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DEPARTMENT OF
WATER RESOURCES

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WATER RESOURCES
WESTERN REGION

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84698 IN THE
NAME OF MARION OGLE**

**MOTION TO EXCLUDE EXPERT
WITNESS AND MEMORANDUM IN
SUPPORT**

MOTION

COMES NOW, the Applicant, Marion Ogle ("Applicant"), by and through her counsel of record, Hawley Troxell Ennis & Hawley LLP, and hereby moves the Idaho Department of Water Resources ("Department") for an order excluding the Protestant, Salubria Holdings LLC ("Protestant"), from offering any expert testimony or evidence at hearing by Scott King, P.E., or, alternatively, for an order limiting the scope of Mr. King's testimony to the rebuttal of matters raised by Applicant's expert, on the basis that Protestant has failed to comply with, and disclose the expert information required by the Hearing Officer's October 20, 2021 Hearing

Notice/Scheduling Order (“Order”) and the Rules of Procedure of the Department and, as incorporated therein, the Idaho Rules of Civil Procedure (“I.R.C.P.”), specifically, I.R.C.P. 26(b)(4). This Motion is supported by the contemporaneously filed Declaration of Tyler J. Anderson and other matters of record with the Department. Oral argument is requested.

MEMORANDUM

I. INTRODUCTION

This proceeding involves a straightforward application to transfer the place(s) of use of Rush Creek Water Right Nos. 67-250 and 67-301 (“Application”). The Application is noncontroversial: the new place of use is near the previous place(s) of use, the water diversion and delivery system will remain the same, the nature of the use (irrigation) will remain unchanged, and the subject water rights have been relatively recently decreed (less than 15 years ago).

In the instant case, a single protest by Protestant, who is an upstream user was filed, alleging an extensive list of legal grounds for its protest. Yet, with less than two months before hearing and just weeks before the close of discovery, Protestant has provided no substance in support of the alleged grounds for its protest making it difficult, if not impossible, for the Applicant and her counsel to properly prepare for hearing. For the reasons further described below, Protestant should be precluded from introducing Scott King’s expert testimony in this matter.

II. BACKGROUND

The subject water rights will continue to be delivered to the proposed new place of use *via* the Hubbard Ditch that crosses Protestant’s property and which Protestant also relies on for delivery of its Rush Creek water rights. This case is part of a series of matters involving the Hubbard Ditch that have come before the Department in recent years.

In 2013, the Protestant's predecessor in interest, Driscoll, unilaterally replaced the Rush Creek diversion for the Hubbard Ditch, removing the measurement device which had been in place historically. Then in 2015/2016, Driscoll, installed ponds on his property, destroying, not only the historic drainage in the area, but also many of the historic ditches for delivering Rush Creek water to downstream users, and filled those ponds without applying with the Department for the necessary water rights. In 2018, Mr. Driscoll finally filed an application for a water right for the ponds (the "Driscoll Application"). In 2019, during the pendency of the Driscoll Application, the Applicant's predecessor in interest (her mother, Kathleen Legg) notified the Department of the illegal retention of water in Mr. Driscoll's ponds, and the resulting negative impacts to downstream water deliveries. Consequently, in June 2019, the Department required Driscoll to drain his ponds until a decision on his water right application was made.

On January 28, 2020, the actual eve of the hearing scheduled on the Driscoll Application, after extensive discovery, settlement discussions, hearing preparation, and significant legal and expert expenditures by the Applicant's predecessor, Driscoll abruptly, and without explanation, withdrew his Application. The Department vacated the hearing on the Driscoll Application by order dated January 28, 2020. Driscoll conveyed the property and appurtenant water rights to Protestant. Protestant reinstated the filling of the ponds without a water right and in 2021, the Department again required that the ponds be drained until a water right was obtained. Finally, in 2021, Protestant filed its Application for Transfer to provide water rights for its ponds.

Meanwhile, in 2020, the Applicant inherited her interest in the proposed new place of use from her mother and purchased Water Right Nos. 67-250 and 67-301 from neighbor, Debra Dibble to transfer there. On February 8, 2021, Applicant filed the subject Application for Transfer No.

84698 with the Department. On July 2, 2021, Protestant filed a Notice of Protest which stated, in part, that “Protestant is particularly concerned with the validity of the water rights proposed for transfer”, that “the Application does not conform to applicable statutes, regulations, or guidance, and does not satisfy the criteria for approval” set forth in Idaho Code, and that its protest would be resolved by “a demonstration that the subject water rights have not been abandoned or forfeited, and that the proposed diversion and use will not injure other water rights.”

The Hearing Officer issued the Hearing Notice/Scheduling Order in this case on October 20, 2021 (“Order”), which provided in pertinent part that, “[o]n or before November 19, 2021, each party shall serve upon the other parties *any expert reports* and the names of the experts the party may call to testify at the evidentiary hearing, *with a brief summary of the topics each expert may testify about*” (emphases added).

On November 19, 2021, Protestants served Salubria Holdings LLC’s Disclosure of Expert Witness (“Protestant’s Disclosure”) identifying Scott King, P.E. as its sole expert witness. *See* Declaration of Tyler J. Anderson in Support of Motion to Exclude Expert Witnesses (“Anderson Dec.”), Ex. A, Salubria Holdings LLC’s Disclosure of Expert Witness (Nov. 19, 2021). Noticeably absent from Protestant’s Disclosure were the facts and opinions to which Mr. King is expected to testify, nor was there any expert report pursuant to the Order. The Protestant’s Disclosure merely repeated the general allegations set forth in the Notice of Protest, stating that the proffered expert will “offer opinions” that “the Application does not meet the criteria for approval” and the “Application will injure Salubria’s water rights and constitute an enlargement of water right nos. 67-250 and 67-301” without providing specific opinions or any supporting facts.. Likewise, its discovery responses served earlier on November 12, 2021, Salubria failed to provide any

substantive opinions or data on which its expert was expected to testify. *See* Anderson Dec., Ex.

C. By contrast, on November 19, 2021, Applicant disclosed the identity of her expert, together with a full expert report, with supporting facts and opinions to be offered at the upcoming hearing. *See* Anderson Dec., Ex. B.

III. ANALYSIS

A. Law Governing Expert Disclosures.

Idaho Rule of Civil Procedure 26(b), adopted by reference in Rule 520 of the Department's Rules of Procedure, provides the applicable standard for required expert witness disclosures pursuant to discovery or court order. IDAPA 37.01.01.520.02. Rule 26(b) divides expert witnesses into two categories and requires different levels of disclosure for each. *Herrett v. St. Luke's Magic Valley Reg'l Med. Ctr., Ltd.*, 164 Idaho 129, 133, 426 P.3d 480, 484 (2018) (citing I.R.C.P. 26(b)(4)(A)). The first category is for retained experts and requires the following to be disclosed:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinions must be disclosed;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

I.R.C.P. 26(b)(4)(A)(i). The second category is for non-retained experts. For non-retained experts, the rule requires a party to disclose “the subject matter on which the witness is expected to testify” and “a summary of the facts and opinions to which the witness is expected to testify.” I.R.C.P. 26(b)(4)(A)(ii).

The Civil Rules Advisory Committee has explained the distinction between disclosures required for retained experts from those required for non-retained experts as follows:

The purpose of making two categories of expert witnesses under this rule is to distinguish expert witnesses specifically retained in anticipation of litigation from those who offer expert opinions *based on their observations with respect to the transaction or occurrences* that are part of the subject matter of the trial, but who are *not retained for the purposes of litigation*; e.g., a treating physician, a police reconstructionist or an in-house engineer or accountant.

I.R.C.P. 26(b)(4)(A) advisory committee note (Jan. 28, 2014) (emphasis added). Whether a witness is being compensated for his or her expertise is not determinative of whether that witness is “retained” or “non-retained.” Rather, Rule 26 defines non-retained experts as “individuals with knowledge of relevant facts *not acquired in preparation for trial.*” I.R.C.P. 26(b)(4)(A)(ii) (emphasis added). As discussed further below, Mr. King would be considered a “retained expert” since he was hired specifically to provide expert testimony in this case. In any event, Protestant’s expert disclosures satisfy neither the “retained expert” disclosure requirements nor the less stringent “non-retained expert” requirements under I.R.C.P. 26(b). As served, Protestant’s generic and conclusory expert disclosures pursuant to the Order and Applicant’s discovery requests failed to provide the necessary detail or to satisfy the expert disclosure standards of I.R.C.P. 26(b)(4)(A).

The Idaho Supreme Court has made clear in cases involving expert testimony:

In cases of this character [involving expert testimony], a prohibition against discovery of information held by expert witnesses produces

in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation ... Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Radmer v. Ford Motor Co., 120 Idaho 86, 89-90, 813 P.2d 897, 900-01 (1991) (quoting Advisory Committee Notes, Rule 26, Fed. R. Civ. P.). In addition to expressing the basic concepts underlying pretrial expert disclosure, the Idaho Supreme Court further elaborated the importance for disclosure:

It is fundamental that opportunity be had for full cross-examination, and this cannot be done properly in many cases without resort to pretrial discovery, particularly when expert witnesses are involved ... *Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon.* If the attorney is required to await examination at trial to get this information, he often will have too little time to recognize and expose vulnerable spots in the testimony.

Id. (emphasis added) (quoting Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan.L.Rev. 455, 485 (1962)).

The Idaho Supreme Court has confirmed “the critical nature of complete and accurate responses regarding expert witnesses in the discovery process....” in accordance with I.R.C.P. Rule 26(b)(4) for the purpose of affording the other side an adequate opportunity to prepare its case. *Radmer*, 120 Idaho at 89, 813 P.2d at 900. Additionally, the Idaho Supreme Court has held that a trial court abuses its discretion and commits reversible error by allowing a party to present expert testimony that was not properly and timely disclosed under Rule 26. *Clark v. Klein*, 137 Idaho 154, 156-57, 45 P.3d 810, 812-13 (2002) *reh’g denied*, (citing *Radmer v. Ford Motor Co.*,

120 Idaho at 89-90, 813 P.2d at 000-01 (1991) (“failure to meet the requirements of Rule 26 results in exclusions of the proffered evidence.”)). It also has found that exclusion of an expert witness altogether is the appropriate remedy when an expert’s report was not timely disclosed in accordance with I.R.C.P. 26(b)(4)(A)(i) disclosure requirements and a court ordered deadline. *See Cummings v. Stephens*, 157 Idaho 348, 361, 336 P.3d 281, 294 (2014).

B. Protestant Should Not Be Allowed to Present Expert Testimony at the Upcoming Hearing Because It Failed to Make Adequate Expert Witness Disclosures Pursuant to the Hearing Officer’s October 20, 2021, Order, the Department’s Rules of Procedure and Rule 26(b)(4) of the Idaho Rules of Civil Procedure.

As stated in Protestant’s Disclosure, Scott King is a specifically retained professional engineer who intends to testify to factual or technical issues regarding the Application, relying on publicly-available documents to be found in the files of the water master and the Department, and the eyewitness testimony of other witnesses. Because Mr. King has been specifically retained for the purpose of this case, the more robust “retained expert” disclosure requirements of I.R.C.P. Rule 26(b) apply in this situation. Nevertheless, Protestant’s expert disclosures provides no detail about Mr. King’s specific opinions or the underlying actual or technical detail for those opinions as required by Rule 26(b). With 3 weeks remaining for discovery in this case, how can the Applicant be expected to address Mr. King’s testimony at hearing without having this information?

Protestant’s expert disclosures further state that Mr. King will rely on his own knowledge of and experience with the water rights that are the subject of the application and connected with the neighboring properties. However, Mr. King’s knowledge of the water rights related to this proceeding involved being a retained expert in another contested case, Driscoll’s Application for Permit No. 67-15261 which had been abruptly withdrawn just before hearing. While some of Mr. King’s own knowledge may have been obtained as a result of being a retained expert in another

case, this would not change the fact that he is also a retained expert in this case because he was retained specifically for the purpose of providing expert testimony in both cases in furtherance of promoting the Protestant's or its predecessor's claims.

Nevertheless, Protestant's expert disclosures fail to even satisfy the non-retained expert Rule 26(b)(4) disclosure requirements as they fail to even to include contain "a summary of the facts and opinions" to which Mr. King is expected to testify, vaguely stating only that "Mr. King may testify as to any factual or technical issues concerning [the Application] raised by [the Department] or any party", and that "Mr. King will offer opinions as to how the Application does not meet the criteria for approval set forth in Idaho Code § 42-222, and particularly how the Application will injure [Protestant's] water rights and constitute an enlargement of water right nos. 67-250 and 67-301." *See* Anderson Dec., Ex. A, at 2 of 4.

As described above, Protestant's expert disclosures are incomplete and woefully inadequate under any possibly applicable measure. At most, these "disclosures" contain general conclusory statements of the subject matter on which Mr. King may testify. Applicant is at a disadvantage to prepare to address the testimony of Mr. King or cross-examine him at hearing because Applicant has no information regarding his specific opinions or the data and other information he relied upon to form those opinions. Applicant is left to guess what Mr. King will say. As in *Radmer v. Ford Motor Co.*, 120 Idaho 86, 90-91, 813 P.2d 897, 901-2 (1991), Protestant's failure to disclose its expert's theory of the case and supporting evidence leaves the other side unprepared to meet and effectively challenge that theory at hearing and fatal error would occur if Protestant's expert is permitted to present undisclosed opinions at hearing. Apart from reciting conclusory statements regarding a broad range possible matters, Protestant has disclosed

no specific expert opinions to be presented at hearing, leaving the Applicant unable to effectively prepare for hearing.

To permit a late disclosure of the facts and opinions to which Protestant's expert will testify would be extremely prejudicial to the Applicant. For Protestant's expert to unload new facts and opinions now, within a few weeks of the close of discovery, would be prejudicial and would not allow for adequate preparation for hearing. Protestant agreed to the timeline described in the Order and had adequate time to produce all of the necessary information, but has failed to do so.

Protestant's expert disclosures do not comply with the Department's Scheduling Order, its Rules of Procedure or Idaho Rules of Civil Procedure 26(b)(4) incorporated therein by reference. Hearing is approaching quickly and the Applicant should not be prejudiced by newly disclosed expert opinions on highly technical subject matter at this late stage in the case. The sum total of the expert information disclosed by Protestant in relation to these experts is contained in Exhibits A and C to the Anderson Declaration. Such information falls woefully short of the requirements of Rule 26(b)(4)(A) and the Hearing Officer's Order. Protestant has attempted to avoid these disclosure requirements by providing the barest of a response, sans any expert report, and without providing a meaningful and substantive summary of Mr. King's opinions and the supporting data. Protestant's failure to properly disclose the substance and foundation of its expert's opinions unfairly prejudices the Applicant, in that the Applicant cannot properly prepare to address the Protestant's expert's opinions.

To compound the issue presented with Protestant's inadequate disclosures, Applicant duly complied with the Department's Scheduling Order by serving her expert disclosures, including a full expert report, on November 19, 2021. *See* Ex. B to Anderson Dec. The Department's

Scheduling Order apparently contemplated simultaneous expert opinion disclosures for both sides. That did not happen. At this point in time, Protestant has received the benefit of Applicant's expert opinions, but has failed to disclose its expert's opinions. By itself, Protestant's failure to adequately disclose its expert's opinions, while enjoying the benefit of Applicant's expert report, serves to prejudice Applicant.

As the Idaho Supreme Court found in *Clark*, *Radmer* and *Cummings*, at this late stage of discovery, the best way to eliminate the resulting prejudice to Applicant of inadequate expert disclosures would be to exclude any testimony of Mr. King. Because Protestant has failed to make the required timely expert opinion disclosures, Mr. King should be barred from testifying. Alternatively, at a minimum, Mr. King should not be allowed to testify as to his own theories and opinions but should be limited at hearing to responding to the opinions of Applicant's expert.

IV. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Hearing Officer enters an order excluding Protestant from offering any testimony or evidence at hearing by expert, Scott King, or in the alternative limits his testimony to rebuttal of the Applicant's expert testimony, on the basis that Protestant has failed to comply with, and timely disclose the information required under the Department's Rules of Procedure, I.R.C.P. 26(b)(4)(A) and the Hearing Officer's October 22, 2021, Order.

Dated: December 15, 2021

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Dana L. Hofstetter, ISB No. 3867
Attorneys for Marion Ogle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of December, 2021, I caused to be served the foregoing MOTION TO EXCLUDE EXPERT WITNESS AND MEMORANDUM IN SUPPORT by the pre-paid method (s) indicated below, and addressed to each of the following:

Nick Miller
Manager, Western Region
IDAHO DEPARTMENT OF WATER RESOURCES
2735 Airport Way
Boise, Idaho 83705
Email: nick.miller@idwr.idaho.gov

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☐ Overnight Mail
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☐ Facsimile 208-334-2348
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Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
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Attorneys for Marion Ogle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84698 IN THE
NAME OF MARION OGLE**

DECLARATION OF TYLER ANDERSON

Tyler Anderson, declare and state as follows:

- (1) I am Tyler Anderson, counsel of record in this proceeding for Marion Ogle.
- (2) Attached hereto as Exhibit A is a true and correct copy of Salubria Holdings LLC's

Disclosure of Expert Witnesses served November 19, 2021.

- (3) Attached hereto as Exhibit B is a true and correct copy of Marion Ogle's Expert
Witness Disclosure served November 19, 2021.

- (4) Attached hereto as Exhibit C is a true and correct copy of Salubria Holdings LLC's
Responses to Marion Ogle's First Set of Discovery Requests served November 12, 2021.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 15, 2021



Tyler Anderson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of December, 2021, I caused to be served the foregoing DECLARATION OF TYLER ANDERSON by the pre-paid method (s) indicated below, and addressed to each of the following:

Nick Miller
Manager, Western Region
IDAHO DEPARTMENT OF WATER RESOURCES
2735 Airport Way
Boise, Idaho 83705
Email: nick.miller@idwr.idaho.gov

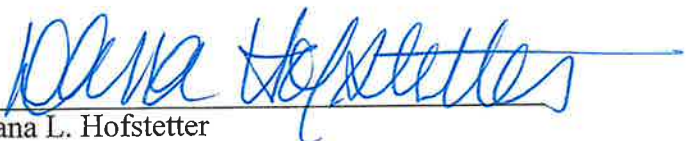
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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE APPLICATION
FOR TRANSFER NO. 84698 IN THE NAME
OF MARION OGLE

**SALUBRIA HOLDINGS LLC'S
DISCLOSURE OF EXPERT WITNESS**

Pursuant to the Hearing Officer's October 20, 2021 *Hearing Notice/Scheduling Order*, and in response to Interrogatory No. 4 of *Marion Ogle's First Set of Interrogatories and Requests for Production to Salubria Holdings LLC*, dated October 29, 2021, Protestant Salubria Holdings LLC ("Salubria"), through its attorneys Givens Pursley LLP, hereby discloses the following individuals who may be called as Salubria's expert witnesses at the hearing of this matter:

1. Scott King, P.E.
SPF Water Engineering, LLC
300 E. Mallard Dr., Suite 350
Boise, ID 83706

Mr. King's curriculum vitae is attached hereto.

Mr. King may testify to any factual or technical issues concerning Application for Transfer No. 84698 (the "Application") raised by the Idaho Department of Water Resources or any party.

Mr. King will offer opinions as to how the Application does not meet the criteria for approval set forth in Idaho Code § 42-222, and particularly how the Application will injure Salubria's water rights and constitute an enlargement of water right nos. 67-250 and 67-301.

Mr. King will rely on publically-available documents in the files of the watermaster and the Idaho Department of Water Resources, the eye witness testimony of other witnesses, and Mr. King's own knowledge of and experience with water right nos. 67-250 and 67-301 and with neighboring properties to both the current place of use of water right nos. 67-250 and 67-301 and the new proposed place of use under the Application.

Exhibits that may be used as a summary of or support for the opinions will be served in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

Mr. King has not authored any publications in the past ten years.

Mr. King is compensated at an hourly rate of \$140 for his testimony in this matter.

Over the last four years, Mr. King has testified in the following trials: *Genta v. Gould*, Bannock County (December 2015); *Friend v. Nettleton*, Elmore County (February 2016); and *Lundholm Enterprises v. Gunderson*, Jefferson County (November 2016). Mr. King has testified in the following depositions and administrative hearings: Transfer 80342 (Casa Del Norte), expert witness testimony in deposition and in an IDWR administrative hearing; Driscoll Family Trust, deposition (December 2019); Eckhardt protest against Double C & J Land Co.'s application for permit 67-15333, testimony at administrative hearing (November 2020); McConnell application for transfer no. 84441, testimony at administrative hearing (April 2021).

DATED as of November 19, 2021.

GIVENS PURSLEY LLP

/s/ Michael P. Lawrence

Michael P. Lawrence

Charlie S. Baser

Attorneys for Salubria Holdings LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 19th day of November, 2021, I served a true and correct copy of the above and foregoing document via the manner listed below to the following:

FILED

Nick Miller		U. S. Mail
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Idaho Water Center		Facsimile
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Boise, ID 83702		
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SERVED

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Boise, ID 83701-1617	X	E-mail
<i>Attorney for Marion Ogle</i>		

/s/ Michael P. Lawrence

Michael P. Lawrence

Education

M.S., Civil Engineering
University of Idaho, 2002

B.S., General Engineering
Idaho State University, 1990

Professional Certification

Professional Engineer
Idaho No. 7914, 1995
Oregon No. 84533PE, 2010

Certified Water Right Examiner
Idaho No. 133
Oregon No. 84533CWRE

Areas of Expertise

- Water rights
 - investigations and analysis
 - permits and transfers
 - marketing and acquisitions
- Expert witness services
- Water resource investigations
- Water well design
- Surface water modeling
- Gravity irrigation systems
- Stream flow measurement
- Pipe flow measurement
- Pumping efficiency evaluations

Experience Summary

Mr. King has over 30 years of professional and academic experience in water resources engineering. He is currently a Project Engineer with SPF Water Engineering, LLC and specializes in water right issues, water flow measurement, open-channel flow, pumping system design, water well design, and geographic information systems (GIS). Prior work includes 14 years experience in a broad variety of Idaho Department of Water Resources' (IDWR) programs including water rights adjudication, water rights administration, safety of dams, and energy efficiency.

SPF Water Engineering, LLC – 2005 to present

Mr. King is currently a Project Engineer with SPF Water Engineering, LLC. SPF was founded in March 2004 to provide hydrologic characterization, water resource development, and public water system design and regulatory compliance. Mr. King provides consulting services on water rights issues, pump design, irrigation system evaluation, surface water hydrology, surface water modeling, and river hydraulics. His recent project experience includes the following:

- Extensive water right experience including
 - permit and transfer applications
 - mitigation plans
 - investigations and analysis
 - acquisitions and sales
 - beneficial use field examinations
 - adjudication claim preparation and support
- Expert witness services
- Gravity irrigation system design and analysis
- Stream flow measurement and monitoring
- Geographic Information System (GIS) mapping and analysis
- Conveyance capacity determinations for streams, culverts, and other open-channel systems
- Water well design including designs to municipal public drinking water supply standards
- Well capacity determination
- Pumping system design
- ***DHI, INC – 2004 to 2005***

Mr. King worked as a senior project engineer responsible for development of various surface water models. Project experience includes the following:

Modeling – MIKE 11. Developed hydrodynamic 1-D MIKE 11 model of the Little Claggett Creek storm water drainage system, a part of Marion County's East Salem Service District, Oregon. Produced flood maps for SCS Type 1A design storms and for the February 1996 flood event. This

model includes 8.5 km of streams in two branches, over 100 cross-sections extracted from a 2 ft vertical resolution DEM, and 23 culverts with corresponding broad-crested weirs representing roadways over culvert crossings. Inflow boundary conditions are represented by 21 catchments contributing point-source and distributed inflows simulated in MIKE 11's rainfall / runoff module.

Modeling – MIKE BASIN. Project lead on MIKE BASIN surface water distribution models developed for the Idaho Department of Water Resources. These models are used by IDWR for three primary purposes: flow enhancement tools to address flow-limited stream reaches; decision making tools to assist in selecting effective mitigation and restoration projects; and communication tools for educating decision makers and stimulating discussion among stakeholders. Developed systems include the Pahsimeroi River and East Fork Salmon River, and experiences with Lemhi River and Stanley Basin models. These models operate on a daily time step and represent the water distribution system within the basins including the stream networks, points of diversion, places of use, and locations of return flow. Time series information includes records of stream gaging, diversion measurements, precipitation, and evapotranspiration. Provided training to IDWR staff, contractors, and watermasters on the operation of MIKE BASIN through a series of hands-on sessions. Presented proposals to local waterusers and stakeholders for new model applications in Morgan Creek and Carmen Creek.

Modeling – Rainfall / Runoff. Developed lumped conceptual rain/snow/runoff models of the Stanley and East Fork Salmon River Basins for the Idaho Department of Water Resources using DHI's lumped conceptual rainfall/runoff module. The developed models are used to supply tributary inflow boundary conditions to the East Fork Salmon River and Stanley Basin MIKE BASIN models.

Developed rainfall/runoff models of 21 catchments supplying inflow boundary conditions for the Little Claggett Creek MIKE 11 model described above. Rainfall/runoff is simulated using DHI's URBAN module. Four storm events are modeled including the February 1996 observed event and SCS Type-1A 2-, 10-, and 50-year design storms.

Idaho Department of Water Resources – 1990 to 2004

During 14 years with the Idaho Department of Water Resources, Mr. King held four engineering positions and gained experience in a wide range of IDWR activities. These positions included Technical Engineer in the Adjudication Bureau, and Staff Engineer positions in the Water Distribution Section, in Western Region's Safety of Dams unit, and in the Energy Division. Relevant experience includes the following:

Program Management

Managed Western Region's Safety of Dams program. Inspected dams and made recommendations for maintenance and operation to improve safety and meet state standards. Issued storage certificates and authorizations to

fill.

Lead technical consultant in statewide water measurement program. Defined water measurement standards and implemented a program for measuring and reporting ground-water withdrawals. Coordinated field work performed by department staff and various measuring districts. Inspected contractor projects for adequacy and compliance with department standards. Designed and managed water measurement databases.

Water Rights

Reviewed complex water right claims and prepared water right recommendations for the Director's Report to the Snake River Basin Adjudication court. Provided technical analysis and recommendations for nonstandard water right claims, such as claims for diversion rates exceeding the standard allocation, and for claims to the use of water outside of the standard seasons of use.

Provided training and direction to new employees, water districts, water measurement districts, groundwater districts, and private consultants on water rights, water measurement programs, and adjudication procedures.

Worked with water users and their legal representatives on various water right enforcement issues, including excessive and illegal water diversions.

Experienced with all aspects of IDWR regional office operations including water rights, transfers, well drilling, adjudication, water district operation, violations, enforcement, and customer complaints.

Irrigation and Pumping Systems

Performed pumping system evaluations including determinations of municipal, industrial, and agricultural pumping plant efficiencies and recommended measures for improved efficiency and reduced operating costs. Provided recommendations and designs for conversions to low-pressure irrigation systems for reduced operating costs and improved yields.

Technical Expert to Snake River Basin Adjudication (SRBA) Court

Provided technical engineering support to department staff in the ongoing SRBA.

Designated as department expert to the SRBA court regarding irrigation requirements, evapotranspiration, and crop water requirements. and how this information is utilized for preparing recommendations.

Public Relations

Presentations at public meetings to explain laws and regulations relating to water measurement and water appropriation.

Provided conflict resolution support for several water related disputes.

Trained IDWR employees, state Watermasters and Hydrographers, contractors, and consultants on water measurement standards, equipment, practices, and procedures through regular training sessions and individual assistance.

Guest lecturer in 1996 and 1998 for College of Southern Idaho's Water Measurement course, and in 1998 for Boise State University's Water Measurement lab.

Presented *Selection and Installation of Pipe Flow Water Measurement Devices* at the 1997 Idaho Irrigation Equipment Show and Exhibition, Shilo Inn, Idaho Falls, January 8-9.

Technical

Developed and proposed to department administration and to the general public technically sound methods of using power records for estimation of pumped water diversions.

Determined acceptability and provided professional opinions for numerous non-standard water measurement methods and devices proposed to IDWR by engineering consultants and water users.

Determined conveyance capacity of pumps, diversions, pipelines, open channels, turbines, etc.

Led IDWR efforts to utilize global positioning systems (GPS). Developed standards for use, trained staff and consultants, and integrated GPS data collection into GIS work.

Report Development

Authored various reports including annual reports of ground water diversions, reports to individual water users, flowmeter accuracy reports, and various other reports relating to water measurement.

Co-author of *Eastern Snake Plain Aquifer Water Measurement Program, A Summary of Measurement Activity & Results from Basin 36 Project Area, 1995-1996 and a Review of Program Expansion in 1997*, IDWR, May 1998.

University of Idaho – 1999 to 2002

Masters of Science in Civil Engineering Thesis: The Effective Discharge Concept in Gravel Bed Stream Restoration: The Twelve Mile Reach of the Salmon River at Challis, Idaho.

Determined channel effective discharge based on sediment transport measurements and flow records. Compared effective discharge to bankfull discharge and stated implications of findings in regards to channel restoration. Completed hydraulic, hydrologic, and geomorphologic characteristics of the study reach. Presented findings and recommendations to technical groups and local property owners.

Developed hydrodynamic pseudo 2-D MIKE 11 model of the Twelve Mile Reach, Salmon River, near Challis, ID. Produced animated flood maps of primary flooding events from 1974 (100-yr), 1996, and 1997. This model includes 27-km of mainstem river including braided sections and split flows. Over-bank discharge into Hannah Slough and across One-Mile Island is represented by link-channels. The model includes 68 surveyed cross-sections and utilizes a 2-ft interval contour map for flood mapping.

Expert Witness and Litigation Experience

February 5, 2008

Idaho Ground Water Appropriators, Inc in Surface Water Coalition Administrative Hearing. Co-authored technical report on behalf of Idaho Ground Water Appropriators and provided expert witness testimony in District Court.

January 14, 2009

Southfork Landing / Eagle Springs Ranch / Barnes Ventures Inc, Garden Valley, ID. Provided expert witness testimony in administrative hearings to contested water right applications.

January 27, 2009

Black Rock Utilities, Coeur d'Alene, ID. Provided expert witness services including hearing testimony in contested application for permit.

October 14, 2009

Jerry Tlucek, Melba, ID. Provided expert witness services in administrative hearing for contested water right transfer.

November 2 & 3, 2009

United States of America vs. Cory Ledea King. Provided technical support for federal sentencing hearing on behalf of the Double C Farms and Cory King.

January 12, 16, 2011

Elmore County P&Z Hearings on Mayfield Townsite. Provided expert witness testimony to the Planning and Zoning Commissioners in support of water availability for a planned community.

May 3, 10, 12, 2011

Elmore County Commissioners Hearing on Mayfield Townsite. Provided expert witness testimony to the County Commissioners in support of water availability for a planned community.

March 23-25, 2011

Preston-Whitney Irrigation Company Water Right Transfer Application Hearing, Preston, ID. Provided expert witness services including investigation and administrative hearing testimony in opposition to the Irrigation Company's proposed transfer.

May 10, 2011

Dwaine Lingle v. TO Engineers. Testified in Civil Court as a witness regarding adequacy of irrigation water for subdivision development.

December 15, 2011

Mann Farms, Inc. (Darin and Kent Mann) application to Canyon County P&Z. Provided expert witness testimony to the Planning

and Zoning Commissioners on Mann Farms' proposed Conditional Use Permit for CAFO.

September 17, 2014

American Falls Aberdeen Ground Water District et. al. Water Right Permit Application No. 36-16976. Provided expert witness testimony in an administrative hearing in support of the Ground Water Districts' "Bridge Diversion" application for permit in response to the "Rangen Call."

October 29, 2014

Deposition in support of Friend in Friend v. Nettleton, Elmore County District Court.

December 18, 2014

North Snake Ground Water District et. al. Water Right Transfer No. 79560. Provided expert witness testimony in an administrative hearing in support of the Ground Water Districts' application for transfer changing the place of use of 10 cfs from the SeaPac Magic Springs hatchery facility to Rangen, Inc.'s hatchery, and purpose of use from Fish Propagation to Mitigation/Fish Propagation.

February 5, 2015

North Snake Ground Water District et. al. Water Right Permit Application No. 36-17011. Provided expert witness testimony in an administrative hearing in support of an application to divert water from Sandy Ponds for Irrigation, Mitigation, and Ground Water Recharge.

December 17, 2015.

Genta v. Gould, Bannock County (Pocatello), ID. Provided expert witness testimony for defendant Robert Gould in District Court regarding a ditch dispute. Case No. CV-2014-0001943-OC.

January 27, February 3, 2016

Friend v. Nettleton, Elmore County (Mountain Home), ID. Provided expert witness testimony in support of the plaintiff Friend in District Court regarding wetland dewatering.

April 27, 2016

Declaration in support of defendant Robert Gould in Genta v. Gould on Case No. CV-14-1943-OC in the District Court of the Sixth Judicial District of the State of Idaho, Bannock County. Declaration provided opinion on ditch reconstruction.

November 28, 2016

Lundholm Enterprises v. Gunderson, Jefferson County (Rigby), ID. Provided expert witness testimony in District Court regarding a ditch removal dispute.

October 8, 2018

Deposition in support of applicant Casa Del Norte in IDWR administrative hearing on Water Right Transfer No. 81800. Deposition provided at Parsons Behle & Latimer, Boise, Idaho.

June 6, 2019

Declaration in support of E. Bruce Stanger, Michael R. Stanger, and Kimberly S. Kvamme, d/b/a Sometimes a Great Notion Land and Cattle Company v. Walker Land & Cattle, LLC., and Vista Valley Ag, Inc, Bonneville County, ID. Declaration provided opinion on aerial imagery interpretation, irrigated and non-irrigated fields, and risk of water right forfeiture due to non-use.

June 11, 2019

Declaration in support of plaintiff Leland and Louise Davis v. Sandra Hansen, Douglas Hansen, and Nicholas and Deborah Wiebe, Washington County, ID. Declaration provided support of a temporary restraining order and preliminary injunction regarding defendant's irrigation practices and flooding on plaintiff's property.

September 24 & 27, 2019

Expert witness testimony at IDWR administrative hearing in support of applicant Casa Del Norte on Amended Water Right Transfer No. 80342. Boise, Idaho.

December 19, 2019

Deposition in support of applicant Driscoll Family Trust on Water Right Application No. 67-15261. Deposition provided at Hawley Troxel, Boise, Idaho.

February 25 & 26, 2020

Expert witness testimony at IDWR administrative hearing in support of applicant Casa Del Norte on Amended Water Right Transfer No. 81800. Boise, Idaho.

May 1, 2020

Expert witness report in support of Eckhardt's protest against Double C & J Land Co's application for permit 67-15333.

November 5 & 6, 2020

Expert witness testimony at IDWR administrative hearing in support of Eckhardt protest against Double C & J Land Co's application for permit 67-15333.

March 26, 2021

Expert witness report in support of McConnell application for water right transfer no. 84441.

April 21 & 22, 2021

Expert witness testimony at IDWR administrative hearing in support of McConnell application for water right transfer no. 84441.

July 20, 2021

Expert witness report in support of Hiawatha Canal Company protest against Eccles Flying Hat Ranch, LLC application for water right transfer no. 83485.

October 8, 2021

Expert witness report in support of Reese application for water right permit 75-15017 and notice of violation case no. E2021-2740.

Publications

Idaho Department of Water Resources May 1998. Eastern Snake Plain Aquifer Water Measurement Program: A Summary of Measurement Activity & Results from Basin 36 Project Area, 1995-1996, and a Review of Program Expansion in 1997. Co-authors Luke, King, Scholer, and Hodges.

King, 2002. The Effective Discharge Concept in Gravel-Bed Stream Restoration: The Twelve Mile Reach of the Salmon River at Challis, Idaho. Masters of Science with a major in Civil Engineering Thesis Project.

Presentations

September 13, 2012

Water Right Transfers. HalfMoon LLC Idaho Water Laws and Regulations seminar, Boise, Idaho. Presented on Idaho's water right transfer process.

September 24 & 25, 2012

Use of Remote Imaging to Assess Water Right Compliance and Historical Water Use. Law Seminars International, Water Law in Idaho, Boise, Idaho. Presented on availability and usage of remote imagery to identify irrigation patterns to determine compliance and historical water use.

March 29, 2013

Water Rights Due Diligence and Valuation in the Agricultural Context. Idaho State Bar Real Property Section, Sun Valley, Idaho. Presented on researching and valuing agricultural water rights.

November 15, 2013

Hydrology for Attorneys. Idaho State Bar Water Law Section, Boise, Idaho. Presented on surface water hydrology, hydrologic cycle, basin characteristics, runoff models, stream channel characteristics, data availability, flow measurement techniques, irrigation systems, crop water use, and aerial photograph interpretation to identify historic irrigation patterns.

December 4, 2013

Technical Aspects of Transfers and Changes. Lorman Educational Services seminar, Boise, Idaho. Presented on identifying water rights for purchase, contracts for sale and purchase, water right transfer process, and mitigation options.

April 30, 2015

Idaho's Water Right Mitigation Program: Creative Approaches for Municipal Water Providers. American Water Works Association, Pacific Northwest Section, Water in Action Conference, Bellevue, Washington. Presented on water right mitigation options available to Idaho municipal providers, major delivery calls, municipal curtailment, and municipal consumptive use.

July 28 & 29, 2014

Surface Water Hydrology. Law Seminars International, Eighth Annual Idaho Water Law Conference, Water Law in North Idaho, Coeur d'Alene, Idaho. Presented on surface water hydrology, the hydrologic cycle, basin characteristics, runoff models, stream channel characteristics, data availability, and flow measurement.

February 9, 2017

Hydrology for Attorneys. Idaho State Bar Water Law Section, Boise, Idaho. Presented on irrigation systems, crop water use, and aerial photograph interpretation to identify historic irrigation patterns.

December 14, 2017

Planning, Organizing and Implementing New Irrigation Projects. Treasure Valley Irrigation Conference, Ontario, Oregon. Presented on the water right appropriation process and available of new water right appropriations in Idaho and Oregon.

April 27, 2018

Water Banking in Idaho: A Tool for Water Suppliers. American Water Works Association, Pacific Northwest Section, 2018 Annual Conference, Tacoma, Washington. Presented on Idaho water rights and Idaho's Water Supply Bank and rental pools as options for meeting municipal water supply needs.

May 16, 2018

Water Rights 101 & 102, American Water Works Association, Pacific Northwest Section, Southwest Idaho Subsection, Idaho Power, Boise, Idaho. Presented on water right processes in Idaho.

November 2017, 2018, 2019, 2020 & 2021

Water Rights 101. Knipe Land Company, Western Land Symposium, Boise, Idaho. Presented on Idaho and Oregon water right processes and status of new appropriations.

Tina Shull

From: Tina Shull <TShull@hawleytroxell.com>
Sent: Friday, November 19, 2021 4:53 PM
To: 'mpl@givenspursley.com'; 'csb@givenspursley.com'
Cc: Dana Hofstetter
Subject: IN THE MATTER OF APPLICATION FOR TRANSFER NO. 84698 IN THE NAME OF MARION OGLE [IWOV-IMANAGE.FID1258994]
Attachments: 2021-11-19 SWE Expert Report - Transfer 84698 Application Rev2.pdf; Notice of Service of Expert Report of Heidi M. Welsh.pdf; Marion Ogle's Witness Disclosure.pdf

Gentlemen,

Relating to the above-referenced matter, attached is the Expert Report of Heidi M. Welsh, along with the Notice of Service of Expert Report of Heidi M. Welsh and Marion Ogle's Witness Disclosure. Thank you.

TINA SHULL

*Legal Assistant to Kenneth C. Howell, Richard G. Smith,
Andrea J. Rosholt, Dana Hofstetter and Brian Ballard*
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HAWLEY TROXELL

Attorneys and Counselors



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Attorneys for Marion Ogle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84698 IN THE
NAME OF MARION OGLE**

MARION OGLE'S EXPERT WITNESS
DISCLOSURE

Pursuant to the Hearing Notice/Scheduling Order dated October 20, 2021, in the above-captioned matter, Marion Ogle, by and through her attorney of record, hereby discloses the following expert witness who she may call to testify at the hearing of this matter:

Heidi M. Welsh, P.H.
Spronk Water Engineers, Inc.
Denver, CO

Ms. Welsh is expected to testify regarding the subject Application's compliance with applicable law, including, without limitation, applicable statutory criteria, and technical matters related thereto.

Marion Ogle specifically reserves the right to call any expert witnesses disclosed by other parties, any other expert witnesses identified in discovery, and rebuttal expert witnesses whether or not previously disclosed.

Dated: November 19, 2021

HAWLEY TROXELL ENNIS & HAWLEY LLP

A handwritten signature in black ink, appearing to read "Dana Hofstetter", written over a horizontal line.

By

Dana L. Hofstetter, ISB No. 3867
Attorneys for Marion Ogle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2021, I caused to be served the foregoing MARION OGLE'S EXPERT WITNESS DISCLOSURE by the pre-paid method (s) indicated below, and addressed to each of the following:

Nick Miller
Manager, Western Region
IDAHO DEPARTMENT OF WATER RESOURCES
2735 Airport Way
Boise, Idaho 83705
Email: nick.miller@idwr.idaho.gov

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Facsimile 208-334-2348
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Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
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Charlie S. Baser
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Tyler J. Anderson, ISB No. 6632
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Attorneys for Marion Ogle

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84698 IN THE
NAME OF MARION OGLE**

**NOTICE OF SERVICE OF EXPERT
REPORT OF HEIDI M. WELSH**

PLEASE TAKE NOTICE that on the 19th day of November, 2021, I caused to be served a true and correct copy of the expert report of Heidi M. Welsh by the pre-paid methods indicated upon the following in the above-captioned matter:

Michael Lawrence (*via e-mail*)
Charlie S. Baser
GIVENS PURSLEY LLP
601 West Bannock Street
Boise, Idaho 83701-2720

Dated: November 19, 2021

HAWLEY TROXELL ENNIS & HAWLEY LLP



By

Dana L. Hofstetter, ISB No. 3867
Attorneys for Marion Ogle

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of November, 2021, I caused to be served the foregoing NOTICE OF SERVICE OF EXPERT REPORT OF HEIDI M. WELSH by the pre-paid method (s) indicated below, and addressed to each of the following:

Nick Miller
Manager, Western Region
IDAHO DEPARTMENT OF WATER RESOURCES
2735 Airport Way
Boise, Idaho 83705
Email: nick.miller@idwr.idaho.gov

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Facsimile 208-334-2348
☐ iCourt

Gary Spackman
Director
IDAHO DEPARTMENT OF WATER RESOURCES
322 E. Front St., Ste. 648
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☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
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Charlie S. Baser
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Dana L. Hofstetter, ISB No. 3867

**EXPERT REPORT IN SUPPORT
OF IDAHO APPLICATION FOR WATER RIGHT
TRANSFER 84698**

Prepared for:

**DANA L. HOFSTETTER
HAWLEY TROXELL
BOISE, IDAHO**

Prepared by:

**HEIDI M. WELSH, P.H.
SPRONK WATER ENGINEERS, INC.
DENVER, COLORADO**

NOVEMBER 19, 2021



1.0 INTRODUCTION

Marion Ogle (the "Applicant") purchased two irrigation surface water rights nos. 67-250 and 67-301 ("Subject Rights") from Debra Dibble in 2020. In February 2021, Mrs. Ogle filed a transfer application with the Idaho Department of Water Resources ("Transfer No. 84698") to change the place of use of the Subject Rights from the original place of use ("Dibble Property") to her property ("Ogle Property"). The Ogle Property consists of approximately 280 acres near Cambridge, Idaho in the Weiser River drainage and is located approximately ¼ mile west of the Dibble Property as shown in **Figure 1-1**. A closeup of the original place of use on the Dibble Property is shown in **Figure 1-2**.

Spronk Water Engineers ("SWE") was retained by counsel for the Applicant to review Transfer No. 84698 and determine if the transfer meets the statutory requirements for approval of a transfer of water right per Idaho Code 42-222. My resume is provided as an attachment to this report (see **Attachment 1**). The information I relied on is identified in Section 3.0 - References.

1.1 Subject Water Rights and Other Hubbard Ditch Water Rights

The Subject Rights were decreed in the Snake River Basin Adjudication ("SRBA") in October 2008 and are both diverted at the headgate of the Hubbard Ditch from Rush Creek, a tributary to the Weiser River. As shown in **Figure 1-1**, the diverted water is conveyed approximately 4 miles to the Dibble Property using a combination of ditch and a natural channel known locally as Jensen Spring Creek. For purposes of this report, the conveyance system for the Subject Rights from the diversion on Rush Creek to Jensen Spring Creek is referred to as the Hubbard Ditch.

There are two other water users with water rights that are delivered by the Hubbard Ditch - Salubria Holdings LLC ("Salubria") and Randy and Kathryn Noah ("Noah"). A summary of all the Rush Creek water rights delivered through the Hubbard Ditch is provided in **Table 1-1**.



Table 1-1
Hubbard Ditch Water Rights
Period of Use: March 15 – October 31
Water Source: Rush Creek, Tributary to Weiser River
Nature of Use: Irrigation

Water Right No.	Current Owner	Priority Date	Decreed Rate (cfs)	Decreed Acres
67-14645	Salubria	05/01/1891	0.29	23.2 ^A
67-14644	Noah	05/01/1891	0.03	2.4 ^B
67-14647	Salubria	05/01/1904	0.45	36.0 ^A
67-14646	Noah	05/01/1904	0.05	4.0 ^B
67-14643	Salubria	10/29/1908	3.94	167.0 ^A
67-14642	Noah	10/29/1908	0.42	18.0 ^B
67-301	Ogle	10/29/1908	0.46	29.3
67-250	Ogle	12/29/1908	0.40	20.8

^A Combined acre limit of 167.0 for water right nos. 67-14643, 67-14645, and 67-14647.

^B Combined acre limit of 18.0 for water right nos. 67-14642, 67-14644, and 67-14646.

1.2 Other Ogle Water Rights

There is a decreed irrigation water right on the Ogle Property, No. 67-2189, that is diverted at three points of diversion from Jensen Spring Creek for domestic use and irrigation use on 40 acres. There is also a permitted irrigation water right, No. 67-15162, that is used for stockwater use and irrigation use on 65 acres. The points of diversion and places of use for these water rights are shown on **Figure 1-1**. A summary of these other water rights used on the Ogle Property is shown in **Table 1-2**.

Table 1-2
Ogle Water Rights

Water Right/ Permit No.	Water Use	Priority Date	Decreed Rate (cfs)	Decreed Acres	Period of Use
67-2189	Irrigation	5/17/1949	0.40	40.0	3/15 - 11/15
67-2189	Domestic	5/17/1949	0.04	n/a	1/1 - 12/31
67-15162	Irrigation	7/25/2016	1.30	65.0	3/15 - 10/31
67-15162	Stockwater	7/25/2016	1.30	n/a	1/1 - 12/31

1.3 Salubria Water Rights

In July 2021, Salubria filed a protest to Transfer No. 84698 asserting potential injury to its water rights.

Salubria purchased its Hubbard Ditch water rights and the associated place of use in August 2020 from Donald F. Driscoll Family Trust ("Driscoll"). Importantly, Salubria's surface water supply is taken out of the Hubbard Ditch upgradient where the supplies to the Dibble Property, Noah Property, and Ogle Property are delivered (see **Figure 1-1**). Salubria also owns a stockwater right, No. 67-10208, that is sourced from a spring with a place of use that is also upgradient from the Ogle Property (see **Figure 1-1**).

In 2018, Driscoll filed an application for a Permit No. 67-15261 for stockwater and wildlife storage in ponds. The 67-15261 application hearing was vacated in 2020 and a transfer application for these ponds recently has been submitted to IDWR. Two ponds on the Driscoll property are evident in the 2019 aerial photo (see **Figure 1-1**).

2.0 REVIEW OF TRANSFER 84698

Based on my review of the transfer application, various supporting documents, and other information, including the Salubria protest, it is my opinion, that Transfer No. 84698 should be approved by IDWR because it meets the statutory requirements for water right transfer set forth in Idaho Code 42-222, and will not cause injury to Salubria's water rights, nor to any other water rights. I hold these opinions to a reasonable degree of engineering certainty. The bases for my opinions are described below.

2.1 No Enlargement of Subject Rights

Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use, exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer (Peppersack, 2009). The authorized diversion rate, annual diversion volume, and number of acres authorized for irrigation will not be increased.

The proposed Transfer No. 84698 will maintain the Subject Rights original point of diversion, diversion rate, and period of use. The only change is the place of use. The transfer approval should contain a term to limit the acres under the Subject Rights to the original decreed acreage of 50.1 acres (20.8 acres plus 29.3 acres).

2.2 No Injury to Other Water Rights

The current and proposed points of diversion and places of use for the Subject Rights are located downstream of Salubria and therefore the proposed transfer will not injure Salubria's water rights.

The Ogle Property and the Dibble Property are both located in the Weiser River drainage. Return flows at the Ogle Property will accrue to a tributary to the Weiser River – similar to the Dibble Property. Review of topographic mapping show that the drainages from both properties intersect the Weiser River within an approximately 500 feet reach and there are no intervening water rights in this reach.

I reviewed the water rights between the Ogle and Dibble properties (Noah Water Rights and Sevy 67-667) and determined that these properties would not be materially injured, and may benefit from return flows.

Because there will be no change in the point of diversion for the Subject Rights, the proposed transfer will not cause injury to other Rush Creek water rights provided there is no enlargement of the historical use of the Subject Rights. Transfer No. 84698 can be practically administered to prevent injury.

2.3 Beneficial Use and Conservation of Water Resources

Before and after the transfer, the Subject Rights will be beneficially used for agricultural irrigation in a reasonable manner consistent with local practices. This addresses the beneficial use and conservation criteria.

2.4 Effect on Economy and Agricultural Base of Local Area and Local Public Interest

Because the transferred Subject Rights will continue to be used locally for agricultural irrigation, there will be no impact on the economy and agricultural base in the area and no impact on the local public interest as defined in Idaho Code 42-202(B).



3.0 REFERENCES

The following information and documents were relied upon as the bases for the analyses and opinions described in this report.

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FIGURES

**Figure 1-1
Location Map
Transfer 84698**

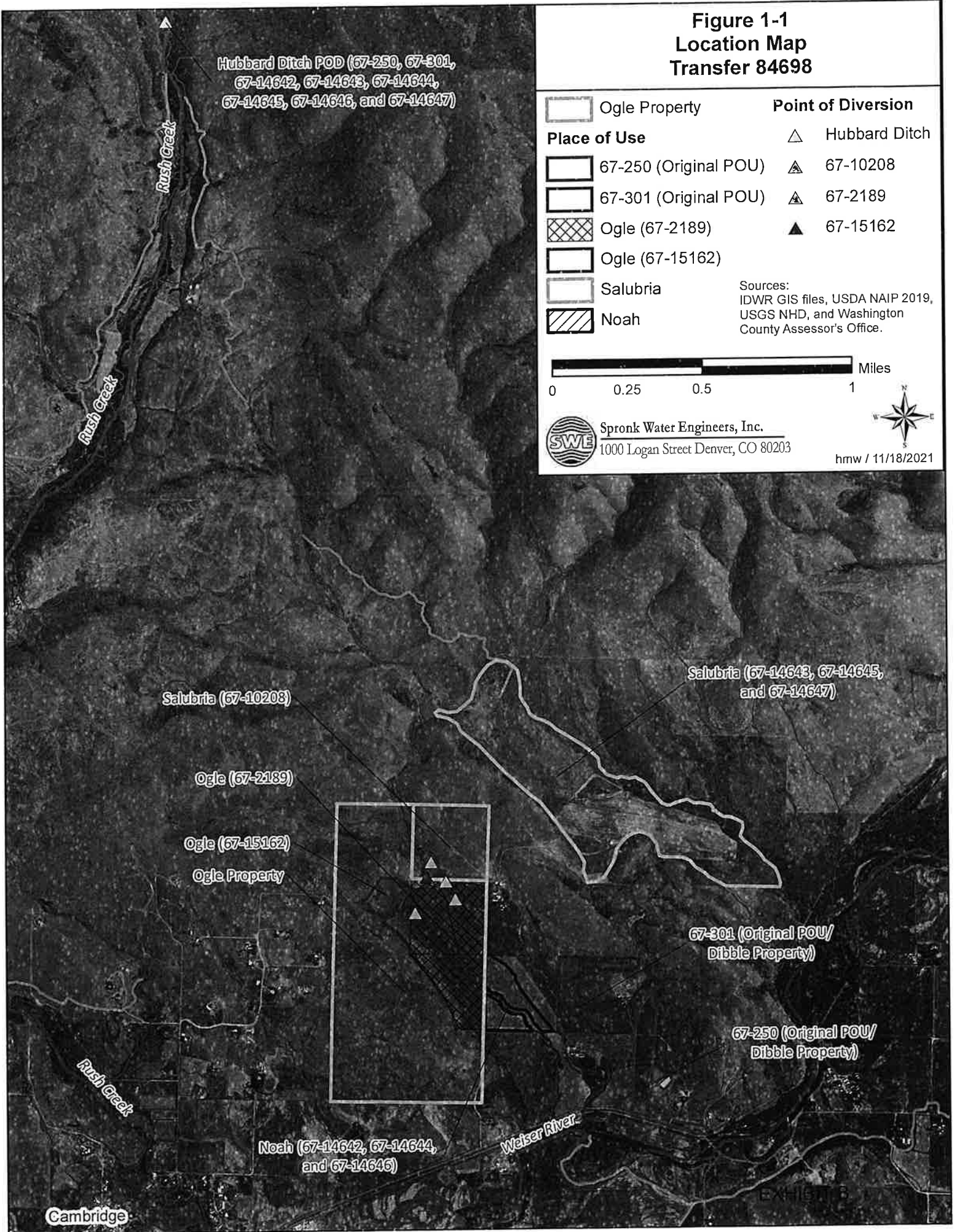


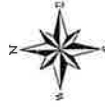
Figure 1-2
Original Place of Use
Subject Rights

Place of Use

 67-250 (Original POU)

 67-301 (Original POU)

Sources:
IDWR GIS files and USDA NAIP 2019.



Sprink Water Engineers, Inc.
1000 Logan Street Denver, CO 80203

hmn / 11/19/2021

67-301 (Original POU/
Dibble Property)

67-250 (Original POU/
Dibble Property)

Water River

ATTACHMENT 1

Heidi M. Welsh, P.H.

Senior Watershed Scientist

Education: B.S. Watershed Science, 2007, Colorado State University

Professional

Registration: Professional Hydrologist, American Institute of Hydrology

Professional Experience:

2009 - Present: ***Spronk Water Engineers, Inc., Senior Watershed Scientist***

Ms. Welsh has over 10 years of experience working on water resources and water rights projects in Colorado, Wyoming, New Mexico, Montana, and Idaho. She has extensive experience in compiling, maintaining, and creating data visualization tools for large and complex hydrologic and geospatial datasets including climatological data, streamflow data, diversion records, reservoir data, cropping patterns, priority call records, and water rights. Her expertise includes analysis of irrigation and municipal water use, crop evapotranspiration, water balance analyses, farm budget analyses, statistical analyses of time-series data, water supply availability analyses, stream depletion modeling, point flow modeling, and other surface water modeling. She is experienced in water rights engineering including water rights protection, historical water use analyses, substitute water supply plans, augmentation plans, and water rights accounting. The data, modeling, and water rights work includes detailed investigation and comprehensive historical research of data, documents, and water use practices. She is also experienced in GIS mapping and geospatial modeling related to water resources including georeferencing and digitizing, delineation and quantification of irrigated area, and utilization of remote sensing data for hydrologic analysis.

Representative Projects:

Water Supply Consulting – Town of LaSalle, Colorado

Ms. Welsh assists the Town in developing a water supply for irrigation of parks, ballfield, and subdivision lawns. She developed annual substitute water supply plans for the Town and assisted the Town in obtaining a decreed augmentation plan. The work in support of the augmentation plan included several engineering analyses including calculation of water demands, historical consumptive use analysis for change of water rights, irrigation demands, and timing of stream depletions to the South Platte River. She is currently



responsible for daily augmentation plan accounting that includes computing stream depletions and providing replacement augmentation water.

Water Rights Protection and Water Supply – City of Pocatello, Idaho

Ms. Welsh prepares exhibits and performs water rights analyses for water rights investigations and administrative hearings. The work includes several engineering analyses for the City including analysis and review of water rights and water measurement data, summarizing and mapping depletions using Eastern Snake Plain Aquifer Model runs, and mapping water rights data. She compiles annual ground water pumping data and other information for the City of Pocatello and other cities in support of a basin-wide mitigation plan.

Rio Grande Compact Litigation - State of New Mexico

Ms. Welsh compiled, reviewed, and analyzed historical data used by the team of experts for the State of New Mexico in an ongoing lawsuit filed by the State of Texas in the U.S. Supreme Court. The work has involved development of an extensive and well documented database of historical data that are being used to support New Mexico's technical and modeling analyses of the claims and counter claims in the lawsuit. This has included extensive QA/QC of the historical data and use of industry standard procedures to estimate and interpolate missing data. In addition, Ms. Welsh has been involved in development of the RiverWare component of New Mexico's Integrated Lower Rio Grande Model. She developed several post-processing tools to review, analyze, and present model results in this case. Ms. Welsh has given deposition testimony regarding her work and is set to testify in the upcoming hearing before the Special Master.

Cherry Creek Project Water Authority, Colorado

Ms. Welsh performs analysis and mapping of the Cherry Creek Basin in support of water rights applications and basin modeling. The work includes several analyses including water availability analyses, point flow modeling, consumptive use analyses, and stream depletion modeling. She updates and maintains a water supply model for a basin-wide Project that includes several municipalities.



Plan for Augmentation - Climax Molybdenum, Colorado

Ms. Welsh worked on several analyses in support of a water rights application. The work included computation of current and historical depletions, point flow and exchange potential modeling, probability analyses, and GIS analyses and mapping.

Water Rights Protection - Centennial Water & Sanitation District, Colorado

Ms. Welsh assists legal counsel with review of water court applications and substitute water supply plans for water rights protection. The work includes return flow and consumptive use calculations, delineation of irrigated area, compilation of diversion records, and stream depletion modeling.

Yellowstone River Compact Litigation, Montana

Ms. Welsh delineated current and historic irrigated fields along the Powder and Tongue Rivers in Montana. She also compiled and analyzed historical agricultural data from the U.S. Agricultural Census.

2007 – 2009: AATA International, Inc., Environmental/GIS Specialist

Ms. Welsh compiled and interpreted social and environmental data for preparation of large-scale environmental impact assessments and other technical reports. The work included collection and maintenance of databases, environmental impact analysis, water supply assessments, and development of mitigation and monitoring plans for natural resource development projects. The work also included GIS mapping and analyses of environmental data and preparation of numerous figures for technical reports.

2006 – 2007: USDA Forest Service, Hydrologic Technician

Ms. Welsh conducted soil, stream crossing, and stream health surveys for timber sale units. The work included completion of soil inventories on grazing units for NEPA compliance, GPS and GIS mapping of streams and forest roads, preparation of operational and maintenance manuals for campground water systems, and evaluation of several Best Management Practices for feasibility and effectiveness.

2006: Teton Science School, Hydrology Intern

Ms. Welsh was responsible for the measurement of stream discharge, monitoring ground water well levels, and collecting water quality samples weekly at twelve sites. The work included tabulation and analysis of the field



Heidi M. Welsh, P.H.

Senior Watershed Scientist

data for technical documentation and educational outreach including teaching courses on watershed science and hydrology field methods for adults and children.

Professional Memberships:

American Institute of Hydrology
American Water Resources Association
Colorado Ground Water Association



SPRONK WATER ENGINEERS, INC

Michael P. Lawrence, ISB #7288
Charlie S. Baser, ISB #10884
GIVENS PURSLEY LLP
601 W. Bannock St.
P.O. Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Fax: 208-388-1300
Attorneys for Salubria Holdings LLC

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE APPLICATION
FOR TRANSFER NO. 84698 IN THE NAME
OF MARION OGLE

**SALUBRIA HOLDINGS LLC'S
RESPONSES TO MARION OGLE'S
FIRST SET OF DISCOVERY
REQUESTS**

The following are the responses of Protestant Salubria Holdings LLC ("Salubria" or "Protestant") to *Marion Ogle's First Set of Interrogatories and Requests for Production to Salubria Holdings* dated October 29, 2021 ("*First Discovery Requests*").

The following responses are based upon such discovery and investigation as has been completed by Salubria to date after reasonable inquiry of all available sources. The following responses are given without prejudice to Salubria's right to produce at hearing evidence of any subsequently discovered information or facts, facts which Salubria may later recall, or information and/or facts omitted as a result of good faith oversight. Salubria reserves the right to supplement or amend any and all responses herein as additional facts are ascertained and analyses are made and as provided by the Idaho Rules of Civil Procedure and procedural rules of the Idaho Department of Water Resources. The responses contained herein are made in a good

faith effort to supply as much information as is presently known, but shall in no way prejudice the right of Salubria in relation to further discovery, research and analyses.

PRELIMINARY OBJECTIONS

Each of the objections set forth in this section is incorporated into each of Salubria's Responses to Interrogatories and Responses to Requests for Production of Documents as though set forth verbatim therein.

Salubria objects to the *First Discovery Requests*, including without limitation the Preliminary Statement and Definitions sections, to the extent they purport to impose duties and obligations beyond those contemplated by the applicable Idaho Rules of Civil Procedure and Department Rules of Procedure. Salubria's responses below respond to the *First Discovery Requests* in accordance with the standards that exist under Idaho law.

Salubria's responses below are made subject to all objections as to competence, relevance, materiality, and admissibility. These responses are subject to all objections that would require the exclusion of any statement, material, or information herein provided if such requests were asked of, or any statement, material, or information provided were made by, witnesses present and testifying in court. All such objections are hereby made and reserved and may be interposed at the time of hearing.

No incidental or implied admissions are intended by Salubria's responses below. The fact that Salubria has responded to any discovery request or part thereof is not an admission that Salubria accepts that the discovery request or the responses or objections thereto constitute admissible evidence. The fact that Salubria has responded to all or part of a discovery request is not intended as, and shall not be construed as, a waiver by Salubria of all or part of any objection to other requests. Salubria's response to any request herein does not constitute a waiver of

Salubria's right to object to any future additional or supplemental discovery request regarding the same or similar matters.

Salubria specifically objects to the *First Discovery Requests* to the extent they seek information protected by the attorney-client privilege, the work product doctrine, and the rules governing discovery relating to experts as set forth in the Idaho Rules of Civil Procedure 26(b). This objection applies to all discovery requests that seek such information. Salubria, to the extent possible, has construed each request as requesting only information and/or documents not subject to any applicable protection.

Finally, Salubria specifically objects to the *First Discovery Requests* to the extent they seek information that is premature at this stage of the matter. Case investigation is in its early stages and all the information requested has not been obtained or finalized. Salubria's responses to the Interrogatories and Requests for Production will be supplemented as appropriate in accordance with applicable case deadlines.

INTERROGATORIES

INTERROGATORY 1: Please state the names, addresses, and telephone numbers of all persons you intend to call as fact witnesses at the hearing of this matter, and for each such person, please state the substance of the facts to which he or she is expected to testify.

RESPONSE TO INTERROGATORY 1: Objection: premature. Salubria will disclose the identity of witnesses expected to be called at the hearing in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*. Without waiving any objection(s), at this time Salubria has identified the following persons who may testify as fact witnesses at the hearing:

(a) Rick Fereday may testify concerning facts related to Salubria's protest (the "*Protest*") of Application for Transfer No. 84698 (the "*Application*"), the delivery of and/or use

of water under the water right sought to be changed in the Application, and the water rights currently held in the name of the Protestant.

(b) Brandi Horton Bonner, watermaster for basin 67, may testify regarding the delivery of water under 67-250 and 67-301.

(c) James Fronk may testify as to the Protest, the delivery of and/or use of water under the water right sought to be changed in the Application, and the water rights currently held in the name of the Protestant.

(d) Donald F. Driscoll may testify concerning the delivery of and/or use of water under the water right sought to be changed in the Application and the water rights currently held in the name of the Protestant.

(e) Hank Ivey may testify concerning the delivery of and/or use of water under the water right sought to be changed in the Application, the delivery of water under 67-250 and 67-301, and the water rights currently held in the name of the Protestant.

(f) Jeff Springer may testify regarding the delivery of and/or use of water under the water right sought to be changed in the Application, the delivery of water under 67-250 and 67-301, and the water rights currently held in the name of the Protestant.

(g) John Whitener may testify as to the delivery of and/or use of water under the water right sought to be changed in the Application, and the water rights currently held in the name of the Protestant.

(h) Kate Noah may testify as to the delivery of water under 67-250 and 67-301.

(i) Debra Dibble may testify concerning the delivery of water under 67-250 and 67-301.

(j) Marion Ogle may testify concerning the property associated with the Application and the delivery of water under 67-250 and 67-301.

INTERROGATORY 2: Please state the name, address, and telephone number of each and every person that is known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of, any of the facts of this case, the Application, or the Protest and, for each, state the relevant facts which you understand to be within the knowledge of such person. By this Interrogatory, Ogle seeks the names, addresses and telephone numbers of all witnesses who have any knowledge of any fact pertinent to this proceeding and the relevant facts which you understand to be within the knowledge of each such person.

RESPONSE TO INTERROGATORY 2: Objection: premature; requests attorney-client privileged information or attorney work product. Without waiving any objection(s), at this time, in addition to persons known to Applicant who are not listed here, Salubria has identified the following persons who may have knowledge of facts pertinent to this proceeding:

Rick Fereday
309 E. Lake Street
McCall, Idaho 83638
(208) 634-4999

Rick Fereday has knowledge of the facts related to the Protest, the delivery of and/or use of water under the water right sought to be changed in the Application, the use of water rights and property currently held in the name of the Protestant, and water right nos. 67-250 and 67-301.

Brandi Horton Bonner
2297 Snapp Lane
Midvale, Idaho 83645

Ms. Bonner may have knowledge based on her position as Basin 67 watermaster, including without limitation knowledge of the area, hydrology, delivery of and/or use of water under the water right sought to be changed in the Application, and administration of water rights.

Scott King
SPF Water Engineering, Inc.
300 East Mallard Drive, Suite 350
Boise, ID 83706

208-383-4140

Scott King has knowledge of facts related to the filing and processing of the Protest.

Donald F. Driscoll

PO Box 1669

McCall, Idaho 83638

208-473-4828

Donald F. Driscoll has knowledge of facts related to the delivery of and/or use of water under the water right sought to be changed in the Application and the use of water rights and property currently held in the name of the Protestant.

James Fronk

PO Box 576

McCall, Idaho 83638

208-634-8093

James Fronk has knowledge of facts related to the delivery of and/or use of water under the water right sought to be changed in the Application and the water rights and property currently held in the name of the Protestant.

Hank Ivey

PO Box 284

Council, Idaho 83612

(208) 740-0228

Hank Ivey may have knowledge of facts related to the delivery of and/or use of water under the water right sought to be changed in the Application and the use of water rights and property currently held in the name of the Protestant.

Jeff Springer

1956 Widner Rd.

Midvale, Idaho 83645

(208) 550 2474

Jeff Springer may have knowledge of facts related to the delivery of and/or use of water under the water right sought to be changed in the Application and the use of water rights and property currently held in the name of the Protestant.

John Whitener

2048 Widner Rd.

Midvale, Idaho 83645

(208) 566-1042

John Whitener may have knowledge of facts related to the delivery of and/or use of water under the water right sought to be changed in the Application and the use of water rights and property currently held in the name of the Protestant.

Kate Noah

2874 Warfield Rd.

Cambridge, Idaho 83610

(208) 550-0074

Kate Noah may have knowledge of facts related to the use of water right nos. 67-250 and 67-301.

Debra Dibble

2948 Mill Rd.

Cambridge, Idaho 83610

(208) 257-3410

Debra Dibble may have knowledge of facts related to the use of water right nos. 67-250 and 67-301.

Marion Ogle

1039 W. Indian Valley Rd.

Indian Valley, Idaho 83632

(208) 256-4448

Marion Ogle may have knowledge of facts related to the use of water right nos. 67-250 and 67-301.

INTERROGATORY 3: Please identify each person who has assisted in, participated in, prepared any information for, supplied any information for, or was relied upon in preparing the answers/responses to these Interrogatories and Requests for Production of Documents.

RESPONSE TO INTERROGATORY 3: Objection: requests attorney-client privileged information or attorney work product. Without waiving any objection(s), at this time Salubria responds to the Interrogatory as follows:

1. Scott King
2. Rick Fereday
3. Michael P. Lawrence, counsel of record
4. Charlie S. Baser, counsel of record

INTERROGATORY 4: With respect to each person that you may call to testify as an expert witness at the hearing of this matter, please separately state the following:

- (a) His or her identity;

(b) His or her background and qualifications, including academic degrees and professional and employment affiliations (a current and complete resume or CV attached to your answer will be a sufficient response);

(c) A complete statement of all opinions to be expressed and the basis and reasons therefor;

(d) The data or other information considered by the witness in forming his or her opinions;

(e) Any exhibits to be used as a summary of or support for the opinions;

(f) A list of all publications authored by the witness within the preceding ten (10) years;

(g) The compensation to be paid for the testimony; and

(h) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

RESPONSE TO INTERROGATORY 4: Objection: premature; requests attorney-client privileged information or attorney work product. Salubria will disclose the identity of expert witnesses expected to be called at the hearing in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*. Without waiving any objection(s), at this time Salubria responds to each subpart of the Interrogatory as follows:

(a) Objection: premature. However, without waiving any objections, Protestant states: Salubria will supplement this response with the information requested for each potential expert witness at the time each potential witness is disclosed in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(b) Objection: premature. Salubria will supplement this response with the information requested for each potential expert witness at the time each potential witness is disclosed in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(c) Objection: premature. Each potential expert witness will disclose this information in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(d) Objection: premature. Each potential expert witness will disclose this information in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(e) Objection: premature. Salubria will supplement this response and serve copies of exhibits to be offered at the hearing in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(f) Objection: premature. Each potential witness will disclose this information at the time each potential witness is disclosed in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(g) Objection: premature; irrelevant. Salubria will supplement this response with the information requested for each potential expert witness at the time each potential witness is disclosed in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

(h) Objection: premature. Salubria will supplement this response with the information requested for each potential expert witness at the time each potential witness is disclosed in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

INTERROGATORY 5: If any person identified in your response to Interrogatory No. 4 above, or his or her employer or business, has worked for, consulted with, or otherwise been hired in any manner by Ogle, Kathleen Legg, the Estate of Kathleen Legg and/or the Legg Family Trust, (the "Work"), please state, describe and identify the following:

- (a) The date the Work was performed;
- (b) All persons that performed, or were associated with, the Work;
- (c) The scope, nature, and stated goals of the Work performed;
- (d) Any engagement letters or contracts involving the Work;
- (e) The amount of compensation paid for the Work;
- (f) Any documents relating to, or produced as a result of, the Work;
- (g) The specific dates and duration of time the Work was performed;
- (h) The location where each individual person identified in response to Interrogatory

No. 5(b) currently works or, resides;

(i) For the persons identified in Response to Interrogatory No. 4 above who are currently or have ever been employed by the same employer as the persons identified in your response to Interrogatory No. 5(b) and the periods of time such persons worked for such employers:

- i. Each and every communication or statement (oral, written, email, or otherwise) made relating to, or pertaining in any way to, this case or the Work between or among such employees identified in your responses to Interrogatory No. 5(b) and (i);
- ii. Any methods utilized by the employer to prevent communication between or among such employees or access to information related to the Work or this case;
- iii. Any methods utilized by such employees to prevent communication between and among each other or access to information related to the Work or this case; and

- iv. The basis for any contention that the employer is not conflicted from providing testimony at hearing in this matter.

RESPONSE TO INTERROGATORY 5: Objection: irrelevant; overbroad; unduly burdensome; not reasonably calculated to lead to the discovery of admissible evidence. Without waiving any objection(s), at this time Salubria responds to each subpart of the Interrogatory as follows:

- (a) Approximately October 4, 2017 to December 19, 2017, according to documents in IDWR's publicly available files for water right no. 67-15162.
- (b) Roxanne Brown, only.
- (c) According to documents in IDWR's publicly available files for water right no. 67-15162, the scope of work was limited to assisting with the filing and processing of the application for water right no. 67-15162 on behalf of Legg Family Trust.
- (d) Salubria cannot respond to this request because neither Salubria nor its consultant Scott King have access to any files concerning Roxanne Brown's work for Legg Family Trust (see answers to subparts (i)ii and (i)iii, below), except for those documents in IDWR's publicly available files for water right no. 67-15162. In any case, any such information should be in Legg Family Trust's possession.
- (e) \$900.00 according to SPF's billing software.
- (f) See the documents in IDWR's publicly available files for water right no. 67-15162 (which are available to Ogle, Kathleen Legg, the Estate of Kathleen Legg, and the Legg Family Trust). Otherwise, Salubria cannot respond to this request because neither Salubria nor his consultant Scott King has access to any files concerning Roxanne Brown's work for Legg Family Trust (see answers to subparts (i)ii and (i)iii below).

- (g) See answer to Subpart (a), above.
- (h) Ms. Brown is no longer employed with SPF Water Engineering.
- (i)
- i. None.
 - ii. On or about November 13, 2019, Terry Scanlan and Scott King ordered the staff at SPF Water Engineering to take appropriate steps to preclude their access to any information or documents in SPF's files related to Roxanne Brown's work for Legg Family Trust. Accordingly, except for subpart (e) concerning compensation, Salubria's answers to this interrogatory are based on documents in IDWR's publicly available files for water right no. 67-15162.
 - iii. See answer to subpart (i)ii above.
 - iv. Without waiving any objections, and reserving the right to assert additional arguments, Salubria responds as follows: Legg Family Trust hired and worked with Roxanne Brown, not Scott King, to assist with application for permit no. 67-15162. Scott King did not have any knowledge of application for permit no. 67-15162 prior to assisting with application for water right no. 67-15261 in the name of the Donald F. Driscoll Family Trust in 2019. Roxanne Brown, who retired in September 2018 and therefore no longer works at SPF, had no involvement in Ogle's Application, the Protest, or this matter. Scott King did not have any knowledge of the hydrology of the Ogle property before being hired to consult on Application for Water Right No. 67-15261 in the name of the

Donald F. Driscoll Family Trust and the Protest. Idaho Rule of Professional Conduct 5.3 for attorneys does not prohibit Scott King's participation as an expert for Salubria in this proceeding or Roxanne Brown's prior work for Legg Family Trust.

INTERROGATORY 6: Please identify each document or exhibit you intend to introduce into evidence at the hearing of this matter, or otherwise use for demonstrative or illustrative purposes. For each document or exhibit identified, describe in detail the exhibit and its contents, identify the present custodian of the exhibit and, if different from the custodian, the witness who will be used to introduce the exhibit.

RESPONSE TO INTERROGATORY 6: Objection: premature; overbroad; unduly burdensome; requests attorney work product. Without waiving any objection(s), Salubria will supplement this response and serve copies of exhibits to be offered at the hearing in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

INTERROGATORY 7: Please identify and describe in detail all facts and documents that you or your attorney are aware of that support, undermine, or in any way relate to your Protest.

RESPONSE TO INTERROGATORY 7: Objection: premature; overbroad; unduly burdensome; requests attorney work product. Without waiving any objection(s) and reserving the right to supplement this response as additional information becomes known, Salubria responds as follows: on information and belief, based on personal observations of the diversion and delivery system and authorized place of use for water right nos. 67-250 and 67-301 since 2006, the place of use authorized for water right nos. 67-250 and 67-301 has not been irrigated with such water rights since 2006.

INTERROGATORY 8: Please set forth a complete and full description of all your contentions in the Protest and the complete factual and legal bases for such contentions, including, without limitation, any of your contentions relating to:

- (a) “The Application does not conform to applicable statutes, regulation, or guidance and does not satisfy the criteria for approval set forth in Idaho Code 42-222”;
- (b) “Protestant is particularly concerned with the validity of the water rights proposed for transfer”;
- (c) whether the change proposed in the Application will injure other water rights;
- (d) whether the change proposed in the Application will constitute an enlargement in use of the original water right;
- (e) whether the change proposed in the Application is in the “local public interest” as defined in Idaho Code 42-202B;
- (f) whether the change proposed in the Application is consistent with the conservation of water resources within the State of Idaho; and
- (g) whether the change proposed in the Application will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates.

RESPONSE TO INTERROGATORY 8: Objection: premature; overbroad; unduly burdensome; requests attorney work product; requests legal conclusions. Without waiving any objection(s) and reserving the right to supplement this response as additional information becomes known, Salubria responds to each subpart of the Interrogatory as follows:

- (a) Approval of the Application will injure other water rights, will constitute enlargement of 67-250 and 67-301, is not in the “local public interest,” as defined by Idaho Code

§ 42-202B, is not consistent with the conservation of water resources within the State of Idaho, and the new use will not be a beneficial use because the land proposed to be irrigated already has irrigation water rights. Additional information responsive to the subpart (a) is provided in responses to subparts (b) through (g) below.

(b) Water right nos. 67-250 and 67-301 have undergone a period of non-use lasting at least five (5) years, and Applicant's use has not satisfied the resumption doctrine set forth under Idaho Code § 42-223(12) and therefore water rights nos. 67-250 and 67-301 are subject to forfeiture and the Application cannot be approved.

(c) The change proposed in the Application will injure Protestant's Rush Creek Water rights (water right nos. 67-14643, 67-14645, and 67-14647) because if water rights that are forfeited are diverted from Rush Creek, there is less water in Rush Creek for delivery to Protestant's water rights.

(d) The change proposed in the Application will constitute an enlargement. Water right nos. 67-250 and 67-301 have been forfeited and any resumption of use will necessarily result in an enlargement.

(e) The change proposed in the Application is not in the "local public interest" as defined in Idaho Code 42-202B because water is scarce in this area and other users (including Protestant) rely on the water that has not been used (i.e. that has been forfeited) under water right nos. 67-250 and 67-301.

(f) See response to subpart (e) above.

(g) The source of water is Rush Creek. The change proposed in the Application will not adversely affect the local economy of the Rush Creek watershed, but it would adversely affect

other users that divert from the Rush Creek watershed (such as Protestant) by reducing the amount of water available from Rush Creek..

INTERROGATORY 9: Please set forth a complete and full description, in chronological fashion (including dates), of all the efforts you made, analyses you had performed, and experts you hired in order to evaluate the issues in Interrogatories No. 8, including, without limitation:

(a) Prior to submitting/filing the Protest.

(b) During or after submitting/filing the Protest.

RESPONSE TO INTERROGATORY 9: Objection: premature; overbroad; unduly burdensome; requests attorney work product; requests legal conclusions; compound question. Without waiving any objection(s), Salubria responds as follows:

(a) Between 6/11/2021 (the date Protestant learned about the Application) and 7/2/2021 (the date Protestant filed its Protest), Protestant evaluated the Application, met with Ogle to attempt to reach an agreement on their respective water uses, and prepared and filed its Protest.

(b) Between 7/3/2021 and the date of this response, prepared for and attended the prehearing conference and prepared these discovery responses. On or around 11/10/2021, Protestant hired Scott King as an expert.

INTERROGATORY 10: Please identify and describe in chronological fashion (including dates) each communication between you or your counsel and the Director or any other Idaho Department of Water Resources employee or agent concerning the Application.

RESPONSE TO INTERROGATORY 10: Objection: irrelevant; not reasonably calculated to lead to the discovery of admissible evidence. Any such communications specifically concerning the Application are part of the public record and can be obtained from IDWR's publicly

available files. In addition, Protestant has had no such communications other than at the September 9, 2021 prehearing conference, which Applicant also attended.

INTERROGATORY 11: For each water right that is appurtenant to your real property contiguous to the proposed new or old place of use identified in the Application, please describe the following:

- (a) The water right number for each such water right;
- (b) The owner of each such water right, if it is other than you;
- (c) The source of each such water right;
- (d) The quantities of water actually diverted at each point of diversion under each such water right for each of the last 10 years, including when such diversions commenced and ended each year at each point of diversion;
- (e) The number of acres irrigated each year within the last 10 years for each such water right and the location of such acreage, designated by a map and/or U.S. Public Land Survey description or, in the case of stock water, the numbers and locations of stock for which water was diverted each year;
- (f) A complete description of the diversion and delivery system for the water used under each such water right, including without limitation, descriptions, illustrations, maps, GIS shape files, or schematics of points of diversion, points of injection, points of reinjection, water diversion, and delivery works and any and all channels or delivery paths within which water is conveyed to the place of use;
- (g) On an annual basis for the last ten (10) years, the methods of irrigation water application for each irrigation water right (e.g. gravity, sprinkler, etc.);

(h) On an annual basis for the last ten (10) years, a description of the crops planted on the irrigated acreage comprising the place of use of each such water right;

(i) On an annual basis for the last ten (10) years, the annual crop yields from the irrigated acreage comprising the place of use of each such water right; and

(j) On an annual basis for the last ten (10) years, a description of the stock use of each such water right, including without limitation the number of stock watered.

RESPONSE TO INTERROGATORY 11: Objection: vague; irrelevant; not reasonably calculated to lead to the discovery of admissible evidence; Salubria's water rights are not at issue in this proceeding. Without waiving any objection(s), Salubria responds as follows: documents that are potentially responsive to this request can be obtained from the watermaster and IDWR's publicly available files for water right nos. 67-10208, 67-14643, 67-14645, and 67-14647.

INTERROGATORY 12: Please identify and describe any water measurement devices and water measurement recording devices used at any place within the delivery system that delivers water to the actual place of use for water rights identified in response to Interrogatory No. 11 above, including the size, type, manufacturer, model, serial number, installation date, IDWR identification number, location, and date(s) on which each such device was calibrated or checked by a watermaster, IDWR, groundwater district hydrographer, or other person or entity, and the identity of such person(s).

RESPONSE TO INTERROGATORY 12: Objection: irrelevant; not reasonably calculated to lead to the discovery of admissible evidence; Salubria's water rights are not at issue in this proceeding. Without waiving any objection(s), Salubria responds as follows: the point of diversion for the water rights identified in Protestant's response to Interrogatory 11 has a headgate controlled by the Watermaster and an electric measuring device that was installed in 2019.

Applicant's grandson (Kameron Ogle) was involved in the installation of the measuring device and can provide Applicant with information responsive to this interrogatory.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION 1: Please produce all documents which relate to in any way or on which you base your responses to the Interrogatories above.

RESPONSE TO REQUEST FOR PRODUCTION 1: Objection: premature; requests confidential attorney work product and attorney-client privileged information; requests documents equally available to Intervenor. Without waiving any objection(s), documents that that may be potentially responsive to this request that can be obtained from the watermaster or IDWR's publicly available files.

REQUEST FOR PRODUCTION 2: Please produce all exhibits or documentary evidence that you may introduce into evidence at the hearing in this matter.

RESPONSE TO REQUEST FOR PRODUCTION 2: Objection, premature. Salubria will supplement this response and serve copies of exhibits to be offered at the hearing in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*.

REQUEST FOR PRODUCTION 3: Please produce all documents or records, including without limitation maps, diagrams, drawings, surveys, GIS shape files, charts photographs, schematics, or other representations that illustrate or show the water delivery system for each water right identified in your responses to the Interrogatories above.

RESPONSE TO REQUEST FOR PRODUCTION 3: Objection: premature; requests confidential attorney work product and attorney-client privileged information; requests documents equally available to Intervenor. Without waiving any objection(s), documents that that may be

potentially responsive to this request can be obtained from the watermaster or IDWR's publicly available files or have already been provided to Applicant as part of settlement negotiations.

REQUEST FOR PRODUCTION 4: Please produce all documents or records, including without limitation maps, diagrams, drawings, surveys, GIS shape files, charts photographs, schematics, or other representations that illustrate or show the past and present extent and location(s) of the water sources for each water right identified in your responses to the Interrogatories.

RESPONSE TO REQUEST FOR PRODUCTION 4: Objection: premature; requests confidential attorney work product and attorney-client privileged information; requests documents equally available to Intervenor. Without waiving any objection(s), documents that may be potentially responsive to this request can be obtained from the watermaster or IDWR's publicly available files or have already been provided to Applicant as part of settlement negotiations.

REQUEST FOR PRODUCTION 5: Please produce each and every document that tends to support or discredit the Application or the Protest, or any part or aspect of the Application or the Protest.

RESPONSE TO REQUEST FOR PRODUCTION 5: Objection: premature; requests confidential attorney work product and attorney-client privileged information; requests documents equally available to Intervenor. Without waiving any objection(s), documents that may be potentially responsive to this request can be obtained from the watermaster or IDWR's publicly available files or have already been provided to Applicant as part of settlement negotiations.

REQUEST FOR PRODUCTION 6: Please produce each and every document that concerns water flows from the source(s) that would supply the uses under the Application or under each water right identified in your responses to the Interrogatories.

RESPONSE TO REQUEST FOR PRODUCTION 6: Objection: premature; requests confidential attorney work product and attorney-client privileged information; requests documents equally available to Intervenor. Without waiving any objection(s), documents that are potentially responsive to this request can be obtained from the watermaster or IDWR's publicly available files or have already been provided to Applicant as part of settlement negotiations.

REQUEST FOR PRODUCTION 7: Please produce the following materials and information for each expert who has been retained or employed by you in preparation for the administrative hearing in this contested case:

(a) All data or other information considered by the expert in forming the opinions, including any and all exhibits to be used as a summary or to support the expert's opinion.

(b) The qualifications of the expert, including a list of all publications authored by the expert within the preceding ten years.

(c) All reports and draft reports which relate directly or indirectly to this proceeding.

(d) List of all cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

RESPONSE TO REQUEST FOR PRODUCTION 7: Objection: premature; requests confidential attorney work product and attorney-client privileged information; requests documents equally available to Intervenor. Without waiving any objection(s), Salubria responds as follows: Salubria will supplement this response in accordance with the October 20, 2021 *Hearing Notice/Scheduling Order*, and see Response to Interrogatory No. 4.

REQUEST FOR PRODUCTION 8: Please produce a copy of each communication between you and any other person or entity relating to the Application or the Protest, and correspondence or records and notes from meetings with the Director or any other Idaho Department of Water Resources employee or agent relating to the Application or the Protest.

RESPONSE TO REQUEST FOR PRODUCTION 8: Objections: relevance; unduly burdensome; overbroad; requests confidential attorney work product and attorney-client privileged information. Without waiving any objection(s), Protestant does not have any documents responsive to this request. Other documents that are potentially responsive to this request can be obtained from IDWR's publicly available files.

DATED this 12th day of November, 2021.

GIVENS PURSLEY LLP



By: Charlie S. Baser
Attorneys for Salubria Holdings LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 12th day of November, 2021, I served a true and correct copy of the above and foregoing document via the manner listed below to the following:

DOCUMENT SERVED

Marion Ogle
c/o Dana Hofstetter
Hawley Troxell Ennis & Hawley
877 Main St., Ste. 1000
PO Box 1617
Boise, ID 83701-1617
Email: DHofstetter@hawleytroxell.com

	U. S. Mail
X	Hand Delivered
	Overnight Mail
	Facsimile
X	E-mail

A handwritten signature in black ink, appearing to read 'Charlie S. Baser', is written over a horizontal line.

Charlie S. Baser