

6/24/02  
SCL

(OPTION:)

SPLIT REVIEW

|                           | Ø3                      | Ø5                          | 19                             | TOTAL                                 |
|---------------------------|-------------------------|-----------------------------|--------------------------------|---------------------------------------|
| Babington                 | (3C)<br>0.71            | (5A)<br>0.25                | (19A)<br>X                     | (24Ac.)<br>0.96 cts                   |
| Simcoe                    | (3F)<br>1.54            | (5C)<br>X                   | (19C)<br>X                     | (58 AC.)<br>1.54 cts                  |
| Kingston                  | (3B)<br>3.84            | (5B)<br>1.40                | (19B) <i>No change</i><br>1.92 | (129 AC.)<br>7.16 cts                 |
| GARDNER<br>(OWNER?)       | (3K)<br>0.24            | (5D) <i>LATE CLAIM</i><br>X | X                              | ( <del>6.5</del> 6.4 AC.)<br>0.24 cts |
| <i>No change!</i> McClure | (3D)<br>- disallow -    | X                           | 19D <i>No change</i><br>0.24   | (8.5 AC.)<br>0.24 cts                 |
| V. Bell                   | (3A)<br>1.38            | X                           | X                              | (13 AC.)<br>1.38 cts                  |
|                           | (3L & 3M<br>DISALLOWED) |                             |                                |                                       |
| SPLIT RT<br>BALANCES:     | 7.71                    | 1.65                        | 2.16                           |                                       |
| Deceee BAL                | 7.71                    | 3.00                        | 2.16                           |                                       |
|                           | Ø                       | (1.35<br>Remaining)         | Ø                              |                                       |

3B  
3.84 cts  
for fish  
5B & 19B =  
no claim  
for fish!

SPLIT REVIEW:    03-05-19

6/24/02  
SCC

7.71 cts    03 balance:  
-1.38  
6.33 cts    Bell - 3A

6.33  
-1.54 cts    -3F SIMCOE    (pro-rata share of 6.33  
4.79    was greater than claimed)

PRO RATA:

|            |      |                     |   |      |   |             |     |
|------------|------|---------------------|---|------|---|-------------|-----|
| 129        | (3B) | $\frac{129}{159.4}$ | * | 4.79 | = | 3.88        | cts |
| 24         | (3C) | $\frac{24}{159.4}$  | * | "    | = | 0.72        |     |
| <u>6.4</u> | (3K) | $\frac{6.4}{159.4}$ | * | "    | = | <u>0.19</u> |     |
| 159.4      | AC.  |                     |   |      |   | 4.79        |     |



OPTION:

Allow for 3K at full 12"

|              |      |                     |   |      |   |             |     |
|--------------|------|---------------------|---|------|---|-------------|-----|
| 4.79 cts     | (3B) | $\frac{129}{159.4}$ | * | 4.55 | = | 3.84        | cts |
| <u>- .24</u> | (3C) | $\frac{24}{159.4}$  | * | "    | = | <u>0.71</u> |     |
| 4.55         | cts  |                     |   |      |   | 4.55        | cts |

|           | 3                                                                                                                                                  | 5                                                                                                                                                                                                                                                   | 19                                                        | Total                                                      |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------|------------------------------------------------------------|
| Babington | $\sqrt{ecvr}$ 3<br><del>3C</del> $\times$ $\sqrt{ecvr}$ (1.97)<br>$\sqrt{ecvr}$ (1.96)<br>$\sqrt{ecvr}$ (24 AC)<br>0.87 cfs<br><del>0.70 cfs</del> | <del>SA</del> $\sqrt{ecvr}$<br>$\sqrt{ecvr}$ + .09 cfs                                                                                                                                                                                              | -19A $\sqrt{ecvr}$<br>$\sqrt{ecvr}$ X $\sqrt{ecvr}$ 0 cfs | $\sqrt{ecvr}$ (2 1/4 AC) .04<br>0.87<br>+ .09<br>0.96 cfs  |
| Simcoe    | $\sqrt{ecvr}$ 3F $\times$ $\sqrt{ecvr}$ (1.32)<br>$\sqrt{ecvr}$ (1.54)<br>$\sqrt{ecvr}$ (58 ac)<br>1.54 cfs<br><del>1.67 cfs</del>                 | -5C<br>$\sqrt{ecvr}$ X $\sqrt{ecvr}$                                                                                                                                                                                                                | -19C<br>$\sqrt{ecvr}$ X $\sqrt{ecvr}$                     | (13 1/4 ac) .0266                                          |
| Kingston  | <del>3B</del> (7.16)<br>$\sqrt{ecvr}$ 129<br>4.69 cfs<br><del>3.71 cfs</del>                                                                       | <del>5B</del><br>+ .55 cfs (2.16 cfs)<br>(136 AC)                                                                                                                                                                                                   | <del>19B</del><br>+ 1.92 cfs                              | 4.69 cfs<br>+ .55<br>+ 1.92<br>7.16 cfs<br>(.056 cfs/acre) |
| Gardner   | $\sqrt{ecvr}$ 0.04 cfs<br><del>3K</del> 136 ac<br>$\sqrt{ecvr}$ 1.37 cfs<br><del>1.03 cfs</del> (?)                                                | $\sqrt{ecvr}$ .92 @ 129<br>$\sqrt{ecvr}$ Rec'd is for 1 acre as found by aerial & field exams. Not combined into the same system with 3B until recently (c.1996). Use found was part of the sprinkler system used by Babington above Buckeye Ditch. |                                                           |                                                            |
| McClure   | - 3D<br>$\sqrt{ecvr}$ X (DISALLOW)                                                                                                                 | $\sqrt{ecvr}$ NO CLAIM<br>$\sqrt{ecvr}$ see 19D                                                                                                                                                                                                     | <del>19D</del> (No Hubble)<br>.24 cfs<br>Rec'd layout     | .24 cfs<br>8.5 AC.                                         |
| V. Bell   | <del>3A</del> $\sqrt{ecvr}$ (1.6 cfs)<br>(13 ac)<br>1.57 cfs<br>Temp. Allowance                                                                    | NO CLAIM<br>$\sqrt{ecvr}$                                                                                                                                                                                                                           | NO CLAIM<br>$\sqrt{ecvr}$                                 |                                                            |

LOWR:  
.42 cfs  
.15 CL  
.57 cfs  
Revised Hubble

Split Right Review  
5/17/01  
SCC

Balances: 3  
7.71 cfs  
~~1.60~~ (bell)  
~~6.11~~

5  
3.0  
- .09  
2.91

19  
2.16  
- .24 (19D)  
1.92  
- 1.92 (3B w/19B)

19D & 19B  
split all of 19 right

See page 2

5/17/01  
SCC

Ø3 SPLIT REVIEW:

Balance: 7.71 cfs

- .57 (-3A Bell)

7.14 cfs

(didn't claim 05 or 19.)  
(- even tho' claimant states 03/5/19 are used together & combined.)

1<sup>ST</sup> PRO RATA:

|            |      |           |   |      |   |                     |
|------------|------|-----------|---|------|---|---------------------|
| 129        | (3B) | $129/212$ | X | 7.14 | = | 4.34 cfs            |
| 24         | (3C) | $24/212$  | X |      | = | 0.81                |
| * 58       | (3F) | $58/212$  | X |      | = | 1.95 (> claim 1.54) |
| 1          | (3K) | $1/212$   | X |      | = | 0.03                |
| <u>212</u> |      | AC.       |   |      |   |                     |

\* Adjust for 3F: (pro rata share > claim)

7.14 cfs

- 1.54 (3F) (all from 03 right)  
5.60

2<sup>ND</sup> PRO RATA:

|            |      |           |   |      |   |          |
|------------|------|-----------|---|------|---|----------|
| 129        | (3B) | $129/154$ | X | 5.60 | = | 4.69 cfs |
| 24         | (3C) | $24/154$  | " |      | = | 0.87     |
| 1          | (3K) | $1/154$   | " |      | = | 0.04     |
| <u>154</u> |      | AC.       |   |      |   |          |

\* full rec'd based on same system as Babington's claim of 0.04 cfs/Ac

PORTIONS OF Ø3 SPLIT:

|                                                           |                                     |                                     |
|-----------------------------------------------------------|-------------------------------------|-------------------------------------|
| <p>- 3B<br/>129 AC.<br/>0.04 AC<br/>- 3K<br/>4.69 cfs</p> | <p>- 3C<br/>24 AC.<br/>0.87 cfs</p> | <p>- 3A<br/>13 AC.<br/>0.57 cfs</p> |
|                                                           | <p>- 3F 58 AC.<br/>1.54 cfs</p>     |                                     |

Total = 7.71 cfs

Common sprinkler system is used.



21 22  
28 27

# Pre-Trial Recommended POU

3B

3K

3L

3C

3M

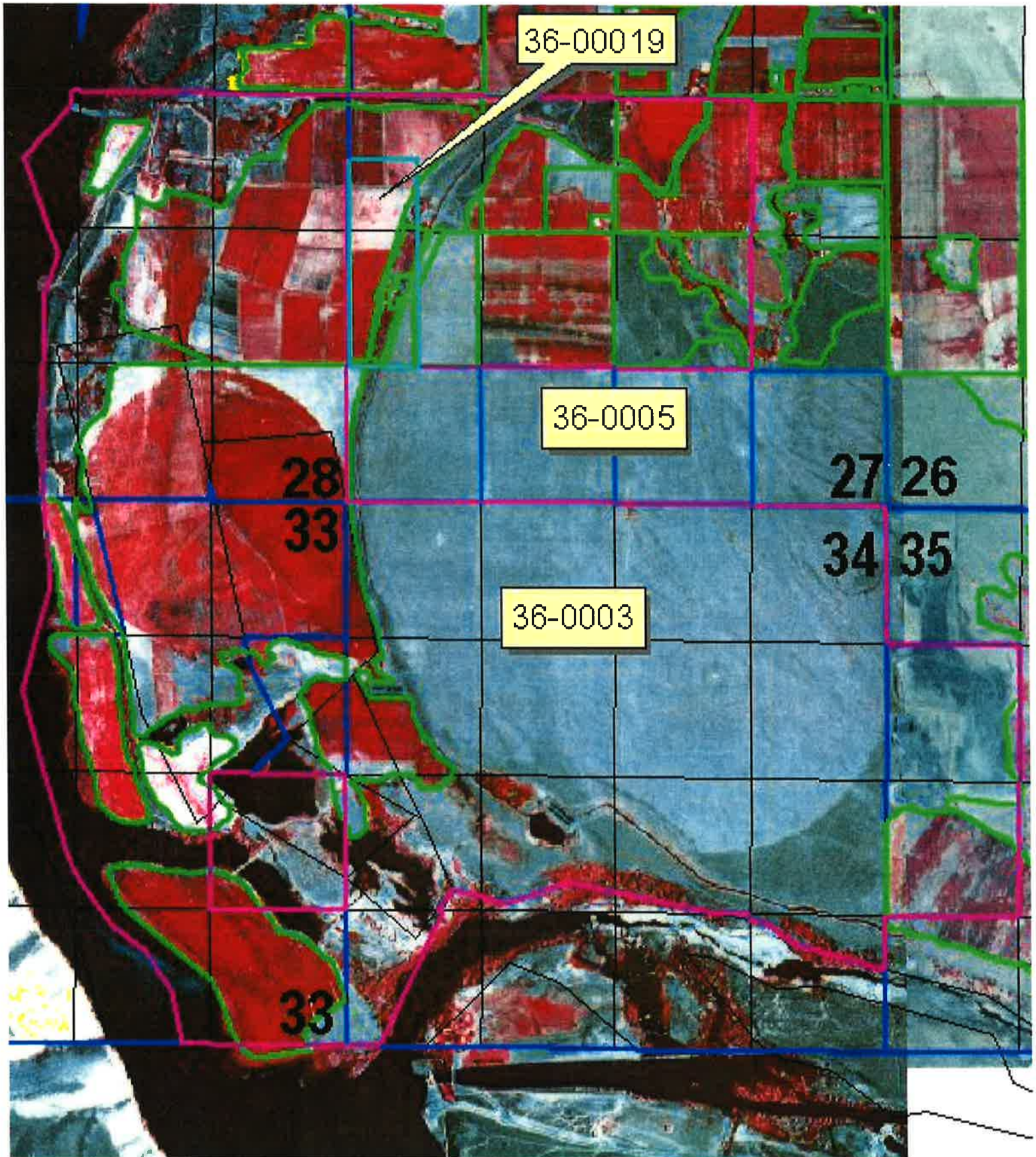
3F

3D

28  
33

36-00003 SPLITS  
5/9/01 SCC





Decreed pou  
5/9/01 scc



# SPLIT REVIEW ANALYSIS - 36-00003

## A Review of the SRBA Claims and Recommendations of 36-00003 Portions.

November 14, 1997 by Steve Clelland

| CLAIM<br>PART<br>36-00003 | NAME                    | "A"<br>RECORD |       | DIRECTOR'S<br>REPORT |       | "R"<br>RECORD<br>OR<br>DECREE |       | COMMENTS<br>OR<br>REMARKS                  |
|---------------------------|-------------------------|---------------|-------|----------------------|-------|-------------------------------|-------|--------------------------------------------|
|                           |                         | CFS           | ACRE  | CFS                  | ACRE  | CFS                           | ACRE  |                                            |
| A                         | Rea                     | 1.60          | 13.0  | 0.41                 | 13.0  | 0.45                          | 13.0  | Stock use.                                 |
| B                         | Kingston                | 7.16          | 129.0 | 5.00                 | 129.0 | 5.00                          | 129.0 | Stock use.<br>Fish use. <sup>1</sup>       |
| C                         | Babington               | 0.30          | 10.0  | 0.30                 | 10.0  | 0.30                          | 10.0  | Trial set: 12/17/97                        |
| D                         | Harbison                | 0.24          | 10.0  | 0.24                 | 2.0   | 0.24                          | 2.0   | Late Obj. filed                            |
| E                         | Vernon                  | 0.20          | 10.0  | 0.20                 | 5.0   | 0.20                          | 6.0   | SF5 - 10/21/97                             |
| F                         | Simcoe                  | 0.80          | 40.0  | 0.80                 | 40.0  | 0.80                          | 40.0  |                                            |
| G                         | Lloyd                   | 0.40          | 20.0  | 0.12                 | 3.0   | 0.19                          | 3.0   | Special Mstr. Rec.                         |
| H                         | Buckeye Farms           | 12.0          | 455.0 | 11.9                 | 290.0 | 11.9                          | 290.0 | Partial Decree <sup>2</sup>                |
| J                         | <B. Gardner><br><Split> | 0             | 0     | 0.46                 | 15.0  | 0                             | 0     | Split into K-L-M<br>by Ownership<br>Change |
| K                         | B. Gardner              | 0.71          | 10.0  | 0                    | 0     | 0.03                          | 1.0   |                                            |
| L                         | Babington               | 1.97          | 27.5  | 0                    | 0     | 0.43                          | 14.0  | Stock use.<br>Fish use. <sup>3</sup>       |
| M                         | Simcoe                  | 1.32          | 18.5  | 0                    | 0     | 0                             | 0     | This Claim<br>Disallowed. <sup>4</sup>     |
| Totals                    |                         | 26.70         | 743   | 19.43                | 507   | 19.54                         | 508   | See Footnote <sup>5</sup>                  |

\* Listings for Diversion Rates reflect the irrigation flow rates only; No Stockwater rates are listed.

<sup>1</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

<sup>2</sup> Partial Decree issued for this right on March 6, 1997.

<sup>3</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

<sup>4</sup> 36-00003M if reinstated as a valid right would apply to 18.5 acres.

<sup>5</sup> Total Acres would increase to 526.5 acres if right 36-00003M is reinstated. Based on rates shown, remaining flow portion of this right is 0.46 cfs; some or all of this amount may be associated with the disallowed right 36-00003M.

## Clelland, Steve

---

**From:** Clelland, Steve  
**Sent:** Wednesday, May 09, 2001 2:35 PM  
**To:** 'pbpc@micron.net'  
**Cc:** Kelly, Vicki  
**Subject:** 36-00003 split and decree exhibits

Dear Pat,

here are the jpegs we talked about. They don't save from the ArcView program as clean as they print from ArcView but it is the only way to save a file version at this time. I have two files showing the decreed borders; one is with labels. The third jpeg is the last known POU shapes before the Trial. Very little has changed with the shapes since the Trial. The area between 3D and 3M was not fully resolved as to ownership at the time of the Trial and is still uncorrected or altered as shown.

Here are the acre calculations for the shapes as shown:

3B = 129 acres

3D = 4.9

3M = 16

3F = 40

3K = 1.1

3L = 14.8

3C = 9.1

unknown part = 4.6

Please let me know if I can help with more GIS prints or information.  
Steve



36-00003 -05-19  
decreed.jpg



36-00003 -05-19  
decreed lab.jp...



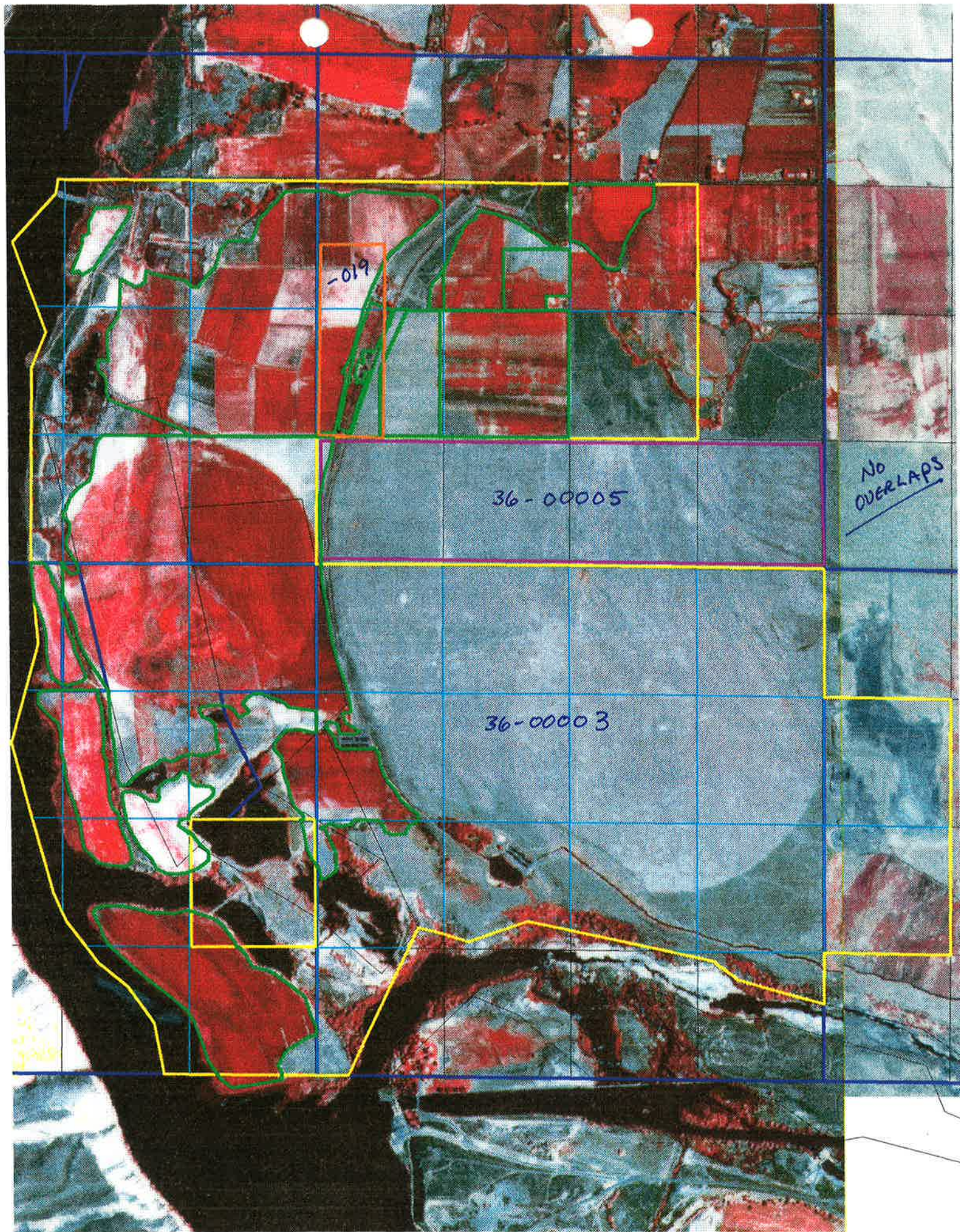
36-00003 splits.jpg

PS: I decided to add one more showing the Splits with the Decree shapes overlayed.



36-00003 splits decree  
overlay...





DECLARED FOWLS



TRANSMITTAL COVER SHEET

TO: MATT HOWARD

TOTAL PAGES SENT: 3  
(including cover sheet)

DOCUMENT DESCRIPTION: Ø3 REVIEW  
(A) PLAT MAP Sec. 27  
(B) Ø5 & 19 REVIEW NOTES

FROM:

IDAHO DEPARTMENT OF WATER RESOURCES  
1341 FILLMORE ST, STE 200  
TWIN FALLS ID 83301-3380

PHONE: 736-3033

FAX: 736-3037

CHARGES: One (1) free copy  
per request, cover sheet not  
counted. Two (2) or more  
copies per request will cost  
\$0.25 per page (\$0.50  
minimum)

Please consider this document as a ~~billing~~ statement.

The charge for your fax copies is: ~~\_\_\_\_\_~~ Please remit to the above address.

SENDER: Steve Clelland

COMMENTS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DATE, TIME  
FAX NO./NAME  
DURATION  
PAGE(S)  
RESULT  
MODE

10/08 12:52  
912084639751-540044  
00:01:18  
03  
OK  
STANDARD  
ECM

TIME : 10/08/1999 12:54  
NAME : IDWR SOUTHERN REGION  
FAX : 2087363037  
TEL : 2087363033

TRANSMISSION VERIFICATION REPORT

# DECREE REVIEW

SCC 3/4/98

-05-  
36-00005

3 cfs

9-10-1884

(AMANDA GOODING)

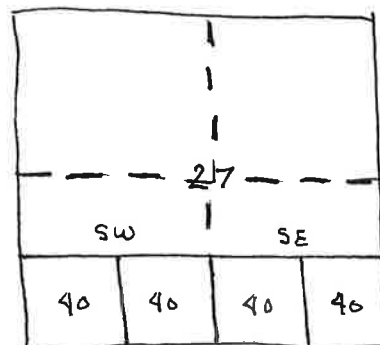
S $\frac{1}{2}$  SW $\frac{1}{4}$

S. 27

S $\frac{1}{2}$  SE $\frac{1}{4}$

T7S, R13E

Pro-Rata:  $\frac{3 \text{ cfs}}{160 \text{ Ac}} = 0.0188 \text{ cfs/Ac}$



SRBA: No claims in Pou.

No IRRIGATION FOUND IN Pou.

160 ACRES

-19-  
36-00019

2.16 cfs

9-10-1884

(HARLAN BELL)

Lot 16 in SWSWNW

S. 27 T7S R13E

Lot 27 & 37 in W $\frac{1}{2}$  NWSW

(BUCKEYE PLAT)

Pro-Rata:  $\frac{2.16 \text{ cfs}}{30 \text{ Ac}} = 0.072 \text{ cfs/Ac}$

previous IDWR estimate  
≈ 30 AC

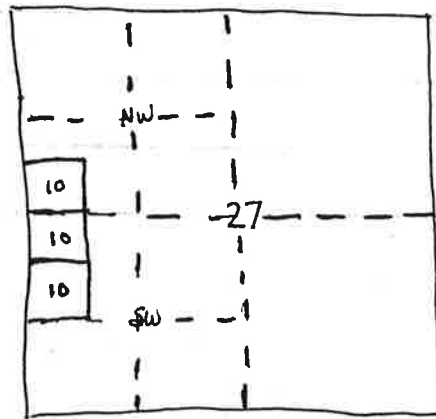
lots are ≈ 10 AC EACH

SRBA: IRRIGATION has been Rec'd

as 36-00003 B-D-K.

About 20 of the 30 ACRES is  
found IRRIGATED.

36-00003D MAY BE PART OF THIS  
RIGHT.



30 ACRES



Dist. 3

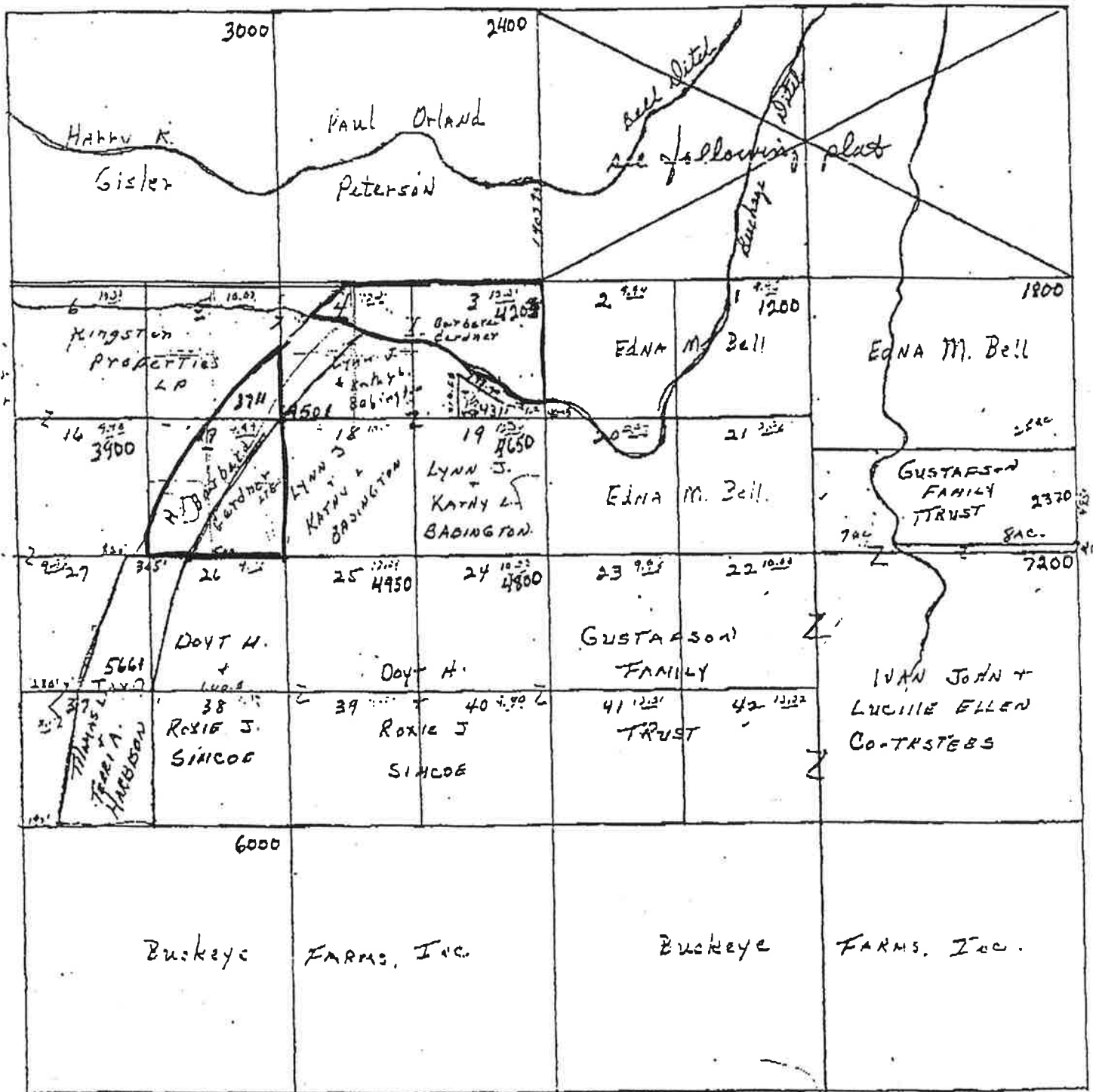
Sec. 27 Twp. 7 Rng. 13

School Dist. 233

| LOT | Acres<br>WATERED |
|-----|------------------|
| 5   | 2.5              |
| 4   | 7.0              |
| 17  | 3.5              |
|     | <u>13.0</u>      |

Rem. Dist. H Fire Dist. H

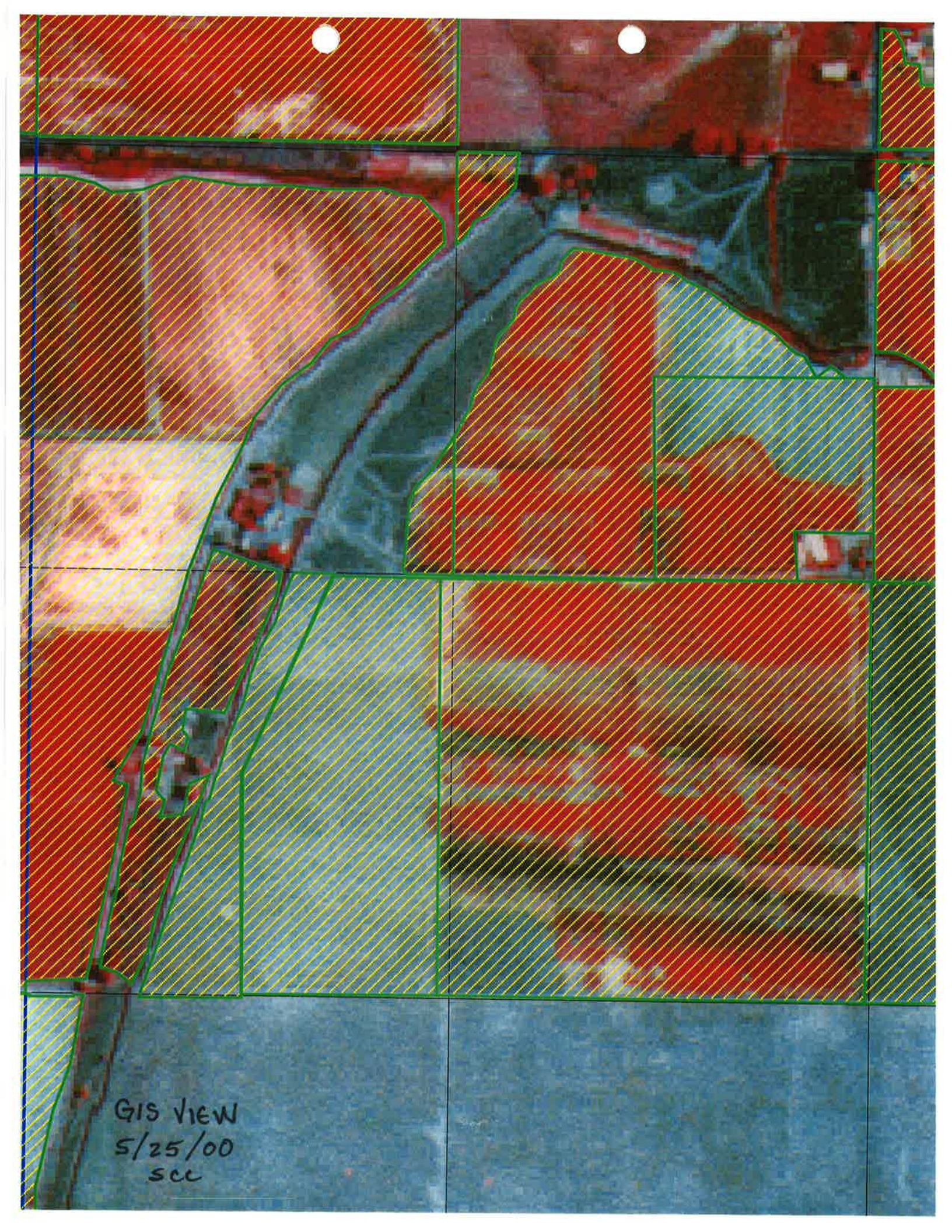
07513E27



FOR ASSESSMENT  
USE ONLY

Successor in Interest  
Want Status Report  
Steve Cleland  
Nick Spivey  
227-7006



An aerial photograph of a coastal area with various land parcels outlined in green. Large areas of the image are covered with red diagonal hatching, while other areas are covered with yellow diagonal hatching. A blue line runs vertically along the left edge. Two punch holes are visible at the top of the page.

GIS VIEW  
5/25/00  
scc





2. I make the following statements in response to a request from the State of Idaho to explain the basis for recommendations made by IDWR for the several rights split off from water right no. 36-00003 and in response to the SRBA District Court's *Order for Additional Information and/or Clarification on Challenge*, Subcase Nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L and 36-00003M (September 30, 1999).

3. Water Right No. 36-00003 is based upon the third water right decreed in *New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New International Decree"), to the New International Mortgage Bank for 20 cfs from Billingsley Creek with a priority date of September 10, 1884. The other water rights contained in the New International Decree were numbered in the same manner, for example the sixth right listed was assigned water right no. 36-00006, the twentieth water right listed in the decree was assigned water right no. 36-00020, etc. These numbers were assigned to the various rights decreed in the New International Decree many years prior to the start of the Snake River Basin Adjudication. Any Claim for a water right not previously decreed, licensed or claimed pursuant to statute would receive a water right number of 36-1xxxx, i.e. 36-10001.

4. I conducted the investigation relating to the claims for water from water right no. 36-00003 and the water rights split off of that right including: 36-00003A, 36-00003B, 36-00003C, 36-00003D, 36-00003E, 36-00003F, 36-00003G, 36-00003H, 36-00003J, 36-00003K, 36-00003L and 36-00003M. I prepared the Director's Reports for these claims.

5. At hearing on the above captioned claims on June 8, 1998 I testified that the place of use as decreed to water right no 36-00003 in the New International Decree overlapped in part with the place of use to water right no 36-00019 as decreed in the New International Decree (the



Harlan Bell Right for 2.16 cfs). Tr Vol. I, p. 216, L. 17 – p. 217, L. 17. After further review of the files and trial exhibits, that is incorrect, the places of use originally decreed do not overlap, but the two places of use claimed did overlap with the place of use decreed to water right no. 36-00019 in the New International Decree.

6. In examining the GIS Shape Files submitted as trial exhibits, it appears that the places of use for 36-00003B and 36-00003D as recommended by the Special Master in the SRBA, overlap the place of use previously decreed to 36-00019 in the New International Decree. See Trial Exhibits 1, 3 and 5. This statement is based upon the assumption that the Special Master recommended the rights in accord with the Shape Files (Trial Exhibits 3 and 5). Based upon the same information and assumption, each of these rights also overlaps a portion of the place of use originally decreed for the 36-00003 Right in the New International Decree as well. From the Trial Exhibits, I am unable to precisely determine how many acres of each water right, as recommended by the Special Master, are within the place of use decreed 36-00019 in the New International Decree. The Special Master's Recommendation does not specify where in the quarter-quarter section the acres are, i.e. the acres could be in the W½ or the E½ of the quarter-quarter section.

7. I obtained and examined the Assessor's Title Plat, relevant portions attached hereto as Exhibit 1, for this area. The Appraiser's Title Plat shows the lots that 36-00019 was decreed to (lots 16, 27, 37, Section 27). Comparing the Title Plat with the Shape File, Trial Exhibit 9, and assuming the Special Master recommended 36-00003M (as part of 36-00003F) in accord with Trial Exhibit 9, it does not appear that the recommended place of use for 36-00003M overlaps with the recommended place of use for 36-00019 in the New International Decree.

Instead, all of these acres are in the E½ of the NW¼SW¼ of Section 27, part of the place of use decreed to 36-00003 in the New International Decree. See Trial Exhibits 1 and 11.

8. In my examination of all information and maps provided to IDWR during my investigation of the above captioned rights, I determined that the place of use decreed to 36-00019 (Lots 16, 27 and 37) in the New International Decree are the same tracts excluded from the place of use of 36-00003 (Tracts 16, 27 and 37) in the New International Decree.

9. From my investigations, I am aware of three claims for irrigation within the place of use decreed to water right no. 36-00005 (Amanda Gooding, 3 cfs) in the New International Decree. All claims were made by the current owner of the 160 acres decreed under water right no. 36-00005 in the New International Decree. The first claim has been decreed by the SRBA District Court to Buckeye Farms, Inc. for one acre as part of the 260 acres decreed under water right no. 36-00003H. The Second and Third claims were also made by Buckeye Farms, Inc. under the first and second rights decreed in the New International Decree (36-00001 and 36-00002). These two rights have Riley Creek as the source. The place of use is being irrigated with Riley Creek water. IDWR recommended 152 acres under 36-00002. IDWR recommended 38 acres under 36-00001, all 38 acres are within the 152 acres recommended under 36-00002. These rights have been partially decreed. Therefore, IDWR recommended a total of 153 acres of the 160-acre place of use to Buckeye Farms under 3 separate water rights with two separate sources.

10. From my investigations and review of relevant files, I cannot find any other claimant who attempted to claim a place of use for the 160 acre place of use decreed to 36-00005 in the New International Decree (S½SW¼ and S½SE¼) other than that described in paragraph 9, above. From my investigations and review of relevant files, I cannot find any other claimant



who attempted to claim a place of use for the 30 acre place of use decreed to 36-00019 in the New International Decree other than above described claims split from the 36-00003 Right. From my investigations and review of relevant files, it appears no one claimed a water right for the 30 acre place of use decreed to 36-00019 in the New International Decree from Riley Creek, which would correspond to the 36-00020 Right.

11. From my investigations and review of relevant files, Buckeye Farms, Inc. is the current owner of the 160 acre place of use decreed to 36-00005 in the New International Decree (S $\frac{1}{2}$ SW $\frac{1}{4}$  and S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 27, T07S, R13E B.M.). Other than those described in paragraph 9, above, Buckeye Farms, Inc. made no claim for a water right appurtenant to the S $\frac{1}{2}$ SW $\frac{1}{4}$  and S $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 27, T07S, R13E B.M. nor did Buckeye Farms claim water right no. 36-00005.

12. From my investigation of water right no. 36-00003G, I determined that this water right had been split off from the 36-00003 right and applied to a new place of use outside of the original place of use for 36-00003. That determination is based, in part, on a copy of a letter from H.F. LeMoyne to George Lemmon (April 14, 1959), attached hereto as Exhibit 2, stating that 20 inches of water had been sold and was to be used in a new place of use. I found no evidence to contradict this letter.

13. From my investigation of water right no. 36-00003E, I determined that this water right had been split off from the 36-00003 right and applied to a new place of use outside of the original place of use for 36-00003. That determination is based, in part, on representations made by the Claimant of 36-00003E during an on site exam visit on or about September 13, 1990. Claimant confirmed that 36-00003E had been purchased from the 36-00003 right and moved to a new place of use. I found no evidence to contradict this assertion of the Claimant.

14. I have examined the Master Title Plat for T07S R13E and Mineral Survey Nos. 1 and 801. These maps confirm that no part of 36-00003, 36-00005 and 36-00019, as decreed in the New International Decree overlap or share a place of use.

15. All of the original claimants of the above captioned water rights submitted only one notice of claim for non de minimis uses. None of these claimants claimed more than one irrigation water right as appurtenant to any claimed property.

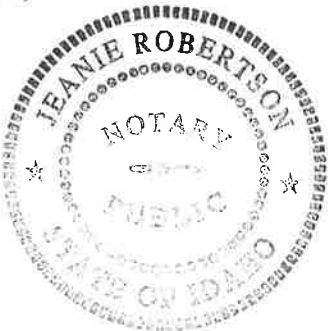
16. I have examined all claim notices, director's reports, Special Master's Recommendations and Partial Decrees for all rights split from water right 36-00003. With the exceptions noted in paragraphs 6, 9, 12 and 13 above, all of the rights split from water right 36-00003 are within the place of use decreed to 36-00003 in the New International Decree, and with the exception of one acre noted above in paragraph 9 above, none of the rights split from water right 36-00003 are within the place of use decreed to 36-00005 in the New International Decree.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

Dated this 15<sup>th</sup> day of October 1999.

  
STEVE CLELLAND

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of October, 1999.



  
Notary Public in and for the State of Idaho  
Residing at: Twin Falls, ID  
My Commission Expires: 9-23-2000



1341 Fillmore St #200  
Twin Falls, ID 83301-3380  
Phone: (208) 736-3033

IDWR

# Fax

|                                     |                               |
|-------------------------------------|-------------------------------|
| <b>To:</b> Peter Ampe               | <b>From:</b> Steve Clelland   |
| <b>Fax:</b> (208) 334-2690          | <b>Date:</b> October 15, 1999 |
| <b>Phone:</b>                       | <b>Pages:</b> 1 + cover       |
| <b>Re:</b> 36-00003 Split Affidavit | <b>CC:</b>                    |

☐ Urgent    ☐ For Review    ☐ Please Comment    ☐ Please Reply    ☐ Please Recycle

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TIME : 10/15/1999 09:33  
NAME : IDWR SOUTHERN REGION  
FAX : 2087363037  
TEL : 2087363033

TRANSMISSION VERIFICATION REPORT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15<sup>th</sup> day of October caused to be served a true and correct copy of the foregoing AFFIDAVIT OF STEVE CLELLAND by the method indicated.

Patrick D. Brown  
109 S. Adams St.  
Jerome, ID 83338

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail
- ☒ Certified Mail # \_\_\_\_\_

Dana Hofstetter  
Beeman & Hofstetter  
P.O. Box 1427  
Boise, Idaho 83701-1427

- ☒ U.S. Mail, postage prepaid
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Maria Yvonne Anderson  
5151 Umatilla Street  
Boise, ID 83709

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- ☒ Statehouse Mail

---

PETER J. AMPE  
Deputy Attorney General  
P9290naa.doc



1341 Fillmore St #200  
Twin Falls, ID 83301-3380  
Phone: (208) 736-3033

**IDWR**

# Fax

**To:** Peter Ampe

**From:** Steve Clelland

**Fax:** (208) 334-2690

**Date:** October 15, 1999

**Phone:**

**Pages:** 1 + cover

**Re:** 36-00003 Split Affidavit

**CC:**

☐ **Urgent**    ☐ **For Review**    ☐ **Please Comment**    ☐ **Please Reply**    ☐ **Please Recycle**

**•Comments:** Here is the Affidavit signature page. Everything looks correct to me.



State of Idaho

## DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE  
GOVERNORKARL J. DREHER  
DIRECTORDEADLINE

10-15-99

TRANSMITTAL COVER SHEET

FAX NUMBER: (208) 327-5400

DATE: 10-6-99TO: STEVE CLELAND  
@ SOUTHERNFROM: NICK SPENCERDOCUMENT DESCRIPTION: SRBA COURT ORDER FOR  
ADD'L INFORMATIONCOVER SHEET + 8 PAGESCONTACT: 327-7930 IF YOU DO NOT RECEIVE ALL THE PAGES.

THANK YOU!

STEVE, PETE AMPE CALLED ME ABOUT THIS ORDER.  
THE JUDGE CLEARLY INTENDS TO GET TO THE BOTTOM OF  
THINGS. PETE SAYS HE'S GOING TO NEED YOUR  
HELP IN RESPONDING TO THE QUESTIONS, AND POSSIBLY  
ALSO AN AFFIDAVIT FROM YOU. PLEASE REVIEW  
THE ORDER AND GIVE ME A CALL.

THANKS,

NBS

**RECEIVED****OCT 01 1999**

Department of Water Resources

SEP 30 PM 4:00  
 DISTRICT COURT - SRBA  
 TWIN FALLS, IDAHO

**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

) Subcases 36-00003A, 36-00003B, 36-  
 ) 00003C, 36-00003F, 36-00003K, 36-  
 ) 00003L and 36-00003M  
 )  
 )  
 )  
 )  
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**ORDER FOR ADDITIONAL  
 INFORMATION AND/OR  
 CLARIFICATION ON  
 CHALLENGE**

**I.****ORAL ARGUMENT ON CHALLENGE**

These subcases were argued before the Court on September 22, 1999. After further review of the record and files of these subcases, the briefing provided, and the oral arguments, the Court determines that it cannot reasonably determine the issues at hand without additional information from the parties and/or clarification. Therefore, the Court **orders** the information/clarification of the hereinafter enumerated matters from the respective parties no later than 5:00 p.m. on Friday, October 15, 1999. After receipt thereof, and unless other questions arise, this Court will consider the matters fully submitted for decision.

**II.****NEEDED INFORMATION/CLARIFICATION**

**ITEM 1: "PURPOSE OF USE" QUESTION.** In review of the *New International Decree*, the decreed rights begin on page 3 thereof. The first right is for 12 cfs from Riley Creek with a priority date of May 1, 1883. Judging by the other numbers assigned by IDWR to various rights under this decree, the Court assumes this to be the 36-00001



right. The second right is for 12 cfs from Riley Creek with a priority date of October 1, 1908. The Court assumes that IDWR assigned this right number 36-00002. The third right is on page 4 of the decree and is for 20 cfs from Billingsley Creek with a priority date of September 10, 1884. This right was assigned number 36-00003 by IDWR and is at issue in these subcases. The next, or fourth right (going by sequence in the decree) is to Mary Curran, 15 cfs from Billingsley Creek with a priority date of September 10, 1884. The fifth right decreed is to Amanda J. Gooding for 3 cfs from Billingsley Creek with a priority date of September 10, 1884. IDWR assigned this the number 36-00005. Continuing in order of listing, the eighteenth listed right (by this Court's count) is to Harlan Bell, 2.16 cfs from Billingsley Creek with a priority date of September 10, 1884. For some unknown reason, IDWR assigned this right number 36-00019.

With the foregoing backdrop, on page 3 of the decree, the last 3 lines of the first full paragraph provide:

...and decreed to have the use of, and the right to use for, the irrigation of its hereinafter described land **and for domestic and other purposes** thereon, the following amounts of water, to wit: [Emphasis added].

Then, the first 12 cfs right is listed stating a point of diversion, followed by the second 12 cfs right, also stating a point of diversion (which this Court above stated assumed were assigned 36-00001 and 36-00002 respectively). Then on page 4, the 36-00003 right for 20 cfs is listed stating a point of diversion. Going to the next described rights (Mary Curran followed by the 36-00005 right to Amanda Gooding), immediately preceding these described rights, in the fourth line down from the top of page 6 is the language, **"for irrigation, domestic, power and other purposes..."** (Emphasis added). No other "purposes of use" language appears in the decree for the decreed rights described thereafter beginning with the Mary Curran right referred to above until near the end of the entire decree, the unnumbered 30<sup>th</sup> page captioned "Big Bend Irrigation and Mining Company." The fifth line of that page reads: **"use for irrigation and domestic purposes the following amounts..."** (Emphasis added).

Now, back to page 4 of the decree and in reference to the three rights decreed to the New International Mortgage Bank (the 12 cfs, 12 cfs and 20 cfs rights at issue here), the paragraph immediately before the legal description of the land to which these rights are appurtenant provides:

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, That the amounts of water heretofore set out, diverted from said natural water supply at the points of diversion heretofore mentioned and set out, are necessary for the proper irrigation and cultivation of, and that the same is appurtenant to the following, described land of the plaintiff, viz: [Legal descriptions omitted; emphasis added].**

**Questions on Item 1.** Given the variously described "purposes of use" outlined above, how do the parties interpret the two different "purpose of use" languages contained on pages 3 and 4 of the decree? Stated another way, are the purposes of use of the 36-00003 right limited to the more narrow "proper irrigation and cultivation of" the legally described land covered by the right, or is the language on page 3 of the 1932 decree controlling as to the purposes of use?

**ITEM 2: 36-00005 AND 36-00019.** It is stated in the briefing that the 36-00005 (Amanda J. Gooding) right and the 36-00019 (Harlan Bell) right were not "claimed" in the SRBA adjudication. In the decree, following each of these enumerated rights, there are the respective legal descriptions of land to which these respective rights are appurtenant. It is also asserted that IDWR "assigned" the respective right numbers to each of the decreed rights in the SRBA. Further, on page 3 of the *Special Master's Findings of Fact and Conclusions of Law* (July 29, 1998), page 3, the first two full paragraphs provide as follows:

The claimants allege that the amount claimed for the split rights does not exceed the original quantity decreed because IDWR never considered other water rights which were decreed to the places of use owned by the parties designated under the splits for 36-00003. As correctly pointed out by the claimants, water right 36-00005 was originally decreed to the place of use now owned by Harbison, Kingston, Simcoe, and

**Babington.** The amount decreed under 36-00005 was 3.0 cfs. Exhibit 1. Water right 36-00019 was decreed to the place of use claimed by **Buckeye Farms.** The decreed amount for 36-00019 was 2.16 cfs.

IDWR should have considered water rights 36-00005 and 36-00019 in determining whether there was enough water to satisfy the entire claimed amount for all rights split from 36-00003. Had these rights been considered, there was substantially enough water originally decreed to cover all the claims before the court. Any argument that the claimants are limited by the water decreed under 36-00003 is placing form over substance. All the rights share the same place of use and priority date. There is absolutely no prejudice to consider the water decreed under 36-00005 and 36-00019 because neither one of these rights was claimed or assigned to any party.

However, on page 2 of the *Findings of Fact*, the master's first sentence states: "All rights before the Court originated from water right 36-00003." Finally, Counsel at oral argument pointed out on the original of Trial Exhibit 11 that the lands appurtenant to the 36-00005 right and most of the lands appurtenant to the 36-00019 right (see also Item 3) were not within the lands described by the 36-00003 right. However, the above-quoted language from the *Special Master's Findings of Fact* seems to indicate otherwise.

**Questions on Item 2.** Which way is it? Irrespective of the right numbers assigned by IDWR (36-00005 and 36-00019), has the land to which these respective rights are appurtenant been de-watered, and hence, is this the basis for the statement that these rights were not claimed in the SRBA? Stated another way, has a water right for these described lands to which 36-00005 and 36-00019 are appurtenant been claimed in the SRBA, regardless of the number assigned by IDWR? And if so, from what decreed right are they claimed? Or is IDWR saying no one claimed water rights by the numbers IDWR assigned, even though the ground to which the rights are appurtenant is the subject of a claim? Or, setting aside the numbers assigned to the respective decreed rights in the 1932 decree, presumably by IDWR (see discussion under Item 1 above), is the land appurtenant to the 20 cfs right to New International Mortgage Bank (36-00003), the land appurtenant to the 3 cfs right to Amanda Gooding (36-00005) and the land appurtenant to the 2.16 right to Harlan Bell (36-00019) all encompassed by what is now called the



respective splits 36-00003 A to M? In other words, the attached chart (Exhibit A to *Memorandum in Support of State of Idaho's Motion to alter or Amend*) shows 743 total acres claimed, 526 acres recommended by IDWR and 538.4 recommended by the special master. So, what is the 36-00003 right? Is it the third right listed in the 1932 decree for 20 cfs? Is it the 20 cfs right plus the Amanda Gooding 3 cfs right plus the Harlan Bell 2.16 cfs right? Are the 538.4 acres (A-M) all within the described lands appurtenant only to the 20 cfs on page 4 of the 1932 decree, or do the 538.4 acres also encompass lands appurtenant to Amanda Gooding's 3 cfs and Harlan Bell's 2.16 cfs? If this evidence is in the record or the transcript, specify where it is located.

**ITEM 3: OVERLAP OF A PORTION OF 36-00019 AND 36-00003.** It was stated during oral argument on challenge that 30 acres to which 36-00019 (Harlan Bell portion of the decree) overlapped 30 acres of the land appurtenant to 36-00003 and is drawn on Trial Exhibit 11; i.e., the same 30 acres have two decreed right from the 1932 decree.

**Questions on Item 3.** Is there a 30 acre "overlap," and if so, what quantity portion of the 36-00019 right is assigned to this 30 acres? If the above is correct, what quantity portion of the 36-00003 right is "relieved" from this duty on the 30 acres (i.e., how did IDWR handle this situation)? Lastly, if this 30 acre "overlap" exists, which portions of which split rights (36-00003 A to M) are affected thereby? The Court understood from oral argument that it covered portions of 36-00003B, D, and M. Again, if this information is in the record or transcript, specify its location. Also, relating back to the quoted paragraphs in Item 2 above, it is stated that the 2.16 cfs (Harlan Bell 36-00019) is within the Buckeye claim (36-00003H). If this is true, how can it be reconciled?

**ITEM 4, 36-00003E AND 36-00003G, SPLIT RIGHTS OF VERNON FOR .2 CFS AND LLOYD FOR .19 CFS.** At oral argument on challenge, this Court was told that these two split rights were not described in the decree for the 36-00003 20 cfs right; i.e., were not part of the 20 cfs right.

**Questions on Item 4.** Are these two rights on lands which are not appurtenant to the 36-00003 right described on page 4 of the 1932 decree? If so, to which right(s) in the 1932 decree are these lands appurtenant? Are they shown on Trial Exhibit 11? Where? And if so, why are these two rights included in the so-called 36-00003 ("03") 20 cfs rights? And finally, if so, wouldn't the combined amount of these two rights (.39 cfs) be available for distribution under the remainder of the 36-00003 split rights? Again, if this information is in the record or transcript, specify its location.

**ITEM 5: UNDEFINED ELEMENTS OF A WATER RIGHT UNDER I.C. 42-1427(2).** "[T]he 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."

**Question to Item 5.** For each claimed split right at issue herein, which elements were undefined by the 1932 decree?

**ITEM 6: "COMBINED RIGHTS" OF SIMCOE AND BABINGTON (36-00003 F AND M AND 36-00003 C AND L).** In his *Order Denying Motions to Alter or Amend* (July 16, 1999), the special master stated on page 5, "After trial, the Court combined several rights." The Court notes that the claimants filed the claims separately.

**Questions to Item 6.** Did any party request this combination? Additionally, was any evidence presented to support the combination? If so, where in the record is this evidence for each of the claims?

IT IS SO ORDERED.

DATED September 30, 1999.



BARRY WOOD  
Administrative District Judge and  
Presiding Judge of the  
Snake River Basin Adjudication

| B             | Kingston     | 7.16                  | 129        | 5.0       | 129        | 7.16         | 129          |
|---------------|--------------|-----------------------|------------|-----------|------------|--------------|--------------|
| C             | Babington    | 0.30                  | 10         | 0.30      | 10         | 1.62         | 22           |
| D             | Harbison     | 0.24                  | 10         | 0.24      | 2          | 0.24         | 8.4          |
| E             | Verney       | 0.20                  | 10         | 0.20      | 5          | 0.20         | 6            |
| F             | Simcoe       | 0.80                  | 40         | 0.80      | 40         | 2.56         | 58           |
| G             | Lloyd        | 0.40                  | 20         | 0.19      | 3          | 0.19         | 3            |
| H             | Buckey Farms | 12.0                  | 455        | 11.9      | 290        | 11.9         | 290          |
| I             | Gardner      | Split into K, L and M |            |           |            |              |              |
| K             | Kingston     | 0.92                  | 10         | 0.03      | 1          | 0.92         | 7            |
| L             | Babington    | 1.32                  | 27.5       | 0.43      | 14         | 0            | 0            |
| M             | Simcoe       | 1.76                  | 18.5       | 0.50      | 18         | 0            | 0            |
| <b>TOTALS</b> |              | <b>26.7</b>           | <b>743</b> | <b>20</b> | <b>526</b> | <b>26.39</b> | <b>538.4</b> |

\* Water right 36-00003J was originally claimed for 4.0 cfs on 56 acres.



**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the **ORDER FOR ADDITIONAL INFORMATION AND/OR CLARIFICATION ON CHALLENGE** was mailed on September 30, 1999, with sufficient first-class postage to the following:

Idaho Department of Water Resources  
PO Box 83720  
Boise, ID 83720

Peter Ampe  
Office of the Attorney General  
State of Idaho  
PO Box 44449  
Boise, ID 83711-4449

United States Department of Justice  
Environment & Natural Resources Division  
550 W Fort Street, MSC 033  
Boise, ID 83724

Beerman & Hofstetter  
PO Box 1427  
Boise, ID 83701-1427

Patrick D. Brown, P.C.  
109 S Adams  
Jerome, ID 83338

Maria Yvonne Anderson (36-00003K)  
5151 Umatilla Street  
Boise, ID 83709

  
Deputy Clerk of the Court

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Adjudication Bureau

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DISTRICT COURT-SRCA  
TWIN FALLS CO., IDAHO  
FILED

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

|                |   |                                      |
|----------------|---|--------------------------------------|
| In Re SRBA     | ) | Subcase: 36-00003A, 36-00003B,       |
|                | ) | 36-00003C, 36-00003D, 36-00003F,     |
| Case No. 39576 | ) | 36-00003J, 36-00003K, 36-00003L, and |
|                | ) | 36-00003M                            |
|                | ) |                                      |
|                | ) | FINDINGS OF FACT AND                 |
| _____          | ) | CONCLUSIONS OF LAW                   |

I. PROCEDURAL BACKGROUND

This matter came before the court for trial involving various subcases claimed in Basin 36. The water rights that were tried before the court include 36-00003A, Edna Rea, claimant; 36-00003B and 36-00003K, Kingston Properties, claimant; 36-00003C and 36-00003L, Lynn and Kathy Babington, claimants; 36-00003D, Thomas and Terri Harbison, claimants; 36-00003F and 36-00003M, Doyt and Roxie Simcoe, claimants.<sup>1</sup> For each water right, the issues before the court are as follows:

1. Edna Rea

36-00003A    Quantity - (irrigation) - claim = 1.6 cfs; IDWR = 0.45 cfs

Quantity - (stock) - claim = 0 .04 cfs; IDWR = 0.02 cfs

2. Kingston Properties

36-00003B    Quantity - claim = 7.16 cfs; IDWR = 5.00 cfs

Purpose of Use - claim = irrigation, fish propagation, and stock;

IDWR = irrigation and stock

1

Water rights 36-00003K, 36-00003L, and 36-00003M were all split from 36-00003J. Water right 36-00003J was claimed by Barbara Gardner for 4.0 cfs. The quantity claimed under the splits are as follows: 36-00003K, 0.92 cfs; 36-00003L, 1.32 cfs; and 36-00003M, 1.76 cfs. To date, no Notice of Administrative Proceeding (NCAP) has been completed changing the name for 36-00003K from Gardner to Kingston Properties. However, the evidence shows that Kingston Properties is the rightful owner of 36-00003K.

- 36-00003K    Quantity - claim = 0.92 cfs; IDWR = 0.46 cfs  
                  Acres - claim = 10 acres; IDWR = 1 acre
3.    Lynn and Kathy Babington
- 36-00003L    Quantity - claim = 1.32; IDWR = 0.46 cfs  
                  Acres - claim = 27.5 acres; IDWR = 14 acres
4.    Thomas and Terri Harbison
- 36-00003D    Acres - claim = 10 acres; IDWR = 5 acres
5.    Doyt and Roxie Simcoe
- 36-00003M    All Elements - IDWR = disallowed

## II. STANDARD OF REVIEW

The Director's Report constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. I.C. § 42-1411(5). I.C. § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of the nonexistence of the fact." *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986), citing Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion: it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934 (1993). "When rebutted, the presumption disappears and the party with benefit of the presumption retains the burden of persuasion on the issue." *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 746, 947 P.2d 409 (1997). If the presumption is overcome by the claimant, then the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5).

## III. GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. THE CLAIMS

All the rights before the court originated from water right 36-00003. That water right was originally decreed in *New International Mortgage Bank v. Idaho Power Company*, in Equity No.



1602 (S.D. Idaho, Mar. 22, 1932) (*International Mortgage Decree*). The total amount originally decreed under water right 36-00003 was 20 cfs. Exhibit 1. Subsequent to the *International Mortgage Decree*, water right 36-00003 was split because the original place of use for water right 36-00003 was subdivided. The quantity claimed for all the rights split from the original right was 26.70 cfs.<sup>2</sup> The issue before the court is whether the claimants are limited to the original quantity decreed under 36-00003.

The claimants allege that the amount claimed for the split rights does not exceed the original quantity decreed because IDWR never considered other water rights which were decreed to the places of use owned by the parties designated under the splits for 36-00003. As correctly pointed out by the claimants, water right 36-00005 was originally decreed to the place of use now owned by Harbison, Kingston, Simcoe, and Babington. The amount decreed under 36-00005 was 3.0 cfs. Exhibit 1. Water right 36-00019 was decreed to the place of use claimed by Buckeye Farms. The decreed amount for 36-00019 was 2.16 cfs.

IDWR should have considered water rights 36-00005 and 36-00019 in determining whether there was enough water to satisfy the entire claimed amount for all rights split from 36-00003. Had these rights been considered, there was substantially enough water originally decreed to cover all the claims before the court. Any argument that the claimants are limited by the water decreed under 36-00003 is placing form over substance. All the rights share the same place of use and priority date. There is absolutely no prejudice to consider the water decreed under 36-00005 and 36-00019 because neither one of these rights was claimed or assigned to any party.

Not  
True!

Furthermore, absent any consideration of 36-00005 or 36-00019, the court is cognizant of the fact that not all the rights split from the original 36-00003 right are before the court. Some of the splits from the original 36-00003 right were previously tried or settled. Those rights include 36-00003E, Edith Vernon, claimant; 36-00003G, Cleave Lloyd, claimant; and 36-00003H, Buckeye Farms, claimant. Since all the rights split from the original 36-00003 water right were not before the court, there is no way to determine each claimant's entitlement under the original decreed right. Because of this impossibility, every claimant should be entitled to prove their share of the previously decreed water rights independent of the settlements in 36-00003E, 36-00003G, and 36-00003H.

<sup>2</sup>

This quantity claimed includes the splits that were previously recommended. Those rights include 36-00003E, 36-00003G, and 36-00003H.

## B. STANDARD TO APPLY TO EXPERT TESTIMONY

The standard for considering expert testimony was recently stated by the Idaho Supreme Court in *State v. Merwin*, 98.14 ISCR 588 (July 1, 1998). In that case, the defendant argued that the court did not properly evaluate the expert testimony being offered by the State under the test announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In dismissing the defendant's argument, the Idaho Supreme Court stated "that the appropriate test for measuring reliability of evidence in this state is I.R.E. 702." *Id.* at 589, citing *Walker v. American Cyanamid Co.*, 130 Idaho 824, 832, 948 P.2d 1123, 1131 (1997). I.R.E. 702 reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In evaluating the disputed expert opinion before the court in *Merwin*, the Idaho Supreme Court's inquiry on the reliability question was whether the evidence offered by the expert "possessed sufficient indicia of reliability to meet the I.R.E. 702 requirements." *Id.* (emphasis added). In determining whether evidence possesses the required "indica of reliability," there are a number of factors to consider. The factors a court could consider are those factors outlined under *Daubert* and its companion cases. For example, in *Merwin* the Idaho Supreme Court relied upon various factors specifically outlined in *Daubert* in upholding the trial court's admission of the disputed expert testimony. See also, *State v. Parkinson*, 128 Idaho 29, 34, 909 P.2d 647, 652 (1996). "Although our Supreme Court has held that [I.R.E. 702] presents the appropriate test for measuring scientific reliability, that Court has not had occasion to articulate the inquiry envisioned by Rule 702. Therefore, for guidance we look to *Daubert*." *Id.* at 34.<sup>3</sup>

In this case, both IDWR and the claimants offered expert testimony as to whether the claimed quantity constituted a reasonable or beneficial use of water. The question an expert must answer is whether the claimed quantity of water is a sufficient amount of water to grow a crop in the field during the entire growing season. Of course, the opinion must be based on sound scientific methodology. If an expert cannot provide a quantity of water that is verifiable ( i.e. actually works)

<sup>3</sup>

"The trial court has broad discretion in admitting expert evidence, and its judgment will only be disturbed on appeal when there has been a clear abuse of discretion." *Walker v. American Cyanamid Co.* at 832.

and is sufficient to grow a crop during the entire growing season, then the opinion is not helpful to the trial court and, therefore, is not reliable under I.R.E. 702 or relevant under I.R.E. 401.

**C. IDWR'S OPINION REGARDING QUANTITY.**

Steve Clelland, Senior Water Agent for IDWR, testified regarding IDWR's recommendations concerning quantity for the water rights at issue. Mr. Clelland offered his opinion for quantity under IDWR's "Hubble" method for determining quantity. Prior to Mr. Clelland giving any opinion, the claimants objected to the testimony as lacking any foundation.

The testimony offered by IDWR was both scientific and technical in nature. Therefore, prior to giving any opinion on quantity, IDWR first had to establish that the testimony was scientifically and technically reliable under I.R.E. 702. Mr. Clelland testified that his job in making the recommendations for these water rights was to calculate numerous variables related to a particular water right and input them into the Hubble model. However, Mr. Clelland could not testify as to the scientific or technical reliability of the Hubble model. Stated differently, Mr. Clelland could not verify that the quantity recommended by IDWR was sufficient. Therefore, the court could not evaluate the scientific reliability of the Hubble method as to these water rights, and the court did not allow Mr. Clelland to venture an opinion as to the quantity for these rights.

The employee from IDWR who may have been able to provide an opinion on IDWR's Hubble methodology was Jeff Peppersack. Prior to trial, the claimants filed a *Motion In Limine* to exclude his testimony. The basis of the motion was that Mr. Peppersack could not lay the proper foundation under I.R.E. 702 as a prerequisite to the admission of any opinion based on the Hubble method. Subsequently, the claimants withdrew their motion based on two considerations. First, as previously indicated, Mr. Clelland could not testify as to any foundation for the Hubble model. Second, although IDWR was given an opportunity to call Mr. Peppersack to qualify an opinion under the Hubble model, IDWR requested that Mr. Peppersack not testify in this trial. At IDWR's request, Mr. Peppersack was not called as a witness.<sup>4</sup>

<sup>4</sup>

For these water rights, IDWR filed a report indicating that "[IDWR's] methodology incorporates both technical procedures and policies to establish the extent of beneficial use of water for irrigation by determining amounts reasonably necessary using acceptable irrigation practices." However, the deposition of Jeff Peppersack indicates that IDWR did not do any field testing to compare the recommendation with acceptable irrigation practices (Deposition of Jeff Peppersack (Tr. pp. 53-54, 60-67, 110, 118-119, 122)), or that IDWR was aware of what constituted "an acceptable irrigation practice." Deposition of Jeff Peppersack (Tr., p. 68, l. 5). See *Motion in Limine*. Without knowing the claimants' actual irrigation practices or having performed any field testing, it is difficult to assess whether or not the Hubble method is verifiable and, therefore, based on sound scientific practices.

**D. CLAIMANT'S EXPERT - DR. CHARLES BROCKWAY, JR.**

The claimants called Dr. Charles Brockway, Jr. Dr. Brockway rendered an opinion as to whether the claimed quantities constituted a reasonable use of water. The court finds that the model and methods used by Dr. Brockway in rendering his opinion satisfy the standards of admissibility outlined under I.R.E. 702. The model used is based on reliable and sound scientific methodology. Most importantly, the model is reliable because it is verifiable and predicts quantities of water that are sufficient (i.e. actually work) for the water rights at issue. For these reasons, the court found that the methodology of Dr. Brockway was both relevant and reliable and, therefore, any opinion offered by Dr. Brockway was admissible opinion testimony for the quantities claimed for these water rights.

Dr. Brockway performed an "excess flow sensitivity analysis" to determine the diversion rate for each water right before the court. Dr. Brockway described the analysis as follows:

AKA  
"Hubble"

The excess flow analysis is an analysis that is designed to determine how much water an irrigator needs to put on a field to grow a particular crop. The reason it's called excess flow is because it may or may not come out in excess of the typically allowed value of 1 inch, 1 miners inch per acre.

The sensitivity part comes in because the inputs are somewhat uncertain. Some are more certain than others, but they are somewhat uncertain. So the sensitivity analysis was performed to see how the amount of water needed changes with changes in inputs.

(Tr., p. 35, ll. 15-25.)

The excess flow analysis is used to determine how much water must be diverted to satisfy a crop's evapotranspiration requirements. "Evapotranspiration" is a term used to describe a crop's water requirements. Dr. Brockway described the term as follows:

Evapotranspiration is a term used to described how much water a crop or plant uses. The use of water by a plant is, has two components. Evaporation, which is simply the crop using water from its roots and releasing that water through the air, it evaporates into the air.

The second component is the crop utilizing the water in conjunction with other nutrients to make food for itself. And that process is called transpiration. So in combination we call it evapotranspiration.

(Tr., p. 12, ll. 18-25; p. 13, ll. 1-2.)



For these rights, the analysis assumed a furrow irrigation system. All the rights were perfected around 1900. At that time, there was no electric power, and therefore, sprinkler systems were not in use. The most common method of irrigation at the time these rights were perfected was wild flooding, although some furrow irrigations systems were used. (Tr., p. 31, ll. 2-14.) Since a right is determined by the first beneficial use of water, *Malad Valley Irrigating Company v. Campbell*, 2 Idaho 411, 18 P. 52 (1888), determining quantity assuming a furrow system is appropriate for these rights.

Accepting furrow irrigation as the method of irrigation, Dr. Brockway developed a model to determine whether these claimants were using too much or too little water. The variables used include "soil types, size of the fields, length of fields, slope of fields, and farm management practices." (Tr., p. 33, ll. 23-25.) Under Dr. Brockway's analysis, each claimant's property was broken down by the number of fields per claim. Each field was then assigned a soil type. The soil type was identified by the Soil Conservation Service (SCS) or Natural Resources Conservation Service (NRCS). (Tr., p. 48, ll. 4-6.) Once each field was identified, the size, slope, and run length for each field was determined. Dr. Brockway determined these factors from field examinations and by viewing aerial photography maps. (Tr., p. 52, ll. 18-20; p. 53, ll. 19-22.)

One of the most important variables is "set time." "Set time" is defined as the length of time that water is allowed to be diverted to the field so that water runs the entire length of the field. (Tr., p. 54, ll. 23-25; p. 55, ll. 1-15.) The designated set time has a great effect on the range of diversion rates under the excess flow analysis. Dr. Brockway testified that it is important to make sure the set time is long enough so that water does run from one length of the field to the other. To determine this, Dr. Brockway considered historical information provided to him by the irrigators themselves to determine what set time was used for each field. "The historical information, in my opinion, is the best estimate of the set time based on the irrigator's knowledge of how long it takes in practical terms for the water to get across and sufficiently irrigate the field." (Tr., p. 56, ll. 23-25; p. 57, ll. 1-2.) Obviously, if the set time is too low, water will not reach the end of the field, and the farmer will not be able to irrigate the entire field. Here, the irrigators informed Dr. Brockway that they use 24-hour set times; and therefore, Dr. Brockway properly considered 24-hour set times in his opinion.

The most uncertain variable is "furrow flow." "Furrow flow" is defined as the amount of flow directed to each individual furrow. . . ." (Tr., p. 58, ll. 13-14.) Numerous systems are

employed to create a furrow flow including cutouts, gated pipes, and siphon tubes. When these rights were perfected, gated pipes and siphon tubes did not exist. The only method of delivery was cutouts. (Tr., p. 63, ll. 4-8.) Dr. Brockway testified that of all the variables, furrow flow is the most uncertain because it is impossible to know how much water is being delivered into any furrow during a given time period. Because of this uncertainty, Dr. Brockway applied his best engineering judgment to arrive at furrow flows of between 3-, 5-, and 7-gallon-per-minute flows.

The furrow flow as an input to the model is an uncertain parameter because we don't know exactly how much is spurting out of the pipe or exactly how much is going through the siphon tube. Those furrow flows are based on best engineering judgment about how long a field is, what type of soil it is, and historical or known practices that work.

In other words, we know that one gallon per minute won't get [water] across the field. We know that nine gallons per minute is too much. So we have a range, and we use engineering judgment to define the input to the model.

(Tr., p. 63, ll. 12-23.)

Using all these variables, Dr. Brockway determined diversion rates required using the different furrow flows for alfalfa, dry beans, and pasture. These crops were selected because the claimants have historically grown these crops and the crops represent a wide range evapotranspiration requirements based on plant physiology. (Tr., p. 39, ll. 19-25; p. 40, ll 1-3.) The diversion rates represent the diversion required during peak period consumption. "Peak period consumptive use" is the amount of water required for a plant during the hottest time of the growing season. (Tr., p. 37, ll. 22-24.) Identifying a water quantity for the peak period of a crop's growth cycle is critical because if a plant does not have enough water during this period, it will die.

Because the inputs are variable, Dr. Brockway testified that he could not arrive at one single number and identify that number as the duty of water for a particular water right. (Tr., p. 72, ll. 5-9.) Rather, by varying the inputs under a sensitivity analysis, a number of different diversion rates were determined. In determining whether the claimed diversion rate for each water right was reasonable, Dr. Brockway determined whether the claimed rate was within reasonable limits of the computed range.

What I'm looking for is we have this range. It's a very wide range. Given the [claimed] number, how does it fit within that range? If it fits toward the upper end,

I would say it's more likely that it's an unreasonable number. If it's right toward the middle. I can say with reasonable confidence that it's a good number.

(Tr., p. 105, ll. 15-21.)

For example, the claimed quantity for water right 36-00003A is 1.6 cfs. The range of diversion rates needed to satisfy a crop's consumptive use during peak flow for water right 36-00003A is 0.25 cfs (0.98 in/ac) to 3.27 cfs (12.76 in/ac). Exhibit 32. The claim of 1.6 cfs falls nearly mid-range for the predicted diversion rates necessary to keep the plants alive during the peak period of consumptive use. Therefore, Dr. Brockway opined that the diversion rate of 1.6 cfs for water right 36-00003A was a reasonable rate. (Tr., p. 104, ll. 10-11.) The analysis discussed by Dr. Brockway is applicable to all the rights currently before the court. For each particular right, the court will discuss the range of predicted diversion rates and whether the claimed rate falls reasonably within the predicted quantities.

The diversion rate used under each variable represents an instantaneous flow rate. (Tr., p. 86, l. 14.) However, since an irrigator generally does not have enough water to irrigate an entire field all at once, the irrigator is required to constantly move his/her sets at all times. Consequently, the diversion rate identified by Dr. Brockway is required 7 days a week, 24 hours a day during peak period use. (Tr., p. 89, ll. 8-25; p. 90, ll. 1-14.)

Finally, some of the rights exceed 1 inch (0.02 cfs) per acre. Under I.C. § 42-220, the court is required to make findings any time a claim exceeds 0.02 cfs per acre. Dr. Brockway testified that water rights in the Hagerman Valley require more than 0.02 cfs per acre for a couple of reasons. First, the evaptrasportation rate in the Hagerman Valley is higher than most of the state. Second, the soil in the Hagerman Valley is very sandy. Dr. Brockway opined that these reasons "add up to a lot of water needed to grow crops in that area." (Tr., p. 118, ll. 16-25; p. 119, ll. 1-9.) Therefore, the court finds good cause for the rights to exceed 1 inch (0.02 cfs) per acre.

In conclusion, it is obvious that a set diversion rate cannot be determined for an entire geographic area. The variables unique to each circumstance vary widely depending on a farmers irrigation practices, the length and width of a field, and the soil type unique to each field. Because Dr. Brockway considered the variables unique to each field and the irrigation practices that actually work for those fields, the court finds that the diversion rates found by Dr. Brockway are based on

sound scientific methods. Consequently, the court is confident that diversion rates found represent a quantity of water that will actually grow crops on the fields at issue.

#### E. CONVEYANCE LOSS

Recently, this Special Master, citing the Idaho Supreme Court, held that "waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use." *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029 (1972). In this case, the opinion of Dr. Brockway did not take into account any conveyance loss. During trial, it was agreed that IDWR would calculate the proper conveyance loss for these water rights once the court determined the proper field requirements. Prior to IDWR performing those calculations, the claimants are directed to notify the court, by motion, whether they intend to include conveyance loss for these water rights. If they do, then the claims will require an amendment as the quantities found for these water rights are at the limit of the current claims.

Fritz's  
Con-  
Loss

#### F. COMBINED USE - COMBINING WATER RIGHTS

Some of the claimants have two claims. IDWR alleges that the water for each water right can only be used on the acreage identified for each individual water right. The claimants allege that when an owner has two contingent parcels with two individual water rights, the water under each water right can be used on the acreage for either water right because the water for both rights was originally decreed to one place of use under the *International Mortgage Decree*. The court agrees with the claimants. Water right 36-00003 was decreed to a place of use. That place of use has not changed. The same water that was decreed under the *International Mortgage Decree* is still appurtenant to the claimed places of use for these water rights.

With this principle in mind, it is important to understand the development and use of all the water rights that were split from the original decreed water right, 36-00003. As previously indicated, as the land covered under the *International Mortgage Decree* was subdivided, 36-00003 was split into its various parcels. Over time, common owners then acquired a number of the separate, yet adjacent, parcels. Although there was a unity of ownership for some of the adjoining parcels, the water rights identified with each parcel remained separately described. The water rights remained separate even though the different parcels have historically been irrigated using one irrigation system, and consequently, the water for both rights have been used on the places of use described for both water rights.



For example, the Simcoes own water rights 36-00003F and 36-00003M. The places of use for each water right are contingent to one another. The property is being irrigated using one sprinkler system. Since the parcels are being irrigated using a common irrigation system and because of the unity in title for the two parcels, it makes sense to combine the two water rights. The same is true for water rights 36-00003C and 36-00003L owned by the Babingtons. The same is not true for water rights 36-00003B and 36-00003K owned by Kingston Properties because the rights are served under two irrigation systems and, therefore, combination of these rights may not be appropriate.

Simply stated, if the original 36-00003 water right can be split as land is subdivided, the separate portions of 36-00003 can be combined if the separate parcels come into a common ownership, the parcels are contingent to one another, the entire parcel is irrigated using a common irrigation system, and the point of diversion, place of use, and nature of the water right have always remained the same.<sup>5</sup>

SINCE  
WHEN?

The court will entertain a motion to combine the water rights consistent with this decision.

#### IV. SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. EDNA REA, 36-00003A

###### 1. Stock Water Quantity - 0.02 cfs

The claimant and IDWR reached a stipulation as to the stock water quantity objection. The stipulation was for 0.02 cfs provided the 0.02 cfs is delivered anywhere on the place of use where the stock may water.

###### 2. Irrigation Quantity - 1.6 cfs (13 acres)

6'5" / AC

The range of quantities required for this water right is 0.25 cfs to 3.27 cfs. Exhibit 32. Since the claimed quantity of 1.6 cfs is mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 1.6 cfs is a reasonable and beneficial quantity of water.

<sup>5</sup>

If the point of diversion, place of use, and nature of use have always remained the same even, then I.C. § 42-222 is not implicated.

**B. KINGSTON PROPERTIES, 36-00003B AND 36-00003K**

1. **Quantity - 36-00003B (7.16 cfs) and 36-00003K (0.92 cfs) for a total of 8.08 cfs (136 acres)** *231" Ac*

The range of quantities required for these water rights is 1.37 cfs to 17.92 cfs. Exhibit 33. Since the claimed quantity of 8.08 cfs is mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 8.08 cfs is a reasonable and beneficial quantity of water.

2. **Purpose of use for 36-00003B - includes fish propagation**

The claim included fish propagation as a purpose of use. IDWR did not recommend fish propagation as a purpose of use. The court notes that these claims are based on the *International Mortgage Decree*. The purposes of use under that decree included irrigation, domestic, and "other purposes thereon." Exhibit 1. The inquiry here is whether fish propagation may be considered an "other purpose" as described in the decree. Under I.C. § 42-1427(1)(a), undefined elements in prior decrees may be established "based on conditions existing on the date of the commencement of the adjudication."<sup>6</sup> The SRBA was commenced on November 19, 1987. On or about that date, the evidence shows that there were ponds on the place of use for water right 36-00003B, and the evidence also shows that the ponds identified in Exhibits 17, 18, and 19 have been used to raise fish. Prior to the *International Mortgage Decree*, the evidence further shows that the place of use claimed for water right 36-00003B was historically used for fish propagation. Therefore, the court finds that fish propagation is a purpose of use for 36-00003B. *wow!*

3. **Acres for 36-00003K - 7 acres**

The area claimed under 36-00003K is highlighted in brown in Exhibit 12. Verl Bell testified that since 1940 he has been familiar with the land owned by

<sup>6</sup>

I.C. § 42-1427(1)(b), in its entirety, reads as follows: "Because of the passage of time it is not possible to establish with any decree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right."

Kingston Properties under 36-00003K. Bell testified that the highlighted area has been historically irrigated. The acreage within the highlighted area is identified as having at least 6 acres; although, it is clear that the highlighted area in Exhibit 12 has more than 6 acres. However, there is no evidence before the court as to exactly how many more acres are included. In reviewing the scale of Exhibit 12, the court can safely identify at least 7 acres. Therefore, the court finds that the place of use for water right 36-00003K is 7 acres.

**4. Ownership, 36-00003K - Kingston Properties**

The evidence establishes that Kingston Properties is the owner of water right 36-00003K.

**C. Lynn and Kathy Babington, 36-00003C and 36-00003L**

1. **Quantity, 36-00003C (0.30 cfs) and 36-00003L (1.32cfs) for a total of 1.62 cfs (24 acres)<sup>7</sup>**  $3 \frac{375}{Ac}$

The range of quantities required for these water rights is 0.60 cfs to 7.56 cfs. Exhibit 34. Since the claimed quantity of 1.62 cfs is well below the mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 1.62 cfs is a reasonable and beneficial quantity of water.

**2. Acres for 36-00003L - 14 acres**

IDWR recommended 14 acres for this water right. The claimant alleges 27.5 acres. The claimant did not contest IDWR's recommendation. Therefore, the acres for this water right comprise 14 acres.

**D. Thomas and Terri Harbison, 36-00003D**

**Acres for 36-00003D - 8.4 acres**  $(0.028 \text{ cfs}/Ac)$   
 $\textcircled{.24 \text{ cfs}}$   $1.43 \text{ "/Ac}$

The only dispute for this right was acreage. IDWR recommended 5 acres to the west of the Buckeye Ditch. Harbison calculated 4.5 acres for this area. Exhibits 13 and 14. For the area to the west of the Buckeye Ditch, the court finds 4.5 acres. IDWR did not recommend any area to the east of the Buckeye Ditch because it was unaware that Harbison owned that property. It is not in dispute that Harbison owns

<sup>7</sup>

The quantity for 36-00003C is not at issue. However, since the quantities for both 36-00003C and 36-00003L are used in combination, the excess flow analysis considers both quantities together in determining the required diversion rate.

property to the east of the Buckeye Ditch. For this portion, Harbison calculated the area to be 3.9 acres. The evidence is not in dispute that the entire portion claimed by Harbison is irrigated. Therefore, the court finds a total of 8.4 acres.

**E. Doyt and Roxie Simcoe, 36-00003F and 36-00003M.**

1. **Quantity for 36-00003F (0.80 cfs) and 36-00003M (1.76 cfs) for a total of 2.56 cfs (58 acres)<sup>8</sup>**

2.20611/Ac

The range of quantities required for these water rights is 1.01 cfs to 14.58 cfs. Exhibit 35. Since the claimed quantity of 2.56 cfs is well below the mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 2.56 cfs is a reasonable and beneficial quantity of water.

2. **Elements for 36-00003M.**

**a. Owner - Doyt and Roxie Simcoe.**

The evidence establishes that Doyt and Roxie Simcoe own the right claimed.

**b. Source - Billingsley Creek.**

The evidence establishes that the source for this water right is Billingsley Creek and that right is diverted into the Buckeye Ditch.

**c. Quantity - 1.76 cfs.**

The evidence establishes that the quantity for this right is 1.76 cfs and that the use of that amount of water is reasonable and beneficial. *See infra*, § IV(E)(1).

**d. Priority date - September 10, 1884.**

The right originated from 36-00003 decreed under the *International Mortgage Decree*. Water right 36-00003 was decreed with a priority date of September 10, 1884. "A decree issued in a private adjudication is evidence of a legal right." *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 746, 947 P.2d 409 (1997). Water right 36-00003M was split from 36-00003. Therefore, the priority date for water right 36-00003M is September 10, 1884.

why didn't the  
Court consider  
-05 or -19?

<sup>8</sup>

The quantity for 36-00003F is not at issue. However, since the quantities for both 36-00003F and 36-00003M are used in combination, the excess flow analysis considers both quantities together in determining the required diversion rate.



**e. Point of diversion - T07S R13E S11 SESENE Within Gooding County.**

Water right 36-00003 was decreed with a point of diversion of T07S R13E S11 SESENE Within Gooding County. Water right 36-00003M was split from 36-00003. Therefore, the point of diversion for water right 36-00003M is T07S R13E S11 SESENE Within Gooding County.

**f. Purpose of use - irrigation.**

The evidence shows that the purpose of use for this claim is irrigation.

**g. Place of Use - T07S R13E S27 NWSW 18 acres.**

IDWR did not recommend water right 36-00003M because no irrigation was found on the place of use claimed. In reviewing the evidence, it is clear that the place of use claimed was irrigated. The area covered by the claim for water right 36-00003M is depicted in Exhibit 12 as the area highlighted in blue and marked with an "M." The ASCS map indicates that this area comprises 18 acres. The areas covered by water rights 36-00003F and 36-00003M are contingent properties and are both owned by the Simcoes. The areas are irrigated using one sprinkler system. At the time the Simcoes purchased the property in 1991, both areas were being irrigated. Prior to the Simcoes purchasing the property, the property had been owned by the Gardners. Dan McFadden testified that he irrigated the property owned by the Gardners from 1977 to 1987. He testified that all the property had been irrigated, including the property covered under 36-00003M. Therefore, the court finds 36-00003M comprises 18 acres. The 18 acres are located in T07S R13E S27 located in the NWSW of Gooding County. Exhibit 9.

Not  
possible  
No  
system

**V. CONCLUSION**

Subject to any determination of conveyance loss and the possible combining of water rights, the court recommends the following as to the disputed elements:

**Edna Rea**

**36-00003A**    Quantity - (irrigation) = 1.6 cfs

Quantity - (stock) = 0.02 cfs with a remark that the 0.02 cfs may be used anywhere on the place of use where stock are watered.

Kingston Properties

36-00003B Quantity = 7.16 cfs

Purpose of Use = irrigation, fish propagation, and  
stock

36-00003K Quantity = 0.92 cfs

Acres = 7 acres

Owner = Kingston Properties

Lynn and Kathy Babington

36-00003L Quantity = 1.32

Acres = 14 acres

Thomas and Terri Harbison

36-00003D Acres = 8.4 acres

Doyt and Roxie Simcoe

36-00003M Owner = Doyt and Roxie Simcoe

Source = Billingsley Creek

Quantity = 1.76 cfs

Priority Date = September 10, 1884

Point of Diversion = T07S R13E S11 SESENE Gooding County

Purpose of Use = Irrigation

Place of Use = T07S R13E S27 NWSW 18 acres

Water Right 36-00003J - This water right was split into rights 36-00003K, 36-00003L, and 36-00003M. Therefore, water right 36-00003J is recommended as **disallowed**.

IT IS SO RECOMMENDED.

DATED this 27 day of July, 1998.

  
\_\_\_\_\_  
Fritz X. Haemmerle, Special Master  
Snake River Basin Adjudication

## CERTIFICATE OF MAILING

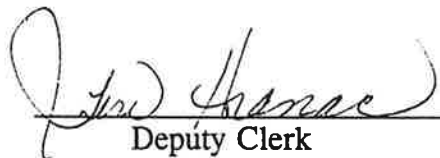
I certify that a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed on July 29, 1998, with sufficient first-class postage prepaid to the following:

Director of IDWR  
PO Box 83720  
Boise, ID 83720-0098

Patrick D. Brown  
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Chief, Natural Resources Division  
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State of Idaho  
PO Box 44449  
Boise, ID 83711-4449

Barbara Gardner  
PO Box 41  
Boise, ID 83332

  
Deputy Clerk

# SPLIT REVIEW ANALYSIS - 36-00003

## A Review of the SRBA Claims and Recommendations of 36-00003 Portions.

November 14, 1997 by Steve Clelland

SRBA

| CLAIM PART<br>36-00003 | NAME                    | "A" RECORD |       | DIRECTOR'S REPORT |       | "R" RECORD OR DECREE |       | COMMENTS OR REMARKS                           |
|------------------------|-------------------------|------------|-------|-------------------|-------|----------------------|-------|-----------------------------------------------|
|                        |                         | CFS        | ACRE  | CFS               | ACRE  | CFS                  | ACRE  |                                               |
| A                      | Rea                     | 1.60       | 13.0  | 0.41              | 13.0  | 0.45                 | 13.0  | Stock use.                                    |
| B                      | Kingston                | 7.16       | 129.0 | 5.00              | 129.0 | 5.00                 | 129.0 | Stock use.                                    |
| C                      | Babington               | 0.30       | 10.0  | 0.30              | 10.0  | 0.30                 | 10.0  | Fish use. <sup>1</sup><br>Trial set: 12/17/97 |
| D                      | Harbison                | 0.24       | 10.0  | 0.24              | 2.0   | 0.24                 | 2.0   | Late Obj. filed                               |
| E                      | Vernon                  | 0.20       | 10.0  | 0.20              | 5.0   | 0.20                 | 6.0   | SF5 - 10/21/97<br>part. Dec.                  |
| F                      | Simcoe                  | 0.80       | 40.0  | 0.80              | 40.0  | 0.80                 | 40.0  |                                               |
| G                      | Lloyd                   | 0.40       | 20.0  | 0.12              | 3.0   | 0.19                 | 3.0   | Special Mstr. Rec.<br>Part. Dec.              |
| H                      | Buckeye Farms           | 12.0       | 455.0 | 11.9              | 290.0 | 11.9                 | 290.0 | Partial Decree <sup>2</sup>                   |
| J                      | <B. Gardner><br><Split> | 0          | 0     | 0.46              | 15.0  | 0                    | 0     | Split into K-L-M<br>by Ownership<br>Change    |
| K                      | B. Gardner              | 0.71       | 10.0  | 0                 | 0     | 0.03                 | 1.0   |                                               |
| L                      | Babington               | 1.97       | 27.5  | 0                 | 0     | 0.43                 | 14.0  | Stock use.<br>Fish use. <sup>3</sup>          |
| M                      | Simcoe                  | 1.32       | 18.5  | 0                 | 0     | 0                    | 0     | This Claim<br>Disallowed. <sup>4</sup>        |
| Totals                 |                         | 26.70      | 743   | 19.43             | 507   | 19.54                | 508   | See Footnote <sup>5</sup>                     |

1.6 cfs

7.16

0.3 cfs

.24

→ .20 -

.80

→ .19 -

→ 11.9 -

- - -

0.92

1.32

1.76

26.39

\* Listings for Diversion Rates reflect the irrigation flow rates only; No Stockwater rates are listed.

<sup>1</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

<sup>2</sup> Partial Decree issued for this right on March 6, 1997.

<sup>3</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

<sup>4</sup> 36-00003M if reinstated as a valid right would apply to 18.5 acres.

<sup>5</sup> Total Acres would increase to 526.5 acres if right 36-00003M is reinstated. Based on rates shown, remaining flow portion of this right is 0.46 cfs; some or all of this amount may be associated with the disallowed right 36-00003M.

Limit of Decree:

03 - 20.0

05 - 3.0

19 - 2.16

} 25.16



# SPLIT REVIEW ANALYSIS - 36-00003

## A Review of the SRBA Claims and Recommendations of 36-00003 Portions.

November 14, 1997 by Steve Clelland

| CLAIM<br>PART<br>36-00003 | NAME                    | "A"<br>RECORD |       | DIRECTOR'S<br>REPORT |       | "R"<br>RECORD<br>OR<br>DECREE |       | COMMENTS<br>OR<br>REMARKS                  |
|---------------------------|-------------------------|---------------|-------|----------------------|-------|-------------------------------|-------|--------------------------------------------|
|                           |                         | CFS           | ACRE  | CFS                  | ACRE  | CFS                           | ACRE  |                                            |
| A                         | Rea                     | 1.60          | 13.0  | 0.41                 | 13.0  | 0.45                          | 13.0  | Stock use.                                 |
| B                         | Kingston                | 7.16          | 129.0 | 5.00                 | 129.0 | 5.00                          | 129.0 | Stock use.<br>Fish use. <sup>1</sup>       |
| C                         | Babington               | 0.30          | 10.0  | 0.30                 | 10.0  | 0.30                          | 10.0  | Trial set: 12/17/97                        |
| D                         | Harbison                | 0.24          | 10.0  | 0.24                 | 2.0   | 0.24                          | 2.0   | Late Obj. filed                            |
| E                         | Vernon                  | 0.20          | 10.0  | 0.20                 | 5.0   | 0.20                          | 6.0   | SF5 - 10/21/97                             |
| F                         | Simcoe                  | 0.80          | 40.0  | 0.80                 | 40.0  | 0.80                          | 40.0  |                                            |
| G                         | Lloyd                   | 0.40          | 20.0  | 0.12                 | 3.0   | 0.19                          | 3.0   | Special Mstr. Rec.                         |
| H                         | Buckeye Farms           | 12.0          | 455.0 | 11.9                 | 290.0 | 11.9                          | 290.0 | Partial Decree <sup>2</sup>                |
| J                         | <B. Gardner><br><Split> | 0             | 0     | 0.46                 | 15.0  | 0                             | 0     | Split into K-L-M<br>by Ownership<br>Change |
| K                         | B. Gardner              | 0.71          | 10.0  | 0                    | 0     | 0.03                          | 1.0   |                                            |
| L                         | Babington               | 1.97          | 27.5  | 0                    | 0     | 0.43                          | 14.0  | Stock use.<br>Fish use. <sup>3</sup>       |
| M                         | Simcoe                  | 1.32          | 18.5  | 0                    | 0     | 0                             | 0     | This Claim<br>Disallowed. <sup>4</sup>     |
| Totals                    |                         | 26.70         | 743   | 19.43                | 507   | 19.54                         | 508   | See Footnote <sup>5</sup>                  |

\* Listings for Diversion Rates reflect the irrigation flow rates only; No Stockwater rates are listed.

<sup>1</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

<sup>2</sup> Partial Decree issued for this right on March 6, 1997.

<sup>3</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

<sup>4</sup> 36-00003M if reinstated as a valid right would apply to 18.5 acres.

<sup>5</sup> Total Acres would increase to 526.5 acres if right 36-00003M is reinstated. Based on rates shown, remaining flow portion of this right is 0.46 cfs; some or all of this amount may be associated with the disallowed right 36-00003M.

See 8-3-92

CONVEYANCE LOSS - WORSTELL

| REACH  | LENGTH<br>(FT) | AVE<br>WIDTH<br>(FT) | SEEPAGE<br>(FT/DAY) | WORSTELL<br>LOSS<br>(CFS) | DELIVERY<br>(CFS) | DELIVERY<br>LEFT<br>(CFS) | LOSS<br>FACTOR | DELIVERY<br>LOSS<br>(CFS) | FLOW<br>(CFS)                                                     |
|--------|----------------|----------------------|---------------------|---------------------------|-------------------|---------------------------|----------------|---------------------------|-------------------------------------------------------------------|
| 1      | 800            | 10.0                 | 2.00                | 0.20                      | 0.06              | 18.83                     | 0.0107         | 0.00                      | 26.81 - 00048B (0.01)                                             |
| 2      | 600            | 10.0                 | 2.00                | 0.15                      | 1.02              | 18.77                     | 0.0081         | 0.02                      | 26.55 - 00112A, 00112B, 00039 Series (7) conveyance insignificant |
| 3      | 1400           | 10.0                 | 2.00                | 0.35                      | 0.24              | 17.75                     | 0.0199         | 0.01                      | 25.38 - 00082A                                                    |
| 4      | 800            | 10.0                 | 2.00                | 0.20                      | 0.44              | 17.51                     | 0.0115         | 0.02                      | 24.79 - 00082B, 00082C, 00039K @ 0.01 cfs each                    |
| 5      | 1100           | 10.0                 | 2.00                | 0.28                      | 0.17              | 17.07                     | 0.0163         | 0.01                      | 24.14 - 00065                                                     |
| 6      | 1200           | 10.0                 | 2.00                | 0.30                      | 0.10              | 16.90                     | 0.0179         | 0.01                      | 23.70 - 00103C, 00103E, 00103F @ 0.01 each                        |
| 7      | 300            | 10.0                 | 2.00                | 0.08                      | 1.22              | 16.80                     | 0.0045         | 0.11                      | 23.29 - 00108A, B, C, H; 00103B, 00085A, B, 00125A @ 0.01 each    |
| 8      | 1000           | 10.0                 | 2.00                | 0.25                      | 0.16              | 15.58                     | 0.0162         | 0.02                      | 22.00 - 00108D, G @ 0.01 each                                     |
| 9      | 500            | 10.0                 | 2.00                | 0.13                      | 0.50              | 15.42                     | 0.0082         | 0.06                      | 21.58 - 00108J                                                    |
| 10     | 2200           | 10.0                 | 2.00                | 0.56                      | 4.13              | 14.92                     | 0.0373         | 0.62                      | 20.96 - 00091A, B; 00108E, 00064B @ 0.16 each                     |
| 11     | 5500           | 10.0                 | 2.00                | 1.39                      | 0.20              | 10.79                     | 0.1288         | 0.06                      | 16.27 - 00003E                                                    |
| 12     | 1700           | 10.0                 | 2.00                | 0.43                      | 0.09              | 10.59                     | 0.0406         | 0.03                      | 14.68 - 00003G                                                    |
| 13     | 3900           | 10.0                 | 2.00                | 0.99                      | 0.34              | 10.50                     | 0.0938         | 0.14                      | 14.16 - 00035J                                                    |
| 14     | 600            | 10.0                 | 2.00                | 0.15                      | 0.27              | 10.16                     | 0.0149         | 0.12                      | 12.84 - 00035E, F, G; 35B @ 0.04                                  |
| 15     | 1500           | 10.0                 | 2.00                | 0.38                      | 0.62              | 9.89                      | 0.0383         | 0.29                      | 12.42 - 00035H, 00003A @ 0.15 each                                |
| 16     | 1600           | 10.0                 | 2.00                | 0.40                      | 1.00              | 9.27                      | 0.0436         | 0.51                      | 11.42 - 00003C, F @ 0.26 each                                     |
| 17     | 600            | 10.0                 | 2.00                | 0.15                      | 0.30              | 8.27                      | 0.0183         | 0.16                      | 10.01 - 00003J                                                    |
| 18     | 300            | 10.0                 | 2.00                | 0.08                      | 3.25              | 7.97                      | 0.0095         | 1.75                      | 9.56 - 00003B                                                     |
| 19     | 3000           | 10.0                 | 2.00                | 0.76                      | 0.24              | 4.72                      | 0.1606         | 0.17                      | 6.24 - 00003D                                                     |
| 20     | 3000           | 10.0                 | 2.00                | 0.76                      | 4.48              | 4.48                      | 0.1692         | 3.89                      | 5.24 - 00003H                                                     |
| TOTALS | 31600          |                      |                     | 7.98                      | 18.83             |                           |                | 7.98                      |                                                                   |

REACH = SECTION OF CHANNEL

LENGTH = LENGTH OF REACH, THE CHANNEL CAN BE DIVIDED INTO EQUAL LENGTH REACHES  
OR ACTUAL LENGTHS BETWEEN DELIVERY POINTS

AVE WIDTH = AVERAGE TOP WIDTH OF REACH

SEEPAGE = SOIL SEEPAGE RATE OF REACH

WORSTELL LOSS = CONVEYANCE LOSS IN REACH BASED ON WORSTELL METHOD

DELIVERY = TOTAL DELIVERIES IN REACH

DELIVERY LEFT = SUM(DELIVERIES OF CURRENT AND REMAINING REACHES)

LOSS FACTOR = WORSTELL LOSS/DELIVERY LEFT

DELIVERY LOSS = SUM(LOSS FACTORS OF CURRENT AND PREVIOUS REACHES) X DELIVERY,  
REPRESENTS THE LOSSES ASSIGNED TO THE DELIVERIES IN THE REACH

FLOW = TOTAL FLOW AT BEGINNING OF EACH REACH

# SPLIT REVIEW ANALYSIS - 36-00003

## A Review of the SRBA Claims and Recommendations of 36-00003 Portions.

November 14, 1997 by Steve Clelland

| CLAIM PART<br>36-00003 | NAME                    | "A" RECORD |             | DIRECTOR'S REPORT |       | "R" RECORD OR DECREE |             | COMMENTS OR REMARKS                  |
|------------------------|-------------------------|------------|-------------|-------------------|-------|----------------------|-------------|--------------------------------------|
|                        |                         | CFS        | ACRE        | CFS               | ACRE  | CFS                  | ACRE        |                                      |
| I (A)                  | Rea                     | 1.60       | 13.0        | 0.41              | 13.0  | 0.45                 | 13.0<br>OK  | Stock use.                           |
| II (B)                 | Kingston                | 7.16       | 129.0       | 5.00              | 129.0 | 5.00                 | 129.0<br>OK | Stock use.<br>Fish use. <sup>1</sup> |
| (C)                    | Babington               | 0.30       | 10.0        | 0.30              | 10.0  | 0.30<br>OK           | 10.0<br>OK  | Trial set: 12/17/97                  |
| (D)                    | Harbison                | 0.24       | 10.0        | 0.24              | 2.0   | 0.24<br>OK           | 2.0         | Late Obj. filed                      |
| P.D. (E)               | Vernon                  | 0.20       | 10.0        | 0.20              | 5.0   | 0.20                 | 6.0         | SF5 - 10/21/97                       |
| (F)                    | Simcoe                  | 0.80       | 40.0        | 0.80              | 40.0  | 0.80<br>OK           | 40.0<br>OK  |                                      |
| P.D. (G)               | Lloyd                   | 0.40       | 20.0        | 0.12              | 3.0   | 0.19                 | 3.0         | Special Mstr. Rec.                   |
| P.D. (H)               | Buckeye Farms           | 12.0       | 455.0       | 11.9              | 290.0 | 11.9                 | 290.0       | Partial Decree <sup>2</sup>          |
| (J)                    | <B. Gardner><br><Split> | 0          | 0           | 0.46              | 15.0  | 0                    | 0           | Split into K-L-M by Ownership Change |
| (K)                    | B. Gardner<br>Kingston  | 0.71       | 10.0<br>(6) | 0                 | 0     | 0.03                 | 1.0         | (fish)                               |
| II (L)                 | Babington               | 1.97       | 27.5        | 0                 | 0     | 0.43                 | 14.0<br>OK  | Stock use.<br>Fish use. <sup>3</sup> |
| (M)                    | Simcoe                  | 1.32       | 18.5        | 0<br>(ext.)       | 0     | 0                    | 0           | This Claim Disallowed. <sup>4</sup>  |
| Totals                 |                         | 26.70      | 743         | 19.43             | 507   | 19.54                | 508         | See Footnote <sup>5</sup>            |

\* Listings for Diversion Rates reflect the irrigation flow rates only; No Stockwater rates are listed.

<sup>1</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use, Not recommended.

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# DECREE REVIEW

SCC 3/4/98

-05-  
36-00005

3 cfs

9-10-1884

(AMANDA GOODING)

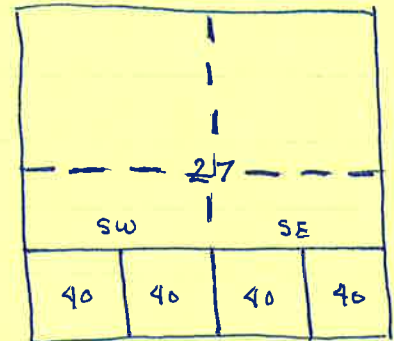
S $\frac{1}{2}$  SW $\frac{1}{4}$

S. 27

S $\frac{1}{2}$  SE $\frac{1}{4}$

T7S, R13E

Pro-Rata:  $\frac{3 \text{ cfs}}{160 \text{ Ac}} = 0.0188 \text{ cfs/Ac}$



SRBA: No claims in Pou.

No IRRIGATION FOUND IN Pou.

160 ACRES

-19-  
36-00019

2.16 cfs

9-10-1884

(HARLAN BELL)

Lot 16 in SWSWNW

S. 27

T7S R13E

Lot 27 + 37 in W $\frac{1}{2}$  NWSW

(BUCKEYE PLAT)

Pro-Rata:  $\frac{2.16 \text{ cfs}}{30 \text{ Ac}} = 0.072 \text{ cfs/Ac}$

previous IDWR estimate  
≈ 30 AC

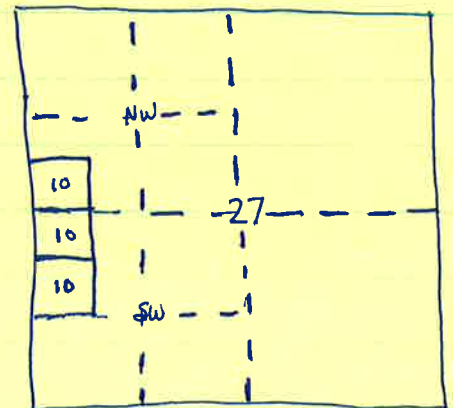
lots are ≈ 10 AC EACH

SRBA: IRRIGATION has been Rec'd

as 36-00003 B-D-K.

About 20 of the 30 ACRES is  
found IRRIGATED.

36-00003D MAY BE PART OF THIS  
RIGHT.



30 ACRES



## DECREED RIGHT SPLIT ANALYSIS

PARENT RIGHT NO. 36-00003

| CLAIM<br>PORTION | CLAIMED<br>RATE | RECOMMENDED<br>RATE |      |
|------------------|-----------------|---------------------|------|
| <u>A</u>         | <u>1.6</u>      | <u>0.26</u>         | 13a  |
| <u>B</u>         | <u>7.16</u>     | <u>3.25</u>         | 129a |
| <u>C</u>         | <u>0.30</u>     | <u>0.20</u>         | 10a  |
| <u>D</u>         | <u>0.24</u>     | <u>0.24</u>         | 2a   |
| <u>E</u>         | <u>6.20</u>     | <u>6.20</u>         | 5a   |
| <u>F</u>         | <u>0.80</u>     | <u>0.80</u>         | 40a  |
| <u>G</u>         | <u>0.40</u>     | <u>0.09</u>         | 3a   |
| <u>H</u>         | <u>20.0</u>     | <u>4.48</u>         | 22a  |
| <u>J</u>         | <u>4.0</u>      | <u>0.30</u>         | 15a  |
|                  |                 |                     |      |
|                  |                 |                     |      |
|                  |                 |                     |      |
| Total            | 34.7            | 9.82                |      |

Recommended rates

36-00003 Div rate listing

R record

A .45 CFS 13A  
 B 5.00 CFS 129A  
 C .30 CFS 10A  
 D .24 CFS 2A  
 E .20 CFS 5A  
 F .80 CFS 40A  
 G .19 CFS 3A  
 H no R  
 J  
 K .03 CFS 1A  
 L .43 CFS 14A  
 M

TRIAL 12/17/97

11.9 CFS 290  
 761A

total 19.54 CFS  
 507 AC.

&lt;0.46&gt; balance

w/M-18.5 AC.  $\approx$  525.5 Acres

SCC-A36-00003.SEL  
 SCC-R36-00003.SEL  
 SCC-36-00003.SEL

# DECREE REVIEW

SCC 3/4/98

-05-  
36-00005

3 cfs

9-10-1884

(AMANDA GOODING)

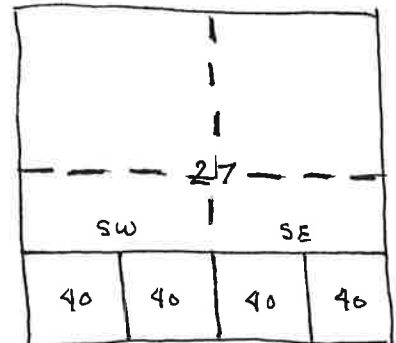
S $\frac{1}{2}$  SW $\frac{1}{4}$

S. 27

S $\frac{1}{2}$  SE $\frac{1}{4}$

T7S, R13E

Pro-Rata:  $\frac{3 \text{ cfs}}{160 \text{ Ac}} = 0.0188 \text{ cfs/Ac}$



SRBA: No claims in Pou.

No IRRIGATION FOUND IN Pou.

160 ACRES

-19-  
36-00019

2.16 cfs

9-10-1884

(HARLAN BELL)

Lot 16 in SWSWNW

S. 27

T7S R13E

Lot 27 & 37 in W $\frac{1}{2}$  NWSW

(BUCKEYE PLAT)

Pro-Rata:  $\frac{2.16 \text{ cfs}}{30 \text{ Ac}} = 0.072 \text{ cfs/Ac}$

[PREVIOUS IDWR estimate  
≈ 30 AC]

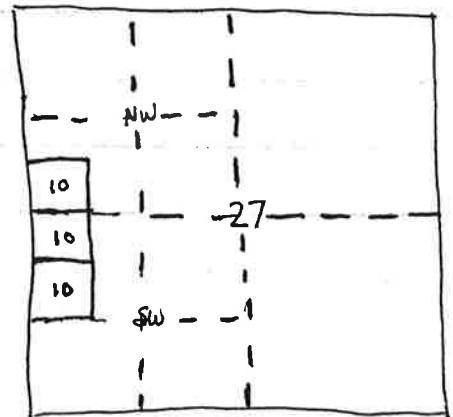
lots are ≈ 10 AC EACH

SRBA: IRRIGATION has been Rec'd

as 36-00003 B-D-K.

About 20 of the 30 Acres is  
found IRRIGATED.

36-00003D MAY BE PART OF THIS  
RIGHT.



30 ACRES

OD-5813  
AJ5813NP  
SELECTION FILE: SCC-BUCKEYE-RS2

IDAHO DEPARTMENT OF WATER RESOURCES  
ADJUDICATION WATER MASTER REPORT  
BY WATER SOURCE/PRIORITY DATE

DATE: 03/04/98  
TIME: 15:23:47  
PAGE: 1

\*MPOD: Y = Multiple Pts of Diversion, Pod Diversion Rate(s) is 0  
U = Multiple Pts of Diversion, Pod Diversion Rate(s) Not 0  
N = No Multiple Pts of Diversion (1 or less)

BUCKEYE  
DITCH

| WATER RIGHT<br>NUMBER | CURRENT OWNER NAME | PRIORITY<br>DATE | S<br>T<br>G | POINT OF DIVERSION | F<br>L<br>G | TOTAL DIVERSION | POD DIVERSION NAME | *M<br>P<br>O<br>D | U<br>S<br>E |
|-----------------------|--------------------|------------------|-------------|--------------------|-------------|-----------------|--------------------|-------------------|-------------|
|-----------------------|--------------------|------------------|-------------|--------------------|-------------|-----------------|--------------------|-------------------|-------------|

WATER SOURCE: BILLINGSLEY CREEK

| WATER RIGHT<br>NUMBER | CURRENT OWNER NAME     | PRIORITY<br>DATE | S<br>T<br>G | POINT OF DIVERSION | F<br>L<br>G | TOTAL DIVERSION | POD DIVERSION NAME | *M<br>P<br>O<br>D | U<br>S<br>E |
|-----------------------|------------------------|------------------|-------------|--------------------|-------------|-----------------|--------------------|-------------------|-------------|
| 36-00024              | PETERSON, ORLAND       | 03/30/1884       | D           | 07S 13E 11 NWSENE  |             | 0.870 CFS       | BELL DITCH         | Y                 | 01          |
| 36-00087              | PETERSON, ORLAND       | 03/30/1884       | D           | 07S 13E 11 NWSENE  |             | 2.400 CFS       | BELL DITCH         | Y                 | 01          |
| 36-00026              | BROWN, LLOYD           | 03/30/1884       | D           | 07S 13E 11 NWSENE  |             | 1.050 CFS       |                    | Y                 | 01          |
| R36-00026             | BROWN, LLOYD           | 03/30/1884       | D           | 07S 13E 11 NWSENE  |             | 2.400 CFS       |                    | Y                 | 01          |
| R36-00085D            | ANDERTON, ALICE A      | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.020 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00085C             | HOWARD, HENRY          | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.340 CFS       | BUCKEYE DITCH      | N                 | 01          |
| R36-00108G            | TUSSEY, KAREN J        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.020 CFS       |                    | N                 | 01          |
| R36-00103C            | MC KINNON, ERNEST L    | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.040 CFS       |                    | N                 | 01          |
| R36-00103F            | ZINK, MYRLE HYDE       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.020 CFS       | BUCKEYE            | N                 | 76          |
| 36-00108J             | EASTERDAY, LOVA U      | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.500 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00003B             | KINGSTON PROPERTIES LP | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 5.000 CFS       |                    | N                 | 01          |
| 36-00103E             | ROBINSON, SHELVE       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.070 CFS       | BUCKEYE DITCH      | N                 | 52          |
| 36-00035J             | SKAAR, KENT            | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.400 CFS       |                    | N                 | 01          |
| R36-00003D            | HARBISON, THOMAS L     | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.240 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00085B             | WAITE, RICHARD H       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.040 CFS       |                    | N                 | 01          |
| R36-00085B            | WAITE, RICHARD H       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.040 CFS       |                    | N                 | 01          |
| R36-00035E            | BROWN, KATHLEEN        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.210 CFS       |                    | Y                 | 01          |
| R36-00003L            | BABINGTON, LYNN J      | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.430 CFS       | BUCKEYE DITCH      | N                 | 01          |
| R36-00003F            | SIMCOE, DOYT H         | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.800 CFS       | BUCKEYE            | N                 | 01          |
| R36-00003A            | REA, EDNA M            | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.450 CFS       | BUCKEYE DITCH      | N                 | 01          |
| R36-00003B            | KINGSTON PROPERTIES LP | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 5.000 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00003C             | BABINGTON, KATHY L     | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.300 CFS       |                    | N                 | 01          |
| 36-00108B             | BONNING, JUDY L        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.510 CFS       |                    | N                 | 01          |
| 36-00108C             | MYERS, ROSELLA F       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.070 CFS       | BUCKEYE DITCH      | N                 | 01          |
| R36-00003C            | BABINGTON, KATHY L     | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.300 CFS       | BUCKEYE            | N                 | 01          |
| 36-00003D             | HARBISON, THOMAS L     | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.240 CFS       |                    | N                 | 01          |
| R36-00108Q            | FETTER, JIM            | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.200 CFS       |                    | N                 | 01          |
| R36-00085A            | MILLER, MARILYN J      | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.200 CFS       | BUCKEYE            | N                 | 01          |
| 36-00035C             | HOFFMAN, TINA I        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.020 CFS       |                    | N                 | 76          |
| R36-00035B            | STURTEVANT, FRED I     | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.600 CFS       |                    | N                 | 01          |
| 36-00091B             | FOBES, GORDON          | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.160 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00108R             | SUTTERLIN, CAROL       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.020 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00108A             | SPLIT RIGHT            | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.300 CFS       |                    | N                 | 01          |
| R36-00065             | BECKSTEAD, FRED A      | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.700 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00035B             | STURTEVANT, FRED I     | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.300 CFS       |                    | N                 | 01          |
| R36-00027             | BROWN, LLOYD           | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.400 CFS       |                    | Y                 | 01          |
| R36-00108B            | BONNING, JUDY L        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.550 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00091A             | ELLSTON, ARTHUR        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.640 CFS       | BUCKEYE DITCH      | N                 | 01          |
| R36-00108P            | VEENENDAAL, SIGRID E   | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.100 CFS       |                    | N                 | 01          |
| R36-00003K            | GARDNER, BARBARA       | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.030 CFS       | BUCKEYE DITCH      | N                 | 01          |
| R36-00035J            | SKAAR, KENT            | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.400 CFS       | BUCKEYE            | N                 | 01          |
| R36-00003E            | VERNON, EDITH L        | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.200 CFS       | BUCKEYE            | N                 | 01          |
| 36-00003A             | REA, EDNA M            | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.410 CFS       |                    | N                 | 01          |
| 36-00065              | BECKSTEAD, FRED A      | 09/10/1884       | D           | 07S 13E 11 SESENE  |             | 0.180 CFS       |                    | N                 | 01          |

36-00039 SPLITS

01/02/1891

00-5813  
AJ5813NP  
SELECTION FILE: SCC-BUCKEYE-RS2

IDAHO DEPARTMENT OF WATER RESOURCES  
ADJUDICATION WATER MASTER REPORT  
BY WATER SOURCE/PRIORITY DATE

DATE: 03/04/98  
TIME: 15:54:00  
PAGE: 3

\*MPOD: Y = Multiple Pts of Diversion, Pod Diversion Rate(s) is 0  
U = Multiple Pts of Diversion, Pod Diversion Rate(s) Not 0  
N = No Multiple Pts of Diversion (1 or less)

| WATER RIGHT<br>NUMBER | CURRENT OWNER NAME                  | PRIORITY<br>DATE | S<br>T<br>G  | POINT OF DIVERSION | F<br>L<br>G | TOTAL DIVERSION | POD DIVERSION NAME | *M<br>P<br>O<br>D | U<br>S<br>E |
|-----------------------|-------------------------------------|------------------|--------------|--------------------|-------------|-----------------|--------------------|-------------------|-------------|
| R36-00112A            | J3G HOLDINGS                        | 01/02/1891       | D 07S 13E 11 | SESENE             |             | 0.310 CFS       | BUCKEYE DITCH      | N                 | 01          |
| 36-00082C             | MARTIN, JAMIE                       | 04/01/1910       | D 07S 13E 11 | SESENE             |             | 0.120 CFS       |                    | N                 | 01          |
| R36-15463             | JOINT HAGERMAN SCHOOL DISTRICT NO 3 | 10/12/1954       | J 07S 13E 11 | SESENE             |             | 0.140 CFS       |                    | N                 | 01          |
| 36-15463              | JOINT HAGERMAN SCHOOL DISTRICT NO 3 | 10/12/1954       | J 07S 13E 11 | SESENE             |             | 0.140 CFS       |                    | N                 | 01          |
| 36-07271              | KING, THOMAS E                      | 11/17/1972       | D 07S 13E 11 | SESENE             |             | 4.620 CFS       |                    | Y                 | 19          |
| 36-07658              | KIPP, ELBERTA M                     | 11/16/1976       | D 07S 13E 11 | SENE               |             | 0.040 CFS       |                    | N                 | 76          |
| 36-07834              | BRANCHFLOWER, MICHAEL G             | 12/21/1978       | P 07S 13E 11 | SESENE             |             | 100.000 CFS     |                    | N                 | 28          |
| 36-08058              | BRANCHFLOWER, MICHAEL G             | 02/03/1982       | P 07S 13E 11 | SESENE             |             | 100.000 CFS     |                    | N                 | 28          |
| TOTAL:                |                                     |                  |              |                    |             | 252.810 CFS     |                    |                   |             |

END OF  
DECREE  
LIST

W/SANDS DITCH

MISSING:

36-00039 splits — 01/02/1891  
36-00112B 01/02/1891

★ others ARE MISSING but trend is shown.



# TRANSMITTAL COVER SHEET

OMNIFAX G66

TO: Nick SPENCER

TOTAL PAGES SENT: 2 + cover

DOCUMENT DESCRIPTION: PRIORITY DATE LISTING  
For Buckeye Ditch  
Re: 36-00039 SETTLEMENT

FROM: **IDAHO DEPARTMENT OF WATER RESOURCES**  
**1341 Fillmore Street, Suite 200**  
**Twin Falls ID 83301-3380**

PHONE: 736-3033

FAX: 736-3037

SENDER: Steve C.

## CHARGES:

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PAGE(S)  
RESULT  
MODE

03/05 09:27

TIME : 03/05/1998 09:28  
NAME : IDWR SOUTHERN REGION  
FAX : 2087363037  
TEL : 2087363033

TRANSMISSION VERIFICATION REPORT

# TRANSMITTAL COVER SHEET

OMNIFAX G66

TO: JOHN MARSHALL

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\_\_\_\_\_

TOTAL PAGES SENT: 1

DOCUMENT DESCRIPTION: 36-0005 & 0019 Review

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FROM: **IDAHO DEPARTMENT OF WATER RESOURCES**  
**1341 Fillmore Street, Suite 200**  
**Twin Falls ID 83301-3380**

PHONE: 736-3033

FAX: 736-3037

SENDER: STEVE C.

## CHARGES:

One (1) free copy per request, cover sheet not counted. Two (2) or more copies per request will cost \$0.25 per page. (\$0.50 minimum)

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State of Idaho

DEPARTMENT OF WATER RESOURCES

1341 Fillmore Street, Suite 200, Twin Falls, ID 83301-3380

Phone: (208) 736-3033 FAX: (208) 736-3037

March 9, 1998

PHILIP E. BATT  
GOVERNOR

KARL J. DREHER  
DIRECTOR

DAVE SHAW  
2309 N MOUNTAIN VIEW STE 174  
BOISE ID 83706

RE: SPLIT REVIEW OF DECREE 36-00003

Dear Dave,

Please find enclosed the materials you requested. These documents were all provided by IDWR during the hearing on March 6, 1998.

Feel free to call if you have further questions on this information.

Sincerely,

STEVE CLELLAND  
Sr. Water Resource Agent

ENC:

**RECEIVED**

**MAY 23 2001**

Department of Water Resources  
Southern Region

**DIRECTOR'S REPORT FOR LATE CLAIMS**

**Subcase Nos. 36-00005A, 36-00005B  
36-00005C, 36-00019A, 36-00019B  
36-00019C & 36-00019D**

**In Re SRBA**

**Twin Falls County Civil Case No. 39576**

**Report to the SRBA District Court**

**Prepared by the Idaho Department of Water Resources**

**Karl J. Dreher, Director**

**David R. Tuthill, Jr., Adjudication Bureau Chief**

**May 18, 2001**



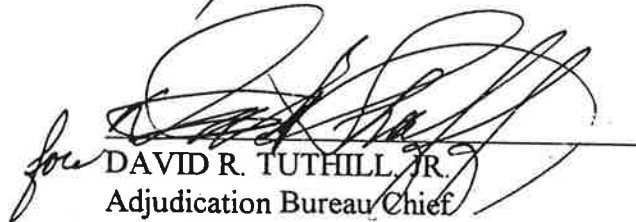
### DESCRIPTIVE SUMMARY

This is a Director's Report for Late Claims submitted by the Director of the Idaho Department of Water Resources.

### DISCUSSION

Pursuant to the Special Master's *Order Setting Subcase Deadlines* dated April 3, 2001, the Director submits for filing with the Court, a Director's Report for Late Claims for the aforementioned subcases.

Respectfully submitted this 18 day of May, 2001.

  
for DAVID R. TUTHILL, JR.  
Adjudication Bureau Chief

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

05/18/2001

RIGHT NUMBER: 36-5A

NAME AND ADDRESS: KATHY L BABINGTON  
LYNN J BABINGTON  
2849 S 850 E  
HAGERMAN, ID 83332

SOURCE: BILLINGSLEY CREEK TRIBUTARY: SNAKE RIVER

QUANTITY: 0.09 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11 SESENE Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 0.09 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.02 CFS        |

PLACE OF USE:

IRRIGATION Within GOODING County  
T07S R13E S27 SENW 24  
STOCKWATER Within GOODING County  
T07S R13E S27 SENW

24 ACRES TOTAL

USE OF THIS RIGHT WITH RIGHT NO. 36-00003C IS LIMITED TO THE  
IRRIGATION OF A COMBINED TOTAL OF 24 ACRES IN A SINGLE  
IRRIGATION SEASON.

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

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.

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

05/18/2001

RIGHT NUMBER: 36-5B

NAME AND ADDRESS: KINGSTON PROPERTIES LP  
477 SHOUP AVE STE 207  
IDAHO FALLS, ID 83402

SOURCE: BILLINGSLEY CREEK TRIBUTARY: SNAKE RIVER

QUANTITY: 0.55 CFS

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11 SESENE Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 0.55 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.05 CFS        |

PLACE OF USE:

|                                  |      |    |                             |
|----------------------------------|------|----|-----------------------------|
| IRRIGATION Within GOODING County |      |    |                             |
| T07S R13E S27                    | SWNW | 24 | T07S R13E S27 NWSW 9        |
| T07S R13E S28 LOT 4              | SWNE | 9  | T07S R13E S28 SENE 25       |
| T07S R13E S28                    | NESE | 40 | T07S R13E S28 LOT 5 NWSE 22 |
| STOCKWATER Within GOODING County |      |    |                             |
| T07S R13E S27                    | SWNW |    |                             |

129 ACRES TOTAL

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO  
THE IRRIGATION OF A COMBINED TOTAL OF 129 ACRES IN A SINGLE  
IRRIGATION SEASON. COMBINED RIGHT NOS.: 36-00003B, 36-00005B &  
36-00019B.

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

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 - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.



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

---

05/18/2001

RIGHT NUMBER: 36-5C  
NAME AND ADDRESS: DOYT H SIMCOE  
ROXIE J SIMCOE  
562 SUNRISE BLVD N  
TWIN FALLS, ID 83301

RECOMMENDED AS RIGHT NO. 36-3F.

05/18/2001

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

---

RIGHT NUMBER: 36-19A

NAME AND ADDRESS: KATHY L BABINGTON  
LYNN J BABINGTON  
2849 S 850 E  
HAGERMAN, ID 83332

RECOMMENDED AS RIGHT NOS. 36-3C & 36-5A.

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

RIGHT NUMBER: 36-19B

NAME AND ADDRESS: KINGSTON PROPERTIES LP  
477 SHOUP AVE STE 207  
IDAHO FALLS, ID 83402

SOURCE: BILLINGSLEY CREEK                      TRIBUTARY: SNAKE RIVER

QUANTITY: 1.92 CFS

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11                      SESENE                      Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 1.92 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.05 CFS        |

PLACE OF USE:

|                                  |      |    |                                                                            |
|----------------------------------|------|----|----------------------------------------------------------------------------|
| IRRIGATION Within GOODING County |      |    |                                                                            |
| T07S R13E S27                    | SWNW | 24 | T07S R13E S27                      NWSW                      9             |
| T07S R13E S28      LOT 4         | SWNE | 9  | T07S R13E S28                      SENE                      25            |
| T07S R13E S28                    | NESE | 40 | T07S R13E S28      LOT 5                      NWSE                      22 |
| STOCKWATER Within GOODING County |      |    |                                                                            |
| T07S R13E S27                    | SWNW |    |                                                                            |

129 ACRES TOTAL

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO  
THE IRRIGATION OF A COMBINED TOTAL OF 129 ACRES IN A SINGLE  
IRRIGATION SEASON. COMBINED RIGHT NOS.: 36-00003B, 36-00005B &  
36-00019B.

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

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 - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.

05/18/2001

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

---

RIGHT NUMBER: 36-19C

NAME AND ADDRESS: DOYT H SIMCOE  
ROXIE J SIMCOE  
562 SUNRISE BLVD N  
TWIN FALLS, ID 83301

RECOMMENDED AS RIGHT NO. 36-3F.



05/18/2001

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

RIGHT NUMBER: 36-19D

NAME AND ADDRESS: RAYBURN B MC CLURE  
PO BOX 483  
HAGERMAN, ID 83332

SOURCE: BILLINGSLEY CREEK TRIBUTARY: SNAKE RIVER

QUANTITY: 0.24 CFS

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11 SESENE Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 0.24 CFS        |

PLACE OF USE:

IRRIGATION Within GOODING County  
T07S R13E S27 NWSW 8.5

8.5 ACRES TOTAL

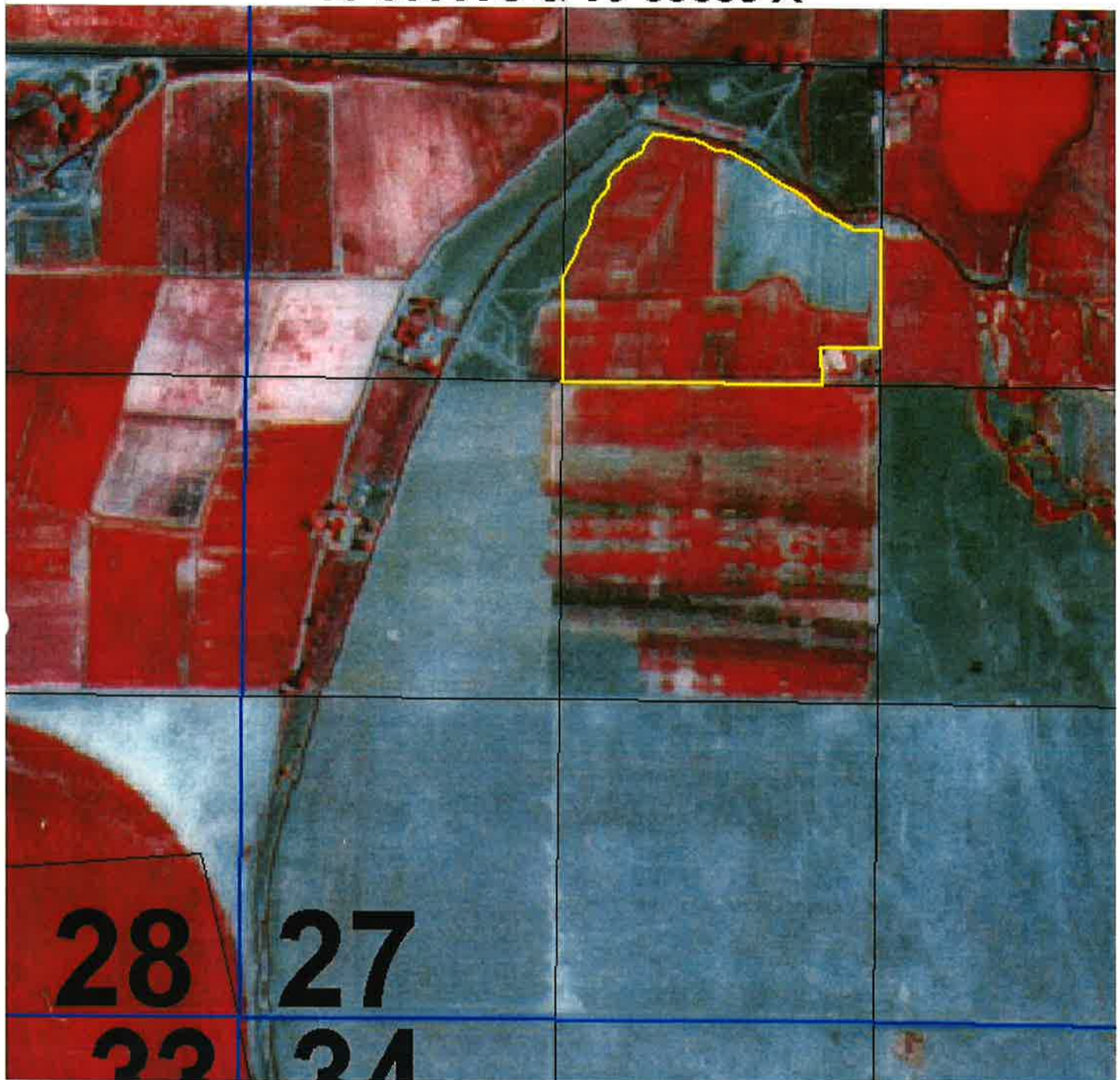
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

WATER IS DELIVERED THROUGH BUCKEYE DITCH.

**IDAHO DEPT OF WATER RESOURCES**  
**36-00003C & 36-00005 A**



660 0 660 1320 Feet

- ▭ RECOMMENDED PLACE OF USE
- POINT OF DIVERSION
- ▬ SECTION LINES
- ▭ 1/4 - 1/4 LINES

**T07S R13E**  
**SEC. 27, SENW**



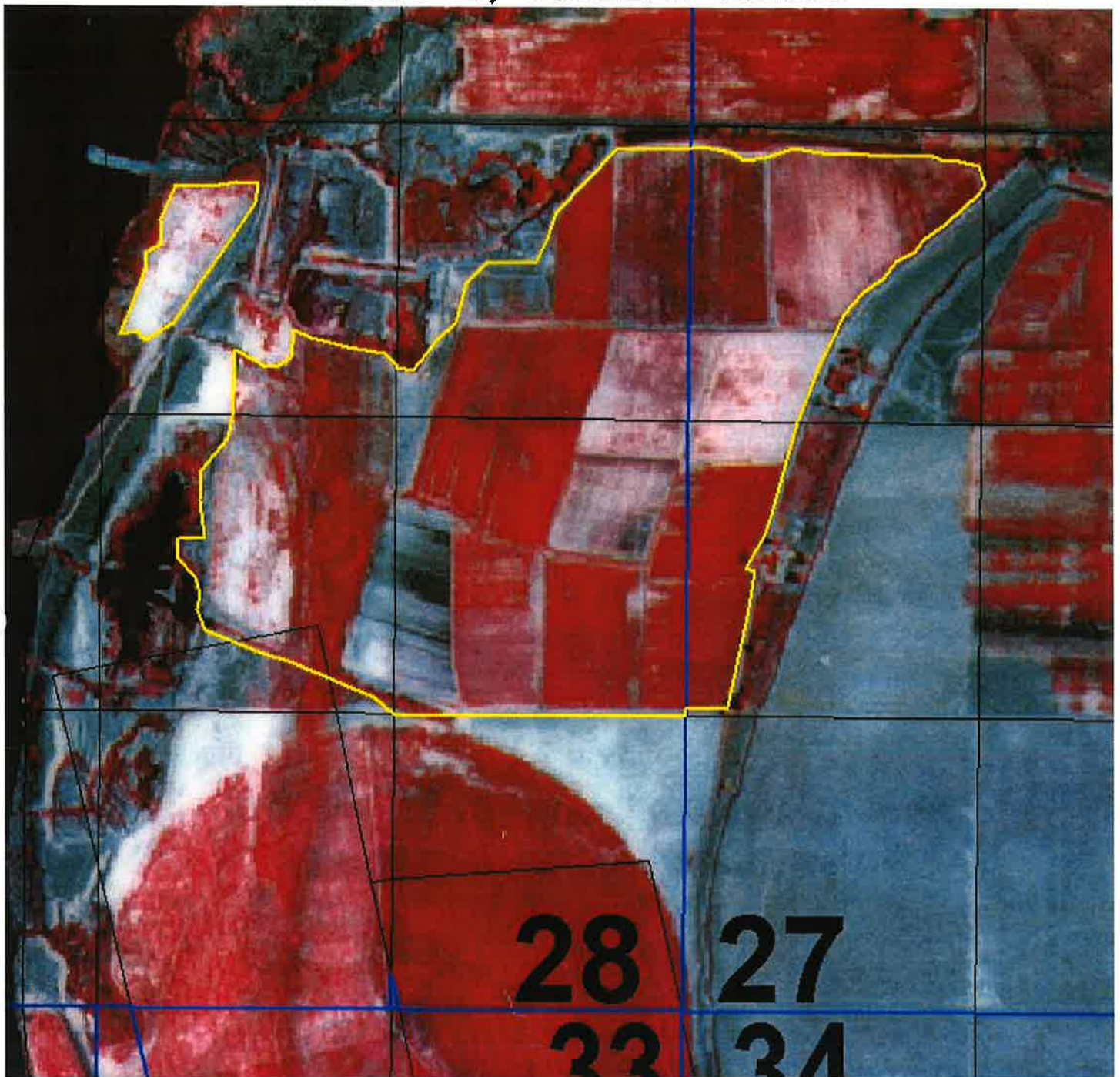
**GIS PLACE OF USE PRESENTATION**  
**1987 &/OR 1988 NAPP PHOTOGRAPHY**

**DATA ENTRY BY: STEVE CLELLAND**  
**DATE: MAY 17, 2001**

**\*\*\*REVISED\*\*\***



**IDAHO DEPT OF WATER RESOURCES**  
**36-00003B, -0005B & -0019B**



660 0 660 1320 Feet

-  **RECOMMENDED PLACE OF USE**
-  **POINT OF DIVERSION**
-  **SECTION LINES**
-  **1/4 - 1/4 LINES**

**T07S R13E**  
**SEC. 27 & 28**



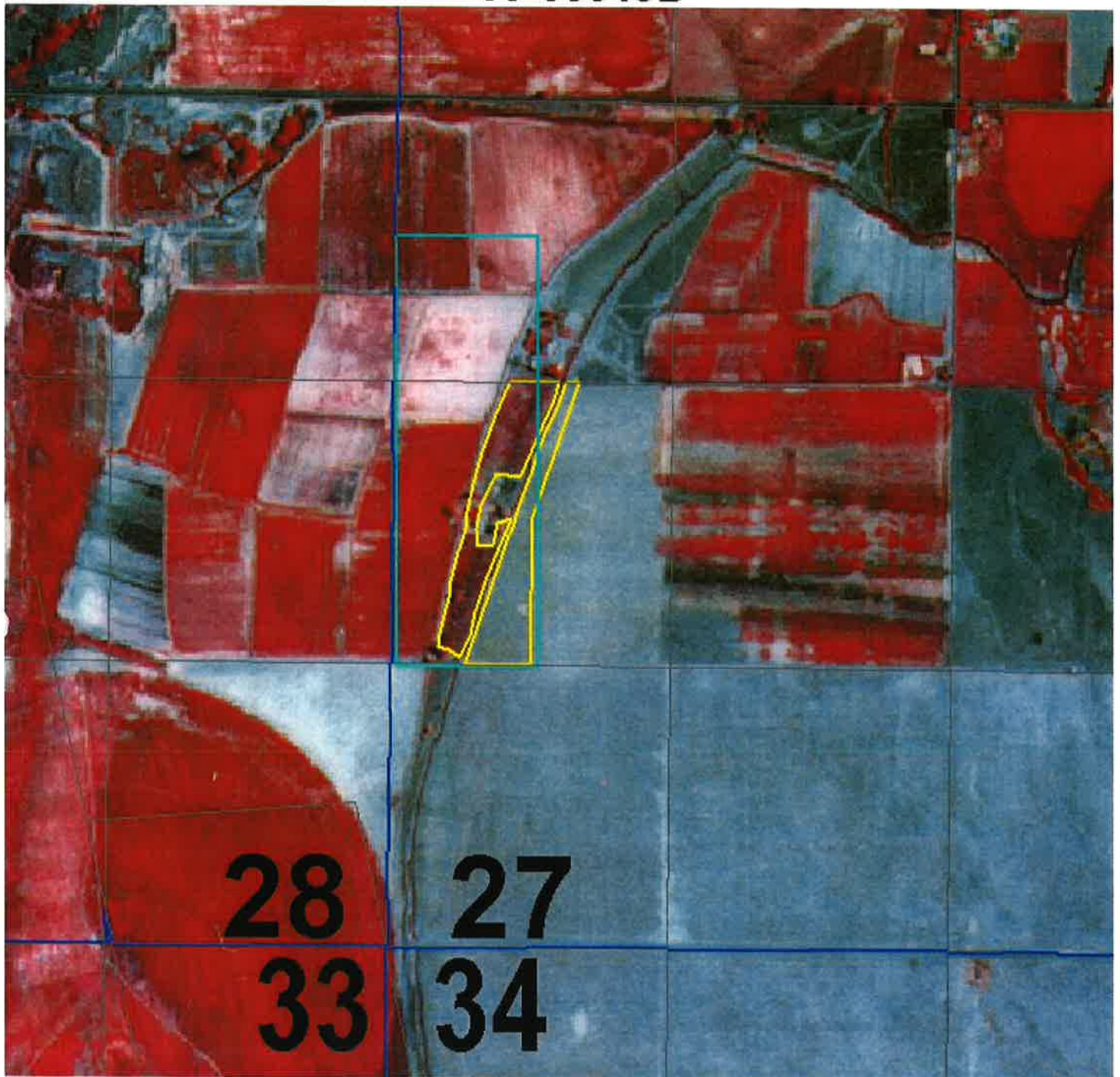
**GIS PLACE OF USE PRESENTATION**  
**1987 & /OR 1988 NAPP PHOTOGRAPHY**

**DATA ENTRY BY: STEVE CLELLAND**  
**DATE: MAY 18, 2001**

**\*\*\*REVISED\*\*\***



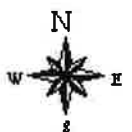
**IDAHO DEPT OF WATER RESOURCES**  
**36-00019D**



660 0 660 1320 Feet

- RECOMMENDED PLACE OF USE
- POINT OF DIVERSION
- ▬ SECTION LINES
- 1/4 - 1/4 LINES

**T07S R13E**  
**SEC. 27, NWSW**



**GIS PLACE OF USE PRESENTATION**  
**1987 & OR 1988 NAPP PHOTOGRAPHY**

**DATA ENTRY BY: STEVE CLELLAND**  
**DATE: MAY 17, 2001**

**\*\*\*REVISED\*\*\***

## CERTIFICATE OF SERVICE

I certify that on 5/18, 2001, I mailed and/or delivered the original and copies of this form, including all attachments, to the following interested parties, by placing them in sealed envelopes, addressed as follows:

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Snake River Basin Adjudication  
253 Third Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707

☐ Overnight Mail  
☐ Regular Mail  
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Office of the Attorney General  
P.O. Box 44449  
Boise, ID 83711-4449

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United States Department of Justice  
Environment & Natural Resources Div.  
550 W. Fort Street MSC 033  
Boise, ID 83724

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Gooding County Courthouse  
624 Main St.  
Gooding, ID 83330

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Peter J. Ampe  
State of Idaho  
P.O. Box 83720  
Boise, ID 83720-0010

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☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

Patrick D. Brown  
109 S. Adams St.  
Jerome, ID 83338

☐ Overnight Mail  
☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile



Dana Hofstetter  
P.O. Box 1427  
Boise, ID 83701-1427

☐ Overnight Mail  
☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

John Rosholt  
John Simpson  
P.O. Box 1906  
Twin Falls, ID 83303-1906

☐ Overnight Mail  
☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

Rayburn & Karen McClure  
P.O. Box 483  
Hagerman, ID 83332

☐ Overnight Mail  
☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

Cleve C. Lloyd  
Route 1, Box 14  
Hagerman, ID 83332

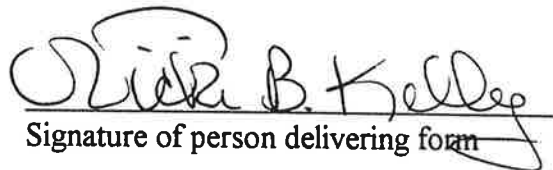
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Edith Vernon  
2722 South 900 East  
Hagerman, ID 83332

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Maria Yvonne Anderson  
Mike Engles  
1945 S. Weimaraner Way  
Meridian, ID 83642

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Signature of person delivering form

**AMENDED DIRECTOR'S REPORT**

**Subcase Nos. 36-00003A, 36-00003B  
36-00003C, 36-00003D, 36-00003F  
36-00003K, 36-00003L & 36-00003M**

**In Re SRBA**

**Twin Falls County Civil Case No. 39576**

**Report to the SRBA District Court**

**Prepared by the Idaho Department of Water Resources  
Karl J. Dreher, Director  
David R. Tuthill, Jr., Adjudication Bureau Chief**

**May 18, 2001**

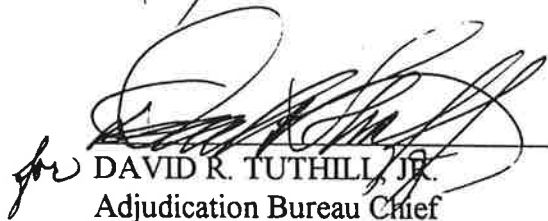
## DESCRIPTIVE SUMMARY

This is an Amended Director's Report submitted by the Director of the Idaho Department of Water Resources (IDWR).

## DISCUSSION

Pursuant to the Special Master's *Order Setting Subcase Deadlines* dated April 3, 2001, the Director submits for filing with the Court, an Amended Director's Report for the aforementioned subcases. Although amended claims for water right numbers 36-00003A, 36-00003B, 36-00003D, 36-00003L and 36-00003M have not been filed, the Director hereby submits amended recommendations for them. This is necessary in order to bring these recommendations into conformance with IDWR's recommendations of overlapping claims, contained in its report entitled *Director's Reports for Late Claims Subcase Nos. 36-00005A, 36-00005B, 36-00005C, 36-00019A, 36-00019B, 36-00019C & 36-00019D*, filed contemporaneously herewith.

Respectfully submitted this 18 day of May, 2001.

  
for DAVID R. TUTHILL, JR.  
Adjudication Bureau Chief

05/18/2001

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

RIGHT NUMBER: 36-3A

NAME AND ADDRESS: EDNA M REA  
PO BOX 543  
WENDELL, ID 83355

SOURCE: BILLINGSLEY CREEK TRIBUTARY: SNAKE RIVER

QUANTITY: 0.57 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11 SESENE Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 0.57 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.02 CFS        |

PLACE OF USE:

IRRIGATION Within GOODING County  
T07S R13E S27 SWNE 13  
STOCKWATER Within GOODING County  
T07S R13E S27 SWNE

13 ACRES TOTAL

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

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 - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.

05/18/2001

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

RIGHT NUMBER: 36-3B

NAME AND ADDRESS: KINGSTON PROPERTIES LP  
477 SHOUP AVE STE 207  
IDAHO FALLS, ID 83402

SOURCE: BILLINGSLEY CREEK                      TRIBUTARY: SNAKE RIVER

QUANTITY: 7.16 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11                      SESENE                      Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 7.16 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.05 CFS        |
| FISH PROPAGATION      | 08-01 04-01          | 7.16 CFS        |

PLACE OF USE:

IRRIGATION Within GOODING County

|               |            |    |               |            |    |
|---------------|------------|----|---------------|------------|----|
| T07S R13E S27 | SWNW       | 24 | T07S R13E S27 | NWSW       | 9  |
| T07S R13E S28 | LOT 4 SWNE | 9  | T07S R13E S28 | SENE       | 25 |
| T07S R13E S28 | NESE       | 40 | T07S R13E S28 | LOT 5 NWSE | 22 |

STOCKWATER Within GOODING County

|               |            |               |            |
|---------------|------------|---------------|------------|
| T07S R13E S27 | SWNW       | T07S R13E S27 | NWSW       |
| T07S R13E S28 | LOT 4 SWNE | T07S R13E S28 | SENE       |
| T07S R13E S28 | NESE       | T07S R13E S28 | LOT 5 NWSE |

FISH PROPAGATION Within GOODING County

|               |      |               |       |      |
|---------------|------|---------------|-------|------|
| T07S R13E S27 | SWNW | T07S R13E S28 | LOT 4 | SWNE |
| T07S R13E S28 | SENE |               |       |      |

129 ACRES TOTAL

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO  
THE IRRIGATION OF A COMBINED TOTAL OF 129 ACRES IN A SINGLE  
IRRIGATION SEASON. COMBINED RIGHT NOS.: 36-00003B, 36-00005B &  
36-00019B.



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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

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 - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.

05/18/2001

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

RIGHT NUMBER: 36-3C

NAME AND ADDRESS: KATHY L BABINGTON  
LYNN J BABINGTON  
2849 SOUTH 850 EAST  
HAGERMAN, ID 83332

SOURCE: BILLINGSLEY CREEK TRIBUTARY: SNAKE RIVER

QUANTITY: 0.87 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11 SESENE Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 0.87 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.02 CFS        |

PLACE OF USE:

IRRIGATION Within GOODING County  
T07S R13E S27 SENW 24  
STOCKWATER Within GOODING County  
T07S R13E S27 SENW

24 ACRES TOTAL

USE OF THIS RIGHT WITH RIGHT NO. 36-00005A IS LIMITED TO THE  
IRRIGATION OF A COMBINED TOTAL OF 24 ACRES IN A SINGLE  
IRRIGATION SEASON.

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

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.

05/18/2001

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

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RIGHT NUMBER: 36-3D

NAME AND ADDRESS: KAREN J MC CLURE  
RAYBURN B MC CLURE  
PO BOX 483  
HAGERMAN, ID 83332

RECOMMENDED AS RIGHT NO. 36-00019D.

05/18/2001

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

RIGHT NUMBER: 36-3F

NAME AND ADDRESS: DOYT H SIMCOE  
ROXIE J SIMCOE  
562 SUNRISE BLVD N  
TWIN FALLS, ID 83301

SOURCE: BILLINGSLEY CREEK                      TRIBUTARY: SNAKE RIVER

QUANTITY: 1.54 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.  
THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11                      SESENE                      Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 1.54 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.02 CFS        |

PLACE OF USE:

|                                  |      |    |                                                                 |
|----------------------------------|------|----|-----------------------------------------------------------------|
| IRRIGATION Within GOODING County |      |    |                                                                 |
| T07S R13E S27                    | NESW | 40 | T07S R13E S27                      NWSW                      18 |
| STOCKWATER Within GOODING County |      |    |                                                                 |
| T07S R13E S27                    | NESW |    | T07S R13E S27                      NWSW                         |

58 ACRES TOTAL

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

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

WATER IS DELIVERED THROUGH THE BUCKEYE DITCH.

05/18/2001

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

RIGHT NUMBER: 36-3K

NAME AND ADDRESS: KINGSTON PROPERTIES LP  
477 SHOUP AVE STE 207  
IDAHO FALLS, ID 83402

SOURCE: BILLINGSLEY CREEK TRIBUTARY: SNAKE RIVER

QUANTITY: 0.04 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE  
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER  
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT  
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED.

PRIORITY DATE: 09/10/1884

POINT OF DIVERSION: T07S R13E S11 SESENE Within GOODING County

PURPOSE AND  
PERIOD OF USE:

| <u>PURPOSE OF USE</u> | <u>PERIOD OF USE</u> | <u>QUANTITY</u> |
|-----------------------|----------------------|-----------------|
| IRRIGATION            | 02-15 11-30          | 0.04 CFS        |
| STOCKWATER            | 01-01 12-31          | 0.02 CFS        |

PLACE OF USE:

IRRIGATION Within GOODING County  
T07S R13E S27 SWNW 1  
STOCKWATER Within GOODING County  
T07S R13E S27 SWNW

1 ACRES TOTAL

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

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

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR  
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL  
USE.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

WATER IS DELIVERED THROUGH BUCKEYE DITCH.



05/18/2001

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

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RIGHT NUMBER: 36-3L

NAME AND ADDRESS: KATHY L BABINGTON  
LYNN J BABINGTON  
2849 S 850 E  
HAGERMAN, ID 83332

RECOMMENDED AS RIGHT NOS. 36-3C AND 36-5A,

05/18/2001

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

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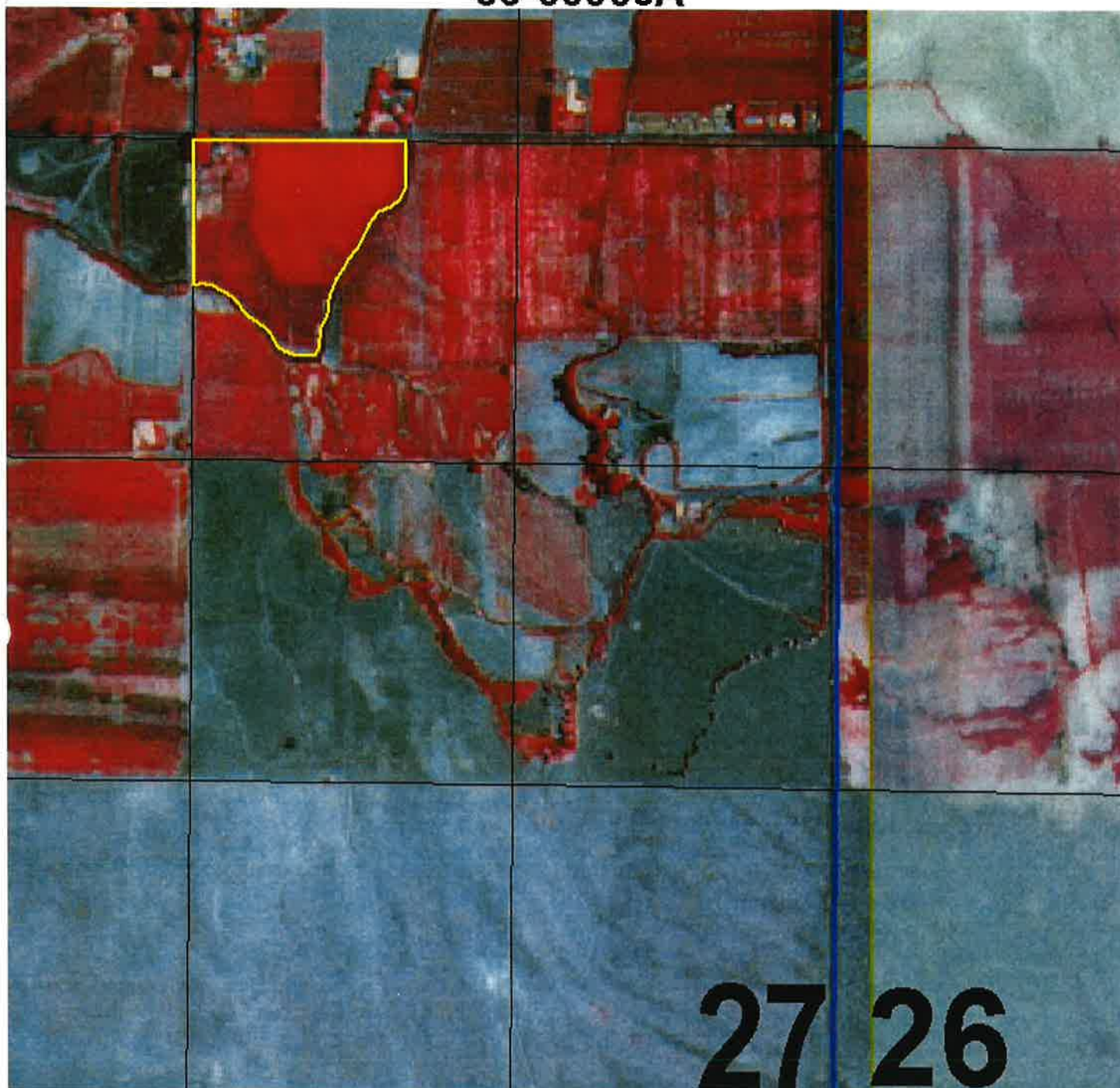
RIGHT NUMBER: 36-3M

NAME AND ADDRESS: DOYT H SIMCOE  
ROXIE J SIMCOE  
562 SUNRISE BLVD N  
TWIN FALLS, ID 83301

RECOMMENDED AS RIGHT NO. 36-3F.

# IDAHO DEPT OF WATER RESOURCES

36-00003A



660 0 660 1320 Feet

- RECOMMENDED PLACE OF USE
- POINT OF DIVERSION
- SECTION LINES
- 1/4 - 1/4 LINES

T07S R13E  
SEC. 27, SWNE



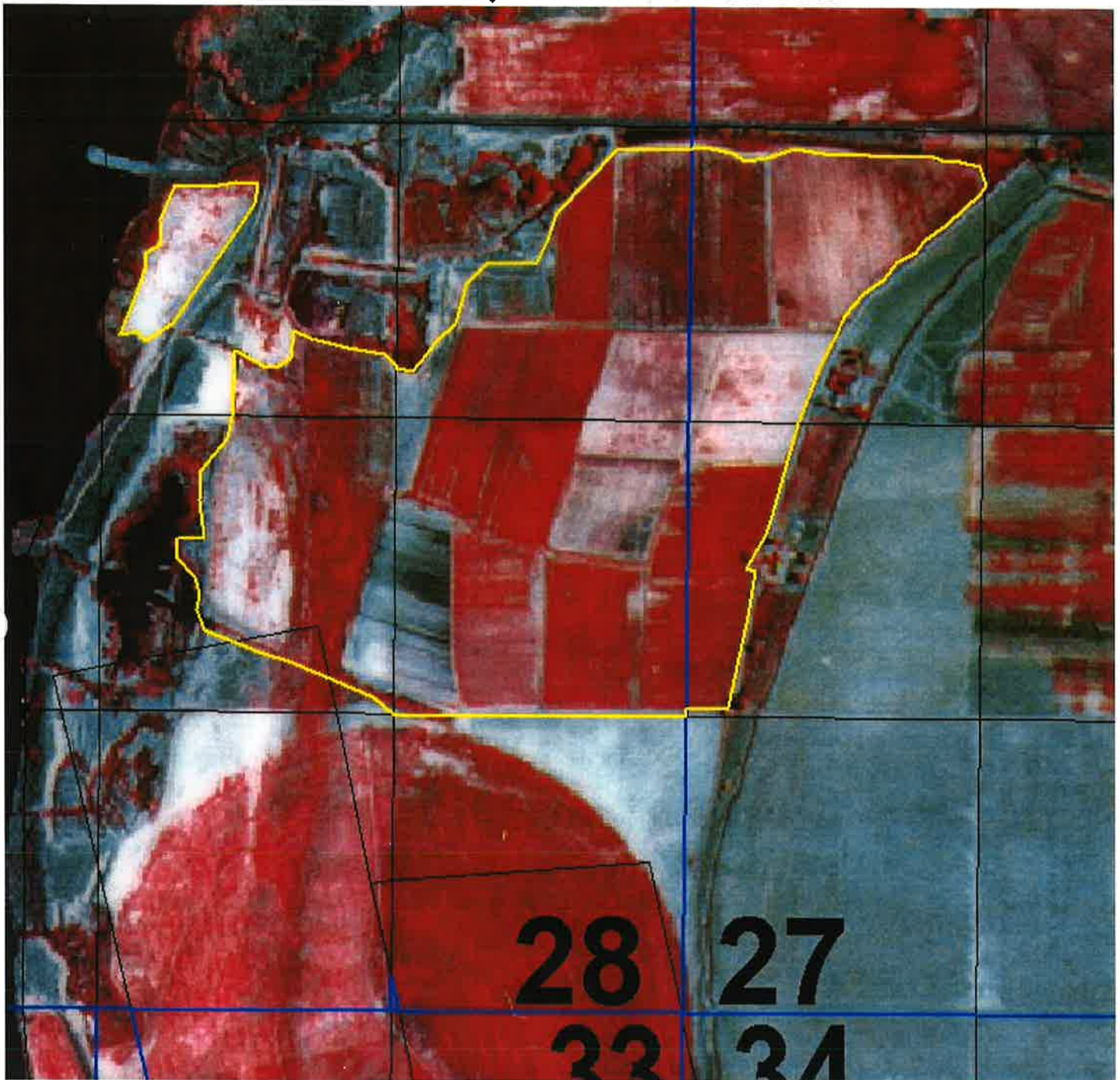
GIS PLACE OF USE PRESENTATION  
1987 & OR 1988 NAPP PHOTOGRAPHY

DATA ENTRY BY: STEVE CLELLAND  
DATE: MAY 17, 2001

\*\*\*REVISED\*\*\*



**IDAHO DEPT OF WATER RESOURCES**  
**36-00003B, -0005B & -0019B**



660 0 660 1320 Feet

- RECOMMENDED PLACE OF USE
- POINT OF DIVERSION
- SECTION LINES
- 1/4 - 1/4 LINES

T07S R13E  
SEC. 27 & 28



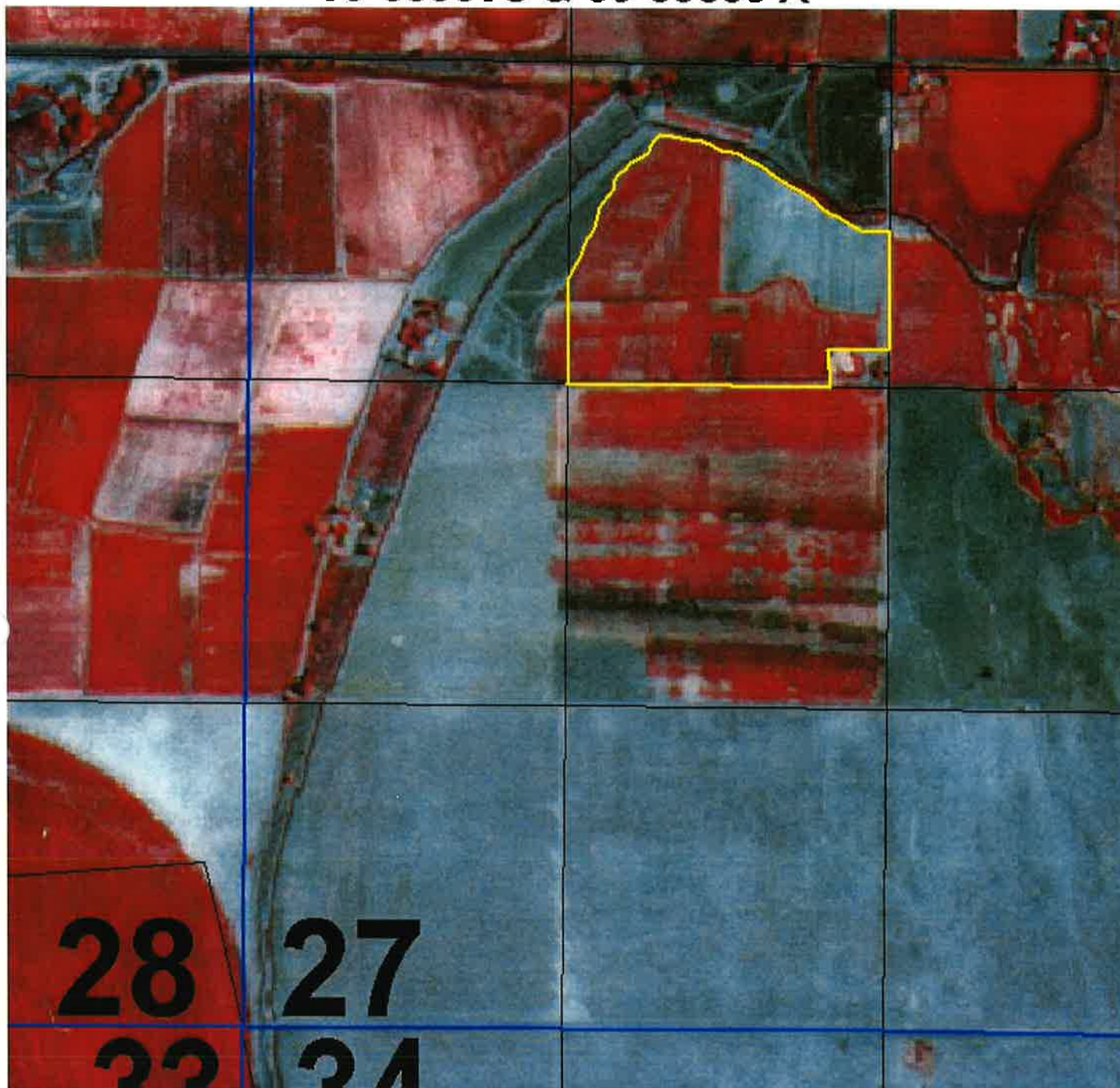
GIS PLACE OF USE PRESENTATION  
1987 & OR 1988 NAPP PHOTOGRAPHY

DATA ENTRY BY: STEVE CLELLAND  
DATE: MAY 18, 2001

\*\*\*REVISED\*\*\*



**IDAHO DEPT OF WATER RESOURCES**  
**36-00003C & 36-00005 A**



660 0 660 1320 Feet

-  **RECOMMENDED PLACE OF USE**
-  **POINT OF DIVERSION**
-  **SECTION LINES**
-  **1/4 - 1/4 LINES**

**T07S R13E**  
**SEC. 27, SENW**



**GIS PLACE OF USE PRESENTATION**  
**1987 & OR 1988 NAPP PHOTOGRAPHY**

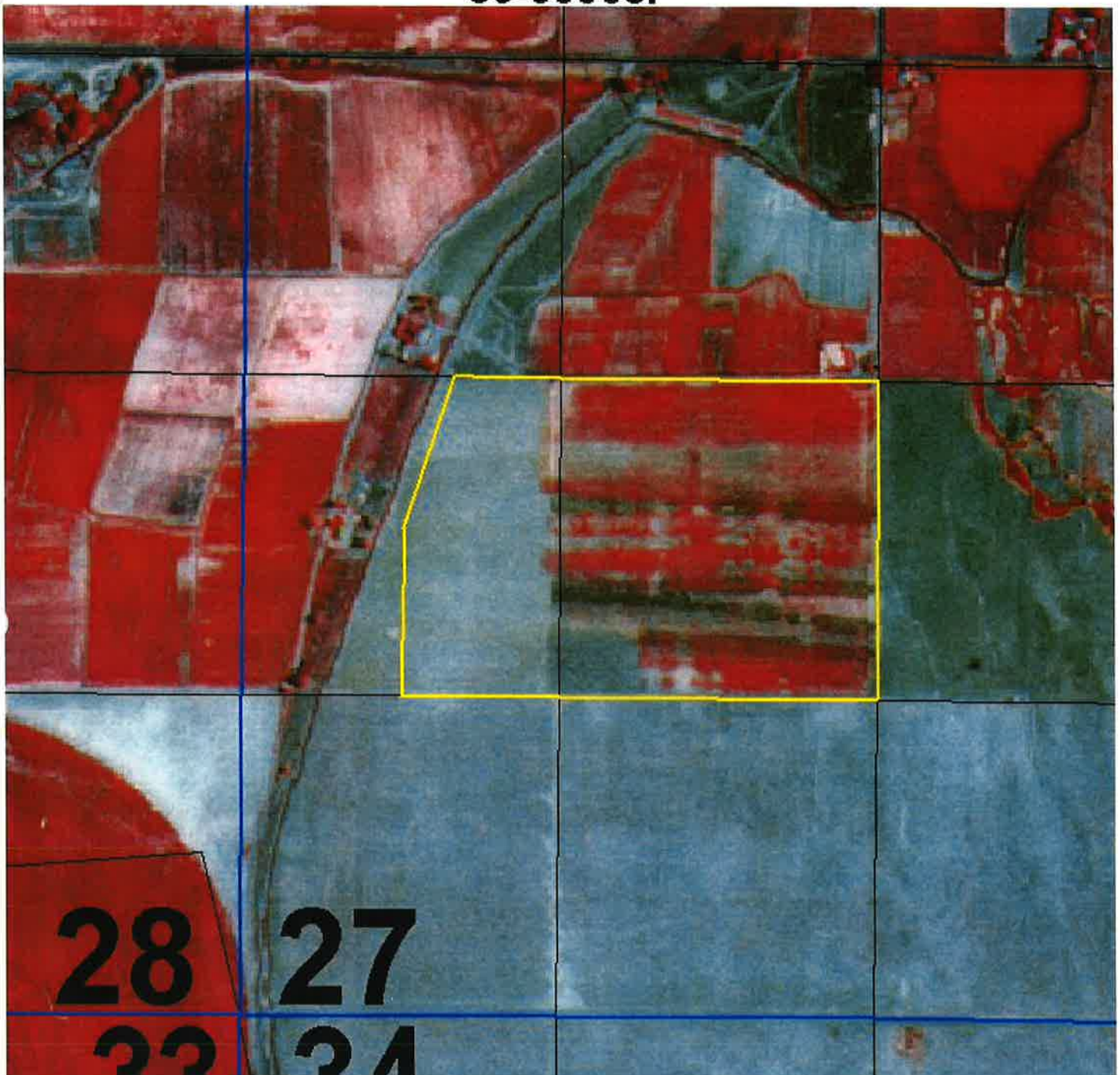
**DATA ENTRY BY: STEVE CLELLAND**  
**DATE: MAY 17, 2001**

**\*\*\*REVISED\*\*\***



# IDAHO DEPT OF WATER RESOURCES

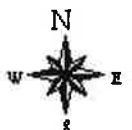
36-00003F



660 0 660 1320 Feet

- RECOMMENDED PLACE OF USE
- POINT OF DIVERSION
- SECTION LINES
- 1/4 - 1/4 LINES

T07S R13E  
SEC. 27, NWSW, NESW



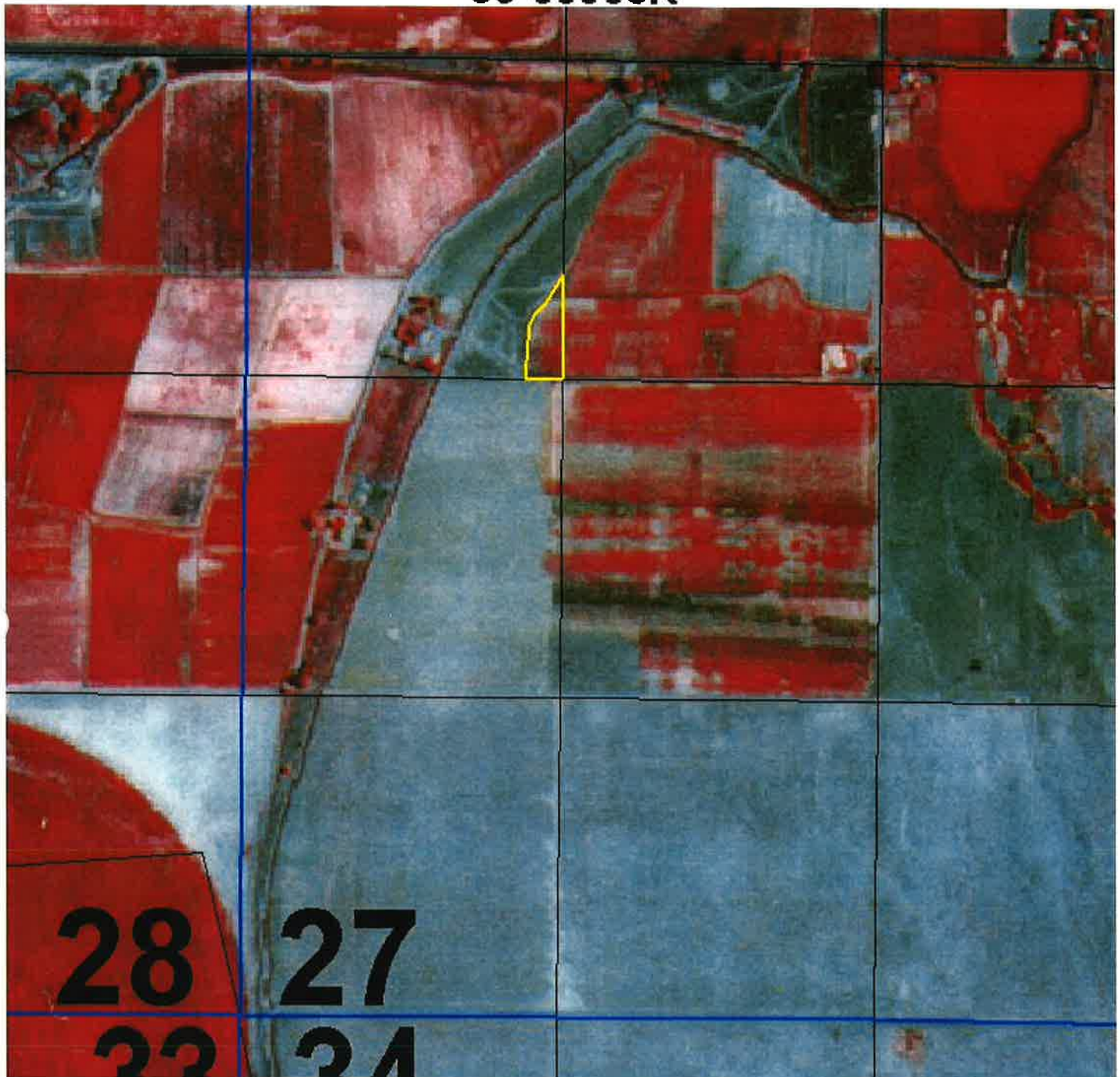
GIS PLACE OF USE PRESENTATION  
1987 & OR 1988 NAPP PHOTOGRAPHY

DATA ENTRY BY: STEVE CLELLAND  
DATE: MAY 17, 2001

\*\*\*REVISED\*\*\*



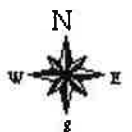
**IDAHO DEPT OF WATER RESOURCES**  
**36-00003K**



660 0 660 1320 Feet

-  RECOMMENDED PLACE OF USE
-  POINT OF DIVERSION
-  SECTION LINES
-  1/4 - 1/4 LINES

**T07S R13E**  
**SEC. 27, SWNW**



**GIS PLACE OF USE PRESENTATION**  
**1987 & OR 1988 NAPP PHOTOGRAPHY**

**DATA ENTRY BY: STEVE CLELLAND**  
**DATE: MAY 17, 2001**

**\*\*\*REVISED\*\*\***

## CERTIFICATE OF SERVICE

I certify that on 5/18, 2001, I mailed and/or delivered the original and copies of this form, including all attachments, to the following interested parties, by placing them in sealed envelopes, 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, ID 83303-2707

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P.O. Box 44449  
Boise, ID 83711-4449

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United States Department of Justice  
Environment & Natural Resources Div.  
550 W. Fort Street MSC 033  
Boise, ID 83724

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Gooding County Courthouse  
624 Main St.  
Gooding, ID 83330

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Peter J. Ampe  
State of Idaho  
P.O. Box 83720  
Boise, ID 83720-0010

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☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

Patrick D. Brown  
109 S. Adams St.  
Jerome, ID 83338

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☐ Hand-Delivered  
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Dana Hofstetter  
P.O. Box 1427  
Boise, ID 83701-1427

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John Simpson  
P.O. Box 1906  
Twin Falls, ID 83303-1906

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Rayburn & Karen McClure  
P.O. Box 483  
Hagerman, ID 83332

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☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

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Route 1, Box 14  
Hagerman, ID 83332

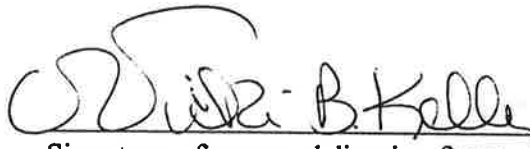
☐ Overnight Mail  
☒ Regular Mail  
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☐ Facsimile

Edith Vernon  
2722 South 900 East  
Hagerman, ID 83332

☐ Overnight Mail  
☒ Regular Mail  
☐ Hand-Delivered  
☐ Facsimile

Maria Yvonne Anderson  
Mike Engles  
1945 S. Weimaraner Way  
Meridian, ID 83642

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Signature of person delivering form



21 22  
28 27

# Pre-Trial Recommended POU

9

25

3K

3L

3C

3B

30

9

40

3M

3F

23

3D

-3B claimed acres  
= 136

McClure 8.5 ac

28  
33

36-00003 SPLITS  
5/9/01 SCC



# SPLIT REVIEW ANALYSIS - 36-00003

A Review of the SRBA Claims and Recommendations of 36-00003 Portions.

9/15/00  
November 14, 1997 by Steve Clelland

Amended  
Claimed  
Desired

| CLAIM PART<br>36-00003 | NAME                    | "A" RECORD |       | DIRECTOR'S REPORT |       | "R" RECORD OR DECREE |       | COMMENTS OR REMARKS                  | 1st Dec'd Q |
|------------------------|-------------------------|------------|-------|-------------------|-------|----------------------|-------|--------------------------------------|-------------|
|                        |                         | CFS        | ACRE  | CFS               | ACRE  | CFS                  | ACRE  |                                      |             |
| A                      | Rea                     | 1.60       | 13.0  | 0.41              | 13.0  | 0.45                 | 13.0  | Stock use.                           | 1.6         |
| B                      | Kingston                | 7.16       | 129.0 | 5.00              | 129.0 | 5.00                 | 129.0 | Stock use.                           | 7.16        |
| C                      | Babington               | 0.30       | 10.0  | 0.30              | 10.0  | 0.30                 | 10.0  | Fish use. <sup>1</sup>               | 0.30        |
| D                      | Harbison                | 0.24       | 10.0  | 0.24              | 2.0   | 0.24                 | 2.0   | Trial set: 12/17/97                  | 0.24        |
| E                      | Vernon                  | 0.20       | 10.0  | 0.20              | 5.0   | 0.20                 | 6.0   | Late Obj. filed                      | 0.20        |
| F                      | Simcoe                  | 0.80       | 40.0  | 0.80              | 40.0  | 0.80                 | 40.0  | SF5 - 10/21/97                       | 0.80        |
| G                      | Lloyd                   | 0.40       | 20.0  | 0.12              | 3.0   | 0.19                 | 3.0   | Special Mstr. Rec.                   | 0.19        |
| H                      | Buckeye Farms           | 12.0       | 455.0 | 11.9              | 290.0 | 11.9                 | 290.0 | Partial Decree <sup>2</sup>          | 11.9        |
| J                      | <B. Gardner><br><Split> | 0          | 0     | 0.46              | 15.0  | 0                    | 0     | Split into K-L-M by Ownership Change | —           |
| K                      | B. Gardner              | 0.71       | 10.0  | 0                 | 0     | 0.03                 | 1.0   |                                      | 0.71        |
| L                      | Kingston                | 1.66       | 136.0 | 0                 | 0     | 0.43                 | 14.0  |                                      | 1.66        |
| M                      | Babington               | 1.97       | 27.5  | 0                 | 0     | 0                    | 0     | Stock use.                           | 1.97        |
|                        | Simcoe                  | 1.32       | 18.5  | 0                 | 0     | 0                    | 0     | Fish use. <sup>3</sup>               | 1.32        |
|                        |                         |            |       |                   |       |                      |       | This Claim Disallowed. <sup>4</sup>  | 0.74        |
| Totals                 |                         | 26.70      | 743   | 19.43             | 507   | 19.54                | 508   | See Footnote <sup>5</sup>            |             |

Kingston = 8.82 total cfs (7.16 + 1.66) 12.29

\* Listings for Diversion Rates reflect the irrigation flow rates only; No Stockwater rates are listed.

-19B- 1.66 cfs 136 AC  
-5B-

Available Balance: 7.71 cfs

<sup>1</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use. Not recommended.

<sup>2</sup> Partial Decree issued for this right on March 6, 1997.

<sup>3</sup> Commercial fish production did not begin as a use until the early 1970's. Not a decreed use. Not recommended.

<sup>4</sup> 36-00003M if reinstated as a valid right would apply to 18.5 acres.

<sup>5</sup> Total Acres would increase to 526.5 acres if right 36-00003M is reinstated. Based on rates shown, remaining flow portion of this right is 0.46 cfs; some or all of this amount may be associated with the disallowed right 36-00003M.

TRANSMITTAL COVER SHEET

TO: Scott King

Backway Analysis  
for Ø3 SPLITS

TOTAL PAGES SENT: 5  
(including cover sheet)

DOCUMENT DESCRIPTION: \_\_\_\_\_

FROM:

IDAHO DEPARTMENT OF WATER RESOURCES  
1341 FILLMORE ST, STE 200  
TWIN FALLS ID 83301-3380

PHONE: 736-3033  
FAX: 736-3037

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TRANSMISSION VERIFICATION REPORT

# V. BELL EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

36-0003A

Base field data:

| Field | Acres in soil type: |     | Total acres | Slope (ft/ft) | Run length (ft) | Furrow spc (ft) | Set time | Furrow flow |
|-------|---------------------|-----|-------------|---------------|-----------------|-----------------|----------|-------------|
|       | KEB                 | KOB |             |               |                 |                 |          |             |
| 1     | 0.0                 | 6.7 | 6.7         | 0.02          | 590             | 2.5             | 24       | 4           |
| 2     | 0.4                 | 0.6 | 1.0         | 0.02          | 200             | 2.5             | 24       | 3           |
| 3     | 2.9                 | 0.0 | 2.9         | 0.02          | 230             | 2.5             | 24       | 3           |
| 4     | 2.2                 | 0.0 | 2.2         | 0.02          | 190             | 2.5             | 12       | 5           |
| Total |                     |     | 12.8        |               |                 |                 |          |             |

Base case: All alfalfa, parameters as above

Base duty: 0.51 cfs = 1.99 in/ac

Range of computed diversion rates based on peak period consumptive use

Set times in hours, furrow flows in gpm

CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.25     | 0.50 |
| 5        | 0.42     | 0.83 |
| 7        | 0.58     | 1.17 |

CROP: DRY BEANS

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.70     | 1.40 |
| 5        | 1.17     | 2.33 |
| 7        | 1.63     | 3.27 |

CROP: PASTURE

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.49     | 0.98 |
| 5        | 0.82     | 1.63 |
| 7        | 1.14     | 2.29 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.98     | 1.95 |
| 5        | 1.64     | 3.24 |
| 7        | 2.27     | 4.57 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.73     | 5.47  |
| 5        | 4.56     | 9.11  |
| 7        | 6.38     | 12.76 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.91     | 3.83 |
| 5        | 3.19     | 6.38 |
| 7        | 4.47     | 8.93 |

Notes:



KINGSTON EXCESS FLOW ANALYSIS AND SENSITIVITY  
 Brockway Engineering, PLLC 6/8/98  
 On-field diversion requirements  
 Hagerman CIR, 80% probability level, no ditch losses

36-0003B

Base: All alfalfa, 24-hr sets, 5 to 7 gpm furrow flows  
 Base duty: 5.29 cfs = 2.07 inches/ac  
 Total ac: 127.9

Range of computed diversion rates based on peak period consumptive use  
 Set times in hours, furrow flows in gpm

CROP: ALFALFA  
 CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.37     | 2.73 |
| 5        | 2.28     | 4.55 |
| 7        | 3.19     | 6.37 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.53     | 1.07 |
| 5        | 0.89     | 1.78 |
| 7        | 1.25     | 2.49 |

CROP: DRY BEANS  
 CFS

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 3.84     | 7.68  |
| 5        | 6.40     | 12.80 |
| 7        | 8.96     | 17.92 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.50     | 3.00 |
| 5        | 2.50     | 5.00 |
| 7        | 3.50     | 7.01 |

3.13 in/a

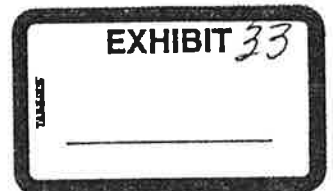
CROP: PASTURE  
 CFS

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.82     | 5.64  |
| 5        | 4.70     | 9.40  |
| 7        | 6.58     | 13.16 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.10     | 2.20 |
| 5        | 1.84     | 3.67 |
| 7        | 2.57     | 5.14 |

Notes:  
 Insufficient application for Alfalfa, 3 and 5 gpm flows, 12 hr sets



# BABINGTON EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

36-0003 L&C

Base field data:

| Field | Acres in soil type: |     | Total acres | Slope (ft/ft) | Run length (ft) | Furrow spc (ft) | Set time | Furrow flow |
|-------|---------------------|-----|-------------|---------------|-----------------|-----------------|----------|-------------|
|       | KEB                 | KSC |             |               |                 |                 |          |             |
| 1     | 9.3                 | 0.0 | 9.3         | 0.025         | 500             | 2.5             | 24       | 5           |
| 2     | 0.0                 | 3.7 | 3.7         | 0.025         | 240             | 2.5             | 12       | 4           |
| 3     | 0.0                 | 2.0 | 2.0         | 0.1           | 140             | 2.5             | 12       | 3           |
| 4     | 5.8                 | 2.6 | 8.4         | 0.025         | 290             | 2.5             | 24       | 4           |
| Total |                     |     | 23.4        |               |                 |                 |          |             |

Base case: All alfalfa, parameters as above

Base duty: 1.29 cfs = 2.76 in/ac

Range of computed diversion rates based on peak period consumptive use

Set times in hours, furrow flows in gpm

CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.60     | 1.20 |
| 5        | 1.00     | 2.00 |
| 7        | 1.40     | 2.80 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.28     | 2.56 |
| 5        | 2.14     | 4.27 |
| 7        | 2.99     | 5.98 |

CROP: DRY BEANS

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.62     | 3.24 |
| 5        | 2.70     | 5.40 |
| 7        | 3.78     | 7.56 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 3.46     | 6.92  |
| 5        | 5.77     | 11.54 |
| 7        | 8.08     | 16.15 |

3.37 in/e

CROP: PASTURE

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.16     | 2.32 |
| 5        | 1.93     | 3.87 |
| 7        | 2.71     | 5.41 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.48     | 4.96  |
| 5        | 4.13     | 8.26  |
| 7        | 5.78     | 11.57 |

Notes:

Insufficient application for

Alfalfa, 12 hrs, all furrow flows

EXHIBIT 34



# SIMCOE EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

36-0003 F&M

Base field data:

| Field | Acres in soil type: |      |     | Total acres | Slope (ft/ft) | Run length (ft) | Furrow spc (ft) | Set time | Furrow flow |
|-------|---------------------|------|-----|-------------|---------------|-----------------|-----------------|----------|-------------|
|       | KSC                 | KEC  | KEB |             |               |                 |                 |          |             |
| 1     | 4.8                 | 21.3 | 3.9 | 30.0        | 0.015         | 430             | 2.5             | 24       | 4           |
| 2     | 25.4                | 0.0  | 0.0 | 25.4        | 0.015         | 460             | 2.5             | 24       | 4           |
| 3     | 3.1                 | 0.0  | 0.0 | 3.1         | 0.015         | 260             | 2.5             | 12       | 4           |
| Total |                     |      |     | 58.5        |               |                 |                 |          |             |

Base case: All alfalfa, parameters as above

Base duty: 2.56 cfs = 2.19 in/ac

Range of computed diversion rates based on peak period consumptive use

Set times in hours, furrow flows in gpm

CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.01     | 2.03 |
| 5        | 1.69     | 3.38 |
| 7        | 2.36     | 4.73 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.86     | 1.74 |
| 5        | 1.44     | 2.89 |
| 7        | 2.02     | 4.04 |

CROP: DRY BEANS

CFS

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 3.13     | 6.25  |
| 5        | 5.21     | 10.42 |
| 7        | 7.29     | 14.58 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.68     | 5.34  |
| 5        | 4.45     | 8.91  |
| 7        | 6.23     | 12.46 |

2.18 in/a

CROP: PASTURE

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 2.25     | 4.5  |
| 5        | 3.75     | 7.5  |
| 7        | 5.25     | 10.5 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.92     | 3.85 |
| 5        | 3.21     | 6.41 |
| 7        | 4.49     | 8.97 |

Notes:

Insufficient application for:

Alfalfa, 3 gpm, 12 hrs

EXHIBIT 35

## MEMORANDUM

To: File 36-3A  
From: Scott King  
Date: May 17, 2001

RECEIVED  
MAY 22 2001  
Department of Water Resources  
Southern Region

Subject: Re-analysis of 1996 Hubble report

Per request from Nick Spencer, I have reviewed the 1996 Hubble analysis report for this claim and made appropriate adjustments to account for changes in analysis guidelines. These changes have resulted in an increase in the expected field irrigation requirement. Specifically, the total on-farm irrigation requirement is computed at 0.42 cfs. Delivery losses remain at 0.15 cfs. The total diversion rate for irrigation uses is therefore 0.57 cfs.

Accompanying this memo are four additional pages. Those labeled "Table 4" and "Table 5" are copies from the 1996 report with my handwritten notes identifying those portions of the analysis that have changed since 1996. The page labeled "Efficiency Analysis" is the new results for determining irrigation application efficiency. The page labeled "Field Irrigation Requirement" and dated 5/17/01 provides the adjusted irrigation requirements based on the new efficiency analysis. Adjustments to our procedure reflected in this analysis include:

- 1) Limiting inflow time to a minimum of 12 hours. Previously the department considered set times less than 12 hours, such as 8 hours as shown. At this time, we currently use a minimum set time of 12 hours unless the water user actually operates at 8-hour sets and desires an analysis at this lower time. Most often the shorter time period results in a higher application efficiency so that using a longer period results in lower efficiencies and higher water requirements.
- 2) Limiting furrow spacing to 24 inches for pasture and grain. Furrow spacing of 30 inches is still acceptable for alfalfa. In this case, changing the furrow spacing for pasture from 30 to 24 inches resulted in a lower application efficiency and higher water requirements.
- 3) Increasing the allowed minimum furrow inflow rate to 3 gallons per minute (gpm). This change also tends to result in lower application efficiencies and higher water requirements as higher runoff flows are incurred.

Together, these changes have resulted in a significant decrease in expected application efficiency for the pasture fields (from about 69 percent to about 38 percent). Application efficiency for the alfalfa field remains unchanged.

36-3A

## Efficiency Analysis

|                 | INTAKE<br>FAMILY | DESIGN<br>APPLIC.<br>Inches | FURROW<br>SLOPE<br>Ft/Ft | FURROW<br>SPACING<br>Feet | FURROW<br>LENGTH<br>Feet | INFLOW<br>RATE<br>Gpm | APPROXIMATE<br>INFLOW TIME<br>Hours | ADVANCE<br>TIME<br>Minutes | GROSS                               | NET                                 | DEEP<br>PERC.<br>In. | IRRIGATION<br>EFFICIENCY<br>% |                  |
|-----------------|------------------|-----------------------------|--------------------------|---------------------------|--------------------------|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-------------------------------------|----------------------|-------------------------------|------------------|
|                 |                  |                             |                          |                           |                          |                       |                                     |                            | IRRIGATION<br>APPLICATION<br>Inches | IRRIGATION<br>APPLICATION<br>Inches |                      |                               | RUNOFF<br>Inches |
|                 |                  |                             |                          |                           |                          |                       |                                     |                            |                                     |                                     |                      |                               |                  |
| EAST<br>PASTURE | 0.55             | 1.99                        | .015                     | 2.00                      | 550                      | 4.5                   | 12                                  | 77.2                       | 4.72                                | 4.07                                | 0.42                 | 2.31                          | 42.12            |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 550                      | 5.0                   | 8                                   | 67.7                       | 3.50                                | 3.01                                | 0.26                 | 1.25                          | <del>56.86</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 450                      | 3.5                   | 12                                  | 67.6                       | 4.49                                | 3.95                                | 0.34                 | 2.16                          | 44.31            |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 450                      | 4.0                   | 8                                   | 56.9                       | 3.42                                | 2.96                                | 0.28                 | 1.15                          | <del>58.15</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 350                      | 3.0                   | 12                                  | 46.3                       | 4.95                                | 3.95                                | 0.87                 | 2.09                          | 40.20            |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 350                      | 3.0                   | 8                                   | 46.3                       | 3.30                                | 2.88                                | 0.27                 | 1.04                          | <del>60.31</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 250                      | 3.0                   | 12                                  | 23.1                       | 6.93                                | 4.05                                | 2.82                 | 2.12                          | <del>28.72</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 250                      | 3.0                   | 8                                   | 23.1                       | 4.62                                | 2.99                                | 1.56                 | 1.07                          | <del>43.08</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 150                      | 3.0                   | 12                                  | 9.7                        | 11.55                               | 4.11                                | 7.42                 | 2.14                          | <del>17.23</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 150                      | 3.0                   | 8                                   | 9.7                        | 7.70                                | 3.05                                | 4.62                 | 1.09                          | <del>25.85</del> |
| WEST<br>PASTURE | 0.70             | 2.24                        | .015                     | 2.00                      | 300                      | 3.0                   | 12                                  | 38.9                       | 5.77                                | 4.93                                | 0.71                 | 2.83                          | 38.79            |
|                 | 0.70             | 2.24                        | .015                     | 2.00                      | 300                      | 3.0                   | 8                                   | 38.9                       | 3.85                                | 3.58                                | 0.12                 | 1.49                          | <del>58.18</del> |
|                 | 0.70             | 2.24                        | .010                     | 2.00                      | 300                      | 3.0                   | 12                                  | 51.8                       | 5.77                                | 5.01                                | 0.57                 | 2.97                          | 38.79            |
|                 | 0.70             | 2.24                        | .010                     | 2.00                      | 300                      | 3.0                   | 8                                   | 51.8                       | 3.85                                | 3.61                                | 0.02                 | 1.59                          | <del>58.18</del> |
|                 | 0.55             | 2.89                        | .010                     | 2.50                      | 680                      | 5.5                   | 12                                  | 130.6                      | 3.74                                | 3.28                                | 0.10                 | 0.74                          | <del>77.34</del> |
| Alfalfa         | 0.55             | 2.89                        | .010                     | 2.50                      | 680                      | 10.5                  | 8                                   | 60.2                       | 4.76                                | 2.92                                | 1.66                 | 0.21                          | <del>60.77</del> |
|                 | 0.55             | 2.89                        | .010                     | 2.50                      | 340                      | 3.0                   | 12                                  | 57.0                       | 4.08                                | 3.22                                | 0.72                 | 0.47                          | <del>70.90</del> |
|                 | 0.55             | 2.89                        | .010                     | 2.50                      | 340                      | 7.5                   | 8                                   | 23.3                       | 6.79                                | 2.89                                | 3.84                 | 0.07                          | <del>42.54</del> |

\* Limits on efficiency: 30% lower, 70% upper

① 8-hour inflow times are generally not considered per current standards

Average efficiency for East Pasture:

$$\frac{42 + 44 + 40 + 30 + 30}{5} = 37\%$$

WEST PASTURE: 39%

Alfalfa: 70%

by Scott King  
May 17, 2001

FIELD IRRIGATION REQUIREMENT

initials: SNK

Claimant = BELL

36-3A

date: 05/17/01

Weather Station = BLISS/HAGERMAN

| crop     | acres | irrig.<br>system | eff.<br>(%) | mar | Monthly ET<br>(mm/day) |      |      |      |      |      |      |     | AVE IR<br>season<br>(mm/yr) | net<br>irrig.<br>app.<br>(in) | ET<br>ratio | irrig.<br>freq.<br>(days) | Gross Irrigation Application<br>(peak period ET/eff. in mm/day) |       |       |       |       |       |       |  |  |  | season<br>(mm/yr) |
|----------|-------|------------------|-------------|-----|------------------------|------|------|------|------|------|------|-----|-----------------------------|-------------------------------|-------------|---------------------------|-----------------------------------------------------------------|-------|-------|-------|-------|-------|-------|--|--|--|-------------------|
|          |       |                  |             |     | apr                    | may  | jun  | jul  | aug  | sep  | oct  | mar |                             |                               |             |                           | apr                                                             | may   | jun   | jul   | aug   | sep   | oct   |  |  |  |                   |
|          |       |                  |             |     |                        |      |      |      |      |      |      |     |                             |                               |             |                           |                                                                 |       |       |       |       |       |       |  |  |  |                   |
| alfh     | 6     | cor              | 70          |     | 6.42                   | 7.94 | 10   | 9.49 | 8.18 | 6.53 | 4.46 |     | 2.89                        | 1.09                          | 6.7         |                           | 10.00                                                           | 12.36 | 15.57 | 14.78 | 12.74 | 10.17 | 6.94  |  |  |  |                   |
| past (E) | 4     | cor              | 37          |     | 3.97                   | 6.12 | 7.69 | 7.3  | 6.29 | 5.04 | 3.45 |     | 1.99                        | 1.11                          | 5.9         |                           | 11.91                                                           | 18.36 | 23.07 | 21.90 | 18.87 | 15.12 | 10.35 |  |  |  |                   |
| past (W) | 3     | cor              | 39          |     | 3.97                   | 6.12 | 7.69 | 7.3  | 6.29 | 5.04 | 3.45 |     | 2.24                        | 1.11                          | 6.7         |                           | 11.30                                                           | 17.42 | 21.89 | 20.78 | 17.90 | 14.34 | 9.82  |  |  |  |                   |

Summary 13

10.89 15.38 19.34 18.35 15.82 12.66 8.66

Peak Gross Irrigation Application (mm/day) = 19.34  
 On-Farm Irrigation Requirement (cfs/acre) = 0.032  
 Total On-Farm Irrigation Requirement (cfs) = 0.42  
 Irrigation Diversion Volume (ft/yr) = 0.00  
 Total Irrigation Diversion Volume (ac-ft/yr) = 0

TOTAL QUANTITY

Irrigation 0.42 cfs

Delivery losses 0.15 cfs

Stockwater 0.02 cfs (not additive to irrigation)

0.57 cfs

Table 4

|                | INTAKE<br>FAMILY | DESIGN<br>APPLIC.<br>Inches | FURROW<br>SLOPE<br>Ft/Ft | FURROW<br>SPACING<br>Feet | FURROW<br>LENGTH<br>Feet | INFLOW<br>RATE<br>Gpm | APPROXIMATE<br>INFLOW TIME<br>Hours | ADVANCE<br>TIME<br>Minutes | GROSS                               | NET                                 | DEEP | IRRIGATION |                  |              |
|----------------|------------------|-----------------------------|--------------------------|---------------------------|--------------------------|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-------------------------------------|------|------------|------------------|--------------|
|                |                  |                             |                          |                           |                          |                       |                                     |                            | IRRIGATION<br>APPLICATION<br>Inches | IRRIGATION<br>APPLICATION<br>Inches |      |            | RUNOFF<br>Inches | PERC.<br>In. |
| 1st<br>pasture | 0.55             | 1.99                        | .015                     | 2.50                      | 550                      | 4.5                   | 12                                  | 77.2                       | 3.78                                | 3.26                                | 0.34 | 1.45       | 52.65            |              |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 550                      | 5.0                   | 8                                   | 67.7                       | 2.80                                | 2.41                                | 0.21 | 0.60       | 71.07            | -            |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 450                      | 3.5                   | 12                                  | 67.6                       | 3.59                                | 3.16                                | 0.27 | 1.33       | 55.38            |              |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 450                      | 4.0                   | 8                                   | 56.9                       | 2.74                                | 2.37                                | 0.22 | 0.52       | 72.69            | -            |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 350                      | 2.5                   | 12                                  | 59.4                       | 3.30                                | 3.04                                | 0.13 | 1.18       | 60.31            |              |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 350                      | 3.0                   | 8                                   | 46.3                       | 2.64                                | 2.31                                | 0.22 | 0.43       | 75.38            | -            |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 250                      | 2.0                   | 12                                  | 36.2                       | 3.70                                | 3.02                                | 0.60 | 1.11       | 53.84            |              |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 250                      | 2.0                   | 8                                   | 36.2                       | 2.46                                | 2.22                                | 0.16 | 0.31       | 80.77            | -            |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 150                      | 1.0                   | 12                                  | 28.4                       | 3.08                                | 2.81                                | 0.21 | 0.88       | 64.61            |              |
|                | 0.55             | 1.99                        | .015                     | 2.50                      | 150                      | 1.5                   | 8                                   | 16.6                       | 3.08                                | 2.20                                | 0.84 | 0.25       | 64.61            | -            |
| 2nd<br>pasture | 0.70             | 2.24                        | .010                     | 2.50                      | 300                      | 3.0                   | 12                                  | 51.8                       | 4.62                                | 4.01                                | 0.45 | 1.93       | 48.49            |              |
|                | 0.70             | 2.24                        | .010                     | 2.50                      | 300                      | 3.0                   | 8                                   | 51.8                       | 3.08                                | 2.89                                | 0.02 | 0.82       | 72.73            | *            |
| alfalfa        | 0.55             | 2.89                        | .010                     | 2.50                      | 680                      | 5.5                   | 12                                  | 130.6                      | 3.74                                | 3.28                                | 0.10 | 0.74       | 77.34            |              |
|                | 0.55             | 2.89                        | .010                     | 2.50                      | 680                      | 10.5                  | 8                                   | 60.2                       | 4.76                                | 2.92                                | 1.66 | 0.21       | 60.77            |              |
|                | 0.55             | 2.89                        | .010                     | 2.50                      | 340                      | 2.5                   | 12                                  | 76.8                       | 3.40                                | 3.07                                | 0.15 | 0.36       | 85.08            | *            |
|                | 0.55             | 2.89                        | .010                     | 2.50                      | 340                      | 7.5                   | 8                                   | 23.3                       | 6.79                                | 2.89                                | 3.84 | 0.07       | 42.54            |              |

Use  
 2.0  
 spacing  
 for pasture  
 & grains  
 full  
 length  
 don't use  
 8 hr

Average efficiency for east pasture :  $70 + 70 + 70 + 70 + 65 = 68.92\%$

Use of this program and input requirements are described in the FIELD APPLICATION EFFICIENCY section of the IDWR report titled Report Regarding Evaluation of Irrigation Diversion Rates, dated July, 1996.



# FIELD IRRIGATION REQUIREMENT

initials: MS

Claimant = Rea

date: 06/25/96

Weather Station = Bliss/Hagerman

| crop      | acres | irrig. system | eff. (%) | Monthly ET (mm/day) |      |      |     |      |      |      |      | AVE IR season (mm/yr) | net irrig. app. (in) | ET ratio | irrig. freq. (days) | Gross Irrigation Application (peak period ET/eff. in mm/day) |       |       |       |       |      |     | season (mm/yr) |     |
|-----------|-------|---------------|----------|---------------------|------|------|-----|------|------|------|------|-----------------------|----------------------|----------|---------------------|--------------------------------------------------------------|-------|-------|-------|-------|------|-----|----------------|-----|
|           |       |               |          | mar                 | apr  | may  | jun | jul  | aug  | sep  | oct  |                       |                      |          |                     | mar                                                          | apr   | may   | jun   | jul   | aug  | sep |                | oct |
| alfh      | 6     | cor           | 70✓      |                     | 6.42 | 7.94 | 10  | 9.49 | 8.18 | 6.53 | 4.46 | 2.89                  | 1.09                 | 6.7      |                     |                                                              |       |       |       |       |      |     |                |     |
| past East | 4     | cor           | 69 37    | 3.97                | 6.12 | 7.69 | 7.3 | 6.29 | 5.04 | 3.45 |      | 1.99                  | 1.11                 | 5.9      | 10.00               | 12.36                                                        | 15.57 | 14.78 | 12.74 | 10.17 | 6.94 |     |                |     |
| past West | 3     | cor           | 70 39    | 3.97                | 6.12 | 7.69 | 7.3 | 6.29 | 5.04 | 3.45 |      | 1.99                  | 1.11                 | 5.9      | 6.30                | 9.70                                                         | 12.19 | 11.58 | 9.97  | 7.99  | 5.47 |     |                |     |

Summary 13

8.03 10.98 13.81 13.10 11.29 9.03 6.18

Peak Gross Irrigation Application (mm/day) = 13.81  
 On-Farm Irrigation Requirement (cfs/acre) = 0.023  
 Total On-Farm Irrigation Requirement (cfs) = 0.30  
 Irrigation Diversion Volume (ft/yr) = 0.00  
 Total Irrigation Diversion Volume (ac-ft/yr) = 0



**State of Idaho**

**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE  
GOVERNOR

KARL J. DREHER  
DIRECTOR

**TRANSMITTAL COVER SHEET**

**FAX NUMBER: (208) 327-5400**

**DATE:** 5-17-01

**TO:** STEVE CLELAND **FROM:** NICK SPENCER

**DOCUMENT DESCRIPTION:** HUBBLE ON 3A

**COVER SHEET +** 5 **PAGES**

**CONTACT:** 327-7930 **IF YOU DO NOT RECEIVE ALL THE PAGES.**

**THANK YOU!**

## MEMORANDUM

To: File 36-3A  
From: Scott King  
Date: May 17, 2001

Subject: Re-analysis of 1996 Hubble report

Per request from Nick Spencer, I have reviewed the 1996 Hubble analysis report for this claim and made appropriate adjustments to account for changes in analysis guidelines. These changes have resulted in an increase in the expected field irrigation requirement. Specifically, the total on-farm irrigation requirement is computed at 0.42 cfs. Delivery losses remain at 0.15 cfs. The total diversion rate for irrigation uses is therefore 0.57 cfs.

Accompanying this memo are four additional pages. Those labeled "Table 4" and "Table 5" are copies from the 1996 report with my handwritten notes identifying those portions of the analysis that have changed since 1996. The page labeled "Efficiency Analysis" is the new results for determining irrigation application efficiency. The page labeled "Field Irrigation Requirement" and dated 5/17/01 provides the adjusted irrigation requirements based on the new efficiency analysis.

Adjustments to our procedure reflected in this analysis include:

- 1) Limiting inflow time to a minimum of 12 hours. Previously the department considered set times less than 12 hours, such as 8 hours as shown. At this time, we currently use a minimum set time of 12 hours unless the water user actually operates at 8-hour sets and desires an analysis at this lower time. Most often the shorter time period results in a higher application efficiency so that using a longer period results in lower efficiencies and higher water requirements.
- 2) Limiting furrow spacing to 24 inches for pasture and grain. Furrow spacing of 30 inches is still acceptable for alfalfa. In this case, changing the furrow spacing for pasture from 30 to 24 inches resulted in a lower application efficiency and higher water requirements.
- 3) Increasing the allowed minimum furrow inflow rate to 3 gallons per minute (gpm). This change also tends to result in lower application efficiencies and higher water requirements as higher runoff flows are incurred.

Together, these changes have resulted in a significant decrease in expected application efficiency for the pasture fields (from about 69 percent to about 38 percent). Application efficiency for the alfalfa field remains unchanged.

36-3A

## Efficiency Analysis

|                 | INTAKE<br>FAMILY | DESIGN<br>APPLIC.<br>Inches | FURROW<br>SLOPE<br>Ft/Ft | FURROW<br>SPACING<br>Feet | FURROW<br>LENGTH<br>Feet | INFLOW<br>RATE<br>Gpm | APPROXIMATE<br>INFLOW TIME<br>Hours | ADVANCE<br>TIME<br>Minutes | GROSS                               | NET                                 | DEEP<br>PERC.<br>In. | IRRIGATION<br>EFFICIENCY<br>% |                  |
|-----------------|------------------|-----------------------------|--------------------------|---------------------------|--------------------------|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-------------------------------------|----------------------|-------------------------------|------------------|
|                 |                  |                             |                          |                           |                          |                       |                                     |                            | IRRIGATION<br>APPLICATION<br>Inches | IRRIGATION<br>APPLICATION<br>Inches |                      |                               | RUNOFF<br>Inches |
|                 |                  |                             |                          |                           |                          |                       |                                     |                            |                                     |                                     |                      |                               |                  |
| EAST<br>PASTURE | 0.55             | 1.99                        | .015                     | 2.00                      | 550                      | 4.5                   | 12                                  | 77.2                       | 4.72                                | 4.07                                | 0.42                 | 2.31                          | 42.12            |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 550                      | 5.0                   | 8                                   | 67.7                       | 3.50                                | 3.01                                | 0.26                 | 1.25                          | <del>56.86</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 450                      | 3.5                   | 12                                  | 67.6                       | 4.49                                | 3.95                                | 0.34                 | 2.16                          | 44.31            |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 450                      | 4.0                   | 8                                   | 56.9                       | 3.42                                | 2.96                                | 0.28                 | 1.15                          | <del>58.45</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 350                      | 3.0                   | 12                                  | 46.3                       | 4.95                                | 3.95                                | 0.87                 | 2.09                          | 40.20            |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 350                      | 3.0                   | 8                                   | 46.3                       | 3.30                                | 2.88                                | 0.27                 | 1.04                          | <del>60.31</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 250                      | 3.0                   | 12                                  | 23.1                       | 6.93                                | 4.05                                | 2.82                 | 2.12                          | <del>28.72</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 250                      | 3.0                   | 8                                   | 23.1                       | 4.62                                | 2.99                                | 1.56                 | 1.07                          | <del>43.88</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 150                      | 3.0                   | 12                                  | 9.7                        | 11.55                               | 4.11                                | 7.42                 | 2.14                          | <del>17.23</del> |
|                 | 0.55             | 1.99                        | .015                     | 2.00                      | 150                      | 3.0                   | 8                                   | 9.7                        | 7.70                                | 3.05                                | 4.62                 | 1.09                          | <del>25.85</del> |
| WEST<br>PASTURE | 0.70             | 2.24                        | .015                     | 2.00                      | 300                      | 3.0                   | 12                                  | 38.9                       | 5.77                                | 4.93                                | 0.71                 | 2.83                          | 38.79            |
|                 | 0.70             | 2.24                        | .015                     | 2.00                      | 300                      | 3.0                   | 8                                   | 38.9                       | 3.85                                | 3.58                                | 0.12                 | 1.49                          | <del>58.18</del> |
|                 | 0.70             | 2.24                        | .010                     | 2.00                      | 300                      | 3.0                   | 12                                  | 51.8                       | 5.77                                | 5.01                                | 0.57                 | 2.97                          | 38.79            |
|                 | 0.70             | 2.24                        | .010                     | 2.00                      | 300                      | 3.0                   | 8                                   | 51.8                       | 3.85                                | 3.61                                | 0.02                 | 1.59                          | <del>58.18</del> |
| ALFALFA         | 0.55             | 2.89                        | .010                     | 2.50                      | 680                      | 5.5                   | 12                                  | 130.6                      | 3.74                                | 3.28                                | 0.10                 | 0.74                          | <del>77.34</del> |
|                 | 0.55             | 2.89                        | .010                     | 2.50                      | 680                      | 10.5                  | 8                                   | 60.2                       | 4.76                                | 2.92                                | 1.66                 | 0.21                          | <del>60.77</del> |
|                 | 0.55             | 2.89                        | .010                     | 2.50                      | 340                      | 3.0                   | 12                                  | 57.0                       | 4.08                                | 3.22                                | 0.72                 | 0.47                          | <del>70.90</del> |
|                 | 0.55             | 2.89                        | .010                     | 2.50                      | 340                      | 7.5                   | 8                                   | 23.3                       | 6.79                                | 2.89                                | 3.84                 | 0.07                          | <del>42.54</del> |

\* Limits on efficiency: 30% lower, 70% upper

① 8-hour inflow times are generally not considered per current standards

Average efficiency for East Pasture:

$$\frac{42 + 44 + 40 + 30 + 30}{5} = 37\%$$

WEST PASTURE: 39%

Alfalfa: 70%

by Scott King  
May 17, 2001

FIELD IRRIGATION REQUIREMENT

initials: SMM Claimant = BELL 36-3A  
 date: 05/17/01 Weather Station = ALISS/HAGGROW

| crop     | acres | irrig.<br>system | eff.<br>(%) | Monthly ET<br>(mm/day) |      |      |      |      |      |      | AVE IR<br>season<br>(mm/yr) | net<br>irrig.<br>app.<br>(in) | ET<br>ratio | irrig.<br>freq.<br>(days) | Gross Irrigation Application<br>(peak period ET/eff. is mm/day) |       |       |       |       |       |       | season<br>(mm/yr) |
|----------|-------|------------------|-------------|------------------------|------|------|------|------|------|------|-----------------------------|-------------------------------|-------------|---------------------------|-----------------------------------------------------------------|-------|-------|-------|-------|-------|-------|-------------------|
|          |       |                  |             | mar                    | apr  | may  | jun  | jul  | aug  | sep  | oct                         |                               |             |                           | mar                                                             | apr   | may   | jun   | jul   | aug   | sep   | oct               |
| alfh     | 5     | cor              | 70          |                        | 6.42 | 7.94 | 10   | 9.49 | 8.18 | 6.53 | 4.66                        | 2.89                          | 1.09        | 6.7                       | 10.00                                                           | 12.36 | 15.57 | 14.78 | 12.74 | 10.17 | 6.94  |                   |
| past (E) | 4     | cor              | 37          |                        | 3.97 | 6.12 | 7.69 | 7.3  | 6.29 | 5.04 | 3.45                        | 1.99                          | 1.11        | 5.9                       | 11.91                                                           | 18.36 | 23.07 | 21.90 | 18.87 | 15.12 | 10.35 |                   |
| past (W) | 3     | cor              | 39          |                        | 3.97 | 6.12 | 7.69 | 7.3  | 6.29 | 5.04 | 3.45                        | 2.24                          | 1.11        | 6.7                       | 11.30                                                           | 17.62 | 21.89 | 20.78 | 17.90 | 14.34 | 9.82  |                   |

Summary 13

10.89 15.38 19.34 18.35 15.82 12.66 8.66

Peak Gross Irrigation Application (mm/day) = 19.34  
 On-Farm Irrigation Requirement (cfs/acre) = 0.032  
 Total On-Farm Irrigation Requirement (cfs) = 0.42  
 Irrigation Diversion Volume (ft/yr) = 0.06  
 Total Irrigation Diversion Volume (ac-ft/yr) = 0

TOTAL QUANTITY

Irrigation 0.42 cfs  
 Delivery losses 0.15 cfs  
 Stockwater 0.02 cfs (not additive to irrigation)  
0.57 cfs



Table 4

| INTAKE<br>FAMILY | DESIGN<br>APPLIC.<br>Inches | FURROW<br>SLOPE<br>Ft/Ft | FURROW<br>SPACING<br>Feet | FURROW<br>LENGTH<br>Feet | INFLOW<br>RATE<br>Gpm | APPROXIMATE<br>INFLOW TIME<br>Hours | ADVANCE<br>TIME<br>Minutes | GROSS                               | NET                                 | RUNOFF<br>Inches | DEEP<br>PERC.<br>In. | IRRIGATION<br>EFFICIENCY<br>% |       |
|------------------|-----------------------------|--------------------------|---------------------------|--------------------------|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-------------------------------------|------------------|----------------------|-------------------------------|-------|
|                  |                             |                          |                           |                          |                       |                                     |                            | IRRIGATION<br>APPLICATION<br>Inches | IRRIGATION<br>APPLICATION<br>Inches |                  |                      |                               |       |
| Lure             | 0.55                        | 1.99                     | .015                      | 2.50                     | 550                   | 4.5                                 | 12                         | 77.2                                | 3.78                                | 3.26             | 0.34                 | 1.45                          | 52.65 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 550                   | 5.0                                 | 8                          | 67.7                                | 2.80                                | 2.41             | 0.21                 | 0.60                          | 71.07 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 450                   | 3.5                                 | 12                         | 67.6                                | 3.59                                | 3.16             | 0.27                 | 1.33                          | 55.38 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 450                   | 4.0                                 | 8                          | 56.9                                | 2.74                                | 2.37             | 0.22                 | 0.52                          | 72.69 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 350                   | 2.5                                 | 12                         | 59.4                                | 3.30                                | 3.04             | 0.13                 | 1.18                          | 60.31 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 350                   | 3.0                                 | 8                          | 46.3                                | 2.64                                | 2.31             | 0.22                 | 0.43                          | 75.38 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 250                   | 2.0                                 | 12                         | 36.2                                | 3.70                                | 3.02             | 0.60                 | 1.11                          | 53.84 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 250                   | 2.0                                 | 8                          | 36.2                                | 2.46                                | 2.22             | 0.16                 | 0.31                          | 80.77 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 150                   | 1.0                                 | 12                         | 28.4                                | 3.08                                | 2.81             | 0.21                 | 0.88                          | 64.61 |
|                  | 0.55                        | 1.99                     | .015                      | 2.50                     | 150                   | 1.5                                 | 8                          | 16.6                                | 3.08                                | 2.20             | 0.84                 | 0.25                          | 64.61 |
| st<br>Lure       | 0.70                        | 2.24                     | .010                      | 2.50                     | 300                   | 3.0                                 | 12                         | 51.8                                | 4.62                                | 4.01             | 0.45                 | 1.93                          | 48.49 |
|                  | 0.70                        | 2.24                     | .010                      | 2.50                     | 300                   | 3.0                                 | 8                          | 51.8                                | 3.08                                | 2.89             | 0.02                 | 0.82                          | 72.73 |
| alfa             | 0.55                        | 2.89                     | .010                      | 2.50                     | 680                   | 5.5                                 | 12                         | 130.6                               | 3.74                                | 3.28             | 0.10                 | 0.74                          | 77.34 |
|                  | 0.55                        | 2.89                     | .010                      | 2.50                     | 680                   | 10.5                                | 8                          | 60.2                                | 4.76                                | 2.92             | 1.66                 | 0.21                          | 60.77 |
|                  | 0.55                        | 2.89                     | .010                      | 2.50                     | 340                   | 2.5                                 | 12                         | 76.8                                | 3.40                                | 3.07             | 0.15                 | 0.34                          | 85.08 |
|                  | 0.55                        | 2.89                     | .010                      | 2.50                     | 340                   | 7.5                                 | 8                          | 23.3                                | 6.79                                | 2.89             | 3.84                 | 0.07                          | 42.94 |

1/2 length  
 full length  
 don't use 8 hr  
 USC  
 2.0  
 Spacing  
 for pasture  
 & grains

Average efficiency for east pasture:  $70 + 70 + 70 + 70 + 65 = 68.92\%$

Use of this program and input requirements are described in the FIELD APPLICATION EFFICIENCY section of the IDWR report titled Report Regarding Evaluation of Irrigation Diversion Rates, dated July, 1996.

# FIELD IRRIGATION REQUIREMENT

initials: MS Claimant = Rea  
 date: 06/25/96 Weather Station = Bliss/Hagerman

| crop      | acres | irrig. system | eff. (%) | Monthly ET (mm/day) |      |      |      |      |      |      |      | AVE IR season (mm/yr) | net irrig. app. (in) | ET ratio | irrig. freq. (days) | Gross Irrigation Application (peak period ET/eff. in mm/day) |       |       |       |       |      |     | season (mm/yr) |
|-----------|-------|---------------|----------|---------------------|------|------|------|------|------|------|------|-----------------------|----------------------|----------|---------------------|--------------------------------------------------------------|-------|-------|-------|-------|------|-----|----------------|
|           |       |               |          | mar                 | apr  | may  | jun  | jul  | aug  | sep  | oct  |                       |                      |          |                     | mar                                                          | apr   | may   | jun   | jul   | aug  | sep |                |
| alfh      | 6     | cor           | 70 ✓     |                     | 6.42 | 7.94 | 10   | 9.49 | 8.18 | 6.53 | 4.46 | 2.89                  | 1.09                 | 6.7      | 10.00               | 12.36                                                        | 15.57 | 14.78 | 12.74 | 10.17 | 6.94 |     |                |
| past East | 4     | cor           | 69 37    |                     | 3.97 | 6.12 | 7.69 | 7.3  | 6.29 | 5.04 | 3.45 | 1.99                  | 1.11                 | 5.9      | 6.39                | 9.85                                                         | 12.37 | 11.74 | 10.12 | 8.11  | 5.55 |     |                |
| past West | 3     | cor           | 78 39    |                     | 3.97 | 6.12 | 7.69 | 7.3  | 6.29 | 5.04 | 3.45 | 1.99                  | 1.11                 | 5.9      | 6.30                | 9.70                                                         | 12.19 | 11.58 | 9.97  | 7.99  | 5.47 |     |                |

Summary 13

Peak Gross Irrigation Application (mm/day) = 13.81  
 On-Farm Irrigation Requirement (cfs/acre) = 0.023  
 Total On-Farm Irrigation Requirement (cfs) = 0.30  
 Irrigation Diversion Volume (ft/yr) = 0.00  
 Total Irrigation Diversion Volume (ac-ft/yr) = 0

8.03 10.98 13.81 13.10 11.29 9.03 6.18

Table 5



**State of Idaho**

**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE  
GOVERNOR

KARL J. DREHER  
DIRECTOR

**TRANSMITTAL COVER SHEET**

**FAX NUMBER: (208) 327-5400**

**DATE:** 5/26/00

**TO:** Steve Clelland

**FROM:** Nick/Vicki

**DOCUMENT DESCRIPTION:** Hi Steve - Nick said you needed to see the Judge's order: what Cushman had done since then (not a lot obviously)!

**COVER SHEET +** 63 **PAGES** (sorry)

**CONTACT:** 327-5458

**IF YOU DO NOT RECEIVE ALL THE PAGES.**

**THANK YOU!**

If this isn't what you needed, let me know and I'll try again. Thanks - V

RECEIVED

NOV 26 1999

Department of Water Resources

1999 NOV 23 PM 4: 40

DISTRICT COURT - SRBA  
TWIN FALLS CO., IDAHO

FILED

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

In Re SRBA

Case No. 39576

Subcase Nos. 36-00003A, 36-00003B,  
36-00003C, 36-00003F, 36-00003K,  
36-00003L, and 36-00003M**MEMORANDUM DECISION AND ORDER ON CHALLENGE****ORDER GRANTING STATE OF IDAHO'S MOTION FOR THE COURT TO  
TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS****ORDER OF RECOMMITMENT WITH INSTRUCTIONS TO SPECIAL  
MASTER CUSHMAN****Appearances:****Mr. Peter J. Ampe, Deputy Attorney General, Natural Resources Division, Attorney for  
the State of Idaho****Ms. Dana L. Hofstetter, Beeman & Hofstetter, P.C., Attorney for North Snake Ground  
Water District, May Farms, Ltd., and Faulkner Land and Livestock Company****Mr. Patrick D. Brown, P.C., Attorney for Lynn Babington, David Kingston, Edna Rea  
(Verl Bell), and Doyt Simcoe****I****BRIEF PROCEDURAL BACKGROUND**

1. On July 29, 1998, Special Master Haemmerle issued *Findings of Fact and Conclusions of Law* regarding water rights 36-00003A, Edna Rea, Claimant; 36-00003B and 36-00003K, Kingston Properties L.P., Claimant; 36-00003C and 36-00003L, Lynn and Kathy Babington, Claimants; 36-00003D, Thomas and Terri Harbison, Claimants; 36-00003F and 36-00003M, Doyt and Roxie Simcoe, Claimants (hereinafter "Claimants").

2. On February 8, 1999, Special Master Haemmerle issued *Special Master's Report(s)* for these subcases.

3. On March 26 and 29, 1999, *Motions to Alter or Amend* were filed by the State of Idaho ("State"), and the North Snake Ground Water District, May Farms, Ltd., and Faulkner Land and Livestock Company (collectively referred to as "NSGWD").

4. On July 16, 1999, Special Master Haemmerle entered an *Order Denying Motions to Alter or Amend*.

5. On July 30, 1999, the State filed separate *Notices of Challenge* to rights 36-00003A, 36-00003B, 36-00003K and combined *Notices of Challenge* to rights 36-00003C and 36-00003L, and 36-00003F and 36-00003M.

6. On July 30, 1999, NSGWD filed its *Notice of Challenge* to subcases 36-00003A, B, C, D, F, J, K, L, and M. On August 20, 1999, NSGWD filed an *Amended Notice of Challenge* dropping (dismissing) its Challenge to rights 36-00003D and 36-00003J.

7. In accordance with a briefing schedule, counsel for the respective parties lodged briefs with the Court.

8. On September 22, 1999, the Court heard oral arguments on the Challenges.

9. On September 30, 1999, the Court issued an *Order for Additional Information and/or Clarification on Challenge*.

10. Responses to the Court's *Order for Additional Information and/or Clarification on Challenge* were filed by the parties on October 15, 1999. No Party objected to or challenged the accuracy of any of the supplemental materials presented. In addition, the State filed a *Motion for the Court to Take Judicial Notice of Adjudicative Facts*.



**II.****MATTER DEEMED FULLY SUBMITTED FOR DECISION**

Responses to the Court's *Order for Additional Information and/or Clarification on Challenge* were filed by the parties on October 15, 1999. Therefore, this matter is deemed fully submitted for decision on the next business day, or October 18, 1999.

**III.****STATE OF IDAHO'S MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF ADJUDICATIVE FACTS**

Pursuant to I.R.E. 201, the State has moved for the Court to take judicial notice of the following adjudicative facts:

- a. *Complaint in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("*Complaint*").
- b. *Stipulation for Decree in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932).
- c. *Answer in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("*Answer*").
- d. *Findings of Fact in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932).
- e. *Plat of Mineral Survey No. 801*, filed in the U.S. Land Office at Hailey, Idaho, January 2, 1890.
- f. *Plat of Mineral Survey No. 1*, filed in U.S. Land Office at Hailey, Idaho, November 20, 1884.

- g. *Master Title Plat, Township 7 South, Range 13 East, of the Boise Meridian, Idaho.*
- h. *Answer and Counter-Claim of Defendant Idaho Power Co. in New International Mortgage Bank v. Idaho Power Co., District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932).*

No party sought an opportunity to be heard on this request. I.R.E. 201(e). Therefore, the State's *Motion for the Court to Take Judicial Notice of Adjudicative Facts* is hereby **GRANTED**. I.R.E. 201(b), (d), and (f).

#### IV.

#### THE STANDARD OF REVIEW OF A SPECIAL MASTER'S REPORT OR RECOMMENDATION IN THE SRBA

##### The Significance of the Director's Report in Adjudication of Water Rights in the SRBA

A statement of the standard of review of a special master's report or recommendation regarding water rights claimed under state law in the SRBA begins with an understanding of the statutorily created procedural framework of how a "state based" claim is processed. See I.C. §§ 42-1401 to -1428 (1996 & Supp. 1999); SRBA Administrative Order 1, Rules of Procedure (Oct. 16, 1997). The pleadings in an adjudication proceeding consist of such documents as the notices of claim, objections, and responses thereto. *Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995).

Summarily stated, the principal steps in a state based water right claim are as follows:

1. A claim of a water right is filed. I.C. § 42-1409 (Supp. 1999).
2. IDWR makes an examination of the relevant water system and of the claim. I.C. § 42-1410 (1996).

3. As a result of the IDWR examination, a Director's Report is filed. I.C. § 42-1411 (Supp. 1999).
4. Objections and/or Responses to the Director's Report can be filed by the claimant or any other party in the SRBA. I.C. § 42-1412 (Supp. 1999); I.C. § 42-1411(5).
  - A. The parties to a subcase can stipulate to the contested elements of a water right by the use of a Standard Form 5. IDWR may concur therewith. AO1(4)(d)(3). If IDWR does not concur, the Court shall conduct any hearing necessary to determine whether a partial decree should be issued. AO1(4)(d)(3)(c).
  - B. Uncontested and settled subcases are partially decreed.
5. Contested subcases proceed toward resolution. The District Court may refer these subcases to a special master. I.C. § 42-1412(4)-(5).
  - A. Settlement conference.
  - B. Scheduling conference.
  - C. Trial before a special master.
6. In referred subcases, a **Special Master's Report or Recommendation** is filed with the Court. AO1(13).
7. **Motions to Alter or Amend a Special Master's Report or Recommendation** are filed, heard and ruled upon by a special master. AO1(13).
8. Objections ("Challenges" in the SRBA) to the final **Special Master's Report or Recommendation** are filed with the SRBA District Court. I.R.C.P. 53(e)(2); AO1(13).
9. A decision is made by the District Court on the Challenge and a Partial Decree is entered.
10. An appeal to the Idaho Supreme Court may be taken.

As it relates to the standard of review, the Director's Report (step 3 above) is of major significance because by statute, the Director's Report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law, and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411(4)-(5); see *Silverstein v. Carlson*, 118 Idaho 456, 461-62, 797 P.2d 856, 861-62 (1990); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418 (1997). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. I.C. § 42-1411(5). However, I.C. § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of the nonexistence of the fact [presumed]." *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986), citing Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 938 (1993). "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Hagerman Water Right Owners, Inc.*, 130 Idaho at 745, 947 P.2d at 418. If the presumption is overcome by the objector, then the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5). That is, when the *prima facie* evidence is rebutted by competent evidence, the issue is decided, like other issues, on the sum of the proof. See D. Craig Lewis, *Idaho Trial Handbook*, § 12.5 (1995), citing *Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956).

Therefore, from the "get-go," a special master's evidentiary view of an "objected to" subcase is directly affected by the content of the Director's Report, who filed the objection (i.e. who has the burden of going forward with the evidence), and to which elements of the claim the objection is directed (i.e. the scope of the objection). I.C. § 42-1411(5). In turn, a review of a Special Master's Report or Recommendation

by the District Court is likewise influenced by the procedural history of the particular subcase(s).

**Special Master's Report or Recommendations (as to the unobjected to portion of Director's Report)**

I.C. § 42-1411(4) purports to mandate that the unobjected to portions of the Director's Report be decreed as reported. Normally, this is exactly what happens. However, despite the unyielding language of this statute, the SRBA district court retains discretion to apply law to facts and render its own conclusions regarding unobjected to water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995), citing I.R.C.P. 55. Additionally, I.C. § 42-1412(7) allows the district court to delay entry of partial decrees for those portions of the Director's Report for which no objection has been filed if the district court determines that the unobjected claim may be affected by the outcome of a contested matter.

**Special Master's Report or Recommendations (as to the objected to portion of Director's Report)**

Because the district court has the duty to independently review a special master's report, the findings of fact and conclusions of law contained therein do not stand automatically approved in the absence of a challenge. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989); C. Wright and A. Miller, *Federal Practice and Procedure* § 2612 (1995).

Under I.R.C.P. 53(e)(2), written objections/challenges may be served upon all other parties within fourteen (14) days of service of the notice of the filing of a special master's report.<sup>1</sup> It should be noted, however, that AO1(13)(a) provides that "[f]ailure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend*

<sup>1</sup> If a Motion to Alter or Amend a Special Master's Recommendation is timely filed under AO1(13)(a), the time to file a challenge under I.R.C.P. 53(e)(2) is suspended until the special master files a decision on the Motion to Alter or Amend.



***the Special Master's Recommendation shall constitute a waiver of the right to challenge it before the Presiding Judge.***<sup>2</sup>

Applications to the referring district court for "action upon the report" are covered by I.R.C.P. 53(e)(2), and are to be by motion. The court, after hearing, has a wide range of actions available. The court may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it to a special master with instructions. I.R.C.P. 53(e)(2). Where a challenge to a special master's report is filed, a district court must hold a hearing on the issues raised therein. See *Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954, 956 (6<sup>th</sup> Cir. 1989). Of course, the parties could waive oral argument and submit the challenge on the briefs.<sup>3</sup>

### **Findings of Fact of the Special Master**

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States

<sup>2</sup> It may seem anomalous that actual participation in a Motion to Alter or Amend is a prerequisite to a Rule 53(e)(2) challenge in the SRBA, but such a challenge or objection is not a prerequisite to appellate review. *Secombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989) (holding that objections to findings and conclusions of the master are not required to preserve an issue for appeal). The following reasons, however, explain this apparent anomaly: First, because of the large and complex nature of the SRBA litigation, and the potential that a large number of parties may have an interest in a particular issue or subcase before a special master, it is necessary for those interested parties to involve themselves in the proceedings before the special master, at least at the Motion to Alter or Amend stage. See AO1 (13)(a). Allowing interested parties to sit back and wait for the special master's final report and then file a challenge with the district court would cause unjustifiable expense and delay. Second, the district court has the affirmative duty to independently review the special master's report (irrespective of whether it has been challenged) using the clearly erroneous standard as to findings of fact and a free review of the conclusions of law. Upon such review, the district court may, on its own initiative, adopt, modify, or reject the report, receive further evidence, or refer it back to the special master. In contrast, an appellate court – which is not a fact finding court – is limited to the record before it in deciding whether the trial court's findings are clearly erroneous and/or whether the conclusions of law are incorrect.

<sup>3</sup> If no party files a challenge to a special masters report and recommendation, the court will not usually hold a hearing under I.R.C.P. 53(e)(2). As a practical matter, such a hearing would accomplish little, if anything; it would not be an efficient use of judicial resources, and would create unnecessary expense for the litigants.

Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

*U.S. v. Aluminum Co. of America*, 148 F.2d 416, 433 (2<sup>nd</sup> Cir. 1945) (L. Hand, J.).

A special master's findings which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,<sup>4</sup> although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v.*

<sup>4</sup> Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special masters findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

*Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. *Wright and Miller*, *supra*, § 2585.

With respect to stipulated facts, I.R.C.P. 53(e)(4) provides that when parties stipulate that a special master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered (meaning freely reviewable by the referring district court).<sup>5</sup>

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7<sup>th</sup> Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1<sup>st</sup> Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does

<sup>5</sup> Read literally, this rule absolutely requires a referring district court to accept stipulated facts without any question. While this would be the result in the vast majority of cases, it is logical that the intent of this rule is much like the "uncontradicted testimony rule" of evidence. This "rule" is that "[t]he uncontradicted testimony of a credible witness must be accepted by the trier of fact unless the testimony is 'inherently improbable, or rendered so by facts and circumstances disclosed at the hearing . . . or impeached by any of the modes known to the law.'" *Faber v. State*, 107 Idaho 823, 824, 693 P.2d 469, 470 (Ct. App. 1984); *cltting Dinnen v. Finch*, 100 Idaho 620, 626-627, 603 P.2d 575, 581-82 (1979). *See also Russ v. Brown*, 96 Idaho 369, 373, 529 P.2d 765, 769 (1974) ("[T]he trial court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable or impeached"); *Roemer v. Green Pastures Farms, Inc.*, 97 Idaho 591, 593, 548 P.2d 857, 859 (1976) ("The district court, sitting as a trier of fact, may reject uncontradicted testimony of a witness if the testimony is inherently improbable."); *Wood v. Høglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998) ("[I]t has long been recognized that unless a witness's testimony is inherently improbable, or rendered so by facts and circumstances disclosed at trial, the trier of fact must accept as true the positive, uncontradicted testimony of a credible witness."); *Wright and Miller*, *Federal Practice and Procedure* § 2586 (1995) ("The court need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable."). Hence, a reviewing district court, through its inherent powers and sitting as the final arbiter of all the issues, could reject stipulated facts which were inherently improbable and/or which would result in a fraud being perpetrated on the court or on others.

not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 33.14 (1995), citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemerway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Ct. App. 1996).

### **Conclusions of Law of the Special Master**

In contrast to the standard of review relative to findings of fact, a special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard.

### **Label is not Decisive**

Plainly, the label put on a determination by a special master is not decisive. Therefore, if a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5<sup>th</sup> Cir. 1975).

### **Mixed Questions of Fact and Law**

There is substantial authority that "mixed questions of fact and law" are not protected by the "clearly erroneous" standard and are freely reviewable. Wright and Miller, *supra*, § 2589; *U.S. v. Ekwunoh*, 12 F.3d 368, 372 (2<sup>nd</sup> Cir. 1993).

### **The Bottom Line Regarding Findings of Fact and Conclusions of Law**

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

### **Standard of Review Regarding Admission or Exclusion of Evidence**

A district court reviews a special master's decision admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. This is the same standard that is used by an appellate court to review such decisions made by a trial court. *Morris by and through Morris v. Thomas*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997), *citing Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

In *Burgess*, the Idaho Supreme Court articulated the following test for whether a trial court (and likewise a special master) has abused its discretion:

(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

*Burgess*, 127 Idaho at 573, *citing Rhodehouse v. Stutts*, 125 Idaho 208, 213, 868 P.2d 1224, 1229 (1994).

A trial court, and likewise a special master, may exclude or strike evidence upon the motion of a party. Furthermore, a trial court or special master may exclude evidence



offered by a party on its own authority, without a motion to strike or an objection made by the opposing party. *Morris*, 130 Idaho at 144, 937 P.2d at 1218, citing *Heccla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. I.R.C.P. 61; I.R.E. 103; *Burgess*, 127 Idaho at 574, 903 P.2d at 739; *Hake v. DeLane*, 117 Idaho 1058, 1065, 793 P.2d 1230, 1237 (1990); *Morris*, 130 Idaho at 144, 937 P.2d at 1218.

## V.

### STATEMENT OF ISSUES BY NSGWD

As previously mentioned, NSGWD filed one combined *Amended Notice of Challenge*. It listed the issues as follows:

1. Numerous different parties claimed a portion of the previously decreed Water Right No. 36-00003, and the entire quantity of the right has been allocated among various parties. Are claimants of portions of Water Right No. 36-0000E barred from receiving more than the proportional share of the 20 cubic feet per second ("cfs") originally decreed to Water Right No. 36-00003?
2. Absent the filing of claims in the SRBA for Water Right Nos. 36-00005 and 36-00019, can Water Right Nos. 36-00005 and 36-00019 be allocated to portions of Water Right No. 36-00003 in the SRBA?
3. Was it error for the Special Master to recommend a diversion rate based on a gravity irrigation analysis when the claimant's water right is actually exercised in part through sprinkler irrigation which generally uses less water than gravity irrigation? Was it error for the Special Master not to address, by qualifying language or by another legal means, that in the event of a water call, the water quantity associated with actual beneficial use will apply?
4. Have the claimants met the burden of persuasion with respect to the quantity element as required by *Idaho Code* § 42-1411(5)?

5. With respect to Water Right No. 36-00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?

6. Is the Motion to Alter or Amend governed by Rule 59(e), I.R.C.P.?

## VI. ISSUES PRESENTED BY THE STATE

As previously mentioned, the State filed five (5) different *Notices of Challenge*, some with the same or similar issues stated and others with issues unique to the particular subcase(s).

### Subcase 36-00003A, Claimant Edna Rea

1. Since 20.0 cfs was originally decreed to water right 36-0003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-0003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Is the claimant of water right 36-00003A bound by *res judicata* from re-litigating the quantity of water necessary to irrigate her property?

3. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and the claimant of water right 36-00003A failed to object or otherwise contest any other claim to the 03 Right, has the claimant effectively waived her right to contest IDWR's quantity recommendation for water right 36-00003A?

4. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

6. Does a decree for more than 0.41 cfs for water right 36-00003A constitute an impermissible enlargement to the 03 Right?

7. Did the Special Master err in his finding that water rights 36-00005 and 36-00019 from the New Int'l Decree and the 03 Right all share the same place of use?

8. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water right 36-00003A even though these rights were not claimed?

9. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

10. Does a decree for more than 0.41 cfs for water right 36-00003A constitute an impermissible enlargement to water right 36-00005 and 36-00019 from the New Int'l Decree?

11. If Claimant is permitted to re-litigate the quantity of water necessary to irrigate her property, has Claimant met her burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 1 to 12 inches per acre could be used to irrigate the property?

#### **Relief Requested**

The State of Idaho respectfully requests that this Court decree water right 36-00003A as recommended by IDWR.

#### **Subcase 36-00003B, Claimant David Kingston and/or Kingston Properties, L.P.**

1. Since 20.0 cfs was originally decreed to water right 36-00003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-00003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Is the claimant of water right 36-00003B bound by *res judicata* from re-litigating the quantity of water necessary to irrigate its property?

3. Where IDWR has recommended the full decreed amount to the various claimants of the 03 Right, and the claimant of water right 36-00003B failed to object or otherwise contest any other claim to the 03 Right, has the claimant effectively waived its right to contest IDWR's quantity recommendation for water right 36-00003B?

4. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

6. Does a decree for more than 5.0 cfs for water right 36-00003B constitute an impermissible enlargement to the 03 Right?

7. Did the Special Master err in his finding that water rights 36-00005 and 36-00019 from the New Int'l Decree and the 03 Right all share the same place of use?

8. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water right 36-00003B even though these rights were not claimed?

9. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

10. Does a decree for more than 5.0 cfs for water right 36-00003B constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

11. If Claimant is permitted to re-litigate the quantity of water necessary to irrigate its property, has Claimant met its burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 0.5 to 6.5 inches per acre could be used to irrigate the property?

12. Does Idaho Code § 42-1427(1)(b), the legislative findings portion of Idaho Code § 42-1427, permit the claimant of water right 36-00003B to add purposes of use to the 03 Right independent of a recommendation from IDWR?

13. Does the addition of a year-round fish propagation use to the 03 Right constitute and impermissible enlargement to the 03 Right?

14. Does Idaho Code § 42-1427 apply to "vague" elements in prior decrees or licenses?

15. Can Idaho Code § 42-1427 ever be used to add purposes of use to prior decreed or licensed water rights?

16. Has Claimant met its burden of proof as to the quantity of water beneficially used for fish propagation?

#### **Relief Requested**

The State of Idaho respectfully requests that this Court decree water right 36-00003B as recommended by IDWR.

#### **Subcases 36-00003C and 36-00003L, Claimants Lynn and Kathy Babington**

1. Since 20.0 cfs was originally decreed to water right 36-00003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-00003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Are the claimants of water rights 36-00003C and 36-00003L bound by *res judicata* from relitigating the quantity of water necessary to irrigate their property?

3. Did the Special Master err in considering any evidence concerning the claim to water right 36-00003C since no outstanding objections were at issue at the time of trial?

4. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and the claimants of water rights 36-00003C and 36-00003L failed to object or otherwise contest any other claim to 03 Right, have the claimants effectively waived their right to contest IDWR's quantity recommendation for water rights 36-00003C and 36-00003L?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

6. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?



7. Does a decree for more than 0.3 cfs for water right 36-00003C constitute an impermissible enlargement to the 03 right?

8. Does a decree for more than 0.43 cfs for water right 36-00003L constitute an impermissible enlargement to the 03 Right?

9. Did the Special Master err in his finding that water rights 36-00005 and 36-00019 from the New Int'l Decree and the 03 Right all share the same place of use?

10. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water rights 36-00003C and 36-00003L even though these rights were not claimed?

11. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

12. Does a decree for more than 0.3 cfs for water right 36-00003C constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

13. Does a decree for more than 0.43 cfs for water right 36-00003L constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

14. Does the combining of water right 36-00003C and water right 36-00003L require an application with IDWR pursuant to Idaho Code § 42-222?

15. If Claimant is permitted to combine water rights 36-00003C and 36-00003L and to relitigate the quantity of water necessary to irrigate their property, have the claimants met their burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 1.25 to 15.75 inches per acre could be used to irrigate the property?

#### **Relief Requested**

The State of Idaho respectfully requests that this Court decree water rights 36-00003C and 36-00003L as separate water rights, each as recommended by IDWR.

**Subcase 36-00003F and 36-00003M, Claimants Doyt and Roxie Simcoe**

1. Since 20.0 cfs was originally decreed to water right 36-00003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-00003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?
2. Are the claimants of water rights 36-00003F and 36-00003M bound by *res judicata* from relitigating the quantity of water necessary to irrigate their property?
3. Did the Special Master err in considering any evidence concerning the claim to water right 36-00003F since no outstanding objections were at issue at the time of trial?
4. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and Claimants of water rights 36-00003F and 36-00003M failed to object or otherwise contest any other claim to the 03 Right, have Claimants effectively waived their right to contest IDWR's quantity recommendation for water rights 36-00003F and 36-00003M?
5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?
6. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?
7. Does a decree for more than 0.8 cfs for water right 36-00003F constitute an impermissible enlargement to the 03 Right?
8. Does a decree for more than 0.50 cfs for water right 36-00003M constitute an impermissible enlargement to the 03 Right?
9. Did the Special Master err in finding that water rights 36-00005 and 36-000019 from the new Int'l Decree and the 03 Right all share the same place of use?
10. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-000019 from the New Int'l Decree in the recommendation for water rights 36-00003F and 36-00003M even though these rights were not claimed?

11. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

12. Does a decree for more than 0.8 cfs for water right 36-00003F constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

13. Does a decree for more than 0.50 cfs for water right 36-00003M constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

14. Does the combining of water rights 36-00003F and water rights 36-00003M require an application with IDWR pursuant to Idaho Code § 42-222?

15. If claimant is permitted to combine water rights 36-00005F and 36-00003M and relitigate the quantity of water necessary to irrigate their property, have the claimants met their burden of proof as to the quantity element through testimony and that a computer program determines that quantities ranging from 0.90 to 12.5 inches per acre could be used to irrigate the property?

#### **Relief Requested**

The State of Idaho respectfully requests that this Court decree water rights 36-00003F and 36-00003M as separate water rights, each as recommended by IDWR.

#### **Subcase 36-00003K, Claimant David Kingston and/or Kingston Properties, L.P.**

1. Since 20.0 cfs was originally decreed to water right 36-0003 in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"), are claimants of water right 36-0003 from the New Int'l Decree (the "03 Right") in the SRBA bound by *res judicata* to a cumulative total of 20 cfs between them?

2. Is the claimant of water right 36-00003K bound by *res judicata* from re-litigating the quantity of water necessary to irrigate its property?

3. Did the Special Master err by recommending a larger number of acres than recommended by IDWR when no objection was filed to the place of use for water right 36-00003K?

4. Where IDWR has recommended the full decreed quantity to the various claimants of the 03 Right, and Claimant of water right 36-00003K failed to object of

otherwise contest any other claim to the 03 Right, has Claimant effectively waived its right to contest IDWR's quantity recommendation for water right 36-00003K?

5. Where several parties in the SRBA have collectively over-claimed the 03 Right, should each claimant of the 03 Right be permitted to prove their entitlement to the quantity to the 03 Right independent of the other claimants to the 03 Right even if this results in SRBA decrees that exceed the originally decreed quantity?

6. Where several parties in the SRBA have collectively over-claimed the 03 Right, should parties in the SRBA who did not claim a portion of the 03 Right be required to prove which claim to the 03 Right is excessive in order to avoid over allocating the 03 Right in the SRBA?

7. Does a decree for more than 0.03 cfs for water right 36-00003K constitute an impermissible enlargement to the 03 Right?

8. Did the Special Master err in his finding that water rights 36-00005 and 36-000019 from the New Int'l Decree and the 03 Right all share the same place of use?

9. Did the Special Master err in concluding that the Idaho Department of Water Resources should have considered water rights 36-00005 and 36-00019 from the New Int'l Decree in the recommendation for water right 36-00003K even though these rights were not claimed?

10. Does the allocation by the Special Master of unclaimed water rights from a prior decree absent a claim for those rights in the SRBA impermissibly violate Idaho Code § 42-1409 and the due process rights of other claimants in the SRBA?

11. Does a decree for more than 0.03 cfs for water right 36-00003K constitute an impermissible enlargement to water rights 36-00005 and 36-00019 from the New Int'l Decree?

12. If Claimant is permitted to re-litigate the quantity of water necessary to irrigate its property, has Claimant met its burden of proof as to the quantity element through testimony that a computer program determines that quantities ranging from 0.5 to 6.5 inches per acre could be used to irrigate the property?

### **Relief Requested**

The State of Idaho respectfully requests that this Court decree water right 36-00003K as recommended by IDWR.

**VII.**  
**CATEGORIZATION OF ISSUES BY CLAIMANTS**

In their Response Brief to Challenges, at page 17, the Claimants have broadly categorized the issues as the following:

1. Are the Challengers estopped from asserting *res judicata* or any other affirmative defense as being preclusive of the quantities recommended by the Special Master in the absence of an objection prior to trial?
2. Was it error for the Special Master to consider unclaimed water right numbers 36-00005 and 36-00019 when the claim numbers had been assigned by IDWR?
3. Can the Challengers raise evidentiary objections where they declined the many opportunities afforded them to file objections and actually participate in the trial and no objections were raised at trial?
4. Is there substantial evidence in the record to support the Special Master's Findings of fact?
5. Did the Special Master properly apply Idaho Code § 42-1427 in these subcases?

**VIII.**  
**CATEGORIZATION OF ISSUES BY THE COURT**

Because many of the State's issues apply to more than one subcase, and because some of the NSGWD's issues are essentially the same as some of the State's issues, the Court has consolidated and restated the issues as follows:

**Issue No. 1:** Are the claimants to the 03 right bound by the New Int'l Decree to a percentage share of the 03 right, the cumulative total of which cannot exceed of 20 cfs?

**Issue No. 2:** Does the failure of each Claimant under the 03 right to object to competing claims under the 03 right constitute a waiver of the right to contest IDWR's quantity recommendation for that Claimant's own claim?

**Issue No. 3:** Where the Claimants have collectively over-claimed the 03 right, should



other parties in the SRBA be required to prove which claim(s) under the 03 right is (are) excessive in order to avoid over-allocation of the 03 right?

**Issue No. 4:** Absent the filing of claims in the SRBA for the 05 and 19 rights, can such rights be used to cover over-allocation of the 03 right?

**Issue No. 5, Part 1:** Was it error for the Special Master to recommend a diversion rate based on a gravity irrigation analysis when the Claimant's water right is actually exercised in part through sprinkler irrigation which generally uses less water than gravity irrigation?

**Issue No. 5, Part 2:** Was it error for the Special Master not to address, by qualifying language or by another legal means, that in the event of a water call, the water quantity associated with actual beneficial use will apply?

**Issue No. 6:** Have the Claimants met the burden of persuasion with respect to the quantity element as required by I.C. § 42-1411(5)?

**Issue No. 7:** Does a decree for more than X cfs for water right 36-00003(respective split) constitute an impermissible enlargement to the 03 right?

**Issue No. 8:** Does the combining of water right 36-00003C with 36-00003L, and water right 36-00003F with 36-00003M, require an application with IDWR pursuant to I.C. § 42-222?

**Issue No. 9:** Is a Motion to Alter or Amend before a special master in the SRBA governed by I.R.C.P. 59(e)?

**Issue No. 10:** Did the Special Master err in considering any evidence concerning the claim to water right 36-00003C and 36-00003F since no outstanding objections were at issue at time of trial?

**Issue No. 11:** With respect to water right No. 36-00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?

**IX.**  
**THE NEW INTERNATIONAL DECREE**

The claims to the water rights at issue in these challenges are derived from the decree entered in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree"). By a review of that decree, it appears to the Court that the plaintiff therein, New International Mortgage Bank, received three water rights, two from Riley Creek and one from Billingsley Creek, as described on pages 2 and 3 of the New Int'l Decree. The third right, from Billingsley Creek and described on page 4 of the New Int'l Decree, was assigned the water right number 36-00003 (the "03" right) by IDWR prior to the SRBA adjudication process. *Affidavit* of Steve Clelland ¶ 3 (October 15, 1999). It has a priority date of September 10, 1884. Numerous other rights were also decreed in the New Int'l Decree. In order of listing in the Decree, Amanda J. Gooding is listed as the fifth right, for 3 cfs from Billingsley Creek with a priority date of September 10, 1884. This right was assigned number 36-00005 (the "05" right) by IDWR. The nineteenth and twentieth rights listed in the New Int'l Decree were to Harlan Bell for 2.16 cfs from Billingsley Creek and 0.5 cfs from Riley Creek, respectively. These rights were assigned numbers 36-00019 (the "019" right) and 36-00020 (the "020" right) by IDWR.

The following table summarizes those portions of the New Int'l Decree which are relevant to these Challenges:

| Number Assigned by IDWR | Decreed to:                     | Quantity (cfs) | Source            | Point of Diversion <sup>6</sup> | Priority Date      |
|-------------------------|---------------------------------|----------------|-------------------|---------------------------------|--------------------|
| 36-00001                | New International Mortgage Bank | 12             | Riley Creek       | Hunt Ditch                      | May 1, 1883        |
| 36-00002                | New International Mortgage Bank | 12             | Riley Creek       | Pipe Ditch                      | October 1, 1908    |
| 36-00003                | New International Mortgage Bank | 20             | Billingsley Creek | Buckeye Ditch                   | September 10, 1884 |
| 36-00005                | Amanda J. Gooding               | 3              | Billingsley Creek | Buckeye Ditch                   | September 10, 1884 |
| 36-00019                | Harlan Bell                     | 2.16           | Billingsley Creek | Buckeye Ditch                   | September 10, 1884 |
| 36-00020 <sup>7</sup>   | Harlan Bell                     | 0.5            | Riley Creek       | Pipe Ditch                      | October 1, 1908    |

The places of use decreed in the New Int'l Decree for the various rights are as follows:

36-00001, 36-00002, and 36-00003

SW1/4 of NE1/4; NW1/4 of SE1/4; S1/2 of NW1/4; N1/2 of SW1/4, Section 27; SE1/4 of NE1/4; NE1/4 of SE1/4; Lots 4, 5, 8, and 9, all in Section 28; Lots 1, 4, 5, and 8; SE1/4 of SE1/4, all in Sec. 33; Lots 1, 2, 3, 4, 5, and 7; SE1/4 of NW1/4; NE1/4; N1/2 of NW1/4, all in Sec. 34; SW1/4 of NW1/4 and NW1/4 of SW1/4 of Section 35, all in Township 7 South, Range 13 E. B. M. Terrace Bar, Big Foot Bar, Union Bar and

<sup>6</sup> For the first three rights listed in the New Int'l Decree, the point of diversion is described by quarter-quarter section. For the remaining rights at issue the point of diversion is described by ditch. To keep it simple, for all the rights in the above table the point of diversion is described by ditch. The point of diversion for the Hunt, Pipe, and Buckeye ditches is particularly described in the New Int'l Findings of Fact at section 7.

<sup>7</sup> Although the 020 right is not at issue in these Challenges, it is listed in the above table because it was decreed in the New Int'l Decree for the same place of use as the 019 right.

Comstock Placer Mining Claims according to plat of Mineral survey No. 1, Lot 37, filed in U.S. Land Office at Hailey, Idaho, November 20, 1884; Starr Hunt, Jack Rabbitt and Fractional Terrace Bar Placer Mining Claims according to plat of mineral survey No. 801, Lot 38, filed in U.S. Land Office at Hailey, Idaho, January 2, 1890; all in Township 7 South, Range 13, E. B. M. All islands in Snake River South of said Section 33, Township 7 South, Range 13 E. B. M., **excepting tracts 16, 27, 37, 124, and 125 of Map of Buckeye Ranch recorded in Book 1 of Plats, page 44, in the office of the County Recorder of Lincoln County, Idaho.** (emphasis added).

36-00005

South Half of Southwest Quarter (S1/2SW1/4) and South Half of Southeast Quarter (S1/2SE1/4) of Section 27, Township 7 South, Range 13 E.B.M.

36-00019 and 36-00020

Lots 16, in the SW1/4 of the SW1/4 of the NW1/4 and Lots 27 and 37 in the W1/2 of the NW1/4 of the SW1/4, in Sec. 27, Twp. 7 S. R. 13 E. B. M., the same being Acreage Tracts shown on the map or plat of Buckeye Ranch on file in the office of the Recorder of Gooding County, Idaho.

The evidence is clear that, as decreed in the New Int'l Decree, the 01, 02, and 03 rights all share the same place of use, and this place of use is separate and distinct from the place of use of the 05, 019, and 020 rights. Note that the description of the place of use for the 01, 02, and 03 rights contains an exclusion of certain lands, which is in bold typeface above. Note also that the place of use for the 019 and 020 rights is wholly within the place of use which is excluded from the 01, 02, and 03 rights.<sup>8</sup>

<sup>8</sup> Although there is a variation between the description of the exclusion for the 01, 02, and 03 rights, and the description of the 019 and 020 rights, the evidence reveals that they describe the same place on planet earth (with the exception of "tracts 124 and 125"). See Affidavit of Steve Clelland ¶ 8 (October 15, 1999) ("In my examination of all information and maps provided to IDWR during my investigation . . . I determined that the place of use decreed to 36-00019 [and 36-00020] (lots 16, 27, and 37) in the New International Decree are the same tracts excluded from the place of use of 36-00003 [and 36-00001 and 36-00002] (Tracts 16, 27, and 37) in the New International Decree.").

## X.

**BRIEF HISTORY OF THE 01, 02, 03, 05, 019, and 020 RIGHTS IN THE SRBA****36-00001**

Water right no. 36-00001 was claimed in the SRBA by Buckeye Farms, Inc. ("Buckeye Farms") on September 1, 1988, for a quantity of 12 cfs from Riley Creek. The place of use claimed was for lands within the boundaries of the place of use decreed for the first three rights listed in the New Int'l Decree. In addition, Buckeye Farms also claimed a place of use for this right on lands outside of the boundaries of the place of use originally decreed in the New Int'l Mortgage Decree. The additional place of use claimed by Buckeye Farms was the 160 acres which were decreed to Amanda J. Gooding (the 05 right) in the New Int'l Decree. Buckeye Farms, however, claimed a different point of diversion than as decreed to the 05 right. A partial decree was issued for this water right on February 10, 1997, for a quantity of 12 cfs. The place of use decreed in the SRBA includes 152 acres within the 160 acre place of use originally decreed to Amanda J. Gooding in the New Int'l Decree.

**36-00002**

Water right no. 36-00002 was claimed in the SRBA by Buckeye Farms on September 1, 1988, for a quantity of 12 cfs from Riley Creek. The place of use claimed was for lands within the boundaries of the place of use decreed for the first three rights listed in the New Int'l Decree. In addition, Buckeye Farms also claimed a place of use for this right on lands outside of the boundaries of the place of use originally decreed in the New Int'l Mortgage Decree. The claimed place of use was identical to that claimed by Buckeye Farms for right no. 36-00001. The additional place of use claimed by Buckeye Farms was the 160 acres which were decreed to Amanda J. Gooding (the 05 right) in the New Int'l Decree. Again, Buckeye Farms claimed a different point of diversion than as decreed to the 05 right. A partial decree was issued for this water right on March 6, 1997, for a quantity of 10.45 cfs. The place of use decreed in the SRBA includes 152 acres



within the 160 acre place of use originally decreed to Amanda J. Gooding in the New Int'l Decree.

### 36-00003

Water right 36-00003 has been split into numerous parts. Attached as Exhibit A to *Memorandum in Support of State of Idaho's Motion to Alter or Amend* (April 9, 1999) is the following chart of the 03 rights, which is reproduced here to provide a graphic aid to understanding the procedural history of the respective subcases involving the 03 rights.

| Claim to the 03 Split Rights | Current Claimant | Claim       |            | IDWR Rec  |            | SM Rec       |              |
|------------------------------|------------------|-------------|------------|-----------|------------|--------------|--------------|
|                              |                  | CFS         | Acres      | CFS       | Acres      | CFS          | Acres        |
| A                            | Rea              | 1.6         | 13         | 0.41      | 13         | 1.6          | 13           |
| B                            | Kingston         | 7.16        | 129        | 5.0       | 129        | 7.16         | 129          |
| C                            | Babington        | 0.30        | 10         | 0.30      | 10         | 1.62         | 24           |
| D                            | Harbison         | 0.24        | 10         | 0.24      | 2          | 0.24         | 8.4          |
| E                            | Vernon           | 0.20        | 10         | 0.20      | 5          | 0.20         | 6            |
| F                            | Simcoe           | 0.80        | 40         | 0.80      | 40         | 2.56         | 58           |
| G                            | Lloyd            | 0.40        | 20         | 0.19      | 3          | 0.19         | 3            |
| H                            | Buckey Farms     | 12.0        | 455        | 11.9      | 290        | 11.9         | 290          |
| J                            | Gardner          | Split into  | K, L & M   |           |            |              |              |
| K                            | Kingston         | 0.92        | 10         | 0.03      | 1          | 0.92         | 7            |
| L                            | Babington        | 1.32        | 27.5       | 0.43      | 14         | 0            | 0            |
| M                            | Simcoe           | 1.76        | 18.5       | 0.50      | 18         | 0            | 0            |
| <b>TOTALS</b>                |                  | <b>26.7</b> | <b>743</b> | <b>20</b> | <b>526</b> | <b>26.39</b> | <b>538.4</b> |

The 03 split rights which are not at issue in these challenges are D, E, G, H, and J. As to rights 03D and 03J<sup>9</sup>, they were originally listed in NSGWD's *Notice of Challenge*, but they were subsequently dropped when NSGWD filed an *Amended Notice of Challenge* on August 20, 1999.

As to right nos. 36-00003E (Vernon) and 36-00003G (Lloyd), the evidence shows that these rights have been moved to a new place of use outside of the original place of use for 36-00003. *Affidavit of Steve Clelland* ¶¶ 12-13. With respect to right no. 36-00003G, a letter from H.F. LeMoyné to George Lemmon as water master (April 14, 1959) shows that 20 inches of water from Billingsley Creek, with a priority date of September 10, 1884, had been sold and moved to a new place of use. *Id.* at Exhibit 2. A partial decree, with a Rule 54(b) certificate, was entered in the SRBA for right no. 36-00003G on November 21, 1997. With respect to rights no. 36-00003E, Steve Clelland states in his affidavit that the "Claimant confirmed that 36-00003E had been purchase from the 36-00003 right and moved to a new place of use." *Id.* at ¶ 13. The Special Master has issued a recommendation for right no. 36-00003E, but a partial decree has not been entered.

As to right no. 36-00003H, a partial decree, with a Rule 54(b) certificate, was entered in the SRBA to Buckeye Farms on March 6, 1997, for a quantity of 11.9 cfs, and a place of use of 260 acres. One acre out of the 260 acres is within the place of use originally decreed to Amanda J. Gooding (the 05 right) in the New Int'l Decree. (Buckeye Farms' water right claim for the entire 260 acres was made under the 03 Right and not the 05, 019 or 020 rights.).

### **36-00019 and 36-00020**

As to water right nos. 36-00019 and 36-00020, no claims have been made in the SRBA which correspond to these right numbers. However, as discussed herein, it appears that the places of use recommended by the Special Master for right nos. 36-00003B and

<sup>9</sup> Water right 36-00003J was originally claimed for 4.0 cfs on 56 acres. It was subsequently split into the K, L, and M rights, and as such J itself has been recommended as disallowed.

36-00003D include land that are within the place of use originally decreed to Harlan Bell (the 019 and 020 rights) in the New Int'l Decree.

## **XI. BRIEF STATEMENT OF FACTS**

On November 2, 1992, IDWR filed Director's Reports in each of the subcases at issue. By the objection deadline date of May 1, 1993, each claimant (of the 03 right) had objected to the Director's Report for their own claims. Even though all of the Claimants claims are purportedly derived from New International Mortgage Company's third decreed right (03) (page 4 of the New Int'l Decree) from Billingsley Creek with a priority date of September 10, 1884, none of the Claimants objected to any competing claims under the 03 right. Thus, as pointed out in the "03" table above, the various claimants "over-claimed" this 20 cfs right by claiming a total of 26.7 cfs, or by 6.7 cfs. Over the course of the next three years, various legal proceedings occurred, including the appeal in some of these subcases to the Idaho Supreme Court. That case, commonly referred to as the "24 Hagerman Subcases," 130 Idaho 736, 947 P.2d 409 (1997), held, among other things, that since IDWR was no longer a party to the SRBA, evidentiary hearings must be held in contested "one party" subcases to support claims which differed from the Director's Report.

Additionally, neither of the challengers herein filed objections or responses, nor have they otherwise sought to participate in these subcases since the 24 Hagerman Subcases decision from the Supreme Court, until the Motion to Alter or Amend stage when it came to light that the Special Master had recommended a total of 26.39 cfs for these rights, when the "03" rights were derived from the New Int'l Decree right of 20 cfs. In an attempt to make up the shortage (26.39 cfs - 20 cfs or 6.39 cfs) by his recommendation which is .31 cfs less than claimed, the Special Master recommended decreeing the 3 cfs from 36-00005 and the 2.16 cfs from 36-00019, both of which were not allegedly claimed by anyone in the SRBA and hence, not reported by IDWR. It

should be noted that the places of use under the 05 and 019 rights were claimed, and that it was IDWR who assigned the right numbers.

Of course, as one can readily discern from the *Notices of Challenge*, a host of other issues are also presented. However, it is fairly apparent that the two primary triggering events were the 6.7 cfs over-claim, the 6.31 over-claim ultimately recommended by the Special Master, and the attempted use of the "05" right and the "019" right to cover (most of) this "overage."

Lastly, despite claiming water rights pursuant to the New Int'l Decree, the record is void as to the chain of title vesting respective shares of the previously decreed water right in the Claimants.

## XII. DECISION

**Issue No. 1:** Are the claimants to the 03 right bound by the New Int'l Decree to a percentage share of the 03 right, the cumulative total of which cannot exceed of 20 cfs?

The Claimants to the 03 right are bound by the New Int'l Decree to a cumulative total of 20 cfs between them. The water right elements decreed in the New Int'l Decree are *res judicata* as between the parties and privies to that Decree, and the Claimants are bound thereby as to any water right elements definitively adjudged by the New Int'l Court.<sup>10</sup> The New Int'l Decree is the progenitor of the water right claims at issue in this Challenge. Because these claims arises from a prior decree, this Court cannot allocate more water to them than is available from their origin. In other words, each Claimant is purportedly tracing the title to their water right back to the third right listed in the New Int'l Decree with an 1884 priority date, and the sum of the claims cannot exceed the 20 cfs on which they are based. To hold otherwise would be to allow the Claimants of the 03

<sup>10</sup> The Claimants are not bound by the New Int'l Decree as to any water right elements which were undefined by that Decree. Likewise, the Claimants are not bound by the New Int'l Decree as to water right claims which do not purport to rely on that Decree, if any.

right to unilaterally expand the quantity element previously decreed, while maintaining the ancient priority date, or place an additional burden on the water master to administer the rights collectively, not to exceed the 20 cfs total.

It is a longstanding rule of law that a claimant to a water right -- which has been established by a predecessor-in-interest -- must show continuity of title in order to claim such right. See e.g. *Union Mill & Mining Co. v. Danberg et. al.*, 81 F. 73, 103 (D. Nevada)(1897)("the law is well settled that the respondents cannot avail themselves of the rights of these early settlers, with whom they have in no manner connected themselves by title"), citing *Loddell v. Hall*, 3 Nev. 507; *Chiatovich v. Davis*, 28 P. 239, 240; *Salina Creek Irr. Co. v. Salina Stock Co.*, 27 P. 578; *Smith v. O'Hara*, 43 Cal. 371; *Burnham v. Freeman*, 19 P. 761; Gould, Waters, § 234; Black's Pom. Water Rights, § 60; Kinney on Irr. § 253. Where there is a prior decree in the chain of title of a water right, the claimant only need trace their title to such decree, and is relieved from tracing the title all the way back to the water right's inception, at least as to those elements of the water right which were defined in the prior decree. In the SRBA, the Director's Report constitutes *prima facie* evidence of the nature and extent of a water right. I.C. 42-1411(4) (Supp. 1999). Implicit in this evidentiary presumption is that claimant is the owner of the water right as reported. However, in the subcases at issue in this Challenge, where the Claimants are claiming ownership of a greater quantity than that reported by the Director, the Claimants are necessarily required to prove such ownership.

Hence, in claiming a portion of a previously decreed -- and then subdivided -- water right, each of the Claimants are required to produce evidence which demonstrates their ownership of a share of such right. Each Claimant has the burden to show privity of estate with the party to whom the water right was originally decreed (i.e. New International Mortgage Bank). This may be done by showing express conveyances of the water right in each deed or other conveying instrument in the chain of title. If all of the prior conveyances are silent regarding the portion of any water right that is appurtenant to a particular Claimant's land, then by operation of law that Claimant would receive a percentage share that correlates to the amount of land received. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916 (1984); *Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964



(1929)("A division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided."). On the other hand, some of the conveyances may have expressly included all or most of the water rights, and the others being silent would be construed as conveying less water. In any event, the Claimants are not entitled to a "fresh start" in showing the quantity of water necessary to irrigate their land, where the water rights they claim stem from a prior decree. For example, Edna Rae's percentage share of the 03 right is the maximum quantity that can be decreed to her in the SRBA under water right no. 36-00003A. Of course, the Director of IDWR, based on his findings, may recommend less than such percentage share. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741, 947 P.2d 409 (1997).

Therefore, the first step that should be undertaken in sorting out the 03 rights is to make factual findings as to the percentage share of each successor-in-interest to the subject water rights decreed in the in the New Int'l Decree. Although the record in these subcases contains some of the conveyances under which a particular Claimant is asserting ownership of a water right, no Claimant has submitted conveyances connecting themselves with New International Mortgage Bank. For example, for water right no. 36-00003C, the record contains an affidavit of Lynn Babington (May 7, 1996), attached to which is a copy of a deed purporting to convey certain real property "[t]ogether with 15 shares of Buckeye Ditch water."<sup>11</sup> Also attached is a copy of page 4 of the New Int'l Decree (page 4 contains the 03 right). The affiant states that "I acquired that water right as successor in interest in the real property to New International Mortgage Bank." However, simply presenting the New Int'l Decree and the last deed in a chain of title, without showing anything in-between, is wholly insufficient, as a matter of law, to demonstrate privity of estate in a water right once owned by New International Mortgage Bank.

Several matters further complicate the process of finding the share of the water for which each Claimant may be entitled, but the task is not insurmountable. Among other things, there is the question of whether each of the Claimant's claims really are for 03

<sup>11</sup> There is no evidence in the record regarding what measure of water constitutes a "share."



water. As explained elsewhere in this opinion, it appears to the Court that water right nos. 36-00003B and 36-00003D include land within the place of use of the 019 and 020 rights.

Another possibility that strikes this Court is that some of the Claimant's claims may be appropriately classified as claims for water under the 01 or 02 rights. Verl Bell testified that some of the land in question had been watered via a pipeline that took water out of Riley Creek line, but when it subsequently fell into disrepair in the late 1930's, the land serviced by this pipe began to receive water out of the Buckeye Ditch. (Buckeye Ditch water comes out of Billingsley Creek and the pipeline came out of Riley Creek.) Tr. p. 277 ll. 12-17. If this is in fact what happened, it is unclear why the Claimant's affected by this did not claim water under the 01 or 02 rights, with an accomplished transfer (I.C. § 42-1425) of the point of diversion.

Second, the process is further complicated by the fact that partial decrees for 12 cfs of the 01 right, 10.45 cfs of the 02 right, and 11.9 cfs of the 03 right have already been issued to Buckeye Farms; and a partial decree for 0.19 cfs of the 03 right has been issued to Cleve Lloyd. Granted, all of the claims to the 01, 02, 03, 05, 019, and 020 are somewhat interrelated and should have all been joined in one action. However, the fact that partial decrees have been issued is not an insurmountable obstacle to a fair and just adjudication of these water rights. Claimants assert that because all claims to 03 water are not before the Court, it is now impossible to determine each Claimant's percentage share of the 03 right, and therefore they should be allowed to prosecute their claims without regard to these partial decrees. *Brief for Respondent* at 20. Implicit in Claimant's assertion is that some of the water decreed to Buckeye Farms and/or Cleve Lloyd may rightfully belong to some or all of the other Claimants. However, unlike the case of *Harvey v. Deseret Sheep Co.*, 40 Idaho 450, 234 P. 146 (1925), Claimants have not shown (or even attempted to show) facts which support the conclusion that water belonging to Claimants has been decreed to Buckeye Farms and/or Cleve Lloyd. Again, this cannot be determined until all of the deeds in the chain of title tracing back to the New Int'l Decree have been compared. Furthermore, the record indicates that, prior to entry of the partial decree for water right no. 36-00003H (Buckeye Farms), counsel for Claimants was aware that Buckeye Farms was claiming a significant portion of the 03 right. This is

evident from counsel's statements made during the September 26, 1996 Scheduling Conference. Tr. p. 24, ll. 8-22. The partial decree for water right no. 36-00003H was not entered until March 6, 1997. Having knowledge of a pending partial decree for Buckeye Farms, it was incumbent upon Claimants to bring to the Court's attention at that time that entry of such a partial decree should be stayed until a resolution had been made regarding other 03 rights. It is difficult for the Claimants to now argue that they are somehow prejudiced by Buckeye Farms' water rights, especially given that none objected to Buckeye Farms' claims and none asked the Court to stay a resolution until all rights were decided.

Claimants argue that they are not bound by *res judicata* because, under I.R.C.P. 8(c), Challengers cannot raise the issue for the first time in a Motion to Alter or Amend. This argument fails for the simple reason that the Challengers were not parties to these subcases prior to the Motion to Alter or Amend stage. Claimants assert that "the Challengers in this action stood idly by despite many opportunities to participate." *Brief for Respondent* at 18. However, with respect to the issue of whether the New Int'l Decree puts a cap on the amount of water that may be claimed under it, the Challengers are not precluded from asserting *res judicata* for the first time in a Motion to Alter or Amend. The Special Master concluded that "every claimant should be entitled to prove their share of the previously decreed water rights independent[ly] . . ." (i.e. without regard to the overall cap of 20 cfs). The Challengers could not have anticipated that the Special Master would arrive at this conclusion of law, and it would be unfair to deny them the opportunity to refute the Special Master's conclusion of law in a Motion to Alter or Amend. Finally, this Court is not required to accept a special master's report and recommendation, whether there is a challenge or not. Simply put, this Court cannot decree more water than exists.

**Issue No. 2:** Does the failure of each Claimant to the 03 right to object to competing claims to the 03 right constitute a waiver of the right to contest IDWR's quantity recommendation for that Claimant's own claim?

Although it clearly would have been helpful in adjudicating the water rights at

issue, the Claimants are not required to object to competing claims to the 03 right, and failure to do so does not constitute a waiver of the right of each Claimant to object to IDWR's quantity recommendation for their own claim. The State has not directed the Court to any authority that dictates otherwise. To the contrary, competing claimants to a property right in Idaho are required to demonstrate their ownership of the property right on the strength of their own title, and not on the weakness of the competitor's title. *Rice v. Hill City Stock Yards Co.*, 121 Idaho 576, 582, 826 P.2d 1288 (1991), rehearing denied March 27, 1992, citing *Owen v. Boydston*, 102 Idaho 31, 624 P.2d 413 (1981); *Pincock v. Pocatello Gold and Copper Min. Co., Inc.*, 100 Idaho 325, 597 P.2d 211 (1979); *Nelson v. Enders*, 82 Idaho 285, 353 P.2d 401 (1960). Thus, while not technically required to object, the end result may essentially be the same, i.e., by not objecting, and given the cap, these Claimants may well have prejudiced themselves. With a "cap" of 20 cfs with claims totaling 26 cfs, and with nobody objecting, the desired result is like a "sweet heart decree" (commonly seen in private adjudications) in the SRBA; a result which is repugnant to this Court's statutory duties. To be clear, and by way of example, assume 10 claimants are on a common ditch with a 100 inches of water maximum. Each claimant claims 15 inches of water. Nobody on the ditch objects. Out of "thin air", is this Court to decree 150 inches of water where the "Creator" only put 100?

**Issue No. 3:** Where the Claimants have collectively over-claimed the 03 right, should other parties in the SRBA be required to prove which claim(s) to the 03 right is excessive in order to avoid over-allocation of the 03 right?

As stated elsewhere in this opinion, the cumulative total of all claims for water rights based on the third right listed in the New Int'l Decree cannot exceed 20 cfs. Therefore, there is not an issue as to who has to prove what in order to avoid over-allocating the 03 right. Clearly, if any of the Claimants have appropriated "new" or "additional" water not claimed under the 03 right, a separate notice of claim for this supplemental right would have to be made in the SRBA, and would necessarily have a priority date sometime after the 1932 date of the New Int'l Decree.



**Issue No. 4: Absent the filing of claims in the SRBA for the 05 and 19 rights, can such rights be used to cover over-allocation of the 03 right?**

In the abstract, the answer to this question is no; the 05 and 019 rights cannot be allocated to cover claims which exceed the 20 cfs available under the 03 right. However, it appears to the Court that claims may have been made to the 05 and 019 rights in the SRBA, in the sense that water rights were claimed under the New Int'l Decree for their respective places of use, but that such claims were erroneously made under incorrect right numbers and/or that IDWR may have erroneously assigned the wrong number.

As to the 05 right, Buckeye Farms claimed water rights in the SRBA appurtenant to the place of use to which the fifth water right listed in the New Int'l Decree (the Amanda J. Gooding right) was originally appurtenant. As noted in Section X of this opinion, partial decrees have been issued to Buckeye Farms which, on their face, transferred water from the 01, 02, and 03 rights to the place of use to which the 05 right was originally appurtenant. This Court has carefully reviewed the SRBA files for water right nos. 36-00001, 36-00002, and 36-00003H, and is unable to find any basis for a transfer of these rights to the place of use to which the 05 right is appurtenant. If such a transfer has taken place, the Court can find no indication that the accomplished transfer statute (I.C. § 42-1425) has been complied with. It strikes this Court that the explanation for this apparent transfer may simply be an error arising from oversight in reading the places of use listed in the New Int'l Decree.

Nevertheless, it is of no import to the subcases at issue as to whether the 05 right was, in fact, claimed by Buckeye Farms (albeit possibly under an incorrect right number), or whether, in fact, nobody has made a claim to the 05 right. The record indicates that none of the pending Claimants own land within the original place of use for the 05 right, nor has any of the pending Claimants shown ownership of 05 water with a transfer of the place of use to their land. Therefore, it is clear that the 05 right cannot be used to satisfy the pending Claimant's claims. Furthermore, it is not even clear as to whether the 05 right still exists, as the water presently irrigating<sup>12</sup> the 05 place of use is both from a different

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<sup>12</sup> Furthermore, it is not even clear that the 05 place of use is being irrigated at all. Steve Clelland

point of diversion and from a different water source, i.e. Riley Creek instead of Billingsley Creek via the Buckeye Ditch.

As to the 019 (and perhaps the 020) right, it appears that claims may have been made in the SRBA for water rights on the place of use to which the 019 and 020 rights are appurtenant. Specifically, water right nos. 36-00003B and 36-00003D appear to include land within the place of use of the 019 and 020 rights. *Affidavit of Steve Clelland* ¶ 6 (October 15, 1999). A careful review of the files for water right nos. 36-00003B and 36-00003D provides no indication as to why the portions of these rights within the place of use for the 019 and 020 rights have been recommended as part of the 03 group of rights. Again, the explanation for this may simply be error due to oversight by either the Claimant, IDWR, or both. The genesis of this apparent error (i.e. who assigned the water right number to the claim) is immaterial. The fact remains that water rights with an "03" number were reported in the Director's Report and recommended by the Special Master for use on lands to which the 019 and 020 rights are appurtenant. There is no indication in the record which shows that 03 water has been purposefully transferred to the land to which the 019 and 020 were originally appurtenant.

What is important at this point is to make sure that claims numbers in the SRBA accurately reflect the specific right in the New Int'l Decree on which they are based. Therefore, the Special Master on remand is instructed to determine whether 03 water has been transferred onto 019 land, and if not, then to segregate out of these rights a quantity of water which corresponds to the amount of 019 land. Obviously this task will require the expertise and cooperation of IDWR. Further, the Claimants of right nos. 36-00003B and 36-00003D should be allowed to file late claims based on the 019 (and possibly the 020) rights. As to any 03 water that may be "freed up" as a result of

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states in his affidavit that "The [05] place of use is being irrigated with Riley Creek Water." See *Affidavit of Steve Clelland* ¶ 9. In contrast, counsel for Claimants contends that "the 36-00005 place of use has been dewatered, except for one acre described in the partial decree to 36-00003H (SWSW§27)." See *Claimants' Response to Order for Additional Information and/or Clarification on Challenge* at 4. Either scenario is probative of the possibility that the 05 right may no longer exist.

diminishment of claim nos. 36-00003B and 36-00003D, all competing claimants to the 03 water should be allowed an opportunity to prove ownership and use of such water.<sup>13</sup>

**Issue No. 5, Part 1: Was it error for the Special Master to recommend a diversion rate based on a gravity irrigation analysis when the Claimant's water right is actually exercised in part through sprinkler irrigation which generally uses less water than gravity irrigation?**

In these subcases, the Special Master did not make specific findings as to the type of water delivery system used by each of the claimants. However, the record indicates that the Simcoes utilize a sprinkler delivery system for water right nos. 36-00003F and 36-00003M. *Findings of Fact and Conclusions of Law* at 11. As to the other water rights at issue, apparently some of them are applied using gated pipe and furrows, as well as with sprinklers. For example, Mr. Babington testified that "[w]e've irrigated in two different ways. We did put a . . . pressure pump in to where we can sprinkler irrigate; and that's our majority use. We have . . . in 1997 irrigated with gated pipe." Tr. p. 359, ll. 8-12. Also, Mr. Harbison testified that he has used both gravity and sprinkler irrigation since 1993. Tr. p. 379, l. 23 – p. 380, l. 6.

The evidence put on by the Claimants regarding quantity consisted of expert testimony by Dr. Charles Brockway, Jr ("Dr. Brockway"). Dr. Brockway had conducted

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<sup>13</sup> The Court has struggled with the question of whether the remaining Claimant's should be allowed to make a claim for any water that may be "freed up" as a result of diminishment of water right nos. 36-00003B and 36-00003D. Weighing against these Claimant's is the fact that they have had their day in court to prove ownership of their percentage share of the 03 right. While very interesting, the testimony of Dr. Brockway goes to how much water each Claimant needs, or his land can use, and has absolutely nothing to do with how much (if any) water each Claimant owns as a successor-in-interest to water rights owned by New International Mortgage Bank. Weighing in favor of allowing the Claimants to prove, on remand to the Special Master, that they are entitled to any "freed up" water, is the fact that the quantities reported for the 03 rights in the Director's Report were not based on an examination of the chain of title of each of the Claimants. Although the facts which underlie the Director's Report are not in the record, what is clear is that an examination of the respective titles is not among these underling facts. The fact that IDWR's recommendations add up to exactly 20 cfs for the 03 rights indicates that IDWR was aware of the overall limit imposed by the New Int'l Decree, but that IDWR was not aware as to how actual ownership of this 20 cfs has been affected by conveyances and conduct subsequent to 1932. Therefore, it is unknown whether IDWR's recommendation would have added up to exactly 20 cfs if portions of water right nos. 36-00003B and 36-00003D had been reported out under a 019 or 020 number. For this reason, the Court will allow any water "freed up" to potentially be reallocated among the various Claimants, assuming adequate proof is made as to ownership and beneficial use of such water.



what he calls an "excess flow sensitivity analysis" to determine a range of diversion rates for the subject water rights. This analysis assumed a furrow irrigation system, irrespective of what type of delivery system is actually being used with each particular right. In essence, NSGWD asserts that because sprinkler irrigation is generally more efficient than gravity irrigation, Dr. Brockway's analysis cannot yield accurate results regarding actual beneficial use, at least for those rights where sprinklers are used.

The facts in the record are insufficient to allow this Court to answer the question posed by NSGWD as it may apply to each of these particular subcases. The evidence put on by the Claimants cannot be viewed as if it were in a vacuum. That is, the starting point for each of the rights claimed must necessarily be a determination as to each Claimant's percentage share -- shown through their chain of title -- of a previously decreed right. Once each of the Claimants have made a satisfactory showing as to ownership of a portion of a previously the decreed right, the evidence they have produced may be relevant in the event that a particular Claimant's percentage share is greater than IDWR's recommendation. If, on the other hand, the Claimant's claimed share under the 03 right is less than or equal to IDWR's recommendation, evidence put on by the respective Claimant to show that their present 03 right "use needs" exceeds the previously decreed amount, would be irrelevant. In this event, it would not matter whether the Claimants' evidence employed absolutely recognized sound scientific principles, or whether it was based on interpreting patterns of scattered chicken bones, i.e. "junk science." Therefore, until each of the Claimants has shown privity of estate and ownership of a portion of the original 03 right, this Court cannot properly evaluate the relevancy of Dr. Brockway's analysis.

**Issue No. 5, Part 2: Was it error for the Special Master not to address, by qualifying language or by another legal means, that in the event of a water call, the water quantity associated with actual beneficial use will apply?**

The Special Master did not err by failing to address, by qualifying language or other legal means, that in the event of a water call, the quantity associated with actual beneficial use will apply. As a preliminary matter, the Court assumes that NSGWD intends the phrase "qualifying language" to mean a remark put in the decree pursuant to

I.C. § 42-1411(2)(j) (Supp. 1999) as incorporated by I.C. § 42-1412(6) (Supp. 1999). NSGWD did not elaborate on what it means by the phrase "other legal means."

Implicit in the quantity element, as contained in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: "Idaho's water law mandates that the SRBA not decree water rights 'in excess of the amount actually used for beneficial purposes for which such right is claimed.'" *State v. Hagerman Water Right Owners*, 130 Idaho 727, 730, 947 P.2d 400, 403 (1997), quoting I.C. § 42-1402. However, the quantity element in a water right necessarily sets the "peak" limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted). *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 415, 958 P.2d 568 (1997). The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the stage of the crop at any given point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short results in a loss or reduction to the water right. *State v. Hagerman Water Right Owners*, at 730, 947 P.2d at 403.

Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to "call,") more water than can be beneficially applied. Stated another way, a water user has no right to waste water. In *State v. Hagerman Water Right Owners*, 130 Idaho at 735, 947 P.2d at 408, the Idaho Supreme Court stated:

A water user is not entitled to waste water. . . . It follows that a water right holder cannot avoid a partial forfeiture by wasting that portion of his or her water right that cannot be put to beneficial use during any part of the statutory period. If a water user cannot apply a portion of the water right to beneficial use during any part of the statutory period, but must waste the

water in order to divert the full amount of the water right, a forfeiture has taken place.

*Id.* (citations omitted).

NSGWD has not convinced this Court that it is necessary to have a restatement of this principal on the face of a water right decree. More importantly, the quantity element of a water right does not contemplate minute by minute, or hour by hour, limitations on diversions, as this truly would be an administrative nightmare.

**Issue No. 6: Have the Claimants met the burden of persuasion with respect to the quantity element as required by I.C. § 42-1411(5)?**

I.C. § 42-1411(5) states that "[e]ach claimant of a water right acquired under state law has the ultimate burden of persuasion for each element for a water right. Since the director's report is prima facie evidence for the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report." I.C. § 42-1411(5). Because these subcases are being remanded to the Special Master for further findings, it is unnecessary at this time to opine whether the Claimants have met the burden imposed on them by I.C. § 42-1411(5).

**Issue No. 7: Does a decree for more than X cfs for water right 36-00003(respective split) constitute an impermissible enlargement to the 03 right?**

Because these subcases are being remanded to Special Master Cushman for further proceedings, the Court finds that it is unnecessary to decide this issue at this time.

**Issue No. 8: Does the combining of water right 36-00003C with 36-00003L, and water right 36-00003F with 36-00003M, require an application with IDWR pursuant to I.C. § 42-222?**

Because these subcases are being remanded to Special Master Cushman for further proceedings, the Court finds that it is unnecessary to decide this issue at this time.

**Issue No. 9: Is a Motion to Alter or Amend before a special master in the SRBA governed by I.R.C.P. 59(e)?**

The Court notes that although NSGWD has listed this issue, their brief contains no argument on this point. However, to the extent that it may answer the question posed by NSGWD, the Court incorporates herein the relevant portions of its *Memorandum Decision and Order on Challenge* in subcases 36-00061, 36-00062, and 36-00063, (*NSGWD v. Howard and Rhonda Morris*) (Sept. 27, 1999). It is clear that the standard has to be either I.R.C.P. 52(b) or 59(e). The Court recognizes that I.R.C.P. 59(e) speaks in terms of altering or amending a "judgment," and that special masters do not enter judgments. However, the proceedings in the SRBA are unique, and by way of analogy, by the order of reference to the special masters, their function relative to the presiding judge is much like a magistrate's function in an ordinary civil proceeding. Therefore, to some extent, an SRBA special master's report and recommendation is analogous to a magistrate's judgment which is then appealed to the district court.

**Issue No. 10: Did the Special Master err in considering any evidence concerning the claim to water right 36-00003C and 36-00003F since no outstanding objections were at issue at time of trial?**

Because these subcases are being remanded to Special Master Cushman for further proceedings, the Court finds that it is unnecessary to decide this issue at this time.

**Issue No. 11: With respect to water right No. 36-00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?**

The claim for the 36-00003B water right included fish propagation as a purpose of use. IDWR did not recommend fish propagation as a purpose of use. The 36-00003B claim is based on the New Int'l Decree. The Decree states that the purposes of use for the described rights include "irrigation," "domestic" and "other purposes." However, the Decree does not specifically designate a particular purpose of use for each described water right. Rather, the purpose of use language collectively modifies several of the described



rights, including the 36-00003 right. (The 36-00003B right comprises part of the original 36-00003 right.) Therefore, the specific purpose for each described right cannot be directly ascertained from the face of the Decree.

The Special Master ruled that fish propagation could be included as an "other purpose" as the term is used in the Decree. The basis for the ruling was twofold. First, the Special Master relied on the operation of I.C. § 42-1427 (1996 & Supp. 1999)<sup>14</sup>. The provisions of I.C. § 42-1427 require the director's recommendation to include those elements of a water right not included in a prior decree based on the extent of the beneficial use of the water right as of the date of the SRBA was commenced on November 19, 1987. The Special Master made the finding, based on the evidence presented, that there were ponds in place which had historically been used for fish propagation on

<sup>14</sup> Idaho Code § 42-1427 provides in its entirety:

**Descriptions of water rights—Reporting and decreeing elements of a decreed or licensed water right.—**(1)Legislative findings:

(a) The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements. Because of the increasing demand for water, it is important that the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply. One (1) purpose of chapter 14, title 42, Idaho Code, is to establish, through an adjudication a uniform description for surface water rights, ground water rights and water rights which include storage.

(b) Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of the commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

(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 on the extent of beneficial use of the water right as of the date of the commencement of an adjudication.



November 19, 1987. Although the director's recommendation did not include fish propagation as a purpose of use, the Special Master permitted the Claimant to present evidence regarding the purpose of use on November 19, 1987, in order to establish the purpose of use element pursuant to I.C. § 42-1427. Based on the evidence presented that there were ponds in existence on November 19, 1987, the Special Master ruled that the Claimant established fish propagation as a purpose of use. As a result, the Challengers raised issues regarding the proper scope and application of I.C. § 42-1427. Namely, whether a claimant can independently rely on operation of I.C. § 42-1427 for establishing an element of a water right irrespective of the director's recommendation, and also, whether the statute can apply to "vague elements" in prior decrees as opposed to omitted or undefined elements.

The second basis for the Special Master's ruling was the finding that the water right was historically being used for fish propagation prior to the entry of the Decree in 1932. This aspect of the ruling raised issues regarding the interpretation of the Decree and in particular, the scope of the term "other purposes." This basis for the ruling, however, essentially renders the application of I.C. § 42-1427, (and the issues raised by its application), irrelevant for purposes of this challenge. By way of explanation, historically fewer elements were required to describe a water right than are required today. Consequently, it follows that older decrees being relied on for establishing water rights may not contain all the elements that are presently required for defining a water right. The purpose of I.C. § 42-1427 is to attempt to remedy the situation where the passage of time makes it difficult to obtain evidence necessary to establish the element not defined in a prior decree. See *Fremont-Madison Irrig. Dist. V. Idaho Groundwater Appropriators, Inc.*, 129 Idaho 454, 463, 926 P.2d 1301, 1310 (1996).

In this case, however, the Claimant did present evidence that one of the purposes of use for the water right prior to 1932 was fish propagation. Tr. p. 298-299. As such, reliance of the provisions of I.C. § 42-1427, together with evidence of the purpose of use on the date of the commencement of the SRBA becomes unnecessary. Accordingly, a ruling on the scope and application of the statute is also unnecessary. The focus then turns to the interpretation of the Decree and how the purpose of use element is defined

therein.

In reviewing the Decree, the Court makes the following observations. As to purpose of use element, the Decree is both vague and internally inconsistent. The Decree is vague in that it does not designate a particular purpose of use for each decreed water right. Rather the Decree states that the described water rights, including the place of use covered by the 36-00003B right, can be used for "irrigation", "domestic" and "other purposes." The Decree is also internally inconsistent in that in the next immediate section sets forth that the water for the same described property is "necessary for . . . proper irrigation and cultivation." This observation is also consistent with the issues raised by the Challengers in regards to the application of I.C. § 42-1427, wherein it is admitted the purpose of use element is somewhat defined, albeit inadequately. Consequently, one interpretation is that the Decree was not intended to designate or otherwise provide a specific limitation on the purpose of use. However, even if it was ultimately the intent that the Decree specifically define or limit the purpose of use, as a matter of law, the Decree could not be *res judicata* as to this particular element. In actions to determine and settle water rights, it is a settled principle of law that decrees and judgments "should be so definite and certain as to the exact rights of each party as to constitute an estoppel between the parties, and to be a full, complete, and definite adjudication of the entire subject matter, as between the parties to the action." See 3 Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1563 (2d ed. 1912). Since the Decree has limited probative value with respect to establishing the purpose of use element, a claimant relying on the Decree must necessarily establish purpose of use through additional evidence.

In regards to interpreting the meaning of "other purposes," absent speculation, the Court cannot determine its intended meaning. The Court acknowledges canons of interpretation wherein a general term, which follows a list of specific terms, is not interpreted in its broadest sense. See e.g., *Pepple v. Headrick*, 64 Idaho 132, 135, 128 P.2d 757, 760 (1942) (discussing generally the *ejusdem generis* rule of statutory construction). Rather, the general term is interpreted to limit the specific terms to a particular class of things. In this case however, the smallest common class shared by "irrigation" and "domestic" is the purpose of use. Consequently, this canon of

interpretation also provides little guidance.

Based on the foregoing reasons, the Court rules that the New Int'l Decree does not sufficiently define the purpose of use element as to the 36-00003B water right so as to preclude the Claimant from establishing the purpose of use element. In this regard, the element should be treated just the same as if the Decree were silent as to purpose of use. In other words, if the Decree were silent on the purpose of use, the Claimant would necessarily be required to present evidence on that element, notwithstanding the Decree. As such, any purpose for which the water right was being used at the time the Decree was entered is within the scope of the Decree. The one *caveat* is that the "other purposes" language cannot be construed to mean that a Claimant has the right to change the purpose of use following the entry of the Decree. This would exceed the authority of the court which entered the Decree. Since, the Claimant in this case put on evidence of fish propagation as a purpose of use, prior to the entry of the Decree, this Court holds, consistent with the Special Master's ruling, that fish propagation is a purpose of use within the meaning of the Decree. Accordingly, to the extent fish propagation historically took place prior to the entry of the Decree, this would not constitute an impermissible enlargement of use based on the purpose of use.<sup>15</sup> The Court makes no ruling as to a specific quantity for that purpose, as additional findings are required on this issue.

<sup>15</sup> The Court acknowledges that the provisions of I.C. § 42-1427 do not authorize an impermissible enlargement of use. Again, however, the basis for this ruling is not predicated on the operation of I.C. § 42-1427.

**XIII**  
**ORDER OF RECOMMITMENT WITH INSTRUCTIONS TO SPECIAL  
MASTER CUSHMAN**

It is ORDERED that the subcases at issue in this Challenge be recommitted to Special Master Thomas R. Cushman<sup>16</sup> for further proceedings consistent with this opinion.

IT IS SO ORDERED:

DATED: November 23, 1999

B. Wood

**BARRY WOOD**  
Administrative District Judge and  
Presiding Judge of the  
Snake River Basin Adjudication

<sup>16</sup> It should be noted that Special Master Haemmerle, who is no longer working in the SRBA, originally heard these subcases. Special Master Cushman is his replacement.

## CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE; ORDER GRANTING JUDICIAL NOTICE; ORDER RECOMMITTING TO SPECIAL MASTER was mailed on November 23, 1999, with sufficient first-class postage to the following:

STATE OF IDAHO

Represented by:

CLIVE STRONG

NATURAL RESOURCES

DEP AG OFFICE OF ATTY GEN

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DAVID O. KINGSTON

DOYT & ROXIE SIMCOE

DOYT H. SIMCOE

EDNA MAE REA

KATHY L. BABINGTON

KINGSTON PROPERTIES L.P.

KINGSTON PROPERTIES, L.P.

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MARIA YVONNE ANDERSON

5151 UMATILLA

BOISE, ID 83709

Phone: 208-362-9360

MEMORANDUM DECISION AND ORDER

Page 49 11/23/99

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

In Re SRBA

Case No. 39576

Subcase Nos. 36-00003A, 36-00003B,  
36-00003C, 36-00003F, 36-00003K, 36-  
00003L and 36-00003M

ORDER ON STATE OF IDAHO'S  
MOTION FOR  
RECONSIDERATION AND/OR  
MOTION FOR CLARIFICATION

Appearances:

Mr. Peter J. Ampe, Deputy Attorney General, Natural Resources Division, Attorney for  
the State of Idaho.

Ms. Dana L. Hofstetter, Beeman & Hofstetter, P.C., Attorney for North Snake Ground  
Water District, May Farms, Ltd., and Faulkner Land and Livestock Company.

Mr. Patrick D. Brown, P.C., Attorney for Lynn Babington, David Kingston, Edna Rea  
(Verl Bell), and Doyt Simcoe.

I  
BRIEF PROCEDURAL BACKGROUND

1. On November 23, 1999, this Court issued its *Memorandum Decision and Order on Challenge* ("Memorandum Decision") in subcase nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L and 36-00003M.
2. On December 8, 1999, the State of Idaho filed a *Motion for Reconsideration and/or Motion for Clarification*. The State of Idaho's motion is limited to part XII, issue no. 11., of the *Memorandum Decision*, which states as follows: "With respect to 36-

00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?"

## II.

### MATTER DEEMED FULLY SUBMITTED FOR DECISION

The State of Idaho filed this motion on December 8, 1999. There having been no responses and/or additional briefing filed and the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or December 9, 1999.

## III.

### ISSUES RAISED/RELIEF REQUESTED

The issues and related arguments raised by the State of Idaho can be paraphrased as follows (i.e., the State's assertions are):

1. That this Court's ruling does not address the limitations imposed on the claimants by the pleadings in the case of *New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity no. 1602 (1932); and,
2. That this Court's ruling may also be interpreted as allowing a new use (fish propagation) to obtain a priority date prior to the date the new use began.

The State of Idaho requests that this Court reconsider its order on challenge regarding these two issues. In the alternative the State seeks clarification regarding the second issue.

## IV.

### DECISION

1. **LIMITATIONS IMPOSED BY THE PLEADINGS**

The State of Idaho asserts that the decree entered in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree" or "Decree") did not include a fish propagation purpose of use in any water right decreed to the predecessor(s)-in-interest of Kingston Properties L.P., the claimant of water right 36-00003B ("Kingston"), because such specific use was not claimed by Kingston's predecessor(s)-in-interest in that litigation. In essence, the State's argument is that irrespective of what the "other purposes" language in the New Int'l Decree may mean for other water rights adjudicated therein, "other purposes" does not include "fish propagation" for water right no. 36-00003B, because the New Int'l pleadings, and stipulation only speak to "irrigation," cultivation," "production of ordinary agricultural crops," and the like. Therefore, the State argues, Kingston is bound by the "purpose of use" statements found in these various documents, none of which make any mention of "other purposes" or "fish propagation."

As a preliminary matter, and as discussed in this Court's *Memorandum Decision*, although Kingston has not yet connected its title to any water right decreed in the New Int'l Decree, it appears that the land presently owned by Kingston is within the places of use originally decreed to the plaintiff, New International Mortgage Bank (the 03 right) and to one of the defendants/counter-claimants, Harlan Bell (the 019 and 020 rights). These subcases have been recommitted to Special Master Cushman for further proceedings for the purpose of determining ownership of the water rights involved in these subcases. Therefore, because the water right claim at issue may involve either the 03 right and/or the 019 / 020 rights, it is necessary to discuss the purpose of use as it pertains to both of these New Int'l rights. It should be noted that there are variations in the "purpose of use" statements which are scattered about in the New Int'l Decree and its underlying documents. However, as it relates to the subcase at issue, these variations are immaterial as the "other purposes" language contained in the Decree pertains to the described 03 right as well as the 019 / 020 rights.

This Court previously ruled that the New Int'l Decree had limited probative value or otherwise lacked specificity with respect to describing the purpose of use element for the water rights decreed therein. Although the New Int'l Decree clearly established "irrigation" and "domestic" as purposes of use, the "other purposes" language was not otherwise defined. Thus, this Court ruled that a party claiming a purpose of use other than irrigation or domestic under the "other purposes" language could present evidence regarding the purpose of use in existence at the time the Decree was entered. The State of Idaho asserts that notwithstanding the "other purposes" language contained in the Decree, the 36-00003B water right should be limited to the purposes of use expressly stated in the pleadings and the stipulation for decree filed in the case. This Court disagrees with the assertion for several reasons.

First, the Idaho Supreme Court has also recognized that the subject New Int'l Decree "describes the required elements of the water rights under I.C. 42-1409 except for consumptive use, period of use, amount of irrigated acreage and some lack of explicit use." *State v. Hagerman Water Right Owners*, 130 Idaho 736, 738, 947 P.2d 409, 411 (1997)(emphasis added). Thus, this Court is correct as a matter of law in concluding that the Decree does not adequately or fully define the purpose of use element. In other words, it cannot be concluded that the Decree limits purpose of use to only irrigation and domestic.

Next, in attempting to interpret the intent behind the "other purposes" language, the Court does not have before it the complete record from the *New International* case (including a Reporter's Transcript of all hearings before the Court). As such, this Court cannot determine the motivation behind including the "other purposes" language in the Decree. The Court has taken judicial notice of those items contained in section III of the *Memorandum Decision*. The Stipulation, Answer and Counterclaim do not include the "other purposes" language as pointed out by the State. However, contrary to the State's assertion, the prayer in the Complaint does in fact contain the "other purposes" language as applied to the defendants in the case. See *Complaint in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of

the District of Idaho, In Equity No. 1602 (1932). Additionally, the findings of fact and the conclusions of law entered by the New Int'l Court on March 22, 1932, reference irrigation, domestic and "other purposes" as purposes of use for the described property pertaining to the 03 right and the 019 / 020 rights. See *Findings of Fact in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932). The foregoing lends further credence to the assertion that the "other purposes" language was intended to be included in the Decree and applied to the subject water rights as opposed to the situation of a Court acting outside the scope of its jurisdiction or otherwise including the language in the Decree as an after-thought.

Further, as to any limitations imposed by the New Int'l pleadings with respect to the Answer and Counterclaim for the 019/020 water right, the pleading alleges that the claimed water had been historically used for "agricultural and domestic purposes." Agricultural purposes has a broader meaning than does irrigation and is not strictly limited to the irrigation of crops. Rather, irrigation falls within the broad meaning of agriculture as does fish propagation (i.e., most commonly thought of as some segment of the food production world).

Despite the intent behind including the "other purposes" language in the Decree, the fact is that the language was none-the-less included in the Decree. As such, this Court cannot strike, "blue pencil" or otherwise fail to attempt to give effect to that language. Although, the language appears to lack specificity today, sixty-eight (68) years ago all parties to the Decree may well have fully appreciated the context and meaning of the term. Since historically, the judgment was not appealed from, nor was a motion filed to correct the judgment, this Court is bound by the terms of the judgment even if, as contended by the State, the "other purposes" language in the Decree does not conform to the pleadings or stipulation. Again, however, it should be reiterated that because the "other purposes" provision is contained in both the Complaint and the Findings of Fact and Conclusions of Law it cannot be concluded as a matter of fact that the Decree does not conform to the agreement of the parties. The case law cited by the State in support of



the argument that consent decrees must conform to the agreement or stipulation of the parties is of little assistance in this regard. The authorities cited by the State involve timely appeals from judgments where it was contended that the judgment varied from the agreement of the parties. See e.g., *Bank of Boston Connecticut v. Degroff*, 624 A.2d 904 (Conn. Ct.App. 1993)(holding appeal may be properly taken from refusal of court to grant a motion to correct judgment); *Fisher v. Fisher*, 84 Idaho 303, 371 P.2d 847 (1962)(direct appeal from judgment where court refused to modify judgment to conform with alleged terms of stipulation). In this case, approximately sixty-eight (68) years have elapsed since judgment was entered, and apparently until the SRBA proceedings were under way it remained unchallenged. Thus this Court is without jurisdiction to go back and modify the judgment, assuming the Court were able to determine the full agreement which led to the judgment.

Next, the intent of the parties to the Decree must also be evaluated against the backdrop that in 1932, a specific purpose or nature of use was not an element required for describing a water right. Rather the water right had to be for a beneficial use. Accordingly, many older decrees failed to include a specific purpose of use in describing a water right or did not describe the purpose of use in narrow and discrete terms. The Idaho legislature even recognized this situation in enacting I.C. § 42-1427 which states in relevant part:

The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and the Courts have made this original description of a water right more specific by the addition of other elements.

Thus it logically follows that if a purpose of use element was not historically required to describe a water right in a decree, that the parties to the decree would not be too concerned about concisely pleading, stipulating to, or otherwise narrowly defining purposes of use. Moreover, in the context of a purpose of use for fish propagation which is considered a non-consumptive use of water it is even less likely that the parties would

contemplate the need to expressly include fish propagation as a purposes of use. This is particularly true in the context where the fish propagation is being used as a purpose in conjunction with, or secondary to, irrigation.

Finally, it should be reiterated that this Court's ruling does not give a claimant *carte blanche* to rely on the Decree and the "other purposes" language to support any presently existing purpose of use. Rather, because of the lack of explicitness as to the purpose of use (at least as to a claim other than for irrigation or domestic), this Court ruled that the claimant must present evidence as to purpose of use at the time the Decree was entered. Also, this is not to say that the claimant is entitled to ignore the intervening sixty-eight years of conduct regarding purpose of use in proving up the water right. As such, the purpose of use originally decreed could have been changed, abandoned or forfeited in the interim period. See *State v. Hagerman Water Right Owners Inc.*, 130 Idaho 736, 741, 947 P.2d 409 (1997) (decreed water rights are not insulated from reexamination by the court and may be lost or reduced based on evidence that right has been forfeited, abandoned or lost through adverse possession).

For the foregoing reasons, this Court disagrees that the claimants to 03 right (and the 019 / 020 rights) are automatically limited to the purpose of use for irrigation or domestic stated in the pleadings and in the Stipulation. Stated another way, this Court refuses the State's request to automatically apply the more strict 1999 legal requirements, which have evolved over time, to the legal climate in 1932 relative to defining purpose of use.

## 2. THE APPROPRIATENESS OF THE PRIORITY DATE

The State next argues that even if the Court finds that fish propagation is a purpose of use under the Decree, that the evidence presented by the Claimant only established the existence of the fish ponds as early as the 1920's. The State argues that since the Decree contains an 1884 priority date, this Court is in effect impermissibly granting an 1884 priority date for a purpose of use that could only be proved to exist as early as the 1920's. Again, this Court disagrees.

The basis for the claimed water right is the Decree. At issue is the interpretation of the Decree as to the purpose of use. The evidence presented as to purpose of use went to the interpretation of the "other purposes" language. Hence a claimant is not required to go back and attempt to prove the purpose of use as of the priority date contained in the Decree and essentially relitigate the case despite the absence of contrary evidence. Rather, given the "other purposes" language it is sufficient that the purpose of use be shown at the time the Decree was entered. Again, the Court is interpreting the Decree, not requiring the relitigation of the underlying merits of the Decree.

Contrary to the State's assertion, despite the evidence only showing the existence of the fish ponds in the 1920's, having the fish propagation right decreed with an 1884 priority date would not constitute an enlargement in use. As stated above, the Court is interpreting the Decree as opposed to having the merits relitigated by the claimant. Obviously it would be to the claimant's benefit to able to prove the purpose of use back to the priority date as decreed. However, this Court ruled that the "other purposes" language included the purpose of use in effect at the time the Decree was entered. This Court is not setting the priority date based on the evidence presented today. Rather, the Decree in 1932 set the priority date of 1884 for irrigation, domestic and other purposes. An enlargement in use would also not occur because historically a water user could change the purpose of use for a water right and still maintain the same priority date so long as other water users were not injured. Although this issue has never been squarely addressed in Idaho<sup>1</sup>, other jurisdictions (including federal) have historically applied the common law "no injury" rule to changes in purpose of use. Idaho however has relied on authority from other jurisdictions in applying the no injury rule in conjunction with changes in the point of diversion. In *Hard v. Boise City Irrigation and Land Co.*, 9 Idaho 589, 76 P. 331 (1904), the Idaho Supreme Court stated (with emphasis):

<sup>1</sup> In *Baker Industries Incorporated v. Georgetown Irrigation District*, 101 Idaho 187, 192, 610 P.2d 546, 551 (1980), the Idaho Supreme Court acknowledged the absence of any Idaho cases addressing the issue where the purpose of use for a water right has been changed from one category, delineated in Article 15 § 3 of the Idaho Constitution such as agriculture, to another category such as mining.

That persons entitled to the use of water may change the place of diversion if others are not injured by such change seems to be the universal rule, the test always being: 'If others are not injured by such change.'

In *Romelli v. Irish*, 96 Cal. 214, 31 Pac. 41, a California case, it is said: 'It is also settled law that persons entitled to the use of water may change the place of diversion or place where it is used, or the use to which it was first applied if others are not injured by such change.'

The following strong language is used in *Union Mill etc. Co. v. Dangberg*, 81 Fed., page 115: 'A party having obtained the prior right to the use of a given quantity of water is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, and may also change the character of its use if the rights of others be not affected thereby.'

*Id.* at 598.

Although *Hard* did not address the issue of purpose of use, the Court clearly adopted the "no injury" rule which, in accordance with the authorities relied on by the Court, also applies to changes in purpose of use. It is incongruous that the Court would adopt the general rule only partially by refusing to apply the no injury rule to changes in purpose of use. This is especially true in light of the fact that a discrete purpose of use was historically not used to describe a water right. See I.C. § 42-1427. Furthermore, the legislature has also adopted the no injury rule as it pertains to changes in nature of use. See I.C. § 42-222; I.C. 42-1425-1426.

In *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937), the Idaho Supreme Court held that the no injury rule applied to changes in purposes of use that are within the generically described classifications of purposes of use set forth in Article 15 § 3 of the Idaho Constitution. Article 15 § 3 of the Idaho Constitution lists domestic, mining, manufacturing, and agricultural as beneficial purposes. Idaho Const. Art. 15 § 3. The Court in *Zezi* upheld the change of purpose of use within the generic classification of mining. Specifically, that the change from one type of mining to another type of mining does not invalidate an appropriation for mining purposes. *Id.* at 712, 68 P.2d at 55. This holding was reconfirmed in *Beker Industries Inc. v. Georgetown Irrigation District*, 101



Idaho 187, 192, 610 P.2d 546, 551 (1980). In *Beker*, the Court distinguished between water use changes occurring within a generic category from the situation where a water user changes generic uses (e.g. mining to agriculture). In the instant case, of the four generic purposes of use mentioned in the Idaho Constitution, fish propagation most correctly fits under the classification of agriculture, as does irrigation. Accordingly, any change in purpose of use from irrigation to fish propagation would be considered a change within the generic or collective classification of agricultural purpose.<sup>2</sup> This is also consistent with the broadly stated beneficial purposes listed in the Article 15 § 3 of the Idaho Constitution. Simply put, historically and constitutionally, water rights were not defined in discrete narrow purposes of use. That being said, and given the non-consumptive nature of a fish propagation right, this Court cannot conclude that this Court's interpretation of the "other purposes" language allowed an impermissible enlargement in use by applying an 1884 priority date to the fish propagation right.

Lastly, this Court's ruling is consistent with the legislative policy set forth in I.C. § 42-1427, wherein rather than nullify prior decrees that inadequately defined a water right by present day requirements, the statute provides for a Director's Recommendation based on the purpose of use as of the date of commencement of the SRBA. This policy also could possibly have the effect of enlarging a water right by resulting in the recommendation of a purpose of use that was historically not intended by the decree.

## V.

### CONCLUSION

For the foregoing reasons, this Court holds that the pleadings in the New Int'l case did not preclude the New Int'l Decree from including fish propagation as a purpose of use under the "other purposes" language as the Decree applies to the 03 or the 019/020

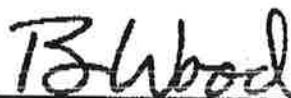
<sup>2</sup> The Supreme Court of Washington, in *Nuebert v. Yakima-Tieton Irrigation District*, 814 P.2d 199 (1991) addressed a similar issue regarding purpose of use. Specifically, the issue was whether a purpose of use for irrigation also included a purpose of use for frost protection. In finding that irrigation did include the beneficial purpose of frost protection, the Washington Court held that the term "irrigation" implies a construction broader than merely nourishing plant roots. Further, the Court held: "A broad construction of beneficial uses which treats all agricultural uses collectively is also consistent with this state's original appropriation law which provided a right to appropriate water 'for irrigation, mining or manufacturing purposes....'" (citing Laws of 1891, ch. 142, § 1, p. 327).



water rights. Further, that applying the priority date as contained in the Decree to a fish propagation purpose of use does not constitute an impermissible enlargement.

IT IS SO ORDERED:

DATED: JANUARY 11, 2000



BARRY WOOD  
PRESIDING JUDGE OF THE SNAKE  
RIVER BASIN ADJUDICATION

### **CERTIFICATE OF MAILING**

I certify that on January 11, 2000, a true and correct copy of the **ORDER ON STATE OF IDAHO'S MOTION FOR RECONSIDERATION AND/OR MOTION FOR CLARIFICATION** were served by first-class mail, postage paid to the following:

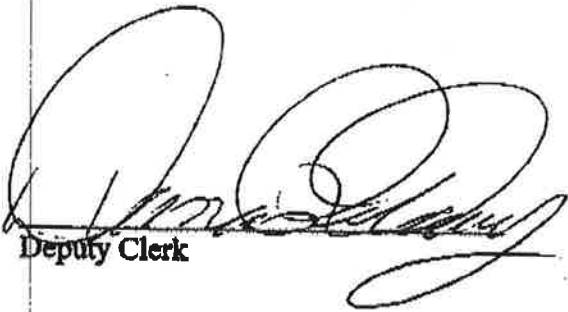
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Chief, Natural Resources Division  
Office of the Attorney General  
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Dana L Hofstetter  
PO Box 1427  
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Patrick D. Brown  
109 S Adams St  
Jerome, ID 83338

Maria Yvonne Anderson  
5151 Umatilla  
Boise, ID 83709



Deputy Clerk

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Department of Water Resources

200 APR 17 AM 8:17

DISTRICT COURT-SRBA  
TWIN FALLS CO., IDAHOIN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN Re SRBA

Case No. 39576

Subcase: 36-00003A, 36-00003B,  
36-00003C, 36-00003F, 36-00003K,  
36-00003L, and 36-00003MORDER SETTING SUBCASE  
DEADLINES

A Status Conference was held in the above subcases on April 14, 2000. At the Status Conference, the Special Master set the following deadline:

5/31/00      5:00 pm      Deadline for Filing Motions to Amend Claims or Motions  
for Late Claims.

IT IS FURTHER ORDERED that a Telephone Status Conference will be held as follows:

Date:            6/29/00 at 9:30 am

Location:      SRBA District Court  
253 Third Avenue North  
Twin Falls, ID

DATED April 17, 2000.



THOMAS R. CUSHMAN  
Special Master  
Snake River Basin Adjudication

Outside an Order Setting Status  
Conf. issued 2/28/00, this is  
the only order Cushman has done  
since it was recommitted to  
him — Y

### CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER SETTING SUBCASE DEADLINES was mailed on April 17, 2000, with sufficient first-class postage prepaid to the following:

Director of IDWR  
PO Box 83720  
Boise, ID 83720-0098

Patrick D. Brown  
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State of Idaho  
PO Box 83720  
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Maria Yvonne Anderson  
515 Umatilla  
Boise, ID 83709

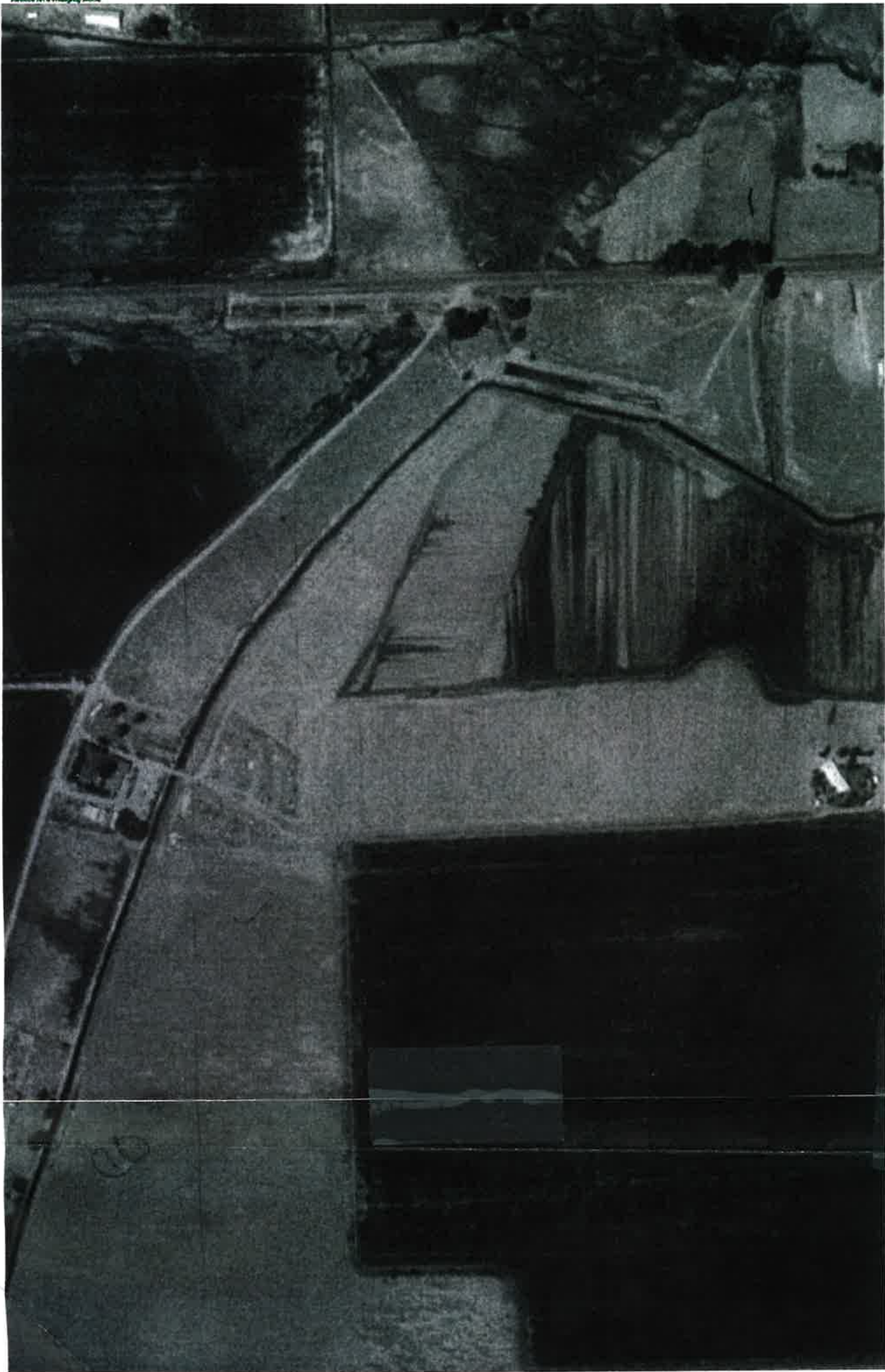
  
Deputy Clerk

Microsoft TerraServer

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USGS Aerial Photograph

4 km SW of Hagerman, Idaho, United States 16 May 1992



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Image courtesy of the US Geological Survey.



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USGS Aerial Photograph

5 km SW of Hagerman, Idaho, United States 16 May



1992



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Image courtesy of the US Geological Survey.

Microsoft TerraServer

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USGS Aerial Photograph

5 km SW of Hagerman, Idaho, United States 16 May 1992



0 100M

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Image courtesy of the US Geological Survey.

#28

PARTIAL ASSIGNMENT OF WATER RIGHTS

The undersigned, BARBARA GARDNER, a widow dealing with her sole and separate property, owner of the following described real estate situated in Gooding County, Idaho, to-wit:

Lots 3 and 4 N of the access road and  
Lots 5 and 17 E of the access road on  
Buckeye Ranch all located in Section 27, Township 7  
South, Range 13, EBM,

does hereby assign and transfer to David O. Kingston, dba D&D Investments hereafter referred to as "Assignee" 134 miner's inches of water, which is now appurtenant to the above described land, to real estate owned by said assignee that is described on Exhibit "A" which is attached hereto and made a part hereof by reference. Said water right shall be transferred from water right No. 36-00003B Snake River Basin Adjudication.

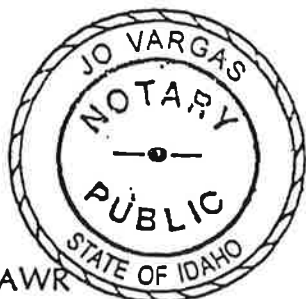
DATED This 17 day of October 1997.

Barbara Gardner  
BARBARA GARDNER

STATE OF IDAHO )  
County of Gooding ) ss.

On this 17<sup>th</sup> day of October, 1997, before me, the undersigned, a notary public in and for said county and state, personally appeared BARBARA GARDNER, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Jo Vargas  
NOTARY PUBLIC FOR IDAHO  
Residing at: Wendell, Idaho  
My Commission Expires: June 30, 2000

WLN\GARDNER.AWR

Exhibit "A"

Township 7 South, Range 13 East of the Boise Meridian, Gooding County,  
Idaho

Section 27: Lots 6, 16, 27, and 37, and Lots 4, 5, 17, West  
of the access road, Buckeye Ranch, as the same is  
platted in the official plat thereof now of record  
in the office of the County Recorder of Gooding  
County, Idaho;

EXCEPTING THEREFROM the following described parcel:

BEGINNING at the Southwest corner of Lot 37, Buckeye Ranch, as the  
same is platted in the official plat thereof now of record in the office  
of the County Recorder of Gooding County, Idaho;

Thence East along the South line of said Lot 37, 190 feet to the TRUE  
POINT OF BEGINNING;

Thence East along said South line to the Southeast corner of said Lot 37;

Thence North to the Northeast corner of said Lot 37;

Thence in a Northeasterly direction to a point on the North line of Lot 26 of  
the Buckeye Ranch, 820 feet East of the Northwest corner of Lot 27  
of the Buckeye Ranch;

Thence West along the North line of said Lot 27, 305 feet;

Thence in a Southwesterly direction to a point 280 feet East of the  
Southwest corner of said Lot 27;

Thence in a Southwesterly direction to the TRUE POINT OF BEGINNING.

Township 7 South, Range 13 East of the Boise Meridian, Gooding County,  
Idaho

Section 28: Lots 7 through 15, inclusive and Lots 28 through  
36, inclusive of the Buckeye Ranch, according to  
the plat thereof on file in the office of the  
County Recorder of Gooding County, Idaho;

EXCEPTING THEREFROM that part of Lots 9, 10 and 11 of Buckeye Ranch  
according to the plat thereof on file in the office of the County Recorder of  
Gooding County, Idaho described as follows:

BEGINNING at a point on the North boundary of Lot 4, Section 28, which  
point is West 660.00 feet from the Northeast corner of said Lot 4;

Thence South 214.00 feet to a point in the existing fence;

Thence South 60°42' West along said fence line 175.70 feet;

Thence West 345.80 feet to a steel pipe set on the East bank of the  
reservoir of Lower Salmon Falls Dam;

Thence continuing West to the River Bank, according to the original GLO  
Land Survey;



EXHIBIT "A" Continued

Thence Northerly following along the river to the point of intersection with  
the North boundary line of Lot 4;  
Thence East to the POINT OF BEGINNING.

ALSO EXCEPTING the North 20 feet of the S1/2 of the NW1/4, Section 27,  
and the SE1/4 of the NE1/4 and the East 548 feet of Lot 4 of Section 28,  
Township 7 South, Range 13 East of the Boise Meridian, for road purposes  
as set forth in Deed to Hagerman Highway District, a Municipal Corporation  
of Idaho, dated June 6, 1951 and recorded October 16, 1951 in Book 45 :  
Deeds Page 182.

172912

STATE OF IDAHO COUNTY OF GOODING

Filed for record at the request of Kingston Properties

09 min. past 9 o'clock A m. this 3rd  
of November 19 97 9:00

By Penny Watson Deputy



1 Q. (BY MR. BROWN) I want you to start with  
 2 Exhibit 11. And let me give you a pen.  
 3 Can you draw on -- do you recognize Exhibit 11?  
 4 A. Yes. I'm trying to figure out where the  
 5 river is here.  
 6 Q. What I'd like you to do for me is, first of  
 7 all, take Exhibit 11 and take the yellow highlighter  
 8 and indicate to me where water comes out of the Buckeye  
 9 Ditch to any fish -- on its way to any fish ponds?  
 10 A. Okay. You're saying that her house is right  
 11 here?  
 12 Q. Would it be easier if I gave you a bigger  
 13 map?  
 14 A. Yes, maybe.  
 15 THE COURT: They've kind of been boring it  
 16 this way (indicating).  
 17 A. Oh, okay.  
 18 THE COURT: For my purposes, anyway.  
 19 MR. BROWN: Could we go ahead and mark that  
 20 as an exhibit?  
 21 THE COURT: Don't we have that one marked  
 22 already?  
 23 THE CLERK: Yes, we do.  
 24 (DISCUSSION HAD OFF THE RECORD)  
 25 Q. (BY MR. BROWN) Why don't you use

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1 Exhibit 12.  
 2 Now, do you recognize the property on Exhibit 12?  
 3 A. Yes.  
 4 Q. Okay. Can you, starting with where water  
 5 comes out of the Buckeye Ditch on its way to any fish  
 6 ponds --  
 7 A. Yes, it's right here.  
 8 Q. -- can you draw the path it takes to get to  
 9 fish ponds  
 10 (THE WITNESS COMPLIED)  
 11 Q. (BY MR. BROWN) Okay. In working down that  
 12 line now, generally it runs from right to left on the  
 13 map?  
 14 A. Uh-huh.  
 15 THE COURT: Mr. Brown, is that water  
 16 coming -- is that the Buckeye Ditch itself, or is that  
 17 a ditch coming out of the Buckeye?  
 18 A. The Buckeye Ditch, I think, is right here.  
 19 MR. BROWN: It's water coming out of the  
 20 Buckeye Ditch across the property to fish ponds.  
 21 Q. (BY MR. BROWN) Correct?  
 22 A. Yes.  
 23 Q. Now, let me show you exhibit, what's been  
 24 marked as Exhibit 16.  
 25 Can you tell me what that exhibit is?

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1 A. Well, that's the first pond right up in the  
 2 front corner of the property.  
 3 Q. In other words --  
 4 A. Right here.  
 5 Q. -- that is the first pond coming out of  
 6 the --  
 7 A. Buckeye Ditch.  
 8 Q. -- Buckeye Ditch. Okay. Does that pond  
 9 have fish in it?  
 10 A. No.  
 11 Q. Did it used to have fish in it?  
 12 A. Not -- it may or may not have. I'm not  
 13 sure.  
 14 Q. Exhibit 17, what is Exhibit 17?  
 15 A. That's like a slough or pond along the road.  
 16 Q. Does that have fish in it?  
 17 A. Yes.  
 18 Q. And does that have fish that have been  
 19 planted or cultivated in it?  
 20 A. Yes.  
 21 Q. Okay. Exhibit 18, can you tell me what that  
 22 shows?  
 23 A. That's a pond that would connect with the  
 24 slough further down the property.  
 25 Q. Can you indicate on Exhibit 12 where that

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1 would be?  
 2 A. It's right here.  
 3 Q. Does that have fish in it?  
 4 A. Yes, it does.  
 5 Q. What kind of fish?  
 6 A. Oh, there's trout. I think there's some, I  
 7 think there's a few carp in there. There's some bass  
 8 as well, I believe.  
 9 Q. Is that pond kept in order to maintain the  
 10 fish there in it?  
 11 A. It is. It's been designed for fish  
 12 propagation with gates and -- to maintain the levels  
 13 and so forth of the water.  
 14 Q. When is the water used for the fish?  
 15 A. Year around.  
 16 Q. Is that water in addition to the irrigation  
 17 water?  
 18 A. Yes, it is.  
 19 Q. Can you explain that to me?  
 20 A. Well, you have to have a certain depth of  
 21 water to maintain the oxygen level and a certain flow.  
 22 And so we need a year-around supply of water to those  
 23 ponds.  
 24 Q. Okay. Exhibit 19, can you tell me what that  
 25 shows?

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1 A. That's a larger pond that's further to the  
2 east of this last pond and very near the Snake River.  
3 Q. Okay. And does that have fish in it?  
4 A. It does. It probably has the largest  
5 population.  
6 Q. And what kind of fish?  
7 A. Those are trout and bass.  
8 Q. Okay. The last two photos, you referred to  
9 two ponds on Exhibit 12 which you've circled on the  
10 left-hand side.  
11 What's your understanding of how long those ponds  
12 have been there?  
13 A. Well, there are -- from my discussion with  
14 Barbara Gardner, she indicated they were there in the  
15 1920s.  
16 Q. Okay. Do you have any reason to believe  
17 they were not there?  
18 A. I've been able to substantiate that from  
19 other neighbors and people who have lived here. Not  
20 many go back to the early Twenties, but their parents  
21 did.  
22 Q. Exhibit 20, what does that show?  
23 A. 20 is just another shot of the same lake.  
24 Q. And Exhibit 21?  
25 A. That's a little further out and the same

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1 large pond.  
2 Q. Where does the water go once it leaves the  
3 ponds?  
4 A. It goes into the Snake River.  
5 THE COURT: Are Exhibits 19 and 20 and 21  
6 all shots of the same --  
7 A. The same lake, yes, Your Honor. It goes  
8 right out -- there's a diversion right here.  
9 MR. BROWN: Okay. I would offer 16 through  
10 21.  
11 THE COURT: Yeah. Without objection,  
12 Exhibits 16 through 21 are admitted.  
13 (Claimant Exhibits 16 thru 21 ADMITTED)  
14 Q. (BY MR. BROWN) Referring you now to  
15 Exhibit 12, can you tell me how much of the ground on  
16 that property is irrigated?  
17 A. We've claimed 129 acres, and I think it  
18 approximate -- some years there's maybe slightly more  
19 than that. Some years it's less.  
20 Q. Okay. Let me show you an area referred to,  
21 identified in brown as the place of use of right  
22 No. K.  
23 Do you own any of the property there?  
24 A. Yes.  
25 Q. And how much there would you own?

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1 A. I'd have to look at the deed to be honest.  
2 Q. Have you consulted with anybody or had  
3 anybody look at this in order to determine how many  
4 acres you have and how much is irrigated?  
5 A. No.  
6 Q. Have you consulted -- have you hired  
7 Doctor Brockway to do that for you?  
8 A. Yes, to determine the amount of need and  
9 use.  
10 Q. What have you done in order to provide him  
11 with information such as the way the property has been  
12 historically irrigated?  
13 A. Essentially I put him in contact with  
14 previous farmers so that he could talk about their flow  
15 rates, the crops that have been grown on that farm, and  
16 the data.  
17 Q. And who have you put him in touch with?  
18 A. Dan McFaddan primarily. He farmed it longer  
19 than anybody else.  
20 Q. Do you know about when he farmed it?  
21 A. He farmed it from 1976 to 1986.  
22 Q. Okay.  
23 A. I believe the Gardners farmed it after  
24 that. I'm not sure. It's prior to my ownership.  
25 Q. Let me ask you a question about these water

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1 rights splits. J has been split into K, L, and M. You  
2 heard the testimony this morning about how those rights  
3 were split.  
4 A. Yes.  
5 Q. Can you tell me what your understanding of  
6 what you were acquiring when you obtained part of the J  
7 right from Miss Gardner?  
8 A. I acquired, first of all, I think it's the B  
9 right. And subsequently I was told by Mrs. Gardner  
10 that there was additional water, and that she was  
11 wanting to convey that to me for the needs other than  
12 those that had been conveyed to others.  
13 Q. Okay. And when you say "other than what had  
14 been conveyed to others," can you explain that?  
15 A. Well, I think that she was concerned that  
16 the department had allocated one inch per acre and, I  
17 think, told me that she felt like she couldn't do, deed  
18 any more than that until there was -- the adjudication  
19 had, you know, concluded. And once that was concluded,  
20 that the rights, whatever rights were determined,  
21 anything that was not decreed to others, because I was  
22 the largest landowner, should be conveyed to me, and  
23 would be.  
24 Q. Okay. So, in other words, you said that she  
25 would convey it first to the others to get more than an

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1 to demonstrate that there is a basis for Mr. Kingston  
2 to testify as to the history of the property, including  
3 the prior statements of prior owners going back into  
4 the Twenties with the fish propagation use.

5 Q. (BY MR. BROWN ) Mr. Kingston, can you tell me  
6 that statement -- I don't know if you're familiar with  
7 the statement in the exhibit; but let me just --

8 THE COURT: Hand the witness the exhibit.

9 Q. (BY MR. BROWN) Let me just tell you that it  
10 mentions commercial fish ponds being developed later,  
11 but also refers to prior recreational ponds.

12 Are the ponds you identified on Exhibit 12 with  
13 the yellow marker, are those the commercial fish ponds  
14 or the recreational ponds?

15 A. I believe that the two further south closest  
16 to the river were the recreational ponds as far as I  
17 know. And the ones that were developed later were  
18 further up the property.

19 Q. And tell me how the ones that were developed  
20 later are different than the two you identified?

21 A. Well, they're of a commercial nature. They  
22 have locks in them. You know, the flow has been  
23 regulated closely for that purpose.

24 Q. So you're not attempting to claim new uses  
25 from the Seventies.

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1 A. No.

2 Q. I wanted to discuss for a minute the  
3 agreement that you --

4 THE COURT: Are you going to offer this  
5 exhibit, Mr. Brown?

6 MR. BROWN: Yes. I offered it, I believe.

7 THE COURT: It's exhibit what?

8 THE WITNESS: 22, Your Honor.

9 THE COURT: 22? 22 has been offered. No  
10 one here is objecting to it. Therefore it will be  
11 admitted.

12 (Claimant Exhibit 22 ADMITTED)

13 MR. BROWN: Your Honor, I would like to  
14 also offer it for the purpose of impeachment. You  
15 heard Mr. Clelland state that he had no information or  
16 no basis to suggest that there were any fish  
17 propagation at or before the time of his  
18 investigation. And I think it's fair to say that the  
19 claim itself identifies under oath that there was.

20 THE COURT: Mr. Brown, statements offered  
21 for mere impeachment purposes don't go to the  
22 substantive truth generally speaking. They just go to  
23 impeach. You're offering it for alternative -- the  
24 court will allow it as substantive evidence of the  
25 purpose of use.

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1 MR. BROWN: Thank you. I just wanted the  
2 record to note that it was being offered for multiple  
3 purposes.

4 THE COURT: Very well.

5 Q. (BY MR. BROWN) I want to go back to this J,  
6 K, L split for a minute. Mr. Clelland testified and  
7 drew in brown on Exhibit 12 an area which he identified  
8 as having the 10 acres contained in it, the 10 acres of  
9 irrigation claimed, but only 1 acre of irrigation, that  
10 being in the very lower right-hand corner.

11 Do you see what I'm referring to?

12 A. Yes.

13 Q. Can you describe the terrain within that  
14 boundary which is more to the west or towards the  
15 left-hand side? In other words, there's a field  
16 indicated on the map as 4.1 acres.

17 A. Uh-huh. Yes.

18 Q. Which has the K labeled in it?

19 A. Yes.

20 Q. Has that property to your knowledge been  
21 irrigated?

22 A. Yes.

23 Q. Okay.

24 A. I think it had been earlier testified by  
25 Mr. Bell that Mr. Gardner had pastured his horses in

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1 that property.

2 Q. Miss Gardner still owns the house indicated  
3 just down the picture --

4 A. That's correct.

5 Q. -- from that area. How is Mrs. Gardner  
6 going to water her house, around her house and up  
7 through that other section that you're purchasing  
8 without water? Do you know?

9 A. I think there's a general agreement to share  
10 that water with her for her needs.

11 Q. Okay. And why is it, then, that you would  
12 own the water instead of she?

13 A. I don't think she has the ability to water  
14 it herself. She was trying to encourage some help by  
15 deeding the water over.

16 Q. And have you agreed to exchange something  
17 for her or do something for her in exchange for the  
18 water?

19 A. In addition to that, I agreed to grade her  
20 driveway, keep it --

21 Q. You're maintaining her road in order to take  
22 the water and utilize it both on your place and hers?

23 A. That's correct.

24 Q. So the place of use of the right is not  
25 changing.

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1 A. No.

2 MR. BROWN: I have no further questions.

3 THE COURT: Wait a second, Mr. Kingston.

4 Kingston, regarding Exhibits 19, 20 and 21, and I  
5 think those are the pictures of the biggest pond?

6 A. Yes, Your Honor, I think so.

7 THE COURT: Is it your understanding that  
8 those particular ponds have been on the property since  
9 the 1920s?

10 A. That's correct, or before. Or before.

11 THE COURT: Or that pond. That's one pond,  
12 correct?

13 A. There's two ponds.

14 THE COURT: Okay. And those two ponds, to  
15 the best of your understanding, have been on the  
16 properties since the Twenties?

17 A. Yeah, or before.

18 THE COURT: Or before. And those have been  
19 used for the purposes of fish propagation?

20 A. Yes.

21 THE COURT: Is that commercial propagation  
22 or just pride?

23 A. I think it's recreational. Those two ponds  
24 are recreational more than commercial; but they've been  
25 there and for that purpose for a long period of time.

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1 THE COURT: Who fishes out of those, in  
2 other words?

3 A. Probably the land owners and friends, I  
4 suspect.

5 THE COURT: And your understanding that  
6 those have been there since the Twenties is from  
7 Mrs. Gardner?

8 A. Mrs. Gardner and others that I've talked  
9 to. The McFaddens and other people who lived in the  
10 community for a long time, and his parents lived  
11 there.

12 THE COURT: Now, the deed you received from  
13 Mrs. Gardner for right -- for the area where right K is  
14 used, that deed didn't specify any particular quantity  
15 of water, did it?

16 A. She said that amount was in dispute and  
17 would be adjudicated. So it does not have a specific  
18 quantity. It just says all remaining rights, I  
19 believe, is how it's written.

20 THE COURT: All right. On the face of the  
21 deed itself -- all right. It may be helpful,  
22 Mr. Brown, at some point to get those deeds in the  
23 rd.

24 MR. BROWN: Your Honor, I hesitate to use  
25 them because they're going to take an inordinate amount

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1 of time to sort through. They are extraordinarily  
2 complicated as what I'm showing you is a diagram of the  
3 deeds. And I'll tell you it's about 12 feet long.

4 The property continued to go through since the  
5 New International Mortgage decree forfeitures, estates,  
6 splits. And I do have them with me, but I'd suggest  
7 that -- I have about four inches worth of them. And in  
8 order to be helpful, you would have to go through them  
9 all.

10 THE COURT: Maybe we could get just that  
11 portion of the deed describing the water rights or all  
12 appurtenances? You could -- I'm just telling you that  
13 now, Mr. Brown. We can supplement later. We don't  
14 have to do it now.

15 MR. BROWN: That's fine, Your Honor.

16 THE COURT: Referring to Exhibit 12,  
17 Mr. Kingston, there's an area labeled brown on  
18 Exhibit -- there's -- yeah. It's labeled K.

19 A. Yeah.

20 THE COURT: And it's your understanding  
21 that area has been irrigated?

22 A. Yes.

23 THE COURT: And that understanding comes  
24 from whom?

25 A. From Mrs. Gardner and from others I've

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1 talked to.

2 THE COURT: Okay. Who are some of those  
3 other people you've talked to?

4 A. McFaddens, Mr. Bell, some of the other  
5 neighbors.

6 THE COURT: All right. You don't have any  
7 personal knowledge that that has been in fact been  
8 irrigated prior to 1996?

9 A. No. No, I don't. Only what people told  
10 me.

11 THE COURT: Okay. And likewise as to the  
12 ponds, you don't have any personal knowledge of those  
13 uses prior to 1996?

14 A. I've witnessed aerial photos that predate  
15 that, yes.

16 THE COURT: Okay. Mr. Brown?

17 Q. (BY MR. BROWN) Mr. Kingston, you own the  
18 water rights; but as you heard Mr. Bell testify  
19 regarding his mother's right, you are also within a  
20 water district organized by the State of Idaho?

21 A. Yes, I am.

22 Q. Do you pay assessments to use your water  
23 rights?

24 A. That's correct.

25 Q. For what amount of water do you pay?

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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 ) REPORTER'S TRANSCRIPT  
Case No. 39576 )  
\_\_\_\_\_)

1999 AUG -9 AM 8:16  
DISTRICT COURT - SRBA  
TWIN FALLS CO., IDAHO  
FILED LODGED

\*\*\*\*\*

REPORTER'S TRANSCRIPT OF NOTICE OF CHALLENGE  
FILED IN SUBCASE NOS. 36-00003A, 36-00003B,  
36-00003C, 36-00003D, 36-00003F, 36-00003J,  
36-00003K, 36-00003L, AND 36-00003M AS FILED  
BY NORTH SNAKE GROUND WATER DISTRICT, MAY  
FARMS, LTD., FAULKNER LAND AND LIVESTOCK,  
AND THE STATE OF IDAHO TO RECOMMENDATIONS  
BY SPECIAL MASTER HAEMMERLE

\*\*\*\*\*

RECEIVED  
AUG 10 1999  
BEEMAN & HORSTETTER, P.C.  
ATTORNEYS AT LAW



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Page:

SEPTEMBER 26, 1996 HEARING

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SCHEDULING CONFERENCE

..... 1

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MARCH 6, 1998 HEARING

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HEARING ON PORTION SPLITS

..... 127

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JUNE 8, 1998 TRIAL

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\*\*\*\*\*

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| 6 | Direct Exam (Brown) | ..... | 337 |
| 7 | Simcoe, Doyt H.     |       |     |
| 8 | Direct Exam (Brown) | ..... | 321 |

\*\*\*\*\*

# EXHIBITS:

|    |    |                                     |       |     |
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| 10 | 1  | - International Mortgage Decree     | ..ADM | 195 |
| 11 | 2  | - IDWR Shape File                   | ..ADM | 195 |
| 12 | 3  | - IDWR Shape File                   | ..ADM | 195 |
| 13 | 4  | - IDWR Shape File                   | ..ADM | 195 |
| 14 | 5  | - IDWR Shape File                   | ..ADM | 195 |
| 15 | 6  | - IDWR Shape File                   | ..ADM | 195 |
| 16 | 7  | - IDWR Shape File                   | ..ADM | 195 |
| 17 | 8  | - IDWR Shape File                   | ..ADM | 195 |
| 18 | 9  | - IDWR Shape File                   | ..ADM | 195 |
| 19 | 10 | - IDWR GIS                          | ..ADM | 381 |
| 20 | 11 | - IDWR GIS                          | ..ADM | 224 |
| 21 | 12 | - 1987 ASCS Aerial Photo (Harbison) | ..ADM | 264 |
| 22 | 13 | - Harbison Measurements             | ..ADM | 374 |
| 23 | 14 | - Harbison Calculations             | ..ADM | 374 |
| 24 | 15 | - Jeff L. Martin letter (Engineer)  | ..ADM | 482 |
| 25 | 16 | - Photo                             | ..ADM | 305 |

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|----|----|--------------------------------------|-------|-----|
| 1  | 17 | - Photo                              | ..ADM | 305 |
| 2  | 18 | - Photo                              | ..ADM | 305 |
| 3  | 19 | - Photo                              | ..ADM | 305 |
| 4  | 20 | - Photo                              | ..ADM | 305 |
| 5  | 21 | - Photo                              | ..ADM | 305 |
| 6  | 22 | - Gardner Claim                      | ..ADM | 313 |
| 7  | 23 | - 1987 ASCS Aerial Photo (Gardner)   | ..ADM | 350 |
| 8  | 24 | - 1987 ASCS Aerial Photo (Babington) | ..ADM | 359 |
| 9  | 25 | - Photo                              | ..ADM | 360 |
| 10 | 26 | - Photo                              | ..ADM | 360 |
| 11 | 27 | - Photo                              | ..ADM | 360 |
| 12 | 28 | - Photo                              | ..ADM | 378 |
| 13 | 29 | - Photo                              | ..ADM | 378 |
| 14 | 30 | - Photo                              | ..ADM | 378 |
| 15 | 31 | - Photo                              | ..ADM | 378 |
| 16 | 32 | - Brockway Data (Bell)               | ..ADM | 458 |
| 17 | 33 | - Brockway Data (Kingston)           | ..ADM | 458 |
| 18 | 34 | - Brockway Data (Babington)          | ..ADM | 458 |
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| 20 | 37 | - Brockway Diagram                   | ..ADM | 408 |
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1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF  
2 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

3 \*\*\*\*\*

4 In Re SRBA ) REPORTER'S TRANSCRIPT  
5 Case No. 39576 ) Subcase No. 36-00003A  
6 ) et al

8 \*\*\*\*\*

11 D-a-t-e: Thursday, September 26, 1996

13 T-i-m-e: 2:30 P.M.

15 P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

17 B-e-f-o-r-e: FRITZ X. HAEMMERLE, Special Master

19 H-e-a-r-i-n-g: Scheduling Conference

22 \*\*\*\*\*

Page 1

1 COURTROOM OF THE DISTRICT COURT, SNAKE RIVER  
2 BASIN ADJUDICATION COURTHOUSE, 253 Third  
3 Avenue North, Twin Falls, Idaho, Thursday,  
4 September 26, 1996, 2:30 P.M.

5 \*\*\*\*\*

6 THE COURT: All right. We're on the record  
7 in the 24 subcases, 36-00003A, et. seq. The date is  
8 September 26, 1996. The time is 2:30 p.m.

9 Present is Matt McKeown on behalf of the State of  
10 Idaho; Pat Brown on behalf of various claimants; and  
11 the department of water resources is present with  
12 Mr. Honsinger and Mr. Spencer.

13 Pat, before we start here, I want to clarify some  
14 of the representation. It's as yet unclear. I just  
15 want to confirm a few things.

16 Are you representing Edna Mae Rea?

17 MR. BROWN: I am representing each and  
18 every of the 24 claimants, Your Honor.

19 THE COURT: Would it be possible to get a  
20 notice of appearance or a general notice of appearance  
21 on these cases?

22 MR. BROWN: Yes, I'll get one filed.

23 THE COURT: When?

24 MR. BROWN: By Monday.

25 THE COURT: What's the date on Monday?

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1 MR. HONSINGER: 30th.

2 THE COURT: Okay. Mr. Brown, short of you  
3 having a baby by that time, I expect that to be filed  
4 with the court. All right? You may want to do that  
5 with the other 85 some subcases also.

6 MR. BROWN: I will, Your Honor.

7 THE COURT: I've had an opportunity to  
8 review the settlement statement this morning just so we  
9 know what we'll be trying. Quantity. I ordered a  
10 pro rata mathematical calculation on that.

11 Mr. Brown or Mr. Honsinger, do you know when  
12 you'll be able to have a final resolution of those  
13 numbers before the court, some sort of agreement, some  
14 sort of anything?

15 MR. BROWN: My understanding is those are  
16 as claimed. And there's no dispute as far as the  
17 splitting of the quantity from the decree down to these  
18 24 claimants.

19 MR. HONSINGER: I would say that we don't know  
20 as to the -- we don't know what was -- Your Honor, I  
21 still am confused over the duty of water you ordered in  
22 this particular, in these particular numbers. You  
23 ordered the quantity decreed divided by the land  
24 decreed, both pursuant to the New International  
25 Mortgage decree.

Page 3

1 THE COURT: Correct.

2 MR. HONSINGER: That comes up with a duty of  
3 water decreed that fluctuates wildly between all the  
4 split rights. And quite frankly we do not know how to  
5 proceed from this point.

6 THE COURT: Fluctuates. What do you mean  
7 "fluctuates wildly"?

8 MR. HONSINGER: They fluctuate from -- if you  
9 take -- shall I give you a for instance or a for  
10 example?

11 THE COURT: You might as well.

12 MR. HONSINGER: They fluctuate from -- for  
13 example, right No. 36-00034B, the quantity decreed in  
14 the New International Mortgage decree was 1.5 cfs. The  
15 land decreed pursuant to that decree was 200 acres. If  
16 you divide that, divide those numbers, you come up  
17 with .008 cfs per acre, which is less than half an inch  
18 per acre.

19 On the other hand, if you go to 36-00085A, the  
20 quantity decreed was 1.2 cfs for 5.89 acres of land.  
21 So that --

22 THE COURT: Which one were you at right  
23 there?

24 MR. HONSINGER: That's 85A. So you've got  
25 1.2 cfs for 5.89 acres of land. You come up with a

Page 4



1 duty of water of .20, or 10 inches per acre.  
 2 THE COURT: So you agree that it's -- just  
 3 crunching the mathematics, it was .20.  
 4 MR. HONSINGER: Just doing the numbers, that's  
 5 what it comes out to.  
 6 THE COURT: Okay. Wait, wait a minute  
 7 now.  
 8 MR. BROWN: Your Honor, can I object to  
 9 this point for the record? First of all, I don't  
 10 understand that you ordered a duty of water. I  
 11 understand that you ruled that the duty of water had  
 12 been specifically addressed in the decree.  
 13 I think we also all agreed that the irrigated  
 14 acres had not been specifically spelled out. Rather,  
 15 the property description of the properties were set  
 16 forth.  
 17 So, first of all, you know, I don't know why  
 18 we're wasting our time on this. Second of all, I think  
 19 that if the court is taking evidence from the  
 20 department on this or something, I think it's being --  
 21 THE COURT: No, we're not -- okay. Go  
 22 ahead, Mr. Brown. I didn't mean to cut you off.  
 23 MR. BROWN: Well, I think it's  
 24 inappropriate for the court to take evidence.  
 25 THE COURT: I'm certainly not taking

Page 5

1 how those have been broken out among the people  
 2 claiming from the root right.  
 3 MR. HONSINGER: I would agree that the original  
 4 root right was that way. We don't know how it should  
 5 be decreed among the split rights. We simply have no  
 6 idea --  
 7 THE COURT: Well, you take the original  
 8 quantity that was decreed and acreage, and divide it  
 9 up. And whatever the acreage split was. And you  
 10 assign the appropriate quantity to that. It's a  
 11 one-for-one reduction, I believe. I mean --  
 12 MR. BROWN: Well, I would agree that  
 13 generally -- the general rule is that unless otherwise  
 14 indicated by an appropriate instrument such as a deed,  
 15 when a piece of property was split the appurtenant  
 16 water went along in proportion to the size of the  
 17 ground with each of those two pieces of property. I  
 18 think that's what we see in all of these with a few  
 19 exceptions. And the exceptions, there are -- we have  
 20 deeds which have already been put into evidence where  
 21 the deed specifically states the amount split off.  
 22 THE COURT: Okay. I didn't want to create  
 23 a big issue here. We have just a few of these out  
 24 there. I don't know if, Pat, if you've had a chance to  
 25 review the numbers.

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1 evidence at this time, Mr. Brown. I'm just seeing  
 2 where we're at on the quantity issue.  
 3 MR. BROWN: My understanding, Your Honor,  
 4 is you decided the quantity issue except to the extent  
 5 where a right, decreed right had been split. And then  
 6 your question was how had the split been allocated  
 7 among various right-holders.  
 8 THE COURT: That's all I want to know.  
 9 MR. BROWN: And I think the department's  
 10 calculations -- and I wrote Mr. Honsinger a letter and  
 11 said I can't find any discrepancies or disputes about  
 12 the right being split off to a bunch of people. I  
 13 mean -- nor in proportion to the ground they own from  
 14 the original right. And he wrote back, and we agree.  
 15 MR. HONSINGER: We agree. But you did order  
 16 this particular analysis that I did.  
 17 THE COURT: All I want to know, gentlemen,  
 18 is I don't want to be performing a mathematical  
 19 crunching for trial. I don't think we need to put on a  
 20 witness to crunch the numbers.  
 21 MR. BROWN: My understanding is the  
 22 quantities are -- the quantity and the particular  
 23 rights have been traced back to the original right.  
 24 THE COURT: Right.  
 25 MR. BROWN: There isn't any dispute about

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1 Are they correct? Do you agree with them or  
 2 not? Are we going to have to go to trial on that  
 3 quantity number?  
 4 MR. BROWN: My understanding is the  
 5 quantities are all correct.  
 6 MR. HONSINGER: As far as -- Your Honor --  
 7 THE COURT: Well, let me direct this. On  
 8 3A, the claim was 1.6 cfs.  
 9 Did you confirm that? Did you crunch the  
 10 numbers? Is that correct?  
 11 MR. McKEOWN: I did not crunch the numbers as  
 12 to the claim. If the claim was for 1.6 cfs, then  
 13 that's what it was for. I was assuming that what you  
 14 wanted was quantity decreed pursuant to right No. 3 --  
 15 THE COURT: Right.  
 16 MR. HONSINGER: -- root right No. 3 divided by  
 17 the land decreed pursuant to root right No. 3 to come  
 18 up with a duty of water. I did that very thing. I  
 19 multiplied that times the land owned by --  
 20 THE COURT: In other words, what did you  
 21 come up for 3A?  
 22 MR. HONSINGER: For 3A, I came up with a duty  
 23 of water of .0149. This is simple math. The land  
 24 owned by the claimant in 3A is 40 acres.  
 25 THE COURT: Uh-huh.

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1 MR. HONSINGER: You multiply that out. It  
2 comes to .596, which is substantially less than claimed  
3 and more than recommended. In other cases --  
4 MR. BROWN: That's correct. And the point  
5 is, you know, the point I'm making here is the amount  
6 claimed, I guess, isn't in dispute. And I think  
7 Charlie and I agree on the fact that in this example  
8 the .59 doesn't mean anything because the original  
9 decree may have gone to -- okay, in this case what was  
10 it? 1342 acres --

11 MR. HONSINGER: That's correct.

12 MR. BROWN: If you figure out the property  
13 boundaries -- and I haven't checked his number on the  
14 property boundaries. But let's assume that's correct.  
15 Some of that ground was irrigated, and some may not  
16 have been. We know the court found a duty of water,  
17 and found that acceptable and necessary in whatever  
18 quantity of irrigated acres it may have been.

19 MR. HONSINGER: I don't know that --

20 MR. BROWN: I don't think there's any  
21 meaning or value to going back and dividing that 1342  
22 acres by the total of 20 feet decreed, because some  
23 ground -- for example, you have a piece of ground  
24 that's been divided into 10 five-acre parcels. Half of  
25 that ground was never irrigated. Those half of the

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1 rights got no water in all the splits. The other half  
2 of that ground contains acres which were irrigated at  
3 that time and which each got a fifth of that right, so  
4 that if you take the five lots and multiply the  
5 claims -- or add up the claims, they add up to the  
6 original decreed right.

7 MR. HONSINGER: Your Honor, if I may interject,  
8 what it comes down to, then, in order for these numbers  
9 to be meaningful, there needs to be the determination  
10 as to the irrigated acreage that was originally  
11 irrigated pursuant to each decreed --

12 THE COURT: Okay.

13 MR. HONSINGER: Hence, we have no way of  
14 knowing that.

15 THE COURT: What did you come up with for  
16 39C?

17 MR. HONSINGER: 39C, duty of water was .10 or  
18 5 inches to the acre. Land owned is 1.92 acres, or  
19 a --

20 THE COURT: Okay. I don't want to go  
21 through it too much.

22 What did you come up with in 39E?

23 MR. HONSINGER: 39E, same duty of water, but  
24 the claimant didn't own the land under the original  
25 decree. The claimant to that particular right does not

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1 own land that was described in the original decree. So  
2 we come up with no water. And I guess that's my point,  
3 is that this is -- this fluctuates wildly.

4 THE COURT: What did you come up with in  
5 39E?

6 MR. HONSINGER: Nothing.

7 THE COURT: Although you're supplemental  
8 report had .03 cfs. Now you're coming up with  
9 nothing?

10 MR. HONSINGER: Well, you asked that I come up  
11 with --

12 THE COURT: Okay. What did you come up  
13 with in 39J?

14 MR. HONSINGER: 39J, I came up with a duty of  
15 water .1. So .20 cfs.

16 THE COURT: Okay. What did you come up  
17 with in 47?

18 MR. HONSINGER: 47. Well, 47 is not a split  
19 right. So 47 should be as decreed.

20 THE COURT: Oh, okay. Okay. Somehow I had  
21 that mismarked.

22 MR. HONSINGER: Let me give you another  
23 illustration here that might be, that might be  
24 helpful. In 35J, there were --

25 THE COURT: Charlie, I don't want to get

Page 11

1 into this too much. I just wanted to see where we're  
2 at generally, okay?

3 MR. HONSINGER: Okay.

4 THE COURT: What did you come up with on  
5 64B?

6 MR. HONSINGER: 64B, I came up with a total of  
7 5.33 cfs.

8 THE COURT: 5.33?

9 MR. HONSINGER: Yes. If you go plot out the  
10 duty of water times the land owned --

11 THE COURT: Okay. Pat, you asked for  
12 4.52. Do you want to just take 4.25?

13 MR. BROWN: I'm not sure what -- are you  
14 talking about quantity?

15 THE COURT: Correct.

16 MR. BROWN: Oh, I thought we had the  
17 quantity decreed.

18 THE COURT: Was that a -- that was a split,  
19 though, wasn't it? 64B?

20 MR. BROWN: It's been split between A and  
21 B. There's two rights, yeah.

22 THE COURT: Right. And you -- what did you  
23 come up with, Charlie, on 64B?

24 MR. HONSINGER: We came up with a total of  
25 5.33 cfs.

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1 THE COURT: Okay. And, Pat, you requested  
 2 4.52 both in your claim and in your summary judgment.  
 3 MR. BROWN: That's right.  
 4 THE COURT: So 4.52, we can settle for  
 5 4.52?  
 6 MR. BROWN: Yeah, that's all we're  
 7 claiming.  
 8 MR. HONSINGER: Your Honor, I mean, again, I  
 9 don't -- I quite frankly don't know where to go here.  
 10 THE COURT: Well --  
 11 MR. HONSINGER: The numbers just, these numbers  
 12 don't make sense without --  
 13 THE COURT: The point is, Mr. Honsinger,  
 14 they're requesting something less than what you came up  
 15 with on your figure there.  
 16 MR. HONSINGER: That is not a recommendation,  
 17 Your Honor. You merely ordered the department to come  
 18 up with that particular, that particular quantity of  
 19 water, or those particular quantities pursuant to those  
 20 particular split rights.  
 21 MR. McKEOWN: What is the quantity  
 22 recommendation with this right?  
 23 THE COURT: .72. Okay. All right. I  
 24 just wanted to see where you were with quantity. I  
 25 guess it's a little bit more difficult than I

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1 anticipated.  
 2 Mr. Brown, I can only ask that you and  
 3 Mr. Honsinger see if you can get together, or we'll  
 4 just simply litigate this thing. Obviously --  
 5 MR. BROWN: Your Honor, I don't think  
 6 there's anything -- I think we're in agreement. I  
 7 think we both agree that the court's, the way the court  
 8 is dividing this water makes no sense. It assumes that  
 9 the water was equally divided among the property to  
 10 which it was decreed. And that is not the case. And  
 11 it has not been sold and split up over the years with  
 12 that assumption.  
 13 MR. HONSINGER: We would agree with that with  
 14 the caveat that we have no idea what acreage was  
 15 irrigated back --  
 16 THE COURT: Okay. In other words, in other  
 17 words, it's obviously more complicated than simply a  
 18 mathematical breakdown, so --  
 19 MR. HONSINGER: That's our interpretation,  
 20 yes.  
 21 THE COURT: Okay. Then those split rights,  
 22 either you'll agree or it will be litigated.  
 23 MR. BROWN: Your Honor, I guess I'm not --  
 24 I don't understand what we're litigating.  
 25 THE COURT: I don't either.

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1 MR. BROWN: Or what we're agreeing on.  
 2 THE COURT: Obviously -- no one can sit  
 3 here today and tell me what we've agreed to and what we  
 4 haven't. The numbers, your numbers requested don't  
 5 jive with the numbers that IDWR is coming forward with  
 6 today, you know. So what I'm telling you both is,  
 7 unless you agree and submit numbers to the court, I  
 8 don't know what those numbers would be.  
 9 MR. BROWN: Your Honor, I don't  
 10 understand -- seriously I don't understand what you are  
 11 saying we're supposed to be agreeing about. I mean the  
 12 quantity of these rights --  
 13 THE COURT: Okay. My -- going back to  
 14 summary judgment, I simply stated that as to the split  
 15 rights, following CROW v. CARLSON, following whatever  
 16 rule was announced in that particular case, that those  
 17 split rights have to be dealt with simply.  
 18 MR. BROWN: Your Honor, I think they have  
 19 been dealt with in two different ways. You have one of  
 20 two scenarios. One, you have the water decreed to a  
 21 certain parcel of ground. That ground has been split  
 22 up.  
 23 THE COURT: Okay. Everyone can accept  
 24 that.  
 25 MR. BROWN: The quantity was also split

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1 up. What the court is saying I need to know how the  
 2 quantities were split, correct?  
 3 THE COURT: That's correct.  
 4 MR. BROWN: The claimants have said how the  
 5 quantities were split and have attached their deeds or  
 6 whatever saying how they were split, if it was  
 7 different than a straight CROW v. CARLSON allocation by  
 8 acre.  
 9 THE COURT: And those are stated in the  
 10 deed?  
 11 MR. BROWN: Yes. For example, the 039C,  
 12 39J, the -- what's the Willow Brook Subdivision? For  
 13 example -- well, let me show you here. For example,  
 14 here's a subdivision -- this is something we were  
 15 looking at this morning -- with different  
 16 right-holders, Your Honor. This was all covered by an  
 17 original root right. The place was subdivided, and the  
 18 lots vary in size. You know, some are -- I think they  
 19 vary from -- they're close to an acre apiece. Some of  
 20 them got 7 inches of water, 7 inches, 7, 7, 6, 6, 6, 6,  
 21 7, 7, 7, 7, 6, 6 --  
 22 THE COURT: And those are contained in the  
 23 deeds themselves?  
 24 MR. BROWN: -- 7. In most of the deeds,  
 25 they are, Your Honor. I won't tell you that every

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1 single deed is. But I'll tell you if it isn't in the  
 2 deed, it has been -- it's probably a straight-out, you  
 3 know, a straight split type of thing. So what I'm  
 4 telling you is if you add all these up, you know, you  
 5 get back to that is the quantity (inaudible) --  
 6 THE COURT: Okay. If it's in the deed, we  
 7 can agree that it's -- the water runs appurtenant with  
 8 the land as deeded.

9 Is there a disagreement about that?

10 MR. CLELLAND: Well, you've got to make sure  
 11 that all these add up to the original right. And in  
 12 this case, if you add these all up and they equal the  
 13 original right, you've got another party,  
 14 Frank Glauner, in the city of Hagerman that owns a  
 15 piece of this right that isn't a part of this  
 16 subdivision. If this totals up to the original right  
 17 as shown here, then the right is overdecreed or  
 18 overallotted because he's got additional water claimed  
 19 under the right for his right.

20 MR. BROWN: My understanding is there's  
 21 only one case where that's true. And that's on the  
 22 Buckeye 03 right where there's 20 or 20, 20 feet  
 23 decreed --

24 THE COURT: Okay. In other words,  
 25 gentlemen --

Page 17

1 MR. BROWN: In that case the only reason we  
 2 have a discrepancy is the department has entered into a  
 3 settlement agreement with the Buckeye Farms for an  
 4 amount greater than claimed or decreed to them. That's  
 5 the only situation where I think that's true.

6 THE COURT: In other words, can you all get  
 7 together with those deeds -- I don't want to have a  
 8 formal scheduling or settlement conference. I mean  
 9 doesn't that appear to be something you can get  
 10 together on?

11 MR. HONSINGER: We can at least get together  
 12 and figure out what's going on as to those, yeah.

13 MR. BROWN: I'm trying to figure out -- I'm  
 14 not sure I know what we're trying to figure out.  
 15 That's my point.

16 THE COURT: Well, Pat, see, the court can't  
 17 sit here and know all be all, have an understanding of  
 18 what's in these deeds. You're telling me that some  
 19 water went with the deeds, and in some cases they  
 20 didn't. So you have to get together, show them the  
 21 deeds, and come to some sort of a meeting of the minds  
 22 on those issues. And those issues not, you know --

23 MR. BROWN: Your Honor, we moved for a  
 24 summary judgment and included the deeds which did  
 25 that. Then they were not opposed. I mean, you know,

Page 18

1 that's the point of summary judgment.

2 MR. HONSINGER: Quite frankly, Your Honor, I  
 3 don't believe, I don't think we ever even addressed  
 4 what was in the deeds.

5 THE COURT: That would be a good place to  
 6 look, I suppose.

7 MR. HONSINGER: And I don't know that we would  
 8 agree that the rights as split were -- we have no idea  
 9 how -- I don't know that -- we would at least look.  
 10 How is that? We would at least sit down and look and  
 11 see what the deeds say as to these split rights. I  
 12 count 18 of them.

13 THE COURT: Well, I think some, most of  
 14 them are, frankly, undisputed. I think when you look  
 15 at the disputed ones you're going to have 3A is  
 16 disputed; 39C is disputed; 39E is disputed; 39J is  
 17 disputed; 39M is disputed; 47 is disputed; 64B is  
 18 disputed.

19 MR. BROWN: Your Honor, what -- when you  
 20 say "disputed," you're referring to what element?

21 THE COURT: Quantity.

22 MR. BROWN: But --

23 THE COURT: Well, I don't know if it's  
 24 disputed or not. I just want to know -- I mean I'll go  
 25 back and look at those deeds, I suppose. I don't want

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1 to say -- I'm using the word "disputed" because my  
 2 ruling is my ruling. I just want you to know that --

3 MR. BROWN: Your Honor, maybe we should  
 4 here schedule a trial and pretrial and a motion in  
 5 limine. Because I'm concerned, too, today after the  
 6 settlement conference.

7 My concern was several of the rights, I think, we  
 8 weren't able to settle because the department says they  
 9 went out and made a beneficial-use exam and didn't see  
 10 beneficial use. The 39 rights you're talking about,  
 11 one of them we talked about today was 39N, I guess.

12 MR. HONSINGER: Well, are we switching gears  
 13 here from the split rights?

14 MR. BROWN: That would be Korbis -- well,  
 15 no. I guess the question is -- what I'm saying is I  
 16 think the court needs to -- I'm not sure how the court  
 17 can rule that any of this is disputed. Summary  
 18 judgment was filed, and none of it was disputed. The  
 19 deeds were submitted. And I can tell the court quite  
 20 honestly today is the first time I've ever --

21 THE COURT: All right, all right.

22 MR. BROWN: -- had any understanding that  
 23 there might be a dispute about that part.

24 THE COURT: Here's why I'm unclear about  
 25 the split rights. I understand the deeds were attached

Page 20

1 to the summary judgment. Nowhere, anywhere in your  
 2 brief did you argue how split rights were to be dealt  
 3 with. If you can show me that, I'd be happy to look at  
 4 it. If not, then I think you need to argue that to the  
 5 court.

6 MR. BROWN: Argue how the split right -- I  
 7 don't think it's something I have to argue. I mean  
 8 it's done through the affidavit and the deed.

9 MR. HONSINGER: Your Honor's decision merely,  
 10 merely said that the decreed elements were to be  
 11 decreed as decreed pursuant to the New International  
 12 Mortgage decree. It didn't say --

13 THE COURT: Well, let's put it this way:  
 14 I'm hearing that for a particular decreed right the  
 15 water itself would go to that amount that was irrigated  
 16 on the property at the particular time. And correct me  
 17 if I'm wrong what your argument is. That when a  
 18 particular right was split, there may have been more  
 19 irrigated acreage with one than another; so it's not  
 20 fair to do a simple mathematical pro rata reduction  
 21 unless it's stated in the deed. None of that was  
 22 argued anywhere at this point in time.

23 MR. BROWN: No. Each affidavit says here  
 24 is the root right; here it is attached. I own the part  
 25 of the property within that, not all of it, but a

Page 21

1 portion of it; and here is the amount I've purchased  
 2 and used on my ground out of that original right.

3 The only concern I could think the court could  
 4 have about that would be if you had 30 guys saying  
 5 that, each claiming an inch when the decreed right was  
 6 only for 10 inches. Then the court might be  
 7 concerned.

8 But where each of these people came in on summary  
 9 judgment, said here's where my right comes from, here's  
 10 the portion I own, here's my deed, here's the part of  
 11 the decree it comes out of, and here's the quantity  
 12 that has come to me, that's unopposed evidence.

13 THE COURT: What I'm saying, Mr. Brown, is  
 14 that you're telling me that in some of the cases the  
 15 deed speaks of the amount of water that went  
 16 appurtenant with the split, correct? Am I correct  
 17 about that?

18 MR. BROWN: Yes.

19 THE COURT: And in some cases you're  
 20 telling me that the deed did not particularly set out a  
 21 quantity of water that went off of that split.

22 Am I right about that?

23 MR. BROWN: There are some cases where  
 24 that's true.

25 THE COURT: Okay. Now, and you're also

Page 22

1 telling me that in those particular cases there -- in  
 2 some cases there would not be a straight pro rata  
 3 allocation of water for the particular land that was  
 4 split.

5 MR. BROWN: Most of those cases, there  
 6 was. And the ones that were not, the affidavits  
 7 specifically explains. That's the only evidence there  
 8 is.

9 THE COURT: Well, I'm understanding the  
 10 evidence that is before the court, Mr. Brown. I'm just  
 11 trying to figure out how to apply the facts before the  
 12 court since nowhere, nowhere did you argue how a split  
 13 right was to be allocated, okay? That's all I'm  
 14 saying.

15 And I guess at this point in time I don't have a  
 16 firm understanding of how that would work. So it's up  
 17 to you as the litigant to explain to me, the court, how  
 18 that needs to work. All right? I'm not disputing the  
 19 evidence because --

20 MR. BROWN: It needs to work as set forth  
 21 in the affidavits is what I'm saying. I guess I don't  
 22 know why there's a --

23 THE COURT: The affidavit set out the  
 24 facts. I guess the -- do you disagree that in some  
 25 cases there would be an overallocation of water from

Page 23

1 the original root right?

2 MR. BROWN: An over -- I don't know what  
 3 you mean by an "overallocation."

4 THE COURT: Well, that if you added up all  
 5 the water that went with all the split rights, if you  
 6 added it up, it would be more than the root right  
 7 itself?

8 MR. BROWN: The only one I'm aware of,  
 9 Your Honor, is the 03 right. The reason for the  
 10 overallocation is the Buckeye ranch, who was not a  
 11 claimant here, not one of my clients, claimed something  
 12 like, it was eight point something, 8.75 maybe out of  
 13 the 20 cfs. The department went ahead and entered a  
 14 settlement agreement, which I understand Mr. Dolan has  
 15 accepted, which states that the Buckeye ranch gets  
 16 12 feet of water.

17 So there would be an overallocation in that case  
 18 because my claimants with 03C have claimed their  
 19 original decreed amount. The Buckeye has come in and  
 20 claimed more -- or has settled for more than claimed or  
 21 decreed to it. Or not claimed or decreed. Claimed or  
 22 deeded to it. So, yes, that's one situation.

23 MR. SPENCER: (inaudible) the number on that;  
 24 but I don't believe that's correct, Pat. I don't  
 25 believe that we would have settled for any more than

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1 the claimed and deeded quantity.

2 MR. BROWN: That's what I would have  
3 assumed, Nick. But when I've looked at it, I think it  
4 came in at, claimed at 8.75 and settled at 12.

5 MR. SPENCER: I believe (inaudible).

6 MR. BROWN: Well, I'll -- I mean that's the  
7 one I'm aware of.

8 MR. CLELLAND: Can I ask you a question?  
9 Regarding these splits, number one, at what point does  
10 the split become an individual right and treated as  
11 such and not as a piece of the original right? That's  
12 one question.

13 And the other question is: If what Mr. Brown has  
14 said that there's no overallocation of those rights,  
15 and which, if I recall, there's several rights that  
16 were underclaimed by the parties, so there was water  
17 left over from what was decreed under your summary  
18 judgment, who do we give that water to since it can't  
19 be forfeited?

20 THE COURT: Well, it's my understanding  
21 that, even if you have a preexisting right, you claim  
22 up to whatever you think the right is in this. And  
23 whatever is remaining or left over is waived, I suppose  
24 would be the correct word. That's, then, subject to  
25 appropriation.

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1 MR. SPENCER: You treat the claim for the  
2 smaller quantity as evidence of intent to abandon  
3 that.

4 THE COURT: It's just that amount. Yeah,  
5 it's unclaimed. It's unclaimed. It would be subject  
6 to appropriation.

7 MR. McKEOWN: I'm confused as to what we're  
8 doing here.

9 THE COURT: Well --

10 MR. McKEOWN: Are we arguing an issue?

11 VOICE: I think we all are.

12 THE COURT: Well, that's a fair question,  
13 Mr. McKeown. I was simply trying to see where we were  
14 on some of these issues. And I guess we got a little  
15 bit too far into them at this point. I think that's a  
16 fair statement.

17 MR. McKEOWN: I'm not, I'm not, I'm just  
18 trying to figure it out for myself because I don't, I  
19 don't understand, I guess I don't understand the  
20 discussion that was just occurring very well.

21 MR. HONSINGER: That's my problem. You're not  
22 alone.

23 THE COURT: Well, actually you're not  
24 entirely alone on that. I'm thoroughly confused at  
25 this point.

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1 MR. HONSINGER: The quantities decreed would  
2 not -- when they were decreed to the root rights, they  
3 were not decreed to split rights. We don't know what  
4 the quantity would be if it were decreed to the split  
5 rights.

6 THE COURT: Well, okay. Number one, the  
7 best place to look is the deed itself.

8 MR. HONSINGER: Okay.

9 MR. SPENCER: Well --

10 MR. HONSINGER: Except the deed might not be  
11 representative of what was actually decreed. It's  
12 merely, it's merely a statement that this amount was  
13 sold, not that this amount was decreed.

14 MR. CLELLAND: An example is Cleave Lloyd  
15 purchased a right from the 03, and he applies it to  
16 ground that was never decreed under the 03 right. And  
17 we've got a summary judgment. His right doesn't  
18 exist.

19 MR. HONSINGER: We've got that same problem  
20 with a couple of these rights if that's the case.

21 THE COURT: Well, CROW v. CARLSON says that  
22 if you have an original right and the land is divided,  
23 then that amount of water goes in a pro rata share to  
24 the amount of land that was divided. That's what  
25 CROW v. CARLSON says.

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1 MR. HONSINGER: Agreed.

2 THE COURT: Okay. I think in case --  
3 CROW v. CARLSON is probably a case where the deeds  
4 themselves did not describe the amount of water that  
5 went with each deed.

6 Am I correct about that?

7 VOICE: Is that the Rexburg decree?

8 THE COURT: Correct.

9 MR. HONSINGER: Yeah. The Rexburg decree  
10 doesn't say very much about rights.

11 MR. McKEOWN: No, it's basically --

12 THE COURT: Well, in that case there was an  
13 amount decreed under the Rexburg decree; and it was  
14 subsequently split. And the court said okay -- I don't  
15 think the deed specified the amount that went with each  
16 split. So the court simply did a pro rata division of  
17 the water to the pro rata reduction of the land.

18 MR. HONSINGER: Because it split two-thirds and  
19 one-third, one-third goes to this side; and two-thirds  
20 of the water goes to this side.

21 THE COURT: Correct. That was absent any  
22 statement in the deed specifying how much water went  
23 where.

24 MR. BROWN: Well, Your Honor, but, see, in  
25 this situation I think the deeds generally -- and the

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1 claims in the SRBA confirm it, too. For instance, the  
2 Dave Cropper claim. That was originally decreed to 80  
3 acres. Everybody agrees that a 40 of that never was  
4 irrigated. That 40 -- that's been split into the two  
5 40s. The full right went with the irrigated 40. The  
6 other one, nothing went with the nonirrigated 40.

7 THE COURT: Okay.

8 MR. BROWN: Nothing is claimed with the  
9 nonirrigated 40; and it's all claimed with the  
10 irrigated 40. So that's what I say when I say I don't  
11 think we have a dispute. I mean the parties -- you  
12 don't follow CROW v. CARLSON because the deeds  
13 allocated it. But --

14 THE COURT: The deeds allocate it in that  
15 particular case.

16 MR. BROWN: Yeah. The deeds say all the  
17 water goes with this 40. And the other 40 got none,  
18 and the other 40 claimed none. And nobody has ever  
19 said the other 40 had any.

20 MR. HONSINGER: The original deed which, from  
21 which the original, from the land, the original deed  
22 which, which deeded land from the original place of use  
23 of the root right, is that correct? Because that's  
24 what we want to be looking at here. The deed which  
25 deeded land to an individual, or split the land in

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1 effect.

2 MR. BROWN: Well, you got to go back to  
3 when the property was split is what you're saying.

4 MR. HONSINGER: Then I think --

5 MR. BROWN: Yeah.

6 MR. HONSINGER: -- if that's what we've got to  
7 do, then that's what we've got to do to make sense of  
8 this.

9 THE COURT: What, Charlie?

10 MR. HONSINGER: Is if you want to use deeds,  
11 you've got to use the deed that actually sold the land  
12 that -- the deed that effected a split of the land.

13 Do you see what I'm saying?

14 THE COURT: Correct.

15 MR. HONSINGER: You've got to find that  
16 particular deed. And that might not be the deed that  
17 the claimants have. I don't know. I guess I haven't  
18 examined the deeds closely enough to be able to tell  
19 you that.

20 MR. BROWN: That's my point. We moved for  
21 summary judgment, entered the deeds and, in addition to  
22 the deeds, the testimony of the property owners saying  
23 that that's how that worked. It's not opposed. So I'm  
24 not sure why it's an issue.

25 I mean I don't know why the court is not saying

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1 right now, okay, the quantities are as they were  
2 claimed in the summary judgment. Those were from the  
3 decrees. They were allocated in the amounts as stated,  
4 and they're unopposed. And now the court is, for some  
5 reason, telling us we need to go back and look at that  
6 again. And I'm not sure why.

7 THE COURT: Okay, Mr. Brown. All I am, all  
8 I am saying, okay, is I acknowledge what evidence you  
9 have submitted on summary judgment.

10 MR. BROWN: And you're asking to take more  
11 evidence?

12 THE COURT: No. I'm not. What I'm asking  
13 is is that normally when you submit evidence, you know,  
14 you submit legal argument with the evidence, right? Am  
15 I right about that?

16 MR. BROWN: You argue some points, yes.

17 THE COURT: One of the issues that was  
18 raised by the summary judgment itself was how to deal  
19 with split rights, all right? Now, I as a court, I  
20 don't pretend to know that right off the top of my head  
21 how that is done, all right? That was not argued in  
22 your summary judgment anywhere.

23 MR. BROWN: You see, I don't understand  
24 what there is to argue. There is not an issue here.

25 THE COURT: Well, maybe not argument, but

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1 perhaps an explanation.

2 MR. McKEOWN: Were the rights split  
3 subsequent to the New International decree?

4 MR. BROWN: Yes.

5 THE COURT: Yes.

6 MR. McKEOWN: That's the whole point, isn't  
7 it? I mean what you're asking -- can I try to take a  
8 stab at this?

9 THE COURT: Feel free.

10 MR. McKEOWN: What you're asking the judge to  
11 do is to say, well, why do you need to look at anything  
12 else; we've got a decree; we have the statements in the  
13 affidavits.

14 But if the rights were split subsequent to that  
15 decree, you still -- there's still this hanging  
16 question of how the water was split amongst the land  
17 subsequently, correct? Is that the question?

18 MR. BROWN: That was, that was answered in  
19 each affidavit. I mean each person said I took out of  
20 this right -- you know, each one of them said here's  
21 the decreed right.

22 MR. McKEOWN: Well, have I at least stated  
23 the question correctly?

24 THE COURT: Yes.

25 MR. BROWN: Okay. In each one of them

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1 that -- you know, maybe I have an example that would  
2 help. You know, each one of them said here's, you  
3 know, here's my, you know, here's my decreed right;  
4 here's where it comes from, you know; and here's the  
5 part of it, you know, here's my decreed right under the  
6 decree.

7 MR. McKEOWN: Yeah, right. Yeah.

8 MR. BROWN: Here's my deed showing that I  
9 got a portion of that property along with these water  
10 rights; and the water right I got is this quantity.

11 MR. HONSINGER: But how do you make the leap  
12 from the decree to the affidavit?

13 MR. BROWN: This decree is, the decree is  
14 attached to the affidavit; and they testify about the  
15 decree. And then they testify about their deed.

16 MR. McKEOWN: I think what the source of  
17 confusion is that there's nothing subsequent -- you  
18 know, if the split occurred after the decree, right?

19 THE COURT: Correct.

20 MR. McKEOWN: And what we're looking for is  
21 documentation at the time of the split, not discussion  
22 in the decree; isn't that right?

23 THE COURT: Well, yeah. I think what  
24 Mr. Brown is saying that in some cases the deed itself  
25 set out what was split from the original right.

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1 MR. McKEOWN: Right. And some cases maybe it  
2 doesn't; is that right?

3 THE COURT: Right. Exactly.

4 MR. McKEOWN: So, Pat, it seems like to me  
5 all the court is asking for in those cases where it  
6 doesn't explain what your claim, your clients proposed,  
7 how they propose to proceed in the absence of that  
8 additional information.

9 MR. BROWN: Now, my question is: What  
10 additional information? It says so in each affidavit.

11 MR. McKEOWN: But does -- but apparently --  
12 I'm just trying to sort this out because I have no idea  
13 what's going on here. Apparently there's some splits  
14 where the deeds don't explain how the water was split;  
15 is that right?

16 THE COURT: Well --

17 MR. McKEOWN: Is that right?

18 MR. BROWN: Yeah.

19 MR. HONSINGER: Yeah, that's correct.

20 MR. BROWN: Yeah.

21 MR. McKEOWN: And those are the situations  
22 where the court is trying to sort this out, correct?

23 THE COURT: Trying to.

24 MR. McKEOWN: And you're saying don't worry  
25 about it; just use the decree and the affidavits.

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1 MR. BROWN: Yeah.

2 MR. McKEOWN: But do the affidavits say,  
3 well, we understand there's no information here about  
4 how this right was ever split; but just do it, anyway?  
5 I don't -- I mean I'm just trying to figure it out.

6 MR. BROWN: No, the affidavit states -- the  
7 affidavits are the ones by the claimants. And there  
8 was one by -- there's one by the owner in each of the  
9 cases, okay?

10 MR. McKEOWN: Okay.

11 MR. BROWN: And the owner says, you know,  
12 my right comes out of this portion of the New  
13 International decree and attaches a page out of the New  
14 International decree. And then it says here's my deed  
15 showing that the property described in the, how the  
16 property described in the decree is -- or how a portion  
17 of my property, more typically, a portion of my  
18 property -- or let me give you the typical one.

19 The typical one is my property is described in my  
20 deed which is attached as Exhibit 2.

21 MR. McKEOWN: Right.

22 MR. BROWN: That property is within a  
23 portion of the decreed place of use.

24 THE COURT: Okay. Does that --

25 MR. BROWN: And I took the amount set forth

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1 through that, through my deed and through my  
2 acquisition of that ground as is set forth in my  
3 quantity of my attached Exhibit C. And then the  
4 Exhibit C goes on and says -- and I guess this is the  
5 David Cropper one. This is 047 here, and the portion  
6 they say they took is the whole portion, the 1.6 cfs  
7 for that.

8 MR. HONSINGER: That was not a split right.

9 MR. BROWN: Huh?

10 MR. HONSINGER: That was not a split right.

11 MR. CLELLAND: That's split from what was  
12 originally decreed.

13 MR. BROWN: It was decreed to property  
14 which comprised, was comprised of 80 acres. That's the  
15 one I just talked about before.

16 MR. McKEOWN: That's the 40, 40, all of it  
17 went to one side --

18 MR. BROWN: Where it went 40 and 40.

19 MR. McKEOWN: So it is a split right.

20 THE COURT: Well, split in the sense that  
21 the land was split; but the water was not.

22 MR. BROWN: Yeah.

23 MR. McKEOWN: So it's not split in that  
24 sense.

25 MR. BROWN: I mean, I don't know what you'd

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1 call it, but --

2 MR. HONSINGER: What about the cases where,  
3 what about the cases where -- I'm not trying to -- I'm  
4 just asking. What about the cases where there's no  
5 land owned by the claimant in the decreed place of  
6 use?

7 MR. BROWN: Well, a couple of those, I  
8 think, we disagree with. I think the ones where the  
9 Willow Brook, the Willow Brook -- is that what it's  
10 called?

11 MR. CLELLAND: Yeah.

12 MR. BROWN: The Willow Brook where you said  
13 two out of the ten rights in Willow Brook weren't a  
14 part of it. Well, first of all, we disagree with  
15 that. And, second of all, we put in the affidavits  
16 saying that it was. And that hasn't been opposed.

17 THE COURT: Okay, Mr. Brown. This is, you  
18 know, it's a big veiled (sic) here. And, you know, if  
19 you read it your way, I agree that's -- what you're  
20 saying is what you're saying. But all you say in this  
21 thing is the real property described in Exhibit A  
22 includes decreed appurtenant water rights. All right?  
23 If you simply look at this affidavit on its --

24 MR. BROWN: And it goes on and specifies.

25 THE COURT: Well, it doesn't say that the

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1 original property was 80 acres, and none was decreed to  
2 the other 40, and all of it was decreed to this 40.

3 MR. BROWN: It says the amount decreed to  
4 this property was the 1.6 as set forth in the  
5 affidavit. By incorporating the one exhibit, it says  
6 the original amount, place of use decreed to is  
7 incorporated by the attachment of the, you know, of the  
8 decree stating what the property description was.

9 MR. McKEOWN: Are these -- Your Honor, can I  
10 interrupt with a question?

11 THE COURT: Yes, please.

12 MR. McKEOWN: Is this sheet here, the sheet,  
13 does this reflect all the splits that we're talking  
14 about?

15 MR. BROWN: I haven't looked at that.

16 MR. McKEOWN: Is this all the splits that  
17 there are?

18 MR. HONSINGER: That's all the splits that I'm  
19 aware of that there are, yes.

20 MR. SPENCER: Then there's a group of  
21 (inaudible).

22 MR. McKEOWN: That's what I mean. That's  
23 what I mean, yeah, given that assumption. If -- just  
24 to take a certain stab at this, what I hear the  
25 decision-maker in this case saying is I can't --

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1 there's more information needed to decree the rights  
2 the way you want them to be decreed.

3 And if that's the case, then why don't you just  
4 provide the additional information? Why wouldn't that  
5 be the easiest way to proceed?

6 MR. BROWN: Well, because I'm not sure what  
7 I'm being asked to provide.

8 MR. McKEOWN: Write it out. For every split  
9 right, say this right was split on this day here; I'll  
10 trace it back to the original one here; here's how the  
11 water follows the land in each single one. Then  
12 everyone can see it.

13 Why would that be so hard to do?

14 MR. BROWN: Okay. Well, I can. I think  
15 that's what the affidavits do as a matter of --

16 MR. McKEOWN: They don't.

17 MR. BROWN: Sure they do.

18 THE COURT: Well, I'll be the judge of  
19 that, Mr. Brown, for sure.

20 MR. McKEOWN: I don't think they do.

21 THE COURT: And it's -- there's no way  
22 of -- I would have to know, exactly what you told me, I  
23 would have to know that no water went with the other 40  
24 in order to know that the full decree -- does it say  
25 here the full water decreed under the International

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1 Mortgage went with this particular right?

2 MR. BROWN: No. But why does it have to?  
3 I mean as long as it says the amount that went --

4 THE COURT: Because then there's an  
5 assumption --

6 MR. BROWN: I mean (inaudible) there's a  
7 portion --

8 THE COURT: Well, there's a question in my  
9 mind whether the other, whether part of that water  
10 right went with the other 40.

11 MR. McKEOWN: In my mind, too. I mean if --  
12 why couldn't you --

13 THE COURT: That's my only question.

14 (END OF TAPE)

15 MR. McKEOWN: The history of the rights  
16 you're talking about to be able to trace them. If you  
17 were to explain it the way you just explained it that I  
18 could make a little graph, a little picture of all the  
19 splits and follow the water, but your affidavits don't  
20 give enough information to do that in my estimation.

21 MR. BROWN: Yeah, but there's no way you  
22 can do that, Matt, without making each claimant go back  
23 and -- I mean if we're going to do that, I guess then  
24 you need to consolidate all the --

25 MR. HONSINGER: All the splits --

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1 MR. BROWN: -- all the rights back to each  
2 root.  
3 MR. McKEOWN: Right. But how much effort  
4 could that possibly take?  
5 MR. BROWN: And I guess I don't know that  
6 my claimant client in one case has to go -- you know,  
7 say you have some wild-card guy out there claiming that  
8 he gets -- you have a right decreed for 10 feet of  
9 water, and it went to 10 places, and they each got a  
10 foot, but one of those guys came in and claimed  
11 9 feet.  
12 Does that mean my client doesn't have his 1 foot  
13 of water when he puts in his affidavit saying this is  
14 appurtenant to my property; this is the amount I  
15 acquired from this decree to this property, in this  
16 quantity?  
17 MR. McKEOWN: I guess I feel like I'm not  
18 being understood. No one is trying to fight with you  
19 about what your -- the claims at this point. It seems  
20 to me this is more of an administration issue. We  
21 can't even connect the dots to what, where the splits  
22 relate to the root rights and how they were divvied up  
23 over time.  
24 No one is questioning the validity of them; is  
25 that right? We just don't --

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1 THE COURT: Yeah. I confess, you know, I  
2 guess I'm admitting to being a dullard here. I know --  
3 MR. McKEOWN: I'm leading the dullard charge  
4 here. I can understand. You have information that we  
5 don't --  
6 MR. BROWN: No, Matt. All I can tell you  
7 is -- you know, I'm not trying to say -- what I'm  
8 trying to say is the information is in the affidavit.  
9 If you want me to put it in a different form or explain  
10 it, I guess I can.  
11 MR. McKEOWN: Yeah.  
12 MR. BROWN: But all it's going to explain  
13 is that that claimant has testified that he got the  
14 water from this root, you know; and here's the property  
15 it was originally decreed to.  
16 MR. McKEOWN: Right.  
17 MR. BROWN: Here's the piece of that  
18 property that I own, and here's my deed.  
19 MR. McKEOWN: Uh-huh. And here's  
20 (inaudible).  
21 MR. BROWN: And most of them, the deed says  
22 the water came with it.  
23 MR. McKEOWN: Here's how much of the water  
24 (inaudible) --  
25 MR. BROWN: If it doesn't, the affiant

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1 says, yeah, here's how much came with it; and here's  
2 how much I have for this piece.  
3 And we summarized all that by putting it in what  
4 we thought was the most usable format, Matt, which was  
5 that Exhibit C thing, you know, where everything was --  
6 I mean that's the reason we presented it that way, so  
7 somebody wouldn't have to go through an affidavit and  
8 try to, try to say, okay, here's place of use, over  
9 here is quantity. So, for example -- you know, and  
10 that's why it comes in a decree deed --  
11 THE COURT: But how am I going to make  
12 sure, Pat, that the root right is not overappropriated  
13 with all the splits? I mean -- I don't want to use  
14 overappropriated, but that the total quantity will not  
15 exceed -- do I have to go back and do all these  
16 calculations?  
17 MR. BROWN: Well, no. I think if somebody  
18 is claiming -- if I'm a claimant and I got a decreed  
19 right, you know, and me and my -- you know, we all got  
20 common, a common predecessor; and we each got water  
21 rights on our property. And, you know, greedy Matt  
22 goes in and claims three-quarters of the water instead  
23 of his one fifth, well, then I guess I'm the guy that's  
24 supposed to come object to your right.  
25 MR. McKEOWN: Right. But I think you're

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1 still putting this in a, to me -- you know, if  
2 Your Honor -- if you mean it the way I'm saying this  
3 correctly, I think you're coming at this from an overly  
4 adversarial perspective, is that this is just a  
5 question of clarification. No one is trying to attack  
6 the rights at this point.  
7 They can't, they just can't follow back to -- you  
8 know, basically what you're hearing, I think, is that  
9 the trouble with decreeing the rights the way they are  
10 now is that you can't trace the quantities to the  
11 land.  
12 Wouldn't that concern your clients?  
13 MR. BROWN: No. Here's what I'm saying.  
14 What I'm saying, Matt, is I think the affidavits set  
15 forth -- I mean they trace them. And I don't know what  
16 more I can give other than that tracing.  
17 I mean I don't know if you're saying I'm supposed  
18 to go out and investigate every other claimant who may  
19 have claimed water under that root right and present  
20 some evidence about them. If that's the case in any of  
21 these, I can tell you what my clients did. They went  
22 out and objected to that right over there. They didn't  
23 do it in their case.  
24 MR. McKEOWN: Okay.  
25 MR. BROWN: You know, like I said, you

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1 know, what I mean --

2 THE COURT: Okay. Pat, let me just ask you  
3 on some of the deeds. You stated that some of the  
4 deeds actually specify a quantity of water.

5 Is that a fact?

6 MR. BROWN: Yes.

7 THE COURT: Okay. Can you venture a guess  
8 on how many of those that would be?

9 MR. BROWN: I mean I can't tell you

10 (inaudible) --

11 THE COURT: Okay. I'll go back, I'll go  
12 back and I'll review those deeds that are on summary  
13 judgment. And if that's true, I think I can enter  
14 summary judgment on those quantities. And I'll look at  
15 the other ones. You know, if there's a question in my  
16 mind, there's a question in my mind. That's all I can  
17 say.

18 MR. BROWN: Well, and I guess my question  
19 is (inaudible) --

20 THE COURT: The question is, is, my  
21 question -- my answer is I'm not smart enough to see it  
22 through the affidavits themselves, I suppose.

23 MR. BROWN: Well, and I guess the  
24 explanation is the -- maybe we need to walk through one  
25 affidavit, because they're intentionally done in a

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1 format that has some reason to it.

2 THE COURT: Okay. Well --

3 MR. BROWN: The reason is so that you can  
4 understand the number in that Exhibit C, that quantity  
5 has been testified to by that affiant as coming not  
6 only out of the original root right, but coming through  
7 that deed, through that appurtenant property to him in  
8 that quantity.

9 MR. McKEOWN: Well, for what it's worth, I  
10 don't think we should do that now.

11 THE COURT: Yeah.

12 MR. McKEOWN: I think we should do what the  
13 court suggests, which is go through and rule on the  
14 ones you can, and just let them know --

15 THE COURT: Yeah. I think that's --

16 MR. McKEOWN: -- later on (inaudible) --

17 THE COURT: I think that's all I can do,  
18 Matt.

19 MR. BROWN: Well, I guess my question,  
20 my -- what I'd urge the court do is, as he goes  
21 through, if one does not say a specific quantity in a  
22 deed --

23 THE COURT: Well, what I want to make sure  
24 of -- and I'll tell you what I want to make sure of.  
25 And frankly I think the department has outlined my

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1 concern. I think Matt has, too. I want to make sure  
2 that, you know, there's not going to be an overgrab on  
3 the original decreed right.

4 And, you know, if there isn't, I suppose it's not  
5 a problem. But if there is, then I've got some  
6 problem. I don't know how that can be resolved on that  
7 point.

8 MR. BROWN: Well, and my understanding from  
9 talking to -- and that was the purpose of my letter to  
10 you, was to understand if there were any and --

11 MR. HONSINGER: And that's what, I guess, we're  
12 saying, is --

13 MR. BROWN: You wrote back --

14 MR. HONSINGER: -- from our understanding is  
15 we didn't think of any; and we couldn't think of any  
16 disputes as to splits. But we still don't know, don't  
17 know how, how the water was decreed to each of these  
18 split rights. And I guess, I mean our confusion is the  
19 same. We don't, we can't (inaudible) --

20 THE COURT: Well, Charlie, it was decreed  
21 to an original root right.

22 MR. HONSINGER: Decreed to the original root  
23 right.

24 THE COURT: At that point it may have been  
25 split a number of different ways.

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1 MR. HONSINGER: Right.

2 THE COURT: I mean it's split by the deed,  
3 by the face of the deed itself. It may have been split  
4 on a pro rata reduction. Three, it may have been split  
5 that perhaps one parcel had the irrigation in one  
6 ditch; it may have been split that way. So, you know,  
7 so I need to review how they've been split --

8 MR. HONSINGER: As to being --

9 THE COURT: -- and if it's clear from the  
10 affidavits or not.

11 MR. CLELLAND: In my review of what was  
12 claimed, if you look at some of the split analyses that  
13 I've done, what was the claimed amount most always  
14 exceeded what was decreed. We added up all the claims  
15 of the splits versus what we recommended, never  
16 exceeded that. But a lot of times the claimed amounts  
17 exceeded that. All it takes is one person to claim the  
18 full right (inaudible) --

19 THE COURT: And then we got a serious  
20 problem.

21 MR. CLELLAND: Then you got to figure out --  
22 and if, even if that one guy is a wild-card, if he  
23 submits an affidavit --

24 THE COURT: Yeah.

25 MR. CLELLAND: -- and says this is my decree

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1 and this is what I was deeded --  
 2 THE COURT: Yeah. You know, what if --  
 3 MR. BROWN: We know that happened in a  
 4 couple cases.  
 5 MR. CLELLAND: So that's --  
 6 MR. BROWN: Quite frankly those aren't my  
 7 cases.  
 8 MR. CLELLAND: Well, but the point is --  
 9 MR. BROWN: It's not my job to go sort that  
 10 out. And it wasn't my job to come forward with  
 11 evidence.  
 12 THE COURT: Okay. Calm down now. Calm  
 13 down. Steve raised a good point.  
 14 MR. BROWN: Steve is raising a point off  
 15 the record after summary judgment, not in proper  
 16 evidentiary context.  
 17 THE COURT: Well, okay. Pat, but if I go  
 18 through -- say there was a right, and we'll call it A,  
 19 and that was decreed 1 cfs. And then there was, you  
 20 know, out of that, there were split four rights. One,  
 21 maybe it's .3; and two was .3; and three was .3; and  
 22 four was .3. Now, that's an overallocation of the  
 23 original right.  
 24 Now, if I only looked at the affidavits and, you  
 25 know, as you're suggesting, it would not be clear that

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1 there was an overallocation of the original right. You  
 2 would agree with that. That would be possible.  
 3 MR. BROWN: I mean, yeah, it's possible.  
 4 THE COURT: Now, if it's possible, we've  
 5 got a problem.  
 6 MR. BROWN: Why do we have a problem?  
 7 THE COURT: Well --  
 8 MR. BROWN: The fact that someone else may  
 9 have claimed a water right out of that decree means my  
 10 clients' evidence is no good when it's unopposed?  
 11 THE COURT: Maybe.  
 12 MR. BROWN: What we have -- I think the  
 13 problem is the court wants to do something perfectly  
 14 and continue to take evidence until it's assured it's  
 15 doing something perfectly, even though these are  
 16 unopposed cases.  
 17 MR. McKEOWN: I think the court is exercising  
 18 its proper function to make sure that the decree that  
 19 is entered in these rights is as accurate as possible.  
 20 I think that there's no risk to your clients here if  
 21 their affidavits are correct. And, as you say, they're  
 22 uncontroverted.  
 23 So what's the big deal? I mean just practically  
 24 speaking, what's the big deal with sorting out this  
 25 problem so we can (inaudible) --

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1 MR. BROWN: The big deal, Matt, is because  
 2 my clients are tired of paying for this. They have  
 3 been six years, Matt.  
 4 MR. McKEOWN: But that's too bad, Pat. The  
 5 statute says it's a requirement. They have to. They  
 6 have to --  
 7 MR. BROWN: They have to what?  
 8 MR. McKEOWN: They have to pony up the proof  
 9 that shows that their splits fit with the original root  
 10 right.  
 11 MR. BROWN: What says that?  
 12 MR. McKEOWN: The code says it's the  
 13 claimant's burden of proof. They have to do this.  
 14 MR. BROWN: And it's done in the  
 15 affidavit.  
 16 MR. McKEOWN: It isn't. It isn't.  
 17 MR. BROWN: The affidavits are unopposed.  
 18 MR. McKEOWN: Once, if the -- fine. I'm not  
 19 their lawyer. If the decision-maker is telling you  
 20 that he doesn't have enough information to make the  
 21 decision, it seems like you should fix it.  
 22 MR. BROWN: Well, I'm trying to find out  
 23 what he's proposing I do. But I also want to preserve  
 24 my record that I'm not, that I'm not in agreement with  
 25 the decision-maker that the decision-maker can continue

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1 to take evidence --  
 2 THE COURT: Pat, I think I can go back into  
 3 the record and simply look at some of these split  
 4 rights, add them all up and see if there's an  
 5 overallocation, period. If there is, then there's a  
 6 problem. If there isn't --  
 7 MR. BROWN: And that's fine.  
 8 THE COURT: -- there's no problem.  
 9 MR. BROWN: That's fine. And I don't have  
 10 a problem with that.  
 11 THE COURT: That's what I'm going to do.  
 12 I'm going to have to go back and look at these and see  
 13 if any of them are overallocated.  
 14 MR. BROWN: I mean, and I asked that  
 15 (inaudible) --  
 16 THE COURT: I mean that's my sole and one  
 17 concern. That's a case where I could look, review the  
 18 affidavits and say, well, fine; but there's someone,  
 19 somewhere, something is not right.  
 20 Now, if it turns out that they're all .25, you  
 21 know, I look at the affidavits and who cares?  
 22 MR. HONSINGER: I would point out to Your Honor  
 23 that, yeah, in order to do that thoroughly you need to  
 24 look at all the split, each of the splits from the root  
 25 right.

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1 THE COURT: I understand that.  
 2 MR. HONSINGER: Those --  
 3 MR. BROWN: You know, that's what I  
 4 asked -- I wrote a letter to Charlie and said is there  
 5 any problem with this, because I can't find a problem  
 6 with it. And Charlie wrote back, and my understanding  
 7 is, he said you can't either.  
 8 MR. HONSINGER: But I didn't know that there  
 9 would be a problem with this.  
 10 THE COURT: Now, to save your clients some  
 11 money, Pat, and knowing my concern, would there be a  
 12 tremendous objection to IDWR simply adding up all the  
 13 root rights and what's claimed and seeing if it's more  
 14 than whatever? I mean it's just a matter of  
 15 mathematics.  
 16 MR. BROWN: Yes. And here's my problem, I  
 17 guess. And it's not so much a problem. It's a problem  
 18 in that I have the duty to see to it that my clients  
 19 get their rights decreed. The only way I know how to  
 20 do that is under the rules of civil procedure. We've  
 21 followed those.  
 22 We don't want there to be any, any question  
 23 whatsoever that we feel the court is allowing -- or I  
 24 should say --  
 25 THE COURT: Pat, all (inaudible) --

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1 MR. BROWN: -- forcing my clients to trial  
 2 in disregard of rule 56.  
 3 THE COURT: Pat, I'm going to do it or the  
 4 department is going to do it.  
 5 MR. BROWN: Well, and then I would ask,  
 6 Your Honor, to go back through the affidavits with the  
 7 decree. The Exhibit C has the quantity. The deed is  
 8 attached. The statements of the affiants are in  
 9 there. And that proves the quantity of the split to  
 10 that person.  
 11 Now, the court is saying I'm concerned that other  
 12 people may have gotten part of this right.  
 13 THE COURT: I'm not concerned that other  
 14 people may have got a part of the right. I'm concerned  
 15 that there's an overallocation of the original right.  
 16 That's what I'm concerned about.  
 17 MR. McKEOWN: So you don't want the  
 18 department to do it. You want him to do it. That's  
 19 what you're saying.  
 20 THE COURT: I'm going to -- someone is  
 21 going to do it. If there's an overallocation, you  
 22 know, it appears to me that there might be a problem  
 23 somewhere. If there isn't, okay --  
 24 MR. BROWN: Okay. Well, let's put it this  
 25 way: I would not object to having the department

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1 simply go down each root right and say which ones are  
 2 overallocated without any commentary --  
 3 THE COURT: No comment.  
 4 MR. BROWN: -- without any purported  
 5 argument, explanation or anything else. They go down  
 6 and they say right No. X, we believe it's  
 7 overallocated, period. That report comes to me, and I  
 8 do the depositions.  
 9 THE COURT: Okay. Here's how the report  
 10 would read. The root right would be described as -- it  
 11 would be given a number, okay? Boom, there.  
 12 MR. BROWN: They've all got a number.  
 13 THE COURT: All right. It's 36, blah,  
 14 blah, blah, blah 1. All right. And the split rights  
 15 off that and the original decreed right was 10 cfs.  
 16 Okay. The split rights were A, B, C, D, E. And the  
 17 quantity for that was, I don't know, the quantity for  
 18 that was, you know, A, B, C, D, E. And that adds up to  
 19 what? X. That's all I want to know.  
 20 VOICE: And we're doing this on the  
 21 basis of the claimed quantities.  
 22 THE COURT: Claimed.  
 23 VOICE: Okay.  
 24 MR. McKEOWN: Can the department do that,  
 25 Charlie?

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1 MR. HONSINGER: We can do that, yes.  
 2 THE COURT: Okay. Now, if that does not  
 3 exceed the root right, it doesn't appear that we have a  
 4 problem. If it does, we've got a problem.  
 5 MR. HONSINGER: You simply want numbers,  
 6 period.  
 7 THE COURT: Period, no comment.  
 8 MR. BROWN: I know where that's going to  
 9 come out. We're going to come out with an excess  
 10 because the department didn't allocate those properly.  
 11 Where the department would think somebody might be  
 12 claiming under a decree, they would say, well, I think  
 13 it must have been under this right number; so they  
 14 added it in there. So we're going to come up with  
 15 more.  
 16 THE COURT: You just told me you're fairly  
 17 safe that that wouldn't, that the amount claimed would  
 18 not exceed the root right.  
 19 MR. McKEOWN: Exactly.  
 20 MR. BROWN: Well, no. I just pointed out  
 21 that it would. And I gave you the right number, the  
 22 03.  
 23 THE COURT: Okay.  
 24 MR. BROWN: It is going to.  
 25 THE COURT: That one will. Are there any

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1 others that you're concerned about?

2 MR. BROWN: I don't know. I think it may  
3 on others. I don't know if it will or won't on  
4 others. I know what the department has -- I know the  
5 department, first of all, has already done this and did  
6 not come forward with it on summary judgment.

7 The department took three months to do that,  
8 right?

9 MR. HONSINGER: To do what?

10 MR. BROWN: To go back and track down each  
11 right back to its root.

12 MR. HONSINGER: Not to my knowledge, the  
13 department hasn't done that.

14 MR. BROWN: Steve Clelland did that.

15 VOICE: Oh, yeah.

16 MR. BROWN: When you went back and did the  
17 whole, each ditch and each right that comes out of it  
18 and who is the right-holder and what the quantity is.

19 MR. CLELLAND: On that and the MAD analysis.

20 MR. BROWN: Yeah.

21 MR. CLELLAND: The ditches.

22 MR. BROWN: So it's already been done. I  
23 don't know what to do at this point, Your Honor. You  
24 know, I think that's something that all should have  
25 been taken care of before. If it hasn't been taken

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1 care of, it doesn't mean the court is in error.

2 Because the court is not perfect based on the evidence  
3 presented.

4 THE COURT: Well, we're --

5 MR. HONSINGER: I object (inaudible) --

6 THE COURT: -- not perfect; and we're not,  
7 you know, obviously extremely bright. I'm just trying  
8 to figure out how this works, okay? Somewhere there's  
9 going -- there might be a problem. I don't know what  
10 to say.

11 MR. BROWN: Somewhere we might have -- I  
12 agree.

13 THE COURT: So that if there's a problem,  
14 if all these affidavits swear that they had a pro rata  
15 reduction, you know, and there's an overallocation,  
16 then there's a problem with someone's affidavit.

17 MR. BROWN: I think that's fine. Do it as  
18 claimed. Or I think we should --

19 THE COURT: That's what I'm asking, as  
20 claimed.

21 MR. BROWN: Okay.

22 THE COURT: I want to know what they are as  
23 claimed.

24 MR. BROWN: That's fine. I can't keep the  
25 court -- I can object to the court taking evidence. I

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1 know I'm not going to keep him from doing it. So  
2 that's fine. Take your evidence.

3 THE COURT: Pat, I'm entitled to look at  
4 this case on the record, I think.

5 MR. BROWN: I understand that.

6 THE COURT: Okay. It's just a matter of  
7 assisting the court in its mathematics. There's no  
8 comment. We're finding out what the root right is, and  
9 what the splits are, and the claimed rate, and if the  
10 claimed rate exceeds the root rate. I don't see what's  
11 so complicated about that.

12 MR. BROWN: Without commentary and  
13 without -- the problem I have with it, Your Honor,  
14 quite frankly, is I think the court has abused its  
15 discretion. And the department has abused its  
16 privilege in the filing of 706 reports, in the filing  
17 of supplemental reports. And they've all been filed  
18 with the court. They haven't been provided to the  
19 claimants.

20 THE COURT: Pat, okay. To the extent that  
21 these claimed rates, Mr. Brown, do not exceed X, I  
22 think that we can look at these affidavits and probably  
23 grant summary judgment on them. I'm just concerned  
24 that there's an overallocation. If there isn't,  
25 there's no problem.

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1 MR. BROWN: And if there is an  
2 overallocation, I guess my question is: Why are we  
3 doing this? What if there's an overallocation?

4 MR. McKEOWN: Your Honor, I think his  
5 objection has been noted. I think your conduct and  
6 what you plan to do has been fairly well laid out. The  
7 department has been ordered to produce a document. I  
8 think it would make some sense to proceed rather than  
9 to continue --

10 THE COURT: Mr. Brown, your objection is  
11 duly noted. You've objected to my request. You've  
12 preserved your objection. And that's the court order.  
13 I think that's correct. All right.

14 Charlie, when can you have that done by?

15 MR. HONSINGER: What's today? Monday. I can  
16 have it in by next Friday.

17 THE COURT: All right.

18 MR. HONSINGER: I would like to clarify the  
19 record that every 706 report the department has  
20 provided, the department has mailed a copy to  
21 Mr. Brown. If Mr. Brown's clients are in the subcase,  
22 the department has mailed a copy to Mr. Brown.

23 MR. BROWN: My objection is the mailing of  
24 them to the court.

25 MR. HONSINGER: The court ordered them.

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1 THE COURT: Okay. Hold off.  
 2 MR. BROWN: Your Honor, my objection is --  
 3 THE COURT: Hold off, Mr. Brown, please.  
 4 All right. I have -- let's proceed on to place of  
 5 use.

6 Evidently you've been able to settle some of the  
 7 rights. I note those rights. And we have disagreement  
 8 on others. And I assume we'll just proceed to trial on  
 9 those. We'll discuss trial date and how that will  
 10 proceed in a moment. I don't think there's much to  
 11 talk about that with that. You'll have your evidence.  
 12 And Mr. Brown --

13 MR. BROWN: Your Honor, on each of those,  
 14 again -- I want my objection noted for the record --  
 15 the affidavits were submitted. They were unopposed.  
 16 They certainly rebut the acreages stated in the  
 17 director's report, and the court is forcing us to a  
 18 trial with a nonparty.

19 THE COURT: Your objection is noted,  
 20 Mr. Brown.

21 (INTERRUPTION OF THE HEARING)  
 22 (DISCUSSION HAD OFF THE RECORD)

23 THE COURT: All right. Let's proceed.

24 Mr. McKeown, I think I can get you out of here.

25 We're going to talk about consumptive use. Well,

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1 let's talk about consumptive use for a moment. I set  
 2 out a briefing schedule on that.

3 Have you seen that?

4 MR. McKEOWN: I've not. I talked to  
 5 Mr. Honsinger, and he said he hadn't seen it either.  
 6 It must have been just mailed out --

7 THE COURT: Yeah, it was just mailed; and I  
 8 have just sent that. The motion to participate is  
 9 extended on the legal issue, and only the legal issue,  
 10 on that. The sole legal issue is whether we subtract  
 11 effective precipitation from the overall number.

12 So there will be simultaneous briefing on that.  
 13 I think I gave two weeks for the opening brief, and  
 14 then one week for the responsive briefs. That will be  
 15 simultaneous briefing.

16 MR. BROWN: Your Honor, I also -- since  
 17 this has been raised, I want to file my objection to  
 18 that. The court stated that it would be taking  
 19 additional -- it would be considering the department's  
 20 706 reports as evidence unless a party moved to strike  
 21 them. It stated that it --

22 First of all, the supplemental 706 reports which  
 23 have been filed exceed the order of the court. The  
 24 first 706 report simply stated that the department  
 25 found a statutory definition which required a deduction

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1 for effective precipitation. They've gone on to file  
 2 evidentiary affidavits. They've gone on to file what's  
 3 called another 706 report which is nothing but  
 4 briefing.

5 The court has refused to put a stop to it --

6 THE COURT: Okay.

7 MR. BROWN: -- and, instead, has  
 8 affirmatively stated in that order that it will be  
 9 considered evidence. And we believe that's also  
 10 improper. We're being denied our due-process rights.

11 MR. McKEOWN: You have no due-process right  
 12 being violated here, Pat.

13 MR. BROWN: I have a right to notice, which  
 14 is meaningful, and an opportunity to be heard, which is  
 15 meaningful, and the opportunity to prepare beforehand.  
 16 And none of those have been given.

17 THE COURT: All right. The ruling is on  
 18 the 706 reports, as they are styled as 706 reports,  
 19 they in and of themselves will not be considered as  
 20 evidence. The purpose of a 706 report, Mr. Brown, is  
 21 to give you information as to what the department has  
 22 or doesn't have. And I think that, number one,  
 23 benefits you.

24 To the extent that -- and I'm still trying to  
 25 understand how that works with the court. The

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1 department of water resources is to act as the court's  
 2 independent expert. Now, obviously the court cannot  
 3 conduct discovery of the department. The court does  
 4 not want to conduct discovery of the department. The  
 5 court needs to know if the department has information  
 6 that would be useful to the court; and if so, the  
 7 department would be asked to testify on the record  
 8 subject to cross-examination on any information that  
 9 was prepared to the court.

10 I see 706 reports no more, no less, and simply an  
 11 offer of proof to the court so the court knows whether  
 12 there is useful information or not. The 706 reports in  
 13 and of themselves are not evidence.

14 706 reports are discovery to you to let you know  
 15 what they have or do not have. Certainly they can be  
 16 used by you on cross-examination.

17 If necessary, the statute provides that the  
 18 department is the court's expert. A mechanism was  
 19 provided for them to act as such. Obviously they would  
 20 be testifying if the court asks them to. And the court  
 21 needs to know what kind of information they have.

22 MR. BROWN: Your Honor, I think it's  
 23 important to look at the first 706 report on  
 24 consumptive use where the department admitted and told  
 25 the court that the only difference of substance here is

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1 on a legal issue. It is inappropriate for the court to  
2 take evidence on a legal issue.  
3 THE COURT: Mr. Brown, what evidence am I  
4 taking?

5 MR. BROWN: And I certainly think the court  
6 is capable, as Judge Hurlbutt has ruled time and time  
7 again, of ruling on a legal issue such as whether the  
8 statutory definition of consumptive use requires a  
9 deduction for effective precipitation.

10 THE COURT: Pat, that's the issue we're  
11 going on.

12 MR. BROWN: That's a legal issue.

13 THE COURT: That's the sole legal issue.

14 MR. BROWN: And the court is taking 706  
15 reports on a legal issue from the department of water  
16 resources, and I believe that's inappropriate. I  
17 believe Judge Hurlbutt has ruled again and again that  
18 the court and the Bar are perfectly capable of handling  
19 those issues without the aid of the department of water  
20 resources, and has stricken 706 reports which purport  
21 to address legal issues time and time again.

22 THE COURT: Pat, the 706 report that was  
23 submitted with the court as to this legal issue was for  
24 your benefit, not for the court's.

25 MR. BROWN: If it's to my benefit, it

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1 should be submitted to me as 706 reports typically are  
2 to the parties and not to the court.

3 THE COURT: Well, I'm going to reserve  
4 ruling on that particular issue. I can only say that,  
5 number one, this is a sole legal issue on consumptive  
6 use. The State has been invited to participate on this  
7 legal issue. And we will litigate it as a legal  
8 issue.

9 MR. BROWN: I understand that. Given that,  
10 though, I'm simply asking, wondering, I guess, why the  
11 court has stated that it will consider as evidentiary  
12 submissions those presented by IDWR concerning --

13 MR. McKEOWN: He just said that wasn't what  
14 he was doing.

15 MR. BROWN: Okay. He said that he was not  
16 going to do it with respect to the 706 reports, but  
17 there were several affidavits submitted also.

18 THE COURT: My feeling is, if the  
19 affidavits were submitted with the 706 reports, there's  
20 no need for the court to consider affidavits at this  
21 point in time. If it's, if we have -- as I stated on  
22 the ruling on the deposition, if effective  
23 precipitation is not deducted, then it will be 3.75.  
24 If it is, it will be 3.5. There.

25 We are on the legal issue of whether we need to

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1 do that or not. The court will not consider  
2 affidavits. The court -- you know, that question has  
3 been answered.

4 MR. BROWN: Well, then I wonder why the  
5 court has stated in its written order which I've  
6 received, I think, today -- I believe I read it this  
7 morning. It is confusing then, because I read it to  
8 say that the court will consider all 706 reports and  
9 everything on this issue. If --

10 THE COURT: Okay.

11 MR. BROWN: If it's in agreement that it's  
12 a legal issue, none of that should be considered.

13 THE COURT: Mr. Brown, to the extent that  
14 you construed that order that way, the court will not  
15 consider the 706 reports as evidence in and of  
16 themselves, or the affidavits.

17 MR. BROWN: Or as anything else. I think  
18 the only other thing they could be is legal argument;  
19 and that's improper, too. They should be stricken.

20 MR. McKEOWN: Your Honor, I think that the  
21 court has inherent authority to consider those  
22 documents lodged, and treat them in any way it chooses  
23 to.

24 THE COURT: Mr. McKeown, they're not,  
25 they're not evidence before the court at this point.

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1 MR. McKEOWN: No, I mean -- I'm not  
2 suggesting they are. But they are lodged before the  
3 court. You know, if you want the look at them, I don't  
4 think it's --

5 MR. HONSINGER: They're lodged pursuant to the  
6 court's -- that order.

7 THE COURT: They were.

8 MR. BROWN: Your Honor, the problem here --

9 THE COURT: Mr. Brown, we'll take up that  
10 issue at a later date on 706 reports. Your objections  
11 have been noted. I'm not going to take those 706  
12 reports as evidence at this time on consumptive use.

13 It's a pure legal argument. Make your argument.

14 Finally, Mr. McKeown -- and this was not  
15 submitted by you. There was a motion for stay  
16 submitted by Miss Jacobus --

17 MR. McKEOWN: Yes, Your Honor. I just  
18 learned about that three hours ago in Twin Falls.

19 MR. BROWN: I have not seen it,  
20 Your Honor.

21 MR. McKEOWN: I apologize because I, as you  
22 know, I work in a different division.

23 THE COURT: I understand that. I  
24 understand that. I just want to clarify for the  
25 record, and I think the record needs to be made here,

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1 that in support of this motion she cited these  
2 particular, this particular summary judgment. And it's  
3 crystal clear that Idaho -- or the department of water  
4 resources said that partial forfeiture was not an issue  
5 in this case. I don't know what else to say.

6 MR. McKEOWN: I don't understand. What did  
7 she say?

8 THE COURT: Well, she is stating that --

9 MR. McKEOWN: I should say what did the State  
10 say?

11 THE COURT: Well, she submitted that she  
12 wants a stay in all the subcases involving -- that  
13 could involve partial forfeiture. And in support of  
14 that, she cites that we have been proceeding on such  
15 cases; and she cites these 24 subcases.

16 MR. McKEOWN: Okay. I'm not understanding  
17 the statement. What is it?

18 THE COURT: Well, I don't know. Maybe she  
19 is not familiar with what's going on in these  
20 subcases. As a representative of the State, maybe you  
21 want to bring that to her attention.

22 MR. McKEOWN: I will -- I can assure you,  
23 Your Honor, that, having just learned about this a few  
24 hours ago, I will be talking to them, to her and others  
25 in Boise about this when I get back.

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1 THE COURT: And also she cited,  
2 Miss Jacobus cited, she also cited, Mr. McKeown, an  
3 order that Miss Bilyeu did. And in that particular  
4 summary judgment, that was based on forfeiture, not  
5 partial forfeiture.

6 MR. McKEOWN: Okay.

7 THE COURT: So, you know, so to the extent  
8 that she's going to argue this in front of

9 Judge Hurlbutt, I'm giving her advanced warning --

10 MR. McKEOWN: To duck.

11 THE COURT: To duck.

12 MR. McKEOWN: I'm sorry. I shouldn't have  
13 said that on the record.

14 I apologize to Mr. Brown and Mr. Honsinger and  
15 you, Your Honor. I just don't know. I should -- I  
16 shouldn't be here unprepared. I apologize.

17 THE COURT: No, that's -- you didn't  
18 prepare this, Matt, so --

19 MR. McKEOWN: I haven't even seen it, had a  
20 chance to read it. I was just --

21 MR. BROWN: Your Honor, for the record,  
22 could I ask what the title of that document is?

23 THE COURT: It's a motion for order staying  
24 the issuance of final special master's recommendation  
25 in all subcases where the recommendation involves

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1 application of this court's decision in basinwide 10  
2 pending Idaho Supreme Court decision on appeal and  
3 memorandum in support.

4 Now, for the record, Mr. Honsinger, IDWR has  
5 submitted on the record that as far as these subcases  
6 and the 85 pending subcases that those were not based,  
7 specifically not based on partial forfeiture. They're  
8 beneficial use, beneficial use only.

9 I can assure you in no uncertain terms that  
10 partial forfeiture will never be litigated in these  
11 85 subcases or these 24. And I --

12 MR. McKEOWN: Okay. All I can do is have,  
13 have her and others get back to you.

14 THE COURT: Beware.

15 MR. McKEOWN: I have no idea.

16 THE COURT: Personally, Matt, I'm not  
17 familiar with any subcase at this point in time in the  
18 SRBA that was decided on partial forfeiture. Because I  
19 think the department of water resources has closed the  
20 door on that little issue, for what it's worth.

21 MR. McKEOWN: Can I ask you, can I ask you to  
22 address one issue very quickly?

23 THE COURT: If I can.

24 MR. McKEOWN: Special Master Bilyeu expressed  
25 some reservation, and I wanted to clarify what we're

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1 doing. On the settlements that we did reach this  
2 morning, the State will not sign on to those  
3 settlements because we are not a factual litigating  
4 party.

5 THE COURT: I understand that.

6 MR. McKEOWN: We will make as a  
7 representation that we will not object to the  
8 settlements that the department of water resources and  
9 Mr. Brown's clients can reach. However, I do not feel  
10 like we should have to enter into those --

11 THE COURT: That's fine.

12 MR. McKEOWN: Is that --

13 THE COURT: That's --

14 MR. McKEOWN: She seemed concerned by that.  
15 I just wanted to see if you were concerned also.

16 THE COURT: No, I'm not concerned.

17 MR. McKEOWN: All right.

18 THE COURT: Does anyone have a pencil on  
19 them?

20 MR. McKEOWN: A pencil or a pen?

21 THE COURT: A pencil. All right. Let's  
22 talk, get down to -- Matt, I think that's about it.

23 MR. McKEOWN: When do you guys --

24 THE COURT: I perceive a trial happening,  
25 if you need to go --

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1 MR. McKEOWN: Just let me know when you think  
2 we can do this. Is this going to happen in the next  
3 month?  
4 THE COURT: No.  
5 MR. McKEOWN: The next two months?  
6 THE COURT: I'm picking a date of  
7 January 27th.  
8 MR. McKEOWN: Okay. Then you want some other  
9 fresh face here to do that. All right.  
10 THE COURT: Okay.  
11 MR. McKEOWN: So we settled acreage on seven  
12 rights.  
13 THE COURT: Six, I think.  
14 MR. HONSINGER: Six.  
15 MR. McKEOWN: Six, I think.  
16 THE COURT: I don't know what's with that  
17 1.25 or 1.  
18 MR. HONSINGER: Give it a chance. I think we  
19 (inaudible) as well.  
20 MR. McKEOWN: We're going to litigate the  
21 legal issue of consumptive use, and then we're going to  
22 go to trial after that.  
23 THE COURT: Correct. And this, the  
24 consumptive-use issue is going to be solved within the  
25 month. I set out a fairly straightforward briefing

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1 schedule on that. Okay.  
2 Now, does anyone have problems with the 27th  
3 date? Pat?  
4 MR. BROWN: With the what?  
5 THE COURT: January 27th, one week. I  
6 don't think it will take a week, but I'm prepared to go  
7 a week.  
8 MR. BROWN: 27th?  
9 MR. McKEOWN: I expect you'll be ready to  
10 go.  
11 THE COURT: With that little baby, he'll be  
12 running to court.  
13 MR. BROWN: I'll be so ready because I  
14 won't get a chance to sleep. I'll just stay up all  
15 night.  
16 MR. HONSINGER: Welcome to the world of  
17 parenthood, Pat.  
18 MR. McKEOWN: When is it due?  
19 THE COURT: Today, tomorrow --  
20 MR. BROWN: Next week or two.  
21 THE COURT: Okay. Let's go January 27th,  
22 Pat. Do you have a problem with that?  
23 MR. BROWN: No.  
24 MR. McKEOWN: What other business have we got  
25 here today, gentlemen?

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1 THE COURT: We're just going over -- Matt,  
2 we're going to go over pleading dates, exchange of  
3 witness -- and probably none of this is applicable  
4 since it's a one-party case. And you guys are legal  
5 participants instead of fact.  
6 MR. McKEOWN: Under your order, Your Honor,  
7 I'm not sure what the State can do in the trial.  
8 THE COURT: I'll send you the order  
9 nevertheless.  
10 MR. McKEOWN: Okay.  
11 THE COURT: So you can go, Matt, if you  
12 want to.  
13 MR. McKEOWN: Great. Thank you. I  
14 appreciate it.  
15 THE COURT: All right. Here's the way I'm  
16 going to do this, Pat, just so I know and Charlie  
17 also. We're going to -- I predict, I guess I'm  
18 wishful, that we're going to be litigating acreage and  
19 purpose of use at the last time, at the last minute.  
20 MR. BROWN: Well, I guess purpose of use  
21 is maybe something we should talk about, because the  
22 winner of the ditch-maintenance use which we put in  
23 there is, first of all -- the department, I think, says  
24 that was unclaimed.  
25 THE COURT: Wait a second, Pat. Let me get

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1 through this first.  
2 MR. BROWN: Okay.  
3 THE COURT: All right. Then I'm going to  
4 go off the record, and we can discuss -- what I'm going  
5 to do is I'm going to start with the earliest, or the  
6 03 -- would be 3A, then 3C, 3F, 34B; and we're going to  
7 go right on down this list that I have here. All  
8 right?  
9 And what I'm going to do is we're going to start  
10 on January 27th at 9:00 a.m. And I'm not going to have  
11 any specific time frame for each particular subcase.  
12 We're just going to start with the first one and just  
13 keep going. Okay?  
14 So it involves some case management on your part,  
15 Pat, and on your part, too, Charlie.  
16 MR. HONSINGER: Yes.  
17 THE COURT: Okay? So we'll just go right  
18 on down.  
19 Would that create any problems?  
20 MR. BROWN: Not that I'm aware of. As we  
21 prepare for trial, we may be able to -- you know, some  
22 rights may, you know, appear that they should go with  
23 others; and we may want to adjust that schedule. But  
24 we'll certainly let the court know ahead of time.  
25 THE COURT: All right. Well, okay. And if

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1 there are --  
 2 MR. BROWN: I mean that's the kind of thing  
 3 you learn more about as you --  
 4 THE COURT: Correct. And I'll accommodate  
 5 your witnesses or your witnesses, Pat.

6 Charlie, on some of these, you know, you may or  
 7 may not be called. That's all I can say.

8 MR. HONSINGER: Uh-huh.

9 THE COURT: If I'm satisfied with the  
 10 evidence that's been presented and it's been by all  
 11 accounts completely truthful and, you know --

12 MR. HONSINGER: Can you give us some indication  
 13 as to whether or not the department will be called  
 14 beforehand so that our witnesses -- our witnesses are  
 15 state employees, and --

16 THE COURT: Right. You can probably at  
 17 this point bet on being called on in the cases where  
 18 there are substantial differences.

19 MR. HONSINGER: Okay.

20 THE COURT: In cases where there are not,  
 21 probably you will not. I don't think there are too  
 22 many of those frankly. All right.

23 So you can get together on any schedule, Pat.  
 24 And any schedule that you believe would be appropriate  
 25 considering your witnesses, just let the court know

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1 ahead of time; and I'll be prepared to proceed.

2 MR. BROWN: Okay.

3 THE COURT: All right? Pretrial  
 4 conference. Most of these are probably not applicable  
 5 since they're one-party cases.

6 Mr. Brown, you can correct me if I'm wrong.

7 MR. BROWN: Your Honor, as we schedule  
 8 dates, I'd ask the court to take into account we will  
 9 be filing motions for the court to accept --

10 THE COURT: Very well. Let's talk about a  
 11 motion cutoff date.

12 Do you predict that there will be any more  
 13 summary judgments that will be applicable, Pat?

14 MR. BROWN: I predict there will be more  
 15 summary judgments filed.

16 THE COURT: Okay. Let's --

17 MR. BROWN: I would like to ask the court  
 18 to schedule that deadline far enough down the road so  
 19 that we can take care of some other motions that will  
 20 be filed.

21 THE COURT: How about November 1st?

22 MR. BROWN: Your Honor, I would like to ask  
 23 that that be moved further back.

24 THE COURT: How far back?

25 MR. BROWN: How about the --

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1 THE COURT: You got to give me time to rule  
 2 on these, obviously, if they're dispositive.

3 MR. BROWN: Well, Your Honor, let me be  
 4 quite frank. My concern is that we be told who the  
 5 court may call as witnesses, what those witnesses may  
 6 be asked, and be given the opportunity to conduct  
 7 discovery prior to filing the summary judgment. You  
 8 know, given all that, we're talking about -- and I  
 9 realize the court's problem is the court is in a  
 10 position where it's difficult to know who it may call.

11 With all due respect to the court, I don't  
 12 believe that's my clients' problem. In fact, I believe  
 13 it's their due-process right to know who the court may  
 14 call.

15 THE COURT: Charlie, who would be the  
 16 person on purpose of use or acreage? It would be  
 17 Steve, wouldn't it?

18 MR. HONSINGER: Steve would be the factual  
 19 witness on acreage and purpose of use, whether or not  
 20 it existed at the time of his examination.

21 If you need somebody to testify as to whether or  
 22 not purpose of use is -- I mean if it's a policy issue,  
 23 then I've got to get somebody else.

24 THE COURT: Well, you're not to testify on  
 25 policy. You're going to testify on facts.

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1 MR. HONSINGER: Then on the facts, Steve would  
 2 be the witness.

3 THE COURT: Okay.

4 MR. HONSINGER: He's the one who examined the  
 5 properties.

6 THE COURT: Immediately, Mr. Brown, I'm  
 7 going to go through these right now and tell you ones  
 8 you may want to focus on. All right? Have you got  
 9 something to write on?

10 I'm probably going to be interested in 3E on  
 11 acreage. I assume, predict, and hope you can come to  
 12 some sort of meeting of the minds between 1.25 and  
 13 1.1 acres. I'm sure you can on the 39E right.

14 Let's see, 39N, I'm confused frankly.

15 MR. BROWN: Your Honor, that's a right  
 16 that's part of a subdivision. We -- and I guess this  
 17 would be an appropriate time to bring up my concerns  
 18 with the court. What happened, where we are  
 19 essentially is that was a lot in a subdivision --

20 MR. HONSINGER: A lot in a subdivision.

21 MR. BROWN: -- and had not been built on at  
 22 the time Mr. Clelland went out and looked.

23 MR. HONSINGER: And the water, we established  
 24 that the water hadn't been used there for 11 years.

25 MR. BROWN: Well, I don't agree that that

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1 was established at all. And in fact the ditches were  
 2 running down through the property.  
 3 THE COURT: Is this disallowed based on  
 4 what, Charlie? Forfeiture?  
 5 MR. HONSINGER: Forfeiture.  
 6 THE COURT: Okay. That's forfeiture,  
 7 right?  
 8 MR. HONSINGER: Yes.  
 9 MR. BROWN: But, in any event, Your Honor,  
 10 we came in here today basically that, I think Charlie  
 11 would agree, that the entire place is irrigated now --  
 12 MR. HONSINGER: It is irrigated now.  
 13 MR. BROWN: -- except for the house and  
 14 driveway.  
 15 MR. HONSINGER: That's correct.  
 16 THE COURT: Well, it sounds like that's a  
 17 matter of fact. It sounds like, you know, the  
 18 department at this point in time is claiming  
 19 forfeiture; and you're not.  
 20 MR. BROWN: Well, then, Your Honor, that's  
 21 a question of law because I don't believe the  
 22 department has standing to raise forfeiture.  
 23 THE COURT: What would they have standing  
 24 to do? Okay. If that's a question of law, I don't  
 25 want to argue it here. If you think it is, then maybe

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1 you want to file something on that.  
 2 MR. BROWN: I guess what I'm trying to find  
 3 out is -- my problem, quite frankly, is I can't conduct  
 4 written discovery. It's extraordinarily costly. Not  
 5 only that, but it's costly to find out what the  
 6 department is -- to pin them down on. And then the  
 7 court asks for additional information, and we may get  
 8 something different out of the department.  
 9 THE COURT: Okay.  
 10 MR. BROWN: I don't know how I pin them  
 11 down --  
 12 THE COURT: Mr. Brown --  
 13 MR. BROWN: -- and limit the court so that  
 14 I can be in a position to file for summary judgment.  
 15 THE COURT: Very well. Very well.  
 16 Charlie, I'm going to ask for a 706 report on the 39N  
 17 right. I'm going to ask that you file that with the  
 18 court sealed, and you give Mr. Brown a copy of the  
 19 report.  
 20 MR. HONSINGER: Sealed.  
 21 THE COURT: Sealed. Outline --  
 22 (END OF TAPE)  
 23 MR. BROWN: I don't know if we have to file  
 24 summary judgment in this case.  
 25 THE COURT: Given that 39N presents a full

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1 forfeiture, I'm inclined to not set that one for trial  
 2 on the 27th then and remove any time pressures that we  
 3 may have on that one.  
 4 How is that?  
 5 MR. HONSINGER: That's fine.  
 6 THE COURT: Mr. Brown?  
 7 MR. BROWN: Your Honor, we filed for  
 8 summary judgment in that case. The department came  
 9 forward with no evidence. I don't think forfeiture  
 10 should be an issue we should have to now litigate. I  
 11 will proceed, but I want my objection understood.  
 12 THE COURT: Well, perhaps, you know,  
 13 Mr. Brown, I can admit to some fault there. I guess  
 14 for that particular right I wasn't aware that that one  
 15 was based on forfeiture and forfeiture only.  
 16 MR. HONSINGER: It was based, Your Honor -- the  
 17 recommendation was made that no beneficial use was  
 18 found. That's what the recommendation in the 706  
 19 report states. There was no beneficial use found for a  
 20 period of 11 years. And I think that it would -- I  
 21 would leave it to the court to draw the conclusion as  
 22 to what the court should do.  
 23 MR. BROWN: Your Honor, once again we are  
 24 back to the point. The affidavit clearly states not a  
 25 period of, been used a period of five years nonuse.

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1 The department stated on the record that forfeiture or  
 2 partial forfeiture were not the basis of these  
 3 recommendations, that beneficial use was.  
 4 I sat through several conferences with the  
 5 department asking what the basis was. I've been told  
 6 that it was beneficial use. And now I'm being told  
 7 today that the department is asserting forfeiture  
 8 which, to me, I guess, has become a euphemism for  
 9 non-beneficial use.  
 10 THE COURT: Well, back up. It is not -- as  
 11 to partial forfeiture goes, my decision stated -- and,  
 12 you know, you can agree with me on this, Mr. Brown.  
 13 And I stated in my opinion that if there's  
 14 non-beneficial use in the context of abandonment or  
 15 forfeiture, then it's certainly relevant.  
 16 MR. BROWN: I guess, Your Honor, my  
 17 confusion is we moved for summary judgment. We said  
 18 here's what our right is. We said it has not been  
 19 abandoned or forfeited. We put in affidavits to that  
 20 effect. The affidavits were unopposed. And now I'm  
 21 being told I'm going to have an evidentiary hearing.  
 22 THE COURT: Very well, Mr. Brown. I will  
 23 review the 39N right in the context of forfeiture. And  
 24 I'll consider the matter submitted on -- and I'll issue  
 25 a decision on 39N.

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1 MR. BROWN: I would appreciate that,  
 2 Your Honor.  
 3 THE COURT: Charlie, anything on the 39N  
 4 right?  
 5 MR. HONSINGER: Just, I guess I'm curious as to  
 6 whether or not the court -- is the court stating that  
 7 it will consider only the evidence that Mr. Brown's  
 8 clients have provided, and that it will not consider  
 9 the department's investigation?

10 THE COURT: No. Well, let's talk about  
 11 this for a moment. I assume that whatever -- even if  
 12 we have an evidentiary hearing, you're going to submit  
 13 whatever is in your report, the current report.

14 MR. HONSINGER: We'll submit whatever is in our  
 15 report including the photographs, the aerial  
 16 photographs, the maps, everything relied upon by the  
 17 individuals who made the recommendation. Compelling  
 18 photographs, I might add.

19 MR. BROWN: Your Honor, see, this is the  
 20 problem. That's why we have summary judgment, so we  
 21 don't have to go through this.

22 THE COURT: No. Wait, Pat. Stop. I want  
 23 to ask you something.

24 Are you telling me that in every single case  
 25 where we have one party that any party can submit the

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1 barest of affidavits on a summary judgment -- I'm not  
 2 saying yours is the barest; I don't know yet -- submit  
 3 any old affidavit and say that the matter is  
 4 submitted? There's no evidence on the other side; we  
 5 win.

6 Every one party in this whole state of Idaho in  
 7 the SRBA would automatically prevail on summary  
 8 judgment if the court couldn't ask for, one, more  
 9 evidence from the department, or an evidentiary  
 10 hearing.

11 Is that what you're saying that the purpose of  
 12 this SRBA is about?

13 MR. BROWN: Your Honor, my understanding is  
 14 our legislature decided quite specifically that the  
 15 department was not to be a party. The department did  
 16 that knowing that the court is supposed to be a court.  
 17 And apparently the court has been uncomfortable with  
 18 strict adherence to that legislative mandate, although  
 19 our Supreme Court has repeatedly said that is the true  
 20 function of the legislation.

21 And so what I'm saying is, yes, Your Honor, if  
 22 there is only one party and if over -- if literally  
 23 thousands and thousands of claimants have chosen not to  
 24 object to this right, it's not the court's role to set  
 25 up an evidentiary hearing. Parties formulate issues.

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1 And if a party can come forward -- and if a party is  
 2 the only party and they come forward with evidence,  
 3 it's not for the court to say I'm going to disregard  
 4 the fact that tens of thousands of people have not  
 5 objected and establish an evidentiary hearing.

6 If the department would have wanted that to  
 7 occur, the legislature would have wanted that to occur,  
 8 they would have left the department as a party. Then  
 9 the department could submit evidence whenever it  
 10 chose.

11 MR. HONSINGER: And yet, Your Honor, the  
 12 department's recommendation is prima facie evidence.  
 13 And the department may submit the basis of its  
 14 recommendation.

15 MR. BROWN: Your Honor, the department --  
 16 to the extent it's prima facie, it is rebutted. I  
 17 don't think --

18 MR. HONSINGER: By clear and convincing  
 19 evidence it --

20 MR. BROWN: Excuse me. If I could finish.  
 21 The department has submitted again and again, and so  
 22 has the State, the statement of purpose for the  
 23 legislation was to reduce the litigation with the  
 24 department, relieve the department of the burden of  
 25 being a litigant and having to be involved in the

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1 litigation. Yet the court wants to keep bringing them  
 2 back in.

3 It's also important to note that the role of the  
 4 director as stated in the statute, 1401B, is to see  
 5 that the rights are recommended accurately, not  
 6 litigated. The only role in the litigation is at the  
 7 request of the court or the parties.

8 And I'm simply saying it is not appropriate for  
 9 the court to feel compelled to hold evidentiary  
 10 hearings in one-party cases where tens and tens of  
 11 thousands of claimants don't care so much as to file a  
 12 pleading.

13 THE COURT: Well, number one,  
 14 Mr. Honsinger, the court agrees with Miss Bilyeu's  
 15 standard on summary judgment that she has issued. I  
 16 don't believe that parties have to come forward with  
 17 clear and convincing evidence. I think her standard is  
 18 the correct standard.

19 Number two, Mr. Brown, there may very well be  
 20 cases that can be handled dispositively on summary  
 21 judgment as you have suggested if the court is  
 22 satisfied under that standard that the burden has been  
 23 overcome. Summary judgment may be granted in certain  
 24 one-party cases where the court is satisfied that there  
 25 is enough evidence before the court.

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1 I think there are other cases where, even if one  
2 party submits affidavits, the court may decide, based  
3 on those affidavits alone, that there is not enough;  
4 that the court may want to go forward with an  
5 evidentiary hearing.

6 MR. BROWN: Your Honor, I believe that the  
7 correct rule we are governed by is rule 56. The  
8 adjudication statutes even specifically state that we  
9 shall be governed by those rules.

10 And those rules, and I believe it's 56(c) and  
11 (e), specifically say what the court must do. If there  
12 are undisputed facts, it's not the court's role to  
13 decide that it would be better to have an evidentiary  
14 hearing.

15 THE COURT: Mr. Brown, I'm not going to --  
16 you know, I think I've laid out the standard in my  
17 summary judgment. You can appeal that, if you want  
18 to. That's the ruling of the court.

19 It would be the same thing in two-party cases  
20 where the two parties have agreed. If they want to  
21 submit affidavits or whatever to the court for their  
22 consideration on summary judgment to overcome the  
23 burden, they can do that. If the court is satisfied  
24 with those affidavits, the court will grant summary  
25 judgment. If not, then the court will order an

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1 evidentiary hearing.

2 MR. BROWN: The standard is whether there's  
3 a genuine dispute of fact, not whether the court is  
4 satisfied.

5 THE COURT: Well, I mean the court will  
6 decide that based on reviewing your affidavits and the  
7 director's report. I can't believe -- well, I can't  
8 believe this adjudication's purpose is in all cases --  
9 and you may want to argue that one up, Mr. Brown. And  
10 if that's the way it is, that's the way it is.

11 MR. BROWN: I think it's been argued.

12 THE COURT: Well --

13 MR. BROWN: I mean, I guess I don't know  
14 what the court is saying when the court says it doesn't  
15 know what the role of the department is. Our Supreme  
16 Court has told us it's not to be a party. Our  
17 legislature has told us that. But the court wants to  
18 either jump into the role of a party or --

19 THE COURT: Well, Mr. Brown, what you're  
20 trying -- what you're arguing to me is you're saying  
21 that, although the court has designated the department  
22 as the court's expert, that what you're telling me is  
23 that the court must accept information from -- solely  
24 information from a litigant and no information from the  
25 department, even though they're designated as the

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1 court's expert.

2 MR. BROWN: Well, my --

3 THE COURT: So we could never seek any  
4 simply facts from them at all ever at any time.

5 MR. BROWN: You do not need to be an expert  
6 to submit facts. The court can order the department to  
7 produce facts. And I have asked this court again and  
8 again since at least 1991 to require the department to  
9 set out the facts in its report or in its file when it  
10 makes a recommendation. That has still not occurred.  
11 We have changing facts.

12 THE COURT: How would the court ever know  
13 what those facts are if the court doesn't ask for  
14 them?

15 MR. BROWN: The court tells the department  
16 to write down the facts, if the court wants some  
17 control of what the facts are, so that we don't have a  
18 moving target, not to write them down anew each time  
19 the court comes up with another issue. I have asked  
20 that since before the objections were due in 1993 and  
21 1992.

22 THE COURT: Okay. So let's take the 39N  
23 right, for example. They've submitted what the facts  
24 are on that.

25 MR. BROWN: Who has submitted the facts?

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1 THE COURT: The facts -- they've submitted  
2 what, the standard investigation on 39N.

3 And do you disagree with that?

4 MR. BROWN: They submitted a 706 report  
5 which is substantially different than the report and  
6 the file originally established in this claim. They  
7 have stated --

8 THE COURT: Well, Mr. Brown, how is the  
9 court going to know that? How am I going to know  
10 that? You tell me that. How am I ever going to know  
11 that?

12 MR. BROWN: The court is going to -- the  
13 only way the court is going to know what is happening  
14 is to hold evidentiary hearings. The only way a party  
15 will be able to prepare for an evidentiary hearing is  
16 for the court to set forth what topics evidence may be  
17 taken on, and to provide full disclosure by the  
18 department --

19 THE COURT: That's what I'm attempting to  
20 do right now.

21 MR. BROWN: -- of the facts. You have not  
22 yet ruled that the department is to provide full  
23 disclosure with the single exception of our last  
24 hearing when you directed them to disclose what was  
25 reviewed. Every other instance the department has

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1 disclosed only those facts which it thinks supports a  
2 position.

3 THE COURT: Well, Mr. Brown --

4 MR. BROWN: -- (inaudible) argue those  
5 facts. But it goes back, Your Honor, to the very  
6 point --

7 THE COURT: How, how is --

8 MR. BROWN: -- the legislature knew that  
9 the department as a party could submit evidence; that  
10 the department, not being a party, would not be  
11 submitting evidence. The State would derive savings by  
12 taking the department out of that position.

13 Maybe it created a bigger burden for the court;  
14 maybe it didn't. But the point is the court, I think,  
15 is now overly concerned about taking evidence on claims  
16 where the litigants don't even care so much as to file  
17 pleadings.

18 MR. HONSINGER: And yet the statute itself  
19 states that the department may lodge with the court the  
20 basis of its recommendation.

21 MR. BROWN: If requested.

22 MR. HONSINGER: It's been requested. It's been  
23 ordered.

24 MR. BROWN: That's why I guess,  
25 unfortunately, I see my problem is with the court at

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1 this stage, not with the department.

2 THE COURT: Mr. Brown, it seems like we're  
3 going in a circle here. Okay. You stated that the  
4 court can request information from -- you don't  
5 disagree with that.

6 MR. BROWN: I don't disagree that, no, the  
7 court has that prerogative.

8 THE COURT: You agree the court has the  
9 prerogative.

10 MR. BROWN: Yes.

11 THE COURT: And you agree the court has  
12 exercised that prerogative in these cases.

13 MR. BROWN: I think the court has the  
14 prerogative and must exercise that prerogative  
15 consistent with both the due-process and the speedy-  
16 remedy constitutional rights of my client. And I don't  
17 think there's --

18 THE COURT: But you've objected to that --  
19 the information the court solicits from IDWR can't be  
20 considered.

21 MR. BROWN: I've objected to what?

22 THE COURT: So what good does it do?

23 You've objected to the information provided by IDWR;  
24 that it can't be considered by the court. So what good  
25 is it?

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1 MR. BROWN: You're referring to the  
2 consumptive-use issue?

3 THE COURT: Any, any issue. Take your pick  
4 on any 706 report that's been requested.

5 MR. BROWN: Well, the first 706 reports  
6 requested were submitted; and apparently the court was  
7 going to consider them on summary judgment. They were  
8 not submitted within the, within the rules set out,  
9 especially rule 56. And the court did not disclose to  
10 my clients that it would be submitting its own evidence  
11 in a manner which gave my clients a meaningful  
12 opportunity to prepare to meet that evidence.

13 The next round of 706 reports, I think, involved  
14 consumptive use. The department stated that it was  
15 simply a matter of statutory definition.

16 THE COURT: Mr. Brown, I don't know how  
17 many times we're going to go around this circle with  
18 you. The purpose of the 706 report -- the department,  
19 number one, can be an expert to the court. And this is  
20 my ruling. And I'll hear your objections, and you can  
21 take it up.

22 Number one, the department is the court's  
23 expert. The court doesn't know what the department  
24 has because the court itself cannot do discovery. The  
25 court doesn't want to do discovery.

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1 As an offer of proof or an understanding of what  
2 the court -- or what the department does or doesn't  
3 have, the court requests a 706 report, which is filed  
4 with the court and you. The purpose of that is to give  
5 you information, due process, of what they have and to  
6 give the court an understanding if, when called upon,  
7 they would be useful. It is not evidence in and of  
8 itself.

9 MR. BROWN: No. But part of the problem,  
10 Your Honor, is the court has not separated a  
11 solicitation of purported fact from the purported  
12 helpful expert opinions of the director. The director  
13 continues to confuse those and continues to interject  
14 into those legal argument.

15 THE COURT: Is that the nature of your  
16 objection right now? Do you disagree that they can  
17 submit facts?

18 MR. BROWN: Your Honor, the question was  
19 whether the court has the prerogative to call the  
20 department. I agree that the court has the prerogative  
21 to call the department as a witness provided it does it  
22 consistent with due process --

23 THE COURT: And what do you suggest --

24 MR. BROWN: -- (inaudible) and remedies.

25 THE COURT: What do you suggest, what do

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1 you suggest would be as satisfying your clients'  
 2 due-process rights? Do you suggest that the court not  
 3 request 706 reports so you do not have notice of what  
 4 they have? Or what are you saying? How would that --  
 5 what's the due-process problem at this point? I  
 6 mean --

7 MR. BROWN: The due-process problem --

8 THE COURT: -- just spewing out "due  
 9 process" is not helpful to the court. Where is the  
 10 due-process problem?

11 MR. BROWN: Due process is, first of all,  
 12 notice of what's about to occur; second of all,  
 13 meaningful opportunity to prepare. When the court does  
 14 not know who it's going to call for witnesses or what  
 15 it is going to ask them, then I should be -- there  
 16 should be a mechanism in place to assure me that I can  
 17 know that beforehand and prepare to meet it.

18 THE COURT: That's what we're doing right  
 19 now, Mr. Brown.

20 MR. BROWN: I don't know how that has  
 21 happened when I file for summary judgment on forfeiture  
 22 and the court tells me that we have a forfeiture issue  
 23 in 39N. The department claims there is a forfeiture  
 24 issue.

25 THE COURT: I think, I think -- I don't

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1 know what your problem is, Pat, on that one. That one  
 2 may have -- through either the court's error or  
 3 department's error, misunderstanding, call it what you  
 4 will, everyone acknowledges partial forfeiture is not  
 5 an issue here. But that's a full forfeiture case.

6 MR. BROWN: And forfeiture, nonforfeiture  
 7 was raised by the claimant, was testified to in an  
 8 affidavit which was unopposed.

9 Why is it now an issue for trial?

10 THE COURT: I'm not saying it is. I'm  
 11 saying I'm going to go back and reconsider that one.

12 MR. BROWN: Then that's fine. I don't have  
 13 a problem with that.

14 THE COURT: I thought I said that a long  
 15 time ago.

16 MR. HONSINGER: That was ordered approximately  
 17 a half an hour ago, Your Honor.

18 MR. BROWN: I think you're correct,  
 19 Your Honor. But then you asked me whether or not the  
 20 court could call witnesses.

21 THE COURT: I didn't say that. We  
 22 weren't -- I wasn't talking about that one. I'm saying  
 23 that may or may not come to pass if I grant or don't  
 24 grant forfeiture -- or a summary judgment on that. I  
 25 don't know. I'm not going to call any right now. I'm

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1 going to go back and reconsider for forfeiture -- for  
 2 summary judgment purposes.

3 MR. BROWN: Then that's fine. I guess what  
 4 we're talking about --

5 THE COURT: I was going through these each  
 6 and every one, and then all of a sudden we popped into  
 7 39N. That became an issue, and we discussed it.

8 MR. BROWN: I think that's right.

9 THE COURT: Okay. That's where we are.

10 MR. BROWN: The court asked me to state my  
 11 concerns about the basis, the way the court has been  
 12 proceeding. And that's what I've done.

13 THE COURT: Well, I'm only trying to be  
 14 helpful to you, Mr. Brown. Let's -- I've told --

15 Where were we, Charlie? I was going through each  
 16 and every one of these trying to tell Mr. Brown where I  
 17 might call the department.

18 MR. HONSINGER: That's correct.

19 THE COURT: All right. And I told you --  
 20 I'm going to start all over again so there's no  
 21 misunderstanding. And I said 3E, I may call the  
 22 department on the acreage question. All right.

23 39J, Mr. Brown, well, yeah, 39J, I may call the  
 24 department on the nature-of-use question.

25 And 39N, I said I would go back and reconsider

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1 that one for summary judgment purposes.

2 On 47, I may call the department on the  
 3 place-of-use question, acreage.

4 On 64B, I may call the department on the acreage  
 5 question.

6 On 79, I may call the department on acreage.

7 On 92, 92, I may call the department on acres.

8 And I may call the department on 106 on acreage.  
 9 That's it.

10 Consumptive use, Mr. Brown, is a legal issue at  
 11 this point in time.

12 MR. BROWN: Your Honor, then should I  
 13 submit an order amending the order I just received  
 14 today which says that 706 reports by the department,  
 15 which I understand to include affidavits, will not be  
 16 considered?

17 THE COURT: On?

18 MR. BROWN: On consumptive use.

19 THE COURT: Do you have -- does anyone have  
 20 a copy of that order?

21 MR. HONSINGER: Yes, I do. My understanding is  
 22 the order, it says they will be received, are reliable  
 23 and relevant, and are as such to be considered. Or  
 24 that's the summary judgment order.

25 Is that what you were wanting?

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1 THE COURT: No. The order that Mr. Brown  
2 was referring to.  
3 MR. BROWN: He sent an order out the last  
4 two days or --  
5 MR. HONSINGER: No, I haven't seen that one. I  
6 haven't been in my office for two days.  
7 MR. BROWN: I mean I don't think there's a  
8 dispute that it's a legal issue, and that that's not  
9 something for the department to be either testifying  
10 about or arguing.  
11 MR. HONSINGER: Again, I would point out to the  
12 court, then, the summary judgment decision states that  
13 the 706 reports on consumptive use are reliable,  
14 relevant and, as such, will be considered.  
15 THE COURT: Okay. Consumptive use, the  
16 order was there's no reason for the court at this point  
17 in time, based on the consumptive -- or the reports  
18 that were filed on summary judgment, to further  
19 consider any facts. The facts were if effective  
20 precipitation is not deleted, it is 3.75; if it is,  
21 it's 3.5.  
22 Now, I arrived at those numbers based on a review  
23 of the report that was submitted by Mr. Brown and on  
24 the reports that were submitted by the department.  
25 Okay.

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1 Those are the two numbers, leaving us with --  
2 that's the basis of those numbers. And now that leaves  
3 us with the legal issue of whether effective  
4 precipitation is excluded or not.  
5 The 706 report that was recently requested will  
6 not be considered as evidence by this court. The  
7 purpose of that is to have Mr. Brown -- assist him in  
8 an understanding of the legal basis of IDWR's decision  
9 or use of effective precipitation. The State of Idaho  
10 is allowed to participate on this issue, if they wish,  
11 to explain the difference in those legal points.  
12 MR. HONSINGER: I'm going to have to object,  
13 Your Honor.  
14 THE COURT: Well, Charlie, you don't get to  
15 object; but state what your problem is.  
16 MR. HONSINGER: I would just state that the  
17 department was ordered to provide those reports with  
18 the understanding that the court would consider them.  
19 And I'll just leave it at that. And I know there's  
20 going to be argument, but we'll just leave it at that.  
21 MR. BROWN: So the record is clear,  
22 Your Honor, I do object to his making objections; and I  
23 disagree with what he was ordered to do.  
24 Your Honor, I think the only other thing is,  
25 element-wise, would be purpose of use, correct?

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1 MR. HONSINGER: Uh-huh.  
2 THE COURT: Well, apparently we only have  
3 disagreement on --  
4 MR. HONSINGER: I think there's a disagreement  
5 on almost every, every single one of them.  
6 THE COURT: No, there really isn't.  
7 There's a disagreement in 39J, 39N, 62 --  
8 MR. HONSINGER: Based on -- are you basing  
9 these disagreements on the claim?  
10 THE COURT: No. I'm basing them on what  
11 was requested for in summary judgment. I might be  
12 wrong about that. I might have that wrong.  
13 MR. HONSINGER: My understanding is that nature  
14 of use is disputed in --  
15 THE COURT: Okay. You're right, Charlie.  
16 MR. BROWN: In what regard?  
17 THE COURT: Well, based on what was  
18 requested for on summary judgment versus -- I can tell  
19 you that as far as those specific uses that were --  
20 again, just so it's crystal clear, the specific uses  
21 that were set forth in International Mortgage are  
22 granted.  
23 So, Mr. Brown, you're not forced to litigate  
24 against anyone else. I just -- the court just needs --  
25 is fully able and ready to accept other purposes so

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1 long as you can show some foundation.  
2 MR. BROWN: Okay. If I could bring up one  
3 of them, because I think we may be able to solve it  
4 right now. In our summary judgment we said ditch  
5 maintenance is year-around. Those -- it's our opinion  
6 that those were all contained within our irrigation and  
7 stock claims originally. In other words, there's no  
8 need for amendment.  
9 What we have run up against is the department has  
10 been telling people, and the State has been telling  
11 people, that these guys are nutszo; they're claiming  
12 year-around irrigation use; and we know they don't  
13 irrigate in January.  
14 Well, we've never said we irrigated in January.  
15 We've said our irrigation systems, our ditches, and our  
16 steel piping have water flowing through them in order  
17 to maintain them in the winter, so they don't freeze up  
18 and bend off the mountains, so that ditches don't cave  
19 in. I mean it's all associated with, you know, with  
20 the underlying irrigation right.  
21 But we want to have something decreed so that we  
22 don't have the department coming out in the middle of  
23 the winter turning off our water and our pipe bends off  
24 the mountainside. You know -- now, I think the most  
25 appropriate way to describe it is a, I think, system

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1 maintenance is what we said it was for. I think what  
2 it really is is an irrigation right. You know, you  
3 can't have your irrigation if you don't keep your pipe  
4 on the mountainside to bring your --

5 THE COURT: Well, was there a general  
6 provision on that at one point, Charlie?

7 MR. HONSINGER: Ditch maintenance, I don't  
8 believe so. I was -- if there was, it was before my  
9 time.

10 THE COURT: What's your feeling on ditch  
11 maintenance?

12 MR. HONSINGER: It's not a purpose of use  
13 recognized by the decree or the department. That has  
14 to be my position at this time. I haven't tossed it  
15 around at all with anybody in the department.

16 THE COURT: Well, I mean would the  
17 department go out there and shut these people down if  
18 they were --

19 MR. HONSINGER: Absolutely not.

20 THE COURT: -- running water through  
21 there?

22 MR. HONSINGER: No. The department would not  
23 do that.

24 MR. BROWN: Well, my understanding is the  
25 department has said the ditches will have to be turned

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1 off in the winter, and that some of the pipes are going  
2 to have to be shut off, too. So I'm not -- you know,  
3 this isn't an idle concern.

4 MR. HONSINGER: If that's the case, what I can  
5 point out is that, from a practical viewpoint, a pipe  
6 that does not have water in it will not break or bend  
7 when frozen. Only when the pipe has water in it will  
8 it, would anything happen.

9 MR. BROWN: No, that's not true with steel  
10 pipe.

11 THE COURT: See, I don't know any of this.  
12 This is --

13 MR. HONSINGER: That's my understanding. That  
14 is not -- that's neither here or there.

15 THE COURT: What about --

16 MR. BROWN: Well, if the department is  
17 representing on the record, Your Honor, they won't come  
18 out and shut the ditches off or check the pipes off, we  
19 will accept that stipulation and live with that.

20 MR. HONSINGER: I'm not prepared to say that at  
21 this time --

22 THE COURT: Well, why don't you, why don't  
23 you go ask, Charlie --

24 MR. HONSINGER: Yes.

25 THE COURT: Let's just see if we can --

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1 MR. HONSINGER: Ditch maintenance, we'll  
2 discuss it.

3 THE COURT: It's sad that we have to  
4 discuss this at this point.

5 Mr. Brown, on some of these you're claiming  
6 everything under the sun pretty much. Are you doing  
7 that to -- I mean, are these realistic, or are these --

8 MR. BROWN: Under what -- I don't think  
9 we've claimed anything that's unrealistic.

10 THE COURT: Irrigation, stock, or wildlife,  
11 recreation, aesthetics, domestic, diversion system, you  
12 know, are there any more that could possibly be claimed  
13 other than those?

14 MR. BROWN: We didn't claim fish rights.

15 MR. HONSINGER: Your Honor --

16 MR. BROWN: But, Your Honor, if that's --  
17 that's what the use has been.

18 THE COURT: Why don't you tell me what  
19 would an aesthetic use be?

20 MR. BROWN: On which right? If you'd tell  
21 me the right, I can tell you what the --

22 THE COURT: Let's see.

23 MR. BROWN: I mean if you want to give me a  
24 for example.

25 THE COURT: I don't know. Well, let me

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1 find out, see if --

2 MR. BROWN: For example, who is the one we  
3 were talking about? Mattie Grigg.

4 MR. HONSINGER: 39, I think, would be one.

5 MR. BROWN: Okay. We were talking about  
6 Mattie Grigg this morning.

7 THE COURT: 106 would be one, and --

8 MR. HONSINGER: 106, that's --

9 MR. BROWN: 106, Paul Watkins.

10 Paul Watkins, as aesthetic rights, would be his boat

11 ramp, his water front, his trees. The rows of trees

12 down the road to the house which the department doesn't  
13 consider part of the irrigation right, well, the trees

14 need water. The trees die. We can tell you the trees

15 have been there probably, you know, since well before

16 '32 because they're big as houses. And they didn't --

17 you know, they had to be watered.

18 MR. HONSINGER: In the first place, I would

19 point out yet again that the claims have yet to be

20 amended. I have yet to see a piece of paper across my

21 desk saying that these claims are to be amended --

22 THE COURT: Okay. Mr. Brown --

23 MR. HONSINGER: -- despite orders, numerous  
24 orders by the court, I might add.

25 MR. BROWN: Your Honor, I don't --

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1 THE COURT: I am going to order a formal  
2 amendment to any of these ones where you have not yet  
3 done so. All you have to do is a formal amendment.  
4 How would that help you, Charlie?  
5 MR. HONSINGER: Okay. As to aesthetics --  
6 THE COURT: And I'm going to order that  
7 within two weeks. What's two weeks from today? Well,  
8 I'll give you three weeks given your circumstances.  
9 MR. BROWN: Please.  
10 MR. HONSINGER: I sympathize completely with  
11 that. Three weeks from today is the 17th, Your Honor.  
12 THE COURT: By 5:00 p.m. If not received,  
13 I'm not going to allow anything to go forward.  
14 MR. BROWN: Does that mean we have to  
15 formally -- I guess -- see, one of the things I'm  
16 trying to get a sense of is this ditch maintenance. Do  
17 we have to amend the complaint?  
18 I mean it's our position that that's part of our  
19 irrigation use; it's part of all our other purposes.  
20 The department apparently has a different opinion. I  
21 think it's rather silly to amend, you know, because I  
22 think --  
23 THE COURT: For purposes of ditch  
24 maintenance, I'll consider that as incidental, at least  
25 for claim purposes.

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1 MR. HONSINGER: That's fine, Your Honor.  
2 THE COURT: I'll consider that incidental  
3 to the irrigation right.  
4 MR. HONSINGER: That's fine.  
5 THE COURT: All right? Okay. Is there  
6 anything else? Well, is there anything else on purpose  
7 of use?  
8 MR. HONSINGER: I can't think of anything,  
9 Your Honor.  
10 THE COURT: How would the department  
11 propose to have input on purpose of use?  
12 MR. HONSINGER: If I were to, if I were to  
13 suggest a 706 report, I assume Mr. Brown would object.  
14 I'm getting to know Mr. Brown rather well. But that  
15 would be my first suggestion.  
16 My second suggestion would simply be testimony on  
17 the record by one of the department's policy experts.  
18 MR. BROWN: Your Honor, my point would be  
19 the department has already said it doesn't have the  
20 evidence before '86. I don't know what evidence of  
21 purpose of use in '32 it's going to put on.  
22 THE COURT: That's correct. I think that's  
23 correct.  
24 MR. BROWN: I guess we could argue that  
25 it's still relevant to, if that '32 evidence cannot be

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1 found, that under 1427 the court can also take evidence  
2 of contemporaneous use. And to the extent they want to  
3 report on contemporaneous uses, I assume they've  
4 already done so.  
5 THE COURT: Well, since the department's  
6 evidence is limited from '86 forward, if a witness  
7 comes forward and testifies as to continuing uses  
8 since, you know, '32 or whenever, there would be no  
9 evidence to rebut that in any way.  
10 MR. HONSINGER: I would have to agree.  
11 THE COURT: Okay. There you go.  
12 Mr. Brown, I guess for your purposes at this  
13 point in time if you lay a sufficient foundation on  
14 some of those purposes, that would be all that would be  
15 required. I ask you to do that with some particularity  
16 and specificity as to, one, nature of use, when it was  
17 perfected, and how long it has proceeded.  
18 With one exception. On this ditch maintenance, I  
19 believe Pat is saying that it's going to be necessary  
20 for delivery, water delivery that water should remain  
21 in the pipe. And I think this is a question of science  
22 pretty much. And I'm not a scientific expert.  
23 So to the extent that you disagree in any way,  
24 Mr. Honsinger, or if you have any witnesses that  
25 would -- who would testify to such a thing?

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1 MR. HONSINGER: Mr. Tuthill.  
2 THE COURT: You're going to be given one  
3 expert, and one expert only.  
4 MR. BROWN: Your Honor, I don't think the  
5 department has any basis under DAUBERT for him to  
6 testify.  
7 THE COURT: I don't know if they do or  
8 don't. How would I know at this point?  
9 MR. HONSINGER: There hasn't been any evidence  
10 that he is or isn't an expert on that, on that  
11 particular --  
12 MR. BROWN: No. But he's already testified  
13 that he hasn't spent any time in the Hagerman area. He  
14 hasn't used any of those systems.  
15 MR. HONSINGER: I believe the question is  
16 whether or not, whether or not --  
17 THE COURT: Well, Mr. Brown --  
18 MR. HONSINGER: -- that should be permissive  
19 use.  
20 THE COURT: -- number one, an expert  
21 witness does not have to have personal knowledge of  
22 facts. He can rely on other people; and you know  
23 that. And I think you do know that.  
24 MR. BROWN: I know he can rely on other  
25 people.

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1 THE COURT: Okay. If he hasn't relied on  
2 other people, I mean, you know, I don't know. If  
3 that's true, then he won't be able to testify.

4 MR. HONSINGER: I would like to qualify my  
5 offer of Mr. Tuthill and make certain that he is indeed  
6 the expert here. So you're going to have to let me  
7 know and give me a chance to find out who is the  
8 expert. I believe it's Mr. Tuthill.

9 THE COURT: Okay.

10 MR. HONSINGER: Are you asking for an expert to  
11 testify on that particular issue then?

12 THE COURT: First of all, Mr. Brown's  
13 witness is going to testify on this issue. I'm going  
14 to ask the department one basic question myself. I'm  
15 going to say is there -- was there anything -- given  
16 that you believe -- well, I don't know how to style the  
17 question.

18 MR. HONSINGER: Would the department believe  
19 anything differently?

20 THE COURT: Right. And if so, then they'll  
21 be asked to testify. Now, on ditch maintenance,  
22 Charlie, you're to designate one expert, one expert  
23 only, within, say -- how about by October 17th?  
24 You're to submit a 706 report on that sealed with the  
25 court, unsealed to Mr. Brown.

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1 MR. BROWN: Your Honor, again, if I could  
2 ask that the court order that that include full  
3 disclosure of all materials reviewed or considered, all  
4 persons consulted or spoken to, and disclosure of what  
5 they were told. In other words, I'm asking --

6 THE COURT: It will be so ordered,  
7 Charlie.

8 Now, just so it's, just so -- I'm going back to  
9 my other question. I'm going to ask -- since the court  
10 has no way of knowing whether they'll have anything  
11 useful or not, the only way I can do this, Mr. Brown,  
12 is ask for an offer of proof to know whether any  
13 information they'll have is useful or not.

14 MR. HONSINGER: So you're saying you don't want  
15 it sealed?

16 THE COURT: I do want it sealed.

17 MR. HONSINGER: How will you know whether we  
18 have any --

19 MR. BROWN: Your Honor, the way I would  
20 propose to do it is that you ask -- that you require  
21 the full disclosure, that you also order that they  
22 shall be limited to the opinions, you know, testimony  
23 in that report, the topics they discuss there and  
24 opinions and the basis. That's their limitation,  
25 unless -- I mean if somehow we went beyond or

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1 something, you know, if something -- I'm not saying it  
2 would be impossible for us to open the door for more.  
3 I'm not saying -- but I'm saying they can give their  
4 testimony. Then I know what to expect.

5 And if they begin to go beyond that, I can  
6 file -- I can make an appropriate objection; and we can  
7 take it up, rather than having it all spill out in  
8 front of the court first and then try to sort it out  
9 later and --

10 MR. HONSINGER: How is the court to know --

11 THE COURT: How am I going to get this  
12 evidence before the court?

13 MR. HONSINGER: How is the court to know  
14 whether or not that the expert is testifying outside  
15 the scope of the report if the court can't read the  
16 report? Is he to rely on your representations?

17 MR. BROWN: No. No. He files the report.  
18 The court says you're only going to get to testify what  
19 you can put in that report so everybody knows what the  
20 testimony is going to be, so that I know what the  
21 testimony is going to be beforehand. That's how any  
22 lawsuit works.

23 THE COURT: How am I going to know if he  
24 goes outside the report?

25 MR. BROWN: Then -- because I'm going to

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1 object. If he tries, then, to testify beyond the  
2 scope, I can file my objection.

3 MR. HONSINGER: Then what objection do you have  
4 to the court reading the report?

5 MR. BROWN: Huh?

6 MR. HONSINGER: What objection if -- if the, if  
7 all the expert is going to testify to is what is in the  
8 report, then what objection do you have to the court  
9 reading the report?

10 MR. BROWN: What I have the objection to  
11 is -- it's just like any discovery objection. If I  
12 object that their expert is trying to testify to  
13 something undisclosed, I pull out my depo or my report  
14 I got from them and say here's what they disclosed;  
15 here's --

16 THE COURT: Okay.

17 MR. BROWN: -- what they're trying --

18 THE COURT: Okay.

19 MR. BROWN: -- to say --

20 THE COURT: Okay. --

21 MR. BROWN: -- (inaudible).

22 THE COURT: Okay. Here's how it will go.  
23 Mr. Honsinger, you'll file that report with the court  
24 sealed. You'll give a copy to Mr. Brown.

25 On this issue, I'm not going to ask for an offer

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1 of proof. What I'm going to ask for, Mr. Honsinger --  
 2 I'll allow you to do a direct examination of  
 3 Mr. Tuthill. And at the time -- Mr. Brown, you'll have  
 4 the report.

5 MR. BROWN: I object to the department  
 6 asking any questions.

7 THE COURT: Well, who is going to ask the  
 8 questions then?

9 MR. BROWN: If the court is uncomfortable  
 10 in that job, I know it's unfortunate --

11 THE COURT: I can ask them.

12 (END OF TAPE)

13 THE COURT: Okay. Where were we?

14 MR. HONSINGER: Will the department be able to  
 15 do a direct examination of its own expert witnesses?  
 16 If it --

17 THE COURT: Well, you know, Pat, on that  
 18 I'm happy to do the examination of the witness,  
 19 Mr. Brown. I can do that. I see it as six and  
 20 one-half dozen or the other.

21 Who cares who does the direct examination of the  
 22 witness?

23 MR. BROWN: Your Honor, I do. I do care.  
 24 And I do think it makes a difference who asks the  
 25 questions. And we prefer that the department, as a

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1 nonparty, not be allowed to ask questions.

2 MR. HONSINGER: Then what role does the  
 3 department have?

4 THE COURT: Unfortunately --

5 MR. BROWN: Their role is to answer.

6 THE COURT: Unfortunately the legislature  
 7 has put you in this fix, Charlie.

8 Without stating a definitive policy in my  
 9 particular subcases of any kind and not to be used as  
 10 any sort of precedent, I will perform the direct in  
 11 these cases.

12 MR. HONSINGER: As to the ditch maintenance  
 13 issue, or as to all issues?

14 THE COURT: Well, let me go back on this  
 15 one. Mr. Brown, without opening up the 706 report, not  
 16 knowing what sort of exhibits the expert may want to  
 17 produce to the court, how am I supposed to know?

18 MR. BROWN: How are you supposed to know --

19 THE COURT: I mean how can I perform an  
 20 effective direct examination of a witness when I don't  
 21 know --

22 MR. BROWN: This court's role in calling  
 23 witnesses is to clarify confusion. If there is  
 24 confusion on a point given the testimony presented by  
 25 the parties, or if the parties put on an expert who

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1 presents confusing testimony, then it would be  
 2 appropriate for --

3 THE COURT: Don't worry, Charlie. I'll  
 4 figure it out.

5 MR. BROWN: -- the court to ask for  
 6 clarification from an expert.

7 THE COURT: It's a good thing I have a  
 8 criminal law background where the defense never  
 9 produced anything. So I'm prepared to do that. Okay.

10 Basically, Charlie, I'll probably open up just  
 11 simply asking a very, I guess an open-ended question as  
 12 to their sources of disagreement with what was produced  
 13 by the claimant's witness, and why they disagree on  
 14 that, the extent of disagreement, why, et cetera,  
 15 okay?

16 MR. HONSINGER: That will be as to -- now, my  
 17 understanding that is as to the ditch maintenance  
 18 issue.

19 THE COURT: Right.

20 MR. HONSINGER: Is that as to the rest of the  
 21 issues that are to be litigated?

22 THE COURT: More than likely.

23 MR. HONSINGER: So despite the fact that the  
 24 department is to put on its -- despite the fact that  
 25 the director's report is prima facie evidence and that

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1 the court has asked the department to -- well, I guess  
 2 the court can set whatever order for witnesses it  
 3 chooses; and I guess it chooses to --

4 THE COURT: Well, the first thing we're  
 5 going to do, obviously the claimants are going to put  
 6 on their witnesses. And in cases where I specified  
 7 where the department will be asked to testify, the  
 8 question is, one, do they disagree with what the  
 9 claimant has stated and the source of their  
 10 disagreement. Basically you'll be a rebuttal witness.

11 Do you see that --

12 MR. HONSINGER: I also -- yes. I would also  
 13 ask that -- apparently Mr. Brown will be allowed to  
 14 cross-examine that witness; is that correct?

15 THE COURT: Oh, yes. Oh, yeah. That's a  
 16 right, a privilege, honor.

17 MR. HONSINGER: I would also ask, then, in  
 18 order to protect the witness, the department should be  
 19 able to object.

20 THE COURT: No. No. You have no standing  
 21 to object, to do cross-examination, do anything.

22 MR. HONSINGER: Certainly the witness is  
 23 entitled to representation.

24 THE COURT: That's true in any case on  
 25 earth. But unless you're a party in that particular

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1 case, you don't ask questions.  
 2 MR. HONSINGER: I would (inaudible) --  
 3 THE COURT: I mean the only way you can  
 4 protect your witness and the only reason why attorneys  
 5 are allowed to do so in any other case is to claim the  
 6 Fifth Amendment. I don't think you want to do that in  
 7 any of these cases. Or attorney-client privilege. And  
 8 I don't think you want to do that in any of these  
 9 cases.  
 10 Does that bring up anything, Mr. Brown?  
 11 MR. BROWN: Well, I will file my pretrial  
 12 motions to address those topics, I guess.  
 13 THE COURT: Okay. I got a little  
 14 sidetracked here. We were trying to come up with a  
 15 deadline for those pretrial motions. Let's come up  
 16 with a deadline.  
 17 MR. BROWN: December 15th? Middle of  
 18 December would be fine with me.  
 19 THE COURT: Okay.  
 20 MR. BROWN: It gives us a month.  
 21 THE COURT: Charlie, is that a weekend at  
 22 all or --  
 23 MR. HONSINGER: December the 15th is a Sunday.  
 24 THE COURT: Okay. Let's make that  
 25 December 16th then, 5 o'clock.

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1 Let's make the trial brief deadline -- do you  
 2 need any more time than December 16th to file the  
 3 deadline? You probably want to file your brief along  
 4 with any motions you have, wouldn't you?  
 5 MR. BROWN: Yes.  
 6 THE COURT: Okay. Let's make it  
 7 December 16th also.  
 8 MR. BROWN: And I assume again, Your Honor,  
 9 that's -- the department is not filing trial briefs, or  
 10 motions in limine, or anything of that sort.  
 11 THE COURT: No. Motion to consolidate is  
 12 not applicable in this case.  
 13 Could we have that pretrial conference on the  
 14 16th also? Or maybe we should hold that after the  
 15 motions have been filed and --  
 16 MR. BROWN: I would like to --  
 17 THE COURT: Would this require any sort of  
 18 a ruling on my part on these motions? Obviously.  
 19 MR. BROWN: Yes, I believe so.  
 20 MR. HONSINGER: If the trial is scheduled for  
 21 the 27th of January, perhaps we ought to hold the  
 22 pretrial conference a little bit closer to the trial.  
 23 THE COURT: Yeah. Let's have that --  
 24 what's two weeks before the 27th?  
 25 MR. HONSINGER: The 13th.

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1 THE COURT: That's not a Friday, is it?  
 2 MR. BROWN: No, it's a Monday.  
 3 MR. HONSINGER: You've exceeded my calendar.  
 4 THE COURT: Okay. Let's go January 13th.  
 5 Good time, what do you say, 2 o'clock?  
 6 MR. BROWN: Sure.  
 7 THE COURT: Any more summary judgments,  
 8 Mr. Brown, you think you'll be filing?  
 9 MR. BROWN: Yes, I believe there will be  
 10 summary judgments filed in -- why don't we just come up  
 11 with a common deadline?  
 12 THE COURT: Which cases do you think  
 13 you'll -- can you give the court some sort of idea  
 14 of --  
 15 MR. BROWN: Without limitation, I would say  
 16 summary judgment most likely will be filed in  
 17 Frank Glauner --  
 18 THE COURT: Case?  
 19 MR. BROWN: -- George Korbis --  
 20 THE COURT: Wait, Pat. Do you have numbers  
 21 with those two? I don't have names.  
 22 MR. BROWN: Frank Glauner would be 39E.  
 23 George Korbis --  
 24 THE COURT: Wait a sec. Excuse me. Okay.  
 25 MR. BROWN: 39N would be Korbis.

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1 THE COURT: Okay. I got that. Well,  
 2 you --  
 3 MR. BROWN: Cropper, 47; Fleming, 64B --  
 4 THE COURT: Okay.  
 5 MR. BROWN: -- and probably Watkins, 106.  
 6 That's just off the top of my head.  
 7 THE COURT: Can you give me some sort of  
 8 idea what you're filing summary judgment on in those  
 9 cases?  
 10 MR. BROWN: On what topics?  
 11 THE COURT: Yeah.  
 12 MR. BROWN: Now you're making me --  
 13 THE COURT: I'm not going to hold you to  
 14 it. I'm just trying to --  
 15 MR. BROWN: Frank Glauner is a -- I think  
 16 place of use is the only question. I don't -- and I  
 17 think that can be handled by summary judgment.  
 18 Korbis, there would be motions concerning  
 19 forfeiture, the nature of forfeiture, standing of the  
 20 department to claim forfeiture, resumption of use, and  
 21 any issues like that which aren't resolved by the  
 22 court's present motion. And I would also anticipate  
 23 motions in limine there.  
 24 With respect to Fleming, there will be motions  
 25 concerning principally place of use and acreage. The

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1 same on Boyers.

2 And on Frank Erwin, we would file motions for  
3 summary judgment on place of use.

4 MR. HONSINGER: Frank Erwin is 92?

5 MR. BROWN: That's correct. Sorry.

6 THE COURT: Anything else we need to talk  
7 about? Deadline, I guess, on summary judgments. I'll  
8 need at least two months before the trial date.

9 MR. BROWN: Can we do it the 30th of  
10 November? Or whatever -- I got --

11 THE COURT: I'll give it my best.

12 MR. HONSINGER: That's Thanksgiving week  
13 there. The 28th and 29th, that's Thursday and Friday  
14 of Thanksgiving.

15 MR. BROWN: How about the --

16 MR. HONSINGER: 27th is the Wednesday before.

17 MR. BROWN: 27th?

18 THE COURT: Okay.

19 MR. BROWN: Oh, Your Honor, did we just  
20 schedule a hearing during the middle, during the -- no,  
21 we didn't --

22 MR. HONSINGER: No.

23 MR. BROWN: -- the first week of January?  
24 I'm gone for the last two weeks of December and the  
25 first two weeks of January.

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1 THE COURT: Where do you think you're  
2 going?

3 MR. HONSINGER: Away from here, I'll bet.

4 MR. BROWN: I'll be in Puerto Rico.

5 THE COURT: I guess that's a good enough  
6 answer.

7 MR. BROWN: Family obligations. I have to  
8 go. I hope I have to go.

9 THE COURT: Okay. Just so we're sure now,  
10 Pat, if you don't file a notice of appearance by the  
11 designated day in these particular cases, you ain't  
12 going to do anything on these cases that I will  
13 acknowledge you on.

14 MR. BROWN: That's fine.

15 THE COURT: Okay.

16 MR. BROWN: Please ask your clerks to mail  
17 everything to me.

18 THE COURT: We would do that if you'd get a  
19 notice of appearance in.

20 We're adjourned.

21 (PROCEEDINGS ADJOURNED)

22  
23  
24  
25

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1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF

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

3 \*\*\*\*\*

4 In Re SRBA ) REPORTER'S TRANSCRIPT

5 Case No. 39576 ) Subcase No. 36-00003A,

6 ) et al

7  
8 \*\*\*\*\*

9  
10  
11 D-a-t-e: Friday, March 6, 1998

12  
13 T-i-m-e: 1:00 P.M.

14  
15 P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

16  
17 B-e-f-o-r-e: FRITZ X. HAEMMERLE, Special Master

18  
19 H-e-a-r-i-n-g: Hearing on Portion Splits

20  
21  
22 \*\*\*\*\*

23  
24  
25

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1 COURTROOM OF THE DISTRICT COURT, SNAKE RIVER  
2 BASIN ADJUDICATION COURTHOUSE, 253 Third  
3 Avenue North, Twin Falls, Idaho, Friday,  
4 March 6, 1998, 1:00 P.M.

5 \*\*\*\*\*

6 THE COURT: All right. We're on the record  
7 in all the Hagerman 3 rights, including, correct me if  
8 I'm wrong, Mr. Brown, 3B, 3C, 3D, 3F, 3K, 3L, and 3M,  
9 and 3A.

10 MR. BROWN: I think that's right,  
11 Your Honor.

12 THE COURT: Okay. Mr. Brown, I'm going to  
13 take a roll to see who you in fact represent now.

14 Just so the record is clear, you represent

15 Miss Rea for right No. 3A?

16 MR. BROWN: Yes, Your Honor.

17 THE COURT: And you represent Kingston  
18 Properties, and I believe that would be right 3B and  
19 3K?

20 MR. BROWN: Yes, Your Honor.

21 THE COURT: And you represent Babington for  
22 right C and L?

23 MR. BROWN: Yes.

24 THE COURT: Mr. Harbison -- is Mr. Harbison  
25 here today?

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1 MR. HARBISON: Yes, sir.  
 2 THE COURT: Mr. Harbison, you're  
 3 representing yourself today?  
 4 MR. HARBISON: Yes, sir.  
 5 THE COURT: And you have right D?  
 6 MR. HARBISON: Yes.  
 7 THE COURT: Okay. And, Mr. Brown, you  
 8 represent the Simcoes for right F and M?  
 9 MR. BROWN: Yes.  
 10 THE COURT: Very good. Did I omit any  
 11 parties, Mr. Brown?  
 12 MR. BROWN: No, Your Honor.  
 13 THE COURT: Some of the other rights,  
 14 Buckeye Farm is right H; and that had a partial decree  
 15 entered.  
 16 Right G is claimed by Mr. Lloyd; and that has a  
 17 special master's recommendation.  
 18 MR. BROWN: I believe that's gone to a  
 19 partial decree at this point.  
 20 THE COURT: A partial decree.  
 21 MR. BROWN: And I also would point out that  
 22 the J right is not really a right. It's been split  
 23 into the three subsequent rights.  
 24 THE COURT: Very good. And the Vernon  
 25 right, right E, has had an SF5 filed. All right.

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1 The purpose of today's hearing is to somehow,  
 2 somehow figure out everyone's proportional right under  
 3 an original International Mortgage decree right which  
 4 was right 3 which has subsequently been split. As I  
 5 said, the purpose of today's hearing is to see if we  
 6 can resolve and agree upon quantities for all these  
 7 rights.  
 8 Mr. Brown, you may proceed.  
 9 MR. BROWN: Well, Your Honor, for the  
 10 record, first of all, I'd like to point out the  
 11 document, I think, we've been referring to as a  
 12 November 14th, 1997 document by Mr. Clelland of water  
 13 resources. It's called a Split Review Analysis for the  
 14 03 right. That document shows that essentially  
 15 26.7 cfs were claimed by the various claimants of this  
 16 right.  
 17 Water resources, for whatever reason, determined  
 18 that the 03 right was a decreed right in the New  
 19 International Mortgage decree for 20 feet; and  
 20 therefore it has the problem of allocating 6.7 feet  
 21 among claims. As I understand it, and I think if we  
 22 ever get to a trial, the evidence will eventually show  
 23 what happened was the department proceeded ad hoc to  
 24 settle some claims and not settle other claims.  
 25 For instance, the H right, the Buckeye Farms

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1 right, had claimed 12 feet. There was a settlement for  
 2 11.9, and an entry of a partial decree. That was done  
 3 without regard to the known fact that several other  
 4 parties were claiming a portion of that decreed right,  
 5 and there was 6.7 more claimed than could be allocated  
 6 under the decree at least.  
 7 Now, what happened then is my clients have gone  
 8 back and done some extensive research into the history  
 9 of these rights both before and after the 1932 federal  
 10 New International Mortgage decree. What they have  
 11 found is significant, I think, especially in terms of  
 12 settlement.  
 13 We could quibble about the individual places of  
 14 use or how much each individual should have gotten or  
 15 may have gotten versus what they got on paper versus  
 16 what they actually use. We could do that forever.  
 17 But the one thing we can't quibble about is the  
 18 fact that the decree decrees three rights with the same  
 19 priority date to the essentially same area, all  
 20 diverted through the Buckeye Ditch. And those three  
 21 rights are, first, the 03 right; second, the 05 right  
 22 which is decreed to Amanda Gooding; and, third, the 019  
 23 right, the 19 right decreed to H. J. Bell who is  
 24 Mr. Bell's father.  
 25 Mr. Bell is here today. He's been invaluable in

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1 helping sort out the history of these rights.  
 2 And what we will see from the map water resources  
 3 produced is this: First of all, the 03 right applied  
 4 to about nine square miles of ground under the 1932  
 5 decree. Within that nine square miles of ground was  
 6 the 05 right. In other words, it overlapped in places  
 7 of use.  
 8 Now, the shape of that nine square miles is  
 9 essentially a big C. And the middle part of the C,  
 10 which is not covered by the 03 right and the 05 right,  
 11 is about a square mile itself. It's four quarter  
 12 sections. And it's covered by the 19 right.  
 13 Now, the court might be saying, well, wait a  
 14 minute; they're all in the same general vicinity; but  
 15 they're different places; so what?  
 16 The important thing you have to understand is  
 17 that the water which came down the Buckeye right, the  
 18 Buckeye Ditch right, that these three rights came from  
 19 the north. This same ground, or a large extent of it,  
 20 was also served by two or three rights that came up  
 21 from the south out of Riley Creek. And they're the 01,  
 22 02 rights. And there are several of the other rights  
 23 decreed, and they are decreed in the alternative. In  
 24 other words, the federal court said you can use the  
 25 rights from the south or you can use the rights from

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1 the north on this giant 10-square-mile area.  
 2 Now, the history of the rights will show  
 3 originally many of my claimants used the water not from  
 4 the Buckeye Ditch rights, these three rights I've  
 5 mentioned, but out of the south from what's known as  
 6 the Hunt Ditch that came out of Riley Creek and Tucker  
 7 Springs.

8 THE COURT: Mr. Brown, let me ask you: Did  
 9 anyone claim the 1 and 2 rights?

10 MR. BROWN: Those rights were claimed by  
 11 Buckeye Farms only. But when I say that, I got to add  
 12 to that right away that they are the only ones who  
 13 presently use them.

14 In other words, the history of these rights is  
 15 the two rights I just mentioned -- I'll call them the  
 16 Riley Creek rights as opposed to the Billingsley Creek  
 17 Buckeye right. The Riley Creek rights were originally  
 18 used on the land on the north end of the Buckeye Farms  
 19 where many of my claimants are. That ditch which can  
 20 be seen in the photograph down here used to run clear  
 21 up here. And it was used up here.

22 In the Seventies, that was discontinued. The  
 23 Buckeye Ditch comes down here and ended at the present  
 24 boundary, present north end of the 019 right, the very  
 25 northwest corner.

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1 What happened at that point in time is these  
 2 people, my clients, who were principally on the north  
 3 end, all went exclusively to Buckeye Ditch water. And  
 4 this Hunt Ditch water from the south was then used on  
 5 what is now the Buckeye Farms.

6 I suspect what has happened here, and I've not  
 7 had anyone deny that it is in fact what happened, is  
 8 that when people came in and made claims they didn't  
 9 claim a right number. They claimed a priority date and  
 10 an amount of water. Water resources helped them fill  
 11 out the claim.

12 Water resources then went and assigned right  
 13 numbers to the rights decreed. In other words, it went  
 14 down the decree and said the first right we get to as  
 15 we read through from page 1 through the decree will be  
 16 right 01; the next right we get to as we read down the  
 17 decree will be 02; the next is 03 and so on. And what  
 18 happened here, I suspect, is they probably said  
 19 priority date you're claiming is X; therefore, you have  
 20 the 03 right claim.

21 Now, water resources tells me today that wouldn't  
 22 be the case because they've gone back and produced this  
 23 map that you've seen today which shows the places of  
 24 use being a little different under the 05 and the 019  
 25 rights.

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1 THE COURT: When they came in, Mr. Brown,  
 2 when they filed the claim, was the claim filed, for  
 3 example, for, say, 3A, or 3B, or 3C?

4 MR. BROWN: No.

5 THE COURT: How was that claimed?

6 MR. BROWN: The claim was made for I have a  
 7 decreed water right with an X priority date.

8 All three of these rights have the same priority  
 9 date. So somebody apparently had to decide what water  
 10 right number to assign to it. And that is a function  
 11 of the department; and that's what they in fact did.  
 12 That is in fact what they've told us they did, until  
 13 today is the first time I've heard they did otherwise.

14 Today they said to me, well, the places of use are  
 15 different; so it wouldn't have worked that way.

16 Well, if you go back through the Split Review  
 17 Analysis, the document I referred to before,  
 18 Your Honor, for the last five years they've been  
 19 telling you there's only 20 feet available, not 25.16.  
 20 If they did the analysis on place of use before, their  
 21 document certainly would show 25.16 available because  
 22 the 25.16 is certainly within the realm of all these  
 23 people that have made the claims.

24 More importantly, though, where --

25 THE COURT: Mr. Brown, you're argument

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1 assumes, though, that the water that was admittedly on  
 2 the 5 right, which part of it was not within the place  
 3 of use of 3, was at some point transferred or moved?

4 MR. BROWN: Your Honor, we can show that  
 5 the use of this water has changed several times, three  
 6 or four times principally since 1932 in terms of place  
 7 of use. We can also show that all occurred prior to  
 8 any mandatory transfer statutes. We can also show it  
 9 is all -- if you take the 3 rights with the same  
 10 priority date and add them together, and add those  
 11 three places of use together, that for the last  
 12 75 years the uses have all been within that bigger  
 13 boundary.

14 So to suggest that we've somehow gone from  
 15 25 feet down to 20 feet doesn't make sense. It's a  
 16 very selective view. And what I've suggested so far is  
 17 it's a selective view based on perhaps just an error in  
 18 the way they allocated numbers to claims.

19 I mean they're going to tell you, as they've just  
 20 told us a few minutes ago, that no, we didn't make an  
 21 assumption and allocate that way; you know, we didn't  
 22 simply fail to read from 03 to 05 to 019. We  
 23 deliberately didn't do it because they were different  
 24 places of use.

25 That doesn't jive with their own spreadsheet that

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1 says total amount available, 20 feet. If there was an  
2 allocation problem between places of use, then they  
3 would have said we have 25 feet available; but we're  
4 within the wrong boxes inside the place of use. They  
5 didn't do that.

6 In fact, they have never reported to this court  
7 that there was 25 feet available. They've always said  
8 there's only 20; and, by the way, we already gave a  
9 large portion to Buckeye Farms; so even if we made a  
10 mistake, you're out of luck because that's a partial  
11 decree.

12 What I am saying to this court is the reason we  
13 are here today, first, is to see if we can resolve  
14 quantity issues. And I'm saying out of 26.7 feet  
15 claimed, we can account for 25.16 at least through  
16 decrees within this place of use.

17 THE COURT: How are we, Mr. Brown, going to  
18 account for the remaining .5?

19 MR. BROWN: Well, I don't know if we can or  
20 not quite frankly. I think my clients will probably  
21 say, number one, if there's a .5 shortage, it's not  
22 their problem. It's some of the people who already  
23 settled their claims problems; or it's water resources'  
24 problems for giving someone else water that my  
25 claimants are entitled to.

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1 As a matter of due process, the department can  
2 never bind my clients by their mistake. My clients  
3 pled the quantity they were entitled to. They're  
4 entitled to have their trial on that quantity.

5 If water resources wants to give part of that  
6 quantity to someone else and even convince the court  
7 through a settlement procedure that that quantity is  
8 appropriate to go to someone else, they can do that.  
9 But as a matter of due process, that can't bind this  
10 court; and that can't deprive my clients of their  
11 due-process right to prove their entitlement to the  
12 quantity they claim. If --

13 THE COURT: Mr. Brown, let me ask, just so  
14 I know where I'm at, there's 26.7 claimed, correct?

15 MR. BROWN: Yes.

16 THE COURT: Okay. Of that, how much has  
17 been decreed to Buckeye?

18 MR. BROWN: 11.9 is my understanding.

19 THE COURT: And the other parties, too. So  
20 how much, in other words, how much is now currently  
21 claimed by the remaining 3 rights; and how much is  
22 available to the remaining 3 rights?

23 MR. BROWN: Well, Your Honor, the total  
24 amount that's been recommended is 19.54. 11.9 has gone  
25 to the Buckeye.

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1 THE COURT: Well, under your theory,  
2 Mr. Brown, if there are 26. -- or there's, well,  
3 there's 26.7 claimed total --

4 MR. BROWN: Yes.

5 THE COURT: All right. Some of that has  
6 been decreed already. In other words, how much is yet  
7 to be decreed of the 26.7 -- or recommended?

8 MR. BROWN: Your Honor, I'm assuming, first  
9 of all, that the -- Mr. Lloyd's recommendation of .19  
10 has become a decree. The Buckeye has received a  
11 decree, and then I know Edith Vernon -- I can't tell  
12 the court where Edith Vernon is. She has a settlement  
13 for .2 cfs; but I understand that it's been challenged  
14 on due-process-notice-of-amendment grounds. So I can't  
15 tell the court exactly. I can tell the court that my  
16 clients are claiming about 13.18 -- 13.86 cfs.

17 THE COURT: And how much would be available  
18 under the theory that there's 25.16 available?

19 MR. BROWN: It would be 1.54 less than the  
20 13.86. So it would be 12 --

21 THE COURT: 11.64?

22 MR. BROWN: No, Your Honor. My numbers  
23 come out to be 12.32. In other words, under the 3  
24 rights there is 12.32 presently available, of which  
25 1.8 -- let me start over.

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1 THE COURT: I'm in the ballpark,  
2 Mr. Brown.

3 MR. BROWN: 13.86 is claimed. 12.32 is  
4 available under the three decreed rights.

5 THE COURT: 13.86 is claimed?

6 MR. BROWN: Yes.

7 THE COURT: Okay. I thought you said one  
8 eight. All right.

9 Have you had a chance to speak with IDWR,  
10 Mr. Brown, to see if some of these can be settled; or  
11 do they all have to go to trial?

12 MR. BROWN: Your Honor, I asked them to let  
13 me know what they -- apparently they were unaware of  
14 the other two rights, or had not put the other two  
15 rights into their analysis until recently. And the  
16 first response I had this morning was we can't do -- my  
17 understanding is they're not going to do anything about  
18 it because they understand that the places of use  
19 claimed by my clients are not within the places of use  
20 of the other two rights, which --

21 THE COURT: And you can show, Mr. Brown,  
22 that those transfers occurred prior to the mandatory  
23 transfers?

24 MR. BROWN: No, but I -- I can show that  
25 some of them have, but not necessarily under those two

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1 rights. What I can show is that those other two rights  
2 should have gone to the Buckeye because part of those  
3 other two rights, if they went to the Buckeye, the  
4 places of use for my guys under the 03 rights would be  
5 just fine.

6 In other words, we're playing with labels here.  
7 I think we're wasting a lot of time by saying, well,  
8 we're going to decree this under the 05, the 03, or the  
9 019 rights; and we're going to look at the place of use  
10 in the decree, when all three are for the same ditch,  
11 the same priority date. The only thing different is  
12 the number you attach to them.

13 THE COURT: All right. Anything else,  
14 Mr. Brown?

15 MR. BROWN: Well, that, Your Honor, plus I  
16 think if we get into this, I think you're also going to  
17 see that the amount allocated to Buckeye Farms was  
18 never used on the present Buckeye Farms to which it's  
19 been allocated until the Seventies, after the mandatory  
20 transfer permit. Because as a matter of fact the  
21 Buckeye Ditch never ran to the present Buckeye Farms  
22 when those rights were established.

23 So if there is an error in allocation, it is  
24 certainly an error in giving 11.9 to Buckeye Farms out  
25 of the Buckeye Ditch. Because we'll be able to

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1 undisputably prove that ditch never ran to the  
2 present-day Buckeye Farms until the Seventies. It ran  
3 to my clients' places of use.

4 And, for the record, I want it to be pointed out  
5 that when the department made this settlement they have  
6 already told us at the last conference we had they  
7 looked to their theory of current beneficial use in  
8 allocating, not to where was the use when the right was  
9 established as our Supreme Court says we must. So  
10 they've essentially admitted that they didn't even look  
11 at the fact that the ditch went to all my clients, not  
12 the Buckeye, at the time the right was established.

13 In other words, I think we can avoid most of the  
14 dispute, though. I mean we could come down to this  
15 foot and a half of water, the difference between the  
16 25.16 and the 26.7 claimed. We could still have that  
17 battle. But I think we ought to be able to resolve the  
18 rest of it.

19 And, you know, if not, I will tell the court,  
20 though, my clients are probably not going to resolve  
21 this piecemeal. Because they want to be able to show  
22 the whole picture to the court at a trial, if need be.  
23 And I think they're entitled to do that.

24 THE COURT: All right. Mr. Brown, how long  
25 do you need to get ready for trial? I'd like to set

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1 these within 45 days.

2 Before we get to that, yeah, what -- can you be  
3 ready within 45 days, Mr. Brown? We're pretty packed  
4 within that time period.

5 MR. BROWN: We have several trials  
6 scheduled for the last couple weeks in May -- or  
7 through May. I think a better time would be maybe mid  
8 June or later.

9 THE COURT: Mid June? How many days do you  
10 think this is going to take, Mr. Brown?

11 MR. BROWN: I would think it's probably  
12 going to take three days.

13 THE COURT: Three days?

14 (DISCUSSION HAD OFF THE RECORD)

15 THE COURT: What's the second Monday in  
16 June, Mr. Brown?

17 MR. BROWN: The 8th.

18 THE COURT: Okay. Let's tentatively  
19 schedule this for the 8th through the 10th, 9 o'clock.

20 MR. BROWN: Can I have a minute,  
21 Your Honor?

22 THE COURT: Yeah. Mr. Harbison, while  
23 Mr. Brown is speaking, do you have anything to add to  
24 the court that you wish to say?

25 MR. HARBISON: Not at this time.

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1 THE COURT: Are you going to be ready for  
2 trial on the 8th, June 8th?

3 MR. HARBISON: Yes. I'd like to talk with  
4 Mr. Brown after this to see if he'd put me in with the  
5 group.

6 THE COURT: Okay.

7 MR. BROWN: Your Honor, this, I think this  
8 may -- I think this is pretty pertinent to the  
9 scheduling of this. In this case we essentially have  
10 like five or six parties who are probably, as far as I  
11 know, not going to be opposing each other. Buckeye  
12 Farms attempted to intervene and was denied  
13 intervention. So I assume that's not going to change.

14 So essentially it is the burden of six different  
15 parties to disprove the recommendation of water  
16 resources, to rebut the presumption, and then put on  
17 persuasive evidence of their contentions. I'm very  
18 concerned in this case, especially in light of the  
19 experience I've had over the past two weeks, which is  
20 receiving, as this court knows, recommendations or 706  
21 reports, if you will, from the department in several of  
22 these Hagerman cases. And the concern is this. I've  
23 got a moving target.

24 THE COURT: Well, let's back --

25 MR. BROWN: The --

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1 THE COURT: -- back, back, just a little  
 2 bit back, Mr. Brown. These are all Class 1 subcases.  
 3 All right. So in those subcases generally what happens  
 4 is the court does not request affidavits.  
 5 Before I get to that, let me ask you,  
 6 Mr. Marshall: Generally in Class 1 subcases you  
 7 present any relevant licenses or decrees. You also get  
 8 to introduce a shape file.  
 9 Is there anything else you wish to present that  
 10 you believe might be relevant to the court?  
 11 MR. MARSHALL: Your Honor, two things. First,  
 12 I'm not positive that each of these are Class 1  
 13 subcases. Some of them might be Class 2s.  
 14 THE COURT: How are any of them Class 2?  
 15 MR. MARSHALL: Your Honor, the 3B right, the  
 16 claim is for 7.16 cfs. The recommendation is for  
 17 5 cfs. So that makes that a Class 2 subcase.  
 18 THE COURT: Okay. So both basically --  
 19 MR. MARSHALL: 3A is also Class 2.  
 20 THE COURT: All right.  
 21 MR. MARSHALL: It's close.  
 22 THE COURT: Do you want to proceed on those  
 23 like they're 2; or do you want to forgo filing  
 24 affidavits in these cases?  
 25 MR. MARSHALL: I think at this point we would

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1 prefer to file affidavits in these cases.  
 2 THE COURT: Okay. Very well. In those two  
 3 cases, those are the only ones you can file affidavits  
 4 in.  
 5 MR. MARSHALL: Your Honor, I should point out  
 6 also that some of these claims -- the 26.7 cfs that has  
 7 been referred to as claimed was as of November. I  
 8 believe some of these claims have since been amended.  
 9 I believe that number might be higher now.  
 10 THE COURT: Have you amended any of these,  
 11 Mr. Brown?  
 12 MR. BROWN: Some of them have been amended,  
 13 Your Honor. I'm not sure -- I don't have a sum of all  
 14 of the ones I don't represent, so I can't tell you.  
 15 Since November, I don't believe that I've -- we have  
 16 not claimed more in any of these cases since last  
 17 November. My clients haven't claimed more water.  
 18 MR. MARSHALL: Your Honor, I'm pretty sure  
 19 that at least Babington has amended his claim. As I  
 20 look at this spreadsheet in the record, the claims --  
 21 THE COURT: Okay. Mr. Marshall, I'm going  
 22 to go off the record for a second so we can -- let's go  
 23 off the record.  
 24 (DISCUSSION HAD OFF THE RECORD)  
 25 THE COURT: We are back on the record. The

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1 purpose of going off the record was to identify the  
 2 cases before the court today that had amended claims.  
 3 And the only amended claim was in 3C.  
 4 Mr. Brown, do you want to respond to that?  
 5 MR. BROWN: Yes, Your Honor. That is a  
 6 claim by Mr. Babington. That was a claim, I  
 7 understand, that was made based on some recommendations  
 8 and some discussions with water resources. They would  
 9 recommend perhaps more than he had claimed out of the  
 10 excess of what -- the 20 feet they had allocated if  
 11 some other things happened.  
 12 But, in any event, Mr. Babington would ask the  
 13 court to allow him to withdraw that amendment and stand  
 14 by his original claim.  
 15 THE COURT: Very well. The motion to  
 16 withdraw the amended claim that was filed in 3C,  
 17 Mr. Brown, the court will grant your motion. If you  
 18 would, prepare a motion withdrawing the amended claim.  
 19 MR. BROWN: I will, Your Honor.  
 20 THE COURT: For the record, we will proceed  
 21 on the initial claim. Very good. Okay. So we don't  
 22 have any amended claims before the court today.  
 23 We do have two Class 2 subcases; and that would  
 24 be right A claimed by Mrs. Rea and right 2 -- or I'm  
 25 sorry, B claimed by Kingston Properties.

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1 MR. MARSHALL: Your Honor, I think 3L is also  
 2 a Class 2 case, the Babington right.  
 3 THE COURT: All right. That would be --  
 4 very well. Right No. 3L also is a Class 2 case. All  
 5 right.  
 6 Mr. Clelland -- or, Mr. Marshall, none of these  
 7 involve amended claims. So how quickly -- I'm not  
 8 going to change the date; but you just give me a date  
 9 now that you can file these affidavits by.  
 10 MR. MARSHALL: Your Honor, may I ask a  
 11 question?  
 12 THE COURT: Yes.  
 13 MR. MARSHALL: I'm curious as to the 05 and  
 14 the 019 right. The department doesn't dispute that  
 15 those rights exist, aren't available. We don't dispute  
 16 that there hasn't been any claims filed on them. If  
 17 people file claims on them, the department is certainly  
 18 willing to look at those.  
 19 THE COURT: Mr. Marshall, I'm not sure if  
 20 that's necessary. You know, I'll perhaps take it under  
 21 advisement, perhaps not.  
 22 What I'm hearing is that when the parties came in  
 23 and claimed they didn't claim under a particular  
 24 right. They made a claim, and you assigned the right  
 25 to the claim.

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1 Is that a true statement?  
 2 MR. MARSHALL: That is a true statement,  
 3 although we looked also at the places of use that  
 4 people were claiming and saw what rights were being  
 5 claimed.  
 6 THE COURT: Understandable, Mr. Marshall.  
 7 I understand that. I think since you were the one who  
 8 allocated the rights, certainly now during this  
 9 process -- now after the fact, you've designated after  
 10 they've filed. I'm sure that you can designate 5 and  
 11 19 any way you see fit at this point in time.  
 12 MR. MARSHALL: Were they claimed.  
 13 MR. BROWN: Your Honor, may I make the  
 14 record clear?  
 15 THE COURT: Yes.  
 16 MR. BROWN: Mr. Kingston, Mr. Harbison, and  
 17 Mr. Simcoe all claim rights within the place of use of  
 18 05. The statement is simply not true by water  
 19 resources.  
 20 THE COURT: Well, the court views it is  
 21 that rights -- they were claimed. The department,  
 22 after the fact, assigned numbers to those.  
 23 The department, if you wish or not wish, at this  
 24 point in time assign right 5 and 19 any way you see fit  
 25 without the necessity of an amended claim.

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1 MR. MARSHALL: At this point we're not going  
 2 to assign the 5 and 19 right.  
 3 THE COURT: Well, that's fine. That's your  
 4 choice. Okay.  
 5 Mr. Marshall, the question before you is: You  
 6 wish to file affidavits for these Class 2 rights. When  
 7 do you wish to file them by?  
 8 MR. MARSHALL: We would like to file  
 9 affidavits, our director's reports and the supplemental  
 10 reports in the Class 2 cases.  
 11 THE COURT: Normally, Mr. Marshall, under  
 12 AO1 they're filed within 14 days of today. But you  
 13 tell me -- give me a reasonable day.  
 14 MR. MARSHALL: Since the trial is not until  
 15 June, I would request that we have until sometime in  
 16 May to file those reports, the second week of May.  
 17 THE COURT: All right. You better  
 18 designate a date very shortly thereafter that Mr. Brown  
 19 can depose those witnesses and make them available here  
 20 in Twin Falls. That's --  
 21 Mr. Brown, correct me if I'm wrong, that's the  
 22 method that you've spoken with Mr. Anderson about?  
 23 MR. BROWN: Your Honor, I have spoken with  
 24 Mr. Anderson. He was going to submit a proposal to  
 25 me. I've not received that.

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1 THE COURT: And the --  
 2 MR. BROWN: My concerns in this case, as  
 3 far as getting a date, are this: I've got trials  
 4 scheduled essentially nonstop from the 11th through the  
 5 28th of May.  
 6 THE COURT: Well, I can move that trial  
 7 date back a little bit, too. It's not a real big  
 8 problem.  
 9 MR. BROWN: I just, I need -- I mean we're  
 10 talking about trying 10 square miles of ground here. I  
 11 need more than a week or two to prepare.  
 12 THE COURT: Mr. Marshall, AO1 says  
 13 14 days. And you're asking for two and a half months.  
 14 MR. MARSHALL: Correct, Your Honor. AO1 also  
 15 requires trial within 45 days.  
 16 THE COURT: Well, that's for Class 1. And  
 17 you've told me that there's three Class 2s, so --  
 18 MR. MARSHALL: Well, how about May 1st?  
 19 THE COURT: How about April 15th?  
 20 MR. MARSHALL: Can we make it April 17th, a  
 21 Friday? It gives us the full week to get those done.  
 22 THE COURT: April 17th it is. All right.  
 23 Mr. Brown, given that date --  
 24 MR. BROWN: Your Honor, I'd like at this  
 25 point to make a motion in limine orally.

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1 THE COURT: Go ahead.  
 2 MR. BROWN: I think the record fully  
 3 establishes that the department elects to stick by its  
 4 original recommendations. It elects not to assign 05  
 5 or 019 rights. It elects to put us to the burden of  
 6 overcoming the presumption of that original  
 7 recommendation. Yet it apparently seeks to come in and  
 8 file affidavits based on new information.  
 9 If the court is going to use the recommendations  
 10 originally filed and require us to rebut those, then it  
 11 should require and limit the testimony of the  
 12 department to the basis for those recommendations. We  
 13 should not have a moving target on the one hand, but  
 14 evidentiary presumptions to overcome and trials to  
 15 prepare for based on the original recommendation which  
 16 is something different on the other hand.  
 17 So if the court would like to use them as an  
 18 expert and have them report the evidentiary basis for  
 19 their original recommendations, I have no problem with  
 20 that. I have a problem with the court allowing them to  
 21 make reports, as they have done to me in several cases  
 22 recently, based on new information. In other words, I  
 23 come to your court; I educate them; and they come up  
 24 with new evidence. Yet I still have to rebut the  
 25 original recommendation because they elect not to

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1 change it.

2 They are strong-arming my clients. And they're  
3 making a farce out of the statute which requires them  
4 to accurately report in the first place.

5 So I'm asking the court either, A, order them to  
6 change their recommendations to their best information;  
7 or, B, only present evidence based on their original  
8 recommendations. They can't have it both ways. It's  
9 simply not fair, nor is it, I think, what the court  
10 ever intended.

11 I think what the court needs to do is if the  
12 department screwed up in the first place, if they for  
13 whatever reason, however innocent, made an error in  
14 their original recommendation, fine. Let them come in  
15 and report only on what their original recommendation  
16 is so the court will see in cases like this that they  
17 didn't even include these two other rights. Don't let  
18 them come into court now and say Judge, well, Mr. Brown  
19 is wrong because we also looked at place of use when in  
20 fact the overlapping place of use shows, if they would  
21 have looked at place of use, they would have known  
22 three of these rights fell within the 05.

23 They're playing games with the court. They're  
24 playing games with my client. And now I suspect I'm  
25 going to receive affidavits based on however much time

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1 they can get out of the court for yet another opinion.

2 The opinion they may have changed to is  
3 irrelevant. If they have not changed their  
4 recommendation, I should not have to challenge anything  
5 they do beyond their recommendation.

6 THE COURT: Mr. Marshall.

7 MR. MARSHALL: Your Honor, I'd just say at  
8 this point filing reports that describe how we  
9 recommended the original quantities.

10 THE COURT: Very well. You've elected not  
11 to include 5 or 19. You will include the  
12 recommendations, the investigation that predated the  
13 recommendations.

14 Do you understand what I'm saying?

15 MR. MARSHALL: No.

16 THE COURT: You filed those  
17 recommendations. You had a reason for doing it.

18 MR. MARSHALL: Right. Certainly.

19 THE COURT: You file -- anything within  
20 your affidavit will deal with the investigation that  
21 predated the recommendations, or the investigations  
22 that led to the recommendations.

23 MR. MARSHALL: That's fine, Your Honor. I  
24 don't believe there's been any investigation since that  
25 time.

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1 THE COURT: Very good. The court --

2 MR. BROWN: Your Honor --

3 THE COURT: Wait, Mr. Brown. The court  
4 will not consider any facts supplied by the department  
5 dealing with an investigation after the recommendations  
6 were made.

7 MR. MARSHALL: Okay. Can you clarify for me  
8 what you mean by not talking about rights 5 and 19?

9 THE COURT: Well, you elected not to  
10 include them.

11 MR. MARSHALL: Okay.

12 THE COURT: It's real simple. You had a  
13 factual basis to file your recommendation. That was, I  
14 take it, based on some investigation. Whatever will be  
15 contained in your affidavits will be applicable to that  
16 investigation.

17 MR. MARSHALL: Certainly.

18 MR. BROWN: Your Honor, for the record, you  
19 will be seeing affidavits of their experts -- and I've  
20 just received this in several cases. Mr. Peppersack  
21 happens to be the person they are saying is their  
22 irrigation requirements expert. He was deposed in  
23 April of '95. He claimed not to be an expert at that  
24 point in time.

25 THE COURT: Wait, Mr. Brown. I can't

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1 anticipate -- Mr. Brown --

2 MR. BROWN: I just want it on the record  
3 what I'm saying so that when they change their mind it  
4 shows. Your Honor, when you say hold them to their  
5 original recommendation, I assume you mean hold them to  
6 what they originally -- the reason --

7 THE COURT: That's what I just said.

8 MR. BROWN: -- they originally recommended  
9 the number of inches per acre. And I can tell you in  
10 numerous cases recently I have received recommendations  
11 based on apparent new science.

12 THE COURT: Mr. Brown, okay, I'm going to  
13 stop you. For the record, for your record, there is  
14 nothing before the court. There are no affidavits in  
15 these cases yet. I've made my order, and you will  
16 prepare an order consistent with your motion in limine  
17 which I've granted. You'll prepare an order. Any  
18 facts supplied by the department after the  
19 recommendations were entered will be stricken, period.

20 Okay. Mr. Brown, are there -- we've got an  
21 affidavit date of April 17th. Do you have a date that  
22 depositions can be taken?

23 MR. BROWN: Your Honor, I'd prefer to leave  
24 that open just because my schedule is pretty closed  
25 both through the end of April and early May with trials

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1 in other cases in this court. So in order to  
 2 accomplish what Mr. Marshall and I talked about, I  
 3 think we ought to remain flexible.  
 4 THE COURT: All right. Is there any  
 5 problem with the affidavit cutoff date of the trial  
 6 still proceeding on June 8th through the 10th?  
 7 MR. BROWN: No, Your Honor.  
 8 THE COURT: All right. I don't think I'm  
 9 going to set any discovery cutoff dates because I think  
 10 that gets everyone in problems when I do that.  
 11 Mr. Brown, I take it you'll proceed under your  
 12 memorandum of understanding that you're developing with  
 13 Mr. Anderson on how to take these depositions, when,  
 14 where and how.  
 15 MR. BROWN: Yes, Your Honor.  
 16 THE COURT: Okay.  
 17 MR. BROWN: We'll let the court know if  
 18 that doesn't work.  
 19 THE COURT: Are there any other matters  
 20 that we need to take up, Mr. Marshall?  
 21 MR. MARSHALL: No. I would just like to  
 22 restate one thing. The 19 right, I would just like to  
 23 restate the department is certainly willing to take a  
 24 look at the 05 and the 019 rights if people were to  
 25 claim them to see if they could be allocated in hopes

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1 MR. BROWN: Thank you, Your Honor.  
 2 THE COURT: Anything else?  
 3 MR. BROWN: No, Your Honor.  
 4 THE COURT: All right. We're off the  
 5 record.

(PROCEEDINGS ADJOURNED)

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1 of not going to trial on this case.  
 2 The department feels that these rights, they'd  
 3 have to show an accomplished transfer. Most claimants  
 4 would have to show an accomplished transfer of these  
 5 rights to claim them. If they could, it's possible  
 6 that we could recommend these rights without a trial.  
 7 THE COURT: Well, all I'm saying,  
 8 Mr. Marshall, from the court's perspective, you can  
 9 settle or not from this day forward until June 8th.  
 10 They filed the claim. They didn't file the claim under  
 11 a particular right. You assigned the right. I take it  
 12 that you can assign right 5 or 19 any way you wish or  
 13 don't wish. It's all up to you.  
 14 So either do it or don't. We're going to have a  
 15 trial on the 8th through the 10th. All right?  
 16 MR. MARSHALL: Very well.  
 17 THE COURT: Mr. Brown.  
 18 MR. BROWN: I understand the court to be  
 19 saying they could settle based on those rights; but  
 20 they're not to be presenting evidence based on those  
 21 rights unless their original recommendation was based  
 22 on those rights.  
 23 THE COURT: That's correct. The motion in  
 24 limine will stand, Mr. Brown. You will file an order  
 25 consistent with that motion.

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PATRICK D. BROWN, P.C.  
LAW OFFICES

May 14, 2001

RECEIVED  
MAY 15 2001  
Department of Water Resources  
Southern Region

Steve Clelland  
Idaho Department of Water Resources  
1341 North Fillmore, Suite 200  
Twin Falls, ID 83301

RE: Subcases No. 36-00003, 05, and 019

Dear Steve:

Enclosed are some materials that may help you understand the explanations I have given about the nature and extent of ownership and use of the 03,05, and 019 rights.

1. A table of dates, facts, and sources of the facts is included. It summarizes the most important ownership and use facts. The deeds and transcripts that reflect the events are referenced in the source column.
2. An outline of the pertinent sales and trades of water, including an accounting for the decreed amounts at each stage.
3. The pertinent deeds, agreements, and testimony given under oath at the trial in 1998. (Tabs 1-23)
4. The GIS photos, amended to show the POUs, with a curt statement of some reasons why they are claimed as shown. (Tab 24)
5. The measurements for the Babington, Simcoe and Rea use, along with the duty of water results from Brockway Engineering.

In short, in 1932 the land was owned by the three named in the New International Decree. Then, by 1941, May Gardner/Enterprise Land Co. owed it all, except the part it gave to Clifford for the Amanda Gooding property and the part it traded with H. J. Bell for his property. In the 1960's, the present day Buckeye was sold to Hap Erwin. He bought undivided interests in the water. After that several transactions involved both land and water. The present day owners and their predecessors generally used more water than specified in the initial deeds.

Consequently, the SRBA forced the owners into potential litigation with one another over who used how much water. Adverse possession, forfeiture, and other hostile types of cases are one means the neighbors could have used to sort out ownership of the water. Instead, they agreed to amicably allocate the water based on historic, actual use. The more recent deeds and agreements reflect this.

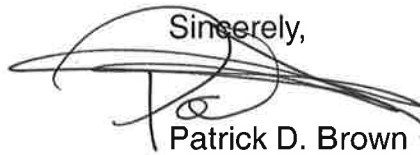
While some may argue that Babington and Simcoe, for example, should not be able to combine the proportionally larger amount of water each acquired in their later purchases with the 1" per acre initially deeded, this is nonsense. The entire purpose of statutes like I.C. §42-1425 through §42-1427 is to update the decrees, especially where they were ambiguous when made or subsequent changes like the 1941 consolidation of properties does not clearly track the changes in water use.

These claimants seek nothing more than to have the SRBA decree fairly and accurately reflect the uses since the forties. I would think this is precisely IDWR's goal.

Toward that end, I submit it is cleaner and more accurate to assign a single right number to each owner's claim(s), perhaps with the comment that they constitute a combination of the 03, 05, and 019 rights. Any attempt to segregate the water according to the three numbers is futile, as they have been mostly used homogenously under the September 10, 1884 priority since the forties. More importantly, it serves no purpose.

If you have any questions, please give me a call.

Sincerely,



Patrick D. Brown  
Attorney at Law

pdb/tf  
enc.

## Master Buckey Rights 36-00003 -05 -19 - Fact Report

5/14/2001 5:24:45 PM

| Date & Time                    | Fact Text                                                                                                                                                                                                                        | Source(s)                                                                                                                                   |
|--------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|
| ??/??/1932                     | Other rights are the 01 right from the Hunt ditch for 12.0cfs and the 02 right for 12. cfs from the pipe ditch                                                                                                                   |                                                                                                                                             |
| ??/??/1932                     | At that time there were 3 parcels of land (1) the Buckeye Ranch ground (03 right); (2) the Amanda Gooding property(05 right); and (3) the Harlan Verl Bell property (019 right),, all with Sept.10, 1884 priority.               |                                                                                                                                             |
| Thu 09/19/1940                 | The Buckeye Ranch passed from New Int'l Mort. to May Gardner Enterprise Land Co.with all appurtenant water.                                                                                                                      | Deed recorded that date                                                                                                                     |
| Mon 02/03/1941                 | May Gardner Enterprise Land Co and HJBell swap land, HJBell getting 1.6 cfs of 1884 water ( specified in deed) and the land presently owned by Edna Rea; May Gardner Enterprise Land Co gets the 019 land and appurtenant water. | Two deeds recorded that date                                                                                                                |
| Tue 12/23/1941                 | May Gardner Enterprise Land Co acquires the Amanda Gooding (05) land and appurtenant water from H.and N. Clifford, who had acquired it from Gooding                                                                              | Deed recorded that date                                                                                                                     |
| ??/??/1943                     | May Gardner Enterprise Land Co passes away leaving all involved land with water rights ( except the present day Edna Rea property) to RBGardner                                                                                  | Quitclaim deed recorded 2/1/44, deed recorded 12/28/45 and final distribution of the May Gardner Enterprise Land Co estate recorded 2/2/46. |
| > Mon 02/03/1941               | HJBell and his wife, Edna Rea, own the 1.6 cfs of 03A Notice of Claim Rea/Bell water and property on which it is claimed                                                                                                         |                                                                                                                                             |
| > Tue 12/23/1941 to ??/??/1960 | All land except Edna Rea's is owned by May, then Robert B. Gardner, and all 3 rights of same priority date are used without separate accounting through Buckeye ditch                                                            | Trial testimony p. 281, l. 12 thru p. 284, l. 1                                                                                             |
| Fri 03/25/1960                 | Robert B. Gardner sells the present day Buckeye Ranch ground to Erwin                                                                                                                                                            | Deed of that date                                                                                                                           |
| Fri 12/14/1973                 | Erwin sells present day Buckeye Ranch to Buckeye Land Co.                                                                                                                                                                        | Deed recorded that date                                                                                                                     |
| Thu 05/31/1973                 | Robert B. Gardner and Barbara Gardner sell to R.E.                                                                                                                                                                               | Deed recorded that date                                                                                                                     |

## Master Buckey Rights 36-00003 -05 -19 - Fact Report

5/14/2001 5:24:46 PM

| Date & Time    | Fact Text                                                                                                                                                                         | Source(s)               |
|----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|
| **             | Shotwell 40 acres of land presently owned by Doyt Simcoe with 40 shares of Buckeye ditch water with Sept. 10, 1884 priority                                                       | **                      |
| Thu 07/25/1974 | R.E. Shotwell sells 30 acres of Doyt Simcoe place and 30 shares of 1884 Buckeye shares to Ken Marshall                                                                            | Deed recorded that date |
| Thu 09/05/1974 | R.E. Shotwell sells 10 acres of Doyt Simcoe place and 10 shares of 1884 Buckeye shares to Ken Marshall                                                                            | Deed recorded that date |
| Fri 10/11/1991 | Ken Marshall sells 40 acres and 40 shares of Buckeye Ditch Company water to Doyt Simcoe                                                                                           | Deed recorded that date |
| Thu 05/16/1974 | Robert B. Gardner and Barbara Gardner deed lot 19 of the present day Lynn Babbington property to M.Engles (her son) with 15" of Billingsley Creek water through the buckeye ditch | Deed recorded that date |
| Wed 03/31/1993 | Barbara Gardner sells lot 18 of the present day Lynn Babbington property to Lynn Babbington and warrants 14 shares of Buckeye ditch water                                         | Deed recorded that date |
| Wed 01/13/1993 | M. Engles sells lot 19 of the present day Lynn Babbington property to Lynn Babbington and warrants 15" of Billingsley creek water through the Buckeye ditch                       | Deed recorded that date |
| Thu 12/26/1974 | Robert B. Gardner and Barbara Gardner deed the present day McClure Harbison property to L. and M. Garner with 15" of Billingsley Creek water dated 9/10/1884                      | Deed recorded that date |
| Thu 10/28/1993 | L. and M. Garner sell the present day McClure Harbison property to McClure Harbison with 15" of Billingsley Creek Buckeye ditch water dated 9/10/1884                             | Deed recorded that date |
| Tue 10/04/1994 | Barbara Gardner, personally and as personal representative for the estate of Robert B. Gardner transfers their property to a family trust                                         | Deed recorded that date |
| Tue 11/07/1995 | Barbara Gardner, for the trust, sells all but a small, reserved piece to Wickham and Bothwell and warrants water at 1" per acre as set forth in the original 03B                  | Deed recorded that date |

# Master Buckey Rights 36-00003 -05 -19 - Fact Report

5/14/2001 5:24:47 PM

| Date & Time    | Fact Text                                                                                                                                                                                                                                                                                                                                                     | Source(s)                                                                         |
|----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| **             | Notice of Claim Kingston claim                                                                                                                                                                                                                                                                                                                                | **                                                                                |
| Thu 01/04/1996 | Wickham and Bothwell sell what they bought to Dave Kingston with the 03B water claimed                                                                                                                                                                                                                                                                        | Deed recorded that date                                                           |
| Mon 11/03/1997 | Barbara Gardner sells her remaining 134" of water appurtenant to her small parcel and the rest of the ranch to Dave Kingston with the understanding that Dave Kingston agrees to give Doyt Simcoe, Lynn Babbington and the others the water they used above the 1" per acre transferred by warranty to each. She receives a road and maintenance in exchange. | Agreement recorded that date; and Testimony, p. 307.                              |
| ??/??/1936     | The Pipe Ditch that brought water to the present day Lynn Babbington and Doyt Simcoe properties " fell into disrepair and was abandoned in the mid to late Thirties." The Buckeye ditch water has been used on those properties since then.                                                                                                                   | March 6, 1998 testimony of Verl Bell, transcript p.277, l.12-21; p. 283, l. 1-22. |
| Fri 01/07/1994 | Barbara Gardner sells 18.5 acres to Doyt Simcoe with 37 inches of Buckeye Ditch water                                                                                                                                                                                                                                                                         | Deed recorded that date.                                                          |

**Ownership of the land and water rights with September 10, 1884 priority:**

**1) 1932**

|    |                           |                                                  |             |
|----|---------------------------|--------------------------------------------------|-------------|
| a) | New Internal Mortgage Co. | 36-00003 on area identified in yellow on GIS     | 20.0        |
|    | cfs                       |                                                  |             |
| b) | Amanda Gooding            | 36-00005 on 80 acres identified in purple on GIS | 3.0         |
|    | cfs                       |                                                  |             |
| c) | Harlan Bell               | 36-00019 on area identified in blue on GIS       | <u>2.16</u> |
|    | cfs                       |                                                  |             |
| d) | total decreed water       |                                                  | 25.16 cfs   |

**2) 1941 to 1960 -Gardner acquires a 3 rights except the 03 water to HJBell and Lloyd:**

|    |                                                              |               |
|----|--------------------------------------------------------------|---------------|
| a) | May Gardner/Enterprise Land Co. then R.B. Gardner            | 23.16 cfs     |
|    | i) from New Intern'l (1940);                                 |               |
|    | ii) swap with HJ Bell (1941); and                            |               |
|    | iii) Clifford (1941)( who had purchased from Amanda Gooding) |               |
| b) | Harlan Bell and Edna Rea                                     |               |
|    | i) swap with May Gardner (1941) (03A)                        | 1.6 cfs       |
| c) | Gardner tranfers to Lloyd (1959)                             | <u>.4 cfs</u> |
| d) | total decreed water                                          | 25.16 cfs     |

**3) 1960- Gardner sells part of Ranch to Buckeye Land Co.:**

|    |                                                                                                                                                                                                                                                                                                                                                      |                |
|----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| a) | Gardner keeps                                                                                                                                                                                                                                                                                                                                        | 11.16 cfs      |
| b) | Gardner sells to Erwin                                                                                                                                                                                                                                                                                                                               | 12.0 cfs       |
|    | i) (who later quit claims to Donnie McFadden who sell to what is now the Buckeye Ranch)                                                                                                                                                                                                                                                              |                |
|    | ii) this sale is confusing because the deed says 3 second feet and a undivided three quarter interest in the water is conveyed. The best evidence of what the Buckeye Ranch thinks it owns, in other words, what it thinks the undivided interest and 3" represent in terms of use, is claim 03H for 12.0 cfs and no claims to the other two rights. |                |
| c) | Harlan Bell and Lloyd                                                                                                                                                                                                                                                                                                                                | <u>2.0 cfs</u> |
| d) | total decreed water                                                                                                                                                                                                                                                                                                                                  | 25.16 cfs      |

**4) 1960 to 1990- Gardners sell more land and water:**

|    |                                              |               |
|----|----------------------------------------------|---------------|
| a) | Gardner keeps                                | 9.56 cfs      |
| b) | Gardner sells to Shotwell (1973)             | .8 cfs        |
|    | i) (who later sells to Marshall then Simcoe) |               |
| c) | Gardner gives to Engles (1974)               | .3 cfs        |
|    | i) (who later sells to Babington)            |               |
| d) | Gardner gives to L. and M. Gardner (1974)    | .3 cfs        |
|    | i) (who later sells to Harbision, McClure)   |               |
| e) | Gardner sells to Vernon (19--)               | <u>.2 cfs</u> |
| f) | total of Gardner's water in 1960             | 11.16 cfs     |

**5) 1990 to present- more land and water sold, including to match water use with land:**

|    |                                                                                    |                 |
|----|------------------------------------------------------------------------------------|-----------------|
| a) | Gardner sells additional land (not Engles) and water to Babington (1993)           | .28 cfs         |
| b) | Gardner sells to Wickham and Bothwell (1995)                                       | 7.16 cfs        |
|    | i) (who later sell to Kingston)                                                    |                 |
| c) | Gardner sells additional 18.5 acres to Simcoe (199-)                               | .74 cfs         |
| d) | Gardner sells her remaining water to Kingston to be distributed per user agreement | <u>1.38 cfs</u> |
|    | i) The deed says 134" are being sold, but she only owned 69"( 1.38cfs)             |                 |



- ii) This 1.38 cfs passed to Kingston, and per agreement between he, Simcoe and Babington
- iii) Babington get .38 cfs of this to reflect longstanding actual use.

e) total of water kept by Gardner before 1990 9.56 cfs

**6) CURRENT OWNERSHIP:**

|                                                                    |          |        |                |             |
|--------------------------------------------------------------------|----------|--------|----------------|-------------|
| a) Kingston L.P.                                                   | 7.16 cfs | 358.0" |                |             |
| b) Kingston L.P.*                                                  | 1.37 cfs | 68.5"  | 8.53 cfs       | 426.5"      |
| i) (* due to rounding, this amount calculates to 1.37 or 1.38 cfs) |          |        |                |             |
| c) Babington                                                       | .30 cfs  | 15.0"  |                |             |
| d) Babington                                                       | .28 cfs  | 14.0"  |                |             |
| e) Babington                                                       | .38 cfs  | 19.0"  | .96 cfs        | 48.0"       |
| f) Simcoe                                                          | .8 cfs   | 40.0"  |                |             |
| g) Simcoe                                                          | .74 cfs  | 37.0"  | 1.54 cfs       | 77.0"       |
| h) McClure                                                         |          |        | .24 cfs        | 12.0"       |
| i) Rea                                                             |          |        | 1.6 cfs        | 80.0"       |
| j) Buckeye                                                         |          |        | 11.9 cfs       | 595.0"      |
| k) Vernon                                                          |          |        | .20 cfs        | 10.0"       |
| l) Lloyd                                                           |          |        | <u>.19 cfs</u> | <u>9.5"</u> |
| m) total water claims and decrees.                                 |          |        | 25.16 cfs      | 1258.0"     |

PROOF READ

No. 78214

THIS INDENTURE, made this 16th day of September in the year of our Lord One Thousand Nine Hundred and forty,

BETWEEN New International Mortgage Bank, Ltd., a corporation organized and existing under and by virtue of the laws of the Kingdom of the Netherlands, the party of the first part, and Enterprise Land Company, a corporation, the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Ten (\$10.00) Dollars, and other valuable considerations, legal tender of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents Grant, Bargain, Sell and Convey unto the said party of the second part, the following described real property situated in the County of Gooding, State of Idaho, particularly bounded and described as follows, to-wit:

Outlots One (1) to One hundred thirty-four (134) inclusive, of the Buckeye Ranch as platted of record in Gooding County, Idaho, together with all water and water rights appurtenant thereto, including (but not limited to) rights awarded to said

BK 30 pg 549  
# 3

lands by the decree in the case of New International Mortgage Bank, Ltd., a corporation, vs. Idaho Power Company, a corporation, et al, recorded in said Gooding County, April 19, 1932, in Book 6, page 31 of the records of judgments of said County, excepting outlots 16, 27, 37, 124 and 125.

(\$22.00 INTERNAL REVENUE STAMPS, ATTACHED & CANCELLED)

TOGETHER WITH ALL AND SINGULAR the tenements, rights, easements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, EXCEPTING, however, roads, school-house sites, cemetery sites, rights of way, flumes, ditches and easements heretofore granted or existing.

TO HAVE AND TO HOLD the said premises with the appurtenances, unto the said party of the second part.

And the above bargained and granted lands and premises, in the quiet and peaceful possession of the said party of the second part, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will Warrant and Defend as to its own acts and deeds.

IN TESTIMONY WHEREOF, the said party of the first part has caused its corporate name to be hereunto subscribed and these presents to be executed by its Attorneys in Fact, duly authorized thereto, the day and year first above written.

(NO CORPORATE SEAL)

NEW INTERNATIONAL MORTGAGE BANK, LTD.,

By Bradley W. Young, Its Attorney in Fact.  
By A. J. Prins, Its Attorney in Fact.

STATE OF WASHINGTON, )  
                          :SS  
County of Spokane.    )

On this 16th day of September A. D., 1940, before me personally appeared Bradley W. Young and A. J. Prins, to me known to be the Attorneys in Fact of the New International Mortgage Bank, Ltd., the Corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(NOTARY SEAL)

Gladys Myers, Notary Public in and for  
the State of Washington,  
residing at Spokane, Wash.  
My Commission Expires April 26th, 1942.

Filed for record at request of New Internat. Mtg. Bank at 4:30 P. M., Sept. 19, 1940.

Fees, \$1.20

Bert Bowler, County Recorder,

By Edith LaSalle, Deputy.

::::::

Book 31,  
P. 162  
#11

PROOF READ

STERN-TORE CO., PRINTERS & BINDERS, BOISE 141224

No. 79464

This Indenture, Made this 31st day of December in the year of our Lord one thousand nine hundred and forty , between  
May Gardner, a widow,  
of Gooding County of Gooding State of Idaho  
the part y of the first part, and

H. J. Bell & Edna M. Bell, husband & wife,  
of Hagerman County of Gooding State of Idaho  
the part ies of the second part,  
WITNESSETH, That said part y of the first part, for and in consideration of the sum of  
One Dollar and Other Valuable Considerations DOLLARS,  
lawful money of the United States of America, to her in hand paid by the said part ies of the second part, the receipt whereof  
is hereby acknowledged, ha ve granted, bargained and sold, and by these presents do - grant, bargain, sell, convey and confirm, unto  
the said part ies of the second part, and to their heirs and assigns, forever, all the following described real estate situated  
in Gooding County, State of Idaho, to-wit:

Southwest quarter of the Northeast quarter (SW $\frac{1}{4}$  NE $\frac{1}{4}$ ), Sec. 27,  
Twp. 7 S., R. 13 E. B. M., with 1.6 sec. ft. of the waters of Billingsley  
creek with priority of September 10, 1884, as awarded to said land in the  
decree appearing in book 6, page 31, of the records of judgments of said  
Gooding county.

(Party of the first part has been a widow since April 13, 1940).  
(Said SW $\frac{1}{4}$  NE $\frac{1}{4}$  is sometimes known as and is the same as Outlots  
1, 2, 20 and 21 of the Buckeye Ranch, according to the official plat of  
said ranch of record in said Gooding county).

(\$2.20 INTERNAL REVENUE STAMPS, ATTACHED & CANCELLED)  
TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining,  
the reversion, and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said  
property as well in law as in equity, of the said part y of the first part:

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

IN WITNESS WHEREOF, The said part y of the first part has hereunto set her hand and seal , the day  
and year first above written.  
Signed, Sealed and Delivered in the Presence of  
May Gardner (SEAL)  
(a widow) (SEAL)  
(SEAL)  
(SEAL)

STATE OF IDAHO, } ss.  
County of Gooding } On this 31st day of December in the year 1940,  
fore me, the undersigned , a notary public in and for said County,  
personally appeared May Gardner, a widow  
known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she  
executed the same.  
In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(NOTARY SEAL)

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

Recorded at the request of H. O. Frazier  
at 1:15 o'clock P. M., this 3 day of February A. D. 1941.  
Fee, \$ 1.20 Bert Bowler  
By Edith LaSalle Deputy. County Recorder.

No. 79470

This Indenture, Made this 10th day of December in the year of our Lord one thousand nine hundred and forty , between  
J. H. Bell & Edna M. Bell, husband & wife  
of Hagerman County of Gooding State of Idaho  
the parties of the first part, and

May Gardner, a widow,  
of Gooding County of Gooding State of Idaho  
the party of the second part,  
WITNESSETH, That said parties of the first part, for and in consideration of the sum of One Dollar and other valuable considerations DOLLARS,  
lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do - grant, bargain, sell, convey and confirm, unto the said party of the second part, and to her heirs and assigns, forever, all the following described real estate situated in Gooding County, State of Idaho, to-wit:

Outlots Sixteen (16), Twenty-seven (27) and Thirty-seven (37), of the Buckeye Ranch, according to the official plat of said ranch of record in said Gooding County;

With all water and water rights appurtenant, including (but not limited to), the following: 2.16 sec. ft. of the waters of Billingsley Creek, with priority of Sept. 10, 1884, and .5 sec. ft. of the waters of Riley Creek, with priority of Oct. 1st, 1908, as awarded to Harlan Bell for use on the above land in the decree recorded April 19, 1932, in book 6, page 31, of the records of judgments of said Gooding County.

(Said J. H. Bell has had no other wife than said Edna M. Bell since September 24, 1929).

(Said J. H. Bell is sometimes known as Harlan Bell, and sometimes as Known  
H. J. Bell)

(\$2.20 INTERNAL REVENUE STAMPS, ATTACHED & CANCELLED)

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

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

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

Signed, Sealed and Delivered in the Presence of

J. H. Bell (SEAL)  
Edna M. Bell (SEAL)  
(Husband and wife) (SEAL)

STATE OF IDAHO, } ss.  
County of Gooding }  
before me, the undersigned }  
personally appeared J. H. Bell & Edna M. Bell, husband & wife }  
known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

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

(NOTARY SEAL)

H. O. Frazier, Notary Public in and for the State of Idaho, residing at Hagerman, Idaho. My commission expires Mch. 23rd, 1944.

Recorded at the request of Bissell & Bird  
at 1:45 o'clock P.M., this 3 day of February A.D. 1941  
Fee, \$ 1.20  
By Edith LaSalle Deputy.  
Bert Bowler  
County Recorder.

## PROOF READ

No. 82468

This Indenture, Made this 17th day of November in the year of our Lord one thousand nine hundred and forty-one, between Howard F. Clifford and Nora C. Clifford, husband and wife, and who have been husband and wife since prior to June 12, 1939,

of Hagerman County of Gooding State of Idaho  
the parties of the first part, and May Gardner, a widow,

of Gooding County of Gooding State of Idaho  
the party of the second part,

WITNESSETH, That said party of the first part, for and in consideration of the sum of \$1.00 and other considerations in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm, unto the said party of the second part, and to her heirs and assigns, forever, all the following described real estate situated in Gooding County, State of Idaho, to-wit:

South half of the Southeast Quarter (S $\frac{1}{2}$  SE $\frac{1}{4}$ ), of Sec. 27,  
Twp. 7 S., R. 13 E. B. M.

(This conveyance is given to carry out a contract for exchange  
of lands between the contracting parties)

(\$ .55 INTERNAL REVENUE STAMPS; ATTACHED & CANCELLED)

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

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

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

~~Signed, sealed and delivered in the presence of~~

Howard F. Clifford (SEAL)  
Nora C. Clifford (SEAL)  
(SEAL)

## STATE OF IDAHO,

County of Gooding ss. On this 17th day of November in the year 1941,  
before me, the undersigned, a notary public in and for said County,  
personally appeared Howard F. Clifford & Nora C. Clifford, husband & wife,  
known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

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

My commission expires 1943

(NOTARY SEAL)

Branch Bird

Notary Public in and for the  
State of Idaho  
residing at Hagerman, Idaho

Recorded at the request of Bissell & Bird  
at 4:40 o'clock P. M., this 23 day of Dec. A. D. 1941  
Fee, \$ 1.20

By Frances Bishop Deputy.

Bert Bowler

County Recorder.



No. 89299.

This Indenture, Made the 15th day of January, in the year of our Lord one thousand nine hundred and forty-four, between May Gardner, a widow since April 13, 1940, of Gooding, County of Gooding, State of Idaho the part Y of the first part, and

Robert B. Gardner, of Hagerman County of Gooding, State of Idaho the part Y of the second part,

WITNESSETH, That the said part Y of the first part, for and in consideration of the sum of natural love and affection and ONE & NO/100 - - - - - DOLLARS lawful money of the United States of America, to her in hand paid by the said part Y of the second part, the receipt whereof is hereby acknowledged, do ss by these presents remise, release and forever QUIT-CLAIM, unto the said part Y of the second part, and to his heirs and assigns, all those certain lot 8, piece 8 or parcel 8 of land, situate, lying and being in the County of Gooding, State of Idaho, bounded and particularly described as follows, to-wit:

Lots 15 and 16, Block 4, Townsite of Hagerman; An undivided one-half interest in the following properties;

BUCKEYE RANCH, described as follows: Outlots 3 to 19, inc; 24 to 40, inc; 43 to 75 inc; 78 to 102, inc; 107 to 121, inc; according to the official plat of said Buckeye Ranch of record in said Gooding County, and S $\frac{1}{2}$  S $\frac{1}{2}$  Sec. 27, T. 7 S. R. 13 E. B. M.;

SCHOOLER CREEK RANCH, described as follows: N $\frac{1}{2}$  SE $\frac{1}{4}$  & SW $\frac{1}{4}$  SE $\frac{1}{4}$  Sec. 4; W $\frac{1}{2}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$  & NE $\frac{1}{4}$  NW $\frac{1}{4}$  Sec. 9, all in Twp. 3 S. R. 15 E. B. M., With all water, grazing and other rights and appurtenances.

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, All and singular, the said premises, together with the appurtenances, unto the said part Y of the second part, and to his heirs and assigns forever.

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

|                                                       |                      |        |
|-------------------------------------------------------|----------------------|--------|
| <p>State, Sealed and Delivered in the Presence of</p> | May Gardner          | (SEAL) |
|                                                       | (widow as aforesaid) | (SEAL) |
|                                                       |                      | (SEAL) |
|                                                       |                      | (SEAL) |

STATE OF IDAHO, } ss.  
County of Gooding, }

On this 29th day of January, in the year 1944, before me Branch Bird, a Notary Public in and for said County, personally appeared May Gardner, a widow as aforesaid,

known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that s/he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(NOTARY SEAL)

Branch Bird, Notary public residing at Gooding, Idaho. My commission expires 1947

Recorded at request of Bissell & Bird at 3:30 o'clock P. M., this 1 day of Feb. 1944.

By Frances Bishop Deputy Bert Bowler County Recorder.  
Fee \$ 1.00

No. 95711

IN THE PROBATE COURT OF GOODING  
COUNTY, STATE OF IDAHOIN THE MATTER OF THE ESTATE OF  
MAY GARDNER,  
Deceased.) Decree of Settlement of Final Account  
) and Final Distribution  
)

Branch Bird, the executor of the above named deceased, having on the 21st day of January, 1946, rendered and presented for settlement and filed in this court his final account and report of his administration of said estate, which account was for a final settlement, and having with said account filed a petition for the final distribution of the estate;

And the said account and petition this day coming on regularly to be heard, and proof having been made to the satisfaction of the Court that notice of the day appointed for the settlement of said account and hearing of said petition had been duly given as required by law and the order of this Court, and no exception or objection in writing to said account or petition having been filed or made; the said executor appearing by

ssell & Bird, his attorneys, and no objection being made;

And it appearing to the Court, after having fully examined the said account and the vouchers filed herein and heard the testimony in support thereof, that said account is in all respects true and correct; that the residue of money in the hands of the executor at the time of filing said account was \$81.91; that the sum of 68.33 has been expended by the executor as necessary charges, debts, claims and expenses of administration, the vouchers whereof have been presented and filed; and that said account is in all respects true and correct and entitled to be settled, allowed and approved, and the Court having duly considered all the matters aforesaid;

IT IS ORDERED AND DECREED, That the said final account be and the same hereby is in all respects as the same was rendered and presented for settlement, approved, allowed and settled;

And it further appearing that since the rendition of said final account there has been received by said executor the sum of nil and that there has been disbursed by him the sum of \$2.50 bank charges, the vouchers whereof, together with a statement of said receipts and disbursements, in now reported and filed, the said statement, receipts and disbursements are settled, allowed and approved, and it further appearing that the estimated expense of closing the estate will amount to \$2.00, leaving a residue of \$77.41 and it appearing that all claims and debts against the said decedent, and all taxes on the personal property of said estate, and all transfer and estate taxes that have attached to or accrued against the said estate, and all debts, expenses and charges of administration have been fully paid and discharged, and that said estate is ready for distribution and in condition to be closed;

And it further appearing to the Court that the said May Gardner died testate, in the County of Gooding, State of Idaho, on the 9th day of August, A. D., 1945, leaving surviving Robert B. Gardner, son; Walter R. Gardner, son; Lois L. Carrico, daughter; W. A. (Bill) Gardner, son, all adults.

That the said Robert B. Gardner, Walter R. Gardner and Lois L. Carrico are entitled to all the residue of said estate in the respective amounts and particulars set forth below, under the will of decedent and under transfers and assignments made between the respective heirs of decedent.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the residue of said estate of May Gardner, deceased, hereinafter particularly described and now redescribed as follows, to-wit:

To Walter R. Gardner & Lois L. Carrico, equally: "E" bonds of the maturity value of \$2575.00 registered in the names of Mrs. Petrea Naser or Mrs. May Gardner; cash remaining in possession of executor; PCA stock; and Lots 13 to 16, inc., block 65, Townsite of Gooding Gooding County, Idaho;

To Lois L. Carrico: Household goods and furniture in residence situate on above described lots; 1942 Oldsmobile auto., title 416,844, motor # GA 424,365, current license # 2 G 868; and E. F. Wilson contract dated March 13, 1945, and pertaining to lands in sections 32 and 33, Twp. 1 S.R. 14 E.B.M., Camas County, Idaho.

To Robert B. Gardner: Decedent's interest in the following real and personal property: "E" bonds registered in the names of Mrs. May Gardner or Robert Gardner, or vice versa, of the maturity value of \$1950.00, and two "G" bonds each for \$100.00; cash deposited with First Security Bank Gooding in the name of Gardner Sheep Company;

BUCKEYE RANCH: Loutlots 3 to 19, inc, 24 to 40, inc, 43 to 75, inc, 78 to 102, inc, 107 to 121, inc, 126 to 134, inc, according to the official plat of said ranch of record in said Gooding County, and the South one-half of the South one-half ( $S\frac{1}{2}S\frac{1}{2}$ ) of Sec. 27, Twp 7 S. R. 13 E.B.M., Gooding County, Idaho

SCHOOLER CREEK RANCH:  $N\frac{1}{2}SE\frac{1}{4}$  &  $SW\frac{1}{4}SE\frac{1}{4}$  of Sec. 4;  $W\frac{1}{2}NE\frac{1}{4}$ ,  $SE\frac{1}{4}NE\frac{1}{4}$  &  $NE\frac{1}{4}NW\frac{1}{4}$  of Sec. 9, all in Twp. 3 S. R. 15 E.B.M., Gooding County, Idaho;

GWIN RANCH:  $SW\frac{1}{4}NE\frac{1}{4}$ ,  $SE\frac{1}{4}NW\frac{1}{4}$ ,  $NE\frac{1}{4}SW\frac{1}{4}$ ,  $S\frac{1}{2}SW\frac{1}{4}$  &  $NW\frac{1}{4}SE\frac{1}{4}$  of Sec. 23 and  $NW\frac{1}{4}$  of Sec. 26, all in Twp. 3 S. R. 15 E.B.M., Gooding County, Idaho;

BARKER RANCH:  $SW\frac{1}{4}SW\frac{1}{4}$  of Sec. 14,  $SE\frac{1}{4}SE\frac{1}{4}$  of Sec. 15  $NE\frac{1}{4}SE\frac{1}{4}$  &  $E\frac{1}{2}NE\frac{1}{4}$  of Sec. 22  $W\frac{1}{2}NW\frac{1}{4}$  &  $NW\frac{1}{4}SW\frac{1}{4}$  of Sec. 23, all in Twp. 2 S. R. 14 E.B.M., Camas County, Idaho, with all grazing, range and reserve rights appurtenant to said lands;

274 head of cows, bulls and yearling steers;

70 head of calves;

machinery, equipment and horses on above ranches;

grain (about 2000 bushels)

1945 hay crop, and

1940 Chev. truck  $1\frac{1}{2}$  tons, title # A 355,40, and any other property not now known or discovered which may belong to the said estate or to which the said estate may have any interest, be and the same is hereby distributed as follows, to-wit: to Robert B. Gardner, Walter R. Gardner, Lois L. Carrico and W. A. (Bill) Gardner, share and share alike.

It is further ordered that inheritance tax has been paid to the State of Idaho by said Lois L. Carrico in the sum of \$505.97, and by said Walter R. Gardner in the sum of \$505.97.

Done in open Court this 2nd day of February, 1946.

H. D. JACKSON, (typed signature)

Probate Judge

(NOTATION OF SEAL)

PROOF READ

DEED RECORD No. 36—GOODING COUNTY, IDAHO

No. 95297

This Indenture, Made this 26th day of December in the year of our Lord one thousand nine hundred and forty five, between Walter R. Gardner and Lois L. Carrico

of Gooding County of Gooding State of Idaho  
the parties of the first part, and Robert B. Gardner

of Hagerman County of Gooding State of Idaho  
the parties of the second part,

WITNESSETH, That said parties of the first part, for and in consideration of the sum of TWENTY THOUSAND & NO/100 (\$20,000.00) DOLLARS, lawful money of the United States of America, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey and confirm, unto the said parties of the second part, and to his heirs and assigns, forever, all the following described real estate situated in Gooding County, State of Idaho, to-wit:

An undivided one-half interest in the following lands:

Outlots 3 to 19, inc; 24 to 40, inc; 43 to 75, inc; 78 to 102, inc, 107 to 121, inc; 126 to 134, inc, according to the official plat of said ranch of record in said Gooding County, and S $\frac{1}{2}$  S $\frac{1}{2}$  Sec. 27, Twp. 7 S. R. 13 E.B.M., all known as the Bickeye ranch;

N $\frac{1}{2}$  SE $\frac{1}{4}$  & SW $\frac{1}{4}$  SE $\frac{1}{4}$  of Sec. 4; W $\frac{1}{2}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$  & NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Sec. 9, all in Twp. 3 S. R. 15 E. B. M., known as Schooler Creek ranch;

SW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , S $\frac{1}{2}$  SW $\frac{1}{4}$  & NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Sec. 23; and NW $\frac{1}{4}$  of Sec. 26, Twp 3 S. R. 15 E. B. M., known as Gwin ranch,

With all grazing and water rights appurtenant thereto and customarily used with and on said lands.

(\$22.20 INTERNAL REVENUE STAMPS ATTACHED AND CANCELLED)

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

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

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

~~XXXXXX XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX~~

Walter R. Gardner (SEAL)  
Lois L. Carrico (SEAL)  
(SEAL)  
(SEAL)

STATE OF IDAHO,

County of Gooding } ss. On this 26th day of December in the year 1945,  
before me, Branch Bird, a notary public in and for said County,  
personally appeared Walter R. Gardner and Lois L. Carrico  
known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

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

My commission expires 1947

(NOTARY SEAL)

Branch Bird  
Notary Public in and for the  
State of Idaho  
residing at Gooding, Idaho

Recorded at the request of Branch Bird  
at 11 o'clock A.M., this 28 day of Dec.  
Fee, \$ 1.20

A. D. 1945

By Frances Bishop Deputy.

Bert Bowler

County Recorder.

1 THE COURT: Let me clarify something,  
 2 Mr. Brown.  
 3 MR. BROWN: Yes.  
 4 THE COURT: Mr. Bell, referring to  
 5 Exhibit 13, there's a parcel that's been indicated as  
 6 parcel 1.  
 7 Is it your testimony that you have or have not  
 8 seen water on that parcel?  
 9 A. Historically, I haven't; but Mr. Simcoe,  
 10 when he put in his pump irrigation system, included  
 11 part of that.  
 12 Is that right? I think that's right.  
 13 THE COURT: Well, don't ask him.  
 14 A. Okay.  
 15 Q. (BY MR. BROWN) And the other parcels have  
 16 been?  
 17 A. Yes.  
 18 Q. Now, let me ask you about this area. On  
 19 Exhibit 12 there is an ASCS field labeled No. 3 for  
 20 4.1 acres within the place of use for right K.  
 21 A. Yes.  
 22 Q. Has that been irrigated?  
 23 A. A lot of it -- yes. Bob Gardner used to  
 24 keep his horses there; and at that time he irrigated  
 25 it.

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1 Q. Okay. So that 4.1 acres was irrigated.  
 2 This 18 acres in this --  
 3 A. Yes.  
 4 Q. -- labeled as M and the other property to  
 5 the left labeled as --  
 6 A. L or I.  
 7 Q. -- H-E-L-L?  
 8 A. Yeah.  
 9 Q. H-E-L. Has that property historically been  
 10 irrigated?  
 11 A. Yes.  
 12 Q. And you indicated that these properties were  
 13 irrigated from a pipeline until sometime when water  
 14 began being used out of the Buckeye?  
 15 A. Yes.  
 16 Q. Okay. Do you know if the ditches which  
 17 provided water other than the Buckeye were decreed to  
 18 the same places of use as the Buckeye 03 and 05 and 019  
 19 rights?  
 20 A. It is my understanding from reading an  
 21 interpretation of the International Mortgage and Loan  
 22 that they were.  
 23 Q. Okay. What is it that you understand?  
 24 A. That they were -- that the water was  
 25 adjudicated to the entire ranch.

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1 Q. Okay. The entire ranch. You're referring  
 2 to what area in reference to Exhibit 11?  
 3 A. All of that land included in the former  
 4 Buckeye Ranch, which was the entire area. *All Buckeye*  
 5 Q. You're telling me the entire area -- you're  
 6 saying that the entire area outlined in yellow, this  
 7 area?  
 8 A. Yes. And including, including part of it  
 9 that isn't, this area in here.  
 10 Q. You're indicating the area circled in  
 11 purple, outlined in purple?  
 12 A. Uh-huh.  
 13 Q. Okay.  
 14 THE COURT: Okay. Wait a minute.  
 15 Mr. Bell, you're testifying that the entire area  
 16 outlined in yellow, including the area outlined in  
 17 purple, was decreed to whom? The Buckeye Ranch?  
 18 MR. BROWN: He's saying that entire area is  
 19 what comprises the ranch.  
 20 THE COURT: Okay.  
 21 A. The 1884 water right. And there were two  
 22 other owners in the Buckeye, the H. J. Bell and the  
 23 Amanda Gooding right; but they were all --  
 24 Q. (BY MR. BROWN) Okay. Those three rights.  
 25 A. Yes.

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1 Q. They all have the same priority date?  
 2 A. Yes.  
 3 Q. They all used out of the same ditch?  
 4 A. Now --  
 5 Q. Out of Billingsley Creek? Are they all used  
 6 out of the same canal out of Billingsley Creek?  
 7 A. Now, part of it was from Riley Creek.  
 8 Q. Okay. And that was part of what?  
 9 A. Well, all that on top of the hill originally  
 10 was decreed from Riley Creek.  
 11 Q. Okay. But historically in the last 20 years  
 12 or so the water to these places we're discussing today  
 13 has all come out of the Buckeye?  
 14 A. Yes. That's correct.  
 15 Q. Explain to me, if you can, how you can have  
 16 water from Riley Creek and water from the Buckeye and  
 17 how that's changed?  
 18 A. Well, it's my understanding that there was  
 19 water sources from both directions; and that the '32  
 20 decree, they were deemed as the same source.  
 21 Q. So they could be used out of either one.  
 22 A. They could be used out of either one.  
 23 MR. BROWN: I would ask the court to take  
 24 judicial notice of the New International Mortgage  
 25 decree rights 1 and 2 out of Riley Creek all to the

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1 same place of use as right 3 and 19, as well as 5.

2 Q. (BY MR. BROWN) Now, let's talk about your  
3 place.

4 How has your place historically been irrigated?

5 when I say "your place," I'm referring to the place of  
6 use for 3A, your mother's place.

7 A. Furrow irrigation.

8 Q. And tell me how much of it was irrigated.

9 A. All of it below the Buckeye, 13 acres.

10 Q. In other words, the entire area you've  
11 claimed?

12 A. Yes.

13 Q. How long would you have to run your sets of  
14 water?

15 THE COURT: Wait a minute, Mr. Brown. Are  
16 we talking only about A now?

17 MR. BROWN: We're talking about A.

18 THE COURT: All right. Proceed.

19 Q. (BY MR. BROWN) How long are your set times  
20 on your --

21 A. Most are 24 hours. A few are 12. And right  
22 around the house, a small pasture and stuff, are 8-hour  
23 sets.

24 Q. Why do you leave your water on your fields  
25 for 12 hours?

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1 A. For 12?

2 Q. 12 or 24.

3 A. The runs are long. And it just takes that  
4 much time to get to the end of the rows. And then  
5 it's, some of the rows are shorter than others; and  
6 it's an irregular-shaped field; and some of them only  
7 take the 12 hours.

8 Q. Have you tried to irrigate with shorter set  
9 times?

10 A. It doesn't work on most crops. Yes, I have.

11 Q. Okay. Now, what kind of crops have been  
12 grown on that property, that 03A property?

13 A. General crops in the area. Watermelons,  
14 cantaloupe, potatoes, sweet corn, alfalfa, pasture,  
15 peas. Just the general rotation.

16 Q. Beans?

17 A. Beans, yes.

18 Q. For how long have you been irrigating that  
19 property?

20 A. Well, I helped my dad when -- early on in  
21 the Forties.

22 Q. Are you familiar with the ground -- if you'd  
23 at the exhibits -- I guess mine are in order. I  
24 don't know if yours are. Exhibit 3. It's the 03B, the  
25 Kingston property.

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1 THE COURT: Mr. Brown, did the witness  
2 testify that this was furrow or flood? Flood, furrow  
3 or wild flood?

4 Q. (BY MR. BROWN ) Can you explain to me whether  
5 you've used wild flood or furrow, or how you've  
6 irrigated?

7 A. It's furrow irrigation. There are  
8 corrugates, corrugations.

9 Q. Okay. Now, looking again at Exhibit 3, can  
10 you tell me -- are you familiar with any fish ponds on  
11 any of that property shown in Exhibit 3?

12 THE COURT: Are we on B now, the B right?

13 MR. BROWN: Yes.

14 A. That ponds were constructed for commercial  
15 fish propagation or --

16 Q. (BY MR. BROWN) Any ponds, any fish ponds.  
17 Ponds with fish in them.

18 A. Well, it's -- I used to hunt all over that  
19 property as a youngster. And one of the spots I used  
20 to stop was there's a lake or a pond down in the gravel  
21 pit areas that usually I could get a jump shot or so.

22 Q. Okay. Theirs also -- can you just go  
23 through it and tell me where all the ponds are on the  
24 property that you're aware of? Maybe you could start  
25 in the top right-hand corner --

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1 THE COURT: Mr. Brown, I don't think I've  
2 heard an answer to the question as to whether he's seen  
3 fish ponds on there or not.

4 MR. BROWN: We're going to go through  
5 that.

6 THE COURT: All right.

7 A. In the top right-hand corner a little bit  
8 out of the picture there's two commercial ponds.  
9 There's a series of ponds next to the road on the upper  
10 right-hand corner. And, oh, boy. Between the SW --  
11 southwest of the northeast in the southeast of the  
12 northeast there's, between those two letterings on the  
13 ponds, there's several commercial ponds in there;  
14 and --

15 Q. (BY MR. BROWN) Okay. Below those commercial  
16 ponds, are there additional ponds?

17 A. Pardon?

18 Q. Water runs down through these ponds, comes  
19 down through these ponds?

20 A. Yes.

21 Q. Are there additional ponds down here?

22 A. There's some ponds that run this way that  
23 discharge water over by the, by the boat dock area.

24 Q. Okay. The ponds that you have seen since  
25 you were a kid, are they fish ponds?

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Exh  
03B



Page 8

This report is provided by **Springer Nature** to **Polina Kuznetsov**

April 8 was our last day at the mine.

Robert Gardner

opportunities, unto the parties of the second part and to their heirs and assigns forever. And the said parties of the first part and their heirs, the said premises in the quiet and peaceable possession of the said parties of the second part their heirs, and assigns against the said parties of the first part and their heirs, and against all and every person and person whomsoever, lawfully claiming or to claim the same shall and will WARRANT and by these presents forever DEFEND.

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

*Robert Gardner*  
Notary Public

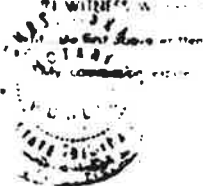
STATE OF IDAHO  
County of Gooding;

On this 26th day of March

the undersigned Notary Public  
personally appeared Robert Larimer and Bonnette Larimer

known to me to be the person whose name is subscribed to the within instrument  
and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.  
1/12/72



Notary Public in and for  
the State of Idaho  
residing at Gooding

No. 1815  
**WARRANTY DEED**

Dated January 3, 1972  
STATE OF IDAHO  
County of Gooding

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and

month first above written.



*Ernest Babcock*

Notary Public for the State of Idaho

Residing at Boyl, Idaho

No. 036481

**WARRANTY DEED**

Direct

Indirect

TO

Dated

STATE OF IDAHO

County of Gooding

I hereby certify that this instrument was filed for record at the request of

*Alan Erwin*

on the 25th day of March

1961 A.D.

at the County Clerk's Office

in the County of Gooding

State of Idaho

Witness my hand and seal

this 25th day of March

1961

**WARRANTY DEED - SHORT FORM**

This form is provided by Gooding County as a courtesy to the public.

THIS INDENTURE, made this 25th day of March

in the year of our Lord, one thousand nine hundred and Sixty

Robert Gardner and Donnette Gardner, husband and wife

of Gooding County of Gooding State of Idaho

the parties of the first part, and Alan Erwin and Annabelle Erwin, husband and wife



# WARRANTY DEED

#13

For Value Received

ALAN ERWIN and ANNABELLE ERWIN, husband and wife

the grantor do hereby grant, bargain, sell and convey unto BUCKEYE LAND COMPANY, of County of Gooding, State of Idaho,

the grantee, the following described premises, in Gooding County, Idaho, to wit:

The South Half of the Southwest Quarter (S2SW4) and the South Half of the Southeast Quarter (S2 SE4) of Section 27, Township 7 South, Range 13 E.B.M.

Also: Lots 43 to 75, both inclusive; Lots 78 to 102, both inclusive; Lots 107 to 121, both inclusive; Lots 126 to 131, both inclusive; of BUCKEYE RANCH, according to the plat thereof on file in the office of the County RECORDER of Gooding County, Idaho, EXCEPT Lot 9 of Section 33, Township 7 South, Range 13 E.B.M., containing approximately .02 acres.

Together with the following water rights:

3 Second Feet of waters flowing in Billingsley Creek with priority date of September 10, 1884.

A three-fourth's interest in the following water rights:

12 Second Feet of waters of Riley Creek of priority date of May 1, 1883;

12 Second Feet of waters of Riley Creek, priority date of October 1, 1908;

20 Second feet of the waters of Billingsley Creek, priority date of September 10, 1884.

The above doc rees are of record in that certain decree of the District Court of the United States for the District of Idaho, Southern Division, entitled New International Mortgage Bank, a corporation, Plaintiff, vs. Idaho Power Company, a corporation, et al, dated March 22, 1932.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, his heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantee, that they are the owners in fee simple of said premises; that said premises are free from all incumbrances except taxes for 1974 and subsequent years, easements of record and assessments, if any, and that certain Mortgage dated January 21, 1964, to The Federal Land Bank of Spokane, in the original amount of \$35,000.00 microfilmed as Instrument No. 10424, and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: December 14, 1973.

*Alan Erwin*  
*Annabelle Erwin*

C-17970

STATE OF IDAHO, COUNTY OF  
On this 14th day of December, 1973.  
Before me, a Notary Public in and for said State, personally appeared ALAN ERWIN and ANNABELLE ERWIN, husband and wife,

known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same

Notary Public  
State of Idaho

STATE OF IDAHO, COUNTY OF Gooding  
I hereby certify that this instrument was filed for record at the request of SECURITY TITLE CO.

at 42 minutes past 14 day of December, 1973, in my office, and duly recorded in Book of Deeds at page:

*Margaret L. Vincente*  
Notary Public

by *Lina L. L...*  
Filed  
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INSTRUMENT

Robert Gardner and Barbara J. Gardner

Hagerman

Gooding

Idaho

Ralph E. Shotwell and Evelyn M. Shotwell, husband and wife

Hagerman

Gooding

Idaho

\$10.00 and other valuable consideration-----

Gooding

Lots 24, 25, 39 and 40, Section 27,  
Twp. 7 S., R. 13 E.B.M.

Together with 40 shares of stock of Buckeye Ditch  
Company.

and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(seal) Notary Public for State of Idaho  
Residing at Gooding, Idaho

### WARRANTY DEED

CORRECTED

For Value Received **RALPH E. SHOTWELL and EVELYN M. SHOTWELL,**

husband and wife,

do hereby grant, bargain, sell and convey unto **KENNETH W. MARSHALL, a**  
married man, whose address is 185 Blair Street, Twin Falls, Idaho 83301,

the grantee, the following described premises, in Gooding County Idaho, to-wit:

Lots Twenty-four (24), Thirty-nine (39), and  
Forty (40), of the Buckeye Ranch, Section  
Twenty-seven (27), Township Seven (7) South,  
Range Thirteen (13) East, Boise Meridian,  
Gooding County, Idaho,

TOGETHER with the water and water rights appurtenant thereto, evidenced by thirty (30) shares of the capital stock of the Buckeye Ditch Company, and the improvements located on said real property.

SUBJECT to existing easements over and across said premises and reservations made in Deeds or Patents from the United States of America and/or the State of Idaho; and,

SUBJECT to that certain Mortgage made by and between **RALPH E. SHOTWELL and EVELYN M. SHOTWELL,** husband and wife, parties of the first part, and **ROBERT GARDNER and BARBARA J. GARDNER,** parties of the second part, recorded July 20, 1973, at 11:16 a.m. as Instrument No. 046323, in the office of the Gooding County Recorder, Gooding County, Idaho, which mortgage Grantees assume and agree to pay.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, his heirs and assigns forever. And the said Grantee do hereby covenant to and with the said Grantee that they are the owner of the simple of said premises, that they are free from all encumbrances.

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated: July 25, 1974.

STATE OF IDAHO COUNTY OF TWIN FALLS

On this 25th day of July 1974 before me, a Notary Public in and for the State of Idaho, appeared **RALPH E. SHOTWELL and EVELYN M. SHOTWELL,** husband and wife,

known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Notary Public  
Twin Falls  
Idaho

STATE OF IDAHO COUNTY OF Gooding  
I hereby certify that this instrument was duly recorded at the office of the Gooding County Recorder on July 25, 1974.

MARGARET F. CLEMENTS  
Notary Public

By *Jane Scott* Direct

Twin Falls Bank & Trust Bldg.  
Twin Falls, Idaho 83301

INSTRUMENT NO. C51424

### QUITCLAIM DEED

Lot 25 is on a separate Warranty Deed.



Known to me to be the person whose name is \_\_\_\_\_  
 subscribed to the within instrument, and acknowledged  
 to me that he executed the same. By Anna Scott  
 Notary Public Idaho. Fees \$ \_\_\_\_\_ Mail to: \_\_\_\_\_  
 Residing at \_\_\_\_\_  
 Ex-Office Notary \_\_\_\_\_  
 INDEXED  
 Direct Deputy ☒  
 Indirect ☒

THIS BLANK FORM IS LOANED TO YOU BY \_\_\_\_\_

## WARRANTY DEED

For Value Received      Ralph E. Shotwell and Evelyn M. Shotwell, husband and wife

Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto  
 Kenneth W. Marshall, a married man  
 185 Blair Drive  
 Twin Falls, Idaho 83301

Hereinafter called the Grantee, the following described premises situated in Gooding County, Idaho,  
 to-wit:

Lot 25 of the Buckeye Ranch, Gooding County, Idaho,  
 as the same is platted in the official plat thereof,  
 now of record in the office of the County Recorder of  
 said County, located in Section 27, Township 7 South,  
 Range 13, East Boise Meridian.

TOGETHER with the water and water rights appurtenant  
 thereto, evidenced by 10 shares of capital stock of  
 the Buckeye Ditch Company.

Subject to that certain Mortgage in favor of Robert Gardner  
 and Barbara J. Gardner, husband and wife, dated May 31, 1973,  
 recorded July 20, 1973 as Instrument Number 46320, Gooding  
 County records, covering the above and other property, which  
 the Grantee assumes and agrees to pay.

TO HAVE AND TO HOLD, the said premises, with their appurtenances unto the said Grantee and  
 to the Grantee's heirs and assigns forever. And the Grantor does hereby covenant to and with the said  
 Grantee, that the Grantor is the owner in fee simple of said premises; that they are free from all incum-  
 brances except as above described and that Grantor will warrant and defend the same from all lawful  
 claims whatsoever.

Dated: September 5, 1974

Ralph E. Shotwell

Evelyn M. Shotwell

STATE OF IDAHO, COUNTY OF Gooding  
 On this 5th day of Sept. 1974  
 before me, a notary public in and for said State, per-  
 sonally appeared      Ralph E. Shotwell  
                                          and Evelyn M. Shotwell,

STATE OF IDAHO, COUNTY OF Gooding  
 I hereby certify that this instrument was filed for record  
 at the request of Leland Title & Escrow  
 at \_\_\_\_\_ minutes past \_\_\_\_\_ o'clock P.M.  
 this 5th day of September  
 1974 in my office, and duly recorded in Book  
 of Deeds at page \_\_\_\_\_

MARGARET F. CLEMENS

Ex-Officio Recorder

Known to me to be the persons whose names are  
 subscribed to the within instrument, and acknowledged  
 to me that they executed the same.  
 \_\_\_\_\_  
 Notary Public      Fees \$ \_\_\_\_\_  
 Residing at \_\_\_\_\_      Idaho      Mail to \_\_\_\_\_

By Anna Scott  
 Notary Public      Fees \$ \_\_\_\_\_  
 Residing at \_\_\_\_\_      Idaho      Mail to \_\_\_\_\_  
 INDEXED  
 Direct Deputy ☒  
 Indirect ☒

Instrument No. 15160-1

13047RP-1

G-001824



WARRANTY DEED

For Value Received

Kenneth W. Marshall and Helen Marshall, husband and wife,  
hereinafter referred to as Grantor, does hereby grant, bargain, sell, and convey unto  
Doyt M. Simcoe and Rosie J. Simcoe, husband and wife,  
hereinafter referred to as Grantee, whose current address is  
562 Sunrise Blvd. North,  
KENDRICK, Twin Falls, ID 83301  
the following described premises, to-wit:

Lots 24, 25, 29 and 40 of BUCKEYE DITCH SUBDIVISION, located in  
Section 27, Township 7 South, Range 13, East of the Boise Meridian,  
Gooding County, Idaho, according to the plat thereof, recorded  
October 10, 1918 in the Office of the County Recorder of said County.

TOGETHER with 40 shares of Buckeye Ditch Company Water.

146417

STATE OF IDAHO, COUNTY OF GOODING

Filed for record at the request of FIRST AMERICAN TITLE

4 min. per. 10 o'clock A. M. this 11

1991

JOHN A. MYERS, Recorder

DO HAVE AND TO HOLD the said premises, with their appurtenances unto the said  
Grantee, his heirs and assigns forever. And the said Grantor does hereby covenant  
to and with the said Grantee, that Grantor is the owner in fee simple of said  
premises; that said premises are free from all encumbrances except current years  
taxes, levies, and assessments, and except U. S. Patent reservations, restrictions,  
easements of record, and easements visible upon the premises, and that Grantor will  
warrant and defend the same from all claims whatsoever.

Dated: October 10, 1991.

Kenneth W. Marshall  
Kenneth W. Marshall

Helen Marshall  
Helen Marshall  
in presence of Kenneth W. Marshall  
P.C.A.

STATE OF IDAHO )  
(COUNTY OF GOODING, Twin Falls ) ss

On this 10th day of October, in the year 1991, before me, a  
Notary Public in and for said State, personally appeared Kenneth W. Marshall and  
Helen Marshall, known or identified to me to be the persons whose names are  
subscribed to the within instrument, and acknowledged to me that they executed the  
same.



Susan M. Bolton  
Notary Public for Idaho  
Residing at Gooding, Idaho  
Commission Expires: 10/14/92

First American Title Company of Idaho

and convey unto

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BOOKING  
FIRST AMERICAN TITLE

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22

STATE OF IDAHO  
COUNTY OF TWIN FALLS

On This 10th day of October, in the year 1991, before me, a Notary Public in and for said State, personally appeared Kenneth W. Marshall, known or identified to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of Helen L. Marshall, and acknowledged to me that he subscribed the name of Helen L. Marshall thereto as principal and his own name as attorney-in-fact.



Notary Public of Idaho  
Residing at: Gooding, ID  
Commission Expires: 10-16-92

Grants



*First American Title Company of Idaho*

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THIS DEED OF TRUST, Made this 31st day of March, 1993  
 BETWEEN Lynn J. Babington and Kathy L. Babington, Husband and Wife herein called GRANTOR,  
 whose address is 28498 830 E. Wagonman, ID 83332  
 FIRST AMERICAN TITLE COMPANY,  
 herein called TRUSTEE, and Barbara Gardner

herein called BENEFICIARY, WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL  
 AND CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in the County of  
 Gooding State of Idaho, described as follows and containing not more than twenty acres:  
 Lot 18 and that portion of Lots 3 and 4 lying South of the centerline of the Buckeye Ditch  
 and Easterly of the access road in the Buckeye Ranch Subdivision being a portion of the  
 Southeast Quarter of the Northwest Quarter of Section 27, Township 7 South, Range 13 East  
 of the Boise Meridian, Gooding County, Idaho.

Notwithstanding anything to the contrary herein, the debt secured hereby shall become  
 immediately due and payable upon the sale, conveyance, or alienation of the above described  
 real property, or any part thereof, or any interest therein, or upon the transfer of the  
 possession of said property, voluntarily or involuntarily, or upon the assignment by Grantor  
 of this Deed of Trust or the Note secured hereby or upon the assumption of the obligations  
 of the same by any other party.

Together with 14 share of water of the Buckeye Ditch.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given  
 to and conferred upon Beneficiary to collect and apply such rents, issues and profits.

For the Purpose of securing payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by  
 Grantor in the sum of TWENTY THOUSAND \$20,000.00 Dollars, (\$20,000.00 and no cents)  
 said payment due March 31, 1997

and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor  
 and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor  
 for any purpose, and of any notes, drafts or other instru-  
 ments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein  
 provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Bene-  
 ficiary, and provided, further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing  
 security until paid for all such advances together with interest thereon.

A. To protect the security of this Deed of Trust, Grantor agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore  
 promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay  
 when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requir-  
 ing any alterations or improvements to be made thereon; not to commit or permit waste thereon; not to commit, suffer or permit  
 any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the  
 character or use of said property may be reasonably necessary, the specific covenants herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The  
 amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and  
 in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be  
 advanced to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate  
 any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Bene-  
 ficiary or Trustee; and to pay all costs and expenses, including cost of title and attorney's fees in a reasonable sum, in  
 any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay, at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances,  
 charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees  
 and expenses of this Trust. In addition to the payments due in accordance with the terms of the note hereby secured the Grantor  
 shall, at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance  
 premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the pay-  
 ment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof,  
 with interest from date of expenditure at eight per cent per annum.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without  
 obligation as to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may:  
 make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof. Beneficiary  
 or Trustee is authorized to enter upon said property for such purposes; appear in and defend any action or proceeding pur-  
 porting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay purchase, collect or compromise any  
 encumbrance, charge or lien which is the judgment of either appears to be prior or superior hereto; and, in exercising any such  
 power, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable  
 fees.

7. It is mutually agreed that:  
 a. Any ground or parcel of land in connection with any condemnation for public use or of injury to said property or any part thereof  
 is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received by him in the same manner  
 and with the same effect as above provided for discharge of proceeds of fire or other insurance.  
 b. The receiving payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require  
 prompt payment, when due of all other sums so secured or to declare default for failure so to pay.

8. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and  
 presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of  
 the indebtedness secured hereby, Trustee may: recover all or any part of said property; consent to the making of any map or  
 plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the first  
 or charge hereof.

9. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this deed  
 and said note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall recover, without warranty,  
 the property then held hereunder. The recitals in any reconveyance executed under this deed of trust of any matters or facts  
 shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "The person or persons  
 legally entitled thereto."

10. As additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the  
 continuance of these trusts, to collect the rents, issues and profits of said property, reserving unto Grantor the right, prior to any  
 default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and  
 retain such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without  
 notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the delivery of any security  
 or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses  
 of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Bene-  
 ficiary may determine. The matter upon and taking possession of said property, the collection of such rents, issues and profits and  
 the application thereof as aforesaid shall not cure or waive any default or notice of default hereunder or invalidate any act done  
 pursuant to such notice.

BE-1

6. Upon defau-  
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DEED OF TRUST  
 WITH POWER OF SALE

To FIRST A  
 Trustee:

You are

The un  
 the owner

Address

Telephone 1



6. Upon default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of his election to raise to be sold the herein described property to satisfy the obligations hereof, and shall cause such notice to be recorded in the office of the recorder of each county wherein said real property or some part thereof is situated.

Notice of sale having been given as then required by law, and not less than the time then required by law having elapsed, Trustee, without demand on Grantor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels and in such order as it may determine, at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee shall deliver to the purchaser its deed conveying the property as sold, but without any covenant or warranty express or implied. The recitals in such deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Grantor, Trustee, or Beneficiary, may purchase at such sale.

After deducting all costs, fees and expenses of Trustee and of this Trust, including cost of evidence of title and reasonable counsel fees in connection with sale, Trustee shall apply the proceeds of sale to payment of all sums expended under the terms hereof, not then repaid, with accrued interest at eight per cent per annum; all other sums then secured hereby; and the remainder, if any, to the person or persons legally entitled thereto.

7. This Deed applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. The term Beneficiary shall mean the holder and owner of the note secured hereby; or, if the note has been pledged, the pledgee thereof. In this Deed, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

8. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantor, Beneficiary or Trustee shall be a party unless brought by Trustee.

9. In the event of dissolution or resignation of the Trustee, the Beneficiary may substitute a trustee or trustees to execute the trust hereby created, and when any such substitution has been filed for record in the office of the Recorder of the county in which the property herein described is situated, it shall be conclusive evidence of the appointment of such trustee or trustees, and such new trustee or trustees shall succeed to all of the powers and duties of the trustee or trustees named herein.

Request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale hereunder be mailed to the Grantor at his address hereinafter set forth.

*Lynn J. Babington*  
Lynn J. Babington

*Kathy L. Babington*  
Kathy L. Babington

STATE OF IDAHO, COUNTY OF GOODING

On this 31st day of March  
before me, a Notary Public in and for said county,  
appeared  
Lynn J. Babington and  
Kathy L. Babington

known to me to be the persons whose names are  
subscribed to the within instrument, and who are  
me that they  
*Susan M. Bolton*  
Susan M. Bolton  
Residing at Gooding  
My Commission Expires: 10/16/98



STATE OF IDAHO, COUNTY OF Gooding

I HEREBY CERTIFY That this instrument was filed for record at  
the request of FIRST AMERICAN TITLE  
at 10 minutes past 4 o'clock P. M.  
this 31 day of March  
19 98, in my office, and duly recorded in Book  
of Mortgages at page

JOHN A. MYERS Recorder,  
By *Robert Soto* Deputy  
Fees: \$ 6.00  
Mail to: 152152

DEED OF TRUST  
WITH POWER OF SALE

GRANTOR

FIRST AMERICAN TITLE COMPANY

TRUSTEE

BENEFICIARY

Dated

19

FIRST AMERICAN TITLE COMPANY

THE PROMISSORY NOTE OR NOTES, AND ANY EVIDENCES OF FURTHER AND/OR  
ADDITIONAL ADVANCES MUST BE PRESENTED WITH THIS REQUEST

To FIRST AMERICAN TITLE COMPANY  
Trustee:

You are hereby authorized and requested to execute a reconveyance hereunder and deliver same to

The undersigned hereby certifies that  
the owner and holder of the debt mentioned in said deed of trust and that the same has never been assigned or transferred.

Address

Telephone No.

COPY

THIS DEED OF TRUST, Made this 31st day of March, 19 93  
BETWEEN

Lynn J. Babington and Kathy L. Babington, Husband and Wife herein called GRANTOR,  
The address is 2849S 850 E, Hagerman, ID 83332  
ST AMERICAN TITLE COMPANY,  
herein called TRUSTEE, and Barbara Gardner

herein called BENEFICIARY, WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL  
AND CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in the County of  
Gooding State of Idaho, described as follows and containing not more than twenty acres:

Lot 18 and that portion of Lots 3 and 4 lying South of the centerline of the Buckeye Ditch  
and Easterly of the access road in the Buckeye Ranch Subdivision being a portion of the  
Southeast Quarter of the Northwest Quarter of Section 27, Township 7 South, Range 13 East  
of the Boise Meridian, Gooding County, Idaho.

Notwithstanding anything to the contrary herein, the debt secured hereby shall become  
immediately due and payable upon the sale, conveyance, or alienation of the above described  
real property, or any part thereof, or any interest therein, or upon the transfer of the  
possession of said property, voluntarily or involuntarily, or upon the assignment by Grantor  
of this Deed of Trust or the Note secured hereby or upon the assumption of the obligations  
of the same by any other party.

Together with 14 share of water of the Buckeye Ditch.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given  
to and conferred upon Beneficiary to collect and apply such rents, issues and profits,

For the Purpose of Securing payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by  
Grantor in the sum of \*\*\*\*\* Dollars,

final payment due March 31, 1997

and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor  
herein, or any or either of them, while record owner of present interest, for any purpose, and of any notes, drafts or other instru-  
ments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein  
provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Bene-  
ficiary, and provided, further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing  
security until paid for all such advances together with interest thereon.

**A. To protect the security of this Deed of Trust, Grantor agrees:**

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore  
promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay  
due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requir-  
any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit  
any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the  
character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The  
amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and  
in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be  
released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate  
any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Bene-  
ficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in  
any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay: at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances,  
charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees  
and expenses of this Trust. In addition to the payments due in accordance with the terms of the note hereby secured the Grantor  
shall at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance  
premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the pay-  
ment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof,  
with interest from date of expenditure at eight per cent per annum.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without  
obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may:  
make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary  
or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding pur-  
porting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any  
encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such  
powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable  
fees.

**B. It is mutually agreed that:**

1. Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof  
is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received by him in the same manner  
and with the same effect as above provided for disposition of proceeds of fire or other insurance.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require  
prompt payment when due of all other sums so secured or to declare default for failure so to pay.

3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and  
presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of  
the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or  
plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien  
or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed  
and said note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty,  
the property then held hereunder. The recitals in any reconveyance executed under this deed of trust of any matters or facts  
shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons  
legally entitled thereto."

5. As additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the  
continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Grantor the right, prior to any  
act by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and  
such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without  
notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security  
for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for  
or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses  
of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Bene-  
ficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and  
the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done  
pursuant to such notice.



# WARRANTY DEED

For Value Received

Michael J. Engles and Jinx Engles, husband and wife,  
hereinafter referred to as Grantor, does hereby grant, bargain, sell, and convey unto

Lynn J. Babington and Kathy L. Babington, husband and wife,  
hereinafter referred to as Grantee, whose current address is

2849 South 850 East, Hagerman, ID 83332

the following described premises, to-wit;

Lot 19 of BUCKEYE RANCH SUBDIVISION, located in Section 27, Township 7 South, Range 13, East of the Boise Meridian, Gooding County, Idaho, according to the plat thereof, recorded October 10, 1918 in the Office of the County Recorder of said County.

TOGETHER with 15 shares of Buckeye Ditch water.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, his heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that Grantor is the owner in fee simple of said premises; that said premises are free from all encumbrances except current years taxes, levies, and assessments, and except U. S. Patent reservations, restrictions, easements of record, and easements visible upon the premises, and that Grantor will warrant and defend the same from all claims whatsoever.

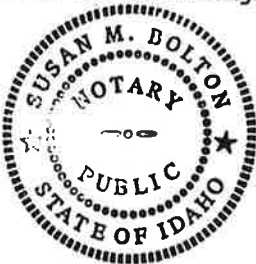
Dated: January 13, 1991.

Michael J. Engles  
Michael J. Engles

Jinx Engles  
Jinx Engles

STATE OF IDAHO )  
COUNTY OF Gooding ) : ss

On This 13<sup>th</sup> day of January, in the year 1991, before me, a Notary Public in and for said State, personally appeared Michael J. Engles and Jinx Engles, known or identified to me to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that they executed the same.



Susan M. Bolton  
Notary Public for Idaho  
Residing at Gooding, Idaho  
Commission Expires: 10/16/92

STATE OF IDAHO COUNTY OF GOODING

147390 Filed for record at the request of FIRST AMERICAN TITLE

54 min. pas. 4 o'clock P. M. this 13  
Jan 1992 14 300

JOHN A MYERS Recorder

Carita Seta

First American Title Company of Idaho

Dep.

COPY

THIS DEED OF TRUST, Made this 31st day of March, 19 93  
 BETWEEN

Lynn J. Babington and Kathy L. Babington, Husband and Wife herein called GRANTOR,  
 whose address is 2849S 850 E, Hagerman, ID 83332  
 FIRST AMERICAN TITLE COMPANY,  
 herein called TRUSTEE, and Barbara Gardner

herein called BENEFICIARY, WITNESSETH: That Grantor does hereby irrevocably GRANT, BARGAIN, SELL  
 AND CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in the County of  
 Gooding State of Idaho, described as follows and containing not more than twenty acres:

Lot 18 and that portion of Lots 3 and 4 lying South of the centerline of the Buckeye Ditch  
 and Easterly of the access road in the Buckeye Ranch Subdivision being a portion of the  
 Southeast Quarter of the Northwest Quarter of Section 27, Township 7 South, Range 13 East  
 of the Boise Meridian, Gooding County, Idaho.

Notwithstanding anything to the contrary herein, the debt secured hereby shall become  
 immediately due and payable upon the sale, conveyance, or alienation of the above described  
 real property, or any part thereof, or any interest therein, or upon the transfer of the  
 possession of said property, voluntarily or involuntarily, or upon the assignment by Grantor  
 of this Deed of Trust or the Note secured hereby or upon the assumption of the obligations  
 of the same by any other party.

Together with 14 share of water of the Buckeye Ditch.

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given  
 to and conferred upon Beneficiary to collect and apply such rents, issues and profits,

For the Purpose of Securing payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by  
 Grantor in the sum of \*\*\*\*\* Dollars,

final payment due March 31, 1997

and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor  
 herein, or any or either of them, while record owner of present interest, for any purpose, and of any notes, drafts or other instru-  
 ments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein  
 provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Bene-  
 ficiary, and provided, further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing  
 security until paid for all such advances together with interest thereon.

**A. To protect the security of this Deed of Trust, Grantor agrees:**

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore  
 promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay  
 when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requir-  
 ing any alterations or improvements to be made thereon; not to commit or permit waste thereof; not to commit, suffer or permit  
 any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the  
 character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The  
 amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and  
 in such order as Beneficiary may determine, or at option of Beneficiary the entire amount so collected or any part thereof may be  
 released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate  
 any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Bene-  
 ficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in  
 any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay: at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances,  
 charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees  
 and expenses of this Trust. In addition to the payments due in accordance with the terms of the note hereby secured the Grantor  
 shall at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance  
 premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the pay-  
 ment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof,  
 with interest from date of expenditure at eight per cent per annum.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without  
 obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may:  
 make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary  
 or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding pur-  
 porting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any  
 encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such  
 powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable  
 fees.

**B. It is mutually agreed that:**

1. Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof  
 is hereby assigned and shall be paid to Beneficiary who may apply or release such moneys received by him in the same manner  
 and with the same effect as above provided for disposition of proceeds of fire or other insurance.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require  
 prompt payment when due of all other sums so secured or to declare default for failure so to pay.

3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and  
 presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of  
 the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or  
 plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien  
 or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed  
 and said note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty,  
 the property then held hereunder. The recitals in any reconveyance executed under this deed of trust of any matters or facts  
 shall be conclusive proof of the truthfulness thereof. The grantee in such reconveyance may be described as "the person or persons  
 legally entitled thereto."

5. As additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the  
 continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Grantor the right, prior to any  
 default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and  
 retain such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without  
 notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security  
 for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for  
 or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses  
 of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Bene-  
 ficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and  
 the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done  
 pursuant to such notice.





WARRANTY DEED

For Value Received

Michael J. Engles and Jinx Engles, husband and wife,  
hereinafter referred to as Grantor, does hereby grant, bargain, sell, and convey unto  
Lynn J. Babington and Kathy L. Babington, husband and wife,  
hereinafter referred to as Grantee, whose current address is  
2849 South 850 East, Hagerman, ID 83332

the following described premises, to-wit;

Lot 19 of BUCKEYE RANCH SUBDIVISION, located in Section 27, Township  
7 South, Range 13, East of the Boise Meridian, Gooding County, Idaho,  
according to the plat thereof, recorded October 10, 1918 in the  
Office of the County Recorder of said County.

TOGETHER with 15 shares of Buckeye Ditch water.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said  
Grantee, his heirs and assigns forever. And the said Grantor does hereby covenant  
to and with the said Grantee, that Grantor is the owner in fee simple of said  
premises; that said premises are free from all encumbrances except current years  
taxes, levies, and assessments, and except U. S. Patent reservations, restrictions,  
easements of record, and easements visible upon the premises, and that Grantor will  
warrant and defend the same from all claims whatsoever.

Dated: January 13, 1991.

Michael J. Engles  
Michael J. Engles

Jinx Engles  
Jinx Engles

STATE OF IDAHO )  
COUNTY OF Gooding ) ss

On This 13<sup>th</sup> day of January, in the year 1991, before me, a Notary Public  
in and for said State, personally appeared Michael J. Engles and Jinx Engles, known  
or identified to me to be the persons whose names are subscribed to the within  
Instrument, and acknowledged to me that they executed the same.



Susan M. Bolton  
Notary Public for Idaho  
Residing at Gooding, Idaho  
Commission Expires: 10/16/92

STATE OF IDAHO COUNTY OF GOODING

147390 Filed for record at the request of FIRST AMERICAN TITLE

54 min. pas. 4 o'clock P M. this 13  
Jan 1992 14 3-00  
JOHN A MYERS Recorder

Curata Seta

Dep:

First American Title Company of Idaho

## WARRANTY DEED

For Value Received

ROBERT B. GARDNER and BARBARA J. GARDNER, husband and wife  
Hagerman,  
Idaho 83332Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto  
Lloyd Gardner and Mary Gardner, husband and wife  
Hagerman,  
Idaho 83332

Hereinafter called the Grantee, the following described premises situated in Gooding County, Idaho, to-wit:

Beginning at the Southwest corner of Lot 37,  
Buckeye Ranch, as the same is platted in the official  
plat thereof now of record in the office of the County  
Recorder of Gooding County, Idaho;  
thence East along the South line of said Lot 37;  
190 feet to the true point of beginning;  
thence East along said South line to the Southeast  
corner of said Lot 37;  
thence North to the Northeast corner of said Lot 37;  
thence in a Northeasterly direction to a point on the  
North line of Lot 26 of the Buckeye Ranch: 820 feet  
East of the Northwest corner of Lot 27 of the Buckeye  
Ranch;  
thence West along the North line of said Lot 27, 305  
feet;  
thence in a Southwesterly direction to a point 280  
feet East of the Southwest corner of said Lot 27;  
thence in a Southwesterly direction to the true  
point of beginning; All in the Northwest Quarter  
of the Southwest Quarter, Section 27, Township 7 South,  
Range 13 E. B. M.

Together with fifteen inches of water under priority  
date of September 10, 1884 from Billingsley Creek  
conveyed in the Buckeye Ditch, together with right of egress  
and ingress to the above described real estate on existing  
private road across Lots 16, 17 and 5 of said Buckeye Ranch.

TO HAVE AND TO HOLD, the said premises, with their appurtenances unto the said Grantee and to the Grantor's heirs and assigns forever. And the Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises; that they are free from all incumbrances except as above described and that Grantor will warrant and defend the same from all lawful claims whatsoever.

Dated: Dated this 24th day of December, 1974.

Robert B. Gardner

Barbara J. Gardner

STATE OF IDAHO, COUNTY OF Gooding

On this 24th day of Dec. 1974,  
before me, a notary public in and for said State, personally appeared

Robert B. Gardner and Barbara  
J. Gardner,

known to me to be the persons whose names are  
subscribed to the within instrument, and acknowledged  
to me that they executed the same.

Residing at Gooding

Notary Public

Idaho

STATE OF IDAHO, COUNTY OF Gooding

I hereby certify that this instrument was filed for record  
at the request of James & Hobbs  
at 25 minutes past 4 o'clock P. M.  
this 26 day of December,  
1974, in my office, and duly recorded in Book  
of Deeds at page

MARGARET F. CLEMENTS

Ex-Officio Recorder

By Dona Scott

Fees \$

Deputy

Mail to:

Instrument No.

(52851



n/w 13146

RIGHT-OF-WAY EASEMENT

The Undersigned Grantor (and each and all of them if more than one) for and in consideration of ONE AND NO/100 dollars (\$1.00) in hand paid by the Grantee, the receipt whereof is hereby acknowledged, hereby grants, bargains and conveys unto The Mountain States Telephone and Telegraph Company, a Colorado corporation, 931 14th Street, Denver, Colorado, 80202, Grantee, its successors, assigns, lessees, licensees and agents a Right-of-Way Easement and the right to construct, operate, maintain and remove such communication and other facilities, from time to time, as said Grantee may require upon, over, under and across the following described land which the Grantor owns or in which the Grantor has any interest, to wit:

A strip of land beginning at a county road, located within the northwest 1/4 section 27, T7S, R 13 E, B.M., and continuing in a southerly direction along a meandering road within sections 27 and 34, T7S, R 13 E, B.M., as shown on the attached sheet which is hereby made a part of this instrument.

This instrument hereby relinquishes and supersedes right-of-way file number 4447, dated March 19, 1948.

situate in County of Gooding, State of Idaho

TOGETHER with the right of ingress and egress over and across the lands of the Grantor to and from the above-described property, the right to clear and keep cleared all trees and other obstructions as may be necessary, and to right-of-way, the right to use the right-of-way, subject to the same.

The Grantor reserves the right to occupy, use, and cultivate said property for all purposes not inconsistent with the rights herein granted.

Signed and delivered this 6th day of January, A.D., 1978

At HAERMAN, IDAHO

Robert E. Anderson

(Add below a form of acknowledgment appropriate for the state in which the right-of-way is located and for the party who is granting the right-of-way, see I.M. 173, Sec. 5 for proper form.)

State of IDAHO  
County of Gooding ss.

On this 6th day of November, in the year 1978, before me, ANDREW E. JAMES, a Notary Public in and for said State, personally appeared LENO GARDNER AND ROBERT GARDNER known to me to be the person(s) whose name(s) BRE subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this day at 1 year in this certificate first above written.

Andrew E. James  
Notary Public for Idaho  
Residing at Gooding, Idaho  
My Commission Expires 1980



73529

STATE OF IDAHO, COUNTY OF GOODING, ss.  
Filed for record at the request of John P. Anderson  
30 min. past 11 o'clock A.M. this 6th day  
of November, 1978

MARGARET F. CLEMENTS Recorder  
By F. Hurd, Deputy

M.S.T. & T. Co.  
Right of Way No. 13146

COUNTY RECORDER'S  
RECEPTION NUMBER

RIGHT OF WAY

from

Robert B. Gardner

LOYD GARDNER

to

THE MOUNTAIN STATES TEL. & TEL. CO.

SPACE BELOW IS RESERVED  
FOR RECORDER'S CERTIFICATE.

Quarter-Section NN & SW

Section 27

Township 7S

Grant or Range 13E

Job No. I-B-6570

Exchange  
or Toll Hagerman

Line & No. 18A5

Load Code 01815

Station or  
Pole Numbers BU CA FR Term #14 to  
cattle guard.

Right of way approved and accepted on behalf  
of Telephone Company

By \_\_\_\_\_

(Title)

Plant Records Posted

Date \_\_\_\_\_ By \_\_\_\_\_

MAIL TO

THE MOUNTAIN STATES TEL. & TEL. CO.

P.O. Box 587

TWIN FALLS, IDAHO 83301

Attention JUN L. ANDERSON  
(Right-of-Way Agent)

ATTACHMENT TO  
P/N # 13146

1470

R 13 E

T 7 S

HAGERMAN  
SHEET # 2

COUNTY ROAD

COUNTY ROAD

APPROX  
ROUTE OF  
TELEPHONE  
LINE

GOODING COUNTY

TWIN FALLS COUNTY

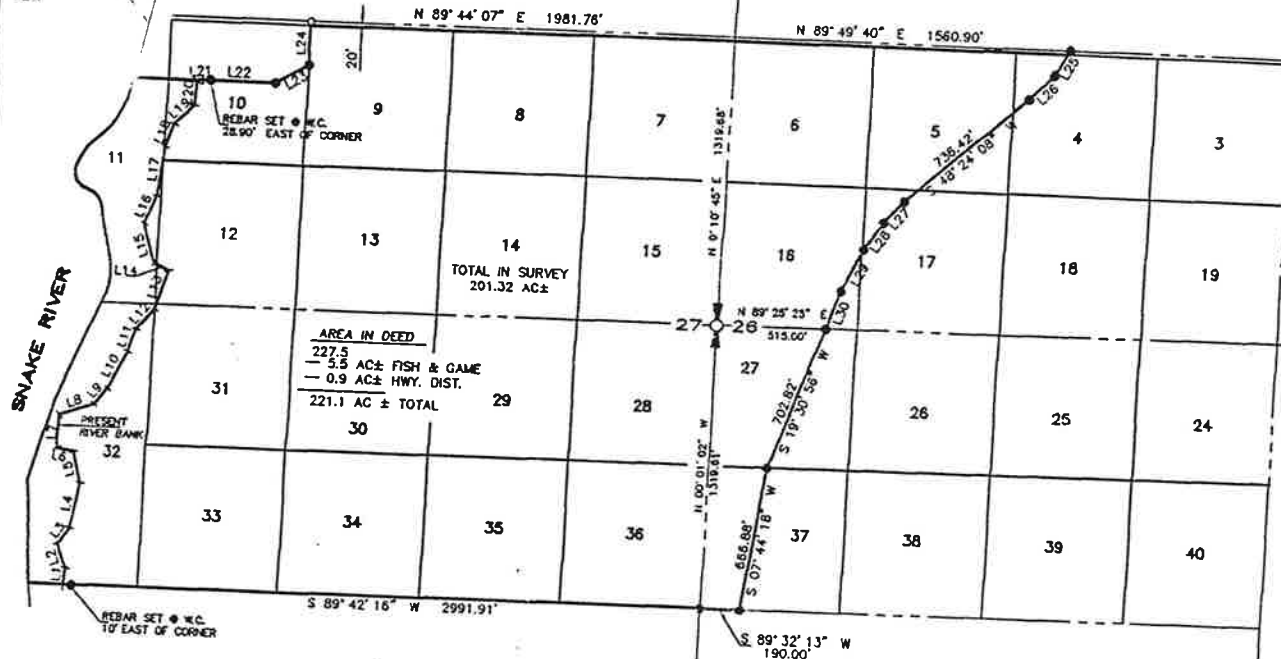
MOUNTAIN BELL  
SCALE - 2" = 1 MILE  
JOB # I-8-6570  
P/N # 13146

# CERTIFICATE OF SURVEYOR

I do hereby certify that I am a Registered Land Surveyor, licensed by the State of Idaho, and that this map has been prepared from an actual survey made on the ground under my direct supervision, and that this map is an accurate representation of said survey, and is in conformity with the Corner Perpetuation and Filing Act, State of Idaho Code 55-1601 through 55-1612 and to the Idaho Code relating to Surveys.



APPROX. RIVER BANK  
FRANCIS RANCH  
PLAT



AREA IN DEED  
227.5  
— 5.5 AC± FISH & GAME  
— 0.9 AC± HWY. DIST.  
221.1 AC ± TOTAL

## LEGEND

- Boundary Line
- - - Centerline of Road
- Section Line
- o 1/2" Iron Pin Found
- 1/2" x 24" Iron Pin w/Cop Set

| LINE | BEARING         | DISTANCE | LINE | BEARING         | DISTANCE |
|------|-----------------|----------|------|-----------------|----------|
| L1   | N 05° 01' 40" E | 77.92'   | L16  | N 22° 03' 48" E | 136.75'  |
| L2   | N 21° 56' 01" W | 120.99'  | L17  | N 07° 05' 48" E | 230.04'  |
| L3   | N 34° 27' 51" E | 80.34'   | L18  | N 19° 16' 28" E | 110.04'  |
| L4   | N 09° 02' 39" E | 214.98'  | L19  | N 45° 57' 53" E | 125.80'  |
| L5   | N 14° 34' 14" W | 146.01'  | L20  | N 01° 08' 09" E | 115.50'  |
| L6   | N 50° 33' 12" W | 63.12'   | L21  | N 83° 41' 08" E | 28.91'   |
| L7   | N 00° 01' 56" W | 157.89'  | L22  | N 89° 56' 00" E | 340.28'  |
| L8   | N 70° 48' 12" E | 171.28'  | L23  | N 60° 25' 32" E | 175.70'  |
| L9   | N 39° 10' 36" W | 97.49'   | L24  | N 00° 03' 51" E | 196.47'  |
| L10  | N 26° 40' 56" E | 194.21'  | L25  | S 30° 28' 27" W | 109.24'  |
| L11  | N 17° 39' 50" E | 113.81'  | L26  | S 44° 58' 14" W | 160.13'  |
| L12  | N 39° 54' 02" E | 128.55'  | L27  | S 42° 34' 44" W | 137.63'  |
| L13  | N 17° 58' 00" E | 187.09'  | L28  | S 32° 46' 50" W | 149.77'  |
| L14  | N 53° 47' 41" W | 78.21'   | L29  | S 25° 37' 23" W | 217.36'  |
| L15  | N 5° 10' 28" W  | 190.34'  | L30  | S 19° 14' 47" W | 190.19'  |



|                                                                                 |                |                                                                                   |  |
|---------------------------------------------------------------------------------|----------------|-----------------------------------------------------------------------------------|--|
| RECORD OF SURVEY<br>FOR<br><b>BRUCE BOTHWELL</b>                                |                |                                                                                   |  |
| A PORTION OF SECTION 27 & 28,<br>T.7 S., R.12 E., B.M.<br>GOODING COUNTY, IDAHO |                |                                                                                   |  |
| <b>JUB</b><br>Engineers Surveyors Planners                                      |                | <b>J-U-B ENGINEERS, Inc.</b><br>Engineers Surveyors Planners<br>Twin Falls, Idaho |  |
| ACAD. DWG. FILE 80592-1                                                         | PLT. NO. 1-400 | DATE: NOV. 1997                                                                   |  |
| DES. DR. LJ                                                                     | CK. DZ         | SHEET 1 OF 1                                                                      |  |



# WARRANTY DEED

For Value Received MARY H. GARDNER, as her sole and separate property

Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto

THOMAS L. HARBISON and TERRI A. HARBISON, husband and wife  
Whose address is: 198 A Bell Rapids Road  
Hagerman, Idaho 83332

Hereinafter called the Grantee, the following described premises situated in Gooding County, Idaho, to-wit:

SEE ATTACHED EXHIBIT "A"  
(containing one page)

TO HAVE AND TO HOLD, the said premises, with their appurtenances unto the said Grantee and to the successors heirs and assigns of the Grantee forever. The Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises, that they are free from all incumbrances except as above described and that Grantor will warrant and defend the same from all lawful claims whatsoever.

Dated: October 28, 1993

*Mary H. Gardner*  
MARY H. GARDNER

STATE OF IDAHO, COUNTY OF Gooding  
On this 28<sup>th</sup> day of October, 1993,  
before me, a notary public in and for said State, personally appeared

Mary H. Gardner

known to me to be the person whose name is  
subscribed to the within instrument, and acknowledged  
to me that she executed the same

*Betty J. Stanwell*  
Notary Public  
Helding at Twin Falls  
Commission expires 1-13-94

154591

STATE OF IDAHO COUNTY OF GOODING

Filed for record at the request of *John A. Myers*  
15 min. past 4 o'clock p.m. this 28  
of Oct 1993

JOHN A. MYERS Recorder  
By *Gibson Sides* Deputy

A 14 1145  
County, 12  
thereof  
County, 1

Beginning  
Thence to  
The 1/4  
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Section 14  
Thence to  
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Thence  
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Gibson  
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SUBJECT TO 1

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County, Idaho,

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E. E. E. E. E. E.  
m. this 28  
rdor  
Deputy

# EXHIBIT "A"

A portion of Lots 26, 27 and Lot 37 of Buckeye Ranch, Gooding County, Idaho, as the same is platted in the official plat thereof, now of record in the office of the Recorder of said County, and more particularly described as follows:

Beginning at the Southwest corner of Lot 37;  
Thence East along the South line of said Lot 37, 190 feet to  
THE TRUE POINT OF BEGINNING;  
Thence East along said South line to the Southeast corner of  
said Lot 37;  
Thence North to the Northeast corner of said Lot 37;  
Thence in a Northeasterly direction to a point on the North  
line of Lot 26 of the Buckeye Ranch, 820 feet East of the  
Northwest corner of Lot 27 of the Buckeye Ranch;  
Thence West along the North line of said Lot 27, 305 feet;  
Thence in a Southwesterly direction to a point 280 feet East  
of the Southwest corner of said Lot 27;  
Thence in a Southwesterly direction to THE TRUE POINT OF  
BEGINNING, all in the Northwest quarter of the Southwest  
quarter, Section 27, Township 7 South, Range 13, East  
Boise Meridian.

TOGETHER WITH right of egress and ingress to the above  
described real estate on existing private road across Lots  
16, 17 and 5 of Buckeye Ranch.

TOGETHER WITH all water and water rights, ditches and ditch rights used  
thereon or appurtenant thereto including but not limited to 15 inches of  
Billingsley Creek-Buckeye Ditch, Priority Date of September 10, 1887.

## SUBJECT TO THE FOLLOWING:

All reservations in patents or deeds in the chain of title.

Taxes for 1993 and subsequent years, which are not yet due and  
payable.

Assessments levied or to be levied by the Gooding County Solid  
Waste Department.

Assessments levied or to be levied by a Water District delivering  
water appurtenant to the above described property.

Reservation contained in Map of the Buckeye Ranch recorded August  
18, 1910 as Instrument Number 18028, Gooding County records,  
reserving unto the Morton Realty Company, Limited, its  
successors, or assigns the right to erect, maintain, operate and  
repair poles and wires for the conveyance, transmission and dis-  
tribution of electric current or power for electric light, heat  
and power.

Terms and conditions as contained in Decree in the case of  
Buckeye Ranch Company, Limited, a corporation, Plaintiff, vs.  
Edward Thomson, et al, dated December 1, 1919, recorded December  
3, 1919 in Book 3 Page 299, Gooding County records, pertaining to  
a certain irrigation ditch.

Power Line Easement given by May Gardner, a widow, to Idaho Power  
Company, a corporation, dated September 2, 1942, recorded  
September 22, 1942 in Book 5 Page 199 as Instrument Number 85099,  
Gooding County records, affecting Lot 5 and 8 and Placer Lot 38,  
Section 34, and W1SW1, Section 27, all in Township 7 South, Range  
13, EBM.

Power Line Easement given by Robert Gardner, single, to Idaho  
Power Company, a corporation, dated May 2, 1961, recorded June  
19, 1961 as Instrument Number 1588, Gooding County records,  
affecting Lots 17, 27 and 37, SW1NW1 and NW1SW1 of Section 27,  
Township 7 South, Range 13, East Boise Meridian.



#24

Craig D. Robbey  
ROBBEY & ROBBEY  
Attorneys at Law  
125 5th Avenue West  
P.O. Box 176  
Gooding, Idaho 83330-0176  
208-934-4429

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

IN THE MATTER OF THE ESTATE OF: CASE NO. SP 94-08921  
ROBERT BRUCE GARDNER, DEED OF DISTRIBUTION  
Deceased.

THIS INSTRUMENT Made this 30 day of September,  
1994, by Barbara Gardner, Personal Representative of the Estate  
of Robert Bruce Gardner, deceased, hereinafter referred to  
as Grantor and Barbara Gardner, Joseph Alex Gardner, Robert  
Michael Gardner, Joseph L. Gardner and Tracy Gardner, hereinafter  
referred to as Grantees:

**WITNESSETH:**

NOW, THEREFORE, pursuant to the law in such cases made  
and provided, and particularly pursuant to the provisions  
of Section 15-3-967, Idaho Code, Grantor does hereby convey,  
transfer, distribute and set-over unto Grantees, and to their  
successors in interest, heirs and assigns, the following  
described real property:

EXHIBIT A attached hereto and by this reference  
made a part hereof as if set forth in full.

WARRANTY DEED

Said real property shall be distributed as follows:

- TO: Joseph Alex Gardner  
An undivided one-third interest.
- TO: Robert Michael Gardner  
An undivided one-third interest.
- TO: Joseph B. Gardner  
An undivided one-sixth interest.
- TO: Tracy Gardner  
An undivided one-sixth interest.

ALL SUBJECT TO A LIFE ESTATE IN ADELAIDE GARDNER, OR LIFE ESTATE DURING HER LIFE IN THE LAST WILL AND TESTAMENT OF ROBERT BRUCE GARDNER, TO THE END OF HER LIFE, AND LIMITING TO PRIVATE IN GARDNER TRUST, AS OF AND FOR, AS DETERMINED 23, 1994.

*Barbara Gardner*  
Her late husband's  
personal representative

STATE OF ILLINOIS  
County of Cook

On this 31 day of September, 1994, the within and the undersigned, a Sole's Executor, and for said estate, personally appeared Barbara Gardner, Her late husband's personal representative of the Robert Bruce Gardner Estate, known to me to be the person whose name is subscribed to the within and foregoing instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and date of this instrument, 1994.

DEED OF DISTRIBUTION

EXHIBIT "A"

Township 7 South, Range 13 E.S.N.

Section 27: Lots 6, 16, 27 and 37  
Less Tax 9; Lots 4, 5, and 17, west of the  
access road.

Section 28: Lots 7 through 15, inclusive,  
Less Tax 1 and Lots 26 through 36, inclusive  
of the Packeye Ranch

158698

STATE OF IDAHO COUNTY OF GOODING

Filed for record at the request of Nobody  
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at Oct 1944 900

JOHN A. MYERS Recorder  
By Arthur S. Sells Deputy

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Order No. G-003693

WARRANTY DEED

For Value Received

Barbara Gardner, an unmarried woman

the grantor(s), do(es) hereby grant, bargain, sell, and convey unto

Bruce R. Bothwell And Mary L. Bothwell, husband and wife, as to an undivided 1/2 interest,  
And Douglas E. Wickham And Toni Wickham, husband and wife, as to an undivided 1/2 interest

the grantee(s), whose current address is

P.O. Box 444, Hagerman, ID 83332

the following described premises, to-wit:

See Attached Exhibit "A"

163270

STATE OF IDAHO COUNTY OF GOODING FIRST AMERICAN TITLE

Filed for record at the request of  
31 min. past 3 o'clock P.M. Sep 7  
at New 10:25 9.00  
By Culbert Sells Deputy

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee(s),  
heirs and assigns forever. And the said Grantor(s) do(es) hereby covenant to and  
with the said Grantee(s), that he/she/they are the owner(s) in fee simple of said premises; that  
said premises are free from all encumbrances except current years taxes, levies, and assessments,  
and except U. S. Patent reservations, restrictions, covenants of record, and covenants visible  
upon the premises, and that he/she/they will warrant and defend the same from all claims whatsoever.

Dated: November 2, 1995

*Barbara Gardner*  
Barbara Gardner

STATE OF IDAHO  
COUNTY OF GOODING

On this day personally appeared to me the year 1995, before me, a Notary Public in and for said State,  
Barbara Gardner, known to me to be the person(s) whose name is subscribed to the within instrument,  
and he/she/they acknowledged to me that he/she/they executed the same.

WITNESS my hand and official seal.

*Doreen M. Sells*  
Notary Public of Idaho  
Residing at: Gooding, ID  
Commission Expires: 10/16/98



First American Title Company of Idaho



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Page 2 of 2



Exhibit "A"

Township 7 South, Range 13 East of the Boise Meridian, Gooding County, Idaho

Section 27: Lots 6, 16, 27, and 37, and Lot: 4, 5, 17, West of the access road

EXCEPTING THEREFROM the following described parcel:

BEGINNING at the Southwest corner of Lot 37, Buckeye Ranch, as the same is platted in the official plat thereof now of record in the office of the County Recorder of Gooding County, Idaho:

Thence East along the South line of said Lot 37, 190 feet to the TRUE POINT OF BEGINNING;

Thence East along said South line to the Southeast corner of said Lot 37;

Thence North to the Northeast corner of said Lot 37;

Thence in a Northeasterly direction to a point on the North line of Lot 26 of the Buckeye Ranch, 620 feet East of the Northwest corner of Lot 27 of the Buckeye Ranch;

Thence West along the North line of said Lot 27, 305 feet;

Thence in a Southwesterly direction to a point 280 feet East of the Southwest corner of said Lot 27;

Thence in a Southwesterly direction to the TRUE POINT OF BEGINNING.

Township 7 South, Range 13 East of the Boise Meridian, Gooding County, Idaho

Section 28: Lots 7 through 15, inclusive and Lots 28 through 36, inclusive of the Buckeye Ranch

EXCEPTING THEREFROM that part of Lots 9, 10 and 11 of Buckeye Ranch according to the plat thereof on file in the office of the County Recorder of Gooding County, Idaho described as follows:

BEGINNING at a point on the North boundary of Lot 4, Section 28, which point is West 660.00 feet from the Northeast corner of said Lot 4;

Thence South 214.00 feet to a point in the existing fence;

Thence South 60°42' West along said fence line 175.70 feet;

Thence West 345.80 feet to a steel pipe set on the East bank of the reservoir of Lower Salmon Falls Dam;

Thence continuing West to the River Bank, according to the original GLO Land Survey;

Surveyed  
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Interest,  
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MCAN TITLE

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EXHIBIT "A" Continued

Thence Northerly following along the river to the point of intersection with  
the North boundary line of Lot 4;  
Thence East to the POINT OF BEGINNING.

ALSO EXCEPTING the North 20 feet of the S1/2 of the NW1/4, Section 27,  
and the SE1/4 of the NE1/4 and the East 548 feet of Lot 4 of Section 28,  
Township 7 South, Range 13 East of the Boise Meridian, for road purposes  
as set forth in Deed to Hagerman Highway District, a Municipal Corporation  
of Idaho, dated June 5, 1951 and recorded October 16, 1951 in Book 45  
Deeds Page 182.

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#35

G-45771  
Order No. 18659

### WARRANTY DEED

For Value Received Bruce R. Bothwell and Mary L. Bothwell, husband and wife as to an undivided 1/2 interest and Douglas E. Wickham and Toni Wickham, husband and wife as to an undivided 1/2 interest

Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto Dave O. Kingston dba D & D Investments, David O. Kingston and Ginger L. Kingston, husband and wife whose address is: Ukon, ID 83454

Hereinafter called the Grantee, the following described premises situated in Gooding County, Idaho, to-wit:

Attached Exhibit "A" attached hereto and made a part thereof.

Along with Water Right Number assigned by IDWR 36-000038

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee and to the Grantee's heirs and assigns forever. And the said Grantee does hereby covenant to and with the said Grantee, that the Grantee is the owner in fee simple of said premises; that said premises are free from all encumbrances except covenants, taxes, levies, and assessments, and except U. S. Patent reservations, restrictions, conditions of record, and easements visible upon the premises, and that Grantee will warrant and defend the same from all claims whatsoever.

Dated: November 18, 1995

Bruce R. Bothwell  
Bruce R. Bothwell

Mary L. Bothwell  
Mary L. Bothwell

Douglas E. Wickham  
Douglas E. Wickham

Toni Wickham  
Toni Wickham

State of Idaho

County of Gooding

On December 18, 1995 before me, the undersigned, a Notary Public in and for said State, personally appeared Bruce R. Bothwell and Mary L. Bothwell personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) are subscribed to the within instrument and acknowledged to me that they executed the same.

WITNESS my hand and official seal

Signature: Susan M. Bolton  
Residing at: Gooding, ID  
Commission Expires: 10-10-98

State of Idaho

County of Gooding

On December 18, 1995 before me, the undersigned, a Notary Public in and for said State, personally appeared Douglas E. Wickham and Toni Wickham personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) are subscribed to the within instrument and acknowledged to me that they executed the same.

WITNESS my hand and official seal

Signature: Susan M. Bolton  
Residing at: Gooding, ID  
Commission Expires: 10-10-98



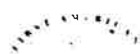
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Page 1 of 2

Exhibit "A"

Township 7 South, Range 13 East of the Boise Meridian, Gooding County,  
Idaho

Section 27: Lots 6, 16, 27, and 37, and Lots 4, 5, 17, West  
of the access road

EXCEPTING THEREFROM the following described parcel:

BEGINNING at the Southwest corner of Lot 37, Buckeye Ranch, as the  
same is platted in the official plat thereof now of record in the office  
of the County Recorder of Gooding County, Idaho;

Thence East along the South line of said Lot 37, 190 feet to the TRUE  
POINT OF BEGINNING;

Thence East along said South line to the Southeast corner of said Lot 37;

Thence North to the Northeast corner of said Lot 37;

Thence in a Northeasterly direction to a point on the North line of Lot 26 of  
the Buckeye Ranch, 820 feet East of the Northwest corner of Lot 27  
of the Buckeye Ranch;

Thence West along the North line of said Lot 27, 305 feet;

Thence in a Southwesterly direction to a point 280 feet East of the  
Southwest corner of said Lot 27;

Thence in a Southwesterly direction to the TRUE POINT OF BEGINNING

Township 7 South, Range 13 East of the Boise Meridian, Gooding County,  
Idaho

Section 28: Lots 7 through 15, inclusive and Lots 26 through  
36, inclusive of the Buckeye Ranch

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according to the plat thereof on file in the office of the County Recorder of  
Gooding County, Idaho described as follows:

BEGINNING at a point on the North boundary of Lot 4, Section 28, which  
point is West 660.00 feet from the Northeast corner of said Lot 4;

Thence South 214.00 feet to a point in the existing fence;

Thence South 60°42' West along said fence line 175.70 feet;

Thence West 345.80 feet to a steel pole set on the East bank of the  
reservoir of Lower Salmon Falls Dam;

Thence continuing West to the River Bank, according to the original G.C.  
Land Survey;



EXHIBIT "A" Continued

Thence Northerly following along the river to the point of intersection with the North boundary line of Lot 4;  
Thence East to the POINT OF BEGINNING.

ALSO EXCEPTING the North 20 feet of the S1/2 of the NW1/4, Section 27, and the SE1/4 of the NE1/4 and the East 548 feet of Lot 4 of Section 28, Township 7 South, Range 13 East of the Boise Meridian, for road purposes as set forth in Deed to Hagerman Highway District, a Municipal Corporation of Idaho, dated June 6, 1951 and recorded October 16, 1951 in Book 45 Deeds Page 182.

1035056

STATE OF IDAHO COUNTY OF SODDING  
Filed for record at the request of FIRST AMERICAN TITLE  
47 per page 3 chg D. per 400  
Gazman 96 900  
Perry Watson

6 003771  
After Recording Return  
FCS - Idaho  
1020 Land T  
Idaho Falls.

THIS MORTGAGE

On January 2, 1951 business as D & E3454, grant, c organized under 601 First Avenue property in Co incorporated he hereditaments, private roads, lighting, water hereafter holder

The following instruments collectively c terms of the rights under agreements here made t Documents.

DATE OF M

July 12, 1951

The terms imposed by any other or any of all such t and any liability t loans or Mortgage

1.

2.

3.

4.

#28

PARTIAL ASSIGNMENT OF WATER RIGHTS

The undersigned, BARBARA GARDNER, a widow dealing with her sole and separate property, owner of the following described real estate situated in Gooding County, Idaho, to-wit:

Lots 3 and 4 N of the access road and  
Lots 5 and 17 E of the access road on  
Buckeye Ranch all located in Section 27, Township 7  
South, Range 13, EBM,

does hereby assign and transfer to David O. Kingston, dba D&D Investments hereafter referred to as "Assignee" 134 miner's inches of water, which is now appurtenant to the above described land, to real estate owned by said assignee that is described on Exhibit "A" which is attached hereto and made a part hereof by reference. Said water right shall be transferred from water right No. 36-00003B Snake River Basin Adjudication.

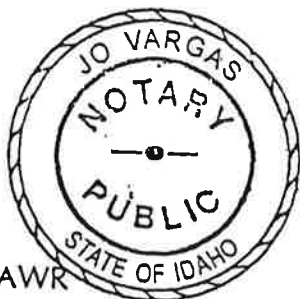
DATED This 17 day of October, 1997.

Barbara Gardner  
BARBARA GARDNER

STATE OF IDAHO )  
County of Gooding ) ss.

On this 17<sup>th</sup> day of October, 1997, before me, the undersigned, a notary public in and for said county and state, personally appeared BARBARA GARDNER, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Jo Vargas  
NOTARY PUBLIC FOR IDAHO  
Residing at: Wendell, Idaho  
My Commission Expires: June 30, 2000

WLN\GARDNER.AWR

Exhibit "A"

Township 7 South, Range 13 East of the Boise Meridian, Gooding County, Idaho

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Thence East along said South line to the Southeast corner of said Lot 37;

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Thence in a Northeasterly direction to a point on the North line of Lot 26 of the Buckeye Ranch, 820 feet East of the Northwest corner of Lot 27 of the Buckeye Ranch;

Thence West along the North line of said Lot 27, 305 feet;

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Township 7 South, Range 13 East of the Boise Meridian, Gooding County, Idaho

Section 28: Lots 7 through 15, inclusive and Lots 28 through 36, inclusive of the Buckeye Ranch, according to the plat thereof on file in the office of the County Recorder of Gooding County, Idaho;

EXCEPTING THEREFROM that part of Lots 9, 10 and 11 of Buckeye Ranch according to the plat thereof on file in the office of the County Recorder of Gooding County, Idaho described as follows:

BEGINNING at a point on the North boundary of Lot 4, Section 28, which point is West 660.00 feet from the Northeast corner of said Lot 4;

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Thence South 60°42' West along said fence line 175.70 feet;

Thence West 345.80 feet to a steel pipe set on the East bank of the reservoir of Lower Salmon Falls Dam;

Thence continuing West to the River Bank, according to the original GLO Land Survey;



EXHIBIT "A" Continued

Thence Northerly following along the river to the point of intersection with the North boundary line of Lot 4;  
Thence East to the POINT OF BEGINNING.

ALSO EXCEPTING the North 20 feet of the S1/2 of the NW1/4, Section 27, and the SE1/4 of the NE1/4 and the East 548 feet of Lot 4 of Section 28, Township 7 South, Range 13 East of the Boise Meridian, for road purposes as set forth in Deed to Hagerman Highway District, a Municipal Corporation of Idaho, dated June 6, 1951 and recorded October 16, 1951 in Book 45 Deeds Page 182.

172912

STATE OF IDAHO COUNTY OF GOODING

Filed for record at the request of Kingston Properties

09 min. past 9 o'clock A.m. this 3rd

of November 19 97 9:00

By Penny Watson Deputy



1 A. That's a larger pond that's further to the  
2 east of this last pond and very near the Snake River.

3 Q. Okay. And does that have fish in it?

4 A. It does. It probably has the largest  
5 population.

6 Q. And what kind of fish?

7 A. Those are trout and bass.

8 Q. Okay. The last two photos, you referred to  
9 two ponds on Exhibit 12 which you've circled on the  
10 left-hand side.

11 What's your understanding of how long those ponds  
12 have been there?

13 A. Well, there are -- from my discussion with  
14 Barbara Gardner, she indicated they were there in the  
15 1920s.

16 Q. Okay. Do you have any reason to believe  
17 they were not there?

18 A. I've been able to substantiate that from  
19 other neighbors and people who have lived here. Not  
20 many go back to the early Twenties, but their parents  
21 did.

22 Q. Exhibit 20, what does that show?

23 A. 20 is just another shot of the same lake.

24 Q. And Exhibit 21?

25 A. That's a little further out and the same

Page 304

1 large pond.

2 Q. Where does the water go once it leaves the  
3 ponds?

4 A. It goes into the Snake River.

5 THE COURT: Are Exhibits 19 and 20 and 21  
6 all shots of the same --

7 A. The same lake, yes, Your Honor. It goes  
8 right out -- there's a diversion right here.

9 MR. BROWN: Okay. I would offer 16 through  
10 21.

11 THE COURT: Yeah. Without objection,  
12 Exhibits 16 through 21 are admitted.

13 (Claimant Exhibits 16 thru 21 ADMITTED)

14 Q. (BY MR. BROWN) Referring you now to  
15 Exhibit 12, can you tell me how much of the ground on  
16 that property is irrigated?

17 A. We've claimed 129 acres, and I think it  
18 approximate -- some years there's maybe slightly more  
19 than that. Some years it's less.

20 Q. Okay. Let me show you an area referred to,  
21 identified in brown as the place of use of right  
22 No. K.

23 Do you own any of the property there?

24 A. Yes.

25 Q. And how much there would you own?

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1 A. I'd have to look at the deed to be honest.

2 Q. Have you consulted with anybody or had  
3 anybody look at this in order to determine how many  
4 acres you have and how much is irrigated?

5 A. No.

6 Q. Have you consulted -- have you hired  
7 Doctor Brockway to do that for you?

8 A. Yes, to determine the amount of need and  
9 use.

10 Q. What have you done in order to provide him  
11 with information such as the way the property has been  
12 historically irrigated?

13 A. Essentially I put him in contact with  
14 previous farmers so that he could talk about their flow  
15 rates, the crops that have been grown on that farm, and  
16 the data.

17 Q. And who have you put him in touch with?

18 A. Dan McFaddan primarily. He farmed it longer  
19 than anybody else.

20 Q. Do you know about when he farmed it?

21 A. He farmed it from 1976 to 1986.

22 Q. Okay.

23 A. I believe the Gardners farmed it after  
24 that. I'm not sure. It's prior to my ownership.

25 Q. Let me ask you a question about these water

Page 306

1 rights splits. J has been split into K, L, and M. You  
2 heard the testimony this morning about how those rights  
3 were split.

4 A. Yes.

5 Q. Can you tell me what your understanding of  
6 what you were acquiring when you obtained part of the J  
7 right from Miss Gardner?

8 A. I acquired, first of all, I think it's the B  
9 right. And subsequently I was told by Mrs. Gardner  
10 that there was additional water, and that she was  
11 wanting to convey that to me for the needs other than  
12 those that had been conveyed to others.

13 Q. Okay. And when you say "other than what had  
14 been conveyed to others," can you explain that?

15 A. Well, I think that she was concerned that  
16 the department had allocated one inch per acre and, I  
17 think, told me that she felt like she couldn't do, deed  
18 any more than that until there was -- the adjudication  
19 had, you know, concluded. And once that was concluded,  
20 that the rights, whatever rights were determined,  
21 anything that was not decreed to others, because I was  
22 the largest landowner, should be conveyed to me, and  
23 would be.

24 Q. Okay. So, in other words, you said that she  
25 would convey it first to the others to get more than an

Page 307

1 A. It enters our property here and follows  
2 around this field there and down. It's there, then on.  
3 Q. (BY MR. BROWN) Does it continue down?  
4 A. It goes to here and goes into a pipeline,  
5 and goes down this way between Mr. Kingston -- or just  
6 south of Mr. Kingston's property.

7 Q. Okay. Now, for how long have you been  
8 familiar with that ditch?

9 A. Well, I used to fall into it a lot.

10 Q. Can you show the court -- you indicated the  
11 house -- excuse me. You indicated the house you grew  
12 up in.

13 Where is that house on Exhibit 11?

14 A. It's about right -- I believe it's right  
15 there, unless I'm turned around.

16 Q. From the point you indicated the Buckeye  
17 enters what's Edna Rea, your mother's property now --

18 A. Uh-huh.

19 Q. -- how far is it to Billingsley Creek where  
20 it's diverted?

21 A. It's got to be approximately maybe four,  
22 four and a half miles, something in there.

23 Q. Now, you indicated that it runs now down to  
24 the property line on the south end of Kingston's.

25 A. Yes.

Page 276

1 Q. Can you tell me did it used to run past  
2 there onto the southern half of the Buckeye property?

3 A. The ditch used to -- ~~there was a little,~~  
4 small irrigation ditch came above the house. And we  
5 irrigated the pasture where Mr. Harbison is, all along  
6 there. But the main part of the ditch came over the  
7 hill back there and followed the road now down; and it  
8 came to essentially the same area and went south to the  
9 river. And the Hunt Ditch came from Riley Creek over  
10 and joined it here. And they joined there and went  
11 west to the river.

12 Q. And were there any other ditches coming from  
13 Riley Creek over to near your property or Simcoe's  
14 property in this area?

15 A. There was a pipeline that came across the  
16 top and put water on this top area up in here. Where  
17 am I at? Over in here, this area.

18 Q. Okay. Do you know what became of the  
19 pipeline?

20 A. It fell into disrepair and was abandoned in  
21 the mid to late Thirties.

22 Q. And how have the properties including  
23 acoe's and Babington's and your mother's received  
24 water since that time?

25 A. My mother's has always been gravity

Page 277

1 irrigation. The others, Mr. Simcoe and Babington, have  
2 used a pump.

3 Q. And pump out of what?

4 A. Out of the Buckeye Ditch.

5 Q. Are you familiar with what we've referred to  
6 as the Harlan Bell right, No. 019?

7 A. Yes.

8 Q. Do you know who Harlan Bell was?

9 A. He's my father.

10 Q. And do you know where that water was used?

11 A. It was used on -- we had 30 acres in here.

12 I forget the lot numbers of the Buckeye Ranch. And we  
13 irrigated that.

14 MR. BROWN: Could I have Exhibit 12,  
15 please?

16 Q. (BY MR. BROWN) Okay. You've indicated that  
17 part of the 1884 rights are used on Harlan Bell's  
18 property.

19 A. Uh-huh.

20 Q. If you look at Exhibit 12, you'll see that a  
21 couple areas in yellow are highlighted.

22 A. Yes.

23 Q. Has that ground been irrigated?

24 A. Yes, it has.

25 Q. And was it irrigated before the last few

Page 278

1 years?

2 A. I can remember that south of the house was  
3 irrigated. And I -- we moved from that property when I  
4 was 5 years old. But that's -- out on that pasture is  
5 the first place I learned to ride a horse. And it was  
6 green and irrigated at that time. This was back of the  
7 old barn. And it was green and irrigated at that  
8 time. We hauled hay off from it.

9 Q. Okay. Let me ask you about if you see what  
10 exhibit -- can you tell what Exhibit 13 represents?

11 A. Well, yeah. This is the pasture south of  
12 the house. And this is the pasture, and  
13 Barbara Gardner's house is over here.

14 Q. Okay. Field No. 1 above the Buckeye Ditch  
15 on Exhibit 13, has that historically been irrigated?

16 A. I never saw water on that. But there was  
17 evidence of old wooden checks, corrugations, ditches.

18 Q. Is it irrigated today?

19 A. This is all Tom's? Or is part of it  
20 Mr. Simcoe's?

21 Q. Let me refer you to Exhibit 12. Within the  
22 place of use for Mr. Harbison, there's a field  
23 identified as field 6 for 3 acres.

24 Is that irrigated?

25 A. I don't know that it is today.

Page 279

1 THE COURT: Let me clarify something,  
2 Mr. Brown.  
3 MR. BROWN: Yes.  
4 THE COURT: Mr. Bell, referring to  
5 Exhibit 13, there's a parcel that's been indicated as  
6 parcel 1.

7 Is it your testimony that you have or have not  
8 seen water on that parcel?

9 A. Historically, I haven't; but Mr. Simcoe,  
10 when he put in his pump irrigation system, included  
11 part of that.

12 Is that right? I think that's right.

13 THE COURT: Well, don't ask him.

14 A. Okay.

15 Q. (BY MR. BROWN) And the other parcels have  
16 been?

17 A. Yes.

18 Q. Now, let me ask you about this area. On  
19 Exhibit 12 there is an ASCS field labeled No. 3 for  
20 4.1 acres within the place of use for right K.

21 A. Yes.

22 Q. Has that been irrigated?

23 A. A lot of it -- yes. Bob Gardner used to  
24 keep his horses there; and at that time he irrigated  
25 it.

Page 280

1 Q. Okay. So that 4.1 acres was irrigated.

2 This 18 acres in this --

3 A. Yes.

4 Q. -- labeled as M and the other property to  
5 the left labeled as --

6 A. L or I.

7 Q. -- H-E-L-L?

8 A. Yeah.

9 Q. H-E-L. Has that property historically been  
10 irrigated?

11 A. Yes.

12 Q. And you indicated that these properties were  
13 irrigated from a pipeline until sometime when water  
14 began being used out of the Buckeye?

15 A. Yes.

16 Q. Okay. Do you know if the ditches which  
17 provided water other than the Buckeye were decreed to  
18 the same places of use as the Buckeye 03 and 05 and 019  
19 rights?

20 A. It is my understanding from reading an  
21 interpretation of the International Mortgage and Loan  
22 that they were.

23 Q. Okay. What is it that you understand?

24 A. That they were -- that the water was  
25 adjudicated to the entire ranch.

Page 281

1 Q. Okay. The entire ranch. You're referring  
2 to what area in reference to Exhibit 11?

3 A. All of that land included in the former  
4 Buckeye Ranch, which was the entire area.

5 Q. You're telling me the entire area -- you're  
6 saying that the entire area outlined in yellow, this  
7 area?

8 A. Yes. And including, including part of it  
9 that isn't, this area in here.

10 Q. You're indicating the area circled in  
11 purple, outlined in purple?

12 A. Uh-huh.

13 Q. Okay.

14 THE COURT: Okay. Wait a minute.

15 Mr. Bell, you're testifying that the entire area  
16 outlined in yellow, including the area outlined in  
17 purple, was decreed to whom? The Buckeye Ranch?

18 MR. BROWN: He's saying that entire area is  
19 what comprises the ranch.

20 THE COURT: Okay.

21 A. The 1884 water right. And there were two  
22 other owners in the Buckeye, the H. J. Bell and the  
23 Amanda Gooding right; but they were all --

24 Q. (BY MR. BROWN) Okay. Those three rights.

25 A. Yes.

Page 282

1 Q. They all have the same priority date?

2 A. Yes.

3 Q. They all used out of the same ditch?

4 A. Now --

5 Q. Out of Billingsley Creek? Are they all used  
6 out of the same canal out of Billingsley Creek?

7 A. Now, part of it was from Riley Creek.

8 Q. Okay. And that was part of what?

9 A. Well, all that on top of the hill originally  
10 was decreed from Riley Creek.

11 Q. Okay. But historically in the last 20 years  
12 or so the water to these places we're discussing today  
13 has all come out of the Buckeye?

14 A. Yes. That's correct.

15 Q. Explain to me, if you can, how you can have  
16 water from Riley Creek and water from the Buckeye and  
17 how that's changed?

18 A. Well, it's my understanding that there was  
19 water sources from both directions; and that the '32  
20 decree, they were deemed as the same source.

21 Q. So they could be used out of either one.

22 A. They could be used out of either one.

23 MR. BROWN: I would ask the court to take  
24 judicial notice of the New International Mortgage  
25 decree rights 1 and 2 out of Riley Creek all to the

Page 283



THIS DEED OF TRUST, Made this 7th day of January 1994  
 BETWEEN DOYT H. SIMCOE AND ROXIE J. SIMCOE, HUSBAND AND WIFE

19 94

whose address is

herein called GRANTOR,

FIRST AMERICAN TITLE COMPANY,

herein called TRUSTEE, and BARBARA CARDNER, AS HER SOLE AND SEPARATE PROPERTY

herein called BENEFICIARY. WITNESSETH: That Grantor does hereby irrevocably GRANT, HARGAIN, SELL  
 AND CONVEY TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in the County of  
 GOODING State of Idaho, described as follows and containing not more than twenty acres:

See attached Exhibit A

COPY

TOGETHER WITH the rents, issues and profits thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given  
 and conferred upon Beneficiary to collect and apply such rents, issues and profits,

For the Purpose of Securing payment of the indebtedness evidenced by a promissory note, of even date herewith, executed by  
 Grantor in the sum of EIGHTEEN THOUSAND ONE HUNDRED AND NO/100\*\*\*\*\* Dollars (\$18,100.00 ),

that payment due January 7, 1998

and to secure payment of all such further sums as may hereafter be loaned or advanced by the Beneficiary herein to the Grantor  
 herein, or any or either of them, while record owner of present interest, for any purpose, and of any notes, drafts or other instru-  
 ments representing such further loans, advances or expenditures together with interest on all such sums at the rate therein  
 provided. Provided, however, that the making of such further loans, advances or expenditures shall be optional with the Bene-  
 ficiary, and provided, further, that it is the express intention of the parties to this Deed of Trust that it shall stand as continuing  
 security until paid for all such advances together with interest thereon.

A. To protect the security of this Deed of Trust, Grantor agrees:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon; to complete or restore  
 promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon and to pay  
 when due all claims for labor performed and materials furnished therefor; to comply with all laws affecting said property or requir-  
 ing any alterations or improvements to be made thereon; not to commit or permit waste thereon; not to commit, suffer or permit  
 any act upon said property in violation of law; to cultivate, irrigate, fertilize, fumigate, prune and do all other acts which from the  
 character or use of said property may be reasonably necessary; the specific enumerations herein not excluding the general.

2. To provide, maintain and deliver to Beneficiary fire insurance satisfactory to and with loss payable to Beneficiary. The  
 amount collected under any fire or other insurance policy may be applied by Beneficiary upon any indebtedness secured hereby and  
 released to Grantor. Such application or release shall not cure or waive any default or notice of default hereunder or invalidate  
 any act done pursuant to such notice.

3. To appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Bene-  
 ficiary or Trustee; and to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum, in  
 any such action or proceeding in which Beneficiary or Trustee may appear.

4. To pay, at least ten days before delinquency all taxes and assessments affecting said property, when due, all encumbrances,  
 charges and liens, with interest, on said property or any part thereof, which appear to be prior or superior hereto; all costs, fees  
 and expenses of this Trust. In addition to the payments due in accordance with the terms of the note hereby secured the Grantor  
 shall at the option, and on demand of the Beneficiary, pay each month 1/12 of the estimated annual taxes, assessments, insurance  
 premiums, maintenance and other charges upon the property, nevertheless in trust for Grantor's use and benefit and for the pay-  
 ment by Beneficiary of any such items when due. Grantor's failure so to pay shall constitute a default under this trust.

5. To pay immediately and without demand all sums expended by Beneficiary or Trustee pursuant to the provisions hereof,  
 with interest from date of expenditure at eight per cent per annum.

6. Should Grantor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without  
 obligation so to do and without notice to or demand upon Grantor and without releasing Grantor from any obligation hereof, may:  
 make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary  
 or Trustee being authorized to enter upon said property for such purposes; appear in and defend any action or proceeding pur-  
 porting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest or compromise any  
 encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and, in exercising any such  
 powers, or in enforcing this Deed of Trust by judicial foreclosure, pay necessary expenses, employ counsel and pay his reasonable  
 fees.

B. It is mutually agreed that:

1. Any award of damages in connection with any condemnation for public use of or injury to said property or any part thereof  
 is hereby assigned and shall be paid to Beneficiary who may apply, or release such moneys received by him in the same manner  
 and with the same effect as above provided for disposition of proceeds of fire or other insurance.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive his right either to require  
 prompt payment when due of all other sums so secured or to declare default for failure so to pay.

3. At any time or from time to time, without liability therefor and without notice, upon written request of Beneficiary and  
 presentation of this Deed and said note for endorsement, and without affecting the personal liability of any person for payment of  
 the indebtedness secured hereby, Trustee may: reconvey all or any part of said property; consent to the making of any map or  
 plat thereof; join in granting any easement thereon; or join in any extension agreement or any agreement subordinating the lien  
 or charge hereof.

4. Upon written request of Beneficiary stating that all sums secured hereby have been paid, and upon surrender of this Deed  
 and said note to Trustee for cancellation and retention and upon payment of its fees, Trustee shall reconvey, without warranty,  
 the property then held hereunder. The recitals in any reconveyance executed under this deed of trust of any matters or facts  
 legally entitled thereto.

5. As Additional security, Grantor hereby gives to and confers upon Beneficiary the right, power and authority, during the  
 continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Grantor the right, prior to any  
 default by Grantor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and  
 retain such rents, issues and profits as they become due and payable. Upon any such default, Beneficiary may at any time without  
 notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security  
 for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in his own name sue for  
 or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses  
 of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Bene-  
 ficiary may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and  
 the application thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done  
 pursuant to such notice.

15



EXHIBIT A

Lot 38 and that portion of Lot 26 of the Buckeye Ranch, according to the Official Plat on file in the County Recorder of Gooding County, State of Idaho, described as follows:

BEGINNING at the Southwest corner of said Lot 26, also being the Southeast corner of Deed, recorded January 10, 1989 as Instrument No. 119145;  
Thence in a North Easterly direction to a point on the North line of said Lot 26, which bears 820 feet East of the Northwest corner of Lot 27;  
Thence East 502.4 feet more or less, along the North Lot line of Lot 26 to the Northeast corner of said Lot 26;  
Thence South, along the East line of said Lot 26 to the Southeast corner thereof;  
Thence West 660.5 feet more or less along the South Lot line to the POINT OF BEGINNING.

TOGETHER with 37 inches of Buckeye Ditch water.



21 22  
28 27

Pre-Trial Recommended POU

3B

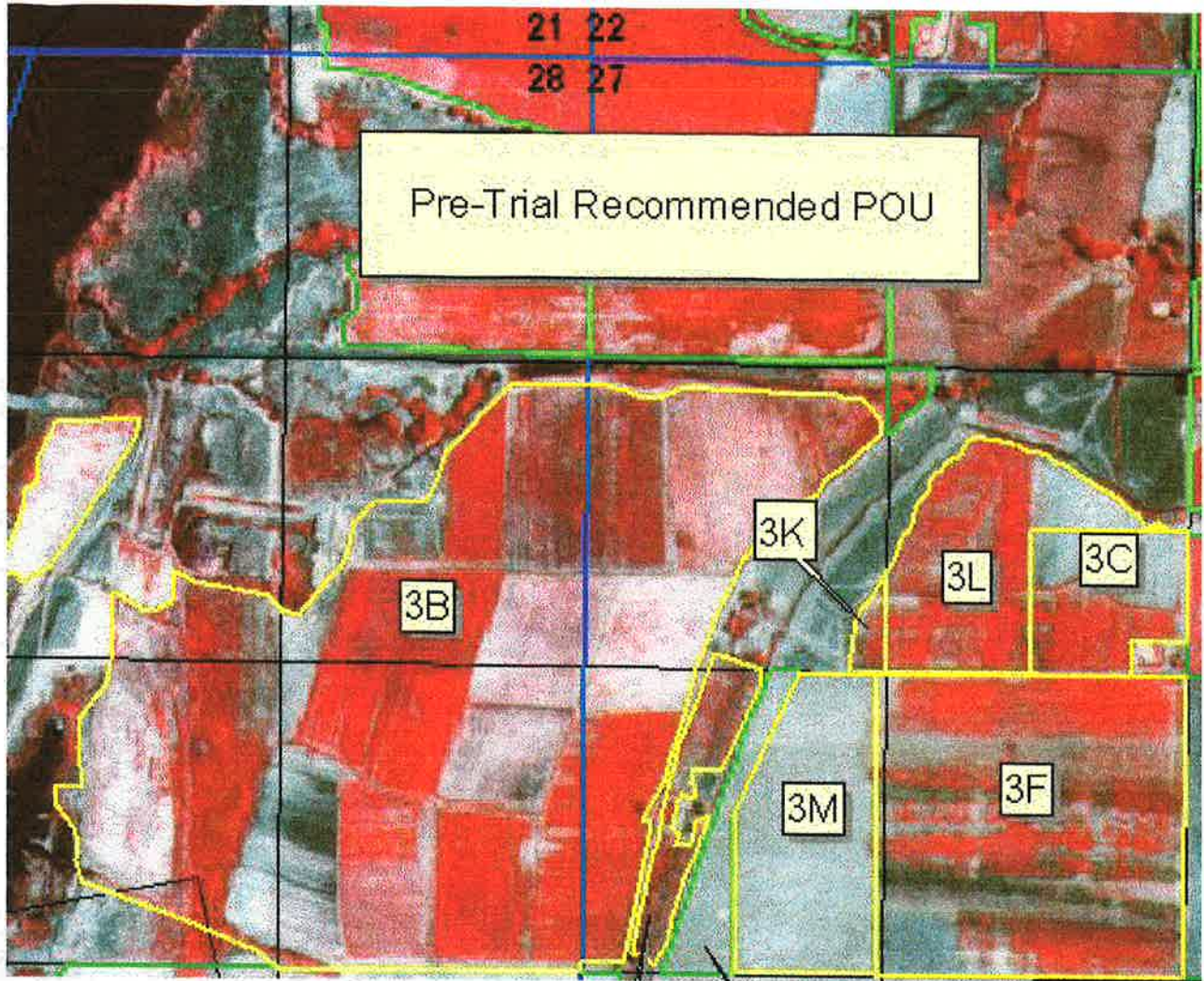
3K

3L

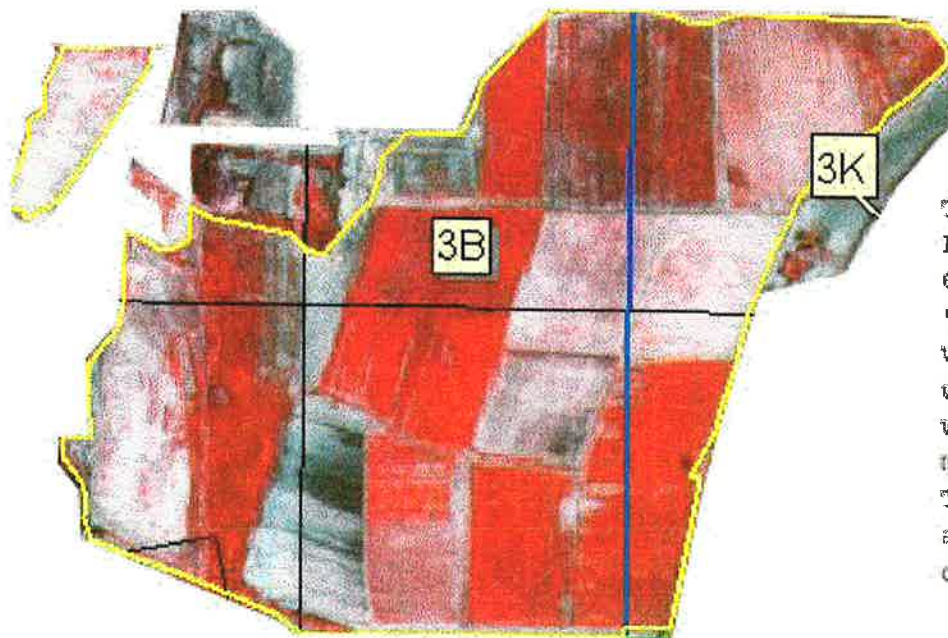
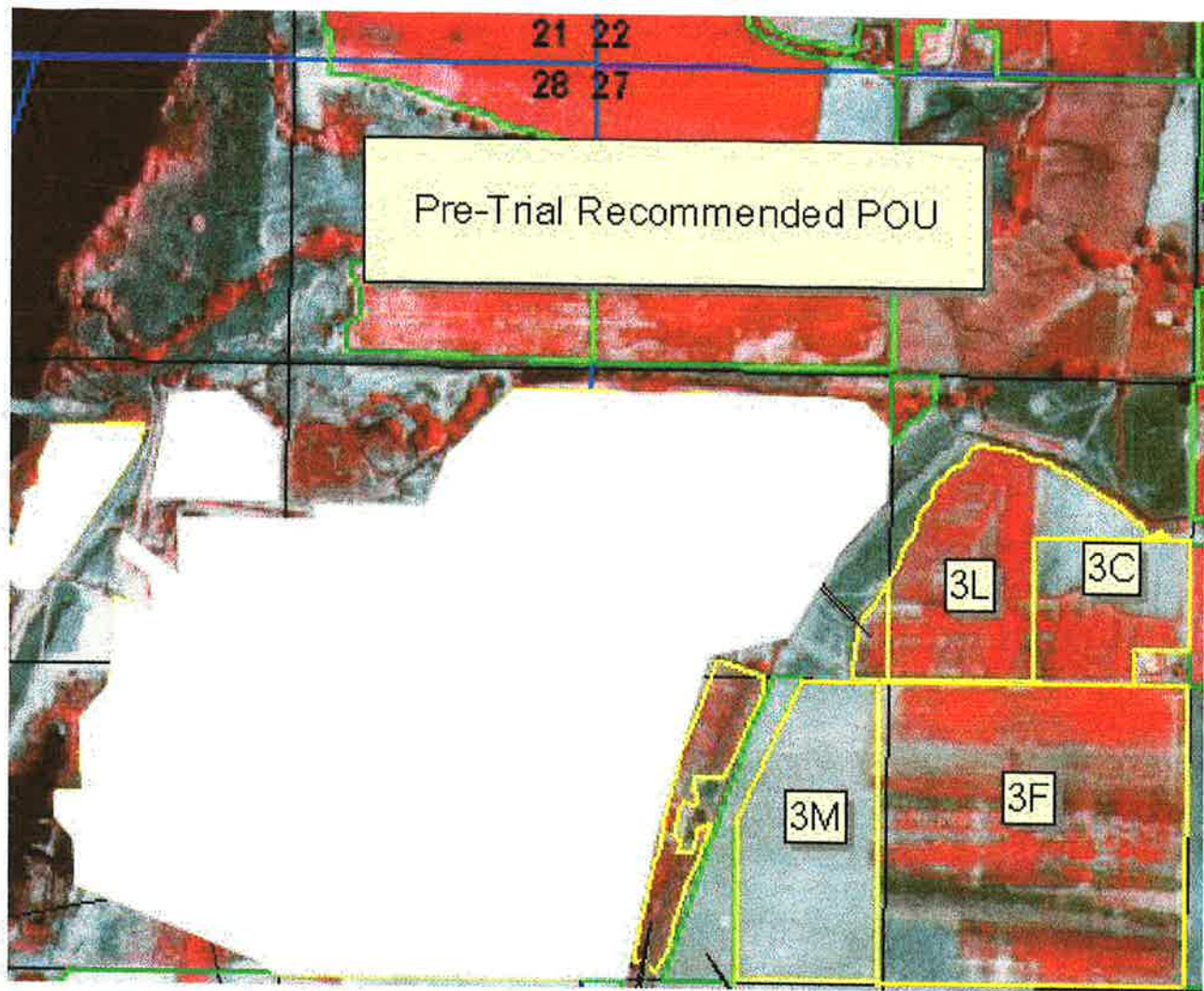
3C

3M

3F

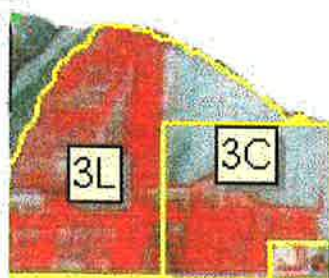
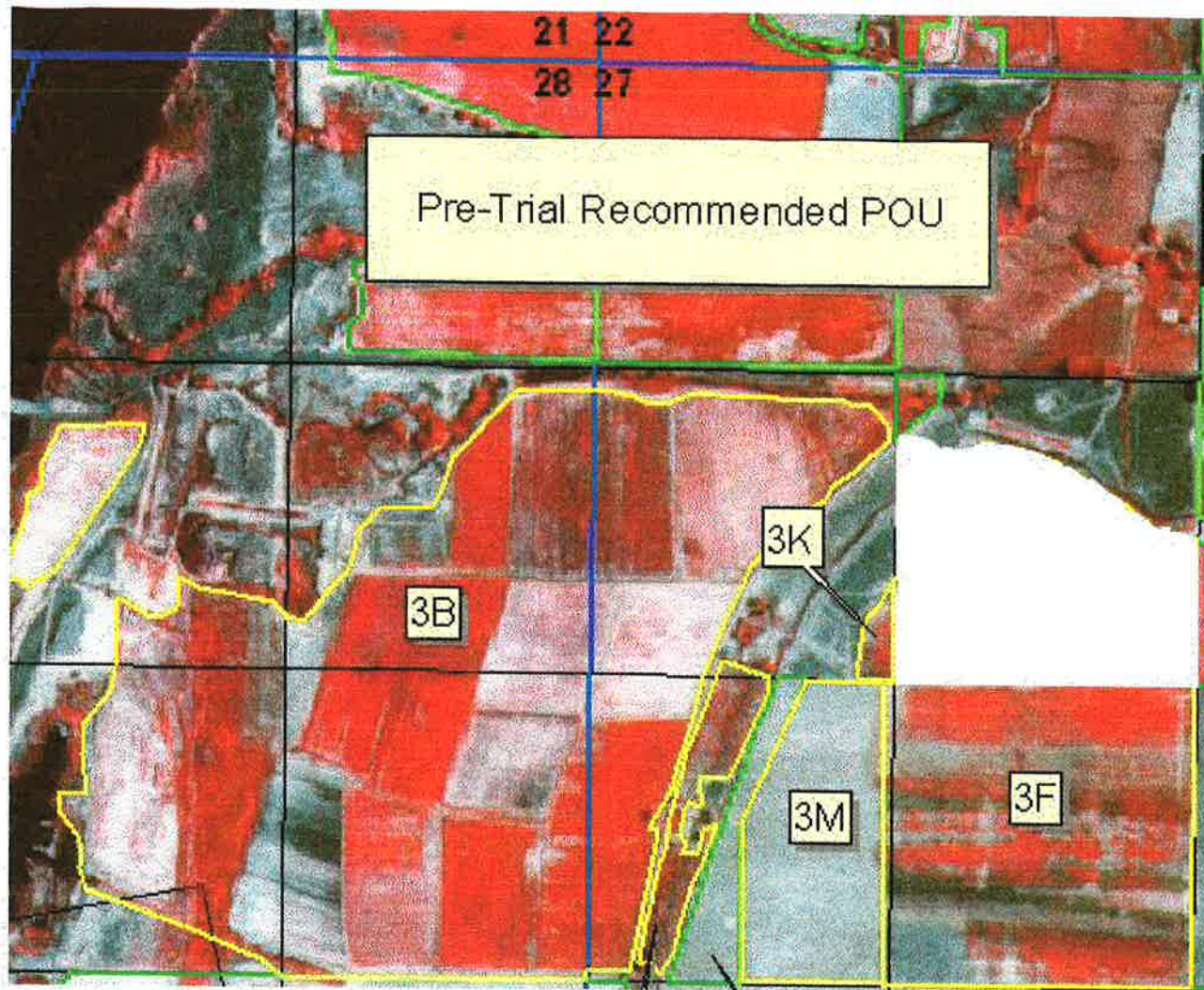






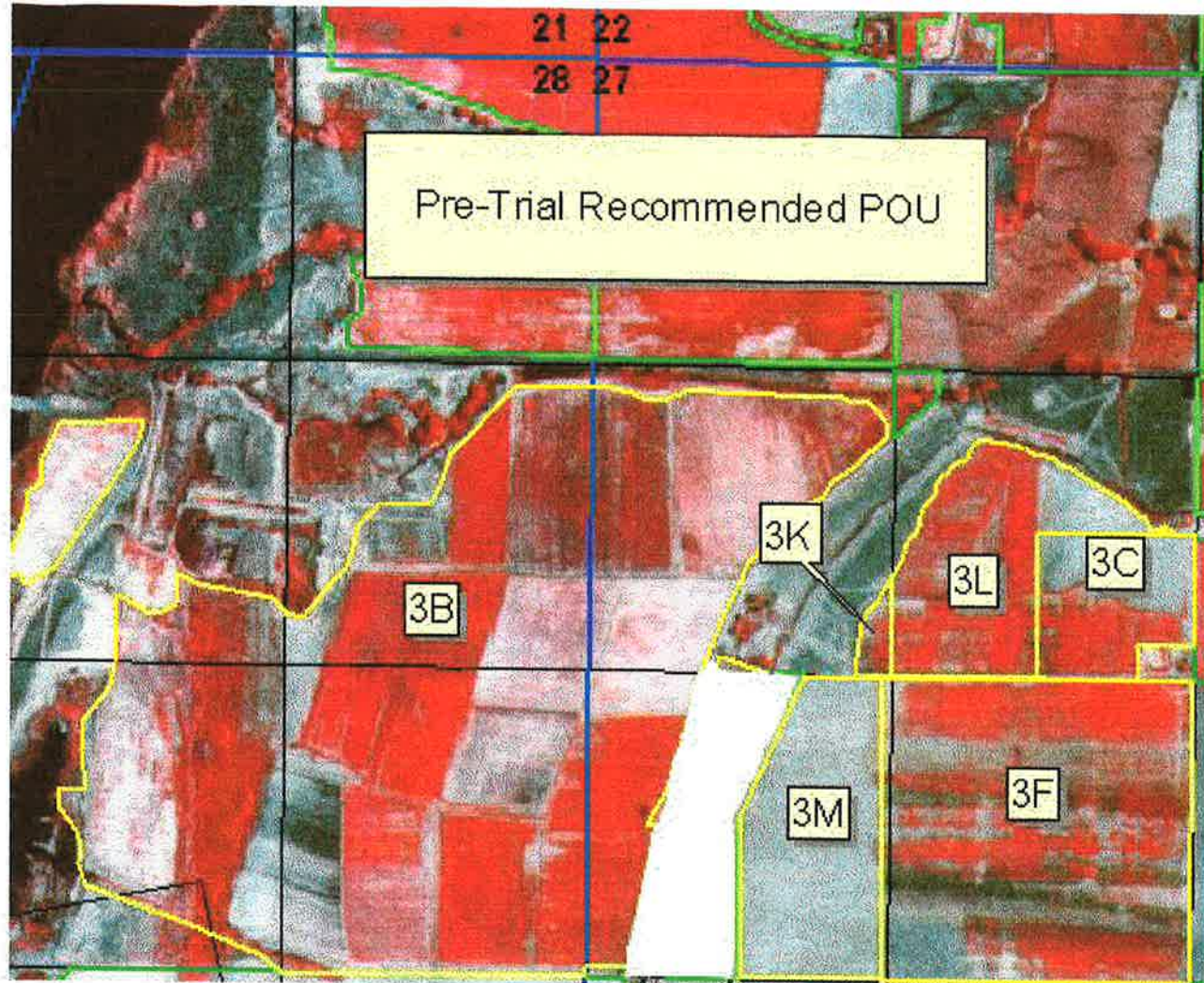
The 03B and K  
POU includes about  
6 acres where the  
"3K" label is. It  
was irrigated except  
when Robert Gardner  
was ill. See testi-  
mony of Dan McFadden.  
The water from 03  
and 019 has been  
commingled since 1941.





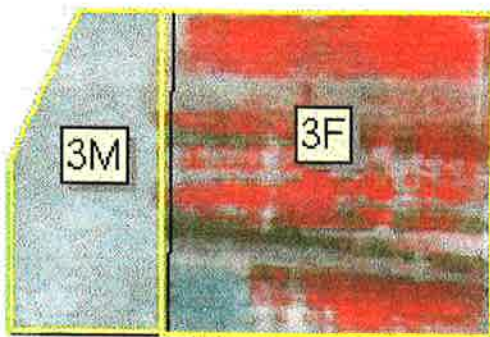
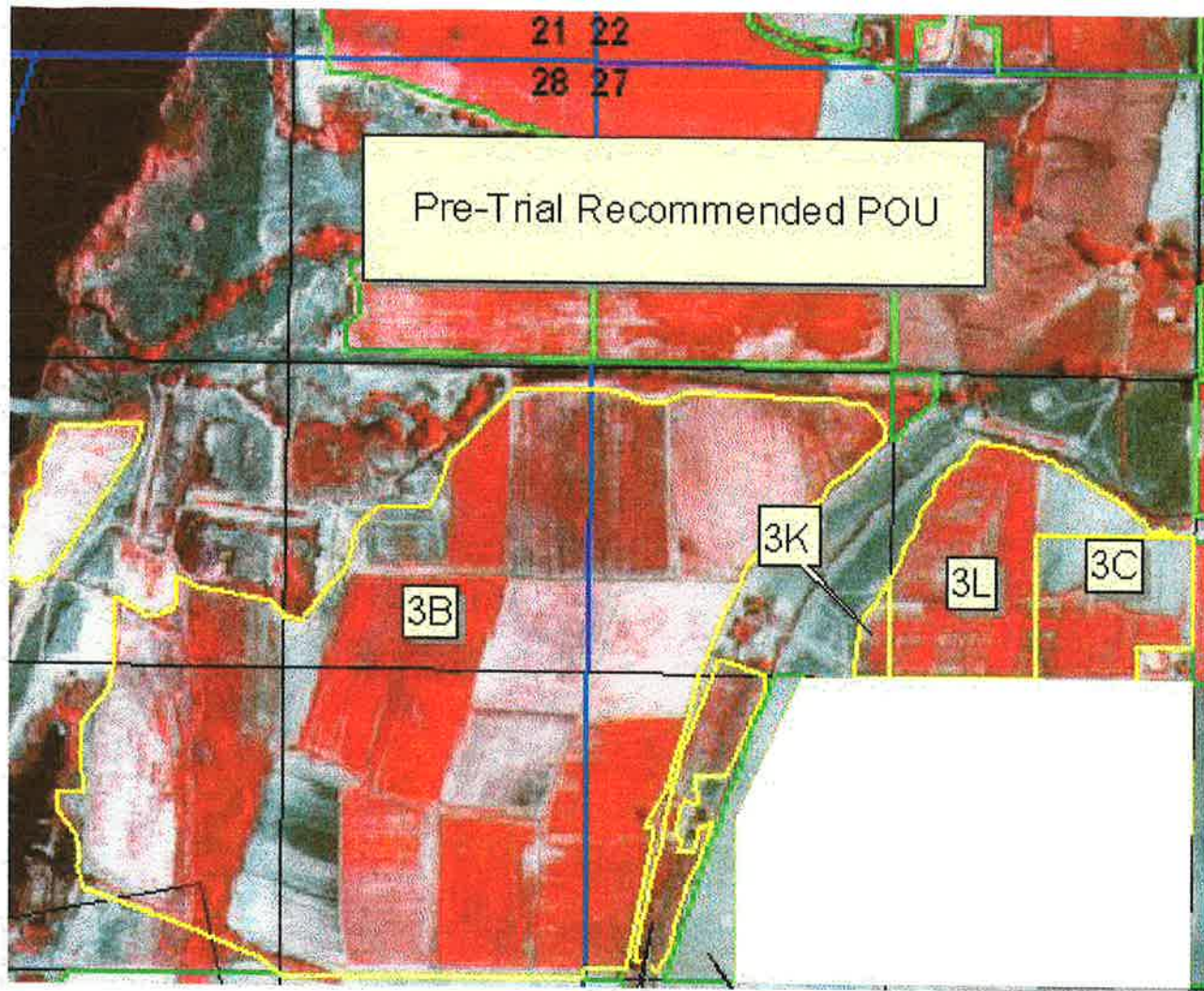
The POU for Babbington is the entire 03C and L area of use, including the north-west corner across the canal. As Dan McFadden testified, this area was not irrigated in 1987 because Robert Gardner was ill. It typically was, and Dan had to keep telling Gardner to turn down the water because it would sub out fields to the west. See trial testimony.





This is the 03D place of use.  
 Its area of irrigation is 8.5 acres. This was determined by actual measurements introduced at the trial. A small part on the northeast corner would be in the 03, rather than 019 POU set out in the 1932 Decree. But since 1941, the 03 and 019 water have been commingled.





The 03F and M POU has historically been irrigated from the same feeder ditches, then under the same wheel line. The combination of the 40" and 37" on the 58.5 acres returns the paperwork to the acknowledged, actual historic use.



PATRICK D. BROWN, P.C.  
LAW OFFICES

May 15, 2001

Steve Clelland  
Idaho Department of Water Resources  
1341 North Fillmore, Suite 200  
Twin Falls, ID 83301

RECEIVED

MAY 15 2001

Department of Water Resource  
Southern Region

5:00 pm  
J. Land Delivered

RE: Subcases No. 36-00003, 05, and 019

Dear Steve:

Enclosed are the following additional materials that may help you understand the explanations I have given about the nature and extent of ownership and use of the 03,05, and 019 rights.

1. Excess Flow Analysis for the Babington, Kingston, Simcoe and Rea/Bell from Brockway Engineering. (Tab 25)
2. Testimony of Brockway explaining how he conducted the analysis and arrived at his Field Irrigation Requirements, Tr. p. 412 through p. 503. (Tab 26)
3. Testimony of Bell regarding measurements, Tr. p. 295, l. 9 through p. 297, l. 25. (Tab 27)
4. Flow Measurements for Simcoe and Babington dated May 11, 2000 by Brockway. (Tab 28)
5. Summary of flow measurements by Steelhead Engineering, dated 6-7-98. (Tab 29)
6. Chart of Harbison fields and calculation of acreage. (Tab 30)
7. Testimony of Kingston regarding fish propagation, Tr. p. 300, l. 1 through p. 304, l. 23 and Tr. p. 315, l. 2 through p. 317, l. 11. (Tab 31)

If you have any questions, please give me a call.

Sincerely,

Patrick D. Brown  
Attorney at Law

pdb/tf  
enc.

# V. BELL EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

Base field data:

| Field | Acres in soil type: |     | Total acres | Slope (ft/ft) | Run length (ft) | Furrow spc (ft) | Set time | Furrow flow |
|-------|---------------------|-----|-------------|---------------|-----------------|-----------------|----------|-------------|
|       | KEB                 | KOB |             |               |                 |                 |          |             |
| 1     | 0.0                 | 6.7 | 6.7         | 0.02          | 590             | 2.5             | 24       | 4           |
| 2     | 0.4                 | 0.6 | 1.0         | 0.02          | 200             | 2.5             | 24       | 3           |
| 3     | 2.9                 | 0.0 | 2.9         | 0.02          | 230             | 2.5             | 24       | 3           |
| 4     | 2.2                 | 0.0 | 2.2         | 0.02          | 190             | 2.5             | 12       | 5           |
| Total |                     |     | 12.8        |               |                 |                 |          |             |

Base case: All alfalfa, parameters as above

Base duty: 0.51 cfs = 1.99 in/ac

Range of computed diversion rates based on peak period consumptive use

Set times in hours, furrow flows in gpm

CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.25     | 0.50 |
| 5        | 0.42     | 0.83 |
| 7        | 0.58     | 1.17 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.98     | 1.95 |
| 5        | 1.64     | 3.24 |
| 7        | 2.27     | 4.57 |

CROP: DRY BEANS

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.70     | 1.40 |
| 5        | 1.17     | 2.33 |
| 7        | 1.63     | 3.27 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.73     | 5.47  |
| 5        | 4.56     | 9.11  |
| 7        | 6.38     | 12.76 |

CROP: PASTURE

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.49     | 0.98 |
| 5        | 0.82     | 1.63 |
| 7        | 1.14     | 2.29 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.91     | 3.83 |
| 5        | 3.19     | 6.38 |
| 7        | 4.47     | 8.93 |

Notes:

EXHIBIT 32

TAB

# KINGSTON

|     | REC'D       | INTENDED<br>TO REG <del>STATE</del> | CLAIMED      |
|-----|-------------|-------------------------------------|--------------|
| 3B  | 7.16        | 4.69                                | 7.16         |
| 5B  | .55         | .55                                 | 2.16         |
| 19B | 1.92        | 1.92                                | 2.16         |
|     | <u>9.63</u> | <u>7.16</u>                         | <u>11.48</u> |
|     |             | 1                                   |              |
|     |             | .056 CFS                            |              |
|     |             | PER ACRE                            |              |

# KINGSTON EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

Base: All alfalfa, 24-hr sets, 5 to 7 gpm furrow flows

Base duty: 5.29 cfs = 2.07 inches/ac

Total ac: 127.9

Range of computed diversion rates based on peak period consumptive use

Set times in hours, furrow flows in gpm

## CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.37     | 2.73 |
| 5        | 2.28     | 4.55 |
| 7        | 3.19     | 6.37 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.53     | 1.07 |
| 5        | 0.89     | 1.78 |
| 7        | 1.25     | 2.49 |

## CROP: DRY BEANS

CFS

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 3.84     | 7.68  |
| 5        | 6.40     | 12.80 |
| 7        | 8.96     | 17.92 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.50     | 3.00 |
| 5        | 2.50     | 5.00 |
| 7        | 3.50     | 7.01 |

## CROP: PASTURE

CFS

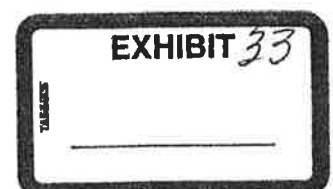
| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.82     | 5.64  |
| 5        | 4.70     | 9.40  |
| 7        | 6.58     | 13.16 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.10     | 2.20 |
| 5        | 1.84     | 3.67 |
| 7        | 2.57     | 5.14 |

Notes:

Insufficient application for Alfalfa, 3 and 5 gpm flows, 12 hr sets



# BABINGTON EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

Base field data:

| Field | Acres in soil type: |     | Total acres | Slope (ft/ft) | Run length (ft) | Furrow spc (ft) | Set time | Furrow flow |
|-------|---------------------|-----|-------------|---------------|-----------------|-----------------|----------|-------------|
|       | KEB                 | KSC |             |               |                 |                 |          |             |
| 1     | 9.3                 | 0.0 | 9.3         | 0.025         | 500             | 2.5             | 24       | 5           |
| 2     | 0.0                 | 3.7 | 3.7         | 0.025         | 240             | 2.5             | 12       | 4           |
| 3     | 0.0                 | 2.0 | 2.0         | 0.1           | 140             | 2.5             | 12       | 3           |
| 4     | 5.8                 | 2.6 | 8.4         | 0.025         | 290             | 2.5             | 24       | 4           |
| Total |                     |     | 23.4        |               |                 |                 |          |             |

Base case: All alfalfa, parameters as above

Base duty: 1.29 cfs = 2.76 in/ac

Range of computed diversion rates based on peak period consumptive use  
Set times in hours, furrow flows in gpm

CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.60     | 1.20 |
| 5        | 1.00     | 2.00 |
| 7        | 1.40     | 2.80 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.28     | 2.56 |
| 5        | 2.14     | 4.27 |
| 7        | 2.99     | 5.98 |

CROP: DRY BEANS

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.62     | 3.24 |
| 5        | 2.70     | 5.40 |
| 7        | 3.78     | 7.56 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 3.46     | 6.92  |
| 5        | 5.77     | 11.54 |
| 7        | 8.08     | 16.15 |

CROP: PASTURE

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.16     | 2.32 |
| 5        | 1.93     | 3.87 |
| 7        | 2.71     | 5.41 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.48     | 4.96  |
| 5        | 4.13     | 8.26  |
| 7        | 5.78     | 11.57 |

Notes:

Insufficient application for

Alfalfa, 12 hrs, all furrow flows

EXHIBIT 34



# SIMCOE EXCESS FLOW ANALYSIS AND SENSITIVITY

Brockway Engineering, PLLC 6/8/98

On-field diversion requirements

Hagerman CIR, 80% probability level, no ditch losses

Base field data:

| Field | Acres in soil type: |      |     | Total acres | Slope (ft/ft) | Run length (ft) | Furrow spc (ft) | Set time | Furrow flow |
|-------|---------------------|------|-----|-------------|---------------|-----------------|-----------------|----------|-------------|
|       | KSC                 | KEC  | KEB |             |               |                 |                 |          |             |
| 1     | 4.8                 | 21.3 | 3.9 | 30.0        | 0.015         | 430             | 2.5             | 24       | 4           |
| 2     | 25.4                | 0.0  | 0.0 | 25.4        | 0.015         | 460             | 2.5             | 24       | 4           |
| 3     | 3.1                 | 0.0  | 0.0 | 3.1         | 0.015         | 260             | 2.5             | 12       | 4           |
| Total |                     |      |     | 58.5        |               |                 |                 |          |             |

Base case: All alfalfa, parameters as above

Base duty: 2.56 cfs = 2.19 in/ac

Range of computed diversion rates based on peak period consumptive use

Set times in hours, furrow flows in gpm

CROP: ALFALFA

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.01     | 2.03 |
| 5        | 1.69     | 3.38 |
| 7        | 2.36     | 4.73 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 0.86     | 1.74 |
| 5        | 1.44     | 2.89 |
| 7        | 2.02     | 4.04 |

CROP: DRY BEANS

CFS

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 3.13     | 6.25  |
| 5        | 5.21     | 10.42 |
| 7        | 7.29     | 14.58 |

IN/AC

| Fur flow | Set time |       |
|----------|----------|-------|
|          | 12       | 24    |
| 3        | 2.68     | 5.34  |
| 5        | 4.45     | 8.91  |
| 7        | 6.23     | 12.46 |

CROP: PASTURE

CFS

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 2.25     | 4.5  |
| 5        | 3.75     | 7.5  |
| 7        | 5.25     | 10.5 |

IN/AC

| Fur flow | Set time |      |
|----------|----------|------|
|          | 12       | 24   |
| 3        | 1.92     | 3.85 |
| 5        | 3.21     | 6.41 |
| 7        | 4.49     | 8.97 |

Notes:

Insufficient application for:

Alfalfa, 3 gpm, 12 hrs

EXHIBIT 35

1 determining factor in a case like that. And there are  
2 cases where wild flooding is preferable.

3 Q. My next question is: Are these types of  
4 systems commonly used in Idaho?

5 A. All these types?

6 Q. Yes.

7 A. I would say all except No. 5, the drip and  
8 the subsurface. The drip is used occasionally in, for  
9 example, nurseries, tree farms.

10 Subsurface is really classified as an  
11 experimental system. And it isn't used very much.

12 Q. Are you familiar with water use generally in  
13 the Hagerman Valley?

14 A. Yes.

15 Q. In the Hagerman Valley are the first four  
16 systems all utilized?

17 THE COURT: Mr. Brown, make sure you speak  
18 up so we can get you on tape.

19 Q. (BY MR. BROWN) Are all of those, the top  
20 four systems utilized in the Hagerman Valley in your  
21 experience?

22 A. To my knowledge, they are except perhaps for  
23 the linear-move system. I'm not aware of any. There  
24 may be some.

25 Q. Okay. Now, I want you to assume that part

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1 of your opinion today is to address, I guess, what  
2 water, what the reasonable irrigation requirements were  
3 when the rights were established. And I'll represent  
4 to you that they were established in the late 1800s,  
5 around the turn of the century.

6 Which of those systems that you've listed there,  
7 if you know, would have been utilized around the turn  
8 of the century?

9 A. Around the turn of the century there was no  
10 power, electric power. So the most common method, as I  
11 understand it, at that time was wild flooding. But  
12 there would have been some furrow irrigation.

13 Q. Tell me how do you furrow irrigate a field  
14 without modern appliances such as gated pipe or --

15 A. You can do it. You can do it with a lot of  
16 hard work, shovels and boards.

17 You can have a ditch that has cutouts in it, just  
18 openings in the ditch itself. And you can regulate the  
19 flow out of those using boards that you stick in the  
20 cutouts, shovels to make earth dams to move the water  
21 where you want it. It's a lot of hard work. Gated  
22 makes it a lot easier. But it can be done.

23 Q. Can you tell me how much someone would use  
24 using dirt ditches and cutouts in terms of furrow  
25 flows? How much water would they run through a

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1 furrow --

2 A. Through an individual furrow?

3 Q. Yes.

4 A. It's really not -- you're not able to  
5 determine exactly how much goes in each individual  
6 furrow under that scenario.

7 Q. And why is that?

8 A. Because it's not -- you do not have water  
9 directed specifically into each furrow like you do with  
10 gated pipe and siphon tubes.

11 MR. BROWN: Your Honor, for demonstrative  
12 purposes, I would ask that we go ahead and print the  
13 exhibit which he has just marked and print the  
14 exhibit. And I would offer it as --

15 THE COURT: 38. Exhibit 38. Is that the  
16 next one, Debbie?

17 THE CLERK: Yes.

18 THE COURT: That's been offered and  
19 admitted for illustrative purposes.

20 MR. BROWN: Your Honor, let's save that  
21 photo. And if he could erase the one on the other  
22 side, if we can just turn the board around, he may want  
23 to come back to that.

24 (Claimants Exhibit 38 ADMITTED)

25 Q. (BY MR. BROWN) Okay. Now, we've talked

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1 about what ET is and what efficiency is. I want you to  
2 explain whether or not these ranges that you've  
3 identified are something which a scientist in the field  
4 would rely on in an individual case. In other words,  
5 you said the maximum efficiency range was 80 -- was it  
6 87 percent for pivot?

7 Would it be a generally accepted practice to say  
8 that if somebody was getting 90 percent efficiency  
9 based on testing or getting 40 percent based on testing  
10 with a pivot that they were using too much or too  
11 little water?

12 A. Yes. The efficiency criteria would be  
13 generally accepted in the field to make a  
14 determination, a broad determination of appropriateness  
15 of water use for various systems.

16 Q. Assume I told you that a particular field,  
17 though, had a 30 percent efficiency. Could you from  
18 that -- and I told you what type of system.

19 Could you from that tell me whether that person  
20 was using too much or too little water?

21 A. I could make an estimate if I knew the other  
22 factors involved, such as soil type, size of the  
23 fields, length of the fields, slope of the fields, and  
24 farm management practices.

25 Q. Okay. So you would need all those criteria

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1 in order to come up with a valid opinion?

2 A. Yes.

3 Q. Now, tell me what the easiest way to  
4 explain -- I want you to --

5 THE COURT: Mr. Brown, it might be helpful  
6 if we write up those input variables that he just  
7 explained.

8 MR. BROWN: Okay. Why don't we -- could  
9 the witness be handed Exhibit 32? Maybe it would be  
10 helpful to refer to that where there are, I know there  
11 are input variables listed.

12 THE WITNESS: Thank you.

13 Q. (BY MR. BROWN) What I want to do at this  
14 point is have you go through and explain generally the  
15 analysis technique you utilized on these particular  
16 fields that are claimed in this case today. We can go

17 back later and go through the individual numbers; but  
18 if you could use Exhibit 32 to explain generally how  
19 the analysis, how the model works.

20 A. Perhaps if I ran through the various inputs  
21 to the model and explained how each one of those fits  
22 into the picture?

23 Q. Okay. Not only do I want to know what  
24 information, what inputs you utilized, but I want to  
25 know what assumptions you had to draw at the same

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1 time.

2 Is it possible simply to go down starting on the  
3 first line of the Exhibit 32 and address each notation  
4 on that page so that we can all follow what you're  
5 talking about?

6 A. You're referring to which line?

7 Q. What I'm suggesting is maybe we can do it in  
8 an order according to the exhibit, starting with -- you  
9 know, the first line says "Bell excess flow analysis  
10 and sensitivity."

11 A. Okay.

12 Q. Explain to me what an excess flow and  
13 sensitivity analysis is.

14 A. Okay. The excess flow analysis is an  
15 analysis that is designed to determine how much water  
16 an irrigator needs to put on a particular field to grow  
17 a particular crop. The reason it's called excess flow  
18 is because it may or may not come out in excess of the  
19 typically allowed value of 1 inch, 1 miner's inch per  
20 acre.

21 The sensitivity part comes in because the inputs  
22 are somewhat uncertain. Some are more certain than  
23 others, but they are somewhat uncertain. So the  
24 sensitivity analysis was performed to see how the  
25 amount of water needed changes with changes in inputs.

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1 Q. Let's go back to the exhibit on the other  
2 side of the board for a moment.

3 THE COURT: Just push "advance."

4 For the record, we'll be referring to what has  
5 been marked and admitted as Exhibit 37.

6 Q. (BY MR. BROWN) Could you just, to help me  
7 refer to the proper document, write "Exhibit 37"  
8 somewhere on that board.

9 (DISCUSSION HAD OFF THE RECORD)

10 Q. (BY MR. BROWN) Okay. Now, you indicated  
11 that you have done a sensitivity analysis.

12 Does that sensitivity analysis take in different  
13 kinds of crops?

14 A. Yes.

15 Q. Okay. Explain to me how your ET would vary,  
16 if it does, with different kinds of crops.

17 A. The --

18 Q. And it may be helpful to refer to -- I note  
19 on Exhibit 32 you've identified pasture, dry beans, and  
20 alfalfa.

21 A. Right. The evapotranspiration of a crop  
22 varies from crop to crop. It varies because, number  
23 one, certain crops just use more water. It's just the  
24 physiology of the crop itself.

25 Number two, crops have different rooting zones.

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1 For example, alfalfa roots down to, oh, about five feet  
2 below the surface. Dry beans, on the other hand, and  
3 pasture root down to approximately two feet maximum.  
4 So those crops that have the shallower rooting depth  
5 have less water available to them because the soil can  
6 hold less in two feet than it does in five feet.

7 Another difference between the crops is the  
8 seasonal use pattern. Alfalfa, for example, has a  
9 fairly uniform shape of use over the year. It starts  
10 out low, peaks gradually, and goes down toward the end  
11 of the season. Beans and other crops may have a slower  
12 start time, and then a sharper peak in the middle of  
13 the season around July, and then down sharper toward  
14 the end.

15 Q. In other words, you're referring to a peak  
16 ET; is that --

17 A. I'm referring to the seasonal pattern of  
18 evapotranspiration.

19 Q. When you refer to a "peak," you're referring  
20 to what?

21 A. I'm referring to the general peak water use  
22 which occurs usually in July, at the hottest point of  
23 the year.

24 Q. Explain to me how those different crop  
25 characteristics impact the diversion requirements.

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1 A. If a crop simply uses more water because of  
2 its physiology, that is obviously going to have an  
3 upward impact on the amount of water that you have to  
4 pump on. On the other hand, if the crop can root down  
5 farther to get at a reservoir, if you will, of more  
6 water, that will tend to have a downward pressure on  
7 the diversion requirement. The seasonal pattern may  
8 also have an effect because the peak may be higher for  
9 a particular crop even though the average may be  
10 lower.

11 Q. When you mentioned some crops before, you  
12 said that alfalfa was different than beans and pasture  
13 because of the depth of the roots in part.

14 A. In part, yes.

15 Q. In other words, the alfalfa has deeper  
16 roots?

17 A. That's correct.

18 Q. Okay. And then you mentioned other factors  
19 such as physiology. But my question pertains to those  
20 three specific crops.

21 Given what you've said, is it fair to say that  
22 alfalfa would use -- have a lower crop irrigation  
23 requirement, peak requirement than beans or pasture?

24 A. You can't make that general statement  
25 without knowing more about, in particular, the soil

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1 water-holding capacity. Because even though alfalfa  
2 roots down, it also -- roots down deeper, it also has a  
3 greater evapotranspiration rate. So there's two  
4 offsetting factors. You need to know more  
5 information.

6 Q. So you have to look at each type of crop to  
7 know which one would use more in a given situation?

8 A. Each type of crop and the soil type.

9 Q. Okay. Now, you, I note, on Exhibit 32, you  
10 list the three crops we've talked about.

11 A. Yes.

12 Q. Can you explain to me why you selected those  
13 three crops?

14 THE COURT: And what are -- I don't have  
15 that sheet; so what's, what are the crops?

16 MR. BROWN: Well, excuse me, Your Honor.  
17 Let me -- I believe I have --

18 A. Those three crops were selected for really  
19 two or three reasons. They're typical crops grown in  
20 southern Idaho. They're crops which are, to the best  
21 of my knowledge -- they're crops which have, to the  
22 best of my knowledge, been grown regularly historically  
23 in the Hagerman Valley and on these particular fields  
24 in question. And they're crops which have a fairly  
25 wide difference in characteristics, in

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1 evapotranspiration rates, and rooting depths in  
2 particular.

3 Q. (BY MR. BROWN) Now, let's work down  
4 Exhibit 32. You indicate that on the third line it's  
5 on-field diversion requirements.

6 A. Yes.

7 Q. What's an on-field diversion requirement?

8 A. That's the diversion requirement which is  
9 necessary at the field itself, not taking into account  
10 any losses in a ditch or other conveyance which may  
11 have been used to bring it to the field. It's just on  
12 the field.

13 Q. Okay. And it says "Hagerman CIR."

14 What is Hagerman CIR?

15 A. That refers to the Hagerman consumptive  
16 irrigation requirement, which is the data compiled by  
17 Allen and Brockway in their 1983 report. That data was  
18 used in this analysis. It's essentially the  
19 consumptive use of the crop.

20 Q. Is it a generally accepted and published  
21 report?

22 A. Yes.

23 Q. It says "80 percent probability level" next  
24 on Exhibit 32.

25 What does that refer to?

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1 THE COURT: Mr. Brown, can we back up on  
2 that for a moment?

3 This was published in a, what, a 1993 report?

4 A. I believe it's '83, Your Honor.

5 THE COURT: What was published again?

6 A. The crop evapotranspiration estimates for  
7 Hagerman.

8 THE COURT: 1983?

9 A. I believe it's '83.

10 THE COURT: Okay. Go ahead, Mr. Brown.

11 Q. (BY MR. BROWN) Now, I was asking what  
12 80 percent probability level refers to.

13 A. Right. The crop evapotranspiration is  
14 expressed in terms of monthly averages. It's one value  
15 in May. It's a little higher in June. It peaks in  
16 July or August, and then heads down toward the end of  
17 the season.

18 The 80 percent probability level -- well, let me  
19 go back. That's a monthly average. That will  
20 obviously change from year to year. One year may be a  
21 hot year. One year may be a cool year. So if you  
22 look, for example, at all of the July, all of the Julys  
23 that we've had and you look at what the crop  
24 evapotranspiration was in July, there will be an  
25 average. But then there will be high years; and then

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1 there will be low years. And there will be kind of a  
 2 scatter around, an average.  
 3 So the 80 percent probability level refers to  
 4 taking, adjusting the average monthly ET upward so that  
 5 80 percent of the values fall below that level. So, in  
 6 other words, in simple terms it's the crop  
 7 evapotranspiration which will be exceeded in two out of  
 8 ten years.

9 Q. In other words, in determining what the full  
 10 amount of water a person needs in order to not stress  
 11 their crops, you have to determine a maximum, I  
 12 presume, correct?

13 A. The --

14 Q. Explain --

15 A. For the crops never to be stressed.

16 Q. Okay. Now, explain to me the relationship  
 17 between average figures and higher figures again. In  
 18 other words --

19 A. Okay.

20 Q. -- you indicated Allen and Brockway has a  
 21 monthly average figure.

22 A. Yes.

23 Q. Okay. You didn't rely -- you didn't utilize  
 24 a pure monthly average figure in your analysis?

25 A. I do not utilize the monthly figure in the

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1 have seen it yet. So you can adjust it upward, say,  
 2 from 80 percent to 90 percent, or 95 or 99; but there  
 3 is no 100 percent.

4 Q. Okay. Is there -- you mentioned that you're  
 5 being conservative in utilizing an 80 percent  
 6 probability level.

7 A. Yes.

8 Q. And you mentioned that you would expect two  
 9 out of ten years a person would be using more water  
 10 than you analyzed given the inputs you utilized?

11 A. That's correct.

12 Q. Okay. So, in other words, you're not here  
 13 today trying to tell the court that, you know, all  
 14 imaginable circumstances of any time, this is what they  
 15 need. You've been more conservative.

16 A. That's correct. There is a 20 percent  
 17 chance in any given month, in any given year that the  
 18 water use requirement will exceed the water that you  
 19 have.

20 Q. Okay. Now, it says "no ditch losses" on  
 21 Exhibit 32.

22 A. Yes.

23 Q. What does that mean?

24 A. That means that either in the ditch which  
 25 brings the water to the field or in the on-farm ditches

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1 analysis; but the monthly figure is used as a base line  
 2 to adjust upward to arrive at the 80 percent level.

3 Q. And is that adjustment done according to  
 4 generally accepted scientific principles?

5 A. Yes, it is.

6 Q. Okay. Now, you adjusted upward to  
 7 80 percent.

8 Why haven't you adjusted it upwards to  
 9 100 percent so the people get what they would need all  
 10 the time?

11 A. Well, the 80 percent is a criteria that may  
 12 be somewhat arbitrary; but it was selected to, as kind  
 13 of a conservative value to make sure that the water use  
 14 is sufficient for a reasonable number of years; and  
 15 that the number of times which water use is  
 16 insufficient is not significant enough to warrant an  
 17 increase in rate.

18 Q. Okay. Assume I told you I want you to  
 19 analyze this with a peak use as opposed to some  
 20 probability of the peak use.

21 Is that possible?

22 A. Statistically, theoretically it's not  
 23 possible. Because the monthly ET follows a bell curve,  
 24 and theoretically there will always be an ET value  
 25 which will exceed the value you chose. We just may not

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1 themselves it was assumed that those ditches do not  
 2 seep water; they don't lose water. So this really  
 3 represents only the water necessary for the crop, not  
 4 to satisfy any ditch losses.

5 Q. Okay. So you're assuming it's getting to  
 6 the field down the ditch and going out of the ditch.

7 A. That's correct.

8 Q. Typically does it take water in addition to  
 9 the crop irrigation requirement to get the water to the  
 10 point where you begin the analysis?

11 A. Depending on the situation, usually ditches  
 12 will lose some water.

13 Q. Okay. The next line says "base field  
 14 data."

15 What's base field data?

16 A. That is the data which was input into the  
 17 model describing soil types, field sizes, acreages, set  
 18 times, and furrow flows which is used as a base line  
 19 for a comparison when the sensitivity analysis was  
 20 performed.

21 Q. Okay. Field data, when you say "field  
 22 data," where does this data come from?

23 A. The field data comes from really two  
 24 sources. One is utilizing the 1987 ASCS aerial photo  
 25 which shows the field boundaries, gives their estimates

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1 of acreages of the fields. And also talking to the  
 2 irrigators, talking to you, Mr. Brown, about how they  
 3 irrigate, where the fields are, where the ditches are.  
 4 Q. So this is based both on the ASCS  
 5 information and on the individual claimant's  
 6 information about their experience in irrigating the  
 7 fields.

8 A. That's correct.

9 Q. Are those kinds of inputs the kinds of  
 10 inputs which a scientist would regularly rely on to  
 11 give these opinions?

12 A. Yes. Typically in this field aerial photos  
 13 such as the ASCS and client information is relied  
 14 upon.

15 Q. Is it important to utilize client  
 16 information or experience in a particular field in  
 17 order to do the analysis?

18 A. In my opinion, it is. Because an aerial  
 19 photo can't tell you everything. It's important for  
 20 the analyst to know what's actually happening on the  
 21 field, whether it's field configuration, where the  
 22 ditches are, soil types.

23 Q. Okay. Let me ask you to go across the  
 24 spreadsheet under base field data and explain, first of  
 25 all, on the field what does that refer to?

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1 A. The field refers to the actual delineation  
 2 of the components of the farm. They are individual  
 3 fields which are irrigated from a particular ditch.

4 Q. Okay. And you got that information, you  
 5 said, from the farmers and from an ASCS photo.

6 A. That's correct, a 1987 photo.

7 Q. Okay. So you --

8 THE COURT: Let me clarify something,  
 9 Mr. Brown.

10 So on Exhibit 32, Doctor, there are -- this is an  
 11 analysis for Verl Bell, correct?

12 A. Correct.

13 THE COURT: And you've indicated field  
 14 and -- and then there's a delineation of 1 through 4;  
 15 and that means there were four fields on Mr. Bell's  
 16 property.

17 A. That's correct.

18 THE COURT: And you outlined factors for  
 19 each one of those fields?

20 A. Correct.

21 THE COURT: All right. Go ahead,  
 22 Mr. Brown.

23 Q. (BY MR. BROWN) Okay. And I want to come  
 24 back to -- you said it was a 1987 ASCS photo you  
 25 utilized --

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1 A. Yes.

2 Q. -- in addition to the other information?

3 The next column says "KEB, acres and soil type."

4 What's KEB and KOB?

5 A. Those are codes that the SCS -- it's now the  
 6 NRCS -- uses to identify different soil families in  
 7 a --

8 THE COURT: Could you spell those out  
 9 exactly what those mean for those of us not so  
 10 fortunate?

11 A. SCS is the Soil Conservation Service.

12 That's the old name; and it just recently changed to  
 13 the NRCS, which is the Natural Resources Conservation  
 14 Service.

15 Q. (BY MR. BROWN) And that's a federal  
 16 government agency?

17 A. Federal government agency.

18 Q. Okay. And that federal government agency  
 19 somehow comes up with soil types?

20 A. They actually go out to the field, take soil  
 21 samples in targeted areas, analyze them, and use that  
 22 as the basis for their report.

23 Q. Okay. And then they prepare a report that  
 24 tells you what fields have what kind of soils?

25 A. Well, they don't break it down by fields.

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1 They just break it down according to their estimations  
 2 of the boundaries of different soil types.

3 Q. You have to get from their boundaries to the  
 4 fields. Explain how you do that.

5 A. Correct. The soils are delineated on the  
 6 same photo as the fields are. So it's simply a matter  
 7 of comparing the two photos, identifying where the farm  
 8 is on the soils map, where the fields are on the soils  
 9 map, and estimating the amount of soil in each field.

10 Q. Okay. So you did that for each of the  
 11 fields?

12 A. That's correct.

13 Q. What does KEB or KOB mean?

14 A. Those are just the codes which the NRCS uses  
 15 to identify the soils.

16 Q. Okay. And when they identify soils, they --

17 A. They identify the properties of the soils,  
 18 the texture, the water-holding capacity, the depth of  
 19 the soil before you hit rock, and many other factors.  
 20 All of the possible, all the known characteristics of a  
 21 soil, they will report.

22 Q. Okay. The next column says "total acres."

23 THE COURT: Wait. I'm not there yet.

24 So -- what's the difference between KEB and --  
 25 what does KEB mean and KOB mean; and what's the

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1 difference?

2 A. I can't tell you exactly what they mean.

3 They're just one of the many cryptic codes that the  
4 NRCS uses to identify the soil.

5 Q. (BY MR. BROWN) It's a class of soil?

6 A. It's a -- yes, in a sense it's a class of  
7 soil. And it's -- for example, for KEB, they will  
8 report water-holding capacity, soil texture, drainage  
9 depth and all the other factors.

10 And then for KOB, they'll report a different set  
11 of factors because in their opinion it's a different  
12 type of soil. So --

13 Q. So that different soil has a different  
14 capacity to hold water in the rooting zone?

15 A. Yes.

16 Q. And other different characteristics which  
17 you utilize?

18 A. Yes.

19 Q. Okay. Now, maybe it would be good to  
20 summarize why you have to look at different, and  
21 utilize different soil classifications in your  
22 analysis.

23 A. Different soils, as you mentioned, have, can  
24 have very different water-holding capacities. And we  
25 may have two or more or several soils on the same farm,

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1 or maybe two or more on the same field. So it's  
2 important to delineate or identify the different  
3 characteristics of the soil so that the model can take  
4 those into account.

5 Q. Are these soil families or soil  
6 classifications the type of classifications which are  
7 reasonably and regularly relied on in the field in  
8 order to conduct an analysis?

9 A. Yes, they are.

10 THE COURT: Okay. Let me ask a question.  
11 So, Doctor, the two soil types that were  
12 identified by SCS or NRCS for Verl Bell's property is  
13 KEB and KOB?

14 A. That's correct.

15 THE COURT: Gotcha. Okay.

16 Q. (BY MR. BROWN) And then what do the numbers  
17 represent under -- in the columns underneath the KEB  
18 and KOB?

19 A. Those are the -- for each field, those are  
20 the acres of that soil type in that particular field.  
21 If I may just do an example, field No. 2 is made up of  
22 two soil types. The total acres of the field is  
23 1 acre. .4 of an acre is a KEB soil. .6 of an acre is  
24 a KOB soil.

25 Q. Okay.

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1 THE COURT: Excellent.

2 Q. (BY MR. BROWN) And then under the "total  
3 acres" column, it says "total, 12.8."

4 That's the total acres of all the fields that you  
5 understand to be irrigated?

6 A. Yes.

7 Q. Okay. The next column, then, is "slope."  
8 Explain what that is.

9 A. Slope refers to the average slope of the  
10 field from the high end to the low end. So it's how  
11 much does the field drop versus the distance from the  
12 high end to the low end.

13 Q. And that would be a factor, I presume, in  
14 determining how much the surface runoff is in relation  
15 to how much soaks into the soil?

16 A. That's correct. It's a factor in  
17 determining how long it takes the water to get from one  
18 end of the field to the other.

19 Q. Okay. And in coming up with figures for  
20 that, what data did you rely on, what information  
21 sources?

22 A. Chiefly we relied on field examinations of  
23 the sites, also using some published topography maps as  
24 a guide.

25 Q. And is that the kind of information that's

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1 regularly relied on in the field to make these kind of  
2 analyses?

3 A. Yes, it is.

4 Q. The next column -- tell me what the numbers  
5 mean under the "slope" first.

6 A. That slope is in feet per foot, which is,  
7 for example, the field drops .02 feet for every foot of  
8 horizontal distance. If you multiply that by a  
9 hundred, you get the percent slope. 2 percent slope.

10 Q. So, in other words, a hundred-foot field  
11 would be two feet lower on one end than the other?

12 A. Correct.

13 Q. "Run length." Explain what that means.

14 A. That is simply the distance from the head  
15 end of the field to the lower end.

16 Q. In other words, you measure across the  
17 field?

18 A. It's just the horizontal distance in the  
19 direction that the water travels.

20 Q. Okay. And what is your source of  
21 information concerning the run lengths for these  
22 particular fields?

23 A. Primarily, again, using the '87 aerial photo  
24 which has the fields on it, verifying that those are in  
25 fact the fields, and scaling the distances from that

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1 photo.

2 Q. Now, how is it that you're able to scale

3 distances from a photo?

4 Those, the ASCS publishes those photos at a  
5 known scale.

6 Q. In other words, it's a scaled photograph.

7 A. That's right. It's a scaled photograph.

8 Q. Okay. Determining the run lengths as you've  
9 described, is that a generally accepted practice in the  
10 field?

11 A. Yes.

12 Q. Okay. The next column is "furrow spc."  
13 Explain to me what furrow spc is.

14 A. That refers to the furrow spacing which is  
15 the distance between the individual furrows, the  
16 distance between the small ditches which run down the  
17 field.

18 Q. Okay. And it says "2.5" in that column for  
19 each.

20 What does that represent?

21 A. That refers to 2.5 feet, or 30 inches.

22 Q. In other words, there's a furrow every  
23 30 inches?

24 A. Correct.

25 Q. Okay. "Set times," what are those?

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1 A. The set times are the times -- or the length  
2 of time that the water is allowed to be diverted to the  
3 field. So, for example, the 24 refers to the fact that  
4 the irrigator turns the water into the field and lets  
5 it -- and keeps it there for 24 hours and then turns it  
6 off.

7 Q. Okay. How does set time relate to surface  
8 runoff?

9 A. The set time has an impact because the  
10 larger the set time, the longer the water is going to  
11 be on the field. And you may have more surface  
12 runoff.

13 You may need a longer set time because the field  
14 is longer, so it takes longer for the water to get from  
15 one end to the next. You may need a larger set time  
16 because the soil infiltrates a lot, so that you have to  
17 keep water on there for a long time to get that lower  
18 end watered.

19 Q. When you say soil, it "infiltrates," you  
20 mean it soaks into the ground?

21 A. It soaks in.

22 Q. In other words, it won't run across the  
23 field because it keeps soaking down instead.

24 A. Right.

25 Q. Okay. What else is that -- what else is

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1 part of the relationship between a set time and a  
2 runoff?

3 A. Well, the set time does affect surface

4 runoff because once the soil profile gets filled up,  
5 anything, any water going on the field is mostly going  
6 to surface runoff.

7 Q. Is it generally -- in your experience do  
8 farmers generally have surface runoff?

9 A. With gravity irrigation they generally do  
10 not because they necessarily want it, but because it's  
11 a physical constraint of that type of irrigation that  
12 you're going to have to have some of that just as a  
13 practical consideration.

14 Q. In other words, you can't appropriately put  
15 enough water on your field without having some surface  
16 runoff.

17 A. That's usually the case.

18 Q. Set times, the information on set times,  
19 what sources did you utilize?

20 A. Primarily the information from the  
21 irrigators based on their knowledge of historical  
22 practices and what set times were used for individual  
23 fields.

24 Q. Why did you utilize that information as  
25 opposed to some other set time figure?

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1 A. The historical information, in my opinion,  
2 is the best estimate of the set time based on the  
3 irrigator's knowledge of how long it takes in practical  
4 terms for the water to get across and sufficiently  
5 irrigate the field.

6 Q. Is that a generally accepted method of  
7 collecting and utilizing information on set times for  
8 people in the field?

9 A. Yes. Utilizing information from people in  
10 the field is generally accepted.

11 Q. Is it important to utilize information from  
12 the people in the field in order to come up with an  
13 analysis?

14 A. In my opinion it is, because over time  
15 irrigators get to know their fields very well. They  
16 get to know how much they infiltrate, how fast the  
17 water moves across the field, how long they have to  
18 leave that water on to get a sufficient water --  
19 sufficient amount of water on the field without  
20 overwatering.

21 And over time through the process of trial and  
22 error, it's my opinion that irrigators generally reach  
23 a situation that in practical terms on the field is  
24 achievable. So that's why I use actual historical  
25 numbers.

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1 Q. Okay. "Furrow flow" is the next column.  
 2 What is furrow flow?  
 3 A. That refers to the flow which is directed  
 4 into each individual furrow.  
 5 Q. Excuse me. Let me go back. The numbers  
 6 under set time, 24 and 12, tell me what those  
 7 represent. What are those numbers?  
 8 A. Those are -- they're in hours. So a 24-hour  
 9 set time means that the irrigator leaves the water on  
 10 the field, diverting it to the field for 24 hours.  
 11 Q. Okay. And the same with the 12. It means  
 12 12 hours.  
 13 A. That's correct.  
 14 Q. Okay. Furrow flow. Go ahead and -- I  
 15 didn't mean to interrupt you.  
 16 A. Furrow flow is the amount of flow directed  
 17 to each individual furrow either through a gated pipe  
 18 with openings at each furrow or siphon tubes. Those  
 19 are the two practices generally used today.  
 20 THE COURT: I'm not there on that one,  
 21 Mr. Brown.  
 22 Q. (BY MR. BROWN) Okay. Maybe you could draw  
 23 another diagram. And --  
 24 A. Maybe I should draw a diagram.  
 25 Q. I'm going to ask you to draw on the diagram

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1 as best as you are artistically able a picture of what  
 2 a siphon tube would look like and what a picture of  
 3 what a cutout would look like.  
 4 THE COURT: Maybe we should -- do we want  
 5 to go to the other advance --  
 6 MR. BROWN: Yeah. Why don't you do another  
 7 page.  
 8 Your Honor, can I ask that we take a five-minute  
 9 break?  
 10 THE COURT: Yeah. This is a good time to  
 11 take a break. Let's take a five-minute break.  
 12 (RECESS)  
 13 THE COURT: Back on the record. We're  
 14 currently -- Doctor Brockway is on the stand. We're  
 15 currently discussing Exhibit 32, and I professed my  
 16 ignorance as to furrow flow. That's where we are.  
 17 Q. (BY MR. BROWN) Let's explain to the court  
 18 what the last column entitled "furrow flow" addresses.  
 19 I believe you were going to draw a picture of a cutout  
 20 and --  
 21 A. I believe I was going to make an attempt.  
 22 If this is the field sloping down from the high end to  
 23 the low end, we have furrows in this field. Let me  
 24 take that field and turn it so that you're looking from  
 25 an aerial view.

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1 THE COURT: Draw big, Doctor.  
 2 A. Okay. This is an aerial view of the field.  
 3 This is a ditch that runs along the upper end of the  
 4 field.  
 5 THE COURT: Why don't you mark on there  
 6 "ditch."  
 7 A. Ditch. Sometimes called the head ditch  
 8 because it's up at the head end of the field.  
 9 The farmer corrugates his field by putting  
 10 furrows extending from the head end of the field to the  
 11 lower end. And these furrow, as we've discussed, are  
 12 usually spaced about 30 inches apart. And they're just  
 13 little ditches that go down the field.  
 14 Q. (BY MR. BROWN) How big is a furrow?  
 15 A. Oh, it's about six or eight inches wide.  
 16 Q. So it's a little ditch.  
 17 A. It's just a little ditch. It runs down --  
 18 Q. How deep? I mean I know there's a range.  
 19 A. Oh, there's a range. Maybe four inches  
 20 deep.  
 21 So those little ditches are running down the  
 22 field. The trick now is to get water into each one of  
 23 those individual ditches. One way is with a siphon  
 24 tube.  
 25 So going back to my first diagram, if this is the

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1 ditch at the head end with embankments, here's the  
 2 water in the ditch. A siphon tube is placed in the  
 3 ditch, over the embankment, and lined up with a furrow  
 4 so that water will flow by siphon action from the  
 5 ditch, over the embankment and go right into the  
 6 furrow. That's one method.  
 7 Another method -- I'll put that down below  
 8 this -- is to have a pipe at the head end of the  
 9 field. But the pipe has openings in it every 30 inches  
 10 or however wide the furrows are. And those gates,  
 11 which the openings are called, are opened; and the  
 12 water spurts out from the pipe into each individual  
 13 furrow. Those are the two chief methods used.  
 14 Q. And can you also draw for me a, as we  
 15 discussed, a ditch with a lateral cutout into furrows?  
 16 A. Yes. You may have a ditch -- I'll draw it  
 17 on this bottom area -- which instead of having the  
 18 highly directed methods of siphon tubes or gated pipe,  
 19 you just have cutouts in the ditch every so often which  
 20 are -- cutouts just mean openings in the ditch where  
 21 you can let the water come out of the ditch.  
 22 And the water comes out of the ditch, spreads out  
 23 like this, and just kind of makes it way into the  
 24 furrows for each cutout. That's a less precise method  
 25 of getting the water into the furrows, but it does

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1 work.

2 So getting back to the furrow flow, the furrow  
3 flow, for example, when I say on field 1 the furrow  
4 is four. That means four gallons per minute  
5 flowing into each individual furrow. Four gallons per  
6 minute is about a third to a half as much as would come  
7 out of a typical garden hose, just for reference.

8 THE COURT: So furrow flow here, as you've  
9 stated in Exhibit 32, is expressed in gallons per  
10 minute?

11 A. That's correct.

12 THE COURT: So each individual number there  
13 would be, for field 1, would be four gallons per  
14 minute. Field 2 and 3 would be three gallons per  
15 minute. And the fourth one would be five gallons per  
16 minute.

17 A. That's correct.

18 THE COURT: Gotcha. I understand furrow  
19 flow.

20 A. Now, the reason for the variability in  
21 furrow flow has to do with the fact that, as we  
22 discussed before, a long field may take a larger flow  
23 to get the water clear across the field. Because a lot  
24 of it seeps into the ground at the head end. Likewise,  
25 if the soil has a high seepage rate or infiltration

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1 rate, that will also dictate a higher furrow flow.

2 Q. (BY MR. BROWN) Describe to me, first of all,  
3 of the three methods you've indicated -- cutouts, gated  
4 pipe and siphon tubes -- what methods were commonly  
5 used at the turn of the century.

6 A. At the turn of the century gated pipe and  
7 siphon tubes didn't exist. They used cutouts because  
8 it was easy, it was cheap, and it did the job. It was  
9 a lot more work, and it wasn't pretty, but it did the  
10 job.

11 Q. Describe to me in terms of precision how  
12 close you're able to come in identifying individual  
13 gallon per minute furrow flows.

14 A. Yeah. The furrow flow as an input to the  
15 model is an uncertain parameter because we don't know  
16 exactly how much is spurting out of that pipe or  
17 exactly how much is going through that siphon tube.  
18 Those furrow flows are based on best engineering  
19 judgment about how long a field is, what type of soil  
20 it is, and historical or known practices that work.

21 In other words, we know that one gallon per  
22 minute won't get across the field. We know that nine  
23 ons a minute is too much. So we have a range, and  
24 we use engineering judgment to define the input to the  
25 model.

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1 Q. Okay. I note down below in your individual  
2 analysis for different crops you have a furrow flow  
3 column in each. Then under the furrow flow it says "3,  
4 5 and 7."

5 A. Right.

6 Q. What do the 3, 5 and 7 represent?

7 A. Those represent, again, gallons per minute.

8 We used the model to look at how the output changed if  
9 we changed this particular uncertain parameter, this  
10 particular uncertain input to the model called furrow  
11 flow. So we varied it from 3 to 5 to 7.

12 Q. Can you tell me with any degree of -- with a  
13 reasonable degree of scientific certainty what the  
14 furrow flow is in any of the particular fields which  
15 we're here to discuss today?

16 A. No, I can't.

17 Q. And why is that?

18 A. Because they have not been measured; and we  
19 don't know precisely how much is coming out of those  
20 gated pipes or through the siphon tubes. We have a  
21 good range.

22 Q. Why haven't you measured each furrow?

23 A. From a practical standpoint, it simply is  
24 not feasible in an engineering study to measure the  
25 flow in every furrow.

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1 Q. In other words, it would be too much work.

2 A. It would be too much work.

3 Q. I mean how many furrows do you have on a  
4 hundred acres of ground?

5 A. Well, without actually doing the numbers,  
6 you know, let's say 5,000.

7 Q. Okay. How long would it take you to measure  
8 an individual furrow?

9 A. It would probably take, to be comfortable  
10 with the measurement, doing it twice so that we have  
11 repeatability, 10 minutes.

12 THE COURT: Each furrow?

13 A. Each furrow.

14 THE COURT: And there's -- you estimate  
15 there's 5,000 furrows on a 100-acre field?

16 A. That's a very, very gross ballpark  
17 estimate.

18 Q. (BY MR. BROWN) In other words, the point  
19 you're making is you don't go measure every single  
20 furrow on every single field because it's just not  
21 practical or cost effective.

22 A. That's right. That's right.

23 Q. In terms of the cutout method, is there any  
24 reason that you -- describe to me the precision you can  
25 articulate with a reasonable degree of scientific

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1 certainty concerning the flows of cutout ditches.  
2 A. Those flows are even less certain than the  
3 flows from a gated pipe or a siphon tube. The flows  
4 from these cutouts are relatively haphazard. The water  
5 was just sort of turned loose. And we don't know how  
6 much was coming out of each cutout.

7 It was a trial-and-error procedure to determine  
8 how many boards the irrigator stuck in the checkout --  
9 stuck in the cutout. And we don't know how much of  
10 that water made its way to each individual furrow. So  
11 from that standpoint it's difficult to estimate the  
12 individual furrow flow.

13 Q. And, in other words, you're saying you can't  
14 be precise in terms of furrow flows per field without  
15 actually going and measure every single one.

16 A. That's correct.

17 Q. How do you compensate for the uncertainty or  
18 lack of precision in that regard?

19 A. Well, whenever you have inputs which are  
20 known to be imprecise or uncertain, an accepted  
21 scientific method is to use a sensitivity analysis in  
22 which you vary the uncertain input parameter within a  
23 reasonable range and assess the effect that that has on  
24 the output. That gives you a reasonable range on the  
25 output based on some uncertainty in an input.

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1 Q. So what you're saying is if you have  
2 uncertain inputs, you have to utilize a range in order  
3 to have an acceptable sensitivity analysis.

4 A. That's correct. You have to estimate what  
5 would be a reasonable uncertainty or an unknown,  
6 unknown variation in the input parameter. And that's a  
7 judgment call. But using that range, it will give you  
8 a range of the output.

9 Q. And is using from three to five, three to  
10 seven gallons per minute a reasonable range utilized in  
11 the field?

12 A. In my opinion, it is.

13 Q. Is it reasonable in the field to simply  
14 utilize three gallons per minute without utilizing the  
15 five and seven gallons per minute in order to get the  
16 range?

17 A. You asked me in the field?

18 Q. Let me back up.

19 A. Okay.

20 Q. In the profession, would it be a reasonable  
21 professional judgment that you came to if you simply  
22 utilized three gallons a minute knowing that there is  
23 variability and uncertainty with the inputs?

24 A. No. Whenever there's an input which is  
25 known to be uncertain, it's important to assess the

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1 impact of changing that input on the output. In other  
2 words, what if we're wrong and it's not three, it's  
3 actually five, what would the output be?

4 Q. Well, you would still get an output.

5 A. Yes, but what would -- how would the output  
6 change if we moved from three gallons a minute to five  
7 gallons a minute? That's important to do whenever you  
8 have an input parameter which is uncertain.

9 You can assess -- you can sort of compensate for  
10 that uncertainty by defining a range in the input  
11 parameter within which you are very confident that it  
12 falls, even though you may not know what the exact

13 number is. Then using that range, you can use the  
14 model to define the corresponding range of outputs so  
15 you can be certain, reasonably certain that the output,  
16 the so-called true number falls within that range.

17 Q. In other words, the conclusion or the output  
18 is only as good as -- or is only as precise as the  
19 variability of the inputs?

20 A. That's a fair statement.

21 Q. And if you use a more precise input than you  
22 have the information to support, you come up with a  
23 conclusion that is more narrow than is supportable.

24 A. You would come up with a conclusion which is  
25 just as arbitrary as your choice of an imprecise

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1 input.

2 Q. Now, you -- I want to move down Exhibit 32.  
3 The next line after the columns we've already discussed  
4 says "base case."

5 Tell me what a base case is.

6 A. For the analysis, we selected a certain set  
7 of parameters and a certain crop, in this case alfalfa,  
8 to use as a base line to which we could compare the  
9 other cases that we ran using the -- by varying the  
10 inputs.

11 Q. Okay. So you had to start with something in  
12 order to make a comparison.

13 A. Right. We had to start with something that  
14 was reasonable. Not necessarily our best estimate of  
15 actual historical water use, but something that was  
16 reasonable so that we could compare the rest of the  
17 cases to it.

18 Q. Okay. So the base case doesn't represent  
19 something that's more reasonable than the rest of the  
20 outputs you had.

21 A. Not necessarily.

22 Q. Okay. It says "base case, all alfalfa  
23 parameters as above."

24 In other words, is that just summarizing what  
25 you've already described?

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1 A. Yes.

2 Q. Okay. It says "base duty."

3 What's base duty?

4 A. From the base case as described, the model  
5 was used to compute a duty of water, or an amount of  
6 water necessary to irrigate the farm. And that number  
7 is, as you see it there, 0.51 cfs, or 1.99 inches per  
8 acre.

9 Q. Okay. This model you described you utilized  
10 is a model which is based on generally accepted  
11 scientific principles?

12 A. Yes, it is. It's based on the principles  
13 which we described previously, all of the water balance  
14 issues that go into the crop growth.

15 THE COURT: Can I ask a question,  
16 Mr. Brown?

17 Doctor, the base duty is for this particular  
18 field; or it's for a model type field?

19 A. No, it's for this actual farm. It's  
20 utilizing the parameters that you see in the base field  
21 data; and then the crop is all alfalfa. So that's what  
22 was utilized for a base line.

23 THE COURT: And let me go back. The furrow  
24 flow, you've got those numbers from where? You assumed  
25 those numbers?

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1 A. Those are assumed based on engineering  
2 judgment.

3 THE COURT: Okay.

4 Q. (BY MR. BROWN) In other words, you have to  
5 assume some number to establish a base line, correct?

6 A. Yes. You have to assume something.

7 Q. But you're not saying the assumption is  
8 better than the range.

9 A. That's correct.

10 Q. In other words, in fact what you've  
11 testified to is that the assumption cannot be better  
12 than the range because of the uncertainty of the  
13 inputs.

14 A. The assumption of a particular input value  
15 is uncertain, correct.

16 Q. What I'm trying to get you to clarify is  
17 whether or not the base case is a better, more accurate  
18 predictor of the water use than the analysis as a  
19 whole.

20 A. No, it isn't. It's simply used as a base  
21 line to compare the other cases to.

22 Q. In fact, if I understand you correctly,  
23 we said that you cannot simply use one value or a  
24 base and come up, within terms of reasonable  
25 professional judgment, a conclusion.

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1 A. Yeah. It's important to recognize whether  
2 or not your inputs are certain or uncertain. If you  
3 have significant uncertainty in the inputs, then simply  
4 picking one number for that input will give you a  
5 result which you cannot be reasonably confident of.  
6 And so it's better to look at a range of those inputs  
7 when you're uncertain about them.

8 Q. In other words, you can't simply look at the  
9 base case numbers listed on that line and say in your  
10 professional judgment this is what the duty, the  
11 irrigation field requirement is.

12 A. That's right.

13 Q. And I think what you've described is what is  
14 referred to as a result with false confidence.

15 A. That sounds right.

16 Q. And that is doing what you've described as  
17 coming up with one number is something that in your  
18 opinion is not within, not generally accepted by  
19 professionals in the field.

20 A. In cases like this where you have inputs  
21 which are significantly uncertain, it is generally  
22 accepted that you should do a sensitivity analysis and  
23 look at a range of input parameters.

24 Q. Okay.

25 A. Now, it is an engineering judgment as to

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1 when you do this. Some input parameters are reasonably  
2 certain. For example, the run length. That's very  
3 easily measured. So we would not -- it would not be  
4 generally accepted to do a sensitivity analysis on the  
5 run length. It's only on parameters like set time and  
6 furrow flow where that's justified.

7 Q. Okay. And crop type.

8 A. Crop type, yes.

9 Q. Okay.

10 A. Because crop type may and has varied over  
11 the years.

12 Q. Okay. I think we've clarified that pretty  
13 well. Going back to the base duty, there's a number  
14 of .51 listed.

15 A. Yes.

16 Q. What does that number represent?

17 A. That is the number, that is the flow rate in  
18 cubic feet per second estimated as the amount of water  
19 necessary to irrigate this field -- or these fields  
20 under the conditions described as the base case.

21 Q. It's the number in terms of what? What  
22 number in terms of what? .51 means what?

23 A. .51 is a rate of flow.

24 Q. And what is the rate? In cfs?

25 A. In cubic feet per second.

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1 Q. Okay. And then it says "equals 1.99."  
 2 Is that inches per acre which follows?  
 3 A. That's miners inches per acre.  
 4 Q. Okay. So assuming individual values for  
 5 all, each of your inputs, as you said you had to do to  
 6 utilize the model in terms of establishing a base line,  
 7 computed a base duty of water, 1.99 inches per acre.  
 8 A. That's correct.  
 9 Q. And, again, that 1.99 inches is not, in your  
 10 judgment, the best number; it's simply the place to  
 11 start the analysis.  
 12 A. That is my judgment.  
 13 Q. Okay. It then says "range of computed  
 14 diversion rates based on peak period consumptive use,  
 15 set times in hours, furrow flows in gpm, gallons per  
 16 minute."  
 17 A. Right.  
 18 Q. What does that refer to?  
 19 A. That describes briefly the sensitivity  
 20 analysis that was done. And it describes the results  
 21 in the bottom half of this exhibit.  
 22 It means that, it means that we computed -- we  
 23 used the model to compute a range of diversion rates by  
 24 letting the uncertain inputs take on different values.  
 25 MR. BROWN: Could the witness be handed

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1 Exhibits 33 through 36. Actually just through 35.  
 2 Q. (BY MR. BROWN) Now, each of these look  
 3 similar in format to Exhibit 32.  
 4 Can you describe to me, starting with 33,  
 5 generally what is 33?  
 6 A. 33 is a similar analysis performed for the  
 7 Kingston property.  
 8 Q. Okay. The Babington -- the next one says  
 9 "Babington," Exhibit 34.  
 10 Is that the same thing?  
 11 A. That is a similar analysis performed for the  
 12 Babington property.  
 13 Q. Okay. And 35 says "Simcoe."  
 14 A. It's a similar analysis for the Simcoe  
 15 property.  
 16 Q. In each one of these do the columns and  
 17 numbers and et cetera represent the same things as  
 18 you've already described?  
 19 A. Yes. Everything is the same as I've  
 20 described. And the values were determined in the same  
 21 manner.  
 22 Q. In other words, in each one of them you  
 23 obtained information concerning set times from the  
 24 people who have farmed the property.  
 25 A. That's correct.

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1 Q. Okay. And et cetera.  
 2 MR. BROWN: I would offer 32 through 35.  
 3 THE COURT: Mr. Brown, is Doctor Brockway  
 4 going to be venturing an opinion as to the cfs for each  
 5 one of these properties?  
 6 MR. BROWN: Yes. We will continue to  
 7 explain.  
 8 THE COURT: Exhibit 32 through 35 will be  
 9 admitted.  
 10 (Claimants Exhibits 32 thru 35 ADMITTED)  
 11 Q. (BY MR. BROWN) Now, I want to go down the  
 12 Exhibit 32, talk about the bottom half of it.  
 13 Explain to me the analysis, the sensitivity  
 14 analysis shown -- maybe you can do it, first, in terms  
 15 of alfalfa since that's the first entry; and explain  
 16 what the numbers are and how they're utilized.  
 17 A. Right. Just looking at the case of alfalfa,  
 18 then, the first block in the bottom half of the page,  
 19 for that crop we used the model to determine a required  
 20 diversion rate for furrow flows of three, five and  
 21 seven gallons per minute, and set times of 12 and 24  
 22 hours on each field. So we end up with six values that  
 23 represent the possible range of diversion rates given  
 24 the inputs -- or given the uncertainty of these two  
 25 inputs to the model.

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1 So, for example, for alfalfa, the required inches  
 2 per acre may vary from around 1 to over 4 depending on  
 3 the assumptions you make about the furrow flows and the  
 4 set times.  
 5 Q. Okay. Explain to me, first, under where it  
 6 says "alfalfa," it says "cfs" and then has a chart.  
 7 A. The cfs side means actual cubic feet per  
 8 second, the actual flow rate.  
 9 Q. Then to the right it says "inches per  
 10 acre."  
 11 Are those two charts the same?  
 12 A. They represent the same amount of water.  
 13 The second chart is simply the first chart expressed in  
 14 terms of number of inches per acre.  
 15 Q. And the other one is in terms of cfs per  
 16 acre per farm; is that correct?  
 17 A. Total cfs for the farm.  
 18 Q. Okay. Let me start, then, on the right-hand  
 19 side under the inches per acre.  
 20 THE COURT: Mr. Brown, make sure you speak  
 21 in the microphone, please.  
 22 Q. (BY MR. BROWN) Let me start on the  
 23 right-hand column where it says "inches per acre" under  
 24 the "alfalfa." First, it says furrow flow of three,  
 25 five and seven. I think you've explained that that

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1 represents gallons per minute, and I understand that.  
 2 On the other side of the vertical line it says  
 3 "set time, 12 and 24."  
 4 And, again, does that refer to a 12-hour set and  
 5 24 as you've described when you described the set time  
 6 column in the base analysis?

7 A. That's correct.

8 Q. So those are based on the actual  
 9 experience.

10 A. That's right.

11 Q. Okay. Now, when you run this sensitivity  
 12 analysis, does it -- when it generates the three  
 13 numbers listed, for instance, under the 24-hour column  
 14 on the inches per acre for alfalfa -- in other words,  
 15 I'm looking at the 1.95, 3.24 and 4.57.

16 A. Yes.

17 Q. So when it generates those numbers, does it  
 18 go through a complete analysis as it did with the base  
 19 analysis?

20 A. Yes, it does.

21 Q. Okay. So you didn't make further  
 22 assumptions that are -- you didn't forshorten the  
 23 analysis.

24 A. No. It's the same analysis procedure as  
 25 used for the base case.

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1 Q. In other words, you just haven't put all the  
 2 other parameters on there --

3 A. That's correct.

4 Q. -- because --

5 A. Because we're only letting the furrow flow  
 6 and the set time vary.

7 Q. Why is it you selected furrow flow and set  
 8 time in terms of variance? Why did you determine that  
 9 you should let furrow flow and set time vary?

10 A. Because in my opinion those are the most  
 11 uncertain inputs that go into this model. And it's  
 12 important not to just assume something that you don't  
 13 know can actually be achieved in the field.

14 In terms of making this model reliable, I have to  
 15 know as the modeler that the inputs that I choose are  
 16 going to be achievable in the field. And that is best  
 17 known by talking to the irrigators to find out what has  
 18 worked.

19 In other words, I could assume a six-hour set  
 20 time; and the model would spit me out a number. But  
 21 does that work in the field? And the only way to  
 22 verify that is to talk to the irrigators and find out  
 23 has actually worked in the past. You know, maybe  
 24 an irrigator will tell you, you know, it takes 24 hours  
 25 to get across this field; or, no, I can do that in 12.

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1 THE COURT: Let me clarify something,  
 2 Doctor Brockway.

3 So actually the set times are not unknown in that  
 4 you have talked to the claimants in all of these cases;  
 5 and you know that these are the set times that are in  
 6 fact used, correct?

7 ~~A. That's correct.~~

8 THE COURT: And the farmers have told you  
 9 that the two set times of 12 and 24 have in fact gotten  
 10 the water from one end of the field to the other end.

11 A. To the best of my knowledge, that's right.

12 THE COURT: All right. So those are not  
 13 completely unknown variables.

14 A. Right. We have an idea of what they should  
 15 be. But they could be different.

16 In other words, the farmer, maybe he really needs  
 17 a little bit longer; or maybe he could do with a little  
 18 shorter. But these are -- ~~the ones in the base case~~  
 19 ~~are the ones that he's actually using.~~

20 THE COURT: And in your opinion those set  
 21 times are reasonable.

22 A. Yes.

23 THE COURT: Mr. Brown, go ahead.

24 Q. (BY MR. BROWN) Let me follow up on some of  
 25 the questions asked by the court. They said -- in

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1 response to one of them, you said you know -- or you're  
 2 relying on the experiences of the farmer in terms of  
 3 telling you what the set times are in order to be able  
 4 to give an opinion that takes into account  
 5 achievability.

6 Why is achievability important, if it is?

7 A. Well, it kinda comes back to the reliability  
 8 of your model. If the purpose of the model is to, in  
 9 this case, estimate the diversion rate necessary to  
 10 irrigate this field --

11 Q. For a particular field.

12 A. For a particular field. If that's the  
 13 purpose, you want to make sure that the model is  
 14 actually predicting a value which is reasonably close  
 15 to what is achievable in the field. If it's not, as an  
 16 engineer, you have to say this model is not doing what  
 17 we want it to do. Because ultimately the goal of this  
 18 model, the goal of any model is to achieve practical  
 19 results which correspond with the real world.

20 Q. Why wouldn't it be practical results if it  
 21 wasn't achievable?

22 A. It wouldn't be.

23 Q. It wouldn't be. And why? I mean what would  
 24 be the deficiency in the model? I mean why wouldn't  
 25 you rely on the model if, I think you said, six-hour

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1 set times --

2 A. Oh.

3 Q. If you ran the number, ran this whole

4 analysis and put in six-hour set times, you said you

5 would get an output from the model.

6 A. You would get some number.

7 Q. But you said that number might not be

8 achievable. What I want you to explain to me is why.

9 A. Well, if a model is giving you results that

10 aren't achievable, there's really -- it could be two

11 things wrong. Number one, your model could be based on

12 faulty theory; or, number two, the inputs to your model

13 are wrong. Both of those things could cause the model

14 to give you results which are not achievable, which

15 don't correspond to the real world.

16 Well, in this case we can be reasonably certain

17 about the theory behind the model because all the

18 principles that go into the model are established,

19 generally accepted, have been tested, published and

20 criticized. So the components that -- the hydraulic

21 and hydrologic principles which make up the model are

22 sound in my opinion.

23 So really the only thing left is, well, if the

24 model says I can do it with an eight-hour set time, but

25 in the field that doesn't happen, that you can't do it,

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1 what's the problem? It could be uncertainties, local

2 variation in soil types which aren't accounted for by

3 the soil families published by the NRCS. It could be

4 I'm assuming the wrong furrow flows. It could be I'm

5 assuming the wrong set times.

6 So the inputs are really the -- have the

7 potential for being the culprits here which will give

8 you a result which isn't achievable.

9 Q. And when I said "why," my question was: Why

10 isn't it achievable? And I think you've done an

11 excellent job of explaining the purpose of the model is

12 to predict what is practical, what can be done.

13 When you say now -- let's stick with the example

14 you gave. If you use six-hour set times, you said it

15 may not be achievable.

16 A. Right.

17 Q. Can you tell me why a six-hour set time may

18 not be achievable?

19 A. Because the water --

20 THE COURT: Whoa.

21 (END OF TAPE)

22 Q. (BY MR. BROWN) The end of the question is:

23 Why wouldn't a six-hour set time be achievable? Or can

24 you tell me if it would be or wouldn't be?

25 A. I can't tell you if it would be or wouldn't

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1 be, but I can tell you why it might not be.

2 Q. Tell me why it might not be.

3 A. The physical characteristics of the field

4 may not let it happen. If you only leave the water on

5 for six hours, it may not give the water a chance to

6 get clear across the field. It may not irrigate the

7 lower end of the field at all. Or it may get to the

8 end, but it won't be continuous enough to completely

9 irrigate the lower end. That's the practical reason

10 why the short set time may not work.

11 Q. So, in other words, you have to rely on some

12 information that says this set time or this range of

13 set times I'm utilizing can be achieved in the real

14 world.

15 A. Right. It's important for me to rely on

16 information which I know to be achievable to use as

17 inputs to the model.

18 Q. And the best information you have is the

19 actual experience of the people who farmed the

20 property.

21 A. That's the best information I have.

22 Q. Okay. Let's now turn back to the inches per

23 acre under the alfalfa crop on the sensitivity

24 analysis. Under the first row and column of three

25 gallons per minute and 12-hour set times, it has a

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1 factor of .98 listed.

2 Tell me what .98 means or represents.

3 A. That means that the model predicted that the

4 water requirement for that set of conditions is

5 .98 miners inches per acre.

6 Q. Okay. So you're saying if these people

7 could get away with three which is in the range, but

8 not the best number --

9 A. Right.

10 Q. -- and if they could get away with 12-hour

11 set times, they would need .98, or about 1 inch per

12 acre.

13 A. That's what the model predicts.

14 Q. Okay. Now, let's jump over to the column

15 and row for seven gallons per minute per furrow and

16 24-hour sets.

17 If those two are achievable, do I correctly

18 understand that the number of 4.57 would mean or

19 represent that the model predicts that 4.57 inches per

20 acre is necessary under those circumstances?

21 A. Under those circumstances, that's what the

22 model predicts.

23 Q. Okay. So I don't need to -- these have been

24 admitted into evidence; so we don't need to repeat

25 every number.

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1 But just to summarize, the model then predicts  
2 that for alfalfa, given the limits of your inputs, they  
3 need between, about an inch and four and a half inches  
4 of water per acre for their crops.

5 A. That's correct.

6 Q. Going down to dry beans, let's look at the  
7 inches-per-acre analysis for dry beans.

8 THE COURT: Mr. Brown, let me back up to  
9 cubic feet per second.

10 Is that an instantaneous flow rate, or is that  
11 a -- would that be expressed how?

12 MR. BROWN: In other words, if you're  
13 looking at under seven gallons per minute and 24 hours  
14 at 1.17?

15 THE COURT: Right.

16 Q. (BY MR. BROWN) Can you tell me what the 1.17  
17 number represents?

18 A. That is a peak instantaneous flow rate.

19 Q. Or an 80 percent probability?

20 A. For, yeah, for the 80 percent probability.

21 Q. So, in other words, what you're saying is  
22 the 1.17 cfs is what would be required for the alfalfa  
23 given the seven-gallon-per-minute, 24-hour scenario to  
24 water the 12.8 acres.

25 A. That's correct.

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1 MR. BROWN: Does that clarify, Your Honor?

2 THE COURT: No. Rehash that again.

3 Q. (BY MR. BROWN) Okay. I understand -- tell  
4 me if I don't understand -- the 1.17 represents the  
5 cfs, the total cfs that must be put on the field given  
6 seven hour -- or seven-gallon-per-minute furrows,  
7 24-hour sets in order to supply the crop irrigation  
8 requirements for the 12.8 acres indicated above as the  
9 total acres.

10 A. That's correct. And if I could just expound  
11 on that. Your Honor, it's the peak rate at the  
12 80 percent probability level. In other words, they  
13 won't need 1.17 cfs for the whole season. They may  
14 need it for a week in July or August. But it's the  
15 peak rate.

16 Q. And if they don't have that peak rate for  
17 the week, though, they --

18 A. The crop will become stressed.

19 Q. Okay.

20 THE COURT: And, for example, under a  
21 12-hour set time under alfalfa for the furrow flow of  
22 an, that would be .58.

23 That's the flow you'd be required for a 12-hour  
24 period, correct?

25 MR. BROWN: Can I clarify that?

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1 THE COURT: Go. I mean clarify.

2 MR. BROWN: Okay.

3 Q. (BY MR. BROWN) That doesn't tell you that  
4 you would only need water for 12 hours, correct?

5 A. No.

6 Q. That's based on a continuous watering  
7 system --

8 A. Yes.

9 Q. -- over the whole time you're watering your  
10 crops.

11 A. Right.

12 Q. In other words --

13 A. In other words, you may, you may -- it's  
14 unlikely you'd have your whole farm not being watered  
15 at any point.

16 Q. Let me ask you to refer --

17 THE COURT: I understand now. But if you  
18 want to go ahead and clarify, go ahead.

19 Q. (BY MR. BROWN) Let me ask you to refer to  
20 the picture you drew behind you where you've indicated  
21 the aerial view of the ditches and furrows.

22 A. Yes.

23 Q. When you say a "12-hour set," can you tell  
24 me -- can you explain how sets work as you irrigate a  
25 field?

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1 A. Yeah. A set would just be, for example in a  
2 cutout method, opening the cutouts, letting water flow  
3 to the field for a total period of 12 hours. Maybe you  
4 start at 8:00 in the morning and you come back at 8:00  
5 at night and shut it off. And then in the middle of  
6 the night you have your son go out and turn the water  
7 on another field and leave it on for 12 hours, and then  
8 turn it off. That's what a 12-hour set would mean.

9 Q. Now, how many furrows is involved in a set?

10 A. How many furrows? For each individual  
11 field?

12 Q. In other words; what I want you to clarify  
13 is the manner in which people irrigate fields, in other  
14 words, changing sets across a field.

15 Can you explain how that works? You do one set,  
16 and then you move your water.

17 A. It depends a lot on the field.

18 Q. Right.

19 A. If the field is the right size, you can turn  
20 the water to the whole field at once.

21 Q. Okay. But typically you don't have enough  
22 water to turn on all the fields you have, correct? So  
23 just describe to me generally how people irrigate --

24 A. Okay.

25 Q. -- in sets across a field.

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1 A. Right. So you might, in other words, you  
 2 might have a set which involves four cutouts. You open  
 3 those cutouts, run that set, shut that off, and move  
 4 down to the next set and run that set. It's pretty  
 5 simple, but that's generally how it works.  
 6 THE COURT: Right. So, in other words,  
 7 generally an irrigator is going to irrigate seven days  
 8 a week, 24 hours a day moving the sets across the  
 9 field; correct?  
 10 A. Generally.  
 11 THE COURT: All right. So no matter  
 12 what -- the rate of flow you're going to be required  
 13 down that ditch for a particular furrow flow under your  
 14 assumptions is going to change. For example, if your  
 15 furrow flow is seven, the rate you're going to need  
 16 down that ditch seven days a week, 24 hours a day, if  
 17 you're going to be moving it along, is .58?  
 18 A. Yes. That's the total rate to the farm.  
 19 THE COURT: I understand.  
 20 Q. (BY MR. BROWN) Let me back up a minute,  
 21 because I want you to explain something in the model.  
 22 And that is you do your first set and -- you know, say  
 23 you have 10 sets across the field. Assume 10 sets  
 24 across the field.  
 25 Once you do your first set, does the model take

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1 into account the fact that at some point in time you  
 2 got to get back to that first set and water it again?  
 3 A. Indirectly, it does. No, the model doesn't  
 4 really get into the nitty-gritty and how, which set is  
 5 where and when you come back to it.  
 6 It just looks at: For 12 hours in a particular  
 7 set, is that sufficient to fill up the soil  
 8 water-holding capacity clear to the end of the field?  
 9 That's the main thing that it looks at.  
 10 Q. Okay. And what determines how soon you have  
 11 to come back and irrigate that ground again?  
 12 A. That's determined by how fast the crop draws  
 13 the water from the soil root zone. If the crop is  
 14 drawing it very slowly, you may not need to come back  
 15 for a fairly long period of time. During the peak  
 16 time, though, the crop is drawing the water out rapidly  
 17 from the soil zone; and you have to come back and  
 18 refill that soil profile often.  
 19 Q. Okay. So, in other words, the time in which  
 20 you have to come back and refill is determined by, I  
 21 think it was 50 percent, you said. You got to get back  
 22 and get more water on it before you're below the  
 23 50 percent water-holding capacity of the soil in the  
 24 root zone.  
 25 A. That's the criteria, yes.

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1 Q. Okay. Let's go on then and look at dry  
 2 beans. And I think it's -- for the sake of time and  
 3 for the sake of simplifying the explanation, let's just  
 4 look at inches per acre. We've already described that  
 5 the first column talks about the total predicted output  
 6 for the given parameters in the box for the entire  
 7 farm, or the total acres listed up in the base line.  
 8 Okay.  
 9 Let's go down the column for inches per acre in  
 10 dry beans. It ranges from 2.73 inches per acre to  
 11 12.76 inches per acre.  
 12 A. That's correct.  
 13 Q. Okay. Can you explain to me why the bean  
 14 numbers are different than the alfalfa numbers?  
 15 A. In the simplest terms, it's mostly due to  
 16 the fact that beans have a rooting zone which is about  
 17 a third of the depth, a little more than a third of the  
 18 depth that alfalfa does. So in the simplest terms,  
 19 they don't have as big of a reservoir of water in the  
 20 soil to draw from. So they just, they need more water  
 21 to replenish it.  
 22 Q. Okay. And then, again, under the inches per  
 23 acre, a range for pasture, it varies from 1.9 inches to  
 24 8.93 inches per acre.  
 25 A. Yes.

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1 Q. Is that for the same reasons you've  
 2 described?  
 3 A. The difference is mainly due to the root  
 4 zone. Pasture has a very similar rooting zone to dry  
 5 beans. So the difference between those two would be  
 6 due to, mainly due to the difference in the crop  
 7 evapotranspiration itself.  
 8 Q. Okay. So to summarize for Verl Bell as the  
 9 Edna Rea's property as shown on Exhibit 32, you've got  
 10 ranges for the various crops of .98 inches to 12.76  
 11 inches required at the field --  
 12 A. Correct.  
 13 Q. -- in order to adequately irrigate without  
 14 stressing the crops.  
 15 Is that fair?  
 16 A. Under the assumptions that were made in the  
 17 sensitivity analysis, that's correct.  
 18 Q. Okay.  
 19 MR. BROWN: May I have Exhibit 15?  
 20 Q. (BY MR. BROWN) I'm showing you what has been  
 21 marked as Exhibit 15.  
 22 Could you take a moment to read that letter?  
 23 MR. BROWN: Your Honor, if we're going to  
 24 break for lunch, now would probably be the time because  
 25 we're going to change our area of testimony for a

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1 little bit.  
 2 THE COURT: How much longer do you think  
 3 you have, Mr. Brown?  
 4 MR. BROWN: I probably have at least  
 5 another hour, around an hour --  
 6 THE COURT: Okay. Let's -- what?  
 7 MR. BROWN: -- with Doctor Brockway.  
 8 THE COURT: All right.  
 9 MR. BROWN: And I intend to call Mr. Bell  
 10 and the other, Babington (inaudible) --  
 11 THE COURT: Okay. Let's reconvene at --  
 12 let's reconvene at 1:15, Mr. Brown. Okay?  
 13 MR. BROWN: That would be fine.  
 14 THE COURT: All right. We're off the  
 15 record.  
 16 (RECESS)  
 17 THE COURT: We're back on the record in the  
 18 3 rights. It's after lunch. Doctor Brockway is on the  
 19 stand.  
 20 Doctor Brockway, you're reminded you're still  
 21 under oath.  
 22 THE WITNESS: Yes, sir.  
 23 THE COURT: Mr. Brown.  
 24 Q. (BY MR. BROWN) Yes. Mr. Brockway, I had  
 25 asked you to read Exhibit 15.

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1 Have you had a chance to do that?  
 2 A. I have not finished it. Okay. I'm  
 3 finished.  
 4 Q. Okay. The letter, first of all, is from  
 5 Steelhead Engineering.  
 6 Are you familiar with that, with who they are?  
 7 A. I was not familiar with them until this  
 8 case.  
 9 Q. Okay. Do you know who Jeffrey Martin is?  
 10 A. Yes.  
 11 Q. And what does "PE" stand for?  
 12 A. It stands for professional engineer.  
 13 Q. Is that a certification of some sort?  
 14 A. It's a certification issued by the State of  
 15 Idaho.  
 16 Q. And certifies what?  
 17 A. Certifies that you have the competency to  
 18 perform professional engineering services in the state  
 19 as evidenced by your ability to complete the PE exam.  
 20 Q. Okay. The letter indicates that a  
 21 polysonic -- or polyflow device was used to make  
 22 measurements of the Bell's -- Mr. Bell's system.  
 23 A. Right.  
 24 Q. Is that type -- are you familiar with that  
 25 type of measuring?

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1 A. Yes, I am.  
 2 Q. Is that a reliable measuring procedure?  
 3 A. Yes, it is. It's the latest  
 4 state-of-the-art in-flow measurement. And if it's --  
 5 if they are set up properly and the flow measuring  
 6 conditions are good, they are very accurate meters.  
 7 Q. Okay. Is the use of that meter something  
 8 you would expect a professional certified engineer to  
 9 be able to accomplish?  
 10 A. Yes, if he's a professional engineer in the  
 11 field of hydraulics and hydrology.  
 12 Q. Okay.  
 13 MR. BROWN: I would offer 15.  
 14 THE COURT: Can I see that exhibit for a  
 15 moment? Mr. Brown, what, on what basis do you admit  
 16 this letter?  
 17 MR. BROWN: It's being offered to show the  
 18 diversion, the actual diversion measurements on  
 19 Mr. Bell's -- or I should say Rea's system. I think  
 20 the foundation for that was laid yesterday.  
 21 THE COURT: Mr. Brown, I'm certainly not  
 22 here to object to your evidence; but I'm here to see  
 23 that complete hearsay is not admitted before the  
 24 court.  
 25 How is this not hearsay?

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1 MR. BROWN: Well, two ways. First of all,  
 2 it gives the measurements as claimed or close to as  
 3 claimed. I think we're going to be getting into some  
 4 opinions by Doctor Brockway. And on that basis, that's  
 5 information he is entitled to rely on.  
 6 Secondly, I believe that it is -- that a farmer  
 7 can testify as to how much -- or the extent of use of  
 8 their property. In fact, under the law they're  
 9 presumed to know that. And that should come in --  
 10 THE COURT: What hearsay exception -- get  
 11 your book. What hearsay exception are you relying  
 12 upon?  
 13 MR. BROWN: You have -- I'm not telling you  
 14 a hearsay exception. I'm telling you that a farmer is  
 15 entitled and presumed, in fact, under Idaho law to know  
 16 the particulars of his ground and property. As such,  
 17 it's proper, was proper for Mr. Rea -- or Mr. Bell to  
 18 testify as to the quantities used. And it's  
 19 appropriate to introduce this as part of the basis for  
 20 his knowing.  
 21 THE COURT: All right.  
 22 MR. BROWN: In other words, it need not  
 23 come in for the truth itself, but is the basis for  
 24 Mr. Rea's knowledge of knowing how much water he's been  
 25 using.

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1 THE COURT: Do you happen to have that cite  
2 or the legal reference on your first proposition that a  
3 farmer is presumed to know all things about his farming  
4 practices?

5 MR. BROWN: I do not have it with me,  
6 Your Honor. I could look up the case and provide it to  
7 the court. It doesn't say "all his farming  
8 practices." It says the particulars of his ground and  
9 his property, the size, the extent of use, et cetera.

10 THE COURT: Okay. First of all, as to  
11 Doctor Brockway, there's no showing that he has in fact  
12 relied upon this. And since he has not testified that  
13 he has in fact relied upon this -- in fact, he's  
14 testified, I believe, that he hasn't seen this until  
15 presumably today. I'm not going to allow it in on that  
16 basis.

17 Secondly, I'm going to withhold my ruling on the  
18 second basis until you provide me the law in that  
19 respect.

20 MR. BROWN: Your Honor, I'd also -- I  
21 offered a third basis; and that is it is not being  
22 within the hearsay rule because it is offered as the  
23 basis of knowledge for the testimony of Mr. Bell.  
24 Knowledge need not be -- that does not fall under the  
25 hearsay rules at all.

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1 THE COURT: Let's go off the record for a  
2 moment.

3 (DISCUSSION HAD OFF THE RECORD)

4 THE COURT: Back on the record. To  
5 clarify, once again, Exhibit 15 has been offered and is  
6 not yet admitted. It's not going to be admitted  
7 through the basis of Doctor Brockway's testimony  
8 because there's no indication that Doctor Brockway  
9 relied upon this information.

10 I'll withhold ruling on the other basis of your  
11 offer, Mr. Brown.

12 Q. (BY MR. BROWN) Doctor Brockway, I'm going to  
13 ask you about opinions as to whether the amount of  
14 water claimed by the Bells, the Reas is a reasonable  
15 amount of water for irrigation.

16 Does the Exhibit 15 in any way assist you in  
17 coming to your conclusions?

18 A. It would assist me in determining the actual  
19 amount of water which was being diverted at the time of  
20 the measurement.

21 Q. And does knowing that in any way corroborate  
22 any opinion you intend to give?

23 A. Yes. That combined with the knowledge that  
24 according to the irrigator that was the amount of water  
25 typically run through those pipes, not just at that

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1 time, that would help me for an opinion.

2 MR. BROWN: Offer 15.

3 THE COURT: An expert witness is entitled  
4 to rely upon any reasonable hearsay which is not  
5 otherwise admitted. The record reflects that this  
6 witness has discussed water usage with Mr. Bell on this  
7 particular property and has consulted Mr. Bell. And in  
8 turn, Mr. Bell has consulted Jeffery L. Martin,  
9 engineer that is referred to in Exhibit 15.

10 That is in fact hearsay upon hearsay; but since  
11 the witness has relied upon the information relayed to  
12 him by Mr. Bell, in turn verified by Mr. Martin,  
13 Exhibit 15 will be admitted solely to illustrate and  
14 explain Doctor Brockway's opinion. And that is the  
15 basis upon which it is now admitted.

16 (Claimants Exhibit 15 ADMITTED)

17 Q. (BY MR. BROWN) Doctor Brockway, I want to  
18 now -- I think we've gone through Exhibit 32; and you  
19 explained how it gives the range of figures, especially  
20 in terms of inches per acre for the crop irrigation  
21 requirement.

22 Now, those numbers and your opinions about those  
23 numbers do not include, as I understand it, several  
24 other aspects that you've identified as being factors  
25 to be considered in determining how much water a farmer

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1 needs. The first factor you identified was conveyance  
2 loss.

3 Can you explain to me -- or clarify for me the  
4 relationship of conveyance loss to the opinions you are  
5 going to give based on the range of figures you have  
6 presented in Exhibits 32 through 35?

7 A. The range of figures in these exhibits do  
8 not include losses due to the conveyance of water  
9 through earthen channels. Typically an earthen channel  
10 will lose some water in the process of delivering the  
11 water from wherever it's diverted down to the farmer's  
12 field.

13 Q. So that includes the ditches not only  
14 bringing it to the property, but ditches utilized to  
15 distribute it into the various fields.

16 A. Yes. Then the farmer will have his own  
17 private, so to speak, distribution system which may  
18 include earthen channels. Those earthen channels also  
19 typically lose some water. So to get the on-farm  
20 irrigation requirement may require more than these  
21 numbers if the ditches in fact do have conveyance  
22 loss.

23 Q. In other words, I'm going to ask you to give  
24 me opinions in a minute about what the crop irrigation  
25 requirements are for these particular places.

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1 Is what you're telling me that the opinion you  
2 would give me would not include an opinion about how  
3 much additional water is necessary in order to convey  
4 figure you give to the property?

5 A. That's correct.

6 Q. Or to the field.

7 A. That's correct.

8 Q. Okay. The next aspect I want to ask about,  
9 do your crop irrigation requirement figures take into  
10 account the water which is necessary to start up a  
11 system, charge a pump system, get water initially  
12 distributed and, as I think you've said, fill up the  
13 root zone for the crop?

14 A. Yes. These numbers do not include those  
15 types of relatively incidental requirements -- the  
16 requirements necessary to fill up a pipe if it's a pipe  
17 distribution system, the requirements necessary to  
18 completely fill the soil profile from near zero at the  
19 start of the season up to 100 percent, also other  
20 considerations.

21 For example, with a crop of alfalfa, the  
22 irrigator may need to shut off the water for two weeks  
23 on average to harvest the crop. And during that two  
24 weeks the soil water in the root zone may deplete down  
25 below the 50 percent. It may deplete almost to zero.

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1 Bell right. What has been identified as claim 03A by  
2 them is for the amount of 1.6 cfs, or 80 inches of  
3 water. And that is based on a claim of 13 irrigated  
4 acres.

5 Can you give me an opinion as to whether or not  
6 the utilization of 1.6 cfs on those 13 acres or, in  
7 other words, 6.15 inches per acre is a reasonable  
8 irrigation diversion requirement for this farm in your  
9 opinion?

10 A. Based on the results of the model, I would  
11 say that that number is a reasonable number.

12 Q. Do you have an opinion as to whether that is  
13 in excess of a reasonable number?

14 A. Based on the model results, it does not  
15 appear to be in excess of a reasonable number.

16 Q. Okay. Now let's talk about Exhibit 33.

17 THE COURT: Let me back up, Mr. Brown.

18 Doctor Brockway, the claim, the claim was for  
19 1.6, correct?

20 A. Yes.

21 THE COURT: Doctor Brockway, you've stated  
22 1.6 is in fact a reasonable number.

23 How in fact did you conclude that? Did you  
24 conclude that from evaluating the range that you  
25 originally testified to in Exhibit 32?

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1 So when he starts the second crop, he needs to charge  
2 the system, so to speak, to refill the soil zone from  
3 zero to 100, which requires more water than filling up  
4 from 50 to 100.

5 Q. So, in other words, the opinions you have  
6 about what the crop irrigation requirement is are for  
7 numbers which would require additional water in order  
8 to account for the practices you've described, such as  
9 getting the system going again after you've shut down  
10 for a couple weeks to harvest your alfalfa.

11 A. Yes. These numbers do not take into account  
12 those additional factors.

13 Q. My question is: Would it take additional  
14 water to -- is it likely to take additional water to  
15 accomplish those?

16 A. Yes, it would likely take additional water  
17 to accomplish that.

18 Q. Okay. Let me represent to you that Edna Rea  
19 and through her son Verl Bell have claimed 1.6 cfs,  
20 or --

21 THE COURT: Mr. Brown, for the sake of my  
22 purposes, when you say "Edna Rea" or "Verl Bell,"  
23 clarify it also by a water right number for the record  
24 also.

25 Q. (BY MR. BROWN) Let me start with the Rea or

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1 A. That's correct. Looking at the three  
2 different crops, the range of likely furrow flows and  
3 the range of likely set times, that number does not  
4 fall outside of what would be considered reasonable.

5 THE COURT: For the record, once again, the  
6 range that you referred to in Exhibit 32 was .98 cfs  
7 for the very lowest amount given the set times to  
8 12.76, correct?

9 A. That would be .98 inches per acre and 12.76  
10 inches per acre.

11 THE COURT: Correct.

12 A. The corresponding cfs rates would be .25 cfs  
13 and 3.27 cfs.

14 THE COURT: 3.27?

15 A. Correct.

16 THE COURT: So given your range, 1.6 cfs  
17 falls basically towards the more conservative rather  
18 than the more liberal end of the range.

19 A. Yes, Your Honor. What I'm looking for is we  
20 have this range. It's a very wide range. Given the  
21 number, how does it fit within that range? If it fits  
22 toward the upper end, I would say that it's more likely  
23 that it's an unreasonable number. If it's right toward  
24 the middle, I can say with reasonable confidence that  
25 it's a good number.

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1 THE COURT: And in fact 1.6 almost falls  
2 squarely in the middle of the range that you originally  
3 testified to.

4 A. That's right. It's pretty close to that.

5 THE COURT: For the record, Mr. Brown,  
6 while the witness is giving his opinion testimony, I  
7 will say for the record that I have reviewed the  
8 factors outlined by the Court of Appeals in STATE v.  
9 PARKINSON, have evaluated those criteria. In light of  
10 Doctor Brockway's foundation, I do find that  
11 Mr. Brockway is suited and, in fact, legally capable of  
12 giving an ultimate opinion as to the reasonable amount  
13 of water in these cases.

14 MR. BROWN: In other words, the court is  
15 finding that essentially the scientific basis for what  
16 he is doing is both relevant and reliable for each  
17 case.

18 THE COURT: Both the scientific basis,  
19 Mr. Brown, and the technical basis of Mr. Brockway's  
20 testimony. I find that there are -- this is in fact  
21 scientific testimony. It is also technical testimony.

22 I have yet to really understand the difference  
23 between those two types of evidence. Certainly it's  
24 both of those.

25 I do find that given that this is both scientific

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1 and technical testimony that must meet the criteria of  
2 STATE v. PARKINSON, I do find that a proper foundation  
3 has been presented evaluating all the criteria outlined  
4 under STATE v. PARKINSON.

5 MR. BROWN: Thank you, Your Honor. At this  
6 point I would ask that you look now at Exhibit 33, the  
7 Kingston property excess flow analysis.

8 Q. (BY MR. BROWN) Mr. Brockway, Exhibit 33, I  
9 think you've already testified, is essentially the same  
10 technique that you've utilized to analyze the Bell or  
11 the Rea property as shown in Exhibit 32.

12 A. That's correct.

13 Q. Can you tell me where your inputs for the  
14 uncertain factors you've described earlier -- the set  
15 times, furrow times, furrow flows, et cetera -- came  
16 from in this case?

17 A. As in the other cases -- I'm sorry,  
18 Mr. Brown. You're talking about the base case?

19 Q. The sources of your information for the set  
20 times and furrow flows and other uncertain parameters.

21 A. Like the other cases, the set times, the  
22 range of set times came from discussions with you and  
23 the irrigators as to what was and is historically done  
24 on the property. The furrow flow, as in the other  
25 cases, comes from engineering judgments as to --

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1 Q. Okay. I -- so we don't waste time, let me  
2 just ask you: With respect to each of these in which  
3 you're going to give an opinion, those inputs came from  
4 the same source. In other words, for each one, you've  
5 obtained the information on the actual irrigation  
6 experiences for the farm?

7 A. That's correct.

8 Q. Okay. I won't ask you that again. Now, on  
9 Exhibit 33, it's a little bit different than 32 in that  
10 you didn't set out the entire input scenario for the  
11 base case. You instead summarized it.

12 Is that accurate?

13 A. That's accurate.

14 Q. But you went through the same analysis that  
15 you've described?

16 A. That's right.

17 Q. And assigned slopes and soil types in each  
18 of those other parameters listed on the top of  
19 Exhibit 32.

20 A. Right.

21 Q. Okay. And the range you came up with,  
22 again, ranges on the low with three-hour furrows and  
23 12-hour sets for alfalfa to a number of .53 inches per  
24 acre up to about .7 -- or excuse me, 7.01 for  
25 seven-gallon, 24-hour sets with beans, correct?

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1 A. That's right.

2 Q. Let me represent to you that the claimants  
3 between the two rights, the first right, the B right  
4 which IDWR identifies as being in Kingston's name, is a  
5 claim for 7.16 cfs on 129 acres; and that he  
6 additionally claims water under the J split for an  
7 additional 10 acres. And I will further represent to  
8 you that the total amount of water claimed for those  
9 two rights for the 129 to 139 acres is for 404 inches  
10 or 8.08 cfs.

11 I have divided the quantity of water by the  
12 number of acres for three scenarios. The high end in  
13 inches per acres is 3.13 inches per acre, and the low  
14 end is 2.9 inches per acre.

15 Can you give me an opinion, based on your  
16 analysis, of whether 3.13 inches per acre is a  
17 reasonable irrigation diversion requirement based on  
18 your analysis with the on-field requirements as  
19 represented in Exhibit 33?

20 A. Based on the model results, the analysis  
21 indicates that that number is, would likely be a  
22 reasonable result, a reasonable diversion rate.

23 Q. Let me represent to you that the person who  
24 farmed it from 1987 to -- excuse me, from '77 to '87,  
25 Mr. McFaddan, has represented that he believes he was

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1 using around 3 inches per acre.

2 Does that lend any confidence to your opinion  
3 that 3.13 inches per acre is reasonable?

4 Having the additional information that  
5 somebody on the farm who knows the system, and I  
6 believe Mr. McFadden does, tells me that he was using  
7 3 inches per acre does provide some confirmation that  
8 that is a reasonable number.

9 Q. And when you say "some confirmation," what's  
10 your bottom line opinion as to the reasonableness of  
11 3.13 inches per acre?

12 A. My bottom line opinion is that it is  
13 reasonable.

14 THE COURT: Once again, Doctor Brockway,  
15 it's reasonable because it fits nearly squarely  
16 50 percent within the range that you testified to?

17 A. That's right. It's not to one extreme or  
18 the other.

19 THE COURT: And for the record, the  
20 extremes in cfs that you've testified to in this case  
21 for this water right is 1.37 to 17.92?

22 A. That's correct.

23 THE COURT: And the claim is for 8.08 cfs,  
24 in cfs?

25 A. I believe that's correct. Is that --

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1 MR. BROWN: Yes, that is correct. Under B,  
2 it's listed as 7.16. And as we told the court, the  
3 three parties claiming I have agreed on a split whereby  
4 the amount in addition to the 7.16 would be an  
5 additional 46 inches, or .92 cfs, bringing the total to  
6 8.08 cfs for the Kingston property for irrigation.

7 THE COURT: So for the record, Mr. Brown,  
8 on this Kingston right, you're claiming .92 for K, 3K,  
9 correct?

10 MR. BROWN: Yes.

11 THE COURT: Very well. Continue,  
12 Mr. Brown.

13 Q. (BY MR. BROWN) Could you now look at the  
14 next exhibit, 34.

15 Can you again tell me what that analysis, what  
16 property does that analysis involve?

17 A. This Exhibit 34 relates to the Babington  
18 property. It's the same analysis that we performed for  
19 the others.

20 Q. Okay. And on Exhibit 34 I note that you  
21 have listed all of your inputs for 23.4 acres. And  
22 you've come up with a range from about 1.28 inches per  
23 acre for three-hour -- I keep doing that. Excuse me.  
24 Your range is 1.28 inches per acre for  
25 three-gallon-per-minute flows on 12-hour sets; and it

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1 goes from there upwards to 16.15 for 24-hour sets on  
2 seven gallons per minute with beans.

3 Is that accurate?

4 A. That is accurate.

5 Q. And in your opinion -- again, I want to  
6 represent to you that Mr. Babington is claiming .3 cfs,  
7 or 15 inches under the -- excuse me, under the 03C  
8 claim; and under the 03L claim, he is claiming an  
9 additional 66 inches of water, or 1.32 cfs, to bring  
10 the total claim for the 24-acre property to 81 inches,  
11 or 1.62 cfs. That calculates to be, 81 inches on  
12 24 acres calculates to be 3.37 inches per acre.

13 Can you give me an opinion as to whether  
14 3.37 inches per acre is a reasonable irrigation claim  
15 given your analysis that it -- the on-field diversion  
16 requirements range from 1.28 to 16.5 inches per acre?

17 A. Based on the model's results, the value of  
18 3.13 -- was it?

19 Q. 3.37.

20 A. -- 3.37 is in the reasonable range. It's on  
21 the low end of the range. But in my opinion it would  
22 be a reasonable rate.

23 Q. Is it in excess of a reasonable rate?

24 A. I would not say it's in excess of a  
25 reasonable rate.

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1 Q. Let me now ask you to turn -- again, is that  
2 for the same reasons you've already described with  
3 respect to the other two?

4 A. Yes. It falls within the range that we  
5 found with the sensitivity analysis, toward the bottom  
6 end.

7 THE COURT: For the record, Mr. Brown.  
8 Doctor Brockway, in cfs, the range that you  
9 testified to for the Babington right is from .6 cfs to  
10 7.56 cfs, correct?

11 A. That's correct.

12 THE COURT: And the amount claimed is  
13 1.62 cfs, which is on the very low end.

14 A. On the low end.

15 THE COURT: All right. Very good.

16 A. Probably the lower third.

17 THE COURT: All right. Go ahead,  
18 Mr. Brown.

19 Q. (BY MR. BROWN) Now let me turn next to  
20 Exhibit 35.

21 And that addresses the Simcoe property, correct?

22 A. Correct.

23 Q. And you've performed essentially the same  
24 analysis with the appropriate inputs for the fields  
25 involved in the Simcoe property as shown on Exhibit 35,

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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 correct?</p> <p>2 A. Correct.</p> <p>3 THE COURT: Water right number, please,</p> <p>4 Mr. Brown.</p> <p>5 Q. (BY MR. BROWN) Okay. I will represent to</p> <p>6 you that the water claimed by Mr. Simcoe for the two</p> <p>7 parcels is a total of 128 inches broken down as</p> <p>8 follows: On the F claim, Mr. Simcoe is asking for</p> <p>9 .8 cfs, or 40 inches. On the M claim, he is asking for</p> <p>10 1.76 cfs, or 88 inches. In other words, he is asking</p> <p>11 for a total between F and M of 128 inches on</p> <p>12 58.5 acres, which computes to be a diversion rate of</p> <p>13 2.18 inches per acre.</p> <p>14 Given that, can you give me an opinion as to</p> <p>15 whether 2.1 inches per acre is a reasonable irrigation</p> <p>16 diversion rate given your on-field diversion</p> <p>17 requirement analysis for this property?</p> <p>18 A. Based on the model results, the analysis</p> <p>19 indicates that that value is a reasonable diversion</p> <p>20 requirement.</p> <p>21 Q. And, again, so the court doesn't have to ask</p> <p>22 additional questions, I understand the range in inches</p> <p>23 per acre of your analysis runs from .86 inches per acre</p> <p>24 to 12.46 inches per acre; is that correct?</p> <p>25 A. That's correct.</p> <p style="text-align: right;">Page 496</p> | <p>1 that it's unlikely that the farm could have been</p> <p>2 successfully farmed with less than 2.18 inches per acre</p> <p>3 based on the model results.</p> <p>4 Q. The same question with respect to the</p> <p>5 Babington property. Could those crops have been</p> <p>6 successfully grown with less than 3.37 inches of water</p> <p>7 per acre?</p> <p>8 A. I'm sorry. What was the number? 3.37?</p> <p>9 Q. 3.37 inches per acre.</p> <p>10 A. The model results indicate that it's</p> <p>11 unlikely that these crops could have been farmed</p> <p>12 successfully with less than that amount. Alfalfa</p> <p>13 probably could have. Pasture maybe with really good</p> <p>14 management. But probably not dry beans.</p> <p>15 Q. The same question with respect to Kingston.</p> <p>16 Kingston -- do you have an opinion as to whether the</p> <p>17 Kingston property could have been successfully</p> <p>18 irrigated in those types of crops with less than</p> <p>19 3.13 inches per acre?</p> <p>20 A. The analysis indicates that 3.13 is a</p> <p>21 reasonable amount, but that with good management it is</p> <p>22 probable that the farm could have been farmed with less</p> <p>23 than that. I can't tell you what the cutoff would be.</p> <p>24 But that value falls in the middle of the typical range</p> <p>25 that you would expect.</p> <p style="text-align: right;">Page 498</p> |
| <p>1 Q. And the total amount for the property runs</p> <p>2 from 1.01 cfs to 14.5 cfs as an irrigation field</p> <p>3 requirement?</p> <p>4 A. That's correct.</p> <p>5 Q. And 2.18 falls within that range?</p> <p>6 A. 2.18 inches per acre?</p> <p>7 Q. Yes.</p> <p>8 A. Falls within about the lower fourth.</p> <p>9 Q. So are you confident that the 2.18 cfs is</p> <p>10 something you can opine as reasonable?</p> <p>11 A. Yes, I am.</p> <p>12 Q. And is it in your opinion in excess of a</p> <p>13 reasonable amount of water to irrigate this property?</p> <p>14 A. No, I do not believe it's in excess of a</p> <p>15 reasonable amount.</p> <p>16 Q. I have one more question I would like to</p> <p>17 address to maybe each of the cases one at a time. Why</p> <p>18 don't we work backwards.</p> <p>19 Let me represent to you that Mr. Simcoe on his</p> <p>20 property has indicated that beans have been grown, and</p> <p>21 that alfalfa, pasture have all been grown.</p> <p>22 In your opinion could that property have been</p> <p>23 successfully farmed with those kind of crops with less</p> <p>24 than 2.18 inches per acre? Is it likely?</p> <p>25 A. For the Simcoe property, it's my opinion</p> <p style="text-align: right;">Page 497</p>                                                            | <p>1 MR. BROWN: I have no further questions.</p> <p>2 Thank you.</p> <p>3 THE COURT: Let's go off the record for a</p> <p>4 moment.</p> <p>5 (DISCUSSION HAD OFF THE RECORD)</p> <p>6 THE COURT: Doctor Brockway, I have a few</p> <p>7 questions to ask before I'm done with you. If I can</p> <p>8 find the -- under Idaho Code 42-220, the court is</p> <p>9 required to make findings any time a recommendation</p> <p>10 exceeds 1 inch per acre.</p> <p>11 In your opinion, for any of the rights that we've</p> <p>12 talked about today, could any of the crops you've</p> <p>13 testified to have been successfully irrigated with</p> <p>14 1 inch per acre?</p> <p>15 <u>A. In my opinion, it's highly unlikely that</u></p> <p>16 <u>they could have been successfully irrigated.</u> The model</p> <p>17 shows that the lowest duty of water that the model</p> <p>18 predicted in the sensitivity analysis for any of these</p> <p>19 rights, while still getting enough water to fill the</p> <p>20 soil profile, and that's an important qualification, is</p> <p>21 right at about an inch per acre. Even though you will</p> <p>22 see some values which are less than an inch per acre,</p> <p>23 in those cases there wasn't enough water to completely</p> <p>24 fill the soil-holding capacity at the lower ends of the</p> <p>25 fields.</p> <p style="text-align: right;">Page 499</p>            |

1 THE COURT: Let me direct your attention to  
2 Exhibit 32.

3 Do you have that?

4 A. Yes.

5 THE COURT: Now, Exhibit 32, there are  
6 18 different permutations given the three different  
7 crops, correct?

8 A. Right.

9 THE COURT: Now, in that range only one  
10 value is around 1 inch per acre; and that's the very  
11 first value for alfalfa, correct?

12 A. Correct.

13 THE COURT: Every other range that you have  
14 determined is more than 1 inch per acre.

15 A. That's right.

16 THE COURT: Now, Doctor, could you explain  
17 particularly why the values in the Hagerman area may  
18 exceed 1 inch per acre as opposed to, say, other places  
19 in the state?

20 A. Yes. Two main factors. One factor is it's  
21 hot. Hagerman is the hot spot in southern Idaho. It  
22 has temperatures which exceed the surrounding area,  
23 somewhat due to the elevation, but other factors as  
24 well. That means that crops require more water. In  
25 other words, they have a higher evapotranspiration rate

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1 than they would in the surrounding area because of the  
2 temperature.

3 The second main reason is the characteristics of  
4 the soil. In the Hagerman Valley, and in this area in  
5 particular, the soils are very sandy. The NRCS  
6 classifies them almost universally as a, it's called a  
7 fine sandy loam, which is a -- it's a loamy soil that  
8 has a lot of sand in it. And because it has a lot of  
9 sand, it doesn't have very high water-holding  
10 capacity. Water drains out of it quickly; and it  
11 doesn't hold much when it's in there.

12 So those two factors combined kind of add up to a  
13 lot of water is needed to grow crops in that area.

14 THE COURT: And I take it those soil types  
15 are taken into consideration in your base field data,  
16 correct?

17 A. That's correct.

18 THE COURT: And that's one of the soil  
19 types identified by the SCS?

20 A. That's right. For example, the KEB or the  
21 KOB.

22 THE COURT: And that is particularly a  
23 ly soil?

24 A. Yes. All of the soil types are quite  
25 sandy. There's approximately five or six different

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1 soil types identified by the NRCS; but they're all  
2 quite sandy.

3 THE COURT: There's five identified in the  
4 Hagerman area or --

5 A. In this specific area.

6 THE COURT: Okay. Do you know how many  
7 different soil types there are totally?

8 A. In the entire Hagerman Valley?

9 THE COURT: No, that SCS identifies.

10 A. Well, no. Because every -- the way the SCS  
11 works, every county is different. Gooding County has  
12 their own classification system. And you may have the  
13 same soil; but you step over the county line and it's  
14 called something else. It gets confusing.

15 THE COURT: All right. Is the temperature  
16 and the soil type predominantly the two variables that  
17 require more than 1 inch per acre in the Hagerman  
18 area?

19 A. Those are predominantly -- the two  
20 predominant variables.

21 THE COURT: Very good. Mr. Brown, does  
22 that bring up anything?

23 A. I should -- if I may, Your Honor?

24 THE COURT: Go ahead.

25 A. It's not just temperature. It's overall

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1 climate. The evapotranspiration of the crop depends on  
2 temperature, relative humidity, wind speed, and some  
3 other minor factors. So the temperature is the main  
4 one, but more properly it should be called climatic  
5 factors.

6 THE COURT: Thank you for that  
7 clarification.

8 Mr. Brown, anything?

9 Q. (BY MR. BROWN) Do those variables, the  
10 climatic factors and the heat, have an effect on what  
11 your set time or your furrow flows have to be?

12 A. Yes. Yes, because the more the crop uses,  
13 that changes how much water you have to put on the  
14 field.

15 Q. In other words, those are -- the driving  
16 components are the two that you've identified; but  
17 based on what you've said, I understand that you would  
18 expect, then, to see either longer set times or more  
19 frequent sets, or greater furrow flows in order to  
20 compensate?

21 A. That's right. If you have a sandy soil  
22 which infiltrates, seeps a lot of water, you're going  
23 to either need longer set times to get the water clear  
24 across the field or greater furrow flows, or both.  
25 That's correct.

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1 MR. BROWN: I have no further questions.  
 2 THE COURT: I have a few questions,  
 3 Mr. Bell, just to clarify. Mr. Bell, on your mom's  
 4 property which is 3A, you've stated that you've used  
 5 gravity furrow irrigation.  
 6 A. Yes.  
 7 THE COURT: And you've testified that the  
 8 quantity would be less if you sprinkler irrigated,  
 9 correct?  
 10 A. Well, yes.  
 11 THE COURT: Have you ever sprinkler  
 12 irrigated down there?  
 13 A. No, we have not.  
 14 THE COURT: Okay. So at all times your use  
 15 has been gravity furrow irrigation?  
 16 A. That is correct.  
 17 THE COURT: The assessment you pay for your  
 18 water, do you pay -- how is that assessed? Is that per  
 19 cfs or --  
 20 A. Yes, or miner's inch of irrigation water.  
 21 THE COURT: Okay.  
 22 A. It's strictly for the maintenance and  
 23 operation of the ditch. And all participants share --  
 24 it's prorated to their allotted water.  
 25 THE COURT: So you pay per miner's inch?

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1 A. Yes.  
 2 THE COURT: And what's the assessment per  
 3 miner's inch?  
 4 A. This year it was \$5.  
 5 THE COURT: And I take it that what you pay  
 6 now equates to 1.6 cfs? You have to answer yes or no.  
 7 A. Yes.  
 8 THE COURT: Now, for right 3A you stated  
 9 that you at times used 24-hour set times?  
 10 A. Yes.  
 11 THE COURT: Referring to Exhibit 13,  
 12 Mr. Bell, there's four parcels on there; and you stated  
 13 that you can't remember ever any water being on  
 14 parcel 1 historically.  
 15 A. No, I cannot.  
 16 THE COURT: Mr. Brown, does that bring up  
 17 any further questions?  
 18 MR. BROWN: Yes.  
 19 Q. (BY MR. BROWN) When you say that you have  
 20 24-hour sets -- well, first of all, you indicated  
 21 before you needed 80 inches. Is that -- you're  
 22 referring to your full right, correct?  
 23 A. Yes.  
 24 Q. Have you tried to irrigate with less than  
 25 24-hour sets on the places where you use 24-hour sets?

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1 A. I've tried, but you just can't get it wet on  
 2 that alfalfa just east of the house there with those  
 3 long runs that are over 600 feet. And it just won't go  
 4 through it.  
 5 Q. You indicated you call the person  
 6 responsible for the canal and pay assessments on the  
 7 canal.  
 8 Do you know are you in a water district?  
 9 A. Pardon?  
 10 Q. Are you in a water district?  
 11 A. As designed, as designated by the State?  
 12 Q. Yes.  
 13 A. We're 36A.  
 14 Q. Okay. And you have a watermaster?  
 15 A. Yes.  
 16 Q. And that watermaster is responsible for  
 17 seeing to it that your rights are delivered?  
 18 A. Yes.  
 19 Q. And you believe that you've been delivered  
 20 your 80 inches under that watermaster, correct?  
 21 A. Yes, I do.  
 22 Q. And you paid assessments in order to have  
 23 that water delivered?  
 24 A. Yes.  
 25 MR. BROWN: I have no further questions.

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1 THE COURT: Thank you, Mr. Bell. You're  
 2 excused.  
 3 (WITNESS EXCUSED)  
 4 THE COURT: Next witness, Mr. Brown? Well,  
 5 I'll tell you what. Why don't we take a 10-minute  
 6 recess here.  
 7 MR. BROWN: Okay.  
 8 (RECESS)  
 9 Q. (DIRECT EXAMINATION CONTINUED BY MR. BROWN)  
 10 Mr. Bell, I'm handing you what's been marked as  
 11 Exhibit 15.  
 12 Can you tell me what that is?  
 13 A. Yes. I was curious on how much water I was  
 14 using; so I contacted Steelhead Engineering in Jerome,  
 15 Idaho. And Mr. Jeffrey Martin came down and did  
 16 measurements on the water.  
 17 Q. Okay. He measured the water that you are  
 18 claiming under this right, correct?  
 19 A. Yes, he did.  
 20 Q. In other words, when I say "you," again I'm  
 21 referring to the, to your mother's right.  
 22 A. Yes. Yes.  
 23 Q. And he measures -- that letter indicates  
 24 that there were 76 inches measured?  
 25 A. Yes. There are 76 out of one of the

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1 takeouts, yes.

2 Q. And can you tell me where that takeout was?

3 A. Directly east of the house on the northeast  
4 corner of the property under the Buckeye.

5 Q. Okay. And it indicates that that 76 inches  
6 was measured; there was some water going out above. In  
7 other words, it wasn't a measurement of the total  
8 amount you were using?

9 A. That's correct.

10 Q. Do you know about how much wasn't measured?

11 A. There were three or four gates open ahead of  
12 that. So --

13 Q. Okay.

14 A. Pardon?

15 Q. Do you have any idea how much that would  
16 have been that wasn't measured? In other words, how  
17 much were you using? The 76 that was measured plus  
18 what?

19 A. Probably 6 or 8 inches more above it, three  
20 or four takeouts open.

21 MR. BROWN: Okay. I offer 15.

22 THE COURT: Can I see that, Mr. Brown? Or,  
23 Debbie, can you hand me that Exhibit 15?

24 (THE CLERK COMPLIED)

25 THE COURT: Let's go off the record for a

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1 moment.

2 (DISCUSSION HAD OFF THE RECORD)

3 THE COURT: Thank you, Mr. Bell, you're  
4 excused.

5 (WITNESS EXCUSED)

6 THE COURT: While we were off -- well,  
7 Mr. Brown has offered Exhibit 15 which is an  
8 engineering report from Jeffrey L. Martin, a letter  
9 signed by Mr. Martin. I think what's happening here is  
10 Mr. Brown is attempting to introduce expert opinion  
11 through a lay witness. At this point in time  
12 Exhibit 15 is offered but not yet admitted.

13 Mr. Brown, next witness.

14 MR. BROWN: Your Honor, for the record, I  
15 do believe it's appropriate. I will offer it later.  
16 But I do believe it's appropriately admitted at this  
17 time.

18 I think it's standard and well-accepted law that  
19 in the State of Idaho one who uses property is entitled  
20 to testify as to his use of the property. Mr. Bell has  
21 testified as to his irrigation and that he has in fact  
22 had it measured, and he has produced a letter to  
23 represent the basis for that. And therefore I don't  
24 think it's inappropriate opinion testimony. Having  
25 said that, I will offer it again.

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1 THE COURT: Thank you, Mr. Brown. Next  
2 witness.

3 MR. BROWN: Mr. Kingston.

4 \*\*\*\*\*

5 DAVE KINGSTON, called as a witness in his own  
6 behalf, being first duly sworn upon his oath, testified  
7 as follows:

8 DIRECT EXAMINATION

9 BY MR. BROWN:

10 Q. Could you state your name for the record?

11 A. Dave Kingston.

12 Q. What is your relationship with Kingston  
13 Properties, LP?

14 A. I'm the general partner.

15 Q. And are you familiar with the water claimed  
16 under rights 03B and 03J?

17 A. Yes, I am.

18 Q. And tell me how that is.

19 A. Through an educational process, but probably  
20 the beginning of it was the acquisition of the  
21 property.

22 Q. When did you acquire the property?

23 A. December of '96.

24 Q. And what, if any, investigation did you do  
25 before you purchased the property?

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1 A. I did a complete analysis of property lines  
2 and the water rights and investigating as to the time  
3 they were decreed and what was decreed.

4 Q. Did you make any inquiries of the owners at  
5 the time of the water rights?

6 A. Yes.

7 Q. And did you -- who did you discuss that  
8 with?

9 A. Primarily Barbara Gardner.

10 Q. Did you ever discuss with Mr. Gardner the  
11 water rights as they pertained to fish propagation?

12 A. With Mrs. Gardner or Mr. Gardner?

13 Q. Mrs. Gardner.

14 A. Yes.

15 Q. And what did she tell you in that regard?

16 A. She told me that the ponds had been there  
17 since early in 1900 and had contained fish.

18 Q. And, in other words, the ponds were used to  
19 raise fish?

20 A. Yeah, for a number of years.

21 MR. BROWN: Could the witness be shown the  
22 photographs we've marked as Exhibits --

23 THE CLERK: 16 through 21.

24 MR. BROWN: Okay. Could the witness also  
25 be shown Exhibit 11?

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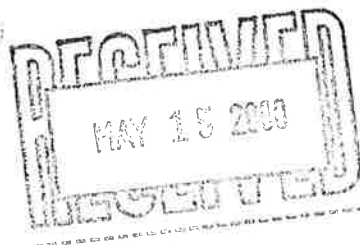


**BROCKWAY**  
ENGINEERING  
P.L.L.C.

Hydraulics

Hydrology

Water Resources



May 11, 2000

Mr. Patrick D. Brown  
109 South Adams Street  
Jerome, ID 83338

Re: Simco flow measurement – Hagerman  
Project No. 153-09-2000

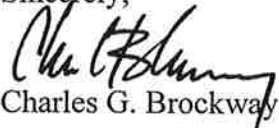
Dear Pat:

This letter is to report the results of the flow measurement you requested on Doyt Simco's pump from the Buckeye Ditch in the Hagerman valley.

A single vertical turbine pump driven by a 25 HP electric motor draws water from an off-ditch forebay and delivers water to an 8-inch steel mainline. A Peek Polysonics DCT-7088 ultrasonic meter was used to measure the flow in the discharge line from the pump. Approximately 6 feet of unobstructed pipe was available to attach the ultrasonic meter. According to Mr. Simco, six (6) wheel lines were on during the measurement, which is the maximum number of lines that can reasonably be operating using the single 25 HP pump. During the test, the flow reading was very stable. The measured flow, averaged over 7 minutes, was 669 gpm.

Please do not hesitate to call if you have any questions.

Sincerely,

  
Charles G. Brockway, P.E.

cc: Doyt Simco

CHARLES E.  
BROCKWAY,  
PH.D., P.E.

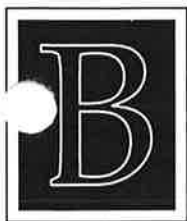
CHARLES G.  
BROCKWAY,  
PH.D., P.E.

2016 NORTH  
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TWIN FALLS,  
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208•736•8543

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**BROCKWAY**  
ENGINEERING  
P.L.L.C.

Hydraulics

Hydrology

Water Resources



May 11, 2000

Mr. Patrick D. Brown  
109 South Adams Street  
Jerome, ID 83338

Re: Babington flow measurement – Hagerman  
Project No. 153-10-2000

Dear Pat:

This letter is to report the results of the flow measurement you requested on Lynn Babington's pump from the Buckeye Ditch in the Hagerman valley.

The pump consists of a single centrifugal pump driven by a 20 HP electric motor delivering water to a 6-inch steel pipe. This line runs underground for approximately 100 feet, where it splits into two 6-inch above-ground aluminum mainlines running south and west. According to Mr. Babington, the wheel lines on during the test were 1 long, 1 medium, and 1 short line. This is the maximum number of lines that can reasonably be operated with this pump. The discharge pressure during the test was 53.5 psi, as indicated by an existing gauge on the pump. A Peek Polysonics DCT-7088 ultrasonic meter was used to measure the flow. A measurement was first attempted on the discharge line from the pump just before it enters the ground. The flow reading at this point was unstable and was inconsistent with the known output of the pump. This may have been due to the close proximity of a 45-degree downward bend. This location was deemed unacceptable and it was decided to measure the flow in the two aluminum mainlines, where at least 15 diameters of clear pipe was available. These readings were very stable, and the total measured discharge was 434 gpm.

Please do not hesitate to call if you have any questions.

Sincerely,

  
Charles G. Brockway, P.E.

cc: Lynn Babington

CHARLES E.  
BROCKWAY,  
PH.D., P.E.

CHARLES G.  
BROCKWAY,  
PH.D., P.E.

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FAX: 736•8506

## Steelhead Engineering

101 W. Main St. #9 Jerome, Idaho 83338  
Phone (208) 324-1083 Fax (208) 324-2016

June 7, 1998

Lynn Babington  
2849 S. 850 East  
Hagerman, Idaho 83332

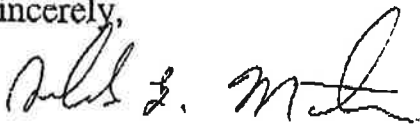
Dear Lynn,

This letter is to summarize the results of flow measurements which I made at your farm at the above address on Saturday, June 6th, 1998. You indicated that you irrigate approximately 24 acres of cropland using two wheel lines totaling approximately one half mile in length. The water is picked up by a 20 horsepower short-coupled turbine (Berkeley B3TPM - Ser. #8044003) and delivered through a 6 inch mainline. You indicated the system is typically operated at 55 p.s.i. measured at the pump discharge. All flow measurements were made using a Polysonics Tyme-Flyte ultrasonic flow meter on the 6 inch aluminum mainline.

We measured the flow in two conditions; the first condition was with water discharging from a riser near the end of the system and the valve at the pump fully open. The system stabilized at 38 p.s.i. and I measured a flow of 492 g.p.m. We then partially closed the valve at the pump to create 55 p.s.i. backpressure at the pump discharge (to simulate normal operating conditions) and measured a flow rate of 378 g.p.m.

The 20 horsepower pump was designed to deliver 450 g.p.m. at 140 ft. (60.7 p.s.i.) of total head at 3600 r.p.m. Information you gave me indicates that the motor speed is 3500 r.p.m. The slightly slower speed and possibly some impeller wear are contributing to the somewhat reduced flowrate in comparison to the design curve.

Sincerely,



Jeffrey L. Martin, P.E.

## Harbison Fields

①  $42' \times 1389' =$

$\frac{1}{2} \times 319 \times 705 =$   
 $\downarrow$   
 $(361-12) (1389-684)$

58,338

112,447.5

$170,785.5 \text{ ft}^2 \div 43,560$   
 $= 3.9 \text{ A}$

NOTE: THIS IS WATERED THROUGH SIMCOE'S SYSTEM.

②  $200 \times 500 = 100,000$   
 $\text{run} = 200'$

③  $50 \times 326 = 16,300$

④  $\frac{1}{2} \times 84 \times 563 =$   $\text{run} = 50$  ~~23~~, 646  
 $563 \times 100 =$  56,300  
 $\text{run} \approx 150$

196,246  $\div 43,560$   
 $= 4.5 \text{ A}$

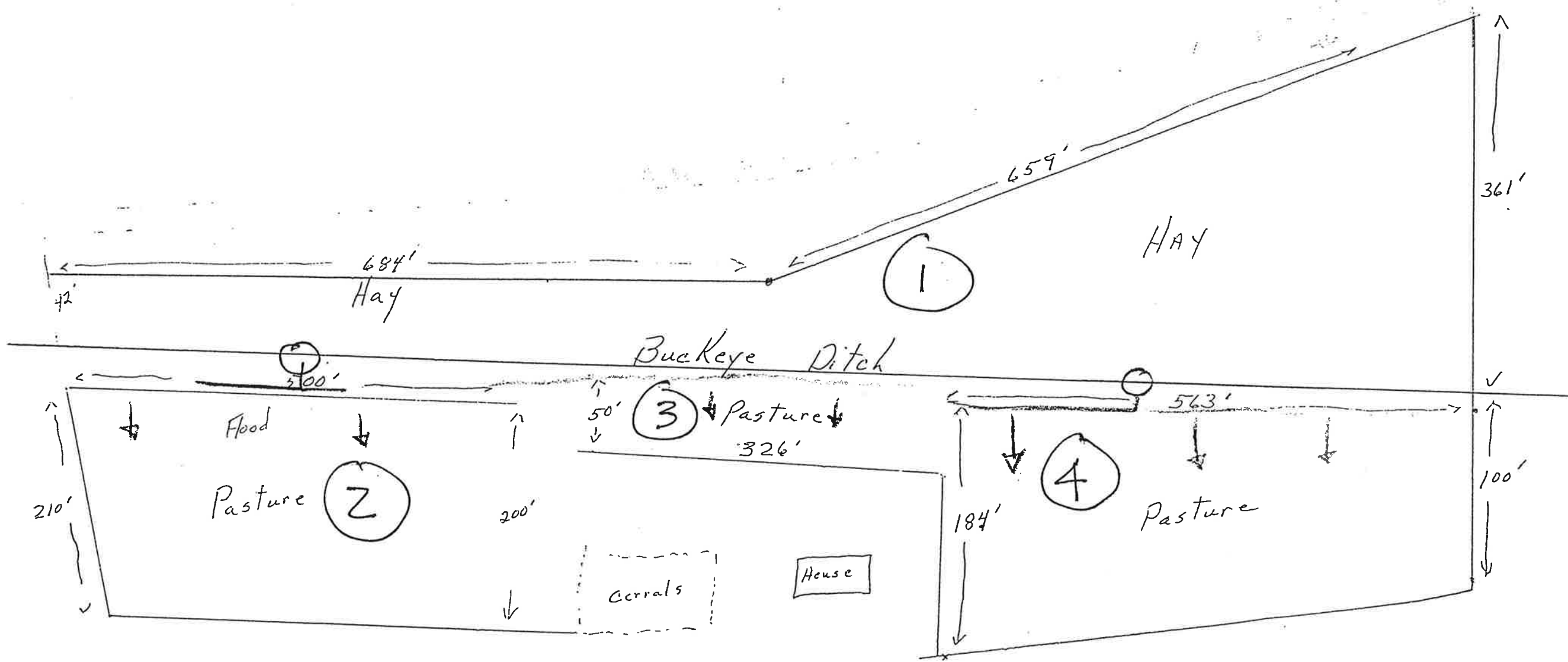
Total Acres:

$\begin{array}{r} 4.5 \\ 3.9 \\ \hline 8.4 \end{array}$

Fields ② ③ ④ are pasture & have been alfalfa



Harbison



1 to demonstrate that there is a basis for Mr. Kingston  
 2 to testify as to the history of the property, including  
 3 the prior statements of prior owners going back into  
 4 the Twenties with the fish propagation use.  
 5 Q. (BY MR. BROWN ) Mr. Kingston, can you tell me  
 6 that statement -- I don't know if you're familiar with  
 7 the statement in the exhibit; but let me just --  
 8 THE COURT: Hand the witness the exhibit.  
 9 Q. (BY MR. BROWN) Let me just tell you that it  
 10 mentions commercial fish ponds being developed later,  
 11 but also refers to prior recreational ponds.  
 12 Are the ponds you identified on Exhibit 12 with  
 13 the yellow marker, are those the commercial fish ponds  
 14 or the recreational ponds?  
 15 A. I believe that the two further south closest  
 16 to the river were the recreational ponds as far as I  
 17 know. And the ones that were developed later were  
 18 further up the property.  
 19 Q. And tell me how the ones that were developed  
 20 later are different than the two you identified?  
 21 A. Well, they're of a commercial nature. They  
 22 have locks in them. You know, the flow has been  
 23 regulated closely for that purpose.  
 24 Q. So you're not attempting to claim new uses  
 25 from the Seventies.

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1 A. No.  
 2 Q. I wanted to discuss for a minute the  
 3 agreement that you --  
 4 THE COURT: Are you going to offer this  
 5 exhibit, Mr. Brown?  
 6 MR. BROWN: Yes. I offered it, I believe.  
 7 THE COURT: It's exhibit what?  
 8 THE WITNESS: 22, Your Honor.  
 9 THE COURT: 22? 22 has been offered. No  
 10 one here is objecting to it. Therefore it will be  
 11 admitted.  
 12 (Claimant Exhibit 22 ADMITTED)  
 13 MR. BROWN: Your Honor, I would like to  
 14 also offer it for the purpose of impeachment. You  
 15 heard Mr. Clelland state that he had no information or  
 16 no basis to suggest that there were any fish  
 17 propagation at or before the time of his  
 18 investigation. And I think it's fair to say that the  
 19 claim itself identifies under oath that there was.  
 20 THE COURT: Mr. Brown, statements offered  
 21 for mere impeachment purposes don't go to the  
 22 substantive truth generally speaking. They just go to  
 23 impeach. You're offering it for alternative -- the  
 24 court will allow it as substantive evidence of the  
 25 purpose of use.

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1 MR. BROWN: Thank you. I just wanted the  
 2 record to note that it was being offered for multiple  
 3 purposes.  
 4 THE COURT: Very well.  
 5 Q. (BY MR. BROWN) I want to go back to this J,  
 6 K, L split for a minute. Mr. Clelland testified and  
 7 drew in brown on Exhibit 12 an area which he identified  
 8 as having the 10 acres contained in it, the 10 acres of  
 9 irrigation claimed, but only 1 acre of irrigation, that  
 10 being in the very lower right-hand corner.  
 11 Do you see what I'm referring to?  
 12 A. Yes.  
 13 Q. Can you describe the terrain within that  
 14 boundary which is more to the west or towards the  
 15 left-hand side? In other words, there's a field  
 16 indicated on the map as 4.1 acres.  
 17 A. Uh-huh. Yes.  
 18 Q. Which has the K labeled in it?  
 19 A. Yes.  
 20 Q. Has that property to your knowledge been  
 21 irrigated?  
 22 A. Yes.  
 23 Q. Okay.  
 24 A. I think it had been earlier testified by  
 25 Mr. Bell that Mr. Gardner had pastured his horses in

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1 that property.  
 2 Q. Miss Gardner still owns the house indicated  
 3 just down the picture --  
 4 A. That's correct.  
 5 Q. -- from that area. How is Mrs. Gardner  
 6 going to water her house, around her house and up  
 7 through that other section that you're purchasing  
 8 without water? Do you know?  
 9 A. I think there's a general agreement to share  
 10 that water with her for her needs.  
 11 Q. Okay. And why is it, then, that you would  
 12 own the water instead of she?  
 13 A. I don't think she has the ability to water  
 14 it herself. She was trying to encourage some help by  
 15 deeding the water over.  
 16 Q. And have you agreed to exchange something  
 17 for her or do something for her in exchange for the  
 18 water?  
 19 A. In addition to that, I agreed to grade her  
 20 driveway, keep it --  
 21 Q. You're maintaining her road in order to take  
 22 the water and utilize it both on your place and hers?  
 23 A. That's correct.  
 24 Q. So the place of use of the right is not  
 25 changing.

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1 A. No.  
 2 MR. BROWN: I have no further questions.  
 3 THE COURT: Wait a second, Mr. Kingston.  
 4 Kingston, regarding Exhibits 19, 20 and 21, and I  
 5 think those are the pictures of the biggest pond?  
 6 A. Yes, Your Honor, I think so.  
 7 THE COURT: Is it your understanding that  
 8 those particular ponds have been on the property since  
 9 the 1920s?  
 10 A. That's correct, or before. Or before.  
 11 THE COURT: Or that pond. That's one pond,  
 12 correct?  
 13 A. There's two ponds.  
 14 THE COURT: Okay. And those two ponds, to  
 15 the best of your understanding, have been on the  
 16 properties since the Twenties?  
 17 A. Yeah, or before.  
 18 THE COURT: Or before. And those have been  
 19 used for the purposes of fish propagation?  
 20 A. Yes.  
 21 THE COURT: Is that commercial propagation  
 22 or just pride?  
 23 A. I think it's recreational. Those two ponds  
 24 are recreational more than commercial; but they've been  
 25 there and for that purpose for a long period of time.

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1 THE COURT: Who fishes out of those, in  
 2 other words?  
 3 A. Probably the land owners and friends, I  
 4 suspect.  
 5 THE COURT: And your understanding that  
 6 those have been there since the Twenties is from  
 7 Mrs. Gardner?  
 8 A. Mrs. Gardner and others that I've talked  
 9 to. The McFaddens and other people who lived in the  
 10 community for a long time, and his parents lived  
 11 there.  
 12 THE COURT: Now, the deed you received from  
 13 Mrs. Gardner for right -- for the area where right K is  
 14 used, that deed didn't specify any particular quantity  
 15 of water, did it?  
 16 A. She said that amount was in dispute and  
 17 would be adjudicated. So it does not have a specific  
 18 quantity. It just says all remaining rights, I  
 19 believe, is how it's written.  
 20 THE COURT: All right. On the face of the  
 21 deed itself -- all right. It may be helpful,  
 22 Mr. Brown, at some point to get those deeds in the  
 23 rd.  
 24 MR. BROWN: Your Honor, I hesitate to use  
 25 them because they're going to take an inordinate amount

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1 of time to sort through. They are extraordinarily  
 2 complicated as what I'm showing you is a diagram of the  
 3 deeds. And I'll tell you it's about 12 feet long.  
 4 The property continued to go through since the  
 5 New International Mortgage decree forfeitures, estates,  
 6 splits. And I do have them with me, but I'd suggest  
 7 that -- I have about four inches worth of them. And in  
 8 order to be helpful, you would have to go through them  
 9 all.  
 10 THE COURT: Maybe we could get just that  
 11 portion of the deed describing the water rights or all  
 12 appurtenances? You could -- I'm just telling you that  
 13 now, Mr. Brown. We can supplement later. We don't  
 14 have to do it now.  
 15 MR. BROWN: That's fine, Your Honor.  
 16 THE COURT: Referring to Exhibit 12,  
 17 Mr. Kingston, there's an area labeled brown on  
 18 Exhibit -- there's -- yeah. It's labeled K.  
 19 A. Yeah.  
 20 THE COURT: And it's your understanding  
 21 that area has been irrigated?  
 22 A. Yes.  
 23 THE COURT: And that understanding comes  
 24 from whom?  
 25 A. From Mrs. Gardner and from others I've

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1 talked to.  
 2 THE COURT: Okay. Who are some of those  
 3 other people you've talked to?  
 4 A. McFaddens, Mr. Bell, some of the other  
 5 neighbors.  
 6 THE COURT: All right. You don't have any  
 7 personal knowledge that that has been in fact been  
 8 irrigated prior to 1996?  
 9 A. No. No, I don't. Only what people told  
 10 me.  
 11 THE COURT: Okay. And likewise as to the  
 12 ponds, you don't have any personal knowledge of those  
 13 uses prior to 1996?  
 14 A. I've witnessed aerial photos that predate  
 15 that, yes.  
 16 THE COURT: Okay. Mr. Brown?  
 17 Q. (BY MR. BROWN) Mr. Kingston, you own the  
 18 water rights; but as you heard Mr. Bell testify  
 19 regarding his mother's right, you are also within a  
 20 water district organized by the State of Idaho?  
 21 A. Yes, I am.  
 22 Q. Do you pay assessments to use your water  
 23 rights?  
 24 A. That's correct.  
 25 Q. For what amount of water do you pay?

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1 Q. (BY MR. BROWN) I want you to start with  
 2 Exhibit 11. And let me give you a pen.  
 3 Can you draw on -- do you recognize Exhibit 11?  
 4 .. Yes. I'm trying to figure out where the  
 5 river is here.  
 6 Q. What I'd like you to do for me is, first of  
 7 all, take Exhibit 11 and take the yellow highlighter  
 8 and indicate to me where water comes out of the Buckeye  
 9 Ditch to any fish -- on its way to any fish ponds?  
 10 A. Okay. You're saying that her house is right  
 11 here?  
 12 Q. Would it be easier if I gave you a bigger  
 13 map?  
 14 A. Yes, maybe.  
 15 THE COURT: They've kind of been boring it  
 16 this way (indicating).  
 17 A. Oh, okay.  
 18 THE COURT: For my purposes, anyway.  
 19 MR. BROWN: Could we go ahead and mark that  
 20 as an exhibit?  
 21 THE COURT: Don't we have that one marked  
 22 already?  
 23 THE CLERK: Yes, we do.  
 24 (DISCUSSION HAD OFF THE RECORD)  
 25 Q. (BY MR. BROWN) Why don't you use

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1 Exhibit 12.  
 2 Now, do you recognize the property on Exhibit 12?  
 3 A. Yes.  
 4 Q. Okay. Can you, starting with where water  
 5 comes out of the Buckeye Ditch on its way to any fish  
 6 ponds --  
 7 A. Yes, it's right here.  
 8 Q. -- can you draw the path it takes to get to  
 9 fish ponds  
 10 (THE WITNESS COMPLIED)  
 11 Q. (BY MR. BROWN) Okay. In working down that  
 12 line now, generally it runs from right to left on the  
 13 map?  
 14 A. Uh-huh.  
 15 THE COURT: Mr. Brown, is that water  
 16 coming -- is that the Buckeye Ditch itself, or is that  
 17 a ditch coming out of the Buckeye?  
 18 A. The Buckeye Ditch, I think, is right here.  
 19 MR. BROWN: It's water coming out of the  
 20 Buckeye Ditch across the property to fish ponds.  
 21 Q. (BY MR. BROWN) Correct?  
 22 A. Yes.  
 23 J. Now, let me show you exhibit, what's been  
 24 marked as Exhibit 16.  
 25 Can you tell me what that exhibit is?

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1 A. Well, that's the first pond right up in the  
 2 front corner of the property.  
 3 Q. In other words --  
 4 A. Right here.  
 5 Q. -- that is the first pond coming out of  
 6 the --  
 7 A. Buckeye Ditch.  
 8 Q. -- Buckeye Ditch. Okay. Does that pond  
 9 have fish in it?  
 10 A. No.  
 11 Q. Did it used to have fish in it?  
 12 A. Not -- it may or may not have. I'm not  
 13 sure.  
 14 Q. Exhibit 17, what is Exhibit 17?  
 15 A. That's like a slough or pond along the road.  
 16 Q. Does that have fish in it?  
 17 A. Yes.  
 18 Q. And does that have fish that have been  
 19 planted or cultivated in it?  
 20 A. Yes.  
 21 Q. Okay. Exhibit 18, can you tell me what that  
 22 shows?  
 23 A. That's a pond that would connect with the  
 24 slough further down the property.  
 25 Q. Can you indicate on Exhibit 12 where that

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1 would be?  
 2 A. It's right here.  
 3 Q. Does that have fish in it?  
 4 A. Yes, it does.  
 5 Q. What kind of fish?  
 6 A. Oh, there's trout. I think there's some, I  
 7 think there's a few carp in there. There's some bass  
 8 as well, I believe.  
 9 Q. Is that pond kept in order to maintain the  
 10 fish there in it?  
 11 A. It is. It's been designed for fish  
 12 propagation with gates and -- to maintain the levels  
 13 and so forth of the water.  
 14 Q. When is the water used for the fish?  
 15 A. Year around.  
 16 Q. Is that water in addition to the irrigation  
 17 water?  
 18 A. Yes, it is.  
 19 Q. Can you explain that to me?  
 20 A. Well, you have to have a certain depth of  
 21 water to maintain the oxygen level and a certain flow.  
 22 And so we need a year-around supply of water to those  
 23 ponds.  
 24 Q. Okay. Exhibit 19, can you tell me what that  
 25 shows?

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1 A. That's a larger pond that's further to the  
2 east of this last pond and very near the Snake River.  
3 Q. Okay. And does that have fish in it?  
4 A. It does. It probably has the largest  
5 population.  
6 Q. And what kind of fish?  
7 A. Those are trout and bass.  
8 Q. Okay. The last two photos, you referred to  
9 two ponds on Exhibit 12 which you've circled on the  
10 left-hand side.  
11 What's your understanding of how long those ponds  
12 have been there?  
13 A. Well, there are -- from my discussion with  
14 Barbara Gardner, she indicated they were there in the  
15 1920s.  
16 Q. Okay. Do you have any reason to believe  
17 they were not there?  
18 A. I've been able to substantiate that from  
19 other neighbors and people who have lived here. Not  
20 many go back to the early Twenties, but their parents  
21 did.  
22 Q. Exhibit 20, what does that show?  
23 A. 20 is just another shot of the same lake.  
24 Q. And Exhibit 21?  
25 A. That's a little further out and the same

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1 large pond.  
2 Q. Where does the water go once it leaves the  
3 ponds?  
4 A. It goes into the Snake River.  
5 THE COURT: Are Exhibits 19 and 20 and 21  
6 all shots of the same --  
7 A. The same lake, yes, Your Honor. It goes  
8 right out -- there's a diversion right here.  
9 MR. BROWN: Okay. I would offer 16 through  
10 21.  
11 THE COURT: Yeah. Without objection,  
12 Exhibits 16 through 21 are admitted.  
13 (Claimant Exhibits 16 thru 21 ADMITTED)  
14 Q. (BY MR. BROWN) Referring you now to  
15 Exhibit 12, can you tell me how much of the ground on  
16 that property is irrigated?  
17 A. We've claimed 129 acres, and I think it  
18 approximate -- some years there's maybe slightly more  
19 than that. Some years it's less.  
20 Q. Okay. Let me show you an area referred to,  
21 identified in brown as the place of use of right  
22 No. K.  
23 Do you own any of the property there?  
24 A. Yes.  
25 Q. And how much there would you own?

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1 A. I'd have to look at the deed to be honest.  
2 Q. Have you consulted with anybody or had  
3 anybody look at this in order to determine how many  
4 acres you have and how much is irrigated?  
5 A. No.  
6 Q. Have you consulted -- have you hired  
7 Doctor Brockway to do that for you?  
8 A. Yes, to determine the amount of need and  
9 use.  
10 Q. What have you done in order to provide him  
11 with information such as the way the property has been  
12 historically irrigated?  
13 A. Essentially I put him in contact with  
14 previous farmers so that he could talk about their flow  
15 rates, the crops that have been grown on that farm, and  
16 the data.  
17 Q. And who have you put him in touch with?  
18 A. Dan McFaddan primarily. He farmed it longer  
19 than anybody else.  
20 Q. Do you know about when he farmed it?  
21 A. He farmed it from 1976 to 1986.  
22 Q. Okay.  
23 A. I believe the Gardners farmed it after  
24 that. I'm not sure. It's prior to my ownership.  
25 Q. Let me ask you a question about these water

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1 rights splits. J has been split into K, L, and M. You  
2 heard the testimony this morning about how those rights  
3 were split.  
4 A. Yes.  
5 Q. Can you tell me what your understanding of  
6 what you were acquiring when you obtained part of the J  
7 right from Miss Gardner?  
8 A. I acquired, first of all, I think it's the B  
9 right. And subsequently I was told by Mrs. Gardner  
10 that there was additional water, and that she was  
11 wanting to convey that to me for the needs other than  
12 those that had been conveyed to others.  
13 Q. Okay. And when you say "other than what had  
14 been conveyed to others," can you explain that?  
15 A. Well, I think that she was concerned that  
16 the department had allocated one inch per acre and, I  
17 think, told me that she felt like she couldn't do, deed  
18 any more than that until there was -- the adjudication  
19 had, you know, concluded. And once that was concluded,  
20 that the rights, whatever rights were determined,  
21 anything that was not decreed to others, because I was  
22 the largest landowner, should be conveyed to me, and  
23 would be.  
24 Q. Okay. So, in other words, you said that she  
25 would convey it first to the others to get more than an

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