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

IN THE MATTER OF APPLICATION FOR
TRANSFER NOS. 79357, 79380, & 79384
(in the name of Thomas & Dorothy Leno),
79466 (in the name of Four Sisters Dairy
LLC)

**APPLICANTS' MOTION IN LIMINE
TO EXCLUDE AND STRIKE
EDWARD SMITH'S *REBUTTAL TO
APPLICANT'S EXPERT REPORT
AND POSITION PAPER***

COME NOW, the Applicants in the above-referenced matter, THOMAS LENO & FOUR SISTERS DAIRY LLC, and Intervenor CEDAR RIDGE DAIRY LLC (hereinafter collectively referred to as "Applicants"), by and through counsel of record, and pursuant to the Department's Rules of Procedure, and hereby submits its **MOTION IN LIMINE TO EXCLUDE AND STRIKE EDWARD SMITH'S *REBUTTAL TO APPLICANT'S EXPERT REPORT AND POSITION PAPER*** to exclude or strike those documents and exhibits as identified herein from the hearing and administrative record in the above captioned matters.

INTRODUCTION/PROCEDURAL HISTORY

On or about January 9, 2015, there was a *Stipulation and Joint Motion to Amend Expert Report Deadlines* executed between the undersigned counsel for the Applicants and David

**APPLICANTS' MOTION IN LIMINE TO EXCLUDE AND STRIKE EDWARD SMITH'S
"*REBUTTAL TO APPLICANT'S EXPERT REPORT*" AND "*POSITION PAPER*"**

Coleman, counsel for Protestants Margaret Winsryg & Leroy Elliott. The hearing officer granted the stipulation and entered his *Order Granting Stipulation and Joint Motion to Amend Export Report Deadlines* on January 15, 2015—which extended the expert report deadline to February 13, 2015 and rebuttal expert reports deadline to March 6, 2015. The separate deadline for identification of witnesses and exhibits to present at hearing of March 4, 2015 was retained. *Id.*

On February 10, 2015, Mr. Smith filed a *Notice to Applicants Concerning the Retention of an Expert Witness on Behalf of Protestants* indicating that he had retained Mr. Ed Squires of Hydro Logic as his expert witness. Pursuant to the stipulation and order of the hearing officer, on February 13, 2015 the Applicants filed their expert reports in support of applications for transfer. *Notice of Filing of Expert Reports in Support of Applications for Transfer.*

In response to Applicants' expert reports, on February 28, 2015, Mr. Smith circulated a document titled "REBUTTAL TO APPLICANT'S EXPERT REPORT by Edward S. Smith." ("Mr. Smith's Expert Rebuttal"). A true and correct copy is attached hereto as Exhibit A.

On March 3, 2015, protestant Mr. Smith circulated a document captioned "POSITION PAPER: On the Ground Water in the Leno-Well Area by Edward S. Smith" (hereafter "Mr. Smith Position Paper"). A true and correct copy is attached hereto as Exhibit B. On March 4, 2015, Mr. Smith served a document titled, "EXHIBITS, EXPERT WITNESSES AND WITNESSES."

Mr. Smith was deposed before a court reporter on March 9, 2015. True and correct copies of the relevant portions of his "draft" deposition transcript are attached hereto as Exhibit C.¹

¹ Due to the short timing between the deposition and the filing of this motion, a final signed transcript of Mr. Smith's deposition is not yet available. The final transcript may vary as indicated by the court reporter.

The Applicants object and move to strike the documents and exhibits from the record titled: 1) Mr. Smith's Position Paper, and 2) Mr. Smith's Expert Rebuttal. Mr. Smith is not qualified as an expert, and admits that he is not qualified as an expert as stated at his deposition. Therefore the documents he submitted cannot be submitted as expert opinion in these cases. Additionally, Mr. Smith's documents and exhibits submitted do not qualify as admissible lay witness opinion testimony pursuant to IRE 701 as they are not based upon his perception and personal knowledge, but instead are strictly based upon scientific data and reports of others. The hearing officer should exclude or strike these documents and exhibits from the record as they are inadmissible expert or lay witness testimony, and are further irrelevant, unduly repetitious, inadmissible and the probative value is outweighed by its prejudicial nature to the Applicants.

STANDARD OF REVIEW

When ruling on the admissibility of evidence, a hearing officer is not bound by the Idaho Rules of Evidence. IDAPA 37.01.01.600. Evidence should be admitted to assist, rather than frustrate, development of the record. IDAPA 37.01.01.600. "The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho." *Id.*; see also *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 163, 125 P.3d 515, 519, (2005); see also I.C. § 67-5251(1). IDAPA rule 605 governs prepared testimony and provides that a presiding officer may include a witness's prepared testimony to be included in the record—subject to Rule 600. IDAPA 37.01.01.605.

Idaho Rule of Evidence 702 governs testimony given by expert witnesses. The rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact

to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” IRE 702.

Idaho Rule of Evidence 701 governs opinion testimony given by lay witnesses. The rule provides that if the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702. *See* IRE 701.

ARGUMENT

1. Mr. Smith is Not An Expert and Therefore His Expert Rebuttal and Position Paper Testimony Should be Excluded from the Administrative Record.

Mr. Smith’s Expert Rebuttal and Position Paper can be either expert testimony or lay witness testimony. There are clear distinctions and limitations between lay opinion testimony and that of expert opinion testimony. Lay witnesses are limited to testifying to opinions gleaned from factual information that they personally perceived, whereas a qualified expert, may testify to opinions derived from information—even inadmissible information—that the expert did not personally perceive, but that was made known to the expert before or at trial. *See e.g., Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1192–1193 (9th Cir. 2005) (district court improperly thwarted highway patrol officer’s testimony about angle of decedent’s truck to railroad tracks on basis that it would “call for expert testimony that was not disclosed”; witness’s perception of angle of tire mark would not constitute expert opinion, but was percipient witness’s observation admissible under Rules 601 and 602 or permissible lay witness opinion, based on personal observation, under Rule 701); *See, e.g., Doe v. Cutter Biological, Inc.*, 971 F.2d 375,

385–386 (9th Cir. 1992) (trial court erred in excluding affidavits of plaintiffs' three experts based on their knowledge of medical literature).

Under Idaho Rules of Evidence, Rule 702, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” IRE 702. The foundation for establishing a witness' qualifications as an expert must be offered before his testimony will be received in evidence. *Hobbs v. Union Pac. R.R.*, 62 Idaho 58, 108 P.2d 841, (1940). There is no foundation for Mr. Smith's expert opinion, documents or exhibits. Importantly, Mr. Smith admits that he is not an expert.

Q. [MR. THOMPSON]: So you're not participating in this matter as an expert witness; would you agree with that?

A. [MR. SMITH]: Absolutely.

Q. Absolutely?

A. I am not an expert witness.

Smith Deposition, p. 28, ln. 24 through p. 29, lns. 1-3, attached hereto as Exhibit C.

Mr. Smith further testifies that he does not have any training as a hydrologist, geologist, or engineer. *Id.*, *Smith Deposition*, p. 28, lns. 9-18. Lastly, he states that he does not have any past training or work experience that would inform him whether he should agree or disagree with an expert report. *Id.*, *Smith Deposition*, p. 30, lns. 10-15.

The admissibility of expert testimony is a question for the hearing officer to decide. I.R.E. 104. The decision whether to exclude rests upon whether the witness is qualified as an expert, based upon personal knowledge or facts reasonably relied upon by experts in the field, and whether its probative value would be substantially outweighed by the danger of unfair

prejudice, confusion of the issues, or misleading the fact finder, or by considerations of undue delay, waste of time and cumulative evidence. *See Earl v. Cryovac*, 115 Idaho 1087, 1090, 772 P.2d 725, 728, 136 (Idaho Ct. App. 1989). Since the foundation has not been laid, and Mr. Smith does not qualify as an expert in this proceeding, the testimony or opinion of Mr. Smith should be properly excluded. *See State v. Winn*, 121 Idaho 850, 828 P.2d 879 (1992) (it was proper to exclude evidence of pastor's testimony dealing with a scientific theory for which adequate foundation had not been laid or expertise established); *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 940 P.2d 1142 (1997) (plaintiff was not qualified as a medical expert, and therefore could not give her opinion about whether the standard of care was breached by the defendants; plaintiff was a lay person and not competent to testify about the cause of her injury, including her statements that the injury occurred during surgery and that her rotator cuff was not torn before surgery).

Mr. Smith is a lay witness concerning the matters in the instant cases. At no time in these proceedings has he disclosed himself as an expert witness as required by I.R.C.P. 26(b). To offer an "expert" rebuttal and formal position paper just prior to the hearing which set forth opinions on scientific issues that he is admittedly unqualified to give clouds the record and unfairly prejudices the Applicants. Consequently, any expert testimony he proffers should be excluded and stricken from the record, including his Expert Rebuttal and Position Paper.

2. Mr. Smith's Lay Witness Opinion Testimony Should also be Excluded and Stricken from the Record.

As set forth above, Mr. Smith's Expert Rebuttal and Position Paper do not qualify as expert testimony, and should be excluded and stricken from the record as such. Since it is not expert opinion testimony, his testimony should be considered lay witness opinion testimony. Mr. Smith admits his participation is as a lay witness:

Q. [MR. THOMPSON]: So would you agree you're participating in this case, these four transfer hearings as a lay witness?

A. [MR. SMITH]: Yes.

Deposition of Mr. Smith, pg. 26, lns. 3-6, attached hereto as Exhibit C.

Mr. Smith's testimony does not meet the criteria for admissible lay witness opinion testimony pursuant to IRE Rule 701 which provides:

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

IRE Rule 701. *State v. Enyeart*, 123 Idaho 452, 849 P.2d 125 (Ct. App. 1993) (a trial court may allow a lay witness to state an opinion about a matter of fact within his or her knowledge, so long as the witness's opinion is based on his or her perception; and the opinion must be helpful to a clear understanding of the witness' testimony or a determination of a fact in issue).

The first requirement of IRE 701 is that the lay witness opinion testimony needs to be based upon his own perception. See IRE 701; see also *State v. Johnson*, 119 Idaho 852, 858, 810 P.2d 1138, 1144, (Idaho Ct. App. 1991) (Doctor did not qualify as an expert, and likewise his testimony was not based upon his own perception, but what others had stated to him). This is consistent with IRE 602 that provides a witness may not testify to a matter unless the witness has personal knowledge of the matter. IRE 602; see *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. N.Y. 2005) (Rule 701 simply recognizes lay opinion as an acceptable "shorthand" for the "rendition of facts that the witness personally perceived."). The limitation of lay witnesses is to testifying to opinions gleaned from factual information that they personally perceived. See, e.g., *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1192-1193 (9th Cir. 2005) (in

wrongful death suit arising from accident at railroad crossing, district court improperly thwarted highway patrol officer's testimony about angle of decedent's truck to railroad tracks on basis that it would "call for expert testimony that was not disclosed"; witness's perception of angle of tire mark would not constitute expert opinion, but was percipient witness's observation admissible under Rules 601 and 602 or permissible lay witness opinion, based on personal observation, under Rule 701, citing Weinstein's).

Mr. Smith's testimony is not based upon his perception, facts or personal knowledge—but but rather based upon the studies, opinions or expert reports of others.

Q. [MR. THOMPSON]: And what facts based on personal knowledge do you have to present in each hearing?

A. [MR. SMITH]: What facts? Well, through my research of these studies we just talked about...but initially when I put in my protest, I didn't know all of this stuff...

Q. [B]ut as a lay witness who doesn't have any scientific training on these type of matters, what facts do you intend to provide testimony about at the hearing?

A. The facts as presented in the studies, I think I have accurately quoted their conclusion in certain sections that dealt with the issue I was talking about...

Deposition of Mr. Smith, p. 26, lns. 7-19, p. 29, lns. 6-13, attached as Exhibit C.

Mr. Smith's testimony likewise does not satisfy the next two requirements of IRE 701 to be admitted as lay opinion testimony—which is the testimony is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue, and not based on scientific, technical or other specialized knowledge. As he admits, Mr. Smith's testimony is solely based upon the scientific, technical or other specialized knowledge of others, i.e. the studies or reports of other experts. *Id.* As such, it should be excluded.

Evidence should be admitted to assist, rather than frustrate, development of the record. IDAPA 37.01.01.600. "The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho." *Id.*; see also *Chisholm v. State Dep't of Water Res. (In re Transfer No. 5639)*, 142 Idaho 159, 163, 125 P.3d 515, 519, (2005); see also I.C. § 67-5251(1). Mr. Smith does not qualify as an expert, and his lay witness opinion testimony is not based upon any personal perception or knowledge, therefore it is inadmissible. As provided by Rule 600, the hearing officer should exclude such evidence particularly when it does not assist the trier of fact but instead clouds the record with inadmissible opinion testimony to the prejudice of the Applicants. If the hearing officer does not exclude such evidence and testimony, any party that reads an expert report would then be qualified and allowed to offer his or her opinions on such scientific issues, regardless of qualification. This is not what Idaho law provides.

As such, the hearing officer should exclude and strike Mr. Smith's *Position Paper on the Ground Water in the Leno-Well Area*, and his *Rebuttal to Applicant's Expert Report* as inadmissible lay witness opinion testimony pursuant to IRE Rule 701.

CONCLUSION

Based upon the aforementioned, the Applicants respectfully request the hearing officer to exclude and strike from the record Mr. Smith's "Rebuttal to Applicant's Expert Report" and "Position Paper" in this matter.

DATED this 17th day of March, 2015.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

*Attorneys for Thomas Leno, Cedar Ridge Dairy,
LLC, and Four Sisters Dairy, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2015, I served a true and correct copy of the foregoing by the method indicated:

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Exhibit A

28 FEB 2015

REBUTTAL TO APPLICANT'S EXPERT REPORT

by
Edward S. Smith

Reference the: "Expert Report and Narrative Relative to Water Right Transfer# 79384 for irrigation" by Brockway Engineering, dated February 13, 2015. The referenced Expert Report focuses on transfer #79384 for a new irrigation well for use by Cedar Ridge Dairy, Filer, Idaho. The source of the proposed transfer is from the Leno-Well, near the Idaho/Nevada Border.

Since the three Expert Reports that involve new water, (#79357, #79380, #79384), are essentially the same in the writings of the main body of each report, I will focus my comments on transfer #79384, but the comments will apply to all three mentioned Expert Reports.

It is noticeable that the Expert Report(s) are not signed nor stamped with a professional seal as professional work would dictate.

Comments applying to the specific paragraphs of the Expert Report follow:

Page 3, Paragraph A.1.(Objectives) of the Expert Report states, in part that: "Hydraulic analysis of the regional aquifer is based upon published reports, well drillers logs, USGS/IDWR monitoring wells and pump test data. From this analysis, the effects of Transfer 79384 on the local aquifer and the Protestants' domestic wells can be determined."

Actually, the best that could be said of such an analysis is that the effects of the new irrigation well can only be estimated, not determined precisely. To say that the effects can be determined with certainty without a valid pump test and simultaneous monitoring of the neighbors' domestic wells is not supportable, considering the fractured basalt geology in the area.

Page 8, top paragraph of the Expert Report: This begins a discussion of the study by K.H. Fowler, 1960, titled "Preliminary Report on Ground Water in the Salmon Falls Area, Twin Falls County, Idaho."

Page 8, top paragraph of the Expert Report: There is no clear delineation between what K.H. Fowler said in his study and what the writer of the Expert Report interjected as his own thoughts. There is no use of quotation marks, nor page references from a 17 page study. The lead sentence of the Expert Report says: "This report states" when in fact in several places of the Expert Report the study does not state what is written. For instance:

It is unlikely Mr. Fowler would state that: "The precipitation and streams are located on the east side of highway 93..."

Further, in the second paragraph, the term "Salmon Falls Canal Company" is used instead of the official name of the Salmon River Canal Company. Mr. Fowler used the correct name.

The entire last paragraph on page 8 of the Expert Report is mostly a direct quote from page 7 of the study but no quotations are used. Additionally the term "Salmon River Creek Reservoir" is used,

which is an inaccurate name for the reservoir in question. The official name for the reservoir is: "Salmon Falls Creek Reservoir" per the Rogerson Quadrangle map.

Also, in the same paragraph, the Expert Report writer states that: "...very little ground water is discharged into the creek from the Salmon Falls Area between the Salmon River Creek Reservoir and the Roseworth crossing (Lily Grade)." The reservoir is roughly 11 miles long, and the Fowler study (page 7, below table) refers specifically to the dam location: i.e.: "...Salmon River Canal Co. dam..." to identify the specific stretch of Salmon Falls Creek (between the dam and Roseworth crossing) that receives little ground water discharge. The Expert Report generalizes where specifics should be used.

Page 8, last paragraph of the Expert Report: This begins a discussion of the study by Eakin and Moore, 1968, titled: "Water Resources-Reconnaissance Series Report 48, Water- Resources Appraisal of the Snake River Basin in Nevada."

Again, there is only occasional identifying of direct quotes nor are there reference page numbers of the study which is 102 pages in length.

On page 9 of the Expert Report, the long quote in the lower half of the page misquotes the term evapotranspiration and instead uses the term "evaporation". The difference is important since a large percentage of the ground water in the Shoshone Creek valley is lost to plant uptake (evapotranspiration). According to the Eakin/Moore study on page 27, last paragraph, it states: "Ground water is discharged from the Nevada part of the Snake River basin largely by evapotranspiration within the basin and by discharge to the perennial streams and thence out of the State as outflow".

The concluding line of the above cited paragraph on page 9 of the Expert Report refers to the uncertainty of determining potential versus actual recharge to the aquifer in the study area. However, this conclusion of the study refers to all seven basins looked at in the study. But, a closer look at just one of these basins, specifically the Salmon Falls Creek/Shoshone Creek confluence area (page 28, of the study, last paragraph), concludes that the underflow into Idaho is "impeded significantly", no matter what the potential versus actual recharge may be.

Page 10, top paragraph of the Expert Report: The production capability of the two wells: "in close proximity to Shoshone Creek" could likely come from the effect of the stream resupplying the pumped ground water, and not an overabundance of ground water. The Study states, on page 28 : "The shallow ground water along the Salmon Falls Creek near the mouth of Shoshone Creek implies that underflow from that area is impeded significantly, most probably by a north-trending fault along the east side of the hills and west of U.S. Highway 93".

The Moore and Eakin study findings do not support the conclusion of the writer of the Expert Report who implies there is "prolific" ground water underflowing into the Salmon Falls Tract. This is not the case, according to the study.

Page 10 , center paragraph, of the Expert Report: This begins a discussion of the Study by Crosthwaite, 1969: "Water Resources of the Salmon Falls Creek Basin Idaho-Nevada"

Page 10, center paragraph of the Expert Report. The Expert Report writer makes the statement that: "The natural discharge direction of the ground water flow is northward towards the Twin Falls Tract

and the Snake River.”

What is not pointed out, however, is that on page D21 and D22 of the Study it is stated: “The general slope of the water table is to the northwest...” This flow direction would direct any ground water toward the west and away from the new proposed Points of Diversion.

Page 10 , last paragraph of the Expert Report. The conclusion of the writer is: “... the aquifer flows northward towards the Snake River.” Again this is only a general direction. See my comments immediately above. The writer does however, in the last line of page 10 disclose a north northwest direction.

Page 12, top paragraph of the Expert Report. The writer of the Expert Report states: “In aquifer regions of basalt, granite or other solid rock formations, the water is more likely to be moving in areas of geologic faults, cracks or fisher areas of the rock formations. The ability of a well to supply an adequate amount of water in this type of aquifer may depend on whether the well connects with or was drilled through the underground channels formed by the faults, cracks and fishers.”

This is precisely the situation in the area of the new irrigation well and why a valid pump test should be performed to determine if an existing domestic well is in the same fault, crack or vein that the new irrigation well would be sharing. If they are both in the same water course, injury will occur.

Page 12 , last paragraph of the Expert Report: In a discussion of what monitoring wells should be used for analysis by the Applicants, the Expert Report writer points out that there was insufficient data points to use a specific USGS well in the Applicant's analysis. The point made was: “The intermittent data is not sufficient to define any statistically sound seasonal trends or long-term trends for well 11S16E-20CCC.”

This statement can also apply to the scarcity of data points in the pump test attempted by the Applicants. The Applicant's pump test should also be considered insufficient, considering the minimal data points collected during the test which was approximately 18 hours, but had less than 3 hours of data recorded.

Page 16, top paragraph of the Expert Report: “October 2015” is listed as the pump test date, but this date has not yet arrived.

Page 26, Table 2: The last entry depicts the location of the “Pump Test Well” in a location approximately 3 miles to the northwest of where it is actually located. Actual location is T11S R16E 8 SWSW, but the table shows the pump test well in T10S R15E 36SENW.

Page 26, paragraph 2 of the Expert Report: Referring to accurate pump tests and high discharge rates, the writer states: “The high discharge rate is important to stress or maximize the ability of the aquifer to provide water.”

If not done properly, accurate calculations can not be made to obtain hydraulic conductivity values which can be applied to the Applicant's computer modeling. The writer goes on to say that for irrigation wells: “...large discharge pump tests must be performed with large pumps for a period of several hours to several days”.

The pump test performed on 7, 8 October 2014, by the Applicants did not maintain a steady discharge rate, and only ran for less than 18 hours, and during that run time, less than 3 hours of data

were recorded. Also, while the test was being run, there was no monitoring of the neighbor's existing domestic wells to determine if the new irrigation well is in the same faults/cracks as the domestic wells. If they are in the same fault, injury to the domestic wells will occur. On all accounts, the pump test is inadequate.

Page 29 , paragraph F-1 of the Expert Report: The incorrect transfer number was used. (#79380 instead of #79384) for this particular Expert Report.

Page 29-30 , Paragraph F-3 of the Expert Report: "Injury to Other Water Rights and Domestic Wells". The writer of the Expert Report concludes: "It is expected that no significant hydraulic impact on local domestic wells will occur".

Saying that there will be no injury to domestic wells without properly monitoring those same domestic wells during a valid pump test is not an accurate statement. The computer modeling conducted by the Applicant can not, with certainty, conclude that any domestic wells will not be injured since the modeling used by the Applicants assumes a uniform subsurface geology which is not the case in fractured basalt. Therefore, the computer modeling conclusions can not be relied upon to state that there will be no injury to existing local domestic wells.

A pump test of a duration of at least 48 hours, with continuous data recordings, and simultaneous monitoring of domestic wells must be accomplished prior to any water transfer being approved by IDWR.



Edward S. Smith
Protestant

Date 28 Feb 2015

Exhibit B

POSITION PAPER

3 March 2015

On the Ground Water in the Leno-Well Area

by
Edward S. Smith

Reference: Water Transfers: # 79357, #79380, #79384, #79466

I contend that the hydrology and the terrain between the Leno-Well and the new Points of Diversion do not support the proposed water rights transfers.

References:

- A. Preliminary Report On Ground Water in the Salmon Falls Area, Twin Falls County, Idaho. Geological Survey Circular #436, by K.H. Fowler, 1960.
- B. Water Resources of the Salmon Falls Creek Basin, Idaho-Nevada. Geological Survey Water Supply Paper #1879 D. By E.G. Crosthwaite . 1969.
- C. Water Resources-Reconnaissance Series, Report #48. Subtitled Water-Resources Appraisal of the Snake River Basin In Nevada. Prepared Cooperatively For Geological Survey, US Department of the Interior. By D.O. Moore and T.E. Eakin, July 1968
- D. Geohydrology and Development of a Steady Ground-Water Model for the Twin Falls, Idaho Area. By D.M. Cosgrove, G.S. Johnson, C.E. Brockway, C.W. Robison, University of Idaho. Dec 1997.
- E. IDWR Administrator's Memorandum #24, Dated 21 December 2009.

ARGUMENTS AGAINST THE TRANSFERS FOLLOW:

EARLIER TRANSFERS ARE NOT APPLICABLE.

Earlier transfers of water from the Leno-Well have no bearing on these proposed transfers. There have been three previously approved transfers from the Leno-Well (#47-17569, #47-17590, and #47-17572). However, the proposed transfers (particularly the new irrigation well) are close to several neighbor's existing domestic wells. IDWR has the responsibility to evaluate potential injury to the existing domestic wells (Ref E, Para 5c). This paper will show there is reason to conclude that the Leno-Well water actually flows into the Shoshone Creek valley, Nevada where evapotranspiration takes a toll, and raises the question of how much water from the Leno-Well will actually arrive at the new Points of Diversion. If the amount is less than the full transferred amount, then the "back-fill to the additional water being extracted will come from the neighbor's domestic wells. Injury will result. So just because IDWR granted earlier requests from the Leno-Well, these current proposed transfers do not qualify for a "Me too" approval as alluded to in the IDWR Memorandum for each proposed transfer (Memo's dated: 9, 17, and 18 Jun 2014).

TOPOGRAPHY

The topography in the Leno-Well area does not support ground water nor surface water movement to the North. A cut-view of the terrain elevations from the Leno Well looking north to the proposed usage sites and south to Shoshone Creek, Nevada is shown in TAB A. Conveniently, the proposed usage sites and the Leno-Well are along the same North/South grid line. As can be seen in the cut-view, there is an approximate 880 foot vertical rise from the Leno-Well going North to the dairies and a gradient that is twice as steep going into Nevada than toward the dairies. This supports a surface and ground water flow into Nevada.

HYDROLOGIC UNIT BOUNDARIES

Hydrologic Unit Codes (HUC) are designations of drainage areas in the United States. Their size ranges from larger areas like the entire North West Region of the United States down to individual drainages in specific areas like the Leno-Well area which includes Mule Creek, Twin Springs Creek and Lost Creek. At TAB B, The HUC boundaries for this area are shown, and the boundaries clearly show that these streams flow SOUTH into Shoshone Creek, Nevada, which in turn joins Salmon Falls Creek. This confluence is upstream from the San Jacinto gage station which is located approximately 3 miles South of Jackpot, Nevada. Also of note is that the HUC boundaries extend well into Idaho. I contend that the ground water also flows in the same direction, that is South, toward Shoshone Creek in Nevada. This is supported by a quote from (Ref C, page 23):

Quote: "Ground water commonly is at or near land surface in the axis of the valleys along the flood plains of the principle streams. The water table slopes upward toward the adjacent mountains but ordinarily with a somewhat lower gradient than the overlying land surface."

My interpretation is that the ground water from the Leno-Well will follow the water gradient in a downward flow toward Shoshone Creek in Nevada.

A further reference: (Ref C, page 24)

Quote: "The principal streams in the Basin function as ground water drains. Most of the ground water not removed by evapotranspiration in the adjacent flood plains reaches the stream and leaves the area as streamflow. Thus, the low flow of the principle streams is largely supported by ground water discharge either through springs or by seepage."

My interpretation is that the Ground Water under the Leno-Well flows South and is either used by vegetation in the area through evapotranspiration, or becomes surface water while only a small amount remains as ground water.

Another reference from (Ref C, page 28) states:

Quote: "The shallow ground water along Salmon Falls Creek near the mouth of Shoshone Creek implies that underflow from that area is impeded significantly, most probably by a north-trending fault along the east side of the hills and west of US Highway 93."

My interpretation is that the ground water is being backed up and becoming closer to the surface, thus subjected to additional loss through evapotranspiration and conversion to surface water as streamflow.

At TAB C is a depiction of the streams in the Jackpot area.

MAP REVIEW

Topographical maps of the area show that the land in the Jackpot area is relatively flat and irrigated (personal observation bears this out). Therefore, as ground water approaches Shoshone Creek, it becomes more broadly susceptible to evapotranspiration and migration to the surface as flood waters or streamflow. Further support for this conclusion is found at (Ref C, pg 27), quote:

"Ground water is discharged from the Nevada part of the Snake River Basin largely by evapotranspiration within the basin and by discharge to the perennial streams and thence out of the State as outflow. Some ground water also leaves the State as underflow. For the most part, ground-water discharge by evapotranspiration occurs in the flood plain of the principal streams and their tributaries,..... Some ground water also is lost by evapotranspiration from spring or seep areas in the mountains. Discharge also occurs in areas adjacent to the flood plain where the ground water is relatively shallow, such as locally.....in parts of the lower Salmon Falls Creek Valley."

A closer look at a topographical map reveals that there are numerous mountain springs feeding the streams of Twin Springs Creek, Mule Creek, and Lost Creek, not to mention Shoshone Creek. This is further evidence that the ground water is flowing in the same direction as the creeks, which is South toward Shoshone Creek in Nevada.

DOUBLE CONSUMPTIVE USE

Consumptive use is defined in Idaho Code 42-202 (1) as: "...that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right"... " " Authorized consumptive use" means the maximum consumptive use that may be made of a water right" (Tab D)

I contend that once water is consumed by whatever means identified above, it is not returned to the state and therefore cannot be reused.

Idaho does not have a "Double Consumptive Use" provision. The referenced studies, highlighted by quotations in this paper, indicate a substantial amount of the Leno-Well ground water is consumed through evapotranspiration in the Shoshone Creek valley. The water being proposed for use at the new Points of Diversion are, in large part, intended to be consumed. This would create a reuse of previously consumed water which by definition is not available for reuse in the state.

WATER FLOW DIRECTION

Whatever the amount (Ref C, page 27, implies a small amount) of Leno-Well ground water remaining in the subsurface, the fractured basalt underlying the Salmon Falls Tract creates an uncertain maze of varied conditions affecting its permeability, direction of fractures, and volume of available water.

Additionally, the water contour levels identified in Ref B, page D22, depicted at TAB E, show a generally Northwest flow of ground water which would divert ground water to the west of the new Points of Diversion.

This is supported by a quote from Ref B, page D21:

Quote: "The general slope of the water table is to the northwest...."

And Ref A, page 6:

Quote: "In general the direction of ground-water movement is to the north and northwest toward the Snake River...."

IDWR's REQUIREMENT

In light of the above revelations, it would appear that a large portion of the Leno-Well water is consumed through evapotranspiration as it moves through the Shoshone Creek valley, and therefore the additional water that would be extracted at the proposed sites would come from the water of the existing domestic wells in the area and not "back-filled" by the Leno-Well water. IDWR is required, per Ref: E (Administrator's Memorandum #24, Paragraph 5c) to determine if there is possible injury to other water rights.

Quote: "For any application for transfer, the department must determine whether the proposed change will injure any other rights, whether junior or senior in priority to the right being changed."

This has not been accomplished. Past transfers are not an automatic pathway for approval for these proposed transfers, and IDWR's reliance on the Applicant's self-serving computer modeling analysis and incomplete pump test to approve the transfers is not equitable to neighbor's with existing domestic wells.

CONCLUSIONS

The proposed water transfers should be denied. There is a real possibility of a substantial amount of the Leno-Well water being consumed through evapotranspiration in the Shoshone Creek valley, Nevada.

The definition of consumptive use states, in summary, that once water is lost to evapotranspiration it does not return to the state. The water transfer proposals are attempting to consume water that has already been consumed, which by definition is not possible. The transfers should be denied.

All reference studies and maps in this paper show that the proposed transfers are not supported by the topography nor hydrology in the Salmon Falls Basin. The only study dealing specifically with the Leno-Well area is the Recon #48 study (Ref C) and it does not support the notion of the Leno-Well supplying the new Points of Diversion with the full amount of the proposed water transfers. The transfers should be denied.

Potential injury to existing domestic wells in the area near the proposed extraction sites has not been properly analyzed. IDWR is required to analyze the potential impact to existing wells, to include domestic wells, per IDWR's Administrator's Memorandum #24 (Ref: E, Para 5c). This has not been

accomplished, therefore the transfers should be denied.

Public interest, whether local or more broadly defined, is served when government agencies act in a manner that conveys an appropriate application of science, common sense, and justice to those impacted, otherwise the public trust fades in support of our government and its agencies.

Respectfully,

A handwritten signature in cursive script, reading "Edward S. Smith". The signature is written in dark ink and is positioned below the word "Respectfully,".

Edward S. Smith

TERRAIN PROFILE (LOOKING EAST)

TAB A

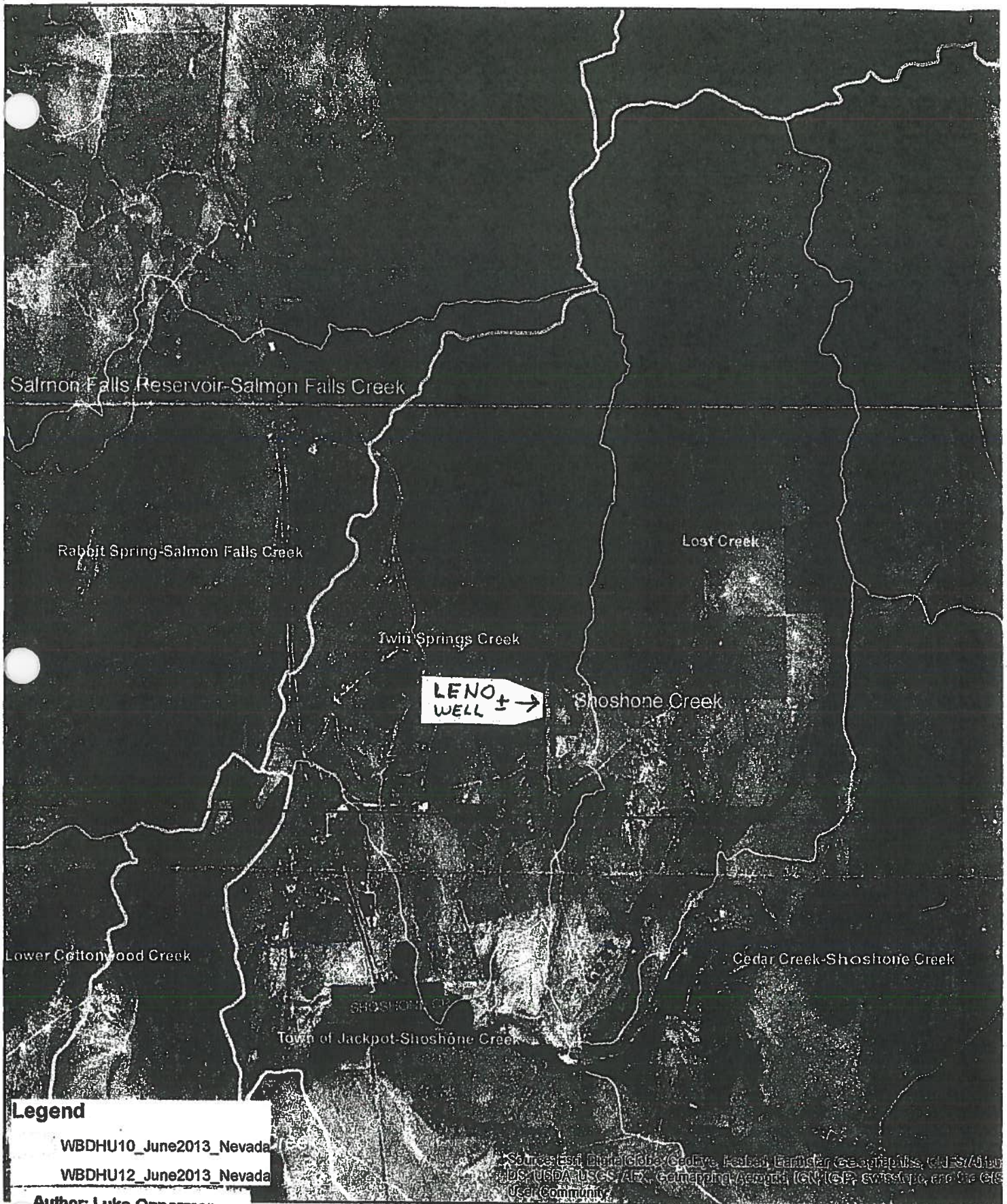


STATION	ELEVATION	CUT	LINE	IS	EAST	OF	SECTION	DOWN	STATION
140	67	18	19	30	31	6	7	18	19
141	67	18	19	30	31	6	7	18	19
142	67	18	19	30	31	6	7	18	19
143	67	18	19	30	31	6	7	18	19
144	67	18	19	30	31	6	7	18	19
145	67	18	19	30	31	6	7	18	19
146	67	18	19	30	31	6	7	18	19
147	67	18	19	30	31	6	7	18	19
148	67	18	19	30	31	6	7	18	19
149	67	18	19	30	31	6	7	18	19

← NORTH

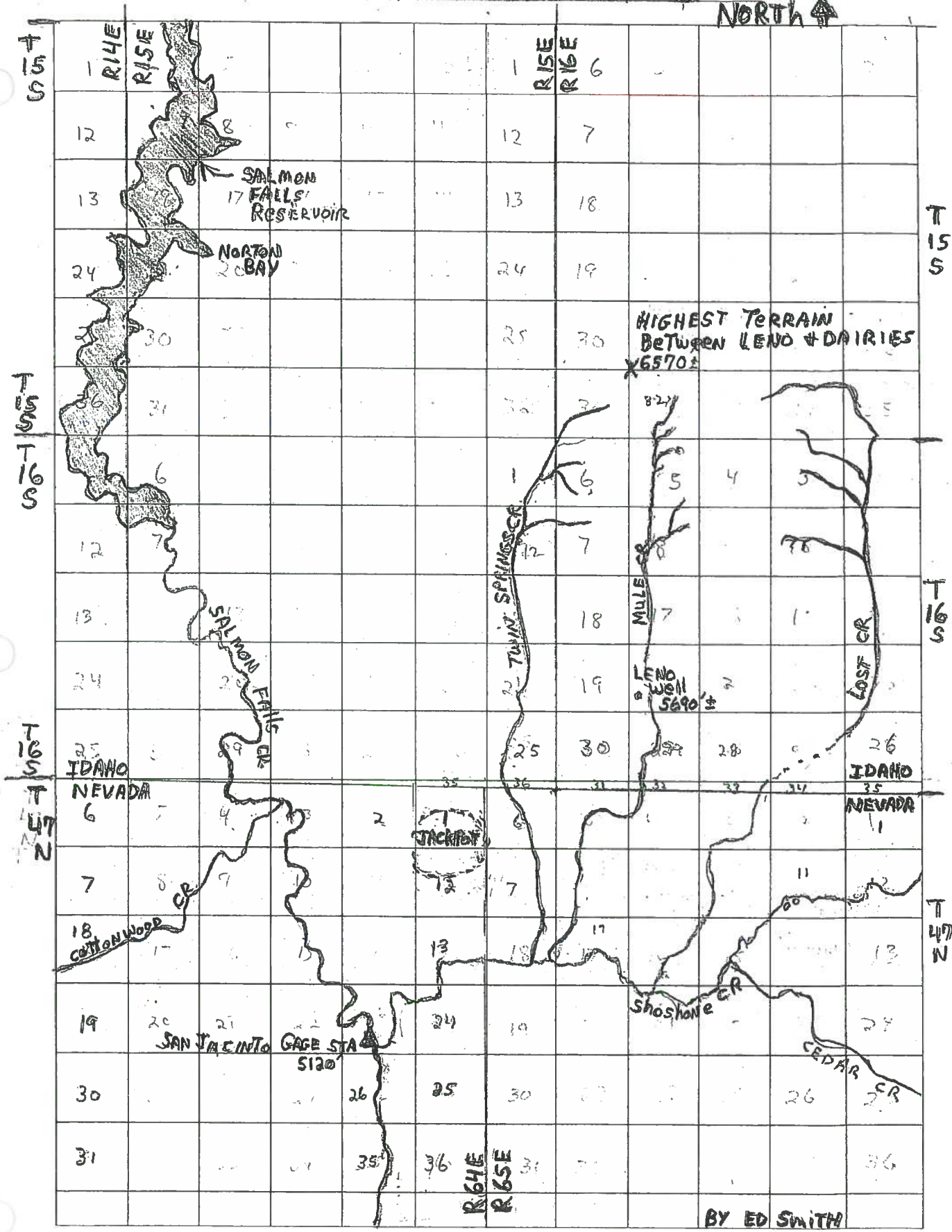
← IDRAHO NEVADA →

Basin Boundaries per the USGS, Huc 10 and Huc 12



STREAMS IN JACKPOT AREA

NORTH 



BY ED SMITH
TAB C



Idaho Statutes

TITLE 42

IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 2

APPROPRIATION OF WATER -- PERMITS, CERTIFICATES, AND LICENSES -- SURVEY

42-202B. DEFINITIONS. Whenever used in this title, the term:

(1) "Consumptive use" means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.

(2) "Digital boundary" means the boundary encompassing and defining an area consisting of or incorporating the place of use or permissible place of use for a water right prepared and maintained by the department of water resources using a geographic information system in conformance with the national standard for spatial data accuracy or succeeding standard.

(3) "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

(4) "Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.

(5) "Municipal provider" means:

(a) A municipality that provides water for municipal purposes to its residents and other users within its service area;

(b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or

(c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.

(6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

(7) "Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water

TAB D

GROUND WATER CONTOURS

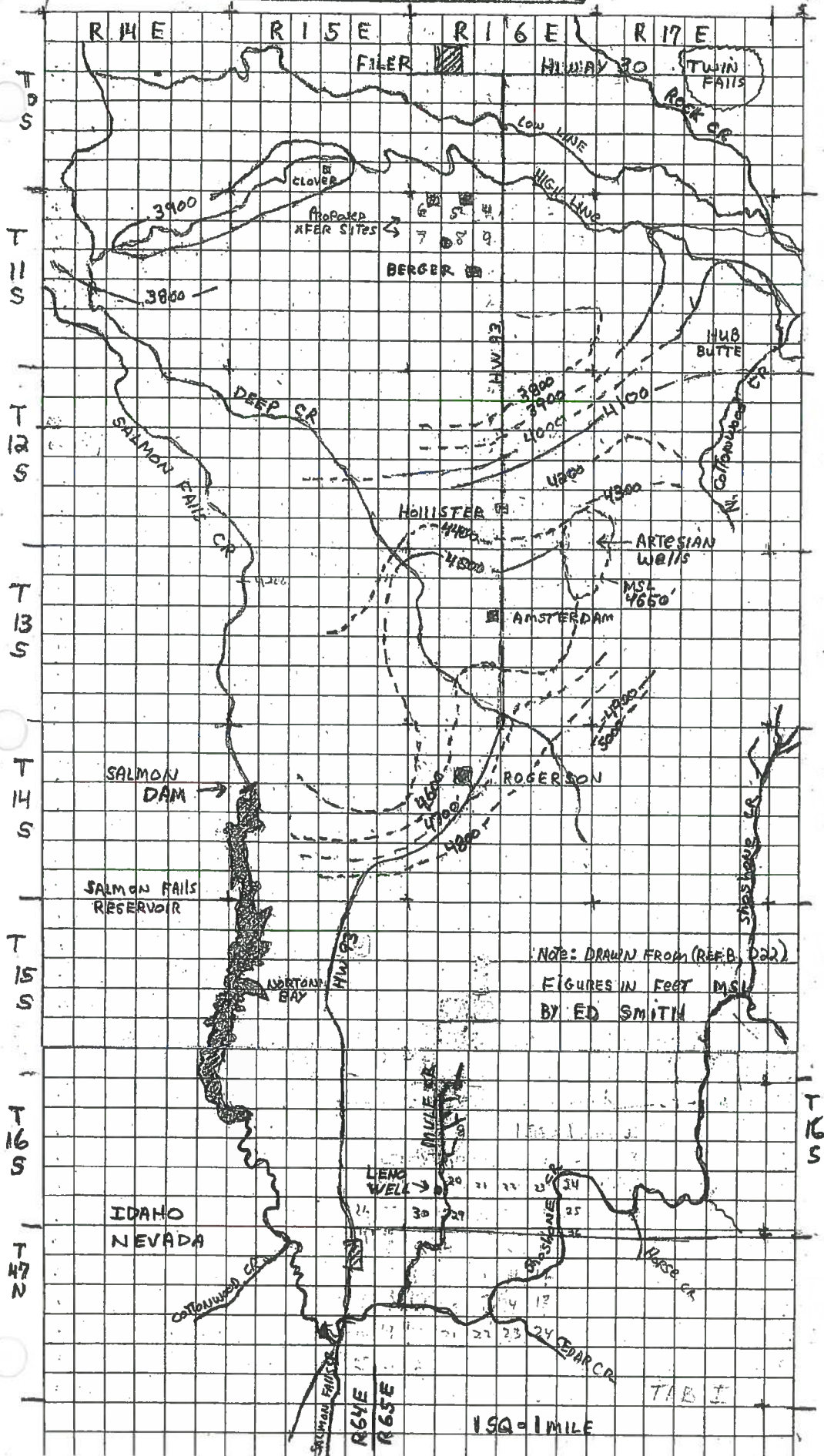


Exhibit C

14:02:12-14:03:22

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1 was. And ever since then I have been essentially
2 retired.
3 Q. (BY MR. THOMPSON) So would you agree you're
4 participating in this case, these four transfer hearings
5 as a lay witness?
6 A. Yes.
7 Q. And what facts based on personal knowledge do
8 you have to present in each hearing?
9 A. What facts? Well, through my research of
10 these studies we just talked about, I think you can --
11 if you read them closely and often enough, you can kind
12 of get a -- you get a definite flavor for how the water
13 is flowing through the area, and, in particular, the
14 recon 48 report shows a south flow of the groundwater in
15 my view. And so I just made those calculations.
16 But initially when I put in my protest, I
17 didn't know all of this. I just thought it was strange
18 to transfer water from Jackpot, essentially, south to
19 Filer. I mean, this doesn't sound right to me.
20 Q. Do you have any training as a hydrologist?
21 A. No.
22 Q. Any training as an engineer?
23 A. No.
24 Q. So would you agree that you're not relying
25 upon any specialized scientific training or past work

14:04:58-14:05:57

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1 say, well, here's maybe a best way to do it. Because
2 this terrain in Europe, as we were talking about at the
3 time. You know, they have all of this rolling terrain
4 all of this -- and you can hide behind the trees. So
5 the long and short of it is I'm not an expert at
6 modeling by any means, but when Greg Sullivan presented
7 his modeling, it wasn't completely foreign to me. I
8 knew kind of how you can input and change the output.
9 Q. (BY MR. THOMPSON) Sure. But you don't have
10 any training as a hydrologist?
11 A. No.
12 Q. A geologist?
13 A. No.
14 Q. An engineer?
15 A. No.
16 Q. Have you designed any irrigation models?
17 A. No.
18 Q. Do you have any experience with well drilling?
19 A. Other than my own. We all prayed over the
20 hole that we we're going to drill that was it.
21 Q. You personally? I mean you're not a well
22 driller?
23 A. No. No.
24 Q. So you're not participating in this matter as
25 an expert witness; would you agree with that?

14:03:27-14:04:52

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1 experience for your testimony?
2 A. I would say that I have a -- from a management
3 point of view, not from an individual one. One of my
4 assignments in the Army was something called -- what
5 they called "combat developments." And that dealt with
6 -- in the early days. This is, what, '80s. I mean, you
7 would model.
8 MS. SMITH: Before the Cold War end.
9 THE WITNESS: Still in the Cold War. You
10 would model the long bow Apache helicopter, put it in a
11 tow missile, which is a wire guided deal. You've got to
12 be closer, and you've got to see your target and shoot
13 it, versus put it on a hell fire missile, which has a
14 range of over 5 kilometers.
15 And so then you model what happens if you use
16 just the cobra, the old cobra. Then you model it with a
17 scout over here with a set of binocular and identifying
18 the target. And then you've got all of this terrain in
19 between. And pretty soon you get shot because some guy
20 over here with a BB gun shoots at you. So then you step
21 off your capabilities. And the further you get back,
22 the more your survival increases. And the more you can
23 step back your shooter which is a bigger aircraft and
24 get your other scout over here, at a different angle,
25 you can begin to develop some tactics of such that you

14:05:59-14:07:19

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1 A. Absolutely.
2 Q. Absolutely?
3 A. I am not an expert witness.
4 MS. SMITH: So why are you here?
5 THE WITNESS: Yeah, why am I here?
6 Q. (BY MR. THOMPSON) And, again, that gets back
7 to -- and we'll go through these exhibits -- but as a
8 lay witness who doesn't have any scientific training on
9 these type of matters, what facts do you intend to
10 provide testimony about at the hearing?
11 A. The facts as presented in the studies, I think
12 I have accurately quoted their conclusions in certain
13 sections that dealt with the issue I was talking about,
14 which is what happens in Nevada. Water gets there out
15 of the Leno well. And I think I have made a fairly
16 accurate depiction of the comments that were made in
17 those studies. And in my position paper, I laid it out
18 as to how they would support my understanding of the
19 situation.
20 Q. As far as those studies, you wouldn't have any
21 past training or work experience to inform you as to
22 whether or not those studies were correct or incorrect,
23 would you agree with that?
24 A. Well, not from a technical point of view, but
25 the fact that they were written by experts, I mean, I

14:07:22-14:08:59

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1 was calling them experts USGS guys they're geologists
2 and if a layman reads those studies with some type of
3 diligence, I think an ordinary person can form opinions
4 about what's going on in certain areas if you're
5 interested in that. So I think I can make -- I'm not an
6 expert by any chance by any means but I can certainly
7 make a -- draw a conclusion based on written words if
8 I'm trying to get an overall flavor for what I think is
9 happening in the area.

10 Q. I guess my question is: You don't have any
11 past training or work experience that would inform you
12 as to whether you should agree or disagree with what an
13 expert has written about a subject on that area?

14 A. No. My past experience would not inform me of
15 that.

16 Q. Let's go to the next exhibit. Can you
17 identify that for the record?

18 A. This is my -- I think this is my first one.
19 Is this the first one. The last word there is
20 unconvincing. Yes this is my first protest, filing of
21 protest to the three groundwater transfers out of the
22 Leno well area 357, 380 and 384.

23 Q. Why did you protest these applications for
24 transfer?

25 A. Because -- well, it says right here I think.

14:10:47-14:11:48

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1 thought that much water out there that you will escape
2 injury.

3 Q. So I guess that's my next question why do you
4 contend the groundwater is scarce out there and by there
5 where do you mean?

6 A. Salmon Tract. Because that's where the
7 irrigation system.

8 Q. So what would you define the Salmon Tract to
9 be?

10 A. The Salmon Tract is the area that potentially
11 and originally designed to be watered by the Salmon
12 River Canal Company irrigation system. And it extends
13 from Rogerson in kind of a V shape up to the Highline
14 Canal.

15 Q. Which would include this area where the
16 proposed transfers are filed?

17 A. Yes.

18 Q. And you contend the groundwater is scarce out
19 there?

20 A. Yes.

21 Q. And what's the basis for that contention?

22 A. Well, the fact that the irrigation company
23 shut off the water on the 23rd of July last year
24 indicates that there's not a lot of water out there.

25 Q. That's the surface water system?

14:09:05-14:10:44

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1 Whenever -- the Salmon Tract is an extremely -- in my
2 view, an extremely short water area. And whenever
3 additional wells, particularly an irrigation well, in
4 this case the 384, is put next to existing domestic
5 well, I think there's a real chance for injury to occur
6 to those existing wells.

7 And then I also -- but at the time -- I didn't
8 have any -- at this point I had no studies in hand. It
9 was just a gut feeling that this is too far guys it
10 doesn't make sense in this terrain. And then I said,
11 the groundwater transfer in 30 plus or minus miles I
12 didn't know what it was south of the magic under the
13 proposed extraction site is unconvincing.

14 Q. So who do you contend was in jeopardy of being
15 adversely impacted by the transfers?

16 A. Well, at that time I think anybody that was in
17 the area could have been injured. I just know where --
18 you don't know how the water flows in this fracture --
19 I'm speaking now from what I've gained over the last
20 couple of months you've got fractured basalt out there
21 Travis and it's not like we got a sand that we just know
22 is going to come evenly all of the way through. If
23 you're unfortunate enough to be in a fracture of the
24 basalt and you've got a new well sticking ahead of you
25 or behind you over whatever the case may be there's just

14:11:50-14:13:05

Page 33

1 A. That's the surface water system, yes. But the
2 surface water is used to irrigate the crops,
3 theoretically. Whatever makes it to the crops. I mean,
4 about 30,000 acre feet a year out of the 75,000 diverted
5 I think is swallowed up by the delivery system. It just
6 it doesn't make it.

7 Q. How do you know that?

8 A. If you read the preliminary report, I think it
9 pretty well.

10 Q. That number, that's a number you got from
11 somebody else, and you accept that?

12 A. Yes. But no. The 23rd of July I got that
13 from the Salmon River Canal Company management people
14 down there.

15 Q. You asked them how much water they lose in
16 their system?

17 A. No. No. The loss I got from a study, the
18 fact that it was turned off.

19 Q. Okay. Gotcha?

20 A. In July. But then in 2011 they had a great
21 year and went up to October. 85,000 acre feet they
22 delivered.

23 Q. Again, getting back to the groundwater
24 question, why do you contend that groundwater is scarce
25 in that entire area?