

file

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NOV 8 1976

Department of Water Resources

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:

1976 AUG 10 PM 3:28

CLERK, DISTRICT COURT

Anta Orzol
DEPUTY

W. HIGER
Counsel
Idaho Department of
Water Resources
Statehouse
Boise, ID 83720
TELEPHONE: 384-2215

LEGAL COUNSEL FOR SPECIAL MASTER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT, et al.,

Plaintiffs,

-vs-

NORTH IDAHO PROPERTIES, INC., et al.,

Defendants,

and

ROBERT J. ADAMSON, et al.,

Intervenors.

CIVIL NOS. 22418
22419
22420

EX PARTE MOTION OF
SPECIAL MASTER FOR
MODIFICATION OF DECREE
AND ORDER

COMES NOW the Special Master, by and through under-
signed counsel, and moves this Court for its order modifying the
decree entered herein on March 23, 1973 to show as to right
#95-0173, in the name of Czenzi Heinemann and Nick Ormonde,
that its source is Lancaster Creek rather than springs as
presently shown in the decree.

This motion is based upon the affidavit attached hereto
and as shown therein, that said right was based on water license
#95-2135 which has Lancaster Creek as its source of supply. The
recommendation of springs is contrary to the claimants' claim
and the facts supporting the recommendation. The recommendation
of the Special Master was an inadvertent error that can not be
explained and does an injustice to these rightholders. They have
always relied upon and diverted their water directly from Lan-
caster Creek, and have no springs directly available to them to
supply their needs and rights. The right in question is the only
decreed right on Lancaster Creek and no prior appropriator will

JUL 31 1996

STATE OF IDAHO
COUNTY OF KOOTENAI
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1973 MAR 23 PM 12:44

CLERK, DISTRICT COURT
ELLEN L. SCHIRMER
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT, et al.,

Plaintiffs,

vs

NORTH IDAHO PROPERTIES, INC., et al.,

Defendants,

and

ROBERT J. ADAMSON, et al.,

Intervenors.

DECREE

CIVIL CASE NOS.

22418

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The proposed Findings of Fact and Recommendation of Water Rights entered on April 15, 1971 was previously filed with this Court by the Special Master, including amendments dated July 20, 1971 and filed July 21, 1971, and amendments dated August 23, 1971 and filed August 30, 1971. This matter came on regularly for hearing on objections to the Findings of the Special Master on February 7, 1973. Following testimony and argument at said hearing and based upon the briefs filed herein, the Court issued its memorandum opinion dated March 7, 1973. Based upon said memorandum of opinion, which is fully incorporated herein as if fully set forth, the Court makes the following Findings of Fact and Conclusions of Law:

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August 23, 1971

The Honorable Watt E. Prather
Bozeman County Court House
Coeur d'Alene, Idaho 83814

Dear Judge Prather:

Since my report in the Hayden Lake water rights adjudication case was printed we have reviewed again the transcripts of the hearings and find that we overlooked making several changes as a result of testimony received in the record and therefore find it necessary to amend those findings as indicated in the enclosure.

These relatively minor amendments will not affect any other rights set out in my report. I ask, therefore, that you include this amendment in my report.

Very truly yours,

R. KEITH HIGGINSON
Director

RKH:pk

Enclosure

cc: Thomas P. Comiskey
Richard E. Elston
Edwin L. Nelson
Jack Lenley

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT, et al.,	)	
	)	
Plaintiffs,	)	<u>AMENDMENT TO</u>
	)	<u>FINDINGS</u>
vs.	)	<u>OF</u>
	)	<u>SPECIAL</u>
NORTH IDAHO PROPERTIES, INC., et al.,	)	<u>MASTER</u>
Defendants,	)	CIVIL CASE NOS.
	)	22418
and	)	22419
	)	22420
ROBERT J. ADAMSON, et al.,	)	
	)	
Intervenors	)	
	)	

THE FINDINGS OF THE SPECIAL MASTER ARE AMENDED as follows:

- (1) Between the entry for Cole, William F., and the entry for Condon, Mrs. J. R., on page 25, the following entry is inserted:

COMASKEY, Thomas P. and Marie M., Route 1, Box 328, Hayden Lake, Idaho
 File No.: 95-0441
 Priority: 1/1/1916
 Source: Spring
 Purpose: Domestic (1 house)
 Irrigation (3/4 acre)
 Period of use: Domestic - From 1/1 to 12/31
 Irrigation - From 4/1 to 10/31
 Quantity per year: 3.19 acre feet
 Maximum rate of diversion: 0.04 c.f.s.
 Type and point of diversion: Pipeline from spring in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 33,
 T. 52 N., R. 3 W.B.M.
 Place of use: SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 33, T. 52 N., R. 3 W.B.M.

- (2) The entry for Elston, Richard E., on page 34 is deleted and in its place there is added the following:

ELSTON, Richard E., Box 300, Rt. 11, Spokane, Washington
 File No.: 95-0115 (a)
 Priority: 4/1/1915
 Source: Unnamed spring
 Purpose: Domestic (2 houses)
 Period of use: From 1/1 to 12/31
 Quantity per year: 1.14 acre feet (supplemented by 95-0115 (b))
 Maximum rate of diversion: 0.04 c.f.s.
 Type and point of diversion: Pipeline from Spring, Part of Govt.
 Lot 5, Sec. 22, T. 51 N., R. 3 W.B.M.
 Place of use: Part of Govt. Lot 5, Sec. 22, T. 51 N., R. 3 W.B.M.

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①

File 93-1

Vol 6 P. 1152

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SEP 8 1961

Department of Reclamation

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Hayden Lake Protective
Association, Inc.

Plaintiff,

vs.

Dalton Gardens Irrigation
District, Hayden Lake
Irrigation District, Avondale
Irrigation District and
Dalton Highway District,

Defendants,

and

Charles F. Pol,

Intervenor.

JUDGMENT

STATE OF IDAHO } ss
County of Kootenai }

E. W. LARSON

CLERK DISTRICT COURT

SEP 7 1961

Filed _____
at _____ o'clock _____ M.

HAROLD E. PETERSON

DEPUTY

This proceeding having been commenced by Complaint filed on August 7, 1959, on behalf of Hayden Lake Protective Association, Inc., Plaintiff, by Scott W. Reed, attorney at law, and E. R. Whittle, attorney at law, having entered an appearance on behalf of Dalton Gardens Irrigation District, Avondale Irrigation District and Dalton Highway District, Defendants, and James W. Ingalls, attorney at law, having filed a Motion to Intervene on behalf of Charles F. Pol, individually and as representative of others, as shown in the files of this Court, and the Defendant, Hayden Lake Irrigation District, having been duly served but having failed to make an appearance whatsoever, and the Defendants, Avondale Irrigation District, Dalton Gardens Irrigation District, and Dalton Highway District and the intervenor Charles F. Pol, by and through their respective attorneys of record, E. R. Whittle and James W. Ingalls having filed and tendered an Offer of Judgment to the Plaintiff and the Plaintiff

JUL 31 1966

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APR 21 1965

Department of Reclamation

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

95-B

HAYDEN LAKE PROTECTIVE
ASSOCIATION, INC.

Plaintiff,

Vs.

DALTON GARDENS IRRIGATION
DISTRICT, HAYDEN LAKE
IRRIGATION DISTRICT, AVONDALE
IRRIGATION DISTRICT AND
DALTON HIGHWAY DISTRICT,

Defendants,

and

CHARLES F. POL,

Intervenor.)

STATE OF IDAHO }
County of Kootenai }

Filed MAR 20 1962
at _____ o'clock _____ M.

E. W. LARSON
Clerk District Court

By HAROLD E. PETERSON
D.

AMENDED JUDGMENT
#18666

STATE OF IDAHO
County of Kootenai
E. W. LARSON
Clerk District Court

Judgment having been entered heretofore on September 7, 1961, upon Offer of Judgment by certain of the defendants which offer was accepted by the plaintiff and the parties having thereafter discovered an ambiguity in said Judgment and a Stipulation having been entered and filed herein on this date by Scott W. Reed, attorney for the plaintiff, Hayden Lake Protective Association, Inc., James W. Ingalls, attorney for Charles F. Pol, et al, intervenors, and E. L. Miller, attorney for and on behalf of the Dalton Gardens Irrigation District, Hayden Lake Irrigation District and Avondale Irrigation District, and said Stipulation appearing fair, equitable and binding on all parties,

NOW THEREFORE, the following Judgment is entered,
nunc pro tunc,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. That the normal and average high water level of Hayden Lake, Kootenai County, Idaho is and shall hereafter be established at 2239.0 feet above sea level on U.S.C. and G.S. datum.

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JUL 31 1966

Box 38

October 25, 1973

No. 95-0115

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OCT 26 1973
Department of Water Administration

③ Miz Woods:

Mr. & Mrs. Richard E. Elston were in the office and wanted the attached papers entered in their file. I didn't realize at the time that they had a decreed water right, so they don't even have a file!

Anyway, thought I'd send it down to you to see what you could do with it. Aren't I nice?

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JUL 31 1996

Corda June

95-B-1

183053

QUIT-CLAIM DEED

THIS INDENTURE, made this 26th day of December in the year of our Lord, One Thousand Nine Hundred and Forty-one between George M. Colborn and Lulu V. Colborn, husband and wife resident of Hayden Lake, County of Kootenai, State of Idaho, parties of the first part, and F.M. Hoag and Lucy King Hoag, husband & wife resident of-----, County of-----, Spokane, State of Washington, parties of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of One & No/100 Dollars and other valuable consideration DOLLARS in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents demise, release and forever quit-claim unto the said parties of the second part and to their heirs and assigns .

All water rights in and to Hoag Creek located in the U.S.Forest Reserve and in the Southerly half of Government Lot Five (5) and the Southwest Quarter (SW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) Section Twenty-two (22) Township Fifty-one (51) North, Range Three (3) West, Kootenai County, State of Idaho.

Together with all and singular the hereditaments and appurtenances, thereunto belonging or in anywise appertaining and the reversion and reversions, reaminder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances, unto said parties of the second part, and to their heirs and assigns forever

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hand and seals the day and year first above written.

Signed, Sealed and delivered in presence of:

Robert W. Danson
I.Norene Hall

George M. Colborn (seal)
Lulu V. Colborn (Seal)

STATE OF WASH.)
) ss:
County of Spokane)

THIS IS TO CERTIFY, That on this 24 day of August, A.D., 1943 before Robert W. Danson, a Notary Public in and for the State of Washington, duly commissioned and sworn personally came George M. Colborn & Lulu V. Colborn his wife to me known to be the individuals described in the within instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal, the day and year in this certificate first above written.

(Notarial Seal)

STATE OF IDAHO,)
) ss:
County of Kootenai)

Robert W. Danson Notary Public
for State of Washington,
residing at Spokane.

Filed for record at the request of F.M.Hoag on the 15th day of Mar. 1946 at 10:40 o'clock A.M., and recorded in Book 130 of Deeds on page 228.

Fee: \$1.00

Jas. A. Foster County Recorder
By Alberta E. Platt, Deputy

THIS INDENTURE, made this 8th day of March, 1946 between OSWALD RALPH WALCH (also known as Ralph and Luola Walch) and LUOLA WALCH, his wife, of 1144 ... in the City of Kellogg, County of Shoshone, and State of Idaho, parties of the first part and NANCY WALCH, a widow, of 1522-18th Avenue, in the City of Seattle, County of King, and State of Washington, party of the second part;

W I T N E S S E T H:

That the said parties of the first part for and in consideration of the sum of One (\$1.00) Dollar, and other good and valuable consideration, lawful money of the United States of America, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, her heirs and assigns forever, all of the following described real estate situate in the County of Kootenai and State of Idaho, to-wit:

Lots Twenty-five (25) and Twenty-six (26) of "A.E. Powell Tracts", according to the Plat thereof recorded in Book "C" of Plats on page 143, in the office of the County Recorder of said County, also an easement and water right with the right to tap the Creek above the reservoir locate on Lot Seventeen (17) and run a pipe line from the point of tapping said Creek over the property of Andrew E. Powell and Hattie M. Powell, husband and wife, grantors in that certain deed dated August 27, 1929 and recorded in Book 94 of Deeds, page 230, records of said County, to service the property conveyed to the grantee with domestic water.

TOGETHER WITH all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said parties of the first part.

TO HAVE AND TO HOLD, All and singular the above mentioned and described premises together with the appurtenances, unto the party of the second part, and to her heirs and assigns forever. And the said parties of the first part, and their heirs, the said premises in the quiet and peaceful possession of the said party of the second part, her heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, or any part thereof, shall and will warrant and by these presents forever defend.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

Oswald R. Walch (S E A L)
Luola Walch (S E A L)

STATE OF IDAHO,)
COUNTY OF SHOSHONE) ss:

I, the undersigned, a Notary Public in and for the State of Idaho, duly commissioned and sworn, do hereby certify that on this 8 day of March, A.D. 1946 personally appeared before me OSWALD RALPH WALCH, sometimes known as RALPH and RALAPH WALCH, and LUOLA WALCH, husband and wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

(Notarial Seal)

State of Idaho)
County of Kootenai) ss:

Stella Brown Notary Public in and for the State of Idaho, residing at Kellogg, Idaho. My Commission expires Apr. 13, 1948
JUL 31 1996

OFFICE OF THE GOVERNOR TRANSMITTAL SLIP		DATE 4-5-72
TO: Dr. Lee Stokes, Health Department		
FROM: Governor Cecil D. Andrus		
ACTION		
☐ NOTE AND FILE	☐ PER OUR CONVERSATION	
☐ NOTE AND RETURN TO ME	☐ PER YOUR REQUEST	
☐ RETURN CORRESPONDENCE	☐ FOR YOUR APPROVAL	
☐ NOTE AND SEE ME ABOUT THIS	☐ FOR YOUR INFORMATION	
☐ PLEASE ANSWER	☐ FOR YOUR COMMENTS	
☐ PREPARE REPLY FOR MY SIGNATURE	☐ SIGNATURE	
☐ TAKE APPROPRIATE ACTION	☒ INVESTIGATE AND REPORT	
COMMENTS: Please look into this problem immediately and advise this office as quickly as possible of any action that has been taken in the past or can be taken in the future on this problem at Hayden Lake. C.D.A.		

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APR 5 1972

Department of Water Administration

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JUL 31 1996

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File in 95 B

April 7, 1972

C

Mr. Edward V. Williams
Administrative Assistant
to GOVERNOR ANDRUS
State of Idaho
Office of the Governor
Room 228, Statehouse
Boise, Idaho 83707

P
Dear Ed:

Enclosed is a copy of a recent letter from Colonel William M. Knox, Chairman of the Hayden Lake Protective Association, for your information.

Very truly yours,

Y
R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure: Letter dated April 6, 1972 from Colonel Knox

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JUL 31 1972

DEAD END LAKE WATERSHED IMPROVEMENT DISTRICT

Route 1 Box 334-A
Hayden Lake, Idaho. 83835.
April 6, 1972.

Mr Keith Higginson, Director,
Department of Water Administration
State of Idaho
Boise, Idaho.

APR 7 1972

Department of Water Administration

Dear Mr Higginson:

Referring to our conversation of even date regarding the flooding conditions which are presently occurring at Hayden Lake, I wish to invite your attention to the following facts:

a. An election was held at Hayden Lake, Idaho, on March 17, 1972, for the purpose of electing three Directors of the Hayden Lake Watershed Improvement District. Two incumbents were candidates for re-election and two others were nominated.

b. I was in Idaho Falls attending the State Convention of the Wildlife Federation at the time the elections were held. When I returned home on March 20, 1972, I found that my name had been entered as a "write-in" and that I had received the second highest number of votes cast at the election. Since the lake had been in "flood stage" even prior to the election, it was turned over to the newly elected officers in a critical stage and without any adequate flood control devices having been constructed in the past ten years.

c. I visited the spillway area after executing my Oath of Office and found that Mr Perry had placed "boom logs" in front of the weir to keep trash from obstructing the spillway. These logs had drifted to the face of the weir and were obstructing the flow by approximately one-third of it's capacity. I called the Highway District who brought heavy equipment and dragged the boom-logs out of the Lake.

d. I am informed by members of the Irrigation companies that the "control boards" were not completely removed until the Lake reached a level which indicated "flood conditions" would occur. Mr Vernon Perry was Chairman of the District prior to the time that I assumed this responsibility and I believe it was his duty to control the level of the lake prior to assumption of the duties by the newly elected officers. At the time I assumed the responsibility the lake level was 2240.44 or 1.44 ft above the legally established high water mark. The level then rose daily until it reached a maximum of 2240.54 on March 24/72. Since that date it has receded to a present level of 2240.26.

I have had conferences with Mr Marlow Freckleton of the SCS in Coeur d' Alene and also with the officers of the irrigation districts. I value the advice of these gentlemen and also rely on my own judgment since I have been a resident on the lake for more than 16 years. At no time have we given any consideration to breaching the Dike. A breach at this time would result in the loss of about 7 feet of water in the lake level and I am also informed that we have about 10 inches left in the watershed.

JUL 31 1996

There are those around the lake that have built their homes very close to the lake level and have allowed nothing for possible flooding in certain years of high precipitation. This is a regrettable fact and I have assured those who have called me that if they think they have a legitimate complaint, that I would call the Health Dept; the SCS and my

95-B

1. JUDGMENT -- Hayden Lake Protective Assoc. -vs- Dalton Gardens Irrig. Dist. et al
2. AMENDED JUDGMENT -- Hayden Lake Protective Assoc. -vs- Dalton Gardens Irrig. Dist, et al.
3. QUIT CLAIM DEED
4. CORRESPONDENCE -- Dated April 4, 1972 to R. Keith Higginson
5. CORRESPONDENCE -- Dated April 7, 1972 to Edward V. Williams

JUL 31 1996

577 P.2d 9

AVONDALE IRRIGATION DISTRICT,
Dalton Gardens Irrigation District, and
Hayden Lake Irrigation District, Plain-
tiffs,

v.

NORTH IDAHO PROPERTIES, INC., an
Idaho Corporation, et al., Defendants,
and

United States of America,
Intervenor-appellant,
and

Robert J. Adamson et al., and R. Keith
Higginson, Director of Water Adminis-
tration, Idaho State Department of
Water Administration, Intervenor-re-
spondents.

John SODERMAN and Martha Soderman,
husband and wife, Farrell Stoor and
Margaret Stoor, husband and wife,
Frank Stoor and Pat Stoor, husband and
wife, Oscar Vias and Verda Vias, hus-
band and wife, Alfred Vias, a single
man, Jack Nuffer and Phyllis Nuffer,
husband and wife, Leith R. Somson and
Virginia Somson, husband and wife, and
Dan Moran, a single man, Plaintiffs,

v.

Dr. Evan KACKLEY and Lois Kackley,
husband and wife, J. C. Smith and Vera
D. Smith, husband and wife, Blue Moun-
tain Grazing Association, Inc., a corpo-
ration, United States of America
through the United States Forest Ser-
vice, Department of Agriculture, the Bu-
reau of Indian Affairs, Department of
the Interior, the State Engineer, Depart-
ment of Reclamation, State of Idaho,
Defendants.

R. Keith HIGGINSON, Director, Idaho
Department of Water Resources,
Cross-claimant, Appellant,

v.

UNITED STATES FOREST SERVICE,
Cross-defendant, Respondent.

Nos. 12174, 12482.

Supreme Court of Idaho.

March 15, 1978.

Rehearing Denied May 1, 1978.

Two actions were brought raising com-
mon issues concerning federal reserved
water rights for nonconsumptive use to nat-
ural flow of several streams in two national
forests. The District Court, First and Sixth
Judicial Districts, Kootenai and Caribou
Counties, Watt E. Prather and Francis J.
Rasmussen, JJ., entered judgments and con-
solidated appeals were taken. The Su-
preme Court, Bakes, J., held that: (1) Coeur
d'Alene and Caribou National Forests were
created to preserve perpetual supply of tim-
ber and protect watersheds to secure favor-
able conditions of water flows, so that any
nonconsumptive water rights reserved by
United States in those two national forests
were limited to amounts necessary to those
purposes and (2) if United States proved
that entire natural flow of streams was at
all times necessary to timber management
and watershed protection, then United
States would be entitled to that entire nat-
ural flow, but if, at any time in seasonal
and yearly variations in stream flows, en-
tire natural flow would exceed minimum
flow necessary, the necessary minimum
flow must be found and United States
would be required to quantify its water
rights in second feet, or acre feet and would
have burden of proving its claim as to the
marginal excess.

One case affirmed and the other case
reversed and remanded.

Shepard, C. J., dissented in part and
filed opinion in which Donaldson, J., con-
curred.

1. Appeal and Error ⇐79(1)

Judgments not adjudicating rights of
all parties were not appealable to Supreme
Court. I.C. § 13-201.

2. Appeal and Error ⇐436

When judgment was appealed to Su-
preme Court, district court was divested of
jurisdiction over the matter.

3. Waters

When
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4. Waters

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streams in
tent it was
reservation,

5. Waters

Woods as
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limited to
the purpose
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Stat. 30-1
Stat. 30-1

3. Waters and Water Courses ⇌2

When federal government reserves land from public domain it also, by implication, reserves rights to appurtenant and then unappropriated water necessary to accomplish the purpose of the reservation and that reserved water right vests on date of reservation and is superior to rights of subsequent appropriators.

4. Waters and Water Courses ⇌2

United States was entitled to reserve nonconsumptive right to natural flow of streams in two national forests only to extent it was necessary to fulfill purpose of reservation, no more.

5. Waters and Water Courses ⇌2

Woods and Forests ⇌8

The Coeur d'Alene and Caribou National Forests were created pursuant to Creative and Organic Acts for purpose of preserving perpetual supply of timber and protecting watersheds to secure favorable conditions of water flows but the preservation of fish cultures and habitats and wildlife, and recreational and aesthetic purposes were not contemplated; thus any nonconsumptive water rights reserved by United States in those two national forests were limited to amount necessary to accomplish the purposes of timber and watershed protection. Proclamation, Nov. 6, 1906, 34 Stat. 3256; Proclamation, Jan. 15, 1907, 34 Stat. 3267.

6. Woods and Forests ⇌8

Fire and erosion control are among purposes for which the Coeur d'Alene National Forest was created. Proclamation, Nov. 6, 1906, 34 Stat. 2356; Proclamation, Jan. 15, 1907, 34 Stat. 3267.

7. Woods and Forests ⇌8

Evidence established that accomplishment of purposes of timber and watershed protection in the Coeur d'Alene National Forest does not require any minimum stream flow in the Hayden, Yellow Banks and Mokins creeks. Proclamation, Nov. 6, 1906, 34 Stat. 3256; Proclamation, Jan. 15, 1907, 34 Stat. 3267.

8. States ⇌4.10

Requirements for water rights under state law, such as diversion and application to beneficial use, and rules against speculative rights are not necessarily applicable to federal reserved rights; rather, federal law, because of Supremacy Clause, supersedes Idaho law and controls volume and scope of federal reserved rights. U.S.C.A.Const. art. 6, cl. 2.

9. Waters and Water Courses ⇌33

Although United States can be joined in general adjudication of water rights pursuant to state law and can be required to quantify its reserved rights pursuant to state law, the volume and scope of particular reserved rights are federal questions.

10. Waters and Water Courses ⇌2

Since nature and scope of reserved water rights claimed by United States as necessary to accomplish purpose of natural forest were determined by federal law and application of state law to peculiar claims of United States might result in change in nature and scope of those claims, and because fundamental requirement of certainty was adequately satisfied, a claim to entire natural flow, if it were proved to be necessary, would be sufficient quantification of reserved rights claimed by the United States. I.C. §§ 42-1409, 42-1409(b).

11. Waters and Water Courses ⇌2

If United States proved that entire natural flow of streams was at all times necessary to accomplish purpose of national forest, then United States would be entitled to that entire natural flow, but if, at any time in seasonal and yearly variations in stream flows, entire natural flow would exceed minimum flow necessary, the necessary minimum flow must be found and United States would be required to quantify its water rights in second feet, or acre feet, and would have burden of proving its claim as to the marginal excess. Proclamation, Jan. 15, 1907, 34 Stat. 3267.

Wayne L. Kidwell, Atty. Gen., Josephine P. Beeman, Asst. Atty. Gen., Boise, for Dept. of Water Resources.

Department of Water Resources filed a cross complaint against the United States disputing the validity of that non-consumptive water right.

[1, 2] Following a trial in November of 1974, the district court found that the entire natural flow of these streams was necessary to preserve the forest ecosystems and fish and wildlife, to serve as fire barriers, and for recreational and aesthetic purposes. The district court concluded that these purposes were among those for which the Caribou National Forest was created, and therefore, under the federal reserved water rights doctrine, the United States was entitled to the non-consumptive water rights it claimed. A judgment to this effect was entered on April 14, 1975. However, because private parties had requested additional time to submit material for incorporation in a stipulation, that judgment did not adjudicate the water rights of those private parties. The Department of Water Resources appealed that judgment, but this Court dismissed the appeal because no final judgment had been entered adjudicating all the water rights between all the parties. *Soderman v. Kackley* (*Soderman I*), 97 Idaho 850, 555 P.2d 390 (1976). After a judgment determining the rights of the other parties had been entered by the district court, the Department filed this second appeal.³

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I

peal September 17, 1976, for lack of a final judgment. The dismissal of the appeal was filed in the district court November 2, 1976. The second appeal was filed December 29, 1976. When the judgment adjudicating the water rights of the other parties, the absence of which in the record prompted this Court's dismissal of the first appeal, was entered on July 2, 1976, the water rights between all the parties had been adjudicated. That suggests a jurisdiction problem under I.C. § 13-201 because this second appeal was not filed until December 29, 1976, more than 60 days after the entry of the second judgment. (I.C. § 13-201 has been repealed and replaced by Rule 14, Idaho Appellate Rules (I.A.R.), effective July 1, 1977, but still controls the time for filing appeals from judgments entered before July 1, 1977. I.A.R. 1.) However, neither the judgment entered April 14, 1975, nor the judgment entered July 2, 1976, is a final judgment adjudicating the rights of all the parties. Hence, neither of

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II

Avondale Irrigation Dist. v. North Idaho Properties, Inc. This action was originally commenced by three Idaho irrigation districts to adjudicate water rights in Hayden Lake and its tributaries. The United States, as an intervenor, asserted water rights under the federal reserved water rights doctrine. The Idaho Department of Water Resources, also an intervenor, contested that claim. The district court ruled that the United States did hold reserved water rights, but required that those reserved rights be quantified. On appeal from that decision, this Court ruled that the United States is required by state law to quantify the amount of water claimed under the reservation doctrine at the time of a general adjudication of water rights. This Court remanded the case to allow the United States an opportunity to quantify those rights. *Avondale Irrigation Dist. v. North Idaho Properties, Inc. (Avondale I)*, 96 Idaho 1, 523 P.2d 818 (1974). On remand, the district court reopened the proceedings for quantification of the reserved water rights, but in its order provided that "the Idaho Department of Water Resources may . . . raise the issue of law of whether the United States is entitled to include in such quantification minimum stream flows."

The United States claimed a non-consumptive right dating from November 6, 1906, the date the Coeur d'Alene National Forest was reserved by presidential proclamation, to the entire natural flow of the Yellow Banks, Mokins and Hayden Creeks within the boundaries of the Coeur d'Alene National Forest. All three creeks originate in the Coeur d'Alene National Forest and are tributaries of Hayden Lake. The Yellow Banks and Hayden Creeks enter Hay-

den Lake on non-federal land. Mokins Creek enters the lake on national forest land, but only after crossing two intervening parcels of non-federal land. Various witnesses called by the United States testified that the entire natural flow of all three creeks is necessary to preserve fish cultures and for wildlife, recreational and aesthetic purposes. The testimony introduced at trial, however, primarily supported the claim that the entire natural flow is necessary to preserve the fish habitat. In addition, the United States introduced in evidence the historical maximum stream flow and annual volume within the boundaries of the national forest of these three creeks.⁴ The United States also claimed a minimum stream flow of 3.57 cfs from April 1 to June 30 of each year in the downstream part of Hayden Creek flowing through private land. Testimony indicated that this minimum stream flow is necessary to enable fish in Hayden Lake to swim upstream to the national forest for spawning.

The district court concluded that a claim to the entire natural flow is not a sufficient quantification and therefore ruled that any non-consumptive water rights of the United States would be limited to those maximum quantities specifically set out in evidence; any water in excess of those amounts would be subject to appropriation. The district court further ruled that the purposes for which the United States claimed these non-consumptive water rights—preservation of fish and wildlife, recreation and aesthetics, and fire and erosion control—were not the purposes for which the national forest was created and therefore the United States was not entitled to water rights for those purposes under the federal reserved water

ment, although composed of two separate documents, adjudicating the rights of all the parties and from which an appeal could properly be taken. Thus, for purposes of I.C. § 13-201, the 60 day limitation period began to run November 2, 1976. This appeal was filed December 29, 1976, well within that limitation period.

these judgments was separately appealable to this Court. When the judgment entered April 14, 1975, was appealed to this Court, the district court was divested of jurisdiction over the matter. *Coeur d'Alene Turf Club, Inc. v. Cogswell*, 93 Idaho 324, 461 P.2d 107 (1969); *Dolbeer v. Harten*, 91 Idaho 141, 417 P.2d 407 (1965), on rehearing (1966). It was not until the dismissal of the first appeal was filed in the district court on November 2, 1976, that there was pending in the district court a final judgment,

4. Hayden—790 cfs, 22,020 acre ft./year; Yellow Banks, 136.94 cfs, 2,440.62 acre ft./year; Mokins—170.73 cfs, 3,336.72 acre ft./year.

rights doctrine. The district court concluded that the forest was reserved only for purposes of timber management and watershed protection, and found that the United States had failed to prove that a non-consumptive right to the entire natural flow or any minimum stream flow was necessary to accomplish these two purposes. The district court further concluded that the reservation doctrine does not apply to those portions of a stream crossing private land and therefore ruled that the United States was not entitled to the seasonal minimum flow of 3.57 cfs in the downstream portion of Hayden Creek on private land. The United States has appealed from that decision.⁵

In these two appeals the United States is not arguing that it has consumptive rights, rights to divert and consume the entire natural flow of the streams, but only that it has the right to the non-consumptive or instream use of the natural flow. Accordingly, the water rights claimed by the United States generally would not affect appropriators downstream of the national forests. The exceptions would be the minimum stream flow claimed in the portion of Hayden Creek crossing private land downstream of the Coeur d'Alene National Forest and downstream appropriators who divert water upstream on the national forest for gravity flow or storage purposes. In theory the rights claimed by the United States would affect upstream users, but in these cases the streams involved all originate within the national forests. The claimed water rights would affect appropriative rights appurtenant to non-federal land within these national forests. The amount of non-federal land within the boundaries of these national forests is not insignificant. Testimony in *Avondale*, for example, indicated that within the Coeur d'Alene National Forest there are approximately 44,000 privately owned acres and 13,480 acres owned by the State of Idaho.

The United States claims that these non-consumptive water rights date from the

time these national forests were created—the Coeur d'Alene National Forest in 1906, the Caribou National Forest in 1907. Accordingly, the United States acknowledges that the reserved rights it claims would be subordinate to water rights with priority dates prior to the creation of these national forests.

The Idaho Department of Water Resources does not dispute the federal reserved water rights doctrine or its applicability to these cases, but does dispute: (1) that the non-consumptive rights claimed by the United States are necessary to accomplish the purposes for which these two national forests were created; (2) that a claim to the entire natural flow is a sufficient quantification of those rights; and (3), in *Avondale*, that the United States is entitled to a right to a minimum stream flow downstream of the national forest on private land.

III

[3] It is now well established that when the federal government reserves land from the public domain it also, by implication, reserves rights to the appurtenant and then unappropriated water necessary to accomplish the purpose of the reservation. This reserved water right vests on the date of the reservation and is superior to the rights of subsequent appropriators. *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); see *Ranquist, The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U.L.Rev. 639.

5. In both cases the district courts exercised jurisdiction over the United States pursuant to 43 U.S.C. § 666. This Court has jurisdiction on

appeal pursuant to I.C. § 13-201, since repealed and replaced by I.A.R. 11.

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Although originating in a case concerning water rights on an Indian reservation, *Winters v. United States*, *supra*, this reserved water rights doctrine has been held to apply to other federal enclaves including national forests. *Cappaert v. United States*, *supra*; *United States v. District Court for Eagle County*, *supra*; *Arizona v. California*, *supra*. This doctrine was most recently considered by the United States Supreme Court in *Cappaert v. United States*, *supra*. That case involved reserved water rights in an underground pool in Devil's Hole National Monument inhabited by a unique species of desert fish. Heavy pumping of groundwater for irrigation purposes on private land several miles away caused the water level in the pool to drop below the minimum level necessary for propagation of the rare fish species. The Supreme Court concluded that the protection of this rare fish species was a purpose for which the Devil's Hole National Monument was created in 1952. Therefore the Court held that under the reserved water rights doctrine the United States was entitled to have the groundwater pumping, which had commenced subsequent to the creation of the Devil's Hole National Monument, curtailed, but only to the extent necessary to preserve the minimum water level necessary for preservation of the fish species.

[4] Similarly, in these two cases the United States asserts a reserved non-consumptive right to the natural flow of these several streams in two national forests. However, as the Supreme Court made clear in *Cappaert*, the United States is entitled to such a water right only if, and only to the extent it "is necessary to fulfill the purpose of the reservation, no more." 426 U.S. at 141, 96 S.Ct. at 2071.

In *Cappaert* the United States Supreme Court ascertained the purpose for which the Devil's Hole National Monument was re-

served by examining the presidential proclamation creating it and the statutory authorization for the reservation. We must do the same in these cases in order to determine the purposes for which the Coeur d'Alene and Caribou National Forests were created.

These two national forests were created by presidential proclamations—the Coeur d'Alene National Forest on November 6, 1906, 34 Stat. 3256, and the Caribou National Forest on January 15, 1907, 34 Stat. 3267.⁶ These proclamations do not indicate the purpose for the reservations, but do state that the reservations were made pursuant to section 24 of the Creative Act of 1891. Section 24 of that Act states:

"The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as [national forests], and the President shall, by public proclamation, declare the establishment of such [forests] and the limits thereof." Ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (codified at 16 U.S.C. § 471).

That statute does not state the purpose for which the President may reserve public lands as national forests, just the requirement that the public land reserved be covered with timber or undergrowth. However, the congressional debates and memorials read in those debates suggest that Congress was concerned with the preservation of timber stands in order to assure a continuous supply of timber and the protection of watersheds in mountainous areas in order to control the water flows in the lower valleys.⁷

Six years later Congress passed what is now referred to as the Organic Administration Act of 1897.⁸ That Act provided that

6. The reservations are referred to as forest reserves in the presidential proclamations and early statutes. The name was later changed to national forest. Ch. 2907, § 1, 34 Stat. 1256, 1269 (1907).

7. See 21 Cong.Rec. 2537-39 (1890); 22 Cong. Rec. 3611-16 (1891).

8. What is presently called the Organic Act of 1897 was passed as a rider to the Sundry Civil Expense Appropriation Act of 1897, ch. 2, § 1, 30 Stat. 11, 34-36, and is generally codified at

national forests were to be established in accordance with the following provisions:

"All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as [national forests] under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions:

"No [national forest] shall be established, except to improve and protect the forest within the reservations, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." Ch. 2, § 1, 30 Stat. 11, 34-35 (1897) (codified at 16 U.S.C. § 475).

In this Act Congress stated that national forests were to be established for the purpose of securing favorable conditions of water flows and a continuous supply of

timber. The United States argues that the phrase "to improve and protect the forest within the boundaries" is a separate and distinct purpose for the creation of national forests and refers not only to the protection of trees, but also to the protection and improvement of the entire forest ecosystem, including fish and wildlife, and the forest's aesthetic and recreational qualities. This argument, however, finds no support in the legislative history of the Act. Despite repeated references in the congressional debates to the need to preserve timber resources and protect watersheds, no mention is made of fish and wildlife or the aesthetic and recreational qualities of the forests.⁹ Moreover, the Organic Act expressly provides that water within the national forest may be used for domestic, mining, milling and irrigation purposes.¹⁰ It would indeed be anomalous for this Court to infer, as the United States asks it to do in these cases, a congressional intent to reserve the entire natural flow of these streams when Congress explicitly authorized and contemplated private consumptive use of these same streams.

The Organic Act further provides that it is not to be "construed to prohibit the egress and ingress of actual settlers" or to "prohibit any person from entering upon such forest reservation for all proper and lawful purposes."¹¹ The Secretary of Agri-

16 U.S.C. §§ 473-478, 479-482, 551. See 30 Cong.Rec. 899 (1897).

9. See, e. g., 30 Cong.Rec. 899-917, 963-1010 (1897) (debates preceding the enactment of the Organic Act of 1897); 25 Cong.Rec. 2371-75, 2430-35 (1893), and 27 Cong.Rec. 85-86, 109-15 (1894) (committee report and debates on the 1892 McRae Bill, H.R. 119. This bill, which was passed by the House but not the Senate, is the forerunner of and substantially the same as the Organic Act of 1897). See generally Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat.Res.Law. 503 (1974).

10. "All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder." Ch. 2, § 1, 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 481).

11. "Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of [Agriculture]. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations." Ch. 2, § 1, 30 Stat. 11, 36 (1897) (codified at 16 U.S.C. § 478).

culture¹² is also authorized to "regulate their occupancy and use."¹³ The United States argues that this mandate for regulation of the occupancy and use of the forests indicates that Congress envisioned uses broader than timber management and watershed protection. We agree that Congress contemplated that the public land reserved as national forests would continue to serve a variety of public uses. In *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), the United States Supreme Court stated:

"From the various acts relating to the establishment and management of forest reservations, it appears that they were intended 'to improve and protect the forest and to secure favorable conditions of water flows.' It was declared that the act should not be 'construed to prohibit the egress and ingress of actual settlers' residing therein, nor to 'prohibit any person from entering upon such forest reservations for all proper and lawful purposes,' (Citations omitted). It was also declared that the Secretary 'may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction;' (Citations omitted). "Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent

with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another." *Id.* at 515-516, 31 S.Ct. at 482.

Congress chose not to prohibit all public use of the national forests, but chose to permit lawful uses of the forest land and water subject to regulation to insure that such uses did not interfere with the purposes, timber management and watershed protection, for which the reservations were created. However, the diverse uses which the public has made of the forests cannot be equated with the purposes for which they were originally created. *Mimbres Valley Irr. Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (1977), *cert. granted sub nom. United States v. New Mexico*, — U.S. —, 98 S.Ct. 716, 54 L.Ed.2d 750 (1978). See also *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965). Had Congress intended that national forests be created for the purposes of recreation, aesthetics, and fish and wildlife preservation, Congress would have so stated as it did in 1890 when Congress set aside public lands in California as "reserved forest lands" for the "preservation from injury all . . . natural curiosities or wonders . . . in their natural condition [and protection of] fish and game. . . ." Ch. 1263, §§ 1 & 2, 26 Stat. 650-51 (1890), and in 1916 in the National Park Service Act which provides that the "fundamental purpose of the said parks, monuments and reservations . . . is to conserve the scenery and the natural and historic objects and the wildlife therein

12. The "forest reserves" were originally administered by the Secretary of Interior. In 1905 Congress transferred control to the Secretary of Agriculture. Ch. 288, § 1, 33 Stat. 628 (1905) (codified at 16 U.S.C. § 472).

13. "The Secretary of [Agriculture] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set

aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; . . ." Ch. 2, § 1, 30 Stat. 11, 35 (1897) (codified at 16 U.S.C. § 551).

... Ch. 408, § 1, 39 Stat. 535 (1916) (codified at 16 U.S.C. § 1). See *Cappaert v. United States*, *supra*.

The United States also argues that the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528, ratifies these additional purposes—recreation, aesthetics, and fish and wildlife preservation—as being among the original purposes for the Creative and Organic Acts. The Multiple-Use Sustained-Yield Act provides in part:

"It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title." 16 U.S.C. § 528.

In response to this same argument, the New Mexico Supreme Court in *Mimbres Valley Irr. Co. v. Salopek*, *supra*, recently concluded:

"The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be 'supplemental to' the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

"We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated." *Id.*, 564 P.2d at 618.

We likewise conclude that the purposes for which the forests were created are de-

termined by the law in existence at the time of their creation, and that the additional "supplemental" purposes described were not among those for which national forests were created pursuant to the Creative and Organic Acts. See *West Virginia Div. of Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975).

We appreciate the growing public concern for the protection of fish and wildlife and the preservation of the aesthetic and environmental qualities of the national forests. We are also sensitively aware of the increasing use of these forests for recreational purposes. We are likewise aware that in an arid state like Idaho there often is simply not enough water to fully accommodate all the worthwhile but competing uses. However, the United States Supreme Court made it very clear in *Cappaert* that claims for federal reserved rights are not to be analyzed in terms of an equitable balancing of competing interests, and we do not do so in these cases. Rather, the United States is entitled to previously unappropriated waters necessary to accomplish the purpose for which the reservations were originally created—no more and no less.

[5] We conclude, therefore, that the Coeur d'Alene and Caribou National Forests were created pursuant to the Creative and Organic Acts for the purpose of preserving a perpetual supply of timber and protecting watersheds to secure favorable conditions of water flows. *United States v. Grimaud*, *supra*; *Light v. United States*, 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911); *United States v. Shannon*, 160 F. 870 (9th Cir. 1908); *Honchok v. Hardin*, 326 F.Supp. 988 (D.Md.1971); *United States v. Johnston*, 38 F.Supp. 4 (S.D.W.Va.1941); *Mimbres Valley Irr. Co. v. Salopek*, *supra*. The preservation of fish cultures and habitats and wildlife, and recreational and aesthetic purposes were not contemplated. *Mimbres Valley Irr. Co. v. Salopek*, *supra*. Accordingly, any non-consumptive water rights reserved by the United States in these two national forests are limited to the amount necessary to accomplish the purposes of timber and watershed protection.

IV

[6, 7] In its conclusions of law in *Avondale* the district court ruled that fire and erosion control were not among the purposes for which the Coeur d'Alene National Forest was created. This conclusion was erroneous. The control and prevention of forest fires is an integral part of the greater purpose of timber protection and a purpose clearly contemplated by Congress. Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 Nat.Res.Law. 503 (1974). Similarly, erosion control is an integral part of watershed protection. However, a review of the record in *Avondale* reveals no testimony or other evidence that the non-consumptive use of the entire natural flow or any minimum stream flow is necessary for fire or erosion control.¹⁴ On the basis of evidence adduced at trial, we agree with the district court that the accomplishment of the purposes of timber and watershed protection in the Coeur d'Alene National Forest does not require any minimum stream flow in the Hayden, Yellow Banks and Mokins Creeks. We have already concluded that the propagation of fish is not a purpose for which the Coeur d'Alene National Forest was created. It follows, therefore, that the United States is not entitled to a minimum stream flow in the downstream portion of Hayden Creek crossing private land to enable fish to spawn in the national forest. For these reasons, we affirm the district court's decision in *Avondale*.

V

In *Soderman* the district court found that:

"[Finding of Fact] 6. The witnesses offered by the United States testified and I find that the non-consumptive use claimed under the federally reserved water right doctrine is necessary in this particular case in order to preserve the forest ecosystems, maintain timber

14. Robert Rice, Deputy Forest Supervisor for the Idaho Panhandle National Forest, testified that the streams are a source for filling small tankers used in fighting forest fires. However,

growth, serve as a fire barrier, and provide vegetation and a stream bed conducive to maintenance of a viable fish hatchery for eastern brook trout. A reduction in the natural flow of the stream would destroy the aquatic fishery resources by degrading habitat, degrading beneficial cover of overhanging banks and bank vegetation which extends into the streamflow.

"[Finding of Fact] 7. The evidence also established wildlife and recreational usage of the natural flow of the three streams and that each stream adds to the aesthetic beauty of the forest as an integral segment and part of the forest reserve.

"[Finding of Fact] 8. The non-consumptive use claimed by the United States will preserve the streams in their natural condition for the use and benefit of the public and is also necessary for animal life, fishery, and recreational uses."

Some of the purposes stated by the district court—timber growth and fire barriers—are of course part of the larger purpose of timber protection and therefore proper purposes for which the United States may claim a reserved water right. However, the other purposes forming the basis of the district court's decision—preservation of fish and wildlife, recreation, and aesthetics—are not. Since the district court did not find whether the entire natural flow of these streams is necessary for these purposes collectively or individually, we remand the case for further proceedings to determine what non-consumptive rights, if any, are necessary for the purposes of timber and watershed protection.

VI

Assuming *arguendo* that on remand in *Soderman II* the United States is able to prove that a non-consumptive right to the entire natural flow is necessary for these two purposes, the question whether the en-

that reference is clearly to a consumptive use of the stream. Claims to consumptive uses are not part of this appeal, but have been resolved in earlier proceedings.

tire natural flow is a sufficient quantification of that right will again arise. Therefore, we consider that issue at this time. I.C. § 1-205.

[8, 9] In *Avondale I* we held that "under 43 U.S.C. § 666, the United States is bound by Idaho state law, and therefore must quantify the amount of water claimed under the reservation doctrine at the time of the general adjudication of water rights." 96 Idaho at 4-5, 523 P.2d at 821-822. In a footnote we also stated:

"10. I.C. 42-1409. Note that reserved rights, unlike state created appropriative rights, do not depend upon diversion from the stream and application to beneficial use. 19 Stan.L.R. 1, at p. 65 (1967); *Arizona v. California*, *supra*; National Water Commission Report, Federal State Relations in Water Law, *supra*, at p. 147j. Likewise, since the doctrine is based upon the supremacy clause, it supercedes Idaho law on speculative water rights (*see Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974)) since some speculation is necessarily required in a present quantification of reserved water rights." *Id.* at 5, 523 P.2d at 822.

I.C. § 42-1409, part of the statutes governing the general adjudication of water rights, requires each claimant to file a notice of claim which includes *inter alia* "the quantity of water claimed to be used in cubic feet per second or the quantity of water stored in acre-feet per year." I.C. § 42-1409(b). However, as we noted in *Avondale I*, requirements for water rights under state law, such as diversion and application to beneficial use, and rules against speculative rights are not necessarily applicable to federal reserved rights. Rather, federal law, because of the supremacy clause, supersedes Idaho law and controls the volume and scope of federal reserved rights. *See Cappaert v. United States*, *supra*; *United States v. District Court for Eagle County*, *supra*. Although the United States can be joined in a general adjudication of water rights pursuant to state law and can be required to quantify its reserved

rights pursuant to state law, "the volume and scope of particular reserved rights, are federal questions . . ." *United States v. District Court for Eagle County*, *supra* at 527, 91 S.Ct. at 1003.

[10] In these cases the United States argues that the right to the non-consumptive use of the entire natural flow of these streams is necessary to accomplish the purpose of the reservation. The periodic natural variations in stream flows with "just the flexibility which nature provides without interference by man" are said to fulfill the varying needs of the United States more effectively than could be done by any attempt to specify these varying needs in terms of cubic feet per second or acre feet. The United States is not arguing that a right to a fixed minimum stream flow, with any excess above the minimum flow available for appropriation, is necessary to accomplish the purposes of the national forests, but that the right to the entire natural flow with all its natural and seasonal variations is necessary for that purpose. Again, assuming *arguendo* that the United States can prove that a right to the entire natural flow is in fact necessary to accomplish the limited purposes for which the Caribou National Forest was established, then the United States would be entitled to that water right under federal law. In such case any application of I.C. § 42-1409 to the United States, which would require the United States to state its claim in cubic feet per second or acre feet and which would have the accompanying effect of making any water in excess of those amounts available for appropriation, might result in a change in the nature and scope of the water rights reserved by the United States pursuant to federal law. Moreover, the reason for requiring the United States to join in a general adjudication of water rights and to quantify its claims pursuant to state law is to insure certainty as to the validity and quantity of the water rights of the water users in the state. *Avondale I*, *supra*. A claim to the entire flow, if it is necessary, cannot be faulted for uncertainty. Therefore, we conclude that since the nature and scope of reserved rights are determined by

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federal law and the application of I.C. § 42-1409 to the peculiar claims of the United States in these cases might result in a change in the nature and scope of those claims, and because the fundamental requirement of certainty is adequately satisfied, a claim to the entire natural flow, *if it is proved to be necessary*, is a sufficient quantification of the reserved rights claimed in these two cases.¹⁵

However, that does not mean that the United States is entitled to the entire stream flow in the *Soderman* case. There are strict standards which must be met in order for the United States to be entitled to the entire stream flow pursuant to its reserved water rights. In *Cappaert* the United States Supreme Court determined that the preservation of a rare desert fish species was the purpose for the creation of the Devil's Hole National Monument and that unless the water level in a pool in that monument was maintained at a specific minimum level the fish species would become extinct and the congressional purpose defeated. Accordingly, the Supreme Court ruled that under the federal reserved water rights doctrine the United States was entitled to maintain the water level of the pool at the minimum level necessary for preservation of the fish. That minimum level—three feet below a certain brass marker—was actually lower than the level of the pool prior to the inception of groundwater pumping by the Cappaerts, at which time the water level was only 1.2 feet below the brass marker. The Court did not rule that the United States was entitled to that 1.2 foot "natural" level below the marker, or that all groundwater pumping which caused any decrease in the level of the pool must be curtailed. The Court ordered the pumping curtailed only to the extent necessary to maintain the minimum level necessary for the accomplishment of the purpose of the reservation, the propagation of the fish, and no more.

15. We do not reach the issue whether Idaho law requires in all cases that water rights be stated in cubic feet per second or acre feet per year. Cf. *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (decided prior to the

[11] If on remand in *Soderman* the United States can prove that the entire natural flow at all times is necessary to accomplish the purposes of the national forest, timber management and watershed protection, then it is entitled to that entire natural flow. However, water which merely contributes to or is helpful in achieving these purposes but the absence of which would not frustrate their accomplishment does not satisfy the test. A strict standard of necessity must be applied in these cases. *Cappaert v. United States, supra*.

Therefore, if on remand it is found by the district court that at any time in the seasonal and yearly variations in stream flows the entire natural flow will exceed the minimum flow necessary to achieve the purposes for which the Caribou National Forest was created, the court must find the necessary minimum flow so that the marginal excess may be available for use and appropriation. In such case, I.C. § 42-1409 would be appropriately applied to the United States, and it should be required to quantify its water rights in second feet, or acre feet, in order to assure certainty, uniformity and clarity among the water rights of the various users in this state. As with all water litigants, the burden of proving its claim is upon the United States.

Avondale, affirmed; Soderman, reversed and remanded.

McFADDEN and BISTLINE, JJ., concur.

SHEPARD, C. J., and DONALDSON, J., concur in Parts I through V.

SHEPARD, Chief Justice, dissenting.

I am unable to agree with and must dissent from Part VI of the majority opinion. In my judgment it errs in holding that the entire natural flow of the streams in question can be a sufficient quantification of the rights of the United States to waters of the streams. Such is merely another way of stating a minimum flow right.

enactment of I.C. § 42-1409 and construing I.C. § 42-102). We decide only that an Idaho statute may not be applied to a federal reserved water right if such application changes the nature and scope of that federal water right.

I would first observe that the holding of the majority here is clearly contradictory to and without so holding overrules the holding of this Court in *Avondale Irrigation District v. North Idaho Properties, Inc.*, 96 Idaho 1, 523 P.2d 818 (1974) (*Avondale I*), "[T]he United States is bound by Idaho state law, and therefore must quantify the amount of water claimed under the reservation doctrine at the time of the general adjudication of water rights." *Id.* at 4-5, 523 P.2d at 821-22 (footnote omitted). I have been cited to no case nor has my research disclosed any language of the U.S. Supreme Court stating that when the United States is a party to a water adjudication proceeding in a state court it need not quantify the water it claims. It is clear to me at least that such an assumption flies in the face of the clear language and intent of the McCarran Amendment, 43 U.S.C. § 666 (1970). The history of the position of the United States in claiming water rights in the West makes clear what the Congress saw as the need for the McCarran Amendment. One cannot have on the one hand an orderly adjudication, administration and use of water and thereby produce an ordered society wherein people can plan and be assured of the future, and on the other hand have an overriding, zealous federal government claim that regardless of almost 100 years of orderly administration in the states, it and it alone will determine its claims to any amount of water in any stream regardless of previous adjudication, administration or use.

The McCarran Amendment requires the federal government to submit its claims to water in streams to the adjudicatory process of the states. It is true that the federal government in those adjudicatory processes may assert "reserved rights" dating back to the establishment by Congress of the particular federal facility. To that extent as stated by the majority "federal law, because of the supremacy clause, supersedes Idaho law and controls the volume and scope of federal reserve rights." That language was used in *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). I see nothing in the

Cappaert decision or any previous decisions of the U.S. Supreme Court which even suggests, much less holds, that the United States, although a party to the adjudicatory state process, need not prove the need to its water rights in measurable quantities.

Clearly, in the instant case since we are dealing largely with claimed nonconsumptive uses, diversion and application to a beneficial use may not be required under our statutory scheme if such conflicts with preeminent federal law. I find no inconsistency in that view since the same result was reached in *State Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974), when an Idaho statute authorized and directed appropriation without diversion. That statute conflicted with and controlled over a prior legislative enactment requiring an actual diversion.

I am fortified in my belief and conclusion, as above set forth, by my analysis of the major cases in the field. The first significant case of the U.S. Supreme Court which established the doctrine of federal reserved water rights is *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). *Winters* involved Indian lands in the state of Montana and as stated by Justice McKenna in his preliminary statement which is not part of the opinion,

"In the year 1889, and long prior to the acts of the defendants * * * the United States, through its officers and agents at the reservation, appropriated and took from the river a flow of 1,000 miners' inches * * *. Afterwards, but a long time prior to the acts of the defendant complained of * * * the Indians residing on the reservation diverted from the river for purpose of irrigation a flow of 10,000 miners' inches * * *." 207 U.S. at 566, 28 S.Ct. at 208.

The Montana courts enjoined other persons from diverting waters upstream which would prevent the flow of the stream from reaching reservation lands in an amount necessary to satisfy the previously established irrigation needs of the Indians. That

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action of the Montana Court was affirmed by the U.S. Supreme Court, but on the basis that there was a federal water reservation dating back to the establishment of the reservation. A close reading of *Winters* might make one speculate whether under the circumstances there was any need for a declaration of federal reserved water rights, since the doctrine of prior appropriation administered by the state courts of Montana would seem to have adequately protected the prior appropriated water rights of the Indians. Nevertheless, the opinion demonstrates the particular and precise quantification of the water involved.

Next came *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). The major thrust of that opinion, of course, was the distribution of the waters of the Colorado river as between the various states. It seems as if the claims of the United States for the allocation of certain waters to not only Indian reservations but national forests, recreation and wildlife areas was almost an afterthought. It was only in the very late language of that opinion without any amplification, explanation or rationale that the Court reaffirmed the *Winters* doctrine and extended it beyond Indian reservation lands to national recreation areas and national forests. The Court, in my judgment, had clearly in mind the quantification of water and "the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." 373 U.S. at 596, 83 S.Ct. at 1496. There the Court affirmed the master's report which held there was, "reserved for all the reservations . . . about 1,000,000 acre-feet, to be used on around 135,000 irrigable acres of land." *Id.*

Thereafter, of course, came the McCarran Amendment, 43 U.S.C. § 666 (1970), wherein consent was given to join the United States as a defendant in state courts in suits seeking adjudication of water rights.

The *Eagle* series of cases, *United States v. District Court for Eagle County*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971); *United States v. District Court for Water*

Div. No. 5, 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971), arose in the Colorado courts and were ultimately decided by the U.S. Supreme Court. They were actions wherein the state of Colorado sought to utilize the provisions of the McCarran Amendment and the United States in turn contended that the McCarran Amendment did not relate to "reserved" waters which had been created in the *Winters* case. The Supreme Court rejected the contentions of the United States and held that the McCarran Amendment was controlling and affirmed the decree entered by the Colorado Supreme Court holding that the McCarran Amendment required the United States to adjudicate its reserved rights in a general state adjudication. Again, I see nothing in the *Eagle* cases which compels the conclusion that federal law will govern over state law in the process of adjudicating water rights of the United States as contrasted with those of private parties. [But see 401 U.S. at 526, 91 S.Ct. 998—also *Cappaert* indicates there is a federal question.] Specifically, I find nothing which would indicate the existence of any federal law which would exempt the federal government from quantifying its reserved water rights.

In March 1976, *Colorado River Water Conservation District v. United States* (*Akin v. United States*), 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483, came down from the U.S. Supreme Court wherein the U.S. Supreme Court tightened down even further its decisions in the *Eagle* cases. There, the United States had attempted to go to the U.S. District Court in Colorado for a determination of its reserved water rights and thereby oust the Colorado courts from the jurisdiction established by the McCarran Amendment. The Supreme Court struck that effort down, albeit in some waffling language relating to the doctrine of abstention. The Court said, among other things in *Akin*,

"The clear federal policy evinced by that legislation [McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to

the court first acquiring control of property, for the concern in such instances is with *avoiding the generation of additional litigation through permitting inconsistent dispositions of property*. This concern is heightened with respect to *water rights, the relationships among which are highly interdependent*. * * * The consent to jurisdiction given by the McCarran amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." 424 U.S. at 819, 96 S.Ct. at 1247. (Emphasis supplied.)

I would interpret the above language as meaning, at least at this time, that the United States stands on no different basis in an adjudicatory process than any other party excepting only as to the backdating of its water right to the date of the reservation of the particular federal land for the particular federal purpose.

Cappaert v. United States, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976), was decided June 7, 1976, shortly after the *Akin* case. *Cappaert* is unusual in that a state adjudicatory proceeding was held by the state of Nevada. Even though the United States was not a party to the proceeding, officials of the National Parks Service filed protest, appeared and testified and a decree was issued adverse to the position of the United States and no appeal was taken therefrom. Thereafter the United States sought and obtained an injunction in United States district court to limit the pumping from certain wells which allegedly lowered the level of the pool within which swam the fabled pup fish. The *Cappaert* opinion is brief, confusing and cryptic. No mention is made of the McCarran amendment nor of the Colorado cases just then recently decided by the U.S. Supreme Court. The reserved water rights doctrine was again affirmed and my best guess would be that *Cappaert* extended the doctrine of reserved federal water rights to ground water. The Court, however, blithely ignored that question since, although enjoining the pumping of underground waters, it simply stated, "Here, however, the water in the pool is

surface water." Nevertheless, I find no language therein which exempts the United States from the necessity of quantifying their claimed water right in a state adjudication process when the United States is a party thereto. Nor do I find any language which provides overriding federal law when the adjudication process is in the state court. It was noted that one of the reasons for the decision was that albeit the United States had filed a protest in the state adjudicatory process and had appeared and testified, nevertheless, it was *not a party to the proceedings*.

From the above I conclude there is no law as enunciated by the U.S. Supreme Court which exempts the federal government from stating its claimed reserved water rights in specific quantities.

In the case at bar the federal government made claim to consumptive water rights in precise quantities of water based on diversion and placement to beneficial use. Some of those consumptive rights were alleged to have a priority of 1882. At the same time and in the same stream the federal government claimed all the water on the basis of a reserved right with a priority of 1907. I cannot understand nor accept that illogical posture of the federal government. As to the exact position of the federal government in this case, I note the opening statement of counsel for the federal government, i. e., "Our right that we're claiming here under the reservation doctrine is just the right to have water continue to flow in its natural state." (Emphasis supplied.)

As stated by the federal government witness Hanks,

"Q. Is it possible under what you just said that the United States could claim the entire natural flow of the Salmon River if necessary for [ecosystems] ecual systems?

A. Could be if necessary for [ecosystems] ecual systems."

Even if the majority was correct in its analysis of the law, I submit that the evidence in the instant case was not sufficient to establish the federal government's need

for all the water in the streams. Only two witnesses testified. One was a fisheries expert who opined solely as to the need for minimum flow in the stream to sustain the fish. Under the holding of the majority relating to the established purpose of the national forest land, his testimony was clearly irrelevant. Nevertheless, he was able to quantify that need in terms of 3.4 c. f. s. The remaining witness testified as to aesthetics, i. e., the desire of people to see water, fisheries need, wildlife, livestock watering and a *consumptive* need at campgrounds. All such *needs* are irrelevant under the established purpose for the national forest lands as found by the majority. The sole *need* to which he testified which comports with the national forest purposes was that relating to the need for the streams for fire break protection. As to that he stated:

"Q. How wide are these streams?

A. They're real narrow, I'd say one to two feet.

* * * * *

Q. But the creeks you're talking about aren't all necessarily an effective fire guard considering the small size?

A. That's true."

I then arrive at my conclusion. Here the federal government desires to assert a right to a minimum flow of water in the particular streams. They attempt to mask their intent by arguing that their needs dictate their usage of water in the streams in a defined, quantifiable amount, to wit, all of it.

I submit that such is not such a required quantification as will permit an orderly adjudication and administration of the waters nor fair usage of the waters as between the government for its reserved rights/needs and those of private appropriators. Such certainly defeats the congressional intent and purpose as expressed in the McCarran Amendment.

It may be that the U.S. Supreme Court will ultimately decide the question in favor of the federal government. Suffice that

day should come without encouragement or premature action by this Court.

DONALDSON, J., concurs.



577 P.2d 24

Larry L. JACOBSEN,
Petitioner-Appellant,

v.

The STATE of Idaho,
Defendant-Respondent.

No. 12425.

Supreme Court of Idaho.

March 30, 1978.

The District Court, Third Judicial District, Canyon County, Robert B. Dunlap, J., entered order quashing writ of habeas corpus by which defendant sought to oppose his extradition, and defendant appealed. The Supreme Court, Shepard, C. J., held that: (1) fact that return made by sheriff to writ issued by trial court failed to have annexed thereto copy of documents under which custody of defendant was held was harmless error; (2) defendant was not entitled to oppose extradition on ground that he was innocent of charged crime in demanding state; (3) Supreme Court, as court of asylum state, would not inquire into motives of those prosecuting case in demanding state; (4) asylum state need not make a probable cause inquiry in cases where demanding documents substantially charge commission of a crime, and (5) even if probable cause was required, sworn affidavits and criminal complaint which were executed in demanding state and which accompanied demanding documents, established probable cause to believe that defendant removed mortgaged personal property from demanding state without consent of secured party in violation of law of demanding state.

STATE OF IDAHO
COUNTY OF KOOTENAI
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE, IRRIGATION)
DISTRICT, et al.,)
)
Plaintiffs,)
)
vs.)
)
NORTH IDAHO PROPERTIES,)
INC., et al.,)
)
Defendants.)

Case No. 22418

MEMORANDUM OPINION

This proceeding is one for 2nd judication of the water rights in the Hayden Lake Drainage Basin. The matter was once before this Court and the claim of the United States of America to certain reserved water rights was denied upon the grounds the same had not been quantified as required by Idaho law. The matter was appealed to the Idaho Supreme Court which reversed that decision holding that the United States must quantify its right but remanding the case for further hearings to give the United States opportunity to do so. The matter came on for hearing on June 9, 1975. The United States claims the entire flow of the streams in

MEMORANDUM OPINION

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the Hayden Lake Basin. Testimony was to the effect that the Hayden Creek drainage within the Hayden Lake Basin yielded 22,020 acre feet per year of water; that Yellow Banks Creek drainage within the Hayden Lake Basin yielded 2,440.62 acre feet of water per year and Mokins Creek drainage within the Hayden Lake Basin yielded 3,336.72 acre feet of water per year. The flow as to Hayden Creek is based upon a gaging station record. The flows as to Mokins and Yellow Banks Creek are calculated amounts based upon acreage and average annual precipitation. It was also testified that maximum stream flow for Hayden Creek was 790 cubic feet per second; maximum for Yellow Banks Creek was 136.94 cubic feet per second; and maximum for Mokins Creek was 170.73 cubic feet per second. In addition the United States claims a right to a maintained minimum flow of 3.57 cubic feet per second of stream flow in Hayden Creek between the point where it leaves the Forest Service boundary and empties into Hayden Lake.

The first question that arises is whether or not the foregoing constitutes sufficient quantification.

As to the 3.75 cubic feet in Hayden Creek for minimum flow from Forest Service land to Hayden Lake this would certainly meet the criteria of I.C. 42-1409, assuming that the United States is as a matter of law entitled to claim a maintained minimum flow.

The Court is also of the opinion that claiming the amount of water and acre feet per year based upon gage station records in the case of Hayden Creek and computations of acreage and annual precipitation as to Mokins and Yellow Bank Creek is a sufficient means of quantification as to the quantities stated.

2. MEMORANDUM OPINION

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However, a different question arises to merely state that the entire flow is claimed. This Court is of the opinion that to merely state "The entire flow is claimed" is not a sufficient quantification. It is therefore the conclusion of the Court that any water right claimed by the United States would be limited to a maximum of 22,020 acre feet per year as to Hayden Creek, 3,336.72 acre feet as to Mokins Creek and 2,440.62 acre feet as to Yellow Banks Creek. The claim of the United States is further limited by its own testimony to a maximum flow of 790 cubic feet per second on Hayden Creek; 136.94 cubic feet per second on Yellow Banks Creek; and 170.73 cubic feet per second on Mokins Creek. Any excess water available in these drainages over and above these amounts would be subject to appropriation pursuant to the laws of the state of Idaho.

The foregoing depends further upon determination of what purposes the United States water right may be used under its doctrine of reserved water rights.

Under the doctrine of Winners vs. United States, 207 U.S. 564 it is implied that a water right for the water necessary to satisfy the purposes of a Federal reservation is made when the Federal reservation is created. It is deemed that the United States would have a water right in the amounts reasonably necessary for the purposes of the reservation. In this case the reservation is a national forest. The Coeur d' Alene National Forest was created in 1906 pursuant to the Organic Act of 1897, 30 statutes 34, 16 U.S.C. 475. That act provides:

"No public forest reservation shall be established, except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flows, and to furnish a continuous

3. MEMORANDUM OPINION

MEMORANDUM OPINION

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supply for timber for the use and necessities of citizens of the United States---"

the same Organic Act contains the following provision:

"---all waters, within the boundaries of National Forests---for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such National Forest are situated---" 30 statutes 36, 16 U.S.C. section 481.

It is thus evident that the Congressional intent in creating National Forests was to improve and protect the forest and provide adequate water supplies for people to be used pursuant to the laws of the state where the National Forest was situated. It is therefore the conclusion of this Court that the claim of the United States to certain minimum flows or to claim all of the flow of a stream within the National Forest is contrary to the express Congressional intent of the legislation creating the Federal Reserve. This Court cannot believe that Congress in the Organic Act of 1897 would ostensibly extend the right to people of a state to use water from the National Forest for domestic, mining, milling, or irrigation purposes under the laws of the state of their residence while at the same time secretly intending to state that the extension of that right to use of the water was subject to a secret (or at least unexpressed) government implied reservation to terminate it at any later time by exercising the unexpressed implied reservation. I believe that Congress would intend to be in a position of having the right hand giving and the left hand taking away.

It is therefore the conclusion of this Court that the claim of the United States to any minimum stream flow either within or without the National Forest boundaries must be denied.

Counsel for the Idaho Department of Water Resources shall

4. MEMORANDUM OPINION

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prepare Finds of Fact; Conclusions of Law and Judgment consistent with this Memorandum Opinion a adjudicating to the United States a water right in the amounts here and above set forth with a priority date of the date of the Congressional Act creating the Coeur d' Alene National Forest. Said decree shall provide, pursuant to the statement and stipulation contained in the brief of the United States filed herein, a provision that said water rights are pertenant to lands of the United States lying within the Coeur d' Alene Nation Forest boundaries and that the place of use shall be and said water rights are pertenant to such lands lying within the Hayden Lake Drainage Basin. It shall further be expressly provided in said decree that the United State shall have no right to transfer or transport waters of the Hayden Lake Drainage Basin outside of the perimeters of said basin. The decree shall further provide that such water rights are not available for use upon lands within the National Forest boundary but acquired after 1906 by purchase or exchange.

Dated and done this *17th* day of *November*, 1975.


Watt E. Prather, District Judge

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STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 33

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CLERK DISTRICT COURT
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DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT,
et al.,

Plaintiffs,

-vs-

NORTH IDAHO PROPERTIES, INC.,
et al.,

Defendants.

CASE NO. 22418

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT

This matter came before this Court for the second time (upon remand on the previous appeal) to allow the United States Government, through the Forest Service, to quantify its rights. This matter came on for hearing June 9, 1975. Based upon the hearing and briefs filed in this matter, the Court enters the following (to the extent that the Findings of Fact, Conclusions of Law, and Judgment vary from the Court's previous Memorandum Decision, that Memorandum is hereby modified):

FINDINGS OF FACT

In this second hearing the United States claimed only non-consumptive uses of water within the Hayden Lake Drainage. The claimed use under the Reservation Doctrine was for the entire natural flow of Yellow Banks Creek, Mokins Creek, and Hayden Creek for the purposes of providing a stream flow for protecting fish spawning, fish rearing, recreation, aesthetics, fire control, and ecosystem maintenance for erosion control. The United States did not intend to, nor did it, offer any evidence supporting a consumptive use. All consumptive uses of the United States were quantified and adjudicated in the first proceedings in this case.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT

In addition to claims for the entire natural stream flows for the above purposes on national forest land, the United States requested a minimum flow of 3.57 c.f.s. for fish passage across private land below the national forest boundary.

The maximum flow of record for the creeks is 790 c.f.s. on Hayden Creek (22,020 A.F.), 136.94 c.f.s. on Yellow Banks Creek (2,440.62 A.F.), and 170.73 c.f.s. on Mokins Creek (3,336.72 A.F.).

The purpose for which the Coeur d'Alene National Forest (which includes the Hayden Lake Drainage) was reserved was to improve and protect the forests within the reservation and provide adequate water supplies for appropriations in accordance with the laws of Idaho. The forest reserves were not established to provide minimum or any stream flows on the forest reserve for the purposes claimed by the United States. The United States did not establish what a reasonable amount of flow for the purposes claimed would be. The entire natural flow of a stream is not reasonably necessary for any purpose of a forest reservation. The claimed purposes will be accomplished if the United States simply improves and protects the national forests.

The Reservation Doctrine, by which the United States claims a water right herein, does not apply to lands acquired after the establishment of the reserve nor to portions of any stream that flows through private lands. The water rights granted in this Court's previous decree can not be transferred to or used upon another federal reservation or used outside of the Hayden Lake Drainage Basin.

The United States has had its opportunity to claim and quantify its water rights, and its rights based on the Reservation Doctrine are as established in this Court's previous decree, and the United States is not entitled to present any further claims to water within the Hayden Lake Drainage Basin.

CONCLUSIONS OF LAW

The United States is not entitled to any minimum flows or to claim all of a stream flow for any purposes claimed in this

PAGE 2 - FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT

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proceeding or otherwise. As a matter of law, the purpose of the creation of the Coeur d'Alene National Forest was not for the purpose of providing a flow of water for protecting fish spawning, fish rearing, recreation, aesthetics, fire control, and ecosystem maintenance for erosion control.

The United States did not claim any consumptive uses in this matter and is not again entitled to make any further claims of water rights in the Hayden Lake Drainage. The amounts claimed by the United States are not reasonably necessary for any purpose for which the reserve was created.

The Reservation Doctrine, by which the United States claims a water right herein, does not apply to lands acquired after the establishment of the reserve nor to portions of any stream that flows through private lands. The water rights granted in this Court's previous decree can not be transferred to or used upon another federal reservation or used outside of the Hayden Lake Drainage Basin.

JUDGMENT

Based upon the above Findings of Fact, Conclusions of Law, it is the judgment of this Court and IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States is not entitled to a water right as claimed herein and shall take nothing thereby.

It is the further judgment of this Court that the full and complete rights of the United States in the waters of the Hayden Lake Drainage are as set forth in the previous decree of this Court entered March 23, 1973, and the United States is not now entitled to claim those waters for any other purposes unless appropriated under and pursuant to the laws of the State of Idaho.

It is further ordered that the water rights granted in the previous decree of this Court can not be transferred to or used upon another federal reservation or used off the reservation of the Coeur d'Alene National Forest.

DATED this 1st day of December, 1975.


WATT E. PRATHER
District Judge

523 P.2d 818

AVONDALE IRRIGATION DISTRICT
et al., Plaintiff-Respondents,

v.

NORTH IDAHO PROPERTIES, INC., an
Idaho corporation, et al., and the unknown
owners and the unknown claimants and/or
unknown heirs and/or unknown devisees
of any deceased person, having, claiming
or asserting any interest in and to those
waters of Hayden Lake, located within
Water District No. 93, Kootenai County,
Idaho, Defendants,

and

United States of America, Intervenor-
Appellant,

and

Robert J. Adamson et al., Intervenor,

and

R. Keith Higginson, Director of Water Ad-
ministration, Idaho State Department of
Water Administration, Intervenor-Respond-
ent.

No. 11370.

Supreme Court of Idaho.

June 27, 1974.

Three irrigation districts brought an action to adjudicate water rights in lake and its tributaries. The United States intervened and filed a notice of claim of water right based upon reservation doctrine. The District Court, First Judicial District, Kootenai County, Watt E. Prather, J., entered judgment which required United States to quantify its water rights, and United States appealed. The Supreme Court, Bakes, J., held that under McCarran Amendment, which constituted consent to have water rights of the United States adjudicated in state court, United States is bound by state law, and thus was required to quantify amount of water claimed under reservation doctrine at time of general adjudication of water rights with respect to lake surrounded by national forest.

Judgment requiring United States to quantify its water rights affirmed. Remanded for further proceedings.

Waters and Water Courses §133

Under McCarran Amendment, which constituted consent to have water rights of the United States adjudicated in state court, United States is bound by state law, and thus was required to quantify amount of water claimed under reservation doctrine at time of general adjudication of water rights with respect to lake surrounded by national forest. 43 U.S.C.A. § 666; I.C. § 42-1409.

Walter Kiechel, Deputy Asst. Atty. Gen. of the U.S., and Paul L. Westborg, Boise, Asst. U.S. Atty., for intervenor-appellant U.S.

W. Anthony Park, Atty. Gen. of Idaho, and Nathan W. Higer, Asst. Atty. Gen., Boise, for intervenor-respondents.

BAKES, Justice.

In October, 1966, three Idaho irrigation districts brought an action to adjudicate water rights in Hayden Lake and its tributaries. Hayden Lake is located in Kootenai County, Idaho, and, but for a small part of its west end, is surrounded by the Coeur d'Alene National Forest. The national forest was reserved and set aside out of public lands of the United States by Presidential Proclamation in 1906. In November, 1968, the United States Government, intervenor-appellant, filed a "notice of claim of water right" based upon the Reservation Doctrine, stating:

"The reserved right claimed by the United States is in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest service lands were reserved; namely timber management and production and related purposes, including fish and wildlife management, livestock grazing and recreational activities."

The district court appointed R. Keith Higginson, Director of the Idaho State Department of Water Administration, as a special master to ascertain and report upon

the number and validity of water right claims and to make recommendations to the court. In April, 1971, the special master issued his Findings of Fact, Conclusions of Law and Recommended Decree, in which he denied appellant's general theory of unquantified reserved water rights and granted all of appellant's quantified claims to water rights and granted an additional 0.20 cfs for future use at the Hells Canyon Campground.

On August 16, 1971, appellant filed its exceptions to those findings and conclusions of the master which, in effect, failed to recognize unquantified federal reserved water rights.

On August 30, 1972, the district court permitted the Idaho State Department of Water Administration to intervene to protest appellant's claim based upon the Reservation Doctrine. In a memorandum decision rendered on March 8, 1973, the district court concluded that appellant held reserved water rights with a priority of November 6, 1906, but insisted that such reserved rights must be quantified, and confirmed the master's fixed quantity limits. From that decision of the district court, appellant prosecutes this appeal.

The issue presented in this appeal is whether in a general adjudication of water rights in a state court, the United States must quantify its reserved water rights.

The existence of federal reserved water rights is apparently firmly established¹ and is not disputed by respondent in this appeal. As the doctrine has received extensive analysis and comment in legal publications² and governmental commission reports,³ a dissertation here on the history

and development of the doctrine is unnecessary.

An analysis of the case law relating to the reserved water rights doctrine fails to provide the answer to the question of whether or not federally reserved water rights must be quantified at the time of a general adjudication and that issue is one of several yet to be resolved.⁴ In *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) (opinion), 376 U.S. 340, 84 S.Ct. 755, 11 L.Ed.2d 757 (1964) (degree), the United States Supreme Court affirmed the rulings of the special master wherein the master quantified the reserved water rights of several Indian reservations involved in the litigation. In doing so, the master specifically rejected a proposal that he issue a decree "stating that each reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment,"⁵ and stated that in his opinion such an open-ended decree "would place all junior water rights in jeopardy of the uncertain and unknowable."⁶ However, the master then proceeded to quantify only two of the four non-Indian federal reservations involved in the litigation, the Havasu Lake and the Imperial National Wildlife Refuges. With respect to the Lake Mead National Recreational Area and the Gila National Forest, the master adopted the same open-ended decree that he had condemned in his discussion of the quantities reserved for the Indian reservation. He apparently justified his inconsistency by his conclusion that the future claims of these reservations would be reviewed.

1. *United States v. District Court, County of Eagle, Colorado*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971).

2. 19 Stan.L.R. 1, at p. 65 (1967); 20 Stan.L.R. 1187 (1968); 50 Ore.L.R. 322 (1971); 15 Rocky Mtn.Min.Law Institute 399 (1969); 17 Rocky Mtn.Min.Law Institute 579 (1972); 1973 Utah L.R. 43 (1973); 6 Land & Water L.R. 89 (1970); 6 Land & Water L.R. 109 (1970); 6 Land & Water L.R. 117 (1970); to note a few.

3. National Water Commission, *Federal State Relations in Water Law*, Frank J. Trelease (Sept.1971); Public Land L.R. Commission, *One Third of the Nation's Land, Report to the President* (1970), at p. 141.

4. See 20 Stan.L.R. 1187, at 1189.

5. Report of the Special Master, pp. 263-264, 20 Stan.L.R. 1187, at 1190.

6. Report of the Special Master, p. 264, 20 Stan.L.R. 1187, at 1190.

In *United States v. District Court, County of Eagle, Colorado*, 401 U.S. 520, 91 S. Ct. 998, 28 L.Ed.2d 278 (1971), the Supreme Court affirmed a Colorado decree holding that 43 U.S.C. § 666, 66 Stat. 560,⁷ (generally known as the McCarran Amendment), constituted consent to have the water rights of the United States adjudicated in a state court. In doing so, the court held that 43 U.S.C. § 666 was an all-inclusive statutory provision that subjects to general adjudication in state proceedings all water rights of the United States to water within a particular state's jurisdiction, regardless of how they were acquired. In so holding, the Supreme Court specifically held that reserved water rights were included within the purview of § 666.

Since reserved water rights are within the purview of the McCarran Amendment,⁸ the resolution of the question before this Court necessarily involves an interpretation of congressional intent in enacting that amendment.

The following excerpts from Senate Report No. 755, 82d Congress, 1st Session, which accompanied the McCarran Amendment, shed some light on the intent of Congress in enacting the amendment. After a discussion of the history of and decisions relating to the law of water rights, the report stated:

"Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its de-

partments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity. "The committee believes that such a situation cannot help but result in a chaotic condition.

"Since it is clear that *the States have the control of the water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.*

"The committee is of the opinion that there is *no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the deci-*

7. 43 U.S.C. § 666 provides in pertinent part: "(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws

are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided, That no judgment for costs shall be entered against the United States in any such suit.*"

8. *United States v. District Court, County of Eagle, Colorado, supra.*

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sions of the Court in the same manner as if it were a private individual." S. Rep. No. 755, 82d Cong., 1st Sess., 5, 6. (Emphasis added).

Further, Senator McCarran, Chairman of the committee reporting on the bill, in response to a letter from Senator Magnuson, stated:

"S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value." S. Rep. No. 755, 82d Cong., 1st Sess., 9.⁹

The position urged by the United States in this appeal would create just the situation that Congress sought to remedy, namely, the casting of doubt on the amount and validity of water rights. To say that the United States can be joined in a general water adjudication but not be required to state the nature and extent of their claim makes any adjudication flowing therefrom, at best, an exercise in uncertainty. There would always be the ominous cloud of the unknown extent of water claimed by the United States, which claim could preempt a state decreed water right without compensation. The United States argument that the amount which might be taken in the future is limited by that "amount reasonably necessary to carry out the limited purposes for which the forest reserve lands were reserved; namely timber management and production and related purposes, including fish and wildlife management, livestock grazing and recreational activities," provides little solace to the holder of a decreed water right whose water right might be taken by the United States at some unknown future time with-

out compensation, and certainly exacerbates the element of uncertainty Congress sought to eliminate in enacting the McCarran Amendment. Witness the situation stated in 19 Stan.L.R. (1967) at p. 72:

"What are the reasonable needs of a national forest? If operated purely as a forest, the amount is very little. If operated as a sylvan playground, with golf courses, swimming pools, and lakes for fishing and boating, the amount begins to increase significantly. And perhaps the most unsettling thing to western water users is the uncertainty about what the Government will claim when today's simple forest might be tomorrow's North Shore of Lake Tahoe."

See also National Water Commission, Federal State Relations in Water Law, Frank J. Trelease (1970), wherein it is stated at p. 22:

"If the [Forest] Service were to assign its reserved right to a development like the proposed 'Mineral King' in the Sequoia National Forest, a \$35,000,000 project planned to accommodate 8,000 skiers at one time and provide overnight accommodations for 3,300 people, a very substantial demand could take priority over rights in use for years. 'Who can say that Walt Disney Productions, Inc. on the National Forests is not the way of the future?'"

In view of the legislative history of 43 U.S.C. § 666, we cannot attribute to Congress the intent to enact a statute which, in an attempt to instill certainty into the water rights of the citizens of the various states, allows the United States to be joined in a general water adjudication but not be required to state with certainty the amount of water required. If such a result as is urged here by the United States is the law of the land, then the Supreme Court of the United States should declare it to be so in clear and unmistakable terms.

We hold that under 43 U.S.C. § 666, the United States is bound by Idaho state law, and therefore must quantify the amount of water claimed under the reservation doc-

9. This letter was also quoted in the *United States v. District Court, County of Eagle, Colorado*, *supra*.

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S.C. § 666, the
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agle, Colorado,

trine at the time of the general adjudica-
tion of water rights.¹⁰ The case is re-
manded for the purpose of allowing the
United States to move to reopen the adju-
dication to quantify. If the United States
so moves, a reasonable time must be al-
lowed for them to quantify the rights
claimed under the reservation doctrine. If
there is no motion to reopen within thirty
days after the remittitur issues herein, the
judgment of the district court shall be in
all respects final. Additionally, on remand,
in order to avoid any question of bias, the
district court must not appoint R. Keith
Higginson, Director of the Idaho State
Department of Water Administration, as
special master in view of his participation
in this appeal. See *Jagow v. Child*, 95 Ida-
ho 830, 521 P.2d 654 (1974).

Remanded for further proceedings con-
sistent with this opinion. No costs al-
lowed.

SHEPARD, C. J., and DONALDSON,
McQUADE and McFADDEN, JJ., concur.



523 P.2d 822

James L. STIPP, Plaintiff-Respondent,

v.

WALLACE PLATING, INC., an Idaho cor-
poration, et al., Defendants-Appellants.

No. 11274.

Supreme Court of Idaho.

June 19, 1974.

Action was brought for retirement
benefits. The District Court, Fourth Judi-
cial District, Ada County, Alfred C. Hag-
an, J., entered summary judgment for
plaintiff, and defendant appealed. The Su-

10. I.C. 42-1409. Note that reserved rights,
unlike state created appropriative rights, do
not depend upon diversion from the stream
and application to beneficial use. 19 Stan.
L.R. 1, at p. 65 (1967); *Arizona v. Cali-
fornia*, *supra*; National Water Commission
Report, Federal State Relations in Water

preme Court, Bakes, J., held that where
employee had voluntarily terminated his
employment and immediately went into
competition with former employer in area,
employee thereby violated provisions of re-
strictive anticompetition covenant in pen-
sion trust plan and covenant as applied to
former employee was reasonable and en-
forceable so that former employee was not
entitled to amount of former employer's
contribution to pension plan.

Judgment reversed.

1. Covenants ⇨

Restrictive covenants are valid when
they are reasonable, as applied to covenan-
tor, covenatee and general public.

2. Contracts ⇨116(1)

Restrictive covenants in contracts lim-
iting an employee's natural right to pursue
an occupation and thus support himself and
his family will be strictly scrutinized.

3. Injunction ⇨189

Courts may modify a restrictive cove-
nant to make it reasonable, so long as cov-
enant in question is not lacking in essential
terms which would protect employee.

4. Contracts ⇨116(1)

In contrast to a restrictive covenant
contained in employment contract, in situa-
tions where restrictive covenant is ancil-
lary to sale of business, courts, in ruling
upon reasonableness of restriction, recog-
nize that vendee is usually purchasing good
will of business and thus is entitled to rea-
sonable protection from competition by sell-
er, and, in these cases, courts are less strict
in construing whether covenant is reason-
able.

Law, *supra*, at p. 147j. Likewise, since the
doctrine is based upon the supremacy clause, it
supercedes Idaho law on speculative water
rights, (see *Lemmon v. Hardy*, 95 Idaho 778,
519 P.2d 1168 (1974)) since some speculation
is necessarily required in a present quantifica-
tion of reserved water rights.

file

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Department of Water Resources

STATE OF IDAHO
COUNTY OF KOOTENAI
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CLERK, DISTRICT COURT

Anta Ornel
DEPUTY

W. HIGER
Counsel
Idaho Department of
Water Resources
Statehouse
Boise, ID 83720
TELEPHONE: 384-2215

LEGAL COUNSEL FOR SPECIAL MASTER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT, et al.,

Plaintiffs,

-vs-

NORTH IDAHO PROPERTIES, INC., et al.,

Defendants,

and

ROBERT J. ADAMSON, et al.,

Intervenors.

CIVIL NOS. 22418
22419
22420

EX PARTE MOTION OF
SPECIAL MASTER FOR
MODIFICATION OF DECREE
AND ORDER

COMES NOW the Special Master, by and through under-
signed counsel, and moves this Court for its order modifying the
decree entered herein on March 23, 1973 to show as to right
#95-0173, in the name of Czenzi Heinemann and Nick Ormonde,
that its source is Lancaster Creek rather than springs as
presently shown in the decree.

This motion is based upon the affidavit attached hereto
and as shown therein, that said right was based on water license
#95-2135 which has Lancaster Creek as its source of supply. The
recommendation of springs is contrary to the claimants' claim
and the facts supporting the recommendation. The recommendation
of the Special Master was an inadvertent error that can not be
explained and does an injustice to these rightholders. They have
always relied upon and diverted their water directly from Lan-
caster Creek, and have no springs directly available to them to
supply their needs and rights. The right in question is the only
decreed right on Lancaster Creek and no prior appropriator will.

JUL 31 1996

be damaged by this modification to conform the decree to the facts and correct this error.

Although the original judgment in this action was entered March 23, 1973, this Court did retain jurisdiction for the purpose of amending this decree, pending receipt of further information from the Department of Water Resources of its experience with systems for operation of the lake. With this retained authority, I believe the Court can modify the decree as requested herein. Further, based upon the fact of the continued unresolved nature of the federal rights, there is still no "final" decree of this Court and makes the request herein proper.

DATED this 6th day of August, 1976.


NATHAN W. HIGER
Legal Counsel, Special Master

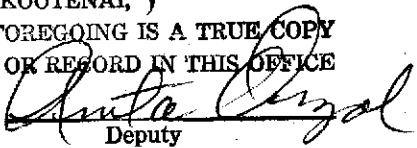
ORDER

Based upon the foregoing motion and attached affidavit, and good cause appearing and the Court having jurisdiction to do so, IT IS HEREBY ORDERED that the decree entered in this matter on March 23, 1973 be and the same is hereby modified as to right #95-0173, Heinemann-Ormonde, to show the source of that right as Lancaster Creek.

DATED this 19th day of August, 1976.


WATT E. PRATHER
District Judge

STATE OF IDAHO }
COUNTY OF KOOTENAI, } ss.
THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY
OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE

By 
Deputy

JUL 31 1996

W. ANTHONY PARK
Attorney General
State of Idaho
by NATHAN W. HIGER
Assistant Attorney General
Statehouse - Annex 2
Boise, Idaho 83720
TELEPHONE: 384-2215

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT,
HAYDEN LAKE IRRIGATION DISTRICT,
and
DALTON GARDENS IRRIGATION DISTRICT,
Quasi municipal corporations,

Plaintiffs,

vs.

NORTH IDAHO PROPERTIES, INC., an
Idaho corporation, et al.

Defendants.

NO. 22420
22419
22418

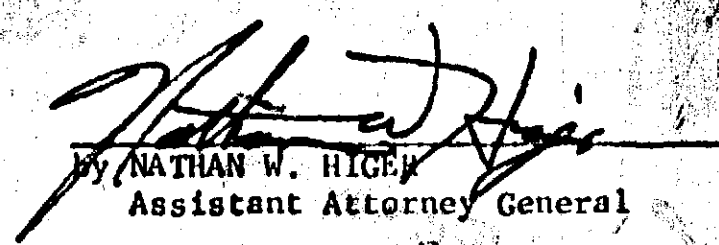
MOTION FOR MODIFICATION
OF DECREE

COMES NOW THE SPECIAL MASTER and pursuant to Rule 60(B)
I.R.C.P. moves this Court for modification of the decree previously
entered in this matter on the 23rd day of March, 1973.

This motion is based upon newly discovered evidence
which shows that Joe M. Jessick and John E. Jessick do not take
their water from any source tributary to Hayden Lake or its
tributaries. This motion is based upon the attached affidavit
marked Exhibit "A" and incorporated herein by reference thereto.

DATED this 29th day of May, 1973.

W. ANTHONY PARK
Attorney General
State of Idaho


by NATHAN W. HIGER
Assistant Attorney General

JUL 31 1973

ORDER

Based upon the above motion and attached affidavit,
and good cause appearing and there having been no objection to
the granting of said motion filed, therefore,

IT IS ORDERED AND THIS DOES HEREBY ORDER that the
decree entered in this matter on the 23rd day of March, 1973
be and the same is hereby modified as follows:

(1) Joe M. Jessick and John E. Jessick are decreed
no water right for the use of Hayden Lake water or any source
tributary thereto for the reason that said claimants do not
receive their water from Hayden Lake or any source tributary
thereto;

(2) Costs assessed against John E. Jessick are hereby
ordered stricken from the record of this action and the judgment
rolls of Kootenai County.

Dated this _____ day of _____, 1973.

WATT E. PRATHER
District Judge

W. ANTHONY PARK
Attorney General
State of Idaho
by NATHAN W. HIGER
Assistant Attorney General
Statehouse - Annex 2
Boise, Idaho 83720
TELEPHONE: 384-2215

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT,	)	
HAYDEN LAKE IRRIGATION DISTRICT,	)	
and	)	NO. 22420
DALTON GARDENS IRRIGATION DISTRICT,	)	22419
Quasi municipal corporations,	)	22418
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
NORTH IDAHO PROPERTIES, INC., an	)	AFFIDAVIT IN SUPPORT OF
Idaho corporation, et al.	)	MOTION TO MODIFY DECREE
	)	
Defendants.	)	

R. KEITH HIGGINSON, being first duly sworn on oath
deposes, says, and states that:

I

He is the Special Master appointed in the above
entitled cause. In that capacity, he caused information to
be compiled regarding the use of water from Hayden Lake and
its tributaries.

II

The Department of Water Administration, State of
Idaho, provided the Special Master with its recommendations
on water rights for Joe M. Jessick (Claim No. 95-0429) and
John E. Jessick (Claim No. 95-0433) which were based upon
claims to water rights filed by those persons. Based upon
the evidence submitted by the Department of Water Administra-
tion, the Special Master recommended water rights for
Joe M. and John E. Jessick as claimed by those persons and

JUL 31 1935

as set forth on pages 51-52 of the Findings of the Special Master dated April 15, 1971 and incorporated in the decree dated March 23, 1973.

III

Following entry of judgment and assessment of costs, John E. Jessick complained to the Special Master of the costs for the reason that he was not taking any water from Hayden Lake or any source tributary thereto, even though the claim which he filed indicated otherwise. The Special Master caused the claims of both Joe M. and John E. Jessick to be re-examined. The field examination and a check of the available maps showing the location of both properties, revealed that neither Joe M. Jessick nor John E. Jessick were receiving or using water from any source tributary to Hayden Lake or from the lake itself. In fact, the investigation revealed that the water used was part of an entirely separate drainage area, foreign to Hayden Lake and its tributaries.

IV

The rights granted to Joe M. and John E. Jessick were claimed and granted erroneously and by mistake and based upon the newly discovered evidence should not have been allowed.

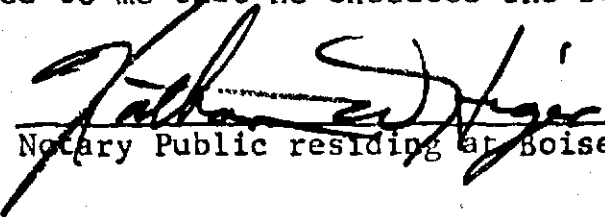
DATED this 29 day of May, 1973.


R. KEITH HIGGINSON
Special Master

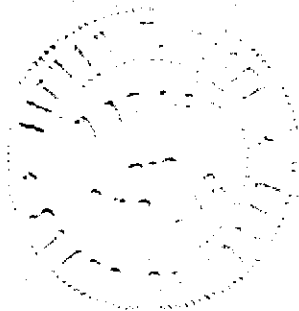
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STATE OF IDAHO)
) ss.
COUNTY OF ADA)

On this 29th day of May, 1973, personally appeared
before me, R. Keith Higginson, signer of the above instrument,
who duly acknowledged to me that he executed the same.


Notary Public residing at Boise, Idaho

My commission expires May 14, 1974



W. ANTHONY PARK
Attorney General
State of Idaho
by NATHAN W. HIGER
Assistant Attorney General
Statehouse - Annex 2
Boise, Idaho 83720
TELEPHONE: 384-2215

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT,	)	
HAYDEN LAKE IRRIGATION DISTRICT,	)	
and	)	NO. 22420
DALTON GARDENS IRRIGATION DISTRICT,	)	22419
Quasi municipal corporations,	)	22418
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
NORTH IDAHO PROPERTIES, INC., an	)	
Idaho corporation, et al.	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 1973, I served the attached AFFIDAVIT IN SUPPORT OF MOTION TO MODIFY DECREE and MOTION FOR MODIFICATION OF DECREE by placing true and correct copies thereof in postpaid envelopes addressed to the persons hereinafter named, at the places and addresses stated below, which are their last known addresses, and by depositing said envelopes with contents in the regular United States Mail at Boise, Idaho.

BROWN, PEACOCK & KEANE
311 Main
Kellogg, Idaho 83837

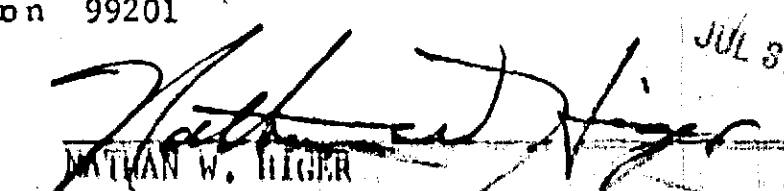
J. RAY COX, Esq.
515 Sherman Avenue
Coeur d'Alene, Idaho 83814

JAMES W. INCALLS, Esq.
Elder Building
Coeur d'Alene, Idaho 83814

WILLIAM S. HAWKINS, Esq.
Elder Building
Coeur d'Alene, Idaho 83814

J. K. CHEADLE, Esq.
CHEADLE, CLANTON & WOEPPEL
750 Lincoln Building
Spokane, Washington 99201

SCOTT W. REED, Esq.
Elder Building
Coeur d'Alene, Idaho 83814


NATHAN W. HIGER
Assistant Attorney General

JUL 31 1996

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:

1973 MAR 23 PM 12:44

CLERK DISTRICT COURT
ELLEN L. SCHIRMER

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

AVONDALE IRRIGATION DISTRICT, et al.,

Plaintiffs,

vs

NORTH IDAHO PROPERTIES, INC., et al.,

Defendants,

and

ROBERT J. ADAMSON, et al.,

Intervenors.

DECREE

CIVIL CASE NOS.

22418

22419

22420

The proposed Findings of Fact and Recommendation of Water Rights entered on April 15, 1971 was previously filed with this Court by the Special Master, including amendments dated July 20, 1971 and filed July 21, 1971, and amendments dated August 23, 1971^v and filed August 30, 1971. This matter came on regularly for hearing on objections to the Findings of the Special Master on February 7, 1973. Following testimony and argument at said hearing and based upon the briefs filed herein, the Court issued its memorandum opinion dated March 7, 1973. Based upon said memorandum of opinion, which is fully incorporated herein as if fully set forth, the Court makes the following Findings of Fact and Conclusions of Law:

JUL 31 1996

FINDINGS OF FACT

The Findings of Fact of the Special Master as filed on April 15, 1971 and amendments thereto, noted above, except as amended and changed below, are approved and adopted as the Findings of Fact of the Court along with the Court's memorandum opinion, and are incorporated herein as if fully set forth.

The Court further finds that the priority date of Hayden Lake Irrigation District, file no. 95-0467(a), of Avondale Irrigation District, file no. 95-0465(b) and of Dalton Garden Irrigation District, file no. 95-0466(c) is May 1, 1958 instead of April 1, 1962. Hayden Lake Irrigation District, Avondale Irrigation District and Dalton Gardens Irrigation District waived all other objections and the Findings of the Special Master on those points are hereby approved and adopted.

The Court finds that the determination of the Special Master that the Avondale Lake drainage is a natural tributary and drains into Hayden Lake is supported by competent and substantial evidence and is not in conflict with any prior decision.

The Court finds that the following claims of water rights in Hayden Lake have been established by use right or permit:

BURNS, GILBERT N.

FILE NO.: 95-0056
PRIORITY: 6/1/53
SOURCE: Hayden Lake
PURPOSE: Irrigation
PERIOD OF USE: Irrigation, From 4/1 to 10/31
QUANTITY PER YEAR: 7.0 acre feet
MAXIMUM RATE OF DIVERSION: 0.04 c.f.s.
TYPE & POINT OF DIVERSION: Pump, in the SW 1/4, SE 1/4, Sec. 3, T.51N, R.3W, B.M., and more particularly on the E 1/2 of Lot 7 and Lots 8 & 9 of Burns Park Addition
PLACE OF USE: Same

COMASKEY, THOMAS P. & MARIE M.

FILE NO.: 95-0441
PRIORITY: 1/1/36
SOURCE: Unnamed spring, tributary to Hayden Lake

JUL 31 1996

COMASKEY, THOMAS P. & MARIE M. (continued)

PURPOSE: Domestic
PERIOD OF USE: From 1/1 to 12/31
QUANTITY PER YEAR: 0.57 acre feet
MAXIMUM RATE OF DIVERSION: 0.02 c.f.s.
TYPE & POINT OF DIVERSION: Collection box and
pump in SW 1/4, SW 1/4, Sec. 33, T.52N, R.3W, B.M.
PLACE OF USE: SE 1/4, SE 1/4, Sec. 32, T.52N, R.3W, B.M.

HONEYSUCKLE HILLS OWNERS ASSOCIATION

FILE NO.: 95-2199
PRIORITY: 2/1/67
SOURCE: Hayden Lake
PURPOSE: Domestic Supply for 17 homes
PERIOD OF USE: From 1/1 to 12/31
QUANTITY PER YEAR: 9.69 acre feet
MAXIMUM RATE OF DIVERSION: *0.34 c.f.s.
TYPE & POINT OF DIVERSION: Pump, government lot 3,
Sec. 20, T.51N, R.3W, B.M.
PLACE OF USE: Sec. 19 & 20, T.51N, R.3W, B.M.

*The maximum rate of diversion shall not exceed 0.6
c.f.s. and a total of 54.19 acre feet when combined with
right no. 95-0506.

LUDDEN, THEODORE E.

FILE NO.: 95-0637
PRIORITY: 1/1/40
SOURCE: Hayden Lake
PURPOSE: Domestic
PERIOD OF USE: From 1/1 to 12/31
QUANTITY PER YEAR: 0.57 acre feet
MAXIMUM RATE OF DIVERSION: 0.02 c.f.s.
TYPE & POINT OF DIVERSION: Pump, SE 1/4, NE 1/4 of
Sec. 21, T.51N, R.3W, B.M.
PLACE OF USE: Same

SHRUM, PAUL W., M.D.

IDWA PERMIT NO.: 95-7083
FILE NO.: 95-0642
PRIORITY: *11/12/69
SOURCE: Hayden Lake
PURPOSE: *Irrigation; and domestic supply for
*36 homes
PERIOD OF USE: *Domestic from 1/1 to 12/31;
*Irrigation from 4/1 to 10/31
QUANTITY PER YEAR: *0.57 acre feet per home;
*Irrigation to be determined
MAXIMUM RATE OF DIVERSION: *.72 c.f.s. for domestic;
*.24 c.f.s. for irrigation
TYPE & POINT OF DIVERSION: *Pump in Lot 2 in the
NW 1/4, NE 1/4, Sec. 17, T.51N, R.3W, B.M.
PLACE OF USE: *Lot 5, Block 1, and Lot 4, Block
2 of Split Rock Subdivision and all of Govern-
ment Lot 2 except the platted portion, Sec.
17, T.51N, R.3W, B.M.

*All subject to proof as required for permit no. 97-7083
as issued by the Idaho Department of Water Administration
(IDWA).

JUL 31 1996

The United States claim for ground water (95-0507) and all other such claims by all claimants were properly denied, without prejudice, since ground waters are not included in this adjudication and does not affect those rights, if any.

The denial of claims no. 95-0502 and 95-0503 are improper. The Court finds that no diversion is necessary for stock watering other than the diversion created by the animal drinking the water and that those rights should have been granted a priority date of November 6, 1906 in the amount needed for each animal multiplied by the number of animals the United States permits to be grazed upon those lands in the Coeur d'Alene National Forest that are in the Hayden Lake drainage, namely the Hayden Creek Allotment and portions of the Mokins Creek Allotment. Based upon the testimony of the United States of America, this amount is 100 animal unit months on Hayden Creek and 17 animal unit months on Mokins Creek at 10 gallons per head per day.

The United States further claimed unspecified amounts of water under the "Reservation Doctrine". The Court finds that under the law, as it now exists, the United States must quantify its claimed water rights the same as any other water user. If this were not done, the adjudication would have little, if any, meaning. The United States, pursuant to the McCarren Amendment (43 U.S.C. 666[a]) is subject to the jurisdiction of this Court and is deemed to have waived any right to plead that State laws are inapplicable or that the United States is not amenable thereto. Therefore, it is the finding of the Court that the United States must establish the place of use, date of priority and the amount of use in the same manner as other litigants. The United States submitted no proof as to the amount of use. The Court finds that the Special Master was correct in denying a water right to the

RECORDED
JUL 21 1906

United States under the Reservation Doctrine because and upon the sole reason that the United States did not offer any proof upon the amount of such water it claimed.

The Court finds that the Special Master is entitled to Court costs as set forth in his Affidavit of Costs for the amount of \$13,274.84, which cost should be apportioned and paid by the following claimants:

Avondale Irrigation District	\$ 2,871.56
Avondale on Hayden Lake	224.54
The Coeur d'Alene Country Club	540.32
Dalton Gardens Irrigation District	3,074.87
Dalton Water Association	284.38
Hayden Haven Water Company	21.70
Hayden Lake Irrigation District	5,598.34
Heinemann, Czenzi and Nick Ormonde	101.08
Honeysuckle Hills Owners Association	59.66
Hundhausen, Robert J.	16.31
Jessick, John E.	98.03
Kirking, Orville P.	39.66
North Idaho Properties, Inc.	48.88
Revilli, Robert J.	261.34
Shrum, Paul W., M.D.	22.36
Upper Columbia Mission Society of Seventh Day Adventists	<u>11.81</u>
TOTAL	\$13,274.84

The Special Master shall also be allowed such further and accruing costs as may be allowed by the Court.

CONCLUSIONS OF LAW

Except as noted below, all the water rights, as recommended by the Special Master in his report of April 15, 1971, together with amendments of July 20, 1971 and August 23, 1971, should be and are hereby recognized, confirmed and decreed to those claimants. All of the Conclusions of Law contained in the Special Master's Report of April 15, 1971 as amended July 20, 1971 and August 23, 1971, except as noted below are hereby adopted as the Court's Conclusions of Law, and are hereby established and decreed as therein set forth.

JUL 31 1971

The Hayden Lake Irrigation District, file no. 95-0467(a), Avondale Irrigation District, file no. 95-0465(b), and Dalton Gardens Irrigation District, file no. 95-0466(c), are entitled to and are hereby decreed a priority date on those claims of May 1, 1958.

The Court concludes that as a matter of law, based on competent evidence, Avondale Lake is a natural tributary to Hayden Lake.

The following persons and companies are entitled to water rights and the same are hereby confirmed and decreed as follows:

BURNS, GILBERT N.

FILE NO.: 95-0056
PRIORITY: 6/1/53
SOURCE: Hayden Lake
PURPOSE: Irrigation
PERIOD OF USE: Irrigation, from 4/1 to 10/31
QUANTITY PER YEAR: 7.0 acre feet
MAXIMUM RATE OF DIVERSION: 0.04 c.f.s.
TYPE & POINT OF DIVERSION: Pump, in the SW 1/4, SE 1/4, Sec. 3, T.51N, R.3W, B.M., and more particularly on the E 1/2 of Lot 7 and Lots 8 & 9 of Burns Park Addition.
PLACE OF USE: Same

COMASKEY, THOMAS P. & MARIE M.

FILE NO.: 95-0441
PRIORITY: 1/1/36
SOURCE: Unnamed spring, tributary to Hayden Lake
PURPOSE: Domestic
PERIOD OF USE: From 1/1 to 12/31
QUANTITY PER YEAR: 0.57 acre feet
MAXIMUM RATE OF DIVERSION: 0.02 c.f.s.
TYPE & POINT OF DIVERSION: Collection box and pump in SW 1/4, SW 1/4, Sec. 33, T.52N, R.3W, B.M.
PLACE OF USE: SE 1/4, SE 1/4, Sec. 32, T.52N, R.3W, B.M.

HONEYSUCKLE HILLS OWNERS ASSOCIATION

FILE NO.: 95-2199
PRIORITY: 2/1/67
SOURCE: Hayden Lake
PURPOSE: Domestic supply for 17 homes
PERIOD OF USE: From 1/1 to 12/31
QUANTITY PER YEAR: 9.69 acre feet
MAXIMUM RATE OF DIVERSION: *0.34 c.f.s.
TYPE & POINT OF DIVERSION: Pump, government lot 3, Sec. 20, T.51N, R.3W, B.M.
PLACE OF USE: Sec. 19 & 20, T.51N, R.3W, B.M.

JUL 31 1958

HONEYSUCKLE HILLS OWNERS ASSOCIATION (continued)
*The maximum rate of diversion shall not exceed 0.6
c.f.s. and a total of 54.19 acre feet when combined
with right no. 95-0506.

LUDDEN, THEODORE E.
FILE NO.: 95-0637
PRIORITY: 1/1/40
SOURCE: Hayden Lake
PURPOSE: Domestic
PERIOD OF USE: From 1/1 to 12/31
QUANTITY PER YEAR: 0.57 acre feet
MAXIMUM RATE OF DIVERSION: 0.02 c.f.s.
TYPE & POINT OF DIVERSION: Pump, SE 1/4, NE 1/4 of
Sec. 21, T.51N, R.3W, B.M.
PLACE OF USE: Same

SHRUM, PAUL W., M.D.
IDWA PERMIT NO.: 95-7083
FILE NO.: 95-0642
PRIORITY: *11/12/69
SOURCE: Hayden Lake
PURPOSE: *Irrigation; and domestic supply for
*36 homes
PERIOD OF USE: *Domestic from 1/1 to 12/31;
*Irrigation from 4/1 to 10/31
QUANTITY PER YEAR: *0.57 acre feet per home;
*Irrigation to be determined
MAXIMUM RATE OF DIVERSION: *.72 c.f.s. for domestic;
*.24 c.f.s. for irrigation
TYPE & POINT OF DIVERSION: *Pump in Lot 2 in the
NW 1/4, NE 1/4, Sec. 17, T.51N, R.3W, B.M.
PLACE OF USE: *Lot 5, Block 1, and Lot 4, Block
2 of Split Rock Subdivision and all of Govern-
ment Lot 2 except the platted portion, Sec. 17,
T.51N, R.3W, B.M.

*All subject to proof as required for permit no. 97-7083
as issued by the Idaho Department of Water Administration
(IDWA).

The claims filed for ground water in this action are
hereby denied, without prejudice.

The United States' claims no. 95-0502 and 95-0503 are
entitled to recognition and the same are hereby confirmed and
decreed as follows:

UNITED STATES OF AMERICA
FILE NOS.: 95-0502 & 95-0503
PLACE OF USE & POINTS OF DIVERSION: Hayden Creek
and its tributaries and Mokins Creek and its
tributaries
PRIORITY: 11/6/06
PERIOD OF USE: From 5/10 to 10/31
PURPOSE: Stock watering

RECORDED
JUL 31 1936

UNITED STATES OF AMERICA (continued)

QUANTITY PER YEAR: 30,000 gallons on Hayden Creek Allotment, and 5,100 gallons on Mokins Creek Allotment

SOURCE: Hayden Creek and its tributaries and Mokins Creek and its tributaries

The United States' claim of an unquantified water right, based upon the Reservation Doctrine, was properly denied by the Special Master and the Findings and Conclusions of Law of the Special Master denying that claim are hereby confirmed and adopted by this Court. The Court concludes that as a matter of law the United States must comply with State law and must quantify its right in a general water right adjudication. Having failed to quantify its claim, the United States is not entitled to the right claimed, and the same is hereby ordered denied.

The Department of Water Administration is directed to establish a water district encompassing Hayden Lake and its tributaries, pursuant to Chp.6 of Title 42, I.C., for the purpose of proper distribution of the lake's water in accordance with this decree. The Department of Water Administration is further ordered, if possible, to devise a system of projecting the maximum water surface elevation on a yearly basis. In order to protect and insure that the claimants herein shall receive their water rights without lowering the lake level below 2,230.0 feet above mean sea level and to maintain, preserve and protect the recreational, wildlife, aesthetic beauty and water quality of Hayden Lake, the Department of Water Administration and the watermaster are hereby authorized to deny water to holders of water rights in the inverse order of their respective priorities, if withdrawal of such water is reasonably expected to lower Hayden Lake surface elevation below 2,230.0 feet above mean sea level at any time during the irrigation season which is declared to be from April 1st to October 31st of each year.

JUL 11 1966

The Special Master is awarded costs in the amount of \$13,274.84 which should be and are assessed against and are ordered to be paid by the following claimants, in the amounts shown:

Avondale Irrigation District	\$ 2,871.56
Avondale on Hayden Lake	224.54
The Coeur d'Alene Country Club	540.32
Dalton Gardens Irrigation District	3,074.87
Dalton Water Association	284.38
Hayden Haven Water Company	21.70
Hayden Lake Irrigation District	5,598.34
Heinemann, Czenzi and Nick Ormonde	101.08
Honeysuckle Hills Owners Association	59.66
Hundhausen, Robert J.	16.31
Jessick, John E.	98.03
Kirking, Orville P.	39.66
North Idaho Properties, Inc.	48.88
Revilli, Robert J.	261.34
Shrum, Paul W., M.D.	22.36
Upper Columbia Mission Society of Seventh Day Adventists	<u>11.81</u>
TOTAL	\$13,274.84

The Special Master shall also be allowed such further and accruing costs as may be allowed by the Court.

The Court shall retain, and does hereby retain jurisdiction of this adjudication, for the purpose of amending this decree, pending receipt of further information from the Department of Water Administration of its experience with systems for operation of the lake.

IT IS SO ORDERED.

DATED AND DONE this 23rd day of March, 1973.

WATT E. PRATHER

WATT E. PRATHER
District Judge

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss.

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY
OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE.

CLERK OF DISTRICT COURT

By Steven L. Schirmer
Deputy



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
NORTHERN REGION

John V. Evans
Governor

A. Kenneth Dunn
Director

Suite No. 1
4055 Government Way
Coeur d'Alene, Idaho 83814
(208) 667-6484

May 18, 1982

RECEIVED

MAY 21 1982

Department of Water Resources

Mr. Patrick J. Sheehan
748 Peyton Building
Spokane, Wa. 99220

Dear Mr. Sheehan:

In 1966, the Hayden Lake drainage was adjudicated. At that time, all existing water rights were recorded, including yours.

The number associated with your Water Right is 95-0340.

If I can be of further assistance, please call.

Sincerely,

LAWRENCE D. BEARD
E.I.T.

LDB/pms

JUL 31 1982

748 Peyton Building
Spokane, Washington 99220
May 11, 1982

RECEIVED

MAY 12 1982

Department of Water Resources
Northern District Office

Northern Region
Idaho Department of Water
Resources
Route 5, Box 203
4055 Government Way
Coeur d'Alene, Idaho 83814

Gentlemen:

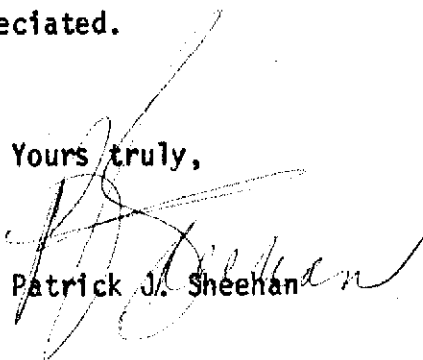
Since 1964 I have owned Lots 43 and 44 Hayden Lake Cottage Tracts,
Kootenai County, Idaho, and have used water from Hayden Lake for
Domestic Use, ^{only} in my single family dwelling.

Please tell me if it is necessary for me to file for water rights.

Your prompt reply will be appreciated.

Thank you.

Yours truly,


Patrick J. Sheehan

PJS/am

JUL 31 1986



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

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

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

June 1, 1994

PATRICK DIX
DIX CORP
S 4024 GROVE RD
SPOKANE WA 99204

RE: Water Right No. 95-00367

Dear Mr. Dix:

I recently received your letter requesting that the above water right be transferred to your name.

This water right is a decreed water right. In Idaho, decreed, licensed, and claimed water rights are considered real property; therefore, proof of owning the land is proof of owning the water right unless extenuating circumstances exist. Water right statute does not provide a means for changing owner of record for decreed water rights; although, I have placed your correspondence in the water right file.

If you have any questions, please feel free to contact me directly at (208) 327-7944.

Sincerely,

CINDY ZIMMERMAN
Water Resource Agent

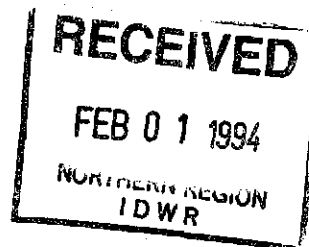
RECEIVED
JUL 31 1996

RECEIVED

FEB 09 1994

Department of Water Resources

January 28, 1994



Mr. Allen Beardslee
Dept. of Water Resources
Suite 210, 1910 Northwest Boulevard
Coeur d'Alene, Idaho 83814-2615

SUBJECT: WATER RIGHT FOR DIVERSION FROM HAYDEN LAKE

Dear Mr. Beardslee:

In October of 1992 you wrote me concerning diverting water from Hayden Lake. I am enclosing a copy of your letter that I somehow misplaced so that it will refresh your memory.

The previous owner, Mr. Floyd Strand had the water right number 95-00367. I enclose a copy of my Purchase Agreement. The agreement shows additional purchasers and I have subsequently purchased from them. Please transfer the right to my name.

Sincerely,

A handwritten signature in cursive script, appearing to read "Patrick Dix".

Patrick Dix

PD:AS
PD:HAYDEN

CONTRACTORS: STEEL ERECTION • EQUIPMENT INSTALLATION • METAL ROOFING & SIDING • HEAVY LIFT/TRANSPORT

Address: S. 4024 Grove Road, Spokane, WA 99204
Telephone: (509) 838-4455
Fax: (509) 838-4464





State of Idaho

DEPARTMENT OF WATER RESOURCES

NORTHERN REGION, Suite No. 210 • 1910 Northwest Blvd. • Coeur d'Alene, Idaho 83814-2615
(208) 765-4639 • Fax (208) 765-2088

CECIL D. ANDRUS
Governor

October 1, 1992

RECEIVED

KEITH HIGGINSON
Director

FEB 01 1994

NORTHERN REGION
IDWR

Mr Patrick Dix.
S. 4024 Grove Rd.
Spokane, WA 99204

RE: Water Right for diversion from Hayden Lake.

It has come to our attention that you are planning to divert, or are currently diverting water from Hayden Lake within Sec 15., T.51N., R3W.,. According to Idaho Code 42-201 it is unlawful to divert water from a public water source without a valid water right or Appropriation Permit.

We have no record of a water right in your name.

It is possible that a previous land owner established water rights for your property. If so, the water rights may have been transferred with the real estate transaction. I have included a print out showing the water rights within the legal description of your property. Please review the list for a previous land owners name. If you find that a previous owner has a water right, please provide this office with documentation of ownership; i.e., copy of warranty deed or sale agreement and a letter explaining that you are the current owner. A licensed water right is considered real property and would be included in the sale, unless specifically withheld by a previous owner.

If you purchased property where the previous owner had filed an Application for Permit which has not been approved, or has an approved Application for Permit, the permit must be assigned to you by the previous owner.

If you are constructing a new diversion of water and have not filed for water rights, we request that you suspend any further development or use of the water system. Please complete the enclosed Application for Permit and return it to this Department with the appropriate fee, as outlined in the instructions. You must have an approved Application for Permit prior to diverting public water.

Failure to establish water rights for the diversion of public water can result in an issuance of a Cease and Desist Order and civil penalties for an illegal diversion of water.

The Department of Water Resources will be happy to assist you any way we can. We appreciate your direct attention on this matter.

If I can be of further assistance, please contact me at this office.

Sincerely,


ALLEN BEARDSLEE

SENIOR WATER RESOURCE AGENT

Enc. - Water Right Print out, Application for Permit & Instructions.

RECEIVED
DIX CORP.

OCT 02 1992

JUL 31 1996

PAT	ION	MARCUS
DAVE	MARY	ARLENE
KEVIN		FILE

QUITCLAIM DEED

THIS INDENTURE, Made this 16 day of JUNE A.D. 1980, between PATRICK DIX and KATHLEEN R. DIX, husband and wife, JOSEPH D. JENSEN and TAMMY JENSEN, husband and wife, and KENNETH N. FRANSEN and LEA J. FRANSEN, husband and wife, the parties of the first part, and FLOYD STRAND and MAXINE BIXEL STRAND, ^{who acquired title as Maxine L. Bixel} husband and wife, the parties of the second part.

W I T N E S S E T H:

That the said parties of the first part, for and in consideration of the sum of ONE DOLLAR (\$1.00) lawful money of the United States of America to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents remise, release and forever quitclaim unto the said parties of the second part, and their heirs and assigns the following described real property, to-wit:

Lot 45, HAYDEN LAKE COTTAGE TRACTS, according to the plat recorded in the office of the County Recorder in Book C of plats, page 68, records of Kootenai County, Idaho.

SUBJECT TO those conditions, covenants and restrictions as contained in Deed from ADOLPH G. HAUGE and ISABELLE L. HAUGE, husband and wife, to FLOYD W. STRAND, recorded October 28, 1947 in Book 135 of Deeds, page 591, records of Kootenai County, Idaho and recited as follows:

1. That no building or structure which shall be used for any purpose except that of a dwelling house or appurtenance thereto shall be erected or placed upon the described real property at any time, said property now being vacant.
2. No building or structure or appurtenance thereto shall be constructed upon Lot Forty five (45) closer than fifteen feet to the boundary line common to Lots Forty four (44) and Forty five and or Lots Forty six and Forty five.
3. That said premises shall at no time be used for any commercial but shall be used for residential purposes.
4. The grantors reserve the right to erect and maintain electric and telephone transmission lines across said premises.



JUL 31 1980

AND

Lot 46, HAYDEN LAKE COTTAGE TRACTS, according to the plat recorded in the office of the County Recorder in Book C of plats, page 68, records of Kootenai County, Idaho.

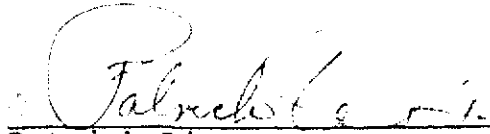
SUBJECT to those certain conditions, covenants and restrictions as contained in Deed from ADOLPH G. HAUGE AND ISABELLE L. HAUGE, husband and wife, to CHARLES J. BIXEL and MAXINE L. BIXEL, husband and wife, recorded July 15, 1947 in Book 135 of Deeds, page 315, records of Kootenai County, Idaho, and recite as follows:

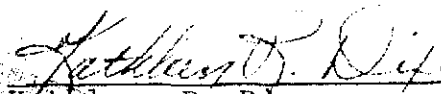
1. That no building or structure which shall be used for any purpose except that of a dwelling house or appurtenances thereto shall be erected or placed upon the above described real property at any time said property now being vacant.
2. No building or structure or appurtenance thereto shall be constructed on Lot Forty-six (46) closer than fifteen feet to the boundary line common to lots Forty-five (45) and Forty-seven (47).
3. That said premises shall at no time be used for any commercial purpose but shall be used only for residential purposes.
4. The grantors reserve the right to erect and maintain electric and telephone transmission and service lines across said premises.

Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances, unto said parties of the second part and to their heirs and assigns forever.

IN WITNESS WHEREOF, said parties of the first part have hereunto subscribed their names the day and year first above written.


Patrick Dix


Kathleen R. Dix

JUL 31 1935
-2-

Joseph D. Jensen
Joseph D. Jensen

Tammy Jensen
Tammy Jensen

Kenneth N. Fransen
Kenneth N. Fransen

Lea J. Fransen
Lea J. Fransen

STATE OF IDAHO)
) ss.
County of Kootenai)

On this 14 day of JUNE A.D. 1980, before me, the undersigned a Notary Public in and for said state aforesaid, personally appeared PATRICK DIX and KATHLEEN R. DIX, husband and wife, known to me to be the persons who signed the within instrument, and acknowledged to me that they executed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial seal the day and year in this certificate first above written.

[Signature]
Notary Public in and for the State of
Idaho. Residing at: Hyden Lake
Idaho.

STATE OF IDAHO)
) ss.
County of Kootenai)

On this 14 day of JUNE A.D. 1980, before me, the undersigned a Notary Public in and for said state aforesaid, personally appeared JOSEPH D. JENSEN and TAMMY JENSEN, husband and wife, known to me to be the persons who signed the within

EX-100-100
JUN 21 1980

instrument, and acknowledged to me that they executed the same.

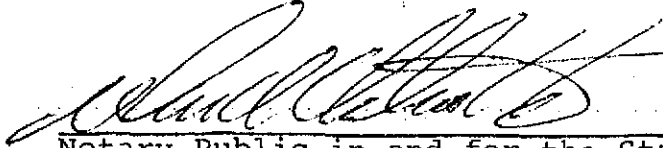
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial seal the day and year in this certificate first above written.


Notary Public in and for the State of
Idaho. Residing at: Hayden Lake
Idaho.

STATE OF IDAHO)
)ss.
County of Kootenai)

On this 14 day of JUNE A.D. 1980, before me, the undersigned a Notary Public in and for said state aforesaid, personally appeared KENNETH N. FRANSEN and LEA J. FRANSEN, husband and wife, known to me to be the persons who signed the within instrument, and acknowledged to me that they executed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Notarial seal the day and year in this certificate first above written.


Notary Public in and for the State of
Idaho. Residing at: Hayden Lake
Idaho.

JUL 8 1980

August 23, 1971

The Honorable Watt E. Prather
Kootenai County Court House
Coeur d'Alene, Idaho 83814

Dear Judge Prather:

Since my report in the Hayden Lake water rights adjudication case was printed we have reviewed again the transcripts of the hearings and find that we overlooked making several changes as a result of testimony received in the record and therefore find it necessary to amend those findings as indicated in the enclosure.

These relatively minor amendments will not affect any other rights set out in my report. I ask, therefore, that you include this amendment in my report.

Very truly yours,

R. KEITH HIGGELSON
Director

RKM:pk

Enclosure

cc: Thomas F. Conaway
Richard E. Elston
Edwin L. Nelson
Jack Lemley

JUL 31 1996

JUL 31 1996:

ELSTON, Richard E., Box 300, Rt. 11, Spokane, Washington

File No.: 95-0115 (b)

Priority: 4/1/67

Source: Hayden Lake

Purpose: Domestic (2 houses)

Period of use: From 1/1 to 12/31

Quantity per year: 1.14 acre feet (supplemented by 95-0115 (a))

Maximum rate of diversion: 0.04 c.f.s.

Type and point of diversion: Pump and pipeline from lake, Part of Govt.
Lot 5, Sec. 22, T. 51 N., R. 3 W.B.M.

Place of use: Part of Govt. Lot 5, Sec. 22, T. 51 N., R. 3 W.B.M.

- (3) Between the entry for Leland, Stanford W., and the entry for Lightner, Rex, on page 58, the following entry is inserted:

LEMLEY, Jack K., North 1007 Bates, Opportunity, Washington

File No.: 95-0223

Priority: 7/1/1949

Source: Hayden Lake

Purpose: Domestic (1 house)

Period of use: From 4/1 to 10/31

Quantity per year: 0.40 acre foot

Maximum rate of diversion: 0.02 c.f.s.

Type and point of diversion: Pump in portion of Govt. Lot 7, Sec. 11,
T. 51 N., R. 3 W.B.M.

Place of use: Portion of Govt. Lot 7, Sec. 11, T. 51 N., R. 3 W.B.M.

- (4) The entry for Nelson, Edwin L., on page 69 is deleted and in its place there is added the following:

NELSON, Edwin L., 2623 E. 14th, Spokane, Washington 99202

File No.: 95-0274

Priority: 5/1/59 pursuant to Water License No. 95-2132)

Source: Spring and Hayden Lake

Purpose: Domestic (1 house)

Period of use: From 1/1 to 12/31

Quantity per year: 0.57 acre foot

Maximum rate of diversion: 0.05 c.f.s.

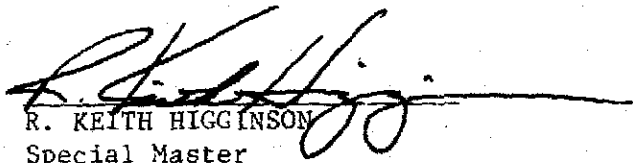
Type and point of diversion: Pipeline from spring and pump from lake,
S. 400' of Govt. Lot 4, Sec. 14, T. 51 N.,
R. 3 W.B.M.

Place of use: S. 400' of Govt Lot 4, Sec. 14, T. 51 N., R. 3 W.B.M.

- (5) The entry for Comaskey, Thomas P. and Marie M., on page 106, is deleted.
- (6) The entry for Lemley, Jack K., on page 107, is deleted.
- (7) The entry for Smith, Warren P., on page 108, is deleted, and in its place there is added the following:

95-0415 Smith, Warren R., Private springs, not tributary to Hayden Lake

DATED this 23rd day of August, 1971


R. KEITH HIGGINSON
Special Master

JUL 31 1971

Hayden Lake Elevation

DATE

2240.44 feet msl	MARCH 21
2240.46 "	22
.50	23
.54	24
.59	25
.50	26
.50	27
.48	28
.49	29
.40	30
.34	31
.32	APRIL 1
.30	2
.26	3
.26	4

William M.

Col Knox

Hayden Lake Protective Area

Erection held on 17th March
New Directors

Vernon Perry - Former Chairman
last 10 years

Jack Ross - Health

Marlene Fingleton -

Marvin Vandenburg - Lands

mean sea level elevation	
2240.44	21 March
2240.46	22
2240.50	23
2240.54	24
.54	25
.50	26
.50	27
.48	28
.44	29
.40	30
.32	31 April
.32	1
.26	2
.26	4

①

File 93-1

Vol 6 P. 1152

RECEIVED
SEP 8 1961

Department of Reclamation

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

Hayden Lake Protective
Association, Inc.

Plaintiff,

vs.

Dalton Gardens Irrigation
District, Hayden Lake
Irrigation District, Avondale
Irrigation District and
Dalton Highway District,

Defendants,

and

Charles F. Pol,

Intervenor.

1866
JUDGMENT

SEP 7 1961

STATE OF IDAHO }
County of Kootenai }

Filed _____
at _____ M.

E. W. LARSON

HAROLD E. PETERSON

CLERK DISTRICT COURT

DEPT. 1

This proceeding having been commenced by Complaint filed on August 7, 1959, on behalf of Hayden Lake Protective Association, Inc., Plaintiff, by Scott W. Reed, attorney at law, and E. R. Whittle, attorney at law, having entered an appearance on behalf of Dalton Gardens Irrigation District, Avondale Irrigation District and Dalton Highway District, Defendants, and James W. Ingalls, attorney at law, having filed a Motion to Intervene on behalf of Charles F. Pol, individually and as representative of others, as shown in the files of this Court, and the Defendant, Hayden Lake Irrigation District, having been duly served but having failed to make an appearance whatsoever, and the Defendants, Avondale Irrigation District, Dalton Gardens Irrigation District, and Dalton Highway District and the intervenor Charles F. Pol, by and through their respective attorneys of record, E. R. Whittle and James W. Ingalls having filed and tendered an Offer of Judgment to the Plaintiff and the Plaintiff

MAILED
JUL 31 1961

JUL 31 1961

having filed an Acceptance of Offer of Judgment, and all parties who have appeared being agreeable thereto as shown by the files and records herein.

Now therefore,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. That the normal and average high water level of Hayden Lake, Kootenai County, Idaho is and shall hereafter be established at 2239.0 feet above sea level on U.S.C. and G.S. datum.
2. That the Plaintiff, Hayden Lake Protective Association, Inc. or its assignees or successors, shall have the power and authority to construct a spillway structure in such a manner as to permit the normal and average high water level of Hayden Lake to reach an elevation of 2239.0 feet above sea level on U.S.C. and G.S. datum.
3. That each of the Defendants and their members and all persons whom may be represented herein and all other persons are hereby perpetually enjoined and restrained from interfering with said decreed normal and average high water level in any manner whatsoever and are further perpetually enjoined and restrained from interfering or damaging any spillway which may be hereafter constructed pursuant to this decree.

Done in Open Court this 7th day of September, 1961.

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE.

E. W. LARSON

CLERK OF DIST. COURT
AUDITOR & RECORDER

By [Signature]
Deputy

Clay V. Spear

District Judge

JUL 31 1961

(2)

Department of Reclamation
95-B

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HAYDEN LAKE PROTECTIVE
ASSOCIATION, INC.

Plaintiff,

Vs.

DALTON GARDENS IRRIGATION
DISTRICT, HAYDEN LAKE
IRRIGATION DISTRICT, AVONDALE
IRRIGATION DISTRICT AND
DALTON HIGHWAY DISTRICT,

Defendants,

and

CHARLES F. POL,

Intervenor.)

STATE OF IDAHO }
County of Kootenai }

Filed MAR 20, 1962
at _____ o'clock _____ M.

E. W. LARSON
Clerk District Court

By HAROLD E. PETERSON
D.

AMENDED JUDGMENT
#18666

Judgment having been entered heretofore on September 7, 1961, upon Offer of Judgment by certain of the defendants which offer was accepted by the plaintiff and the parties having thereafter discovered an ambiguity in said Judgment and a Stipulation having been entered and filed herein on this date by Scott W. Reed, attorney for the plaintiff, Hayden Lake Protective Association, Inc., James W. Ingalls, attorney for Charles F. Pol, et al, intervenors, and E. L. Miller, attorney for and on behalf of the Dalton Gardens Irrigation District, Hayden Lake Irrigation District and Avondale Irrigation District, and said Stipulation appearing fair, equitable and binding on all parties,

NOW THEREFORE, the following Judgment is entered,
nunc pro tunc,

IT IS HEREBY ORDERED ADJUDGED AND DECREED:

1. That the normal and average high water level of Hayden Lake, Kootenai County, Idaho is and shall hereafter be established at 2239.0 feet above sea level on U.S.C. and G.S. datum.

JUL 31 1966

Box 38

2. That the plaintiff, Hayden Lake Protective Association, Inc. or its assignees or successors, shall have the power and authority to construct a spillway structure in such a manner as to permit the normal and average high water level of Hayden Lake to reach an elevation of 2239.0 feet above sea level on U.S.C. and G.S. datum, and that such spillway as constructed shall be designated and operated to draw excess water levels over and above the level fixed by this decree, reasonably calculated to maintain normal and average high water at a level of 2239.0.
3. That each of the defendants and their members and all persons whom may be represented herein and all other persons are hereby perpetually enjoined and restrained from interfering with said decreed normal and average high water level in any manner whatsoever and are further perpetually enjoined and restrained from interfering or damaging any spillway which may be hereafter constructed pursuant to this decree.

Done in Open Court this 20th day of March, 1962.

/s/ CLAY V. SPEAR
District Judge

JUL 31 1966

October 25, 1973

No. 95-0115

③ Miz Woods:

Mr. & Mrs. Richard E. Blston were in the office and wanted the attached papers entered in their file. I didn't realize at the time that they had a decreed water right, so they don't even have a file!

Anyway, thought I'd send it down to you to see what you could do with it. Aren't I nice?

JUL 31 1996

Linda June

95-0115

183053

QUIT-CLAIM DEED

THIS INDENTURE, made this 26th day of December in the year of our Lord, One Thousand Nine Hundred and Forty-one between George M. Colborn and Lulu V. Colborn, husband and wife resident of Hayden Lake, County of Kootenai, State of Idaho, parties of the first part, and F.M. Hoag and Lucy King Hoag, husband & wife resident of-----, County of----- Spokane, State of Washington, parties of the second part.

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of One & No/100 Dollars and other valuable consideration DOLLARS in hand paid to the said parties of the second part, the receipt whereof is hereby acknowledged, do by these presents demise, release and forever quit-claim unto the said parties of the second part and to their heirs and assigns .

All water rights in and to Hoag Creek located in the U.S.Forest Reserve and in the Southerly half of Government Lot Five (5) and the Southwest Quarter (SW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) Section Twenty-two (22) Township Fifty-one (51) North, Range Three (3) West, Kootenai County, State of Idaho.

Together with all and singular the hereditaments and appurtenances, thereunto belonging or in anywise appertaining and the reversion and reversions, reaminder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances, unto said parties of the second part, and to their heirs and assigns forever.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hand and seals the day and year first above written.

Signed, Sealed and delivered in presence of:

Robert W. Danson
I.Norene Hall

George M. Colborn (seal)
Lulu V. Colborn (Seal)

STATE OF WASH.)
County of Spokane) ss:

THIS IS TO CERTIFY, That on this 24 day of August, A.D., 1943 before Robert W. Danson, a Notary Public in and for the State of Washington, duly commissioned and sworn personally came George M. Colborn & Lulu V. Colborn his wife to me known to be the individuals described in the within instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal, the day and year in this certificate first above written.

(Notarial Seal)

Robert W. Danson Notary Public
for State of Washington,
residing at Spokane.

STATE OF IDAHO,)
County of Kootenai) ss:

Filed for record at the request of F.M.Hoag on the 15th day of Mar. 1946 at 10:4 o'clock A.M., and recorded in Book 130 of Deeds on page 228.

Jas. A. Foster County Recorder
By Alberta E. Platt, Deputy

Fee: \$1.00

THIS INDENTURE, made this 8th day of March, 1946 between OSWALD RALPH WALCH (also known as Ralph and Luola Walch, and LUOLA WALCH, husband and wife, of 114 N. Main St. the City of Kellogg, County of Shoshone, and State of Idaho, parties of the first part and NANCY WALCH, a widow, of 1522-13th Avenue, in the City of Seattle, County of King, State of Washington, party of the second part;

W I T N E S S E T H:

That the said parties of the first part for and in consideration of the sum of One (\$1.00) Dollar, and other good and valuable consideration, lawful money of the United States of America, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, her heirs and assigns forever, all of the following described real estate situate in the County of Kootenai and State of Idaho, to-wit:

Lots Twenty-five (25) and Twenty-six (26) of "A.E.Powell Tracts", according to the Plat thereof recorded in Book "C" of Plats on page 143, in the office of the County Recorder of said County, also an easement and water right with the right to tap the Creek above the reservoir locate on Lot Seventeen (17) and run a pipe line from the point of tapping said Creek over the property of Andrew E. Powell and Hattie M. Powell, husband and wife, grantors in that certain deed dated August 27, 1929 and recorded in Book 94 of Deeds, page 230, records of said County, to service the property conveyed to the grantee with domestic water.

TOGETHER WITH all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property, as well in law as in equity, of the said parties of the first part.

TO HAVE AND TO HOLD, All and singular the above mentioned and described premise together with the appurtenances, unto the party of the second part, and to her heirs and assigns forever. And the said parties of the first part, and their heirs, the said premises in the quiet and peaceful possession of the said party of the second part, her heir and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, or any part thereof, shall and will warrant and by these presents forever defend.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seal the day and year first above written.

Oswald R. Walch (S E A L)
Luola Walch (S E A L)

STATE OF IDAHO,)
COUNTY OF SHOSHONE) ss:

I, the undersigned, a Notary Public in and for the State of Idaho, duly commissioned and sworn, do hereby certify that on this 8 day of March, A.D. 1946 personal appeared before me OSWALD RALPH WALCH, sometimes known as RALPH and RALAPH WALCH, and LUOLA WALCH, husband and wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

(Notarial Seal)

State of Idaho)
County of Kootenai) ss:

Stella Brown Notary Public in and for the State of Idaho, residing at Kellogg, Idaho. My Commission expires Apr. 13, 1948
JUL 31 1996



RECEIVED

STATEHOUSE, BOISE, IDAHO 83707

APR 5 1972

Department of Water Administration
April 4, 1972

R. Keith Higginson, Director
Department of Water Administration
BUILDING MAIL

Dear Keith:

Would you read the enclosed material and see if you can help us respond to the Governor?

Vaughn tells me that your office was involved in some kind of study and arbitration at Hayden Lake sometime in the past. Do you know who controls the lake level? Can the State control the situation to protect the people from flooding?

Anything you can do to help will be appreciated.

Sincerely,

Lee W. Stokes, Ph.D., Chief
Water Pollution Control Section
Environmental Improvement Division

LWS:ew

Enclosure

RECEIVED
JUL 31 1996

OFFICE OF THE GOVERNOR TRANSMITTAL SLIP		DATE 4-7-72
TO: Dr. Lee Stokes, Health Department		
FROM: Governor Cecil D. Andrus		
ACTION		
☐ NOTE AND FILE ☐ NOTE AND RETURN TO ME ☐ RETURN CORRESPONDENCE ☐ NOTE AND SEE ME ABOUT THIS ☐ PLEASE ANSWER ☐ PREPARE REPLY FOR MY SIGNATURE ☐ TAKE APPROPRIATE ACTION	☐ PER OUR CONVERSATION ☐ PER YOUR REQUEST ☐ FOR YOUR APPROVAL ☐ FOR YOUR INFORMATION ☐ FOR YOUR COMMENTS ☐ SIGNATURE ☒ INVESTIGATE AND REPORT	
COMMENTS: Please look into this problem immediately and advise this office as quickly as possible of any action that has been taken in the past or can be taken in the future on this problem at Hayden Lake. C.D.A.		

RECEIVED

APR 5 1972

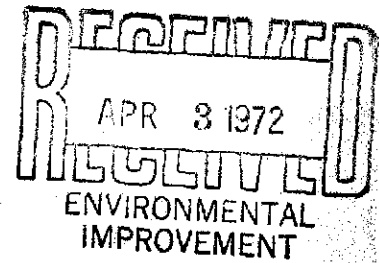
Department of Water Administration

RECEIVED
JUL 31 1972



STATE OF IDAHO
OFFICE OF THE GOVERNOR
BOISE

CECIL D. ANDRUS
GOVERNOR



April 3, 1972

Mr. Vernon E. Perry
Route #2; Box 70
Hayden Lake, Idaho 83835

Dear Mr. Perry:

We are in receipt of your letter dated March 23rd concerning perpetual flooding problems in the Hayden Lake Protective Association and Watershed Improvement District.

I have taken the liberty to send your letter on to our State Soil Conservation Commission Officer, Doyle Scott, and have asked him to respond forthwith.

I have also taken the opportunity to send a copy of your letter to the Health Department to see if we can, in effect, do the things which you seem to think can and have been done to alleviate the problem. If we have such control, I am sure we will be able to help. If we have no control, it's our duty to at least respond and let you know, which we will do.

Sincerely,

CECIL D. ANDRUS
GOVERNOR

bb

cc: Doyle Scott
Dr. Lee Stokes

JUL 31 1996

Hayden Lake, Idaho 83835
March 23, 1972

Honorable Governor Cecil Andrus
Statehouse
Boise, Idaho 83701

RECEIVED
MAR 25 1972
OFFICE OF GOVERNOR

Dear Governor Andrus:

To your Honor's attention, and that of the State Soil Conservation Service, Administrative Office, Doyle R. Scott!

Organizations to solve the Hayden Lake perpetual flooding problem have functioned (Hayden Lake Protective Association - 1950-1962 and Hayden Lake Watershed Improvement District - 1962 - 1972) to solve the perpetual flooding problems of landlocked Hayden Lake. Promises prevailed to no accomplishment.

And today we are again plagued with depleted high watershed forests overlogged and the resultant flashflooding of ours, and many other home grounds, roads, and many domestic lake water pumping facilities! There is available a past listing of 30-32 homes, postoffice, Fish & Game facilities and rearing ponds, barns, roads public and private to add to the list of total destruction or raised to seawall and riprap flood protection to public and private costs in the several hundreds of thousands of dollars!

In a letter of ALARM received March 21, 1972, it is expressed: "It is sad to see such a wonderful lake succumb to the wheels of "Progress".

We have landfills, beaverdam erasures for back-of-home developments, weed cutting and raw chemical and pellet poisoning of tulies and the weeds. All this by local, even out-of-state lot promotionist's dollar gains--and thousands continue to drink the sickened and dying Hayden waters which scientists, the late years, declare to be sick and dying!!!!!!!!!!!!!! The Hayden fishery and waterfowl habitat has gone to near total destruction the last several years -- ask Frank Lanham (Ret. Fish & Game Project Engineer, Coeur d'Alene) and many old-time resident fisherfolks!

A once clear water and pure Hayden I fished as a boy (1910) and here since 1900 I have made Hayden shores my home for forty-seven good years! Somehow, I made an early day (Model T Ford) lumber grader's living for a period of 22-23 years. Then married to happy living and building of seventy docks mostly on Hayden, and with my wife Myra running our small resort and boat rental facilities. There was a girl Margaret, long married and with four children; and a son, David V. Perry graduating Stanford University on a scholarship, and presently to graduate Texas University, in Law, Austin, Texas. This all cost a FORTUNE, as with most citizens, in time, loving care, dollar finance--and now REWARDING MEMORIES to "carry-on" thru our latter years 62-73 year ages!

JUL 31 1996

Governor Cecil Andrus
March 23, 1972

Personal property lakeshore frontage (400') once entailed a \$11.00 yearly tax--now risen to \$440 yearly, and going up! Further, this along with the IMMEDIATE 1972 PERPETUAL AND PRESENT FLOODING! Present high water stages will, with wind and boat wave action, cause severe destruction and erosion to many places. PLEASE! WE NEED HELP IMMEDIATELY!!

1956 Flooding, Gov. Smylie stated, "Do what you can to save flooding"-- and irrigationists cut the artificial F. Lewis Clark dyke to save flooding their pump facilities! Why can't you order such action again, cutting the shallower north end to but little refill repair? Many, many of us WILL GOD BLESS YOU! The dyke has been cut five times and replaced!

Under the Hayden Protective Association and the irrigationist's 1956 cutting of the dyke I was in charge. I would now direct any decision be immediately available to Marlow Freckleton, Soil Conservation Service, Coeur d'Alene 83814, and James O. Nutt (new WID Director, and now in flood danger) Rte. 2, Hayden Lake, Idaho 83835.

Sincerely yours,

Vernon E. Perry

Vernon E. Perry
Rte. 2, Box 70
Hayden Lake, Idaho 83835

Phone 772-3786

Former Dalton Hwy. Dist. Commissioner, 8 yrs.
1939-1940 CDA Wildlife President
Past Hayden Lake WID Chairman
Past Coeur d'Alene Toastmaster Pres.

Just for the record, I, Mrs. Perry, will enclose a letter I wrote trying to get some cooperation with the Health Department here in CDA. This has been going on since 1948 when the Clark Estate at Hayden was chopped up into little lots and sold. Before I wrote the Nov. 5, 1965 letter I had talked myself blue in the face with Mr. Boughton and got nowhere. Thus, in regard to the Oss situation I wrote this letter, sending a copy to all government offices in Boise and CDA and didn't even get a reply. And I am still trying to find out how people can bring in dirt and dump on the lakeshore and make a building site to further pollute! Naturally, these out-of-state people who come in and take over do everything they can to harm us because we are trying to protect this once beautiful, clear lake.

JUL 31 1972 *Mrs. Vernon E. Perry*

Rte. 2, Box 70
Hayden Lake, Idaho 83835
November 5, 1965

Mr. Donald J. Boughton
Kootenai County Health Unit
Courthouse
Coeur d'Alene, Idaho

Dear Mr. Boughton:

You will recall that I called you sometime ago regarding the installation of sewage disposal on Lot 128, Honeysuckle Hills, Hayden Lake (situated a short distance east of the dyke road), owner Paul Oss, Spokane. At the time a contractor was in the process of installing such disposal. You informed me that no permit had been issued to Mr. Oss for such installation. I requested that you go out to the place and see what was going on. Later you told me you had gone out and no one being there you left a note on the bulldozer (you did not mention the contents of the note but I assumed it was a request that no more work be done until you had talked with the owner). When I next called to tell you that the contractor had completed installation and had covered it all up with dirt you said you had just received the request for approval that morning. (I mentioned that I surely hoped you would not approve such installation under these circumstances.) During this time I had talked with Mr. Scott Reed, Attorney for the Hayden Lake Protective Association, and at this point Mr. Reed informed me by phone that he had talked with you and you had informed him that you were not approving the installation. However, the Oss family evidently did not take you seriously, if they were informed that the sewage disposal was not approved, because they went right ahead and have had built quite a house and are continuing with installation of plumbing. I have been reliably informed that the contractor who put in the sewage disposal did not have a permit approving this installation. Also, that he will, sometime soon, put in a dry well on the south side of the road and that sewage will be pumped. This I do not understand. I have had several conversations with Mr. John Sanford (who is as much interested in the sanitation of Hayden Lake as I am) regarding this particular installation (and others in the past) and just this morning Mr. Sanford told me that he and Mr. Trzuskowski, also of Hayden Lake, had talked with you and you told them a permit had been issued and that the installation was already put in on the south side of the road. Why would you tell them this when it has not been done? I understand the regulations at this time for installation of sewage disposal are that the site and method must first be approved, and no work started until written approval is given.

I also mentioned the fact that the land on which this installation was made, and the house built, was on a fill which had just been put in by Mr. Oss, and there was quite a question in my mind as to how people could fill in state property (lakeshore), claim title and build. In this particular instance there was absolutely no place to build on the lakeshore until all this material had been hauled in and dumped on the lakeshore. I am very much aware, Mr. Boughton, that you have no authority over people filling in and claiming lakeshore land; but since you are the County Sanitarian, you should be concerned over sanitation and bring it to the attention of proper state authorities. It would seem the State Land Dept. would be interested in working with the State Health Dept. in enforcing laws or regulations to prevent willful pollution. Wouldn't this end a lot of complaints received at your end?

Comments have been made as to how permits could have been issued on several installations recently and I do know that in the past several years installations were made with no thought of a permit. Since there is a county health regulation requiring permits for such installations it would seem that some penalty should be assessed for those who ignore such regulations or better yet, the installation should not ever be approved. Even though people are so many feet from the water supply does not mean that their installation will not pollute, because in some instances it will drain into the ditch beside the road and certainly end up in the lake.

I do not wish to be arbitrary about this, Mr. Boughton, but Hayden Lake is my home and no doubt will be till my dying day, and this matter of sanitation is a vital point with me, and I also know it is with many other people, but most do not speak up, wanting "George" to do it (and at this particular time, I am George).

Hayden Lake is a beautiful lake and has been such a clean body of water and that is the way we want it kept and it can be if the regulations are enforced now before it starts getting worse. Consider the number of people who get their water from Hayden, the entire community of Dalton Gardens, Hayden Lake, including two schools, the Country Club, and many private individuals who live around the lake. And we do not want the time to come when it is so heavily chlorinated that you have to hold your nose to take a drink. Practically every magazine and paper you read these days has an article on preserving and keeping clean the water supply. The Saturday Evening Post recently had an article on this; a pamphlet entitled "Clean Water" has been advertised on TV for many weeks. This is emphasized all over the U.S. but still nothing seems to be done to enforce what regulations there are.

If we don't start enforcement now what is to keep anyone owning property entirely around Hayden Lake from deciding that they wish to either have more land or be right next to the lake, from hauling in fill and making new lots. If they have enough money they could build their own little settlement out in the lake.

Sincerely,

Mrs. M. Perry

cc: Mr. Harold Peterson
County Auditor
Courthouse
Coeur d'Alene, Idaho

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April 7, 1972

C
Mr. Edward V. Williams
Administrative Assistant
to GOVERNOR ANDRUS
State of Idaho
Office of the Governor
Room 228, Statehouse
Boise, Idaho 83707

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Dear Ed:

Enclosed is a copy of a recent letter from Colonel William M. Knox, Chairman of the Hayden Lake Protective Association, for your information.

Very truly yours,

Y
R. KEITH HIGGINSON
Director

RKH:mjl

Enclosure: Letter dated April 6, 1972 from Colonel Knox

JUL 21 1972

DEAD LAKE WATERSHED IMPROVEMENT DISTRICT

Route 1 Box 334-A
Hayden Lake, Idaho. 83835.
April 6, 1972.

Mr Keith Higginson, Director,
Department of Water Administration
State of Idaho
Boise, Idaho.

Dear Mr Higginson:

Referring to our conversation of even date regarding the flooding conditions which are presently occurring at Hayden Lake, I wish to invite your attention to the following facts:

a. An election was held at Hayden Lake, Idaho, on March 17, 1972, for the purpose of electing three Directors of the Hayden Lake Watershed Improvement District. Two incumbents were candidates for re-election and two others were nominated.

b. I was in Idaho Falls attending the State Convention of the Wildlife Federation at the time the elections were held. When I returned home on March 20, 1972, I found that my name had been entered as a "write-in" and that I had received the second highest number of votes cast at the election. Since the lake had been in "flood stage" even prior to the election, it was turned over to the newly elected officers in a critical stage and without any adequate flood control devices having been constructed in the past ten years.

c. I visited the spillway area after executing my Oath of Office and found that Mr Perry had placed "boom logs" in front of the weir to keep trash from obstructing the spillway. These logs had drifted to the face of the weir and were obstructing the flow by approximately one-third of it's capacity. I called the Highway District who brought heavy equipment and dragged the boom-logs out of the Lake.

d. I am informed by members of the Irrigation companies that the "control boards" were not completely removed until the Lake reached a level which indicated "flood conditions" would occur. Mr Vernon Perry was Chairman of the District prior to the time that I assumed this responsibility and I believe it was his duty to control the level of the lake prior to assumption of the duties by the newly elected officers. At the time I assumed the responsibility the lake level was 2240.44 or 1.44 ft above the legally established high water mark. The level then rose daily until it reached a maximum of 2240.54 on March 24/72. Since that date it has receded to a present level of 2240.26.

I have had conferences with Mr Marlow Freckleton of the SCS in Coeur d' Alene and also with the officers of the irrigation districts. I value the advice of these gentlemen and also rely on my own judgment since I have been a resident on the lake for more than 16 years. At no time have we given any consideration to breaching the Dike. A breach at this time would result in the loss of about 7 feet of water in the lake level and I am also informed that we have about 10 inches left in the watershed.

JUL 31 1996

There are those around the lake that have built their homes very close to the lake level and have allowed nothing for possible flooding in certain years of high precipitation. This is a regrettable fact and I have assured those who have called me that if they think they have a legitimate complaint, that I would call the Health Dept; the SCS and my

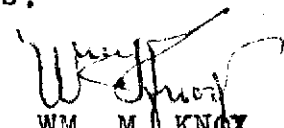
Board and make a detailed "inspection" of their premises and determine if we are in any way liable. In all cases, they have withdrawn their complaint. I have not had any contact with Mr Perry since I was elected to the Board.

The Irrigation companies have informed me that they have realized the danger of inadequate flood control devices being constructed and that they have offered to finance and build a "spillway" for the District. They also inform me that last Fall they offered to clean the Weir and "sump area" which is littered with rocks, trash, etc. They said Mr Perry informed them that their services were neither required or desired. This action would indicate that Mr Perry failed to use the facilities available to him during his tenure as a Director and that he can expect or demand little relief at this time.

I met with the Directors of the Avondale Irrigation District and the Hayden Lake Irrigation District last evening and informed them that the present Board of the Watershed Improvement District wished to co-operate with them fully to construct an adequate flood control system and that we hoped that they still felt that it was possible to do it with their funds rather than taxing property owners in the district. As soon as I have more information including costs, plans, etc., I am calling a meeting of our Board and all the irrigation districts. It is my desire to agree on a plan and start construction as soon as the Lake recedes to a level that will allow construction. I anticipate that this will occur about the 15th of July.

I hope this information will be of value to you in answering any other complaints which may be referred to your office. I assure you that we are "on the job" and will do everything reasonable to handle this situation.

For the Board of Directors:


WM. M. KNOX
Colonel, AUS., Ret
Chairman.

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JUL 31 1966