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DEPARTMENT OF
WATER RESOURCES

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February 10, 2006

Jeff Peppersack
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Water Right No. 63-31194

Dear Mr. Peppersack,

I am writing on behalf of my client, L. Darwin McKay. This letter is submitted in response to your February 9, 2006 letter to William McKleeven ("McKleeven letter") regarding Water Right No. 63-31194. The Department's intention to change the record for water right 63-31194 to show Sundance as the current owner is inconsistent with your November 5, 2004 letter to Richard W. Jankowski discussing this very issue. Furthermore, existing case law and the transactional proceedings granting Sundance the land in question support Mr. McKay's ownership claim to water right no. 63-31194.

In your November 5, 2004 letter, you stated that "a warranty deed or similar document would likely verify ownership of the land, but **if the deed does not specify the conveyance of any particular water rights, the ownership of water right 63-31194 would not be clarified by submittal of the deed in this case.**" The deeds you reference in your McKleeven letter fail to identify water right no. 63-31194 with any particularity. Any boiler plate comment contained in the referenced deeds did not transfer ownership of water right no. 63-31194.

The SRBA District Court, regarding the significance of boiler plate clauses in deeds, recently noted that "[w]hether or not the water right passes as an appurtenance is a question of fact depending entirely on the intention of the parties." *Memorandum Decision and Order on Challenge*, Subcases 55-et al. P.23 (January 3, 2005) citing Clesson S. Kinney, *Kinney on Irrigation and Water Rights* §§ 1005, 1007, 1008 (2nd Ed. 1912). As has been pointed out to you and the Department, Mr. McKay intentionally acquired the water right in his name, paid all costs associated with the water right, and has never intended to transfer the water right – especially for no compensation.

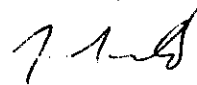
You reference in the McKleeven letter to a license date of February 1, 2000 and the associated condition are unknown to me. Water right no. 63-31194 was licensed on August 23, 1995 and I am unaware of any condition on the water right that states "[t]his water right is appurtenant to the

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described place of use." Regardless, the importance of the condition, if it does exist, is unclear.

Lastly, why does the Department now intend to change the record for water right 63-31194 to show Sundance as the current owner if it is not the role of the Department to adjudicate or quiet title to establish ownership of water rights? The history of the water right clearly establishes that Mr. McKay owned this water right. The water right is not mentioned in any of the deeds presented to you. Furthermore, existing case law supports Mr. McKay's ownership claim. The Department should maintain the status quo as it had previously represented in writing it would do, and continue to list Mr. McKay as the owner while an ownership controversy exists. Your prompt action to ensure that the ownership record is not changed is requested. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Gould", written over the printed name.

Jon Gould

cc: L. Darwin McKay