

Merlyn W. Clark, ISB No. 1026
Geoffrey M. Wardle, ISB No. 5604
Jake D. McGrady, ISB No. 8209
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 342-3829
Email: mclark@hawleytroxell.com
gwardle@hawleytroxell.com
jmcgrady@hawleytroxell.com

Attorneys for SeaPac of Idaho

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)	CM-DC-2011-003
WATER TO WATER RIGHTS NOS. 36-)	
07072 AND 36-08356)	REPLY TO ORDER REQUIRING
(SEAPAC OF IDAHO))	SEAPAC OF IDAHO, INC. TO
)	SUPPLEMENT DELIVERY CALL
)	
)	

SeaPac of Idaho, Inc. (“SeaPac”), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby submits this Reply to Order Requiring SeaPac of Idaho, Inc. to Supplement Delivery Call.

I.
INTRODUCTION

On July 12, 2011, SeaPac delivered a letter to the Idaho Department of Water Resources (the “Department”) demanding that the Director require the require the watermaster for Water

District 130 to administer water rights as required by Idaho Code section 42-607 and pursuant to the Department's conjunctive management rules, IDAPA 37.03.11 in order to supply SeaPac with water under its senior rights. The delivery call claimed that junior ground water pumpers are causing material injury to SeaPac's beneficial use of its water. On July 29, 2011, the Department submitted its Order Requiring SeaPac of Idaho, Inc. to Supplement Delivery Call, asserting that SeaPac must set forth specific information required under IDAPA 37.03.11.30.01.

II. ANALYSIS

A. IDAPA 37.03.11.30.01 is Inapplicable to Seapac's Delivery Call.

Idaho Code section 42-602 authorizes and compels the Director to control and distribute water in a water district in accordance with the prior appropriation doctrine. IDAHO CODE ANN. § 42-602. The Director and the Department have promulgated administrative rules which govern the administration of surface and ground water rights. These are known as the Conjunctive Management Rules, which are set forth in IDAPA 37.03.11.

Pursuant to Rule 20.01 of the Conjunctive Management Rules,

01. Distribution of Water Among The Holders of Senior and Junior-Priority Rights. Holders of Senior and Junior-Priority Rights. These rules apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply.

IDAPA 37.03.11.20.01. Furthermore, Rule 20.04 provides the general statement and policy for water calls relating to the conjunctive management of surface and ground water resources:

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the

distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a juniorpriority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued.

IDAPA 37.03.11.20.04. Rule 20.07 then designates the particular rules that apply to each particular type of delivery call:

07. Sequence of Actions for Responding to Delivery Calls. Rule 30 provides procedures for responding to delivery calls within areas having a common ground water supply that have not been incorporated into an existing or new water district or designated a ground water management area. Rule 40 provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. Rule 41 provides procedures for responding to delivery calls within areas that have been designated as ground water management areas. Rule 50 designates specific known areas having a common ground water supply within the state.

IDAPA 37.03.11.20.07. As indicated in Rule 20.07, Rule 30 provides the procedures for responding to delivery calls *only* when the common ground water supply has not been incorporated into an existing or new water district or designated as a ground water management area. *Id.* Rule 30 is thus inapplicable to delivery calls made in water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created. *Id.* Indeed, Rule 30.09 specifically acknowledges that Rule 30 is inapplicable:

09. Administration Pursuant to Rule 40. Upon a finding of an area of common ground water supply and upon the incorporation of such area into an organized water district, or the creation of a new water district, the use of water *shall be administered in accordance with the priorities of the various water rights as provided in Rule 40.*

IDAPA 37.03.11.20.09 (emphasis added).

In this case, as SeaPac is located within the boundaries of Water District No. 130, Rule 30 is inapplicable to the current delivery call.

B. SeaPac is Located Within the Boundaries of Water District No. 130, and Therefore, Rule 40 Governs the Procedures for SeaPac’s Delivery Call.

As indicated above, Rule 40 “provides procedures for responding to delivery calls within water districts where areas having a common ground water supply have been incorporated into the district or a new district has been created.” IDAPA 37.03.11.20.07. As SeaPac is located within the boundaries of Water District No. 130, Rule 40 of the conjunctive management rules governs the procedures for SeaPac’s delivery call. Rule 40 provides in relevant part:

040. RESPONSES TO CALLS FOR WATER DELIVERY MADE BY THE HOLDERS OF SENIOR-PRIORITY SURFACE OR GROUND WATER RIGHTS AGAINST THE HOLDERS OF JUNIOR-PRIORITY GROUND WATER RIGHTS FROM AREAS HAVING A COMMON GROUND WATER SUPPLY IN AN ORGANIZED WATER DISTRICT (RULE 40).

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one (1) or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year (5) period to lessen the economic impact of immediate and complete curtailment; or

- b.** Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

IDAPA 37.03.11.40.01. Notably, the rules relating to delivery calls against the holders of junior-priority ground water rights within a water district do not contain similar provisions to Rule 30 requiring supplementation of, among other things, “[t]he names, addresses and description of the water rights of the ground water users (respondents) who are alleged to be causing material injury to the rights of the petitioner in so far as such information is known by the petitioner or can be reasonably determined by a search of the public records.” IDAPA 37.03.11.30.01.b. Indeed, such a regulatory scheme makes logical sense, as the creation of the water district provides the information called for by Rule 30 in instances where no water district exists. Furthermore, in the Department’s Order Granting IGWA’s Petition to Intervene, the Department itself recognizes that “IGWA’s members are all owners of water rights that divert from the Eastern Snake Plain Aquifer that have hydraulic connections with the source for Water Right Nos. 36-7072 and 36-8356 and many of its members are junior ground water users that SeaPac alleges have caused material injury to Water Right Nos. 36-7072 and 36-8356.” Consequently, there is no question that SeaPac is within the boundaries of Water District 130 and that Rule 40 governs the delivery call.

III. CONCLUSION

In SeaPac’s July 12, 2011, delivery call, SeaPac alleged that by reason of diversion by junior-priority ground water users from an area within Water District No. 130, SeaPac is suffering material injury. Therefore, SeaPac has fulfilled its delivery call requirements under Rule 40, has otherwise provided the information required by IDAPA 37.01.01, Rule 230, and is thus entitled to the prompt administration of its water rights within Water District 130 in

accordance with SeaPac's rights. It is disconcerting that the Department would attempt to impose regulations upon SeaPac that are clearly not relevant or applicable to its claim.

**IV.
SUPPLEMENTATION**

Nonetheless, in the interest of reaching a just and prompt adjudication of SeaPac's prior appropriation rights, SeaPac hereby submits Exhibits A through J demonstrating the material injury to SeaPac's beneficial use of its water rights.

DATED THIS 5th day of August, 2011.

By 

Geoff M. Wardle, ISB No. 5604
Attorney for SeaPac of Idaho, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2011, I caused to be served a true copy of the foregoing REPLY TO ORDER REQUIRING SEAPAC OF IDAHO, INC. TO SUPPLEMENT DELIVERY CALL by the method indicated below, and addressed to each of the following:

Victoria Wigle
Idaho Department of Water Resources.
PO Box 83720
Boise, ID 83720-0098
Victoria.wigle@idwr.idaho.gov
Garrick.baxter@idwr.idaho.gov
Chris.bromley@idwr.idaho.gov

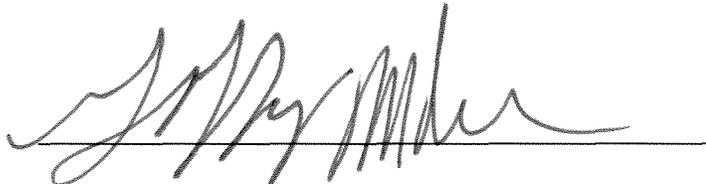
U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy

Candice M. McHugh
RACINE OLSON NYE BUDGE & BAILEY,
CHARTERED
101 S. Capitol Blvd., Ste. 300
Boise, ID 83702
cmm@racinelaw.net

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy

Mike Creamer
GIVENS PURSLEY LLP
PO Box 2720
Boise, ID 83702
mcc@givenspursley.com

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 E-mail
 Telecopy



Geoff M. Wardle

EXHIBIT A

MAGIC SPRINGS WATER FLOWS

CFS

MSPF909A

YEAR	JAN	FEB	MAR	APR	MAY	JUN	JULY	AUG	SEP	OCT	NOV	DEC	AVE.
1995			125	125	116	116	116	116	115	116	116	115	117.6
1996	115	116	117	126	120	114	112	113	115	115	116	116	116.3
1997	116	115	114	114	113	114	114	114	114	115	115	115	114.4
1998	115	115	115	114	114	113	113	113	114	115	115	115	114.3
1999	115	115	115	115	114	114	113	114	114	115	115	115	114.5
2000	115	115	114	114	113	113	113	114	114	114	114	114	113.9
2001	113	114	114	113	113	113	112	112	113	113	114	114	113.2
2002	114	114	114	113	113	113	98	103	107	109	109	110	109.8
2003	109	104	103	103	105	102	103	106	111	116	117	119	108.2
2004	120	104	102	102	104	104	100	108	109	111	111	111	107.2
2005	111	108	108	108	98	102	105	113	119	121	119	115	110.6
2006	114	115	106	115	112	113	116	111	114	121	119	117	114.4
2007	116	113	111	107	104	103	116	113	111	107	104	103	109.0
2008	105	103	103	105	104	103	102	103	104	100	99	99	102.5
2009	96	94	93	94	95	94	92	91	93	95	98	97	94.3
2010	96	94	93	94	95	95	95	96	97	99	99	97	95.8
2011	95	93	91	89	88	90	92						
License	148	148	148	148	148	148	148	148	148	148	148	148	
Ave 02-	107.6	104.2	102.4	103.0	101.8	101.9	101.9	104.9	107.2	108.8	108.3	107.6	

EXHIBIT B

YEAR VERSUS AVE. FLOW

YEAR	AVE. FLOW
1995	117.6
1996	116.3
1997	114.4
1998	114.3
1999	114.5
2000	113.9
2001	113.2
2002	109.8
2003	108.2
2004	107.2
2005	110.6
2006	114.4
2007	109.0
2008	102.5
2009	94.3
2010	95.8
2011	

AVE. MONTHLY FLOW (2002 to 2009)

MONTH	AVE. FLOW
JAN	107.6
FEB	104.2
MAR	102.4
APR	103
MAY	101.8
JUN	101.9
JUL	101.9
AUG	104.9
SEP	107.2
OCT	108.8
NOV	108.3
DEC	107.6

EXHIBIT C

MAGIC AVERAGE MONTHLY FLOWS

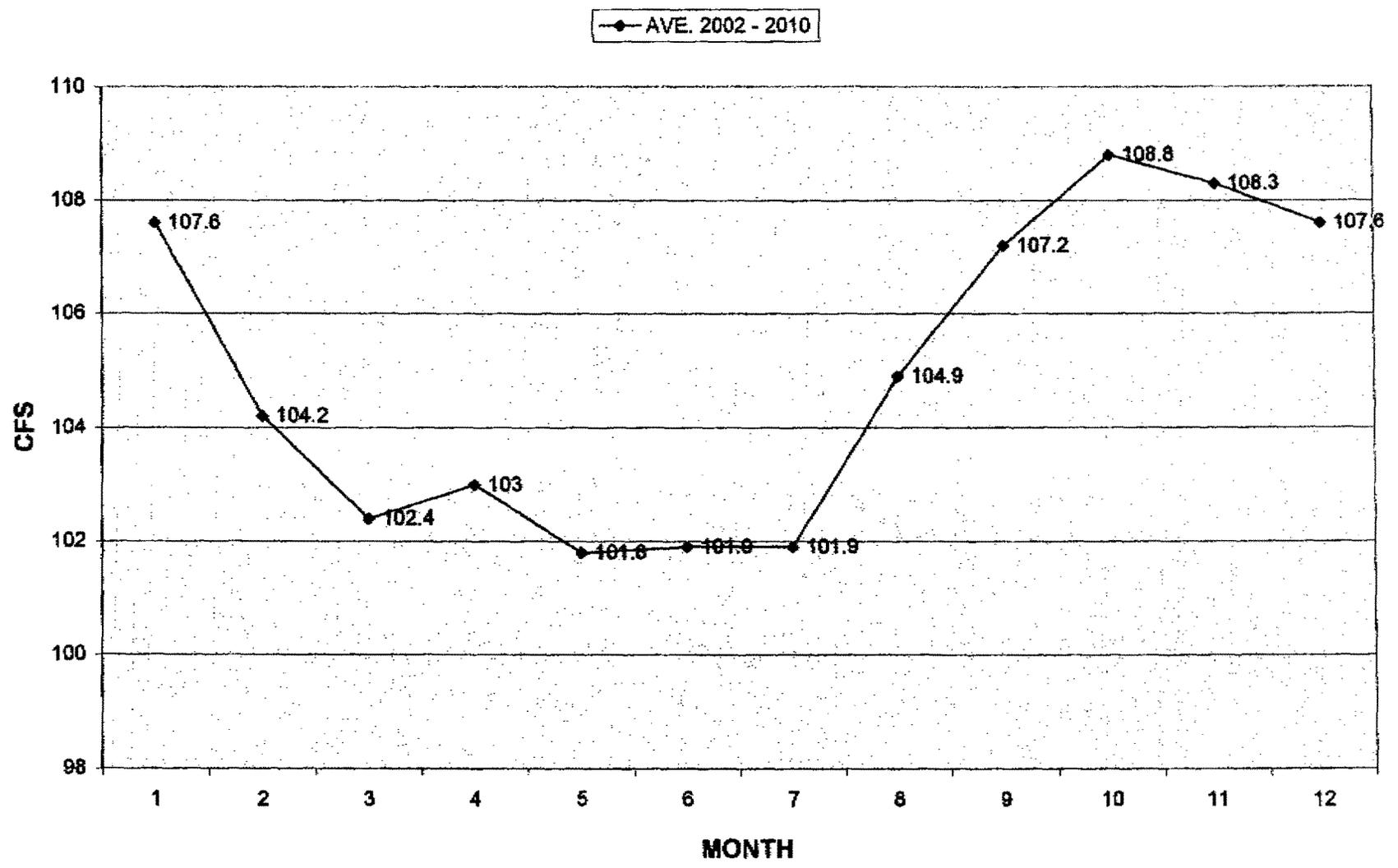


EXHIBIT D

MAGIC AVERAGE YEARLY FLOWS

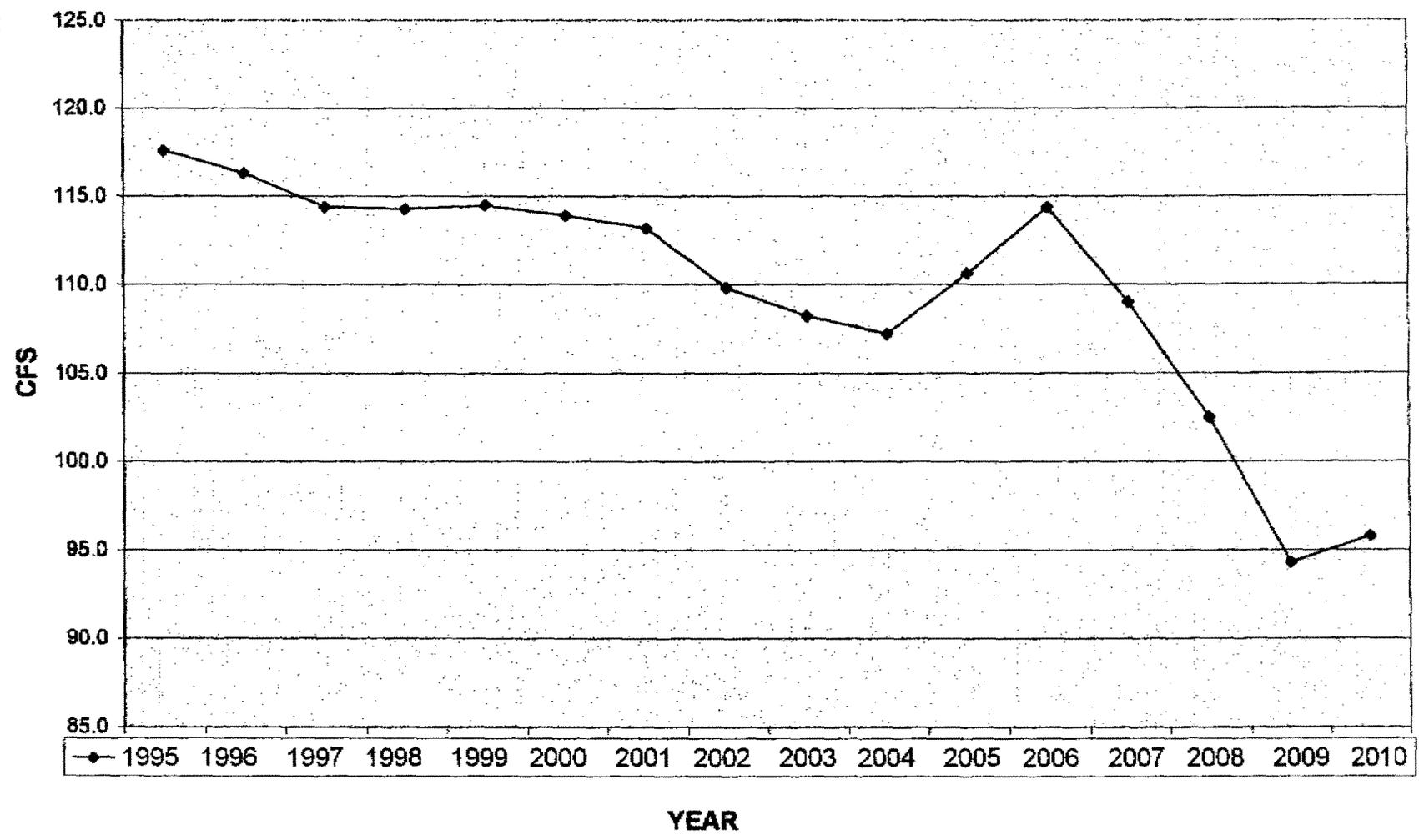


EXHIBIT E

MAGIC SPRINGS WATER FLOWS

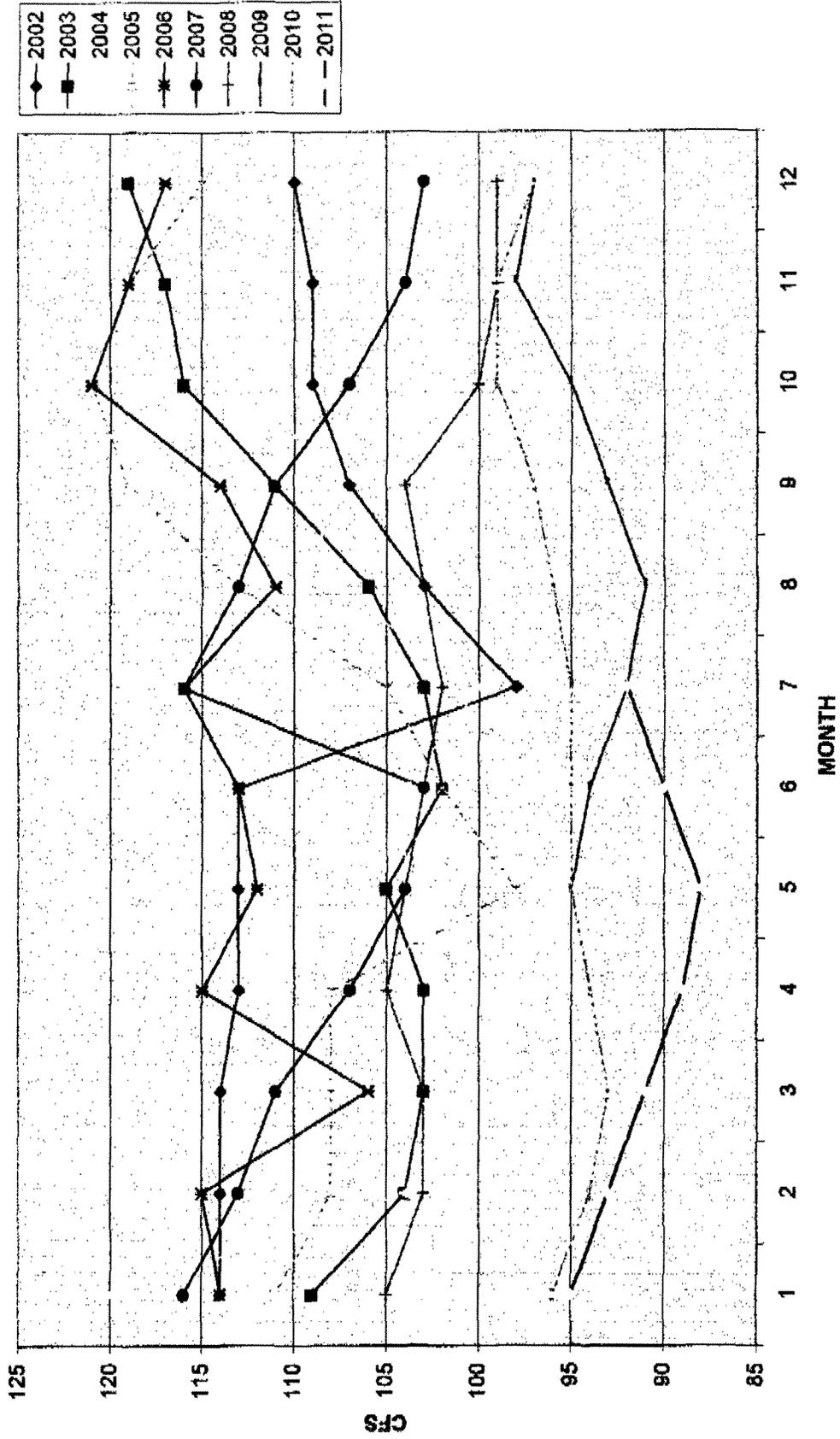


EXHIBIT F

MAGIC SPRINGS WATER FLOWS

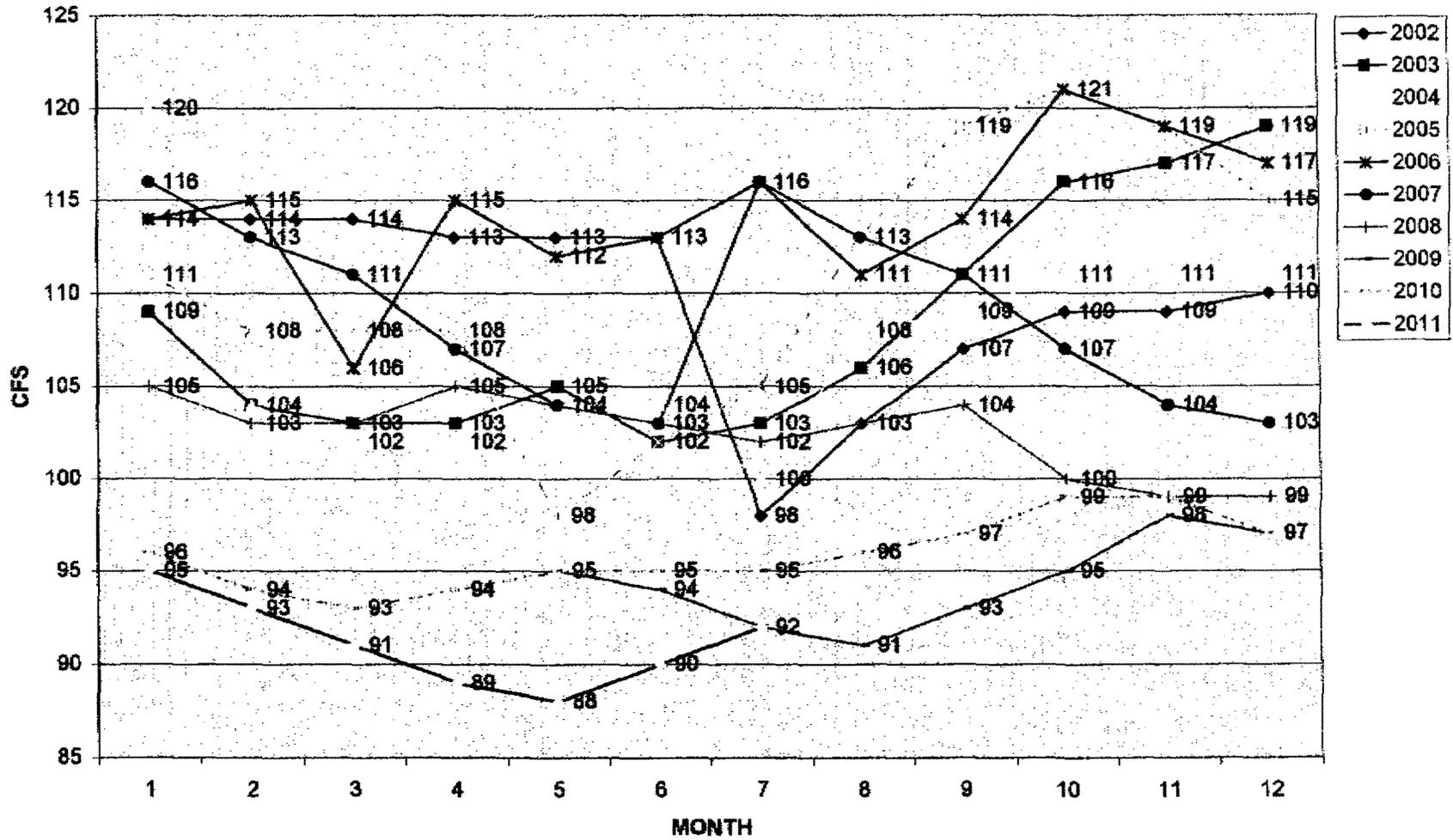
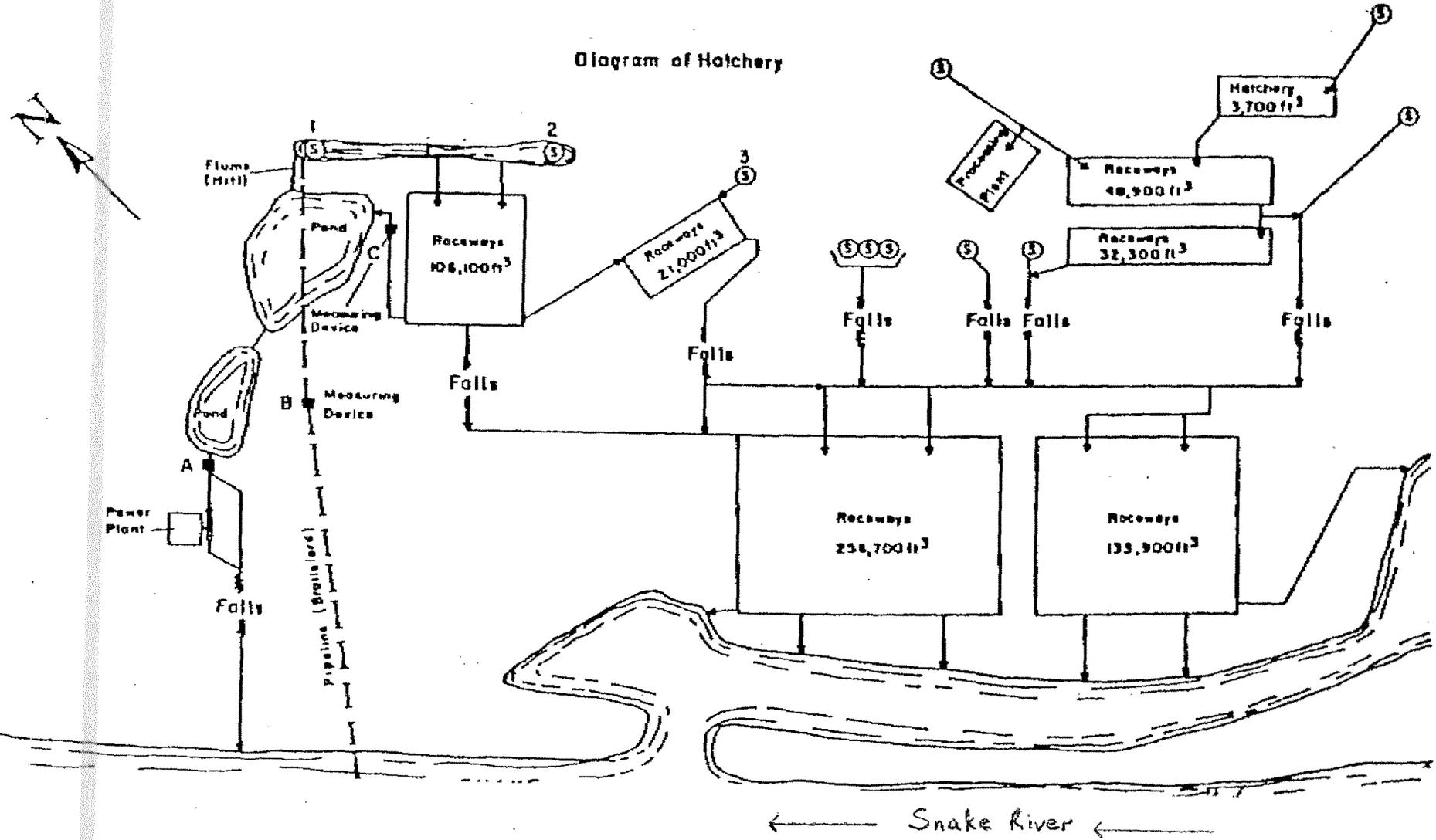


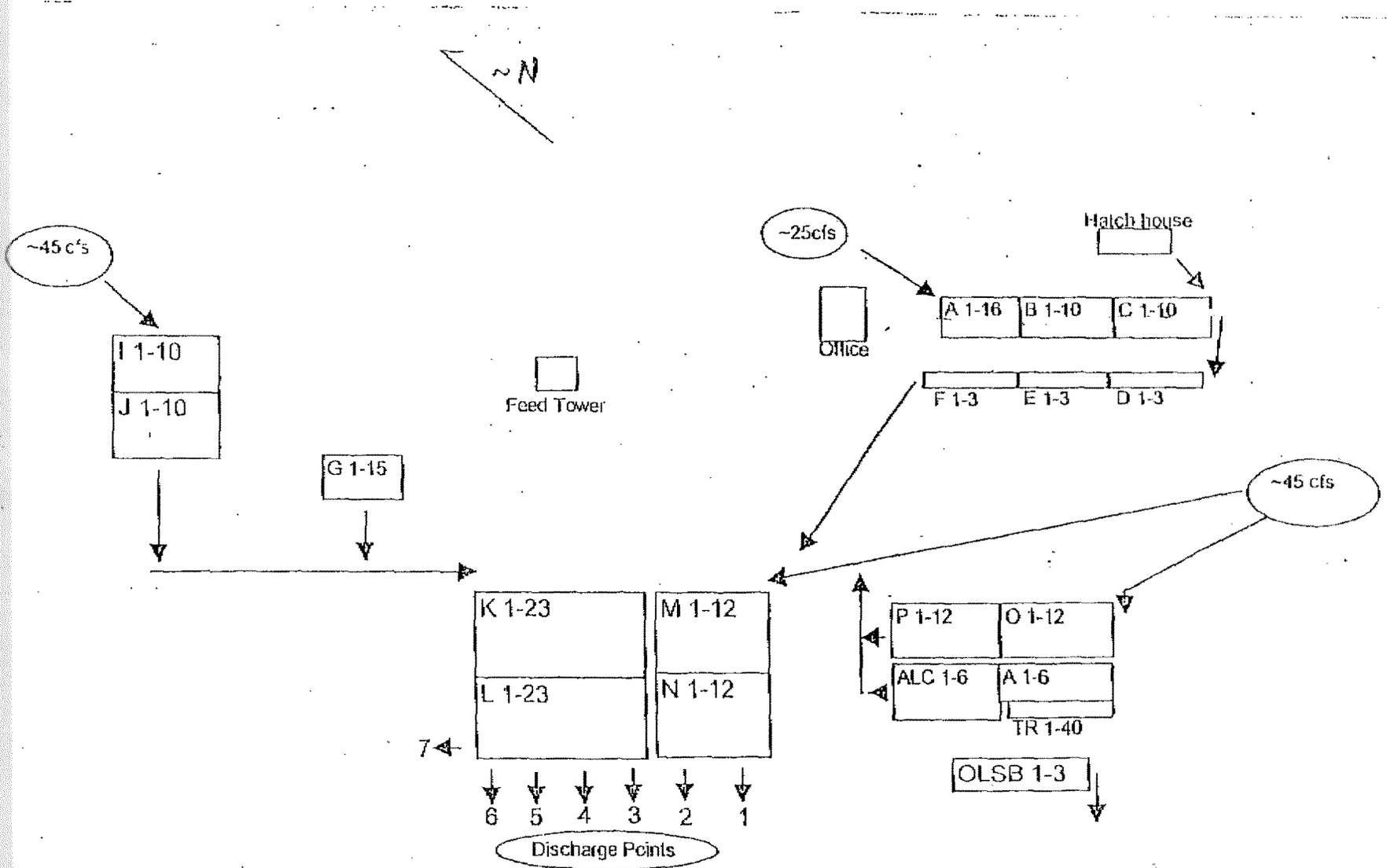
EXHIBIT G

Diagram of Hatchery



Seapac of Idaho
 P.O. Box 546 • Buhl, Idaho 83316
 (208) 326-3100 • Fax: (208) 326-5935

EXHIBIT H



Seapac of Idaho
 P.O. Box 546 • Buhl, Idaho 83316
 (208) 326-3100 • Fax: (208) 326-5935

EXHIBIT I

EXHIBIT J

RECEIVED

State of Idaho
Department of Water Resources

FEB 21 1990

Department of Water Resources
Southern Region Office

WATER RIGHT LICENSE

(Late Proof)

License of Water Right No. 36-7072 Priority September 5, 1969 Amount 148.2 cfs

THIS IS TO CERTIFY, that Pisces Investments, Inc.
of Twin Falls, Idaho, has complied with the terms and conditions of Permit
No. 36-7072 issued pursuant to Application for Permit dated July 17, 1969
and has submitted proof to the Department of Water Resources on May 31, 1984
that he has applied water to a beneficial use; an examination by the Department indicates that the works have a
capacity for the diversion of 148.2 cfs of water from Thousand Springs
tributary to Snake River, and that the permit holder has applied to a beneficial use and
established a right to use water as follows:

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
Fish Propagation	from January 1 to December 31	at 148.2 cfs and	N/A
	from _____ to _____	at _____ cfs and	
	from _____ to _____	at _____ cfs and	

(both dates inclusive)

Subject, however, to the condition that no more than 148.2 cfs of water be diverted at any one time, and that the amount of water so diverted and to which such right is entitled and confirmed is for the purpose aforementioned and is limited to the amount which can actually be beneficially used and shall not exceed N/A acre feet per year, said waters to be diverted within the (2 points)-Lot 8 (SESESE)

Section 6, Twp 8S, Rge 14E* in the County of Gooding

Description and location of place of use:

Twp.	Range	Sec.	NE¼				NW¼				SW¼				SE¼				Totals
			NE¼	NW¼	SW¼	SE¼													
8S	14E	5										X							
		6																	LB
		8					X												

*(2 points)-Lot 1 (NW¼NW¼NW¼); Total number of acres irrigated _____
Lot 1 (NE¼NW¼NW¼);

(4 points)-Lot 1 (SE¼NW¼NW¼); Sec. 8, Twp 8S, Rge 14E

Facility Volume = 602,600 cubic feet.

RECORDED

36-7072