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No. 72-7209/T-5647

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STATE OF IDAHO

**IDAHO DEPARTMENT OF
ENVIRONMENTAL QUALITY**

1410 North Hilton, Boise, ID 83706, (208) 373-0502

JAMES E. RISCH, GOVERNOR
TONI HARDESTY, DIRECTOR

September 22, 2006

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SEP 27 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION

Ms. Sharon Wilson
Office of Water and Watersheds;
USEPA Region 10
1200 Sixth Avenue, OWW-130
Seattle, WA 98101

RE: Comments Pertaining to the Preliminary Draft Aquaculture NPDES Permits and the Associated Fact Sheet
IDG-130000 – Aquaculture Facilities Subject to Wasteload Allocations (WLAs)
IDG-131000 – Cold Water Aquaculture Facilities Not Subject to WLAs
IDG-132000 – Fish Processors Associated with Aquaculture Facilities
ID-0028266 – Epicenter Aquaculture (a warm water facility without a WLA)

Dear Ms. Wilson:

The Idaho Department of Environmental Quality (DEQ) has reviewed the above-referenced draft permits and associated fact sheet. DEQ's comments are contained in the attached document. Our draft 401 water quality certification will be on DEQ's web page at <http://www.deq.idaho.gov/> later this week.

We appreciate this opportunity to provide comments on the draft permit and look forward to receiving the proposed final permits which will enable us to complete our §401 water quality certification decision. If you have any questions regarding our comments, please contact Johnna Sandow at 208-373-0163, or at Johnna.Sandow@deq.idaho.gov.

Sincerely,

Barry N. Burnell

Barry N. Burnell
Water Quality Division Administrator

BNB:JS

Attachments: DEQ Comments for the Draft Aquaculture NPDES Permits and
Associated Fact Sheet
Updated DMR Data Spreadsheet for Fish Processors (Processors exp data
2000-5_2006.xls)
Draft Section 401 Water Quality Certification

cc: Doug Conde, Idaho Attorney Generals Office
Regional Administrators, DEQ
Aquaculture Facility Distribution List
Upper Snake BAG Chair
Mike Lidgard, Region X EPA
Jim Wertz, IOO EPA

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**Idaho DEQ Comments for
Draft Aquaculture NPDES Permits and the associated Fact Sheet**

DEPT. OF WATER RESOURCES
SOUTHERN REGION

Comments Pertaining to the Wasteload Allocation Permit

Page 11 Limitations for 12 facilities deviate from what is specified in the TMDL. For TSS,
Table 2 loads are expressed in the TMDL as tons/year. To calculate pounds per day (lbs/day), the TMDL WLA was multiplied by 2000 and divided by 365. The corrected limitations (reflecting rounding to the nearest tenth) are presented in the table below.

Permit Number	Parameter	Average Monthly Limitations (lbs/day)
IDG130061	Net TSS	841.1
IDG130008	Net TSS	4223.0
IDG130014	Net TSS	8060.8
IDG130088	Net TSS	614.2
IDG130011	Net TSS	4322.7
IDG130006	Net TSS	5538.1
IDG130007	Net TSS	4891.5
IDG130018	Net TSS	3207.1
IDG130002	Net TSS	2581.9
IDG130020	Net TSS	821.9

Page 27 The TSS limits for Batise Springs Trout Farm do not appear to be correct given the
Table 8 reported monthly average concentrations (5 mg/L average monthly limit (AML), 10 mg/L maximum daily limit (MDL)) and average flow 30.8 cfs. Based on our calculations, the AML should be 830.5 lbs/day and the MDL should be 1661.1 lbs/day.

The TP limits presented in Table 8 are NOT based on the 2001 EPA-approved WLAs. According to the 2001 TMDL, the WLA for TP is 2.37 tons/year (13.0 lbs/day) based on a flow of 22.2 million gallons/day. Please correct the table to accurately reflect what is contained within the 2001 Portneuf River TMDL.

The total inorganic nitrogen (TIN) limits presented in Table 8 are NOT based on information presented in the 2001 Portneuf River TMDL, which assigned a TIN WLA of 5.42 tons/year (29.7 lbs/day) based on a target concentration of 0.16 mg/L.

Page 28 According to DEQ calculations, the AML for Net TP for the Crystal Springs Trout
Table 9 Farm should be 6.7 lbs/day (1.223 tons/year WLA reported in the American Falls Reservoir TMDL). Please correct the table.

Page 29 It is unclear if this permit condition applies to all off-line settling basins or just those that
II.A.10 discharge pollutants to surface waters. Discharge of off-line settling basins to land disposal or into full flow settling ponds should not have intermediate limits. Table 11 should only apply to facilities that discharge effluent from off-line settling basins to surface waters.

Page 29 Please include the following under Prohibited Discharges:
II.B.2 g. Any deleterious materials in concentrations that impair designated beneficial uses;

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h. Any oxygen-demanding materials in concentrations that would result in an anaerobic water condition;

Please revise subpart "b" to read: Any hazardous materials *in concentrations found to be of public health significance or to impair designated beneficial uses.*

Page 30
II.D.3 It would be helpful to provide a list of the EPA-approved methods (including information about the appropriate preservation, sample volume, container type, and holding time) that achieve the method detection limits specified in Table 15 to provide clear guidance to the industry. It is our understanding that EPA is likely to have this information readily available and incorporation into the permit should be relatively easy and straight-forward.

Page 32
II.E.1 EPA should define "zone of partial mixing."

Page 32
II.E.2 DEQ believes it is inappropriate to require monitoring during those periods when a facility is not discharging. Please clarify that monitoring is only required during quarters that a facility discharges.

Please see the section entitled "Comments Pertaining to the Fact Sheet" for additional DEQ comments regarding monitoring (page 51).

Page 34
Table 15 The units and/or values presented for total copper and hardness appear to be incorrect. Did EPA mean to report these as mg/L rather than µg/L? In Table 12 (page 31), EPA is requiring the permittees to report total copper in mg/L and hardness in µg/L. EPA should check the permit to ensure the units for parameters are consistent among the various tables. Furthermore, DEQ does not have any documentation of any water bodies in the state having hardness levels less than 5 mg/L and would like to understand why EPA is requiring such a low MDL for hardness. Please double check the method detection limits to ensure they correctly represent the EPA analytical method capabilities and are meeting the objectives and goals of the TMDL monitoring plans DEQ has established.

Page 34
II.E.7 The permit requires receiving water monitoring information (such as date, time, and place of sample collection, analysis dates, analytical methods, and analytical results) and DMRs be submitted to EPA. In addition, EPA is requiring the permittee to provide a "summary and evaluation of the analytical results." DEQ would like to more fully understand exactly what information EPA is expecting when asking for a "summary and evaluation" of the analytical results. EPA should be more explicit about the type of information that will meet this permit requirement.

App. B
Page 4 DEQ received a NOI from Deadman Hatchery (IDG130091) on July 30, 2004. DEQ provided EPA with a copy of this on July 10, 2006. DEQ suggests listing this facility with the other WLA general permit facilities.

App. B
Page 4 Snyder Blue Rock Farms (IDG130102) is presently in operation and has been for nearly a year (Dirk Bogaard, Clear Lakes Trout Company, personal communication July 14, 2006). Therefore, this facility should not be included in the final table ("Dischargers believed to be eligible for coverage under the WLA Permit but who are not expected to be containing, growing, or holding fish at the facility on the effective date of the WLA permit") of Appendix B.

App. C Pollutant trading can provide a useful tool for facilities to meet TMDL goals. DEQ recognizes that the potential for localized impacts to water quality is least when the seller of pollutant credits is upstream of the buyer. However, DEQ's Pollutant Trading Guidance document does allow a buyer to be upstream of a seller as long as the ambient water quality between the parties is not adversely impacted. DEQ encourages EPA to provide for such trades and omit the requirement that a purchasing facility must be downstream of a selling facility.

We suggest the sentence stating "In order to trade phosphorus credits, the outfall for the purchasing facility must be downstream of the outfall for the selling facility" be removed from the first paragraph of Appendix C (page 1) of the permit.

In addition, we suggest that the first sentence in Appendix C (page 1) under Section I "How to Buy Credits for Pollutant Trading" be modified as follows:

A facility may purchase available phosphorus credits (in lbs/day for a specified month) from ~~an upstream~~ another eligible facility using the Trade Tracking System...

These changes would allow for trades between all eligible facilities no matter the location of the buyer and seller provided there are no adverse impacts to water quality.

Furthermore, DEQ suggests that this NPDES permit provide for trades between point sources and non-point sources as allowed in the Pollutant Trading Guidance document. DEQ is willing to work with EPA on appropriate language for the permits.

Comments Pertaining to the Cold Water Aquaculture Facility (not subject to WLAs) Permit

- Page 10 Hardness is reported in µg/l, are these the correct units?
Table 1
- Page 12 Please include the following under Prohibited Discharges:
II.B.2 g. Any deleterious materials in concentrations that impair designated beneficial uses;
 h. Any oxygen-demanding materials in concentrations that would result in an anaerobic water condition;
- Please revise subpart “b” to read: Any hazardous materials *in concentrations found to be of public health significance or to impair designated beneficial uses.*
- Page 13 EPA should define “zone of partial mixing.”
II.E.1
- Please see the section entitled “Comments Pertaining to the Fact Sheet” for additional DEQ comments regarding monitoring (page 51).
- Page 13 Are the units and/or values for Total Copper and hardness correct? DEQ does not have
Tables 3 documentation of any water bodies in the state with hardness levels less than 5 mg/L, and
& 4 would like to understand why EPA is requiring such a low method detection limit. Please
 double check the detection limits to ensure they correctly represent the EPA analytical
 method capabilities and are appropriate for expected conditions. EPA should check the
 permit to ensure the units for parameters are consistent among the various tables.
- Page 14 The permit requires receiving water monitoring information (such as date, time, and
II.E.5 place of sample collection, analysis dates, analytical methods, and analytical results) and
 DMRs be submitted to EPA. In addition, EPA is requiring the permittee to provide a
 “summary and evaluation of the analytical results.” DEQ would like to more fully
 understand exactly what information EPA is expecting when asking for a “summary and
 evaluation” of the analytical results. EPA should be more explicit about the type of
 information that will meet this permit requirement.

Comments Pertaining to the Fish Processors Permit

- Page 9 Please include the following under Prohibited Discharges:
II.B.1 g. Any deleterious materials in concentrations that impair designated beneficial uses;
h. Any oxygen-demanding materials in concentrations that would result in an anaerobic water condition;

Please revise subpart "b" to read: Any hazardous materials *in concentrations found to be of public health significance or to impair designated beneficial uses.*

- Page 11 EPA should define "zone of partial mixing."
II.E.1

Please see the section entitled "Comments Pertaining to the Fact Sheet" for additional DEQ comments regarding monitoring (page 51).

- Page 12 The permit requires receiving water monitoring information (such as date, time, and
II.E.4 place of sample collection, analysis dates, analytical methods, and analytical results) and DMRs be submitted to EPA. In addition, EPA is requiring the permittee to provide a "summary and evaluation of the analytical results." DEQ would like to more fully understand exactly what information EPA is expecting when asking for a "summary and evaluation" of the analytical results. EPA should be more explicit about the type of information that will meet this permit requirement.

- App. C Pollutant trading can provide a useful tool for facilities to meet TMDL goals. DEQ recognizes that the potential for localized impacts to water quality is least when the seller of pollutant credits is upstream of the buyer. However, DEQ's Pollutant Trading Guidance document does allow a buyer to be upstream of a seller as long as the ambient water quality between the parties is not adversely impacted. DEQ encourages EPA to provide for such trades and omit the requirement that a purchasing facility must be downstream of a selling facility.

We suggest the sentence stating "In order to trade phosphorus credits, the outfall for the purchasing facility must be downstream of the outfall for the selling facility" be removed from the first paragraph of Appendix C (page 1) of the permit.

In addition, we suggest that the first sentence in Appendix C (page 1) under Section I "How to Buy Credits for Pollutant Trading" be modified as follows:

A facility may purchase available phosphorus credits (in lbs/day for a specified month) from ~~an upstream~~ another eligible facility using the Trade Tracking System...

These changes would allow for trades between all eligible facilities no matter the location of the buyer and seller provided there are no adverse impacts to water quality.

Furthermore, DEQ suggests that this NPDES permit provide for trades between point sources and non-point sources as allowed in the Pollutant Trading Guidance document. DEQ is willing to work with EPA on appropriate language for the permits.

Comments Pertaining to the Epicenter Permit

Page 6 Please include the following under Prohibited Discharges:
II.C.2 g. Any deleterious materials in concentrations that impair designated beneficial uses;
 h. Any oxygen-demanding materials in concentrations that would result in an anaerobic water condition;

Please revise subpart "b" to read: Any hazardous materials *in concentrations found to be of public health significance or to impair designated beneficial uses.*

Page 7 Are the units for Total Copper and hardness correct? EPA should check the permit to
Table 2 ensure the units for parameters are consistent among the various tables.

Page 8 Did EPA intend to omit hardness from this table? Are the units for total copper correct in this
Table 3 table?

Comments Pertaining to the Fact Sheet

- Page 20 DEQ believes it is appropriate to wait until the temperature TMDL for the Upper Snake Rock subbasin is developed and does not recommend EPA develop temperature limits for the three warm-water facilities.
- Page 40 EPA should clarify in the text that the compliance schedule is provided only for
VI.C.9 solids (TSS and settleable solids) and temperature. As written, the permit reads as though final compliance for the all of the limits is required by August 3, 2007.
- Page 40 EPA proposes to apply concentration limits in the permit for the Big Lost River facilities because DEQ reported concentration based wasteload allocations in the TMDL. Similarly, DEQ reported concentration based TSS WLAs for Batise Springs Trout Farm, however, EPA converted them to mass limits. Why did EPA employ different approaches to assigning permit limits?
- Page 42 EPA states "The Total Inorganic Nitrogen limits are technology-based limits,
VI.C.10.a calculated from data submitted by the facility." However, on page 27 of Appendix B of the Fact Sheet, EPA concludes the WLA is more stringent and is applied as the average monthly limit. Please clarify the basis for the limit – is it technology based or is it water quality based?

In addition, please see comments for the WLA permit under Page 27, Table 8. Please correct Appendix B of the Fact Sheet as appropriate.

- Page 49 In response to EPA's solicitation for comments on the frequency and manner of
VII.B flow measurement requirements for off-line settling basins (OLSBs), DEQ would like emphasize that a consistent and accurate approach be used to report flows for OLSBs. Flows to OLSBs are normally very small in comparison to the total facility flows. OLSB effluent is typically less than 1.5% of the total flow during daytime working hours and less than 0.75% against 24 hour averages (Idaho Waste Management Guidelines for Aquaculture, 1997). This is in part due to the fact that these waste treatment systems are in operation intermittently, with periods of daily or weekly inactivity being common across the range of facilities using this type of discharging waste treatment system. A review of NPDES inspection reports conducted on fish farms in the Twin Falls Region showed that there are generally two basic methods of flow monitoring being done on OLSBs in the area.

- 1) Time and Known Delivery Rate. In this method the fish farm has determined the delivery rate of wastewater being sent to the OLSB during quiescent zone cleaning and the minutes of cleaning are tracked and reported daily. The variation in reporting comes from how the numbers are reported on the monthly DMR. We have observed 5 day averages being used and reported (each 5 day average is used as one week's worth of flow information); true monthly averages (30 of 30 flow measurements) and 7 day averages; and, just picking one day of the week and consistently using the flow from that day to determine monthly averages and maximums.
- 2) Discharge Rate. In this method, some facilities measure the actual discharge at a weir. This can occur once to several times a day when quiescent zone cleaning is occurring. It has been frequently observed during inspections that the reported flow value is that for 24 hours of continuous discharge at the observed rate and does not reflect the period of inactivity that occurs after normal business hours.

What these two methods have in common is that while the current NPDES permit requires a certain minimum monitoring frequency for flow, that minimum is generally exceeded at the

fish farms. DEQ is not suggesting that either of these two methods of determining OLSB flow is inappropriate; however, as indicated earlier, DEQ encourages consistency as well as accuracy in the industry when measuring and reporting OLSB flows.

Page 49
VII.B Robert Sharpnack, of the DEQ Twin Falls Regional Office previously provided EPA with a database containing aquaculture facility effluent monitoring data through December 2004. As part of these comments, DEQ is submitting an updated spreadsheet (called "Processors exp data 2000-5_2006.xls) that contains raw DMR data for fish processors through 2006.

Page 51 DEQ is supportive of requiring limited receiving water monitoring for permitted discharge pollutants in waters that are 303(d) listed or that have TMDLs. However, DEQ believes EPA should provide further guidance on how to conduct receiving water monitoring in order to ensure proper sample collection and analysis. EPA should more clearly stipulate the monitoring objectives. Each facility faces its own unique circumstances, and such variation makes a one-size-fits-all approach difficult to successfully implement. As such, DEQ recommends the following:

- There is no definition for what constitutes a zone of partial mixing. Please clarify what EPA means by "zone of partial mixing";
- Receiving water quality monitoring should not be required during times when the facility is not discharging;
- Allow facilities one year to develop a monitoring plan that would be reviewed and approved by EPA to ensure the appropriate monitoring is being conducted to meet EPA objectives;
- Allow facilities in close proximity to each other to collaborate and collect a single sample upstream of the group. Allow facilities that are in close proximity to collect a single downstream sample. DEQ is willing to work with EPA to decide when collaborative monitoring approaches would be appropriate;
- The rationale used to exempt Epicenter Aquaculture from receiving water monitoring (because the receiving water is a canal) should be applied to facilities in the WLA permit. According to IDAPA 58.01.02.101.02, man-made waters are to be protected for the use for which they were developed, unless designated in Sections 110 through 160. Facilities that discharge to man-made waters, should not be required to sample the ambient water quality of the canal or drainage ditch. Furthermore, facilities that discharge to man-made waters will need permission to discharge from the owners of the man-made waters. DEQ is willing to assist EPA in making man-made water determinations; and
- Allow other factors (such as size of facility) to be considered when determining the frequency at which a discharger has to monitoring the receiving water quality.

Page 52
VII.D. Why does EPA use Canadian risk-based standards to evaluate PCB contamination rather than their own recently revised Sediment Evaluation Framework Guidance? This guidance is now used to regulate dredged sediment projects in Idaho. The values in Table 7-1 of the Draft Sediment Evaluation Framework are based on 2003 Washington state sediment quality

guidelines. These were developed for freshwater habitats in the northwest for sensitive benthic organisms.

In addition, DEQ suggests that if there are any ESA requirements related to the collection of sediment samples in water bodies that support listed species, EPA should provide additional guidance in the permit speaking to any such requirements. For example, the permit should indicate what agency(ies) the permittee is required to contact prior to conducting sediment sampling to ensure they have fulfilled any applicable ESA requirements associated with collecting sediment samples in waters supporting listed species.

- App. B
Page 15
II.B.1.b The statement "IDEQ has determined for purposes of setting target loads for ambient water-quality-limited streams that 52 mg/L TSS or less would not impair designated uses" is taken out of context. DEQ does not have a specific guidance that set a specific target to be applied on a statewide basis. In addition, DEQ does not have a numeric criterion for TSS. It is likely that the 52 mg/L TSS target load was developed for a specific watershed in Idaho. DEQ recommends removing this statement and requests that EPA provide DEQ with the source of this information.
- App. B
Page 18
II.B.1.e DEQ agrees that temperature limits for the two warm water facilities discharging to Jacks Creek in the Bruneau subbasin are not necessary. Please refer to the EPA-approved Bruneau Subbasin TMDL (2001).
- App. B
Page 19
II.B.1.f In order to conduct a reasonable potential analysis, EPA must have an estimate of receiving water stream flow (unless EPA determines to not consider dilution when conducting a reasonable potential analysis). In addition, in order for DEQ to consider granting a mixing zone for particular constituents, DEQ must have a reasonable estimate of the critical flow of the receiving waters. DEQ is willing to work with the facilities on a case-by-case basis to determine what type of data would satisfy flow information needs for the mixing zone analysis.
- App. B
Page 25
II.C.4.a After reviewing the 1999 permit and associated materials (Fact Sheet, EPA Response to Comments, and Memorandum to the Administrative Record – "Technology-based limits for warm water aquaculture facilities and changes in limits for cold water aquaculture facilities, Section VI.C *Aquaculture Facilities*"), there is insufficient information available for readers to understand the development of the technology-based limit for TP of 0.2 mg/L for warm water facilities. Information that would be useful includes the source of data (i.e. number of facilities), long-term average (mean of the data), and coefficient of variation. Please provide this information. Furthermore, EPA should justify why data from one facility sufficiently represents all of the facilities.
- App. B
Page 32
III.A DEQ believes it is inappropriate to group the fish processing facilities when determining average concentrations because these facilities use different combinations of technologies to treat their processing wastewater. The technologies used directly relate to the technologically achievable concentrations in the discharge. This is recognized for other industries in that the Code of Federal Regulations stipulate different technology based standards for similar dischargers, such as the SSC 13 Industries, which essentially do the same basic job but use different control processes. DEQ would like EPA to justify its rationale for grouping these four facilities together.

EPA indicates that based on data submitted over the last permit cycle, the coefficient of variation (CV) for TP discharged from fish processing facilities is 0.561. On page 39 of the

Fact Sheet, EPA indicates that the CV of the discharge data from this sector (fish processing facilities) is 1.194. Please explain this discrepancy.

App. B Are the MDL and AML TP limits for the Clear Springs Foods (CSF) Processing Plant
Page 33-34 Holding Ponds net or gross?
III.A.2.c

Why does EPA use different flows when calculating the MDL (4.44 MGD) and AML (3.87 MGD) TP limits for CSF Processing Plant Holding Ponds?

The background TP concentration in the aquifer is approximately 0.02 mg/L. Given the flow rates in the calculation of loads from the holding ponds, the background loading would be:

- At 4.44 MGD, TP loading = 0.74 lbs/day; and
- At 3.87 MGD, TP loading = 0.64 lbs/day.

The 0.2 lbs/day (AML) and 0.7 lbs/day (MDL) are less than the background loadings. Please explain the rationale.

Why did EPA omit a load allocation for TSS for the CSF processing plant holding ponds?

App. B Idaho water quality standards (IDAPA 58.01.02.060) allow DEQ to determine the
Page 37-39 applicability of mixing zones. Similar to the 1999 GAP, EPA should include a statement that
III.B indicates permittees can ask DEQ for a mixing zone to ease their end-of-pipe effluent limitations.

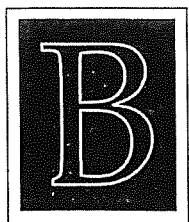
App. B EPA indicates that "Where the technology-based limits are selected, they are also
Page 41 retained under the anti-backsliding provisions of Section 402 (o) of the CWA, though their
III.C.3 units have been converted to lbs/day." The 1999 permit did not have TP limits for fish processors; therefore, the anti-backsliding provisions are not applicable for this parameter.

General According to 40 CFR 125.3(d)(3)(v), in setting case-by-case limitations, the permit writer must consider the cost of achieving such effluent limitations for best available technology requirements. The fact sheet does not contain an economic analysis for fish processors to achieve the best-professional-judgment (BPJ)-technology based limit (TBL) for TP. At a minimum, EPA should provide this analysis for the newly developed BPJ-TBLs for non-conventional parameters.

General DEQ appreciates that the permits contain a reopener clause and would like to emphasize that EPA should strive to include newly approved WLAs into the permit. Allowing a facility to continue to discharge loads greater than approved WLAs is not protective of water quality standards. On the other hand, continuing to force effluent limitations based on previously developed WLAs that are more stringent than revised WLAs would be over-protective and may cause unnecessary burdens on the facilities.

General For some of the tables, the footnotes in the table are not corresponding to footnote descriptions at the end of the table. For example, Table 10 of the fact sheet has a footnote numbered as "7", yet there is no description for footnote 7 at the end of the table. EPA should carefully review all of the tables to be sure that these errors are corrected.

It appears to DEQ that pollutant trading may be precluded by the use of a technology based water quality effluent limit. Is this the case and is this consistent with EPA guidance?



BROCKWAY
ENGINEERING
P.L.L.C.

Hydraulics

Hydrology

Water Resources

September 20, 2006

Mark & Jo Anne Lupher
Epicenter Aquaculture
P.O. Box 336
Challis, ID 83313

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SEP 26 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

Re: Applications for Permit 72-7577 through 72-7580

Dear Mr. & Mrs. Lupher:

Introduction

This letter report presents the information required by Water Appropriation Rules 40.05.c through 40.05.g. in order to provide IDWR with adequate information to evaluate the following criteria with respect to Applications for Permit 72-7577 through 72-7580:

- 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 to complete the project
- The local public interest related to the public water resource
- The conservation of water resources in Idaho
- Impacts to the economy of the local area or watershed

Pending Applications

Although it appears that initially a relatively simple application for permit was submitted to IDWR for additional diversion through the Epicenter Aquaculture facility to maximize production, review by IDWR personnel identified multiple existing water uses on the property and the applications were expanded to 4 separate permits:

- **72-7577 (1.1 cfs: Fish Propagation)**

Application 72-7577 proposes capture and diversion from existing springs seeping below the primary Warm Springs discharge for use in the proposed facility.

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- **72-7578 (13.1 cfs: Fish Propagation)**

Application 72-7578 proposes 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

- **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.

- **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.

Background of Warm Springs Creek

The following summary is based primarily on research of available Idaho Department of Water Resources (IDWR) water rights data and published studies prepared by the Idaho Department of Environmental Quality (DEQ) as well as the Environmental Protection Agency in relation to the NPDES Permit approval process associated with the existing aquaculture facility.

- Historical geothermal flow prior to 1983 approximately 12-15 cfs.
- October 28, 1983 Mt Borah earthquake altered subsurface flows¹
- Post earthquake flow peaked ~70 cfs
- Temperature at spring source ~90° F.

Following the 1983 earthquake, the additional spring flows were eventually captured and diverted through a series of two power plants under currently licensed water rights 72-7372 & 72-7375. During the period directly after the earthquake, significant work was performed through public and private cooperation to enlarge the existing diversion canal system in the Round

¹ R. L. Whitehead, R. W. Harper, H.G. Sisco, "Hydrologic Changes Associated with the October 28, 1983, Idaho Earthquake" Pure and Applied Geophysics. Volume 122, Numbers 2-4 / March, 1984

Valley area to restrain the new flow of highly turbid geothermal water from directly discharging into the Salmon River and degrading water quality.

Epicenter Aquaculture Facility Design

A layout of the existing facility and proposed additional construction pending approval of these applications is included as **Exhibit A**. The current configuration of the diversion system at the fish facility circulates a portion of the flow (currently 6.98 cfs authorized by 72-7209 – See **Exhibit B**) from the hydropower canal into the raceways and eventually down to the lower settling pond where it is pumped back up into the hydropower canal. 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 springs².

Anticipated Effects on Existing Water Rights

Based on review of the 2004 aerial photo, the natural Warm Springs Creek channel no longer exists as a continuous reach. This is not surprising considering that every effort was made to collect the full flow into the hydropower feeder canal thus making it the de-facto primary channel of Warm Springs Creek below the first hydropower plant. The original Warm Springs Creek channel does still exist just downstream of the Epicenter facility conveying any remaining uncaptured seeps downstream for irrigation and other uses after which the majority of the flow is captured in the feeder canal and conveyed northeast across the highway to the second hydropower plant. The total additional consumptive use resulting from the proposed facility expansion and approval of Permits 72-7577 through 7580 is relatively insignificant (0.1 afa) and the majority of the identified consumption actually already exists as part of current facility operations. Most all remaining flow from the lower seep springs continues in the existing natural channel where it provides water for irrigation on the Warm Springs Ranch and incidental wildlife habitat. The natural channel appears to be captured after the first hydropower plant so no impacts on other water rights from this channel are expected. A listing of water rights associated with Warm Springs & Warm Springs Creek is included as **Exhibit C**.

Review of the power plant water right applications indicates that some diversion bypass (~2.0 cfs) in the SENWNE of Section 32, T.13N, R.20E is required after passing through the first power plant in order to supply certain downstream water rights through a ditch on the west side of the highway

² See Exhibit E (Page 4).

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(likely the original Warm Springs channel). This requirement was determined during IDWR review of application for permit 72-7372 associated with the hydropower development. This diversion requirement is several miles downstream of the fish propagation facility, and therefore should not be impacted significantly by approval of these applications.

A map and listing of active water rights associated with Warm Springs Creek is included as **Exhibit C**. Based on the nature of the applications; it is expected that no water rights will be significantly impacted by approval of Applications 72-7577, 7578, 7579 & 7580 which in total are estimated to consume no more than 4 acre-ft per year³ from a source which currently seeps within the Warm Springs Ranch property boundary.

The primary method utilized to minimize impacts to downstream water users consists of two existing measuring devices (submerged orifices) which are currently installed on the inflow and outflow of the main raceway which is attached to the hydrocanal. These orifices will be monitored and adjusted as necessary to maintain the existing flow of the hydropower canal which supplies downstream water rights.

Several water rights appear to list points of diversion on Warm Springs Creek downstream of the Epicenter facility (See Exhibit C). No impact to the rights is anticipated assuming the current seepage bypassing the facility is continued. No further information was readily available regarding the configuration of the diversions, however it has been mentioned that no protest would be made and in fact it would probably be preferred even if the additional flow in the historical Warm Springs channel were to be diverted into the hydrocanal for additional power generation.

Sufficiency of Proposed Water Supply

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. **Exhibit D** includes some information specifically related to water quality and quantity requirements for Tilapia and other warm water species production.

³ Primarily free water surface evaporation of the fish ponds and raceways (< 1.0 acre) in addition to approximately 0.1 acre-feet per year for live shipping.

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Applications Made in Good Faith and not for Speculative Purposes

The existing facility is currently designed to operate most efficiently with the full diversion identified in application 72-7578. 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 water right applications. To demonstrate, a copy of the existing lease agreement and pending EPA permits for the facility are included as **Exhibit E**.

Financial Resources to Complete Project

The additional flow will provide adequate water quality to allow additional facility construction for self-sufficient hatchery operations including the addition of hatchery ponds, fingerling raceways and holding ponds. The additional construction is expected to cost between \$50,000 and \$100,000 and should significantly increase the profitability of the facility. A notarized financial statement demonstrating the ability to complete the proposed construction is included as **Exhibit F**.

Local Public Interest

Approval of these applications will allow additional fish production increasing the income and tax base for the community while providing additional employment. Comment letters from the Idaho Department of Environmental Quality, Idaho Department of Fish & Game, Custer County Board of Commissioners and the Watermaster (See **Exhibit G**) all indicate no foreseeable negative impacts from approval of the applications. Although downstream water users would certainly benefit by lifting the lower spring seeps into the hydrocanal, it is the firm position of the Idaho Department of Fish & Game that this water be allowed to remain in the lower channel to continue to provide beneficial habitat in the original Warm Springs streambed just north of the fish facility where it eventually seeps into the ground. Regardless of the ultimate fate of the lower spring water, 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.

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Review of the Idaho Department of Environmental Quality Upper Salmon River Subbasin Assessment and TMDL⁴ indicates Warm Springs Creek has likely seeped into the ground prior to reaching the Salmon river for many years and more recently has been diverted in its entirety for irrigation and other uses. Since the waters are warm, no 303(d) assessment was made. Comments and responses related to the 303(d) listing study conclude that Warm Springs Creek does not connect to the Salmon River, is diverted in its entirety, the natural channel is dry and most likely does not fit the U.S. Army Corps of Engineers definition for a “navigable water” so there is no anticipated impact to the Salmon River due to approval of these applications.

Conclusions

- 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.
- 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.
- 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.
- 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.
- 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.

⁴ State of Idaho Department of Environmental Quality, Upper Salmon River Subbasin Assessment and TMDL (January, 2003) pgs. 54-55, 116.

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Page 6 of 7 OCT 13 2006

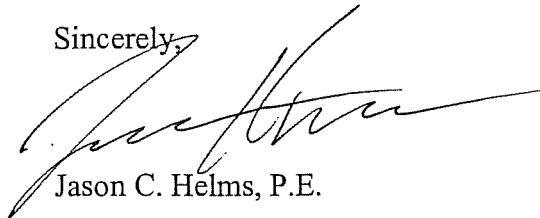
September 2 006

Epicenter Aquaculture – Application for Permits 72-7577 through 72-7580

- The proposed use of water under the applications is compatible with the objectives and policies of the State Water Plan pertaining to beneficial use and conservation of water resources.

It is my professional opinion that these applications meet the criteria for the best use of the available resource and have little or no impact on other water users and I look forward to their approval by IDWR. If you have any questions or comments or need any additional information please don't hesitate to contact our office. Thank you for the opportunity to provide this service to you.

Sincerely,



Jason C. Helms, P.E.

Attachment: Exhibits

Cc: Rob Williams
Allen Merritt (IDWR-Southern Region)

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Project No. 921-01-2006

Exhibits

Epicenter Aquaculture Application for Permits 72-7577, 7578, 7579, 7580 - Custer County, Idaho

Prepared for:

Mark Lupher

RECEIVED
SEP 26 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

September 25, 2006

For information concerning this report, contact
Jason C Helms, P.E.



CHARLES E. BROCKWAY, Ph.D., P.E.
CHARLES G. BROCKWAY, Ph.D., P.E.
JASON C. HELMS, P.E.

2016 NORTH WASHINGTON, SUITE 4
TWIN FALLS, IDAHO 83301

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**Mark Jo Anne Lupher – Epicente Aquaculture
Water Right Application No's. 72-7577, 7578, 7579, 7580**

List of Exhibits

- 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: 72-7579)

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Mark & Jo Anne Luper – Epicenter Aquaculture
Water Right Application No's. 72-7577, 7578, 7579, 7580

Exhibit A
Facility Design

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OCT 12 2006

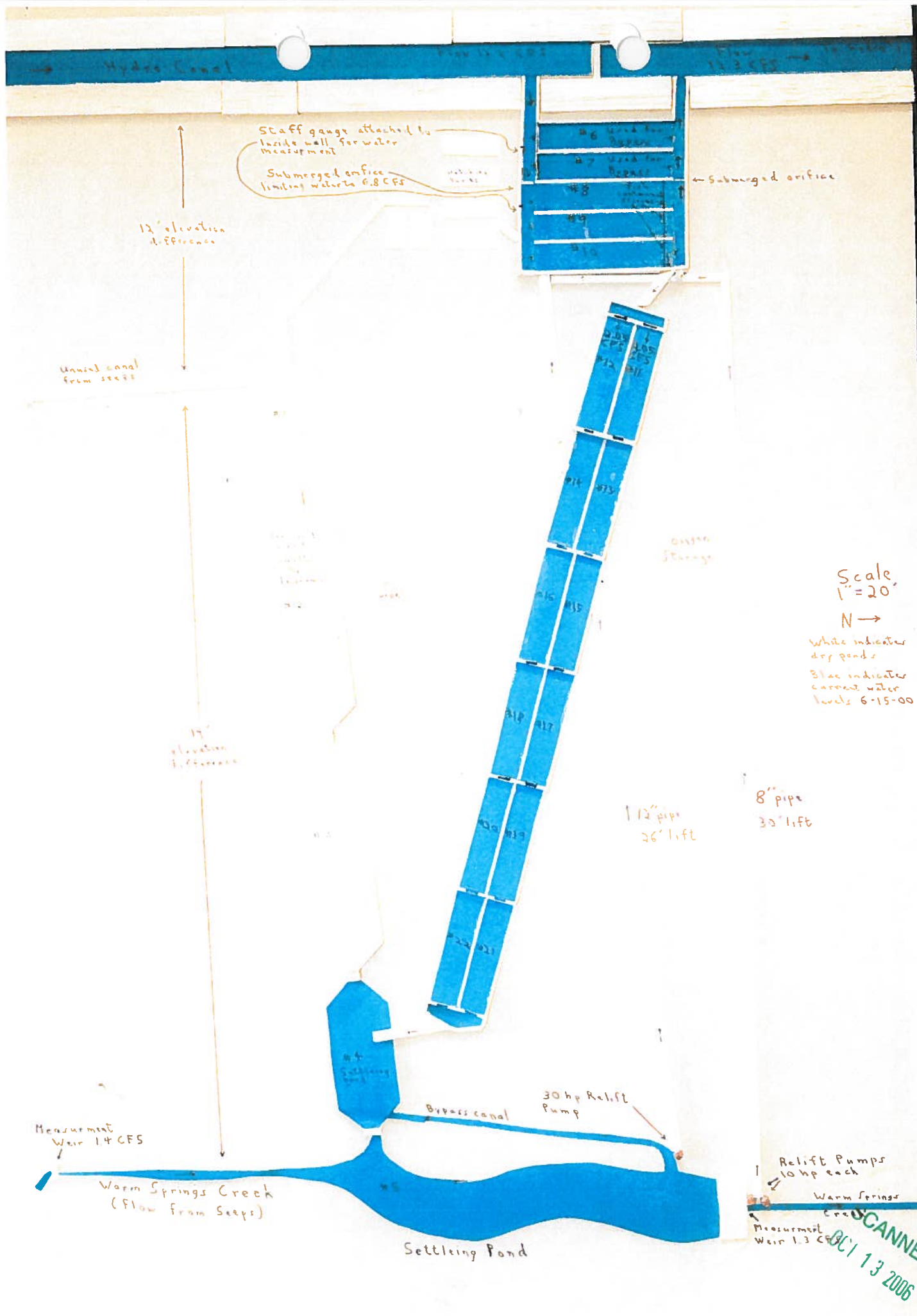


LUPHER - FISH FACILITY SYSTEM
NAIP 2004 AERIAL PHOTO
T. 12N., R. 20E. Section 9

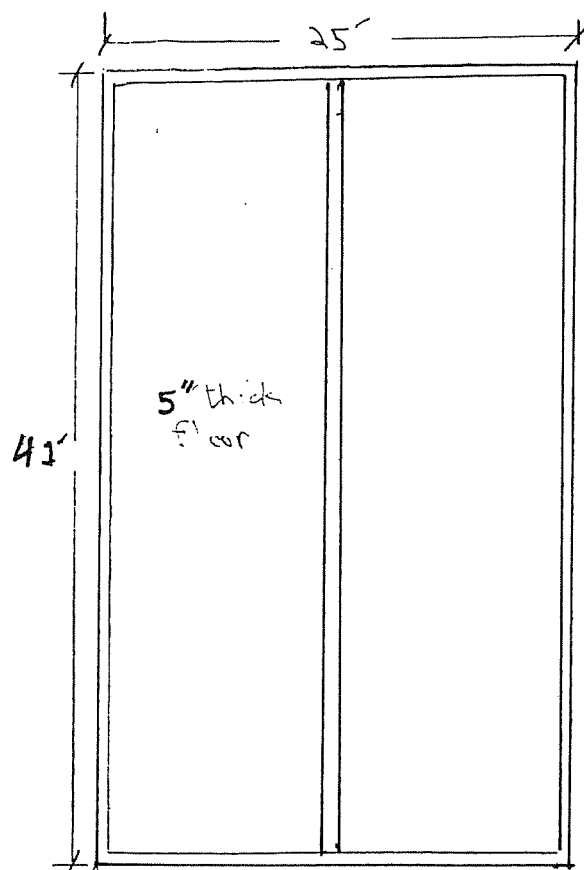
Legend

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





Holding ponds 1" = 10'
 Cost \$10,000



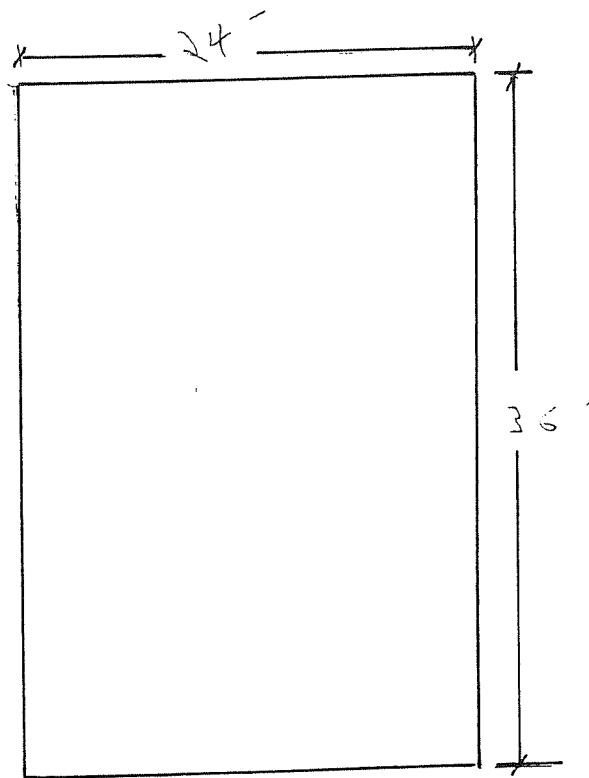
8" thick walls & high

→ Loading Dock

concrete:
 16 yards floor
 17 yards walls

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Hatchery Building 1" = 10'
Cost ~25,000

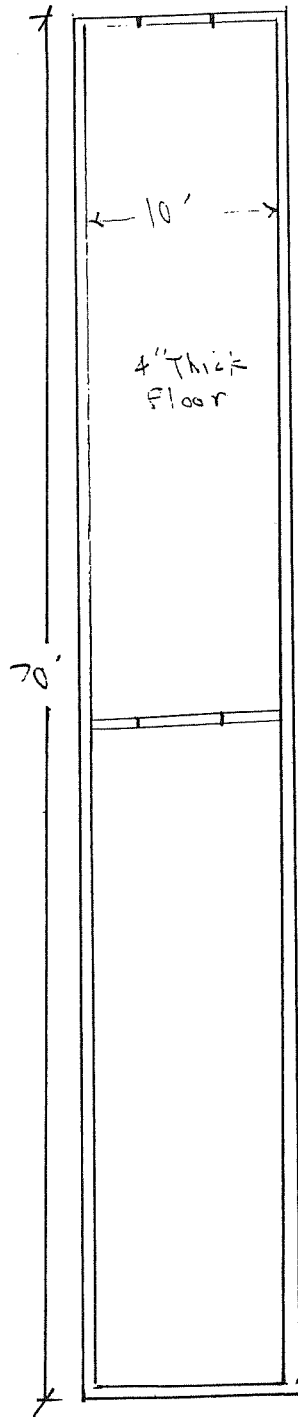


Greenhouse style with ocean walls
10' walls

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Fingerling Raceway
Cost \$5,000 (8" pipe is on hand)



6" Thick walls 3' high

9 yds Floor
9 1/2 yds Walls

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Mark & Jo Anne Lupper – Epicenter Aquaculture
Water Right Application No's. 72-7577, 7578, 7579, 7580

Exhibit B

Existing water right license 72-7209 and pending applications 72-7577 through 72-7580

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Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

08/23/2006

WATER RIGHT NO. 72-7209

Owner Type	Name and Address
Current Owner	TIMOTHY A INGRAM HC 61 BOX 3020 CHALLIS, ID 83226 (208)879-4721
Original Owner	WARM SPRINGS RANCH C/O JACK SIMPSON PO BOX 336 KETCHUM, ID 83340 (208)726-3249

Priority Date: 09/01/1982

Basis: License

Status: Active

Source	Tributary
SPRINGS	WARM SPRING CREEK
WARM SPRINGS	WARM SPRINGS CREEK

Beneficial Use	From	To	Diversion Rate	Volume
FISH PROPAGATION	1/01	12/31	6.98 CFS	5052.2 AFA
Total Diversion			6.98 CFS	

Location of Point(s) of Diversion:

SPRINGS	SWNW	Sec. 10	Township 12N	Range 20E	CUSTER County
WARM SPRINGS	NWSW	Sec. 10	Township 12N	Range 20E	CUSTER County

Licensed Diversion Capacity: 6.98

Place(s) of use:

Place of Use Legal Description: FISH PROPAGATION CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12N	20E	10		SWNW										

08/23/2006

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08/23/2006
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08/23/2006

13N		32		NENE											
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Conditions of Approval:

1.	R09	Return water shall be treated to insure that the effluent meets Idaho Water Quality Standards.
2.	R03	Measuring devices of a type approved by this Department shall be maintained at the point of diversion and point of effluent discharge.
3.	R11	Should the use of the water on this right reduce the quality of water available to prior water rights and make it unusable to satisfy the prior appropriations, the right holder shall cease diversion under this right.
4.		The facility volume = .8 acre feet.

Dates:
 Licensed Date: 07/28/1995
 Decreed Date:
 Permit Proof Due Date: 7/1/1989
 Permit Proof Made Date: 6/28/1989
 Permit Approved Date: 7/25/1983
 Permit Moratorium Expiration Date:
 Enlargement Use Priority Date:
 Enlargement Statute Priority Date:
 Water Supply Bank Enrollment Date Accepted:
 Water Supply Bank Enrollment Date Removed:
 Application Received Date: 09/01/1982
 Protest Deadline Date:
 Number of Protests: 0

Other Information:
 State or Federal:
 Owner Name Connector:
 Water District Number:
 Generic Max Rate per Acre:
 Generic Max Volume per Acre:
 Combined Acres Limit:
 Combined Volume Limit:
 Combined Rate Limit: 25
 Civil Case Number:
 Old Case Number:
 Decree Plaintiff:
 Decree Defendant:
 Swan Falls Trust or Nontrust:
 Swan Falls Dismissed:
 DLE Act Number:
 Cary Act Number:
 Mitigation Plan: False

Close

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Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Application Report

09/05/2006

WATER RIGHT NO. 72-7577

Owner Type	Name and Address
Current Owner	EPICENTER AQUACULTURE
Current Owner	JO ANNE LUPHER
Current Owner	MARK L LUPHER
	PO BOX 336
	CHALLIS, ID 83226

Priority Date: 10/14/1999
Status: Active

Source	Tributary
SPRINGS	WARM SPRING CREEK
WARM SPRINGS CREEK	SALMON RIVER

Beneficial Use	From	To	Diversion Rate	Volume
FISH PROPAGATION	1/01	12/31	1.1 CFS	
Total Diversion			1.1 CFS	

Location of Point(s) of Diversion:

SPRINGS	SESENE	Sec. 09	Township 12N	Range 20E	CUSTER County
WARM SPRINGS CREEK	NENWSW	Sec. 10	Township 12N	Range 20E	CUSTER County

Place(s) of use:

Place of Use Legal Description: FISH PROPAGATION CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12N	20E	9		NENE			SENE							

Dates:

Initial Application Received: 10/14/1999
Initial Application Denied:
Last Date of Beneficial Use:
Extension End Date:
Latest Deadline Date: 1/10/2000

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Number of Protests: 1
Enlargement Use Priority Date:
Enlargement Statute Priority Date:

Other Information:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Application Type: New Appropriation
Applicant Remarks:
Other Water Rights:
Time to Complete Works:
Transfer Affected Description:
Transfer Affected Contracts:
Old Transfer Number:
Transfer Reason:
Transfer Return Flows:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

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Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Application Report

09/05/2006

WATER RIGHT NO. 72-7578

Owner Type	Name and Address
Current Owner	ANNE W LUPHER HC 61 BOX 3016 CHALLIS, ID 83226
Current Owner	EPICENTER AQUACULTURE
Current Owner	MARK L LUPHER PO BOX 336 CHALLIS, ID 83226

Priority Date: 12/14/1999
Status: Active

Source	Tributary
WARM SPRINGS	WARM SPRINGS CREEK

Beneficial Use	From	To	Diversion Rate	Volume
FISH PROPAGATION	1/01	12/31	13.1 CFS	
Total Diversion			13.1 CFS	

Location of Point(s) of Diversion:

WARM SPRINGS	SENWSW	Sec. 10	Township 12N	Range 20E	CUSTER County
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Place(s) of use:

Place of Use Legal Description: FISH PROPAGATION CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
2N	20E	9		NENE			SENE							

Dates:

Application Received: 10/14/1999

Application Denied:

Last Date of Beneficial Use:

Extension End Date:

Test Deadline Date: 1/10/2000

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Number of Protests: 1
Enlargement Use Priority Date:
Enlargement Statute Priority Date:

Other Information:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Application Type: New Appropriation
Applicant Remarks:
Other Water Rights:
Time to Complete Works:
Transfer Affected Description:
Transfer Affected Contracts:
Old Transfer Number:
Transfer Reason:
Transfer Return Flows:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

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Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Application Report

09/05/2006

WATER RIGHT NO. 72-7579

Owner Type	Name and Address
Current Owner	EPICENTER AQUACULTURE
Current Owner	JO ANNE LUPHER
Current Owner	MARK L LUPHER
	PO BOX 336
	CHALLIS, ID 83226

Priority Date: 10/25/1999

Status: Active

Source	Tributary
WARM SPRINGS CREEK	SALMON RIVER

Beneficial Use	From	To	Diversion Rate	Volume
WILDLIFE STORAGE	1/01	12/31		1.7 AFA
Total Diversion			1.7 AFA	

Location of Point(s) of Diversion:

WARM SPRINGS CREEK	NENWSW	Sec. 10	Township 12N	Range 20E	CUSTER County
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Place(s) of use:

Place of Use Legal Description: WILDLIFE STORAGE CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
2N	20E	10		NWSW										

Conditions of Approval:

This application being held pending withdrawal of Wilderness Moratorium.

Dates:

Initial Application Received: 10/25/1999

Initial Date: 09/05/2006

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OCT 13 2006

Date Application Denied:
Last Date of Beneficial Use:
Extension End Date:
Protest Deadline Date:
Number of Protests: 0
Enlargement Use Priority Date:
Enlargement Statute Priority Date:

Other Information:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Application Type: New Appropriation
Applicant Remarks:
Other Water Rights:
Time to Complete Works:
Transfer Affected Description:
Transfer Affected Contracts:
Old Transfer Number:
Transfer Reason:
Transfer Return Flows:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
WLE Act Number:
Cary Act Number:
Mitigation Plan: False

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IDAHO DEPARTMENT OF WATER RESOURCES
Water Application Report

09/05/2006

WATER RIGHT NO. 72-7580

Owner Type	Name and Address
Current Owner	EPICENTER AQUACULTURE
Current Owner	JO ANNE LUPHER
Current Owner	MARK L LUPHER
	PO BOX 336
	CHALLIS, ID 83226

Priority Date: 12/17/1999
Status: Active

Source	Tributary
WARM SPRINGS CREEK	SALMON RIVER

Beneficial Use	From	To	Diversion Rate	Volume
COMMERCIAL	6/01	9/30	0.02 CFS	0.1 AFA
WILDLIFE STORAGE	1/01	12/31		
DIVERSION TO STORAGE	1/01	12/31	0.1 CFS	
Total Diversion			0.1 CFS	

Location of Point(s) of Diversion:

WARM SPRINGS CREEK	NENWSW	Sec. 10	Township 12N	Range 20E	CUSTER County
--------------------	--------	---------	--------------	-----------	---------------

lace(s) of use:

Place of Use Legal Description: COMMERCIAL CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12N	20E	9		SENE										

Place of Use Legal Description: WILDLIFE STORAGE CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12N	20E	10		SWNW										

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OCT 13 2006

Conditions of Approval:

1. Commercial use is for cooling live fish in tanker trucks for interstate shipping. Application being held pending withdrawal of Wilderness Moratorium.

Dates:

Date Application Received: 12/17/1999

Date Application Denied:

Last Date of Beneficial Use:

Extension End Date:

Protest Deadline Date:

Number of Protests: 0

Enlargement Use Priority Date:

Enlargement Statute Priority Date:

Other Information:

State or Federal:

Owner Name Connector:

Water District Number:

Generic Max Rate per Acre:

Generic Max Volume per Acre:

Application Type: New Appropriation

Applicant Remarks:

Other Water Rights:

Time to Complete Works:

Transfer Affected Description:

Transfer Affected Contracts:

Old Transfer Number:

Transfer Reason:

Transfer Return Flows:

Swan Falls Trust or Nontrust:

Swan Falls Dismissed:

OLE Act Number:

Cary Act Number:

Mitigation Plan: False

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TRANSFER NO. 67067

MARK L LUPHER

PO BOX 336

CHALLIS ID 83226, has filed Application No. 67067 for changes to the following water rights within

County: CUSTER

Purpose of Transfer	Water Right Number
---------------------	--------------------

Right No. 72-7209

Priority Sep 1 1982 12:00AM

Source SPRINGS, WARM SPRINGS,

Use FISH PROPAGATION 6.98 CFS 5052.2 AFA,

Total Amount 6.98 CFS 5052.2 AFA

Point(s) of Diversion

Township	Range	Section	QQQ	QQ	Quarter	GovernmentLotNumber
12N	20E	10		SW	NW	
12N	20E	10		NW	SW	

Place Of Use

Place of Use Legal Description: FISH PROPAGATION CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12N	20E	10		SWNW										
13N		32		NENE										

The purpose of the transfer is to change the above rights a follows:

Proposed Right No. 72-7209

Priority Sep 1 1982 12:00AM

Source

Use FISH PROPAGATION 6.98 CFS 5052.2 AFA,

Total Amount 6.98 CFS 5052.2 AFA

Township	Range	Section	QQQ	QQ	Quarter	GovernmentLotNumber
12N	20E	10	NE	NW	SW	
12N	20E	10	SE	NW	SW	
12N	20E	9	SE	SE	NE	
12N	20E	9	NW	SE	NE	

Place Of Use

Place of Use Legal Description: FISH PROPAGATION CUSTER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
12N	20E	9		NENE			SENE							

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OCT 13 2006
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OCT 13 2006

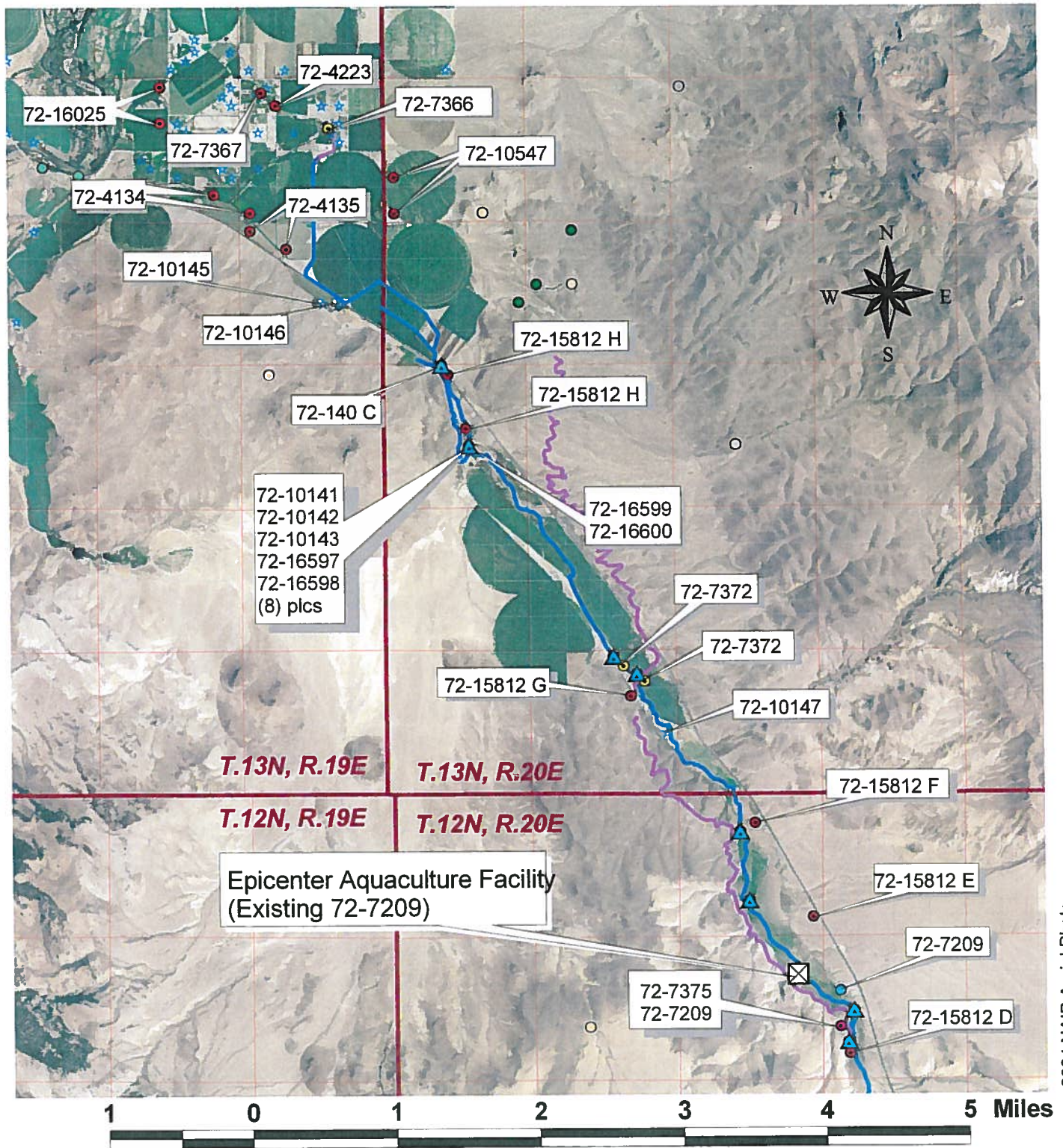
Mark & Jo Anne Lupher – Epicenter Aquiculture
Water Right Application No's. 72-7577, 7578, 7579, 7580
Response to IDWR RFI

Exhibit C
Effect on existing water rights

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Warm Springs Creek & Vicinity (Active Water Right Licenses & Decrees)



2004 NAIP Aerial Photo

- Warm Springs Creek
- Hydropower Canal
- PLSS Township Boundaries
- PLSS Section Lines 40's

IDWR - P.O.D.

- GROUND WATER
- WARM SPRING CREEK
- WARM SPRINGS
- WARM SPRINGS CREEK
- 72-10141 thru 72-10143
- 72-16597, 72-16598

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06/13/2006

Query parameters:
basinFrom = 72
Source = WARM SPRING
Search for: active Records

Information for type: Recommendation

Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	Water Uses	Owner List
72	16049		1	Reserved	Active			WARM SPRING CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	UNITED STATES OF AMERICA TRUSTEE (Current)
72	16062		1	Reserved	Active			WARM SPRING CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	UNITED STATES OF AMERICA TRUSTEE (Current)
72	16081		1	Reserved	Active			WARM SPRINGS CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	UNITED STATES OF AMERICA TRUSTEE (Current)
72	16093		1	Reserved	Active			WARM SPRINGS CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	UNITED STATES OF AMERICA TRUSTEE (Current)
72	16131		1	Reserved	Active			WARM SPRINGS CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	NEZ PERCE TRIBE ACTING THROUGH THE (Current)
72	16144		1	Reserved	Active			WARM SPRING CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	NEZ PERCE TRIBE ACTING THROUGH THE (Current)
72	16163		1	Reserved	Active			WARM SPRINGS CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	NEZ PERCE TRIBE ACTING THROUGH THE (Current)
72	16175		1	Reserved	Active			WARM SPRINGS CREEK	AVERAGE ANNUAL FLOW, BANKFULL FLOW, CHANNEL MAINTENANCE, FISH HABITAT	NEZ PERCE TRIBE ACTING THROUGH THE (Current)

Information for type: Application

Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	Water Uses	Owner List
72	7364				Active	12/19/1983	5	WARM SPRING CREEK	IRRIGATION, POWER	SCHOWENGERDT, RICHARD (Current)
72	7577				Active	10/14/1999	1.1	SPRINGS , WARM SPRINGS CREEK	FISH PROPAGATION	EPICENTER AQUACULTURE (Current); LUPHER, JO ANNE (Current); LUPHER, MARK L (Current)
72	7578				Active	12/14/1999	13.1	WARM SPRINGS	FISH PROPAGATION	EPICENTER AQUACULTURE (Current); LUPHER, ANNE W (Current); LUPHER, MARK L (Current)
72	7579				Active	10/25/1999		WARM SPRINGS CREEK	WILDLIFE STORAGE	EPICENTER AQUACULTURE (Current); LUPHER, JO ANNE (Current); LUPHER, MARK L (Current)
72	7580				Active	12/17/1999	0.1	WARM SPRINGS CREEK	COMMERCIAL, DIVERSION TO STORAGE, WILDLIFE STORAGE	EPICENTER AQUACULTURE (Current); LUPHER, JO ANNE (Current); LUPHER, MARK L (Current)

Information for type: Statutory Claim, Decree and License

Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	Water Uses	Owner List
72	140	C		Decreed	Active	1877-04-01	0.2	WARM SPRING CREEK	IRRIGATION	KOEPPEN, KENT K (Current)
72	144			Decreed	Active	1877-02-01	6.4	WARM SPRING CREEK	IRRIGATION, STOCKWATER	MOUNTAIN SPRINGS RANCH (Current)
72	146			Decreed	Active	1885-11-01	0.02	WARM SPRING CREEK	STOCKWATER	CHIVERS, GARTH T (Current); CHIVERS, GLENIS M (Current)
72	4005			Decreed	Active	11/1/1932	0.84	WARM SPRING CREEK	STOCKWATER	SALMON RIVER RANCHES LT CO (Current)
72	4093	A		Decreed	Active	6/1/1916	0.09	WARM SPRINGS CREEK	IRRIGATION	SORENSEN, CAROLE K (Current)
72	4093	B		Decreed	Active	6/1/1916	1.58	WARM SPRINGS CREEK	IRRIGATION	SORENSEN, CAROLE K (Current)
72	4134			Decreed	Active	6/1/1962	0.05	WARM SPRING CREEK	STOCKWATER	HUNT, GLENDON H (Current)
72	4135			Decreed	Active	6/1/1970	0.05	WARM SPRING CREEK	STOCKWATER	HUNT, RYAN N (Current)
72	4192	A		Decreed	Active	1898-04-16	6.19	SALMON RIVER , WARM SPRING CREEK	IRRIGATION	HUNT, RYAN N (Current)
72	4222	A		Decreed	Active	6/1/1951	4	WARM SPRING CREEK	IRRIGATION	CHIVERS, GARTH T (Current); CHIVERS, GLENIS M (Current)
72	4222	B		Decreed	Active	6/1/1951	4	WARM SPRING CREEK	IRRIGATION	ROJOEMCO (Current)

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Information for type: Statutory Claim, Decree and License

Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	Water Uses	Owner List
72	4223			Decreed	Active	4/15/1970	0.52	WARM SPRING CREEK	IRRIGATION	TUPPER, FRANCES (Current); TUPPER, MICHAEL (Current)
72	7209			License	Active	9/1/1982	6.98	SPRINGS , WARM SPRINGS	FISH PROPAGATION	INGRAM, TIMOTHY A (Current)
72	7366			License	Active	7/30/1984	0.03	WARM SPRINGS CREEK	IRRIGATION, STOCKWATER	WOOLWINE, ANDREW JACKSON (Current); WOOLWINE, GWENDOLYN O (Current)
72	7367			Decreed	Active	4/3/1984	0.08	WARM SPRING CREEK	IRRIGATION, STOCKWATER	NALLION, MYLA R (Current); NALLION, WILLIAM M (Current)
72	7372			License	Active	4/19/1984	25	WARM SPRINGS CREEK	POWER	VON MORGANROTH, LOIS (Current)
72	7375			License	Active	4/19/1984	25	WARM SPRINGS CREEK	POWER	VON MORGANROTH, LOIS (Current)
72	7499			License	Active	6/9/1992	0.28	WARM SPRINGS CREEK	FISH PROPAGATION	STATE OF IDAHO (Current)
72	10141			Decreed	Active	1877-03-01	8	WARM SPRING CREEK	IRRIGATION, STOCKWATER	VON MORGANROTH, LOIS (Current)
72	10142			Decreed	Active	1878-03-01	11.4	WARM SPRING CREEK	IRRIGATION	VON MORGANROTH, LOIS (Current)
72	10143			Decreed	Active	1/26/1911	3.9	WARM SPRING CREEK	IRRIGATION	VON MORGANROTH, LOIS (Current)
72	10547			Decreed	Active	10/1/1970	0.02	WARM SPRING CREEK	STOCKWATER	ROGERS, PAMELA A (Current); ROGERS, W GARY (Current)
72	10922			Decreed	Active	12/31/1900	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	A		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	C		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	D		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	E		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	F		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	G		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	15812	H		Decreed	Active	6/28/1934	0.02	WARM SPRING CREEK	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	16025			Decreed	Active	10/15/1945	0.02	WARM SPRING CREEK	STOCKWATER	WINTER, FRED M (Current); WINTER, KATHERINE K (Current)
72	16597			Decreed	Active	6/13/1977	6.58	WARM SPRING CREEK	IRRIGATION	VON MORGANROTH, LOIS (Current)
72	16598			Decreed	Active	6/13/1977	0.31	WARM SPRING CREEK	IRRIGATION	UNITED STATES OF AMERICA ACTING THROUGH (Current)
72	16599			Decreed	Active	1/1/1950		WARM SPRING CREEK	IRRIGATION FROM STORAGE, IRRIGATION STORAGE, STOCKWATER FROM STORAGE, STOCKWATER STORAGE	VON MORGANROTH, LOIS (Current)
72	16600			Decreed	Active	1/1/1950		WARM SPRING CREEK	IRRIGATION FROM STORAGE, IRRIGATION STORAGE	UNITED STATES OF AMERICA ACTING THROUGH (Current)

Information for type: Permit

Basin	Sequence	Suffix	Version	Basis	Status	Priority Date	Diversion Rate	Source List	Water Uses	Owner List
72	7360				Active	12/2/1983	6	WARM SPRING CREEK	IRRIGATION	HUNT, GLENDON H (Current)
72	7498				Active	6/9/1992	0.8	WARM SPRINGS CREEK	FISH PROPAGATION	STATE OF IDAHO (Current)

Information for type: Transfer

Application ID	Existing Water Right Nos.	Proposed Water Right Nos.	Received Date	Status	Protest Deadline	Total Div. Rate (cfs)	Total Div. Vol (af)	Total Acres	Applicant
67067	72-7209,	72-7209,	1/31/2000	Active	3/20/2000				MARK L LUPHER (Transfer Applicant), JO ANNE LUPHER (Transfer Applicant),

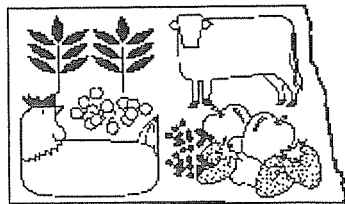
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Mark & Jo Anne Luper – Epicenter Aquiculture
Water Right Application No's. 72-7577, 7578, 7579, 7580
Response to IDWR RFI

Exhibit D

Information relative to sufficiency of water supply

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Tilapia

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Department of Agricultural Economics, NDSU

Series Editor: **Dwight Aakre**, Farm Management Specialist
NDSU Extension Service

The aquaculture industry in the United States and North Dakota is in its infancy. Presently, the success of the industry depends largely on two factors.

First, demand for high-quality fish products is increasing. In 1989 the United States consumed a record 15.9 pounds of seafood per capita, up 5 percent -- or 3.1 billion pounds -- from 1988. Most of the fish consumed by Americans is imported. Of all products imported to the United States in 1989, the value of imported seafood was second only to that of imported petroleum.

Second, world supplies of wild fish stock are decreasing. As wild stocks continue to be depleted, aquaculture represents an alternative means to meet the increasing demand for fish products. Currently, aquaculture is the most rapidly growing segment of the agricultural sector of the United States economy. The National Fisheries Institute expects to meet an annual consumption goal of 20 pounds per capita by the year 2000.

Some of the more established species currently produced on fish farms include catfish, trout and salmon. According to Andrew Davlin, Jr., an industry spokesman, aquaculture should increase production by 10 to 15 percent annually through the year 2000. U.S. aquaculture will depend largely on five species: shrimp, salmon, catfish, trout and tilapia. Tilapia is a relatively new species, just beginning to be produced on farms in the United States. Tilapia production will expand throughout the 1990s as consumers become more aware of the product.

Tilapia is poised to make a substantial contribution to aquaculture. It is hardier and more prolific than other species. Also, tilapia produces a fine-tasting white flakey meat. Initial consumer taste panels have indicated that tilapia is a delicious fish. The main impediment to an increase in tilapia consumption is the lack of familiarity of tilapia to the American consumer.

Characteristics

Tilapia is a hardy, prolific, fast-growing tropical fish native to Israel, where it has been farmed for about 2,500 years. It requires water temperatures from 76 to 86 degrees Fahrenheit. Currently, tilapia are produced in outdoor ponds and indoor systems. They are prolific breeders and were considered a national pest in Indonesia until the citizens began using them as a food source. Tilapia production in outside ponds is strictly regulated in the southern United States for fear that some fish may escape from the farm ponds and encroach on native sport fishing populations.

Food

Tilapia can survive on a diversity of food. Algae is probably their most common food in the wild. On fish farms they are fed a high-protein pelleted feed. When raised in a controlled environment they can achieve growth rates of up to 3 percent of body weight per day, but 2 percent is a more likely average. The fish is efficient and should gain about one pound for every 1.5 pounds of food. Tilapia fingerlings are typically purchased at a weight of 0.07 of an ounce. They are marketed at 1½ to 1¾ pounds at 6 months of age.

Tilapia are fed commercially available pelleted fish food which costs approximately \$.23 per pound. They can be fed by hand or with a sprinkler mechanism, and are generally fed twice per day. Tilapia are generally quite hardy and readily adapt to new environments. Death loss of 10 percent is common until the fingerlings weigh about 1.0 ounce. Death loss of 0.5 percent from 1.0 ounce to selling weight is common.

Special Considerations

Potential disadvantages to producing tilapia in North Dakota include the need for warm water and the lack of nearby production experience. The need for warm water suggests that combining a tilapia fish farm and an industry with warm water as a waste product could be beneficial.

Lack of producer experience will be less of a problem as interest in aquaculture increases. Also, because tilapia are extremely hardy they can withstand a relatively greater amount of disease and temperature variability than catfish or trout.

Here are key factors for starting a successful tilapia farming business:

1. A viable market
2. Appropriate water quality and availability
3. Financial backing
4. Consistent product inspection
5. Disease control and availability of therapeutics
6. Appropriate stock quality
7. Appropriate feed quality and price

Economic Feasibility

Producing tropical tilapia in North Dakota requires an indoor installation where water and air temperature can be controlled, and this requires a relatively large capital investment than producing the fish outdoors in a warmer climate. This means North Dakota tilapia producers must maintain a continuous level of high output to justify the high capital requirements. The size of tilapia farms in North Dakota could vary dramatically, depending to a large extent on market demand. The economic feasibility analysis for tilapia production presented here is for a structure producing 80,000 pounds of tilapia per year (live weight) with a 2 percent growth rate.

Table 1. Estimated Tilapia Enterprise Budget For
10,000-Pound Facility In North Dakota, 1992

	Economic	Budgets Cash
Returns		
Quantity sold		
lb. live weight	80,048	80,048
Price per lb. (a)	\$1.12	\$1.12
Gross revenue	\$89,654	\$89,654
Variable expenses		
Fingerlings (b)	\$5,413	\$5,413
Feed (c)	27,617	27,617
Utilities (d)	15,515	15,515
Operating interest (e)	4,733	4,733
Total variable expenses	53,277	53,277
Fixed Expenses		
Equipment	\$4,450	\$4,450
Building and lagoon	2,550	2,550
Depreciation (f)		25,438
Total fixed expenses	12,438	7,000
Total Expenses		\$85,715
Return to labor,		
management & equity	\$3,939	-----
Cash flow		
(debt service-family living) -----	\$29,377	

(a) Actual price would need to be contracted prior to building facility and beginning construction.

(b) 54,126 fingerlings purchased at \$.10 per fingerling.

(c) 120,072 pounds of pelleted fish food purchased (or 1.5 pounds feed per pound of gain) at \$.23 per pound of food.

(d) Calculated as percent of plant cost.

(e) Operating interest charged on fingerlings, feed, utilities, and insurance at 9.75 percent on borrowed capital and 4 percent for equity capital for 12 months

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(f) Equipment value (\$111,250) depreciated over five years,
Building and lagoon (\$63,750) depreciated over 20 years.

The economic budget is generated by charging market rates for all resources needed for production. It helps answer the question "Is this enterprise profitable?" The bottom line represents a return to labor and management.

The cash flow budget is an estimate of the out-of-pocket cash needed to run the enterprise, including not only direct costs but indirect cash costs such as principle and interest payments, insurance and taxes. It helps answer the question "Can I make meet my cash obligations if I go into this enterprise?" Total cash expenses are subtracted from total cash receipts to calculate the net cash which is available for family living and other needs.

Marketing

While consumer trends indicate that per capita fish consumption has been increasing and will probably continue to do so, efforts are focused on market development for tilapia since it is a relatively new fish to American consumers. Attempting to market tilapia through local retail outlets may prove to be unsuccessful unless some attempt is made to educate consumers about tilapia. The processed fish market may be easier to enter, but the selling price will be low. Potential producers will probably find it necessary to obtain contracts from market outlets which specify the amount and price of fish to be sold before credit agencies will be willing to provide financing.

Facilities Requirements

Facilities required for the production of tilapia depend, to a large extent, on the size of the market. The smallest size which could be considered economically feasible for commercial production would be 63,000 pounds of fish (live weight) per year. Tilapia farms have existed which produced 2 million pounds (live weight) per year. Facility requirements for an indoor fish farm producing 80,000 pounds per year (live weight) are presented here. A facility of this size is big enough to be profitable, yet allows for future expansion should the market potential exist. It would require 4-to-5 hours per day of labor. An insulated pole shed measuring 75 feet by 90 feet in length with 14 foot sidewalls could efficiently house the facility. The building would have nine tanks 46 inches deep with diameters from 9 to 30 feet. The total cost for constructing and equipping a facility of this type would be \$175,000.

The 80,000-pound facility would require about 46,000 gallons of water for the holding tanks. An additional 4,000 gallons would be needed for the biotreatment unit, sump tank, and pipe and waste treatment. With a projected water flow rate of 10 gallons per minute, a total of 82 hours would be required to fill the system. A constant supply of make up water running at 3 to 5 gallons per minute would be required. Make-up water is necessary to replace water loss because of evaporation and waste disposal.

Costs associated with building and operating the facility are shown below. Based on a projected sale price of \$1.12 per pound live weight and a 2 percent growth rate, each year the enclosed tilapia production facility would contribute \$4,571 to owner labor, management and equity capital.

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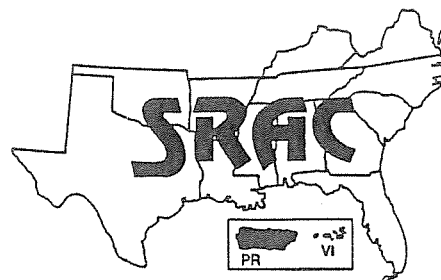
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North Dakota State University
NDSU Extension Service

Southern Regional Aquaculture Center



November 1991

Water Quantity and Quality Requirements for Channel Catfish Hatcheries

Craig S. Tucker*

Simple and inexpensive production of seed stock is a key to successful aquaculture. Indeed, the rapid growth of commercial channel catfish culture is owed in no small part to the ease with which large numbers of channel catfish fry can be produced using relatively unsophisticated hatchery technology.

Although the production of channel catfish fry is technically a simple process, success in some hatcheries is poor year after year. Problems may include poor egg matchability, low fry survival, poor fry growth, or a high incidence of infectious diseases of eggs or fry. Sometimes these problems are related to poor management practices, but quite often they are the result of poor water quality within the hatchery.

With appropriate treatment, any water can be made suitable for use in a catfish hatchery. Cost of treatment is often not economically justifiable. It is usually good practice to use a source that provides, as nearly as possible, water of correct quality for optimum matchability of eggs and survival and growth of fry. Good water quality is maintained in the hatchery by provid-

ing adequate water flow and aeration to hatching and rearing troughs. Frequent removal of uneaten feed and other accumulated organic debris will also aid in maintaining proper rearing conditions within troughs or tanks.

Water sources

In many regions, water from several sources may be available for use in the hatchery. Sources may include ground waters from aquifers lying at different depths and various surface water supplies. Before the hatchery is built, the manager should become familiar with the quality and availability of these potential hatchery water supplies. The best water supply may then be selected by comparing desired water quality and flow requirements with the chemical characteristics, temperature, and availability of various water sources.

The success of other hatcheries using water from a common source is the best indicator of the suitability of a particular water. Obviously, if poor water quality at other hatcheries is causing low survival of eggs or fry, or if costly treatment is required to make the water suitable for use, then it may be wise to seek an alternative water source. If there are no other

hatcheries in the area and the quality of the water supply is questionable, a pilot-scale hatchery can be constructed to ensure that the water is suitable for use.

Ground water

Ground water generally is considered to be the best source of water for catfish hatcheries. Ground waters are usually free of suspended matter, pollutants, and fish disease organisms. Temperature and chemical composition are relatively constant, and, in regions with abundant ground water, the supply is dependable. The chemical composition and well pumping rates for some ground water supplies may be obtained from well logs for existing nearby wells. Alternatively, a test well can be drilled to assess the source. The quality of most ground waters is relatively constant over time, so a single chemical analysis will suffice to characterize water quality. Nevertheless, it is good practice to have the supply reanalyzed every year or two.

Although ground waters are preferred for hatcheries, some waters may have to be treated to make them suitable for use. Depending upon the water, treatments may include:

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- aeration to increase dissolved oxygen concentrations;
- degassing to reduce total gas pressure and remove carbon dioxide and hydrogen sulfide;
- temperature regulation using water heaters or mixing of waters of different temperatures;
- sedimentation and filtration to remove iron; and
- addition of calcium to waters of low hardness.

Surface waters

Surface water supplies include streams and rivers, ponds, lakes, and reservoirs. Unpolluted surface water offers several advantages over ground water as a hatchery water supply. For example, dissolved oxygen concentrations tend to be near saturation; dissolved carbon dioxide and hydrogen sulfide concentrations are usually low; total gas supersaturation is seldom a problem; and iron concentrations are usually very low. Nevertheless, all surface water supplies suffer the disadvantages of variable quality and availability with time and exposure to sources of pollution and turbidity. For these reasons, carefully evaluate any surface water before use as a hatchery water supply.

Because quality and availability vary over time, historical record is necessary to predict whether the water will be suitable. Such records are not available for most waters, however, and changes in water temperature, chemical composition, and water availability caused by unusual weather events cannot be predicted by records. The best advice is to use common sense and avoid those waters that may become unsuitable for use during the time the hatchery is in operation.

Another major constraint to using surface water for hatcheries is the potential for contamination by fish disease organisms or water-borne predators. Most surface waters have a resident fish community. The fish in the water supply may

serve as a reservoir for fish disease organisms that could enter the hatchery and cause major losses. Natural predators of catfish fry, such as wild fish, insects, and other invertebrates, can also enter a hatchery and cause losses of fry.

Water quantity requirements

The success of a hatchery will suffer if insufficient water is available, even if that water is of optimum initial quality. Low water flow rates through hatching and rearing troughs allow waste products to accumulate which may quickly cause deterioration of water quality.

The typical trough (Figure 1) used for egg hatching and fry rearing holds roughly 100 gallons of water and is about 8 feet long, 2 feet wide and 10 inches deep. Troughs this size can hold 10 spawns at a time without crowding. Although the number of eggs per spawn varies with the size of the female brood fish, the ten spawns will contain (as a rough average) a total of 200,000 eggs. After the fry begin feeding, hold only about 100,000 fry in a trough of these di-

mensions. Thus, in a traditionally managed hatchery, two fry rearing troughs are available for each egg hatching trough.

Experience has indicated that minimum water turnover time (defined here as trough volume in gallons divided by water flow in gallons per minute) in hatching and rearing troughs should be about 40 minutes. Thus for a single 100 gallon trough, water flow should be a minimum of 2.5 gallons per minute. Larger troughs require proportionately higher flow rates. More water flow is also needed when egg or fry densities are higher.

Over a 10-to 12-week spawning season, each set of three 100-gallon troughs (one for eggs, two for fry) could be expected to produce roughly 1 to 1.5 million fry and would require a minimum flow of 7.5 gallons per minute (three troughs times 2.5 gallons/minute per trough). A hatchery capable of producing about 10 million fry per spawning season will typically contain 21 to 30 troughs and require a minimum water flow to the hatchery of 50 to 75 gallons per minute.

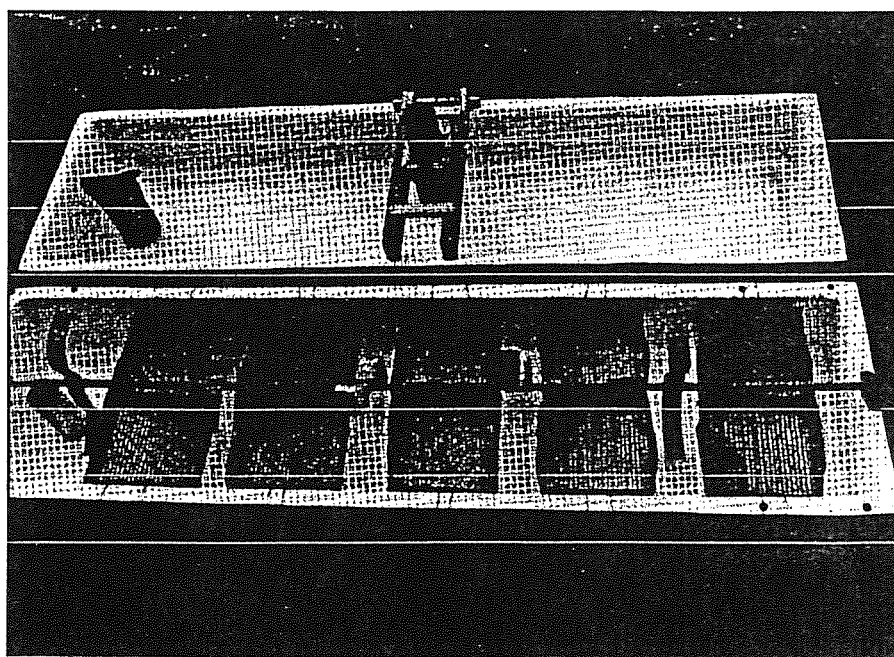


Figure 1. Traditional equipment used in a channel catfish hatchery: a fry rearing trough (top) with a 1/20-horsepower electric agitator and an egg hatching trough (bottom) with egg baskets and paddles.

The calculations above represent minimum flows. It is good practice to use at least twice those flow rates (turnover times of 20 minutes) to ensure against deterioration of water quality within hatcheries. Additional water flow is particularly important during the peak of the spawning season when the number of spawns arriving at the hatchery and the number of fry being reared temporarily exceeds the planned hatchery capacity. Thus, as a rough guide, a hatchery expected to produce 10 million fry per season should be supplied with roughly 100 to 150 gallons of water per minute.

Water quality requirements

Some of the more important water quality requirements for hatchery water supplies are discussed in the following sections. Aside from these specific requirements the water should also be:

- free of pesticides, solvents, petroleum products, and other pollutants;
- free of fish disease organisms;
- of relatively constant quality and availability.

Temperature

The optimum temperature range for development of eggs and rearing of fry is between 78 and 82°F (26 to 28°C). If the temperature is too low, hatching and development are prolonged, and fungi, which thrive in cool waters, often invade the egg mass. At higher water temperatures, embryos develop too fast and there may be a high incidence of malformed or nonviable fry. Also, bacterial diseases of eggs or fry and channel catfish virus disease of fry are more common if the water temperature is greater than 82°F (28°C).

Considerable energy is required to heat or cool water, and it is usually too costly to attempt major changes in water temperature. Therefore, the temperature of the water supply should be near 80°F before it enters the hatchery.

Ground water from deep wells (500 to 1,000 feet deep) is warmed by the internal heat of the earth and may be suitable for use in channel catfish hatcheries without temperature modification. Water from shallow wells (less than 300 feet) and some surface waters are too cool to use directly. Cool ground waters can be impounded in a small reservoir pond where solar heating will raise the temperature to some extent.

Nevertheless, water temperatures in the reservoir pond and in most other surface waters will vary with local weather conditions and still may be too cool for use early in the spawning season. An in-line water heater can be used to ensure a minimum temperature in the inlet water. The opposite condition may be encountered late in the spawning season when surface waters become too warm for use in hatcheries. It is very expensive to cool large volumes of water using refrigeration or chiller units. The best method of reducing water temperature is to mix the water that is too warm with cool water (such as water from a shallow well) to achieve the correct temperature.

Dissolved oxygen

Adequate dissolved oxygen is critical in hatcheries because eggs and fry have high metabolic rates and thus a high requirement for oxygen. Dissolved oxygen concentrations should not fall below 4-5 ppm at any time within the hatchery. Proper management of dissolved oxygen involves two distinct considerations: (1) ensuring that the water is oxygenated before use and (2) providing adequate aeration in hatching and rearing units to maintain optimal levels of dissolved oxygen throughout the hatchery.

Waters deficient in dissolved oxygen should be aerated before use. Pre-aeration not only ensures adequate initial levels of dissolved oxygen, but also may benefit some waters by partially degassing waters supersaturated with total dis-

solved gases and by removing some carbon dioxide and hydrogen sulfide. The two most common systems for pre-aerating water supplies for catfish hatcheries are packed column aerators (Figure 2) and aeration of water in an aeration tank.

Properly designed packed columns are highly effective aerators and relatively inexpensive to operate. They offer an added advantage of being good degassing devices for waters supersaturated with total dissolved gases. Packed columns are filled with a high surface area plastic packing. Influent water is evenly distributed at the top of the column and flows down over the packing in a thin film where gas exchange with the atmosphere occurs. Various plastic materials have been used as packing media and materials specifically designed for use in packed columns are commonly available from aquaculture supply companies.

Specific design criteria for packed columns are based upon water flow, water temperature, dissolved gas concentrations in the influent water, and desired dissolved gas concentrations in the effluent. These considerations are discussed in detail in appropriate references listed at the end of this report. As a rough guide, a packed column 4 to 6 feet high and about 30 inches in diameter will be sufficient to pre-aerate water for a catfish hatchery supplied with 100 gallons per minute of anoxic, 80°F groundwater.

As an alternative to packed columns, influent water maybe pumped into a metal or fiberglass tank and oxygenated with surface aerators or underwater diffusers. In such a system considerable initial aeration can be accomplished by running the influent water onto a splashboard or through an expanded metal grate to break the flow into small drops. The aeration tank should be large enough to provide adequate water residence time for aeration, but the appropriate tank volume will

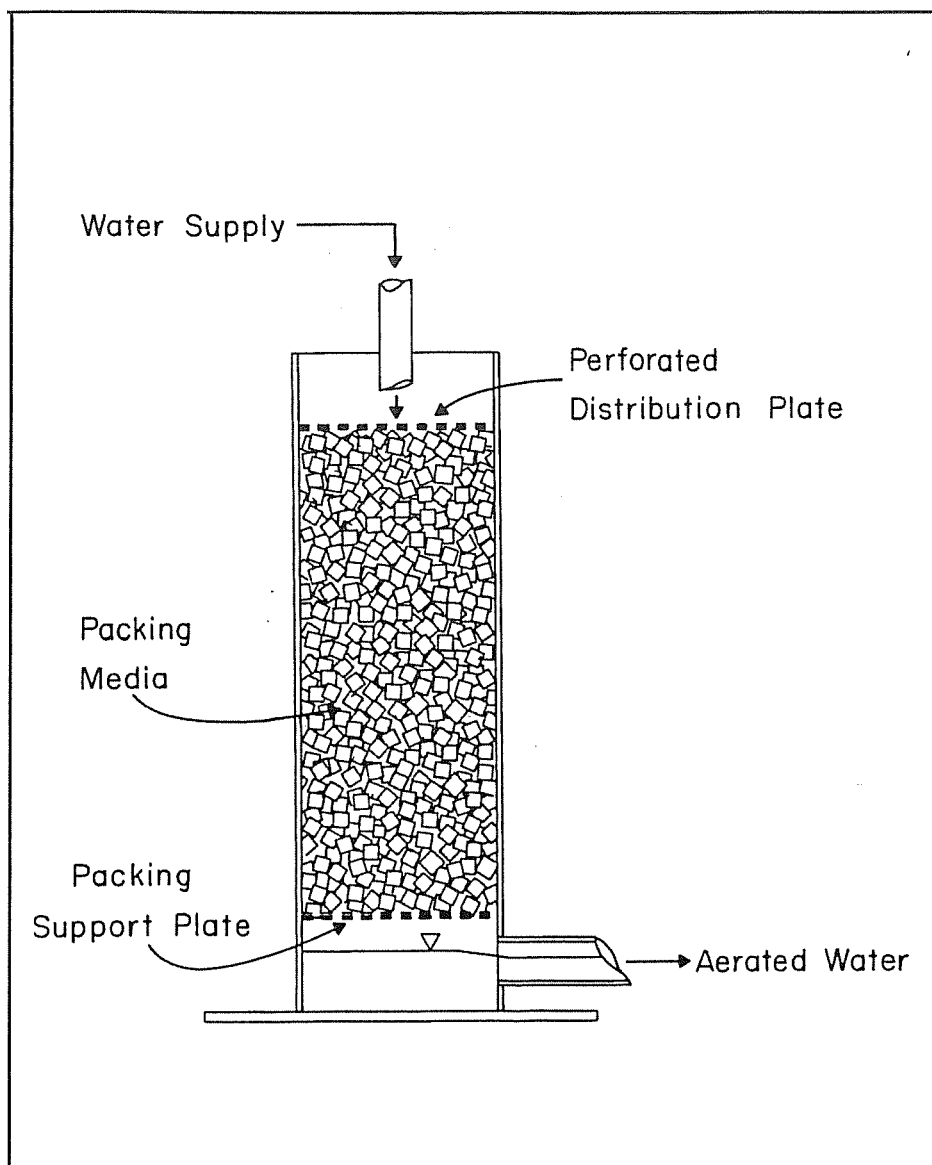


Figure 2. Cross section of a simple packed-column aerator.

depend upon the type and size of aerator used. Some experimentation may be required to find the best combination of tank volume and aeration device; the goal is generally to achieve an effluent dissolved oxygen concentration exceeding about 5 ppm.

As a starting point, pre-aeration tanks used in many existing catfish hatcheries provide a turnover time of 10 to 15 minutes (a capacity of 1,000 to 1,500 gallons for a water flow of 100 gallons per minute). Water is aerated with one or two 1/3-horsepower surface agitators (Figure 3).

Some type of aeration device must be provided to each trough within the hatchery to replenish dissolved oxygen lost as eggs or fry respire. Again, some trial and error may be necessary to find the right size and type of aerator. Common practice is to provide one 1/20 horsepower surface agitator per 100-gallon fry rearing trough. The agitators should be covered with small-mesh screening to prevent injury to fry.

Water circulation, in addition to adequate dissolved oxygen, is important in egg hatching troughs because oxygenated water must flow

around and through the egg mass to ensure that all eggs receive sufficient dissolved oxygen. A common sign of inadequate water circulation in hatching troughs is the presence of dead eggs in the center of the egg mass. Those areas may serve as foci for fungal or bacterial infection. Slowly rotating paddles in egg hatching troughs serve both to aerate and circulate the water through the egg mass. Vigorous aeration with diffusers (air stones) may also be used to aerate and circulate water in hatching troughs. Air flows and the size and placement of diffusers must be determined through experience.

Carbon dioxide

High levels of dissolved carbon dioxide interfere with respiration by eggs and fry. Ideally, water supplies for catfish hatcheries should not contain measurable levels of dissolved carbon dioxide, but concentrations up to at least 10 ppm seem to be well tolerated, provided that dissolved oxygen concentrations are adequate. Some groundwaters may contain in excess of 20 ppm dissolved carbon dioxide and should be vigorously aerated to drive off some of the gas.

Total gas pressure

Total gas pressure is a measure of the "concentration" of all gases dissolved in water. It is expressed in pressure units such as millimeters of mercury (mm Hg). When total gas pressure in water exceeds local barometric pressure, water is supersaturated and gas will tend to leave the water by diffusion or by forming bubbles. Gas bubble trauma (also called gas bubble disease) may occur in fish living in gas-supersaturated water when gases in the blood or tissues come out of solution and form bubbles. The bubbles can block blood flow or damage tissues.

Instruments called "saturation meters" are used to measure total gas pressures. Values are usually expressed as delta-P, which is the total gas pressure in water compared to local barometric pres-

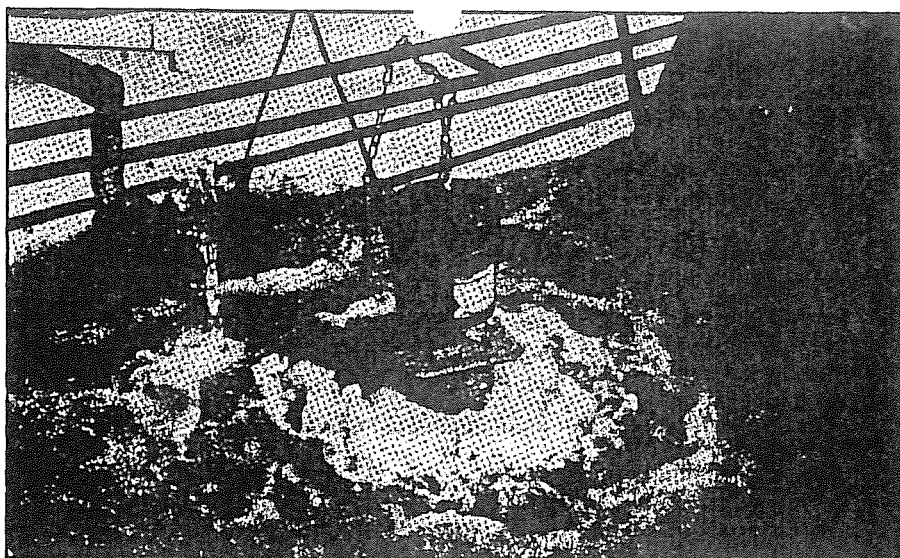


Figure 3. A 1/3-horsepower surface agitator used to oxygenate water in a pre-aeration tank.

sure. Positive delta P values mean the water is supersaturated. Satrometers are not commonly available to catfish hatchery managers, but supersaturated conditions can sometimes be diagnosed by the formation of bubbles on the surface of tanks or the milky appearance of water as gases come out of solution.

Channel catfish eggs are fairly resistant to high delta P-values because the naturally high pressure within the eggs helps prevent bubble formation. Eggs appear to withstand delta P-values at least as high as 100 mm Hg with no adverse effects. At high delta P-values, bubbles may form on and in the egg mass causing it to float high in the egg hatching basket. The top of the egg mass may be above water and will tend to dry out. Dislodging the bubbles by shaking and rotating the mass will temporarily alleviate the problem, although decreasing the delta P of the water is the best solution. Quite often, however, the first indication of supersaturated conditions is death of fry.

Clinical signs of gas bubble trauma in catfish fry include loss of equilibrium, abnormal swimming and gas bubbles in the yolk sac, behind the eyes, or on the skin. The bubbles prevent normal swimming and feeding and fry may become trapped at the surface. In severe cases, newly

hatched fry rapidly die as blood flow is restricted or the yolk sac ruptures. Gas bubble trauma may occur in fry when delta P-values exceed about 70 to 80 mm Hg. To be safe, delta P-values should not exceed about 40 mm Hg in channel catfish hatcheries.

Gas supersaturation can be caused by a variety of natural and man-made conditions. Many groundwaters and some surface waters are naturally supersaturated. Surface water gas supersaturation is common below dams where air is entrained in the spillway overflow or when water is heated in electrical generating facilities. Gas supersaturation can also be caused within the hatchery water supply system.

The most common cause of supersaturation in supply systems is entrainment of air from a leak in the pipes on the suction side of a water pump. Some of the gases in the entrained air are driven into solution as the water is pressurized after moving through the pump. In those situations, it is often possible to hear air bubbles moving through elbows and valves in the delivery system. Heating water can also cause considerable increases in delta P unless the water is degassed after heating. The increase in delta P attributable to heating can be substantial: if water is

heated from 70°F to 80°F, delta-P increases by more than 60 mm Hg.

Pre-aeration of the influent water is commonly used to reduce supersaturation to tolerable levels. Packed column aerators are particularly effective at degassing supersaturated waters, but other types of systems providing vigorous aeration may be used. Be aware, however, that underwater diffused aeration (air bubbled through airstones) is relatively inefficient at degassing waters and, in some systems, may actually cause supersaturation. If supersaturation is caused by air leaks in the water supply line, the first course of action is to locate and repair the problem.

Salinity

Salinity is the dissolved salt content of water and is often expressed as the parts of salt by weight per thousand parts of water by weight (ppt). Channel catfish can breed and reproduce over a wide range of salinities. Eggs can hatch and fry will develop in waters with salinities up to at least 8 parts per thousand, but the optimum salinity for channel catfish hatchery supplies appears to be between 0.5 and 3 ppt (500 to 3,000 ppm).

Hardness

Hardness refers to the amounts of calcium and magnesium in the water and is expressed as ppm of equivalent CaCO_3 . Adequate concentrations of environmental calcium are required for "hardening" of eggs and for normal bone and tissue development of fry. Symptoms of environmental calcium deficiency include swelling and poor matchability of eggs and slow development, lack of vigor, poor stress resistance, and low survival of sac fry.

A minimum of 5 ppm calcium hardness is required for adequate egg matchability and for development and vigor of sac fry. Higher calcium concentrations are desirable because calcium also protects fry from ammonia and metal toxic-

cosis. All things considered, hatchery water supplies should contain at least 20 ppm calcium hardness. Calcium levels can be increased by adding a solution of calcium chloride to the water supply. The calcium solution can be added by chemical metering pumps or by using an inexpensive "drip system" where a concentrated solution of calcium chloride is slowly dripped into the pre-aeration system.

Alkalinity

Alkalinity is a measure of the capability of water to neutralize acids. In most natural waters, the predominant bases are bicarbonate and carbonate. Alkalinity is expressed as ppm equivalent CaCO_3 . Catfish eggs and fry thrive in waters with a wide range of alkalinity, although waters of very low alkalinity (<10 ppm as CaCO_3) should be avoided as hatchery supplies if possible. These waters are poorly buffered and pH can fluctuate drastically with small additions of acid or base. More importantly, dissolved metals such as copper and zinc are very toxic to fry in waters of low alkalinity. Copper and zinc can leach from pipes used to plumb the hatchery water distribution system.

pH

pH expresses the intensity of the acidic or basic character of the water. The pH scale is usually represented as ranging from 0 to 14. Conditions become more acidic as pH values decrease and more basic as they increase. At 77°F, pH 7.0 is the neutral point. The pH of most fresh waters is a function of total alkalinity and dissolved carbon dioxide concentration. Generally, if levels of those two variables are within the desired range, pH will be between 7.0 and 8.5, which is the desired pH range for incubating eggs and rearing fry.

An important exception to this general rule exists when surface waters containing dense sub-

mersed plant communities are used as a water supply. During sunny afternoons, rapid carbon dioxide removal by photosynthesizing plants may cause pH values to temporarily rise above pH 9. In extreme instances, values well above pH 10 have been recorded. Exposure to pH-values above 9 are undesirable and even short-term exposure to waters of pH 10 or above may kill fry and reduce egg matchability. Vigorous aeration of such waters will add some carbon dioxide to the water and somewhat reduce the pH, but this reaction is not rapid enough to be effective in extreme circumstances. The best solution is to avoid the use of surface waters that contain dense stands of submersed plants.

Ammonia

Un-ionized ammonia is quite toxic to channel catfish sac fry and early swim-up fry. Ideally, water in rearing troughs should be free of ammonia for optimal health and growth of fry, and the maximum concentration of un-ionized ammonia that should be allowed is about 0.05 ppm $\text{NH}_3\text{-N}$. Above this concentration, fry develop more slowly and are more susceptible to infectious diseases.

Removing ammonia from water supplies is difficult, so waters containing appreciable ammonia should not be used to supply catfish hatcheries. Ammonia is a product of fish metabolism, and ammonia production can be significant when high densities of fry are held in rearing troughs. Ammonia levels in rearing troughs can be decreased by either decreasing fry density or increasing water flow to flush the troughs.

Iron

Most surface waters contain very low concentrations of iron. Some anoxic ground waters, however, contain considerable iron in a dissolved form. When the water is aerated the iron is oxidized to a rust-colored precipitate of iron oxide. Dissolved iron is consid-

ered to be of relatively low toxicity to most aquatic organisms. Solid precipitates of iron oxide are even less toxic but may coat the gills of fry and interfere with respiration. Dense precipitates of iron oxide also may cover eggs and hinder gas exchange and suffocate the eggs. Total iron concentrations should be less than about 0.5 ppm for hatchery water supplies.

The simplest system used to remove iron is to pump the water into a small reservoir pond (0.5 to 1 acre) where the dissolved iron is oxidized and some of the iron oxide precipitate settles out. Some of the remaining precipitate can be removed using sand filters. An alternate method is to oxidize the iron by vigorously aerating the water in a tank or chamber prior to sand filtration. Complete removal of iron is difficult regardless of the system used.

Hydrogen sulfide

Hydrogen sulfide gives water a "rotten-egg" odor and is very toxic to channel catfish fry. Sac-fry will be killed when exposed to as little as 0.005 ppm hydrogen sulfide. Avoid using waters containing appreciable hydrogen sulfide. If this is not possible, hydrogen sulfide should be removed from water before it enters the rearing trough. Vigorous aeration will remove some hydrogen sulfide by volatilization and by oxidation of the sulfide to sulfate, which is nontoxic.

Treatment processes

The most common water quality problems encountered in channel catfish hatcheries and the treatment processes required to correct those problems are summarized in Table 1. But remember, it is often easier to seek an alternative water source rather than add expensive treatment systems in an effort to make a particular water suitable for use.

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Table 1. Common water quality problems in channel catfish hatchery water supplies.

Variable	Desired level	Problem	Solution
Temperature	78-82°F	too low	reservoir pond for solar heating or use water heaters
		too high	blend with cooler water
Dissolved oxygen	5 ppm to saturation	too low	vigorous aeration of incoming water and supplemental aeration in troughs
Carbon dioxide	less than 10 ppm	too high	vigorous aeration (degassing) of incoming water and supplemental aeration in vats or troughs
Total dissolved gases	delta P less than 40 mmHg	too high	vigorous aeration (degassing)
Calcium hardness	more than 20 ppm as CaCO ₃	too low	addition of calcium chloride to water supply
Ammonia (un-ionized)	less than 0.05 ppm NH ₃ -N	too high	do not use as a water supply; avoid accumulation within hatchery by decreasing fry density or increasing water flow
Iron	less than 0.5 ppm total iron	too high	aeration (oxidation) followed by precipitation or sand filtration
Hydrogen sulfide	less than 0.005 ppm H ₂ S-S	too high	vigorous aeration (degassing) of incoming water

Additional readings

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Colt, J. and G. Bouck. 1984. Design of packed columns for degassing. *Aquacultural Engineering* 3:251 - 273.

Hackney, G. E. and J. E. Colt. 1982. The performance and design of packed column aeration systems for aquaculture. *Aquacultural Engineering* 1:275-295.

Tucker, C. S. and E. H. Robinson. 1990. *Channel Catfish Farming Handbook*. Van Nostrand Reinhold, New York.

Wheaton, F. W. 1977. *Aquacultural Engineering*. Wiley Interscience, New York.

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OCT 13 2006

Mark & Jo Anne Lupher – Epicenter Aquaculture
Water Right Application No's. 72-7577, 7578, 7579, 7580
Response to IDWR RFI

Exhibit E

Information relative to good faith, delay or speculative purposes

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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.

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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 Lupher, 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 Lupher
MARK LUPHER

Jo Anne W. Lupher
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 Logan & Timothy A. Logan, 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 Auster) 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

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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

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EXHIBIT "B"

LUPIER/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

SCANNED
02/18/2006

MEMORANDUM

ORIGINAL

This is to acknowledge that in January, 1996, Timothy Ingram, representing Ingram Warm Springs Ranch, Lessor, and Mark Lupher and Jo Anne Lupher, Lessees, verbally agreed and consented, pursuant to the paragraph entitled "Rental," page 3 of the Lease Agreement dated the 1st day of July, 1994, to add to Exhibit "A" of said Lease Agreement the additional line item entitled "Freight and Hauling."

We mutually agreed that the charge for this item would be \$1.00 per mile both ways for this service to the Ingram Warm Springs lease.

DATED this 9 day of Nov., 1998.

INGRAM WARM SPRINGS RANCH

By: Timothy Ingram
Timothy Ingram

"Lessor"

Mark Lupher
MARK LUPHER

Jo Anne W. Lupher
JO ANNE LUPHER

"Lessees"

STATE OF IDAHO)
) ss.
County of Twin Falls)

On this 9th day of November, 1998, before me, the undersigned, a Notary Public in and for said County and State, personally appeared TIMOTHY INGRAM, known or identified to me to be the Authorized Agent of INGRAM WARM SPRINGS RANCH, the corporation that executed the instrument, or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

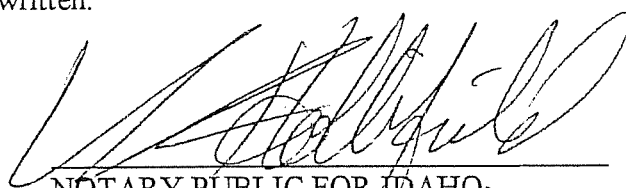
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

Kathryn M. Surndell
NOTARY PUBLIC FOR IDAHO
Residing at Challis ID
My commission expires 11/17/2000

STATE OF IDAHO)
) ss.
County of Twin Falls)

On this 27th day of October, 1998, before me, the undersigned, a Notary Public in and for said County and State, personally appeared MARK LUPHER, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

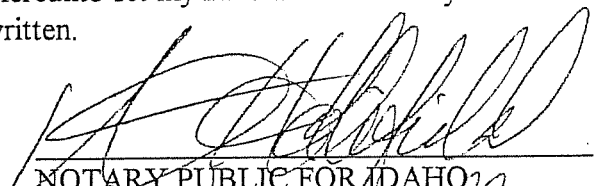
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.


NOTARY PUBLIC FOR IDAHO
Residing at Twin Falls
My commission expires 2002

STATE OF IDAHO)
) ss.
County of Twin Falls)

On this 27th day of October, 1998, before me, the undersigned, a Notary Public in and for said County and State, personally appeared JO ANNE LUPHER, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she 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.


NOTARY PUBLIC FOR IDAHO
Residing at Twin Falls
My commission expires 2002

SEC. 9 & 10, T. 12N., R. 20E., B.M.

ERICKSON SERVICES

Construction & Land Surveying
William B. Erickson, Professional Land Surveyor
P.O. Box 606/110 North Main
MACKAY, IDAHO 83251
(208) 588-3112

JOB LUPHER INGRAM LEASE ARE

SHEET NO. _____ OF _____

CALCULATED BY B.E. DATE 6-27-95

CHECKED BY _____ DATE _____

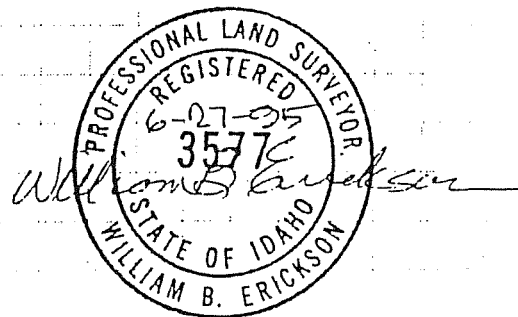
SCALE _____

~ LEGAL DESCRIPTION ~

PARCEL "A" - A PARCEL OF LAND SITUATED IN SECTIONS 9 AND 10, T. 12N., R. 20E., B.M., CUSTER COUNTY, STATE OF IDAHO. SAID PARCEL IS LOCATED WITHIN THE FENCED AND OCCUPIED LAND KNOWN AS "INGRAMS WARM SPRINGS RANCH." THE FOLLOWING DESCRIPTION MAY NOT AGREE WITH DEED BOUNDARY LINES.

BEGINNING AT A POINT WHICH BEARS $S 34^{\circ} 32' 39'' W$ 1266.30 FEET FROM THE NORTHWEST CORNER OF SECTION 10, T. 12N., R. 20E., B.M.; THENCE $S 54^{\circ} 25' 55'' W$ 717.54 FEET TO THE CENTERLINE OF WARM SPRINGS CANAL; THENCE THE FOLLOWING COURSES ALONG SAID CENTERLINE OF CANAL;

$S 11^{\circ} 30' 50'' E$	92.74 FEET;
$S 27^{\circ} 28' 56'' E$	148.72 FEET;
$S 42^{\circ} 52' 49'' E$	270.40 FEET;
$S 53^{\circ} 34' 51'' E$	190.38 FEET;
$S 75^{\circ} 59' 44'' E$	242.87 FEET;
$S 86^{\circ} 30' 57'' E$	144.52 FEET;
$S 64^{\circ} 50' 47'' E$	50.93 FEET;
$S 39^{\circ} 10' 56'' E$	52.34 FEET;
$S 30^{\circ} 10' 46'' E$	32.92 FEET;



THENCE LEAVING SAID CENTERLINE OF WARM SPRINGS CANAL $N 51^{\circ} 13' 30'' E$ 557.75 FEET TO A POINT; THENCE $N 40^{\circ} 00' 07'' W$ 277.77 FEET TO A POINT; THENCE $N 46^{\circ} 16' 55'' W$ 792.20 FEET TO THE POINT OF BEGINNING;

ENCOMPASSING 18.605 ACRES, MORE OR LESS.

SCANNED
OCT 13 2006

ERICKSON SERVICES
 Construction & Land Surveying
 William B. Erickson, Professional Land Surveyor
 P.O. Box 606/110 North Main
 MACKAY, IDAHO 83251
 (208) 588-3112

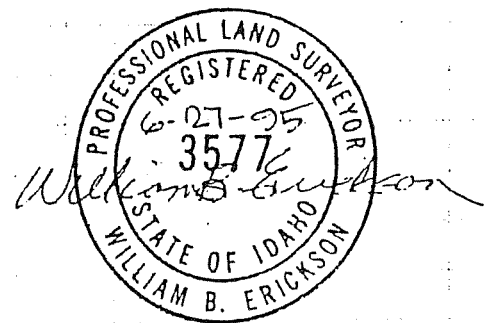
JOB LUPHER INGRAM LEASE
 SHEET NO. 2 OF
 CALCULATED BY B.E. DATE 6-27-95
 CHECKED BY DATE
 SCALE

~ LEGAL DESCRIPTION ~

PARCEL "B" - A PARCEL OF LAND SITUATED IN SECTIONS 9 AND 10, T.12N., R.20E., B.M. CUSTER COUNTY, STATE OF IDAHO. SAID PARCEL IS LOCATED WITHIN THE FENCED AND OCCUPIED LAND KNOWN AS "INGRAMS WARM SPRINGS RANCH." THE FOLLOWING DESCRIPTION MAY NOT AGREE WITH DEED BOUNDARY LINES.

BEGINNING AT A POINT WHICH BEARS $57^{\circ}33'23''$ E 2070.20 FEET FROM THE NORTHWEST CORNER OF SECTION 10, T.12N., R.20E., B.M.; THENCE $533^{\circ}43'17''$ W 506.01 FEET TO THE CENTERLINE OF WARM SPRINGS CANAL; THENCE THE FOLLOWING COURSES ALONG SAID CENTERLINE OF CANAL;

S $76^{\circ}15'36''$ E	82.77 FEET;
S $65^{\circ}13'50''$ E	64.76 FEET;
S $43^{\circ}16'06''$ E	52.05 FEET;
S $11^{\circ}49'41''$ E	132.96 FEET;
S $28^{\circ}53'58''$ E	73.68 FEET;
S $78^{\circ}26'31''$ E	116.57 FEET;
N $50^{\circ}42'50''$ E	60.59 FEET;
N $70^{\circ}24'19''$ E	127.69 FEET;
N $85^{\circ}36'00''$ E	135.27 FEET;
N $81^{\circ}51'19''$ E	96.55 FEET;
S $71^{\circ}10'13''$ E	79.17 FEET;
S $50^{\circ}42'24''$ E	96.27 FEET;
S $28^{\circ}55'25''$ E	95.78 FEET;
S $10^{\circ}46'53''$ W	91.31 FEET;
S $22^{\circ}55'51''$ W	142.83 FEET;
S $4^{\circ}14'15''$ W	218.84 FEET;
S $38^{\circ}07'51''$ E	200.05 FEET;
S $47^{\circ}56'40''$ E	70.86 FEET;
S $19^{\circ}39'55''$ W	105.78 FEET;



CONT. ON SHEET 3

SCANNED
 OCT 13 2006

ERICKSON SERVICES
Construction & Land Surveying
William B. Erickson, Professional Land Surveyor
P.O. Box 606/110 North Main
MACKAY, IDAHO 83251
(208) 588-3112

JOB _____
SHEET NO. 3 OF _____
CALCULATED BY W.B.E. DATE 6-27-95
CHECKED BY _____ DATE _____
SCALE _____

~ LEGAL DESCRIPTION ~
CONT. FROM SHEET 2

S5°09'48"E 241.14 FEET;

THENCE LEAVING SAID CENTERLINE OF WARM
SPRINGS CANAL S57°26'43"E 179.02 FEET TO A POINT;
THENCE N77°35'42"E 89.45 FEET TO A POINT; THENCE
N6°07'22"E 887.24 FEET TO A POINT; THENCE N8°52'22"W
214.36 FEET TO A POINT; THENCE N29°13'09"W 342.05
FEET TO A POINT; THENCE N55°12'27"W 423.26 FEET
TO A POINT; THENCE N67°35'15"W 565.83 FEET TO THE
POINT OF BEGINNING.

ENCOMPASSING ~~18.605~~ ACRES, MORE OR LESS.
21.395



SCANNED
OCT 11 2006

SEC. 9 & 10, T. 12N., R. 20E., B.M.

ERICKSON SERVICES

Construction & Land Surveying
William B. Erickson, Professional Land Surveyor
P.O. Box 606/110 North Main
MACKAY, IDAHO 83251
(208) 588-3112

JOB LUPHEK/INGRAM LEASE ARE

SHEET NO. 4 OF

CALCULATED BY B.E. DATE 6-27-95

CHECKED BY DATE

SCALE

~ LEGAL DESCRIPTION ~

PARCEL-"C"—A PARCEL OF LAND SITUATED IN SECTIONS 9 AND 10, T. 12N., R. 20E., B.M., CUSTER COUNTY, STATE OF IDAHO. SAID PARCEL IS LOCATED WITHIN THE FENCED AND OCCUPIED LAND KNOWN AS "INGRAM WARM SPRING RANCH." THE FOLLOWING DESCRIPTION MAY NOT AGREE WITH DEED BOUNDARY LINES.

BEGINNING AT A POINT WHICH BEARS $S1^{\circ}03'03"E$ 1803.61 FEET FROM THE NORTHWEST CORNER OF SECTION 10, T. 12N., R. 20E., B.M.; THENCE $S51^{\circ}13'30"W$ 557.75 FEET TO THE CENTERLINE OF WARM SPRINGS CANAL; THENCE THE FOLLOWING COURSES ALONG SAID CENTERLINE OF CANAL;

$S16^{\circ}04'54"E$ 62.88 FEET;

$S27^{\circ}02'50"E$ 70.83 FEET;

$S52^{\circ}18'42"E$ 112.30 FEET;

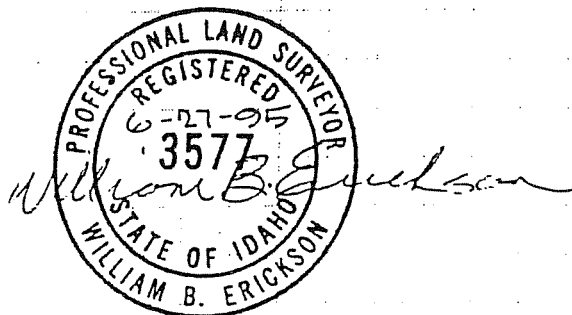
$S71^{\circ}31'54"E$ 88.66 FEET;

$S79^{\circ}52'02"E$ 102.59 FEET;

$S32^{\circ}32'21"E$ 48.96 FEET;

$S46^{\circ}32'10"E$ 59.46 FEET;

THENCE LEAVING SAID CENTERLINE OF WARM SPRINGS CANAL $N33^{\circ}43'17"E$ 506.01 FEET TO A POINT; THENCE $N67^{\circ}35'15"W$ 50.10 FEET TO A POINT; THENCE $N40^{\circ}00'07"W$ 300.00 FEET TO THE POINT OF BEGINNING ENCOMPASSING 5.393 ACRES, MORE OR LESS.



SCANNED
06/13/2006

SEC. 9 & 10, T. 12N., R. 20E., B.M.

ERICKSON SERVICES

Construction & Land Surveying
William B. Erickson, Professional Land Surveyor
P.O. Box 606/110 North Main
MACKAY, IDAHO 83251
(208) 588-3112

JOB LUPHE, / INGRAM LEASE ARE

SHEET NO. 4 OF

CALCULATED BY B.E. DATE 6-27-95

CHECKED BY DATE

SCALE

~ LEGAL DESCRIPTION ~

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$S27^{\circ}02'50"E$ 70.83 FEET;

$S52^{\circ}18'42"E$ 112.30 FEET;

$S71^{\circ}31'54"E$ 88.66 FEET;

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SCANNED
06/13/2006

SEC. 9 & 10, T. 12N., R. 20E., B.M.

ERICKSON SERVICES

Construction & Land Surveying
William B. Erickson, Professional Land Surveyor
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CALCULATED BY B.E. DATE 6-27-95

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BEGINNING AT A POINT WHICH BEARS $S 1^{\circ} 03' 03" E$ 1803.61 FEET FROM THE NORTHWEST CORNER OF SECTION 10, T. 12N., R. 20E., B.M.; THENCE $S 51^{\circ} 13' 30" W$ 557.75 FEET TO THE CENTERLINE OF WARM SPRINGS CANAL; THENCE THE FOLLOWING COURSES ALONG SAID CENTERLINE OF CANAL;

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$S 27^{\circ} 02' 50" E$ 70.83 FEET;

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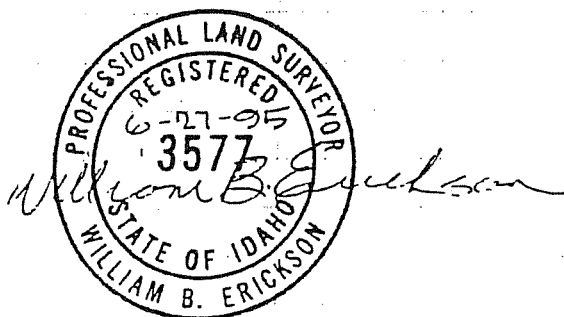
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THENCE LEAVING SAID CENTERLINE OF WARM SPRINGS CANAL $N 33^{\circ} 43' 17" E$ 506.01 FEET TO A POINT; THENCE $N 67^{\circ} 35' 15" W$ 50.10 FEET TO A POINT; THENCE $N 40^{\circ} 00' 07" W$ 300.00 FEET TO THE POINT OF BEGINNING ENCOMPASSING 5.393 ACRES, MORE OR LESS.



SCANNED
OCT 13 2006

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, Washington 98101

**Authorization to Discharge under the
National Pollutant Discharge Elimination System**

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act",

Epicenter Aquaculture

is authorized to discharge from its facility located near Challis, Idaho, at the following location(s):

Outfall	Receiving Water	Latitude	Longitude
001	Warm Springs Hydro-Canal	44 23' 30" N	114 06' 40" W

in accordance with discharge point(s), effluent limitations, monitoring requirements and other conditions set forth herein.

A copy of this Permit shall be kept at the facility where discharges occur.

This permit shall become effective *insert date*

This permit and the authorization to discharge shall expire at midnight, *insert date*

Each permittee shall reapply for a permit reissuance on or before *insert date*, 180 days before the expiration of this permit, if the permittee intends to continue operations and discharges at the facility beyond the term of this permit.

Signed this ____ day of _____, _____,

Draft

Michael F. Gearheard, Director
Office of Water and Watersheds

Draft Permit

SCANNED
06/13/2006

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Appendix A: Flow Measurement Methods Approved by Idaho Department of Water Resources
Appendix B: Effluent calculations
Appendix C: Quality Assurance Plan and Best Management Practices Plan Certification
Appendix D: Drug and Chemical Use Report Contents
Appendix E: Annual Report Contents

Schedule of Submissions

The following is a summary of some of the items which the permittee must complete and/or submit to the U.S. Environmental Protection Agency (EPA) and the Idaho Department of Environmental Quality (IDEQ) during the term of this permit:

Item	Due Date
1. Discharge Monitoring Reports (DMRs)	DMRs are due monthly and must be postmarked by the 10 th day of the following month.
2. Quality Assurance Plan (QA Plan)	The permittee must develop and implement a QA Plan within 60 days of the effective date of this permit (see Part I.G.). The Plan must be kept on site and made available to EPA and IDEQ upon request. The permittee must submit a certification that the QA Plan has been developed and implemented to EPA and IDEQ within 90 days of the effective date of this permit.
3. Best Management Practices (BMP) Plan	The permittee must submit a certification that the BMP Plan has been developed and implemented to EPA and IDEQ within 90 days of the effective date of this permit (see Part II.C.).
4. Sediment Monitoring Report	The Sediment Monitoring Report must be submitted with the DMR for the first month of the second year of coverage under this permit. (see Part I.F.)
5. Submittal of a permit application	The application to continue coverage under the next permit must be submitted by <i><180 days before the expiration date of this permit></i> (see Part VI.B.).
6. Annual Report	The Annual Report must be submitted by January 20 th each year (see Part III.D).

I. Limitations and Monitoring Requirements

A. Discharge Authorization

During the effective period of this permit, the permittee is authorized to discharge pollutants from the outfalls specified in this permit to the Warm Springs Hydro-Canal, within the limits and subject to the conditions set forth herein. This permit authorizes the discharge of only those pollutants resulting from facility processes, waste streams, and operations that have been clearly identified in the permit application process, including non-production facilities, such as incubators, laboratories, etc. It does not authorize the discharge of any waste streams, including spills and other unintentional or non-routine discharges of pollutants, that are not part of the normal operation of the facility as disclosed in the permittee's application nor does it authorize the discharge of any pollutants that are not ordinarily present in such waste streams.

B. Effluent Limitations

The permittee must limit discharges from all outfalls authorized under this permit as specified in Table 1, below. All limits represent maximum effluent limits, unless otherwise indicated. The permittee must comply with the applicable effluent limits at all times, unless otherwise indicated, regardless of the frequency of monitoring required in Table 2, below, or reporting required by Part IV.B, below.

Table 1		
Effluent Limitations		
Parameter	Limitations (mg/l)	
	Average Monthly	Maximum Daily
Net ¹ TSS	15	25
Net Total Phosphorus	0.20	0.32

¹ Net addition = effluent concentration - influent concentration. See Appendix B.

C. Prohibited Discharges

1. Discharges from aquaculture facilities must not cause or contribute to a violation of Idaho State Water Quality Standards.
2. The permittee must not discharge:
 - a) Any floating solids or visible foam in other than trace amounts on the surface of the receiving water;

SCANNED
06/13/2006

- b) Any hazardous materials;
- c) Any sludge, grit and accumulated solid residues;
- d) Any untreated cleaning wastewater (e.g., obtained from a vacuum or standpipe bottom drain system or rearing/holding unit disinfection); or
- e) Any floating, suspended or submerged matter, including dead fish, in amounts causing nuisance or objectionable condition or that may impair designated beneficial uses in the receiving water.
- f) Any toxic substances, including drugs, pesticides, or other chemicals, in concentrations that impair designated uses.

D. Prohibited Practices

The permittee is prohibited from engaging in any of the following practices:

- 1. Practices (e.g., the removal of dam boards in raceways or ponds) which allow accumulated solids to be discharged to waters of the United States.
- 2. Sweeping, raking, or otherwise intentionally discharging accumulated solids from raceways or ponds to waters of the United States.
- 3. Containing, growing or holding fish within an offline or full-flow settling basin.

E. Facility Monitoring Requirements

- 1. The permittee must monitor discharges from all outfalls authorized under this permit as specified in Table 2, below. All influent and effluent samples and flow measurements required must be taken on the same day. Facilities with multiple effluent discharge points and/or influent points must composite samples from all points proportionally to their respective flows. Only the composite sample must be analyzed.
- 2. The permittee must collect effluent samples from the effluent stream just prior to discharge into the receiving waters or subsequent mixing with other water flows.

Table 2 Raceway and Associated Full-flow Settling Basin Discharges Monitoring Requirements				
Parameter	Units	Sample Frequency	Sample Type	Sample Location
Flow	Cfs	1/month ²	Approved method ³	Effluent ⁴
Total Suspended Solids	mg/l	1/month	Composite ⁵	Influent & Effluent
	lbs/day ⁶			

Table 2 Raceway and Associated Full-flow Settling Basin Discharges Monitoring Requirements				
Parameter	Units	Sample Frequency	Sample Type	Sample Location
Flow	Cfs	1/month ²	Approved method ³	Effluent ⁴
Total Phosphorus	mg/l	1/month	Composite ⁵	Influent & Effluent
	lbs/day ⁶			
Temperature	°Celsius	1/month	Thermometer	Effluent ⁴
Total Copper	mg/l	1/quarter ⁷	composite	effluent
Hardness	µg/l	1/quarter	composite	effluent

² Flow measurement must be taken concurrently with each pollutant sampling; it may be taken on either the influent or effluent as long as the measurement at that location accurately reflects the discharge flow to the receiving water.

³ Flow measurement method must be one of those specified in Appendix A, Part I.A, unless IDWR authorizes a non-standard device as allowed in Part I.B. This requirement applies to measuring flow at each point where pollutants are measured.

⁴ Flow measurements may be taken on the influent if the measurement at that location accurately reflects the discharge flow to the receiving water and must be taken concurrently with pollutant sampling.

⁵ Composite samples must consist of four (4) or more discrete samples taken at one-half hour intervals or greater over a 24-hour period; at least one fourth of the samples must be taken during quiescent zone or raceway cleaning. If the facility had multiple effluent discharge points and/or influent points, it must composite samples from all points proportionally to their respective flows. Only the composite sample must be analyzed.

⁶ See Appendix B (Effluent Calculations) for guidance on calculating loads.

⁷ Only when using chelated copper compounds or copper sulfate.

3. Method Detection Limits (MDL).

a) The permittee must use methods that can achieve MDLs less than or equal to those specified in Table 3.

b) For purposes of reporting on the DMR, if a value is greater than the MDL, the permittee must report the actual value. If an influent or effluent value is less than the MDL, the permittee must report "less than {numeric MDL}" on the DMR, but use one-half the MDL when calculating the net value. If both influent and effluent values are less than the MDL, the permittee must report zero on the DMR, and use this for calculating monthly averages. See Appendix B (Effluent Calculations).

Table 3: Method Detection Limits	
Parameter	Method Detection Limit (MDL)
Phosphorus	0.005 mg/l
Total Suspended Solids	2 mg/l
Ammonia Nitrogen as N	0.01 mg/l
pH	0.1 S.U.
Temperature	0.1° C
Aroclor (PCB)	33 µg/kg (dry weight)
Total Copper	0.02 µg/l

4. Quality assurance/quality control plans for all the monitoring must be documented in the Quality Assurance Plan required under Part I.G (Quality Assurance Plan).

F. Monitoring of Polychlorinated Biphenyls (PCBs)

Facilities that have painted surfaces or caulking in hatch houses or raceways are required to conduct the following sampling, analysis, reporting, and, if warranted, investigation.

1. Sediment Monitoring -- The permittee must take a sediment sample downstream of the facility's outfall from painted or caulked raceways or hatch houses and analyze for PCBs as Aroclors once during the first year of coverage under the permit. The sediment sample must be a composite of at least three samples each of which is collected from the nearest depositional area downstream of the outfall.
2. PCB Reporting -- The permittee must submit results of the PCB analysis of the sediment sampling along with a description of the location of sampling and a justification for the choice of location with the DMR by the 10th of the first month of the second year of coverage under this permit.
 - a) If the sediment results show any Aroclor (PCB) higher than 34 µg/kg dry weight, the permittee must investigate the source of PCBs in its facility; this investigation should include fish feed, and paint and caulking in raceways and hatch houses.
 - b) A report on the required investigation of PCBs in the facility must be submitted to EPA and IDEQ by 18 months after the first day of coverage under this permit. See Part IV.B. for details on submitting reports.

G. Quality Assurance (QA) Plan

The permittee must develop a quality assurance (QA) plan for all monitoring required by this permit. The plan must be developed and implemented within 60 days of coverage under this

permit. Any existing QA Plans may be modified to meet this requirement. The permittee must certify that a QA Plan has been developed and is being implemented and must submit the certification, which includes the information specified in Appendix C, to EPA and to IDEQ (see Part IV.B, below) within 90 days of the effective date of this permit.

1. The QA Plan must be designed to assist in planning for the collection and analysis of effluent and receiving water samples in support of the permit and in explaining data anomalies when they occur.
2. Throughout all sample collection and analysis activities, the permittee must use the EPA-approved quality assurance and quality control (QA/QC) and chain-of-custody procedures described in Requirements for Quality Assurance Project Plans (EPA/QA/R-5)¹ and Guidance for Quality Assurance Project Plans (EPA/QA/G-5)². The QA Plan must be prepared in the format that is specified in these documents.
3. At a minimum, the QA Plan must include the following:
 - a) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantification limits for each parameter, type and number of quality assurance field samples, precision and accuracy requirements, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements (see Part IV.A.-F. for additional requirements regarding monitoring);
 - b) Description of flow measuring devices used to measure influent and/or effluent flow at each point, calibration procedures, and calculations used to convert to flow units. Facilities with multiple effluent discharge points and/or influent points must describe their method of compositing samples from all points proportionally to their respective flows;
 - c) Maps indicating the location of each sampling point;
 - d) Qualification and training of personnel; and
 - e) Name, address and telephone number of the laboratory used by or proposed to be used by the permittee.
4. The permittee must amend the QA Plan whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QA Plan and must update it whenever there is a change in ownership or operator.
5. Copies of the QA Plan must be kept on site and made available to EPA and IDEQ upon request.

II. Best Management Practices Plan

A. Purpose

Through implementation of the best management practices (BMP) plan, the permittee must prevent or minimize the generation and discharge of wastes and pollutants from the facility to

¹ <http://www.epa.gov/quality/qs-docs/r5-final.pdf>

² <http://www.epa.gov/quality/qs-docs/g5-final.pdf>

the waters of the United States and ensure disposal or land application of wastes in such a way as to minimize negative environmental impact and comply with relevant Idaho solid waste disposal regulations.

B. Development and Implementation Deadline

The permittee must develop and implement a BMP Plan which meets the specific requirements listed in Part II.E, below. An existing BMP Plan may be modified for use under this section. The permittee must implement the provisions of the BMP Plan as conditions of this permit within 90 days of the effective date of this permit.

C. Certification

The permittee must certify that a BMP Plan has been developed and is being implemented. The certification must be submitted to EPA and to IDEQ (see Part IV.B., below) and must include the information specified in Appendix C. The permittee must submit the certification within 90 days of the effective date of this permit.

D. Annual Review

1. The permittee must review the BMP Plan annually.
2. A certified statement that the annual review has been completed and that the BMP Plan fulfills the requirements set forth in this permit must be submitted to EPA in the Annual Report of Operations, due by January 20 each year. See Appendix E.

E. Requirements of the BMP Plan

The BMP Plan must include, at a minimum, the following BMPs:

1. Chemical Storage:
 - a) Ensure proper storage of drugs and other chemicals to prevent spills that may result in the discharge to waters of the United States.
 - b) Implement procedures for properly containing, cleaning, and disposing of any spilled materials.
2. Structural Maintenance:
 - a) Routinely inspect rearing and holding units and waste collection and containment systems to identify and promptly repair damage.
 - b) Regularly conduct maintenance of rearing and holding units and waste collection and containment systems to ensure their proper function.
3. Training Requirements:
 - a) Train all relevant personnel in spill prevention and how to respond in the event of a spill to ensure proper clean-up and disposal of spilled materials.

- b) Train personnel on proper structural inspection and maintenance of rearing and holding units and waste collection and containment systems.

4. Operational Requirements:

- a) Water used in the rearing and holding units or hauling trucks which is disinfected with chlorine or other chemicals must be treated before it is discharged to waters of the U.S.
- b) Treatment equipment used to control the discharge of floating, suspended or submerged matter must be cleaned and maintained at a frequency sufficient to prevent overflow or bypass of the treatment unit by floating, suspended, or submerged matter.
- c) Procedures must be implemented to prevent fish from entering quiescent zones, full-flow and off-line settling basins. Fish which have entered quiescent zones or basins must be removed as soon as practicable.
- d) All drugs and pesticides must be used in accordance with applicable label directions (FIFRA or FDA), except under the following conditions, both of which must be reported to EPA and IDEQ in accordance with Part III.A, below:
 - (1) Participation in Investigational New Animal Drug (INAD) studies, using established protocols; or
 - (2) Extralabel drug use, as prescribed by a veterinarian.
- e) Chelated copper compounds and copper sulfate, when used, must be applied to only one raceway at a time. For required concurrent monitoring, see section I.E.
- f) Identify and implement procedures to collect, store, and dispose of wastes, such as biological wastes, in accordance with IDAPA §02.04.17 and IDAPA §58.01.02. Such wastes include fish mortalities and other processing solid wastes from aquaculture.

F. Documentation

The permittee must maintain a copy of the BMP Plan at the facility and make it available to EPA, IDEQ, or an authorized representative upon request.

G. BMP Plan Modification

The permittee must amend the BMP Plan whenever there is a change in the facility or in the operation of the facility which materially increases the generation of pollutants or their release or potential release to surface waters. With any change in operator, the BMP plan must be reviewed and modified, if necessary. The new operator must submit a certification in accordance with Part II.C., above.

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III. Aquaculture Specific Reporting Requirements

(See Part IV for standard reporting requirements)

A. Drug and Other Chemical Use and Reporting Requirements

The following requirements apply for chemicals that are used in such a way that they will be or may be discharged to waters of the United States.

1. Use of Drugs, Pesticides, and Other Chemicals

a) All drugs, pesticides and other chemicals must be applied in accordance with label directions.

b) Records required

Records of all applications of drugs, pesticides, and other chemicals must be maintained and must include, at a minimum, information specified in Appendix D (Drug Use Report Contents). This information must also be summarized in the annual report as required in Part III.D below.

2. Investigational New Animal Drugs (INAD) and Extralabel Drug Use.

The following written and oral reports must be provided to EPA and IDEQ:

a) Anticipated INAD Study participation and Extralabel drug use:

Written Report: A permittee must provide a written report to EPA and IDEQ within seven days of agreeing or signing up to participate in an INAD drug study, or receiving a prescription for extralabel drug use. The report must include the information specified in Appendix D.

b) Actual Use of INADs or Extralabel Drug Use:

(1) Oral report:

For INAD and extralabel drug uses, the permittee must provide an oral report to EPA (206-553-1846) and to IDEQ (see Part IV.B. below) as soon as possible during business hours, preferably in advance of use, but no later than 7 days after initiating use of the drug. The report must include the information specified in Appendix D.

(2) Written report:

For INADs and extralabel drug uses, the permittee must provide to EPA and IDEQ a written report within 30 days after initiating use of the drug. The report must include the information specified in Appendix D.

B. Structural failure or damage to the facility

Failure or damage to the facility must be reported to EPA and IDEQ orally within 24 hours and in writing within five days when there is a resulting discharge of pollutants to waters of the U.S. Reports must include the identity and quantity of pollutants released. (See Representative Sampling and Noncompliance Reporting in Parts IV.A and G)

C. Spills of feed, drugs, pesticides or other chemicals

The permittee must monitor and report to EPA and IDEQ any spills that result in a discharge to waters of the United States; these must be reported orally within 24 hours and in writing within five days. Reports must include the identity and quantity of pollutants released. (See Representative Sampling and Noncompliance Reporting in Parts IV.A. and G.)

D. Annual Report of Operations

During the term of this permit, the permittee must prepare and submit an annual report of operations by January 20th of each year to EPA and IDEQ. A copy of the annual report and the data used to compile it must be available to EPA and IDEQ upon request and during inspections. The report must include the information specified in Appendix E (Annual Report Contents).

IV. Standard Monitoring, Recording and Reporting Requirements**A. Representative Sampling (Routine and Non-Routine Discharges)**

Samples and measurements must be representative of the volume and nature of the monitored discharge or source water.

In order to ensure that the effluent limits set forth in this permit are not violated at times other than when routine samples are taken, the permittee must collect additional samples at the appropriate outfall whenever any discharge occurs that may reasonably be expected to cause or contribute to a violation that is unlikely to be detected by a routine sample. The permittee must analyze the additional samples for those parameters limited in Part I.B (Effluent Limitations) that are likely to be affected by the discharge.

The permittee must collect such additional samples as soon as the spill, discharge, or bypassed effluent reaches the outfall. The samples must be analyzed in accordance with Part IV.C (Monitoring Procedures). The permittee must report all additional monitoring in accordance with Part IV.D (Additional Monitoring by Permittee).

B. Reporting of Monitoring Results

The permittee must summarize monitoring results, including influent, effluent, and net results, each month on the Discharge Monitoring Report (DMR) form (EPA No. 3320-1) or equivalent. The permittee must submit reports monthly, postmarked by the 10th day of the following month. The permittee must sign and certify all DMRs, and all other reports, in accordance with the requirements of Part VI.E ("Signatory Requirements"). The permittee

must submit the legible originals of these documents to the EPA Region 10 Director, Office of Compliance and Enforcement, with copies to IDEQ at the addresses below:

US EPA Region 10
Attn: PCS Data Entry Team
1200 Sixth Avenue, OCE-133
Seattle, Washington 98101

Idaho Department of Environmental Quality
Idaho Falls Regional Office
900 N. Skyline
Idaho Falls, Idaho 83402

C. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit or approved by EPA as an alternate test procedure under 40 CFR §136.5.

D. Additional Monitoring by Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR Part 136 or as specified in this permit, the permittee must include the results of this monitoring in the calculation and reporting of the data submitted in the DMR.

Upon request by EPA or IDEQ, the permittee must submit results of any other sampling, regardless of the test method used.

E. Records Contents

Records of monitoring information must include:

1. the date, exact place, and time of sampling or measurements;
2. the name(s) of the individual(s) who performed the sampling or measurements;
3. the date(s) analyses were performed;
4. the names of the individual(s) who performed the analyses;
5. the analytical techniques or methods used; and
6. the results of such analyses.

F. Retention of Records

The permittee must retain records of all monitoring information, including, all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, copies of DMRs, a copy of the

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NPDES permit, and records of all data used to complete the application for this permit, for a period of at least five years from the date of the sample, measurement, report or application submittal. This period may be extended by request of EPA or IDEQ at any time. Data collected on site, copies of Discharge Monitoring Reports, and a copy of the permit must be maintained on site during the duration of activity at the permitted location.

G. Twenty-four Hour Notice of Noncompliance Reporting

1. The permittee must report the following occurrences of noncompliance by telephone to EPA (206-553-1846), and to IDEQ at the phone numbers listed in §I.C.1, above, as soon as possible, but no later than 24 hours from the time the permittee becomes aware of the circumstances (for noncompliance that endangers listed Snake River snail species, a permittee also must report within 24 hours to the U.S. Fish and Wildlife Service at 208-378-5243):

- a) any discharge to the receiving water not authorized under this permit;
- b) any noncompliance that may endanger health, the environment or listed Snake River snail species;
- c) any unanticipated bypass that exceeds any effluent limitation in the permit (See Part V.F., "Bypass of Treatment Facilities"); or
- d) any upset that exceeds any effluent limitation in the permit (See § V.G., "Upset Conditions).

2. For incidents involving releases of hazardous or deleterious chemicals to the environment, the permittee must contact the Idaho State Communications Center (StateComm) at 1-800-632-8000 as soon as possible.

3. The permittee must also provide a written submission within five days of the time that the permittee becomes aware of any event required to be reported under subpart 1 above. The written submission must contain:

- a) a description of the noncompliance and its cause;
- b) the period of noncompliance, including exact dates and times;
- c) the estimated time noncompliance is expected to continue if it has not been corrected; and
- d) steps taken or planned to reduce, eliminate, and prevent recurrence of the noncompliance.

4. The Director of the Office of Compliance and Enforcement may waive the written report on a case-by-case basis if the oral report has been received within 24 hours by the NPDES Compliance Hotline in Seattle, Washington, by telephone, 206-553-1846.

5. Reports must be submitted to the addresses in § IV.B ("Reporting of Monitoring Results"). Reports on noncompliance that endangers listed Snake River snail species must be sent also to the U.S. Fish and Wildlife Service, Snake River Office, 1387 South

Vinnell Way, Room 368, Boise, Idaho 83709.

H. Other Noncompliance Reporting

The permittee must report all instances of noncompliance, not required to be reported within 24 hours, at the time that monitoring reports for Part.IV.B ("Reporting of Monitoring Results") are submitted. The report must contain the information listed in §IV.G.3 of this permit ("Twenty-four Hour Notice of Noncompliance Reporting").

V. Compliance Responsibilities

A. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for permit termination, or for denial of a permit renewal application.

B. Penalties for Violations of Permit Conditions

1. Civil and Administrative Penalties. Pursuant to 40 CFR §19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under Section 402, or any requirement imposed in a pretreatment program approved under Sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461 note) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701 note) (currently \$32,500 per day for each violation).
2. Administrative Penalties. Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19 and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461 note) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701 note) (currently \$11,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$32,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461 note) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701 note) (currently \$11,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$157,500).
3. Criminal Penalties:
 - a) Negligent Violations. The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of

the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than 1 year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than 2 years, or both.

b) **Knowing Violations.** Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than 3 years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than 6 years, or both.

c) **Knowing Endangerment.** Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.

d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than 4 years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

C. Need To Halt or Reduce Activity not a Defense

It shall not be a defense for the permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this permit.

D. Duty to Mitigate

The permittee must take all reasonable steps to minimize or prevent any discharge in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance

The permittee must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

F. Bypass of Treatment Facilities

1. Bypass not exceeding limitations. The permittee may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of §§ 2 and 3 of this Part.
2. Notice.
 - a) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it must submit prior notice, if possible at least 10 days before the date of the bypass.
 - b) Unanticipated bypass. The permittee must submit notice of an unanticipated bypass as required under Part IV.G (Twenty-four Hour Notice of Noncompliance Reporting).
3. Prohibition of bypass.
 - a) Bypass is prohibited, and the Director of the Office of Compliance and Enforcement or IDEQ may take enforcement action against the permittee for a bypass, unless:
 - (1) The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
 - (2) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and
 - (3) The permittee submitted notices as required under §2 of this Part.
 - b) The Director of the Office of Compliance and Enforcement and IDEQ may approve an anticipated bypass, after considering its adverse effects, if the Director

and IDEQ determine that it will meet the three conditions listed above in §3.a. of this Part.

G. Upset Conditions

1. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the permittee meets the requirements of §2 of this Part. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.
2. Conditions necessary for a demonstration of upset. To establish the affirmative defense of upset, the permittee must demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:
 - a) An upset occurred and that the permittee can identify the cause(s) of the upset;
 - b) The permitted facility was at the time being properly operated;
 - c) The permittee submitted notice of the upset as required under Part IV.G, (Twenty-four Hour Notice of Noncompliance Reporting); and
 - d) The permittee complied with any remedial measures required under Part V.D, (Duty to Mitigate).
3. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

H. Toxic Pollutants

The permittee must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

I. Planned Changes

1. The permittee must give notice as soon as possible to the Director of the Office of Water and Watersheds and to IDEQ of any planned physical alterations or additions to the permitted facility whenever:
 - a) The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR§122.29(b); or
 - b) The alteration or addition, including production changes, could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the permit.
2. The permittee must submit the notification to the following addresses:

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1200 Sixth Avenue, OWW-130
Seattle, Washington 98101

Idaho Department of Environmental Quality
Idaho Falls Regional Office
900 N. Skyline
Idaho Falls, Idaho 83402

3. A permittee must submit to IDEQ all plans and specifications for the construction, modification, expansion, or alteration of waste treatment or disposal facilities for review and approval before construction may begin (Idaho Code § 39-118).

J. Anticipated Noncompliance

The permittee must give advance notice to the Director of the Office of Compliance and Enforcement and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this permit.

VI. General Provisions

A. Permit Actions

This permit or coverage under this permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR §§122.62, 122.64, or 124.5. The filing of a request by the permittee for a permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

B. Duty to Reapply

If the permittee intends to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Regional Administrator, the permittee must submit a new application at least 180 days before the expiration date of this permit.

If the application is received by that deadline, even if the permit is not reissued before the expiration date, the conditions of the permit will continue in force until the effective date of the subsequently reissued permit. If the facility is no longer operating but still has a potential to discharge when the permit is due to expire, the permittee must reapply for coverage.

C. Duty to Provide Information

The permittee must furnish to EPA and IDEQ, within the time specified in the request, any information that EPA or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee must also furnish to EPA or IDEQ, upon request, copies of records required to be kept by this permit.

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D. Other Information

When the permittee becomes aware that it failed to submit any relevant facts in an application or that it submitted incorrect information on an application or any report to EPA or IDEQ, it must promptly submit the omitted facts or corrected information.

E. Signatory Requirements

All applications, reports or information submitted to EPA and IDEQ must be signed and certified as follows.

1. All applications must be signed by the permittee as follows:
 - a) For a corporation: by a responsible corporate officer.
 - b) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
 - c) For a municipality, state, federal, Indian tribe, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the permit and other information requested by EPA or IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - a) The authorization is made in writing by a person described above;
 - b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company; and
 - c) The written authorization is submitted to the Director of the Office of Compliance and Enforcement and IDEQ.
3. Changes to authorization. If an authorization under § VI.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of § VI.E.2 must be submitted to the Director of the Office of Compliance and Enforcement and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Certification. Any person signing a document under this Part must make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the

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information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

F. Availability of Reports

In accordance with 40 CFR §2, information submitted to EPA pursuant to this permit may be claimed as confidential by the permittee. In accordance with the Act, applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the permittee. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR § 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry

The permittee must allow the Director of the Office of Compliance and Enforcement, EPA Region 10; IDEQ; or an authorized representative (including an authorized contractor acting as a representative of the Administrator), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights

The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of federal, tribal, state or local laws or regulations.

I. Transfers

This permit is not transferable to any person except after notice to the Director of the Office of Water and Watersheds as specified in § V.I. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate

such other requirements as may be necessary under the Act. (See 40 CFR §122.61; in some cases, modification or revocation and reissuance of the permit is mandatory).

J. Permit reopener and modification.

EPA is authorized to modify or revoke and reissue a permit pursuant to 40 CFR §122.62. Effluent limits, monitoring requirements or other permit conditions may be modified if new information is received which was not available at the time of issuance and would have justified the application of different permit conditions at the time of issuance (e.g. information showing violations of state water quality standards). This includes information indicating cumulative effects which are unacceptable. New information may originate from future waste load allocations and biological opinions issued pursuant to the Endangered Species Act.

K. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authority preserved by Section 510 of the Act.

VII. Definitions

1. "Act" means the Clean Water Act.
2. "Administrator" means the Administrator of the EPA, or an authorized representative.
3. "Aquaculture facility" means a hatchery, fish farm, or other facility which contains, grows, or holds fish for later harvest (or process) and sale or for release for conservation enhancement purposes.
4. "Average monthly limitation" means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all "daily discharges" measured during a calendar month divided by the number of "daily discharges" measured during that month.
5. "Beneficial use" means any of the various uses which may be made of the water of Idaho, including, but not limited to, domestic water supplies, industrial water supplies, agricultural water supplies, navigation, recreation in and on the water, wildlife habitat, and aesthetics. (IDAPA §58.01.003.04).
6. "Best Management Practices" (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage areas.
7. "Biosolids" means waste material from an aquaculture facility, primarily fish manure and uneaten feed.
8. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.
9. "CFR" means Code of Federal Regulations.

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10. "cfs" means cubic feet per second.
11. "cold water aquatic animals" include, but are not limited to, the *Salmonidae* family of fish: e.g., trout and salmon.
12. "compliance schedule" means a schedule of remedial measures included in a permit (or authorization to discharge), including an enforceable sequence of interim requirements (for example, actions, operation, or milestone events) leading to compliance with the CWA and regulations. (40 CFR§122.2)
13. "composite" sample means a combination of four (4) or more discrete samples taken at one-half hour intervals or greater over a 24-hour period; at least one fourth of the samples must be taken during quiescent zone or raceway cleaning. Facilities with multiple effluent discharge points and/or influent points must composite samples from all points proportionally to their respective flows.
14. "CWA" means Clean Water Act, 33 U.S.C. §1251 *et seq.*
15. "Daily discharge" means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.
16. "Deleterious material" means any nontoxic substance which may cause the tainting of edible species of fish, taste and odors in drinking water supplies, or the reduction of the usability of water without causing physical injury to water users or aquatic and terrestrial organisms. (IDAPA §58.01.02.003.23)
17. "Director of the Office of Compliance and Enforcement" means the Director of the Office of Compliance and Enforcement, EPA Region 10, or an authorized representative.
18. "Director of the Office of Water and Watersheds" means the Director of the Office of Water and Watersheds, EPA Region 10, or an authorized representative.
19. "DMR" means discharge monitoring report, the EPA uniform national form, including any subsequent modifications, for the reporting of self-monitoring results by permittees.
20. "EPA" means the United States Environmental Protection Agency.
21. "Environmental assessment (EA)" consists of a brief discussion of the following: the need for the proposal; alternatives (when there is an unresolved conflict concerning alternative uses of available resources); the environmental impacts of the proposed action and alternatives; and a listing of agencies and persons consulted.
22. "Environmental impact statement (EIS)" consists of discussions of the purpose of and need for the action, alternatives, the affected environment, the environmental consequences of the proposed action, lists of preparers, agencies, organizations and persons to whom the statement is sent, an index, and an appendix (if any).
23. "Extralabel drug use" means a drug approved under the Federal Food, Drug, and Cosmetic Act that is not used in accordance with the approved label directions, see 21 CFR Part 530.

24. "FDA" means Food and Drug Administration.
25. "FIFRA" means Federal Insecticide, Fungicide, and Rodenticide Act.
26. "Finding of No Significant Impact (FNSI or FONSI)" is a document issued by a federal agency, such as EPA, if an environmental assessment finds that a proposed action will have no significant impact (FONSI). The FONSI may address measures which an agency will take to reduce (mitigate) potentially significant impacts.
27. "General permit" means an NPDES permit issued under 40 CFR §122.28 authorizing a category of discharges under the CWA within a geographical area.
28. "Grab" sample is an individual sample collected over a period of time not exceeding 15 minutes.
29. "Hazardous material" means a material or combination of materials which, when discharged in any quantity into state waters, presents a substantial present or potential hazard to human health, public health, or the environment. [IDAPA §58.01.02.003.49]
30. "IDAPA" means Idaho Administrative Procedure Act; the acronym refers to the compilation of promulgated administrative rules in Idaho.
31. "IDEQ" means the Idaho Department of Environmental Quality.
32. "INAD" means *Investigational New Animal Drug*, which is a drug for which there is a valid exemption in effect under Section 512(j) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 360b(j), to conduct experiments.
33. "Maximum daily limitation" means the highest allowable "daily discharge."
34. "Method Detection Limit (MDL)" means the minimum concentration of a substance (analyte) that can be measured and reported with 99 percent confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix containing the analyte.
35. "Minimum Level (ML)" means the concentration at which the entire analytical system must give a recognizable signal and an acceptable calibration point. The ML is the concentration in a sample that is equivalent to the concentration of the lowest calibration standard analyzed by a specific analytical procedure, assuming that all the method-specified sample weights, volumes and processing steps have been followed.
36. "Monthly average"—see "average monthly limitation".
37. "NPDES" means National Pollutant Discharge Elimination System, the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits . . . under Sections 307, 402, 318, and 405 of the CWA.
38. "Net" means the difference between influent and effluent load, concentration or volume.
39. "New source" means a facility from which there is or may be a pollutant discharge, the construction of which commenced after September 22, 2004. [40 CFR §122.2].
40. "Nuisance" means anything which is injurious to the public health or an obstruction to the free use, in the customary manner, of any waters of the state. (IDAPA 58.01.02.003.73)

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41. "Off-line settling basin" means a constructed retention basin that receives wastewater from cleaning of other aquaculture facility rearing/holding units or quiescent zones, or both, for the retention and treatment of the wastewater through settling of solids.
42. "Permittee" means the operator who has substantial control over the day-to-day operations of the facility; when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit [40 CFR §122.21(b)].
43. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. §2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
44. "Pond" means an earthen-bottomed rearing/holding unit for fish production.
45. "Production" means the amount of fish grown and fed in a given period of time for harvest, processing, or release.
46. "QA Plan" means quality assurance plan.
47. "QA/QC" means quality assurance/quality control.
48. "Regional Administrator" means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.
49. "s.u." means Standard Units (a measure of pH).
50. "solids" means sand, silt, or other debris collected from facility intake or source waters, and accumulated waste material from aquaculture raceways and their quiescent zones, offline settling basins, full-flow settling basins, ponds, or other areas of the accumulation.
51. "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.
52. "TMDL" means Total Maximum Daily Load, which is the sum of the individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background.
53. "TP" means Total Phosphorus.
54. "TSS" means Total Suspended Solids.
55. "Technology-based effluent limitation" means wastewater treatment requirements under Section 301(b) of the CWA that represent the minimum level of control that shall be imposed in a permit issued under Section 402 of the CWA. (IDAPA §58.01.02.003.117)
56. "U.S.C." means United States Code.
57. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include

noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

58. "WLA" means Wasteload Allocation, which is the portion of a receiving water's load capacity that is allocated to one of its existing or future point sources of pollution. (IDAPA §58.01.02.003.129)

59. "Waters of the United States (or waters of the U.S.)" means

- a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- b) All interstate waters, including interstate wetlands;
- c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands", sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
- d) All impoundments of waters otherwise defined as waters of the United States under this definition;
- e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- f) The territorial sea; and
- g) "Wetlands" adjacent to water (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. (40 CFR §122.2)

Appendix A

Flow Measurement Methods

Approved by

Idaho Department of Water Resources

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Flow Measurement Methods

Approved by Idaho Department of Water Resources¹

The source and means of diversion of water, whether surface or ground water, generally determines the measurement and reporting process. Surface water sources such as streams, springs and waste channels are normally diverted into open channels (ditches or canals), but closed conduits (pipes or culverts) are also used. Ground water is usually diverted into pipes (which may also discharge into open channels).

Measuring devices are required at or near the point of diversion from the public water source.

SURFACE WATER DIVERSIONS

I. Flow Measurement

The following discussion is applicable only to diversions from surface water sources. Measurement of a ground water diversion with an open channel measuring device must be pre-approved by the Department.

A. Standard Open Channel Measuring Devices

All open channel flow diversions should be measured using one of the following standard open channel flow measuring devices commonly used in Idaho:

- contracted rectangular weir
- suppressed rectangular weir
- cipolletti weir
- 90 degree V-notch weir
- ramped broad crested weir (or ramped flume)
- parshall flume
- trapezoidal flume
- submerged rectangular orifice
- constant head orifice

Construction and installation of these devices should follow published guidelines. References are available upon request.

B. Non-standard open channel devices: Rated Structures or Rated Sections

IDWR may authorize the use of non-standard devices and rated sections provided the device or section is rated or calibrated against a set of flow measurements using an acceptable open channel current meter or a standard portable measuring device. Further restrictions and requirements are available from the Department upon request.

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C. Closed conduit measuring devices

Refer to the Ground Water measuring section for installation, accuracy, and calibration standards of closed conduit measuring devices.

II. Reporting

All surface water measuring devices, rated structures and rated sections should be read and readings recorded at least once per week, and more frequently if necessary. IDWR will accept the assumption of constant flow rates between readings if flow rates are continuous and reasonable constant. Forms will be provided for recording dates, stage (or water levels) and flow rates.

Users with diversions located within water districts may report their diversions individually to IDWR or provide for the water district water master to report their diversions in acceptable annual water distribution reports. Ground water diversions are not normally included in a water district, and must be reported individually.

¹ *Excerpt From:* State of Idaho Department of Water Resources (IDWR). Minimum Acceptable Standards for Measurement and Reporting of Surface and Ground Water Diversions.

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Appendix B

Effluent Calculations

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Guidance on Calculating Effluent Values

1. Calculating "Net" Effluent Values

- a. **Pollutant Concentrations** for TSS and Total Phosphorus are measured at both influent and effluent monitoring locations. The net concentration is the difference between the two measurements and can either be positive or negative since the pollutant load may either increase or decrease as the water passes through the facility. It is calculated as follows:

$$\text{Effluent concentration (mg/l)} - \text{influent concentration (mg/l)} = \text{Net concentration (mg/l)}$$

2. Conversion from concentration to mass values:

The following calculations are conducted separately for **raceway discharges** and for **off-line settling basins** (if applicable). The two results are added together to yield the total loading discharged from the facility; see *step d*, below.

- a. **Pollutant levels** are measured in terms of concentration, usually in milligrams/liter (mg/l). If they are reported in micrograms /liter ($\mu\text{g/l}$), divide by 1000 to get the result in mg/l.

$$\frac{1 \mu\text{g}}{\text{liter}} \times \frac{1 \text{ mg}}{1000 \mu\text{g}} = 0.001 \text{ mg/l}$$

Therefore: $\underline{\mu\text{g/l} / 1000 = \text{mg/l}}$

- b. **Flow** is usually measured in cubic feet per second (cfs) or gallons per minute (gpm). If it is measured in gpm, divide by 448.8 to convert to cfs.

$$\frac{1 \text{ gallon}}{\text{minute}} \times \frac{1 \text{ minute}}{60 \text{ seconds}} \times \frac{1 \text{ cu. ft.}}{7.48 \text{ gals}} = 1/448.8 \text{ cfs}$$

Therefore: $\underline{\text{gpm} / 448.8 = \text{cfs}}$

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- c. **Load** (in pounds/day) is calculated using the concentration and flow measurements for the day of pollutant sampling:

$$\frac{1 \text{ mg}}{\text{l}} \times \frac{28.3 \text{ liters}}{\text{cu. ft.}} \times \frac{\text{cu. ft.}}{\text{sec.}} \times \frac{86400 \text{ secs}}{\text{day}} \times \frac{2.2 \text{ lbs}}{1,000,000 \text{ mg}} = \text{lbs/day}$$

Therefore: $\text{mg/l} \times \text{cfs} \times 5.4 = \text{lbs/day}$

- d. **Total facility loading** (in pounds/day) is calculated by adding the loading from the raceways and the loading from the off-line settling basins.

$$\text{Raceway loading (lbs/day)} + \text{OLSB loading (lbs/day)} = \text{Total facility loading (lbs/day)}$$

3. DMR Reporting

- Values greater than the MDL: the permittee must report the actual value.
- Influent or effluent value less than the MDL: the permittee must report "less than {numeric MDL}" on the DMR, but use one-half the MDL when calculating the net value.
- Both influent and effluent values less than the MDL: the permittee must report zero on the DMR, and use this for calculating monthly averages.

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Appendix C

**Quality Assurance Plan
and
Best Management Practices Plan
Certification**

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Idaho Aquaculture
Best Management Practices Plan
(BMP Plan)
Certification

Facility Name: _____

NPDES Permit Number: _____

The BMP Plan is complete and is available upon request to EPA and IDEQ.

The BMP Plan is being implemented by trained employees.

The BMP Plan has been reviewed and endorsed by the facility manager.

The individuals responsible for implementation of the BMP Plan have been properly trained.

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Signature:	Title/Company:
Print Name:	Date:

An existing discharger must submit this certification within 90 days of the effective date of this permit. For a new permittee, this certification must be submitted no later than the written Notice of Intent to be covered under this permit. The certification must be submitted to EPA and to the responsible IDEQ office (§I.C.1 of the permit).

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Idaho Aquaculture
Quality Assurance Plan
(QA Plan)
Certification

Facility Name: _____

NPDES Permit Number: _____

The QA Plan is complete and is available upon request to EPA and IDEQ.

The QA Plan is being implemented by trained employees.

The QA Plan has been reviewed and endorsed by the facility manager.

The individuals responsible for implementation of the QA Plan have been properly trained.

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Signature:	Title/Company:
Print Name:	Date:

An existing discharger must submit this certification within 90 days of the effective date of this permit. For a new permittee, this certification must be submitted no later than the written Notice of Intent to be covered under this permit. The certification must be submitted to EPA and to the responsible IDEQ office (§I.C.1 of the permit).

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Appendix D

Drug and Chemical Use Report Contents

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CHECKLIST FOR ORAL REPORT FOR INAD AND EXTRALABEL DRUG USE

(Provide an oral report to EPA: 206-553-1846; and IDEQ
within 7 days after initiating use of the drug)
(First row is an example.)

Reported to Permitting Authority?	Name of Drug (INAD & Extralabel) Used & Reason for Use	Method of Application	First Date of Drug Use	Date Oral Report Submitted to Permitting Authority	Initials
☒	Extralabel: Erythromycin Treat bacterial infections	Injection	09/09/04	09/10/04	MJ
☐					
☐					
☐					
☐					
☐					
☐					
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**WRITTEN REPORT FOR AGREEING
TO PARTICIPATE IN AN INAD STUDY**
(Submit a written report to EPA and IDEQ within
7 days of agreeing or signing up to participate in an INAD study)

Facility Name: _____ NPDES Permit Number: _____

Name of person submitting this report: _____

Date of agreement to participate in INAD study: _____

Date this written report will be submitted: _____

The first row is an example.

Expected Dates of Use	Name of INAD Used	Disease or Condition Intended to Treat	Method of Application	Dosage
09/09/04	Oxytetracycline	For controlling columnaris in trout	☒ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____	
			☐ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____	
			☐ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____	
			☐ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____	

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WRITTEN REPORT FOR INAD AND EXTRALABEL DRUG USE

(Submit a written report to EPA and IDEQ
within 30 days after initiating use of the drug)

Facility Name: _____ NPDES Permit Number: _____

Name of person submitting this report: _____

Date this written report will be submitted to the permitting authority: _____

For Extralabel Drug Use, include the name of the prescribing veterinarian and date of the prescription in a footnote.

The first row is an example.

Name of Drug & Reason for Use	Date and Time of Application (start date/time end date/time)	Duration	Method of Application	Total Amount of Active Ingredient Added	Total Amount of Medicated Feed Added*
Oxytetracycline For control of columnaris in walleye	09/09/04 10:00 AM 09/13/04 10:00 AM	5 consecutive days	☒ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____	1 g/lb as sole ration	50 lbs
			☐ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____		
			☐ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____		
			☐ Medicated feed ☐ Injection ☐ Bath treatment ☐ Other: _____		

* Applies only to drugs applied through medicated feed.

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Facility Name: _____ NPDES Permit Number: _____

[illegible]

² Treatment type means, for example, static or flush bath, injection or feed.

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Appendix E

Annual Report

Contents

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ANNUAL REPORT OF OPERATIONS FOR YEAR _____

Idaho Aquaculture Permit

I. Facility Name:		NPDES #	
Operator Name (Permittee):		Phone:	
Address:		Fax:	
		E-Mail:	
Owner Name (if different from operator):		Phone:	
II. Annual Production:		Number of pounds of fish produced in the year _____ pounds	
III. Food used:		Number of pounds of food fed to the fish during the maximum month: _____ pounds	
IV. Noncompliance Summary:			
Include description & dates of noncompliance, the reasons for such incident, and the steps taken to correct the problem. Attach additional pages, if necessary.			
V. Best Management Practices (BMP) Plan			
BMP Plan has been reviewed this year? Yes No BMP Plan fulfills the requirements set forth in the permit: Yes No Summarize changes in the BMP Plan since last annual report:			
VI. Land application of solids and/or irrigation with wastewater			
Attach Maps of Application Sites. (Note: IDAPA 58.01.02.650 requires IDEQ approval for solids disposal on land.)			
Date	Location and Acreage of Application	Solids Applied in Pounds	Wastewater Applied in Gallons
Yearly Total			

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VII. Chemical Usage (including drugs and pesticides)

Date	Chemicals used, number of days used, and maximum concentration in effluent.
Yearly Total	

VIII. Inspections and Repairs for production and wastewater treatment systems

Date Inspected	Date Repaired	Description of system inspected and/or repaired

Signature & Certification

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure the qualified personnel properly gather and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Signature:	Title/Company:
Print Name:	Date:

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FACT SHEET

June 14, 2006

NPDES Permit Numbers: **IDG-130000**
IDG-131000
IDG-132000
ID-002826-6

Public Notice Start Date: June 19, 2006
Public Notice Expiration Date: August 3, 2006

Technical Contacts: Carla Fromm, 208-378-5755 fromm.carla@epa.gov
Sharon Wilson, 206-553-0325 wilson.sharon@epa.gov
1-800-424-4372 ext.8-5755 or 3-0325 (within Region 10)

The United States Environmental Protection Agency (EPA)
Region 10

Proposes to Issue Three General Wastewater Discharge Permits,

Two of them for

Aquaculture Facilities in Idaho,

One of them for

Fish Processors associated with Aquaculture Facilities in Idaho

and an individual permit for

Epicenter Aquaculture

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C. Epicenter Aquaculture

Epicenter Aquaculture acquires source water from a canal which diverts water from a naturally hot water spring, the headwaters of Warm Springs Creek. Pollutants generated at the facility are the same as those described above for other rearing facilities, i.e. solids, nutrients, drug and other chemical residuals. The majority of the facility's effluent is discharged back into the canal (6 cfs), which joins another canal after water flows through a hydroelectric generator. All 13--16 cfs of canal water is used for irrigation in the Warm Spring Creek Valley from May through September or October. During those months, little, if any, water is left to flow into the Salmon River, approximately 15 miles downstream of Epicenter Aquaculture. During the rest of the year, all of the canal water, including the Epicenter discharge, reaches the Salmon River. The remaining effluent from the facility (1 cfs) flows into Warm Springs Creek to deliver a water right downstream. Warm Springs Creek has no defined streambed or channel within a mile of the Salmon River; therefore, it is unlikely that any facility discharge to Warm Springs Creek enters the Salmon River.

V. Permit History

The first NPDES permit issued to aquaculture facilities in Idaho became effective in May 1975. Subsequent permits were issued to the facilities in October 1984, October 1990, and September 1999.

A. Effluent limitations of the 1999 General Permit

The general permit for aquaculture facilities issued in 1999 contained technology-based limitations on total phosphorus, total suspended solids, and settleable solids; and water quality-based limitations on total phosphorus based on the WLAs assigned to the largest facilities discharging in the Upper Snake Rock watershed. Derivation of these limits was included in the fact sheet for that permit. The permit required that solids, sludge, filter backwash, and other pollutants removed in the treatment of wastewaters be disposed of in a manner so as to prevent any pollutant from such materials from entering the waters of the United States. The limits, disposal requirements, and discharge prohibitions collectively reduced discharges of oxygen-demanding materials, residual feed, and floating, suspended, and submerged matter, including dead fish. The water-quality based total phosphorus limits had a compliance deadline of September 10, 2004.

B. Monitoring history

Monitoring requirements of past NPDES permits issued to aquaculture facilities and fish processors have included effluent compliance monitoring and effluent characterization monitoring. Effluent compliance monitoring required sampling the discharge and analyzing for pollutant parameters which were limited in the permit: TSS, Total Phosphorus (TP), and settleable solids. Effluent characterization monitoring in the 1999 permit included analysis for

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Therefore, EPA determined in its best professional judgment that the control technology in place at the facilities was providing a high level of removal for this pollutant and that a separate settleable solids limit was no longer necessary. The proposed effluent limits in the draft Cold Water Permit are provided in Tables 6 and 7. For comparison, the effluent limits in the 1999 permit are included also.

Three warm-water facilities (FBI Catfish Farm, First Ascent, and Canyon Springs) discharge at temperatures averaging 26 degrees Celsius into the Upper Snake Rock watershed in the vicinity of known populations of endangered or threatened snails, which require water temperatures no greater than 18 degrees Celsius to survive. Therefore, EPA is considering setting a temperature limit for these facilities. Alternatively, we may wait until IDEQ develops its temperature TMDL (by 2008), require the implementation of best management practices, require the conduct of temperature and/or snail studies, and/or require the reporting of technology alternatives for cooling the effluent. Any selected option would need the concurrence of the US Fish and Wildlife Service. EPA is inviting public comment and input of information including available technology to reduce the temperature of warm water discharges.

Two warm water facilities discharge to Jacks Creek in the Bruneau River watershed. These facilities utilize water from warm water wells drilled for supplying irrigation for farmers. Because the temperature of the water in the stream is elevated already and because the water used in the facility is cooled by evaporation and conductivity in the process, the facility is actually a heat sink and discharges cooler water than would otherwise be discharged to the stream for irrigation. Therefore, EPA is not proposing to limit temperature from these facilities. However, we are inviting comment on this issue and submittal of information regarding the technology available to reduce the temperature of the discharges.

For Epicenter Aquaculture, the lone warm-water facility with an individual permit, we determined that the previously applied technology-based effluent limits TSS and TP for warm-water raceway and full-flow settling basins were fully protective of the water quality in the receiving stream, Warm Springs Hydro Canal; therefore, those limits were proposed for this permit; they are provided in Table 8.

The limits in Table 9 are those proposed in the WLA permit for most of the facilities that are subject to WLAs in the Upper Snake Rock watershed. As explained in Appendix B, EPA determined that technology-based limits were more stringent than the WLAs for four of the aquaculture facilities and three of the fish processors in this watershed; therefore, those lower limits are footnoted in Table 8 and in the respective permits.

The proposed limits for those facilities with seasonally variable limits are listed in Table 10. For two of the facilities in this table, FBI Catfish Farm and Smith Farm Ponds, the State has informed EPA that the WLAs in the approved TMDL had some errors. We have used the

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2. Limitations on **Offline Settling Basin Discharges** from all permittees; see Table 7.

Table 7 Limitations on Offline Settling Basin Discharges from all permittees				
Parameter	Average Monthly		Maximum Daily	
	1999	2005	1999	2005
Settleable Solids	0.7 ml/L (0.3 ml/L) ²	None	1.0 ml/L (0.5 ml/L) ² & ≥95% removal	None
Total Suspended Solids (TSS)	67 mg/l	67 mg/l	100 mg/l & ≥90% removal	100 mg/l & ≥90% removal

² Limit on settleable solids for facilities discharging to Billingsley Creek.

3. Effluent Limitations for **Epicenter Aquaculture**; see Table 8.

Table 8 Effluent Limitations for Epicenter Aquaculture		
Parameter	Limitations (mg/l)	
	Average Monthly	Maximum Daily ³
Net TSS	15	25
Net Total Phosphorus	0.20	0.32

³ Reporting is required within 24 hours of violating a maximum daily limit; .see Part V.G.

4. Effluent Limitations for facilities in the **Upper Snake Rock Watershed**.

All of these limitations are based on 2005 wasteload allocations, which were reviewed in a public process and determined to comply with Idaho Water Quality Standards; see Table 9 and Appendix B.

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this segment will be studied in this process. An upper limit of 18 degrees Celsius is necessary to protect the habitat for listed snail species, which are known to be present in the vicinity of these three facilities. Therefore, EPA is considering several options regarding setting a temperature limit, possibly at 18 degrees Celsius, and is inviting public input including information regarding available technology to reduce the temperature of warm water discharges to the requisite 18 degrees Celsius to protect endangered snails. Any chosen options would require the concurrence of U.S. Fish and Wildlife Service. The options presently under consideration are:

- (a) Set a limit at 18 degrees Celsius;
- (b) Wait for IDEQ to develop a temperature TMDL which assigns load reductions to all significant sources;
- (c) Require that the facilities:
 - (i) conduct studies of the presence of snails;
 - (ii) monitor ambient stream temperatures;
 - (iii) report on available strategies for reducing effluent temperature; and/or
 - (iv) implement best management practices to reduce effluent temperatures.

Two warm water facilities discharge to Jacks Creek in the Bruneau watershed. These facilities utilize water from warm water wells drilled for supplying irrigation water to farmers. Because the temperature of the water in the stream is elevated already and because the water used in the facility is cooled by evaporation and conductivity in the process, the facility is actually a heat sink and discharges cooler water than would otherwise be discharged from the wells to the stream for irrigation. Therefore, EPA is not proposing to limit temperature from these facilities. However, we are inviting comment on this issue and submittal of information regarding the technology available to reduce the temperature of the discharges.

The source water for Epicenter Aquaculture is Warm Springs Hydro-Canal, a private canal, which flows from a naturally warm water spring. The facility discharges back to the Warm Springs Hydro-Canal, which discharges to a public canal seven miles downstream; that canal discharges to the Salmon River approximately seven miles further downstream. Because the temperature of the water in the canal is naturally elevated because of its warm source water and because the water used in the facility (from the same source water) is actually cooled by evaporation and conductivity in the facility, the facility is actually a heat sink and discharges water cooler than that same water would be if it had not been withdrawn from the canal for use in the aquaculture facility. Therefore, the proposed individual permit for this facility will not have a limit for temperature. However, we are inviting comment on this issue and submittal of information

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regarding the technology available to reduce the temperature of the discharges.

f. Ammonia

Idaho's State Water Quality Standard provides acute and chronic criteria for total ammonia that are dependent on temperature and pH levels. (IDAPA §58.01.02.250.02.c.iii). Ammonia data collected from the discharges from raceways at aquaculture facilities indicate that the discharges are not exceeding the State standard that is applicable in the receiving water. But data collected from offline settling basin discharges from some aquaculture facilities, revealed that ammonia concentrations in these discharges may exceed the ambient State standards at some times. In such cases, EPA analyzes the reasonable potential of the discharge to cause a violation of the State water quality standard. Unfortunately, we do not have temperature and pH data which are necessary to conduct this analysis. Therefore, in these draft permits, EPA is proposing to require the monitoring of ammonia, pH and temperature of the effluents and of the receiving water above offline settling basin discharges. These data will allow the calculation in the next permit cycle of the reasonable potential to exceed State standards for total ammonia at the temperatures and pH of the facilities' discharges and of the receiving streams. We are also requesting comment on the issue of requiring streamflow monitoring or data to support the application of mixing zones for such limits. EPA believes the intermittent nature and small volume of OLSB discharges relative to raceway discharges minimizes adverse effects that occasional spikes in ammonia would have on receiving water.

2. WLA Parameters in WLA Permit

a. Applicable TMDLs

The regulations at 40 CFR §122.44(d)(1)(vii)(B) require that effluent limits be consistent with the assumptions and requirements of any available wasteload allocation (WLA) for a discharge to a water body subject to an approved TMDL. A TMDL is a determination of the amount of a pollutant from point, nonpoint, and natural background sources that may be discharged to a water body without causing the water body to exceed the state water quality criterion for that pollutant. The State of Idaho is developing, has issued, and, if appropriate, EPA has approved final TMDLs, all of which include WLAs for aquaculture facilities and/or fish processors, for the water bodies listed in Table B-5. The TMDLs themselves can be accessed at http://www.deq.state.id.us/water/data_reports/surface_water/tmdls/sba_tmdl_master_list.cfm.

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3. Epicenter Aquaculture individual permit

- a. TSS – EPA determined above that the technology-based limits of 15 mg/l AML and 25 mg/l MDL were protective of the water quality standards in the receiving waters and therefore did not develop water quality-based effluent limits. Therefore, EPA proposes these limits for Epicenter Aquaculture. See Table B-8.
- b. Total Phosphorus – EPA determined above that the technology-based limits of 0.2 mg/l AML and 0.32 mg/l MDL were protective of the water quality standards in the receiving waters. Therefore, EPA proposes these limits for Epicenter Aquaculture. See Table B-8.

Table B-8		
Epicenter Aquaculture		
Effluent Limitations		
Parameter	Limitations (mg/l)	
	Average Monthly	Maximum Daily
Net TSS	15	25
Net Total Phosphorus	0.20	0.32

4. WLA Permit

The selected limits for the permittees under the WLA permit are listed in the WLA Permit (Tables 2—10) and in the Fact Sheet (Tables 9—17). To conserve paper, they are not repeated here.

a. Upper Snake Rock Watershed

(1) Total Suspended Solids Limits

The IDEQ waste load allocations for TSS for the Upper Snake Rock watershed facilities were based on the technology-based average monthly limit in the previous permit for cold water facilities of 5 mg/l TSS. This concentration limit was converted to a WLA of TSS in units of tons/year for each facility using its long term average facility flows. EPA converted the IDEQ's tons/year WLA to pounds per day for each facility.

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Extension for Aquaculture Facilities and Associated Fish Processors in Idaho.

United States Environmental Protection Agency (EPA)
Region 10
1200 Sixth Avenue, OWW-130
Seattle, Washington 98101

Notice of EXTENSION of PUBLIC COMMENT PERIOD

For Three
National Pollutant Discharge Elimination System (NPDES)
General Permits
and One Individual Permit
to Discharge to
Waters of the United States
For **Aquaculture Facilities And Associated Fish Processors**
In The State Of Idaho

Technical Contacts:
Carla Fromm
(208) 378-5755,
fromm.carla@epa.gov

Sharon Wilson
(206) 553-0325
wilson.sharon@epa.gov

Public Notice Issuance Date: June 19, 2006
Original Public Notice Expiration Date: August 3, 2006
Extended Public Notice Expiration Date: August 18, 2006

1. Summary

In response to requests from the regulated community, EPA is extending to August 18, 2006, the public comment period on its proposal to reissue three general permits (GPs) and one individual permit for aquaculture facilities and associated fish processors in the State of Idaho.

2. Tentative Determination

The Region 10 Office of EPA has tentatively determined to issue the permits.

3. Public Comments

Persons wishing to comment on the tentative determinations contained in the proposed permits may do so in writing, by August 18, 2006.

Comments must be received by August 18, 2006, to be considered in the formulation of final determinations regarding the permits. All comments should include the name, address, and telephone number of the commenter, a concise statement of any comment, and the relevant facts upon which it is based. All written comments and requests should be submitted to EPA at the above address to the attention of the Director, Office of Water and Watersheds, 1200 Sixth Avenue, OWW-130, Seattle, WA 98101. Comments may also be submitted via email to wilson.sharon@epa.gov.

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4. Document Availability

Copies of the proposed permits and fact sheet may be found on the internet at the following website: <http://yosemite.epa.gov/r10/WATER.NSF/NPDES+Permits/General+NPDES+Permits#Aquaculture> . The proposed permits and Fact Sheet are also on file and may be inspected at EPA Region 10 offices at 1200 Sixth Avenue, Seattle, WA 98101 any time between 8:30 a.m. and 4:00 p.m., Monday through Friday. Copies and other information may be requested by writing to the EPA at the above address to the attention of the NPDES Permits Unit, by calling Audrey Washington at 1-800-424-4372 (within Alaska, Idaho, Oregon & Washington) or (206) 553-0523, or by e-mail at washington.audrey@epa.gov.

For other physical locations in Idaho and Seattle where the documents may be viewed, see the public notice in this publication on June 19, 2006.

To ensure effective communication with everyone, additional services can be made available to persons with disabilities by contacting one of the above EPA representatives. For those with impaired hearing or speech, please contact EPA's telecommunication device for the deaf (TDD) at (206) 553-1598.

See the previous public notice for more details.

Unit: NPDES Permits

Point of contact: Carla Fromm

Email: fromm.carla@epa.gov

Phone Number: (206) 553-5755

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URL: <http://yosemite.epa.gov/r10/water.nsf/NPDES+Public+Notices/Aquaculture+Extension>

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Tilapia are fed commercially available pelleted fish food which costs approximately \$.23 per pound. They can be fed by hand or with a sprinkler mechanism, and are generally fed twice per day. Tilapia are generally quite hardy and readily adapt to new environments. Death loss of 10 percent is common until the fingerlings weigh about 1.0 ounce. Death loss of 0.5 percent from 1.0 ounce to selling weight is common.

Special Considerations

Potential disadvantages to producing tilapia in North Dakota include the need for warm water and the lack of nearby production experience. The need for warm water suggests that combining a tilapia fish farm and an industry with warm water as a waste product could be beneficial.

Lack of producer experience will be less of a problem as interest in aquaculture increases. Also, because tilapia are extremely hardy they can withstand a relative greater amount of disease and temperature variability than catfish or trout.

Here are key factors for starting a successful tilapia farming business:

1. A viable market
2. Appropriate water quality and availability
3. Financial backing
4. Consistent product inspection
5. Disease control and availability of therapeutics
6. Appropriate stock quality
7. Appropriate feed quality and price

Economic Feasibility

Producing tropical tilapia in North Dakota requires an indoor installation where water and air temperature can be controlled, and this requires a relatively larger capital investment than producing the fish outdoors in a warmer climate. This means North Dakota tilapia producers must maintain a continuous level of high output to justify the high capital requirements. The size of tilapia farms in North Dakota could vary dramatically, depending to a large extent on market demand. The economic feasibility analysis for tilapia production presented here is for a structure producing 80,000 pounds of tilapia per year (live weight) with a 2 percent growth rate.

Table 1. Estimated Tilapia Enterprise Budget For 10,000-Pound Facility In North Dakota, 1992

	Economic	Budgets Cash
Returns		
Quantity sold		
Lb. live weight)	80,048	80,048
Price per lb. (a)	\$1.12	\$1.12
Gross revenue	\$89,654	\$89,654
Variable expenses		
Fingerlings (b)	\$5,413	\$5,413
Feed (c)	27,617	27,617
Utilities (d)	15,515	15,515
Operating interest (e)	4,733	4,733
Total variable expenses	53,277	53,277
Fixed Expenses		
Equipment	\$4,450	\$4,450
Building and lagoon	2,550	2,550
Depreciation (f)		25,438
Total fixed expenses	32,438	7,000
Total Expenses		\$85,715
Return to labor, management & equity	\$3,939	-----
Cash flow		
(Net service-family living) -----	\$29,377	

Actual price would need to be contracted prior to building facility and beginning construction.
 54,126 fingerlings purchased at \$.10 per fingerling.
 120,072 pounds of pelleted fish food purchased (or 1.5 pounds feed per pound of gain) at \$.23 per pound of food.
 Calculated as percent of plant cost.
 Operating interest charged on fingerlings, feed, utilities, and insurance at 9.75 percent on borrowed capital and 4 percent for equity capital for 12 months

f) Equipment value (\$111,250) depreciated over five years,
Building and lagoon (\$63,750) depreciated over 20 years.

The economic budget is generated by charging market rates for all resources needed for production. It helps answer the question "Is this enterprise profitable?" The bottom line represents a return to labor and management.

The cash flow budget is an estimate of the out-of-pocket cash needed to run the enterprise, including not only direct costs but indirect cash costs such as principle and interest payments, insurance and taxes. It helps answer the question "Can I make meet my cash obligations if I go into this enterprise?" Total cash expenses are subtracted from total cash receipts to calculate the net cash which is available for family living and other needs.

Marketing

While consumer trends indicate that per capita fish consumption has been increasing and will probably continue to do so, efforts are focused on market development for tilapia since it is a relatively new fish to American consumers. Attempting to market tilapia through local retail outlets may prove to be unsuccessful unless some attempt is made to educate consumers about tilapia. The processed fish market may be easier to enter, but the selling price will be low. Potential producers will probably find it necessary to obtain contracts from market outlets which specify the amount and price of fish to be sold before credit agencies will be willing to provide financing.

Facilities Requirements

Facilities required for the production of tilapia depend, to a large extent, on the size of the market. The smallest size which could be considered economically feasible for commercial production would be 63,000 pounds of fish (live weight) per year. Tilapia farms have existed which produced 2 million pounds (live weight) per year. Facility requirements for an indoor fish farm producing 80,000 pounds per year (live weight) are presented here. A facility of this size is big enough to be profitable, yet allows for future expansion should the market potential exist. It would require 4-to-5 hours per day of labor. An insulated pole shed measuring 75 feet by 90 feet in length with 14 foot sidewalls could efficiently house the facility. The building would have nine tanks 46 inches deep with diameters from 9 to 30 feet. The total cost for constructing and equipping a facility of this type would be \$175,000.

The 80,000-pound facility would require about 46,000 gallons of water for the holding tanks. An additional 4,000 gallons would be needed for the biotreatment unit, sump tank, and pipe and waste treatment. With a projected water flow rate of 10 gallons per minute, a total of 82 hours would be required to fill the system. A constant supply of make up water running at 3 to 5 gallons per minute would be required. Make-up water is necessary to replace water loss because of evaporative and waste disposal.

Costs associated with building and operating the facility are shown below. Based on a projected sale price of \$1.12 per pound live weight and a 2 percent growth rate, each year the enclosed tilapia production facility would contribute \$4,571 to owner labor, management and equity capital.

References For Further Information

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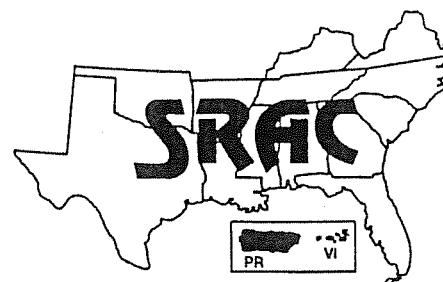
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North Dakota State University
NDSU Extension Service

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Southern Regional Aquaculture Center



November 1991

Water Quantity and Quality Requirements for Channel Catfish Hatcheries

Craig S. Tucker*

Simple and inexpensive production of seed stock is a key to successful aquaculture. Indeed, the rapid growth of commercial channel catfish culture is owed in no small part to the ease with which large numbers of channel catfish fry can be produced using relatively unsophisticated hatchery technology.

Although the production of channel catfish fry is technically a simple process, success in some hatcheries is poor year after year. Problems may include poor egg matchability, low fry survival, poor fry growth, or a high incidence of infectious diseases of eggs or fry. Sometimes these problems are related to poor management practices, but quite often they are the result of poor water quality within the hatchery.

With appropriate treatment, any water can be made suitable for use in a catfish hatchery. Cost of treatment is often not economically justifiable. It is usually good practice to use a source that provides, as nearly as possible, water of correct quality for optimum matchability of eggs and survival and growth of fry. Good water quality is maintained in the hatchery by provid-

ing adequate water flow and aeration to hatching and rearing troughs. Frequent removal of uneaten feed and other accumulated organic debris will also aid in maintaining proper rearing conditions within troughs or tanks.

Water sources

In many regions, water from several sources may be available for use in the hatchery. Sources may include ground waters from aquifers lying at different depths and various surface water supplies. Before the hatchery is built, the manager should become familiar with the quality and availability of these potential hatchery water supplies. The best water supply may then be selected by comparing desired water quality and flow requirements with the chemical characteristics, temperature, and availability of various water sources.

The success of other hatcheries using water from a common source is the best indicator of the suitability of a particular water. Obviously, if poor water quality at other hatcheries is causing low survival of eggs or fry, or if costly treatment is required to make the water suitable for use, then it may be wise to seek an alternative water source. If there are no other

hatcheries in the area and the quality of the water supply is questionable, a pilot-scale hatchery can be constructed to ensure that the water is suitable for use.

Ground water

Ground water generally is considered to be the best source of water for catfish hatcheries. Ground waters are usually free of suspended matter, pollutants, and fish disease organisms. Temperature and chemical composition are relatively constant, and, in regions with abundant ground water, the supply is dependable. The chemical composition and well pumping rates for some ground water supplies may be obtained from well logs for existing nearby wells. Alternatively, a test well can be drilled to assess the source. The quality of most ground waters is relatively constant over time, so a single chemical analysis will suffice to characterize water quality. Nevertheless, it is good practice to have the supply reanalyzed every year or two.

Although ground waters are preferred for hatcheries, some waters may have to be treated to make them suitable for use. Depending upon the water, treatments may include:

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- aeration to increase dissolved oxygen concentrations;
- degassing to reduce total gas pressure and remove carbon dioxide and hydrogen sulfide;
- temperature regulation using water heaters or mixing of waters of different temperatures;
- sedimentation and filtration to remove iron; and
- addition of calcium to waters of low hardness.

Surface waters

Surface water supplies include streams and rivers, ponds, lakes, and reservoirs. Unpolluted surface water offers several advantages over ground water as a hatchery water supply. For example, dissolved oxygen concentrations tend to be near saturation; dissolved carbon dioxide and hydrogen sulfide concentrations are usually low; total gas supersaturation is seldom a problem; and iron concentrations are usually very low. Nevertheless, all surface water supplies suffer the disadvantages of variable quality and availability with time and exposure to sources of pollution and turbidity. For these reasons, carefully evaluate any surface water before use as a hatchery water supply.

Because quality and availability vary over time, historical record is necessary to predict whether the water will be suitable. Such records are not available for most waters, however, and changes in water temperature, chemical composition, and water availability caused by unusual weather events cannot be predicted by records. The best advice is to use common sense and avoid those waters that may become unsuitable for use during the time the hatchery is in operation.

Another major constraint to using surface water for hatcheries is the potential for contamination by fish disease organisms or water-borne predators. Most surface waters have a resident fish community. The fish in the water supply may

serve as a reservoir for fish disease organisms that could enter the hatchery and cause major losses. Natural predators of catfish fry, such as wild fish, insects, and other invertebrates, can also enter a hatchery and cause losses of fry.

Water quantity requirements

The success of a hatchery will suffer if insufficient water is available, even if that water is of optimum initial quality. Low water flow rates through hatching and rearing troughs allow waste products to accumulate which may quickly cause deterioration of water quality.

The typical trough (Figure 1) used for egg hatching and fry rearing holds roughly 100 gallons of water and is about 8 feet long, 2 feet wide and 10 inches deep. Troughs this size can hold 10 spawns at a time without crowding. Although the number of eggs per spawn varies with the size of the female brood fish, the ten spawns will contain (as a rough average) a total of 200,000 eggs. After the fry begin feeding, hold only about 100,000 fry in a trough of these di-

mensions. Thus, in a traditionally managed hatchery, two fry rearing troughs are available for each egg hatching trough.

Experience has indicated that minimum water turnover time (defined here as trough volume in gallons divided by water flow in gallons per minute) in hatching and rearing troughs should be about 40 minutes. Thus for a single 100 gallon trough, water flow should be a minimum of 2.5 gallons per minute. Larger troughs require proportionately higher flow rates. More water flow is also needed when egg or fry densities are higher.

Over a 10-to 12-week spawning season, each set of three 100-gallon troughs (one for eggs, two for fry) could be expected to produce roughly 1 to 1.5 million fry and would require a minimum flow of 7.5 gallons per minute (three troughs times 2.5 gallons/minute per trough). A hatchery capable of producing about 10 million fry per spawning season will typically contain 21 to 30 troughs and require a minimum water flow to the hatchery of 50 to 75 gallons per minute.

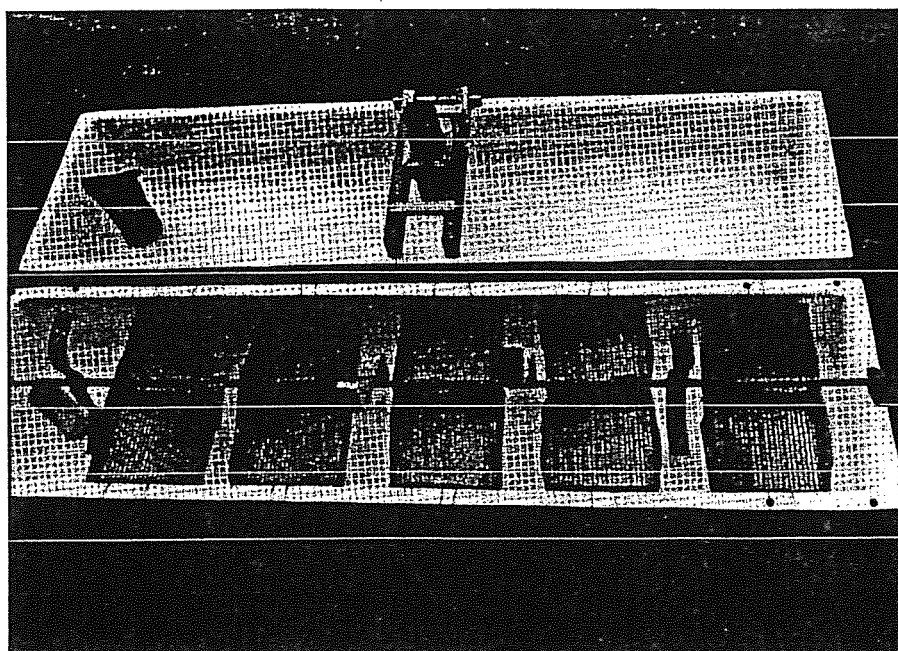


Figure 1. Traditional equipment used in a channel catfish hatchery: a fry rearing trough (top) with a 1/20-horsepower electric agitator and an egg hatching trough (bottom) with egg baskets and paddles.

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The calculations above represent minimum flows. It is good practice to use at least twice those flow rates (turnover times of 20 minutes) to ensure against deterioration of water quality within hatcheries. Additional water flow is particularly important during the peak of the spawning season when the number of spawns arriving at the hatchery and the number of fry being reared temporarily exceeds the planned hatchery capacity. Thus, as a rough guide, a hatchery expected to produce 10 million fry per season should be supplied with roughly 100 to 150 gallons of water per minute.

Water quality requirements

Some of the more important water quality requirements for hatchery water supplies are discussed in the following sections. Aside from these specific requirements the water should also be:

- free of pesticides, solvents, petroleum products, and other pollutants;
- free of fish disease organisms;
- of relatively constant quality and availability.

Temperature

The optimum temperature range for development of eggs and rearing of fry is between 78 and 82°F (26 to 28°C). If the temperature is too low, hatching and development are prolonged, and fungi, which thrive in cool waters, often invade the egg mass. At higher water temperatures, embryos develop too fast and there may be a high incidence of malformed or nonviable fry. Also, bacterial diseases of eggs or fry and channel catfish virus disease of fry are more common if the water temperature is greater than 82°F (28°C).

Considerable energy is required to heat or cool water, and it is usually too costly to attempt major changes in water temperature. Therefore, the temperature of the water supply should be near 80°F before it enters the hatchery.

Ground water from deep wells (500 to 1,000 feet deep) is warmed by the internal heat of the earth and may be suitable for use in channel catfish hatcheries without temperature modification. Water from shallow wells (less than 300 feet) and some surface waters are too cool to use directly. Cool ground waters can be impounded in a small reservoir pond where solar heating will raise the temperature to some extent.

Nevertheless, water temperatures in the reservoir pond and in most other surface waters will vary with local weather conditions and still may be too cool for use early in the spawning season. An in-line water heater can be used to ensure a minimum temperature in the inlet water. The opposite condition may be encountered late in the spawning season when surface waters become too warm for use in hatcheries. It is very expensive to cool large volumes of water using refrigeration or chiller units. The best method of reducing water temperature is to mix the water that is too warm with cool water (such as water from a shallow well) to achieve the correct temperature.

Dissolved oxygen

Adequate dissolved oxygen is critical in hatcheries because eggs and fry have high metabolic rates and thus a high requirement for oxygen. Dissolved oxygen concentrations should not fall below 4-5 ppm at any time within the hatchery. Proper management of dissolved oxygen involves two distinct considerations: (1) ensuring that the water is oxygenated before use and (2) providing adequate aeration in hatching and rearing units to maintain optimal levels of dissolved oxygen throughout the hatchery.

Waters deficient in dissolved oxygen should be aerated before use. Pre-aeration not only ensures adequate initial levels of dissolved oxygen, but also may benefit some waters by partially degassing waters supersaturated with total dis-

solved gases and by removing some carbon dioxide and hydrogen sulfide. The two most common systems for pre-aerating water supplies for catfish hatcheries are packed column aerators (Figure 2) and aeration of water in an aeration tank.

Properly designed packed columns are highly effective aerators and relatively inexpensive to operate. They offer an added advantage of being good degassing devices for waters supersaturated with total dissolved gases. Packed columns are filled with a high surface area plastic packing. Influent water is evenly distributed at the top of the column and flows down over the packing in a thin film where gas exchange with the atmosphere occurs. Various plastic materials have been used as packing media and materials specifically designed for use in packed columns are commonly available from aquaculture supply companies.

Specific design criteria for packed columns are based upon water flow, water temperature, dissolved gas concentrations in the influent water, and desired dissolved gas concentrations in the effluent. These considerations are discussed in detail in appropriate references listed at the end of this report. As a rough guide, a packed column 4 to 6 feet high and about 30 inches in diameter will be sufficient to pre-aerate water for a catfish hatchery supplied with 100 gallons per minute of anoxic, 80°F groundwater.

As an alternative to packed columns, influent water maybe pumped into a metal or fiberglass tank and oxygenated with surface aerators or underwater diffusers. In such a system considerable initial aeration can be accomplished by running the influent water onto a splashboard or through an expanded metal grate to break the flow into small drops. The aeration tank should be large enough to provide adequate water residence time for aeration, but the appropriate tank volume will

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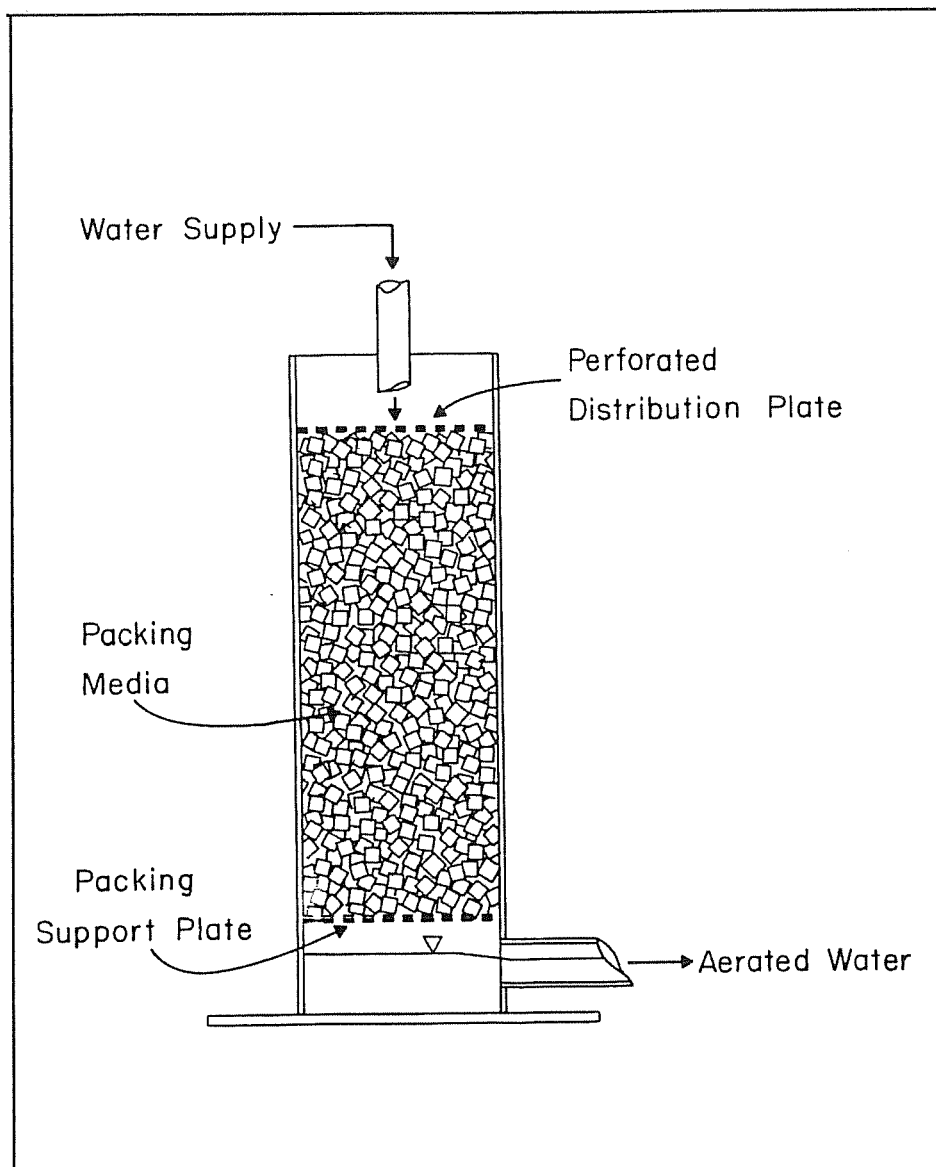


Figure 2. Cross section of a simple packed-column aerator.

depend upon the type and size of aerator used. Some experimentation may be required to find the best combination of tank volume and aeration device; the goal is generally to achieve an effluent dissolved oxygen concentration exceeding about 5 ppm.

As a starting point, pre-aeration tanks used in many existing catfish hatcheries provide a turnover time of 10 to 15 minutes (a capacity of 1,000 to 1,500 gallons for a water flow of 100 gallons per minute). Water is aerated with one or two 1/3-horsepower surface agitators (Figure 3).

Some type of aeration device must be provided to each trough within the hatchery to replenish dissolved oxygen lost as eggs or fry respire. Again, some trial and error may be necessary to find the right size and type of aerator. Common practice is to provide one 1/20 horsepower surface agitator per 100-gallon fry rearing trough. The agitators should be covered with small-mesh screening to prevent injury to fry.

Water circulation, in addition to adequate dissolved oxygen, is important in egg hatching troughs because oxygenated water must flow

around and through the egg mass to ensure that all eggs receive sufficient dissolved oxygen. A common sign of inadequate water circulation in hatching troughs is the presence of dead eggs in the center of the egg mass. Those areas may serve as foci for fungal or bacterial infection. Slowly rotating paddles in egg hatching troughs serve both to aerate and circulate the water through the egg mass. Vigorous aeration with diffusers (air stones) may also be used to aerate and circulate water in hatching troughs. Air flows and the size and placement of diffusers must be determined through experience.

Carbon dioxide

High levels of dissolved carbon dioxide interfere with respiration by eggs and fry. Ideally, water supplies for catfish hatcheries should not contain measurable levels of dissolved carbon dioxide, but concentrations up to at least 10 ppm seem to be well tolerated, provided that dissolved oxygen concentrations are adequate. Some groundwaters may contain in excess of 20 ppm dissolved carbon dioxide and should be vigorously aerated to drive off some of the gas.

Total gas pressure

Total gas pressure is a measure of the "concentration" of all gases dissolved in water. It is expressed in pressure units such as millimeters of mercury (mm Hg). When total gas pressure in water exceeds local barometric pressure, water is supersaturated and gas will tend to leave the water by diffusion or by forming bubbles. Gas bubble trauma (also called gas bubble disease) may occur in fish living in gas-supersaturated water when gases in the blood or tissues come out of solution and form bubbles. The bubbles can block blood flow or damage tissues.

Instruments called "saturation meters" are used to measure total gas pressures. Values are usually expressed as delta-P, which is the total gas pressure in water compared to local barometric pres-

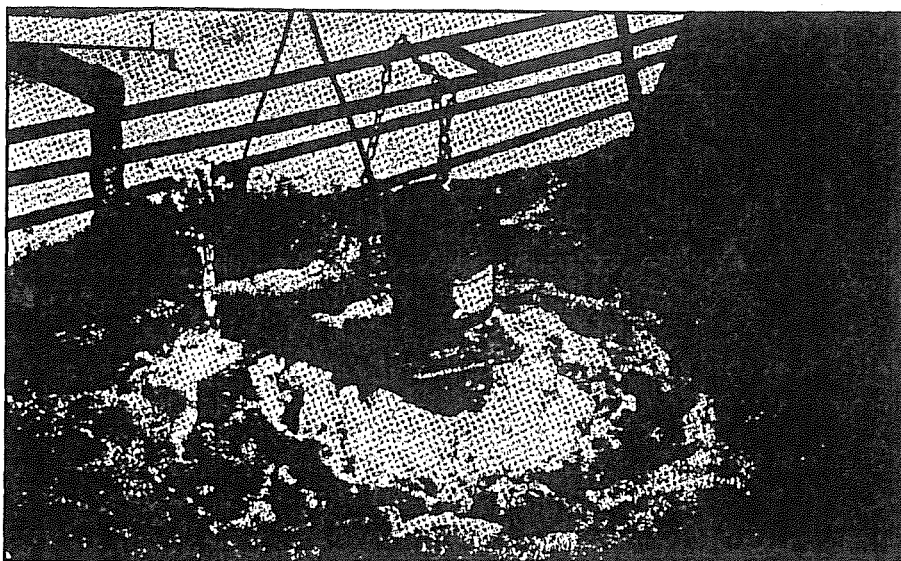


Figure 3. A 1/3-horsepower surface agitator used to oxygenate water in a pre-aeration tank.

sure. Positive delta P values mean the water is supersaturated. Saturometers are not commonly available to catfish hatchery managers, but supersaturated conditions can sometimes be diagnosed by the formation of bubbles on the surface of tanks or the milky appearance of water as gases come out of solution.

Channel catfish eggs are fairly resistant to high delta P-values because the naturally high pressure within the eggs helps prevent bubble formation. Eggs appear to withstand delta P-values at least as high as 100 mm Hg with no adverse effects. At high delta P-values, bubbles may form on and in the egg mass causing it to float high in the egg hatching basket. The top of the egg mass may be above water and will tend to dry out. Dislodging the bubbles by shaking and rotating the mass will temporarily alleviate the problem, although decreasing the delta P of the water is the best solution. Quite often, however, the first indication of supersaturated conditions is death of fry.

Clinical signs of gas bubble trauma in catfish fry include loss of equilibrium, abnormal swimming and gas bubbles in the yolk sac, behind the eyes, or on the skin. The bubbles prevent normal swimming and feeding and fry may become trapped at the surface. In severe cases, newly

hatched fry rapidly die as blood flow is restricted or the yolk sac ruptures. Gas bubble trauma may occur in fry when delta P-values exceed about 70 to 80 mm Hg. To be safe, delta P-values should not exceed about 40 mm Hg in channel catfish hatcheries.

Gas supersaturation can be caused by a variety of natural and man-made conditions. Many groundwaters and some surface waters are naturally supersaturated. Surface water gas supersaturation is common below dams where air is entrained in the spillway overflow or when water is heated in electrical generating facilities. Gas supersaturation can also be caused within the hatchery water supply system.

The most common cause of supersaturation in supply systems is entrainment of air from a leak in the pipes on the suction side of a water pump. Some of the gases in the entrained air are driven into solution as the water is pressurized after moving through the pump. In those situations, it is often possible to hear air bubbles moving through elbows and valves in the delivery system. Heating water can also cause considerable increases in delta P unless the water is degassed after heating. The increase in delta P attributable to heating can be substantial: if water is

heated from 70°F to 80°F, delta-P increases by more than 60 mm Hg.

Pre-aeration of the influent water is commonly used to reduce supersaturation to tolerable levels.

Packed column aerators are particularly effective at degassing supersaturated waters, but other types of systems providing vigorous aeration may be used. Be aware, however, that underwater diffused aeration (air bubbled through airstones) is relatively inefficient at degassing waters and, in some systems, may actually cause supersaturation. If supersaturation is caused by air leaks in the water supply line, the first course of action is to locate and repair the problem.

Salinity

Salinity is the dissolved salt content of water and is often expressed as the parts of salt by weight per thousand parts of water by weight (ppt). Channel catfish can breed and reproduce over a wide range of salinities. Eggs can hatch and fry will develop in waters with salinities up to at least 8 parts per thousand, but the optimum salinity for channel catfish hatchery supplies appears to be between 0.5 and 3 ppt (500 to 3,000 ppm).

Hardness

Hardness refers to the amounts of calcium and magnesium in the water and is expressed as ppm of equivalent CaCO_3 . Adequate concentrations of environmental calcium are required for "hardening" of eggs and for normal bone and tissue development of fry. Symptoms of environmental calcium deficiency include swelling and poor matchability of eggs and slow development, lack of vigor, poor stress resistance, and low survival of sac fry.

A minimum of 5 ppm calcium hardness is required for adequate egg matchability and for development and vigor of sac fry. Higher calcium concentrations are desirable because calcium also protects fry from ammonia and metal toxic-

cosis. All things considered, hatchery water supplies should contain at least 20 ppm calcium hardness. Calcium levels can be increased by adding a solution of calcium chloride to the water supply. The calcium solution can be added by chemical metering pumps or by using an inexpensive "drip system" where a concentrated solution of calcium chloride is slowly dripped into the pre-aeration system.

Alkalinity

Alkalinity is a measure of the capability of water to neutralize acids. In most natural waters, the predominant bases are bicarbonate and carbonate. Alkalinity is expressed as ppm equivalent CaCO_3 . Catfish eggs and fry thrive in waters with a wide range of alkalinity, although waters of very low alkalinity (<10 ppm as CaCO_3) should be avoided as hatchery supplies if possible. These waters are poorly buffered and pH can fluctuate drastically with small additions of acid or base. More importantly, dissolved metals such as copper and zinc are very toxic to fry in waters of low alkalinity. Copper and zinc can leach from pipes used to plumb the hatchery water distribution system.

pH

pH expresses the intensity of the acidic or basic character of the water. The pH scale is usually represented as ranging from 0 to 14. Conditions become more acidic as pH values decrease and more basic as they increase. At 77°F, pH 7.0 is the neutral point. The pH of most fresh waters is a function of total alkalinity and dissolved carbon dioxide concentration. Generally, if levels of those two variables are within the desired range, pH will be between 7.0 and 8.5, which is the desired pH range for incubating eggs and rearing fry.

An important exception to this general rule exists when surface waters containing dense sub-

mersed plant communities are used as a water supply. During sunny afternoons, rapid carbon dioxide removal by photosynthesizing plants may cause pH values to temporarily rise above pH 9. In extreme instances, values well above pH 10 have been recorded. Exposure to pH-values above 9 are undesirable and even short-term exposure to waters of pH 10 or above may kill fry and reduce egg matchability. Vigorous aeration of such waters will add some carbon dioxide to the water and somewhat reduce the pH, but this reaction is not rapid enough to be effective in extreme circumstances. The best solution is to avoid the use of surface waters that contain dense stands of submersed plants.

Ammonia

Un-ionized ammonia is quite toxic to channel catfish sac fry and early swim-up fry. Ideally, water in rearing troughs should be free of ammonia for optimal health and growth of fry, and the maximum concentration of un-ionized ammonia that should be allowed is about 0.05 ppm $\text{NH}_3\text{-N}$. Above this concentration, fry develop more slowly and are more susceptible to infectious diseases.

Removing ammonia from water supplies is difficult, so waters containing appreciable ammonia should not be used to supply catfish hatcheries. Ammonia is a product of fish metabolism, and ammonia production can be significant when high densities of fry are held in rearing troughs. Ammonia levels in rearing troughs can be decreased by either decreasing fry density or increasing water flow to flush the troughs.

Iron

Most surface waters contain very low concentrations of iron. Some anoxic ground waters, however, contain considerable iron in a dissolved form. When the water is aerated the iron is oxidized to a rust-colored precipitate of iron oxide. Dissolved iron is consid-

ered to be of relatively low toxicity to most aquatic organisms. Solid precipitates of iron oxide are even less toxic but may coat the gills of fry and interfere with respiration. Dense precipitates of iron oxide also may cover eggs and hinder gas exchange and suffocate the eggs. Total iron concentrations should be less than about 0.5 ppm for hatchery water supplies.

The simplest system used to remove iron is to pump the water into a small reservoir pond (0.5 to 1 acre) where the dissolved iron is oxidized and some of the iron oxide precipitate settles out. Some of the remaining precipitate can be removed using sand filters. An alternate method is to oxidize the iron by vigorously aerating the water in a tank or chamber prior to sand filtration. Complete removal of iron is difficult regardless of the system used.

Hydrogen sulfide

Hydrogen sulfide gives water a "rotten-egg" odor and is very toxic to channel catfish fry. Sac-fry will be killed when exposed to as little as 0.005 ppm hydrogen sulfide. Avoid using waters containing appreciable hydrogen sulfide. If this is not possible, hydrogen sulfide should be removed from water before it enters the rearing trough. Vigorous aeration will remove some hydrogen sulfide by volatilization and by oxidation of the sulfide to sulfate, which is nontoxic.

Treatment processes

The most common water quality problems encountered in channel catfish hatcheries and the treatment processes required to correct those problems are summarized in Table 1. But remember, it is often easier to seek an alternative water source rather than add expensive treatment systems in an effort to make a particular water suitable for use.

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Table 1. Common water quality problems in channel catfish hatchery water supplies.

Variable	Desired level	Problem	Solution
Temperature	78-82°F	too low	reservoir pond for solar heating or use water heaters
		too high	blend with cooler water
Dissolved oxygen	5 ppm to saturation	too low	vigorous aeration of incoming water and supplemental aeration in troughs
Carbon dioxide	less than 10 ppm	too high	vigorous aeration (degassing) of incoming water and supplemental aeration in vats or troughs
Total dissolved gases	delta P less than 40 mmHg	too high	vigorous aeration (degassing)
Calcium hardness	more than 20 ppm as CaCO ₃	too low	addition of calcium chloride to water supply
Ammonia (un-ionized)	less than 0.05 ppm NH ₃ -N	too high	do not use as a water supply; avoid accumulation within hatchery by decreasing fry density or increasing water flow
Iron	less than 0.5 ppm total iron	too high	aeration (oxidation) followed by precipitation or sand filtration
Hydrogen sulfide	less than 0.005 ppm H ₂ S-S	too high	vigorous aeration (degassing) of incoming water

Additional readings

Bouck, G. R., R. E. King, and G. Bouck-Schmidt. 1984. Comparative removal of gas supersaturation by plunges, screens, and packed columns. *Aquacultural Engineering* 3:159-176.

Colt, J. and G. Bouck. 1984. Design of packed columns for degassing. *Aquacultural Engineering* 3:251 - 273.

Hackney, G. E. and J. E. Colt. 1982. The performance and design of packed column aeration systems for aquaculture. *Aquacultural Engineering* 1:275-295.

Tucker, C. S. and E. H. Robinson. 1990. *Channel Catfish Farming Handbook*. Van Nostrand Reinhold, New York.

Wheaton, F. W. 1977. *Aquacultural Engineering*. Wiley Interscience, New York.

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ULI 13 2006

The work reported in this publication was supported in part by the Southern Regional Aquaculture Center through Grant No. 89-38500-4516 from the United States Department of Agriculture.

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OCT 13 2006

Mark & Jo Anne Luper – Epicenter Aquaculture
Water Right Application No's. 72-7577, 7578, 7579, 7580
Response to IDWR RFI

Exhibit F
Information relative to financial resources

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OCT 13 2006
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OCT 13 2006

Mark L . And Jo Anne W. Lupher dba Epicenter
BALANCE SHEET
21-Jun-06

ASSETS

Current Assets

Checking & Savings	\$59,554.00
Accounts Receivable	\$ 10,271.00
Inventory and Other Current Assets	<u>\$213,651.00</u>

Total Current Assets	\$283,476.00
----------------------	--------------

Other Assets

Leasehold Improvements	\$ 212,497.00
Capital Credit/Custer Telephone	\$ 4,215.21
Capital Credit/SREC	\$ 14,561.68
Conesco Life	\$ 10,783.91
Household Goods	\$ 34,296.09
Vehicles and Equipment	\$ 101,928.00
Valley Street House	\$ 70,000.00
Winberg Note Payabel	<u>\$ 3,641.39</u>

Total Other Assets	\$ 451,923.28
--------------------	---------------

Total Assets	\$735,399.28
--------------	--------------

LIABILITIES & EQUITY

Current Liabilities

Accounts Payable	\$ 81,569.00
Bank Loans	<u>\$ 89,339.00</u>

Total Current Liabilities	\$ 170,908.00
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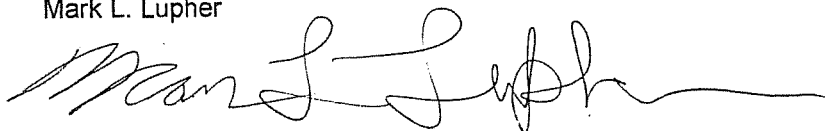
Long Term Liabilities	\$ 50,465.00
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Total Liabilities	\$ 221,373.00
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Equity	\$514,026.28
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TOTAL LIABILITIES & EQUITY	\$ 735,399.28
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I certify that this is a true and correct statement to the best of my knowledge
Mark L. Lupher



7-25-06

SCANNED
07 13 2006

SCANNED
07 13 2006

STATE OF IDAHO)

SS.

COUNTY OF CUSTER)

On this 25th day of July, 2006,
before me, a notary public in and for the said State, personally
appeared Mark L. Luper
known or identified to me to be the person whose name
subscribed to the within instrument, and acknowledged to me that
he she they executed the same.

Lura H. Baker

Notary Public

Residing in Clayton

My Commission Exp. 12-12-09

LURA H. BAKER
NOTARY PUBLIC
STATE OF IDAHO

SCANNED
OCT 13 2006
SCANNED
OCT 13 2006

Mark & Jo Anne Luper – Epicenter Aqu. re
Water Right Application No's. 72-7577, 7578, 7579, 7580
Response to IDWR RFI

Exhibit G

Information relative to conflict with the local public interest

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OCT 13 2006



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

900 NORTH SKYLINE DRIVE, SUITE B • IDAHO FALLS, IDAHO 83402 • (208) 528-2650

JAMES E. RISCH, GOVERNOR
TONI HARDESTY, DIRECTOR

July 18, 2006

Mr. and Mrs. Mark Lupher
Epicenter Aquaculture
HC 61 Box 3016
Challis, Idaho 83226

RECEIVED
JUL 27 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

RE: Water Rights Application Comments

Dear Mr. and Mrs. Lupher:

The Idaho Department of Environmental Quality ("Department") has reviewed our existing water quality information near your proposed project site identified in Application 72-07577 through 72-07580.

The Department does not have any information regarding Warm Springs Creek near your facility. We would encourage you to use only the water appropriated by these applications and allow as much water as possible to travel downstream.

The Department also suggests any outlets be screened according to local Fish and Game specifications.

We do not have any other substantive comments at this time.

Please do not hesitate to contact me at 208.528.2650 for additional information we may be able to provide.

Thank you for the opportunity to review your application.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Saffle".

Troy Saffle
Regional Water Quality Manager
Idaho Falls Regional Office

c: Shelly Keen, IDWR
Marti Bridges, IDEQ
Allen Merritt, IDWR

SCANNED
OCT 13 2006

53132



IDAHO DEPARTMENT OF FISH AND GAME
SALMON REGION
99 Highway 93 North 756-2271
P.O. Box 1336
Salmon, Idaho 83467

James E. Risch / Governor
Steven M. Huffaker / Director

July 24, 2006

RECEIVED
JUL 26 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

Re: Water Right Application No's. 72-7577, 7578, 7579, & 7580 (Lupher)

Dear Allen,

Idaho Department of Fish and Game staff has attempted to review the above applications from Mr. and Mrs. Lupher for water rights in the Warm Springs drainage and found insufficient information in the application to make a determination of potential impacts. The Department requests additional time for our staff to work with the applicants and your office to gain a thorough understanding of the applications.

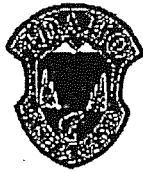
Sincerely,

James R. Lukens
Regional Supervisor

cc: Cindy Robertson
Walt Poole
Mark Armbruster
Mark and JoAnne Lupher
Bob Foster
Shelley Keen

Keeping Idaho's Wildlife Heritage

SCANNED
OCT 13 2006



IDAHO DEPARTMENT OF FISH AND GAME

SALMON REGION
99 Highway 93 North
P.O. Box 1336
Salmon, Idaho 83467

James E. Risch/Governor
Steven M. Huffaker/Director

September 1, 2006

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

Re: Applications for Water Permit No's. 72-7577, 7578, 7579, & 7580 (Lupher)

Allen,

The Department staff has met with Mr. Lupher regarding his application for water rights in the Warm Springs drainage. The Department is willing to withdraw our concerns to Mr. Lupher's proposal if at least 1.5 cfs is allowed to continue to flow down the main stem Warm Springs Creek below the Lupher settling pond. The stream channel below the settling pond supports a variety of riparian and wetland habitats that are important to many wildlife species. Thank you for the opportunity to comment.

Sincerely,

 for JRL

Jim Lukens
Regional Supervisor

Cc:

Cindy Robertson - NRPB

Walt Poole - NRPB

Mark and Anne Lupher - Applicants

Bob Foster - Idaho Department of Water Resources

Shelley Keen- Idaho Department of Water Resources

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**BOARD OF COMMISSIONERS
CUSTER COUNTY, IDAHO
P.O. BOX 385 – CHALLIS, IDAHO 83 226**

(208) 879-2360

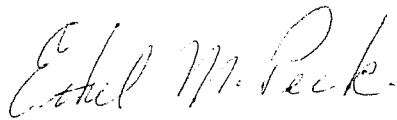
Idaho Department of Water Resources
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380

July 25, 2006

Re: Mark and Joanne W. Luper DBA Epicenter Aquaculture Water
Appropriate 72-07577, 72-07578, 72-07579 and 72-07580

The Custer County Board of Commissioners reviewed the above four
water permits. We have no comment on the applications in
questions.

If you have any questions, please let me know.



WFB Wayne F. Butts, Acting Chairman
Custer County Board of Commissioners

SCANNED
OCT 13 2006

SCANNED
OCT 13 2006

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

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AUG 17 2006

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



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

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

EUGENE D. FREDERICKSEN - Retired

August 11, 2006

RECEIVED

AUG 14 2006

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

DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

Dear Allen:

After speaking with personnel at Brockway Engineering who are assisting in compiling the requested information on the above referenced water rights, we are asking for an additional extension of time to provide the materials discussed in my prior letter of July 20, 2006 from August 15, 2006 to August 31, 2006. It is my understanding that this is acceptable to the Department. If it is not, please contact me by telephone on Monday, August 14, 2006.

Very truly yours,

FREDERICKSEN WILLIAMS MESERVY & LOTHSPREICH, LLP

A handwritten signature in black ink, appearing to read 'REW', with a long horizontal flourish extending to the right.

ROBERT E. WILLIAMS

REW/ch
C: Client
C:\data\Lupher\JDWR 8-11-06.doc

SCANNED
AUG 16 2006



IDAHO DEPARTMENT OF FISH AND GAME

SALMON REGION
99 Highway 93 North
P.O. Box 1336
Salmon, Idaho 83467

RECEIVED

AUG 15 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION

James E. Risch / Governor
Steven M. Huffaker / Director

July 24, 2006

RECEIVED

JUL 26 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

Re: Water Right Application No's. 72-7577, 7578, 7579, & 7580 (Lupher)

Dear Allen,

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Sincerely,

James R. Lukens
Regional Supervisor

cc: Cindy Robertson
Walt Poole
Mark Armbruster
Mark and JoAnne Lupher
Bob Foster
Shelley Keen

SCANNED
AUG 11 2006

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. LOTH SPEICH

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

EUGENE D. FREDERICKSEN - Retired

July 20, 2006

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

RECEIVED
JUL 24 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

Dear Allen:

To follow up your letter to my clients dated June 27, 2006 and our subsequent telephone conversation, I am asking for an extension of time until August 15, 2006 to provide the additional material requested by your June 27th letter. The reason for the request for additional time is that we have asked Brockway Engineering of Twin Falls to prepare some of the hydrological data requested. Because of the engineering firms workload, it will not be possible to gather all the material and submit it to you prior to August 15th 2006.

Would you please confirm to me by telephone or otherwise upon your return to the office on Monday July 24, 2006 that requested extension of time is permissible.

Very truly yours,

FREDERICKSEN WILLIAMS MESERVY & LOTH SPEICH, LLP

ROBERT E. WILLIAMS

Returned
Call 7/24/06 & to
Granted extension
Respond until Aug 15th
ADW

REW/ch
C: Client
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SCANNED
AUG 11 2006



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

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DEPARTMENT OF
WATER RESOURCES

900 NORTH SKYLINE DRIVE, SUITE B • IDAHO FALLS, IDAHO 83402 • (208) 528-2650

JAMES E. RISCH, GOVERNOR
TONI HARDESTY, DIRECTOR

July 18, 2006

Mr. and Mrs. Mark Lupher
Epicenter Aquaculture
HC 61 Box 3016
Challis, Idaho 83226

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Thank you for the opportunity to review your application.

Sincerely,

Troy Saffle
Regional Water Quality Manager
Idaho Falls Regional Office

c: Shelly Keen, IDWR
Marti Bridges, IDEQ
Allen Merritt, IDWR

RECEIVED
JUL 27 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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AUG 11 2006

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

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August 11, 2006

RECEIVED

AUG 14 2006

DEPT. OF WATER RESOURCES
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Department of Water Resources
Allen Merritt
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301-3380

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ROBERT E. WILLIAMS

REW/ch
C: Client
C:\data\Lupher\IDWR 8-11-06.doc

SCANNED
AUG 16 2006



IDAHO DEPARTMENT OF FISH AND GAME
SALMON REGION
99 Highway 93 North
P.O. Box 1336
Salmon, Idaho 83467

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AUG 15 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION

James E. Risch / Governor
Steven M. Huffaker / Director

July 24, 2006

RECEIVED

JUL 26 2006

DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

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James R. Lukens
Regional Supervisor

cc: Cindy Robertson
Walt Poole
Mark Armbruster
Mark and JoAnne Lupher
Bob Foster
Shelley Keen

SCANNED

AUG 11 2006

Keeping Idaho's Wildlife Heritage

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. LOTH SPEICH

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

EUGENE D. FREDERICKSEN - Retired

July 20, 2006

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

RECEIVED
JUL 24 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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 letter to my clients dated June 27, 2006 and our subsequent telephone conversation, I am asking for an extension of time until August 15, 2006 to provide the additional material requested by your June 27th letter. The reason for the request for additional time is that we have asked Brockway Engineering of Twin Falls to prepare some of the hydrological data requested. Because of the engineering firms workload, it will not be possible to gather all the material and submit it to you prior to August 15, 2006.

Would you please confirm to me by telephone or otherwise upon your return to the office on Monday July 24, 2006 that requested extension of time is permissible.

Very truly yours,

FREDERICKSEN WILLIAMS MESERVY & LOTH SPEICH, LLP

ROBERT E. WILLIAMS

Returned
Call 7/24/06 &
Granted extension
Respond until Aug 15th
ADW

REW/ch
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SCANNED
AUG 11 2006



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

~~75-7577~~
RECEIVED

Aug 04 06

DEPARTMENT OF
WATER RESOURCES

900 NORTH SKYLINE DRIVE, SUITE B • IDAHO FALLS, IDAHO 83402 • (208) 528-2650

JAMES E. RISCH, GOVERNOR
TONI HARDESTY, DIRECTOR

July 18, 2006

Mr. and Mrs. Mark Lupher
Epicenter Aquaculture
HC 61 Box 3016
Challis, Idaho 83226

RE: Water Rights Application Comments

Dear Mr. and Mrs. Lupher:

The Idaho Department of Environmental Quality ("Department") has reviewed our existing water quality information near your proposed project site identified in Application 72-07577 through 72-07580.

The Department does not have any information regarding Warm Springs Creek near your facility. We would encourage you to use only the water appropriated by these applications and allow as much water as possible to travel downstream.

The Department also suggests any outlets be screened according to local Fish and Game specifications.

We do not have any other substantive comments at this time.

Please do not hesitate to contact me at 208.528.2650 for additional information we may be able to provide.

Thank you for the opportunity to review your application.

Sincerely,

Troy Saffle
Regional Water Quality Manager
Idaho Falls Regional Office

c: Shelly Keen, IDWR
Marti Bridges, IDEQ
Allen Merritt, IDWR

RECEIVED
JUL 27 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

SCANNED

AUG 11 2006

35132



IDAHO DEPARTMENT OF FISH AND GAME

SALMON REGION
99 Highway 93 North
P.O. Box 1336
Salmon, Idaho 83467

James E. Risch / Governor
Steven M. Huffaker / Director

July 24, 2006

RECEIVED
JUL 26 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

Re: Water Right Application No's. 72-7577, 7578, 7579, & 7580 (Lupher)

Dear Allen,

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Sincerely,

A handwritten signature in cursive script that reads "James R. Lukens".

James R. Lukens
Regional Supervisor

cc: Cindy Robertson
Walt Poole
Mark Armbruster
Mark and JoAnne Lupher
Bob Foster
Shelley Keen

SCANNED
AUG 11 2006

Keeping Idaho's Wildlife Heritage

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

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



ROBERT E. WILLIAMS
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EUGENE D. FREDERICKSEN - Retired

July 20, 2006

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

RECEIVED
JUL 24 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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Mark and/or Joanne Lupher

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Very truly yours,

FREDERICKSEN WILLIAMS MESERVY & LOTH SPEICH, LLP

ROBERT E. WILLIAMS

Returned
Call 7/24/06 & to
Granted extension
Respond until Aug 15th
ADW

REW/ch
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SCANNED
AUG 11 2006

72-7577



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

RECEIVED

Aug 04 06

DEPARTMENT OF
WATER RESOURCES

900 NORTH SKYLINE DRIVE, SUITE B • IDAHO FALLS, IDAHO 83402 • (208) 528-2650

JAMES E. RISCH, GOVERNOR
TONI HARDESTY, DIRECTOR

July 18, 2006

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HC 61 Box 3016
Challis, Idaho 83226

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Please do not hesitate to contact me at 208.528.2650 for additional information we may be able to provide.

Thank you for the opportunity to review your application.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy Saffle".

Troy Saffle
Regional Water Quality Manager
Idaho Falls Regional Office

c: Shelly Keen, IDWR
Marti Bridges, IDEQ
Allen Merritt, IDWR

RECEIVED
JUL 27 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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AUG 11 2006

35132

State of Idaho
Department of Water Resources
Application for Permit
RECOMMENDATION OF WATERMASTER

Application for Permit No 72-7579
Applicant's Name: EPICENTER AQUACULTURE
PO BOX 336
CHALLIS ID 83226

MARK L LUPHER
PO BOX 336
CHALLIS ID 83226

JO ANNE LUPHER
PO BOX 336
CHALLIS ID 83226

RECEIVED
JUL 20 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

Watermaster's Recommendation:

- a) ☒ I do not oppose approval of this application.
- b) ☐ I do not oppose approval of this application if it is conditioned as follows:
- c) ☐ I oppose approval of this application for the following reasons:
- d) ☐ Additional Comment:

Dated this 18TH day of July, 2006

Water District No: 170

Ryanne Brown
Watermaster's Signature

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001 13 2006



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

900 NORTH SKYLINE DRIVE, SUITE B • IDAHO FALLS, IDAHO 83402 • (208) 528-2650

JAMES E. RISCH, GOVERNOR
TONI HARDESTY, DIRECTOR

July 18, 2006

Mr. and Mrs. Mark Lupher
Epicenter Aquaculture
HC 61 Box 3016
Challis, Idaho 83226

RECEIVED

AUG 04 2006

DEPARTMENT OF
WATER RESOURCES

RE: Water Rights Application Comments

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Sincerely,

Troy Saffle
Regional Water Quality Manager
Idaho Falls Regional Office

c: Shelly Keen, IDWR
Marti Bridges, IDEQ
Allen Merritt, IDWR

RECEIVED
JUL 27 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

Frederickson, 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. LOTH SPEICH

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-MAIL: FWMA11TYS@CABLEONE.NET

EUGENE D. FREDERICKSEN - Retired

July 20, 2006

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

RECEIVED
JUL 24 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

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ROBERT E. WILLIAMS

REW/ch
C: Client
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Returned
Call 7/24/06 & to
Granted extension
Respond until Aug 15th
AD



IDAHO DEPARTMENT OF FISH AND GAME

SALMON REGION
99 Highway 93 North
P.O. Box 1336
Salmon, Idaho 83467

James E. Risch / Governor
Steven M. Huffaker / Director

July 24, 2006

RECEIVED
JUL 26 2006
DEPT. OF WATER RESOURCES
SOUTHERN REGION

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

Re: Water Right Application No's. 72-7577, 7578, 7579, & 7580 (Lupher)

Dear Allen,

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Sincerely,

A handwritten signature in cursive script that reads "James R. Lukens".

James R. Lukens
Regional Supervisor

cc: Cindy Robertson
Walt Poole
Mark Armbruster
Mark and JoAnne Lupher
Bob Foster
Shelley Keen

Keeping Idaho's Wildlife Heritage

Equal Opportunity Employer • 208-334-3700 • Fax: 208-334-2114 • Idaho Relay (TDD) Service: 1-800-377-3529 • <http://fishandgame.idaho.gov>



Epicenter Aquaculture, Incorporated
P. O. Box 336
Challis, Idaho 83226
208-879-5786

December 16, 2005

RECEIVED
DEC 20 2005
DEPARTMENT OF
WATER RESOURCES

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

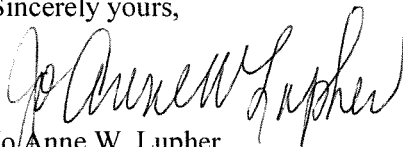
RECEIVED
DEC 22 2005
Department of Water Resources
Southern Region
RECEIVED
JAN 09 2006
DEPARTMENT OF
WATER RESOURCES

Re: Application of Appropriate Water no. 72-7577 ✓
Application of Appropriate Water no. 72-7578
Application of Appropriate Water no. 72-7579
Application of Appropriate Water no. 72-7580

Dear Sir:

This is in response to your letters of November 21, 2005 regarding the above water right applications. It is to inform the Department of our continuing interest in applying for the permits to appropriate water as evidenced by the above application numbers. It is our desire to see the applications to completion.

Sincerely yours,



JoAnne W. Lupher,
Secretary/Treasurer

P.S. Please note our new mailing address: P. O. Box 336, Challis, ID 83226

RECEIVED

DEC 09 2005

Department of Water Resources
Southern Region

November 21, 2005

EPICENTER AQUACULTURE
MARK L LUPHER
JO ANNE LUPHER
HC 61 BOX 3016
CHALLIS ID 83226

Re: Application to Appropriate Water no. 72-7577

Dear Applicant:

The records of the Idaho Department of Water Resources (the Department) show that you filed an application to appropriate water no. 72-7577 with the Department proposing diversion of water from a water source in the Salmon River Basin or the Clearwater River Basin. In April 1993, a moratorium order signed by the Director of the Department prohibited processing and approval of most new permits to appropriate water proposing to divert and use water from surface water sources in the Salmon River and Clearwater River Basins. In October 1999, a second moratorium order signed by the Director of the Department prohibited processing and approval of most new permits to appropriate water proposing to divert and use water from surface water and ground water sources within and upstream of designated wilderness areas in the Salmon River and Clearwater River Basins. Recently, the Director of the Department issued an order rescinding both moratoriums.

Enclosed is the order titled *Order Rescinding Salmon-Clearwater Basin Moratorium and Wilderness Moratorium*. The order directs Department staff to begin processing applications to appropriate water that were held during the moratoriums. Applications will be processed in the approximate order of the Department's receipt of the applications. A reasonable number of applications will be processed each month considering other duties assigned to Department staff. A document attached to the order titled "Statement of Available Procedures and Applicable Time Limits" explains possible actions you might take should you disagree with the order.

Because of the passage of time since you filed your application for permit to appropriate water, ownership of land, desire to use water, or other circumstances may have changed. **This letter requests that you inform the Department in writing, at the address in the letterhead, of your continuing interest in applying for a permit to appropriate water. This letter is a request for additional information under Idaho Code § 42-204. If the requested written statement of continuing interest is not received by the Department within thirty (30) days**

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DEC 06 2005

November 21, 2005

Page 2

of the date of this letter, the Department will assume you are no longer interested in applying for a permit to appropriate water, and will void your application pursuant to Idaho Code § 42-204. If you wish to voluntarily withdraw your application, please complete the enclosed withdrawal form and return it to this office.

If you have questions, please call the Department at (208)287-4952.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary Spackman". The signature is fluid and cursive, with a large initial "G" and a long, sweeping underline.

Gary Spackman, Chief
Water Allocations Bureau

Enclosures (2)

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

IN THE MATTER OF APPLICATIONS AND)	)	ORDER RESCINDING
PERMITS FOR THE DIVERSION AND USE)	)	SALMON - CLEARWATER
OF SURFACE WATER AND GROUND)	)	BASIN MORATORIUM AND
WATER IN THE SALMON RIVER AND)	)	WILDERNESS
CLEARWATER RIVER BASINS)	)	MORATORIUM

FINDINGS OF FACT

Salmon - Clearwater Basin Moratorium

1. On May 15, 1992, the Director of the Department of Water Resources ("Director" or "Department") issued a *Moratorium Order* enjoining the processing of most applications to appropriate surface water sources within the Salmon and Clearwater River Basins. On April 30, 1993, the Director issued an *Amended Moratorium Order* ("Salmon - Clearwater Order"), again enjoining the processing of most applications to appropriate water.

2. The Salmon - Clearwater Order stated:

This moratorium shall be in effect on and after the date it is entered until withdrawn or modified by further order of the Director. A future decision to continue or rescind the moratorium will consider all efforts being made within the region toward the recovery of the salmon.

3. Since the issuance of the Salmon - Clearwater Order, significant efforts have been undertaken in the Salmon River and Clearwater River Basins for the recovery of salmon. These activities include:

- Protection of instream flows in streams and rivers to benefit anadromous fish habitat;
- A process for re-establishment of flows in dewatered anadromous fish streams by delivery of rented or acquired water rights to the dewatered reaches;
- Screening and control of irrigation diversions;
- Consolidation of irrigation diversions;

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DEC 06 2005

- Riparian habitat improvement projects; and
- Administration of water rights following creation of the Upper Salmon River Water District (creation anticipated at the end of 2005).

Wilderness Moratorium

4. On October 26, 1999, the Director issued a *Moratorium Order* ("Wilderness Order") enjoining further processing and development of pending applications and permits for the diversion and use of surface and ground water in and tributary to the Selway-Bitterroot Wilderness Area, the Gospel-Hump Wilderness Area, and the Frank Church River of No Return Wilderness Area.

5. The Director issued the Wilderness Order in response to an Idaho Supreme Court decision titled *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999). The *City of Challis* decision affirmed a 1997 Snake River Basin Adjudication (SRBA) District Court decision that the United States is entitled to reserved water rights to all unappropriated water within the Selway-Bitterroot, the Gospel-Hump, and the Frank Church River of No Return Wilderness areas. The Director determined the recognition of the federal reserved water rights to include all unappropriated water within and upstream of the wilderness areas.

6. The Wilderness Order affected all water permits and applications for permit for which proof of beneficial use had not been filed with the Department in the Salmon River Basin upstream from the location where the Salmon River leaves the Gospel-Hump Wilderness Area in Section 3, Township 24 North, Range 4 East, Boise Meridian, and in the Clearwater River Basin upstream from the location where the Selway River leaves the Selway-Bitterroot Wilderness in Section 7, Township 31 North, Range 10 East, Boise Meridian.

7. The Wilderness Order required all water permit holders to cease development authorized by the permits. Some permit holders submitted proof of beneficial use for the beneficial use completed as of the date of the Wilderness Order. Other permit holders ceased development, and the requirement for filing proof of beneficial use was stayed until the Wilderness Order was amended or lifted to allow additional development.

8. The Idaho Supreme Court granted a petition for rehearing of the *City of Challis* decision, and, on October 27, 2000, the Idaho Supreme Court issued another decision titled *Potlatch Corp. v. United States of America*, 134 Idaho 916, 12 P.3d 1260 (2000). The Court reversed its previous decision in *United States v. City of Challis* and held the Wilderness Act and associated wilderness designations did not create federal reserved water rights for the Frank Church River of No Return, the Selway-Bitterroot, and the Gospel-Hump Wilderness Areas.

Wild and Scenic Rivers

9. In the case of *Pollatch Corp. and Hecla Mining v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000), the Idaho Supreme Court determined that federal designation of Wild and Scenic Rivers in Idaho reserved water rights for the federal government to satisfy the intent of the designation. The Idaho Supreme Court remanded the case to the SRBA District Court for quantification of the reserved water rights for the Wild and Scenic Rivers.

10. On November 16, 2004, the SRBA District Court entered an Amended Order Approving Stipulation and Entry of Partial Decrees in SRBA Case No. 39576 (Consolidated Subcase No. 75-13316 Wild & Scenic Act Claims). The amended order and the associated partial decrees define federal reserved water rights nos. 75-13316, 77-11941, 77-13844, 78-11961, 81-10472, 81-10513, and 81-10625 in Wild and Scenic Rivers in the Salmon and Clearwater River basins. A stipulated agreement (hereafter referred to as the "Wild & Scenic Agreement") between the United States and parties to the original subcases prior to consolidation forms the framework for the partial decrees issued by the SRBA District Court. The Wild & Scenic Agreement and the partial decrees defining the federal reserved water rights set forth subordination provisions under which the federal reserved water rights are subordinate to other existing and future water rights, describe limitations on appropriation and beneficial use under existing and future water rights to which the federal reserved water rights are subordinate, and provide specific requirements for the administration of water rights within the Salmon and Clearwater River basins.

CONCLUSIONS OF LAW

1. In issuing the Salmon - Clearwater Order and the Wilderness Order, the Director relied on Idaho Code § 42-1805(7). The subsection grants the Director the authority:

After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of the minimum flow provisions of the state water plan.

2. The Salmon - Clearwater Order was issued after the Director found and concluded that further appropriations of surface water at the time would not be in the local public interest and would not be consistent with conservation of the waters of the State of Idaho.

3. Enhancements to streamflows, other improvements to anadromous fish habitat, the execution of the Wild & Scenic Rivers Agreement, and the determination of related federal reserved water rights, have addressed the underlying basis upon which the *Amended Moratorium Order* was issued.

4. The prohibition of new water right appropriations by the Director's Salmon – Clearwater Order dated April 30, 1993, can be rescinded and processing of applications to appropriate surface water in the Salmon River and Clearwater River Basins can be allowed.

5. The Wilderness Order was issued following the initial Idaho Supreme Court decision of *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999). Based on the Court's decision, the Director determined there was no additional water available for appropriation. Upon reconsideration, the subsequent Idaho Supreme Court decision, *Potlatch Corp. v. United States of America*, 134 Idaho 916, 12 P.3d 1260 (2000), determined that the wilderness designations did not reserve water rights for the wilderness. As a result of the latest Supreme Court decision in *Potlatch*, the Wild and Scenic Rivers Agreement, and related federal reserved water rights, there is additional water available for appropriation within the limitations described by the Wild & Scenic Agreement and the partial decrees for related federal reserved water rights.

6. The prohibition of new water right appropriations and development authorized by permits to appropriate water by the Director's Wilderness Order dated October 26, 1999, can be rescinded and processing of applications to appropriate water and continued development authorized under existing permits to appropriate water can be allowed.

7. Permit holders who were prohibited from completing application of water for the beneficial use authorized under existing permits are entitled to additional time to complete application of water for beneficial use. For each permit, the additional time granted for completing development should be equal to the number of days from the date the Wilderness Order was issued to the date proof of beneficial use was originally due under the permit. The Department should issue an order subsequent to this order establishing the additional time to complete development delayed by the Wilderness Order and specifying the revised date for filing proof of beneficial use for each permit.

ORDER

IT IS HEREBY ORDERED that the *Amended Moratorium Order*, issued on April 30, 1993, prohibiting appropriations of surface water in the Salmon and Clearwater River Basins, is **RESCINDED**.

IT IS FURTHER ORDERED that the *Moratorium Order*, issued on October 26, 1999, prohibiting appropriations of surface and ground water and development of permits for the use of surface water or ground water in and tributary to the Selway-Bitterroot Wilderness Area, the Gospel-Hump Wilderness Area, and the Frank Church River of No Return Wilderness Areas, is **RESCINDED**.

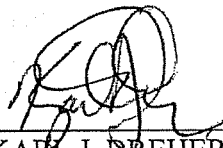
IT IS FURTHER ORDERED that permit holders who were prohibited from completing beneficial use of water authorized under existing permits by the *Moratorium Order* issued on October 26, 1999, are granted additional time for completing the beneficial use authorized. For

each permit, the additional time granted for completing development shall be equal to the number of days from the date the Wilderness Order was issued to the date proof of beneficial use was originally due for the permit. The Department shall issue an order subsequent to this order allowing additional time for completion of beneficial use delayed by the Wilderness Order and specifying a date for filing proof of beneficial use for each permit.

IT IS FURTHER ORDERED that appropriations of ground water and surface water within the Salmon River Basin may resume subject to the requirements of the Wild and Scenic Agreement and the federal reserved water rights decreed in accordance with that stipulated agreement.

IT IS FURTHER ORDERED that Department staff shall process new applications to appropriate water generally in the chronological order of the receipt of the applications. Department staff shall also process a reasonable number of applications per month considering all other duties assigned to Department staff.

Dated this 9th day of November, 2005.



KARL J. DREHER
Director

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

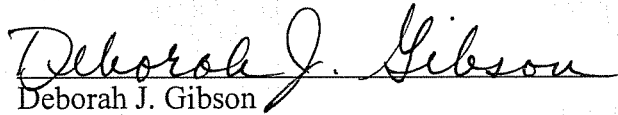
The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2005, a true and correct copy of the above and foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Order Rescinding Salmon-Clearwater Basin Moratorium and Wilderness Moratorium
Explanatory Information to Accompany a Final Order

See attached service list.


Deborah J. Gibson
Administrative Assistant

Name	Address	City	State	Postal Code
PATRICK W LEE	C/O JOHN T BROWN PO BOX 61	SUN VALLEY	ID	83353
STANLEY SEWER ASSN	PO BOX 71	STANLEY	ID	83278
SALMON RIVER HEREFORD RANCH	HC 63 BOX 1760	CHALLIS	ID	83226
ELINOR J CORRIGAN	PO BOX 569	CHALLIS	ID	83226
MOUNTAIN SPRINGS WATER INC	PO BOX 628	CHALLIS	ID	83226
US DEPT OF INTERIOR	BUREAU OF LAND MANAGEMENT SALMON DISTRICT 1206 S CHALLIS ST	SALMON	ID	83467
ROBERT A PIVA	HC 63 BOX 1641	CHALLIS	ID	83226
DANA C HURLESS	HC 67 BOX 621	CLAYTON	ID	83227
TRENT J ROMAN	HC 82 BOX 4023-4	CHALLIS	ID	83226
PARKINSON FOUNDATION SEED FARM	C/O BOB PARKINSON PO BOX 65	ELLIS	ID	83235
THOMPSON CREEK MINING CO	PO BOX 62	CLAYTON	ID	83227
CHALLIS IRRIGATION CO	PO BOX 71	CHALLIS	ID	83226
TAIT P JOHNSON	1317 N 141ST AVE	OMAHA	NE	68154
ARCHIE SHERWOOD	PO BOX 163	CLAYTON	ID	83227
L & W STONE CORP	PO BOX 789	CHALLIS	ID	83226
DON M ONEAL	8 ONEAL LN	MAY	ID	83253-2003
US DEPT OF INTERIOR	BUREAU OF LAND MANAGEMENT SALMON DISTRICT 1206 S CHALLIS ST	SALMON	ID	83467
RICHARD L TYLER	796 LEE CREEK RD	LEADORE	ID	83464
ERNEST GEORGE HOLSCHER	BOX 96	LEADORE	ID	83464
ROBERT L THOMAS	12 REBA LN	SALMON	ID	83467
EDWARD M SNOOK	1205 HWY 28	SALMON	ID	83467
STEPHANIE SNOOK	505 W WINDSOR CT	COEUR D ALENE	ID	83815
HARRY L COLEMAN	PO BOX 70	LEADORE	ID	83464-0070
SHIRLEY R COLEMAN	435 TEE CIR	ST GEORGE	UT	84770
JAMES KRUCKEBERG	411 EIGHTEEN MILE RD	LEADORE	ID	83464-5030
GERALD R MORPHEY	PO BOX 625	SALMON	ID	83467-0625
ALBERT D ANDERSON	5425 BUNDY AVE NORTH	KEISER	OR	97303
JERRY G BLACKBURN	PO BOX 41	LEADORE	ID	83464
VELMA MAHAFFEY	PO BOX 14	LEMHI	ID	83465
DALE A PETERSON	PO BOX 67	LEADORE	ID	83464
WILLIAMS LAKE RECREATIONAL WATER & SEWER DISTRICT	PO BOX 82	SALMON	ID	83467
E J SCHWARZENBERGER	PO BOX 146	UCON	ID	83454
MERRIDEE S OVERACKER	1510 HWY 93 N	SALMON	ID	83467
MICHAEL J OVERACKER	162 HIGHWAY 93 N	SALMON	ID	83467-5301
LEWIS E ROSS	HC 10 BOX 112	GIBBONSVILLE	ID	83463
THOMAS CHARLES PIKE	3478 SALMON RIVER RD	SHOUP	ID	83469-6506
J REX TOLMAN	41 CORBETT LN	SALMON	ID	83467
SALMON RIVER PROPERTIES INC	PO BOX 774	SALMON	ID	83467
DONALD L HAWKINS	14429 WATKINS DR	LA MIRADA	CA	90638
DIXIE GRAVES	PO BOX 963	SALMON	ID	83467
GUY M CARLSON	PO BOX 319	RIGGINS	ID	83549
JOE B SCOTT	380 E PARKCENTER BLVD STE 100	BOISE	ID	83706
WELLS LIVESTOCK INC	512 N BROADWAY	BUHL	ID	83316
JACK A WALKER		YELLOW PINE	ID	83677
SALMON RIVER TOURS CO	PO BOX 779	NORTH FORK	ID	83466
KENNETH D CASPER	812 7TH ST S	NAMPA	ID	83651
DALE J LACRONE	BOX 63	NEW PLYMOUTH	ID	83655
UNIVERSITY OF IDAHO REGENTS	C/O GERARD BILLINGTON FINANCE & ADMINISTRATION PO BOX 443162	MOSCOW	ID	83844-3162
BARBARA G PYLE	77 SILVER FOX TR	MC CALL	ID	83638
STEVE M WRIGHT	PO BOX 1450	MCCALL	ID	83638
RICHARD L PULLEN	STAR RT	POLLOCK	ID	83547
ROBERT J KYRK	HC75 BOX 3546	NEW MEADOWS	ID	83654
THOMAS D MEES	1882 POLE CREEK RD	COUNCIL	ID	83612
WAYNE H REDENBAUGH	PO BOX 275	POLLOCK	ID	83547
RAYMOND K STOLTEY	HC 75 BOX 3556	NEW MEADOWS	ID	83654

DELBERT M WELCH	PO BOX 962	VALDEZ	AK	99686
PAUL SAND	PO BOX 16	WHITE BIRD	ID	83554
JAMES E BONATO	PO BOX 350	LUCILE	ID	83542
BONNIE E KANNADA	PO BOX 55	WHITE BIRD	ID	83554
EUGENE H TENNIES	HCR 75 BOX 32	KOOSKIA	ID	83539
RUSSELL C TRAINOR	HCR 75 BOX 38 A	KOOSKIA	ID	83539
USDA FOREST SERVICE	NEZ PERCE NATIONAL FOREST □ SUPERVISORS OFFICE □ 1005 HIGHWAY 13	GRANGEVILLE	ID	83530
US DEPT OF AGRICULTURE	US FOREST SERVICE □ CLEARWATER NATIONAL FOREST □ 12730 HWY 12	OROFINO	ID	83544 9333
FRANK CAPITO	PO BOX 2545	COEUR D ALENE	ID	83816
GARY BOWLING	3366 N CROFT WAY	EAGLE	ID	83616
AHSAHKA WATER & SEWER DIST	PO BOX 37	AHSAHKA	ID	83520
IDAHO WATER RESOURCE BOARD	PO BOX 83720	BOISE	ID	83720-0098
DON R BERRY	PO BOX 424	LEWISTON	ID	83501
CITY OF KOOSKIA	PO BOX 126	KOOSKIA	ID	83539-0126
MARK LADOUX	PO BOX 149	PECK	ID	83545-0149
JOSEPH SCHNELL	RR 2 BOX 311A	GRANGEVILLE	ID	83530
CITY OF KENDRICK	PO BOX 195	KENDRICK	ID	83537
PORT OF LEWISTON	1626 6TH AVE N	LEWISTON	ID	83501

RECEIVED

APR 07 2004

Department of Water Resources

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP

117 South Adams Street

P.O. Box 168

Jerome, ID 83338

Telephone: (208) 324-2303

Facsimile: (208) 324-3135

Attorney for Applicants

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 AND
APPLICATIONS FOR PERMITS Nos.
72-07577 and 72-07578 IN THE
NAME OF MARK L. AND/OR
JOANNE LUPHER, DBA EPICENTER
AQUACULTURE

AFFIDAVIT IN SUPPORT OF
PETITION IN OPPOSITION TO
ISSUANCE OF PROPOSED
DEFAULT ORDER

STATE OF IDAHO)

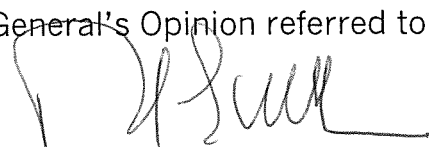
:ss.

County of Jerome)

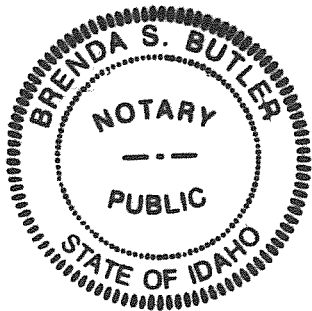
ROBERT E. WILLIAMS, being duly sworn deposes and says as follows:

1. I am the attorney for the Applicants.

2. Exhibits A through P attached to the Petition in Opposition to Issuance of Proposed Default Order, filed herewith, are true and correct copies of the correspondence, order and Attorney General's Opinion referred to in the Petition.


ROBERT E. WILLIAMS

SUBSCRIBED AND SWORN To before me this 5th day of April, 2004.



Brenda S. Butler

Notary Public for Idaho

Residing at:

Comm. Expires:

Gooding
3/5/2010

CERTIFICATE OF SERVICE

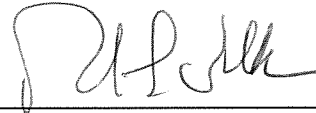
I, the undersigned, hereby certify that on the 5th day of April, 2004, I caused to be served the foregoing document as follows:

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

- ☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/331-1202
☐ Hand-Delivered - Court Folder
☐ Other _____

Peter R. Anderson, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
1301 N Orchard St
Boise ID 83706

- ☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/327-7866
☐ Hand-Delivered - Court Folder
☐ Other _____



ROBERT E. WILLIAMS

RECEIVED

APR 07 2004

Department of Water Resources

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693

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117 South Adams Street

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Attorney for Applicants

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 AND
APPLICATIONS FOR PERMITS Nos.
72-07577 and 72-07578 IN THE
NAME OF MARK L. AND/OR
JOANNE LUPHER, DBA EPICENTER
AQUACULTURE

PETITION IN OPPOSITION
TO ISSUANCE OF PROPOSED
DEFAULT ORDER

COME NOW, the Applicants, MARK L. LUPHER and JOANNE LUPHER, dba EPICENTER AQUACULTURE, by and through their attorney, Robert E. Williams of the firm FREDERICKSEN, WILLIAMS, MESERVY & LOTH SPEICH, LLP, and petition the Hearing Officer that the default order contained in the Notice of Proposed Default Order dated March 19, 2004, not be entered. The grounds upon which this petition are brought are as follows:

I.
A DEFAULT ORDER IS NOT APPROPRIATE AT THIS STAGE OF THE PROCEEDINGS.

IDAPA 37.01.01700 provides, in pertinent part, as follows:

“Notice of Proposed Default After Failure to Appear. If an Applicant or Claimant or Appellant, Petitioner, Complainant or moving party fails to appear at the time and place set for hearing on an application or claim or appeal, petition, complaint or motion, the presiding officer may serve upon all parties a notice of a proposed default order denying the application, claim, or appeal, petition, complaint, or motion...”

The Applicants herein have appeared in this matter. The Applicants have not failed to appear at a time and place set for hearing on an application, claim, appeal, petition, complaint or motion. Therefore, under the terms of the rule upon which the proposed order of default is based, there are no grounds for default. A Default Order should not be issued on the basis of IDAPA 37.01.01700.

II.
THE FAILURE TO SUBMIT A FINAL RESOLUTION OF THE LEASE AGREEMENT DISPUTE, WHICH UNDERLIES THE PENDING APPLICATIONS ABOVE REFERENCED, IS EQUALLY THE RESPONSIBILITY OF THE PROTESTANT.

Under the unique circumstances of this proceeding, it is inappropriate that the pending applications for appropriation and transfer be finally considered until a final resolution of the lease issues has been made. A chronology of the attempts to resolve the issues under the lease, and references to relevant documents, where appropriate, is as follows:

A. Robert E. Williams appeared on behalf of the Applicants in the present proceedings before the Idaho Department of Water Resources on August 6, 2002. At the time of this appearance, lengthy discussion had been held between the parties regarding the selection of an arbitrator. See **EXHIBIT A** attached hereto consisting of twelve (12) separate pieces of correspondence between the parties regarding the selection of an arbitrator of the dispute, arranged in reverse chronological order. The parties were unable to agree upon the selection of an arbitrator. Daniel Hurlbutt, however, was agreed upon to act as a mediator of all disputes.

B. Judge Hurlbutt conducted the mediation on October 15, 2002. Following the conduct of the mediation, counsel for both parties advised the Hearing Officer that they remained optimistic regarding the resolution of the dispute. They asked the Hearing Officer to take no further action regarding this matter until such time as he was advised by the parties to do so. This conversation was noted by the Hearing Officer in paragraph 2 of the Notice of Proposed Default Order dated March 19, 2004, as having occurred March 14, 2003.

C. Following March 14, 2003, substantial negotiations regarding settlement of the water right and lease issues ensued. The negotiations took place in the form of correspondence and telephone calls between counsel.

D. Applicants initially proposed to assign their rights in the pending applications for transfer and appropriation to the Protestants on the condition that the applications be approved as submitted. The first letter is dated March 19,

2003, a copy of which is attached hereto as **EXHIBIT B**. In response to that proposal, correspondence from the Protestant's attorney was received April 4, 2003, a copy of which is attached hereto as **EXHIBIT C**. This exhibit was not received by the Applicants' attorney until April 17, 2003. **EXHIBIT D** was provided to Protestant's counsel on April 18, 2003. This letter continued discussions on new lease arrangements and still considered the assignment of applications for water right transfer and appropriation as a viable option. **EXHIBIT D** was replied to by correspondence dated June 6, 2003, a copy of which is attached hereto as **EXHIBIT E**. In response, Applicants returned correspondence to Protestant's counsel on June 20, 2003, a copy of which is attached hereto as **EXHIBIT F**. Protestant's counsel returned correspondence dated August 22, 2003, a copy of which is attached hereto as **EXHIBIT G**. In the August 22, 2003 correspondence, all new lease options proposed by Applicants were completely disregarded, and the original defaults on the lease, which were the subject matter of the state court complaint filed December 11, 2000, with counterclaim filed February 1, 2001, (stayed by Order of the District Court dated July 6, 2001) were rehashed. In response, Applicants' counsel provided correspondence dated September 5, 2003, a copy of which is attached hereto as **EXHIBIT H**.

E. Protestant's attorney responded to Exhibit H six (6) weeks later on October 16, 2003, a copy of which correspondence is attached hereto as **EXHIBIT I**. Applicants' counsel responded on October 24, 2003, a copy of which letter is attached hereto as **EXHIBIT J**.

F. In response to requests from the Hearing Officer, Applicants submitted a status report dated December 30, 2003, a copy of which is attached hereto as **EXHIBIT K**. Applicants have never received a copy of any status report filed by the Protestants if in fact any status reports have been filed by Protestant.

G. On December 30, 2003, Applicants' counsel provided correspondence to Protestant's counsel in an effort to bring the state court issues to a final resolution proposing to agree that arbitration would be binding, thus eliminating the need to return to District Court on the conclusiveness of the arbitration when it is completed. A copy of this correspondence is attached hereto as **EXHIBIT L**. Protestant's attorney responded by letter dated January 13, 2004, a copy of which is attached hereto as **EXHIBIT M**, to which Applicants' attorney replied on January 20, 2004, by correspondence, a copy of which is attached hereto as **EXHIBIT N**. Applicants remain ready to resolve the state court issues under the lease by binding arbitration, thus removing uncertainties arising from Judge Moss's Order on Motion to Reconsider in the state court action dated August 8, 2001, a copy of which is attached hereto as **EXHIBIT O**.

As the Hearing Officer has noted several times in this matter, most recently in the Order on Show Cause hearing dated April 16, 2002, determination of the ability of an Applicant to proceed with a water transfer or appropriation application should be resolved in state court. By virtue of Judge Moss's order dated August 8, 2001, however, the parties have been unable to complete these state court proceedings until arbitration had first been at least attempted. As amply

demonstrated by the correspondence and other exhibits attached hereto, the failure to get to arbitration at this point has not been due to the lack of effort of the Applicants.

The exhibits filed with this petition, as well as the other materials in the case file, show that the parties have worked mightily to accomplish the required arbitration. Though an arbitrator was never agreed to, a mediator was. Even after the conclusion of the mediation, the parties remained optimistic that the disputes could be resolved as demonstrated by the many proposals and modifications to proposals submitted over several months.

Judge Moss's order established that, in his view, Idaho law is not conclusive as to whether arbitration may be non-binding or binding. His order required the parties to return to him after the completion of an arbitration for him to determine whether it was binding or not. In an effort to avoid any further dispute as to the binding nature of arbitration, Applicants in good faith have proposed and remain willing, to stipulate that an arbitration of the state court issues be binding. That would remove further uncertainty to both parties and bring the state court issues to a final conclusion. Applicants' good faith is further demonstrated by their willingness to assign the pending application to the Protestants on the basis that they be approved as now filed. No explanation has been provided by the Respondent as to why the substance of either of these proposals is not acceptable.

Applicants believe it to be incorrect, and very unfair under all the circumstances related by this petition, to require dismissal of the pending

application for transfer and appropriation. Such dismissal would imply, that the Applicants have been the sole cause of the inability to complete arbitration. The Applicants respectively suggest that such is not the case.

The policy of this state has long favored the resolution of disputes on the merits and not upon the basis of default. (See *Stirm v. Puckett*, 107 Idaho 1046, 695 P.2d 431, Idaho App. 1985; *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721, Idaho App., 1985; *Loomis, Inc. v. Cudahy*, 104 Idaho 196, 656 P.2d 1359, Idaho, 1982; *Hawkes v. Sparks*, 108 Idaho 917, 702 P.2d 1337, Idaho App., 1985; *Kovachy v. DeLeusomme*, 122 Idaho 973, 842 P.2d 309, Idaho App., 1992; *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274, Idaho App., 1993) Applicants are anxious to have their disputes with the Protestants resolved on the merits. As shown below, if the Applicants' status as valid tenants under the lease is vindicated by the state court action, the Applicants have a clear right to pursue the present applications even though they are Lessees. The issues presented by the pending applications should be continued to be held in abeyance while the state court issues are decided on their merits. Applicants should not be handicapped in the pursuit of their state court rights by dismissal of the pending applications which dismissal may have a significant impact on the state court litigation.

**III.
STATUS AS A LESSEE IS SUFFICIENT TO SUPPORT APPLICATIONS FOR TRANSFERS AND
APPROPRIATIONS OF WATER RIGHTS.**

The Court has previously referred to *Federal Land Bank of Spokane vs. Union Central Life Insurance Co.*, 51 Idaho 490 (1932), wherein the Court established the rule that before a person may have the place of use of water changed, he must show 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. Hence, the necessity of the current state court action. The lease which underlies this dispute provides that the Applicants have the right to 16.0 cfs of water for their fish propagation facilities. The applications for transfer and appropriation became necessary only when it was determined, after possession of the property had been taken, that the place of use provided by the existing water rights was incorrect and that the existing water license only provided for 6.9 cfs instead of the promised and anticipated 16.0 cfs. The right of a tenant to appropriate water for beneficial use on land owned by the appropriator was established in *First Security Bank v State*, 49 Idaho 740, 291 P 1064 (1930). This principle was acknowledged as valid by the Idaho Attorney General in its Option No. 88-6, issued October 21, 1988, wherein the Attorney General acknowledged the principles above set forth. See copy of Attorney General's Opinion attached hereto as **EXHIBIT P**.

**IV.
CONCLUSION**

Completion of the arbitration of the state court dispute has not been due to the unilateral actions of the Applicants. The Applicants have in good faith negotiated with the Protestants to resolve the issues of the presently pending applications and to conclude the state court issues. The issues of this proceeding should be resolved on their merits and should not be permitted to be decided by default. For all these reasons, Applicants request that the proposed default order contained in the Notice provided by the Hearing Officer dated March 19, 2004 be withdrawn, and that the Hearing Officer enter an order staying all further proceedings on the pending applications until arbitration has been completed.

Respectfully submitted this 5th day of April, 2005.

FREDERICKSEN, WILLIAMS, MESERVY
& LOTH SPEICH, LLP



ROBERT E. WILLIAMS
Attorney for Applicants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 5th day of April, 2004, I caused to be served the foregoing document as follows:

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/331-1202
☐ Hand-Delivered - Court Folder
☐ Other _____

Peter R. Anderson, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
1301 N Orchard St
Boise ID 83706

☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/327-7866
☐ Hand-Delivered - Court Folder
☐ Other _____



ROBERT E. WILLIAMS

EXHIBIT A

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

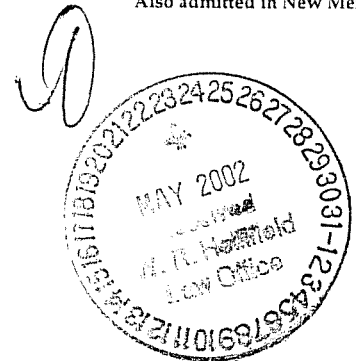
RANSOM J. BAILEY
SUSAN E. BUXTON*
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*

JOHN J. MCFADDEN*
Of Counsel

* Also admitted in Oregon
† Also admitted in Washington
‡ Also admitted in South Dakota
* Also admitted in New Mexico

May 22, 2002

William R. Hollifield
Hollifield and Bevan, P.A.
P.O. Box 66
Twin Falls, Idaho 83303-0066



RE: Lupher/L&M Angus Arbitration

Dear Bill:

I believe we have a conference call set up today at 4:00 p.m. with Judge Hurlbutt to discuss this matter. I'm not sure what you have discussed with Judge Hurlbutt, but I am more than willing to participate in the call. Nevertheless, I need to respond to the issues you raised in your letters of May 8, 2002.

First, regarding your selection of Judge Hurlbutt and conflict of interest concerns with Judge Meyers and Roos. We had originally discussed using Judge Roos or Judge Meyers because they agreed to do the arbitration without charge. I did not have any concerns over their conflicts because I don't know that they have any. I still have no problems with either of them. Both of them are fine judges and fully capable of doing this arbitration. You indicated your client might have a problem with Judge Meyers because of some business issue, but I asked him about this, and he said he didn't have any business relationship with the Luphers. If there is a business relationship, please let me know what it is.

In order to help both our clients, I have been under the impression that we would use a geographically neutral judge who would serve as arbitrator without cost. You never got back to me about any concern with this until I got a letter saying you had selected Judge Hurlbutt either as a single arbitrator or as your pick for a three arbitrator panel. Certainly you are free to select one of the three if you elect to do so; however, I still question why you would want to pay for an arbitrator if the two judges were willing to do so without charge. Is there some reason for this change of course?

Notwithstanding all of this, I will proceed with the understanding that you want to use Judge Hurlbutt as your selection. However, your client will be responsible for his fees and costs.

William R. Hollifield

May 22, 2002

Page 2

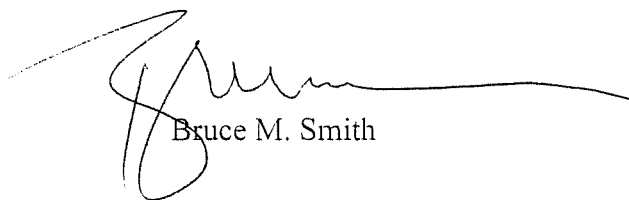
As for my client's choice under the lease, I am recommending Judge Meyers or Judge Roos. Since they do not intend to charge any fees, my client will not have fees although, to be fair to the judges, I am recommending that we should cover any nonreimbursable costs.

As for the assertions in your May 8 letter regarding your client's default, I do not see any benefit in rehashing what we have discussed several times before. You did put funds in your trust account as far as I know, and you did tell me were withdrawing them. But the lease has been and is in default. Your client has done nothing to cure the defaults. To the contrary, your client has continuously denied that there has been any default. It is simply not credible for your client to assert that they have attempted to cure when they deny the existence in the first place.

As a recap, your clients misused the water provided them under the lease, denied my client access to financial records, built facilities without approval, filed suit without notice or even attempting to comply with the dispute resolution provisions in the lease, filed for water rights to which they are not entitled, and are even trying to transfer my client's water rights. All of this has been disclosed to you. Much of this information is in the hands of your client. When you asked about trying to resolve the differences, I told you that full and complete financial disclosure was a prerequisite, a point which your client has refused to acknowledge, much less agree to. Withdrawal of the water right applications is also a requirement. So I repeat, are your clients prepared to do this? I look forward to hearing from you.

Sincerely,

MOORE SMITH BUXTON & TURCKE,
CHARTERED



Bruce M. Smith

BMS:ck

Cc: Client

Hollifield and Bevan, P.A.

249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066

William R. Hollifield, Attorney at Law
G. Richard Bevan, Attorney at Law

Telephone: (208) 734-5610
FAX: (208) 734-8077

May 8, 2002

VIA FACSIMILE (208) 331-1202

Bruce M. Smith
Attorney at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702

Dear Mr. Smith:

Re: Lupher/L&M Angus Ranch – Department of Water Resources

During a mediation with Judge Hurlbutt as a mediator, he indicated he could act as a single arbitrator if you agreed, or as one of three. You were still concerned about a conflict of interest with Judges Meyers and Roos, and when I realized Judge Hurlbutt was doing arbitration during that mediation, I inquired and he agreed.

I do not understand your apparent confusion as expressed in your April 22, 2002 letter. The Lease provides for three arbitrators; that each party pick one arbitrator; and those two pick another arbitrator. I informed you my clients had chosen Judge Dan Hurlbutt.

I further requested that Judge Hurlbutt send each of us his agreement for arbitration, but have not received it.

I am available for a conference call as follows:

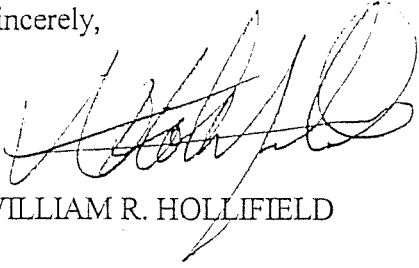
May 10 in morning;
May 13 in afternoon;
May 15 in morning.

I will have my legal assistant coordinate the time and date.

May 8, 2002

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Hollifield', with a large, stylized flourish at the end.

WILLIAM R. HOLLIFIELD

le
cc Dan Hurlbutt

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702

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

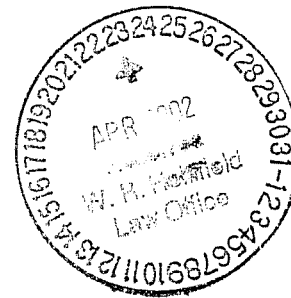
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TAMMY A. ZOKAN*

JOHN J. MCFADDEN*
Of Counsel

* Also admitted in Oregon
* Also admitted in Washington
* Also admitted in South Dakota
* Also admitted in New Mexico

April 22, 2002

Judge Daniel C. Hurlbutt
392 Falls Avenue
Twin Falls, Idaho 83301



RE: Morganroth/Lupher Arbitration

Dear Judge Hurlbutt:

Bill Hollifield and I have been trying to agree on an arbitrator for this matter. I received some correspondence from Bill Hollifield indicating we had agreed to have you act as arbitrator. I apologize but Bill got a little ahead of me on this. I have not had an opportunity to raise this with my client or get approval because I was waiting to hear back from Bill about the terms and arrangements of using you as arbitrator. I was expecting we would have a short discussion about this or that Bill was going to provide me with some information. I also need to just make sure there are no potential conflicts or other issues, so I can be ready to explain the arrangement to my client. Thanks. I hope things are going well for you. Anyways, when Bill gets back, let's schedule a call.

Sincerely,

BRUCE M. SMITH

BMS/ad

cc: Client with enclosures
Bill Hollifield with enclosures

Hollifield and Bevan, P.A.

249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066

William R. Hollifield, Attorney at Law
G. Richard Bevan, Attorney at Law

Telephone: (208) 734-5610
FAX: (208) 734-8077

April 16, 2002

VIA FACSIMILE 733-5553

Daniel C. Hurlbutt
392 Falls Avenue
Twin Falls, Idaho 83301

Dear Dan:

Re: Morganroth/Lupher Arbitration

The parties in the above-referenced matter have selected you to act as an arbitrator in this case. I represent the Luphers and Bruce Smith represents the Morganroths.

It is my understanding you are available for a telephone conference at 9:00 a.m. on Thursday, April 18, 2002, and I will initiate the conference call. If Mr. Smith is not available for this conference, I will let you know immediately. Unfortunately, I am out of the office between April 19 and 26, 2002.

Thank you for your courtesy and assistance in this matter. If you have any questions, please do not hesitate to call.

Sincerely,



WILLIAM R. HOLLIFIELD

le

cc: Bruce M. Smith (via facsimile)

APR. -22' 02 (MON) 14:31 MOORE 'H BUXTON
APR-17-2002 WED 09:54 AM HOLLIFIELD&BEVAN

TEL: 208 '202
FAX NO. 1 208 734 8077

P. 005
P. 01

Hollifield and Bevan, P.A.

249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066

William R. Hollifield, Attorney at Law
G. Richard Bevan, Attorney at Law

Telephone: (208) 734-5610
FAX: (208) 734-8077

April 17, 2002

VIA FACSIMILE (208) 331-1202

Bruce M. Smith
Attorney at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702

Dear Mr. Smith:

Re: Lupher/L&M Angus Ranch - Department of Water Resources

I have been in contact with Judge Daniel Hurlbutt concerning the arbitration in this matter and have enclosed a copy of my letter to him in that regard.

Judge Hurlbutt is available for a telephone conference tomorrow, April 18, 2002, at 9:00 a.m. If you are not available at this time, please let me know immediately. I will be out of the office from April 19 through 26, and would like to conduct this telephone conference prior to that time.

Please advise at your earliest convenience.

Sincerely,

Signed and sent in attorney's absence
to avoid further delay

WILLIAM R. HOLLIFIELD

lc

Enclosure

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420

BOISE, ID 83702

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

SUBAN E. BUXTON*
MICHAEL C. MOORE*
BRUCE M. SMITH
PAUL A. TURCKE*
CHRISTOPHER E. YORCASON
TAMMY A. ZOKAN*

JOHN J. MCFADDEN*
Of Counsel

* Also admitted in Oregon
* Also admitted in Washington
* Also admitted in South Dakota
* Also admitted in New Mexico

April 5, 2002

William R. Hollifield
Hollifield and Bevan, P.A.
P.O. Box 66
Twin Falls, Idaho 83303-0066

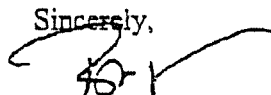
RE: Morganroth/Lupher Arbitration

Dear Bill:

Thank you for your letter of March 26, 2002, regarding this matter. I thought we had agreed that Judge Roos was going to arbitrate this matter. As you know, both Judge Roos and Judge Meyers, both being neutral in terms of location, had agreed to arbitrate this at no cost to our clients. Although Judge Meyers indicated he did not have a conflict of interest with your client, I understood you probably wouldn't agree to Judge Meyers, hence Judge Roos would be selected. I'm still not clear why you object to Judge Meyers or if there is a problem with Judge Roos. Both are well respected judges and, because they were sitting judges, agreed to do this at no cost. Notwithstanding this, I have no problem with Judge Hurlbutt even though he is in Twin Falls. Since he is not an active judge, did he agree to do this at no cost as well?

It was also my understanding that once we agreed on an arbitrator, you and I would meet with him to outline the case, define the scope of the proceeding, agree to rules of procedure if necessary and set some kind of reasonable schedule. That has been the normal process in every arbitration I've participated in and, I believe, is justified in this case as well. I would be willing to meet with Judge Hurlbutt at a mutually agreeable time and place to discuss this. I think that would help expedite this matter and lead to a more efficient proceeding. Please give me a call next week to arrange a time.

Sincerely,



Bruce M. Smith

BMS/ad

Hollifield and Bevan, P.A.

249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066

William R. Hollifield, Attorney at Law
G. Richard Bevan, Attorney at Law

Telephone: (208) 734-5610
FAX: (208) 734-8077

January 18, 2002

VIA FACSIMILE (208) 331-1202

Bruce M. Smith
Attorney at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702

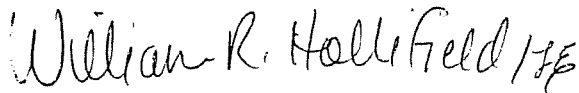
Dear Mr. Smith:

Re: Lupher v. Morganroth

I have been informed that my clients and Judge Meyers have a business relationship which disqualifies him.

Let's set up a conference call with Judge Roos next week.

Sincerely,



WILLIAM R. HOLLIFIELD

le

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702

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

SUSAN E. BUXTON*
MICHAEL C. MOORE*
BRUCE M. SMITH
PAUL A. TURCKE*
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*

JOHN J. MCFADDEN**
Of Counsel

* Also admitted in Oregon
* Also admitted in Washington
* Also admitted in South Dakota
* Also admitted in New Mexico

January 18, 2002

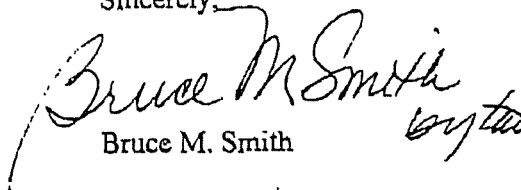
VIA FACSIMILE 208/734-8077

William R. Hollifield
Hollifield and Bevan, P.A.
P.O. Box 66
Twin Falls, Idaho 83303-0066

Dear Bill:

I would like to call Judge Meyers and/or Chuck Roos to see if they will agree to arbitrate. If your client objects to either of these, please let me know. Unless I hear differently, I will contact them next week to see if they will do it, possible fees, etc. Thanks.

Sincerely,


Bruce M. Smith

BMS/to

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

SUSAN E. BUXTON*
MICHAEL C. MOORE*
BRUCE M. SMITH
PAUL A. TURCKE*
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*

JOHN J. MCFADDEN *
Of Counsel

* Also admitted in Oregon
* Also admitted in Washington
* Also admitted in South Dakota
* Also admitted in New Mexico

January 10, 2002

VIA FACSIMILE 208/734-8077

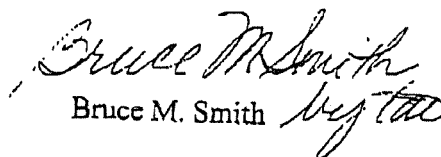
William R. Hollifield
Hollifield and Bevan, P.A.
P.O. Box 66
Twin Falls, Idaho 83303-0066

Dear Bill:

Thank you for your letter suggesting Bill Parsons or Bob Alexander as arbitrators. I'm not sure whether you've spoken with either of them about their fees, potential conflicts, or other relevant information. I called you yesterday to see if you had that information. Notwithstanding that both Bill and Bob are fine attorneys, my initial reaction is that I am hesitant to select an arbitrator from the Twin Falls area. I have intentionally avoided naming a Boise mediator because I thought you would not want to do that. Also, I checked the Supreme Court and Federal Court lists of mediators and neither Bill nor Bob are on the lists. On the other hand, I was thinking we could ask Magistrate Judge Meyers in Salmon or Magistrate Judge Roos in Challis to do this. Judge Meyers is on the federal court list and has training in ADR. I'm not sure about Judge Roos but he does have the advantage of being a neutral judge in the area of the dispute. Judge Meyers charges only for expenses according to the federal list which has the added advantage of holding costs down. I haven't talked to either one of them and I have never appeared before either judge although both have good reputations. My guess is neither has a conflict and they are certainly geographically neutral for both you and me.

Give these two names some thought. I'd suggest we call them (or one of them) on a conference call to see if they would agree to help us on this. I look forward to hearing from you.

Sincerely,


Bruce M. Smith

BMS/to

cc
JAN 14 2002
LE

Hollifield and Bevan, P.A.

249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066

William R. Hollifield, Attorney at Law
G. Richard Bevan, Attorney at Law

Telephone: (208) 734-5610
FAX: (208) 734-8077

January 9, 2002

VIA FACSIMILE (208) 331-1202

Bruce M. Smith
Attorney at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702

Dear Mr. Smith:

Re: Lupher v. Morganroth

We will agree to either of the following as an arbitrator in this matter:

William A. Parsons
Parsons, Smith & Stone
P.O. Box 910
Burley, Idaho 83318
(208) 678-8382

J. Robert Alexander
Benoit, Alexander, Sinclair, Harwood & High
P.O. Box 366
Twin Falls, Idaho 83303-0366
(208) 733-5463

Please let me know.

Sincerely,



WILLIAM R. HOLLIFIELD

le

*faxed
1-9-02
2:52f*

8014.000

Hollifield and Bevan, P.A.

249 Third Avenue East
P.O. Box 66
Twin Falls, Idaho 83303-0066

William R. Hollifield, Attorney at Law
G. Richard Bevan, Attorney at Law

Telephone: (208) 734-5610
FAX: (208) 734-8077

December 26, 2001

Bruce M. Smith
Attorney at Law
225 North 9th Street, Suite 420
Boise, Idaho 83702

Dear Bruce:

Re: Lupher v. Morganroth

My clients will agree to one arbitrator. I have reviewed the list of arbitrators on the Supreme Court list; however, there are no arbitrators in Custer County.

One attorney in Custer County has had a professional relationship with the parties, but one of the District Judges in Eastern Idaho, Dick Sinclair, may be willing to act as arbitrator. Bill Parsons from Burley also may agree to be the arbitrator. I do not know of anyone else in that area who would be an arbitrator and also be competent. If you have any specific person in mind, please let me know.

For the record, any offer that may have been extended to settle this matter is hereby withdrawn.

Thank you.

Sincerely,



WILLIAM R. HOLLIFIELD

le

Via Facsimile (208) 331-1202

cc - M

EXHIBIT B

FREDERICKSEN, WILLIAMS & MESERVY, LLP
ATTORNEYS AT LAW

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

EUGENE D. FREDERICKSEN
ROBERT E. WILLIAMS
JAMES C. MESERVY

JOHN B. LOTHSPICH, ASSOCIATE



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

March 19, 2003

Bruce M. Smith
Moore Smith
225 N 9th, Suite 420
Boise ID 83702

Re: *Lupher/ Von Morganroth*

Dear Bruce:

Enclosed herewith is a proposed Assignment by which my clients will assign to yours all their right, title and interest in the pending applications for transfer and appropriation before the Idaho Department of Water Resources, with docket numbers as designated in the Assignment. Please review the proposed document and call me as to its acceptability.

I have also enclosed a short Agreement by which your clients will acknowledge that the assignment of the applications made by my clients to them are subject to the condition that the Morganroths allow both the application for transfer and for appropriation to be issued as filed and that they will not withdraw either application. If you find the form of Agreement to be satisfactory, return the document executed by your clients acknowledging they will take the Assignment subject to the conditions I have stated. When I have received the return of the Agreement from you, I will obtain the original executed Assignment and send it to you for disposition.

To follow up our recent discussions, I am also submitting herewith two (2) alternative proposals for essential terms of a modified lease arrangement between our clients and a single proposal for purchase of real property and water rights by the Luphers. These proposals are submitted in an effort to present alternative solutions to resolving the present disputes of the parties regarding the existing lease. These are outlines of the salient features, and would be subject to the negotiation and execution of a definitive agreement.

These proposals are submitted in good faith in recognition of our clients' jointly held belief that a different business relationship than is presently embodied in the current document would be to the best interests of all parties. I look forward to your response after reviewing the proposals with your clients. The proposals are as follows:

LEASE PROPOSAL - OPTION A

- A. The Luphers would continue to lease the existing facilities plus an additional parcel of approximately 200' x 200' on the northwest end of the current property being leased.
- B. All the water rights, including the water rights subject to the transfer and appropriations assigned to the Morganroths, would be subject to the lease.
- C. The Luphers would, at their cost, construct additional improvements, spending approximately \$100,000.00 for five (5) new raceways that would be located immediately east of the existing northernmost raceways. These improvements would be constructed so that water would flow by gravity through from the hydro canal through the new raceways and back into the hydro canal without the necessity of pumping. These raceways would allow for added capacity for fish raising with the additional water which would now be available. Additionally, the Luphers would construct a fingerling raceway and a hatchery building and a small fish facility in the vicinity of the present fingerling raceway, utilizing water that arises at a lower elevation than the hydro canal.
- D. The lease term would be for ten (10) years with an option in the Luphers to renew for an additional term of ten (10) years.
- E. The Luphers would pay rent of \$150.00 per cfs per month. This proposed rental is based upon comparisons made to existing leases which we now have information concerning as I will describe more fully at another place in this letter.
- F. The actual amount of water subject to the lease (expressed in cfs) would be measured by a mutually agreed upon hydrologist or other suitable person with expertise in water measuring.
- G. Under this option, the Luphers would not require the Morganroths to pay back any more of their share of the unpaid capital improvements which balance presently approximates \$107,000.00.

- H. The Luphers would continue to pay for the costs of pumping the water from the existing improvements back to the hydro canal. As I explained previously, there would be no additional pumping costs for the additional raceways because they would be designed to flow the water back to the hydro canal by gravity.

LEASE PROPOSAL - OPTION B.

- A. Same option term as Option A.
- B. The new improvements, described in Option A and Morganroth's existing share of unpaid improvements in the amount of approximately \$107,000.00 would be paid by Morganroths.
- C. Morganroths would pay for all pumping costs.
- D. The Luphers would pay rental of \$425.00 per cfs, measured as per Lease A. The gross amount of rent of approximately \$5,950.00 per month would be reduced by an amount necessary to amortize the unpaid cost of the existing improvements, of approximately \$107,000.00, over the initial ten (10) year term of the lease.
- E. The Luphers would prepare the plans for the improvements under this option and submit them to the Morganroths.
- F. The new lease would begin upon completion of the improvements by the Morganroths.

These lease proposals are based upon information my client has received regarding some existing leases of trout raising facilities in the Hagerman area and tilapia raising facilities in the Grace and Bruneau areas.

- (A) Lynn Babington of Hagerman paid \$150.00 per cfs for the lease of trout raising facilities on Briggs Creek. Those facilities included 23 cfs of water, 5 raceways wide and 7 uses deep (35 raceways total). No pumping was required under this lease for water back to the head raceway. All improvements (raceways, etc.) were paid for by the owner (Lessor).
- (B) John Lambregts, the Lupher's son-in-law presently leases a tilapia raising facility near Grace at \$150.00 per cfs with no pumping required. All improvements on this facility were paid for by Lambregts.

- (C) Bob Williams from Bruneau, who does business under the name "Ace Development", leases a facility with 4.7 cfs, 4 raceways wide and 9 uses deep (36 total raceways) with no pumping at \$2,000 per month. This facility contained all improvements necessary for its operation at the inception of the lease, explaining the higher rent.

It is fine with my clients if you or the Morganroths would like to talk with Mr. Babington, Mr. Lambregts or Mr. Williams concerning these leases.

As a purchase option, my clients propose to purchase all the real property and appurtenant water rights, for the following 240 acres:

- N $\frac{1}{2}$ NE $\frac{1}{4}$; SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 9
- SW $\frac{1}{4}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 10

all of which is located in Township 12 North, Range 20 East, Boise Meridian, Custer County, Idaho for the total sum of \$450,000.00. The down payment would be my clients' forgiveness of the approximately \$107,000.00 presently owed by the Morganroths for the unpaid portion of the improvements. The balance would accrue interest at 8% per annum and would be paid in monthly installments of \$3,000.00 a month, inclusive of interest, until the entire balance would be fully paid. There would be no prepayment penalty on the Note. The Note would be secured by a first Mortgage in the real property and water rights.

As I mentioned to you earlier, I will look forward to hearing from you soon.

Very truly yours,

FREDERICKSEN, WILLIAMS & MESERVY, LLP



ROBERT E. WILLIAMS

ASSIGNMENT

FOR VALUE RECEIVED, **MARK L. LUPHER AND JOANNE W. LUPHER**, husband and wife, dba EPICENTER AQUACULTURE, hereinafter referred to as "ASSIGNOR" do hereby assign to **LOIS VON MORGANROTH, dba L & M ANGUS RANCH**, hereinafter referred to as "ASSIGNEE", all Assignor's right, title and interest in the following applications presently pending before the Idaho Department of Water Resources:

- A. Application for Permit No. 72-07577
- B. Application for Permit No. 72-07578
- C. Application for Transfer No. 5647

The Assignor hereby requests the Idaho Department of Water Resources to freely and fully substitute the Assignee as the Applicant for each of these applications above referenced.

MARK L. LUPHER

JOANNE W. LUPHER

STATE OF IDAHO)

:ss

County of _____)

On this _____ day of _____, 2003, before me, the undersigned, a Notary Public in and for said County and State, personally appeared MARK L. LUPHER and JOANNE W. LUPHER, husband and wife, dba Epicenter Aquaculture, known to me to be the persons whose names are subscribed to the within and foregoing instrument, and who acknowledged to me that they executed the same, individually and on behalf of Epicenter Aquaculture.

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

NOTARY PUBLIC for Idaho

Residing at: _____

Commission Expires: _____

AGREEMENT

This Agreement is made and entered into this ____ day of _____, 2003, by and between **MARK L. LUPHER AND JOANNE W. LUPHER**, husband and wife, dba EPICENTER AQUACULTURE, hereinafter referred to as "LUPHER" do hereby assign to **LOIS VON MORGANROTH, dba L & M ANGUS RANCH**, hereinafter referred to as "MORGANROTH", all Assignor's right, title and interest in the following applications presently pending before the Idaho Department of Water Resources:

RECITALS

- A. LUPHER has filed the following applications which are now pending before the Idaho Department of Water Resources:
 - (i) Application for Permit No. 72-07577.
 - (ii) Application for Permit No. 72-07578.
 - (iii) Application for Transfer No. 5647.
- B. VON MORGANROTH has filed protests with respect to each of the Applications.
- C. LUPHER desires to assign to VON MORGANROTH all of their right, title and interest in the application on the condition that VON MORGANROTH withdraws the protests she has filed with respect to the applications and requests that the applications be approved as filed.

IT IS THEREFORE AGREED, in consideration of these recitals and the promises and covenants hereafter contained as follows:

1. LUPHER agrees to execute an Assignment in favor of VON MORGANROTH, assigning all of LUPHER's right, title and interest in the following applications now pending before the Idaho Department of Water Resources:

- A. Application for Permit No. 72-07477;
- B. Application for Permit No. 72-07578;
- C. Application for Transfer No. 5647.

A copy of the Assignment is attached hereto as **EXHIBIT A**.

2. VON MORGANROTH agrees to withdraw her protests now filed in the matters referenced in Paragraph 1, and to request to the Idaho Department of Water Resources that the applications be granted, as now filed, subject only to VON MORGANROTHS being substituted for LUPHER as the Applicant.

3. If default be made by any party hereto in keeping or performing any of the covenants, conditions or agreements herein agreed to be kept by them, and the other party is required to employ an attorney to enforce any of the covenants, conditions or agreements herein contained, then and in such event, the party in default agrees to pay to the non-defaulting party, in addition to all other sums herein agreed to be paid by them, a reasonable attorney's fee, together with any costs and disbursements that may be incurred in enforcing this agreement.

4. This agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, executors, administrators and assigns.

5. This Agreement may be signed in counterparts.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names, the day and year in this agreement first above written.

"LUPHER"

MARK L. LUPHER

JOANNE W. LUPHER

STATE OF IDAHO)
 :SS
County of _____)

On this _____ day of _____, 2003, before me, the undersigned, a Notary Public in and for said County and State, personally appeared MARK L. LUPHER and JOANNE W. LUPHER, husband and wife, dba Epicenter Aquaculture, known to me to be the persons whose names are subscribed to the within and foregoing instrument, and who acknowledged to me that they executed the same, individually and on behalf of Epicenter Aquaculture.

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

NOTARY PUBLIC for Idaho

Residing at: _____

Commission Expires: _____

"VON MORGANROTH"

LOIS VON MORGANROTH

STATE OF IDAHO)
 :SS
County of _____)

On this _____ day of _____, 2003, before me, the undersigned, a Notary Public in and for said County and State, personally appeared LOIS VON MORGANROTH, dba L & M Angus Ranch, known to me to be the person whose name is subscribed to the within and foregoing instrument, and who acknowledged to me that she executed the same, individually and on behalf of L&M Angus Ranch.

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

NOTARY PUBLIC for Idaho

Residing at: _____

Commission Expires: _____

EXHIBIT C

MOORE SMITH BUXTON & TURCKE, CHARTERED

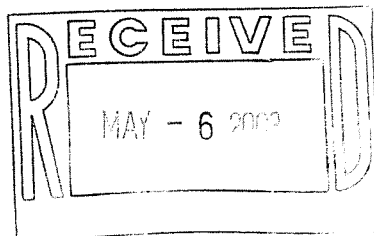
ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420

BOISE, ID 83702

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

RANSOM J. BAILEY
SUSAN E. BUXTON*
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE°
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*



JOHN J. MCFADDEN*†
Of Counsel

* Also admitted in Oregon
† Also admitted in Washington
° Also admitted in South Dakota
* Also admitted in New Mexico

April 4, 2003

Robert E. Williams
Fredericksen, Williams & Meservy
117 S. Adams Street
P.O. Box 169
Jerome, ID 83338

RE: Lupher/ Morganroth

Dear Rob:

I've had a chance to review the proposal in your March 19, 2003, letter with Ms. Morganroth and Al Morganroth in terms of value and practicability. While some of the details will obviously have to be worked out, we need to focus on some numbers to see if we are in the same ballpark. In response to the offer to purchase, Ms. Morganroth would be willing to consider selling the entire ranch, but not part of it. Depending on details and refinement as to the value of equipment, standing crops, etc. the price would be \$7 million (US).

Alternatively a lease arrangement constructed around the ideas in Options A & B, i.e. 10/10 year lease, using current facilities, adding the 200'x200' additional land, etc., would be considered. The lease payment would be \$15,000.00 per month. Ms. Morganroth would pay for construction of the five new raceways assuming the cost is the approximately \$100,000 you've noted, but the claimed capital improvement balance of \$107,000 would be eliminated.

As to the assignment of the applications, I am reviewing the applications in light of your draft agreement. However, as we discussed, any assignment would have no bearing or relevance to the current litigation, i.e. your clients could not claim or argue that the assignments or transfer of the applications to Ms. Morganroth has any relationship or relevance to the lease. She would simply have the water rights. If another lease arrangement or sale works out, that would be fine. The water rights your client would like to have would be there. Otherwise, the water rights and transfer are irrelevant to the lease. This is necessary because we have explained that Ms. Morganroth has fully complied with her obligations under the lease with regard to providing the amount of water the lease requires and the fact that your clients are not using the water in the

Lupher/ Morganroth

April 4, 2003

Page 2

authorized location. I assume a provision to this effect would be added to the agreement based on our previous discussions. Please notify me immediately if that is not the case.

Thanks for your help and cooperation on this. I look forward to your client's response to Ms. Morganroth's counterproposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Smith', with a long horizontal flourish extending to the right.

Bruce M. Smith

BMS/aad

cc: client

EXHIBIT D

FREDERICKSEN, WILLIAMS & MESERVY, LLP
ATTORNEYS AT LAW

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

EUGENE D. FREDERICKSEN
ROBERT E. WILLIAMS
JAMES C. MESERVY

JOHN B. LOTHSPREICH, ASSOCIATE



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

April 18, 2003

Via facsimile to 208.331.1202

Bruce M. Smith
Moore Smith
225 N 9th, Suite 420
Boise ID 83702

Re: Lupher/Morganroth

Dear Bruce:

This will respond to your letter of April 4, 2003, which I received on April 17, 2003.

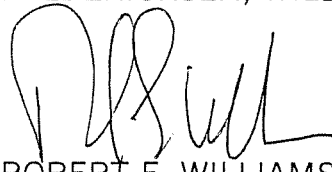
- A. The Luphers are not interested in pursuing a purchase of the entire Morganroth ranch at a price of \$7 million.
- B. I believe we are in general agreement on the affect of the assignment which accompanied my letter of March 19, 2003. From our end what would be accomplished is that the pending applications and resulting water rights would be issued in the name of the Morganroths. This would effectively terminate the dispute over the current water right proceeding. Approval of the pending applications for permits and transfer would not affect the litigation underway in state court regarding the lease. Your client's claims that he has provided all the water under the lease that is required and that the water is not being used in the authorized location would be preserved. Likewise, my clients' claims to the contrary would also be preserved, to be resolved by either negotiating an acceptable new lease or letting the state court litigation run its course.
- C. We do not believe your client's proposal of a lease payment of \$15,000.00 per month reflects the realistic fair market value of a lease of the facility. We are prepared to continue the negotiation of a new lease that would reflect a realistic fair market value for the lease, after the build out of the new raceways and use of all the water.

Page - 2 -

Please call me when you have reviewed this letter. We can discuss appropriate language to add to the draft Assignment to at least get that much of the present dispute behind us, and discuss how we proceed to negotiate a new lease.

Very truly yours,

FREDERICKSEN, WILLIAMS & MESERVY

A handwritten signature in black ink, appearing to read 'REW', with a stylized flourish extending to the right.

ROBERT E. WILLIAMS

REW/bsb
cc: Client
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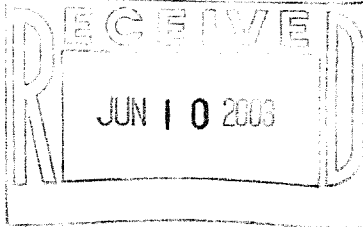
EXHIBIT E

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

RANSOM J. BAILEY
SUSAN E. BUXTON*
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TAMMY A. ZOKAN*



JOHN J. MCFADDEN*†
Of Counsel

* Also admitted in Oregon
†Also admitted in Washington
‡ Also admitted in South Dakota
* Also admitted in New Mexico

June 6, 2003

Robert E. Williams
Fredericksen, Williams & Meservy
117 S. Adams Street
P.O. Box 169
Jerome, ID 83338

RE: Lupher/ Morganroth

Dear Rob:

Thank you for your response to my letter of April 4, 2003. I have spoken to Ms. Morganroth about this situation. She understands that the Luphers may not want to purchase the ranch at this time. While she is amenable to working out a lease arrangement with Mr. and Mrs. Lupher, the financial details must provide her a reasonable return, a situation that has not been reflected in the Luphers' use of the L & M Angus land to date. My April 4, 2003, letter laid out a very viable option for the Luphers, including a proposed lease arrangement that is reflective of the substantial use of L & M assets. Notwithstanding your clients' rejection of the offer, Ms. Morganroth is still willing to try to accommodate the Luphers' interests. Keeping the other terms of the proposal as expressed in my letter, Ms. Morganroth would be willing to accept a lease payment of \$10,000.00 a month. This would include the use of the land and water and her paying the costs of the additional raceways. Given her consideration of this reduction in the proposed lease payment, she would also ask that this matter be resolved and completed within a short period of time. If your clients agree to this proposal, I will prepare a lease agreement for you to review. Thank you.

Sincerely,

Bruce M. Smith

BMS/ccf

cc: Lois Von Morganroth
Al Von Morganroth

EXHIBIT F

FREDERICKSEN, WILLIAMS & MESERVY, LLP

ATTORNEYS AT LAW

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

EUGENE D. FREDERICKSEN
ROBERT E. WILLIAMS
JAMES C. MESERVY

JOHN B. LOTHSPREICH, ASSOCIATE

FILE COPY

06/20/03



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

June 20, 2003

Via facsimile to 208.331.1202

Bruce M. Smith
Moore Smith
225 N 9th, Suite 420
Boise ID 83702

Re: Lupher/Morganroth

Dear Bruce:

I have reviewed your recent letter with the Luphers.

As I suggested to you in our earlier telephone conversation, \$10,000.00 per month as rent as proposed by your recent letter is unacceptable to the Luphers. The \$10,000.00 rent would cause the Luphers to suffer a substantial loss on their operation each month and is not close to being economically viable.

The Luphers have asked me to submit revised lease and purchase proposals. They have returned to their books and records and have asked me to forward these proposals which are the best they can possibly do under each of the scenarios. Without the Von Morganroths' acceptance of one of the modified proposals, the Luphers will have no remaining choice but to fully litigate the issues regarding the current lease. In an effort to avoid that result, the following proposals are modified from those originally presented to you in my letter of March 19, 2003. I will refer to each option originally presented and set forth only the portions that are modified. All other paragraphs of each proposal will remain as originally presented in my March 19, 2003 letter.

MODIFIED LEASE PROPOSAL - OPTION A

1. Paragraph E would be modified to read as follows:

E. The Luphers would pay rent of \$200.00 per cfs used on the leasehold (approximately 14 cfs - total current flow) which equals \$2,800.00 per month.

MODIFIED LEASE PROPOSAL - OPTION B

1. Paragraph B would be modified to read as follows:

B. The new improvements described in option A would be paid for by the Von Morganroths.

2. Paragraph C would be modified to read:

C. The Luphers would pay for all pumping costs.

3. Paragraph D would be modified to read:

D. The Luphers would pay rental of \$300.00 per cfs measured as per Option A. The gross amount of rent then would be approximately \$4,200.00 per month if 14 cfs is available and used on the leasehold.

2. **OPTION C - PURCHASE.**

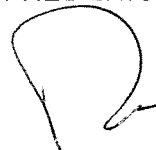
The purchase option would be revised to read as follows:

As a purchase option my clients propose to purchase all the real property and appurtenant water rights on that portion of the land owned by the Von Morganroths in Sections 9, 10 and 15, west of Highway 93, all of which is located in Township 12 North, Range 20 EBM, Custer County, Idaho, for the total sum of \$600,000.00. The down payment would be my client's forgiveness of the approximately \$107,000.00 presently owed by the Von Morganroths for the unpaid portion of the improvements. The balance would accrue interest at 8% per annum and would be payable in monthly installments of \$4,500.00 per month, inclusive of interest, until the entire balance is paid. There will be no prepayment penalty on the note. The note would be secured by a first mortgage on the real property and appurtenant water rights.

Please review these proposals with your client and advise me of your position. If there is any aspect of the proposal that you wish to discuss before talking to your client, or afterward, please call me.

Very truly yours,

FREDERICKSEN, WILLIAMS & MESERVY



ROBERT E. WILLIAMS

EXHIBIT G

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420

BOISE, ID 83702

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RANSOM J. BAILEY
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TAMMY A. ZOKAN*

JOHN J. MCFADDEN*†
Of Counsel

* Also admitted in Oregon
† Also admitted in Washington
‡ Also admitted in South Dakota
* Also admitted in New Mexico

August 22, 2003

Robert E. Williams
Fredericksen, Williams & Meservy
117 S. Adams Street
P.O. Box 169
Jerome, ID 83338

Re: Lupher/ Morganroth

Dear Rob:

The current situation with regard to the lease of the L&M Angus property by the Luphers has reached a point whereby it is clear that the Luphers cannot or will not remedy the defaults that have been noted. Mrs. Von Morganroth has provided not only written notice, but also an extremely generous amount of time for the Luphers to remedy the situation. However, nothing seems to change. We tried to mediate the matter based on the Court's decision, but that too produced no resolution.

Among the items Mrs. Morganroth has provided notice about are the following:

- Failure to provide accurate accounting records of the operations;
- Failure to use water in a manner that does not interfere with the hydro operations;
- Failure to provide advance notice of construction; and
- Failure to develop the business in a manner consistent with the agreement.

I would note that among the other actions taken by the Luphers that are inconsistent with the lease are:

- Applying for water rights on the L&M Angus Ranch;
- Using water in a manner that necessitated the hiring of a water master; and
- Bringing suit in contravention of the lease terms.

The fact that the Luphers have never made any cash lease payment in the approximately nine years they have been operating on the L&M Angus Ranch, despite promises to do so, highlights the problems created by the above actions.

Lupher/ Morganroth
August 22, 2003
Page 2

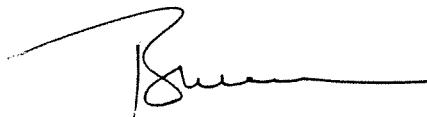
In light of the fact that the Luphers have not cured the defaults that led to notice of termination of the lease and have, in fact, exacerbated the problems, demand is hereby made that the Luphers vacate the property. Mrs. Von Morganroth has agreed, as a matter of courtesy, that the Luphers can have thirty (30) days to wind up operations and vacate the property.

There are some details to be addressed as this occurs. First, the Luphers need to provide a list of all real and personal property associated with the aquaculture business including leasehold improvements. As you know, we have sought such a list in the past, but it has never been made available. Second, Mrs. Von Morganroth would like a written explanation and assurances that all debts and obligations of the business are being taken care of in a manner that does not encumber her property. Third, there needs to be a winding up accounting of the status of the books and financial statements for the business. Certainly, if there are additional details or needs that Mrs. Von Morganroth is unaware of that should be addressed, please let me know. I will discuss them with her and, if at all possible, make arrangements for addressing those issues.

As of the date of this notice, however, no additional fish inventory should be brought to the property, no additional leasehold improvements made, or any other actions taken which will hinder winding up the business or necessitating a period of occupancy longer than thirty (30) days.

I would ask the Luphers' help and yours in seeing this matter wrapped up as efficiently and cooperatively as possible. If you have any questions, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce M. Smith', with a long horizontal flourish extending to the right.

Bruce M. Smith

BMS/cf

cc: Lois Von Morganroth
Alfred Von Morganroth

EXHIBIT H

FREDERICKSEN, WILLIAMS & MESERVY, LLP

ATTORNEYS AT LAW

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

EUGENE D. FREDERICKSEN
ROBERT E. WILLIAMS
JAMES C. MESERVY

JOHN B. LOTHSPICH, ASSOCIATE



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

September 5, 2003

Bruce M. Smith
Moore Smith
225 N 9th, Suite 420
Boise ID 83702

Re: Lupher/Morganroth

Dear Bruce:

I received your letter of August 22, 2003, on August 25, 2003. I have discussed the letter with my clients.

It should not surprise either your or your client that the Luphers will not accept the invitation to vacate the real property subject to the existing lease. The Luphers position has always been, and remains, that they are not in default in any material respect under the lease agreement. The Luphers' response to your portrayal of uncured events of default, and actions alleged to be inconsistent with the lease follows:

1. FAILURE TO PROVIDE ACCURATE ACCOUNTING RECORDS OF THE OPERATIONS.

The Luphers have consistently provided monthly statements of their operations to Mrs. Morganroth and her predecessor-in-interest since 1996. In response to your client's requests for additional information, I have had in my office since last October seventeen (17) banker's boxes of records which contain all the documentation that remains in my clients' possession regarding their operations from 1994 through the middle part of 2002. You have had an open invitation to come to my office and examine these records on behalf of your client since last October. I believe you have spent two or three hours in my office on one occasion looking through the records. Additionally, your client had her own accountant spend two days with the Luphers examining their records in 2000.

2. FAILURE TO USE WATER IN A MANNER THAT DOES NOT INTERFERE WITH THE HYDRO OPERATIONS.

Your client has claimed, without supporting documentation at this point, \$21,800.00 in damages because of interference with the hydro operation. Repeated requests were made by Bill Hollifield of you and your client for documentation regarding the claim of damages but to my knowledge nothing has been provided to date. My clients remain willing to discuss this damage issue and seek a resolution of it if adequate records are produced by Mrs. Morganroth to

document what the damage was, and how it was caused. The Luphers can produce evidence that they have been returning on a continuous historic basis approximately .9 cfs more water to the hydro raceway than they have been diverting, so we are uncertain as to what your client is actually claiming.

3. FAILURE TO PROVIDE ADVANCE NOTICE OF CONSTRUCTION.

This apparently refers to the construction which took place in 1999. Before your involvement in the case, correspondence was sent to your client's previous attorney, Gregory Fitzmaurice in Grangeville, Idaho, on June 1, 1998. On July 10, 1998, Bill Hollifield advised Mr. Fitzmaurice that no additional time to review the plans would be granted and since there had been no response to the June 1, 1998 letter, he was instructing the Luphers to proceed with construction, which they finally did in 1999. No other written communication regarding the construction was given the Luphers until your "Notice of Default" of October 11th of 1999.

4. FAILURE TO DEVELOP THE BUSINESS IN A MANNER CONSISTENT WITH THE AGREEMENT.

Neither my clients nor myself are sure exactly what is meant by this claim. There is no "specific business plan" which is set forth in detail in the lease agreement. It is clear from the agreement that the purpose of the lease was to allow the development and operation of a fish propagation business. It was originally anticipated by the parties that the business could be developed in a fashion similar to that existing in the Magic Valley area where the fish were raised and customers would come to the facilities and take delivery of processed fish at that point. It became apparent that to fully develop the tilapia rearing business the fish would have to be delivered live, before processing, and that no customer existed to take the delivery of the live fish at Challis. The Luphers, through their own ingenuity and extremely hard work, were able to develop a business which included the hauling and delivery of live tilapia to customers on the west coast. They also developed a companion business which involved the purchase of fish from third parties, a mark up of the fish and their re-sale. The Luphers have reported all revenues of every sort from their business as it has now come to be established.

5. APPLYING FOR WATER RIGHTS ON THE L & M ANGUS RANCH.

The Luphers have applied in their own name for additional water rights to secure the benefits of the water rights promised to them in the original lease agreement. For many months now the Luphers have clearly made known to your client that they would be willing to transfer their interest in the pending appropriation application to Mrs. Morganroth on the condition that she allow the transfer application to be approved as now constituted. Your position in response to this has been mysterious. It is clear to us that my clients' proposal would resolve this part of the dispute, but your client seems reluctant to proceed. The only possible motive we can identify for this position is her desire that the Luphers not succeed in their endeavors and that she regains possession of the property more quickly than might otherwise be the case. My clients remain ready to assign the pending appropriation application to your client on the condition that the application proceed to approval without objection or delay by Mrs. Morganroth.

6. USING WATER IN A MANNER THAT NECESSITATED THE HIRING OF A WATER MASTER.

The Luphers constructed the initial raceways at the same location where the existing raceways were present at the inception of the lease. It turns out that this was not the place of use identified as part of the relevant water right. When my clients determined this was the case, they filed the transfer application to realign the place of use and other elements of the water right correctly. As with the appropriation application, my clients remain ready to assign their interest in the pending transfer application to Mrs. Morganroth on the condition that the application be allowed to proceed to approval. Once again, this proposed resolution appears to us to be fair to all parties. Mrs. Morganroth's reluctance to conclude this part of the dispute can only be attributed to what we believe is her desire to see the Lupher's enterprise fail. Another example of this is that your client agreed to hire a water master and split the cost at the meeting held at Department of Water Resources in Twin Falls. He has made regular visits to the fish farm diversion over the past four years. Additionally, your client called him to come out on numerous occasions to make "surprise" evaluations. At no time during all of these visits did he find a deficiency in the water being pumped-up. In fact, in most cases he found the Luphers to be pumping in excess of the amount that was withdrawn from the hydro-canal.

7. NOT MAKING ANY CASH LEASE PAYMENT UNDER THE LEASE.

It is true that no cash has been directly paid to Mrs. Morganroth or her predecessor-in-interest. However, your client has never disputed the fact that the Luphers have spent \$212,000.00 on leasehold improvements since the inception of the lease, that Mrs. Morganroth and her predecessors' share of the profits were first to be applied to the payment of losses and leasehold improvements, and that \$98,990.00 of profits have been applied to the leasehold improvements, leaving a balance to be paid out of future profits of approximately \$113,010.00. My clients reiterate that their long-held position that the generation of additional profits, as originally contemplated by the parties, would have been possible had they had the use of the full amount of water originally represented by the Lessor been available. Instead of allowing the Luphers the additional use of the water originally contemplated, and to proceed with the corresponding development, your client has at every turn frustrated the Luphers' attempts to maximize the return on the resource. Although substantial time and potential profits have been lost, it remains my clients' position that the expeditious development of additional raceways that would accommodate the amount of water originally contemplated will result in additional profits and accelerate the time table in the re-payment of the leasehold improvements and distribution of cash to Mrs. Morganroth.

8. EXACERBATION OF PROBLEMS BY THE LUPHERS.

You do not comment as to exactly how the "problems" have been exacerbated by the Luphers. For the reasons I stated above, if there has been any exacerbation of the problems, it has been entirely at the hand of your client. My clients have made several proposals for a new arrangement involving cash lease payments. These proposals have been met with responses which have absolutely no business reality with numbers that no one could operate under profitably. Remind your client that her predecessor-in-interest attempted unsuccessfully to

operate a fish raising business on the property prior to the Luphers' lease. The Luphers have, as demonstrated above, operated profitably. The proposals provided by my clients have been realistic and are comparable to other fish lease operations in southern Idaho. You have been provided the comparable data. Mrs. Morganroth's response appears to be numbers plucked out of the sky intentionally designed to avoid an acceptance by the Luphers. Once again, your client's primary motive appears to be to arrange things to insure the Luphers' failure in their business operations.

My clients will not vacate the premises. My clients have never been adjudicated to be in default and continue to deny that they are in default of the lease agreement. As you have suggested in your letter, the filing of the initial litigation by the Luphers may have been premature given the arbitration language of the lease. Although we have engaged in mediation, arbitration has still not ensued. If your client remains adamant in her position, we should be discussing arrangements for non-binding arbitration of the lease dispute before you file new litigation or the litigation commenced by the Luphers is allowed to continue. This approach seems fully consistent with the last order entered by Judge Moss on August 8, 2001. In the meantime, my clients will continue to conduct their business in accordance with the existing lease agreement.

Very truly yours,

FREDERICKSEN, WILLIAMS & MESERVY

A handwritten signature in black ink, appearing to read 'R. Williams', with a long horizontal stroke extending to the right.

ROBERT E. WILLIAMS

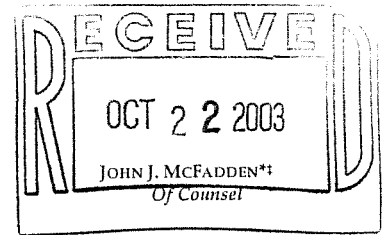
EXHIBIT I

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

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TAMMY A. ZOKAN*



* Also admitted in Oregon
†Also admitted in Washington
‡Also admitted in South Dakota
* Also admitted in New Mexico

October 16, 2003

Robert E. Williams
Fredericksen, Williams & Meservy
117 S. Adams Street
P.O. Box 169
Jerome, ID 83338

Re: Lupher/ Morganroth

Dear Rob:

This letter is a follow-up to our discussions about Ms. Von Morganroth's notice to the Luphers that they vacate the property. In my letter providing notice, I indicated that Ms. Von Morganroth was willing to accommodate a reasonable schedule for the Luphers to vacate. However, as has been requested several times in the past, she would like a listing of the assets and fixtures that are on the premises. It is difficult for me to understand what objection the Luphers have to her request for a listing of assets and fixtures.

Notwithstanding the request for information, this is a second notice for the Luphers to vacate the premises. I believe Ms. Von Morganroth has been quite accommodating in trying to work with the Luphers on the timing. However, my understanding from our discussions is that the Luphers refuse to vacate under any circumstances regardless of Ms. Von Morganroth's allowance of a reasonable time to wrap up. Given that as the Luphers' position, I believe immediate vacation of the premises is appropriate. If there is some need for a limited amount of time, please let me know.

As you know, when a tenant improperly holds over after the termination of a lease, the landlord is entitled to a reasonable value for such holdover period. Given the Luphers' occupation and use of the area and the amount of water they are illegally diverting, a reasonable rate is \$10,000.00 per month for the improper holdover period. This is notice that the Luphers will be charged this amount for the duration of their improper holdover period beginning with the date Ms. Von Morganroth had allowed as a reasonable time for them to vacate.

October 16, 2003

Page 2

Also, we discussed what steps may need to be taken given the Court's decision on the arbitration issue. I believe it is probably necessary to approach the Court to get some idea of how best to proceed to resolve this dispute. Since your clients are occupying my client's land and refuse to vacate, I will be seeking the Court's guidance on this issue probably by means of a status conference. I will contact you as to your availability on the timing of that. In the meantime, please advise your clients that they are to take no actions that would harm or injure the property.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce M. Smith', with a long horizontal flourish extending to the right.

Bruce M. Smith

BMS/cf

cc: client

EXHIBIT J

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. LOTH SPEICH

EUGENE D. FREDERICKSEN - Of Counsel



Telephone: (208) 324-2303
Telecopier: (208) 324-3135
E-MAIL rewilliams@cableone.net

FILE COPY

October 24, 2003

Bruce M. Smith
Moore Smith
225 N 9th, Suite 420
Boise ID 83702

Re: *Lupher/Morganroth*

Dear Bruce:

This will respond to your letter of October 16, 2003.

My clients do not have an objection to providing you a copy of the improvements to the real property. They are compiling a list, and I will provide it to you when available.

My clients and I do not understand what change of circumstances you believe have occurred between October 16, 2003, and my last letter to you that would now convince them to vacate the real property. I repeat – the Luphers are not in default under the Lease and they will not voluntarily vacate the real property no matter how many times you choose to extend the invitation. We believe your clients' position that the Lease has been lawfully terminated to be completely incorrect. The Lease calls for arbitration of this or any other dispute. Perhaps we should get on with it.

Your clients have done, and continue to do, everything possible to cause the Luphers to fail in their business endeavors. For example, your clients continue to point to "unlawful" diversions of water. When my clients took possession of the real property, they rightfully assumed that the Morganroths' predecessors in interest had established the use of the water consistent with the water rights that had been obtained and applied to a beneficial use on the property. They had every right to make this assumption. Subsequent events have shown that the point of diversion and place of use were misaligned, hence the necessity for the pending transfer application. Your clients' predecessors in interest represented a volume of water available to the Luphers, which turned out not to be the case. Hence, the pending appropriation application to properly allow the amount of the water that was represented to be available to become an actuality.

My clients filed the Application for Transfer and the Appropriation Application in order to obtain their lawful rights under the Lease. They have offered to resolve the dispute over the applications by assigning these rights to your clients on the condition that the applications proceed to finality without objection. I have had many conversations with you regarding this over these last months, during which my clients' position has never been accepted or rejected. It is as if your clients understand the need to have these applications proceed to finality, and that there is no reasonable basis for an objection when my clients are willing to assign these applications to them, but because they are fearful that in doing so they will give the Luphers some advantage which they do not wish them to have, they stand silent. Have your clients intentionally interfered with the Luphers' right to obtain what they originally bargained for under the Lease?

Your clients also continue to take the position that they have been damaged by a failure of the Luphers to pay the amount of profits to which they were entitled under the Lease. After several years, your clients still have not quantified this damage or communicated what the profits were that should have been paid to your clients or applied to their share of the capital improvements as per the Lease. At what point do you expect your clients' damages to be ascertained?

Finally, you requested that I advise my clients that they take no actions that would harm or injure the property. The Luphers have never taken such actions and will not do so in the future. As long as requests are being made to advise clients of what they should do, I would appreciate you advising the Morganroths that they cease interfering with my clients' business opportunities and to honor their obligations under the Lease, including their duty to observe the implied covenant of good faith and fair dealing, which they have materially breached.

Very truly yours,

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP



ROBERT E. WILLIAMS

EXHIBIT K

FILE COPY

Robert E. Williams

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP

117 South Adams Street

P.O. Box 168

Jerome, ID 83338

Telephone: (208) 324-2303

Facsimile: (208) 324-3135

Attorney for Applicant

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 67067 AND) STATUS REPORT
APPLICATIONS FOR PERMITS Nos.) OF APPLICANTS
72-07577 and 72-07578 IN THE)
NAME OF MARK L. AND/OR JOANNE)
LUPHER, DBA EPICENTER)
AQUACULTURE)
)

Pursuant to the written request of Peter R. Anderson, Hearing Officer, dated December 9, 2003, Applicants hereby provide their Status Report.

Following the filing of the Stipulation for Order signed by counsel for the Applicant on August 6, 2002, and by counsel for the Protestants on August 11, 2002, the parties conducted a day-long mediation before the Honorable Daniel C. Hurlbutt on October 16, 2002. The mediation identified several avenues for pursuit which were thought by counsel and the parties to be promising in terms of leading to a resolution of the entire dispute. Because of this, the Hearing Officer

was advised, through counsel for the Applicant and Protestants, that no further action regarding the pending matters should be pursued until otherwise advised by counsel. The Applicants believe this position was taken by all parties with the recognition that progress was being made towards a resolution of all disputes and that such a resolution would be in the parties' collective best interests.

From October, 2002, through the present date, the parties have exchanged written proposals for the resolution of the dispute. These proposals included revised lease terms and, alternatively, terms of purchase of the real property and water rights which are subject to the lease which underlies the dispute. At the present date, it does not appear that any of the proposals made by a party are acceptable to the other, and there is no immediate prospect for settlement.

The Applicants have also offered to resolve the matters pending before the Department of Water Resources by assigning their rights in the pending Applications to the Protestant subject to the condition that the Protestant would not withdraw the Applications. The Protestants have not accepted this offer. Additionally, since October, 2002, fifteen (15) storage boxes of records, constituting substantially all of the financial records of the Applicants while they have been in possession of the real property under the lease have been made available to the Protestant for review.

There are many issues which remain to be resolved between the parties in the pending State Court litigation. As the Hearing Officer is well aware, the State

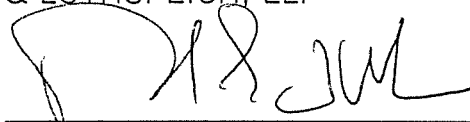
Court litigation has been suspended pending arbitration of the issues under the lease. The last Order of the Honorable Brent J. Moss in Case No. CV-00-101, entitled "Lupher vs. Morganroth, et al.", now pending in the Seventh Judicial District of the State of Idaho, in and for the County of Custer, ruled that no further action would be taken in the State Court case until the arbitration is completed. The Order of Judge Moss reserved a decision on the additional question as to whether the arbitration would be binding or non-binding until the arbitration was completed. This left the parties to face the possibility that arbitration could be resorted to, but prove to be of no avail unless a voluntary settlement was reached, or the Court ruled the arbitration to be binding. The Court's Order arises from a clause in the lease agreement which requires arbitration "before litigation is resorted to". To resolve the issue of whether the arbitration of all issues which are now being addressed in the State Court action would be final, the Applicants have recently proposed to stipulate to the binding arbitration of all issues between the parties under the lease agreement, subject to the condition that the State Court action be dismissed with each party to bear their costs and fees. The problem with the lease provision on arbitration would, therefore, be resolved. As this proposal has only been recently made, a response from the Protestant has not yet been received.

Binding arbitration, if accepted by the Protestants, will lead to a final resolution of all issues between the parties on the lease, including the lease issues

which are relevant to the matters presently pending before the Department of Water Resources. Applicants respectfully suggest that it would be appropriate to postpone further action on the Applications herein pending until an Order from the arbitration, which will be binding, has been entered. Applicant has suggested that the Honorable Daniel C. Hurlbutt be allowed to serve as Arbitrator since he is already quite familiar with the issues before the parties, having conducted the mediation in October, 2002. If the Protestant cannot agree to this suggestion of further postponement, the Applicant desires the opportunity to file a Motion seeking a modification of the existing Order to Show Cause requesting that this matter be further continued until binding arbitration has been completed.

Respectfully submitted this 30th day of December, 2003.

FREDERICKSEN, WILLIAMS, MESERVY
& LOTH SPEICH, LLP



ROBERT E. WILLIAMS
Attorney for Applicant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 30th day of December, 2003, I caused to be served the foregoing document as follows:

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

- ☒ Via US Mail, Postage Paid
☐ Via Facsimile - 208/331-1202
☐ Hand-Delivered - Court Folder
☐ Other _____

Peter R. Anderson, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
1301 N. Orchard St.
Boise ID 83706

- ☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/327-7866
☐ Hand-Delivered - Court Folder
☐ Other _____



ROBERT E. WILLIAMS

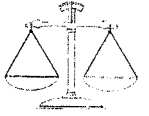
EXHIBIT L

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

FAXED
12/30/03

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

FILE COPY



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

Telephone: (208) 324-2303
Telecopier: (208) 324-3135
E-MAIL rewilliams@cableone.net

EUGENE D. FREDERICKSEN - Of Counsel

December 30, 2003

Sent Via Facsimile - 208/331-1202

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

Re: Lupher/Morganroth

Dear Bruce:

To follow up our telephone conversation and in an effort to allow an expeditious determination of the lease issues, I am formally advising you that Mark and Jody Lupher propose that all issues under the existing Lease Agreement between the parties be resolved by binding arbitration. This will eliminate any question under the lease as to whether an arbitration would be binding or not. My clients further suggest that we agree upon Judge Daniel C. Hurlbutt as the arbitrator since he has already been made familiar with many of the issues which exist between the parties.

This proposal to agree upon binding arbitration would be subject to the requirement that the existing State Court action be dismissed with prejudice, each party to bear their own attorney fees and costs.

I will look forward to hearing from you in the near future.

Very truly yours,

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPICH, LLP

ROBERT E. WILLIAMS

EXHIBIT M

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420

BOISE, ID 83702

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

RANSOM J. BAILEY
SUSAN E. BUXTON*
MICHAEL C. MOORE*
BRUCE M. SMITH
PAUL A. TURCKE*
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*

JOHN J. MCFADDEN*
Of Counsel

* Also admitted in Oregon
* Also admitted in Washington
* Also admitted in South Dakota
* Also admitted in New Mexico

January 13, 2004

Robert E. Williams
Fredericksen, Williams & Meservy
117 S. Adams Street
P.O. Box 169
Jerome, ID 83338

Re: Luper v. Von Morganroth

Dear Rob:

I have forwarded your letter indicating that the Luperes would now agree to binding arbitration to Ms. Von Morganroth. I will provide you a response after she has an opportunity to review it. A couple of comments though on some of your conditions. First, it seems appropriate that the Luperes' claims would be dismissed with prejudice, but that Ms. Von Morganroth's counterclaim wouldn't. I believe that is probably what you meant anyway, but I thought it best to be clear. As for costs and fees being borne by each side, I believe the only fair resolution is for the Luperes to at least pay for Ms. Von Morganroth's costs and fees for the district court proceedings. I do not believe they would be that high, but the fact is we tried to explain to the Court that the lease prohibited the filing of any suit prior to arbitration. The Luperes violated that provision by filing. When we pointed out that was improper, they disagreed. I know you didn't make that argument but they did through their previous counsel. Now they want to go back to following the terms of the lease agreement. It hardly seems fair for the Luperes to force Ms. Von Morganroth into having to participate in a suit, then switch positions. I do not know what her response will be, but I wanted to raise this issue from my perspective.

Sincerely,



Bruce M. Smith

BMS/cf

cc: client

EXHIBIT N

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 rewilliams@cablone.net

EUGENE D. FREDERICKSEN - Of Counsel

FILE COPY

January 20, 2004

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

RE: *Lupher v. Von Morganroth*

Dear Bruce:

In response to your letter of January 13, 2004, I offer the following:

The proposal is that the entire lawsuit, both the Complaint and the Counterclaim be dismissed with prejudice, with each side to bear their costs and fees. I recognize that the suit was filed in the face of the arbitration clause. We both recognize that the arbitration clause is at the very least ambiguous and seems to anticipate that arbitration not being the final method of dispute resolution under the lease. There is no other explanation for the language in the Lease Agreement other than that lawsuits could be filed subsequent to the arbitration.

In light of the ambiguous language in the Lease Agreement and in a good faith desire to provide a speedy form for the final resolution of the disputes between the parties under the Lease, the Luphers are willing to make binding arbitration as the final word. It is in that spirit that the proposal was suggested. The Luphers are giving up their right to claim that any arbitration would be non-binding, which they believe is a substantial right. The Von Morganroths would be giving up their claim to attorney fees and costs incurred in the defense of the State Court lawsuit to date.

It remains my clients' belief that this proposal, coupled with an agreement for binding arbitration of the State Court case, is in the best interests of all parties.

I will look forward to hearing from you soon.

Very truly yours,

FREDERICKSEN, WILLIAMS, MESERVY & LOTH SPEICH, LLP

A handwritten signature in black ink, appearing to read "Robert E. Williams", written over the printed name.

ROBERT E. WILLIAMS

REW/mrf
c: client
C:\data\Lupher\Smith 01 19 04.wpd

EXHIBIT O

8-15
PB

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,

v.

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; CORPORATIONS
A-Z; LIMITED PARTNERSHIPS 20-25;
LOIS, LLC, 40-50; and their heirs
successors and assigns,

Defendants.

Case No.: CV-00-101

ORDER ON MOTION TO
RECONSIDER

LOIS VON MORGANROTH,
Counterclaimant,

vs.

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

Counterdefendants.

Defendant, Lois Von Morganroth, has filed with this court a Motion for Reconsideration of Order of Stay Pending Arbitration. Plaintiffs have responded with a memorandum in opposition to Defendant's motion for reconsideration. Defendant argues that the parties have agreed to submit their case to binding arbitration so the case should be dismissed rather than stayed. Defendant further argues that all arbitration, by definition, is binding and therefore the parties' agreement need not specifically state that the arbitration is binding. Plaintiffs respond by stating that not only have the parties agreed to non-binding arbitration, but that an agreement to first submit the dispute to non-binding arbitration is a valid contract.

The parties clearly bargained for arbitration when they entered into the lease agreement. However, whether the arbitration clause in the lease agreement calls for binding or non-binding (if there is such a thing under Idaho law) is irrelevant at this time. This court is aware of Defendant's argument that if the arbitration is binding, a dismissal rather than a stay is required. This argument ignores the plain language of Idaho Code §7-901, which mandates a stay rather than a dismissal for arbitration under the Idaho Arbitration Act. Therefore, whether or not the arbitration is or is not binding is not relevant as the court is required to issue a stay regardless.

The problem this court has is the uncertain state of Idaho law with regard to non-binding arbitration. Some states have decided that there is no such thing as non-binding arbitration.¹ Other states and the federal courts have decided that non-binding

¹ Godfrey v. Hartford Cas., Ins., 142 Wash.2d 885, 16 P.3d 617 (Wash. 2001); City of Lenexa v. C.L. Fairley Constr. Co., Inc., 245 Kan. 316, 323, 777 P.2d 851, 857 (Kan. 1989); Schaefer v. Allstate Ins. Co., 63 Ohio St.3d 708, 711, 590 N.E.2d 1242, 1245 (Ohio 1992).
Order on Motion to Reconsider

arbitration agreements are perfectly valid and enforceable according to their terms.² The Idaho Supreme Court has used the phrase "binding arbitration" in numerous cases.³ One could argue that this implies that the Idaho Supreme Court recognizes non-binding arbitration for if all arbitration was binding there would be no need to use the word "binding." Defendant also argues that the Idaho Arbitration Act only sets forth the details for enforcing binding arbitration agreements. Idaho Code §7-901 of the Uniform Arbitration Act titled "Validity of arbitration agreement," states the following:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between parties is valid, enforceable and irrevocable, save upon such grounds as exists at law or in equity for the revocation of any contract. . . .

This section does not state that arbitration agreements must be binding in order to be enforced or that any agreement to arbitrate automatically becomes binding irrespective of the parties' intent. Also, non-binding arbitration is very similar to mediation which under I.R.C.P §16(k) a judge can order the parties to attend at any time. The Idaho Supreme Court has not specifically ruled that non-binding arbitration agreements are invalid and unenforceable. All of the cases cited by Defendant involve the interpretation and enforceability of agreements where the parties bargained for "binding arbitration."

² Water Works Employees Local No. 1045, AFSCME, AFL-CIO v. Bd. of Water Works, 615 P.2d 52 (Colo. App. 1980); Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205 (9th Cir. 1998).

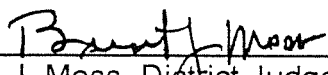
³ Hughes v. Hughes, 123 Idaho 711, 851 P.2d 1007 (Ct. App. 1993); Accomazzo v. CEDU Educ. Services, Inc., 135 Idaho 145, 15 P.3d 1153 (2000); Chicoine v. Bignall, 127 Idaho 225, 899 P.2d 438 (1995); Lady v. Allstate Ins. Co., 113 Idaho 667, 747 P.2d 76 (Ct. App. 1987).

As a result of the uncertain state of Idaho law, this court will not decide at this time if the arbitration clause in the lease calls for binding or non-binding arbitration. The parties have agreed to arbitrate and therefore both parties must attend arbitration and put forth a good faith effort to resolve this dispute. If after arbitration either party is unhappy with the arbitrator's decision, they can return to this court, which will then decide whether or not the arbitration is binding or non-binding in conjunction with the enforceability of the arbitrator's decision.

THEREFORE, it is HEREBY ORDERED,

Defendant's Motion to Reconsider is DENIED.

Dated this 8 day of August, 2001.



Brent J. Moss, District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has this 8 day of August, 2001 been served upon the individuals listed below and in the following manner:

William R. Hollifield
G. Richard Bevan
Hollifield & Bevan, P.A.
249 Third Avenue East
P.O. Box 66
Twin Falls, ID 83303-0066

U.S. Mail – Postage prepaid
Hand delivered
Fax

☒
[]
[]

Bruce M. Smith
Moore, Smith, Buxton & Turcke
225 North 9th Street, Suite 420
Boise, ID 83702

U.S. Mail – Postage prepaid
Hand delivered
Fax

☒
[]
[]

Clerk of the Court

By:

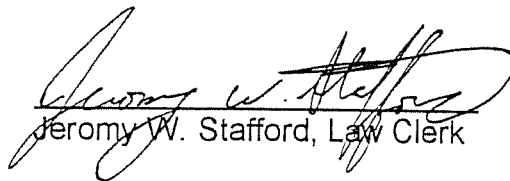

Jeromy W. Stafford, Law Clerk

EXHIBIT P

Idaho Op. Atty. Gen. No. 88-6

Office of the Attorney General
State of Idaho*1 Opinion No. 88-6
October 21, 1988R. Keith Higginson, Director
Department of Water Resources
Statehouse Mail

Per Request for Attorney General's Opinion.

QUESTIONS PRESENTED:

1. Does Section 42-114, Idaho Code, prohibit the issuance of a water right permit to a landowner for stock watering purposes if the land is or is intended to be leased to another person for the grazing of livestock?
2. Section 42-220, Idaho Code, provides that a water right permit confirmed by the issuance of a license becomes appurtenant to, and shall pass with a conveyance of the land for which the right of use is granted. What is the effect, if any, of this provision upon the ownership of a licensed water right if the permit upon which it is based was issued to and held by a person other than the landowner?

CONCLUSIONS:

1. Idaho Code § 42-114 (Supp.1988) does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock.
2. Idaho Code § 42-220 has no effect on the ownership of the water right in the situation posed by your question.

ANALYSIS:

Question No. 1

Courts have had difficulty in fitting stock watering from natural watercourses into the appropriative water rights doctrine. Recently, the legislature enacted legislation addressing this issue. Idaho Code § 42-114 (Supp.1988). The first question asks us whether this statute precludes issuance of a water right permit to a landowner for stock watering if the land is or is intended to be leased to another person for the grazing of livestock.

Idaho Code § 42-114 states as follows:

Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water.

As used in this section, the 'watering of domestic livestock' means the drinking of water by domestic livestock from a natural stream, ground water source or other source.

The statute, by its express language, requires the department to issue the permit for stock watering "to the person or association of persons making application therefor." It provides no restriction on who may apply. Therefore, any person, including a landowner who leases his land to stockmen, may file an application for a water right.

The statute further provides that "watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of the water." This sentence addresses an issue of particular importance to the livestock industry in a state that

depends on summer grazing on lands administered by the U.S. Forest Service and by the Bureau of Land Management. In such a case, the owner of the cattle has no legal title to the summer grazing land. This provision makes it clear that the owner of cattle is making beneficial use of the water even without any ownership in the underlying place of use.

*2 Some of the correspondence received by the department concludes that this clause provides a negative implication, i.e., that a landowner/lessor who does not personally own the livestock grazed on his land is not a proper party to apply for and receive a permit/license to appropriate water for instream livestock watering on his land. Some statements in the legislative history arguably support this view.

Idaho Code § 42-114 was enacted in 1986. Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498. The statement of purpose recites: "This bill will place the beneficial use clearly with the consumption and the ownership of the cattle and not with the land management agencies." This statement is repeated at several committee hearings. Minutes of House Resources and Conservation Committee (February 17, 1986). Minutes of Senate Resources and Environment Committee (March 19, 1986). In addition, the following statement appears in the legislative history: "Representative Brackett presented this legislation because he has heard so much discussion and questions as to who should file for water permits regarding domestic livestock." Minutes of House Resources and Conservation Committee (March 3, 1986).

None of these statements from the legislative history convinces us that Idaho Code § 42-114 should be read to require ownership of the cattle by the permittee/licensee. First, this interpretation rests on the assumption that the title holder of a water right in Idaho must make the actual beneficial use of the water appropriated under a permit/license and that beneficial use of the water by a lessee or permittee of the landowner is insufficient to maintain a water right held by the title holder/landowner. While a lower court in Nevada has accepted this analysis, *State v. Morros*, Elko County Civil Nos. 19404 and 19511, slip op. at 11 (D.Nev. Feb. 5, 1987), appeal filed, 18 Env'tl.L.Rep. (Env'tl.L.Inst.) 10224 (June 1988), such is not the law in Idaho.

The appropriative water rights doctrine was created to address the arid conditions of the western states. The doctrine as developed by the courts recognized the necessity to transport waters from distant sources of supply to places of use for mining, agricultural and other beneficial uses.

Significantly, much of the early mining and agriculture occurred on vacant public domain. Miners staked placer claims and courts recognized such claims even though title to the land remained in the United States. *Irwin v. Phillips*, 5 Cal. 140 (1855). In 1866, Congress confirmed in legislation the right of the public to go on the public domain and to appropriate water for "mining, agricultural, manufacturing, or other purposes." Act of July 26, 1866, ch. 262, 14 Stat. 251, 253.

In like manner Idaho courts recognized that water may be appropriated for beneficial use on land not owned by the appropriator. For example, in **First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930)**, the bank's predecessor in interest had been decreed a water right for use on unsurveyed public land. When the land was surveyed, that portion of the land within section 36 passed to the state, and the bank's predecessor thereafter leased the land from the state. After the bank acquired the land, it sought to transfer the water right for the leased land to other land owned by the bank. The Idaho Supreme Court concluded that the bank possessed a water right and that the bank could transfer it to other land. **49 Idaho at 745-747, 291 P. at 1066**. Thus, a bifurcation of ownership of the land and of the water right used on the land is allowed under Idaho law. See also, *Sanderson v. Salmon River Canal Co. Ltd.*, 34 Idaho 145, 199 P. 999 (1921); *Sarret v. Hunter*, 32 Idaho 536, 185 P. 1072 (1919).

*3 Your question asks whether the landowner/lessor can hold the stock water right used by a lessee. It presents the issue of what relationship is allowed under Idaho law among the landowner, title holder of the water right, and the water user. Four different fact patterns are apparent. First, the landowner holds title to the water right and makes beneficial use of the water. This consolidation of all roles in one person is obviously allowed by Idaho Law and needs no further discussion. Second, a person other than the landowner holds title to the water right and makes beneficial use of the water on landowner's land. Idaho courts confirmed the existence of a water right in that situation in **First Security Bank**. Third, a person other than the landowner holds title to the water right; the landowner makes actual beneficial use of the water. This situation occurs frequently in Idaho. Canal companies, irrigation districts and other organizations routinely hold valuable water rights. The title holder--the canal company or irrigation district--does not itself make beneficial use of the water. *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 209, 157 P.2d 76, 81 (1945). Individual landowners who hold shares in the canal company or who own land within the irrigation district

make beneficial use of the water. Fourth, the landowner holds legal title to the water right; a person other than the landowner makes actual beneficial use of the water on landowner's land. Your question asks whether the fourth fact pattern is allowed by Idaho law. We are not aware of an Idaho decision that answers your question. Since Idaho courts have recognized the relationships stated in the second and third fact patterns, we believe Idaho courts would recognize the slightly different relationship stated in the fourth fact pattern. If the legislature had intended to limit the circumstances when it would allow different persons to be the title holder to the water right and the user of the water right, its intent to do so would have to be clearly expressed in section 42-114. We find nothing in the section to express such a limitation.

Second, Idaho Code § 42-501 specifically recognizes the appropriation of water for stock watering by the Bureau of Land Management, U.S. Department of the Interior. The interpretation of Idaho Code § 42-114 suggested by the correspondence received by the department would prohibit the appropriation of water for stock watering by the Bureau of Land Management that Idaho Code § 42-501 authorizes. Since repeals by implication are not favored, Doe v. Durtschi, 110 Idaho 466, 478, 716 P.2d 1238, 1250 (1986), it is unlikely that a court will find that the legislature intended a repeal of Idaho Code § 42-501 by enactment of Idaho Code § 42-114.

Based upon the foregoing analysis, we conclude that Idaho Code § 42-114 does not prohibit the Idaho Department of Water Resources from issuing a water right permit to a landowner for stock watering purposes even though the landowner leases his land to another person for the grazing of stock. Section 42-114 merely affirms that stock watering is a beneficial use of water and that any person may file an application for that use.

Question No. 2

*4 This question asks what effect the appurtenance provision of Idaho Code § 42-220 has on the ownership of a licensed water right if the permit upon which it is based was issued to and held by a person other than the landowner. Idaho Code § 42-220 states:

Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.

Although Idaho Code § 42-220 was first enacted in the Act of March 11, 1903, 1903 Idaho Sess. Laws 223, 233, we are unaware of any court decision that discusses the issue raised by your question.

The effect of Idaho Code § 42-220 on ownership may be analyzed from two perspectives. First, the effect of issuance of a license to a permit holder when no change in ownership of the water right or of the underlying land occurs. Second, the effect of a change in ownership of the underlying land after the department has issued a license.

The first effect is answered in our response to the first question. Idaho courts have long recognized a bifurcation of ownership of a water right and of the underlying land. Furthermore, in Sanderson v. Salmon River Canal Co. Ltd., 34 Idaho 145, 199 P. 999 (1921), the court construed an appurtenance provision relating to Carey Act projects now codified at Idaho Code § 42-2025. The court concluded that the appurtenance provision did not make the water right inseparable from the underlying land. 34 Idaho at 160, 199 P. at 1003. Similarly, Idaho Code § 42-220 cannot be read to make the water right inseparable from the underlying land or to change the long standing court interpretation of our appropriative water rights doctrine.

The second effect is more difficult to answer. The use of the word "all" in the statute appears to state that in a land conveyance situation the grantee of the land receives the water right as an appurtenance even though the grantor did not possess the water right in the first instance. This confiscatory result is not a reasonable interpretation of the statute because that interpretation would deprive water right holders of property without due process of law. Sanderson v. Salmon River Canal Co., Ltd., 34 Idaho 145, 160-161, 199 P. 999, 1003 (1921). Furthermore, that interpretation is not consistent with Paddock v. Clark, 22 Idaho 498, 126 P. 1053 (1912). In Paddock, the court concluded that an express limitation in a deed regarding the quantity of water rights conveyed to a grantee operated to reserve the excess appurtenant water rights to the grantor. 22 Idaho at 504-505, 126 P. at 1055. Although the water rights described in Paddock were apparently decreed in Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist., Ltd., Canyon County Civil Case No. 1323, aff'd, 14 Idaho 450, 94 P. 761 (1908), aff'd in part, rev'd in part, 16 Idaho 525, 102 P. 481

(1909), the court in Paddock failed to discuss the application of section 3262 of Idaho Revised Code (1908) to the facts of that case; section 3262, a predecessor of Idaho Code § 42-220, required "all rights to water confirmed ... by any decree of court ... [to] pass with a conveyance of, the land for which the right of use is granted." Nonetheless, the conclusion of the court in Paddock clearly indicated that a grantor of land had authority to retain to himself appurtenant water rights.

*5 A more logical interpretation of Idaho Code § 42-220 is that it codifies the common law rule concerning the conveyance of appurtenances with a conveyance of land. This common law rule provides:

In the absence of any language in a deed indicating a contrary intention on the part of the grantor, everything that is properly appurtenant to the land granted thereby--that is, everything which is essential or reasonably necessary to the full beneficial use and enjoyment of property and which the grantor has the power to convey--is to be considered as passing to the grantee.

23 Am.Jur.2d Deeds § 65 (1988) (footnotes omitted) (emphasis added). See also Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911) (a division of land produces a proportional division of the water right, absent a reservation of the water right). This common law rule creates a presumption in favor of the passing of appurtenances upon the conveyance of the underlying land. However, if a grantor of the land does not have the power to convey the water right or if a grantor reserves the appurtenant water rights, Idaho Code § 42-220 does not cause the water right to pass to a grantee of the land. The question of whether a particular grantor has the power to convey a stock water right held by another may involve an interpretation of many different documents such as leases, federal regulations and statutes, or state regulations and statutes. The determination of such factual issues may be quite difficult. However, your question does not raise these difficult factual issues because it stipulates that the water right is owned by a person other than the underlying landowner. In that case the landowner does not have the power to convey the water right. Therefore, Idaho Code § 42-220 would not change the ownership of the water right--it remains with the licensee.

Under the fact pattern you pose, the issue becomes what happens to the water right if the new landowner denies the licensee access to the place of use. The licensee would have three options: (1) sell the water right to the new landowner, (2) transfer the water right to other land for himself or for a third party, or (3) lose the water right by forfeiture, if the nonuse of the water right continues for five years when water is available under the priority of the water right. Finally, none of these options may be available to the licensee if the facts of the particular conveyance of land also constituted an abandonment of the water right.

AUTHORITIES CONSIDERED:

Idaho Statutes

Act of March 11, 1903, 1903 Idaho Sess. Laws 223.
Section 3262 of Idaho Revised Code (1908).
Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498.
Idaho Code § 42-114.
Idaho Code § 42-220.
Idaho Code § 42-501.
Idaho Code § 42-2025.

Idaho Cases

Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).
Farmers' Cooperative Ditch Co. v. Riverside Irrigation Dist., Ltd., Canyon County Civil Case No. 1323, aff'd, 14 Idaho 450, 94 P. 761 (1908), aff'd in part, rev'd in part, 16 Idaho 525, 102 P. 481 (1909). *6 First Security Bank v. State, 49 Idaho 740, 291 P. 1064 (1930).
Paddock v. Clark, 22 Idaho 498, 126 P. 1053 (1912).
Rayl v. Salmon River Canal Co., 66 Idaho 199, 157 P.2d 76 (1945).
Russell v. Irish, 20 Idaho 194, 118 P. 501 (1911).
Sanderson v. Salmon River Canal Co., Ltd., 34 Idaho 145, 199 P. 999 (1921).
Sarrett v. Hunter, 32 Idaho 536, 185 P. 1072 (1919).

Other Statutes

Act of July 26, 1866, ch. 262, 14 Stat. 251.

Other Cases

Irwin v. Phillips, 5 Cal. 140 (1855).

State v. Morros, Elko County Civil Nos. 19404 and 19511 (D.Nev. February 5, 1987), appeal filed, 18 Env'tl.L.Rep. (Env'tl.L.Inst.) 10224 (June 1988).

Other

Minutes of House Resources and Conservation Committee (February 17, 1986; March 3, 1986).

Minutes of Senate Resources and Environment Committee (March 19, 1986).

23 Am.Jur.2d Deeds § 65 (1988).

Statement of Purpose for Act of April 3, 1986, ch. 199, 1986 Idaho Sess. Laws 498.

JIM JONES

Attorney General

State of Idaho

Analysis By:

David J. Barber

Deputy Attorney General

Natural Resources Division

1988 Idaho Op. Atty. Gen. 41, Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.)

END OF DOCUMENT

Copr. (C) West 2004 No Claim to Orig. U.S. Govt. Works

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP

117 South Adams Street

P.O. Box 168

Jerome, ID 83338

Telephone: (208) 324-2303

Facsimile: (208) 324-3135

Attorney for Applicants

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 AND
APPLICATIONS FOR PERMITS Nos.
72-07577 and 72-07578 IN THE
NAME OF MARK L. AND/OR
JOANNE LUPHER, DBA EPICENTER
AQUACULTURE

AFFIDAVIT IN SUPPORT OF
PETITION IN OPPOSITION TO
ISSUANCE OF PROPOSED
DEFAULT ORDER

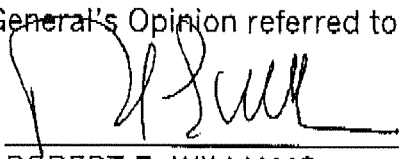
STATE OF IDAHO)

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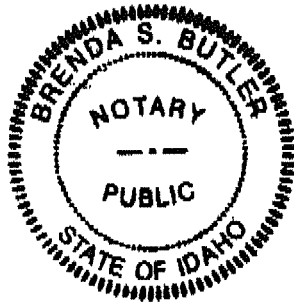
County of Jerome)

ROBERT E. WILLIAMS, being duly sworn deposes and says as follows:

1. I am the attorney for the Applicants.
2. Exhibits A through P attached to the Petition in Opposition to Issuance of Proposed Default Order, filed herewith, are true and correct copies of the correspondence, order and Attorney General's Opinion referred to in the Petition.


ROBERT E. WILLIAMS

SUBSCRIBED AND SWORN To before me this 5th day of April, 2004.



Brenda S. Butler

Notary Public for Idaho

Residing at:

Comm. Expires:

Gooding
3/5/2010

CERTIFICATE OF SERVICE

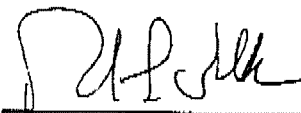
I, the undersigned, hereby certify that on the 5th day of April, 2004, I caused to be served the foregoing document as follows:

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

- ☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/331-1202
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☐ Other _____

Peter R. Anderson, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
1301 N Orchard St
Boise ID 83706

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☒ Via Facsimile - 208/327-7866
☐ Hand-Delivered - Court Folder
☐ Other _____



ROBERT E. WILLIAMS

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP

117 South Adams Street

P.O. Box 168

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Facsimile: (208) 324-3135

Attorney for Applicants

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 67067 AND
APPLICATIONS FOR PERMITS Nos.
72-07577 and 72-07578 IN THE
NAME OF MARK L. AND/OR
JOANNE LUPHER, DBA EPICENTER
AQUACULTURE

PETITION IN OPPOSITION
TO ISSUANCE OF PROPOSED
DEFAULT ORDER

COME NOW, the Applicants, MARK L. LUPHER and JOANNE LUPHER, dba EPICENTER AQUACULTURE, by and through heir attorney, Robert E. Williams of the firm FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP, and petition the Hearing Officer that the default order contained in the Notice of Proposed Default Order dated March 19, 2004, not be entered. The grounds upon which this petition are brought are as follows:

**I.
A DEFAULT ORDER IS NOT APPROPRIATE AT THIS STAGE OF THE
PROCEEDINGS.**

IDAPA 37.01.01700 provides, in pertinent part, as follows:

"Notice of Proposed Default After Failure to Appear. If an Applicant or Claimant or Appellant, Petitioner, Complainant or moving party fails to appear at the time and place set for hearing on an application or claim or appeal, petition, complaint or motion, the presiding officer may serve upon all parties a notice of a proposed default order denying the application, claim, or appeal, petition, complaint, or motion..."

The Applicants herein have appeared in this matter. The Applicants have not failed to appear at a time and place set for hearing on an application, claim, appeal, petition, complaint or motion. Therefore, under the terms of the rule upon which the proposed order of default is based, there are no grounds for default. A Default Order should not be issued on the basis of IDAPA 37.01.01700.

**II.
THE FAILURE TO SUBMIT A FINAL RESOLUTION OF THE LEASE AGREEMENT DISPUTE,
WHICH UNDERLIES THE PENDING APPLICATIONS ABOVE REFERENCED, IS EQUALLY THE
RESPONSIBILITY OF THE PROTESTANT.**

Under the unique circumstances of this proceeding, it is inappropriate that the pending applications for appropriation and transfer be finally considered until a final resolution of the lease issues has been made. A chronology of the attempts to resolve the issues under the lease, and references to relevant documents, where appropriate, is as follows:

A. Robert E. Williams appeared on behalf of the Applicants in the present proceedings before the Idaho Department of Water Resources on August 6, 2002. At the time of this appearance, lengthy discussion had been held between the parties regarding the selection of an arbitrator. See **EXHIBIT A** attached hereto consisting of twelve (12) separate pieces of correspondence between the parties regarding the selection of an arbitrator of the dispute, arranged in reverse chronological order. The parties were unable to agree upon the selection of an arbitrator. Daniel Hurlbutt, however, was agreed upon to act as a mediator of all disputes.

B. Judge Hurlbutt conducted the mediation on October 15, 2002. Following the conduct of the mediation, counsel for both parties advised the Hearing Officer that they remained optimistic regarding the resolution of the dispute. They asked the Hearing Officer to take no further action regarding this matter until such time as he was advised by the parties to do so. This conversation was noted by the Hearing Officer in paragraph 2 of the Notice of Proposed Default Order dated March 19, 2004, as having occurred March 14, 2003.

C. Following March 14, 2003, substantial negotiations regarding settlement of the water right and lease issues ensued. The negotiations took place in the form of correspondence and telephone calls between counsel.

D. Applicants initially proposed to assign their rights in the pending applications for transfer and appropriation to the Protestants on the condition that the applications be approved as submitted. The first letter is dated March 19,

2003, a copy of which is attached hereto as **EXHIBIT B**. In response to that proposal, correspondence from the Protestant's attorney was received April 4, 2003, a copy of which is attached hereto as **EXHIBIT C**. This exhibit was not received by the Applicants' attorney until April 17, 2003. **EXHIBIT D** was provided to Protestant's counsel on April 18, 2003. This letter continued discussions on new lease arrangements and still considered the assignment of applications for water right transfer and appropriation as a viable option. **EXHIBIT D** was replied to by correspondence dated June 6, 2003, a copy of which is attached hereto as **EXHIBIT E**. In response, Applicants returned correspondence to Protestant's counsel on June 20, 2003, a copy of which is attached hereto as **EXHIBIT F**. Protestant's counsel returned correspondence dated August 22, 2003, a copy of which is attached hereto as **EXHIBIT G**. In the August 22, 2003 correspondence, all new lease options proposed by Applicants were completely disregarded, and the original defaults on the lease, which were the subject matter of the state court complaint filed December 11, 2000, with counterclaim filed February 1, 2001, (stayed by Order of the District Court dated July 6, 2001) were rehashed. In response, Applicants' counsel provided correspondence dated September 5, 2003, a copy of which is attached hereto as **EXHIBIT H**.

E. Protestant's attorney responded to Exhibit H six (6) weeks later on October 16, 2003, a copy of which correspondence is attached hereto as **EXHIBIT I**. Applicants' counsel responded on October 24, 2003, a copy of which letter is attached hereto as **EXHIBIT J**.

F. In response to requests from the Hearing Officer, Applicants submitted a status report dated December 30, 2003, a copy of which is attached hereto as **EXHIBIT K**. Applicants have never received a copy of any status report filed by the Protestants if in fact any status reports have been filed by Protestant.

G. On December 30, 2003, Applicants' counsel provided correspondence to Protestant's counsel in an effort to bring the state court issues to a final resolution proposing to agree that arbitration would be binding, thus eliminating the need to return to District Court on the conclusiveness of the arbitration when it is completed. A copy of this correspondence is attached hereto as **EXHIBIT L**. Protestant's attorney responded by letter dated January 13, 2004, a copy of which is attached hereto as **EXHIBIT M**, to which Applicants' attorney replied on January 20, 2004, by correspondence, a copy of which is attached hereto as **EXHIBIT N**. Applicants remain ready to resolve the state court issues under the lease by binding arbitration, thus removing uncertainties arising from Judge Moss's Order on Motion to Reconsider in the state court action dated August 8, 2001, a copy of which is attached hereto as **EXHIBIT O**.

As the Hearing Officer has noted several times in this matter, most recently in the Order on Show Cause hearing dated April 16, 2002, determination of the ability of an Applicant to proceed with a water transfer or appropriation application should be resolved in state court. By virtue of Judge Moss's order dated August 8, 2001, however, the parties have been unable to complete these state court proceedings until arbitration had first been at least attempted. As amply

demonstrated by the correspondence and other exhibits attached hereto, the failure to get to arbitration at this point has not been due to the lack of effort of the Applicants.

The exhibits filed with this petition, as well as the other materials in the case file, show that the parties have worked mightily to accomplish the required arbitration. Though an arbitrator was never agreed to, a mediator was. Even after the conclusion of the mediation, the parties remained optimistic that the disputes could be resolved as demonstrated by the many proposals and modifications to proposals submitted over several months.

Judge Moss's order established that, in his view, Idaho law is not conclusive as to whether arbitration may be non-binding or binding. His order required the parties to return to him after the completion of an arbitration for him to determine whether it was binding or not. In an effort to avoid any further dispute as to the binding nature of arbitration, Applicants in good faith have proposed and remain willing, to stipulate that an arbitration of the state court issues be binding. That would remove further uncertainty to both parties and bring the state court issues to a final conclusion. Applicants' good faith is further demonstrated by their willingness to assign the pending application to the Protestants on the basis that they be approved as now filed. No explanation has been provided by the Respondent as to why the substance of either of these proposals is not acceptable.

Applicants believe it to be incorrect, and very unfair under all the circumstances related by this petition, to require dismissal of the pending

application for transfer and appropriation. Such dismissal would imply, that the Applicants have been the sole cause of the inability to complete arbitration. The Applicants respectively suggest that such is not the case.

The policy of this state has long favored the resolution of disputes on the merits and not upon the basis of default. (See *Stirm v. Puckett*, 107 Idaho 1046, 695 P.2d 431, Idaho App. 1985; *Gro-Mor, Inc. v. Butts*, 109 Idaho 1020, 712 P.2d 721, Idaho App., 1985; *Loomis, Inc. v. Cudahy*, 104 Idaho 196, 656 P.2d 1359, Idaho, 1982; *Hawkes v. Sparks*, 108 Idaho 917, 702 P.2d 1337, Idaho App., 1985; *Kovachy v. DeLeusomme*, 122 Idaho 973, 842 P.2d 309, Idaho App., 1992; *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274, Idaho App., 1993) Applicants are anxious to have their disputes with the Protestants resolved on the merits. As shown below, if the Applicants' status as valid tenants under the lease is vindicated by the state court action, the Applicants have a clear right to pursue the present applications even though they are Lessees. The issues presented by the pending applications should be continued to be held in abeyance while the state court issues are decided on their merits. Applicants should not be handicapped in the pursuit of their state court rights by dismissal of the pending applications which dismissal may have a significant impact on the state court litigation.

III.**STATUS AS A LESSEE IS SUFFICIENT TO SUPPORT APPLICATIONS FOR TRANSFERS AND APPROPRIATIONS OF WATER RIGHTS.**

The Court has previously referred to *Federal Land Bank of Spokane vs. Union Central Life Insurance Co.*, 51 Idaho 490 (1932), wherein the Court established the rule that before a person may have the place of use of water changed, he must show 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. Hence, the necessity of the current state court action. The lease which underlies this dispute provides that the Applicants have the right to 16.0 cfs of water for their fish propagation facilities. The applications for transfer and appropriation became necessary only when it was determined, after possession of the property had been taken, that the place of use provided by the existing water rights was incorrect and that the existing water license only provided for 6.9 cfs instead of the promised and anticipated 16.0 cfs. The right of a tenant to appropriate water for beneficial use on land owned by the appropriator was established in *First Security Bank v State*, 49 Idaho 740, 291 P 1064 (1930). This principle was acknowledged as valid by the Idaho Attorney General in its Opinion No. 88-6, issued October 21, 1988, wherein the Attorney General acknowledged the principles above set forth. See copy of Attorney General's Opinion attached hereto as **EXHIBIT P**.

IV. CONCLUSION

Completion of the arbitration of the state court dispute has not been due to the unilateral actions of the Applicants. The Applicants have in good faith negotiated with the Protestants to resolve the issues of the presently pending applications and to conclude the state court issues. The issues of this proceeding should be resolved on their merits and should not be permitted to be decided by default. For all these reasons, Applicants request that the proposed default order contained in the Notice provided by the Hearing Officer dated March 19, 2004 be withdrawn, and that the Hearing Officer enter an order staying all further proceedings on the pending applications until arbitration has been completed.

Respectfully submitted this 5th day of April, 2005.

FREDERICKSEN, WILLIAMS, MESERVY
& LOTH SPEICH, LLP



ROBERT E. WILLIAMS
Attorney for Applicants

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 5th day of April, 2004, I caused to be served the foregoing document as follows:

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

- ☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/331-1202
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Peter R. Anderson, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
1301 N Orchard St
Boise ID 83706

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☒ Via Facsimile - 208/327-7866
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ROBERT E. WILLIAMS

FREDERICKSEN, WILLIAMS, MESERVY & LOTH SPEICH, 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 Attn: Victoria 208.327.7866
Bruce Smith 208.331.1202
FROM: Robert E. Williams/bsb
SUBJECT: Luper Transfer No. 67067 Permit Nos 72-07577 and 72-07578
DATE: April 5, 2004

Pursuant to our telephone conversation, here is the Petition and Affidavit, without exhibits, the originals of which are being sent today by U.S. Mail. Call if there are any questions. Thank you. Brenda.

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.

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FREDERICKSEN, WILLIAMS, MESERVY & LOTHSPREICH, LLP
ATTORNEYS AT LAW

117 SOUTH ADAMS STREET - POST OFFICE BOX 168

JEROME, IDAHO 83338-0168

TELEPHONE (208) 324-2303

E-MAIL FWMATTYS@CABLEONE.NET

TELECOPIER (208) 324-3135

TELECOPIER COVER SHEET

TO Peter Anderson FAX NO. 208-327-7866
DATE 3-24-04

From: ☐ Eugene D. Fredericksen ☒ Robert E. Williams ☐ James C. Meservy ☐ John B. Lothspeich

Matter: Transfer No. 67067
App for Permits Nos. 72-67577 & 72-67578

TRANSMITTED:	<u>Stipulation to amend (Continuing</u>
	<u>Due Date of Petition)</u>
	<u>& proposed order</u>

☒ ORIGINAL WILL FOLLOW BY MAIL☐ ORIGINAL WILL NOT FOLLOW BY MAIL

- | | |
|---|---|
| ☐ FOR YOUR INFORMATION | ☐ PURSUANT TO YOUR REQUEST |
| ☐ PURSUANT TO OUR CONVERSATION | ☐ FOR PROCESSING WITH YOUR OFFICE |
| ☐ FOR SUBMISSION TO THE JUDGE | ☒ PLEASE REVIEW; ~~CALL WITH REVISIONS~~ |
| ☐ PLEASE CALL ME TO DISCUSS THIS MATTER | ☐ IMMEDIATE ATTENTION REQUIRED |
| ☐ PLEASE SIGN WHERE INDICATED; RETURN PROMPTLY | |
| ☐ PLEASE HAVE SIGNATURE NOTARIZED | |
| ☒ OTHER: | |

Please call if this is not
sufficient.

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ROBERT E. WILLIAMS
IDAHO STATE BAR NO. 1693
FREDERICKSEN, WILLIAMS & MESERVY
Attorneys at Law
117 South Adams Street
P. O. Box 168
Jerome, Idaho 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135

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 PERMITS NO. 72-07577 AND NO. 72-07578 IN THE NAME OF MARK L. and/or JOANNE LUPHER, dba EPICENTER AQUICULTURE	STIPULATION FOR ORDER CONTINUING DEADLINE TO FILE PETITION
---	--

COME NOW Applicants, through their attorneys, Robert E. Williams of
Fredericksen, Williams, Meservy & Lothspeich, LLP, and Protestant, by and through
its attorney, Bruce M. Smith of Moore, Smith, ^{Buxton} ~~Buckston~~ and Turcke, Chtd., and
stipulate that an order may be entered in this matter amending the Notice of
Proposed Default Order dated March 19, 2004, granting Applicants an additional
seven (7) days to April 5, 2004, to file a written petition requesting that the default
order not be entered.

This stipulation is entered into because Mr. Williams is presently in Hawaii
and is not scheduled to return until March 29, 2004.

FREDERICKSEN, WILLIAMS,
MESERVY & LOTH SPEICH, LLP

MOORE SMITH BUXTON & TURCKE,
CHTD.


ROBERT E. WILLIAMS
By J.B. Lothspeich
ATTORNEY FOR APPLICANTS
DATED: 3-24-04


BRUCE M. SMITH
By: Jimmy A. Zokan
ATTORNEY FOR PROTESTANTS
DATED: 3-24-2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 24th day of March, 2004, 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
Idaho Department of Water Resources
PO Box 83720
Boise, Idaho 83720-0098

☐ U.S. Mail, postage prepaid
☐ Hand Delivery ☐ Court Folder
☒ Facsimile 208-327-7866
☐ Federal Express

**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)
_____)

**NOTICE OF PROPOSED
DEFAULT ORDER**

NOTICE OF PROPOSED DEFAULT ORDER

1. On August 23, 2002, an *Order* issued in this matter which provided:

IT IS HEREBY ORDERED, AND THIS DOES ORDER, That the Order on Show Cause Hearing, dated April 12, 2002, be amended to provide that Applicants shall submit to the Idaho Department of Water Resources (IDWR) within 72 hours of the date upon which mediation disputes of the parties before Daniel C. Hurlbutt is concluded, final resolution of the lease agreement dispute indicating that the Applicants have 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 have been resolved.

2. 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 Idaho Department of Water Resources ("IDWR") soon, possibly within ten days of the conference.
3. Both parties have now indicated in status reports filed with IDWR that final resolution of the lease agreement dispute has not been reached.

Based upon these facts IDWR gives Mark L. and/or Joanne Lupher, DBA Epicenter Aquaculture **NOTICE** that the following default order is proposed to be issued pursuant to

IDAPA 37.01.01.700 because of their failure to respond to the information inquiry in the *Order* 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).

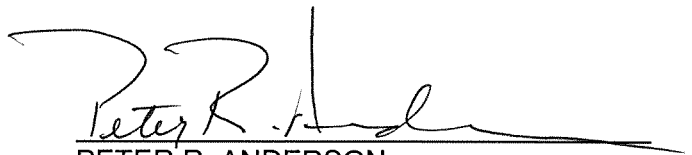
PROPOSED DEFAULT ORDER

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**.

RIGHT TO CHALLENGE

Pursuant to IDAPA 37.01.01.701, Mark L. and/or Joanne Luper, DBA Epicenter Aquaculture have seven (7) days after the serve of this *Notice of Proposed Default Order* to file a written petition requesting that the default order not be entered. The petition must state that grounds why the petitioning party believes that default should not be entered.

Dated this 19th day of March 2004.

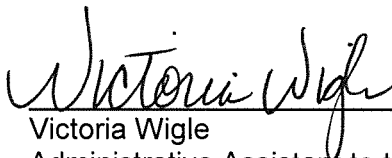

PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 19th day of March, 2004, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

BRUCE M SMITH
MOORE SMITH BUXTON & TURCKE CHARTERED
225 N 9TH ST STE 420
BOISE ID 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

MOORE SMITH BUXTON & TURCKE, CHARTERED

ATTORNEYS AND COUNSELORS AT LAW

225 NORTH 9TH STREET, SUITE 420
BOISE, ID 83702
TELEPHONE: (208) 331-1800 FAX: (208) 331-1202

RANSOM J. BAILEY
SUSAN E. BUXTON*
MICHAEL C. MOORE†
BRUCE M. SMITH
PAUL A. TURCKE‡
CHRISTOPHER E. YORGASON
TAMMY A. ZOKAN*

JOHN J. MCFADDEN*†
Of Counsel

* Also admitted in Oregon
†Also admitted in Washington
‡ Also admitted in South Dakota
* Also admitted in New Mexico

January 5, 2004

Peter Anderson
Hearing Officer
729 W. Braemere Road
Boise, ID 83702

Re: Status Report filed by Applicants
Application for Transfer No. 67067 and
Applications for Permits Nos. 72-07577 and 72-07578

Dear Peter:

You had requested a status report from the parties. I understood your request to be seeking information relative to your order requiring resolution of the lease issues by August 30, 2002, and submitted an explanation simply explaining that had not occurred. The Applicants, in turn, filed a lengthy recitation of things that have occurred in the interim, including the details of a number of discussions which I considered to be private settlement discussions. For the record, I do not necessarily agree with the Applicants' explanation of all of these events. Nor do I wish to provide my clients' perspective, unless you order me to do so, since they were settlement discussions and I would prefer that they not be put into public records. I therefore am requesting that you consider both of our submittals as private correspondence and not part of the record.

As for the substance of the matter, you ordered final resolution of the lease issues by August 30, 2002. I agreed to an extension to allow the mediation which, unfortunately, was not successful. It's now 2004, and the lease issues are still not resolved. The Applicants have now offered to do binding arbitration to try to finalize the lease issues. However, the Applicants' effort to resolve these issues at this point by agreeing to binding arbitration is somewhat belated since they argued at the hearing in the district court that the arbitration had to be non-binding. This almost guaranteed that resolution would take not only an arbitration, but a trial as well. This was in July 2001. (To be fair, the Applicants' current counsel did not make the non-binding

Peter Anderson, 1/5/04

Page 2

arbitration argument). The Applicants have gamed this proceeding as much as should be allowed. The Applications should be dismissed both for substantive reasons and for failing to comply with your orders of April 12, 2002 and August 23, 2002.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce M. Smith', with a long horizontal flourish extending to the right.

Bruce M. Smith

BMS/cf

cc: Rob Williams
client

RECEIVED

JAN - 2 2004

Department of Water Resources

Robert E. Williams

IDAHO STATE BAR NO. 1693

FREDERICKSEN, WILLIAMS, MESERVY & LOTH SPEICH, LLP

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Attorney for Applicant

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 67067 AND) STATUS REPORT
APPLICATIONS FOR PERMITS Nos.) OF APPLICANTS
72-07577 and 72-07578 IN THE)
NAME OF MARK L. AND/OR JOANNE)
LUPHER, DBA EPICENTER)
AQUACULTURE)
)

Pursuant to the written request of Peter R. Anderson, Hearing Officer, dated December 9, 2003, Applicants hereby provide their Status Report.

Following the filing of the Stipulation for Order signed by counsel for the Applicant on August 6, 2002, and by counsel for the Protestants on August 11, 2002, the parties conducted a day-long mediation before the Honorable Daniel C. Hurlbutt on October 16, 2002. The mediation identified several avenues for pursuit which were thought by counsel and the parties to be promising in terms of leading to a resolution of the entire dispute. Because of this, the Hearing Officer

was advised, through counsel for the Applicant and Protestants, that no further action regarding the pending matters should be pursued until otherwise advised by counsel. The Applicants believe this position was taken by all parties with the recognition that progress was being made towards a resolution of all disputes and that such a resolution would be in the parties' collective best interests.

From October, 2002, through the present date, the parties have exchanged written proposals for the resolution of the dispute. These proposals included revised lease terms and, alternatively, terms of purchase of the real property and water rights which are subject to the lease which underlies the dispute. At the present date, it does not appear that any of the proposals made by a party are acceptable to the other, and there is no immediate prospect for settlement.

The Applicants have also offered to resolve the matters pending before the Department of Water Resources by assigning their rights in the pending Applications to the Protestant subject to the condition that the Protestant would not withdraw the Applications. The Protestants have not accepted this offer. Additionally, since October, 2002, fifteen (15) storage boxes of records, constituting substantially all of the financial records of the Applicants while they have been in possession of the real property under the lease have been made available to the Protestant for review.

There are many issues which remain to be resolved between the parties in the pending State Court litigation. As the Hearing Officer is well aware, the State

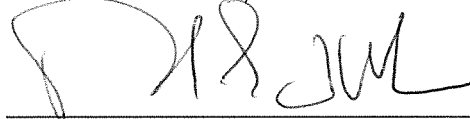
Court litigation has been suspended pending arbitration of the issues under the lease. The last Order of the Honorable Brent J. Moss in Case No. CV-00-101, entitled "Lupher vs. Morganroth, et al.", now pending in the Seventh Judicial District of the State of Idaho, in and for the County of Custer, ruled that no further action would be taken in the State Court case until the arbitration is completed. The Order of Judge Moss reserved a decision on the additional question as to whether the arbitration would be binding or non-binding until the arbitration was completed. This left the parties to face the possibility that arbitration could be resorted to, but prove to be of no avail unless a voluntary settlement was reached, or the Court ruled the arbitration to be binding. The Court's Order arises from a clause in the lease agreement which requires arbitration "before litigation is resorted to". To resolve the issue of whether the arbitration of all issues which are now being addressed in the State Court action would be final, the Applicants have recently proposed to stipulate to the binding arbitration of all issues between the parties under the lease agreement, subject to the condition that the State Court action be dismissed with each party to bear their costs and fees. The problem with the lease provision on arbitration would, therefore, be resolved. As this proposal has only been recently made, a response from the Protestant has not yet been received.

Binding arbitration, if accepted by the Protestants, will lead to a final resolution of all issues between the parties on the lease, including the lease issues

which are relevant to the matters presently pending before the Department of Water Resources. Applicants respectfully suggest that it would be appropriate to postpone further action on the Applications herein pending until an Order from the arbitration, which will be binding, has been entered. Applicant has suggested that the Honorable Daniel C. Hurlbutt be allowed to serve as Arbitrator since he is already quite familiar with the issues before the parties, having conducted the mediation in October, 2002. If the Protestant cannot agree to this suggestion of further postponement, the Applicant desires the opportunity to file a Motion seeking a modification of the existing Order to Show Cause requesting that this matter be further continued until binding arbitration has been completed.

Respectfully submitted this 30th day of December, 2003.

FREDERICKSEN, WILLIAMS, MESERVY
& LOTHSPREICH, LLP



ROBERT E. WILLIAMS
Attorney for Applicant

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 30th day of December, 2003, I caused to be served the foregoing document as follows:

Bruce Smith
MOORE SMITH
225 N 9th Ste 420
Boise ID 83702

- ☒ Via US Mail, Postage Paid
☐ Via Facsimile - 208/331-1202
☐ Hand-Delivered - Court Folder
☐ Other _____

Peter R. Anderson, Hearing Officer
IDAHO DEPARTMENT OF WATER RESOURCES
1301 N. Orchard St.
Boise ID 83706

- ☒ Via US Mail, Postage Paid
☒ Via Facsimile - 208/327-7866
☐ Hand-Delivered - Court Folder
☐ Other _____



ROBERT E. WILLIAMS