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BONNEVILLE COUNTY
HONORABLE JON L. SHINDURLING
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CUSTER

DAVE NELSON and LOY PEHRSON, et
al.,

Plaintiffs,

v.

BIG LOST RIVER IRRIGATION
DISTRICT, Board of Directors,
RICHARD REYNOLDS, CHARLIE
HUGGINS, KENT HARWOOD, JOEL
ANDERSON, and BRUCE WARNER;
IDAHO DEPARIMENT OF WATER
RESOURCES and KARL J. DREHER,
Director,

Defendants.

Case No. CV-05-91

OPINION, DECISION, AND ORDER ON
DEFENDANT BIG LOST RIVER
IRRIGATION DISTRICT'S MOTION
FOR SUMMARY JUDGMENT AND
PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT

BIG LOST RIVER IRRIGATION
DISTRICT,

Counter Claimant,

v

DAVE NELSON and LOY PEHRSON, et
al ,

Counter Defendants

I.
FACTUAL AND PROCEDURAL BACKGROUND

Defendant Big Lost River Irrigation District ("BLRID") holds storage water rights in the Mackay Reservoir on the Big Lost River. Defendant BLRID Board of Directors ("Board") administers the delivery of storage water to the patrons in the district. Plaintiffs Dave Nelson and Loy Pehrson are patrons of the BLRID who use storage water for irrigation along the upper reaches of the Big Lost River. There are 62 additional plaintiffs named in this action most of whom divert storage water for irrigation along the upper reaches of the Big Lost River.

The BLRID delivers water from the Mackay Reservoir to its patrons through a series of 16 diversions from the river. The Big Lost River area has large gravel deposits and porous soils, which allow water to seep into the ground. The loss of water is referred to as conveyance loss or "shrink." The upper reaches of the Big Lost River experience significantly less shrink, if any, compared to the lower reaches where shrink is substantial.

Shrink in the BLRID has been determined in various ways. Prior to 1994, BLRID used a pre-shrink calculation, which reduced the deliverable volume in the Mackay Reservoir to account for shrink. The pre-shrink method was unsuccessful in low water years because there was never enough water in the reservoir to cover patrons' water needs on the lower reaches of the Big Lost River. Due to the hydrological condition of the Big Lost River area and the on-going Snake River Basin Adjudication ("SRBA"), the Idaho Department of Water Resources ("IDWR") initiated a negotiated rulemaking procedure to resolve concerns of waterusers in the Big Lost River area. In 1994, the IDWR promulgated Water Distribution Rules for Water District 34, which includes the Big Lost River Basin. *See* IDAPA 37.03.12.

In 2005, the Board considered changing the shrink calculation because patrons on the lower reaches of the Big Lost River were not receiving their allotment of storage water. This had become a particular problem through a number of drought years, beginning in the late 1990s. On April 25, 2005, BLRID obtained an opinion letter from Steve Burell, IDWR Water Distribution Engineer, regarding the allocation of shrink. Burell responded that IDWR administrative rules do not control the manner in which BLRID allocates shrink among its patrons. (Aff. of Bob Shaffer, Ex. E.) On April 30, 2005, the Board considered a motion to apply shrink universally among the patrons (*Id.*, Ex. G.) However, no decision was made at that time. The Board considered the motion again on May 5, 2005, and approved the universal shrink motion.

On July 28, 2005, Plaintiffs filed their Complaint and Request for Immediate Injunctive Relief and a Motion for Preliminary Injunction, seeking to enjoin the BLRID Board from applying the universal shrink rule to its patrons. Hearing on the preliminary injunction motion was held August 10, 2005. The Court granted the motion for preliminary injunction on August 11, 2005.

On August 12, 2005, Plaintiffs filed their First Amended Complaint and Request for Immediate Injunctive Relief, wherein they added a claim for a declaratory judgment. On November 17, 2005, BLRID filed a counterclaim seeking declaratory relief as well. The Court authorized BLRID's counterclaim on November 17, 2005.

BLRID filed a Motion for Order of Dismissal and Motion for Summary Judgment on January 30, 2006. Plaintiffs filed a Cross-Motion for Summary Judgment on February 13, 2006, seeking summary judgment on all claims and the counterclaim. On February 21, 2006, BLRID filed a motion to strike the affidavit of Alison Madhavi Bradford and an objection to the notice of hearing on the cross-motion for summary judgment.

On February 24, 2006, Robert Waddoups, et al , Jay F. Pearson, et al , and the Butte County, Idaho, Board of County Commissioners filed a Motion to Intervene. Plaintiffs objected to the proposed intervention.

The Court held a hearing on the motion to dismiss, motions for summary judgment, motion to strike, and motion to intervene on February 27, 2006. At the hearing, the Court denied the motion to intervene due to the late request and the close proximity to the trial. However, the Court permitted Waddoups, et al., Pearson, et al., and Butte County to participate by presenting briefs and argument as amici curiae. Additionally, the Court ordered Plaintiffs to post a \$3000 cash bond as security for the preliminary injunction pursuant to Idaho Rule of Civil Procedure 65(c).

On April 6, 2006, the Court issued a memorandum decision denying BLRID's motion to dismiss. Since the parties seek a declaratory judgment of an IDWR administrative rule, the Court ordered that IDWR must be joined as a party pursuant to Idaho Code § 67-5278(2) and Idaho Rule of Civil Procedure 19(a)(1). The Court instructed that it would consider the motions for summary judgment after IDWR was joined and had an opportunity to respond to the motions.

On April 18, 2006, Amici Curiae Waddoups, et al., Pearson, et al., and Butte County filed a Second Motion to Intervene. The Court granted the motion as to Waddoups, et al., and Pearson, et al. The Court denied the motion as to Butte County, but permitted the county to participate as amicus curiae. Waddoups, et al., and Pearson, et al., collectively, "Intervenors."

The Court granted permission to join IDWR on May 22, 2006. IDWR responded to the motions for summary judgment on October 16, 2006.

The Court heard argument on the motions for summary judgment on October 30, 2006. At that time, the Court took all pending motions under advisement. After considering the Court's file,

pleadings, admissions, affidavits, and the argument of counsel, the Court renders the following opinion on the motions for summary judgment

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56(c), provides that “summary judgment shall be granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *DBSI/TRIV v Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996))

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct.App 1998) citing *G & M Farms v Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). If reasonable people could reach different conclusions based on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

The burden of proving the absence of material facts is upon the moving party. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002). Once the moving party establishes the absence of a genuine issue, the burden shifts to the nonmoving party to show that a genuine issue of material fact on the challenged element of the claim does exist. *Id.* The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial.” I R C.P. 56(e) Failure to do so will result in an order granting summary judgment. *Id* Therefore, the moving party is entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party’s case on which that party will bear the burden of proof at trial *Thomson*, 137 Idaho at 476, 50 P.3d at 491; *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

III ANALYSIS

Plaintiffs and BLRID seek a declaratory judgment regarding the applicability of IDWR Water Distribution Rules - Water District 23, specifically IDAPA 37.03.12.040.03.b (“Rule 40.03.b”). BLRID frames the issue before the Court on summary judgment as:

[O]nce shrink is applied by the Watermaster pursuant to the Water Distribution Rules and water is delivered to BLRID, do the Water Distribution Rules limit the ability of the Directors of BLRID to then allocate storage water among BLRID waterusers?

(Def.’s Br. in Supp. of Mot. at 8) Plaintiffs frame the issue on summary judgment as:

Once shrink is applied by the Watermaster pursuant to the Water Distribution Rules and water is delivered to [BLRID], does the [BLRID] have authority to disregard the prior allocation of shrink pursuant to the Water Distribution Rules for District 34 and apply their own rules which essentially nullify prior shrinkage calculations applied by the Watermaster.

(Br. in Opp’n to Def.’s Mot. for Summ. J. and in Supp. of Pls.’ Cross-Mot. for Summ. J. at 10.) The Intervenor and Amicus Curie contend the issue before the Court is “whether [Rule 40.03.b] applies to BLRID’s distribution of its” storage water. (Amicus Br. at 12) Finally, IDWR phrases the question before the Court as, “[D]oes Rule 40.03.b prevent the BLRID Board from applying a universal shrink assessment to its patrons ” (IDWR Resp. to Cross-Mot. for Summ. J. at 6) It is apparent to the Court that the crux of this declaratory judgment action, as framed by the parties, is the interpretation of Rule 40.03.b, and whether the rule applies to the decisions of the BLRID Board

The interpretation and application of Rule 40.03.b are questions of law.

Administrative rules and regulations, such as those in IDAPA, “are traditionally afforded the same effect of law as statutes.” *Huyett v. Idaho State Univ.*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004). Therefore, the principles of statutory construction apply to administrative rules. *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). If the language of a statute is clear and unambiguous, “statutory construction is unnecessary and the court need only apply the statute” *Huyett*, 140 Idaho at 909, 104 P.3d at 951. The language will be ambiguous “when the meaning is so doubtful or obscure that ‘reasonable minds might be uncertain or disagree as to its meaning.’” *Canty v. Idaho State Tax Comm’n*, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002) (quoting *Payette River Property Owners Ass’n v. Board of Comm’rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999)). “However, ambiguity is not established merely because different possible interpretations are presented to a court. If this were the case then all statutes that are the subject of litigation could be considered ambiguous” *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). Specifically discussing the interpretation of administrative rules, the Idaho Supreme Court stated:

Interpretation of such a rule should begin, therefore, with an examination of the literal words of the rule. *Thomas v. Worthington*, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999) (citing *State ex rel. Lisby v. Lisby*, 126 Idaho 776, 779, 890 P.2d 727, 730 (1995)). The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning. *Id.* In addition, this language should be construed in the context of the rule and statute as a whole, to give effect to the rule and to the statutory language the rule is meant to supplement. *Grand Canyon Dories v. Idaho State Tax Comm’n*, 124 Idaho 1, 5, 855 P.2d 426, 466 (1993).

Mason, 135 Idaho at 581, 21 P.3d at 908.

In this case, Chapter 6, Title 42 of the Idaho Code is the enabling statute the IDWR rules are “meant to supplement” *Mason*, 135 Idaho at 581, 21 P.3d at 908. Chapter 6 is entitled

“Distribution of Water Among Appropriators.” Pursuant to the statute, IDWR “is authorized to adopt rules for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources.” I.C. § 42-603; *see also* IDAPA 37.03.12.000. IDWR adopted such rules for Water District 34, which includes the Big Lost River Basin IDAPA 37.03.12.001.

The Water Distribution Rule at the center of the controversy in this case is Rule 40.03.b. The rule provides:

Conveyance losses in the natural channel shall be proportioned by the watermaster between natural flow and impounded water. The proportioning shall be done on a river reach basis. Impounded water flowing through a river reach that does not have a conveyance loss will not be assessed a loss for that reach. Impounded water flowing through any area that does have a conveyance loss will be assessed the proportionate share of the loss for each losing reach through which the impounded water flows. To avoid an iterative accounting procedure, impounded water conveyance loss from the previous day shall be assessed on the current day.

The Court finds that Rule 40.03.b is unambiguous. The plain language of the rule charges the watermaster to calculate conveyance loss. The watermaster, according to the Water Distribution Rules, is the “duly appointed watermaster” for Water District 34 IDAPA 37.03.12.001. The meaning of the rule is clear. Due to the dynamic hydrology of the Big Lost River, the watermaster must calculate “conveyance loss to determine the amount of natural flow and impounded water in the river channel in order to assist the watermaster in delivering the natural flow rights in priority.” (IDWR Resp. to Cross-Mot. for Summ. J. at 7.) Natural flow is defined in IDAPA as “[w]ater or the right to use water that exists in a spring, stream, river, or aquifer at a certain time and which is not the result of the storage of water flowing at a previous time.” IDAPA 37.02.03.010.07. According to the rules, impounded water includes both storage water held by the BLRID in the Mackay Reservoir and rotation credit water attributed to natural flow water rights. IDAPA 37.03.12.010.12 and 15. The plain reading of the rule is not “so doubtful or obscure that ‘reasonable minds might be

uncertain or disagree as to its meaning,” thus the rule is not ambiguous. *Canty*, 138 Idaho at 182, 59 P.3d at 987 (citations omitted). Since the rule is clear, the Court will not engage in statutory construction or consider extrinsic evidence to determine the intent of the clear language. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001).

The parties agree that Rule 40.03.b is unambiguous. However, the parties disagree as to the application of the rule. BLRID argues the rule applies to the watermaster for Water District 34 because the rules are directed to the IDWR-employed watermaster IDAPA 37.03.02.001. BLRID further argues the rule does not apply to the BLRID Board because the Board has discretion to manage its water pursuant to I.C. § 43-304. Thus, argues BLRID, the rule does not mandate that the Board allocate its storage water within the irrigation district according to the watermaster’s conveyance loss calculation. IDWR, Intervenor, and Amicus Curiae agree with BLRID’s application of Rule 40.03.b.

Plaintiffs, on the other hand, argue the rule does apply to the BLRID Board. Plaintiffs contend that BLRID’s narrow application of the rule ignores the negotiated rulemaking procedure from which IDWR promulgated the Water Distribution Rules for Water District 34. Plaintiffs argue they depended upon IDWR and BLRID to enforce and comply with the Water Distribution Rules. If BLRID does not comply with Rule 40.03.b, Plaintiffs contend the rule is essentially meaningless.

The Court reviews the parties’ proposed application of the rule within the text of the applicable statutes. *Mason*, 135 Idaho at 581, 21 P.3d at 908.

Chapter 6, Title 42 of the Idaho Code is the enabling statute for the Water Distribution Rules. The statute authorizes the IDWR to adopt rules for the distribution of water from sources within their jurisdiction. I.C. § 42-603. The statute also authorizes the creation of water districts. I.C. § 42-604. A water district is “considered an instrumentality of the state of Idaho for the purpose of

performing the essential government function of distribution of water among appropriators under the laws of the state of Idaho.” *Id.* The water district watermaster is charged to distribute water under the direction of the IDWR. I.C. § 42-607. The IDWR carried out its statutory obligation and promulgated Water Distribution Rules for Water District 34. The rules are specifically directed to the “duly appointed watermaster” for Water District 34. IDAPA 37.03.12.001.

Title 43 of the Idaho Code allows for the creation of irrigation districts. An irrigation district is created when a majority of title owners of real property, susceptible to irrigation, “desire to provide for the irrigation of the same.” I.C. § 43-101. With respect to water distribution, the board of directors of an irrigation district has authority “to establish equitable by-laws, rules and regulations for the distribution and use of water among owners of such land, as may be necessary and just to secure the just and proper distribution of the same.” I.C. § 43-304. The irrigation district has the authority to acquire “lands and water rights.” *Id.* The irrigation district holds property in trust for the uses authorized by the statute. I.C. § 43-316. As the title holder to such property, the irrigation district board is authorized to “hold, use, acquire, manage, occupy and possess said property” as provided under the statute. *Id.*

BLRID contends Rule 40.03 b applies only to the IDWR watermaster for Water District 34. The statute charges IDWR with the responsibility to promulgate water distribution rules. When the IDWR promulgated those rules, the agency specifically directed that the rule applied to the watermaster. According to the statute, the watermaster is directed to distribute water under the direction of the IDWR. Therefore, BLRID’s application of the rule is consistent with the enabling statute.

Plaintiffs contend Rule 40.03 b applies to both the IDWR watermaster and the BLRID Board.

Idaho Code § 42-603 authorizes the IDWR to promulgate water distribution rules for water sources

within their jurisdiction, "streams, rivers, lakes, ground water and other natural sources " Pursuant to Idaho Code § 43-304, the board of directors has authority to establish policies for water distribution within the jurisdiction of the irrigation district. The statutes above set forth the jurisdiction of the IDWR in a water district and the jurisdiction of the BLRID Board in an irrigation district. In the Court's view, the proposed application of the Rule 40.03 b advanced by Plaintiffs positions these two statutes in conflict with each other.

Under the Idaho Code, the jurisdiction of the IDWR ends and the jurisdiction of the BLRID begins when the watermaster delivers storage water to the BLRID. In other words, jurisdiction for water distribution, and consequently compliance with Rule 40.03.b, begins and ends at the appropriator's headgate. In the case of the BLRID, the district, itself, is the appropriator. The BLRID, itself, holds storage water rights in the Big Lost River (Aff. of Bob Shaffer, Ex C.) When the watermaster delivers storage water to the BLRID, according to the statute, the district may distribute its water within the irrigation district according to water distribution policies set by the Board. If the Court declared that Rule 40.03 b must be applied by the BLRID Board to water distributed within the BLRID, such a declaration would violate the Board's statutory authority.

The Court declines to accept Plaintiffs' application of Rule 40.03 b. The Court cannot read requirements into an unambiguous administrative rule. Further, the Court cannot apply an administrative rule in a manner contrary to the Idaho Code. For these reasons, the Plaintiffs' application of Rule 40.03 b is not supported by the law. However, the Plaintiffs may pursue a change of the IDWR Water Distribution Rules through administrative rulemaking procedures. Likewise, the Plaintiffs, as patrons in a water district, have the ability to change the policies of the BLRID through the political process within the irrigation district.

The Court declares that Rule 40.03.b applies to the distribution of water by the IDWR to appropriators within Water District 34. The Court also declares that the BLRID Board is not mandated to distribute storage water within the BLRID according to watermaster's calculation in Rule 40.03.b.

**IV.
CONCLUSION**

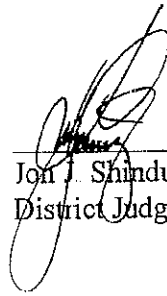
Defendant BLRID's Motion for Summary Judgment is granted.

Plaintiffs' Cross-Motion for Summary Judgment is denied.

The Preliminary Injunction issued by Court is vacated.

IT IS SO ORDERED.

Dated this 17th day of November, 2006



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November, 2006, I served a true and correct copy of the foregoing OPINION, DECISION, AND ORDER ON DEFENDANT BIG LOST RIVER IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

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by

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FILED IN CHAMBERS
AT IDAHO FALLS
BONNEVILLE COUNTY
HONORABLE JON J. SHINDURLING
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
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v.

BIG LOST RIVER IRRIGATION
DISTRICT, Board of Directors,
RICHARD REYNOLDS, CHARLIE
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ANDERSON, and BRUCE WARNER;
IDAHO DEPARTMENT OF WATER
RESOURCES and KARL J. DREHER,
Director,

Defendants.

Case No. CV-05-91

ORDER ON DEFENDANT BIG LOST
RIVER IRRIGATION DISTRICT'S
MOTION TO STRIKE

BIG LOST RIVER IRRIGATION
DISTRICT,

Counter Claimant,

v.

DAVE NELSON and LOY PEHRSON, et
al.,

Counter Defendants.

Defendant Big Lost River Irrigation District ("BLRID") moves to strike the Affidavit of Alison Madhavi Bradford, arguing the affidavit is irrelevant, lacks foundation, and contains hearsay.

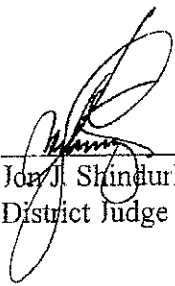
Idaho Rule of Civil Procedure 56(e) provides, "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits that are conclusory, based on hearsay, and not supported on personal knowledge do not meet the requirements of I.R.C.P. 56(e). *State v. Shama Resources Ltd. Partnership*, 127 Idaho 267, 271, 889 P.2d 977, 981 (1995).

Idaho Rule of Evidence 701 permits opinion testimony by a lay witness, so long as the testimony is: (a) rationally based on the perception of the witness, (b) helpful to understand the testimony or determine a fact in issue, and (c) not based on scientific, technical or other specialized knowledge. I.R.E. 701. An opinion constituting a legal conclusion is improper opinion testimony because the Court independently decides questions of law.

The Court finds that Bradford's affidavit testimony lacks the requisite foundation under I.R.C.P. 56(e). Bradford bases her opinions on her "understanding" without providing a foundation for such opinions. Further, the Court finds that the testimony purports to interpret a water right. This testimony is a legal conclusion beyond the scope of I.R.E. 701. Therefore, those portions of the affidavit that assert statements without foundation and assert legal conclusions will not be considered by the Court for purposes of summary judgment.

IT IS SO ORDERED.

Dated this 17th day of November, 2006.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2006, I served a true and correct copy of the foregoing ORDER ON DEFENDANT BIG LOST RIVER IRRIGATION DISTRICT'S MOTION TO STRIKE upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes

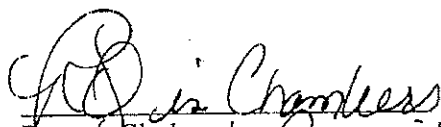
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Ethel Peck
Clerk of the District Court
Custer County, Idaho

by  *J. Chambers*
Deputy Clerk *at Bonneville County*