

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW
950 W. BANNOCK STREET, SUITE 520; BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202 www.msbtlaw.com

LOREN W. ANDERSON
STEPHANIE J. BONNEY≈
SUSAN E. BUXTON*
PAUL J. FITZER
JILL S. HOLINKA
BRUCE M. SMITH
PAUL A. TURCKE^o
CARL J. WITHROE»*

RECEIVED

JUL 14 2009

DEPARTMENT OF
WATER RESOURCES

JOHN J. MCFADDEN *Of Counsel*
MICHAEL C. MOORE[‡] *Of Counsel*

» Also admitted in California
* Also admitted in Oregon
^o Also admitted in South Dakota
≈ Also admitted in Utah
[‡] Also admitted in Washington

July 10, 2009

Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

**Re: In Re Matter of Application for Transfer No. 67067 (fka 5647) and
Application for Permit Nos. 72-07577 and 72-07578**

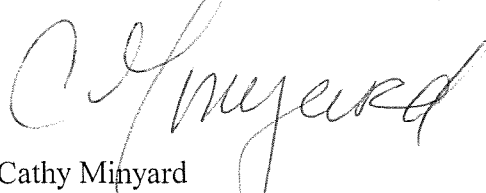
To Whom It May Concern:

Enclosed please find an original and one copy of Respondent's Response to Motion to Resume Application in the above matter, a copy of which was faxed to the Department this date. Please file the original and return a conformed copy to our office in the enclosed self-addressed stamped envelope. Thank you.

Done
SRX

Sincerely,

MOORE SMITH BUXTON & TURCKE, CHARTERED



Cathy Minyard
Legal Assistant to Bruce M. Smith

/cam
Enclosure

RECEIVED

JUL 14 2009

DEPARTMENT OF
WATER RESOURCES

(Rec'd via

fax 7/13/09

Bruce M. Smith, ISB# 3425
MOORE SMITH BUXTON & TURCKE
225 North 9th Street, Suite 420
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorneys for Protestant L&M Angus Ranch, Inc.

STATE OF IDAHO DEPARTMENT OF WATER RESOURCES

In Re Matter of Application for)
Transfer No. 67067 (formerly known)
As 5647) and Application for Permit)
Nos. 72-07577 and 72-07578 in the)
Name of Mar. L. and/or Joanne)
Lupher, dba Epicenter Aquaculture)
_____)

**RESPONSE TO MOTION TO
RESUME APPLICATION**

COMES NOW Lois Von Morganroth, dba L & M Angus Ranch, and responds to the above purported "motion" which should be denied as unsupported and misleading. The petitioners' "relevant facts" cited for support of this very unusual request are incomplete and misleading.¹

First, the Hearing Officer issued his Recommended Order in 2006, over three years ago, based on the petitioners' blatant failure to comply with the Hearing Officer's orders. It would be prejudicial and unfair to the protestant to now "resurrect" these applications at this point. The protestant's position is that this matter is, and has been, completed and petitioners are estopped from asking to have the applications processed due to the passage of time and the petitioners' failure to comply for over three years with the order.

¹ The protestant recognizes some deference to Counsel for the petitioners, who is the fifth attorney to work on these matters for the petitioners, in that he may not be aware of other underlying facts and the history which bears on this matter.

ORIGINAL

Next, the Lease referenced by the petitioners does not “control” anything related to these applications. In fact, the Lease has since been terminated by the Lessor.

Equally as compelling, petitioner has failed to disclose that the first lawsuit, which is mentioned in petitioners’ motion and that was dismissed by the district court, has now been supplanted by a second suit filed by the petitioners. Many of the same issues are involved. To suggest that the “litigation” has been resolved, and that these applications should be further considered is strange, especially since it was the petitioners who have now filed yet another suit.²

Importantly, the first lawsuit was dismissed by the Court *over the objection of the petitioners* because of petitioners’ failure to prosecute the district court case. Therefore, it is highly misleading to argue that the first suit has been “dismissed” without explaining that the petitioners waited several years, then filed another suit, yet seek to have the applications somehow resurrected because the litigation is “over”.

Finally, the IDWR should be aware that there is no agreement by the petitioners and the protestant over the continued processing of these applications. Rather, the protestant has previously notified the IDWR (Twin Falls) of protestant’s standing objection to any processing of these applications. Petitioners have also failed to disclose this fact. In fact, it appears that the Twin Falls IDWR office was not even notified of petitioners’ motion.

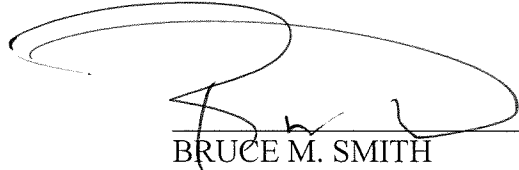
CONCLUSION

There is no basis for “resuming” any consideration of these applications. The motion should be denied as frivolous, without basis, and highly prejudicial. The IDWR should immediately end any further consideration of these applications as the Lease involved does not

² Counsel in this matter is not involved in the district court proceeding.

control, and the applicants have never complied with the directions and orders of the Hearing Officer which led to his order dismissing the applications.

RESPECTFULLY SUBMITTED this 10 day of July, 2009.

A handwritten signature in black ink, appearing to read "B. M. Smith", is written over a horizontal line.

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHTD.

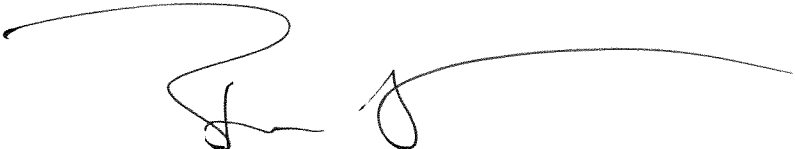
CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2009, a true and correct copy of the foregoing RESPONSE TO AFFIDAVIT OF MARK LUPHER IN RESPONSE TO ORDER TO SHOW CAUSE was served upon the following by the method indicated below:

Jerry R. Rigby
RIGBY, ANDRUS & RIGBY, Chtd.
P.O. Box 250
Rexburg, Idaho 83340

☒ via U.S. MAIL
☐ via HAND DELIVERY
☐ via OVERNIGHT MAIL
☐ via FACSIMILE

Facsimile: (208) 356-0768



BRUCE M. SMITH

RECEIVED

JUL 02 2009

DEPARTMENT OF
WATER RESOURCES

Rec'd by fax
4/29/09

Jerry R. Rigby (ISBN 2470)
RIGBY, ANDRUS & RIGBY, Chtd.
P.O. Box 250
Rexburg, ID 83440
Telephone: 208-356-3633
Facsimile: 208-356-0768

Attorneys for Applicants

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 (formerly
known as 5647) and APPLICATIONS FOR
PERMIT NOS. 72-07577 and 72-07578 IN
THE NAME OF MARK L. and/or JOANNE
LUPHER, dba EPICENTER
AQUACULTURE

SOURCE: Groundwater

COUNTY: Twin Falls

MOTION TO RESUME APPLICATION

COME NOW, MARK L. and JO ANNE LUPHER, dba EPICENTER AQUACULTURE
(hereinafter "Petitioner"), by and through their present counsel, Jerry R. Rigby, of the law firm of
Rigby, Andrus & Rigby, Chtd. and hereby petitions the Department of Water Resources to
resume the application heretofore filed on the above described water right.

Although the application was initially heard by Peter R. Anderson, IDWR hearing officer,
which resulted in an order Recommended Order Denying Petition for Reconsideration of a
Default Order on December 7, 2006, no action has been taken by the Department and therefore,
the Petitioner's Application continues to be pending before the Department.

Petitioner submits that the following facts are relevant to this cause of action before the
Department:

(1) The original Lease, upon which the right to the use of the lands for fish production is
granted to Petitioner, continues to control.

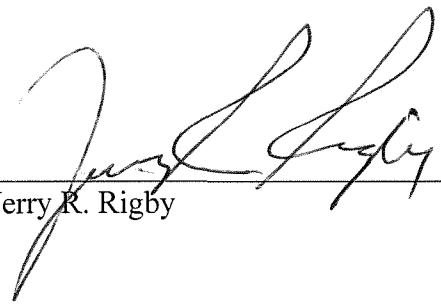
(2) There is absolutely nothing within said lease which prohibits the amount of water claimed in said Application, providing certain impacts do NOT injure the Landlord.

(3) The law suit in District Court for the County of Custer (CV2000-101) upon which the Hearing Officer, in part, based his recommendation has been dismissed as of January 31, 2006.

(4) The major structural facilities presently upon the leased lands and the additional water proposed to be diverted would support the full application of water as contained in Petitioner's Application without injury to Landlord.

In support of this motion, petitioner, hereby attaches hereto an update prepared by Charles E. Brockway, of Brockway Engineering, PLLC, in support of the resumed application.

Dated this 29th day of June, 2009.



Jerry R. Rigby

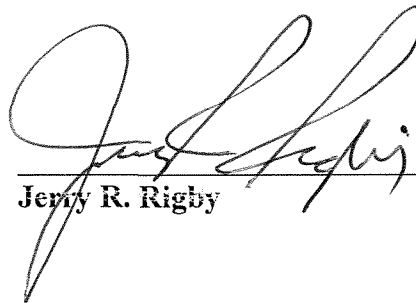
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29th day of June, 2009, a true and accurate copy of the foregoing was sent via facsimile and by U.S. Mail postage pre-paid and addressed to the following:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
208-287-6700

Bruce M. Smith
Moore Smith Buxton, et al
950 W. Bannock, Ste. 520
Boise, ID 83702
208-331-1202

David R. Tuthill, Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720
208-287-6700



Jerry R. Rigby

Supplemental Narrative in Support of Water Right Permits and Transfer

Epicenter Aquaculture

Permit applications 72-07577, 72-07578 and 72-07580 and Transfer
Application T5647

Charles E. Brockway, P.E.
June 29, 2009

Brockway Engineering, PLLC.

In October, 1999 Epicenter Aquaculture submitted the above applications to improve water use and enhance the water supply for the existing fish propagation facility on Warm Springs Creek. The facility was being operated under a lease agreement with the then current owner, Ingram Warm Springs Ranch.

Information was provided by Brockway Engineering PLLC in support of the applications including an extensive analysis of water rights, water use and potential impacts to existing uses on Warm Springs Creek.

Hearings were held by IDWR relative to 72-07577, 72-07578 and Transfer T5647 and a recommended default order issued by the Hearing Officer, Peter Anderson denying the above permits and transfer for failure to submit a final resolution of a lease agreement dispute. Water right permit application 72-07580 was not advertised nor was it involved in the dispute because it was not processed by IDWR because of the Wilderness Moratorium which has subsequently been terminated.

This Supplemental Narrative is prepared in support of the request to IDWR to resume processing the applications in light of the dismissal of the lawsuit on the lease agreement.

The fish propagation facility for which the proposed permits and transfer are applicable has not changed since the applications were submitted. The primary water source is Warm Springs which is collected in its entirety at the spring head and conveyed through a power canal to a power plant downstream of the fish facility. Available main spring flow increased after the 1983 Mt. Borah earthquake from about 15 cfs to a peak of 70 cfs. The flow available is now conveyed through two power plants under water rights 72-7372 & 72-7375. Current water right (72-7209) allows diversion of 6.8 cfs from the power canal to the fish raceways and the settling pond and subsequent return to the power canal via pumping facilities. Since the hydropower canal flow directly below the fish facility is maintained at the same level as upstream of the facility, no impacts are expected to existing water rights diverting from the hydropower canal. Any losses within measurable limits are required to be replaced from the lower seep springs. Facilities are shown on the attached aerial photograph , Exhibit A.

Pending Applications

The 4 separate permits are as follows:

- 1 72-7577 (1.1 cfs: Fish Propagation)
Application 72-7577 proposes to capture and divert from existing springs seeping below the primary Warm Springs discharge for use in the proposed facility.
- 2 72-7578 (13.1 cfs: Fish Propagation)
Application 72-7578 proposes a total diversion through the fish propagation facility of 12 cfs from the primary Warm Springs discharge in addition to the 1.1 cfs from the additional seeps identified in application 72-7577
- 3 72-7579 (1.7 acre-ft: Wildlife Storage)
Application 72-7579 proposes to authorize the existing settling ponds which are actually part and parcel of the fish propagation facility to treat the waste products associated with the facility.
- 4 72-7580 (0.02 cfs/0.1 acre-ft: Commercial, Wildlife Storage)
Application 72-7580 proposes to authorize the existing cooling pond which will supply trucking water at an appropriate temperature to relax the fish for live shipping. The consumptive use identified with this application relates to the holding water utilized for fish trucking of approximately 6,000 gallons per week.

Anticipated effects on existing water rights are outlined in a letter from Brockway Engineering PLLC to Mr. and Mrs. Lupher dated September 20, 2006 and submitted to IDWR. This analysis shows that the operation proposed under the permits and transfer will not impact the flows in the power canal or the natural channel below the Epicenter facility. There are two submerged orifice measuring devices on the inflow and outflow of the main raceway which are monitored and adjusted as necessary to maintain the existing flow of the hydropower canal which supplies downstream water rights.

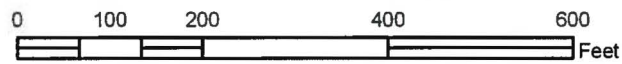
The water supply is ideal for the proposed use due to its elevated temperature and the facility was designed to operate with full diversion of the 12 cfs currently estimated to exist in the hydrocanal. The additional flow sought by application 72-7577 will also allow a separate source for convenient construction and diversion to hatchery and fingerling ponds. Currently the fish facility is operating at approximately half capacity due to the current diversion limit and is unable to provide an environment suitable for full Tilapia production from hatchling to adult.

The applicants are fully committed to the water use applied for and have diligently pursued completion of the pending water right applications. The additional flow will allow full use of the existing facilities and provide adequate water quality and quantity to allow the addition of hatchery ponds, fingerling raceways and holding ponds which will significantly increase the profitability of the facility.

Comment letters from the Idaho Department of Environmental Quality, Idaho Department of Fish & Game, Custer County Board of Commissioners and the Watermaster all indicate no foreseeable negative impacts from approval of the applications. The flow in the hydrocanal will be maintained at or above the level it exists above the facility through re-lift of the water from the main settling pond and any consumption in the facility will be effectively replaced from the lower spring source.

The following conclusions were enumerated in the September 20, 2006 letter and are repeated here:

- 1 No injury to existing water rights will occur. Water available under all existing water rights will not be reduced below the historical amount beneficially used by the existing water right holders. The majority of the water consumption proposed is already realized in the existing facility and these applications are designed to provide adequate water for full facility operation and eliminate any ambiguity regarding the configuration of the facility and the water uses therein.
- 2 The water considered in these applications is currently available at the facility but the flow is restricted or allowed to bypass to maintain currently authorized uses under water right 72-7209 only.
- 3 The existing facility as currently constructed can utilize the full amount of water proposed under these applications and approval would allow the facility to operate at full capacity with minimal additional construction.
- 4 Current water quality available to existing water right holders will not be impaired. Some minor additional cooling of the geothermal water source is possible; however no downstream users specifically require the geothermal quality beyond maintaining the flow in the hydrocanal without freezing which should not be impaired by the approval of these applications.
- 5 The applications actually seek to increase efficient use of the water based on economies of scale for the existing facility and every effort will be made to continue to meet contemporary standards for reasonably efficient use of water.



LUPHER - FISH FACILITY SYSTEM
NAIP 2004 AERIAL PHOTO
T. 12N., R. 20E. Section 9

Legend

- | | |
|---------------------|-----------------------|
| Ext'g Facility | Current Bypass |
| Ext'g Pipe | Section Lines |
| QQ Lines | Water ways |
| Parcels Luper | Proposed Pipeline |
| Proposed Structures | Ext'g check structure |



MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

950 WEST BANNOCK, SUITE 520
BOISE, ID 83702

TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

FACSIMILE COVER SHEET**RECEIVED**
JUL 13 2009
DEPARTMENT OF
WATER RESOURCESDATE: July 10, 2009 RECIPIENT'S FAX: 287-6700TO: IDWR CLIENT: 1624-00RE: Matter of Application for Transfer No. 67067 (fka 5647) &
Application for Permit Nos. 72-07577 and 72-0578FROM: Bruce M. Smith/CathyNUMBER OF PAGES INCLUDING THIS COVER SHEET: 5☐ ORIGINAL WILL NOT BE SENT
☐ ORIGINAL WILL BE SENT BY FIRST CLASS MAIL
☐ ORIGINAL WILL BE SENT BY FEDERAL EXPRESS

ADDITIONAL COMMENTS:

Please find enclosed Respondent's Response to Motion to Resume Application in the
above matter. Thank you.

Sincerely,

Cathy Minyard
Legal Assistant to Bruce M. Smith

***** IMPORTANT MESSAGE *****

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

Gibson, Deborah

From: Wigle, Victoria
Sent: Monday, July 13, 2009 8:38 AM
To: Spackman, Gary; Gibson, Deborah
Subject: FW: incoming fax 287-6700

Attachments: image-710165748-0001.pdf

From: Ferree, Shari **On Behalf Of** IDWR Fax
Sent: Monday, July 13, 2009 8:04 AM
To: Wigle, Victoria
Subject: FW: incoming fax 287-6700

10/20/09

From: idwr.fax@idwr.idaho.gov [<mailto:idwr.fax@idwr.idaho.gov>]
Sent: Friday, July 10, 2009 5:58 PM
To: IDWR Fax
Subject: incoming fax 287-6700



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MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

BANNER BANK BUILDING, SUITE 520
950 WEST BANNOCK STREET, BOISE, ID 83702
TELEPHONE (208) 331-1800 FAX: (208) 331-1202

FACSIMILE COVER SHEETDATE: May 21, 2008 RECIPIENT'S FAX: 287-6700TO: Debbie Gibson CLIENT: _____RE: L and M Angus Ranch/Epicenter AquacultureFROM: Bruce M. Smith/Donda

NUMBER OF PAGES INCLUDING THIS COVER SHEET: _____

____ ORIGINAL WILL NOT BE SENT
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____ ORIGINAL WILL BE SENT BY FEDERAL EXPRESS

ADDITIONAL COMMENTS:

Debbie—Attached are the Pleading Table of Contents for the water rights we were discussing. I've also included the last order sent out by Peter Anderson. As a recap, these proceedings dealt with two applications (72-7577 and 72-7578) and a transfer (5647). My client L and M owns the property and water right number 72-7209. Water right 72-7209 is the subject of the transfer. I think the transfer was renumbered 67067. There were actually four different applications filed : 72-7577, -7578, -7579, and 72-7580. L and M protested all of them and the transfer. All of this was caught up in the Wilderness Act moratorium and eventually --7577, --7578, and the transfer were the subject of a default order by Peter. 72 -7579 and -7580 were never advertised and I think the IDWR told the applicant they were improper filings. I am concerned about the ownership for 72-7209 as showing up in the name of Ingram instead of Lois von Morganroth who is the owner of L and M Angus Ranch. Please check the IDWR files. I am glad to provide copies of documents from my files if you need them. Thanks Bruce

***** IMPORTANT MESSAGE *****

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**IN THE MATTER OF APPLICATION FOR TRANSFER NO. 5647
AND APPLICATION FOR PERMIT NOS. 72-07577 & 72-07578**

(Lupher/Morganroth)

IDWR

PLEADING BOARD 1

No.	Date	Pleading	Party
1	05/17/00	Notice of Joint Pre-Hearing Conference (6/21/00 @ 1:30 p.m. - Twin Falls)	IDWR
2	06/21/00	Motion for Order Compelling Discovery	Protestant
3	07/05/00	Order Authorizing Discovery	IDWR
4	07/06/00	Order Appointing Hearing Officer	IDWR
5	09/13/00	Requests for Admission to Applicant	Protestant
6	09/13/00	Requests for Production of Documents to Applicant	Protestant
7	09/13/00	First Set of Interrogatories	Protestant
8	09/13/00	Notice of Service of First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions to Applicants	Protestant
9	09/29/00	Answers to Requests for Admissions	Applicant
10	09/29/00	Response to Requests for Production of Documents	Applicant
11	09/29/00	Answers to First Set of Interrogatories	Applicant
12	10/05/00	Motion to Compel	Protestant
13	10/17/00	Notice of Hearing on Motion To Compel	IDWR
14	10/20/00	Motion to Continue	Applicant
15	10/23/00	Order Substituting Hearing Officer	IDWR
16	10/27/00	Order Granting Motion To Continue and Amended Notice of Hearing On Motion To Compel Discovery	IDWR
17	11/9/00	Affidavit of Ronald Beckman	Protestant

**IN THE MATTER OF APPLICATION FOR TRANSFER NO. 5647
AND APPLICATION FOR PERMIT NOS. 72-07577 & 72-07578**

(Lupher/Morganroth)

IDWR

PLEADING BOARD 1

No.	Date	Pleading	Party
18	11/9/00	Supplemental And Amended Answers to First Set of Interrogatories	Applicant
19	11/14/00	Order Denying Motion To Compel Discovery	IDWR
20	11/9/00	Supplemental and Amended Answers to First Set of Interrogatories	Applicant
21	11/17/00	Request for Submission of IDWR Staff Memorandum	IDWR
22	11/28/00	Notice of Prehearing Conference	IDWR
23	12/4/00	Amended Notice of Prehearing Conference	IDWR
24	12/29/00	Order Staying Proceedings and Setting Status Conference (3-30-01 @ 1:30 p.m.)	IDWR
25	03/23/01	Notice of Status Conference	IDWR
26	11/09/01	Notice of Prehearing Conference (12-07-01 @ 9:30 a.m. by Telephone)	IDWR
27	11/19/01	Order to Show Cause and Notice of Hearing	IDWR
28	01/09/02	Affidavit of Mark Lupher in Response to Order to Show Cause	Applicant
29	01/09/02	Supplemental Affidavit of Mark Lupher in Response to Order to Show Cause	Applicant
30	02/05/02	Stipulation to Continue Order to Show Cause	Parties
31	02/05/02	Response to Affidavit of Mark Lupher in Response to Order to Show Cause	Protestant
32	02/08/02	Order Continuing Order to Show Cause Hearing	IDWR
33	02/15/02	Amended Notice of Hearing	IDWR

**IN THE MATTER OF APPLICATION FOR TRANSFER NO. 5647
AND APPLICATION FOR PERMIT NOS. 72-07577 & 72-07578**

(Lupher/Morganroth)

IDWR

PLEADING BOARD 2

No.	Date	Pleading	Party
34	8/19/02	Stipulation for Order	Parties
35	8/23/02	Order	Court
36	2/25/03	Notice of Status Conference	Court
37	4/12/02	Order on Show Cause Hearing	IDWR
38	03/19/04	Notice of Proposed Default Order	IDWR
39	04/05/04	Petition in Opposition to Issuance of Proposed Default Order	Applicants
40	04/05/04	Affidavit in Support of Petition in Opposition to Issuance of Proposed Default Order	Applicants
41	04/05/04	Stipulation for Order Continuing Deadline to File Petition	Parties
42	04/05/04	Order Continuing Deadline to File Petition	IDWR
43	04/05/04	Petition in Opposition to Issuance of Proposed Default Order	Applicants
44	04/05/04	Affidavit in Support of Petition in Opposition to Issuance of Proposed Default Order	Applicants
45	04/09/04	Order on Notice of Proposed Default	IDWR
46	01/03/06	Recommended Default Order (Applications 72-07577 and 72-07578 DENIED)	IDWR
47	11/17/06	Applicants' Petition for Reconsideration of Recommended Default Order	Applicants
48	12/07/06	Order Denying Petition for Reconsideration	IDWR
49	12/27/06	Exceptions to Recommended Default Order w/Brief	Applicants

RECEIVED

DEC 6 - 2006

BEFORE THE DEPARTMENT OF WATER RESOURCES

MSB & T, CTD.

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 67067 (formerly known)
as 5647) and APPLICATIONS FOR)
PERMIT NOS. 72-07577 and 72-07578)
IN THE NAME OF MARK L. and/or)
JOANNE LUPHER, dba EPICENTER)
AQUACULTURE)

ORDER DENYING
PETITION FOR
RECONSIDERATION

The *Petition for Reconsideration of Recommended Default Order* filed by the applicants in this matter on November 17, 2006, is hereby DENIED pursuant, in part, to the findings in the attached Exhibit A.

Dated this 7th day of December, 2006.


Peter R. Anderson
Hearing Officer

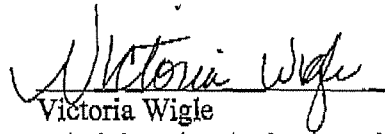
Pleading #48

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of December 2006, I delivered the foregoing document by U.S. mail, postage prepaid and properly addressed to the following:

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHTD
950 W BANNOCK STE 520
BOISE, IDAHO 83702

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS & MESSERVY
PO BOX 168
JEROME ID 83338


Victoria Wigle

Administrative Assistant to the Director
Idaho Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 67067 (formerly known)
as 5647)and APPLICATIONS FOR)
PERMIT NOS. 72-07577 and 72-07578)
IN THE NAME OF MARK L. and/or)
JOANNE LUPHER, dba EPICENTER)
AQUACULTURE)

**ORDER ON SHOW CAUSE
HEARING**

FINDINGS OF FACT

1. This matter involves for Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 in the name of and Mark L. Luper and Jo Anne W. Luper dba Epicenter Aquaculture (the "Applicants"). The Applicant's interest in the property upon which the applied-for permits would be developed, and their interest in the water right to be transferred is pursuant to a lease dated July 1, 1994 between Ingram Warm Springs Ranch and Mark Luper and Jo Anne W. Luper (the "Lease Agreement").
2. The following chronology applies to the processing of Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 and the Applicant's leasehold interest in the place of use in question:
 - a. July 1, 1994: Lease Agreement effective.

- b. October 11, 1999: Date of a Notice of Default under the "Default" provision on page 11 of the Lease Agreement sent by L& M Angus Ranch, successor to the Ingrams, to the Applicants.
- c. October 14, 1999: Application for Permit Nos. 72-07577 and 72-07578 fully submitted to IDWR. Both Applications indicate that the "arrangement enabling the applicant to make this filing" is the Lease Agreement.
- d. December 14, 1999: Transfer of Water Rights No. 5647 fully submitted to IDWR. The Transfer indicates that the document which shows the Applicants ownership of the water right to be transferred, Water Right License No. 72-07209, is the Lease Agreement.
- e. January 10, 2000: Protests to Application for Permit Nos. 72-07577 and 72-07578 filed by L & M Angus Ranch.
- f. February 17, 2000: Protest to Transfer of Water Rights No. 5647 filed by L & M Angus Ranch (the "Protestant").
- g. June 15, 2000: Date of letter from the Protestant notifying the Applicants that they continue to be in default under the lease.
- h. June 21, 2000: Joint prehearing conference held by IDWR regarding Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647. The Protestant argued that IDWR could not approve the Applications and Transfer because the Lease Agreement was in default and/or the Applicants did not own the land.
- i. July 5, 2000: IDWR issues order authorizing discovery.

- j. October 5, 2000: Protestants file a Motion to Compel Discovery.
- k. November 14, 2000: IDWR issues its *Order Denying Motion to Compel*.

IDWR indicated to the parties, regarding the question of whether or not the Applicants had defaulted upon their lease, that:

IDWR is fully aware that this issue is crucial to the Applicants' ability and authority, or not, to proceed with these Applications. Resolution of this question, however, is better left to another forum and discovery under that forum's authority. See e.g., *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.") In fact, the lease itself provides that any dispute regarding the lease must be submitted to arbitration. Lease Agreement at page 10. When either the Applicants or the Protestant submit an indication that the question of default has been submitted to arbitration IDWR will stay these matters until that arbitration has been completed, and then reflect in its decisions the determination of the arbitration panel.

- l. December 15, 2000: Prehearing Conference. At this conference the Applicants indicated that they had filed an action for declaratory judgment on the Lease Agreement, Custer Co. Case No. CV-00-101.
- m. December 29, 2000: IDWR issues an *Order Staying proceedings and Setting Status Conference*. The Order provides, in part, that "all contested case proceedings on these applications are STAYED pending resolution of Custer Co. Case. *Sic* No. CV-00-101, so long as the Applicants exercise reasonable diligence in the prosecution of that action."

- n. March 30, 2001: At a status conference the Applicants indicated that the declaratory judgment action is proceeding. A summary judgment motion had been filed by the Protestants in District Court, arguing that the appropriate forum was arbitration, as provided by the Lease Agreement. The Applicants indicated that the summary judgment motion would be argued within 45 days.
- o. July 2, 2001: Summary judgment argument. At the February 22, 2002, show cause hearing the Protestant represented that it argued in District Court that the Lease Agreement provided for binding arbitration, and Applicants argued in District Court that the arbitration contemplated by the Lease was non-binding. The Applicants did not disagree with this representation at the show cause hearing.
- p. September 14, 2001: The parties indicate that the District Court has directed them to arbitrate the Lease Agreement dispute.
- q. December 7, 2001: Prehearing Conference. At the conference the Applicants indicate that they are preparing a letter to Protestants regarding selection of an arbitrator. Both parties indicate that arbitration will likely take a least 6 months.
- r. February 22, 2002: At the, show cause hearing the parties indicated that an arbitrator still had not been selected. The Applicants indicated that they would do everything within their power to complete arbitration within

sixty days. The Protestant indicated that six months was more realistic. The Protestants stated that they would accept binding arbitration. Whether or not the arbitration is binding and final is completely within the hands of the Applicants.

CONCLUSIONS OF LAW

1. As a part of the decision regarding Application for Permit Nos. 72-07577 and 72-07578, the Director of IDWR is required to determine whether the application for the new water right permits is made for speculative purposes or whether the applicant has sufficient financial resources with which to complete the work involved. Idaho Code § 42-203A(5)(c) and (d). See also IDAPA 37.03.08.040.05.e.i and 37.03.08.045.01.c.i. The Idaho Supreme Court has stated, "The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself." *Lemmon v. Hardy*, 95 Idaho 778, 781 (1974).
2. Idaho's water right transfer statutes provide that only a "person entitled to the use of water or owning any land to which water has been made appurtenant" may apply to transfer that water. I.C. § 42-108, I.C. § 42-222(1) ("Any person, entitled to the use of water whether represented by license... by claims...or by decree, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change."). Ownership of a legal interest in a water right is a prerequisite for a person's ability to change a water right. *Federal*

Land Bank of Spokane v. Union Central Life Ins. Co., 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.").

3. Applicants knew within days of filing Application for Permit Nos. 72-07577 and 72-07578 in October 1999 that there was a dispute regarding the Lease Agreement. The existence of this dispute was reiterated to them many times. In November 2000 the Applicants were informed in the *Order Denying Motion to Compel* that arbitration appeared to be necessary. Now, more than two years after they were informed of the possible default and over a year after the written decision staying this matter, Applicants indicate to IDWR that they would try to complete arbitration within sixty days of February 22, 2002. Applicants control whether arbitration will finally resolve the lease dispute. With reasonable diligence, Applicants can finally resolve the dispute over the Lease Agreement within six months of the February 22, 2002, show cause hearing.

Base upon the foregoing it is hereby ORDERED that the Applicant submit to IDWR on August 30, 2002, final resolution of the Lease Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647.

Dated this 12th day of April, 2002.



PETER R. ANDERSON
HEARING OFFICER

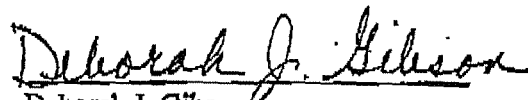
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of April, 2002, I delivered the foregoing **ORDER ON SHOW CAUSE HEARING** by U.S. mail, postage prepaid and properly addressed to the following:

William R. Hollifield
HOLLIFIELD & BEVAL, PA
249 3RD Ave. E.
P.O. Box 66
Twin Falls, ID 83303-0066

Allen D. Merritt
Southern Regional Manager
Idaho Dept. of Water Resources
1341 Fillmore St., Ste 200
Twin Falls, ID 83301

Bruce M. Smith
MOORE SMITH BUXTON &
TURCKE, CHTD
225 North 9th Street, Suite 420
Boise, Idaho 83702



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

RECEIVED

DEC 23 2006

DEPARTMENT OF
WATER RESOURCES

ROBERT E. WILLIAMS
IDAHO STATE BAR NO. 1693
FREDERICKSEN, WILLIAMS & MESERVY
117 South Adams Street
P. O. Box 168
Jerome, Idaho 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135
Attorneys for Applicants Mark L. and/or Jo Anne Lupher,
dba Epicenter Aquaculture

Filed via Fax
12-27-06
W

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 (formerly
known as 5647) and APPLICATIONS
FOR PERMIT NOS. 72-07577 and 72-
07578 IN THE NAME OF MARK L.
and/or JOANNE LUPHER, dba
EPICENTER AQUACULTURE

SOURCE: Groundwater

COUNTY: Twin Falls

**EXCEPTIONS TO RECOMMENDED
DEFAULT ORDER**

COME NOW, MARK L. and/or JO ANNE LUPHER, dba EPICENTER
AQUACULTURE (hereinafter "Applicants"), through their attorney of record, Robert E.
Williams, of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and pursuant
to Rule 720 of the Idaho Department of Water Resources (IDAPA Rule 37.01.01.02(b))
and take exceptions to the Recommended Default Order dated November 3, 2006
("Recommended Order").

The portions of the Recommended Order to which exceptions are taken are that:

- (a) the "Lease Agreement Dispute" between the parties as to lawful
possession of the real property to which the water right applications apply has not been
finalized, and
- (b) that the Applicant has failed to demonstrate clear legal interest in the place
of use to which Permit No. 72-07577 and 72-07578 would be appurtenant or legal

authority for transfer of the water right now pending in Transfer No. 5647, formerly
denominated 67067.

These Exceptions are supported by the attached Brief.

Dated this 27th day of December, 2006.

FREDERICKSEN, WILLIAMS, MESERVY &
LOTHSPEICH, LLP



ROBERT E. WILLIAMS

Attorney for Applicants, Mark L. and/or
Joanne Lupher, dba Epicenter Aquaculture

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 27th day of December, 2006, I served a true and
correct copy of the foregoing document on the person(s) whose names and addresses appear
below by the method indicated:

Peter R. Anderson, Hearing Officer Attn: Victoria Wygle Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid w/exhibits ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express
Bruce M. Smith Moore Smith Buxton, et al 950 W. Bannock, Suite 520 Boise, Idaho 83702-6118	☒ U.S. Mail, postage prepaid w/exhibits ☐ Hand Delivery ☐ Court Folder ☒ Facsimile 208.331.1202 w/exhibits ☐ Federal Express
Karl Dreher Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid w/exhibits ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express



ROBERT E. WILLIAMS

ROBERT E. WILLIAMS
IDAHO STATE BAR NO. 1693
FREDERICKSEN, WILLIAMS & MESERVY
117 South Adams Street
P. O. Box 168
Jerome, Idaho 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135
Attorneys for Applicants Mark L. and/or Jo Anne Lupher,
dba Epicenter Aquaculture

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 (formerly
known as 5647) and APPLICATIONS
FOR PERMIT NOS. 72-07577 and 72-
07578 IN THE NAME OF MARK L.
and/or JOANNE LUPHER, dba
EPICENTER AQUACULTURE

SOURCE: Groundwater

COUNTY: Twin Falls

**APPLICANTS' BRIEF IN SUPPORT
OF EXCEPTIONS**

COME NOW, MARK L. and/or JO ANNE LUPHER, dba EPICENTER
AQUACULTURE (hereinafter "Applicants"), through their attorney of record, Robert E.
Williams, of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and submit their
Brief in Support of Exceptions to the Recommended Default Order, dated November 3, 2006. A
copy of the Recommended Default Order is attached hereto as **EXHIBIT A**. Exceptions were
made pursuant to IDWR Rule 720 (IDAPA Rule 37.01.01.02(b)), on the 27th day of December,
2006.

INTRODUCTION

Applicants do not contest the Hearing Officer's recitation of the procedural history in the
Recommended Default Order, as far as it went. Supplementing this procedural history, the
Applicants filed a Petition for Reconsideration on the 17th day of November, 2006. The Hearing
Officer issued an Order Denying Petition for Reconsideration on December 7, 2006, a copy of

which is attached hereto as **EXHIBIT B**. However, Applicants do contest the conclusions of the Hearing Officer that present circumstances fail to demonstrate that Applicants have a “clear legal interest” in the place of use to which the Applications Nos. 72-07577 and 72-07578 would be appurtenant and that Applicants lack legal authority to bring the transfer proceeding pending under Transfer No. 67067 (formerly known as 5746). Applicants believe the Hearing Officer to have erred in these conclusions for the following reasons:

A. THE APPLICANTS ARE LAWFULLY IN POSSESSION OF THE REAL PROPERTY UNDER A WRITTEN LEASE.

Dismissal of the state court action regarding the disputed Lease Agreement leaves the Applicants in lawful possession of the real property to which the Application for Permits Nos. 72-7577 and 72-07578 apply. Applicants have been in possession of the real property under a written Lease Agreement, a copy of which is attached hereto as **EXHIBIT C**, for more than twelve (12) consecutive years. Further, after the three (3) years remaining under the initial lease term expire, the Lease Agreement gives Applicants the right to extend the lease for another fifteen (15) year term if such notice is given prior to July 1, 2008. Applicants currently intend to exercise their right to extend. Because of the dismissal of the state court action, there is no longer a pending dispute between the parties regarding the Lease Agreement and, therefore, there is no dispute to resolve as to Applicants’ right to possession.

The counterclaim in the state court action alleged various breaches and defaults under the Lease Agreement. A copy of the pleading containing the counterclaim is attached hereto as **EXHIBIT D**. Like Applicants’ claims for declaratory judgment and damages, the Protestants’ claims for breach of the Lease have been dismissed. A copy of the District Court’s Order of Dismissal is attached hereto as **EXHIBIT E**. There is therefore no current unresolved dispute as to Applicants’ right to possession of the real property. Applicants are currently lawfully in possession of the real property which is directly related to the water right appropriation and transfer applications, which right runs for a continuous period of thirty (30) years from its inception. No action has ever been brought or is now pending to remove the Applicants from the real property. The Hearing Officer is clearly incorrect in his conclusion that the pending application should be dismissed for failure to resolve questions as to the right to the possession

of the real property to which the water rights apply, because no such dispute currently exists, and Applicants are in possession.

B. EVEN IF DISPUTES OVER THE LEASE AGREEMENT WERE STILL PENDING, THE DISPUTES DO NOT DEPRIVE THE DEPARTMENT OF WATER RESOURCES OF THE ABILITY TO PROCESS THE APPLICATIONS.

Resolutions of disputes regarding the Lease Agreement were not necessary prerequisites to the Department's proceeding on the Applicants' pending applications. The necessity of proving a possessory interest in land, either from which water is diverted, or on which it is to be put to beneficial use, is two fold:

1. To protect the private property owner's right to exclusive use and possession of the land. *Bassett v. Swenson*, 51 Idaho, 5 P.2d 722, 723-724 (Idaho 1931); and
2. To prevent bad faith delay and speculative purposes. *Lemmon v. Hardy*, 95 Idaho 778, 781, 519 P.2d 1168 (1974).

The *Lemmon* court emphasized the Idaho doctrine of discouraging the seeking of water permits for speculative purposes. The lack of a possessory interest in the property is identified by the court as a *per se* indication of speculation. The Applicants' right to continue possession of the real property for a thirty (30) year period, presently unchallenged by the Protestants, does not meet the *Lemmon* standard for speculation. Additionally, IDAPA 37.03.08.045.01(c) also provides in pertinent part that:

...speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence..."

No speculation, within the court and regulation definitions has been shown to have been committed by the Applicants. Dismissal of the pending Applications does not protect the interest of the Department of Water Resources or the public in avoiding speculation or avoiding trespass onto a private property owner's land, as prohibited by the *Bassett* and *Lemmon* cases, *supra*, because there is no speculation.

Transfer number 67067 (fka 5647) seeks the change of the permissible place of use to the actual portion of the real property upon which the fish raising works have been

constructed. This is a technical transfer. The authority of the Lessee to engage in this transfer is clearly implied by the terms of the Lease Agreement which unambiguously contemplates the Applicants' ability to use the real property for the rearing of fish for the duration of the lease term. Not permitting the Applicants' transfer amending the place of use to comply with that which has been constructed and used upon the grounds, in the absence of the Protestants wanting to do so, deprives the Lease Agreement of all meaning.

The Lease Agreement clearly demonstrates the right of the Applicants to the use of the water which is a prerequisite to bringing an application for transfer. See *Idaho Code* § 42-108 and I.C. §42-222(1). The statutory standards having been met, Applicant's water transfer application should be processed.

C. EFFORTS HAVE BEEN MADE TO RESOLVE DISPUTES BETWEEN THE PARTIES AND INFORMATION HAS BEEN PROVIDED TO IDWR UPON ITS REQUEST.

From 2002 to the present date, the parties have engaged in discussions regarding the resolution of various disputes between them. In 2002, a lengthy mediation was held with Judge Daniel Hurlbutt. Several proposals to resolve disputes were promulgated by each of the parties with no final resolution. In the meantime, Applicants have remained in possession of the real property for more than twelve (12) years under the terms of the Lease Agreement. There is no proceeding pending which challenges the Applicants' right to the lawful possession of the real property because the state court action has been dismissed. See EXHIBIT E attached hereto.

Because of Applicants' continued possession of the real property, their present possession of the real property, and their contractual right to extend the right to possession for another eighteen (18) years beyond 2006, there is no present dispute which needs to be resolved as to Applicants' continued rights to the possession of the real property underlying the two (2) appropriation and one (1) transfer proceeding.

Applicants did, on the 25th day of September, 2006, submit, in response to requests from the Idaho Department of Water Resources, a substantial amount of technical information regarding the pending water right appropriation matter in this

proceeding and two (2) other water right appropriation applications filed by the Applicants. The materials were compiled at considerable expense with the assistance of Brockway Engineering, Twin Falls, Idaho. Because the materials are voluminous, they are not attached to this petition. The original documents were filed with the Department of Water Resources in September, 2006. A description of the documents provided, by title, is as follows:

- Exhibit A. Facility Design
- Exhibit B. Existing water right license 72-7209 and pending application summaries
- Exhibit C. Effect on existing water rights
 - C.1. Map – Active Water Right Licenses & Decrees in Vicinity
 - C.2. IDWR Active Water Right Listing (“Warm Springs”)
- Exhibit D. Information relative to sufficiency of water supply
 - D.1. Tilapia Production
 - D.2. Water Quantity & Quality Requirements for Channel Catfish Hatcheries
- Exhibit E. Information relative to good faith, delay or speculative purposes
 - E.1. Existing Lease Agreement & Survey
 - E.2. EPA NPDES Permit ID-002826-6 & related documents
- Exhibit F. Information relative to financial resources
 - F.1. Current financial statement – Mark L. & Jo Anne W. Lupher dba Epicenter Aquaculture
 - F.2. Additional facility estimated construction costs
- Exhibit G. Information relative to conflict with the local public interest
 - G.1. Letter of comment from Idaho Department of Environmental Quality
 - G.2. Letter of comment from Idaho Department of Fish & Game (2)
 - G.3. Letter of comment from Custer County Commissioners
 - G.4. Recommendation of Watermaster (RE: 72-7479)

CONCLUSION

Applicants have a clear, undisputed right to the possession of the real property underlying the pending applications. The dismissal of the state court action means there is no longer a dispute in existence as to the Applicants' rights to possession. This possessory right entitles the Applicants to have their applications for appropriation and transfer processed. The Department should rescind the Recommended Order of Default and set the two (2) appropriation filings and the single transfer filing now pending for hearing at a time and place convenient to the assigned Hearing Officer and the parties.

RESPECTFULLY SUBMITTED THIS 27th day of December, 2006.

FREDERICKSEN, WILLIAMS & MESERVY



ROBERT E. WILLIAMS

Attorneys for Applicants, Mark L. and/or
Joanne Luper, dba Epicenter Aquaculture

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 27th day of December, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Peter R. Anderson, Hearing Officer Attn: Victoria Wygle Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express
Bruce M. Smith Moore Smith Buxton, et al 950 W. Bannock, Suite 520 Boise, Idaho 83702-6118	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile ☐ Federal Express
Karl Dreher Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express

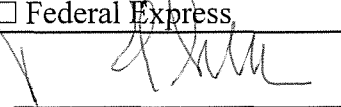

ROBERT E. WILLIAMS

EXHIBIT A

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

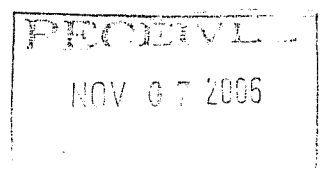
IN THE MATTER OF APPLICATION FOR	)	
TRANSFER NO. 67067 (formerly known	)	
as 5647) and APPLICATIONS FOR	)	RECOMMENDED
PERMIT NOS. 72-07577 and 72-07578	)	DEFAULT ORDER
IN THE NAME OF MARK L. and/or	)	
JOANNE LUPHER, dba EPICENTER	)	
AQUACULTURE	)	
_____	)	

IDAPA 37.01.01.700 provides, in part, that:

If an applicant ...fails to respond to a written information inquiry, the presiding officer may serve upon all parties a notice of a proposed default order denying the application

(Emphasis added). This language provides the Hearing Officer grounds for denying the applications if an applicant fails to provide information requested by the Hearing Officer.

On August 23, 2002, an *Order* was issued in this matter requiring that Mark L. and/or Joanne Lupher, DBA Epicenter Aquaculture ("Applicants") submit to the Idaho Department of Water Resources (IDWR) within 72 hours of the date upon when the mediation of the disputes between the parties before Daniel C. Hurlbutt was concluded, final resolution of a Lease Agreement dispute indicating that the Applicants had a clear legal interest in the place of use to which Permit No. 72-07577 and No. 72-07578 would be appurtenant and that Applicants have legal authority for transfer of Water Right No. 5647, or to otherwise advise IDWR that all issues involved in the current proceedings before IDWR had been resolved. That mediation arose out of a district court case Applicants filed to declare their interest in the Lease Agreement which purports to give



them the real property interest supporting their applications. Lupher v. Morganroth et.al., Custer County case no. CV-2000-101.

At a March 14, 2003, status conference the parties to this matter indicated that following mediation on October 16, 2002, the Lease Agreement dispute had not been resolved, but that resolution appeared likely, and that a settlement agreement would be provided to the IDWR soon, possibly within ten days of the conference.

Both parties later indicated in status reports filed with IDWR that final resolution of the Lease Agreement dispute had not been reached.

Because of Applicants failure to respond to the information inquiry in the *Order* the Hearing Officer gave them *Notice of Proposed Default Order* on March 19, 2004, that a default was proposed to be entered for their failure to respond.

Applicants filed a *Petition in Opposition to Issuance of Proposed Default Order* on April 5, 2004. The primary factual basis opposing the proposed default in the *Petition* was that the failure to submit a final resolution of the lease agreement dispute is equally the responsibility of the Protestant. The exhibits attached to the Applicants' *Petition* support factual assertion in one sense—they demonstrate an equal lack of diligence on both the part of the Applicants and the Protestant in resolving the Lease Agreement dispute that has been apparent since October 1999. But the *Petition* shows no attempt by the Protestant to frustrate diligent resolution of the Lease Agreement dispute. The duty to exercise reasonable diligence in this administrative proceeding lies with the Applicant.

Initially, even though declining to issue a default order, the Hearing Officer noted that a default would not be a harsh result in this matter. The only harm they would suffer by the dismissal of Transfer No. 67067 would be the loss of their filing fee. They could

simply re-file this application for transfer upon resolution of the Lease Agreement dispute. The dismissal of Application for Permit Nos. 72-07577 and 72-07578 would result in the loss of both filing fees and priority.

In April 2004 the Hearing Officer stated:

There appears to be little reason, however, to force the Luper's to lose their filing fee. Leaving these applications in IDWR's records would not appear to entail much cost to IDWR. Allowing the Applicants' to maintain their priority, however, does lessen their incentive to diligently resolve the Lease Agreement dispute and damages the ability of more diligent water appropriators to put water to beneficial use without being subject to the priorities of derelict applicants. I.C. §42-204 provides a means to resolve this problem by providing that the priority of the right initiated by an application shall be determined by the date of receipt of needed information.

Based upon this language this matter was stayed on April 9, 2004.

On January 27, 2006, that district court action was dismissed for inactivity. Exhibit A to this *Recommended Default Order*. There now appears to be no activity by Applicants to resolve the Lease Agreement dispute.

The Hearing Officer has determined that he will revisit the *Notice of Proposed Default Order*. It now appears that even the loss of priority was insufficient incentive to force the Applicant's to finally resolve the Lease Agreement dispute. Because Applicants had already lost the priority of their water right application, the only harm in entering a default order in this matter will be the loss of the Applicant's filing fees. The loss of those fees is appropriate when IDWR has been left with open-ended Applications and the costs of processing this contested case. As with the district court, at some point a resolution must be diligently pursued in good faith by the Applicants. That has not occurred in this matter.

RECOMMENDED ORDER

Based upon the failure of Mark L. and/or Joanne Luper, DBA Epicenter Aquaculture to respond to the information inquiry requesting that they submit to IDWR final resolution of the Lease Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647 (67067) it is **ORDERED** that Application for Permit Nos. 72-07577 and 72-07578 and Application for Transfer of Water Right No. 5647 (67067) are **DENIED**.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

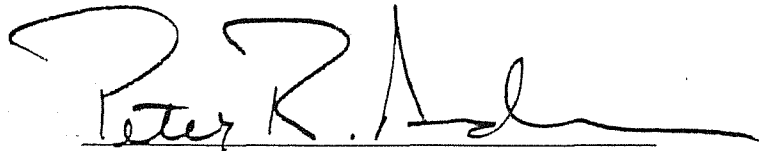
Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no

party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;
- ii. The service date of a denial of a petition for reconsideration by the hearing officer; or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Dated this 3rd day of November 2006.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", is written over a horizontal line.

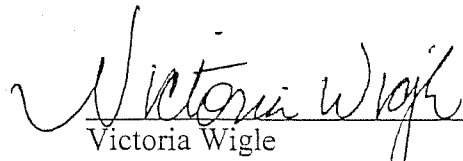
PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November 2006, I delivered the foregoing **RECOMMENDED DEFAULT ORDER** by U.S. mail, postage prepaid and properly addressed to the following:

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHTD
225 NORTH 9TH STREET, SUITE 420
BOISE, IDAHO 83702

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS & MESSERVY
PO BOX 168
JEROME ID 83338

A handwritten signature in cursive script, reading "Victoria Wigle", written over a horizontal line.

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

DISTRICT COURT
CUSTER COUNTY
IDAHO

2006 JAN 30 PM 12:01

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife,

Plaintiffs,

vs.

LOIS VON MORGANROTH, successor in
Interest to INGRAM WARM SPRINGS
RANCH; LOIS, INC., an unknown entity;
L&M ANGUS RANCH, INC., an unknown
Entity; JOHN DOES 1-15; JANE DOES
1-15; CORPORATIONS A-Z; LIMITED
PARTNERSHIP 20-25; LOIS, LLC 40-50;
And their heirs, successors and assigns,

Defendants.

LOIS VON MORGANROTH,

Counterclaimant,

vs.

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife, d/b/a Epicenter
Aquaculture,

Counterdefendants.

RECEIVED

OCT 04 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION
2006-101

RECEIVED

JAN 31 2006

BY:

ORDER DISMISSING CASE

WHEREAS the above-captioned matter has been inactive for a period greater
than six (6) months; and

WHEREAS the Clerk of Court served a notice of pending dismissal on December
13, 2005; and

WHEREAS the Court has received an Affidavit in Support of Retention on
Calendar from Robert E. Williams, Esq. in response to said notice, and the court having
reviewed the affidavit and finding that good cause does not exist for the retention of the
above-captioned matter;

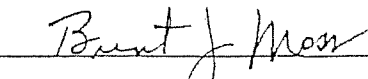
COPY

Exhibit A

NOW, THEREFORE, the court hereby dismisses the above-captioned matter,
without prejudice, pursuant to I.R.C.P. 40(c).

So Ordered.

DATED this 27 day of January, 2006.



Brent J. Moss, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was this
30th day of January, 2006, served upon the individuals as indicated:

Bruce Smith
Moore Smith
225 N 9th, Ste 420
Boise, ID 83702

[] U.S. Mail, postage prepaid

Robert E. Williams, Esq.
117 South Adams Street
P.O. Box 168
Jerome, ID 83338

☒ U.S. Mail, postage prepaid

Clerk of the Court

By:

1st Linda Aumkin

EXHIBIT B

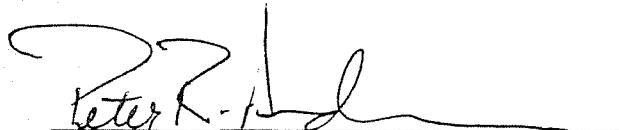
BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 67067 (formerly known)
as 5647) and APPLICATIONS FOR)
PERMIT NOS. 72-07577 and 72-07578)
IN THE NAME OF MARK L. and/or)
JOANNE LUPHER, dba EPICENTER)
AQUACULTURE)
_____)

**ORDER DENYING
PETITION FOR
RECONSIDERATION**

The *Petition for Reconsideration of Recommended Default Order* filed by the applicants in this matter on November 17, 2006, is hereby DENIED pursuant, in part, to the findings in the attached Exhibit A.

Dated this 7th day of December, 2006.



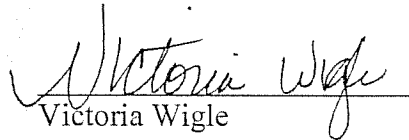
Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December 2006, I delivered the foregoing document by U.S. mail, postage prepaid and properly addressed to the following:

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHTD
950 W BANNOCK STE 520
BOISE, IDAHO 83702

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS & MESSERVY
PO BOX 168
JEROME ID 83338



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 67067 (formerly known)
as 5647)and APPLICATIONS FOR)
PERMIT NOS. 72-07577 and 72-07578)
IN THE NAME OF MARK L. and/or)
JOANNE LUPHER, dba EPICENTER)
AQUACULTURE)

ORDER ON SHOW CAUSE
HEARING

FINDINGS OF FACT

1. This matter involves for Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 in the name of and Mark L. Lupher and Jo Anne W. Lupher dba Epicenter Aquaculture (the "Applicants"). The Applicant's interest in the property upon which the applied-for permits would be developed, and their interest in the water right to be transferred is pursuant to a lease dated July 1, 1994 between Ingram Warm Springs Ranch and Mark Lupher and Jo Anne W. Lupher (the "Lease Agreement").
2. The following chronology applies to the processing of Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 and the Applicant's leasehold interest in the place of use in question:
 - a. July 1, 1994: Lease Agreement effective.

- b. October 11, 1999: Date of a Notice of Default under the "Default" provision on page 11 of the Lease Agreement sent by L& M Angus Ranch, successor to the Ingrams, to the Applicants.
- c. October 14, 1999: Application for Permit Nos. 72-07577 and 72-07578 fully submitted to IDWR. Both Applications indicate that the "arrangement enabling the applicant to make this filing" is the Lease Agreement.
- d. December 14, 1999: Transfer of Water Rights No. 5647 fully submitted to IDWR. The Transfer indicates that the document which shows the Applicants ownership of the water right to be transferred, Water Right License No. 72-07209, is the Lease Agreement.
- e. January 10, 2000: Protests to Application for Permit Nos. 72-07577 and 72-07578 filed by L & M Angus Ranch.
- f. February 17, 2000: Protest to Transfer of Water Rights No. 5647 filed by L & M Angus Ranch (the "Protestant").
- g. June 15, 2000: Date of letter from the Protestant notifying the Applicants that they continue to be in default under the lease.
- h. June 21, 2000: Joint prehearing conference held by IDWR regarding Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647. The Protestant argued that IDWR could not approve the Applications and Transfer because the Lease Agreement was in default and/or the Applicants did not own the land.
- i. July 5, 2000: IDWR issues order authorizing discovery.

- j. October 5, 2000: Protestants file a Motion to Compel Discovery.
- k. November 14, 2000: IDWR issues its *Order Denying Motion to Compel*.

IDWR indicated to the parties, regarding the question of whether or not the Applicants had defaulted upon their lease, that:

IDWR is fully aware that this issue is crucial to the Applicants' ability and authority, or not, to proceed with these Applications. Resolution of this question, however, is better left to another forum and discovery under that forum's authority. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.") In fact, the lease itself provides that any dispute regarding the lease must be submitted to arbitration. Lease Agreement at page 10. When either the Applicants or the Protestant submit an indication that the question of default has been submitted to arbitration IDWR will stay these matters until that arbitration has been completed, and then reflect in its decisions the determination of the arbitration panel.

- l. December 15, 2000: Prehearing Conference. At this conference the Applicants indicated that they had filed an action for declaratory judgment on the Lease Agreement, Custer Co. Case No. CV-00-101.
- m. December 29, 2000: IDWR issues an *Order Staying proceedings and Setting Status Conference*. The Order provides, in part, that "all contested case proceedings on these applications are STAYED pending resolution of Custer Co. Case. *Sic* No. CV-00-101, so long as the Applicants exercise reasonable diligence in the prosecution of that action."

- n. March 30, 2001: At a status conference the Applicants indicated that the declaratory judgment action is proceeding. A summary judgment motion had been filed by the Protestants in District Court, arguing that the appropriate forum was arbitration, as provided by the Lease Agreement. The Applicants indicated that the summary judgment motion would be argued within 45 days.
- o. July 2, 2001: Summary judgment argument. At the February 22, 2002, show cause hearing the Protestant represented that it argued in District Court that the Lease Agreement provided for binding arbitration, and Applicants argued in District Court that the arbitration contemplated by the Lease was non-binding. The Applicants did not disagree with this representation at the show cause hearing.
- p. September 14, 2001: The parties indicate that the District Court has directed them to arbitrate the Lease Agreement dispute.
- q. December 7, 2001: Prehearing Conference. At the conference the Applicants indicate that they are preparing a letter to Protestants regarding selection of an arbitrator. Both parties indicate that arbitration will likely take a least 6 months.
- r. February 22, 2002: At the, show cause hearing the parties indicated that an arbitrator still had not been selected. The Applicants indicated that they would do everything within their power to complete arbitration within

sixty days. The Protestant indicated that six months was more realistic. The Protestants stated that they would accept binding arbitration. Whether or not the arbitration is binding and final is completely within the hands of the Applicants.

CONCLUSIONS OF LAW

1. As a part of the decision regarding Application for Permit Nos. 72-07577 and 72-07578, the Director of IDWR is required to determine whether the application for the new water right permits is made for speculative purposes or whether the applicant has sufficient financial resources with which to complete the work involved. Idaho Code § 42-203A(5)(c) and (d). *See also* IDAPA 37.03.08.040.05.e.i and 37.03.08.045.01.c.i. The Idaho Supreme Court has stated, "The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself." *Lemmon v. Hardy*, 95 Idaho 778, 781 (1974).
2. Idaho's water right transfer statutes provide that only a "person entitled to the use of water or owning any land to which water has been made appurtenant" may apply to transfer that water. I.C. § 42-108, I.C. § 42-222(1) ("Any person, entitled to the use of water whether represented by license... by claims...or by decree, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change."). Ownership of a legal interest in a water right is a prerequisite for a person's ability to change a water right. *Federal*

Land Bank of Spokane v. Union Central Life Ins. Co., 51 Idaho 490, 491 (1931)(“Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.”).

3. Applicants knew within days of filing Application for Permit Nos. 72-07577 and 72-07578 in October 1999 that there was a dispute regarding the Lease Agreement. The existence of this dispute was reiterated to them many times. In November 2000 the Applicants were informed in the *Order Denying Motion to Compel* that arbitration appeared to be necessary. Now, more than two years after they were informed of the possible default and over a year after the written decision staying this matter, Applicants indicate to IDWR that they would try to complete arbitration within sixty days of February 22, 2002. Applicants control whether arbitration will finally resolve the lease dispute. With reasonable diligence, Applicants can finally resolve the dispute over the Lease Agreement within six months of the February 22, 2002, show cause hearing.

Base upon the foregoing it is hereby ORDERED that the Applicant submit to IDWR on August 30, 2002, final resolution of the Lease Agreement dispute indicating that the Applicants have a a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647.

Dated this 12th day of April, 2002.



PETER R. ANDERSON
HEARING OFFICER

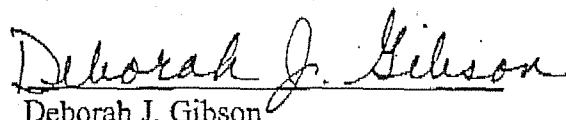
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of April, 2002, I delivered the foregoing
ORDER ON SHOW CAUSE HEARING by U.S. mail, postage prepaid and properly addressed
to the following:

William R. Hollifield
HOLLIFIELD & BEVAL, PA
249 3RD Ave. E.
P.O. Box 66
Twin Falls, ID 83303-0066

Allen D. Merritt
Southern Regional Manager
Idaho Dept. of Water Resources
1341 Fillmore St., Ste 200
Twin Falls, ID 83301

Bruce M. Smith
MOORE SMITH BUXTON &
TURCKE, CHTD
225 North 9th Street, Suite 420
Boise, Idaho 83702



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

EXHIBIT C

LEASE AGREEMENT

THIS AGREEMENT is made and entered into effective as of the 1st day of July, 1994, by and between INGRAM WARM SPRINGS RANCH, a Partnership, herein referred to as "Lessor" or "Lessors" and MARK LUPHER AND JO ANNE W. LUPHER, husband and wife, residing at HC 61 Box 3016, Challis, Idaho 83226, herein referred to as "Lessee" or "Lessees".

WITNESSETH:

The Lessor has leased and by these presents does lease unto the Lessee on the terms herein mentioned the real property located in Custer County, Idaho, described as follows:

40 acres located on the Ingram Warm Springs Ranch as follows:

40 acres to be selected by Lessees at their sole and separate discretion on or before the 1st day of July, 1995, from the following described tract of land:

Township 12 North, Range 20 East, Boise Meridian

NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 10

SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 4

NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 9

NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 9

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 10

NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 10

Township 13 North, Range 20 East, Boise Meridian

NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 32

The selected lands shall be in no more than three separate contiguous tracts unless otherwise consented to by Lessors.

TOGETHER WITH all appurtenances, to have and to hold the said premises with the appurtenances thereon from the 1st day of July, 1994.

LESSOR: The parties agree that Lessor may for whatever reason transfer the leased lands to a new or different entity or person and that so long as it is clearly understood that such new entity is taking the lands subject to the terms of this lease, the transfer or assignment will not be objected to by Lessees. In fact, Lessee understands that Lessor intends to assign or transfer the leased lands and this lease to partner, Timothy Ingram, or to an entity designated by him.

TERM: The term of this Lease shall be from July 1, 1994 to July 1, 2009. This Lease may be renewed for another 15-year term if written notice of intent to extend the Lease is provided by Lessee to Lessor no later than July 1, 2008. If no such notice is given, then this Lease shall terminate on midnight of July 1, 2009, and Lessee shall promptly vacate the premises.

PURPOSE: Lessee is leasing the real property for the purpose of fish propagation.

RENTAL: Lessee agrees to pay to the Lessor as rent for said premises 50% of all profits arising from the sale of fish products grown or processed on the leased property.

For the purpose of this agreement, profit shall be computed by subtracting from gross receipts all operating expenses directly incurred in the production of fish products. It is further agreed that the Lessee's compensation will be his 50% of the profits. Further that Lessee, Mark Luper, will not

charge to the above expenses for his work as manager of the fish propagation business to be established on the leased site.

Lessor must apply any and all payments from profits first toward the cost of leasehold improvements. Lessor's excess share of profit over and above the cost of such improvements shall be paid to Lessor in cash. For valuation purposes, the value of leasehold improvements shall be the cost of construction of said improvements to Lessee. The attached Exhibits "A" and "B" shall govern the interpretation of this section in regard to Gross Sales, Allowable Expenses and Leasehold Improvements. Profits as used herein shall be determined by deducting Allowable Expenses from Gross Sales. This interpretation of income and expenses shall not necessarily be related to income or allowable expense for tax purposes. Additions or deletions to Exhibits "A" and "B" shall be accomplished only upon the mutual consent of the parties.

All payments due Lessor shall be due and payable by the 10th day of the month following Lessee's receipt of said funds. Lessees shall provide an accounting monthly on or before such date in regard to cost of improvements and the credits given Lessors for their share of profits.

INSPECTION OF BOOKS AND RECEIPTS: Lessor may inspect Lessee's financial books and receipts which will be kept on the premises. Inspection will be subject to reasonable notice of not less than 12 hours.

RESIDENTIAL SITES: Lessor will supply sufficient real property to enable Lessee to establish two (2) residential sites on the leased property. These sites shall be located in such a manner as not to interfere with access to hydropower facilities or ingress and egress from the leased real property or interfere with agricultural uses or facilities.

POWER AND ELECTRICAL: Lessee shall pay all power and utility expenses incurred on the leased real property. However, cost of utility construction shall be considered a reimbursable leasehold improvement as defined in Exhibit "B". Power and utility expenses are to be included as one category of the aforementioned expenses to be deducted from gross receipts.

GEOHERMAL WATER RIGHT: Lessor shall provide to Lessee the natural flow of geothermal water pursuant to License #72-7209 (copies attached as Exhibits "C", "D", and "E") to enable Lessee to use geothermal water for fish propagation. It is understood that Lessor currently has in operation a hydropower plant from the same geothermal source. Lessee agrees not to interfere with said source in any manner which will decrease income to Lessor. Specifically, Lessees agree that they will allow nothing to be done on the premises which will cause the water level at the spring source to be raised above the normal level given the present and existing situation. Further, it is agreed that Lessees will at all times put at least an equal or greater amount of water back into the existing hydro canal compared to the

amount diverted or used by Lessee. For the purpose of fulfilling this requirement Lessees may utilize the seeps or springs flowing upon the leased premises. All water will be returned upstream from the hydro-plant or facility. If Lessor's income from the hydropower plant does decrease due to Lessee's use of the geothermal water or because of Lessees use of the property, Lessee shall reimburse Lessor for its actual loss. Lessee shall also be fully responsible for any and all damage or loss caused Lessor from its operation including but not limited to pollution, waste water quality and other damage.

WATER FOR OTHER USES: All water used for residential purposes or any use other than fish propagation shall be taken from wells and Lessees shall meter such use and pay Lessor at the rate of \$1.00 per thousand gallons for all water used unless otherwise agreed.

INSPECTION OF PREMISES: Lessor or Lessor's agent may inspect the leased premises at reasonable times and upon reasonable notice.

NEW CONSTRUCTION: Lessee shall submit the plans for any new construction or development to be undertaken on the leased premises to Lessor for Lessors approval prior to commencement of any project or improvement. Lessor agrees to only deny such request upon the basis of what may be determined to affect Lessors hydro income.

FENCE: Lessor shall construct and maintain a fence surrounding the leased real property in order to keep Lessor's livestock from entering the leased premises.

LIENS AND ENCUMBRANCES: Neither party shall allow or cause any liens or encumbrances to be placed on the real property which is the subject of this Lease during the term of this Lease without prior written approval of the other party. Lessee acknowledges that Lessors presently have a mortgage upon the premises which Lessors will endeavor to remove.

INGRESS AND EGRESS: Lessee shall have the right of ingress and egress from Highway 93 to the leased real property. Lessor shall not interfere with or hinder said ingress and egress in any manner.

TAXES: Lessor shall pay all real property taxes assessed against the leased lands during the term of this Lease except for taxes assessed against all improvements or structures erected by Lessee or put in place at Lessee's request which shall be paid by Lessee as an operating expense.

MANAGEMENT AND INSURANCE: Lessee intends to operate a fish propagation business on the leased premises. It is understood that the operation and management thereof is under the sole and exclusive control of Lessee. Additionally, Lessee shall have total and complete control over the nature and extent of facilities constructed upon the premises for fish propagation, and the variety and amount of fish to be propagated. However,

Lessee agrees to take every precaution to keep Lessee's business and operation totally separate and apart from Lessor and to minimize all liability to Lessor. Lessee further agrees to maintain a general and products liability policy of insurance in good standing at all times for the protection of Lessor as well as Lessee in the minimum coverage of \$500,000/\$1,000,000. Should Lessor be held accountable for any debt or assessment against the business, Lessee will be responsible to Lessor for full reimbursement.

LETTER OF CONSENT: Lessor shall provide to Lessee's residential financial institution a Letter of Consent to enter upon the leased premises in order to foreclose, if necessary, on the mobile homes used by Lessee and located upon the residential sites described herein so long as such entry or action does not threaten Lessor's title to the underlying lands.

FIRST RIGHT OF REFUSAL: If, during the term of this Lease or at the termination of this Lease, Lessor receives an offer to sell or lease the above described property to a third person, Lessee shall have the first right of refusal to purchase or lease the real property upon the same terms and conditions as the original proposed offer. However it is to be noted that if the proposed sale or offer is in regard to a sale of the entire Ingram's Warm Springs Ranch or a smaller component of agricultural land in addition to the lands described in this lease, then in that event, the within First Right of Refusal

shall have no effect, it being understood, however, that any such sale would nonetheless be made specifically subject to the terms of this lease. Should the within First Right of Refusal come into effect, Lessor will first determine that the prospective Buyer is a qualified and bona fide buyer. Lessor will then advise Lessee in writing of the specific terms and conditions of the offer. Lessee will have forty five (45) days thereafter within which to review the offer and to respond to Lessor with an acceptance of the terms and conditions or a rejection of the same. No response by Lessee within the term set out will constitute a rejection. In the event that Lessee accepts the terms of the offer the sale will close as set forth in the notice so long as Lessee is given a reasonable time of not less than thirty (30) days after acceptance within which to secure closing funds. Unless otherwise mutually agreed, closing will take place under the direction of Custer County Title, Inc. in the customary and standard fashion with Lessee to receive clear title subject only to the usual or general exceptions.

NON-ASSIGNMENT BY LESSEES: Lessees agree that the within lease may not be assigned by them at any time without Lessor's consent, which consent will not be unreasonably withheld.

IMPROVEMENTS: At the end of the term of this lease for whatever cause or reason, all improvements and facilities set in place upon the premises shall remain in place and shall become

the property of Lessor, including but not limited to dams, raceways, ponds, headgates, or other structures, fences, roads, ditches, utilities. In no event upon termination shall Lessor owe Lessee for cost of the improvements even should sums remain owing upon the same from Lessor's share of profits as noted above. During the first five years, however, improvements not yet paid for by Lessor may be removed and liquidated by Lessee. In any event, all liens, debts or other encumbrances will be satisfied by Lessee in regard to the property remaining on the leased premises at the time of termination. However this clause shall not affect the provisions contained in the "LESSOR BUY-BACK" paragraph set forth below. The personal property or movables and equipment, however, shall remain the property of Lessee upon termination.

LESSOR BUY-BACK: At the end of the first Lease period ending July 1, 2009, should Lessees elect to renew as provided above, Lessor shall have the counter-right, or right, to buy back the remaining lease term from Lessees. If Lessor so elects to purchase or buy back, Lessees shall be entitled to a cash payment as mutually agreed upon, but if agreement cannot be mutually reached then the price shall be determined based upon the appraised value of the 15 year lease. The valuation to be determined shall not include value of the improvements, land or water but will include the business value and profit potential.

In the event of a dispute regarding selection of an appraiser the same shall be resolved by arbitration.

ARBITRATION: In the event a disagreement or dispute arises in connection with this Lease, parties agree that prior to either bringing or filing a suit or cause of action against the other they will submit the dispute to arbitration. The parties further agree that unless otherwise agreed the arbitrators shall be three in number, one to be selected by each party with the third selected by agreement of the two arbitrators selected by the parties. An award or decision may be rendered by a majority of the three arbitrators who will be governed as established by the laws and rules of arbitration under Idaho law except as otherwise set forth herein or by mutual agreement of the parties.

EXCLUSIVE USE: Lessor and Lessees agree that the water furnished by Lessor will be used exclusively for fish propagation and that excessive amounts, not dictated by good fish propagation practices, will not be used. It is also agreed that to the extent of its control, Lessor will not permit any fish propagation operation other than Lessee's to exist on the water source or the flow of Warm Spring water upstream from the point where the waters flow under U.S. Highway 93 in the present hydro canal, or if the flows are returned to the original channel, then upstream from the point of such flow which is due West from the above point.

AGRICULTURAL LANDS: No facilities or uses will be employed by Lessee that may unreasonably interfere with, damage or detrimentally affect agricultural uses currently in place upon the lands held by Lessor, whether the injury occurs, or would occur, upon the leased lands or the surrounding lands of Lessor.

DEFAULT: Should either party default in their duties and responsibilities contained herein and should the defaulting party fail to cure said default within forty five (45) days after receiving written notice of said default, this agreement may be terminated by the non-defaulting party. Upon default the non-defaulting party shall have any and all remedies allowed at law or equity.

LITIGATION/ATTORNEY FEES: In the event of any litigation between the parties concerning their respective rights and obligations hereunder, the prevailing party shall be entitled to a judgment for its costs of suit, reasonable litigation expenses, and attorney's fees reasonably incurred, in addition to any other relief awarded by the Court.

REPRESENTATION: This Lease Agreement was prepared jointly by the attorneys for Lessee and Lessor. The parties acknowledge their right to individual counsel. Each party agrees to pay all of its respective attorney's fees incurred in negotiation and execution of this Agreement; however, all costs related to document preparation beneficial to both parties shall be equally shared.

RECORDING: The parties agree that once the leased lands have been selected and set forth by Lessee as noted above, Lessee or Lessee's agent may record a copy of this lease complete with the property description or that in the alternative the parties execute a Memorandum of Lease or an abstract setting forth the parties, the property, the first right of refusal and other pertinent data which may be recorded.

BINDING EFFECT: The provisions of this contract shall be binding upon and inure to the benefit of the heirs, personal representatives, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereunto set their hands the day and year first above written.

Ingram Warm Springs Ranch
by Will Ingram
INGRAM WARM SPRINGS RANCH

Timothy A. Ingram

"LESSOR"

Mark Luper
MARK LUPHER

Jo Anne W. Luper
JO ANNE LUPHER

"LESSEE"

STATE OF IDAHO)

County of Custer)

) ss.

On this 10th day of November, 1994, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Will Jensen & Timothy A. Jensen known or identified to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

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

James B. Beatty
NOTARY PUBLIC FOR IDAHO
Residing at Challis Idaho
My Commission Expires 1-21-99

STATE OF IDAHO)

County of Custer)

) ss.

On this 10th day of November, 1994, before me, the undersigned, a Notary Public in and for said County and State, personally appeared MARK LUPHER and JO ANNE W. LUPHER, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

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

James B. Beatty
NOTARY PUBLIC FOR IDAHO
Residing at Challis Idaho
My commission expires 1-21-99

EXHIBIT "A"

LUPHER/INGRAM WARM SPRINGS RANCH LEASE AGREEMENT

For the purpose of this lease the following items will be used to determine profit:

Income - Gross Receipts

Rental Income	
Fingerlings	Fish
Food Fish	Fish
All Eggs, By-Products or Miscellaneous Sales	
Total Income	Total Sales

Operating Expense

Advertising	Advertising (Not to exceed 5% of sales)
Bank Charge	Bank service charge
Chemicals	Chemicals
Contract Labor	Contract Labor
Dues	Dues and Subscriptions (Not to exceed 1% of sales)
Equipment Rent	Equipment Rental
Feed	Feed
Fuel	Fuel
Insurance	Liability, disability, workman's compensation, crop
Interest	Interest expense
Machine Hire	Machine Hire
Miscellaneous	Miscellaneous Expense (not to exceed 1% of sales)
Office Supplies	Office Supplies
Payroll	Payroll Expense
Professional Fees	Professional Fees (for the benefit of both parties)
a) Accounting	Accountant Fees
b) Legal	Legal Fees
Repairs	Repairs (building, computer, equipment, etc.)
Seed Fish	Seed fish
Supplies	Supplies
T & E	Travel and entertainment (not to exceed 2% of sales)
Taxes	Federal, local, property, state

Tools and Equipment
Utility
Vehicle
R & D

Tools and equipment
Electricity, LP Gas
Vehicle
Research and Development (not to exceed
10% of sales)

Total Expense

Net

EXHIBIT "B"

LUPHER/INGRAM WARM SPRINGS RANCH

For the purpose of this lease the following items will be used to define leasehold improvements:

Commercial Buildings

Dams, Canals and Waterways

Fish Ponds and Raceways

Residences

Roads and Fences

Utility Construction

Water and Sewer Systems

TAL H/10/94
WET

IN THE MATTER OF APPLICATION FOR PERMIT) MEMORANDUM DECISION
)
 NO. 72-7209 IN THE NAME OF WARM SPRINGS RANCH) AND ORDER
)

SE 1/4 / NE 4 / Sec 9

Challis Messenger,

Living on Warm Springs

Department met with

application were

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ormation would be

SECRET

TAL
WEL 11/10/44

Warm Springs Creek.

Mr. Allen's report was received by the Department on April 4, 1983.

Copies of the report and conclusions were mailed to the concerned parties on April 13, 1983 with notice that the Department would accept responses to the report until April 30, 1983.

No responses have been received by the Department.

Based upon the information in the record and his understanding of the law, the Director of the Department of Water Resources makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1) Based upon an investigation of Warm Springs Creek by Richard G. Allen, P.E., the applicant's proposed development will have a negligible effect on water temperatures in Warm Springs Creek at distances more than six miles downstream from the point of diversion.

2) The reach of Warm Springs which experiences flooding due to freezing is more than six miles downstream from the applicant's point of diversion.

CONCLUSIONS OF LAW

- 1) Issuance of a permit will not conflict with local public interest.
- 2) Applicant is entitled to a permit.

ORDER

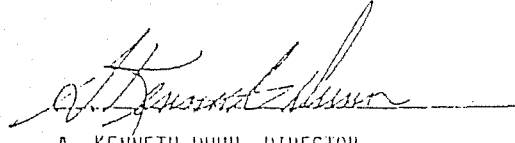
IT IS, THEREFORE, HEREBY ORDERED that Application for Permit No. 72-7209 be and is APPROVED subject to the following conditions:

- 1) Measuring devices of a type approved by the Department shall be permanently installed and maintained at the point of diversion and the point of effluent discharge.
- 2) This permit shall not be assigned or sold without first securing the written approval of the Department of Water Resources.
- 3) Return water shall be treated to insure that the effluent meets intrastate stream water quality standards. Should the use of water under this permit reduce the quantity of water available to prior water rights and make it unusable to satisfy the prior appropriations, then the diversion under this permit must cease.
- 4) Permit holder shall commence the excavation or construction of diverting works within one year of the date this permit is issued and shall proceed diligently until the project is complete.

TAC 11/10/44
WEI

5) Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before July 1, 1988.

Dated this 28th day of July, 1983.


A. KENNETH DUNN, DIRECTOR

RECEIVED

STATE OF IDAHO APR 16 1987

Department of Water Resources

APPLICATION FOR AMENDMENT OF A PERMIT

To change the point of diversion and/or the place of use.

APPROVED

Comes now Warm Springs Ranch Partnership Phone 879-4457

of (address) HC 61-Box 3020 Challis, ID 83226, and represents to the Director of the Idaho Department of Water Resources:

That he is the owner and holder of Permit to Appropriate the Public Waters of the State of Idaho No. 72-7209, and requests that the permit and permit map be changed as follows:

(No change)
1. Point of diversion: 1/4 1/4, Section 32, Township 20N, Range 1E, B.M.,
County of Custer. Other points of diversion: _____

2. Period and nature of use: (irrigation, domestic, stockwatering, industrial, etc.)

(No change)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(feet or acre feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(feet or acre feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(feet or acre feet per annum)
Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(feet or acre feet per annum)

3. Place of use or land to be irrigated:

TWP	RGE	SEC	NE1/4				NW1/4				SW1/4				SE1/4				TOTALS
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	
120	20E	32	X			X													

Total number of acres to be irrigated = _____

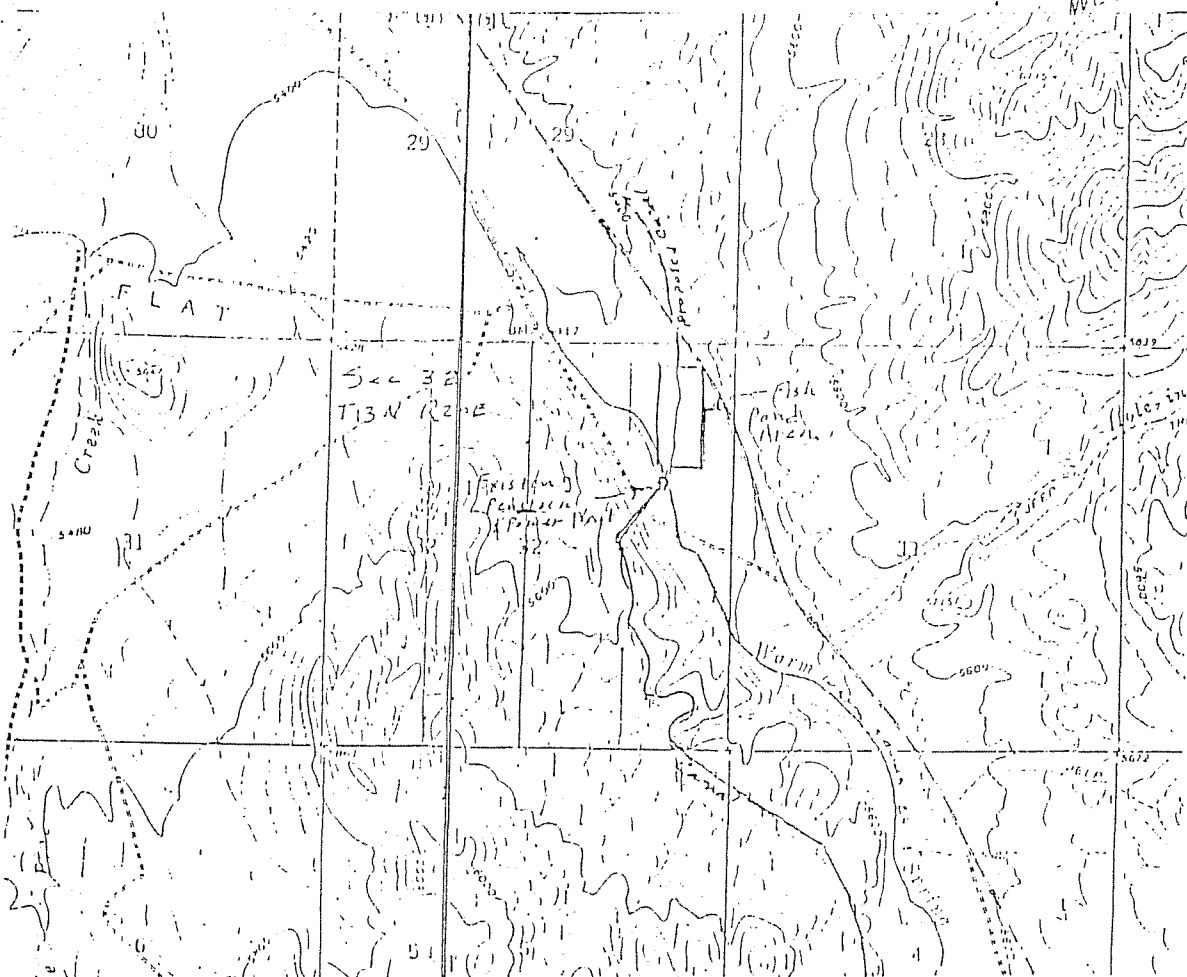
4. a. Who owns the property at the point of diversion? Applicant
b. Who owns the land to be irrigated or the place of use? Applicant
c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing: _____

MICROFILMED

MAY 1 1987

Complete the following map by showing land and point of diversion used by this amendment.

Show 40-acre subdivisions, townships, ranges and ditches.



That no one will be injured by such change, and that such change will be made at permit holder's own risk.

Signed at Twain Falls, this 19 day of February, 19 87.

Timothy A. Ingram
(Signature)

FOR DEPARTMENT USE ONLY

R# 40686

Preliminary check by ADA Fee = \$20.00

Received by ADA Date 2/10/87

Publication prepared by DA Date 3/20/87

Published in the Challis Messenger, Times, The Lewiston Morning Tribune, Post Reg.
The Idaho Statesman

Publication dates 3/19 & 3/26/87

ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, L. GLEN SAXTON, of the Department of Water Resources hereby

Approve the above referenced Amendment provided the conditions as set forth in

Permit No. 72-7209 are met.

Witness my hand and seal

RECEIVED

April

19 87

MAY 13 1987

L. Glen Saxton
Chief, Operations Bureau

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR PERMIT

APPROVED

To appropriate the public waters of the State of Idaho

1. Name of applicant WARM SPRINGS RANCH (PARTNERSHIP) Phone 877-7457
 Post office address Star Pl. CHAMBERS WHITE
2. Source of water supply WARM SPRING which is a tributary of SALMON RIVER
3. Location of point of diversion is NW $\frac{1}{4}$ of S10 $\frac{1}{4}$ of Section 10 Township 12N
 Range 20E U.M. COSEVILLE County, additional points of diversion if any: _____

* Note Address change 11661, Box 2020, Challis, Ida., 83226

4. Water will be used for the following purposes:

Amount 16.0 for FISH PROP. purposes from JAN 1 to DEC 31 (both dates inclusive)
(cfs or acre-feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

5. Total quantity to be appropriated:

a. 16.0 cubic feet per second and/or b. _____ acre-feet per annum.

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. CONSTRUCT CONCRETE
HEAD WORKS

b. Height of storage dam _____ feet, active reservoir capacity _____ acre-feet; total reservoir capacity _____ acre-feet, materials used in storage dam: _____

Period of year when water will be diverted to storage _____ to _____ inclusive.
(Month/Day) (Month/Day)c. Proposed well diameter is 1 inches; proposed depth of well is _____ feet.7. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years (minimum 1 year - maximum 5 years).

8. Description of proposed uses:

a. If water is not for irrigation:

See (1) Give the place of use of water: NW $\frac{1}{4}$ of _____ $\frac{1}{4}$ of Section _____ Township _____
 Range _____ U.M. 5

(2) Amount of power to be generated: _____ horsepower under _____ feet of head.

(3) List number of each kind of livestock to be watered _____

(4) Name of municipality to be served _____, or number of families to be supplied with domestic water _____

(5) If water is to be used for other purposes describe: FISH PROPAGATIONRECEIVED
FEB 1 1979

b. If water is for irrigation, indicate acreage in each subdivision in the tabulation below:

[illegible]

Total number of acres to be irrigated _____

c. Describe any other water rights used for the same purposes as described above. _____

9. a. Who owns the property at the point of diversion Don't know

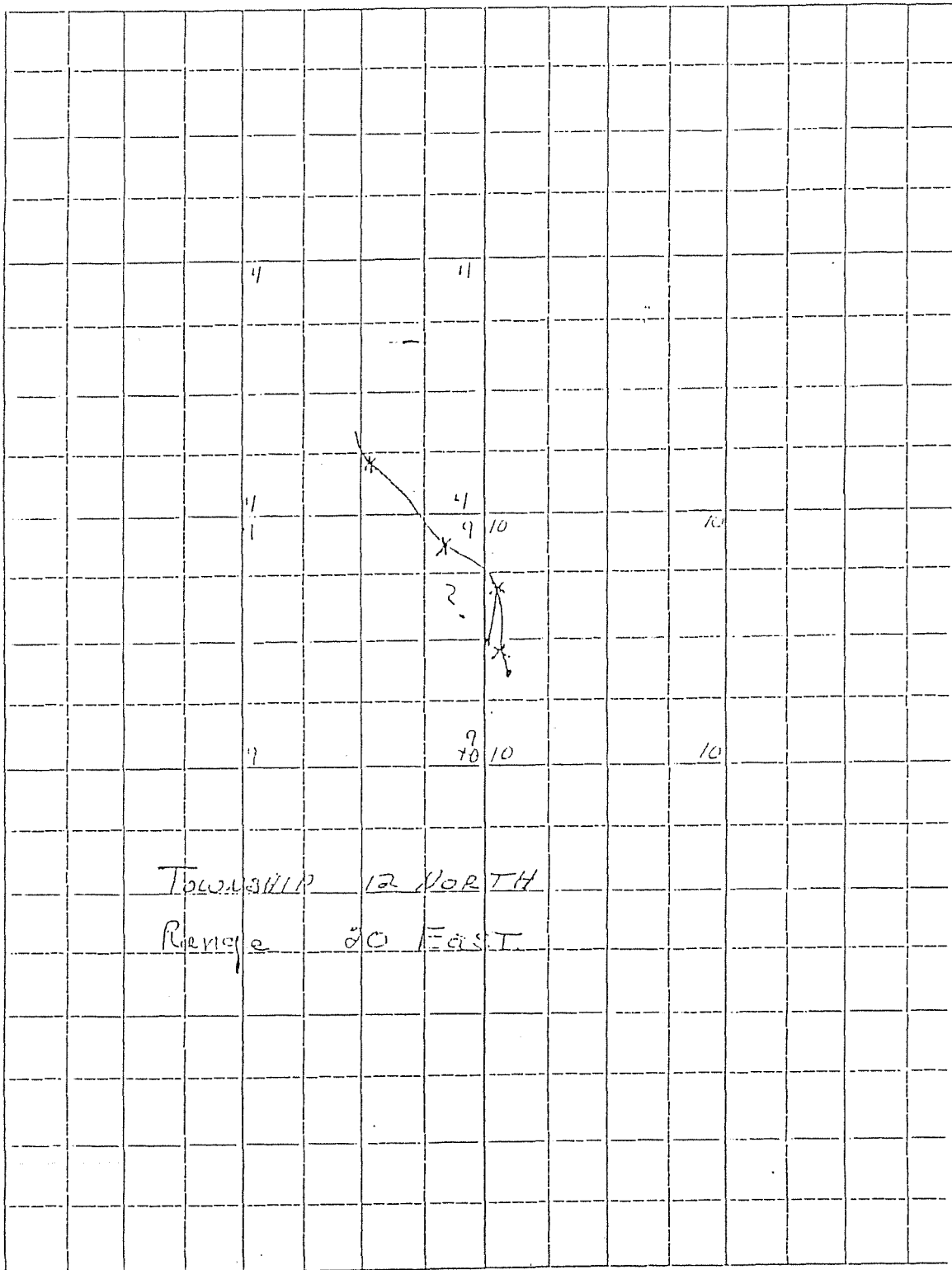
b. Who owns the land to be irrigated or place of use _____

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing

10. Remarks Fish Ponds will be CONSTRUCTED
IN THE CANAL SYSTEM & ABOVE THE CANAL

11/10/74

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile.

RECEIVED

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

x Timothy A. Lyman
(Applicant)
partner Wm. Sprague Ranch.

RECORDED

Received by W. J. [unclear] Date 7/1/83 Time 10:00 W.F. 2/1/83
Preliminary check by [unclear] Fee \$ 345.00
Receipted by [unclear] Date 7/3/83 HL 20945
Publication prepared by [unclear] Date 7/6/83
Published by Walter J. [unclear] Co.
Publication dates 7/6 & 7/22/83
Publication approved [unclear] Date 7/6/83
Protests filed by: None

Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for (approval) denial by ADW

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 72-7209, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before July 1, 19 88.
- c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.
- d. Other:

Pursuant to Memorandum Decision and Order.

Dated this 25th day of July, 1983.

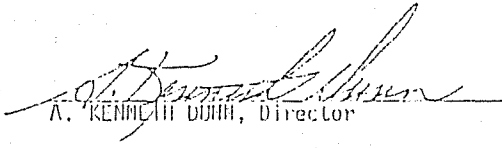

A. KENNETH DUNN, Director

EXHIBIT D

COPY

BRUCE M. SMITH, ISB #3425
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
225 North 9th Street, Suite 420
Boise, ID 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202

Attorney for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

MARK LUPHER and JO ANNE W. LUPHER,)
husband and wife,)

Plaintiffs,)

vs.)

LOIS VON MORGANROTH, successor in)
interest to INGRAM WARM SPRINGS RANCH;)
LOIS, INC., an unknown entity; L&M ANGUS)
RANCH, INC., an unknown entity; JOHN DOES)
1-15; JANE DOES 1-15; CORPORATIONS A-Z;)
LIMITED PARTNERSHIPS 20-25; LOIS, LLC)
40-50; and their heirs, successors and assigns,)

Defendants.)

LOIS VON MORGANROTH,)

Counterclaimant,)

vs.)

MARK LUPHER and JO ANNE W. LUPHER,)
husband and wife, d/b/a/ Epicenter Aquaculture,)

Counterdefendants.)

Case No. CV-00-101

**DEFENDANTS' ANSWER TO
PLAINTIFFS' COMPLAINT FOR
DECLARATORY JUDGMENT,
INTERPLEADER AND
DAMAGES & COUNTERCLAIM**

cc
FEB - 5 2001
lf

COME NOW Defendants, and in answer to Plaintiffs' Complaint for Declaratory Judgment, Interpleader and Damages, hereby admit, deny, and answer as follows:

1. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 1, and on that basis deny the same.

2. Defendants admit the allegations in paragraph 2.

3. Defendants deny the allegations in paragraph 3.

4. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 4, and on that basis deny the same.

5. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 5, and on that basis deny the same.

6. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in sentence one of paragraph 6, and on that basis deny the same. Defendants deny sentence two of paragraph 6; Exhibit A appears to be a copy of the Lease.

7. Defendants admit the allegations in paragraph 7, except that the correct spelling is Lois Von Morganroth, not Lois Van Morganroth.

8. The allegations in paragraph 8 consist of legal conclusions that require no response. It appears Plaintiffs are alleging that both parties have the same obligations under the lease which is not true. To the extent any other response is required, Defendants deny each of the allegations.

9. Defendants admit to the allegations in paragraph 9.

**COUNT ONE
INTERPLEADER**

10. The allegations in paragraph 10 consist of Plaintiffs' restatement of allegations previously answered by Defendants and require no response. To the extent a response is required, Defendants deny the allegations.

11. The allegations in paragraph 11 purport to characterize the Notice of Default, a document that speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied. Defendants deny that the defaults have been cured.

12. The allegations in paragraph 12 purport to characterize the Notice of Default, a document that speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied. Defendants deny that the defaults have been cured.

13. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 13, and on that basis deny the same.

14. Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 14, and on that basis deny the same.

**COUNT TWO
DECLARATORY JUDGMENT**

15. The allegations in paragraph 15 consist of Plaintiffs' restatement of allegations previously answered by Defendants and require no response. To the extent a response is required, Defendants deny the allegations.

16. The allegations in paragraph 16 consist of legal conclusions that require no response. To the extent a response is required, Defendants deny each of the allegations.

17. The allegations in paragraph 17 consist of legal conclusions that require no response. To the extent a response is required, Defendants deny each of the allegations.

18. Defendants admit sentences one and two of paragraph 18. Defendants deny the allegations in sentence three of paragraph 18.

19. The allegations in paragraph 19 consist of legal conclusions or Plaintiffs' characterization of their demands that require no response. To the extent a response is required, Defendants deny each of the allegations. Further, Idaho Code § 10-1100 does not provide for the relief Plaintiffs seek.

COUNT THREE DAMAGES

20. The allegations in paragraph 20 consist of Plaintiffs' restatement of allegations previously answered by Defendants and require no response. To the extent a response is required, Defendants deny the allegations.

21. Defendants admit they operate a hydroelectric facility.

22. The allegations in paragraph 22 purport to characterize the Lease, a document that speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

23. The allegations in paragraph 23 are too vague and unclear to allow Defendants to formulate an answer, and on that basis Defendants deny each of the allegations. To the extent Plaintiffs seek to characterize the Lease, the document speaks for itself.

24. Defendants lack the knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 24, and on that basis deny the same. Defendants deny they have caused any damage to Plaintiffs.

ATTORNEYS' FEES

25. The allegations in paragraph 25 consist of Plaintiffs' restatement of allegations previously answered by Defendants and require no response. To the extent a response is required, Defendants deny the allegations.

26. The allegations in paragraph 26 purport to characterize the Lease, a document that speaks for itself and is the best evidence of its contents. Any allegations contrary to its plain language and meaning are denied.

27. The allegations in paragraph 27 are too vague and unclear to allow Defendants to formulate an answer, and on that basis Defendants deny each of the allegations. To the extent Plaintiffs seek to characterize the Lease, the document speaks for itself.

PRAYER FOR RELIEF

The remainder of the Complaint consists of Plaintiffs' Prayer for Relief and requires no response. To the extent a response is required, Defendants deny that the Plaintiffs are entitled to the relief requested or to any relief whatsoever.

GENERAL DENIAL

Defendants hereby deny any allegations of Plaintiffs' Complaint, whether express or implied, that are not otherwise specifically admitted, denied, or qualified herein.

AFFIRMATIVE DEFENSE

First Affirmative Defense

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

Plaintiffs have failed to name an indispensable party, Ingram Warm Springs Ranch.

Third Affirmative Defense

Plaintiffs' claims are barred by the doctrine of estoppel in that Defendants have provided all water required pursuant to water license number 72-7209.

Fourth Affirmative Defense

Plaintiffs' claims are barred by accord and satisfaction.

Fifth Affirmative Defense

Plaintiffs' claims are barred by unclean hands.

Sixth Affirmative Defense

Plaintiffs' claims are barred by statute of limitations in that Plaintiffs' contract with the Ingram Warm Springs Ranch was entered into in July, 1994.

Seventh Affirmative Defense

Plaintiffs' claims are barred by the Lease which requires any dispute to be arbitrated prior to filing suit.

Eighth Affirmative Defense

Plaintiffs' claims are barred in that they assumed any and all risks as to development of the aquaculture operation.

Ninth Affirmative Defense

Consideration offered by Plaintiffs under the Lease has failed thereby rendering the Lease void.

Tenth Affirmative Defense

Upon information and belief, Plaintiffs have fraudulently represented the nature of the aquaculture business and the profits accruing to the business.

Eleventh Affirmative Defense

Plaintiffs' claims with regard to the amount of water to be provided are barred based on laches, accord and satisfaction, statute of limitations, assumption of risk, and waiver in that Plaintiffs knew or should have known that the water right did not provide the amount of water Plaintiffs appear to be claiming is due.

Twelfth Affirmative Defense

Plaintiffs' claims are barred in that Defendants have fully complied with the Lease including delivery of all water required under the Lease and have allowed all development required under the Lease at locations allowed pursuant to state law.

Thirteenth Affirmative Defense

Plaintiffs' claims are barred in that they have breached the Lease agreement and have failed to cure the defaults.

Fourteenth Affirmative Defense

Plaintiffs' interpleader claim fails to state a cause of action in that Plaintiffs have failed to allege or show that they are subject to multiple liability claims.

Fifteenth Affirmative Defense

Paragraph 22 of Plaintiffs' complaint appears to suggest that Ms. Von Morganroth's protest of Plaintiffs' application for water rights, their application to transfer Ms. Von Morganroth's water right as well as Ms. Von Morganroth's sending of the Notice of Default is "litigation" under the Lease. Sending a Notice of Default is not, and was not intended to be, litigation. It was merely Ms. Von Morganroth's way of informing Plaintiffs' that they were not complying with the Lease. As to the protests filed by Ms. Von Morganroth, if Plaintiffs take the position that such action is litigation, Plaintiffs initiated the litigation by filing the applications.

Such action, filed prior to arbitration pursuant to the Lease, is a violation of the Lease. It appears the allegation is nothing more than an attempt to justify Plaintiffs' legal bills incurred in filing the water right applications.

Sixteenth Affirmative Defense

Lessor hereby reserves the right to add or delete affirmative defenses based on information to be developed through discovery.

COUNTERCLAIM

COMES NOW Defendant/Counterclaimant, Lois Von Morganroth and claims and alleges against Plaintiffs/Counterdefendants, Mark and Jo Anne Luper d/b/a Epicenter Aquaculture as follows:

PARTIES

1. Defendant/Counterclaimant Lois Von Morganroth (aka "Lessor") is a resident of California. Ms. Von Morganroth owns the L&M Angus Ranch in Challis, Idaho, and with regard to this property, is the successor in interest to the Ingram Warm Springs Ranch Partnership.
2. Plaintiffs/Counterdefendants, Mark and Jo Anne Luper (Lupers) are, upon information and belief, residents of Custer County, Idaho. The Lupers, upon information and belief, operate an aquaculture facility located on the L&M Angus Ranch under the name of Epicenter Aquaculture.

JURISDICTION

This Court would have jurisdiction because of the situs of the property and pursuant to Idaho Code § 1-705. However, Counterclaimant, Ms. Von Morganroth does not believe the court has jurisdiction because the terms of the Lease preclude filing suit prior to compliance with the arbitration clause of the Lease. Plaintiffs have not complied with this provision and thus, this

Court does not have jurisdiction over Plaintiffs' claims. The Court does have jurisdiction as to Count 1 of this Counterclaim (arbitration) pursuant to Idaho Code § 7-917.

VENUE

Venue is proper in this Court because the property that is the subject of the Lease is located in Custer County.

BACKGROUND

1. This case involves an aquaculture Lease on real property known as the L&M Angus Ranch in Custer, County, Idaho.

2. Counterclaimant, Ms. Von Morganroth purchased the Ingram Warm Springs Ranch in September, 1996. This ranch, now known as the L&M Angus Ranch (Ranch), is a producer of registered Angus cattle and farm products including hay.

3. At the time of the purchase, the Counterdefendants Luphers had entered into a Lease Agreement (Lease) with the previous owners of the Ranch. Ms. Von Morganroth assumed the rights and obligations under the Lease. A copy of the Lease is attached as Exhibit A to the Complaint filed by the Luphers. A number of provisions in the Lease are relevant to this proceeding.

4. The Lease provides the Luphers the right to occupy certain portions of the Ranch in order to operate an aquaculture facility.

5. The Lease, however, does not provide for exclusive use of the leased premises so as to exclude all others, including Lessors, their agents, or employees.

6. The Lease does not require a fixed rental payment. Instead, the Lease requires the Luphers to pay the Lessors 50% of all profits from the sale of fish products grown or processed on the leased property. The Lease contains a provision for calculation of profits as well as a

provision applying profits first toward the cost of leasehold improvements. The value of leasehold improvements is to be the cost of construction to the Lessees.

7. Profit payments are due and payable by the 10th day of the month following Lessee's receipt of funds.

8. The Lease allows the Lessor to inspect the books and receipts of the Lessee upon reasonable notice.

9. Under the Lease, Lessor is to provide to the Lessee's facility the natural flow of water pursuant to Water Right License 72-7209. Ms. Von Morganroth acquired Water Right 72-7209 when she purchased the Ranch.

10. The Lease does not provide Lessee with the right to apply for Lessee's own water right on Lessor's property or to transfer the water rights of the Lessor.

11. Pursuant to state law, the licensed amount of water that can be diverted under right 72-7209 is 6.98 cfs.

12. The water right license also identifies where the water can be used and for what purpose.

13. There are two hydroelectric plants on the Ranch which were also acquired by Ms. Von Morganroth when she purchased the Ranch. The source of the water that serves the hydro plants, Warm Springs, is the same source that serves the aquaculture facility. Water from Warm Springs flows to the hydro plants in the Warm Springs Canal. Water for the aquaculture facility is diverted from Warm Springs Canal above the hydro plants. According to the Lease, the water is supposed to be pumped back from the aquaculture facility into the Warm Springs Canal above the hydro plants in order to allow the generation of electricity. Lessor has existing contracts for sale of all electricity generated by the plants.

14. To the extent water is diverted out of the Warm Springs Canal for the aquaculture facility and not returned to the canal above the hydro plants, the amount of electricity generated is reduced with a corresponding reduction in payment to Lessor under the contracts.

15. Because the water used by Lessee is also necessary for hydroelectric generation, under the Lease, Lessees are required not to interfere with the source of the water in any manner that will decrease the hydroelectric income for the Lessor.

16. If the Lessor's income from the hydroelectric plant decreases due to Lessee's use of the water or use of the leased property, the Lessee must reimburse the Lessor for such losses.

17. The Lessee is also responsible for damages from its operation because of "pollution, waste water quality, and other damage."

18. All water used by Lessee other than for fish propagation is to be taken from wells with payment to Lessor at a fixed rate.

19. The Lease provides for the Lessor to inspect the leased premises at reasonable times and upon reasonable notice.

20. Under the Lease, the Lessee must submit plans for any new construction or development to Lessors prior to construction or development. The Lessor reserved the right to deny the new construction if it affected Lessor's income from the hydroelectric plants.

21. The Lessee is required to pay all taxes assessed against all improvements or structures erected by Lessee.

22. The Lessee is required to maintain a general and products liability insurance policy in the amount of \$500,000.00/\$1,000,000.00.

23. If the Lease is terminated, all the improvements and facilities belong to the Lessor, even if they are not fully paid for. Personal property or movables and equipment belong to the Lessee.

24. Under a buy-back provision, the Lessor is entitled to buy the remaining renewable lease term based on the appraised value of the Lease. The appraised value does not include any improvements but only “business value and profit potential.”

25. The Lease prohibits facilities and uses that unreasonably “interfere with, damage, or detrimentally affect” the Lessor’s agricultural operations regardless of whether the injury occurs or would occur, on the actual leased premises or Lessor’s surrounding lands.

26. If a party defaults in their obligations, after receiving notice, they have 45 days to cure.

27. If the defaulting party does not cure the default, the non-defaulting party may terminate the Lease.

28. The Lease contains a dispute resolution procedure. The Lease provides that if a disagreement or dispute arises in connection with the Lease, the Parties would arbitrate the dispute prior “to bringing or filing suit or cause of action” against the other party.

29. This arbitration provision is a condition precedent to filing suit, including the present action

30. As set forth below, Plaintiffs/Counterdefendants have breached, and continue to breach, the Lease Agreement in multiple ways thereby causing injury and damage to Ms. Von Morganroth.

COUNT I

Breach of Contract – Breach of Arbitration Clause

31. Lessor reasserts and realleges all previous paragraphs as if set forth in full.
32. Under the Lease, if a party has a disagreement or dispute in connection with the Lease, the party must submit the dispute to arbitration prior to filing suit.
33. On December 12, 2000, the Lessees filed the present suit against Ms. Von Morganroth alleging claims arising under the Lease as set forth in the Complaint.
34. Ms. Von Morganroth only learned of the filing of the suit incidental to a phone conference with the Lessees and the Idaho Department of Water Resources.
35. The Lessees provided no notice of the suit prior to filing it and made no demand or request for arbitration.
36. Failure to request or demand arbitration prior to filing suit is a breach of the Lease Agreement and has caused damage and injury to Mrs. Von Morganroth, including the necessity to retain the services of an attorney to answer and defend against the suit.

COUNT II

Breach of Contract –Financial and Accounting Obligations

37. Lessor reasserts and realleges all previous paragraphs as if set forth in full.
38. Under the Lease, the Plaintiffs/Counterdefendants are required to meet a number of obligations related to financial and accounting matters which they have not done. These include, but are not limited to:
 - (a) failure to properly pay or credit profits according to the Lease;
 - (b) failure to provide information relative to the books and records of the business;

- (c) failure to obtain approval before constructing facilities;
- (d) failure to identify leasehold improvements and their costs;
- (e) failure to identify personal and movable property.

39. With regard to payment of profits, Plaintiffs/Counterdefendants have never made any payments to Ms. Von Morganroth.

40. In addition, in a proceeding before the Idaho Department of Water Resources, wherein Plaintiffs/Counterdefendants' compliance with the Lease is an issue, when asked to provide information on profits, on bank accounts, on leasehold improvements, on tax assessments, on personal equipment, on type of products sold or marketed by Plaintiffs/Counterdefendants and loans and financing for the business, they refused to disclose such information.

41. In the limited financial information Plaintiffs/Counterdefendants have provided, some discrepancies have been identified. For instance, Plaintiffs/Counterdefendants have deducted as expenses Freight and Handling and Telephone costs none of which are permitted under the Lease. Including costs such as these understates profits properly due and owing to Ms. Von Morganroth.

42. Upon information and belief, Plaintiffs/Counterdefendants also are deducting the entire cost of seed fish "purchased" instead of the cost of the seed fish actually "sold", thereby underestimating the true profits.

43. Upon information and belief, Plaintiffs/Counterdefendants also are deducting or offsetting any profits against total leasehold costs instead of against the true depreciation expense, thereby misstating the profits due and owing Ms. Von Morganroth.

44. Upon information and belief, Plaintiffs/Counterdefendants expense all items, including seed fish and other items properly identified as inventory.

45. Upon information and belief, Plaintiffs/Counterdefendants do not account for any items as inventory.

46. The net effect of Plaintiffs/Counterdefendants' accounting practices is to under-represent profits due and owing under the Lease.

47. Plaintiffs/Counterdefendants representations as to profits have been misleading. In April, 1998, Plaintiff/Counterdefendant Mark Lupher informed Al and Tammy Morganroth that the aquaculture business had begun making a profit and that rental payments would begin in a "couple of months." Said payments have never been paid.

48. Plaintiffs/Counterdefendants' accounting practices and methodologies, to the extent disclosed and based on information provided to date, do not comply with any normally accepted accounting practices. They also fail to properly present the true financial position of the business.

49. As a result of Plaintiffs/Counterdefendants' accounting practices, Ms. Von Morganroth has been deprived of profits properly due and owing to her according to the Lease.

50. These actions of the Plaintiffs/Counterdefendants have caused Ms. Von Morganroth injury and damages.

COUNT III

Breach of Contract – Intentional and/or Negligent Damage to Hydroelectric Operations

51. Lessor reasserts and realleges all previous paragraphs as if set forth in full.

52. Under the Lease, Plaintiffs/Counterdefendants are required to not interfere with the source of flows to the hydroelectric plants so as to cause any loss of income.

53. Plaintiffs/Counterdefendants have operated the aquaculture facility in a manner that has and continues to reduce Ms. Von Morganroth's income from the hydroelectric plants.

54. Until recently, Plaintiff/Counterdefendants diverted the entire flow of water from the Warm Springs Canal instead of just the amount allowed pursuant to Water Right 72-7209.

55. In addition, on more than one instance the pumps which are supposed to return water delivered pursuant to License 72-7209 back into the Warm Springs channel did not work or were incapacitated so as to not allow the diverted water to be returned back into the channel either through the intentional or negligent actions of Plaintiffs/Counterdefendants.

56. As a result, Plaintiffs/Counterdefendants have allowed excess amounts of water to go down certain watercourses instead of returning the water into the channel above the hydro plants so as to allow the water to run through the hydroelectric plants.

57. As a result of the malfunctioning of the pumps at the aquaculture facility, Ms. Von Morganroth had to install additional pumping capacity at another location on the Ranch at considerable cost.

58. Even with the additional pumping capacity, the Ranch manager has not been able to recover all the water diverted by Plaintiffs/Counterdefendants.

59. Failure to return diverted water into the channel above the hydro plants reduces the amount of electricity generated and results in less income to Ms. Von Morganroth.

60. As a result of Lessee's improper and illegal diversions and operations, Lessor had to request appointment of a water master by the Idaho Department of Water Resources and to pay for construction of measuring devices.

61. In November, 2000, Plaintiff/Counterdefendant Mark Luper admitted to Ranch Manager, Al Morganroth, that the operation of the aquaculture facility had damaged the hydroelectric operation, but that the amount of damages would be impossible to calculate.

62. Upon information and belief, Plaintiff/Counterdefendant Mark Luper has admitted to others that said impacts to the hydroelectric generation have occurred.

63. As a result of these intentional and/or negligent actions by the Plaintiffs/Counterdefendants, Ms. Von Morganroth has suffered injury and damages.

COUNT IV

Breach of Contract – Intentional and/or Negligent Damages to Agricultural Operations

64. Under the Lease, Plaintiffs/Counterdefendants may not construct facilities or operate in a manner that would interfere, damage, or affect Ms. Von Morganroth's agricultural operations.

65. Plaintiffs/Counterdefendants have constructed facilities without permission and operated the aquaculture facility in a manner that has damaged and interfered with Ms. Von Morganroth's agricultural operations by interfering with Ms. Von Morganroth's agricultural water supply.

66. In 1998, Plaintiffs/Counterdefendants expanded the number of raceways and began use of a settling pond in a manner that negatively affected the amount and delivery of irrigation water to the Ranch.

67. In addition, on more than one instance the pumps which are supposed to return water delivered pursuant to License 72-7209 back into the Warm Springs channel did not work or were incapacitated so as to not allow the diverted water to be returned into the channel either through the intentional or negligent actions of Plaintiffs/Counterdefendants.

68. As a result of the malfunctioning of the pumps at the aquaculture facility, Ms. Von Morganroth had to install additional pumping capacity at another location on the Ranch at considerable cost.

69. Even with the additional pumping capacity, the Ranch manager has not been able to recover all the water diverted by Plaintiffs/Counterdefendants.

70. As a result of decreased available water, the Ranch manager was required to turn off certain irrigation pivots due to lack of water. This resulted in a loss of crops.

71. As a result of these intentional or negligent actions by Plaintiffs/Counterdefendants, Ms. Von Morganroth has suffered damages and injury.

COUNT V – Declaratory Judgment

72. Lessor reasserts and realleges all previous paragraphs as if set forth in full.

73. As a result of the above identified actions by Plaintiffs/Counterdefendants, Ms. Von Morganroth has suffered damage and injury to the Ranch.

74. According to records of the Idaho Department of Water Resources, Plaintiffs/Counterdefendants have not been using the water provided pursuant to License 72-7209 according to the requirements of State water law and the license.

75. For instance, Plaintiffs/Counterdefendants have diverted in excess of the amounts allowed under License 72-7209, have used and are using the water in locations where such use is not permitted, and have failed to comply with requirements of the license, including installation of measuring devices.

76. In 2000, the Plaintiffs/Counterdefendants filed applications for their own water rights on Ms. Von Morganroth's Ranch, some of which are not even related to the aquaculture operation, and even applied to transfer Ms. Von Morganroth's Water Right 72-7209.

77. These actions are not authorized by the Lease.

78. As a result of the above identified actions by Plaintiffs/Counterdefendants, they have violated the terms and the intent of the Lease. These actions were not approved by Ms. Von Morganroth since she was never asked or informed of Plaintiffs/Counterdefendants actions.

79. In light of the above identified actions by the Plaintiffs/Counterdefendants, Ms. Von Morganroth seeks a declaration from the Court that Plaintiffs/Counterdefendants have violated one or more terms of the Lease.

80. Alternatively, Ms. Von Morganroth seeks a declaration from the Court as to her rights and those of the Plaintiffs/ Counterdefendants under the Lease.

WHEREFORE, Ms. Von Morganroth prays for judgment as follows:

As to Count I

1. For judgment that Plaintiffs/Counterdefendants are in violation of the terms of the Lease requiring arbitration prior to the filing of any suit;

2. For an order dismissing Plaintiffs' suit and requiring Plaintiffs/Counterdefendants to undertake arbitration;

3. For costs and attorney fees pursuant to the Lease, I.R.C.P. 54, I.C. 12-120 and/or I.C. 12-121 for the costs and fees incurred in responding to Plaintiffs/Counterdefendants' suit.

As to Count II

1. For an order declaring that Plaintiffs/Counterdefendants are in breach of their obligations under the Lease as set forth in Count II;

2. For an order requiring Plaintiffs/Counterdefendants to make full disclosure of all financial and business records of the business Epicenter Aquaculture;

3. For an order requiring Plaintiffs/Counterdefendants to submit to the Court and to Ms. Von Morganroth a full, complete and accurate accounting of profits and losses, including supporting documentation, of the business Epicenter Aquaculture;

4. For an order awarding Ms. Von Morganroth all general and special damages as proven at trial.

As to Count III

1. For an order enjoining Plaintiffs/Counterdefendants from taking any action which interferes with or results in loss of income associated with the hydroelectric plant operations, including, but not limited to, any action which interferes or delays with delivery of water to the hydroelectric plants;

2. For an order awarding general and special damages to Ms. Von Morganroth for Plaintiffs/Counterdefendants' interference with the hydroelectric operation, including costs associated with Ms. Von Morganroth's efforts to mitigate damages resulting from Plaintiffs/Counterdefendants actions as proven at trial.

As to Count IV

1. For an order enjoining Plaintiffs/Counterdefendants from taking any action which interferes with Ms. Von Morganroth's agricultural operations including, but not limited to, production of cattle and agricultural crops;

2. For an order awarding general and special damages for Plaintiffs/Counterdefendants interference with Ms. Von Morganroth's agricultural operations, including costs associated with Ms. Von Morganroth's efforts to mitigate damages resulting from Plaintiffs/Counterdefendants actions.

As to Count V

1. For an order declaring that Plaintiffs/Counterdefendants are required to use water pursuant to License 72-7209 according to the terms of the license;

2. For an order declaring that the Lease does not provide any basis for Plaintiffs/Counterdefendants to apply for water rights or transfer Ms. Von Morganroth's water rights;

3. For an order declaring that Plaintiffs/Counterdefendants have violated the terms of the Lease by using water and operating the aquaculture facility so as to interfere with Ms. Von Morganroth's hydroelectric operations and agricultural operations;

4. For an order defining Plaintiffs/Counterdefendants' obligations under the Lease.

As to All Counts

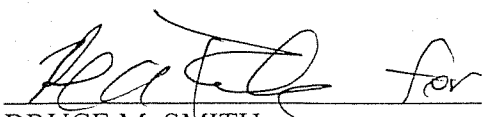
1. For attorney fees and costs pursuant to the Lease, Idaho Code § 12-120, § 12-121, and I.R.C.P. 54;

2. For costs of suit;

3. For such other relief that the Court deems justified in order to make Ms. Von Morganroth whole.

DATED this 2^d day of February, 2001.

MOORE SMITH BUXTON & TURCKE,
CHARTERED



BRUCE M. SMITH
Attorney for Defendants

IDAHO
FEB 7 11 33 AM '01

VERIFICATION

STATE OF CALIFORNIA)
)ss.
County of Santa Monica)

LOIS VON MORGANROTH, being duly sworn, states as follows:

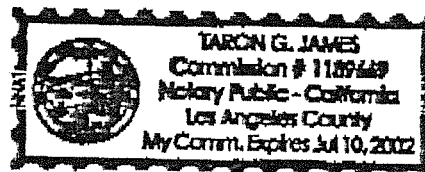
That she is a Defendant/Counterclaimant in the above-entitled matter; that, as such, she has read the foregoing document, knows the contents thereof, and believes the same to be true and correct to the best of her knowledge;

FURTHER, your Affiant saith not.

Lois von Morganroth
LOIS VON MORGANROTH

SUBSCRIBED AND SWORN TO before me this 2nd day of February, 2001.

[Signature]
NOTARY PUBLIC FOR CALIFORNIA
Residing at: 1007 17th St. Apt. 304, Santa Monica, CA 90407
My Commission Expires: July 10, 2002



RECEIVED
FEB 09 2001
MSB & T, CTI

COPY

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of February, 2001, a true and correct copy of the foregoing DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT FOR DECLARATORY JUDGMENT, INTERPLEADER AND DAMAGES & COUNTERCLAIM was served upon the following by the method indicated below:

William R. Hollifield
G. Richard Bevan
HOLLIFIELD & BEVAN, P.A.
249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066
Facsimile: (208) 734-8077

☒ via U.S. MAIL
☐ via HAND DELIVERY
☐ via OVERNIGHT MAIL
☐ via FACSIMILE

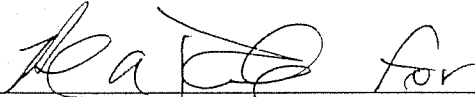
 for
BRUCE M. SMITH

EXHIBIT E

DISTRICT COURT
CUSTER COUNTY
IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

2006 JAN 30 PM 12:01

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife,

Plaintiffs,

vs.

LOIS VON MORGANROTH, successor in
Interest to INGRAM WARM SPRINGS
RANCH; LOIS, INC., an unknown entity;
L&M ANGUS RANCH, INC., an unknown
Entity; JOHN DOES 1-15; JANE DOES
1-15; CORPORATIONS A-Z; LIMITED
PARTNERSHIP 20-25; LOIS, LLC 40-50;
And their heirs, successors and assigns,

Defendants.

LOIS VON MORGANROTH,

Counterclaimant,

vs.

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife, d/b/a Epicenter
Aquaculture,

Counterdefendants.

RECEIVED

OCT 04 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION 066-101

ORDER DISMISSING CASE

WHEREAS the above-captioned matter has been inactive for a period greater
than six (6) months; and

WHEREAS the Clerk of Court served a notice of pending dismissal on December
13, 2005; and

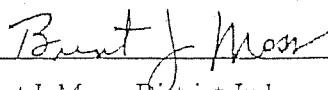
WHEREAS the Court has received an Affidavit in Support of Retention on
Calendar from Robert E. Williams, Esq. in response to said notice, and the court having
reviewed the affidavit and finding that good cause does not exist for the retention of the
above-captioned matter;

COPY

NOW, THEREFORE, the court hereby dismisses the above-captioned matter,
without prejudice, pursuant to I.R.C.P. 40(c).

So Ordered.

DATED this 27 day of January, 2006.



Brent J. Moss, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was this
30th day of January, 2006, served upon the individuals as indicated:

Bruce Smith
Moore Smith
225 N 9th, Ste 420
Boise, ID 83702

[] U.S. Mail, postage prepaid

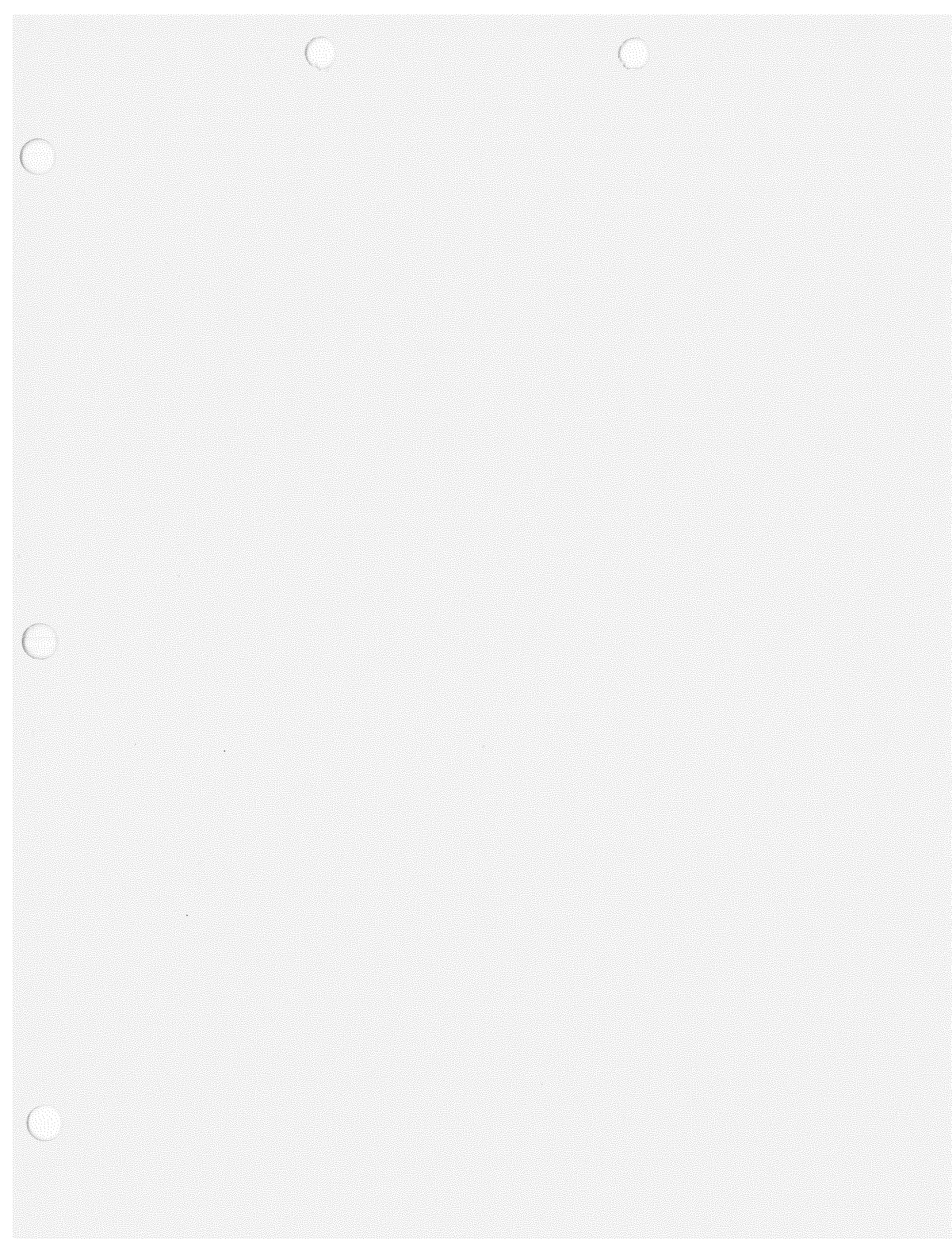
Robert E. Williams, Esq.
117 South Adams Street
P.O. Box 168
Jerome, ID 83338

☒ U.S. Mail, postage prepaid

Clerk of the Court

By:

1st Linda Runyon



FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPETCH, LLP

117 South Adams Street
PO Box 168
Jerome, Idaho 83338
Telephone: 208.324.2303
Fax: 208.324.3135

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO:

TO: Peter R. Anderson – 208.287.6700
Karl Dreher – 208.287.6700

FROM: Robert E. Williams/bsb
SUBJECT: Lupher/ Transfer No. 67067 (fka 5647)
DATE: December 27, 2006

DOCUMENT(S) TRANSMITTED:

Exceptions to Recommended Default Order
Applicants' Brief in Support of Exceptions w/o exhibits

As we discussed in the telephone call of earlier today, I am faxing to you the Exceptions and Brief without exhibits and mailing a copy with exhibits. If you have any questions or there is a problem with the transmission, please call me.

THE DOCUMENTS ACCOMPANYING THIS TELECOPY TRANSMISSION CONTAIN INFORMATION WHICH IS CONFIDENTIAL AND/OR PRIVILEGED. THE INFORMATION IS INTENDED FOR THE USE OF THE INDIVIDUAL/ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION, OR USE OF THE CONTENTS OF THIS TELECOPIED INFORMATION IS STRICTLY PROHIBITED. IF YOU'VE RECEIVED THIS TELECOPY IN ERROR, PLEASE NOTIFY US BY TELEPHONE WITHOUT DELAY.

_____, COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE *Brenda* IMMEDIATELY AT 208.324.2303.

ROBERT E. WILLIAMS
 IDAHO STATE BAR NO. 1693
 FREDERICKSEN, WILLIAMS & MESERVY
 117 South Adams Street
 P. O. Box 168
 Jerome, Idaho 83338
 Telephone: (208) 324-2303
 Facsimile: (208) 324-3135
 Attorneys for Applicants Mark L. and/or Jo Anne Lupher,
 dba Epicenter Aquaculture

BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
 FOR TRANSFER NO. 67067 (formerly
 known as 5647) and APPLICATIONS
 FOR PERMIT NOS. 72-07577 and 72-
 07578 IN THE NAME OF MARK L.
 and/or JOANNE LUPHER, dba
 EPICENTER AQUACULTURE

SOURCE: Groundwater

COUNTY: Twin Falls

**EXCEPTIONS TO RECOMMENDED
 DEFAULT ORDER**

COME NOW, MARK L. and/or JO ANNE LUPHER, dba EPICENTER
 AQUACULTURE (hereinafter "Applicants"), through their attorney of record, Robert E.
 Williams, of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and pursuant
 to Rule 720 of the Idaho Department of Water Resources (IDAPA Rule 37.01.01.02(b))
 and take exceptions to the Recommended Default Order dated November 3, 2006
 ("Recommended Order").

The portions of the Recommended Order to which exceptions are taken are that:

- (a) the "Lease Agreement Dispute" between the parties as to lawful
 possession of the real property to which the water right applications apply has not been
 finalized, and
- (b) that the Applicant has failed to demonstrate clear legal interest in the place
 of use to which Permit No. 72-07577 and 72-07578 would be appurtenant or legal

authority for transfer of the water right now pending in Transfer No. 5647, formerly denominated 67067.

These Exceptions are supported by the attached Brief.

Dated this 27th day of December, 2006.

FREDERICKSEN, WILLIAMS, MESERVY &
LOTHSPEICH, LLP

ROBERT E. WILLIAMS

Attorney for Applicants, Mark L. and/or
Joanne Lupher, dba Epicenter Aquaculture

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 27th day of December, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Peter R. Anderson, Hearing Officer Attn: Victoria Wygle Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid w/exhibits ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express
Bruce M. Smith Moore Smith Buxton, et al 950 W. Bannock, Suite 520 Boise, Idaho 83702-6118	☒ U.S. Mail, postage prepaid w/exhibits ☐ Hand Delivery ☐ Court Folder ☒ Facsimile 208.331.1202 w/exhibits ☐ Federal Express
Karl Dreher Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid w/exhibits ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express

ROBERT E. WILLIAMS

ROBERT E. WILLIAMS
 IDAHO STATE BAR NO. 1693
 FREDERICKSEN, WILLIAMS & MESERVY
 117 South Adams Street
 P. O. Box 168
 Jerome, Idaho 83338
 Telephone: (208) 324-2303
 Facsimile: (208) 324-3135
 Attorneys for Applicants Mark L. and/or Jo Anne Lupher,
 dba Epicenter Aquaculture

BEFORE THE DEPARTMENT OF WATER RESOURCES
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 FOR PERMIT NOS. 72-07577 and 72-
 07578 IN THE NAME OF MARK L.
 and/or JOANNE LUPHER, dba
 EPICENTER AQUACULTURE

SOURCE: Groundwater

COUNTY: Twin Falls

**APPLICANTS' BRIEF IN SUPPORT
 OF EXCEPTIONS**

COME NOW, MARK L. and/or JO ANNE LUPHER, dba EPICENTER
 AQUACULTURE (hereinafter "Applicants"), through their attorney of record, Robert E.
 Williams, of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and submit their
 Brief in Support of Exceptions to the Recommended Default Order, dated November 3, 2006. A
 copy of the Recommended Default Order is attached hereto as **EXHIBIT A**. Exceptions were
 made pursuant to IDWR Rule 720 (IDAPA Rule 37.01.01.02(b)), on the 27th day of December,
 2006.

INTRODUCTION

Applicants do not contest the Hearing Officer's recitation of the procedural history in the
 Recommended Default Order, as far as it went. Supplementing this procedural history, the
 Applicants filed a Petition for Reconsideration on the 17th day of November, 2006. The Hearing
 Officer issued an Order Denying Petition for Reconsideration on December 7, 2006, a copy of

which is attached hereto as **EXHIBIT B**. However, Applicants do contest the conclusions of the Hearing Officer that present circumstances fail to demonstrate that Applicants have a "clear legal interest" in the place of use to which the Applications Nos. 72-07577 and 72-07578 would be appurtenant and that Applicants lack legal authority to bring the transfer proceeding pending under Transfer No. 67067 (formerly known as 5746). Applicants believe the Hearing Officer to have erred in these conclusions for the following reasons:

A. THE APPLICANTS ARE LAWFULLY IN POSSESSION OF THE REAL PROPERTY UNDER A WRITTEN LEASE.

Dismissal of the state court action regarding the disputed Lease Agreement leaves the Applicants in lawful possession of the real property to which the Application for Permits Nos. 72-7577 and 72-07578 apply. Applicants have been in possession of the real property under a written Lease Agreement, a copy of which is attached hereto as **EXHIBIT C**, for more than twelve (12) consecutive years. Further, after the three (3) years remaining under the initial lease term expire, the Lease Agreement gives Applicants the right to extend the lease for another fifteen (15) year term if such notice is given prior to July 1, 2008. Applicants currently intend to exercise their right to extend. Because of the dismissal of the state court action, there is no longer a pending dispute between the parties regarding the Lease Agreement and, therefore, there is no dispute to resolve as to Applicants' right to possession.

The counterclaim in the state court action alleged various breaches and defaults under the Lease Agreement. A copy of the pleading containing the counterclaim is attached hereto as **EXHIBIT D**. Like Applicants' claims for declaratory judgment and damages, the Protestants' claims for breach of the Lease have been dismissed. A copy of the District Court's Order of Dismissal is attached hereto as **EXHIBIT E**. There is therefore no current unresolved dispute as to Applicants' right to possession of the real property. Applicants are currently lawfully in possession of the real property which is directly related to the water right appropriation and transfer applications, which right runs for a continuous period of thirty (30) years from its inception. No action has ever been brought or is now pending to remove the Applicants from the real property. The Hearing Officer is clearly incorrect in his conclusion that the pending application should be dismissed for failure to resolve questions as to the right to the possession

of the real property to which the water rights apply, because no such dispute currently exists, and Applicants are in possession.

B. EVEN IF DISPUTES OVER THE LEASE AGREEMENT WERE STILL PENDING, THE DISPUTES DO NOT DEPRIVE THE DEPARTMENT OF WATER RESOURCES OF THE ABILITY TO PROCESS THE APPLICATIONS.

Resolutions of disputes regarding the Lease Agreement were not necessary prerequisites to the Department's proceeding on the Applicants' pending applications. The necessity of proving a possessory interest in land, either from which water is diverted, or on which it is to be put to beneficial use, is two fold:

1. To protect the private property owner's right to exclusive use and possession of the land. *Bassett v. Swenson*, 51 Idaho, 5 P.2d 722, 723-724 (Idaho 1931); and
2. To prevent bad faith delay and speculative purposes. *Lemmon v. Hardy*, 95 Idaho 778, 781, 519 P.2d 1168 (1974).

The *Lemmon* court emphasized the Idaho doctrine of discouraging the seeking of water permits for speculative purposes. The lack of a possessory interest in the property is identified by the court as a *per se* indication of speculation. The Applicants' right to continue possession of the real property for a thirty (30) year period, presently unchallenged by the Protestants, does not meet the *Lemmon* standard for speculation. Additionally, IDAPA 37.03.08.045.01(c) also provides in pertinent part that:

...speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence..."

No speculation, within the court and regulation definitions has been shown to have been committed by the Applicants. Dismissal of the pending Applications does not protect the interest of the Department of Water Resources or the public in avoiding speculation or avoiding trespass onto a private property owner's land, as prohibited by the *Bassett* and *Lemmon* cases, *supra*, because there is no speculation.

Transfer number 67067 (fka 5647) seeks the change of the permissible place of use to the actual portion of the real property upon which the fish raising works have been

constructed. This is a technical transfer. The authority of the Lessee to engage in this transfer is clearly implied by the terms of the Lease Agreement which unambiguously contemplates the Applicants' ability to use the real property for the rearing of fish for the duration of the lease term. Not permitting the Applicants' transfer amending the place of use to comply with that which has been constructed and used upon the grounds, in the absence of the Protestants wanting to do so, deprives the Lease Agreement of all meaning.

The Lease Agreement clearly demonstrates the right of the Applicants to the use of the water which is a prerequisite to bringing an application for transfer. See *Idaho Code* § 42-108 and I.C. §42-222(1). The statutory standards having been met, Applicant's water transfer application should be processed.

C. EFFORTS HAVE BEEN MADE TO RESOLVE DISPUTES BETWEEN THE PARTIES AND INFORMATION HAS BEEN PROVIDED TO IDWR UPON ITS REQUEST.

From 2002 to the present date, the parties have engaged in discussions regarding the resolution of various disputes between them. In 2002, a lengthy mediation was held with Judge Daniel Hurlbutt. Several proposals to resolve disputes were promulgated by each of the parties with no final resolution. In the meantime, Applicants have remained in possession of the real property for more than twelve (12) years under the terms of the Lease Agreement. There is no proceeding pending which challenges the Applicants' right to the lawful possession of the real property because the state court action has been dismissed. See EXHIBIT E attached hereto.

Because of Applicants' continued possession of the real property, their present possession of the real property, and their contractual right to extend the right to possession for another eighteen (18) years beyond 2006, there is no present dispute which needs to be resolved as to Applicants' continued rights to the possession of the real property underlying the two (2) appropriation and one (1) transfer proceeding.

Applicants did, on the 25th day of September, 2006, submit, in response to requests from the Idaho Department of Water Resources, a substantial amount of technical information regarding the pending water right appropriation matter in this

proceeding and two (2) other water right appropriation applications filed by the Applicants. The materials were compiled at considerable expense with the assistance of Brockway Engineering, Twin Falls, Idaho. Because the materials are voluminous, they are not attached to this petition. The original documents were filed with the Department of Water Resources in September, 2006. A description of the documents provided, by title, is as follows:

- Exhibit A. Facility Design
- Exhibit B. Existing water right license 72-7209 and pending application summaries
- Exhibit C. Effect on existing water rights
 - C.1. Map – Active Water Right Licenses & Decrees in Vicinity
 - C.2. IDWR Active Water Right Listing (“Warm Springs”)
- Exhibit D. Information relative to sufficiency of water supply
 - D.1. Tilapia Production
 - D.2. Water Quantity & Quality Requirements for Channel Catfish Hatcheries
- Exhibit E. Information relative to good faith, delay or speculative purposes
 - E.1. Existing Lease Agreement & Survey
 - E.2. EPA NPDES Permit ID-002826-6 & related documents
- Exhibit F. Information relative to financial resources
 - F.1. Current financial statement – Mark L. & Jo Anne W. Luper dba Epicenter Aquaculture
 - F.2. Additional facility estimated construction costs
- Exhibit G. Information relative to conflict with the local public interest
 - G.1. Letter of comment from Idaho Department of Environmental Quality
 - G.2. Letter of comment from Idaho Department of Fish & Game (2)
 - G.3. Letter of comment from Custer County Commissioners
 - G.4. Recommendation of Watermaster (RE: 72-7479)

CONCLUSION

Applicants have a clear, undisputed right to the possession of the real property underlying the pending applications. The dismissal of the state court action means there is no longer a dispute in existence as to the Applicants' rights to possession. This possessory right entitles the Applicants to have their applications for appropriation and transfer processed. The Department should rescind the Recommended Order of Default and set the two (2) appropriation filings and the single transfer filing now pending for hearing at a time and place convenient to the assigned Hearing Officer and the parties.

RESPECTFULLY SUBMITTED THIS 27th day of December, 2006.

FREDERICKSEN, WILLIAMS & MESERVY



ROBERT E. WILLIAMS

Attorneys for Applicants, Mark L. and/or
Joanne Lupher, dba Epicenter Aquaculture

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 27th day of December, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Peter R. Anderson, Hearing Officer Attn: Victoria Wygle Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express
Bruce M. Smith Moore Smith Buxton, ct al 950 W. Bannock, Suite 520 Boise, Idaho 83702-6118	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile ☐ Federal Express
Karl Dreher Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 w/o exhibits ☐ Federal Express


 ROBERT E. WILLIAMS

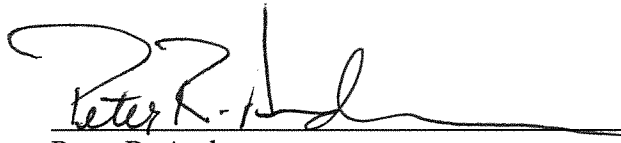
**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 67067 (formerly known)
as 5647) and APPLICATIONS FOR)
PERMIT NOS. 72-07577 and 72-07578)
IN THE NAME OF MARK L. and/or)
JOANNE LUPHER, dba EPICENTER)
AQUACULTURE)
_____)

**ORDER DENYING
PETITION FOR
RECONSIDERATION**

The *Petition for Reconsideration of Recommended Default Order* filed by the applicants in this matter on November 17, 2006, is hereby DENIED pursuant, in part, to the findings in the attached Exhibit A.

Dated this 7th day of December, 2006.



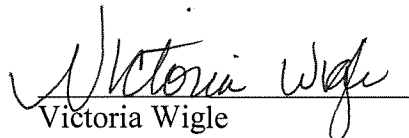
Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of December 2006, I delivered the foregoing document by U.S. mail, postage prepaid and properly addressed to the following:

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHTD
950 W BANNOCK STE 520
BOISE, IDAHO 83702

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS & MESSERVY
PO BOX 168
JEROME ID 83338

A handwritten signature in cursive script, reading "Victoria Wigle", written over a horizontal line.

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 67067 (formerly known)
as 5647)and APPLICATIONS FOR)
PERMIT NOS. 72-07577 and 72-07578)
IN THE NAME OF MARK L. and/or)
JOANNE LUPHER, dba EPICENTER)
AQUACULTURE)

**ORDER ON SHOW CAUSE
HEARING**

FINDINGS OF FACT

1. This matter involves for Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 in the name of and Mark L. Lupher and Jo Anne W. Lupher dba Epicenter Aquaculture (the "Applicants"). The Applicant's interest in the property upon which the applied-for permits would be developed, and their interest in the water right to be transferred is pursuant to a lease dated July 1, 1994 between Ingram Warm Springs Ranch and Mark Lupher and Jo Anne W. Lupher (the "Lease Agreement").
2. The following chronology applies to the processing of Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647 and the Applicant's leasehold interest in the place of use in question:
 - a. July 1, 1994: Lease Agreement effective.

- b. October 11, 1999: Date of a Notice of Default under the "Default" provision on page 11 of the Lease Agreement sent by L& M Angus Ranch, successor to the Ingrams, to the Applicants.
- c. October 14, 1999: Application for Permit Nos. 72-07577 and 72-07578 fully submitted to IDWR. Both Applications indicate that the "arrangement enabling the applicant to make this filing" is the Lease Agreement.
- d. December 14, 1999: Transfer of Water Rights No. 5647 fully submitted to IDWR. The Transfer indicates that the document which shows the Applicants ownership of the water right to be transferred, Water Right License No. 72-07209, is the Lease Agreement.
- e. January 10, 2000: Protests to Application for Permit Nos. 72-07577 and 72-07578 filed by L & M Angus Ranch.
- f. February 17, 2000: Protest to Transfer of Water Rights No. 5647 filed by L & M Angus Ranch (the "Protestant").
- g. June 15, 2000: Date of letter from the Protestant notifying the Applicants that they continue to be in default under the lease.
- h. June 21, 2000: Joint prehearing conference held by IDWR regarding Application for Permit Nos. 72-07577 and 72-07578 and Transfer of Water Rights No. 5647. The Protestant argued that IDWR could not approve the Applications and Transfer because the Lease Agreement was in default and/or the Applicants did not own the land.
- i. July 5, 2000: IDWR issues order authorizing discovery.

- j. October 5, 2000: Protestants file a Motion to Compel Discovery.
- k. November 14, 2000: IDWR issues its *Order Denying Motion to Compel*.

IDWR indicated to the parties, regarding the question of whether or not the Applicants had defaulted upon their lease, that:

IDWR is fully aware that this issue is crucial to the Applicants' ability and authority, or not, to proceed with these Applications. Resolution of this question, however, is better left to another forum and discovery under that forum's authority. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.") In fact, the lease itself provides that any dispute regarding the lease must be submitted to arbitration. Lease Agreement at page 10. When either the Applicants or the Protestant submit an indication that the question of default has been submitted to arbitration IDWR will stay these matters until that arbitration has been completed, and then reflect in its decisions the determination of the arbitration panel.

- l. December 15, 2000: Prehearing Conference. At this conference the Applicants indicated that they had filed an action for declaratory judgment on the Lease Agreement, Custer Co. Case No. CV-00-101.
- m. December 29, 2000: IDWR issues an *Order Staying proceedings and Setting Status Conference*. The Order provides, in part, that "all contested case proceedings on these applications are STAYED pending resolution of Custer Co. Case. *Sic* No. CV-00-101, so long as the Applicants exercise reasonable diligence in the prosecution of that action."

- n. March 30, 2001: At a status conference the Applicants indicated that the declaratory judgment action is proceeding. A summary judgment motion had been filed by the Protestants in District Court, arguing that the appropriate forum was arbitration, as provided by the Lease Agreement. The Applicants indicated that the summary judgment motion would be argued within 45 days.
- o. July 2, 2001: Summary judgment argument. At the February 22, 2002, show cause hearing the Protestant represented that it argued in District Court that the Lease Agreement provided for binding arbitration, and Applicants argued in District Court that the arbitration contemplated by the Lease was non-binding. The Applicants did not disagree with this representation at the show cause hearing.
- p. September 14, 2001: The parties indicate that the District Court has directed them to arbitrate the Lease Agreement dispute.
- q. December 7, 2001: Prehearing Conference. At the conference the Applicants indicate that they are preparing a letter to Protestants regarding selection of an arbitrator. Both parties indicate that arbitration will likely take a least 6 months.
- r. February 22, 2002: At the, show cause hearing the parties indicated that an arbitrator still had not been selected. The Applicants indicated that they would do everything within their power to complete arbitration within

sixty days. The Protestant indicated that six months was more realistic. The Protestants stated that they would accept binding arbitration. Whether or not the arbitration is binding and final is completely within the hands of the Applicants.

CONCLUSIONS OF LAW

1. As a part of the decision regarding Application for Permit Nos. 72-07577 and 72-07578, the Director of IDWR is required to determine whether the application for the new water right permits is made for speculative purposes or whether the applicant has sufficient financial resources with which to complete the work involved. Idaho Code § 42-203A(5)(c) and (d). *See also* IDAPA 37.03.08.040.05.e.i and 37.03.08.045.01.c.i. The Idaho Supreme Court has stated, "The appellant's filing an application for a water permit with no possessory right in the land designated as the place of use amounted to speculation in and of itself." *Lemmon v. Hardy*, 95 Idaho 778, 781 (1974).
2. Idaho's water right transfer statutes provide that only a "person entitled to the use of water or owning any land to which water has been made appurtenant" may apply to transfer that water. I.C. § 42-108, I.C. § 42-222(1) ("Any person, entitled to the use of water whether represented by license... by claims...or by decree, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change."). Ownership of a legal interest in a water right is a prerequisite for a person's ability to change a water right. *Federal*

Land Bank of Spokane v. Union Central Life Ins. Co., 51 Idaho 490, 491 (1931) ("Before a person may have the place of use of water changed, he must show that he owns the water, or has the right to have it changed, which must, if there is a dispute, be determined in an action for that purpose.").

3. Applicants knew within days of filing Application for Permit Nos. 72-07577 and 72-07578 in October 1999 that there was a dispute regarding the Lease Agreement. The existence of this dispute was reiterated to them many times. In November 2000 the Applicants were informed in the *Order Denying Motion to Compel* that arbitration appeared to be necessary. Now, more than two years after they were informed of the possible default and over a year after the written decision staying this matter, Applicants indicate to IDWR that they would try to complete arbitration within sixty days of February 22, 2002. Applicants control whether arbitration will finally resolve the lease dispute. With reasonable diligence, Applicants can finally resolve the dispute over the Lease Agreement within six months of the February 22, 2002, show cause hearing.

Base upon the foregoing it is hereby ORDERED that the Applicant submit to IDWR on August 30, 2002, final resolution of the Lease Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647.

Dated this 12th day of April, 2002.



PETER R. ANDERSON
HEARING OFFICER

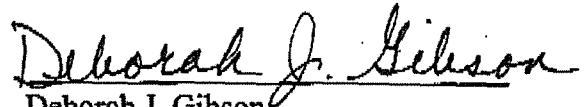
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of April, 2002, I delivered the foregoing **ORDER ON SHOW CAUSE HEARING** by U.S. mail, postage prepaid and properly addressed to the following:

William R. Hollifield
HOLLIFIELD & BEVAL, PA
249 3RD Ave. E.
P.O. Box 66
Twin Falls, ID 83303-0066

Allen D. Merritt
Southern Regional Manager
Idaho Dept. of Water Resources
1341 Fillmore St., Ste 200
Twin Falls, ID 83301

Bruce M. Smith
MOORE SMITH BUXTON &
TURCKE, CHTD
225 North 9th Street, Suite 420
Boise, Idaho 83702



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

RECEIVED

NOV 20 2006

DEPARTMENT OF
WATER RESOURCES

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS & MESERVY

117 South Adams Street

P. O. Box 168

Jerome, Idaho 83338

Telephone: (208) 324-2303

Facsimile: (208) 324-3135

Attorneys for Applicants Mark L. and/or Jo Anne Luper,
dba Epicenter Aquaculture

Filed via Fax
11-17-06
VW

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 67067 (formerly known as 5647) and APPLICATIONS FOR PERMIT NOS. 72-07577 and 72- 07578 IN THE NAME OF MARK L. and/or JOANNE LUPHER, dba EPICENTER AQUACULTURE	SOURCE: Groundwater COUNTY: Twin Falls APPLICANTS' PETITION FOR RECONSIDERATION OF RECOMMENDED DEFAULT ORDER
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COME NOW, MARK L. and/or JO ANNE LUPHER, dba EPICENTER
AQUACULTURE (hereinafter "Applicants"), through their attorney of record, Robert E.
Williams, of the firm Fredericksen, Williams, Meservy & Lothspeich, LLP, and petition the
Hearing Officer for reconsideration of the Recommended Default Order dated November 3,
2006. This Petition for Reconsideration is made pursuant to IDWR Rule of Procedure 720.

INTRODUCTION

Applicants do not contest the Hearing Officer's recitation of the procedural history in the
Recommended Default Order. However, Applicants do contest the conclusions of the Hearing
Officer that present circumstances fail to demonstrate that Applicants have a "clear legal interest"
in the place of use to which the Applications Nos. 72-07577 and 72-07578 would be appurtenant

and that Applicants lack legal authority to bring the transfer proceeding pending under Transfer No. 67067 (formerly known as 5746). Applicants believe the Hearing Officer to be mistaken in these conclusions for the following reasons:

A. THE APPLICANTS ARE LAWFULLY IN POSSESSION OF THE REAL PROPERTY UNDER A WRITTEN LEASE.

Dismissal of the State Court Action Regarding the Disputed Lease Agreement leaves the Applicants in lawful possession of the real property to which the Application for Permits Nos. 72-7577 and 72-07578 apply. Applicants have been in possession of the real property under the Lease Agreement for more than twelve (12) consecutive years. Further, after the three (3) years remaining under the initial lease term expire, the Lease Agreement gives Applicants the right to extend the lease for another fifteen (15) year term if such notice is given prior to July 1, 2008. Applicants currently intend to exercise their right to extend. Because of the dismissal of the state court action, there is no longer a pending dispute between the parties regarding the Lease Agreement and, therefore, there is no dispute to resolve as to Applicants' right to possession.

The counterclaim in the state court action alleged various breaches and defaults under the Lease Agreement. Like Applicants' claims for declaratory judgment relief concerning certain terms of the lease and damages, the Protestants' claims have been dismissed. Therefore, Applicants are lawfully in possession of the real property which is directly related to the water right appropriation and transfer applications and will be for a continuous period of thirty (30) years. No action has ever been brought or is now pending to remove the Applicants from the real property.

B. EVEN IF DISPUTES OVER THE LEASE AGREEMENT WERE STILL PENDING, THE DISPUTES DO NOT DEPRIVE THE DEPARTMENT OF WATER RESOURCES OF THE ABILITY TO PROCESS THE APPLICATIONS.

Resolution of disputes regarding the lease agreement were not necessary prerequisites to the Department's proceeding on the Applicants' pending applications. The necessity of proving

a possessory interest in land, either from which water is diverted, or on which it is to be put to beneficial use, is two fold:

1. To protect the private property owner's right to exclusive use and possession of the land *Bassett v. Swenson*, 51 Idaho, 5 P.2d 722, 723-724 (Idaho 1931); and
2. To prevent bad faith delay and speculative purposes. *Lemmon v. Hardy*, 95 Idaho 778, 781, 519 P.2d 1168 (1974).

The *Lemmon* court emphasized the Idaho doctrine of discouraging the seeking of water permits for speculative purposes. The lack of a possessory interest in the property is identified by the court as a *per se* indication of speculation. The Applicants' right to continue possession of the real property for a thirty (30) year period, presently unchallenged by the Protestants, does not meet the *Lemmon* standard for speculation. Additionally, IDAPA 37.03.08.045.01(c) also provides in pertinent part that:

...speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence..."

No speculation, within the court and regulation definitions has been shown to have been committed by the Applicants. Dismissal of the pending Applications does not protect the interest of the Department of Water Resources or the public in avoiding speculation or avoiding trespass onto a private property owner's land, as prohibited by the *Bassett* and *Lemmon* cases, *supra*, because there is no speculation.

Transfer number 67067 (fka 5647) seeks the change of the permissible place of use to the actual portion of the real property upon which the fish raising works have been constructed. This is a technical transfer. The authority of the Lessee to engage in this transfer is clearly implied by the terms of the Lease Agreement which unambiguously contemplates the Applicants' ability to use the real property for the rearing of fish for the duration of the lease term. Not permitting the Applicants' transfer amending the place of use to comply with that which has been constructed and used upon the grounds, in the absence of the Protestants wanting to do so, deprives the Lease Agreement of all meaning.

The Lease Agreement clearly demonstrates the right of the Applicants to the use of the water which is a prerequisite to bringing an application for transfer. See *Idaho Code* § 42-108 and I.C. §42-222(1). The statutory standards having been met, Applicant's water transfer application should be processed.

C. EFFORTS HAVE BEEN MADE TO RESOLVE DISPUTES BETWEEN THE PARTIES AND INFORMATION HAS BEEN PROVIDED TO IDWR UPON ITS REQUEST.

From 2002 to the present date, the parties have engaged in discussions regarding the resolution of various disputes between them. In 2002, a lengthy mediation was held with Judge Daniel Hurlbutt. Several proposals to resolve disputes were promulgated by each of the parties with no final resolution. In the meantime, Applicants have remained in possession of the real property for more than twelve (12) years under the terms of the Lease Agreement. There is no proceeding pending which challenges the Applicants' right to the lawful possession of the real property because the state court action has been dismissed.

Because of Applicants' continued possession of the real property, their present possession of the real property, and their contractual right to extend the right to possession for another eighteen (18) years, there is no present dispute which needs to be resolved as to Applicants' continued rights to the possession of the real property underlying the two (2) appropriation and one (1) transfer proceeding.

Applicants did, on the 25th day of September, 2006, submit, in response to requests from the Idaho Department of Water Resources, a substantial amount of technical information regarding the pending water right appropriation matter in this proceeding and two (2) other water right appropriation applications filed by the Applicants. The materials were compiled at considerable expense with the assistance of Brockway Engineering, Twin Falls, Idaho. Because the materials are voluminous, they are not attached to this petition. The original documents were filed with the Department of Water Resources in September, 2006. A description of the documents provided, by title, is as follows:

- Exhibit A. Facility Design
- Exhibit B. Existing water right license 72-7209 and pending application summaries
- Exhibit C. Effect on existing water rights
 - C.1. Map – Active Water Right Licenses & Decrees in Vicinity
 - C.2. IDWR Active Water Right Listing (“Warm Springs”)
- Exhibit D. Information relative to sufficiency of water supply
 - D.1. Tilapia Production
 - D.2. Water Quantity & Quality Requirements for Channel Catfish Hatcheries
- Exhibit E. Information relative to good faith, delay or speculative purposes
 - E.1. Existing Lease Agreement & Survey
 - E.2. EPA NPDES Permit ID-002826-6 & related documents
- Exhibit F. Information relative to financial resources
 - F.1. Current financial statement – Mark L. & Jo Anne W. Lupher dba Epicenter Aquaculture
 - F.2. Additional facility estimated construction costs
- Exhibit G. Information relative to conflict with the local public interest
 - G.1. Letter of comment from Idaho Department of Environmental Quality
 - G.2. Letter of comment from Idaho Department of Fish & Game (2)
 - G.3. Letter of comment from Custer County Commissioners
 - G.4. Recommendation of Watermaster (RE: 72-7479)

CONCLUSION

Applicants have a clear, undisputed right to the possession of the real property underlying the pending applications. The dismissal of the state court action means there is no longer a dispute in existence as to the Applicants’ rights to possession. This possessory right entitles the Applicants to have their applications processed. The Hearing

Officer should rescind the Recommended Order of Default and set the two (2) appropriation filings and the single transfer filing now pending for hearing at a time and place convenient to the Hearing Officer and the parties.

RESPECTFULLY SUBMITTED THIS 17th day of November, 2006.

FREDERICKSEN, WILLIAMS & MESERVY



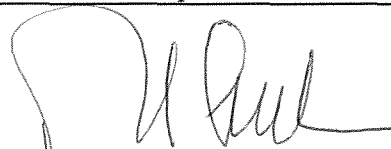
ROBERT E. WILLIAMS

Attorneys for Applicants, Mark L. and/or
Joanne Lupher, dba Epicenter Aquaculture

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 17th day of November, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

Peter R. Anderson, Hearing Officer Attn: Victoria Wygle Idaho Department of Water Resources PO Box 83720 Boise, Idaho 83720-0098	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☒ Facsimile – 208.287.6700 ☐ Federal Express
Bruce M. Smith Moore Smith Buxton, et al 225 North 9 th Street, Suite 520 Boise, Idaho 83702-5716	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Court Folder ☐ Facsimile ☐ Federal Express



ROBERT E. WILLIAMS

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

IN THE MATTER OF APPLICATION FOR	)	
TRANSFER NO. 67067 (formerly known	)	
as 5647) and APPLICATIONS FOR	)	RECOMMENDED
PERMIT NOS. 72-07577 and 72-07578	)	DEFAULT ORDER
IN THE NAME OF MARK L. and/or	)	
JOANNE LUPHER, dba EPICENTER	)	
AQUACULTURE	)	
_____	)	

IDAPA 37.01.01.700 provides, in part, that:

If an applicant ...fails to respond to a written information inquiry, the presiding officer may serve upon all parties a notice of a proposed default order denying the application

(Emphasis added). This language provides the Hearing Officer grounds for denying the applications if an applicant fails to provide information requested by the Hearing Officer.

On August 23, 2002, an *Order* was issued in this matter requiring that Mark L. and/or Joanne Lupher, DBA Epicenter Aquaculture (“Applicants”) submit to the Idaho Department of Water Resources (IDWR) within 72 hours of the date upon when the mediation of the disputes between the parties before Daniel C. Hurlbutt was concluded, final resolution of a Lease Agreement dispute indicating that the Applicants had a clear legal interest in the place of use to which Permit No. 72-07577 and No. 72-07578 would be appurtenant and that Applicants have legal authority for transfer of Water Right No. 5647, or to otherwise advise IDWR that all issues involved in the current proceedings before IDWR had been resolved. That mediation arose out of a district court case Applicants filed to declare their interest in the Lease Agreement which purports to give

them the real property interest supporting their applications. Lupher v. Morganroth et.al., Custer County case no. CV-2000-101.

At a March 14, 2003, status conference the parties to this matter indicated that following mediation on October 16, 2002, the Lease Agreement dispute had not been resolved, but that resolution appeared likely, and that a settlement agreement would be provided to the IDWR soon, possibly within ten days of the conference.

Both parties later indicated in status reports filed with IDWR that final resolution of the Lease Agreement dispute had not been reached.

Because of Applicants failure to respond to the information inquiry in the *Order* the Hearing Officer gave them *Notice of Proposed Default Order* on March 19, 2004, that a default was proposed to be entered for their failure to respond.

Applicants filed a *Petition in Opposition to Issuance of Proposed Default Order* on April 5, 2004. The primary factual basis opposing the proposed default in the *Petition* was that the failure to submit a final resolution of the lease agreement dispute is equally the responsibility of the Protestant. The exhibits attached to the Applicants' *Petition* support factual assertion in one sense—they demonstrate an equal lack of diligence on both the part of the Applicants and the Protestant in resolving the Lease Agreement dispute that has been apparent since October 1999. But the *Petition* shows no attempt by the Protestant to frustrate diligent resolution of the Lease Agreement dispute. The duty to exercise reasonable diligence in this administrative proceeding lies with the Applicant.

Initially, even though declining to issue a default order, the Hearing Officer noted that a default would not be a harsh result in this matter. The only harm they would suffer by the dismissal of Transfer No. 67067 would be the loss of their filing fee. They could

simply re-file this application for transfer upon resolution of the Lease Agreement dispute. The dismissal of Application for Permit Nos. 72-07577 and 72-07578 would result in the loss of both filing fees and priority.

In April 2004 the Hearing Officer stated:

There appears to be little reason, however, to force the Lupher's to lose their filing fee. Leaving these applications in IDWR's records would not appear to entail much cost to IDWR. Allowing the Applicants' to maintain their priority, however, does lessen their incentive to diligently resolve the Lease Agreement dispute and damages the ability of more diligent water appropriators to put water to beneficial use without being subject to the priorities of derelict applicants. I.C. §42-204 provides a means to resolve this problem by providing that the priority of the right initiated by an application shall be determined by the date of receipt of needed information.

Based upon this language this matter was stayed on April 9, 2004.

On January 27, 2006, that district court action was dismissed for inactivity. Exhibit A to this *Recommended Default Order*. There now appears to be no activity by Applicants to resolve the Lease Agreement dispute.

The Hearing Officer has determined that he will revisit the *Notice of Proposed Default Order*. It now appears that even the loss of priority was insufficient incentive to force the Applicant's to finally resolve the Lease Agreement dispute. Because Applicants had already lost the priority of their water right application, the only harm in entering a default order in this matter will be the loss of the Applicant's filing fees. The loss of those fees is appropriate when IDWR has been left with open-ended Applications and the costs of processing this contested case. As with the district court, at some point a resolution must be diligently pursued in good faith by the Applicants. That has not occurred in this matter.

RECOMMENDED ORDER

Based upon the failure of Mark L. and/or Joanne Lupher, DBA Epicenter Aquaculture to respond to the information inquiry requesting that they submit to IDWR final resolution of the Lease Agreement dispute indicating that the Applicants have a clear legal interest in the place of use to which the Permit Nos. 72-07577 and 72-07578 would be appurtenant, and legal authority for Transfer of Water Rights No. 5647 (67067) it is **ORDERED** that Application for Permit Nos. 72-07577 and 72-07578 and Application for Transfer of Water Right No. 5647 (67067) are **DENIED**.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* Section 67-5243(3) Idaho Code.

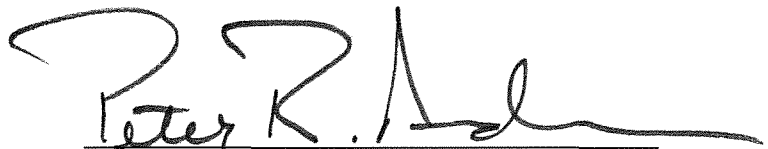
Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no

party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;
- ii. The service date of a denial of a petition for reconsideration by the hearing officer; or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

Dated this 3rd day of November 2006.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

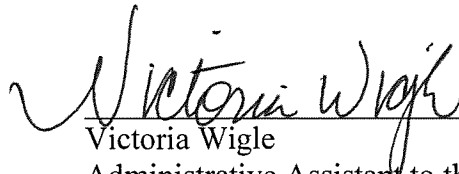
PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of November 2006, I delivered the foregoing **RECOMMENDED DEFAULT ORDER** by U.S. mail, postage prepaid and properly addressed to the following:

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHTD
225 NORTH 9TH STREET, SUITE 420
BOISE, IDAHO 83702

ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS & MESSERVY
PO BOX 168
JEROME ID 83338

A handwritten signature in cursive script, reading "Victoria Wigle", written over a horizontal line.

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

DISTRICT COURT
CUSTER COUNTY
IDAHO

2006 JAN 30 PM 12:01

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife,

Plaintiffs,

vs.

LOIS VON MORGANROTH, successor in
Interest to INGRAM WARM SPRINGS
RANCH; LOIS, INC., an unknown entity;
L&M ANGUS RANCH, INC., an unknown
Entity; JOHN DOES 1-15; JANE DOES
1-15; CORPORATIONS A-Z; LIMITED
PARTNERSHIP 20-25; LOIS, LLC 40-50;
And their heirs, successors and assigns,

Defendants.

LOIS VON MORGANROTH,

Counterclaimant,

vs.

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife, d/b/a Epicenter
Aquaculture,

Counterdefendants.

RECEIVED

OCT 04 2005

DEPT. OF WATER RESOURCES
SOUTHERN REGION
CY 2000-101

RECEIVED

JAN 31 2006

BY: _____

ORDER DISMISSING CASE

WHEREAS the above-captioned matter has been inactive for a period greater
than six (6) months; and

WHEREAS the Clerk of Court served a notice of pending dismissal on December
13, 2005; and

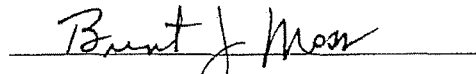
WHEREAS the Court has received an Affidavit in Support of Retention on
Calendar from Robert E. Williams, Esq. in response to said notice, and the court having
reviewed the affidavit and finding that good cause does not exist for the retention of the
above-captioned matter;

COPY

NOW, THEREFORE, the court hereby dismisses the above-captioned matter,
without prejudice, pursuant to I.R.C.P. 40(c).

So Ordered.

DATED this 21 day of January, 2006.


Brent J. Moss, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was this
30th day of January, 2006, served upon the individuals as indicated:

Bruce Smith
Moore Smith
225 N 9th, Ste 420
Boise, ID 83702

[] U.S. Mail, postage prepaid

Robert E. Williams, Esq.
117 South Adams Street
P.O. Box 168
Jerome, ID 83338

☒ U.S. Mail, postage prepaid

Clerk of the Court

By: 18/ Linda Aunpkin

Gibson, Deborah

From: Spackman, Gary
Sent: Monday, October 16, 2006 4:25 PM
To: Gibson, Deborah
Subject: RE: 72-7577, 72-7578,72-7579,75-7580

Debbie,
 Let's talk about it.

Gary

-----Original Message-----

From: Gibson, Deborah
Sent: Monday, October 16, 2006 3:23 PM
To: Spackman, Gary
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

Gary - FYI. Sounds like Peter will respond on behalf of the department. I can't image the Victoria has much on her computer since I helped Peter with this. Besides, how can we recreate a file from electronic documents that won't have dates or signatures? What should I do? I can supply only what I have in the shadow file I have held for the last few months. It does contain the dismissal order issued by the district court, and Peter's Order staying the protested applications.
 Debbie

-----Original Message-----

From: Wigle, Victoria
Sent: Monday, October 16, 2006 3:08 PM
To: Gibson, Deborah
Cc: Homan, John
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

Debbie - FYI - Peter does not have the file, nor can I find it here in Administration. When we moved here from Orchard, we did lose a box of Admin files that has never been recovered. Most of it was Bear River Commission files, but it is very possible that the hearing files were grouped into the same box given their proximity in the old file cabinets. I can, however, print off everything on my computer that I have in relation to the matter. The majority of the files were yours, and perhaps I can print off a file list on my computer for comparison. Peter is requesting a copy of the dismissal order - do you have a copy?

John - can you please amend Peter's contract as requested? Thank you.

Victoria

-----Original Message-----

From: Hearing Officer Peter Anderson [mailto:hearingofficer@fiberpipe.net]
Sent: Monday, October 16, 2006 2:03 PM
To: Wigle, Victoria
Subject: RE: 72-7577, 72-7578,72-7579,75-7580

Victoria,

I'm sure I don't have them. My general practice was to not take IDWR files home unless a hearing had been conducted and I needed the file to render a decision. My memory is that the Lupher files were somewhat voluminous and I would notice them if they were here despite my usual practice.

That being said, if the Luphers are no longer pursuing the declaratory judgment action we should take action on this case to conclude it. I will need to have John Homan do a contract amendment to

increase my hourly rate from \$40 to \$75, but I think it will only take me an hour or two to finish this one up. Please forward this to John and send me the dismissal order to review. This was contract CON 00475.

Thanks,
Peter

From: Wigle, Victoria [mailto:Victoria.Wigle@idwr.idaho.gov]
Sent: Friday, October 13, 2006 4:58 PM
To: Peter Anderson (E-mail)
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

Peter,

FYI. We still have not been able to locate the files for Lupher/Epicenter. I will check with Debbie to see what remnants of the file she has, and will print off what little I have on my computer. Please look around your office one more time to see if you might have the files at your home.

Victoria

-----Original Message-----

From: Gibson, Deborah
Sent: Friday, October 13, 2006 4:49 PM
To: Wigle, Victoria
Cc: Merritt, Allen; Keen, Shelley
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

Victoria,

The above water right files in the name of Lupher/Epicenter Aquaculture are becoming a topic of discussion and it may be necessary to include Peter. He was the hearing officer presiding over two applications for permit (nos. 72-7577 & 72-7578) and an application for transfer (67067, formerly known as 5647) that had protests filed against. As you know, these files have been missing for a couple of years and to date have not been located. The last document Peter issued was on April 9, 2004, that was an Order Staying these applications based on the district court resolving a lease dispute between the parties. Now to bring you up to 2006, an order was issued by the Seventh Judicial District on January 31st, 2006, dismissing the state court actions regarding the lease between the parties, because of a lack of activity in the case. Recently this order was provided to the department. It would appear that now is the time for Peter to resume his duties as hearing officer for the applications before the department. I have the only file that contains remnants of the original files at my desk.

The attached messages from Bruce Smith & Allen Merritt may be of interest to Peter. I'm sure that what Mr. Smith is looking for is contained in the missing files that are not available on microfilm or scanned in our database. Please contact Peter and advise him that the Lupher matter may need to be revisited, and that it is imperative that we locate the missing three files. Please make another sweep of your area and let me know if you find anything new.

Thank you!!
Debbie

-----Original Message-----

From: Bruce M. Smith [mailto:BMS@msbtlaw.com]
Sent: Friday, October 13, 2006 3:40 PM
To: Merritt, Allen
Cc: Rob Williams (E-mail); Rob Williams (E-mail 2); Spackman, Gary; Gibson, Deborah; Keen, Shelley
Subject: RE: 72-7577, 72-7578,72-7579,75-7580

Thanks Allen-I had tried to check all the records on these as transfers and kept coming up with strange

results. The litigation between Mr. Williams' client and mine was dismissed for failure to prosecute over the Luphers' objection and there was no decision rendered. However, my client continues to take the position that there is no authority or permission for Mr. Williams' client to obtain a water right on my client's property. Given Idaho law, therefore, there is no basis for the department to process these applications. If the Department does choose to advertise and or process these, please provide notice to me. If the applications Nos. 7579 and 7580 are not on the IDWR system, would you please forward copies of them to me. Thanks Bruce

-----Original Message-----

From: Merritt, Allen [mailto:Allen.Merritt@idwr.idaho.gov]

Sent: Friday, October 13, 2006 3:20 PM

To: Bruce M. Smith

Cc: Rob Williams (E-mail); Rob Williams (E-mail 2); Spackman, Gary; Gibson, Deborah; Keen, Shelley

Subject: RE: 72-7577, 72-7578,72-7579,75-7580

Dear Mr. Smith:

This e-mail is in response to your inquiry and our phone conversation this morning. As we discussed, the letter of Mr. Williams dated 10/3/2006 incorrectly identifies files as transfers. To clarify, IDWR has five applications filed by Mark Lupher/Epicenter Aquaculture as listed below:

1. Application for transfer of water right 72-7209 numbered as transfer 67067. This application was protested and a hearing held by Peter Anderson. Mr. Anderson issued an order staying processing of this until ownership/lease issues were resolved.
2. Application for permit 72-7577. This application was protested and a hearing held by Peter Anderson. Mr. Anderson issued an order staying processing of this until ownership/lease issues were resolved.
3. Application for permit 72-7578. This application was protested and a hearing held by Peter Anderson. Mr. Anderson issued an order staying processing of this until ownership/lease issues were resolved.

** Note that the above three files were sent to the State Office on 11/13/2001 after the hearing.

4. Application for permit 72-7579. This application has been held due to the Salmon River Moratorium however the moratorium has been rescinded and this office is processing this application pursuant to guidelines adopted for processing permits in the Salmon River drainage. To date the application has not been advertised.
5. Application for permit 72-7580. This application has been held due to the Salmon River Moratorium however the moratorium has been rescinded and this office is processing this application pursuant to guidelines adopted for processing permits in the Salmon River drainage. To date the application has not been advertised.

During the processing of applications #4 and #5 listed above this office sent letters requesting additional information pursuant to the guidelines for processing applications in the Salmon drainage. During that phase of processing we learned that the litigation between Lupher and Morganroth had ended in an order or there was some sort of resolution. We requested copies which prompted the letter from Mr. Williams. We also requested the same information for #2 and #3 as #4 and #5. Please find attached a copy of our normal letter sent out pursuant to the guidelines for processing in the Salmon drainage.

As soon as our office finishes with critical SRBA review we intend to process (advertise) the block of applications for permit that have been held in the Salmon drainage due to the moratorium and

those recently received including #4 and #5. As for #1, #2 and #3 any information received is forwarded to the State Office. Please direct questions regarding #1, #2 and #3 to the state office.

If you have further questions, please feel free to contact this office.

Allen Merritt

-----Original Message-----

From: Bruce M. Smith [mailto:BMS@msbtlaw.com]
Sent: Friday, October 13, 2006 10:54 AM
To: Merritt, Allen
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

-----Original Message-----

From: Bruce M. Smith
Sent: Friday, October 13, 2006 10:46 AM
To: 'amerritt@idwr.idaho.gov'
Cc: Bruce M. Smith
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

-----Original Message-----

From: Bruce M. Smith
Sent: Friday, October 06, 2006 6:30 PM
To: 'amerritt@idwr.state.id.us'
Cc: Bruce M. Smith
Subject: 72-7577, 72-7578,72-7579,75-7580

Allen-I received a letter from Rob Williams today referring to these transfers and some litigation that my client and the Luphers were involved in some years ago. The Luphers are running an aquaculture operation on my client's ranch. I'm not sure what this is about so can you give me a call to explain. If these transfers in any way relate to my client's property or water rights, it will be somewhat serious as the Luphers do not have any right to deal with my client's rights. Thanks Bruce

Merritt, Allen

From: Merritt, Allen
Sent: Friday, October 13, 2006 3:20 PM
To: 'Bruce M. Smith'
Cc: Rob Williams (E-mail); Rob Williams (E-mail 2); Spackman, Gary; Gibson, Deborah; Keen, Shelley
Subject: RE: 72-7577, 72-7578,72-7579,75-7580

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If you have further questions, please feel free to contact this office.

Allen Merritt

10/13/2006

SCANNED
OCT 16 2006

-----Original Message-----

From: Bruce M. Smith [mailto:BMS@msbtlaw.com]
Sent: Friday, October 13, 2006 10:54 AM
To: Merritt, Allen
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

-----Original Message-----

From: Bruce M. Smith
Sent: Friday, October 13, 2006 10:46 AM
To: 'ameritt@idwr.idaho.gov'
Cc: Bruce M. Smith
Subject: FW: 72-7577, 72-7578,72-7579,75-7580

-----Original Message-----

From: Bruce M. Smith
Sent: Friday, October 06, 2006 6:30 PM
To: 'ameritt@idwr.state.id.us'
Cc: Bruce M. Smith
Subject: 72-7577, 72-7578,72-7579,75-7580

Allen-I received a letter from Rob Williams today referring to these transfers and some litigation that my client and the Lupters were involved in some years ago. The Lupters are running an aquaculture operation on my client's ranch. I'm not sure what this is about so can you give me a call to explain. If these transfers in any way relate to my client's property or water rights, it will be somewhat serious as the Lupters do not have any right to deal with my client's rights. Thanks Bruce

SCANNED
OCT 16 2006

>date

>

RE: Application No. > to Appropriate Water in the Salmon River Drainage

Dear Applicant>s:

The Idaho Department of Water Resources (IDWR) is reviewing your application to appropriate water from > for > purposes.

As you may know the Director rescinded the various moratoriums in the Salmon River Drainage that have been in place in one form or another since 1992. IDWR is now allowed to process applications subject to the Wild and Scenic Agreement between the state and the federal government. The processing of your permit is pursuant to Water Appropriation Rules (IDAPA 37.03.08).

To ensure that IDWR has sufficient information to evaluate applications in the Salmon River Drainage you are **required** to augment your application with additional information. The enclosed sheet describes what additional information is needed. It also sets forth the time frame in which you **must** respond and also has important contact information where information needs to be sought.

If you have any questions, please feel free to contact this office or contact Shelley Keen at 208-287-4947 in our state office.

Sincerely,

Allen Merritt, PE
Southern Region Manager

Enclosure

SCANNED
06/16/2006

IDAHO DEPARTMENT OF WATER RESOURCES

Applying for a Permit to Appropriate Water in the Salmon and Clearwater River Basins

Idaho Code § 42-203A(5) requires IDWR to evaluate the following criteria for applications to appropriate water:

- The potential to reduce the quantity of water under existing water rights
- The sufficiency of the water supply for the proposed appropriation
- The good faith nature of the application
- The adequacy of the applicant's financial resources
- The local public interest in the public water resource
- The conservation of water resources in Idaho
- Impacts to the economy of the local area or watershed

To ensure that IDWR has sufficient information to evaluate the criteria, Rule 40.05 of the Water Appropriation Rules (IDAPA 37.03.08.040.05) requires water right applicants to submit additional information to IDWR in connection with their applications.

The additional information requirement is usually waived for applications proposing the appropriation of 5.0 cfs or less or the storage of 500 af or less. Because the waters of the Salmon River and Clearwater River drainages are habitat for fish species listed as endangered or threatened under the federal Endangered Species Act, caution is necessary to ensure that new appropriations of water do not undermine efforts to protect and restore the ESA listed fish species and other public values in the basins' rivers and streams. IDWR is, therefore, requiring that applicants submit the additional information required by Water Appropriation Rules 40.05.c through 40.05.g, even when the applications are for less than the usual 5.0 cfs/500 af threshold. Only certain applications for small domestic and stockwater uses and applications to divert ground water for domestic use in multiple homes are exempt from the additional information requirement. A copy of Water Appropriation Rules 40.05.c-g is printed on the back of this page.

Please submit the information required by Water Appropriation Rules 40.05.c-g to IDWR within 30 days from the date you are notified that it is required. IDWR will hold your application until you have submitted the additional information. If you believe that a particular piece of information is not relevant to your application, please explain why. If you do not respond within 30 days, IDWR may void your application. If you need additional time to submit the required information, please submit a written request. IDWR can grant additional time "upon a showing of good cause."

The following are agency representatives who will help you respond to the local public interest requirement of Rule 40.05.g. Please contact these agency representatives at least 15 days prior to the end of your 30-day response period.

IDFG contact list for water right applications:

Panhandle Region: Mary Terra-Berns at 208-769-1414 Clearwater Region: Ray Hennekey at 208-799-5010
McCall Subregion: Dale Allen at 208-634-8137 Southwest Region: Eric Leitzinger at 208-465-8465
Salmon Region: Tom Curet at 208-756-2271

IDEQ contact list for water right applications:

Lewiston: Kerby Cole at 208-769-4370 (Clearwater or lower Salmon River basins)
Cascade: Leslie Freeman at 208-382-6808 (South Fork Salmon River basin)
Idaho Falls: Troy Saffle at 528-2650 (Upper Salmon, Lemhi, Pahsimeroi basins)

Water Appropriation Rules 40.05.c through 40.05.g

c. The following information shall be submitted for applications to appropriate unappropriated water. . . .

Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows:

- i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted.
- ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.
- iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights.

d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows:

- i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.
- ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source.

e. Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.
- ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed.
- ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications.

g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows:

The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the director.

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AT LAW

BANNER BANK BUILDING, SUITE 520
950 WEST BANNOCK STREET, BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202**FACSIMILE COVER SHEET**DATE: October 6, 2006 RECIPIENT'S FAX: 525-7177TO: Allen Merritt CLIENT: _____RE: Attached letterFROM: Bruce M. Smith/Debbie

NUMBER OF PAGES INCLUDING THIS COVER SHEET: _____

- ____ ORIGINAL WILL NOT BE SENT
____ ORIGINAL WILL BE SENT BY FIRST CLASS MAIL
____ ORIGINAL WILL BE SENT BY FEDERAL EXPRESS

ADDITIONAL COMMENTS:

Allen—can you explain to me what this letter is referring to. My client owns the ranch and the
Luphers do not have any right to transfer my client's water rights but at this point I'm trying to
figure out what this is about. Thanks Bruce

***** IMPORTANT MESSAGE *****

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL
INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE. IF THE READER OF THIS
MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE
INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF
THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE
ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

Received Time Oct. 6. 6:38PM

SCANNED
OCT 16 2006

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

2006 JAN 30 PM 12:01

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife,

Plaintiffs,

vs.

LOIS VON MORGANROTH, successor in
Interest to INGRAM WARM SPRINGS
RANCH; LOIS, INC., an unknown entity;
L&M ANGUS RANCH, INC., an unknown
Entity; JOHN DOES 1-15; JANE DOES
1-15; CORPORATIONS A-Z; LIMITED
PARTNERSHIP 20-25; LOIS, LLC 40-50;
And their heirs, successors and assigns,

Defendants.

LOIS VON MORGANROTH,

Counterclaimant,

vs.

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife, d/b/a Epicenter
Aquaculture,

Counterdefendants.

RECEIVED

OCT 04 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION
CY-2000-101

RECEIVED

JAN 31 2006

BY: _____

ORDER DISMISSING CASE

WHEREAS the above-captioned matter has been inactive for a period greater
than six (6) months; and

WHEREAS the Clerk of Court served a notice of pending dismissal on December
13, 2005; and

WHEREAS the Court has received an Affidavit in Support of Retention on
Calendar from Robert E. Williams, Esq. in response to said notice, and the court having
reviewed the affidavit and finding that good cause does not exist for the retention of the
above-captioned matter;

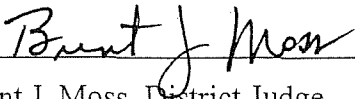
COPY

SCANNED
OCT 12 2006

NOW, THEREFORE, the court hereby dismisses the above-captioned matter,
without prejudice, pursuant to I.R.C.P. 40(c).

So Ordered.

DATED this 27 day of January, 2006.



Brent J. Moss, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was this
30th day of January, 2006, served upon the individuals as indicated:

Bruce Smith
Moore Smith
225 N 9th, Ste 420
Boise, ID 83702

[] U.S. Mail, postage prepaid

Robert E. Williams, Esq.
117 South Adams Street
P.O. Box 168
Jerome, ID 83338

[X] U.S. Mail, postage prepaid

Clerk of the Court

By:

1st Linda Lunkin

MSB & T, CTD.



E-MAIL: FWMAITYS@CABLEONLINE.IT

SCANNED
OCT 16 2006

Drawings

APPENDIX A

Frederick, Williams, Meservy & Lothspeich, LLP
Attorneys at Law

117 South Adams Street
Post Office Box 168
Jerome, Idaho 83338-0168



ROBERT E. WILLIAMS
JAMES C. MESERVY
JOHN B. LOTHSPICH

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-MAIL: FWMATTYS@CABLEONE.NET

EUGENE D. FREDERICKSEN – Retired

October 3, 2006

RECEIVED
OCT 04 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

Department of Water Resources
Allen Merritt
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380

Re: Transfers No. 72-7577, 72-7578, 72-7579, 75-7580 in the name of
Mark and/or Joanne Luper

Dear Allen:

To follow up your request relayed to me through Jason Lee Helms, at Brockway Engineering, please find enclosed a copy of the Order of the Seventh Judicial District Court dismissing the state court actions regarding aspects of the lease between my clients, the Luphers, who are the tenants, and the current property owners. This means that there are no longer current issues in litigation regarding the status of the lease agreement under which my clients are currently operating.

Very truly yours,

FREDERICKSEN WILLIAMS MESERVY & LOTHSPICH, LLP

ROBERT E. WILLIAMS

REW/ch
C: Client
Bruce Smith
C:\data\Lupher\IDWR 10-3-06.doc

SCANNED
OCT 12 2006

Fredericksen, Williams, Meservy & Lothspeich, LLP
Attorneys at Law

117 South Adams Street
Post Office Box 168
Jerome, Idaho 83338-0168



ROBERT E. WILLIAMS
JAMES C. MESERVY
JOHN B. LOTSPEICH

EUGENE D. FREDERICKSEN - Retired

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-MAIL: FWMATTYS@CABLEONE.NET

October 3, 2006

RECEIVED
OC
DEPT. OF WATER RESOURCES
SOUTHERN REGION

Department of Water Resources
Allen Merritt
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380

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Very truly yours,

FREDERICKSEN WILLIAMS MESERVY & LOTSPEICH, LLP

ROBERT E. WILLIAMS

REW/ch
C: Client
Bruce Smith
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DISTRICT COURT
CUSTER COUNTY
IDAHO

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

2006 JAN 30 PM 12:01

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife,

Plaintiffs,

vs.

LOIS VON MORGANROTH, successor in
Interest to INGRAM WARM SPRINGS
RANCH; LOIS, INC., an unknown entity;
L&M ANGUS RANCH, INC., an unknown
Entity; JOHN DOES 1-15; JANE DOES
1-15; CORPORATIONS A-Z; LIMITED
PARTNERSHIP 20-25; LOIS, LLC 40-50;
And their heirs, successors and assigns,

Defendants.

LOIS VON MORGANROTH,

Counterclaimant,

vs.

MARK LUPHER and JO ANNE W.
LUPHER, husband and wife, d/b/a Epicenter
Aquaculture,

Counterdefendants.

RECEIVED

OCT 04 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION
EX-100-101

RECEIVED

JAN 31 2006

BY:

ORDER DISMISSING CASE

WHEREAS the above-captioned matter has been inactive for a period greater than six (6) months; and

WHEREAS the Clerk of Court served a notice of pending dismissal on December 13, 2005; and

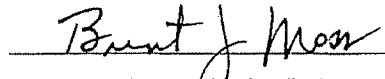
WHEREAS the Court has received an Affidavit in Support of Retention on Calendar from Robert E. Williams, Esq. in response to said notice, and the court having reviewed the affidavit and finding that good cause does not exist for the retention of the above-captioned matter;

COPY

NOW, THEREFORE, the court hereby dismisses the above-captioned matter,
without prejudice, pursuant to I.R.C.P. 40(c).

So Ordered.

DATED this 27 day of January, 2006.



Brent J. Moss, District Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was this
30th day of January, 2006, served upon the individuals as indicated:

Bruce Smith
Moore Smith
225 N 9th, Ste 420
Boise, ID 83702

[] U.S. Mail, postage prepaid

Robert E. Williams, Esq.
117 South Adams Street
P.O. Box 168
Jerome, ID 83338

☒ U.S. Mail, postage prepaid

Clerk of the Court

By: 1st Linda Runkin