

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

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

CIVIL CASE NUMBER: 39576

Ident. Number 37-2543
Date Received: 3/4/2010
Receipt No:
Received By:

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

1. Name of Claimant(s)

DAVID A SIMON Phone: (208)764-2345
PO BOX 545
FAIRFIELD ID USA 83327

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAR 16 2010

By _____ Clerk
Deputy Clerk

2. Date of Priority: 08/26/1953

3. Source: GROUND WATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County	Type
01S	15E	16	NW SE	CAMAS		

5. Description of diverting works:

Diesel pump will be installed on the existing well with a mainline and 3 wheel lines - each 1/4 mile long.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	04/15	10/31	3.1	

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

8. Total consumptive use:

9. Non-irrigation uses:

SCANNED
MAY 26 2010

SCANNED
MAY 26 2010

10. Place of use:

Township	Range	Section	1/4 of 1/4 Lot		Use	Acres
01S	15E	16	NE	NE	IRRIGATION	40
			NW	NE	IRRIGATION	40
			SW	NE	IRRIGATION	35
			SE	NE	IRRIGATION	35
			NE	SE	IRRIGATION	35
			NW	SE	IRRIGATION	35
			SW	SE	IRRIGATION	40
			SE	SE	IRRIGATION	40
			Section Acres			
Total Acres					300	

11. Place of use in counties: CAMAS

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

13. Other Water Rights Used:

14. Remarks:

This is a claim based on the resumption of use of licensed water right 37-2543.

15. Basis of Claim: License

16. Signature(s)

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

Number of attachments: _____

For Individuals:

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

Signature of Claimant(s): David A. Simon

Date: 3/12/10

Date: _____

SCANNED
MAY 26 2010

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

CLAIM TO A WATER RIGHT

FEB 26 2010

Under the provisions of Section 42-243, *Idaho Code*, any person claiming a water right established by diversion and application of water to beneficial use must file a claim with the Department of Water Resources. **The filing of this claim does not confirm the water right claimed.** Water rights represented by a valid permit, license, decree, or previous claim are exempt from this requirement, as are uses of water for domestic purposes as defined in Section 42-111, *Idaho Code*. A filing fee must be submitted with this claim. See the instruction sheet to determine the appropriate fee.

Notice is hereby given that David Simon
(Name of Claimant)

Mailing Address: PO Box 545, Fairfield, ID 83327

Telephone No: (208) 764-2345 Email: _____

claims a right to the diversion and beneficial use of surface or ground water. The extent and nature of said claim is as follows:

1. Date of Priority: (When the water was first applied to beneficial use) 08/26/1953
A claim is not acceptable for the use of surface water with a priority later than May 20, 1971. A claim is not acceptable for the use of ground water with a priority date later than March 25, 1963, unless the water is used for domestic purposes as defined in Section 42-111, Idaho Code.

2. Describe the source of water: (Name of stream, lake, spring, etc., or ground water)
ground water tributary to _____

3. Describe the purpose for which the water has been used and the time during the year when you have used the right claimed:

(cfs or af)	(Irrigation, Domestic, Stock, Etc.)	(Both dates inclusive) (MM/DD) (MM/DD)
Quantity <u>3.1 cfs</u>	Use <u>Irrigation</u>	Period of Use From <u>4/15</u> to <u>10/31</u>
Quantity _____	Use _____	Period of Use From _____ to _____
Quantity _____	Use _____	Period of Use From _____ to _____
Quantity _____	Use _____	Period of Use From _____ to _____

4. 3.1 cfs TOTAL QUANTITY USED.
(cfs or af)

5. A) Location of point of diversion is NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of _____ $\frac{1}{4}$, Govt. Lot _____
Sec. 16 Township 1S Range 15E B.M., Camas County; additional points of diversion, if any: _____

B) Describe means of diversion of water: (Pump and pipeline, well, diversion dam, reservoir, length of ditch etc.). Give sizes and capacities. Be specific. Describe any changes in the system and give the date of the change.
Diesel pump will be installed on the existing well with a mainline and 3 wheel lines - each 1/4 mile long.

SCANNED

MAY 26 2010

6. A) Describe the place of use within each 40-acre tract in the appropriate box using the symbols listed below. If the use is for irrigation, describe the location by listing the number of irrigated acres within each 40-acre tract.

D - domestic, S - stockwater, M - municipal, C - Commercial, I - Industrial, X - other

Twp	Rge	Sec	NE¼				NW¼				SW¼				SE¼				TOTAL ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
1S	15E	16	40	40	35	35									35	35	40	40	300

TOTAL ACRES 300

- B) If water is used for purposes other than irrigation, fully describe the use. Be specific.

NOTE: Include here the type and number of stock watered: _____

7. Remarks: This is a claim based on the resumption of use of licensed water right 37-2543

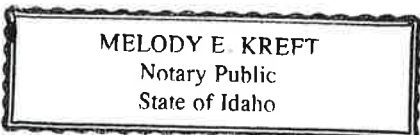
8. **Map** – Attach an 8½"x11" map clearly identifying the point of diversion and the place of use by 40-acre subdivisions, section, township and range of the public land survey system. (A photocopy of a USGS 7½ minute topographic quadrangle map is preferred.) Attach an **aerial photograph** of the place of use if available.

State of Idaho)
County of Twin Falls) ss.

Be it known that the undersigned, being duly sworn, deposes and says that he, she, they subscribed the forgoing claim to a water right, together with all attached information, and that the matters and facts therein are true to the best of the affiant's knowledge.

Dan A. Simon
Claimant's Signature (and title if claim is for an organization)

Sworn to before me this 24th day of February, 2010.



Melody E. Kreft
Notary Public
Residing at: Filer, Idaho
My commission expires: 2/8/13

FOR DEPARTMENT USE ONLY

Received by _____ Date _____
Prelim. check by _____ Date _____
Fee _____ Receipt # _____
Receipt prepared by _____ Date _____

Published in _____
Publication dates _____
Publication checked by _____ Date _____
Exceptions filed by _____

SCANNED
MAY 26 2010

RECEIVED

MAY 25 2010

Department of Water Resources

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAY 24 2010

By

Clerk

Deputy Clerk

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

In Re SRBA

Subcase: 37-02543

Case No. 39576

ORDER GRANTING MOTION TO FILE
LATE NOTICE OF CLAIM

On February 26, 2010, David Simon, by and through counsel, Paul L. Arrington, filed a *Motion to File Late Notice of Claim* for the above-captioned water right. Hearing was held on the *Motion* on May 18, 2010. This *Motion* complied with all procedural requirements under *SRBA Administrative Order 1*, and no objections were made to this late Notice of Claim.

THEREFORE, IT IS ORDERED, that the *Motion to File a Late Notice of Claim* for the above-captioned water right is **granted**.

The original Notice of Claim, as well as any attached filing fees, and a copy of this *Order* will be forwarded to the Idaho Department of Water Resources for further action. Following investigation by the Idaho Department of Water Resources, recommendation for the claim will be reported in the next *Late Claims Director's Report* which is issued on an annual basis. This modifies the provisions of *SRBA Administrative Order 1* 4d(2)(h).

IT IS SO ORDERED.

Dated: May 24, 2010.


ERIC T. WILDMAN
Presiding Judge
Snake River Basin Adjudication

SCANNED

MAY 26 2010

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO FILE LATE NOTICE OF CLAIM was mailed on May 24, 2010, with sufficient first-class postage to the following:

DAVID SIMON

Represented by:

PAUL L ARRINGTON

113 MAIN AVE W, STE 303

PO BOX 485

TWIN FALLS, ID 83303-0485

Phone: 208-733-0700

DAVID SIMON

Represented by:

TRAVIS L THOMPSON

113 MAIN AVE W, STE 303

PO BOX 485

TWIN FALLS, ID 83303-0485

Phone: 208-733-0700

DIRECTOR OF IDWR

PO BOX 83720

BOISE, ID 83720-0098

SCANNED

MAY 26 2010

Julie Murphy

5-18-10
Hearing

1851

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 103
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444



Attorneys for David Simon

**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 *Claim is complete*
Case 39576 *Fees Paid OK*
C. Simon
3-31-10

Subcase No.: 37-2543

STANDARD FORM 4

MOTION TO FILE:

☒ **LATE NOTICE OF CLAIM**

☐ **AMENDED NOTICE OF CLAIM**

INSTRUCTIONS

This form is used to file a late Notice of Claim or an amendment to a Notice of Claim in a reporting area where the Director's Report has been filed. Forms may be obtained from the SRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form. If you copy or reproduce this form, please copy on both sides with the even-number pages upside down.

The water right number for your late or amended claim must be indicated above in the blank space following "Subcase." You must use a **separate form for each** late or amended Notice of Claim.

This form has been adopted by the court in **SRBA Administrative Order 1, Rules of Procedure** (amended Sept. 30, 1996), Section 4, which may be consulted for further information.

By filing a *Motion to File a Late Notice of Claim* or a *Motion to File an Amended Notice of Claim*, you certify that it is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any

improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

X I have read *SRBA Administrative Order 1, Rules of Procedure* (amended Sept. 30, 1996).

Contact Information:

DAVID A. SIMON
P.O. BOX 545
FAIRFIELD, ID 83327
(208) 764-2345

Attorney of Record:

TRAVIS L. THOMPSON, ISB#6168
PAUL L. ARRINGTON, ISB#7198
P.O. BOX 485
TWIN FALLS, ID 83301
(208) 733-0700 (Office)
(208) 735-2444 (Fax)

MOTION TO FILE A LATE NOTICE OF CLAIM

A Motion to File a Late Notice of Claim will require a hearing before the Presiding Judge.

X I did not file a Notice of claim to the use of water in the SRBA because:
See attached Memorandum in Support of Motion to File Late Notice of Claim.

☐ I filed a Notice of Claim and elected to defer judicial proceedings on my domestic or stock watering use. I desire to reinstate my Notice of Claim for domestic or stock watering use.

X I am providing legal and factual documentation for my claimed use of water. You must describe these documents and attach a readable copy. (You do not need to fill this out if you are reinstating a Notice of Claim for domestic or stock watering use, but you **must** attach a copy of your Notice of Claim.)
See attached Memorandum in Support of Motion to File Late Notice of Claim.

I have attached:

☐ A fully completed Notice of Claim (available from IDWR).

- ☐ A claim filing fee for a domestic and stock watering use. IDWR may charge this fee pursuant to I.C. § 42-1414. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$_____.
- ☐ A claim filing fee and a late claim fee for those claims other than a domestic or stock watering use for which a notice of claim was not filed. To determine this amount, contact IDWR at (800) 451-4129. I have enclosed a check payable to: State of Idaho Department of Water Resources in the amount of \$400.

Follow these instructions regarding the hearing on this motion.

1. Contact the Clerk of the SRBA Court (208-736-3011) to request a hearing date and time.
2. Fill in the following information:

This motion will be heard on May 18, 2010 at 1:30 pm at the SRBA courthouse, 253 Third Avenue North, Twin Falls, Idaho.

MOTION TO FILE AN AMENDED NOTICE OF CLAIM

A Motion to File an Amended Notice of Claim may require a hearing before the Presiding Judge or Special Master or may be granted by leave of the court or by written consent of the parties and the Idaho Department of Water Resources. Leave to amend a claim shall be freely given when justice so requires.

- ☐ I must amend my Notice of Claim to the use of water in the SRBA because:

- ☐ I am providing legal and factual documentation to support my amended Notice of Claim. You must describe these documents and attach a readable copy.

I have attached:

- ☐ An amended Notice of Claim (available from IDWR).
- ☐ Payment of the following additional fees required by IDWR:

VERIFICATION (Must be completed)

State of Idaho

County of Twin Falls

Paul Arrington, being first duly sworn, upon oath, deposes and says:

(Insert name of person filing form)

That I am the party/claimant filing this motion for late or amended claim (as listed on Page 2) as defined by I.C. §§ 42-1401A(1) and (7) or that I am the attorney for the party/claimant filing this motion for late or amended claim and that I have read this motion, know its contents, and believe that the statements are true to the best of my knowledge.

Signature of person filing motion


Attorney signing in representative capacity

Subscribed and sworn to before me on February 24, 2010.
(Insert Date)




Notary Public for Filet Idaho
Residing at: "
My Commission expires: 2/8/13

INSTRUCTIONS FOR MAILING

You must mail this form, including all attachments, to the Clerk of the SRBA Court. **FAX filings will not be accepted by the SRBA Clerk of the Court.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

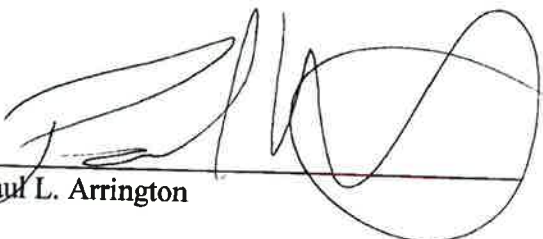
CERTIFICATE OF SERVICE

I certify that on this 26th day of February, 2010, I served a copy of the foregoing **MOTION TO FILE LATE NOTICE OF CLAIM**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Paul L. Arrington

*Albert P. Barker
John A. Rosholt
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington
Scott A. Magnuson
Sarah W. Higer*



113 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

1010 W. Jefferson St., Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

RECEIVED

MAR 17 2010

DEPARTMENT OF
WATER RESOURCES

March 16, 2010

Craig L. Saxton
Water Rights Supervisor
Idaho Dept. of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Notice of Claim to a Water Right #37-2543

Dear Mr. Saxton,

In response to your letter dated March 4th, 2010, enclosed please find a copy of the *Notice of Claim to a Water Right* that our office filed today with the SRBA District Court.

Should you have any questions, please contact our office at (208) 733-0700

Thank you,

Jessica Nielsen

Assistant for Paul L. Arrington

Enclosure

PLA/jn

SCANNED

MAR 17 2010

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

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

CIVIL CASE NUMBER: 39576

Ident. Number 37-2543
Date Received: 3/4/2010
Receipt No:
Received By:

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

RECEIVED

MAR 17 2010

**DEPARTMENT OF
WATER RESOURCES**

1. Name of Claimant(s)

DAVID A SIMON Phone: (208)764-2345
PO BOX 545
FAIRFIELD ID USA 83327

2. Date of Priority: 08/26/1953

3. Source: GROUND WATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County	Type
01S	15E	16	NW SE	CAMAS		

5. Description of diverting works:

Diesel pump will be installed on the existing well with a mainline and 3 wheel lines - each 1/4 mile long.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	04/15	10/31	3.1	

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

8. Total consumptive use:

9. Non-irrigation uses:

SCANNED

MAR 17 2010

10. Place of use:

Township	Range Section		1/4 of 1/4 Lot		Use	Acres
01S	15E	16	NE	NE	IRRIGATION	40
			NW	NE	IRRIGATION	40
			SW	NE	IRRIGATION	35
			SE	NE	IRRIGATION	35
			NE	SE	IRRIGATION	35
			NW	SE	IRRIGATION	35
			SW	SE	IRRIGATION	40
			SE	SE	IRRIGATION	40
			Section Acres			
Total Acres					300	

11. Place of use in counties: CAMAS

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

13. Other Water Rights Used:

14. Remarks:

This is a claim based on the resumption of use of licensed water right 37-2543.

15. Basis of Claim: License

16. Signature(s)

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

Number of attachments:

For Individuals:

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

Signature of Claimant(s): David A. Simon

Date: 3/12/10

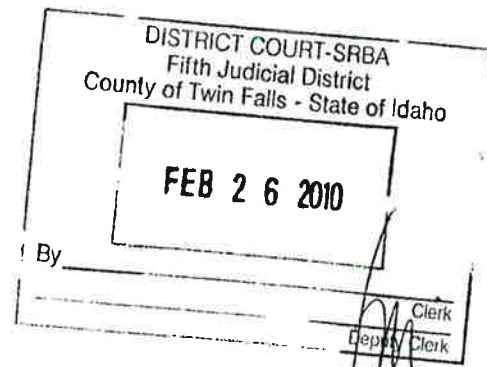
Date:

SCANNED

MAR 17 2010

Albert P. Barker, ISB #2867
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for David A. Simon.



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

In Re SRBA)

Subcase No. 37-2543

Case No. 39576)

AFFIDAVIT OF DAVID A. SIMON

I, DAVID A. SIMON, being first duly sworn upon oath, deposes and hereby
states as follows:

1. I reside in Camas County and I am over the age of 18. I state the following based on my personal knowledge.
2. I grew up on the family farm near Fairfield, Idaho. My brother Bill R. Simon and I now own a majority of the family farm corporation. We are responsible for the day to day operations of the family farm.
3. Since acquiring the farm from my dad, William "Bill" Simon, we have continued to irrigate crops to receive the greatest yield. We do dry farm in some areas and I have found that yields are much greater when I incorporate irrigation.

AFFIDAVIT OF DAVID A. SIMON

4. I bought the land associated with water right 37-2543 from Colleen Egersdorf on December 15, 2009.

5. I do not know why the previous owners did not file a claim for this water right in the SRBA. I also do not know why the previous owners did not resume use of this water right. However, if this motion is granted, I intend to maintain the water right for use on the property.

6. Currently, the land is unproductive due to lack of care. There are many weeds, with some pasture grasses remaining from previous owners' use. In order to get the land back into productivity, I intend to plow and till, then plant grain this season. There will be a lot of work involved with getting this land back to productivity. The grain will help fight the weeds and next season the land will be better and I will be able to put this ground into my normal crop rotation.

7. Irrigation water will greatly help with the revitalization of this land.

8. As to the water right, I intend to install a diesel pump on the well. I will connect a mainline and two or three wheel lines and will be able to use this water during the 2010 irrigation season. This will be done as soon as weather permits – hopefully by the end of April.

FURTHER YOUR AFFIANT SAYETH NAUGHT

David A. Simon
David A. Simon

SUBSCRIBED & SWORN to before me this 24 day of February, 2010.



Melody KrefT
Notary Public in and for the State of Idaho
My Commission Expires: 2/8/13

CERTIFICATE OF SERVICE

I certify that on this 26th day of February, 2010, I served a copy of the foregoing **AFFIDAVIT OF DAVID A. SIMON**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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

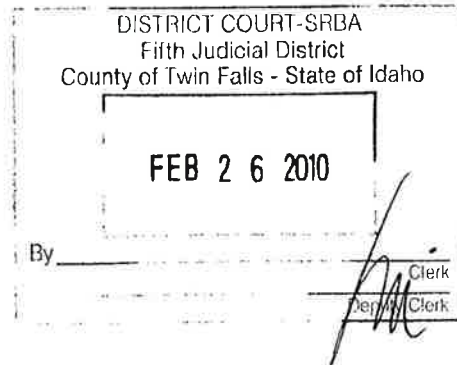
Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724


Paul L. Arrington

Albert P. Barker, ISB #2867
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for David A. Simon.



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

In Re SRBA)

Case No. 39576)

Subcase No. 37-2543

AFFIDAVIT OF WILLIAM A. SIMON

I, WILLIAM A. SIMON, being first duly sworn upon oath, deposes and hereby
states as follows:

1. I reside in Camas County and I am over the age of 18. I state the following based on my personal knowledge.
2. I have lived near Fairfield, Idaho for all of my adult life. I have owned and/or managed farming operations near Fairfield, Idaho for nearly all of that time. As such, I am familiar with water right 37-2543, and the history of the ground to which it is appurtenant.
3. Prior to 1953, all the land in the area of this water right, including my farming operations, was farmed using dry farming. In 1953, a number of farmers, including my father, William D. Simon, began installing wells and irrigating. This generally involved flood irrigation and hand lines. I remember that in 1953, George Petrie (then owner of the property) drilled a

well and acquired this water right. At that time, he ran some water in ditches for livestock and irrigated much of the property with hand lines. He used an electric well.

4. In the late 1970's, Mr. Petrie stopped using the water right. He began dry farming the property and the water has not been used since that time.

5. I remember that in the 1970's several area farmers reverted to dry land farming methods.

6. I incorporated irrigation into my farming practices where possible because I have found that, with irrigation, I can get a significantly increased yield as compared to dry farming.

7. After Mr. Petrie stopped irrigating, he grew alfalfa and grain.

8. As I recall, after Mr. Petrie, the property was owned by Elmer and/or Joyce Johnson (Mr. Petrie's daughter and son-in-law). They continued to dry farm the land.

9. Next, Ralph Egersdorf acquired the property. He began using the land for pasture until he passed away in 2002.

10. After Mr. Egersdorf passed away, his wife, Colleen, owned the property. Ms. Egersdorf did not take care of the land and it is now overrun with weeds.

11. Ms. Egersdorf sold the property to my son, David, in late 2009.

12. I do not know why Mr. Petrie stopped irrigating or why the subsequent owners did not irrigate with this water right. I also do not know no claim was filed in the SRBA Court for this water right or why use of the water right was not resumed before now.

///

///

///

///

FURTHER YOUR AFFIANT SAYETH NAUGHT

William A. Simon
William A. Simon

SUBSCRIBED & SWORN to before me this 24 day of February, 2010.



Melody E. Krefit
Notary Public in and for the State of Idaho
My Commission Expires: 2/8/13

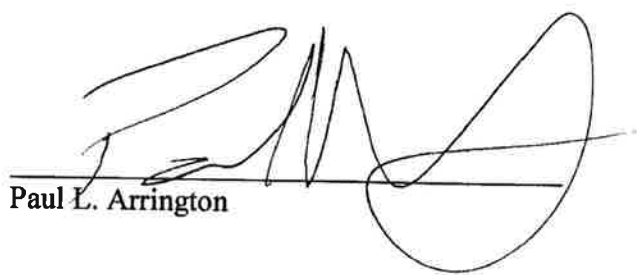
CERTIFICATE OF SERVICE

I certify that on this 26th day of February, 2010, I served a copy of the foregoing **AFFIDAVIT OF WILLIAM A. SIMON**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Paul L. Arrington

Albert P. Barker, ISB #2867
Paul L. Arrington, ISB #7198
BARKER RSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

Attorneys for David A. Simon.



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

In Re SRBA

Case No. 39576

Subcase No. 37-2543

AFFIDAVIT OF PAUL L. ARRINGTON

I, PAUL L. ARRINGTON, being first duly sworn upon oath, deposes and hereby states as follows:

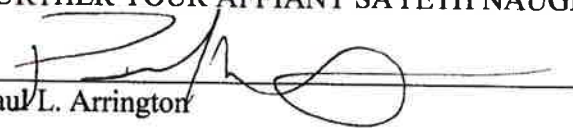
1. I reside in Twin Falls County and I am over the age of 18. I am an attorney representing David A. Simon, in this matter.
2. Attached hereto, as Exhibit A, is a true and correct copy of the License & Certificate of Water Right, dated October 10, 1958, acquired from the water right back file on the Idaho Department of Water Resources' website (www.idwr.idaho.gov).
3. Attached hereto, as Exhibit B, is a true and correct copy of pump measurement data for water right 37-2543, compiled by Brockway Engineering, PLLC on February 25, 2010.

///

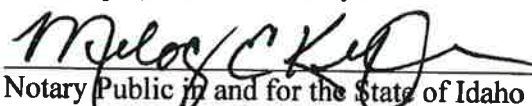
///

AFFIDAVIT OF PAUL L. ARRINGTON

FURTHER YOUR AFFIANT SAYETH NAUGHT


Paul L. Arrington

SUBSCRIBED & SWORN to before me this 26 day of February, 2010.


Notary Public in and for the State of Idaho
My Commission Expires: 2/8/13

MELODY E. KREFT
Notary Public
State of Idaho

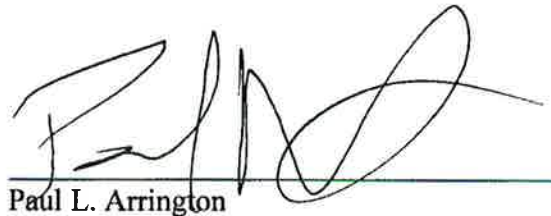
CERTIFICATE OF SERVICE

I certify that on this 26th day of February, 2010, I served a copy of the foregoing **AFFIDAVIT OF PAUL L. ARRINGTON**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Paul L. Arrington

Exhibit A

State of Idaho License and Certificate of Water Right

Water License No. G-24406Amount 3.1 c.f.s.

Water District No. _____

Priority August 26, 1953THIS IS TO CERTIFY that GEORGE PETRIE

of Fairfield, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated August 26, 19 53; that Permit No. G-24406 was issued under said application; that Certificate of Completion of works, with a carrying capacity of 3.1 second feet, was issued thereunder on October 10, 19 58, showing that said works were completed on the 19th day of June, 19 58; and that on the 19th day of June, 19 58, GEORGE PETRIE

of Fairfield, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of the right to use the waters of a well, a tributary of subterranean, for the purpose of Irrigation, under Use Permit No. G-24406 of the Department of Reclamation and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 10 of Licenses at page 6438, on the 10th day of October, 19 58; The right hereby confirmed dates from August 26, 19 53;

The Point of Diversion is located

In the NW 1/4 SE 1/4, Sec. 16, Tp. 1 S., R. 15 E., B. M. County Camas

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 3.1 cubic feet per second.

Description and location of use:

Twp.	Range	Sec.	Forty-acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
1 S.	15 E.	16	NE $\frac{1}{4}$ NE $\frac{1}{4}$	40	40
			NW $\frac{1}{4}$ NE $\frac{1}{4}$	40	40
			SW $\frac{1}{4}$ NE $\frac{1}{4}$	40	35
			SE $\frac{1}{4}$ NE $\frac{1}{4}$	40	35
			NE $\frac{1}{4}$ SE $\frac{1}{4}$	40	35
			NW $\frac{1}{4}$ SE $\frac{1}{4}$	40	35
			SW $\frac{1}{4}$ SE $\frac{1}{4}$	40	40
			SE $\frac{1}{4}$ SE $\frac{1}{4}$	40	<u>40</u>
Total number of acres irrigated				- - - 300	

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

WITNESS the seal and signature of the State Reclamation Engineer, affixed at Boise, Idaho, this

10th day of October, 19 58./s/ Geo. N. Carter

State Reclamation Engineer.

(SEAL)

37 553

Exhibit B

OBSERVATION WELL

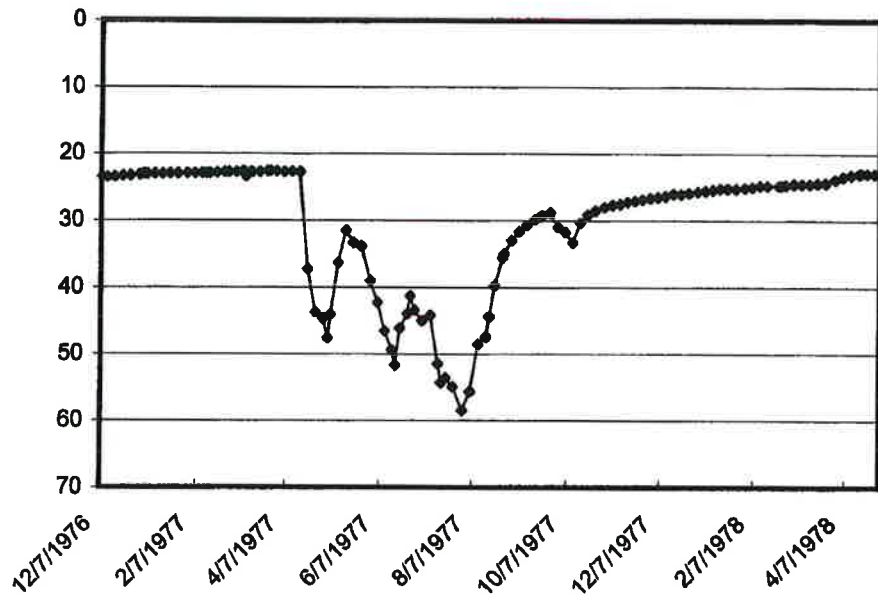
USGS 431958114405601 01S 15E 16DBC1

(Petrie well)

Depth: 122

LSElev: 5019

7/24/1967	32.31
12/7/1976	23.42
12/10/1976	23.47
12/15/1976	23.43
12/20/1976	23.29
12/25/1976	23.23
12/31/1976	23.09
1/3/1977	22.91
1/5/1977	23.02
1/10/1977	22.97
1/15/1977	22.95
1/20/1977	22.93
1/25/1977	22.94
1/31/1977	22.88
2/5/1977	22.87
2/10/1977	22.84
2/13/1977	22.82
2/15/1977	22.84
2/20/1977	22.77
2/25/1977	22.7
2/28/1977	22.67
3/5/1977	22.68
3/9/1977	22.54
3/10/1977	22.68
3/11/1977	23.35
3/14/1977	22.74
3/15/1977	22.73
3/20/1977	22.68
3/25/1977	22.57
3/27/1977	22.5
3/31/1977	22.57
4/5/1977	22.64
4/10/1977	22.58
4/15/1977	22.64
4/20/1977	37.25
4/25/1977	43.8
4/30/1977	44.7
5/3/1977	47.63
5/5/1977	44.1
5/10/1977	36.34
5/15/1977	31.49
5/20/1977	33.37
5/25/1977	33.87
5/31/1977	39.06
6/5/1977	42.25
6/10/1977	46.53
6/15/1977	49.35
6/17/1977	51.72
6/20/1977	46.11
6/25/1977	43.95
6/27/1977	41.28
6/30/1977	43.42

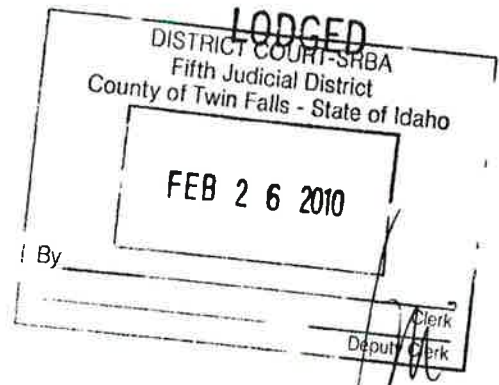


7/5/1977	44.96
7/10/1977	44.18
7/15/1977	51.45
7/17/1977	54.26
7/20/1977	53.52
7/25/1977	54.91
7/31/1977	58.43
8/5/1977	55.59
8/10/1977	48.6
8/15/1977	47.51
8/17/1977	44.4
8/20/1977	39.77
8/25/1977	35.62
8/26/1977	35.01
8/31/1977	32.99
9/5/1977	31.67
9/10/1977	30.7
9/15/1977	29.87
9/19/1977	29.38
9/20/1977	29.3
9/25/1977	28.84
9/30/1977	31.04
10/5/1977	31.81
10/10/1977	33.39
10/15/1977	30.36
10/20/1977	29.11
10/25/1977	28.49
10/31/1977	27.9
11/5/1977	27.61
11/10/1977	27.44
11/15/1977	27.14
11/20/1977	26.98
11/25/1977	26.76
11/30/1977	26.58
12/5/1977	26.43
12/10/1977	26.31
12/15/1977	25.94
12/20/1977	25.99
12/25/1977	25.79
12/31/1977	25.62
1/5/1978	25.48
1/10/1978	25.37
1/15/1978	25.18
1/20/1978	25.18
1/25/1978	25.16
1/31/1978	25.03
2/5/1978	24.95
2/10/1978	24.71
2/15/1978	24.72
2/23/1978	24.72
2/25/1978	24.67
2/28/1978	24.61
3/5/1978	24.49
3/10/1978	24.5
3/15/1978	24.5
3/20/1978	24.41
3/25/1978	24.3
3/31/1978	23.79

4/5/1978	23.39
4/10/1978	23.09
4/15/1978	22.9
4/16/1978	22.83
4/20/1978	22.86
4/25/1978	22.93
4/28/1978	22.91
4/29/1978	N

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 103
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for David Simon



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

In Re SRBA

Case No. 39576

Subcase No. 37-2543

**MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE NOTICE OF
CLAIM**

COMES NOW, David Simon ("Simon"), by and through his counsel of record, and hereby files this *Memorandum in Support of Motion to File Late Notice of Claim*. This Motion is supported by the *Affidavit of Paul L. Arrington* (hereinafter "*Arrington Aff.*"), the *Affidavit of David A. Simon* ("*David Simon Aff.*") and the *Affidavit of William A. Simon* ("*William Simon Aff.*"), filed together herewith.

INTRODUCTION

Through this motion, Simon seeks leave to file a late claim to resume the use of and claim a previously licensed water right. Although the water right has not been used since the late 1970's, Idaho law allows for the resumption of use of a water right for which there has not been a judicial forfeiture determination. Further, Simon meets the requirements for granting a motion

to file a late claim in the SRBA. The delay was not willful and there is no prejudice as any interested party will be able to participate in the SRBA process. Accordingly, the motion should be granted.

FACTUAL BACKGROUND

Water Right 37-2543 is a licensed water right. It was originally licensed on October 10, 1958, and authorized the diversion of 3.1 cfs of ground water to irrigate 300 acres in Camas County. *Arrington Aff.* Ex. A. The priority date is August 26, 1953. *Id.*

Prior to 1953, much of the land in the area of this water right, including the Simon farming operations, were farmed using dry land farming methods. *William Simon Aff.* ¶ 3. In 1953, a number of area farmers began installing wells and irrigating. *Id.* Farmers generally used flood irrigation and hand lines on their fields. *Id.*

Water right 37-2543 was originally licensed to George Petrie. *Arrington Aff.* Ex. A.; *William Simon Aff.* ¶ 3. In 1953, Mr. Petrie drilled the well, installed an electric pump and began irrigating the place of use with hand lines. *William Simon Aff.* ¶ 3. He also ran water in ditches for livestock. *Id.* USGS measurement data shows that water was diverted under this water right in 1977. *Arrington Aff.* Ex. B.

After 1977, Mr. Petrie reverted back to dry farming his property – growing alfalfa and grain. *Id.* at ¶ 5. Water right 37-2543 has not been used since that time. *See Id.* ¶ 4. After Mr. Petrie, Elmer and/or Joyce Johnson (Mr. Petrie's daughter and son-in-law) owned and managed the property and continued dry farming the land. *Id.* ¶ 8. The property was next farmed by Ralph Egersdorf, who used the property as pasture for his livestock. *Id.* ¶ 9. After Mr. Egersdorf passed away, his wife took over the land but did not maintain the land. *Id.* ¶ 10; *David Simon Aff.* ¶ 6. Neither David Simon, nor his dad, William, knows why use of this water right was not

resumed by any of the previous owners or why they failed to file a claim in the SRBA. *Id.* ¶ 12; *David Simon Aff.* ¶ 5. d

William Simon has been farming in Camas County for much of his adult life. *William Simon Aff.* at ¶ 2. He found that dry farming reduces his crop yields. *Id.* at 6. In the 1970's, when William Simon witnessed a lot of farmers in the area reverting to dry land farming, *id.* ¶ 5, he decided to continue using irrigation in his farming operations so as to increase his crop yields, *id.* at ¶ 6.

David Simon now owns and manages the family farming operations with his brother. *David Simon Aff.* at ¶ 3. He continues to use irrigation on the lands and also finds that irrigation provides greater crop yields than the lands he dry farms. *Id.*

Currently, the place of use for water right 37-2543 is overgrown with weeds and lingering pasture grasses. *Id.* at ¶ 6. To bring the land back into use, Simon will cultivate the land and raise grain to help fight the weeds. *Id.* He hopes to put the land into the normal crop rotation within the next irrigation season. *Id.* Irrigation water will greatly assist with the revitalization and future farming of this land. *Id.* at ¶ 7.

As to the water right itself, Simon intends to install a diesel pump on the well and to connect a main line and two or three wheel lines. *Id.* at ¶ 8. With this, Simon will be able to irrigate these fields during the 2010 irrigation season and beyond. *Id.* Simon will install these diversion works as soon as the weather permits, hopefully before the end of April. *Id.* He intends to maintain this water right for use in his farming operations. *Id.* ¶ 5

STANDARD OF REVIEW

Under this Court's *AOI*, a motion to file a late notice of claim is determined pursuant to Civil Rules 55(c). *See AOI* § 4(d)(2)(d). The Court, therefore, applies a "good cause" standard,

see Civil Rule 55(c), which is more lenient than the Rule 60(b) standard, see *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993). The “good cause” standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland, 123 Idaho at 936; see also *Order Granting Motions to File Late Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005).¹ Finally, courts must “examine each case in light of the unique facts and circumstances presented.” *Baldwin v. Baldwin*, 114 Idaho 525, 527 (Ct. App. 1988).

THE LAW OF RESUMPTION OF USE

A water right may be lost if it is not applied to a beneficial use for a period of five years. Idaho Code § 42-222(2). However, “forfeitures are not favored.” *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 836 (2003). As such, the Courts have entertained various defenses to forfeiture and Idaho Code § 42-223 provides a number of exceptions to forfeiture. One such defense, resumption of use, was recently addressed by Special Master Booth in his *Memorandum Decision & Order on Motion for Summary Judgment*, Subcase Nos. 63-2446, et al. (Dec. 16, 2009) (the “*Monarch Order*”). That decision provided valuable insight into a water user’s ability to resume use of a water right after more than five years of nonuse.

¹ Other jurisdictions apply similar criteria, such as: (1) proof that the default was not willful or culpable; (2) prompt action by the defaulting party to correct the default; (3) the existence of a meritorious defense; (4) an absence of prejudice to the opponent; (5) whether the default resulted from a good faith mistake in following a rule of procedure; (6) the nature of the defendant’s explanation for defaulting; (7) the amount in controversy; (8) the availability of effective alternative sanctions; and (9) whether entry of a default would produce a harsh or unfair result. See *Memorandum Decision and Order on Challenge; Order of Recommitment* at 6 (Subcase No. 47-14633 et al., March 22, 2005).

[T]he doctrine of resumption of use ... establishes that a forfeiture is not effective, even after the passage of five-year period of nonuse, unless there has been a claim of right by a third party ... The analytical framework is that a forfeiture is not effective or complete – and hence the use of such right may be resumed – unless and until one of the events listed in *Sagewillow* actually occurs (i.e. a third party either: (1) institutes legal proceedings to declare a forfeiture; (2) obtains a new water right prior to the resumption; or (3) uses the water pursuant to an existing right).

Monarch Order at 9.

This is consistent with Supreme Court precedent. In *Jenkins v. State Department of Water Resources*, 103 Idaho 384, 389 (1982), the Court held that “if use of the water right is resumed after the five year period, but before any third parties make a claim to the water, then the courts will decline to declare a forfeiture.” In *Jenkins*, the Director found that the waterway had been overappropriated and therefore denied a request to transfer a water right that had not been used for 18 years. *Id.* at 386.

In *Sagewillow*, which was relied upon by Special Master Booth in the *Monarch Order*, the Court again confirmed that:

[F]orfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party.

138 Idaho at 836. The *Sagewillow* Court held that a forfeiture analysis requires more than simply a review of the relative priorities in the area. “The mere existence of a junior appropriator, however, is not sufficient to show that the junior appropriator has made a claim of right to the water not used by the senior appropriator.” *Id.* at 837. Rather, harm would only occur “if there would not be sufficient water to fill [junior] water rights due to the senior appropriator being permitted to resume his use.” *Id.*

ARGUMENT

I. Simon Meets the “Good Cause” Standard for Amending a Notice of Claim

The central question presented here is whether Simon should be permitted to submit a late claim for a previously *licensed* water right that was historically diverted and used and that will be put back into use this spring. *See David Simon Aff.* ¶ 8. Since Simon’s actions were not willful, the granting of this motion will not prejudice any other water user, and a meritorious position has been shown, *see Order Granting Motions to File Late Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005), this motion should be granted.

A. Simon Actions were not Willful

Simon purchased this property on December 15, 2009. *David Simon Aff.* ¶ 4. Prior to that time, Simon had no interest in the water right and no authority to file a claim thereon. Simon does not know why the prior owners did not attempt to resume use of the water right and claim the right in the SRBA. *Id.* at ¶ 4; *see also William Simon Aff.* ¶ 12. As soon as Simon acquired the property, he hired legal counsel to investigate the water rights on the property and take any necessary action, including filing the present this motion.

B. Granting This Motion Will not Prejudice Other Water Users.

No other water users will be prejudiced by the granting of this motion. This right was developed and previously *licensed* by the Department. Furthermore, while resuming use of this water right may impact available water supplies, in *Sagewillow, supra*, the Court made clear that the mere existence of junior water rights does not equate to injury in the resumption analysis. Rather, harm would only occur “if there would not be sufficient water to fill [junior] water rights due to the senior appropriator being permitted to resume his use.” *Id.* Finally, if this motion is granted, the Department will be able to review the impacts of resumption under this water right

and all interested water users will be able to participate in this process, including the filing of objections and/or responses to any future recommendation. As such, no prejudice will occur.

C. A Meritorious Position has been Presented

Finally, a meritorious position has been presented. The law plainly allows a water user to resume use of a water right after five years of nonuse. *See supra*. There has been no judicial decree of forfeiture. Furthermore, the Department's analysis will include a review of existing water rights and the available water supply. So long as there is a sufficient water supply, resumption should be permitted. *Sagewillow, supra*.

Irrigation is a vital element of the Simon farming operations. *David Simon Aff.* at ¶ 3; *William Simon Aff.* at ¶¶ 5-6. Indeed, William Simon long ago decided to continue irrigating while neighboring farmers reverted to dry farming – a practice still followed by his sons, who now run the family farm. *Id.* While no prejudice will occur as a result of granting this motion, Simon will be left without a valuable resource should the motion be denied. Accordingly, the motion should be granted.

CONCLUSION

Simon meets the standard for filing a late notice of claim to a water right. The delay in filing a claim was not willful, as Simon did not own the property until late 2009 and had no authority or ability to resume use of this water right and/or claim it in the SRBA prior to that time. Furthermore, the Department's analysis will examine the impact of resumption of the water right and any interested parties may file objections and participate in these proceedings. As such, there is no prejudice. Finally, because there is a valid claim based on the law of resumption of use, a meritorious position has been presented. Accordingly, this motion should be granted.

DATED this 26th day of February, 2010.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to be "T. Thompson", written over a horizontal line.

Travis L. Thompson
Paul L. Arrington

Attorneys for David A. Simon

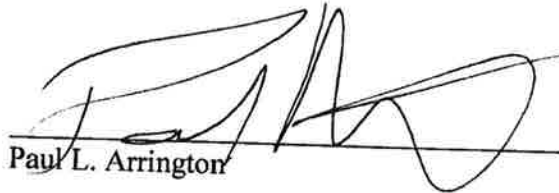
CERTIFICATE OF SERVICE

I certify that on this 26th day of February, 2010, I served a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Paul L. Arrington

06/15/2012

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

RIGHT NUMBER: 37-2543
NAME AND ADDRESS: DAVID A SIMON
PO BOX 545
FAIRFIELD ID 83327

SOURCE: GROUND WATER TRIBUTARY:
QUANTITY: 3.100 CFS
1,000.00 AFY

PRIORITY DATE: 08/26/1953

POINT OF
DIVERSION: T01S R15E S16 NWSE Within CAMAS County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	04/15 10/31	3.100 CFS 1,000.00 AFY

PLACE OF USE: IRRIGATION in CAMAS County

T01S R15E S16	NENE	38.00	T01S R15E S16	NWNE	38.00
T01S R15E S16	SWNE	29.00	T01S R15E S16	SENE	28.00
T01S R15E S16	NESE	39.00	T01S R15E S16	NWSE	40.00
T01S R15E S16	SWSE	40.00	T01S R15E S16	SESE	39.00

291 ACRES TOTAL

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

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

EXPLANATORY MATERIAL: BASIS OF CLAIM - License



Idaho Department of Water Resources

Adjudication Recommendation

37-2543

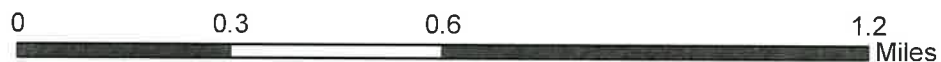
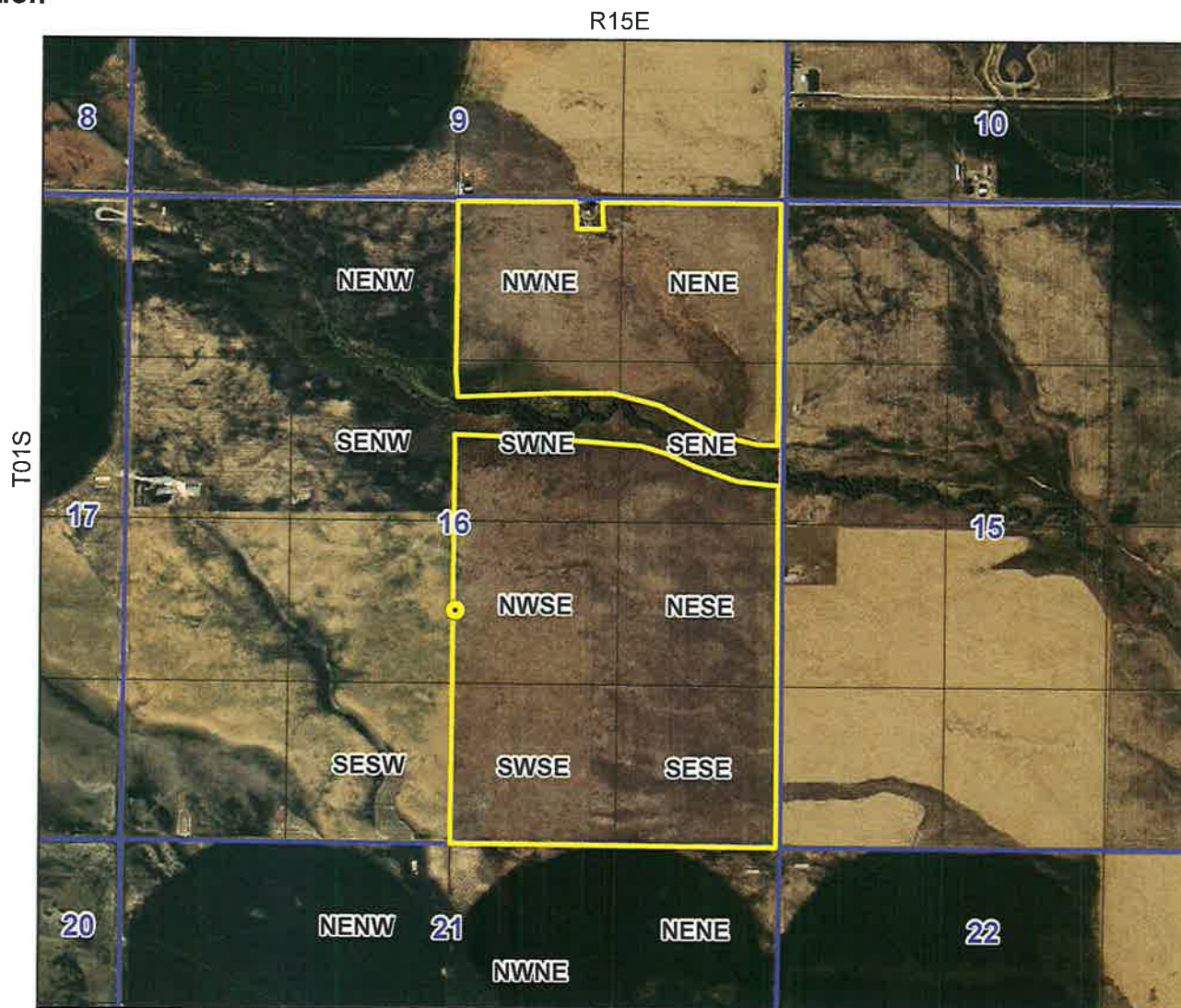
(IRRIGATION)

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



Camas County
IDWR Basin 37

Prepared by Jones, Doug
On June 15, 2012
2009 Aerial Photography



RECEIVED
JUN 26 2012
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

In Re SRBA

Case No. 39576

) Subcase No.: 37-2543

) (Formerly Disallowed)

) STANDARD FORM 5

) STIPULATED ELEMENTS OF A
) WATER RIGHT

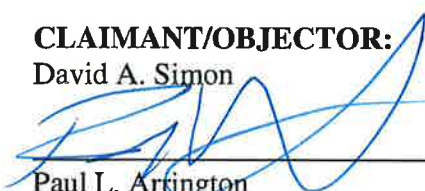
This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary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

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

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

CLAIMANT/OBJECTOR:

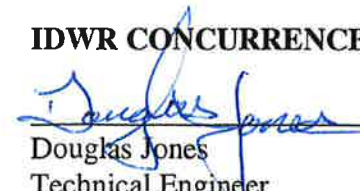
David A. Simon


Paul L. Arrington

6-21-12
Date

Attorney for David A. Simon

IDWR CONCURRENCE:


Douglas Jones
Technical Engineer

6/26/12
Date

IDWR CONCURRENCE:

Andrea L. Courtney
Deputy Attorney General
Attorney for IDWR

Date

CERTIFICATE OF SERVICE

I certify that on _____, 2012, I caused to be served true and correct copies of this Standard Form 5, to the following persons, in the manner indicated and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

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

2. Copies to:

IDWR Document Repository
P.O. Box 83720
Boise, ID 83720-0098

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

Paul L. Arrington
Barker, Rosholt & Simpson, LLP
P.O. Box 485
Twin Falls, ID 83303

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

Signature of person or attorney mailing the form

Jones, Doug

From: Courtney, Andrea
Sent: Wednesday, June 13, 2012 10:02 AM
To: Jones, Doug
Subject: RE: 37-2543 Simon

That's an interesting thesis. SMDolan has a decision post-trial re:partial resumption that would support partial recommendation. I think the PPU idea is good, and with the full flow and volume, it sounds a solid recommendation. I'm gonna ask for a July status if she's got it. We've gotta get the rec to Paul in the next 2 wks to make this more credible and settlement-possible.

From: Jones, Doug
Sent: Wednesday, June 13, 2012 9:54 AM
To: Courtney, Andrea
Subject: RE: 37-2543 Simon

That is my thesis. Weren't the previous SM decisions recognizing that only the amount resumed is protected? I don't know what Carter would think of it, but if there isn't anything but dry land on the remaining area then the amount irrigated is recommended and I would put it in a PPU on the whole licensed area. The air photos show ~150 ac. I can recognize nearly the full flow rate and the volume full season (3.5 af per acre) is approximately what 2 irrigations on 300 ac would be.

Doug

From: Courtney, Andrea
Sent: Wednesday, June 13, 2012 9:45 AM
To: Jones, Doug
Cc: Kelly, Vicki
Subject: RE: 37-2543 Simon

Are you thinking the current amount of resumption will match the aerial photos you've looked at?

From: Jones, Doug
Sent: Wednesday, June 13, 2012 9:37 AM
To: Courtney, Andrea
Subject: RE: 37-2543 Simon

... I would like to drive by on the sly. Either they are or have appeared to irrigate the SE field by now or it is only partially resumed. In my mind.

Doug

From: Courtney, Andrea
Sent: Wednesday, June 13, 2012 8:56 AM
To: Jones, Doug

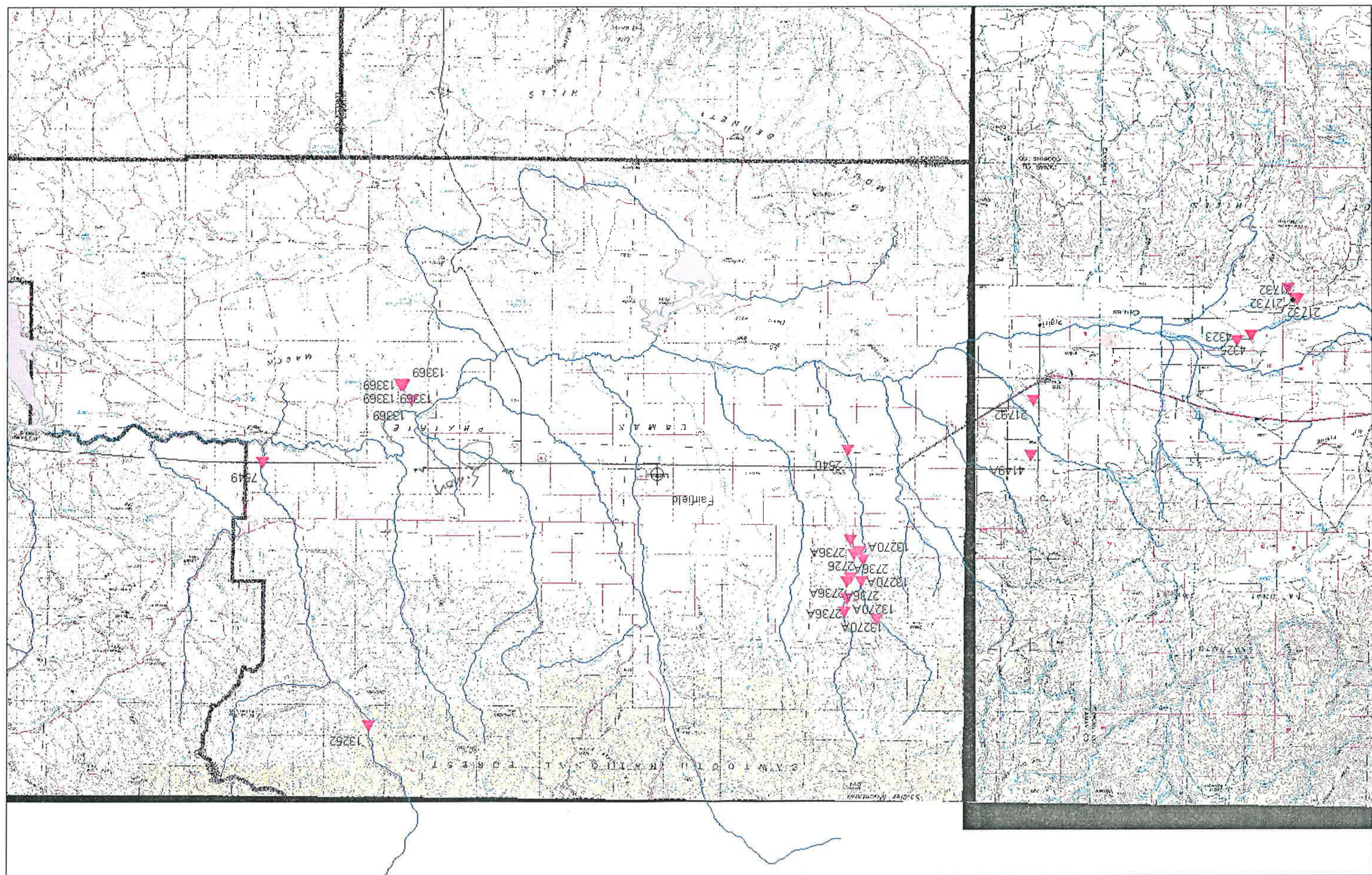
Cc: Kelly, Vicki
Subject: 37-2543 Simon

Doug~

Before this morning's status conference on this subcase, wanted to see if you'd been able to put the SF5 together as we discussed last week. Any update for me?

Thanks.

Andrea



Albert P. Barker
John A. Rosholt
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington
Scott A. Magnuson
Sarah W. Higer



Paul L. Arrington
pla@idahowaters.com

113 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

1010 West Jefferson, Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

January 31, 2012

Andrea Courtney
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

RECEIVED

FEB 01 2012

DEPT. OF WATER RESOURCES
SOUTHERN REGION

RE: Simon Water Right No. 37-2543

Dear Andrea:

This is a follow up to our conversation during the initial hearing for the above water right. Since that time, I have reviewed the *Order* creating the Big Wood River Ground Water Management Area ("WRGWMA"), including the accompanying *Management Policy*. I have also reviewed our briefing before the presiding judge and the history of the resumption of use by Mr. Simon. Following a conversation with my client, we do not believe that the WRGWMA prevents resumption of use of water right 37-2543. Likewise, we do not believe that there is any need to advance the priority date of the water right.

First, as discussed in the *Memorandum in Support of Motion to File Late Notice of Claim*, a water right is not automatically lost after 5 years of nonuse. Rather, a judicial decree of forfeiture or a subsequent claim of use for that water must occur. None of that has happened here. In fact, there has been *no objection* to Mr. Simon's claim of water right 37-2543 in the SRBA. Perhaps more importantly, Mr. Simon diverted water under this water right for each of the last two irrigation seasons (2010 and 2011). During that time, there have been no known complaints about Mr. Simon's resumption of use.

During our discussion, you indicated that, perhaps, designation of the WRGWMA would prevent resumption of use. After reviewing that *Order* and *Management Policy*, I do not believe that this is the case. First, both documents speak directly to "new ground water uses." *Order* at 1. Water right 37-2543 is not a "new ground water use." In fact, the right was licensed in 1958. Since no action was ever taken to determine whether or not this right had been lost due to nonuse, it would have been considered as part of the cumulative diversions that led to the WRGWMA designation. As such, it cannot now be considered a "new ground water use."

Furthermore, I cannot find any reference in the *Order* or *Management Policy* that allows the Department to prevent the resumption of use of a water right that predates the *Order*. There is discussion of transfers seeking to move points of diversion, but that is not the case here. If there are any separate policies or management guidelines that purport to give the Department authority to prevent resumption of use in this case, please provide that information.

An analogous decision recently issued by Judge Wildman is insightful here. See *Memorandum Decision & Order on Motion to Strike Affidavits & Motion for Accounting*, Subcase No. 27-11375 (July 14, 2011). In that matter, the State of Idaho moved the SRBA Court for an accounting pursuant to the certain provisions of the Fort Hall Agreement. There, the Tribes had agreed to subordinate their water right to certain junior surface water rights. Through the accounting, the State sought an identification of the water rights that benefited from the subordination.

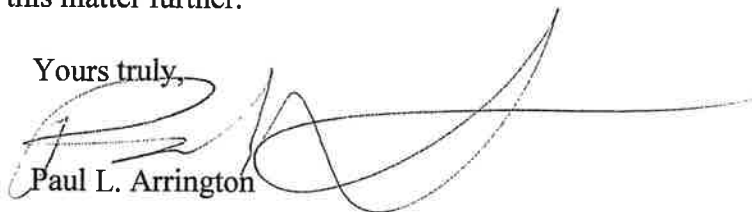
The Committee of Nine asserted that the subordination was limited. It asserted that, during the negotiations, the parties identifies the potential water rights that would benefit from the subordination provision based on 1986-87 diversion data. As such, even though the Agreement provided subordination for "persons diverting natural flow from the Blackfoot River prior to January 1, 1990," the parties' intent was to only subordinate to those rights actually diverted in 1986-87. Rights that were not being diverted during that time were not considered and, therefore, should not benefit from the subordination.

According to the Court, the Committee of Nine was attempting to read something into the Agreement (i.e. a limitation on the benefits provided in the agreement) that contradicted the plain language of the Agreement. In the *Memorandum Decision*, the Court concluded that the Agreement was "unambiguous regarding the scope of protected non-Indian water rights."

Similarly, the Department should not read anything into the WRGWMA *Order* and *Management Policy* that is not there. Here, the "unambiguous" and plain language of the documents speaks of "new ground water uses." This language should not be expanded to prevent the lawful resumption of pre-order ground water rights.

It is my hope that we will be able to resolve the objection to this water right short of litigation. Please give me a call to discuss this matter further.

Yours truly,


Paul L. Arrington

PLA/jn

cc: David Simon
Doug Jones ✓

Jones, Doug

From: Courtney, Andrea
Sent: Thursday, March 15, 2012 4:43 PM
To: Jones, Doug
Cc: Kelly, Vicki
Subject: RE: Confidential Atty/client: Simon, 37-2543

Doug~

First, I hope your surgery went well and you are doing better. I've had a shoulder surgery and multiple dislocations so I can relate. Take it easy.

Second, and more to the work facing us when you return, we have the Simon status conference on the 21st. I'm off on Monday so I'll connect with you on Tuesday. I read a couple SMBilyeu decisions on resumption and reread SMBooth's more recent Monarch Greenback 63-2446 et al decision (interpreting the Sagewillow case) as well as the Id Supreme Court's City of Poky decision issued earlier this year. Because we know that Simon has begun using water again, legally we've moved beyond the question of abandonment/forfeiture. He has resumed. Now we have to turn towards injury. Do you know if the Dept has received other resumption requests (or been alerted to resumption) in this GWMA? Have there been any calls in the area in which Simon's land is situated?

What concerns me most is the stance that Simon appears to want to take, that an advanced priority will not be satisfactory. If the Dept proposes an advanced priority and Simon fights us, then we need to have done the homework to demonstrate injury. I remain hopeful that Paul will suggest to his client, after seeing whatever evidence or suggestion of injury we put together, that Simon take the resumption with advanced priority date and not pursue to trial. In the City of Poky case, the City argued that no injury analysis could be triggered under 42-1425 unless a 3rd party filed an objection and that future injury could not be assessed, only injury on the date of the change could be considered. The Id Sup Ct soundly rejected both arguments. I think that opens the door for some future injury consideration even if no call in Simon's area has been made yet. We know SMBilyeu has concluded advancing priority date for resumption alleviates injury to jrs so this is a strong option. It is possible to argue that because Simon's right is in the GWMA that it's not just jrs at risk here, but rather the whole mgt area b/c the Dept has already concluded the area was fully appropriated. This is where Paul's argument about whether or not the Dept included Simon's right in the "already appropriated" calculation or not could be relevant (and I'm still very interested in learning the answer – who would know?). In the Mgt Policy for the GWMA, the Dept spells out "... any withdrawal and consumption of water which would otherwise contribute water to a surface water source, when the source is fully appropriated, will injure another water user. ...[And] withdrawal and use of water from either source [surface or ground] will impact the total supply." But Paul is right, on their faces neither the Order nor the Policy specifies the factual scenario here of resumption. Has the Dept issued new permits or licenses in the GWMA (if so, what is total cfs? How close to Simon's land?)? Has the Dept granted transfers from pods outside the GWMA to within? Does the Dept have better science about the GWMA that show the situation is more or less dire than believed in '91?

Please give this some thought. I'll call you on Tuesday so we can talk further.

Andrea

From: Jones, Doug
Sent: Friday, February 24, 2012 4:27 PM
To: Courtney, Andrea
Subject: Confidential Atty/client: Simon, 37-2543

RE: Arrington letter of 1/31

Andrea,

*Albert P. Barker
John A. Rosholt
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington
Scott A. Magnuson
Sarah W. Higer*



113 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

1010 W. Jefferson St., Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

June 25, 2012

RECEIVED
JUN 26 2012
DEPT. OF WATER RESOURCES
SOUTHERN REGION

Doug Jones
Idaho Department of Water Resources
Southern Regional Office
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301

RE: *David A. Simon Water Right 37-2543 SF5*

Dear Mr. Jones,

Enclosed please find the signed SF5 regarding David Simon water right 37-2543.

Should you have any questions, please contact Paul at (208) 733-0700.

Thank you,



Jessica Nielsen
Assistant for Paul L. Arrington

Enclosure
PLA/jn

Jones, Doug

From: Bromley, Chris
Sent: Thursday, July 29, 2010 2:57 PM
To: Jones, Doug; Spencer, Nick; Fritschle, Carter
Cc: Kelly, Vicki
Subject: RE: Camas Prairie Late Claim 37-2543

Doug, I can't see the justification in going up there when the documents filed state that it hasn't been resumed yet.

Chris

From: Jones, Doug
Sent: Thursday, July 29, 2010 2:56 PM
To: Spencer, Nick; Bromley, Chris; Fritschle, Carter
Cc: Kelly, Vicki
Subject: RE: Camas Prairie Late Claim 37-2543

The Management Area creation was to end ground water development not manage what was there so I don't see it CAUSING them to stop. Honestly, I think the folks got old, did not want the bills and hassles. The present claimant is a neighbor with irrigated lands around them in several places and when the previous folks passed away then they bought it. I am suspicious they bought it as dry land farm and now want to boost the value as irrigated land OR to transfer the water to their junior water right land when conjunctive administration comes to town.

I with Nick, I don't see how we can recommend it with an INTENT to resume. I suppose I should go up and observe that it is or isn't in operation now in 2010, but it seems like a time sink when so much needs to be done.

Thank you. Carter?

Doug

From: Spencer, Nick
Sent: Thursday, July 29, 2010 1:58 PM
To: Bromley, Chris; Jones, Doug; Fritschle, Carter
Cc: Kelly, Vicki
Subject: RE: Camas Prairie Late Claim 37-2543

I am coming to this party a little late, but is there any likelihood that the reason the predecessor in interest ceased used the right in the first place was because he was required to do so by the Big Wood Ground Water Management Area plan? If so, the non-use is excused under 42-223(4). On a different note, I have a hard time wrapping my mind around the concept that one can assert resumption of use on the theory that the appropriator *intends* to resume the use in the future. If that is how broad the doctrine has become we might as well forget there is even a forfeiture statute on the books. NBS

From: Bromley, Chris
Sent: Thursday, July 29, 2010 1:31 PM
To: Jones, Doug; Fritschle, Carter; Spencer, Nick
Cc: Kelly, Vicki
Subject: RE: Camas Prairie Late Claim 37-2543

With a moratorium in place, I think there's a very good argument to disallow the claim based on abandonment/forfeiture.

Doug, I know that SM Bilyeu likes to see us give a start date for abandonment/forfeiture, so if the decision is to move forward with the disallowal, it'd be good to include the start date.

Chris

From: Jones, Doug
Sent: Thursday, July 29, 2010 12:28 PM
To: Bromley, Chris; Fritschle, Carter; Spencer, Nick
Cc: Kelly, Vicki
Subject: RE: Camas Prairie Late Claim 37-2543

The area is part of the Upper Snake Moratorium area and is also in the Big Wood Ground Water Management Area (see attached link).

www.idwr.idaho.gov/WaterInformation/GroundWaterManagement/BigWoodRiver/bw_gwma.htm

Doug

From: Bromley, Chris
Sent: Thursday, July 29, 2010 11:25 AM
To: Jones, Doug; Fritschle, Carter; Spencer, Nick
Cc: Kelly, Vicki
Subject: RE: Camas Prairie Late Claim 37-2543

Doug,

I've read the materials submitted by Paul. I also went back through SM Booth's decision in the Monarch Greenback case. I think you're right that the pumps and electrical lines were removed, that water hasn't been used since the late 1970s, and that timely claims were not filed in the SRBA. I think those facts would support a finding of forfeiture and possibly even abandonment. Paul, however, states that his client is protected from forfeiture under a resumption of use theory.

Paul asserts resumption is proper because juniors would not be injured.

One factual bit of information I'd like to know from you is whether the Camas Prairie is within a moratorium area, or the trust water area. Here's why:

In SM Booth's decision, he comments that the objectors could not prove that the Boise River system was overappropriated; thereby not constituting a per se showing that juniors would be injured by Monarch Greenback's resumption. My thinking is that if we can show there's a moratorium in place, there would be a decent argument that resumption of a 3 cfs 1950s ground water license would injure junior appropriators because ground water is fully appropriated. I just can't remember if the Camas Prairie is within one of the moratorium areas.

Chris

From: Jones, Doug
Sent: Thursday, July 29, 2010 10:50 AM
To: Fritschle, Carter; Spencer, Nick; Bromley, Chris
Cc: Kelly, Vicki
Subject: Camas Prairie Late Claim 37-2543

Gents,

Paul Arrington has called about this late claim. It was a license that hadn't been used since the mid1970s and was purchased in 2009 and the claim filed with intent to resume the use. The Late Claim was granted by the court and Paul wants to dialogue about an affirmative recommendation.

How do we interpret this "resumption" after claim and after the original Dir Rpt? His memorandums filed with the late claim give his spin. Please look them over and let me know what you think. My initial response is – not that it would surprise you – no. The electrical service and pump were removed from the well and it seems to be a good indication of the original owner's intent to abandon and the 30 years of non-use as forfeiture.

Thanks,

Doug



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

June 15, 2010

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

PAUL ARRINGTON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 485
TWIN FALLS ID 83301

Re: Snake River Basin Adjudication (SRBA)
Late Notice of Claim to a Water Right No. 37-2543

Dear Paul:

The Notice of Claim you filed on behalf of David Simon has been received from the SRBA Court. I have enclosed Receipt No. C090856 for the filing fees you paid. Please retain the receipt for your records.

The Notice of Claim will be investigated and reported to the Court in a future supplemental Director's Report. If you have any questions, please feel free to contact our office.

Sincerely,

Lori Harris
Technical Records Specialist 2
Adjudication Section

LH:I
Enclosure