IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BYRON PEHRSON, LOY PEHRSON, AND RANDY PEHRSON, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER in his capacity as the Director of the Idaho Department of Water Resources, Respondents.	Case No. CV01-25-13914
IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.) IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

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RECEIVED
Feb 14, 2024
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001 **PETITION FOR DECLARATORY RULING FOR WATERMASTER INSTRUCTIONS**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.300.02.d, hereby file this *Petition for Declaratory Ruling for Watermaster Instructions* regarding delivery of certain water rights from the Big Lost River in Water District No. 34 and releases of storage water from Mackay Reservoir as carriage water to satisfy natural flow rights from the Big Lost River. The *Petition* seeks two forms of relief:

(1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.

(2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

The Petition is supported by the *Declaration of Chris M. Bromley* ("Bromley Dec.").

I. INTRODUCTION

A. The Moss Water Rights

Water right nos. 34-182 and 34-381A ("Moss Water Rights") were partially decreed on November 20, 1998 by the Snake River Basin Adjudication district court ("SRBA") to Catherine M. and Lee J. Watson with a single point of diversion at what is locally known as the "3 in 1 Ditch." The Moss Water Rights are summarized as follows:

	Water Right No. 34-182	**Water Right No. 34-381A**
Source:	Big Lost River, tributary to Sinks	Big Lost River, tributary to Sinks
Quantity:	1.60 cfs[1]	2.40 cfs
Priority Date:	6/1/1883	9/26/1894
Point of Diversion:	T06N, R25E, S14, SENWSE, Butte County	T06N, R25E, S14, SENWSE, Butte County
Purpose of Use:	Irrigation	Irrigation

[1] Water right nos. 34-182 and 34-381A are limited to a total combined diversion rate of 5.20 cfs.

Place of Use:	T06N, R26E, S31, SWNE (40 ac), SENE (26 ac), NESE (39 ac), NWSE (39 ac), SWSE (25 ac); T06N, R26E, S32, SWNW (8 ac), NWSW (35 ac), totaling 212 acres[2]	T06N, R26E, S31, SWNE (40 ac), SENE (26 ac), NESE (39 ac), NWSE (39 ac), SWSE (25 ac); T06N, R26E, S32, SWNW (8 ac), NWSW (35 ac), totaling 212 acres[3]

On November 13, 2012, Moss filed a *Notice of Change in Water Right Ownership* with IDWR, changing ownership of water right nos. 34-182, 34-381A, and 34-2379F from the Watsons to Moss. On November 16, 2012, IDWR changed ownership of water right nos. 34-182, 34-381A, and 34-2379F from Watsons to Moss. On December 11, 2012, IDWR acknowledged Zions First National Bank's security interest in the water rights.

On April 6, 2015, Moss filed an *Application for Transfer of Water Right* ("Moss Transfer") as to water right nos. 34-182 and 34-381A seeking to: "Add a point of diversion to my Big Lost River rights to allow me to pump directly from the river." *Transfer* at 2, ln. A.2 (emphasis added). According to the Moss Transfer, the existing diversion at the 3 in 1 Ditch would be retained and a new point of diversion would be located downstream at: T06N, R26E, S32, SENW ("River Diversion").

On April 10, 2015, Lucas Yockey, Watermaster for Water District No. 34 ("Watermaster Yockey"), stated he did not oppose the Moss Water Rights listing both the 3 in 1 Ditch and the River Diversion as authorized points of diversion.

On June 15, 2015, IDWR agent Michael Holliday, reviewed the Moss Transfer, finding there would be no injury to existing water rights if it was approved: "The watermaster reviewed

[2] Water right nos. 34-182, 34-381A, and 34-2379F are limited to the irrigation of a combined total of 200 acres in a single irrigation season.

[3] Water right no. 34-381A is limited to the irrigation of 120 acres within the 212 place of use in a single irrigation season.

the application and did not oppose its approval. . . . . The transfer was advertised and no protests were filed." *Memorandum* (6/15/2015).

On June 30, 2015, James Cefalo, Water Resources Program Manager, approved the Moss Transfer, thereby adding the River Diversion to the existing 3 in 1 Ditch as authorized points of diversion for the Moss Water Rights.

B. The Pehrson Water Rights

The Pehrsons are authorized to use water right nos. 34-10236, 34-14189, 34-14193, 34-14207, 34-14209 ("Pehrson Water Rights") for irrigation and stockwater purposes from the Big Lost River, diverted at locations including the 3 in 1 Ditch. The Perhrson Water Rights are summarized as follows:

Water Right No.	**Priority Date**	**Quantity**	**Irrigated Acres**
34-10236	5/30/1885	2.0 cfs	100 acres within a 313-acre PPU
34-14189	6/1/1885	1.54 cfs	77 acres within a 645-acre PPU
34-14193	6/1/1888	0.77 cfs	38.5 acres within a 645-acre PPU
34-14207	6/30/1885	3.08 cfs	154 acres within a 645-acre PPU
34-14209	9/14/1886	2.31 cfs	115.5 acres within a 645-acre PPU

In recent years, the Pehrson Water Rights have been curtailed prior to the historical cutoff dates for two reasons. First, in dry years, water has been delivered to the Moss Water Rights at the River Diversion, as opposed to the historic point of diversion located at the 3 in 1 Ditch, causing an earlier curtailment of the Pehrson Water Rights than normal. Second, storage water releases from Mackay Reservoir have been used as carriage water to shepherd the Moss Water

Rights to the River Diversion, resulting in curtailment of the Pehrson Water Rights earlier than would have occurred without the construction of Mackay Dam.

C. 3 in 1 Ditch Watermaster Instructions

Since approval of the Moss Transfer, water has been delivered to Big Lost River water users in varying water conditions. Watermaster Yockey was the watermaster at the time of the Moss Transfer and resigned his position in 2022. The current watermaster for Water District No. 34, Preston Marcroft ("Watermaster Marcroft"), succeeded Watermaster Yockey. Based on their years of experience delivering water rights in Water District No. 34 in any number of conditions, the current and former watermasters believe the following instruction should be adopted by the Department to address when the Moss Water Rights may be diverted at the 3 in 1 Ditch and/or River Diversion:

> When the natural flow of the river at the 2B gauging station reaches 187 cfs[] or less (inflow in the Mackay Reservoir) for 3 (three) consecutive days, the point of diversion for water right 34-182 [and 34-381A] will move upstream to the original point of diversion, 3 and 1 heading located at the Blaine Diversion. When the natural flow of the river EXCEEDS 500 cfs at the 2B gauging station for 3 (three) consecutive days, then water right 34-182 [and 34-381A] may be moved to the river.

Bromley Dec., Ex. 1 (emphasis in original) (footnote omitted explaining averaging of inflows to Mackay Reservoir).

D. Mackay Reservoir Watermaster Instructions

Mackay Dam was completed in 1918 making storage of water in Mackay Reservoir junior to the Pehrson Water Rights and the Moss Water Rights. Because Mackay Dam was constructed before perfection of the Pehrson Water Rights and the Moss Water Rights, releases of storage water can be used, improperly, to augment or supplement Big Lost River flows when flow in the River would otherwise be insufficient to carry natural flow rights. Current Watermaster Marcroft and past Watermaster Yockey agree that storage releases from Mackay

Reservoir should not be used to augment or supplement flow in the Big Lost River when natural flow would otherwise be insufficient to deliver natural flow water rights. *Bromley Dec., Ex. 2*.

II. ARGUMENT

A. The Department Should Approve Watermaster Instructions for Proper Administration of the Moss Water Rights in Times of Shortage

It is blackletter law that junior water users are entitled to the conditions of the stream as they found them when they perfected their water rights. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 41, 147 P. 1073, 1078 (1915); *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912). When the Moss Water Rights were partially decreed by the SRBA, the sole point of diversion was the 3 in 1 Ditch; thus, the Pehrson Water Rights, which are junior, are entitled to the conditions of the Big Lost River as they existed when their rights were perfected. When the Moss Transfer was approved, it is critical to understand that it did not *omit* the 3 in 1 Ditch as a point of diversion, it instead *added to* the Moss Water Right descriptions by authorizing the River Diversion as a second point of diversion. *Transfer* at 2, ln. A.2 (purpose of the *Transfer* was to "Add a point of diversion to my Big Lost River rights to allow me to pump directly from the river") (emphasis added).

Since the Moss Transfer was approved, watermasters Yockey and Marcroft have delivered water in any number of conditions. Based on their experience, and in order to preserve streamflow conditions for the Pehrsons as they existed when their rights were perfected, the Department should adopt the following watermaster instruction to explain when the Moss Water Rights may use the 3 in 1 Ditch and River Diversion:

> When the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located in the T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at

> T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days

This is particularly important because the River Diversion for the Moss Water Rights is located below the Darlington Sinks, so losses in the Big Lost River downstream from the original point of diversion at the 3 in 1 Ditch are significant.

B. The Department Should Issue Watermaster Instructions Defining When Futile Call Exists for Natural Flow Water Rights But for Storage Water Releases from Mackay Reservoir

Recently, the Idaho Supreme Court had occasion to review watermaster instructions issued by the Department in Basin 95, holding it was proper for the Department to ensure delivery of natural flow rights but for the addition of storage water releases:

> The stored waters are already appropriated, making them unavailable for redistribution to satisfy Sylte's natural flow water right. *See Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935) ("After the water was diverted from the natural stream and stored in the reservoir, it was no longer 'public water' subject to diversion and appropriation under the provisions of the Constitution."); *see also Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007) ("when water is stored, it becomes 'the property of the appropriators ... impressed with the public trust to apply it to a beneficial use.' ") (quoting *Talboy*, 55 Idaho at 389, 43 P.2d at 945).
>
> The Instructions are in harmony with the Final Decree. The Instructions generally prohibit the watermaster from releasing water to satisfy Rathdrum Creek water rights when seepage and evaporation losses exceed the natural tributary inflow, while still upholding the exception carved out for Sylte and giving it priority over junior rights.

Sylte v. Idaho Dept. of Water Res., 165 Idaho 238, 245, 443 P.3d 252, 259 (2019).

Consistent with *Sylte*, natural flow water users are entitled to delivery determinations being made in the same manner as when their rights were first appropriated, which in this case is prior to construction of Mackay Dam. The Department should therefore adopt watermaster instructions explaining that storage releases from Mackay Reservoir cannot be used to augment

or supplement natural flow in the Big Lost River to the detriment of appropriators whose water rights pre-date storage of water in Mackay Reservoir.

III. CONCLUSION

Based on the foregoing, the Department should: (1) adopt watermaster instructions that are substantially similar to the instructions prepared by watermasters Yockey and Marcroft as to use of the 3 in 1 Ditch and River Diversion for the Moss Water Rights; and (2) adopt watermaster instructions explaining that storage releases from Mackay Reservoir cannot be used to augment or supplement natural flow in the Big Lost River to the detriment of appropriators whose water rights pre-date storage of water in Mackay Reservoir.

Pehrsons are interested in having the matter resolved in time for the 2024 irrigation season. The Director has discretion under the Department's Rules of Procedure to begin consideration of this matter with either formal or informal proceedings. IDAPA 37.01.01.100. Based on the Department's procedural rules, Pehrsons respectfully request that informal proceedings be used first to resolve the issues presented in this contested case.

DATED this 14th day of February, 2024.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron and Loy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Chris M. Bromley
CHRIS M. BROMLEY

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Feb 14, 2024
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001 ~~**PETITION FOR DECLARATORY RULING FOR WATERMASTER INSTRUCTIONS**~~
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF CHRIS M. BROMLEY**

CHRIS M. BROMLEY under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of a statement from Watermaster Preston Marcroft and former Watermaster Lucas Yockey regarding the point of diversion for water right no. 34-182.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a statement from Watermaster Preston Marcroft and former Watermaster Lucas Yockey regarding the storage releases from Mackay Reservoir as carriage water for natural flow water rights.

4. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 14th day of February, 2024.

/s/ Chris M. Bromley
CHRIS M. BROMLEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Chris M. Bromley
CHRIS M. BROMLEY

EXHIBIT 1

Water Right 34-182 (Moss)

When the natural flow of the river at the 2B gauging station reaches 187 cfs[1] or less (inflow in the Mackay Reservoir) for 3 (three) consecutive days, the point of diversion for water right 34-182 will move upstream to the original point of diversion, 3 in 1 heading located at the Blaine Diversion. When the natural flow of the river EXCEEDS 500 cfs at the 2B gauging station for 3 (three) consecutive days, then water right 34-182 point of diversion may be moved to the river.

Preston Marcroft

Water Master, Water District #34

1-24-24

Date

Lucas Yockey

Past Water Master, Water District #34

1-24-24

Date

[1] Average inflows to the Mackay Reservoir
08-13-2022 208 cfs
08-14-2022 187 cfs
08-15-2022 165 cfs
Average 186.6

EXHIBIT 2

Certain natural flow water rights from the Big Lost River were appropriated before construction of Mackay Dam and creation of Mackay Reservoir. As the current Water Master for Water District #34 and the immediately past Water Master for Water District # 34, we agree that natural flow water users are entitled to streamflow conditions as the existed before construction of Mackay Dam and that storage releases from Mackay Reservoir should not be used as carriage water for natural flow water rights. We ask that IDWR instruct the Water District #34 Water Master to make futile calls on the Big Lost River for natural flow users in the same manner as when their appropriations were made, prior to creation of storage.

Preston Marcroft
Water Master, Water District #34

2/12/2024
Date

Lucas Yockey
Past Water Master, Water District # 34

2-12-24
Date

Skyler C. Johns, ISB No. 11033
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Attorney for Moss Farms, Inc.

RECEIVED
Feb 23, 2024
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

In the matter of Water Right Nos. 34-182 and 34-381A (Moss Farms, Inc.)	**OBJECTION TO PETITION FOR DECLARATORY RULING FOR WATERMASTER INSTRUCTIONS**
In the matter of use of natural flow from the Big Lost River and Storage Releases from Mackay Reservoir	Docket No. P-DR-2024-001

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby objects to the *Petition for Declaratory Ruling for Water Master Instructions* (hereafter "Petition") filed by Byron Pehrson and Loy Pehrson (hereafter "Petitioners"). Moss Farms respectfully requests the Director of the Idaho Department of Water Resources (hereafter "Director") reject the petition and not consider it for the following reasons:

1) Idaho Code § 67-5255(1) does not authorize the Director to grant the declaratory relief requested by Petitioners;

2) The Petitioners' time to challenge the Moss Farms' Water Rights has expired pursuant to Idaho Code §§ 42-222 & 42-5246;

3) The relief requested violates legal principles of priority administration and is against public policy; and

4) The doctrine of *res judicata* bars the relief requested by Petitioners.

I.
BACKGROUND OF THE DISPUTE

The instant Petition seeks to limit the use of senior water rights on the Big Lost River. Water Right No. 34-182 bears a priority date of 1883. Water Right No. 34-381A bears a priority date of 1894. Pursuant to Idaho Code § 42-222, Moss Farms filed an application to transfer the point of diversion for both these rights. *See Application for Transfer of Water Rights No. 79972*.

The Watermaster for Basin 34 at the time did not object to the transfer, nor did the Director find that the transfer would injury or otherwise violate requirements set forth in Idaho Code § 42-222. *See record* for Water Right Nos. 34-381A and 34-182. On June 30, 2015, the Idaho Department of Water Resources (hereafter IDWR") approved Moss Farms' application to transfer Water Right No. 34-381A and 34-182. Neither of these applications were protested by the Petitioners, nor was judicial review of the final order of the Director sought by the Petitioners. *Id.*

Relying on this final order, Moss Farms invested hundreds of thousands of dollars in infrastructure to take water from his new point of diversion. Water rights in Basin 34 have been administered for nearly nine years since Moss Farms' transfers were approved.

Having failed to bring an appropriate action in the past, Petitioners are now seeking to place conditions on the water rights of Moss Farms under the guise of "Watermaster Instructions". However, as will be set forth in detail below, Idaho law and public policy do not permit the declaratory relief sought by the Petitioners.

II.
ARGUMENT

1) Idaho Code § 67-5255(1) does not authorize the Director to grant the declaratory relief requested by Petitioners.

The declaratory ruling sought by Petitioners seeks relief unavailable to them under Idaho Code § 67-5255 – Declaratory Ruling by Agencies – because it is not requesting a ruling as to the

applicability of any order. Petitioners cite Rule 300.02.d. as the sole legal basis for their Petition, but this rule does not provide grounds for the declaratory relief they seek. In fact, this section merely states, "Petitions for declaratory orders shall state the declaratory ruling that the petitioner seeks." Thus, the title 67, chapter 5, The Idaho Administrative Procedures Act, must be consulted to determine the Director's authority.

IDWR is an agency within the meaning Idaho Administrative Procedure Act. *See* Idaho Code § 67-5201(3). Therefore, Idaho Code § 67-5255(1) applies to IDWR. This section only permits a person to petition IDWR "for a declaratory ruling as to the applicability of any order issued by the agency." *Id.* at (1).

Here, the Petition does **not** seek a declaratory ruling as to the applicability of any specific order issued by the Department. Rather, Petitioners are requesting the Director provide instructions to the Watermaster for Water District No 34, which amount to nothing more than a collateral attack on adjudicated water rights and the prior order approving transfer of those water rights.

Even if it did, IDAPA Rules do not control over the statute, as the Statute is the governing law. In short, the Petitioners are not challenging any order of the Department, and, therefore, the Director lacks authority to grant the requested declaratory relief under Idaho Code § 67-5255(1).

2) The Petitioners time to challenge the Moss Farms' Water Rights has expired.

The instant Petition seeks to limit the use of the water may be considered the most senior water right on the Big Lost River by making a collateral attack on the rights themselves. It is undisputed that the adjudicated priority dates of these rights are senior to the Protestants. It is also undisputed that the orders approving the transfer applications of Moss Farms for these water rights constituted final orders. *See* Idaho Code §§ 42-222 & 42-5246.

Petitioners were given notice and an opportunity to participate in proceedings and to protest the water right transfer. They did not. They also did not move to reconsider or otherwise seek declaratory relief consistent with the deadlines prescribed in Idaho Code §§ 42-222 or 42-5246. As such, the Orders approving Moss Farms' transfers are final order that Petitioners lack any legal grounds to now modify or undue. The order on the Moss Farms' transfers have been final for nearly nine (9) years.

3) The relief requested violates legal principles of priority administration (e.g., first-in-time-first-in-right), and is against public policy.

There is no dispute that water rights in Idaho are administered on a time priority basis, which give priority to senior water right holders – not juniors. "The prior appropriation doctrine consists of two core principles, 'that the first appropriator in time is the first in right and that water must be placed to a beneficial use.'" S. *Valley Ground Water Dist. v. Idaho Dep't of Water Res., No. 49632*, 2024 WL 136840, at *15 (Idaho Jan. 12, 2024), as amended (Jan. 12, 2024) (*citing A&B v. Spackman*, 155 Idaho 640, 650, 315 P.3d 828, 838 (2013)). Petitioners requested relief artfully attempts to argue for watermaster instructions that ignore this doctrine and allow junior water users to divert out of priority.

Electing to hear this Petition has the potential to open a Pandora's Box of litigation by junior water right holders. If IDWR accepts the premise of this Petition, any junior who is aggrieved by a senior water user may potentially seek declaratory relief declaring new watermaster's instructions limiting the use of senior water users. This would create grave uncertainty in the administration of water rights in the State for years. There is a reason the legislature limited the process and time in which orders of IDWR may be challenged. For these reasons, too, the Department should dismiss and not consider the instant Petition.

4) The doctrine of res judicata bars the relief requested by Petitioners.

The doctrine of res judicata bars the Director from granting the relief sought by Petitioners because the precise subject matter and issues in which they seek review were previously, considered, and adjudicated in the transfer application proceedings. *Sagewillow, Inc. v. Idaho Department of Water Resources* is instructive on the application of the doctrine of res judicata in this case:

> The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242–43 (1922), this Court stated that the scope of the doctrine of res judicata was as follows:
>
> > We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.
>
> The 'sameness' of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc*., 103 Idaho 441, 649 P.2d 1197 (1982).

Sagewillow, Inc. v. Idaho Dep't of Water Res., 138 Idaho 831, 844, 70 P.3d 669, 682 (2003).

Here, Moss Farms water rights were transferred to a new point of diversion in 2015 and 2016 respectively. In reviewing these applications, IDWR was required to consider recommendations from the watermaster as to whether any injury would occur. Idaho Code § 42-222(1) provides in relevant part that:

> it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the

> application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.
>
> ….
>
> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

The application for transfer of Moss Farms water rights was approved. Therefore, prior to approving the applications for transfer, the Director reviewed recommendations from the watermaster, determined there was no injury to other water rights, the transfer was consistent with conservation fin the state and was in the public interest, and the change did not adversely affect the local economy of the watershed or local area within Basin 34. These are the very issues that the Petitioners seek to relitigate in front of the Director. Because they were already addressed in the prior proceeding, the Director is barred from relitigating them now under the cloak of them being new instructions for the watermaster.

III.
CONCLUSION

The law simply does not authorize the Director to grant the relief requested, nor does the law permit the Director to relitigate the issues already resolved in the prior transfer proceeding. Allowing this Petition to move forward will also open a Pandora's Box of litigation from junior water right holders against seniors, and is, therefore against public policy. For these reasons, and

others not yet identified, Moss Farms respectfully request the Director reject the petition and not consider it.

DATED: February 23, 2024

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2024, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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/s/ Skyler C. Johns
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001 **REPLY TO OBJECTION TO PETITION FOR DECLARATORY RULING FOR WATERMASTER INSTRUCTIONS**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.300.02.d, hereby reply to the *Objection to Petition for Declaratory Ruling for Watermaster Instructions* ("Objection") filed by Moss Farms, Inc. ("Moss").[1] The *Objection*

[1] Pehrsons filed the *Petition* in accordance with IDAPA 37.01.01.300.02.d. Rule 300 does not provide for an objection or a response; rather, it requires agency notification to "persons likely to be interested in the subject matter of the petition," IDAPA 37.01.01.301. Pehrsons recognize that the Department's Procedural Rules are to be

should be considered untimely because it circumvents the procedures outlined in IDAPA 37.01.01.300.02.d and IDAPA 37.01.01.301. However, if the *Objection* is timely and procedurally proper, the relief requested should be denied because the Pehrsons are asking for watermaster instructions, not to undo the prior Transfer.

I. BECAUSE THE PROCEDURES IN IDAPA 37.01.01.301 HAVE NOT YET BEEN SATISFIED, THE MOSS OBJECTION IS UNTIMELY

On February 14, 2024, Pehrsons filed their *Petition for Declaratory Ruling for Watermaster Instructions*, pursuant to IDAPA 37.01.01.300.02.d, in order to be heard regarding the issues framed, with notice given "to persons likely to be interested in the subject matter of the petition." IDAPA 37.01.01.301. Pehrsons served the *Petition* on Moss's attorney because the request for watermaster instructions does implicate Moss's water rights, nos. 34-182 and 34-381A ("Moss Water Rights").

On February 23, 2024, Moss filed what is styled as an *Objection*, asking the Idaho Department of Water Resources ("IDWR") to "reject the petition and not consider it . . . ." *Objection* at 1. The *Objection* is untimely because the Department has not yet decided if notice of the *Petition* should be given to other water users in Basin 34 who may "be interested in the subject matter of the petition." *Id*. Consistent with IDAPA 37.01.01.301, the *Objection* should not be considered until IDWR has decided if further notice of the *Petition* should be given, with the topic discussed through informal proceedings, IDAPA 37.01.01.101.

"liberally construed to ensure just, speedy and economical determination of all issues presented to the agency." IDAPA 37.01.01.051. To the extent that the *Objection* is treated as a "response," IDAPA 37.01.01.220.02.b, the contents of this filing should be considered a "reply," IDAPA 37.01.01.220.02.c, and is why the pleading is captioned as a reply, and filed within seven (7) days of receiving the objection/response.

II. IF THE MOSS OBJECTION IS TIMELY, IT SHOULD BE DENIED

Turning to the substance of the *Objection*, it wrongly styles the *Petition* as an attempt to circumvent the prior Transfer, with various legal arguments against the relief sought. As explained in the *Petition*, the Transfer added a new point of diversion from the Big Lost River to the existing point of diversion at the 3 in 1 Ditch. *Petition* at 3. Said differently, the Transfer did not remove the existing diversion at the 3 in 1 Ditch from the water right descriptions. Because there are alternate points of diversion, the *Petition* correctly asks the Director to issue watermaster instructions that explain, for purposes of administration, when the points of diversion may be exercised, with the past and current watermasters stating that when "the natural flow at the 2B gauging station reaches 187 cfs or less (inflow in the Mackay Reservoir) for 3 (three) consecutive days, the point of diversion for [the Moss water rights] will move upstream to the original point of diversion, 3 in 1 heading located at the Blaine Diversion." *Id*. at 5.

1. Idaho Code § 67-5255 Supports The *Petition*

Citing Idaho Code § 67-5255(1), Moss claims that the relief sought in the *Petition* is barred because IDWR has not issued an "order" addressing the issue. *Objection* at 3. However, Moss's argument reads subsection (2) out of Idaho Code § 67-5255, with Idaho Code § 67-5255 stating in full:

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any order issued by the agency.
>
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
>
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

I.C. § 67-5255 (emphasis added).

Principles of statutory construction require that Idaho Code § 67-5255 be read in full, "to give meaning to all of its provisions." *State v. Bever*, 118 Idaho 80, 82, 794 P.2d 1136, 1138 (1990); *see also Smith v. Excel Fabrication, LLC*, 172 Idaho 725, 731, 535 P.3d 1098, 1104 (2023) ("The statute should be considered as a whole."). Idaho Code § 67-5255 provides two pathways for a declaratory ruling: (1) to ask for relief after issuance of an order; and (2) to ask for relief through initiation of a contested case. When Idaho Code § 67-5255 is read in conjunction with IDAPA 37.01.01.300.02.d (contents of a petition for declaratory ruling), IDAPA 37.01.01.301 (notice of petition for declaratory ruling), and IDAPA 37.01.01.051 (liberal construction of the Department's procedural rules "to ensure just, speed and economical determination of all issues presented to the agency"), it is clear that IDWR may accept the *Petition*, decide if further notice of the relief sought to other interested water users is proper, to initiate a contested case, which will result in issuance of a final order. Thus, Idaho Code § 67-5255 supports the *Petition*.

2. The Petition Does Not Challenge The Moss Water Rights, It Asks For Watermaster Instructions To Clarify Administration Of the Moss Water Rights

Moss correctly states that the time to protest the Transfer has expired, with Moss arguing that due to the passage of time, the Transfer cannot be undone. To be clear, the Pehrsons are not asking IDWR to undo or otherwise alter the Transfer. As stated previously, the Transfer added the River Diversion to the Moss water right descriptions as an alternate point of diversion to the existing 3 in 1 Ditch. If the Pehrsons were challenging the Transfer, they would ask IDWR to remove the River Diversion as an authorized point of diversion from the Moss water rights; this is not, however, what the Pehrsons are seeking. The Pehrsons are instead asking the Director to exercise his discretionary authority, for purposes of water rights administration, *see e.g. Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 157, 408 P.3d 899, 912 (2018) (explaining the

Director's discretion in administering water rights); *A&B v. State*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014) (same), to issue an order explaining when the River Diversion may be exercised, with issuance of watermaster instructions to govern the same.

3. The *Petition* Is Consistent With The Prior Appropriation Doctrine

Moss argues that the principle of "first in time is first in right" controls the outcome, with the Pehrsons unable to ask the Department to explain when the River Diversion may be exercised through watermaster instructions. However, as stated in the *Petition*, it is also blackletter law that junior water users are entitled to the conditions of the stream as they found them when they perfected their water rights. *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 41, 147 P. 1073, 1078 (1915); *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912). When the Moss Water Rights were partially decreed by the SRBA, the sole point of diversion was the 3 in 1 Ditch; thus, the Pehrson Water Rights, which are junior, continue to be entitled to the conditions of the Big Lost River as they existed when their rights were perfected.

When the Transfer added the River Diversion it did <u>not</u> omit or otherwise remove the 3 in 1 Ditch as an authorized point of diversion. As explained by the watermasters, there are certain flow regimes when the River Diversion may be exercised and certain flow regimes when the 3 in 1 Ditch should be used. Thus, the Pehrsons are asking for watermaster instructions to explain when the alternate points of diversion may be exercised.

Although not directly on point, asking for watermaster instructions of this nature finds support in the Supreme Court's decision in *City of Pocatello v. State*, wherein the Court held that the City of Pocatello could not exercise its alternate points of diversion to the detriment of junior-priority water rights, with administrative instructions to govern the same:

> IDWR recommended that each well could be an alternate point of diversion for all water rights associated with an interconnected system only if the water rights had

> an attached condition stating, "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello well [description] in the amount of ___ cfs." IDWR asserted that the condition was necessary to avoid injury to other water rights and to assist in the administration of water rights in times of shortage.
>
> The district court agreed, writing:
>
> > Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought.
>
> The court also noted, "The very fact that Pocatello contests the condition is an acknowledgment that without the condition the priorities of existing water rights will be diminished in favor of the alternative point of diversion for one of Pocatello's more senior rights. i.e. injury."

City of Pocatello v. State, 152 Idaho 830, 834-35, 275 P.3d 845, 849-850 (2012) (emphasis added).

Like Pocatello, the fact that Moss is contesting the issuance of watermaster instructions demonstrates that he understands that the River Diversion alters administration in a manner against the Pehrsons.[2]

4. The Doctrine Of *Res Judicata* Does Not Bar The *Petition* Because There Is No "Sameness" In The Cause Of Action

As with other arguments, Moss conflates the relief sought in the *Petition* with an attempt to reframe the relief sought as an attack on the prior Transfer, barred by the doctrine of *res judicata*. Again, and as stated previously, the Pehrsons are not attempting to undo or otherwise

[2] The issuance of watermaster instructions is not novel and can be necessary for proper administration of water rights. *See e.g. In the Matter of the Petition Filed by Aberdeen-Springfield Canal Company Regarding Distribution of Natural Flow by Water District 01* (Jan. 18, 2017) (initiation of a contested case by Aberdeen-Springfield Canal Co. regarding inequitable distribution of natural flow in the Shelley to At Blackfoot reach of the Snake River); *Final Order Regarding Instructions to Water District 01 Watermaster, In the Matter of Water Right No. 1-6* (Feb. 11., 2013); *Notice of Contested Case and Formal Proceedings, and Notice of Status Conference In the Matter of Accounting for Distribution of Water to the Federal On-stream Reservoirs in Water District 1* (Oct. 22, 2013).

unravel the Transfer, they are instead asking the Director to exercise his discretionary authority, for purposes of administration, to instruct the watermaster as to when the alternate points of diversion may be exercised. Thus, there is no "sameness" in the cause of action as explained in *Sagewillow, Inc. v. Idaho Dept. of Water Res.*, 138 Idaho 831, 844, 70 P.3d 669, 682 (2003), that would trigger *res judicata*. As stated in *Sagewillow*:

> The "sameness" of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits.
>
> . . . .
>
> An application to transfer the point of diversion or place of use of a water right is made by the party claiming the water right. Any claim that the water right had been abandoned or forfeited in whole or in part by nonuse would be an issue raised either by the Department or a third party. Ordinarily, issues of forfeiture or abandonment are not adjudicated in a transfer proceeding, although they can be. It would be a substantial burden upon the Department to require that in response to every transfer application it conduct an investigation into whether the water right(s) involved had been lost or reduced by forfeiture or abandonment. Therefore, we hold that if forfeiture or abandonment is not actually raised as an issue in a proceeding to transfer the point of diversion or place of use of a water right, the final order in the transfer proceeding is not res judicata on the issue of whether the water right at issue had been forfeited or abandoned.

Id. at 844-45, 70 P.3d at 682-83.

Here, asking for watermaster instructions is not the same as what was at issue when the Transfer was filed. Then, Moss was asking for approval to add the River Diversion as a point of diversion to the existing 3 in 1 Ditch. Pehrsons did not protest the Transfer because diverting the Moss water rights at the River Diversion can occur in certain years without altering administration of existing water rights, evidenced by the statements of the watermasters. Today, the Pehrsons are asking the Director to exercise his discretionary authority, for purposes of ongoing administration, to explain under what flow conditions the River Diversion may be used. If every administrative outcome had to be considered during a transfer proceeding, that would

place a "substantial burden upon the Department." *Id*. at 845, 70 P.3d at 683. Thus, the relief requested in the *Petition* is not the same from whether the River Diversion could ever be added as a point of diversion and is not barred by *res judicata*.

III. CONCLUSION

Based on the foregoing, the *Objection* is untimely and should not be considered until at least the procedures outlined in IDAPA 37.01.01.300.02.d, IDAPA 37.01.01.301, and IDAPA 37.01.01.101, have been satisfied. If, however, the *Objection* is timely and procedurally proper, the relief in the *Objection* should be denied because the Pehrsons are not asking to undo the Transfer, instead they are asking for the Director to exercise his discretion, for purposes of ongoing water rights administration, to issue watermaster instructions explaining when the alternate points of diversion may be used.

DATED this 1st day of March, 2024.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron and Loy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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Boise, ID 83720
file@idwr.idaho.gov

Director Mathew Weaver
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PO Box 83720
Boise, ID 83720
mathew.weaver@idwr.idaho.gov

Garrick L. Baxter
Deputy Attorney General
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garrick.baxter@idwr.idaho.gov

Skyler C. Johns
OLSEN TAGGART PLLC
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Idaho Falls, ID 83403
sjohns@olsentaggert.com

/s/ Chris M. Bromley
CHRIS M. BROMLEY

RECEIVED
Apr 12, 2024
DEPARTMENT OF
WATER RESOURCES

W. Kent Fletcher (ISB #2248)
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
208-678-3250
208-878-2548 (fax)
wkf@pmt.org

Attorney for Big Lost River Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	Docket No. P-DR-2024-001
	)	**BLRID'S PETITION TO INTERVENE**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	Filing Fee: Exempt I.C. § 67-2301

Big Lost River Irrigation District (BLRID), an irrigation district organized and operating pursuant to the laws of the State of Idaho, petitions the Director pursuant to Rules 350 through 354 of the Rules of Procedure of the Idaho Department of Water Resources (IDWR) and other applicable law to enter an order authorizing BLRID to intervene in the above entitled matter on the following grounds:

1. A Petition for Declaratory Ruling for Watermaster Instructions ("Petition") dated February 14, 2024 was filed on behalf of Byron Pehrson and Loy Pehrson seeking two (2) forms of relief describing two (2) requested watermaster instructions.

2. The Big Lost River is a source of storage water for Mackay Reservoir, which is owned

and operated by BLRID for the benefit of its waterusers. In addition, BLRID delivers storage water and natural flow water to waterusers located within the boundary of BLRID.

3. The manner in which natural flow rights are delivered can materially affect the storage of water, the delivery of storage water and natural flow water and the accounting for the delivery of natural flow and storage rights.

4. BLRID is uniquely situated as the only irrigation district located on and diverting from the Big Lost River.

5. BLRID asserts that it should be allowed to intervene in the proceeding in order to participate in any negotiations and hearings that may affect BLRID and that address the terms of the watermaster instructions.

6. BLRID reserves the right to address any issue raised in this proceeding and at the hearing on this matter that pertains to or affects the delivery of storage water to Mackay Reservoir and the delivery of storage water and natural flow to waterusers located within BLRID.

7. This Petition is timely; this matter has not been given a Docket Number and has not been scheduled for any hearing.

8. For all of the foregoing reasons, BLRID has a direct and substantial interest in the outcome of this proceeding and should be allowed to intervene.

9. For the purposes of this proceeding the name and address of BLRID shall be:

Big Lost River Irrigation District
c/o Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
208-678-3250
208-878-2548 (fax)
wkf@pmt.org

Wherefore, BLRID requests that the Director enter an order granting this Petition and authorizing the intervention of BLRID into this proceeding.

Dated April 12, 2024

W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, Idaho 83318
Attorney for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12th day of April, 2024, served the foregoing PETITION TO INTERVENE upon all parties of record in this proceeding, electronically, as follows:

Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720
file@idwr.idaho.gov

Director Mathew Weaver
Idaho Department of Water Resources
P.O. Box 83720
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mathew.weaver@idwr.idaho.gov

Garrick L. Baxter
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Chris M. Bromley
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W. Kent Fletcher

RECEIVED
Apr 19, 2024
DEPARTMENT OF
WATER RESOURCES

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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001 **NON-OPPOSITION TO BIG LOST RIVER IRRIGATION DISTRICT'S PETITION TO INTERVENE; RENEWED REQUEST FOR INFORMAL SETTLEMENT CONFERENCE**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and hereby notice their non-opposition to the Big Lost River Irrigation District's ("BLRID") *Petition to Intervene* and further renew their request for the Idaho Department of Water Resources ("IDWR") to set an informal settlement conference to discuss the issues raised by the Pehrsons in their February 14, 2024, *Petition for Declaratory Ruling for Watermaster Instructions* ("Petition").

While responsive briefing was filed by Moss Farms, Inc. in opposition to the *Petition*, a decision has not yet been issued by IDWR. With BLRID's recently filed *Petition to Intervene*, and given that a decision has not been issued, Pehrsons' believe it is appropriate to bring the parties together, through an informal settlement conference, to discuss the issues raised in the *Petition* and the parties' positions and interests.

DATED this 19th day of April, 2024.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of April, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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Garrick L. Baxter
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garrick.baxter@idwr.idaho.gov

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/s/ Chris M. Bromley
CHRIS M. BROMLEY

RECEIVED
May 29, 2024
DEPARTMENT OF
WATER RESOURCES

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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001 **RENEWED REQUEST FOR INFORMAL SETTLMENT CONFERENCE; REQUEST FOR STATUS CONFERENCE; and FILING OF STATEMENT FROM WATER DISTRICT #34 ADVISORY BOARD**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.300, hereby files this *Renewed Request for Informal Settlement Conference; Request for Status Conference, and Filing of Statement from Water District #34 Advisory Board* for consideration by the Idaho Department of Water Resources ("IDWR" or "Department").

I. BACKGROUND

The above-captioned contested case was initiated by Pehrsons on February 14, 2024 – more than 100 days ago – through the filing of a *Petition for Declaratory Ruling for Watermaster Instructions* ("Petition"). In summary, the *Petition* sought a ruling from IDWR that the Director should:

> (1) adopt watermaster instructions that are substantially similar to the instructions prepared by watermasters Yockey and Marcroft as to the use of the 3 in 1 Ditch and River Diversion for the Moss Water Rights; and (2) adopt watermaster instructions explaining that storage releases from Mackey Reservoir cannot be used to augment or supplement natural flow in the Big Lost River to the detriment of appropriators whose water rights pre-date storage of water in Mackey Reservoir.

Petition at 8.

The *Petition* further requested that, in order to resolve the matter "in time for the 2024 irrigation season . . . Pehrsons respectfully request that . . . [pursuant to] IDAPA 37.01.01.100 . . . informal proceedings be used first to resolve the issues presented in this contested case." *Id*.

On February 23, 2024, Moss Farms, Inc. filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* ("Opposition"). For various procedural reasons, the *Opposition* asked the Director to reject the *Petition* out-of-hand.

On March 1, 2024, Pehrsons addressed the *Objection* through their *Reply to Objection to Petition for Declaratory Ruling for Watermaster Instructions*.

On April 12, 2024, the Big Lost River Irrigation District filed a *Petition to Intervene* "BLRID Intervention").

On April 19, 2024, Pehrsons filed a *Notice of Non-Opposition to BLRID's Petition to Intervene; Renewed Request for Informal Settlement Conference*, in which Pehrsons stated they did not oppose the *BLRID Intervention* and further stated, "given that a decision has not been issued, Pehrsons' believe it is appropriate to bring the parties together, through an informal

settlement conference, to discuss the issues raised in the *Petition* and the parties' positions and interests." *Notice of Non-Opposition to BLRID's Petition to Intervene; Renewed Request for Informal Settlement Conference* at 2.

To date, the Department has not issued any orders in the above-captioned matter, nor has it responded to Pehrsons' requests for an informal settlement conference.

II. RENEWED REQUEST FOR INFORMAL SETTLMENT CONFERENCE

Pehrsons hereby renew their request for the Department to set a date and time for an informal, as soon as practicable. The 2024 irrigation season has begun and storage water will begin to be used in approximately 30-45 days. The time is therefore ripe to bring the parties together to discuss the issues without the need for further litigation.

III. REQUEST FOR STATUS CONFERENCE

If IDWR is not inclined to set an informal settlement conference, Pehrsons hereby request that the Department set a date and time for a status conference, as soon as practicable, so the Pehrsons can understand whether or not the *Petition* will be addressed.

IV. FILING OF STATEMENT FROM WATER DISTRICT #34 ADVISORY BOARD

Attached herewith for filing is a statement from the Water District #34 Advisory Board, in support of the recommendations from watermasters Yockey and Marcroft, which were included in the *Petition*.

V. CONCLUSION

Based on the foregoing, Pehrsons respectfully request that, in order to allow the parties to understand where matters stand for the 2024 irrigation season, the Department should either set a date and time for an informal settlement conference or a status conference.

DATED this 29th day of May, 2024.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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Boise, ID 83720
mathew.weaver@idwr.idaho.gov

Garrick L. Baxter
Deputy Attorney General
IDAHO DEPARTMENT OF WATER RESOURCES
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Kent Fletcher
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PO Box 248
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/s/ Chris M. Bromley
CHRIS M. BROMLEY

May 5, 2024

Rob Whitney

RE: Water Master Instructions

The Advisory Board of Water District #34 supports the current and past Water Master's recommendations that pertain to Water Rights 34-182 and 34-381A to prevent injury to the Water Rights upstream.

Respectfully,

Water District #34

Advisory Board

Ver Ron Roche Advisory Board Chairman

Cc: Chris M Bromley, ATTY

380 South 4Th Street

Ste #103

Boise, ID 83702

Water Right 34-182 (Moss)

When the natural flow of the river at the 2B gauging station reaches 187 cfs[1] or less (inflow in the Mackay Reservoir) for 3 (three) consecutive days, the point of diversion for water right 34-182 will move upstream to the original point of diversion, 3 in 1 heading located at the Blaine Diversion. When the natural flow of the river EXCEEDS 500 cfs at the 2B gauging station for 3 (three) consecutive days, then water right 34-182 point of diversion may be moved to the river.

Preston Marcroft

Water Master, Water District #34

1-24-24

Date

Lucas Yockey

Past Water Master, Water District #34

1-24-24

Date

[1] Average inflows to the Mackay Reservoir
08-13-2022 208 cfs
08-14-2022 187 cfs
08-15-2022 165 cfs
Average 186.6

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF PREHEARING CONFERENCE** **ORDER APPOINTING HEARING OFFICER**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* ("*Petition*") and a supporting *Declaration of Chris M. Bromley* with the Idaho Department of Water Resources ("Department"). The *Petition* asks the Director to issue watermaster instructions to the Water District 34 watermaster "to address when the Moss Water Rights may be diverted" and explain that "storage releases from Mackay Reservoir cannot be used to augment or supplement natural flow in the Big Lost River to the detriment of appropriators whose water rights pre-date storage of water in Mackay Reservoir." *Petition* at 5, 8. The *Petition* also requests the Department to begin consideration of this matter with informal proceedings. *Id.* at 8.

On February 23, 2024, Moss Farms, Inc. ("Moss Farms"), filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* ("*Response*") with the Department.[1] In its *Response*, Moss Farms requests the Department not consider the *Petition*, alleging that the Pehrsons' are improperly "seeking to place conditions on the water rights of Moss Farms under the guise of 'Watermaster Instructions'" and asserting that Idaho law does not permit the Department to grant the declaratory relief sought. *Response* at 2.[2] Shortly thereafter, the Department staff contacted counsel for Moss Farms about scheduling informal proceedings.[3] Counsel indicated that the matter should start with formal proceedings so that legal questions about the Department's jurisdiction could be addressed first.

On April 12, 2024, the Big Lost River Irrigation District ("BLRID") filed *BLRID's Petition to Intervene ("Petition to Intervene")*, stating that it owns Mackay Reservoir and that it

[1] Pursuant to the Department's Rules of Procedure (IDAPA 37.010.01), objections are not a form of pleading allowed in contested cases. IDAPA 37.01.01.210. Moss Farm's filing is properly characterized as a response, which is authorized. *Id*.

[2] On March 1, 2024, the Pehrsons filed a *Reply to Objection to Petition for Declaratory Ruling for Watermaster Instructions* ("*Reply*"). Pursuant to the Department's Rules of Procedure, replies are not a form of pleading allowed in contested cases. IDAPA 37.01.01.210. The Pehrsons' *Reply* will not be considered.

[3] Pursuant to Rule 414 of the Department's Rules of Procedure, the Department is authorized to communicate ex parte regarding procedural matters (e.g., scheduling). IDAPA 37.01.01.414.

should be allowed in intervene in the proceeding because the proceeding may affect its delivery of storage water and natural flow to water users located with BLRID. *Petition to Intervene* at 2.

On April 19, 2024, the Pehrsons filed *Non-Opposition to Big Lost River Irrigation District's Petition to Intervene; Renewed Request for Informal Settlement Conference*.

On May 29, 2024, the Pehrsons filed a *Renewed Request for Informal Settlement Conference; Request for Status Conference; and Filing of Statement from Water District #34 Advisory Board*.

CONCLUSIONS OF LAW

The Director, having determined that informal proceedings are unlikely to resolve this contested case and in accordance with IDAPA 37.01.01.102, will set the matter for a prehearing conference and will appoint Roger S. Burdick, former Idaho Supreme Court Justice, to serve as the hearing officer in this matter.

NOTICE OF PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that a prehearing conference in this matter will be held on **August 29, 2024 at 10:00 am (MT)**, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Room 648A, Boise, Idaho. All parties must be present at the prehearing conference in person or by video conference. The parties shall come prepared to discuss proposed issues for hearing, any proposed settlement, and any other matters that could aid in the fair and efficient resolution of this contested case.

To join the conference via computer or smartphone, please click the following Webex link and follow the prompts:

https://idahogov.webex.com/idahogov/j.php?MTID=m49515ad39e15d35f95e5eebb4b7c4276

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: **2630 248 8119**.

The conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at https://adminrules.idaho.gov/rules/current/37/370101.pdf.

The prehearing conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require reasonable accommodations to attend, participate in, or understand the conference, please advise the Department no later than five (5) days before the conference. Inquiries for reasonable accommodation should be directed to Sarah Tschohl, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho 83720-0098, telephone (208) 287-4815, or email sarah.tschohl@idwr.idaho.gov.

ORDER

IT IS HEREBY ORDERED that Roger S. Burdick is appointed to serve as hearing officer in this matter and is authorized to hear this contested case on behalf of the Department pursuant to IDAPA 37.01.01.410–414 and the provisions of chapter 52, title 67, Idaho Code. Hearing Officer Burdick's contact information is as follows:

Roger S. Burdick
roburd47@gmail.com

DATED this 8th day of August 2024.



MATHEW WEAVER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

Chris M. Bromley Candice McHugh McHugh Bromley, PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ U.S. Mail, postage prepaid ☒ Email
Skyler C. Johns OLSEN TAGGART PLLC PO Box 3005 Idaho Falls, Idaho 83403 sjohns@olsentaggert.com	☒ U.S. Mail, postage prepaid ☒ Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, Idaho 83318 wkf@pmt.org	☒ U.S. Mail, postage prepaid ☒ Email

Courtesy copy via email:

Moss Farms Inc.
mx222moss@aol.com

Megan Jenkins
Executive Assistant

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RIGBY, ANDRUS & RIGBY LAW, PLLC
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Attorneys for Moore Canal Users'

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	**MOORE CANAL USERS PETITION TO INTERVENE**

Comes now, Moore Canal Water Users' Association, a water users association formed pursuant to Idaho law, the Timberdome Canal Company, and the Lost River Pipeline, a lateral ditch water users' association, (hereinafter, Moore Canal Users), through its attorney of record, and, pursuant to Procedure Rules 350 through 354 and other applicable law, petitions the Hearing Officer to enter an order authorizing the Moore Canal Users to intervene in the above captioned matter on the following grounds:

1. A Petition for Declaratory Ruling for Watermaster Instructions ("Petition") dated February 14, 2024 was filed on behalf of Byron Pehrson and Loy Pehrson seeking two forms of relief describing two requested watermaster instructions.

2. Moore Canal Users receive natural flow and storage water for irrigation delivered by the Big Lost River Irrigation District (BLRID) from Mackay Reservoir.

3. The manner in which natural flow and storage water rights are delivered from Mackay reservoir materially affects the ability of Moore Canal Users' members to irrigate their land. Any change to the current manner of delivery could have a negative impact.

4. Moore Canal Users assert that it should be allowed to intervene in the proceeding in order to participate in any negotiations and hearings that may affect it and that address the terms of the watermaster instructions regarding deliver of water from Mackay Reservoir.

5. This petition is timely; this matter has been set for a prehearing conference on August 29, 2024.

6. For all the foregoing reasons, Moore has a direct and substantial interest in the outcome of this proceeding and should be allowed to intervene.

7. For the purposes of this proceeding the name and address of Moore shall be:

Moore Canal Users'
c/o Rigby Andrus and Rigby Law
P.O. Box 250
Rexburg, ID 83440
(208) 356-3633
mmortimer@rex-law.com

Wherefore, Moore requests that the Hearing Officer enter an order granting this Petition and authorizing the intervention of Moore into this proceeding.

DATED this 22nd day of August, 2024.

Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 22nd day of August, 2024.

RIGBY ANDRUS & RIGBY LAW, PLLC

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Attorneys for the Big Lost River Ground Water District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.) IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001 **BIG LOST GROUND WATER DISTRICT'S PETITION TO INTERVENE**

The Big Lost River Ground Water District ("District"), by and through its counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby file this *Big Lost River Ground Water District's Petition to Intervene* ("*Petition*"), pursuant to the Rules of Procedure of the Idaho Department of Water Resources (specifically IDAPA 37.01.01.350—37.01.01.354) and other applicable law. This *Petition* requests an order authorizing District to intervene in this contested case before the Idaho Department of Water Resources ("IDWR" or "Department"), which was initiated by the petitioners through counsel with filing of a *Petition of Declaratory Ruling for Watermaster Instructions* filed on February 14, 2024.

I. LEGAL STANDARD

A party may intervene in an IDWR proceeding under certain circumstances. IDAPA 37.01.01.350. IDAPA 37.01.01.353.01 provides:

> Timely-Filed Petitions. If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties.

Based on this rule, the analysis of a petition to intervene requires consideration of: (a) whether the *Petition* is timely, (b) whether the potential intervenor shows a "direct and substantial interest in any part of the subject matter of a proceeding," (c) a showing that the intervention would "not unduly broaden the issues," and (d) whether the potential intervenor's "interest is adequately represented by existing parties." *Id*.

II. ARGUMENT

A. The *Petition* is timely.

A petition to intervene is timely filed if it is "filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice." IDAPA 37.01.01.352. This *Petition* is filed before the prehearing conference currently scheduled for August 29, 2024, and is thus timely.

B. District has a direct and substantial interest in subject matter of this proceeding.

District was created on November 14, 2016, pursuant to Idaho Code § 42-5201 *et seq*. The self-stated mission of District is "to protect and stabilize the basin's aquifers while protecting all member's ground water rights which will promote the full economic benefit derived from using Basin 34's ground water resource." https://blrgwd34.com/. District patrons

consist of individuals and entities that utilize ground water for various purposes pursuant to valid ground water rights, a majority of whom also possess and utilize natural flow surface water rights and storage water entitlements (as patrons of the Big Lost River Irrigation District) in conjunction with their ground water use.

As water users, District patrons will be affected by the outcome of the above-entitled action as it implicates issues of water administration and imposition of watermaster instructions in the Big Lost River basin. As water users that are subject to water administration, District patrons have a direct and substantial interest in this matter. Further, part of District's water management plan is to increase surface water use and delivery as part of a ground water pumping reduction plan. The petitioners seek implementation of a type of futile call of the Big Lost River that is detrimental to lower valley water users. The requested type of futile call will diminish the surface water supply and result in increased ground water diversions of District patrons. Accordingly, District has a direct and substantial interest in the subject matter of this proceeding.

C. District's intervention will not unduly broaden the issues involved in this proceeding.

Presently, this proceeding is in its very early stages, as no contested matters have been addressed and no prehearing conferences have been held. District's interests relate to the relief requested by petitioners (the delivery of natural flow and storage water to water users). Thus, District's intervention will not unduly broaden the issues.

D. District's interest is not adequately represented by existing parties.

District's interests are specific in nature to its patrons as water users that either utilize ground water or use surface and storage water along with ground water. District's interests are not adequately represented or protected by any of the existing parties to these proceedings. The intervention of District is necessary to adequately represent and protect its unique interests.

III. CONCLUSION

For the foregoing reasons, District requests an order of the Hearing Officer granting this *Petition* and authorizing District to intervene in this proceeding.

Dated this 26th day of August, 2024.

Robert L. Harris

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2024, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: **BIG LOST RIVER GROUND WATER DISTRICT'S PETITION TO INTERVENE**

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

\\Law\data\WPDATA\RLH\22787-000 Big Lost River Ground Water District\Moss Farms Matter\BLGWD Petition to Intervene.docx

RECEIVED
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Attorneys for Intervenor Big Lost River Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	NOTICE OF SUBSTITUTION OF COUNSEL

PLEASE TAKE NOTICE that Intervenor Big Lost River Irrigation District, pursuant to Rule 204 of the Rules of Procedure of the Department, IDAPA 37.01.01.204, hereby substitutes Norman M. Semanko and Payton G. Hampton as counsel of record, in place of Kent Fletcher. All future correspondence and pleadings in this matter should be directed to them at the contact information noted above in this caption.

DATED this 9th day of September, 2024.

PARSONS BEHLE & LATIMER

Norman M. Semanko; Payton G. Hampton
Attorneys for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September, 2024, a true and correct copy of the foregoing document was filed by email to file@idwr.idaho.gov, and I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Original to:	
IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83729 Boise, ID 83720	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: file@idwr.idaho.gov; Garrick.baxter@idwr.idaho.gov
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Norman M. Semanko

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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001 **OPPOSITION TO PETITIONS TO INTERVENE FILED BY THE MOORE CANAL USERS AND THE BIG LOST GROUND WATER DISTRICT**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.354, hereby files its opposition to the petitions to intervene filed by the Moore Canal Users and the Big Lost River Ground Water District.

I. BACKGROUND

The above-captioned contested case was initiated by Pehrsons on February 14, 2024 through the filing of a *Petition for Declaratory Ruling for Watermaster Instructions* ("Petition").

In summary, the *Petition* sought a ruling from the Idaho Department of Water Resources that the Director should:

> (1) adopt watermaster instructions that are substantially similar to the instructions prepared by watermasters Yockey and Marcroft as to the use of the 3 in 1 Ditch and River Diversion for the Moss Water Rights; and (2) adopt watermaster instructions explaining that storage releases from Mackey Reservoir cannot be used to augment or supplement natural flow in the Big Lost River to the detriment of appropriators whose water rights pre-date storage of water in Mackey Reservoir.

Petition at 8.

On February 23, 2024, Moss Farms, Inc. ("Moss") filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* ("Opposition"). For various procedural reasons, the *Opposition* asked the Director to reject the *Petition* out-of-hand.

On March 1, 2024, Pehrsons addressed the *Objection* through their *Reply to Objection to Petition for Declaratory Ruling for Watermaster Instructions*.

On April 12, 2024, the Big Lost River Irrigation District ("BLRID") filed a *Petition to Intervene* "BLRID Intervention").

On April 19, 2024, Pehrsons filed a *Notice of Non-Opposition to BLRID's Petition to Intervene; Renewed Request for Informal Settlement Conference*.

On August 8, 2024, the Director of the Idaho Department of Water Resources issued a *Notice of Prehearing Conference; Order Appointing Hearing Officer*, wherein Roger S. Burdick was appointed hearing officer and a prehearing conference was scheduled for August 29, 2024.

On August 22, 2024, and on August 26, 2024, the Moore Canal Users and the Big Lost River Ground Water District filed petitions to intervene, respectively.

On August 29, 2024, Hearing Officer Burdick stated that any opposition to the petitions to intervene filed by Moore Canal and the Ground Water District must be filed by September 9, 2024, with replies thereto by September 16, 2024.

II. LEGAL STANDARD

A petition to intervene must set forth "the name and address of the potential intervenor and must state the direct and substantial interest of the potential intervenor in the proceeding." IDAPA 37.01.01.351. If a timely filed petition to intervene "shows a direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant's interest is adequate represented by existing parties." IDAPA 37.01.01.353.01. The decision to grant or deny a motion to intervene is a matter of discretion. *See Ellis v. Ellis*, 167 Idaho 1, 7, 467 P.3d 365, 371 (2020).

III. ARGUMENT

Pehrsons acknowledge that the petitions to intervene filed by Moore Canal and the Ground Water District are timely; however, intervention should nonetheless be denied because petitioners have not shown: (1) a direct and substantial interest in the issues that are the subject of the *Petition*; and (2) even if they do, the interests alleged are adequately represented by the existing parties.

A. Moore Canal

Here, the sum total of Moore Canal's interest in the *Petition* is as follows: "The manner in which natural flow and storage water rights are delivered from Mackay Reservoir materially affects the ability of Moore Canal Users' members to irrigate their land. Any change to the current manner of deliver could have a negative impact." *Moore Canal Petition to Intervene* at 2.

First, the statement that the outcome of this case "could" impact Moore Canal lacks specificity, and a cognizable interest as to what will happen to water delivery; therefore, Moore

Canal cannot meet its burden of establishing its direct and substantial interest. Moreover, Moore Canal has not explained how intervention, if it is granted, will not unduly broaden the issues into problems that Moore Canal may have when it comes to how BLRID delivers natural flow and/or storage water into the Moore Canal.

Second, Moore Canal does not explain who its members are, how many of its members have irrigation entitlements/shares through BLRID, and how many – if any – have water rights that are independent of the irrigation entitlements/shares that they hold in BLRID. During the August 29, 2024 pre-hearing conference, counsel for Moore Canal represented to the Hearing Officer that at least some of his client's members are members of BLRID. *See also Moore Canal Petition to Intervene* at 2 ("Moore Canal Users receive natural flow and storage water for irrigation delivered by Big Lost River Irrigation District (BLRID) from Mackay Reservoir."). This statement makes sense because the Moore Canal "is owned by the Big Lost River Irrigation District." *Telford Lands LLC v. Cain*, 154 Idaho 981, 984, 303 P.3d 1237, 1240 (2013) (emphasis added). By not stating who Moore Canal's members are, whether its members have privately owned water rights in the Moore Canal that are independent of BLRID's water rights, and how its interests in the litigation are different than the existing parties, Moore Canal cannot meet its burden of establishing how its interests are not adequately represented.

B. Ground Water District

The Ground Water District states that its purpose is "to protect and stabilize the basin's aquifers while protecting all member's ground water rights which will promote the full economic benefit derived from using Basin 34's ground water resource." *Ground Water District Petition to Intervene* at 2.

First, the issue in the proceeding is delivery of surface water and does not address "full economic development" of Idaho's water resources. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011) (discussing whether IDWR's conjunctive administration curtailment orders violated "the full economic development provision of Idaho Code § 42-226"). Moreover, the instant proceeding does not address conjunctive administration, either through the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, or the Ground Water Act, Idaho Code § 42-226 *et seq*. Therefore, the Ground Water District has not met its burden of establishing what its direct or substantial interest in the litigation is, much less how intervention will not unduly broaden the issues into the interrelationship between ground water and surface water in Basin 34. *See Ground Water District Petition to Intervene* ("part of the District's [ground] water management plan is to increase surface water use and delivery as part of a ground water pumping reduction plan") (emphasis added).

Second, similar to Moore Canal, the Ground Water District acknowledges that "a majority [of its members] possess and utilize natural flow surface water rights and storage water entitlements (as patrons of the Big Lost River Irrigation District) . . . ." *Ground Water District Petition to Intervene* at 3. Therefore, the Ground Water District cannot meet its burden of establishing how its interests are inadequately represented by the existing parties, and how it will not unduly broaden the issues into problems that the Ground Water District's members have when it comes to how BLRID delivers natural flow and/or storage water.

IV. CONCLUSION

Based on the foregoing, Pehrsons respectfully request that the Hearing Officer deny the petitions to intervene filed by Moore Canal Users and the Big Lost River Ground Water District.

DATED this 9th day of September, 2024.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Chris M. Bromley
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF CONTINUED PREHEARING CONFERENCE** **ORDER GRANTING INTERVENTION: BLRID**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* with the Idaho Department of Water Resources ("Department").

On February 23, 2024, Moss Farms, Inc. filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* with the Department.

On April 12, 2024, the Big Lost River Irrigation District ("BLRID") filed *BLRID's Petition to Intervene*. On April 19, 2024, the Pehrsons filed a *Non-Opposition to Big Lost River Irrigation District's Petition to Intervene; Renewed Request for Informal Settlement Conference*.

On August 8, 2024, the Director issued a *Notice of Prehearing Conference; Order Appointing Hearing Officer*, scheduling a prehearing conference for August 29, 2024, and appointing former Idaho Supreme Court Justice Roger S. Burdick as the hearing officer in this matter.

On August 22, 2024, Moore Canal Users filed a petition to intervene. On August 26, 2024, Big Lost River Ground Water District also filed a petition to intervene.

All parties and potential intervenors were represented by counsel during the August 29, 2024 prehearing conference. Hearing Officer Burdick identified a potential conflict of interest and gave counsel time to privately discuss the concern off the record. Counsel for the parties and potential intervenors agreed to Hearing Officer Burdick's continued participation in the case.

During the prehearing conference, Hearing Officer Burdick granted *BLRID's Petition to Intervene*. The hearing officer also extended the time allowed for the Pehrsons to file an objection to the intervention of Moore Canal Users or Big Lost River Ground Water District to September 9, 2024, at 5 p.m. (MT), giving Moore Canal Users and Big Lost River Ground Water District seven days to respond to any objection filed.

The Hearing Officer continued the prehearing conference to October 10, 2024.

NOTICE OF CONTINUED PREHEARING CONFERENCE

NOTICE IS HEREBY GIVEN that a continued prehearing conference in this matter will be held on **October 10, 2024, at 10 a.m. (MT)**, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Room 648A, Boise, Idaho. All parties must be present at the prehearing conference in person or by video conference. The parties shall come prepared to discuss proposed issues for hearing, any proposed settlement, and any other matters that could aid in the fair and efficient resolution of this contested case.

To join the conference via computer or smartphone, please click the following Webex link and follow the prompts: https://idahogov.webex.com/idahogov/j.php?MTID=m3dc5402eaf51cdaae1684b1290df2867.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2632 700 3521.

The conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at https://adminrules.idaho.gov/rules/current/37/370101.pdf.

The continued prehearing conference will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require reasonable accommodations to attend, participate in, or understand the conference, please advise the Department no later than five (5) days before the conference. Inquiries for reasonable accommodation should be directed to Sarah Tschohl, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho 83720-0098, telephone (208) 287-4815, or email sarah.tschohl@idwr.idaho.gov.

ORDER

IT IS HEREBY ORDERED that *BLRID's Petition to Intervene* is GRANTED.

DATED this 10th day of September 2024.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C. PO Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	☒ U.S. Mail, postage prepaid ☒ Email

Courtesy copy via email:

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Sarah Tschohl
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Sep 16, 2024
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Attorneys for the Big Lost River Ground Water District

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.) IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001 **BIG LOST RIVER GROUND WATER DISTRICT'S RESPONSE TO OPPOSITION TO PETITION TO INTERVENE**

The Big Lost River Ground Water District ("District"), by and through its counsel, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby files *Big Lost River Ground Water District's Response to Opposition to Petition to Intervene* (the "*Response*") which is submitted in response to the *Pehrsons' Opposition to Petitions to Intervene Filed by the Moore Canal Users and the Big List Ground Water District* filed on September 9, 2024 ("*Opposition*"). The *Notice of Continued Prehearing Conference* dated September 10, 2024, provides District seven (7) days to respond to the *Opposition* (to be filed on or before September 16, 2024). This *Response* is filed pursuant to IDAPA 37.01.01.354 and other applicable law.

The *Opposition* opposes District's request to intervene in the above-entitled matter, which is a contested case before the Idaho Department of Water Resources ("IDWR" or "Department") initiated by the Pehrsons through counsel with filing of a *Petition of Declaratory*

Ruling for Watermaster Instructions filed on February 14, 2024 (the "*Petition*"). The *Petition* is directed at certain surface water rights owned by Moss Farms, Inc. (Water Right Nos. 34-182 and 34-318A).

I. ARGUMENT

A party may intervene in an IDWR contested case proceeding under certain circumstances. IDAPA 37.01.01.350. IDAPA 37.01.01.353.01 provides:

> Timely-Filed Petitions. If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties.

Based on this rule, the analysis of a petition to intervene requires consideration of: (a) whether the *Petition* is timely, (b) whether the potential intervenor shows a "direct and substantial interest in any part of the subject matter of a proceeding," (c) a showing that the intervention would "not unduly broaden the issues," and (d) whether the potential intervenor's "interest is adequately represented by existing parties." *Id*.

Pehrsons argue that intervention should be denied because District has not shown a direct and substantial interest in the subject of the *Petition*, and even if District does have a direct and substantial interest, the interests alleged are adequately represented by the existing parties. *Opposition* at 3. Further, the Pehrsons agree that District's petition to intervene was timely filed, *id.* at 3, and only summarily asserts that District cannot meet its burden on how it will not unduly broaden the issues in this proceeding. *Id*. at 5. Each of the Pehrsons arguments are addressed below.

A. District has a direct and substantial interest in subject matter of this proceeding.

The Pehrsons argue that because this contested case is controversy associated with the delivery of surface water and does not address full economic development of Idaho's water resources or conjunctive administration, District does not have a direct or substantial interest in this litigation. *Id*. at 5. Pehrsons base this argument on the apparent belief that because District is a ground water district, whose primary purpose is to protect and stabilize the Big Lost River Basin aquifer, it does not or cannot have a direct or substantial interest in the above-captioned matter. *Id*.

While there are no Idaho cases that specifically address the direct and substantial element interest intervention element in the context of a contested case before IDWR, whether District has a direct or substantial interest in this proceeding is a broader inquiry that the primary focus or objective of the entity seeking intervention. The thrust of this intervention requirement is whether the entity seeking intervention will be directly affected by the outcome. District will be directly affected by the outcome of this proceeding because, as water users within Basin 34, the above-entitled action implicates issues of water administration and imposition of watermaster instructions in the Big Lost River basin. District patrons consist of individuals and entities that utilize ground water for various purposes pursuant to valid ground water rights, but a majority of these users also possess and utilize natural flow surface water rights and storage water entitlements (as patrons of the Big Lost River Irrigation District) in conjunction with their ground water use. As such, District has a "direct" interest as it represents water users in Basin 34 and this matter involves an issue—which District believes is significant—that could affect water delivery and water rights administration in Basin 34 as the *Petition* seeks implementation of a specific watermaster instruction that will have direct ramifications for futile call determinations in Basin 34. *Petition* at 6-7. District should be permitted to intervene in this matter to advocate

for their position and protect their interests concerning these issues.

District's interest in this matter is also "substantial" and more than just one of generalized interest because it involves water. The interaction of surface water and ground water supplies in the Big Lost River basin is extensive and well-known and historically a source of significant conflict and resulting attention from IDWR and the Idaho Water Resource Board. *See, e.g,.* https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/20240301-Big-Lost-Groundwater-Update.pdf; https://idwr.idaho.gov/wp-content/uploads/sites/2/publications/Update-of-Ground-Water-Conditions-in-the-Big-Lost-River-Valley.pdf. In the first linked document provided above, it explains that "[g]roundwater in the Big Lost River valley is recharged by infiltration of precipitation, seepage from streams, seepage from irrigation canals, and infiltration of excess water applied for irrigation." Sukow Jennifer, UPDATE ON GROUNDWATER MONITORING AND HYDROLOGIC INVESTIGATIONS IN THE BIG LOST RIVER VALLEY, March 2024 at 10. Sukow's report also quotes Crosthwaite et al. (1970), who determined: "A distinctive feature of the Big Lost River basin is the large interchange of water from surface streams into the ground and from the ground into surface streams[;]" and further concluded, "[s]urface and groundwater are so closely related that neither can be considered as a separate source of supply." *Id*. at 14 (underling added). And specific to the area of Basin 34 at issue, Sukow notes that "[a]pproximately 95% of groundwater diversions in the Big Lost River basin occur in the valley south of Mackay Dam." *Id*. at 24. The watermaster instruction at issue will implicate futile call determinations for the Big Lost River in the exact same location—below Mackay Dam.

District's interest in this matter is also rooted in important policy considerations. The Pehrsons are effectively attempting to do an end-run around the finality of a final order approving a transfer application. The Idaho Supreme Court has declared that "finality in water

rights is essential." *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998). The order on the Moss Farms transfers have been final for nearly nine (9) years. As part of the transfer review process, even without protests filed, IDWR conducts its own analysis of the transfer review criteria, including injury to other water rights.

District is concerned with the precedent this matter could set in providing parties a second bite at the apple on a water right transfer that was finalized and completed without conditions of approval of the type the Pehrsons are trying to impose through watermaster instructions—effectively an end run around the finalized transfer. The review criteria for an application for transfer is found at Idaho Code § 42-222, which provides:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

(Underlining added). Because the director has an independent duty to analyze the review criteria under Idaho Code § 42-222, even if the transfer is not protested, for the Moss transfers the Department already determined no other water rights would be injured through the transfer approval as evidenced by the lack of conditions that could have been included like the conditions the Pehrsons seek to now add.

The Pehrsons assert language from a 1915 case that junior water users are protected to the conditions of the stream when the juniors perfected their water rights in support of their argument, *Opposition* at 6, but the case offered in support of this argument is distinguishable from the above-entitled matter as the Moss rights were amended pursuant to the provisions of a statute (Idaho Code § 42-222) and were subject to the very injury analysis policy articulated in the 1915 case that protects juniors. IDWR did not find injury, and the Pehrsons did not object to find injury. There is clearly disagreement as to whether the Pehrsons are now being injured as a result of the Moss transfers, but there should be no disagreement that the Moss transfers went through the appropriate legal process and were subject to injury scrutiny. The Pehrsons simply now disagree with the results of that analysis and now effectively argue there is no real finality with a final order of the Department because water users are subject to after-the-fact claims of injury once their water rights are amended. The policy implications of these assertions, if successful, are far reaching, and as the representative of virtually all the ground water users in the Big Lost River basin, District can foresee how these arguments could be asserted in future water right proceedings, evaluation of pumping from a former authorized point of diversion as opposed to a current point of diversion, or other ways that effectively assert that water rights should be evaluated based on past or former conditions rather than current conditions.

In sum, the Pehrsons seek implementation of a type of futile call of the Big Lost River that is detrimental to lower valley water users. The requested type of futile call will establish a precedent which will diminish the surface water supply and necessarily result in increased ground water diversions of District patrons. District represents many water users and is far from a single water user who wants to intervene merely because water is involved, or the issue may be interesting. The outcome of this proceeding will have direct implications on water right

administration in the Big Lost River basin, a basin whose water supply of both surface and ground water are "so closely related that neither can be considered as a separate source of supply." *Id*. at 14. Further, District is concerned with the precedent this matter could set in providing parties a second bite at the apple on a water right transfer that was finalized and completed without conditions of approval of the type the Pehrsons are trying to impose through watermaster instructions—effectively an end run around the finalized transfer approval. For all these reasons, District has a direct and substantial interest in the subject matter of this proceeding and should be permitted to intervene.

B. District's interest is not adequately represented by existing parties.

At this early stage, because District's legal positions primarily align with Mosses in this matter, the Pehrsons appear to assert that District's interest are adequately represented by existing parties. However, the test is not whether the legal positions of an existing party and a proposed intervenor in a contested case are the same or similar, rather, the question is whether their *interests* are adequately represented by existing parties.

District's interests are not adequately represented by Moss or any other party in this matter. District's interests are specific in nature to its patrons as water users that either utilize ground water or use surface and storage water along with ground water. The Moss water rights at issue in this proceeding do not authorize the diversion of ground water. Nevertheless, the implications of the relief the Pehrsons seek in this matter will affect District even though District's interests and Moss's interests are not precisely the same. For these reasons, the intervention of District is necessary to adequately represent and protect its unique interests.

C. District's intervention will not unduly broaden the issues involved in this proceeding.

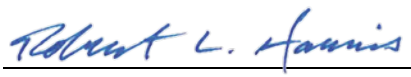
The Pehrsons do not offer any specific argument as to how District's involvement will unduly broaden the issues, only that District cannot meet their burden that they will not unduly

broaden the issues. *Opposition* at 5. As stated previously, presently, this proceeding is in its very early stages, as no contested matters have been addressed. At this early stage, District seeks to intervene on the issues of water rights administration of surface and storage water, futile call determination, and the finality of approved water right transfers and any subsequent attempt to attack the final order through watermaster instructions. All these issues are presently squarely at issue in this contested case, and District has not asserted any other issues it seeks to be determined or decided in this contested case. Thus, District's intervention will not unduly broaden the issues.

II. CONCLUSION

For the foregoing reasons, District requests an order of the Hearing Officer granting District's petition to intervene.

Dated this 16th day of September, 2024.



Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2024, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: **BIG LOST RIVER GROUND WATER DISTRICT'S RESPONSE TO OPPOSITION TO PETITION TO INTERVENE**

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Sep 16, 2024
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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	**MOORE CANAL USERS REPLY TO OPPOSITION TO PETITION TO INTERVENE**

Come now, Moore Canal Water Users' Association Inc., an Idaho non-profit corporation and water users association formed pursuant to Idaho law; the Timberdome Canal Company, Inc., an Idaho non-profit corporation formed pursuant to Idaho law; the Lost River Pipeline, a lateral ditch water users' association, (collectively hereinafter, Moore Canal Users), and pursuant to the Hearing Officer's instructions and Notice of Continued Prehearing Conference respond to Byron Pehrson, Loy Pehrson and Randy Pehrson's (Pehrson's) Opposition to Petition to Intervene.

1. **BLRID does not adequately represent the interests of the Moore Canal Water Users' Association Inc. The Association members have an interest in protecting their individual senior natural flow rights in the Big Lost River which pre-date the Mackay Reservoir and which are separate and distinct from the BLRID storage and irrigation rights.**

   The Moore Canal Water Users' Association Inc. (the Association) oversees improvement

projects related to the Moore Canal and its laterals under a canal modification agreement with BLRID. The Association represents a group of individual water users who have their individual water rights carried through the Moore Canal that are separate from BLRID irrigation rights. The Association's members hold roughly 70% of the total cfs delivered through the Moore Canal for the private water rights. The members of the Association have some of the oldest private natural flow rights in the basin. Their privately owned water rights pre-date storage of water in Mackay Reservoir and the creation of BLRID. The private individual rights are delivered through BLRID's system from the Big Lost River at the Moore Diversion through the Moore Canal. Association members also have shares in BLRID. However, BLRID does not represent the private individual water rights in this matter.

BLRID delivers water to shareholders within its 34,000 acre service area. BLRID's water rights are as follows:

Big Lost River Irrigation District Water Rights				
Water Right #	Priority Date	Div. Rate (cfs)	Source	Water Use
34-12	2/7/1916		BIG LOST RIVER	IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-13	7/31/1905	100	Antelope Creek	IRRIGATION
34-810	6/1/1888	3.2	BIG LOST RIVER	DIVERSION TO STORAGE, IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-811	6/30/1881	1.7		DIVERSION TO STORAGE, IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-817B	3/1/1902	0.8		DIVERSION TO STORAGE, IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-818	6/30/1880	3.2		DIVERSION TO STORAGE, IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-2507	9/2/1959			IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-10873	10/2/1905			IRRIGATION FROM STORAGE, IRRIGATION STORAGE
34-10935	6/1/1896	6.4		DIVERSION TO STORAGE, IRRIGATION FROM STORAGE, IRRIGATION STORAGE

The mainstem of the Moore Canal spans approximately 11 miles and delivers water to laterals that combined span approximately 27 miles. Some laterals are within BLRID boundaries, and some are not. The Moore Canal delivers water to approximately 85 points of delivery to irrigate approximately 9500 acres.

A map depicting the places of use of all the individual natural flow water rights represented by the Association but not owned by BLRID is attached as Exhibit "A."[1]

The Association is operated pursuant to its bylaws and has an established Board of Directors. The current officers are as follows:

President: Travis Andersen
Vice President: Derek Nichols
Secretary: Bill Van Lente
Treasurer: Todd Perkes

The Association has a direct and substantial interest in the proceeding because the instructions to the Water District 34 watermaster regarding the relationship between storage water and natural flow impacts futile call determinations and the ability of the Association's members to receive their pre-storage natural flow rights.

2. **BLRID does not adequately represent the interests of Timberdome Canal Company. The interests of Timberdome are distinct from the interests of BLRID as its members are outside the service area for storage water from BLRID, but they still receive natural flow from Mackay Reservoir.**

The Timberdome Canal Co. Inc. is a non-profit corporation that operates a lateral of the Moore Canal. Many of the water rights of the members of Timberdome Canal Company (Timberdome) are senior natural flow rights delivered through the BLRID system. The farm ground served by Timberdome only receives natural flow. It is outside of the BLRID service area and does not have any storage rights.

Timberdome was formally incorporated in 1976, operates pursuant to its bylaws and has an established Board of Directors. The current officers are as follows:

President: Mark Telford
Vice President: Adam Sorensen
Secretary: Evan Rogers

The private individual water rights within Timberdome's service area are depicted on Exhibit "A."

Timberdome has a direct and substantial interest in the proceeding because the instructions to the Water District 34 watermaster regarding the relationship between storage water and natural flow impacts futile call determinations and the ability of Timberdome to deliver its shareholders pre-storage natural flow rights.

3. **BLRID and the Association do not adequately represent the interests of Lost River as Lost River has a vested interest in protecting its members individual natural flows rights that are separate and distinct from BLIRDs rights and the Association rights.**

The Lost River Pipeline is also a lateral of the Moore Canal. It receives and delivers both individual natural flow rights and storage water from BLRID. The members of the Lost River Pipeline Ditch Users' Association (Lost River) have senior natural flows rights as well as shares in the BLRID.

Lost River is not formally registered with the Idaho Secretary of State and operates pursuant to Idaho Code § 42-1301. It operates pursuant to its bylaws and has an established Board of Directors

President: Seth Beal
Vice President: Keith Waddoups
Secretary: Wade Waddoups

[1] Exhibit A was created to help illustrate all of the private water rights delivered through the Moore Canal to assist the Association in preparation for a piping project. All of the sections, other than the Lost River Pipeline and the Timberdome Canal are represented by the Association.

The individual rights within Lost River's service area are depicted on Exhibit "A."

Lost River Pipeline water users have a direct and substantial interest in the proceeding because the instructions to the Water District 34 watermaster regarding the relationship between storage water and natural flow impacts futile call determinations and the ability of Lost River to deliver its shareholders pre-storage natural flow rights.

4. Allowing Petitioners to intervene in this matter will not unduly broaden the issues.

Petitioners have brought no counterclaims and do not intend to do so. The Association, Timberdome, and Lost River have an interest in this matter as each entity's members hold senior natural flow rights that pre-date the Mackay Reservoir. If the watermaster instructions pertaining to Mackay Reservoir are changed as described in the Petition for Declaratory Ruling for Water Master Instructions filed on February 14, 2024, it will have a serious negative effect on the senior natural flow rights that are delivered through the Moore Canal to the Petitioners' places of use. Petitioners should be allowed to intervene in this matter as they have the right to protect the current delivery method of their respective members' private natural flow rights that are separate and distinct from BLRIDs water rights.

DATED this 16th day of September, 2024.

__/s/ Hyrum Erickson_____
Hyrum Erickson

VERIFICATION PURSUANT TO IDAHO CODE § 9-1406

I have read and understand the foregoing language. I declare under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

___/s/ Travis Andersen_____ September 16, 2024_____
Travis Andersen Date

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 16th day of September, 2024.

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___/s/ Hyrum Erickson_____
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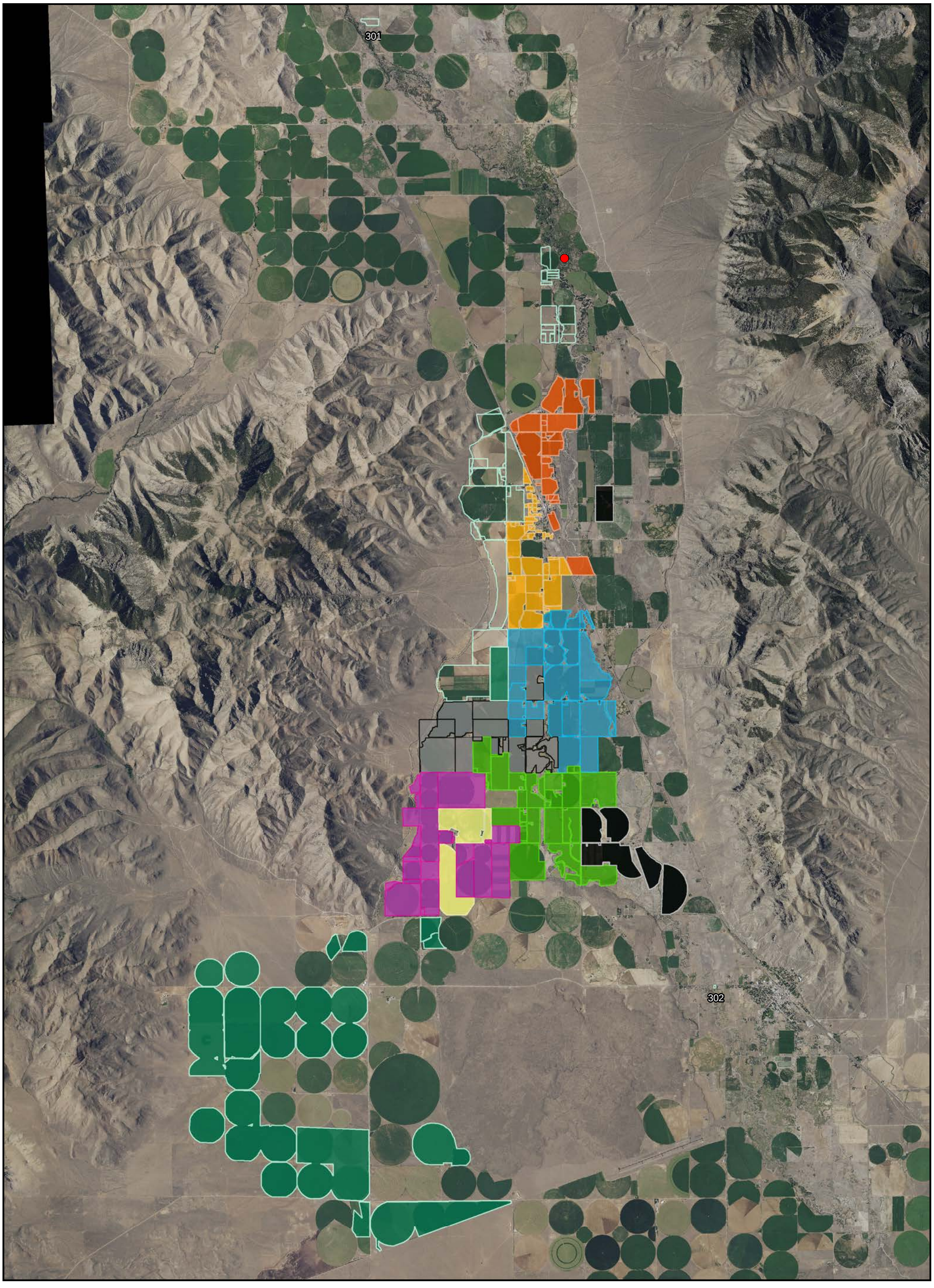
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2021 NAIP

0 1.75 3.5 7 Miles

Legend

- Moore Canal POD
- Remaining Users
- Aikele Stubb
- West Side East Pipeline
- City Pipeline
- Middle System
- Upper System
- Old Aikele Stubb
- Timberdome Canal
- Lost River Pipeline
- East Side Canal

N W E S

000088

Moore Canal Users POUs

All Users

RMEA # 23-0087

by: KM

Date: 7/17/2024

Rocky Mountain ENVIRONMENTAL ASSOCIATES, INC.

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Garrett M. Kitamura of Parsons Behle & Latimer hereby appears as counsel, along with Norman M. Semanko and Payton G. Hampton, of Parsons Behle & Latimer, for Intervenor Big Lost River Irrigation District. All future correspondence and pleadings in this matter should be directed to him at the contact information noted above in this caption.

DATED this 4th day of October, 2024.

PARSONS BEHLE & LATIMER

Garrett Kitamura

Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura
Attorneys for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2024, a true and correct copy of the foregoing document was filed by email to file@idwr.idaho.gov, and I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Original to:	
IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83729 Boise, ID 83720	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: file@idwr.idaho.gov; Garrick.baxter@idwr.idaho.gov
Copies To:	
Chris M. Bromley Candice McHugh MCHUGH BROMLEY, PLLC P. O. Box 107 Boise, ID 83701 *Attorneys for Bryon Pehrson, Loy Pehrson & Randy Pehrson*	☐ U.S. Mail ☐ Facsimile: 208/287-0864 ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: cbromley@mchughbromley.com; cmchugh@mchughbromley.com
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Norman M. Semanko; Garrett M. Kitamura

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**ORDER ON PETITIONS TO INTERVENE FILED BY THE MOORE CANAL USERS AND THE BIG LOST RIVER GROUND WATER DISTRICT**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* with the Idaho Department of Water Resources ("Department"). The Pehrsons seek two forms of relief:

1. Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right now. 34-18 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.

2. Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Petition for Declaratory Ruling for Watermaster Instructions, at 2.

On February 23, 2024, Moss Farms, Inc. ("Moss Farms") filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* ("*Moss Farms' Response*") with the Department. Moss Farms urged the Director to reject the petition and not consider it for four reasons:

1. Idaho Code § 67-5255(1) does not authorize the Director to grant the declaratory relief requested by Petitioners;

2. The Petitioners' time to challenge the Moss Farms' Water Rights has expired pursuant to Idaho Code §§ 42-222 & 42-5246;

3. The relief requested violates legal principles of priority administration and is against public policy; and

4. The doctrine of *res judicata* bars the relief requested by Petitioners.

Moss Farms' Response, at 1.

On April 12, 2024, the Big Lost River Irrigation District ("BLRID") filed a petition to intervene. On August 22, 2024, Moore Canal Users filed a petition to intervene. On August 26, 2024, Big Lost River Ground Water District also filed a petition to intervene. All three petitions to intervene were timely filed.

All parties and potential intervenors were represented by counsel during the August 29, 2024 prehearing conference. During the prehearing conference, Hearing Officer Burdick granted *BLRID's Petition to Intervene* and extended the time allowed for the Pehrsons to file an objection to the intervention of Moore Canal Users or Big Lost River Ground Water District to September 9, 2024, at 5 p.m. (MT), giving Moore Canal Users and Big Lost River Ground Water District seven days to respond to any objection filed.

On September 9, 2024, the Pehrsons timely filed their *Opposition to Petitions to Intervene Filed by the Moore Canal Users and the Big Lost Ground Water District* ("*Pehrsons' Opposition to Petitions to Intervene*"). On September 16, 2024, the proposed intervenors timely filed *Moore Canal Users Reply to Opposition to Petition to Intervene* ("*Moore Canal Users' Response*") and *Big Lost River Ground Water District's Response to Opposition to Petition to Intervene* ("*BLRGWD's Response*").

Having reviewed the record and briefing on this issue, the Hearing Officer decides the matter as follows without oral argument.

STANDARD

The Department's Rules of Procedure allow a hearing officer discretion to grant intervention in contested cases in limited circumstances. *See* IDAPA 37.01.01.350–354. A hearing officer properly exercises his or her discretion when he or she: (1) correctly perceives the issue as one of discretion; (2) acts within the boundaries of such discretion; (3) acts consistently with any legal standards applicable to the specific choices before him or her; and (4) reaches a decision by an exercise of reason. *See Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

Department Rule of Procedure 350 provides: "A person who is not already a party to a contested case and who has a direct and substantial interest in the proceeding may petition for an order granting intervention as a party to the contested case." IDAPA 37.01.01.350.

Rule 353 further guides a hearing officer on deciding petitions to intervene: "If a timely-filed petition to intervene shows direct and substantial interest in any part of the subject matter of

a contested case and does not unduly broaden the issues, the agency shall grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties." IDAPA 37.01.01.353.01.

The moving parties have not requested oral argument; therefore, these motions will be decided on the briefing in this interlocutory order. *See* IDAPA 37.01.01.220.02, 37.01.01.710.

ANALYSIS

A. *Moore Canal Users' Petition to Intervene*

"Moore Canal Users" collectively refers to Moore Canal Water Users' Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline. Moore Canal Users' Water Association Inc. is an Idaho non-profit corporation and water users' association. The Timberdome Canal Company is an Idaho non-profit corporation. The Lost River Pipeline is a lateral ditch water users' association.

In opposition to the *Moore Canal Users' Petition to Intervene*, the Pehrsons allege that the Moore Canal Users' "statement that the outcome of this case 'could' impact Moore Canal lacks specificity, and a cognizable interest as to what will happen to water delivery; therefore, Moore Canal cannot meet its burden of establishing its direct and substantial interest." *Pehrsons' Opposition to Petitions to Intervene*, at 3–4 (emphasis in original).

The Pehrsons further argue that "Moore Canal does not explain who its members are, how many of its members have irrigation entitlements/shares through BLRID, and how many – if any – have water rights that are independent of the irrigation entitlements/shares that they hold in BLRID." *Id.* at 4. The Pehrsons assert that the Moore Canal "is owned by the Big Lost River Irrigation District." *Id.* (emphasis in original). Therefore, the Pehrsons conclude that:

> By not stating who Moore Canal's members are, whether its members have privately owned water rights in the Moore Canal that are independent of BLRID's water rights, and how its interests in the litigation are different than the existing parties, Moore Canal cannot meet its burden of establishing how its interests are not adequately represented.

Id.

In the Moore Canal Users' reply to the *Pehrsons' Opposition to Petitions to Intervene*, the Moore Canal Users argue:

1. BLRID does not adequately represent the interests of the Moore Canal Water Users' Association Inc. The Association members have an interest in protecting their individual senior natural flow rights in the Big Lost River which pre-date the Mackay Reservoir and which are separate and distinct from the BLRID storage and irrigation rights.

2. BLRID does not adequately represent the interests of Timberdome Canal Company. The Interests of Timberdome are distinct from the interests of BLRID as its members are outside the service area for storage water from BLRID, but they still receive natural flow from Mackay Reservoir.

3. BLRID and the Association do not adequately represent the interests of Lost River [Pipeline] as Lost River has a vested interest in protecting its members individual natural flows rights that are separate and distinct from BLRIDs rights and the Association rights.

4. Allowing [Moore Canal Users] to intervene in this matter will not unduly broaden the issues.

Moore Canal Users' Response, at 1, 3, 4, 5 (emphasis omitted).

Moore Canal Users assert that each of its entities have "a direct and substantial interest in the proceeding because the instructions to the Water District 34 watermaster regarding the relationship between storage water and natural flow impacts futile call determinations and the ability of" the entities to receive or deliver to shareholders their "pre-storage natural flow rights." *Id.* at 3, 4, 5.

The Hearing Officer agrees with the Pehrsons that the *Moore Canal Users Petition to Intervene* did not provide sufficient information to show they have a direct and substantial interest in the proceeding to warrant their intervention. However, the additional specificity supplied in the *Moore Canal Users' Response* provides the Hearing Officer with the necessary information to find that Moore Canal Users have shown a direct and substantial interest in this matter, their intervention does not unduly broaden the issues, and their interests are not adequately represented by existing parties.

B. *Big Lost River Ground Water District's Petition to Intervene*

Big Lost River Ground Water District's "patrons consist of individuals and entities that utilize ground water for various purposes pursuant to valid ground water rights, a majority of whom also possess and utilize natural flow surface water rights and storage water entitlements (as patrons of the Big Lost River Irrigation District) in conjunction with their ground water use." *Big Lost River Ground Water District's Petition to Intervene*, at 2–3.

Big Lost River Ground Water District alleges in its petition to intervene that it has a direct and substantial interest in this proceeding because the proceeding "implicates issues of water administration and imposition of watermaster instructions in the Big Lost River basin. As water users that are subject to water administration, District patrons have a direct and substantial interest in the matter." *Id.* at 3. Further, the district claims that part of its internal "water management plan is to increase surface water use and delivery as part of a ground water pumping reduction plan." *Id.* Big Lost River Ground Water District argues that "[t]he petitioners seek implementation of a type of futile call of the Big Lost River that is detrimental to lower valley

water users. The requested type of futile call will diminish the surface water supply and result in increased ground water diversions of District patrons." *Id.*

In opposition, the Pehrsons argue:

> First, the issue in the proceeding is delivery of surface water and does not address "full economic development" of Idaho's water resources. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 796, 252 P.3d 71, 77 (2011) (discussing whether IDWR's conjunctive administration curtailment orders violated "the full economic development provision of Idaho Code § 42-226"). Moreover, the instant proceeding does not address conjunctive administration, either through the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, or the Ground Water Act, Idaho Code § 42-226 *et seq*. Therefore, the Ground Water District has not met its burden of establishing what its direct [and] substantial interest in the litigation is, much less how intervention will not unduly broaden the issues into the interrelationship between ground water and surface water in Basin 34. *See Ground Water District Petition to Intervene* ("part of the District's [ground] water management plan is to increase surface water use and delivery as part of a ground water pumping reduction plan") (emphasis added).

Pehrsons' Opposition to Petitions to Intervene, at 5.

In its response to the Pehrson's opposition, Big Lost River Ground Water District argues that it has a direct interest "as it represents water users in Basin 34 and this matter involves an issue—which District believes is significant—that could affect water delivery and water rights administration in Basin 34 as the *Petition* seeks implementation of a specific watermaster instruction that will have direct ramifications for futile call determinations in Basin 34." *BLRGWD's Response*, at 3. Big Lost River Ground Water District argues that its interest in this matter is substantial due to the "interaction of surface water and ground water supplies in the Big Lost River basin[.]" *Id.* at 4.

The Big Lost River Ground Water District also makes several policy arguments regarding why it should be allowed to intervene (e.g., its "concern[ ] with the precedent this matter could set in providing parties . . . effectively an end run around [a] finalized transfer"). *Id.* at 5.

With respect to the argument that the Big Lost River Ground Water District has a direct and substantial interest in the proceeding because of its potential impact on water rights administration in the basin and the interaction between surface and ground water supplies in the basin, the Hearing Officer concludes this is essentially the argument that all water is connected and, at some point, any change may affect another's right. This argument would lead to the conclusion that, for example, any water delivery change BLRID makes will affect ground water supplies therefore BLRID cannot run its business without ground water users' intervention. Also, the Big Lost River Ground Water District's ground water management plan is fluid and carries no legal effect on water administration pursuant to the prior appropriation doctrine, but rather is a plan used for the internal operations of the ground water district.

With respect to the argument that the Big Lost River Ground Water District has a direct and substantial interest in the proceeding because of policy concerns, if a general interest in the Department's water rights administration policies and hypothetical precedent setting were enough to warrant intervention, the intervention of water users in any contested case would be limitless.

Additionally, Big Lost River Ground Water District's intervention would expand the issues in this matter to include the interrelationship between ground water and surface water in Basin 34. The Hearing Officer finds this expansion would unduly broaden the issues.

Therefore, the Hearing Officer finds that Big Lost River Ground Water District has not shown a direct and substantial interest in the proceeding and has not shown its intervention would not unduly broaden the issues.

CONCLUSION

In an exercise of his discretion, the Hearing Officer finds that Moore Canal Users have shown a direct and substantial interest affected and should be permitted to intervene, but Big Lost River Ground Water District has not. The Hearing Officer further finds that allowing Big Lost River Ground Water District to intervene would unduly broaden the issues in this matter. Therefore, the Hearing Officer GRANTS Moore Canal Users' petition to intervene and DENIES Big Lost River Ground Water District's petition to intervene.

ORDER

IT IS HEREBY ORDERED that *Moore Canal Users' Petition to Intervene* is GRANTED.

IT IS FURTHER ORDERED that *Big Lost River Ground Water District's Petition to Intervene* is DENIED.

DATED this 9th day of October 2024.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of October 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

Chris M. Bromley Candice McHugh McHugh Bromley, PLLC 380 S. 4th St., Ste. 103 Boise, ID 83702 cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ U.S. Mail, postage prepaid ☒ Email
Skyler C. Johns OLSEN TAGGART PLLC PO Box 3005 Idaho Falls, Idaho 83403 sjohns@olsentaggert.com	☒ U.S. Mail, postage prepaid ☒ Email
Norman M. Semanko Garrett M. Kitamura Payton G. Hampton PARSONS BEHLE & LATIMER 800 W. Main Street, Suite 1300 Boise, Idaho 83702 nsemanko@parsonsbehle.com gkitamura@parsonsbehle.com phampton@parsonsbehle.com	☒ U.S. Mail, postage prepaid ☒ Email
Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW, PLLC 25 North Second East Rexburg, Idaho 83440 herickson@rex-law.com mmortimer@rex-law.com	☒ U.S. Mail, postage prepaid ☒ Email

Robert L. Harris HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C. PO Box 50130 Idaho Falls, ID 83405 rharris@holdenlegal.com	☒ U.S. Mail, postage prepaid ☒ Email

Courtesy copy via email:

Moss Farms Inc.
mx222moss@aol.com

Kayleen Richter
Deputy Attorney General

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**ORDER AUTHORIZING DISCOVERY AND EMAIL SERVICE** **SCHEDULING ORDER** **NOTICE OF HEARING**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* with the Idaho Department of Water Resources ("Department"). The Pehrsons seek two forms of relief:

> 1. Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right now. 34-18 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.
>
> 2. Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Petition for Declaratory Ruling for Watermaster Instructions, at 2.

On February 23, 2024, Moss Farms, Inc. filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* with the Department. Additionally, the Big Lost River Irrigation District, Moore Canal Users,[1] and Big Lost River Ground Water District petitioned for intervention in this contested case. The Hearing Officer granted intervention to the Big Lost River Irrigation District and Moore Canal Users and denied Big Lost River Ground Water District.

[1] "Moore Canal Users" collectively refers to Moore Canal Water Users' Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline.

On October 10, 2024, Hearing Officer Burdick held a continued prehearing conference. All parties appeared represented by counsel. The Hearing Officer and the parties discussed authorizing discovery, dates and deadlines for dispositive motions and other prehearing procedures, and a date for the hearing. No party raised any objections to the authorization of discovery, or the dates and deadlines proposed at the prehearing conference. Therefore, the Hearing Officer hereby exercises his discretion to authorize the parties to engage in discovery and to adopt the schedule below. The Hearing Officer also exercises his discretion to authorize the Department and the parties to officially serve documents by email in this contested case.

ORDER

IT IS HEREBY ORDERED that as of October 17, 2024, and pursuant to IDAPA 37.01.01.521, the parties are authorized to conduct and engage in the methods of discovery listed under IDAPA 37.01.01.520.01. Barring any conflicting discovery procedures or limitations set forth in the Department's Rules of Procedure (IDAPA 37.01.01) or an order of the presiding officer, discovery shall conform to Title V of the Idaho Rules of Civil Procedure.

IT IS FURTHER ORDERED that as of October 17, 2024, and pursuant to IDAPA 37.01.01.053.02–03, the Department and the parties are authorized to serve documents by email as an alternative to service by mail or personal service. The emails included in the certificate of service below are to be used as the official service emails, unless a notice instructing otherwise is filed with the Department and properly served on the parties.

IT IS FURTHER ORDERED that the following schedule is ADOPTED:

Nov. 1, 2024	Deadline for the parties to file a list of expert witnesses they intend to rely upon at the hearing, including names, addresses, and updated curricula vitarum. However, a curricula vitarum is not required if the expert identified is an employee of the Department.
Dec. 2, 2024	Deadline for the parties to exchange proposed stipulations of fact and expert reports. Unless the expert identified is an employee of the Department, if a party intends to have an expert testify during the hearing, the expert needs to have authored a disclosed expert report. Deadline for the parties to serve written discovery requests. If a party feels that additional time for written discovery is necessary, the party may move the Hearing Officer for an extension. Such a motion must explain the additional discovery sought and the reason the discovery could not be conducted prior to the deadline. Any response must be filed within 4 days after service of the motion. Replies are not authorized.
Dec. 16, 2024	Deadline for the parties to exchange rebuttal expert reports, if any. If an updated curricula vitarum for the rebuttal expert witness was not previously disclosed, one shall be provided with their report.

Jan. 24, 2025 Deadline for the parties to file dispositive motions, including motions for summary judgment. Any supporting documents or opening briefs must be filed concurrently with the dispositive motion.

Feb. 7, 2025 Deadline for the parties to file a response to a dispositive motion.

Feb. 14, 2025 Deadline for the moving party to file a reply to a dispositive motion response.

Feb. 21, 2025 Date reserved to hear oral argument on dispositive motions. If a dispositive motion is timely filed, a notice of hearing for the motion will be issued by the presiding officer without the need for a request.

Feb. 28, 2025 Deadline for the parties to complete all depositions.

Mar. 25, 2025 Deadline for the parties to file an index of exhibits and a list of the names and addresses of all witnesses that they may call to testify at the hearing. A short summary of the scope of each witnesses' anticipated testimony shall be included and expert witnesses shall be identified as such. The parties shall use the following reserved exhibit numbers and reach out to Paralegal Sarah Tschohl if additional numbers are needed:

Exhibit Nos.	Assigned Party
1–99	Pehrsons
100–199	Moss Farms, Inc.
200–299	Big Lost River Irrigation District
300–399	Moore Canal Users

April 1, 2025 Deadline for the parties to exchange and submit to the Department an electronic copy (via e-file email, USB thumb drive, or disc(s)) of their pre-marked exhibits. Each exhibit must be an independent file, and all file text must be machine readable. Exhibits shall be pre-marked in the bottom right corner of every page and must include the name of the party proposing the exhibit, the exhibit number, and a page number (each exhibit must start with page 1).

April 8, 2025 Prior to the start of the hearing, the parties shall submit to the Department three physical copies of their pre-marked exhibits. Exhibits shall be organized in binders that are labeled with the party's name and include dividers that identify each exhibit by its number.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Hearing Officer Burdick will hold a hearing in this matter on **April 8–11, 2025**. Each hearing day will begin at **9:00 a.m. (MT)**. The hearing will take place at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Rooms 602B–D, Boise, Idaho. All parties who wish to participate in the hearing and their witnesses shall be present in person.

The conference will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at https://adminrules.idaho.gov/rules/current/37/370101.pdf.

The hearing will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require reasonable accommodation to attend, participate in, or understand the hearing, please advise the Department no later than five (5) days before the hearing. Inquiries for reasonable accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho 83720-0098, telephone (208) 287-4815, or email sarah.tschohl@idwr.idaho.gov.

DATED this 17th day of October 2024.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

Chris M. Bromley Candice McHugh McHugh Bromley, PLLC cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ Email
Skyler C. Johns OLSEN TAGGART PLLC sjohns@olsentaggert.com	☒ Email
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Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW, PLLC herickson@rex-law.com mmortimer@rex-law.com	☒ Email

Courtesy copy via email:

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Sarah Tschohl
Paralegal

RECEIVED
Nov 01, 2024
DEPARTMENT OF
WATER RESOURCES

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Attorney for Moss Farms, Inc.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER IF WATER RIGHT NOS. 34-182 and 34-381A ((MOSS FARMS, INC.)	**Docket No. P-DR-2024-001** **EXPERT WITNESS DISCLOSURE**
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby discloses the following expert witness it intends to rely upon in these proceedings:

Bryce Contor
Contor Water LLC
5223 Steele Ave., PO BOX 94
Ioana, ID 83427

Mr. Contor's updated curricula vitarum is attached hereto.

DATED: November 1, 2024

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 1, 2024, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

Chris M. Bromley (X) Via Email
McHugh Bromley, PLLC
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/s/ Skyler C. Johns
Attorney for Moss Farms, Inc.

Curriculum Vitae

Bryce A. Contor
5223 Steele Avenue, P.O. Box 94
Iona, Idaho 83427
208-681-9100

Summary Statement

Mr. Contor has worked in the hydrology field since 1996, including ten years with the Idaho Water Resources Research Institute where he served as a research hydrologist, and five years with Idaho Department of Water Resources where he served as a Senior Water Resource Agent. Prior to that he farmed and served on the board of directors of a small canal company.

With the Institute, Mr. Contor served as principal investigator on hydrologic projects as diverse as preparing water budgets for large numerical aquifer models, investigating remote sensing of evapotranspiration on irrigated lands, developing tools to calculate the economic demand for irrigation water, and investigating managed recharge of aquifers. He has published in national peer-reviewed scientific journals and has authored numerous technical completion reports for the Idaho Water Resources Research Institute. At Idaho Department of Water Resource, Mr. Contor measured flow in pipelines and open channels, investigated water-right claims and made water-right recommendations in the Snake River Basin Adjudication.

Mr. Contor holds an M.S. Degree in hydrology from the University of Idaho. His hydrologic specialties include groundwater/surface-water interactions and MODFLOW aquifer modeling, water-budget analysis, pipeline and open-channel flow measurement, and statistics. GIS specialties include aerial land photography interpretation and manipulation of remote-sensing data. Economics specialties are water banking and economic demand for irrigation water. He has extensive experience with water-budget preparation and with collaboration as a member of the development team for Enhanced Snake Plain Aquifer Models (ESPAM) versions 1.0 through 2.1, and the Spokane Valley – Rathdrum Prairie Model. Contor has served as an expert witness in water-related matters.

Education

University of Idaho, Idaho Falls, Idaho, 2005, M.S., Hydrology
Brigham Young University, Provo, Utah, 1994, B.S., Agricultural Economics. Cum Laude.
Ricks College, Rexburg, Idaho, 1980, A.S., Farm Crops Management

Work Experience

Principal Hydrologist at Contor Water LLC, Iona Idaho, January 2024 through present. This is a semi-retirement position primarily supporting Rocky Mountain Environmental Associates in

similar work to that performed previously as an employee.

Senior Hydrologist and then Principal Hydrologist at Rocky Mountain Environmental Associates, Inc., Idaho Falls, Idaho, 2010 through 2023.

Position included aquifer modeling, hydrologic field investigation, hydrologic analysis, GIS and expert-witness work in support of Idaho water-rights transactions, negotiations and proceedings. For approximately two years, Mr. Contor reduced his work at Rocky Mountain Environmental Associates while doing landowner-outreach and technical work for the Henry's Fork Foundation and Friends of the Teton River.

Research Hydrologist of Idaho Water Resources Research Institute, University of Idaho, Idaho Falls, Idaho, 2001-2010

Position included serving as a principle investigator on a ground water banking project in cooperation with U.S. Bureau of Reclamation, as principle investigator in water-budget preparation for aquifer modeling projects, and field investigation in support of managed aquifer recharge. The position included GIS analysis and supervision of hydrologists and data technicians. During this period Mr. Contor sub-contracted field exams for the Snake River Basin Adjudication for Idaho Department of Water Resources.

Senior Water Resource Agent, Idaho Department of Water Resources and North Water Measurement District, 1996-2001

Duties included field and office evaluation of water-right claims, including flow measurements and characterization of conveyance and diversion structures, making water-right recommendations in the Snake River Basin Adjudication, and the measurement of water discharge and power consumption of irrigation wells for documentation of ground water withdrawal volumes.

Worked in irrigated agriculture from 1980 through 1995 as irrigation supervisor, farm manager, tenant farmer, farm owner, seed-company field representative, and Idaho Department of Agriculture chemigation inspector. In the late 1980s through early 1990s served as a board member and then as secretary of a small canal company.

Experience Testifying/Giving Depositions

Circa 2005: Deposed in matters related to the calibration of Enhanced Snake Plain Aquifer Model Version 1.0 and 1.1. This was not in behalf of a client, but in my role as one of the model developers at Idaho Water Resources Research Institute.

Circa 2012: Deposed and testified at hearing in behalf of Fremont Madison Irrigation District and Madison Ground Water District before IDWR regarding aquifer-modeling issues related to the Rangen Aquifer Delivery Call.

2016: Testified in behalf of Gunderson, defendant in a civil case related to filling in of an irrigation ditch in Jefferson County.

Circa 2019: Deposed and testified at hearing in behalf of Fremont Madison Irrigation District, Henry's Fork Ground Water District and Madison Ground Water District before IDWR regarding creation of the Eastern Snake Plain Aquifer Ground Water Management Area.

2021: Testified in behalf of Whittaker, protestant at hearing before IDWR regarding change in Point of Diversion of surface-water rights. The crux of the matter was implications of the abandonment of parts of a historical ditch system, and a water-right transfer seeking to restore a subset of those parts.

2023: Testified in behalf of Nelson, applicant at hearing before IDWR regarding change in Point of Diversion and Place of Use of surface-water rights. An important element of the matter was ditch capacity and conveyance.

2023: Testified in behalf of Bonneville-Jefferson Ground Water District at hearing before IDWR regarding the 5th Methodology Order under the Surface-Water Coalition conjunctive-administration delivery call.

2024: Testified in behalf of Bonneville-Jefferson Ground Water District at hearing before IDWR regarding remedies for the District's alleged breach of a mitigation plan.

Publications Since 2013

B.A. Contor and R. G. Taylor. 2016. *A Framework for Assessing the Effect of Irrigation Improvements: Economic Rivalry, Irrigation Abstraction, and Partition to Fates.* Water Economics and Policy, Vol. 3, Issue 3.
doi: 10.1142/S2382624X16500181

R. Garth Taylor, R.D. Schmidt, L. Stodick and B. Contor. 2014. *Modeling Conjunctive Water Use as a Reciprocal Externality*. American Journal of Agricultural Economics, Vol. 94, Issue 6, pp 753-768.
doi 10:1093/ajae/aat095

B. Contor and R. G. Taylor. 2013. *Why Improving Irrigation Efficiency Increases Total Volume of Consumptive Use*. Irrigation and Drainage, Vol. 62, Issue 3, doi 10:1002/ird. 1717

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Nov 01, 2024
DEPARTMENT OF
WATER RESOURCES

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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSONS EXPERT WITNESS DISCLOSURE**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and hereby disclose their expert witnesses, as required by the Hearing Officer's *Order Authorizing Discovery and Email Service; Scheduling Order; Notice of Hearing* (Oct. 17, 2024).

1. David R. Tuthill, Jr., Ph.D., P.E.

   Dr. Tuthill is expected to testify as to the process by which the Idaho Department of Water Resources ("IDWR") permits, licenses, and approves transfers for water rights, as well as administration of water rights, and his opinions thereto. Dr. Tuthill's CV is attached.

2. Lucas Eli Yockey, Former Watermaster Water District No. 34, Former General Manager of the Big Lost River Irrigation District

Mr. Yockey was born in 1990 and may be contacted at: 4015 W. Houston Road, Mackay, Idaho 83251; (208) 588-2824. Mr. Yockey holds a B.S. from the University of Idaho in Fishery Resources, graduating in 2013. Mr. Yockey was the Watermaster for Water District No. 34 ("WD34") for eight (8) years from 2015-2022; served as the General Manager for the Big Lost River Irrigation District ("BLRID") for five (5) years from 2018-2022; and is presently employed as the Superintendent of the Lost River Highway District from 2022 to present. Mr. Yockey is expected to testify regarding the method in which water is delivered in WD 34 and how BLRID delivers water within said basin, and his opinions thereto.

3. Preston Marcroft, Watermaster, Water District No. 34

   Mr. Marcroft was born in 1963 and may be contacted at: PO Box 534, Mackay, Idaho 83251; (208) 833-6420. Mr. Marcroft graduated from Mackey High School. Mr. Marcroft served as a Ditch Rider for WD 34, above Mackay Reservoir, for 9.5 years from 2013 to 2022. Since Mr. Yockey's resignation in 2022, Mr. Marcroft has served as the Watermaster for WD 34 and is presently employed as the Watermaster. Mr. Marcroft is expected to testify regarding the method in which water is delivered in WD 34, and his opinions thereto.

4. Shelley Keen, IDWR

   Mr. Keen is expected to testify as to the process by which IDWR permits, licenses, and approves transfers for water rights, as well as administration of water rights, and his opinions thereto.

5. James Cefalo, IDWR

   Mr. Cefalo is expected to testify as to the process by which IDWR permits, licenses, and approves transfers for water rights, as well as administration of water rights, and his opinions thereto.

The Pehrsons reserve the right to call the above-disclosed witnesses as expert and/or fact witness.

DATED this 1st day of November, 2024.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER IF WATER RIGHT NOS. 34-182 and 34-381A ((MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**EXPERT REPORT**

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby discloses the following expert report ("Report"), prepared by Bryce Contor of Contor Water, LLC. The Report is attached hereto.

DATED: December 2, 2024

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2, 2024, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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/s/ Skyler C. Johns
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **NOTICE OF SERVICE OF EXPERT REPORTS AND EXCHANGE OF PROPOSED STIPULATED FACTS**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

PLEASE TAKE NOTICE that Byron Pehrson, Loy Pehrson, and Randy Pehrson, by and through their attorneys of record and pursuant to the *Order Authorizing Discovery and Email Service, Scheduling Order and Notice of Hearing* dated October 17, 2024, have served upon the parties to this matter via electronic service the following:

1) Expert report produced by David Tuthill dated December 2, 2024,
2) Expert report produced by Preston Marcroft and Lucas Yockey dated December 2, 2024.
3) Proposed stipulated facts

Submitted this 2nd day of December, 2024.

MCHUGH BROMLEY, PLLC

_/s/Candice McHugh_____
Chris Bromley
Candice McHugh
Attorneys for Pehrsons

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/s/ Candice McHugh

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **JOINT MOTION TO EXTEND WRITTEN DISCOVERY DEADLINE**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Byron Pehrson, Loy Pehrson, and Randy Pehrson, Moss Farms, Inc, the Big Lost Irrigation District and the Moore Canal, ("the Parties") by and through their attorneys of record jointly request that the deadline for written discovery which is currently set for December 2, 2024 be extended to December 13, 2024.

The reason for this request is that the extension will allow the Parties to work on possible stipulated facts which will likely eliminate the need for certain written discovery and will streamline written discovery which will be more cost effective and efficient for the Parties.

The Parties do not expect that moving the written discovery deadline will impact any other remaining deadlines in the case.

Therefore, the Parties ask that the written discovery deadline be moved to December 13, 2024.

Submitted this 2nd day of December, 2024.

MCHUGH BROMLEY, PLLC

/s/Candice McHugh
Chris Bromley
Candice McHugh
Attorneys for Pehrsons

OLSON TAGGART PLLC

/s/Skyler C. Johns
Skyler C. Johns
Attorneys for Moss Farms, Inc.

RIGBY, ANDRUS & RIGBY LAW, PLLC

/s/ Michelle Moritmer
Hyrum Erickson
Michelle Mortimer
Attorneys for Moore Canal

PARSONS BEHLE & LATIMER

/s/ Norman M. Semanko
Norman M. Semanko
Garrett M. Kitmura
Payton G. Hampton
Attorneys for Big Lost River Irrigation Dist.

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/s/ Candice McHugh

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**ORDER GRANTING JOINT MOTION TO EXTEND WRITTEN DISCOVERY DEADLINE**

BACKGROUND

On October 17, 2024, Hearing Officer Burdick issued an *Order Authorizing Discovery and Email Service; Scheduling Order; Notice of Hearing* ("*Order*"). The deadline to serve written discovery requests in this contested case was set for December 2, 2024. *Order*, at 2. However, included in the *Order*: "If a party feels that additional time for written discovery is necessary, the party may move the Hearing Officer for an extension. Such a motion must explain the additional discovery sought and the reason the discovery could not be conducted prior to the deadline." *Id*.

On December 2, 2024, the parties in this matter—the Pehrsons, Moss Farms, Inc, Big Lost River Irrigation District, and Moore Canal Users—filed a *Joint Motion to Extend Written Discovery Deadline* ("*Joint Motion*"). The *Joint Motion* requests the deadline for written discovery be extended to December 13, 2024, to allow the parties additional time to work on a set of stipulated facts to reduce the need for written discovery. *Joint Motion*, at 1–2. The *Joint Motion* does not seek to alter any additional scheduling deadlines. *See id*.

In an exercise of discretion, and on the basis that the parties are moving jointly, the Hearing Officer will grant the parties' *Joint Motion*. *See* IDAPA 37.01.01.412.

ORDER

IT IS HEREBY ORDERED that the parties' *Joint Motion to Extend Written Discovery Deadline* is GRANTED. The deadline for the parties to serve written discovery requests is extended to December 13, 2024.

DATED this 3rd day of December 2024.



ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of December 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Courtesy copy via email:

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Sarah Tschohl
Paralegal

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF SERVICE OF PEHRSON DISCOVERY TO MOSS FARMS, INC., BIG LOST RIVER IRRIGATION DISTRICT AND MOORE CANAL WATER USERS INC.**

PLEASE TAKE NOTICE that Byron Pehrson, Loy Pehrson, and Randy Pehrson, by and through their attorneys of record and pursuant *Order Granting Joint Motion to Extend Written Discovery Deadline dated December 3, 2024*, have served Pehrson's First Set of Discovery to each of the Parties respectively.

Submitted this 13th day of December, 2024.

MCHUGH BROMLEY, PLLC

/s/Candice McHugh
Chris Bromley
Candice McHugh
Attorneys for Pehrsons

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I HEREBY CERTIFY that on this 13th day of December, 2024, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Candice McHugh

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Attorney for Moss Farms, Inc.

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **MOTION TO EXTEND DEADLINE FOR STIPULATED FACTS**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc., by and through his attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, and Byron Pehrson, Loy Pehrson and Randy Pehrson, the Big Lost Irrigation District and the Moore Canal, through their respective attorneys, hereby move to extend the deadline for Stipulated Facts which is currently set for December 16, 2024, be extended to December 18, 2024. The reason for this extension will allow Parties to work on possible stipulated facts.

The Parties do not expect that moving the deadline will impact any other remaining deadlines in the case.

Therefore, the Parties ask that the Stipulated deadline to be moved to December 18, 2024.

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Attorney for Moss Farms, Inc.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER IF WATER RIGHT NOS. 34-182 and 34-381A ((MOSS FARMS, INC.)	**Docket No. P-DR-2024-001** **REBUTTAL EXPERT REPORT**
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby discloses the following rebuttal expert report ("Rebuttal"), prepared by Bryce Contor of Contor Water, LLC. The Rebuttal is attached hereto.

DATED: December 16, 2024

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
Attorney for Moss Farms, Inc.

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF SERVICE PEHRSON ANSWERS TO MOSS FARMS, INC., FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION, AND REQUESTS FOR ADMISSIONS**

PLEASE TAKE NOTICE that Byron Pehrson, Loy Pehrson, and Randy Pehrson, by and through their attorneys of record have served their Answers to Answers To Moss Farms, Inc., First Set Of Interrogatories, Requests For Production, And Requests For Admissions on January 2, 2025.

Submitted this 2nd day of January, 2025

MCHUGH BROMLEY, PLLC

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Chris Bromley
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Attorneys for Pehrsons

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/s/ Candice McHugh

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Attorneys for Moore Canal Users

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	**MOORE CANAL USERS MOTION TO DISMISS**

COMES NOW, Moore Canal Users, by and through their attorney of record, Hyrum Erickson of Rigby, Andrus & Rigby Law, *PLLC*, and, pursuant to IDAPA 37.01.01.220 and IRCP Rule 12(b)(6), moves and petitions the Court to dismiss the within action on the basis that these counts fail to state a claim upon which relief can be granted.

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons") submitted a Petition for Declaratory Ruling for Watermaster Instructions (Petition) with the Idaho Department of Water Resources ("Department"). The Pehrsons seek two forms of relief:

> 1. Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right now. 34-18 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B

Gage for three (3) consecutive days.

2. Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Petition for Declaratory Ruling for Watermaster Instructions, at 2.

On February 23, 2024, Moss Farms, Inc. filed an Objection to Petition for Declaratory Ruling for Watermaster Instructions with the Department. Additionally, the Big Lost River Irrigation District (BLRID), and Moore Canal Users (Moore), were admitted as intervenors in this contested case.

STANDARD

Pehrsons cite IDAPA 37.01.01.300.02.d as the authority under which they have filed the above petitions for declaratory ruling. The rule relates to the form and content of pleadings and written motions. Section 2 in its entirety states as follows:

> 02. Content of Pleadings and Written Motions. A pleading or written motion shall fully state:
>
> a. The facts upon which it is based;
> b. The provision of statute, rule, order, or other controlling law upon which it is based; and
> c. The relief sought, including any proposed limitation (or the denial) of any right, license, or permit sought in an application.
> d. Petitions for declaratory orders shall state the declaratory ruling that the petitioner seeks.

Effective date of 3-18-2022 after each part was omitted for clarity.

The Petition does not state any other provision of statute, rule, order, or other controlling law upon which the declaratory ruling is being requested.

Idaho Code § 67-5232 provides,

> **(1)** Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.
> **(2)** A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.

> **(3)** A declaratory ruling issued by an agency under this section is a final agency action.

Idaho Code §67-5255 provides,

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any order issued by the agency.
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

12(b)(6) Standard

Idaho Rule of Civil Procedure 12(b)(6) states as follows:

> **(b) How to present defenses.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third party claim, must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> **(6)** failure to state a claim upon which relief can be granted.

The Idaho Supreme Court's standard for a dismissal under IRCP 12(b)(6) is the same as the summary judgment standard. *Tomchak v. Walker*, 108 Idaho 446, 700 P.2d 68 (1985). "The non-moving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated." *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). However, the Supreme Court has also held, "The only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, supplemented by such facts as the court may judicially notice." *See*, *Cohen v. United States*, 129 F.2d 733 (8th Cir. 1942); *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (1990).

ARGUMENT

1. **The Pehrsons' Petition does not comply with the statutory and regulatory authority regarding petitions for declaratory rulings by agencies. The requests for Declaratory Ruling for Watermaster Instructions contained in the Petition must be dismissed.**

Idaho Codes §§ 67-5232 and 67-5255, both relating to "Declaratory rulings by agencies" inform how petitions for declaratory rulings by an agency may be made. Idaho Code § 67-5232 states,

> **(1)** Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.
> **(2)** A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
> **(3)** A declaratory ruling issued by an agency under this section is a final agency action.

The Pehrsons' Petition does not contain a cite to any authority that they are asking the Department for a declaratory ruling on. It doesn't request a "declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency" as required by the above statue. Instead, it seems that they are demanding that the Department issue watermaster instructions that benefit them as a junior water user without any authority at all.

Idaho Code §67-5255 states,

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any order issued by the agency.
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

Idaho Code § 67-5201(15), which is the definitions section of the chapter, defines "order" as follows:

> "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.

The Petition does not cite to any order or ask for clarification on the applicability of any order issued by the Department. Even though the 2015 transfer adding a point of diversion to Moss'

water rights is mentioned, the Petition is not requesting the Department issue a declaratory ruling as to the applicability of that transfer.

In fact, if the Petition is granted, multiple orders and rules will be ignored to provide the Pehrsons' requested relief, including IDAPA 37.03.12.040.02.d.iii, part of the Water Distribution Rules for Water District 34 which states as follows:

> If natural flow can not be delivered to a point of diversion at the beginning of the irrigation season and the watermaster determines rotation credit is needed to make possible the delivery of water rights being called for, and there is room in Mackay Reservoir for rotation credit, the watermaster may rotate natural flow rights, which would not otherwise be deliverable to their point of diversion, for credit of up to a combined total of three thousand five hundred (3,500) AF to be released from the reservoir under the control of the watermaster to make natural flow rights deliverable to their point of diversion. *The watermaster may use storage water to assist the delivery of natural flow water rights at the beginning of the irrigation season when requested to do so by the storage holder.*

Emphasis added.

A petition for declaratory rulings by agencies must contain specific elements that are identified in Idaho Code and IDAPA regulations. The Petition does not meet the statutory or regulatory requirements for petitions for declaratory rulings by agencies. On this basis alone, the Petition must be denied.

2. **Alternatively, the requested watermaster instructions incorrectly use the doctrine of Futile Call as a sword to cut off senior water users, rather than as a mechanism to protect the water resources in Basin 34. The Requested relief must be denied.**

Pehrsons' Petition cites to *Sylte v. Idaho Dept. of Water Res.,* 165 Idaho 238, 245, 443 P.3d 252, 259 (2019) as support for their request that "[t]he Department should issue watermaster instructions defining when futile call exists for natural flow water rights but for storage water releases from Mackay Reservoir." (Petition at 7). However, this situation is distinguishable from the situation in *Sylte*. In *Sylte*, releasing storage water from Twin Lakes was expressly barred by the Final Decree. *Id.* Here, Mackay Reservoir is a storage reservoir with the

purpose of storing water for irrigation. There is no general bar on releases of storage water from Mackay Reservoir as there was in *Sylte*.

Futile call is not meant to be used as a sword by junior appropriators against senior appropriators. Futile call is a last resort applied only when water will not make it to a senior's point of diversion and will be wasted if the senior continues to call for its water. No water user has a right to a futile call, it is merely the recognition of a practical reality. The watermaster instructions requested in the Petition will not only affect Moss, but will affect all senior and junior downstream users. If the first requested watermaster instruction is allowed, the trigger at the 2B Gage will effectively shut off the delivery of water for all downstream users, not just Moss.

Idaho Courts have long held that futile call is only to be used in situations where water is short and there is no other option for the senior user to receive its water. The Idaho Supreme Court in *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) held as follows,

> As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion. We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Internal citations omitted. The Court identifies the reasons that a futile call may exist as "seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators[.]" In other words, geological and hydrological realities. This is consistent with the definition of futile call used in the Conjunctive Management rules.

> 08. Futile Call. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.

IDAPA 37.03.11.010.08. A call becomes futile when it cannot be delivered "for physical or hydrological reasons." Futile call is based on a hydrological and physical reality – it is not a legal right held by any water user. In fact, futile call is generally treated as an affirmative defense used by junior water right holders as a shield to explain their failure to respond to a senior's call for water. *See Montana v. Wyoming*, No. 137, 2014 U.S. LEXIS 8446, at *292-94 (Dec. 29, 2014) (citing to *A&B Irrigation v. Spackman*, 155 Idaho 640, 315 P.3d 828, 835 (Idaho 2013) and *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71, 98 (Idaho 2011) as examples of futile call as an affirmative defense.).

The Pehrsons' petition misapprehends the nature of futile call. Rather than a recognition of a physical reality, they seek to turn futile call into a right by asserting that, although water can be delivered to senior water right holders, it should not be. This is a novel argument and unsupported in Idaho law.

Under IDAPA 37.03.12.040, the rules governing water delivery in Water District 34, the delivery of storage water is under the control of the appropriators. If an appropriator has storage water, they can call for it to be delivered whenever they want. If storage water is available and it can be used, there is no reason it cannot be used to help deliver the natural flow right of the same appropriator if it is in priority.

Pehrsons state, "[i]t is blackletter law that junior water users are entitled to the conditions of the stream as they found them when they perfected their water rights." (Pet. For Decl. Ruling p. 6) Petitioners cite W*ashington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915)

and *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912) as support. However, a brief review of the cases makes clear that they contain no such holding. Both cases describe the injury analysis conducted for water right transfers. The actual holding of both cases is that "a prior appropriator has no right to change the point of diversion when it will in any manner injure a subsequent appropriator." *Bennett v. Nourse*, 22 Idaho 249, 254, 125 P. 1038, 1039-40 (1912). Neither case is relevant to the issues at hand.

Pehrsons misapply the water right transfer injury analysis to argue that because their rights were appropriated before the construction of Mackay Reservoir, they are entitled to delivery determinations as if the reservoir did not exist. However, the construction of Mackay Reservoir changed the delivery of water to the entire basin downstream. The allocation and accounting of water in the basin changed to account for the storage of water in Mackay Reservoir. It would be impossible to do the water right accounting as if Mackay Reservoir did not exist purely to inform futile call decisions that benefit Pehrsons.

Pehrsons' two watermaster instructions would negatively affect delivery of water to all users downstream of the 2B Gage and Moss' point of diversion on the Big Lost River. The Petition should be dismissed in its entirety.

CONCLUSION

Pehrsons' Petition for watermaster instructions should be dismissed in its entirety as it does not comply with statutory or regulatory requirements, improperly asserts a right to a futile call, and if granted would harm all downstream users, not just Moss. No oral argument is requested.

DATED this 13th day of January, 2025.

Michelle Mortimer

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 13th day of January, 2025.

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RECEIVED
Jan 13, 2025
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WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	**Docket No. P-DR-2024-001**
	)	**NOTICE OF SERVICE**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	

I hereby certify that on the 13th day of January, 2025, I served **"ANSWERS TO PEHRSONS' FIRST SET OF DISCOVERY TO MOORE CANAL WATER USERS' ASSOCIATION, INC."** via electronic mail of the same, to the following:

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/s/ Michelle Mortimer
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **NOTICE OF SERVICE OF DISCOVERY ANSWERS**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

PLEASE TAKE NOTICE that, on the 13th day of January 2025, Moss Farms, Inc., by and through its counsel of record, served the following documents in the manner indicated on the service list:

- *Answer to First Set of Discovery to Moss Farms, Inc.*

DATED: January 13, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
Skyler C. Johns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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Attorneys for Big Lost River Irrigation District

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.), --- IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001

PLEASE TAKE NOTICE that, on the 13th day of January, 2025, Big Lost River Irrigation District, by and through its counsel of record, Parsons Behle & Latimer, served the following documents in the manner indicated on the service list:

a. *Big Lost River Irrigation District's Responses to Pehrson's First Set of Discovery*; and
b. This *Notice of Service of Discovery Responses*.

DATED this 13th day of January, 2025.

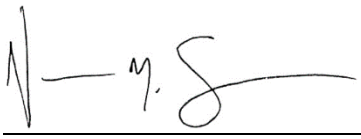
PARSONS BEHLE & LATIMER

Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura
Attorneys for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

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RECEIVED
Jan 24, 2025
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **MOTION FOR SUMMARY JUDGMENT**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc., by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby moves the Hearing Officer pursuant to IDAPA 37.01.01.220.03 and Idaho Rules of Civil Procedure 56 for an order granting summary judgment in favor of Moss Farms as to all relief requested in the *Petition for Declaratory Ruling for Water Master Instructions*. This Motion for Summary Judgment is supported by the record, the Declaration or Skyler C. Johns, and the Memorandum in Support of Motion for Summary Judgment filed concurrently herewith.

DATED: January 24, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 24, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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RECEIVED
Jan 24, 2025
DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **MEMORANDUM IN SUPPORT OF MOTION FORU SUMMARY JUDGMENT**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc. (hereafter "Moss Farms"), by and through his attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, provides the following *Memorandum in Support of Motion for Summary Judgment* (hereafter "Memorandum") pursuant to IDAPA 37.01.01.220.03 and Idaho Rules of Civil Procedure 56. This Memorandum is supported by the record and the *Declaration of Skyler Johns in Support of Motion for Summary Judgment* (hereafter "Dec. of Johns").

Moss Farms respectfully requests the Hearing Officer dismiss the *Petition for Declaratory Ruling for Water Master Instructions* (hereafter "Petition") filed by Byron Pehrson and Loy Pehrson (hereafter "Petitioners") and not consider it for the following reasons:

1) The Petitioners' time to challenge the Moss Farms' Water Rights has expired pursuant to Idaho Code §§ 42-222 & 42-5246; and

2) The doctrine of res judicata bars the relief requested by Petitioners.

I.
BACKGROUND

The dispute between Moss Farms and the Petitioners first arose in 2022 when the Petitioners realized they should have protested an Application for Transfer of Water Right (hereafter "Application") filed by Moss Farms clear back in 2015. In 2015, Moss Farms asked the Idaho Department of Water Resources to add a new location for it to divert its senior water rights from the Big Lost River. Even though notice and opportunity to protest the Application was given to the Pehrsons and others potentially affected, not a single person protested the additional point of diversion to Moss Farms water rights. The Idaho Department of Water Resources (hereafter "Department") sought comments from the Basin's Watermaster, conducted an injury analysis of the proposed transfer, and concluded that the transfer did not cause injury to any water right holders.

The Pehrson's instant Petition should be dismissed because it is really just seeking to re-adjudicate the issues that were tackled by the Department during its review and approval of the Application. As will be shown in this memorandum, the time to protest Moss Farms' transfer expired and the issues in their Petition were previously adjudicated. Therefore, the instant Petition must be dismissed.

II.
STATEMENT OF UNDISPUTED FACTS

1. Moss Farms holds water rights 34-182 and 34-381A (hereafter "Water Rights") and uses them for irrigation. Dec. of Johns ¶¶ 4 & 5, Exs. A & B.

2. On October 27, 2015, Moss Farms filed an Application for Transfer of Water Rights (hereafter "Application") with the Department to add a new point of diversion (hereafter the "River Diversion") at T06N, R26E, S32, SENW) to its Water Rights. *Id.* at ¶ 6, Ex. C.

5. Watermaster comments were sought as part of the transfer review process. *Id.* at ¶ 7, Ex., D.

6. The Watermaster approved the Application. *Id.* at ¶ 8, Ex. E.

7. Notice of the Application was published to the public. *Id.* at § 9, Ex. F.

7. There were no protests filed against approval of the Application. *Id.* at ¶ 10.

9. IDWR conducted its own injury analysis of the proposal in the Application. *Id.* at ¶ 11, Ex. G.

10. The transfer was approved by the Idaho Department of Water Resources (IDWR) on December 14, 2015, and the River Diversion was added as an authorized point of diversion to both water rights along with the 3 in 1 Ditch. *Id.* at ¶¶ 11 & 12, Exs. G & H.

11. The Department did not impose any specific conditions on the approval of the Application related to futile call or flow limitations. *Id.*

III.
STANDARD OF REVIEW

The Idaho Rules of Civil Procedure provide that "summary judgment shall be rendered when "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. If the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this Court exercises free review." *Krinitt v. Idaho Dept of Fish & Game*, 162 Idaho 425, 428–29, 398 P.3d 158, 161–62 (2017) (internal citations omitted).

IV.
ARGUMENT

1) The Petitioners time to challenge the Moss Farms' Water Rights has expired.

Petitioners were already given the opportunity to protest the administration of Moss Farms' Water rights clear back in 2015. But, they failed to act. There is no dispute that no person or entity, including the Petitioners, objected to the Application filed by Moss Farms in 2015 despite notice of the Application being given by the Department pursuant to Idaho Code Idaho Code § 42-222. The preliminary order approving the Application was issued pursuant to Idaho Code § 67-5243.This order became a final order because no motions to reconsider were filed within the 14-day time limit. *See id.* Because no motions to reconsider, nor appeals were filed, the preliminary order became a final order. *See* Idaho Code §§ 67-5245, 67-5270, & 67-5272.

Petitioners were given notice and an opportunity to participate in proceedings and to protest the water right transfer. They did not. They also did not move to reconsider or otherwise seek declaratory relief consistent with the deadlines prescribed in Idaho Code §§ 42-222 or 42-5246. As such, the order on the Moss Farms' transfers have been final for nearly nine (9) years, and there are simply no legal grounds to undue it now.

2) The doctrine of res judicata bars the relief requested by Petitioners.

The doctrine of res judicata bars the Director from granting the relief sought by Petitioners because the precise subject matter and issues in which they seek review were previously, considered, and adjudicated in the transfer application proceedings. *Sagewillow, Inc. v. Idaho Department of Water Resources* is instructive on the application of the doctrine of res judicata in this case:

> The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis*

> *Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990). In *Joyce v. Murphy Land & Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242–43 (1922), this Court stated that the scope of the doctrine of res judicata was as follows:
>
> > We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.
>
> The 'sameness' of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits. *Houser v. Southern Idaho Pipe & Steel, Inc*., 103 Idaho 441, 649 P.2d 1197 (1982).

Sagewillow, Inc. v. Idaho Dep't of Water Res., 138 Idaho 831, 844, 70 P.3d 669, 682 (2003).

Here, the facts underlying the Application directly involved the Water Rights of Moss Farms. The same issues involving injury to other water right holders, and appropriate conditions for approval of diversions out of the Big Lost River are involved in both cases. The Department sought a recommendation from the Watermaster, Lucas Yockey, who approved of the Application. The same is being sought here. In reviewing the Application, IDWR evaluated whether any injury would occur pursuant to the duties prescribed by Idaho Code. Section 42-222(1) provides in relevant part that:

> it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence.
> ….
>
> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change

> does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

The Argument that Moss Farm's diversion of its Water Rights is injuring the Pehrons' water rights was precisely the same inquiry and determination the Department made regarding the Application. The Pehrsons' instant petition is merely seeking to redo what could have been done in the prior Application proceedings. They are now seeking to impose a condition on the Moss Farms Water Rights by cloaking the request as a routine administrative adjustment. However, the same issues they are raising in their Petition were already presented to the Department in 2015.

The Pehrsons also had the opportunity to be involved in the earlier process but declined to participate. The issues they are raising now, certainly should have been part of the Application proceedings. Public Notice of the Application was given in accordance with Idaho Code § 42-222, and nobody, including the Pehrsons, protested approval of the Application. Because these issues were already addressed in the prior proceeding, the Pehrsons are barred from relitigating them here.

V.
CONCLUSION

The law simply does not authorize the Director to grant the relief requested, nor does the law permit the Director to relitigate the issues already resolved in the prior transfer proceeding. Allowing this Petition to move forward will also open a Pandora's Box of litigation from junior water right holders against seniors, and is, therefore against public policy. For these reasons, and

others not yet identified, Moss Farms respectfully request the Director reject the petition and not consider it.

DATED: January 24, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

‘

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 24, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

Chris M. Bromley (X) Via Email
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
cbromley@mchughbromley.com

Candice McHugh (X) Via Email
McHugh Bromley, PLLC
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cmchugh@mchughbromley.com

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PO Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700
garrick.baxter@idwr.idaho.gov
roburd47@gmail.com
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/s/ Skyler C. Johns

Skyler C. Johns, ISB No. 11033
OLSEN TAGGART PLLC
P. O. Box 3005
Idaho Falls, ID 83403
Telephone: (208) 552-6442
Facsimile: (208) 524-6095
Email: sjohns@olsentaggart.com

Attorney for Moss Farms, Inc.

RECEIVED
Jan 24, 2025
DEPARTMENT OF WATER RESOURCES

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **DECLARATION OF SKYLER JOHNS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

I, Skyler C. Johns, under penalty of perjury make the following declaration:

1. I am over the age of eighteen (18) and competent to testify in this matter. I make this affidavit based upon my own personal knowledge unless otherwise stated, and under penalty of perjury.

2. I am counsel for the Moss Farms, Inc. (hereafter "Moss Farms") in the above-captioned matter.

3. I have personal knowledge of the facts to which I am about to testify.

4. I obtained a true and accurate copy of the Water Right Report for Water Right No.

34-182 from the website for the Idaho Department of Water Resources (hereafter "Department") and attached the same hereafter as "Exhibit A."

5. I obtained a true and accurate copy of the Water Right Report for Water Right No. 34-381A from the Department's website and attached the same hereafter as "Exhibit B."

6. I obtained a true and accurate copy of the Application for Transfer of Water Rights No. 79972 (hereafter "Application") from the Department's website and attached the same hereafter as "Exhibit C."

7. I obtained a true and accurate copy of the Legal Notice Letter from the Department dated April 9, 2015, sent to the basin 35 Watermaster, Lucas Yockey, from Department's website and attached the same hereafter as "Exhibit D."

8. I obtained a true and accurate copy of the Watermaster Recommendation from Lucas Yockey dated April 10, 2015, from Department's website and attached the same hereafter as "Exhibit E."

9. I obtained a true and accurate copy of the Affidavit of Publication dated May 4, 2015, from the Department's website and attached the same hereafter as "Exhibit F."

10. The Department's records for the Application do not show that any person or entity protested or objected to the Application.

11. I obtained a true and accurate copy of the Review & Evaluation of Sufficiency of Information Memorandum by Michael Holliday, dated June 15, 2015, from the Department's website and attached the same hereafter as "Exhibit G."

12. I obtained a true and accurate copy of the Preliminary Order approving the Application dated June 30, 2015, from the website for the Department's website and attached the same hereafter as "Exhibit H."

13. I obtained a true and accurate copy of the Notice of Approval of Transfer dated June 30, 2015, from the Department's website and attached the same hereafter as "Exhibit I."

14. Further, your declarant saith not.

DATED: January 24, 2025

/s/ Skyler C. Johns
Skyler C. Johns
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 24, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

Chris M. Bromley (X) Via Email
McHugh Bromley, PLLC
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Candice McHugh (X) Via Email
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Garrett M. Kitamura
Payton G. Hampton
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gkitamura@parsonsbehle.com
phampton@parsonsbehle.com

/s/ Skyler C. Johns

EXHIBIT A

Close

Water Right Report : 34-182(Decreed/Active)

Water Right Owners

Owner Type	Name	Address	City	State	Postal Code
Current Owner	MOSS FARMS INC	3286 N 3350 W	MOORE	ID	83255-8761
Original Owner	JEPPESEN, C R			ID	
Original Owner	SUNDBERG, OSCAR E			ID	
Previous Owner	WATSON, CATHERINE M	4177 RD L	ORLAND	CA	95963
Previous Owner	WATSON, LEE J	4177 RD L	ORLAND	CA	95963
Previous Owner	SCHWARTZ, JAMES DAVID	4330 S BANNOCK HWY	POCATELLO	ID	83204
Previous Owner	SCHWARTZ, LISA	4330 S BANNOCK HWY	POCATELLO	ID	83204
Security Interest	D L EVANS BANK	PO BOX 64	RIGBY	ID	83442-0064
Security Interest	ZIONS FIRST NATIONAL BANK	2460 S 3270 W	WEST VALLEY CITY	UT	84119

Water Right Status

Priority Date : 6/1/1883
Basis : Decreed
Status : Active

Water Source

Source	Source Qualifier	Tributary	Tributary Qualifier
BIG LOST RIVER		SINKS	

Points Of Diversion (Location)

Source	Township	Range	Section	Govt. Lot	QQQ	QQ	Q	County	Diversion Type
BIG LOST RIVER	06N	25E	14	0	SE	NW	SE	CUSTER	
BIG LOST RIVER	06N	26E	32	0		SE	NW	CUSTER	

Water Uses

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION	5/01	10/15	1.60 CFS	
TOTAL			1.60 CFS	

Places of Use

Printable View Paged View

Place of Use Legal Description : IRRIGATION (BUTTE county)

Township	Range	Section	Lot	QQQ	QQ	Q	Acres
06N	26E	31			SW	NE	32.0
06N	26E	31			SE	NE	28.0
06N	26E	31			NE	SE	35.0
06N	26E	31			NW	SE	35.0
06N	26E	31			SW	SE	9.0
06N	26E	31			SE	SE	16.0
06N	26E	32			SW	NW	6.0
06N	26E	32			NW	SW	22.0
06N	26E	32			SW	SW	17.0

Irrigation Totals

Total Acres	Acre Limit
200.00	80.00

Conditions

Code	Condtions
X27	This right is limited to the irrigation of 80 acres within the authorized place of use in a single irrigation season.
X35	Rights 34-182, 34-381A and 34-2379F when combined shall not exceed a total diversion rate of 5.2 cfs and the irrigation of 200 acres.
X35	Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres.
R63	This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
S34	The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.
R05	Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.
R43	The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
004	This right does not grant any right-of-way or easement across the land of another.
T07	The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
T08	Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
T19	Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Dates

Licensed Date :
Decreed Date : 6/3/2002
Permit Proof Due Date :
Permit Proof Made Date :
Permit Approved Date :
Permit Moratorium Expiration Date :
Enlargment Use Priority Date :
Enlargement Statute Priority Date :
Application Recevied Date:
Protest Deadline Date:

Other Information

State or Federal : S
Water District Number : 34
Generic Max Rate Per Acre : 0.02
Generic Max Volume Per Acre : 3.5
Combined Acre Limit : 200.00
Combined Volume Limit:
Combined Rate Limit: 5.20
Civil Case Number :
Decree Plantiff :
Decree Defendant :
Swan Falls Trust or Nontrust :
Swan Falls Dismissed :
DLE Act Number :
Cary Act Number :
Mitigation Plan: False

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EXHIBIT B

Close

Water Right Report : 34-381-A (Decreed/Active)

Water Right Owners

Owner Type	Name	Address	City	State	Postal Code
Current Owner	MOSS FARMS INC	3286 N 3350 W	MOORE	ID	83255-8761
Original Owner	JEPPESEN, C R			ID	
Original Owner	SUNDBERG, OSCAR E			ID	
Previous Owner	WATSON, CATHERINE M	4177 RD L	ORLAND	CA	95963
Previous Owner	WATSON, LEE J	4177 RD L	ORLAND	CA	95963
Previous Owner	SCHWARTZ, JAMES DAVID	4330 S BANNOCK HWY	POCATELLO	ID	83204
Previous Owner	SCHWARTZ, LISA	4330 S BANNOCK HWY	POCATELLO	ID	83204
Security Interest	D L EVANS BANK	PO BOX 64	RIGBY	ID	83442-0064
Security Interest	ZIONS FIRST NATIONAL BANK	2460 S 3270 W	WEST VALLEY CITY	UT	84119

Water Right Status

Priority Date : 9/26/1894
Basis : Decreed
Status : Active

Water Source

Source	Source Qualifier	Tributary	Tributary Qualifier
BIG LOST RIVER		SINKS	

Points Of Diversion (Location)

Source	Township	Range	Section	Govt. Lot	QQQ	QQ	Q	County	Diversion Type
BIG LOST RIVER	06N	25E	14	0	SE	NW	SE	CUSTER	
BIG LOST RIVER	06N	26E	32	0		SE	NW	CUSTER	

Water Uses

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION	5/01	10/15	2.40 CFS	
TOTAL			2.40 CFS	

Places of Use

Printable View Paged View

Place of Use Legal Description : IRRIGATION (BUTTE county)

Township	Range	Section	Lot	QQQ	QQ	Q	Acres
06N	26E	31			SW	NE	32.0
06N	26E	31			SE	NE	28.0
06N	26E	31			NE	SE	35.0
06N	26E	31			NW	SE	35.0
06N	26E	31			SW	SE	9.0
06N	26E	31			SE	SE	16.0
06N	26E	32			SW	NW	6.0
06N	26E	32			NW	SW	22.0
06N	26E	32			SW	SW	17.0

Irrigation Totals

Total Acres	Acre Limit
200.00	120.00

Conditions

Code	Condtions
X27	This right is limited to the irrigation of 120 acres within the authorized place of use in a single irrigation season.
X35	Rights 34-182, 34-381A and 34-2379F when combined shall not exceed a total diversion rate of 5.2 cfs and the irrigation of 200 acres.
X35	Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres.
R63	This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
S34	The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.
R05	Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.
R43	The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
004	This right does not grant any right-of-way or easement across the land of another.
T07	The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
T08	Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
T19	Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Dates

Licensed Date :
Decreed Date : 6/30/2002
Permit Proof Due Date :
Permit Proof Made Date :
Permit Approved Date :
Permit Moratorium Expiration Date :
Enlargment Use Priority Date :
Enlargement Statute Priority Date :
Application Recevied Date:
Protest Deadline Date:

Other Information

State or Federal : S
Water District Number : 34
Generic Max Rate Per Acre : 0.02
Generic Max Volume Per Acre : 3.5
Combined Acre Limit : 200.00
Combined Volume Limit:
Combined Rate Limit: 5.20
Civil Case Number :
Decree Plantiff :
Decree Defendant :
Swan Falls Trust or Nontrust :
Swan Falls Dismissed :
DLE Act Number :
Cary Act Number :
Mitigation Plan: False

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EXHIBIT C

Rev. 01/15

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 79972

MINIMUM REQUIREMENTS CHECKLIST
TO BE SUBMITTED WITH APPLICATION FOR TRANSFER

RECEIVED
APR 06 2015
Department of Water Resources
Eastern Region

An application for transfer must be prepared in accordance with the minimum requirements listed below to be acceptable for processing by the Department. Incomplete applications will be returned. The instructions, fee schedule, Part 2A reports and additional Part 2B forms are available from any Department office or on the Department's website at www.idwr.idaho.gov.

Name of Applicant(s) Moss Farms Inc.

Check whether each item below is *attached* (Yes) or *not applicable* (N/A) for the proposed transfer.

Yes	N/A	
		* Means the item is always required and must be included with the application.
☑	*	Completed Application for Transfer of Water Right form, Part 1.
☑	*	Signature of applicant(s) or applicant's authorized representative on Application for Transfer Part 1. Include evidence of authority labeled Attachment #3 (see below) if signed by representative.
☑	*	Application for Transfer Part 2A. Attach a Part 2A report describing each water right in the transfer as currently recorded.
☐	☑	Complete and attach an Application for Transfer Part 2B for each water right for which only a portion is proposed to be changed through this transfer application.
☑	*	Application for Transfer Part 3A is always required (see Attachment #7a below); Parts 3B and 3C must be completed for transfer applications proposing to change the nature of use of the water right(s) or proposing changes to supplemental right(s).
☑	*	Correct fee submitted with transfer application form. (Fee schedule is on website and instructions for application for transfer.)

Attachments to Application - Label each attachment with the corresponding number shown below as Attachment #1-10.

☑	☐	#1 If the applicant is a business, partnership, organization, or association, and not currently registered in the State of Idaho as a business entity, attach documentation identifying officers authorized to sign or act on behalf of right holder. (See Part 1.)
☐	☑	#2a Water Right ownership documentation if Dept. records do not show the applicant as the current water right owner. **
☐	☑	#2b If the ownership of the water right will change as a result of the proposed transfer to a new place of use, attach documentation showing land and water right ownership at the new place of use. Include documentation for all affected land and owner(s).** ** Additional fee(s) required for water right ownership changes; see fee schedule.
☐	☑	#3 Documentation of authority to make the change if the applicant is not the water right owner.
☐	☑	#4 Power of Attorney or documentation providing authority to sign or act on the applicant's behalf. (See Part 1.)
☐	☑	#5 If the transfer application proposes to change the point of diversion for a water right affecting the Eastern Snake Plain Aquifer (ESPA), attach the results of an ESPA analysis and a detailed mitigation plan to offset any depletions to hydraulically connected reaches of the Snake River. ESPA transfer spreadsheet and model grid labeled cells are available on the Department's website at www.idwr.idaho.gov/WaterManagement/WaterRights/WaterRightTransfers/resources.htm.
☐	☑	#6 Notarized statement of agreement or a statement on official letterhead signed by an authorized representative from each lien holder or other entity with financial interest in the water right(s) or land affected by the proposed transfer. (See Part 1.5.c.)
☑	*	#7a Attach a map identifying the proposed point(s) of diversion, place(s) of use, and water diversion and distribution system details as described on the application. Include legal description labels. If only a portion of the right is proposed to be changed, identify the current location of the part of the existing right(s) proposed to be changed. (See Part 3A.)
☐	☑	#7b If the transfer application proposes to change the place or purpose of use of an irrigation right attach a Geographic Information System (GIS) shape file, or an aerial photo or other image clearly delineating the location and extent of existing acres and changes to the place of use. If some or all of any right is leased to the Water Supply Bank, you must also show the the specific location and/or acres to be idled at the new, proposed place of use to satisfy lease requirements.
☐	☑	#8a If the transfer application proposes to change the nature of use or period of use for one or more rights, provide documentation describing the extent of historic beneficial use for the water rights proposed to be transferred and document how enlargement will be avoided. (See Part 3B.) Additional fee required for proposed changes to nature of use; see fee schedule.
☐	☑	#8b If the transfer application proposes to change the place of use of a supplemental irrigation right, provide documentation regarding the historic use of the supplemental right(s) and availability or reliability of the primary right(s) being supplemented, both before and after the proposed change. (See Part 3C.)
☐	☑	#9 Water Supply Bank information for all rights proposed for transfer and currently leased to the Bank. (Attachment WSB)
☐	☐	#10 Other. Please describe: _____

Rev. 01/15

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED
APR 06 2015
Department of Water Resources
Eastern Region

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1

Name of Applicant(s) Moss Farms Inc. Phone 208-554-4140

Mailing address 3286 North 3350 West, Moore, ID 83255 Email mx222moss@aol.com

☐ If applicant is not an individual and not registered to do business in the State of Idaho, attach documentation identifying officers authorized to sign or act on behalf of the applicant. Label it **Attachment #1**.

☐ Attach water right ownership documentation if Department records do not show the transfer applicant as the current water right owner. Label it **Attachment #2a**.

☐ If the ownership of the water right will change as a result of the proposed transfer to a new place of use, attach documentation showing land and water right ownership at the new place of use. Include documentation for all affected land and owner(s). Label it **Attachment #2b**.

☐ Attach documentation of authority to make the proposed change if the applicant is not the water right owner. Label it **Attachment #3**.

Provide contact information below if a consultant, attorney, or any other person is representing the applicant in this transfer process.

☐ No Representative

Name of Representative _____ Phone _____

Mailing address _____ Email _____

☐ Send all correspondence for this application to the representative and not to the applicant.
OR
☐ Send original correspondence to the applicant and copies to the representative.

☐ The representative may submit information for the applicant but is not authorized to sign for the applicant.
OR
☐ The representative is authorized to sign for the applicant. Attach a Power of Attorney or other documentation providing authority to sign for the applicant and label it **Attachment #4**.

I hereby assert that no one will be injured by the proposed changes and that the proposed changes do not constitute an enlargement in use of the original right(s). The information contained in this application is true to the best of my knowledge. I understand that any willful misrepresentations made in this application may result in rejection of the application or cancellation of an approval.

Dennis Moss For Moss Farms Inc. — Signature of Applicant or Authorized Representative

Dennis Moss ~~For~~ President — Print Name and Title if applicable

4-2-15 — Date

_____ — Signature of Applicant or Authorized Representative

_____ — Print Name and Title if applicable

_____ — Date

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☑ Add diversion point(s) ☑ Change place of use
☐ Change nature of use ☐ Change period of use ☐ Other _____

2. Describe your proposal in narrative form, including a detailed description of non-irrigation uses to justify amounts transferred (i.e. number of stock, etc.), and provide additional explanation of any other items on the application. Attach additional pages if necessary and label it **Part 1A.2.**
Add a point of diversion to my Big Lost River rights to allow me to pump directly from the river. Rearrange the place of use to reflect current irrigation system.

79972

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1 Continued

B. DESCRIPTION OF RIGHTS AFTER THE REQUESTED CHANGES. IF THE RIGHTS ARE BEING SPLIT, DESCRIBE PORTIONS TO BE CHANGED AS THEY WOULD APPEAR AFTER THE REQUESTED CHANGES.

1. All	Part	Right Number	Amount (cfs/ac-ft)	Nature of Use	Period of Use	Source & Tributary
☑	☐	34-182	1.60 cfs	Irrigation	5/1 to 10/15	Big Lost River
☑	☐	34-381A	2.40 cfs	Irrigation	5/1 to 10/15	Big Lost River
☐	☐				to	
☐	☐				to	
☐	☐				to	
☐	☐				to	
☐	☐				to	
☐	☐				to	
☐	☐				to	

Total authorized under rights 4.00 cfs and/or _____ acre-feet.

2. Total amount of water proposed to be transferred or changed 4.00 cubic feet per second and/or _____ acre-feet per year.

3. Point(s) of Diversion:

☐ No changes to point(s) of diversion are proposed - the following chart is therefore not completed. (Proceed to #4.)
☐ Attach Eastern Snake Plain Aquifer analysis if this transfer proposes to change a point of diversion affecting the ESPA. Label it **Attachment #5**.

New ?	Lot	¼	¼	¼	Sec	Twp	Rge	County	Source	Local name or tag #
		SE	NW	SE	14	6N	25E	Custer	Big Lost River	3 in 1 Ditch
Y			SE	NW	32	6N	26E	Custer	Big Lost River	River Pump

4. Place of use: (If irrigation, identify with number of acres irrigated per ¼ ¼ tract.)

☐ No changes to place of use are proposed - the following chart is therefore not completed. (Proceed to #5.)

Twp	Rge	Sec	NE ¼				NW ¼				SW ¼				SE ¼				Acre Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
6N	26E	31			32	28									35	35	9	16	155
		32							6			22	17						45

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1 Continued

5. General Information:

a. Describe the complete diversion system, including how you will accommodate a measuring device and lockable controlling works should they be required now or in the future:
3 in 1 Ditch is measured by the watermaster. New pump on the river will be equipped with a measuring device.

b. Who owns the property at the point(s) of diversion? Robert Moss
If other than the applicant, describe the arrangement enabling the applicant to access the property for the diversion system:
Private agreement.

c. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts?
If yes, ☐ attach a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes on official letterhead signed by an authorized representative. Label it **Attachment #6**. List the name of the entity and type of lien: N/A

It is the applicant's responsibility to provide notice to lien holder, trustee, mortgagor, or contract holder of the proposed changes that may impact or change the value of the water rights or affected real property. Any misrepresentation of legal encumbrance on this application may result in rejection of the application or cancellation of an approval.

d. Are any of the water rights proposed for transfer currently leased to the Water Supply Bank?
If yes, ☐ complete Attachment WSB.

e. Describe the effect on the land now irrigated if the place or purpose of use is changed pursuant to this transfer:
Nothing will change. Transfer reflects current irrigation configuration.

f. Describe the use of any other water right(s) for the same purpose or land, or the same diversion system as right(s) proposed to be transferred at both the existing and proposed point(s) of diversion and place(s) use:
Ground water right 34-2379F is also used on the property. The place of use for this right isn't changing so it wasn't included in the transfer.

g. To your knowledge, has/is any portion of the water right(s) proposed to be changed:

Yes	No	
☐	☑	undergone a period of five or more consecutive years of non-use,
☐	☑	currently leased to the Water Supply Bank,
☐	☑	currently used in a mitigation plan limiting the use of water under the right, or
☐	☑	currently enrolled in a Federal set-aside program limiting the use of water under the rights?

If yes, describe:

79972

IDAHO DEPARTMENT OF WATER RESOURCES 4/8/2015
Proof Report

Water Right 34-182

Owner Type	**Name and Address**
Current Owner	MOSS FARMS INC 3286 N 3350 W MOORE, ID 83255 (208)554-4140

Priority Date: 6/1/1883
Basis: Decreed
Status: Active

Source	**Tributary**
BIG LOST RIVER	SINKS

Beneficial Use	**From**	**To**	**Diversion Rate**	**Volume**
IRRIGATION	5/01	10/15	1.600 CFS	
	Total Diversion		1.600 CFS	

Source and Point(s) of Diversion

BIG LOST RIVER SENWSE Sec. 14, Twp 06N, Rge 25E, BUTTE County

Place Of Use

IRRIGATION within BUTTE County

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31			40.0	26.0									39.0	39.0	25.0		169.0
06N	26E	32							8.0			35.0							43.0

Right Acre Limit: 80.0

POU Total Acres: 212.0

Conditions of Approval:

1. S34 THE PERIOD OF USE FOR IRRIGATION DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES.
2. USE OF THIS RIGHT WITH RIGHT NOS. 34-00381A AND 34-02379F IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 5.20 CFS.
3. THIS RIGHT IS LIMITED TO THE IRRIGATION OF 80 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON. USE OF THIS RIGHT WITH RIGHT NOS. 34-00381A AND 34-02379F IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.
4. C18 THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

79972

5. WATER IS DELIVERED THROUGH 3 IN 1 DITCH.
6. C05 RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.

Dates and Other Information
Decreed Date: 6/3/2002
Civil Case Number: 39576
Judicial District: FIFTH
State or Federal: S
Owner Name Connector: AND
Water District Number: 34
Mitigation Plan: False

Combined Use Limits

Rate	Volume	Acres
5.200		200.0

34-2379F V1,34-381A ,34-182

SubCase:
N/A

Water Supply Bank:
N/A

79972
000170

IDAHO DEPARTMENT OF WATER RESOURCES
Proof Report

Water Right 34-381A

Owner Type	Name and Address
Current Owner	MOSS FARMS INC 3286 N 3350 W MOORE, ID 83255 (208)554-4140

Priority Date: 9/26/1894
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION	5/01	10/15	2.400 CFS	
	Total Diversion		2.400 CFS	

Source and Point(s) of Diversion

BIG LOST RIVER	SENWSE	Sec. 14, Twp 06N, Rge 25E, BUTTE County

Place Of Use

IRRIGATION within BUTTE County

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31			40.0	26.0									39.0	39.0	25.0		169.0
06N	26E	32							8.0			35.0							43.0

Right Acre Limit: 120.0

POU Total Acres: 212.0

Conditions of Approval:

1. USE OF THIS RIGHT WITH RIGHT NOS. 34-00182 AND 34-02379F IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 5.20 CFS.
2. THIS RIGHT IS LIMITED TO THE IRRIGATION OF 120 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON. USE OF THIS RIGHT WITH RIGHT NOS. 34-00182 AND 34-02379F IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.
3. WATER IS DELIVERED THROUGH 3 IN 1 DITCH.
4. S34 THE PERIOD OF USE FOR IRRIGATION DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES.
5. C18 THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY

OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

Dates and Other Information
Decreed Date: 6/30/2002
Civil Case Number: 39576
Judicial District: FIFTH
State or Federal: S
Owner Name Connector: And
Water District Number: 34
Mitigation Plan: False

Combined Use Limits

Rate	Volume	Acres
5.200		200.0

34-2379F V1,34-381A ,34-182

SubCase:
N/A

Water Supply Bank:
N/A

000172 79972

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 3

A. PLAT MAP (See Part 3A of Instructions for application for transfer for complete requirements.)

☑ Attach a map of the diversion, measurement, control, and distribution system. Label it **Attachment #7a.**
☑ If the transfer application proposes to change the place or purpose of use of an irrigation right attach a Geographic Information System (GIS) shape file, or an aerial photo or other image clearly delineating the location and extent of existing acres and changes to the place of use. Label it **Attachment #7b.**

If the place of use currently consists of a permissible place of use, then the attachment is not required if the application contains a clear statement that the boundaries for the place of use are not proposed to be changed by the transfer and the total number of irrigated acres within the place of use before and after the transfer is clearly stated.

If any part of the irrigation water right is leased to the Water Supply Bank, you must also specify the location and number of acres that will remain idled for the duration of the lease contract at the new, proposed place of use.

B. CHANGES IN NATURE OF USE (Water Balance)

☐ If you propose to change the nature of use or period of use of all or part of the rights(s) listed in this application, attach documentation describing the extent of historic beneficial use of the portion of the right(s) proposed to be changed. Also attach documentation showing that the portion of the right(s) to be changed will not be enlarged in rate, volume, or consumptive use through the proposed change. Label it **Attachment #8a.**

C. PLACE OF USE CHANGES TO SUPPLEMENTAL IRRIGATION RIGHTS

☐ If you propose to change the place of use of a supplemental irrigation right, answer below and attach supporting documentation. Label it **Attachment #8b.**

Describe how the supplemental water rights have been used historically in conjunction with other water rights at the existing place of use. Describe the time during the irrigation season that the supplemental rights have been used. Include information about the availability or reliability of the primary right(s) being supplemented, both before and after the change. If the applicant is proposing to change a supplemental irrigation right to a primary right, provide the information required on Part 3B above:

N/A

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments.

Received by SC Date _____ Preliminary check by MH Date 4/8/2015

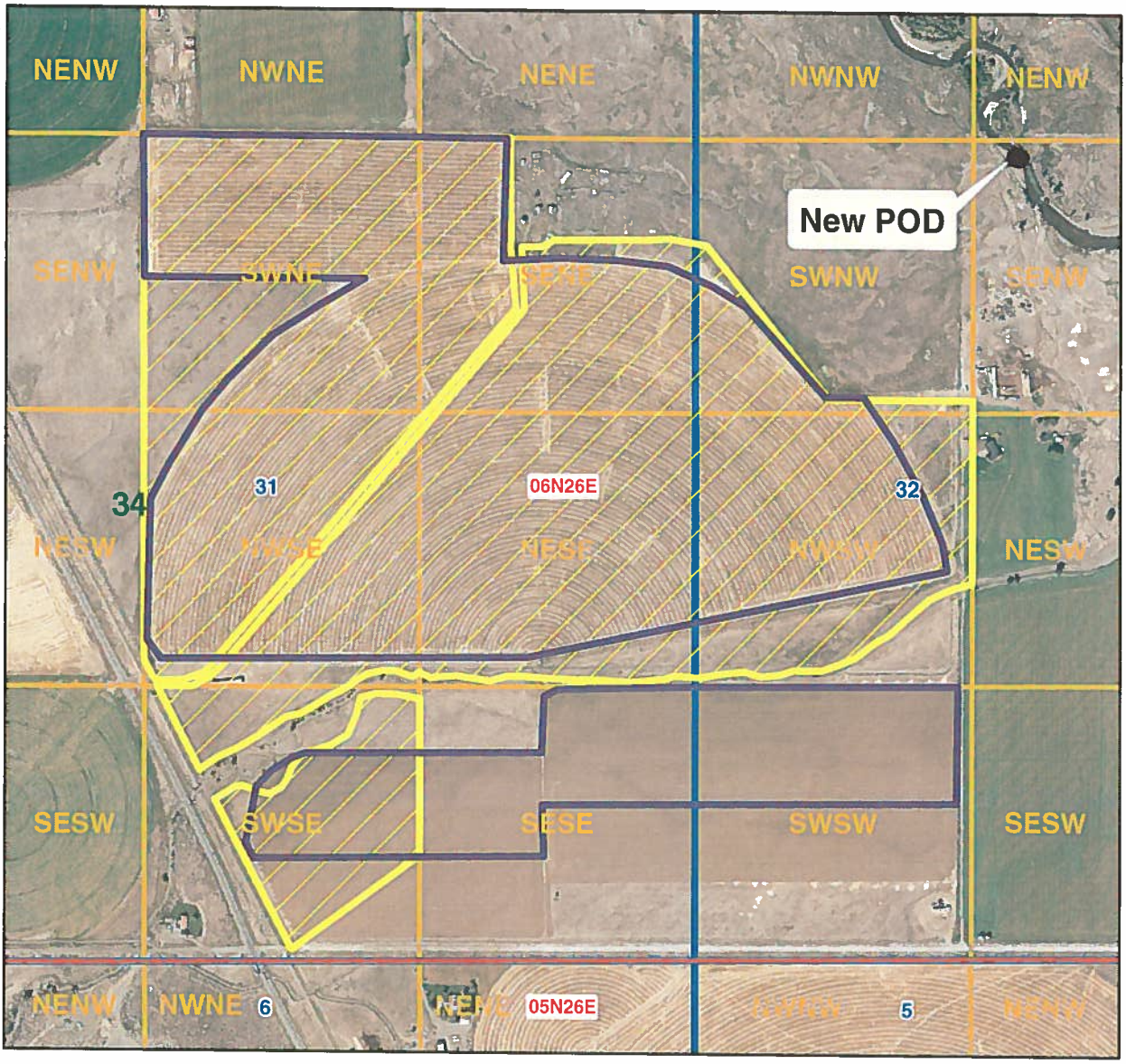
Fee paid 740- Date 4/6/15 Receipted by SC Receipt # E0408623

Add'l fee paid _____ Date _____ Receipted by _____ Receipt # _____

Check all that apply: Attachment WSB ☐ (copy sent to state office) Lessor Designation form ☐ &/or W-9 ☐ (originals to state office)

000173 79972

Moss Farms Inc. Transfer Application



2013 Aerial Photo

- Proposed POU
- Existing Right POU
- Township/Range
- Sections
- Quarter Quarters

0 1,000 2,000 Feet

N

No. **C 181399**	**Due no later than Jan 31, 2015** **Annual Report Form**	2. Registered Agent and Address **(NO PO BOX)**
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 **NO FILING FEE IF RECEIVED BY DUE DATE**	**1. Mailing Address: Correct in this box if needed.** MOSS FARMS, INC PO BOX 1811 IDAHO FALLS ID 83403	DENNIS MOSS 3286 N 3350 W MOORE 83255 3. New Registered Agent Signature:*

4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).

Office Held	Name	Street or PO Address	City	State	Country	Postal Code
PRESIDENT	DENNIS MOSS	3286 N 3350 W	MOORE	ID	USA	83255

5. Organized Under the Laws of:	6. Annual Report must be signed.*	
ID **C 181399**	Signature: ROBERT CRANDALL	Date: 02/16/2015
	Name (type or print): ROBERT CRANDALL	Title: AGENT
Processed 02/16/2015	* Electronically provided signatures are accepted as original signatures.	

79972

BIG LOST RIVER IRRIGATION DISTRICT
P.O. BOX 205 · MACKAY, IDAHO 83251 · (208) 588-2231 · FAX: (208) 588-2863

March 3, 2015

To Whom It May Concern:

This letter is based on the latest information to my knowledge of the present agricultural situation of Dennis Moss residing at 3286N 3350W Moore, Idaho 83255 concerning the water situation in the Big Lost River Irrigation District #34.

Dennis just recently bought an acreage where he has been attempting to get surface water for irrigation. He has been farming this land for over 8 years. The Canal where he gets his water has a high loss rate of water resulting in only getting 10% of the water put in at the head of the canal. Dennis has tried for several years to get water to his crops through the present irrigation system without much success. For example, he attempted several years ago to use this ditch and he put 1200 inches at the heading and got less than 200 at his pump. Dennis has a 6-1-1883 water right of 80 inches and another water right 9-26-1894 for 120 inches as well as 5040 inches of storage right in the Mackay reservoir.

So consequently Dennis is trying to build a better, less shrinking system for water delivery to maximize the water delivery to his pump. Part of the problem is that over the years most of the people in that canal have found other ways to irrigate and do not use that canal for the obvious reason of too high of water losses. In fact that canal is used for aquifer recharge because it does put a significant amount of water in the ground through seepage.

In my opinion, based on information at this time, Dennis needs to find ways to improve this delivery system and to have more water available to have better success at raising crops.

79972

If there are any questions, call Jim at 390-1447

Sincerely,

James Rindfleisch, Manager
Big Lost River Irrigation District

79972

EXHIBIT D

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N Skyline Dr., Ste A, Idaho Falls, Idaho 83402-1718
Phone: (208) 525-7161 FAX: (208) 525-7177 www.idwr.idaho.gov

April 9, 2015

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

RE: Transfer No. 79972
Water Right No(s). 34-182, 34-381A

Dear Applicant(s):

The Department of Water Resources has received your water right transfer application. Please refer to the transfer number referenced above in all future correspondence regarding this transfer.

A legal notice of the application has been prepared and is scheduled for publication in the CHALLIS MESSENGER on April 16 and 23, 2015. Protests to this application may be submitted for a period ending ten (10) days after the second publication (**May 4, 2015 at 5:00 PM**).

If the application is protested, you will be sent a copy of each protest. All protests must be resolved before the application can be considered for approval. If the protest(s) cannot be resolved voluntarily, the Department will conduct a conference and/or hearing on the matter.

If the application is not protested, the Department will process your application and notify you of any action taken on the application. If your application is approved, the Department will send you a copy of the approval document.

Please contact this office if you have any questions regarding the application.

Sincerely,

Sharla Cox
Administrative Assistant

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N Skyline Dr., Ste A, Idaho Falls, Idaho 83402-1718
Phone: (208) 525-7161 FAX: (208) 525-7177 www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

April 9, 2015

Lucas Yockey
Watermaster 34
PO Box 53
Mackay, ID 83251

RE: Application for Transfer 79972

Dear Watermaster:

A copy of the above referenced application is enclosed. Please review the application, then complete the enclosed recommendation form and return it to this office within 21 days of the date of this letter.

IDWR's regional offices can finish reviewing an unprotested application as soon as the protest period has past. Your prompt response to this request will ensure that your recommendation can be considered during regional review. If IDWR has not received your written recommendation within 21 days from the date of this letter, IDWR will presume that you do not oppose approval of the application and that you have no comments for IDWR to consider.

Please contact this office if you have any questions regarding the application.

Sincerely,

Sharla Cox
Administrative Assistant

Enclosure(s)

Cox, Sharla

From: Cox, Sharla
Sent: Thursday, April 09, 2015 10:39 AM
To: 'Challis Messenger (ameans@challismessenger. com) '
Subject: Legal Notice for your paper
Attachments: Challis Messenger E-Mail.doc

Contacts: Challis Messenger

PLEASE PUT IN NORMAL COLUMN AND NO BORDERS. THANK YOU.

Sharla

Sharla Cox
Administrative Assistant
Idaho Dept of Water Resources
900 N Skyline Dr. Ste A.
Idaho Falls ID 83402
sharla.cox@idwr.idaho.gov
208-525-7161 phone
208-525-7177 fax

NOTICE OF PROPOSED CHANGE OF WATER RIGHT
TRANSFER NO. 79972

MOSS FARMS INC, 3286 N 3350 W, MOORE, ID 83255; has filed Application No. 79972 for changes to the following water rights within CUSTER County(s): Right No(s). 34-182, 34-381A; to see a full description of these rights and the proposed transfer, please see www.idwr.idaho.gov/apps/wr/QueryNewTransfers/QueryNewTransfers.aspx. The purpose of the transfer is to change a portion of the above rights as follows: The applicant proposes to add a point of diversion and to change the place of use. The points of diversion are in the SENW Sec 32 T6N R26E (new, river pump) and the SENWSE Sec 14 T6N R25E (3 in 1 ditch) for 4.0 cfs from the Big Lost River. The place of use is in Sec 31 and 32 T6N R26E for 200 acres.

For additional information concerning the property location, contact Eastern Region office at (208) 525-7161. Protests may be submitted based on the criteria of Idaho Code Sec. 42-222.

Any protest against the proposed change must be filed with the Department of Water Resources, Eastern Region, 900 N Skyline Dr Ste A, Idaho Falls ID 83402 together with a protest fee of $25.00 for each application on or before May 4, 2015. The protestant must also send a copy of the protest to the applicant.

GARY SPACKMAN, Director

Published on April 16 and 23, 2015

EXHIBIT E

State of Idaho
Department of Water Resources

RECOMMENDATION OF WATERMASTER

Application No.: 79972

Applicant's Name: MOSS FARMS

Watermaster's Recommendation:

a) LY 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 10 day of April, 20 15

Water District No: 34

Watermaster's Signature

EXHIBIT F

AFFIDAVIT OF PUBLICATION

State of Idaho, County of Custer, ss:

I, Susan Callahan, representing the Challis Messenger, a weekly newspaper, published at Challis, Idaho, do solemnly swear that the notice hereto attached and made a part thereof, was published in the regular and entire issue of the Challis Messenger for 2 consecutive weeks, commencing with the issue dated 4/16, 2015 and ending with the issue dated 4/23, 2015.

Susan Callahan

STATE OF IDAHO)
)
COUNTY OF CUSTER)

On this 27th day of April in the year of 2015, before me, a Notary Public, personally appeared Susan Callahan, known or identified to me to be the person whose name subscribed to the within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that he executed the same.

Veronica M. Weisbeck
Notary Public for Idaho
Residing at Challis, Idaho
My commission expires: 1/9/21

NOTICE OF PROPOSED CHANGE OF WATER RIGHT TRANSFER NO. 79972

MOSS FARMS INC, 3286 N 3350 W, MOORE, ID 83255; has filed Application No. 79972 for changes to the following water rights within CUSTER County(s): Right No(s). 34-182, 34-381A; to see a full description of these rights and the proposed transfer, please see www.idwr.idaho.gov/apps/wr/QueryNewTransfers/QueryNewTransfers.aspx. The purpose of the transfer is to change a portion of the above rights as follows: The applicant proposes to add a point of diversion and to change the place of use. The points of diversion are in the SENW Sec 32 T6N R26E (new, river pump) and the SENWSE Sec 14 T6N R25E (3 in 1 ditch) for 4.0 cfs from the Big Lost River. The place of use is in Sec 31 and 32 T6N R26E for 200 acres.

For additional information concerning the property location, contact Eastern Region office at (208) 525-7161. Protests may be submitted based on the criteria of Idaho Code Sec. 42-222.

Any protest against the proposed change must be filed with the Department of Water Resources, Eastern Region, 900 N Skyline Dr Ste A, Idaho Falls ID 83402 together with a protest fee of $25.00 for each application on or before May 4, 2015. The protestant must also send a copy of the protest to the applicant.

GARY SPACKMAN, Director
Published: April 16 and 23, 2015

RECEIVED
MAY 04 2015
Department of Water Resources
Eastern Region

VERONICA M. WEISBECK NOTARY PUBLIC STATE OF IDAHO

EXHIBIT G

MEMORANDUM

Date: June 15, 2015

To: Transfer 79972

From: Michael Holliday

Re: Review & Evaluation of Sufficiency of Information

The applicant has difficulty getting water to his property from the current point of diversion. The purpose of this transfer is to add a point of diversion closer to the place of use in order to improve water delivery. The applicant also seeks to rearrange the place of use to reflect the current irrigation system.

Authority to File:
IDWR records show the applicant as the current owner of the rights being transferred. The deed which accompanied the 2012 ownership change for these rights confirms ownership of the proposed place of use. The application was signed by the president, who is authorized to sign on behalf of the corporation.

Water Right Validity:
Rights 34-182 and 34-381A were decreed in the SRBA in 1998. Review of available post-decree imagery shows some years in which the place of use was not irrigated. However, there does not appear to be a consecutive five-year period of non-use. A temporary change application for these rights was approved in 2014. Therefore, the rights included in this transfer are valid.

Injury to Other Water Rights:
Other rights will not be injured by the proposed changes. The watermaster reviewed the application and did not oppose its approval. Although the proposed new point of diversion is located downstream from the current point of diversion on a losing river reach, discussion with the watermaster revealed that conveyance losses are uniformly charged to all diversions between Mackay Dam and Arco, regardless of their location on the river. The quantity authorized to be diverted will not change as a result of the transfer. The transfer application was advertised and no protests were filed.

Enlargement of Use:
The proposed change will not result in enlargement because neither rate nor irrigated acreage will increase as a result of the transfer. Right 34-2379F is currently overlapped by the rights included in this transfer. Although the place of use for the two transferred rights is being rearranged, right 34-2379F will continue to be completely overlapped. Rights 34-182 and 34-381A will retain a condition limiting all three rights to the irrigation of 200 acres. The number of stacked acres will not change.

Local Public Interest:
No issues identified.

Beneficial Use / Conservation of Water Resources:
No issues identified.

Effect on Economy the Local Area:
No issues identified.

Effect on Agricultural Base of the Local Area:
No issues identified.

Review of the application finds there is no clear inconsistency with criteria set forth in Section 42-222 Idaho Code preventing processing of this application.

EXHIBIT H

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT
TRANSFER NO. 79972

This is to certify that: MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

Water Right	Origin/Basis	Priority Date	Diversion Rate	Diversion Volume	Acre Limit	Total Acres	Source
34-182	WR/DECREED	6/1/1883	1.600 cfs	N/A	80.0	212.0	BIG LOST RIVER
34-381A	WR/DECREED	9/26/1894	2.400 cfs	N/A	120.0	212.0	BIG LOST RIVER

Purpose of Transfer (Changes Proposed)

Current Number	Split	POD	POU	Add POD	Period of Use	Nature of Use
34-182	NO	NO	YES	YES	NO	NO
34-381A	NO	NO	YES	YES	NO	NO

Summary Of Water Rights After the Approved Change

Existing Right	New No. (Changed Portion)	Transfer Rate	Transfer Volume	Acre Limit	Total Acres	New No. (remaining portion)	Remaining Rate	Remaining Volume	Remaining Acre Limit	Remaining Total Acres
34-182	34-182	1.600 cfs	N/A	80.0	200.0	N/A	N/A	N/A	N/A	N/A
34-381A	34-381A	2.400 cfs	N/A	120.0	200.0	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		**4.000 cfs**	**N/A**	**200.0**	**200.0**		**N/A**	**N/A**	**N/A**	**N/A**

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 30th day of June, 2015.

for Chief, Water Allocation Bureau

SUPPORT DATA

IN FILE # 34-182

Transfer No. 79972

WATER RIGHT NO. 34-381A

As Modified by Transfer No. 79972

In accordance with the approval of Transfer No. 79972, Water Right No. 34-381A is now described as follows:

Right Holder: MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

Priority Date: 9/26/1894

Source: BIG LOST RIVER **Tributary:** SINKS

BENEFICIAL USE	From		To	Diversion Rate
IRRIGATION	5/01	to	10/15	2.400 cfs
				2.400 cfs

LOCATION OF POINT(S) OF DIVERSION

BIG LOST RIVER	SENWSE	Sec 14 Twp 06N Rge 25E CUSTER County
BIG LOST RIVER	SENW	Sec 32 Twp 06N Rge 26E CUSTER County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31			32.0	28.0									35.0	35.0	9.0	16.0	155.0
06N	26E	32							6.0			22.0	17.0						45.0

Right Acre Limit: 120.0
POU Total Acres: 200.0

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 120 acres within the authorized place of use in a single irrigation season.
2. Rights 34-182, 34-381A and 34-2379F when combined shall not exceed a total diversion rate of 5.20 cfs and the irrigation of 200 acres.
3. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
4. The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.
5. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.

Transfer No. 79972

WATER RIGHT NO. 34-381A

As Modified by Transfer No. 79972

CONDITIONS OF APPROVAL

6. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

7. This right does not grant any right-of-way or easement across the land of another.

8. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

10. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

WATER RIGHT NO. 34-182

As Modified by Transfer No. 79972

CONDITIONS OF APPROVAL

6. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

7. This right does not grant any right-of-way or easement across the land of another.

8. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

10. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

EXHIBIT I

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N Skyline Dr., Ste A, Idaho Falls, Idaho 83402-1718
Phone: (208) 525-7161 FAX: (208) 525-7177 www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

June 30, 2015

MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

Re: Transfer No: 79972
Water Right No(s).: 34-182, 34-381A
Transfer Approval Notice

Dear Water Right Holder:

The Department of Water Resources has issued the enclosed approved Transfer of Water Right(s). Please be sure to thoroughly review the conditions of approval and remarks listed on the approval document.

The Transfer of Water Right(s) is a PRELIMINARY ORDER issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action by the Department unless the APPLICANT petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

ANY PERSON aggrieved by any decision, determination, order or action of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Department and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

If the transfer approval includes a condition requiring measuring and recording devices, such devices shall comply with specifications established by the Department Detailed specifications are available on the Department's home page on the Internet, or you can request a copy by contacting any office of the Department. Please be sure to thoroughly review the specifications to avoid unnecessary costs for reinstallation or modification due to non-conforming or improperly installed devices.

Please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a $100 late filing fee. Contact any office of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

If you have any questions, please contact me at (208)525-7161.

Sincerely,

James Cefalo
Water Resources Program Manager

Enclosure

JC:sc

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2015 I mailed a true and correct copy, postage prepaid, of the foregoing TRANSFER APPROVAL to the person(s) listed below:

Re: Transfer No.: 79972
Water Right No(s).: 34-182, 34-381A

MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

WATER DISTRICT 34
PO BOX 53
MACKAY ID 83252

Sharla Cox

Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

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

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

RECEIVED
Jan 24, 2025
DEPARTMENT OF
WATER RESOURCES

Norman M. Semanko, ISB #4761
Garrett M. Kitamura, ISB #11502
Payton G. Hampton, ISB #11529
PARSONS BEHLE & LATIMER
800 W. Main Street, Suite 1300
Boise, Idaho 83702
Telephone: (208) 562-4900
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Email: *nsemanko@parsonsbehle.com*
gkitamura@parsonsbehle.com
phampton@parsonsbehle.com

Attorneys for Big Lost River Irrigation District

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	BLRID'S JOINDER IN SUPPORT OF MOORE CANAL USERS' MOTION TO DISMISS

Intervenor Big Lost River Irrigation District ("BLRID"), by and through its counsel of record, Parsons Behle & Latimer, hereby joins in Moore Canal Users' Motion to Dismiss, previously filed in this matter. BLRID reserves the right to reply to any response filed in opposition to said motion or to participate in any oral argument on the motion.

DATED this 24th day of January, 2025.

PARSONS BEHLE & LATIMER

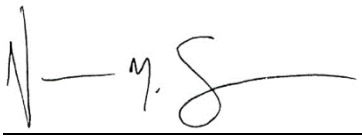
Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura
Attorneys for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of January, 2025, a true and correct copy of the foregoing document was filed by email to file@idwr.idaho.gov, and I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Original to:	
IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83729 Boise, ID 83720	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: file@idwr.idaho.gov; Garrick.baxter@idwr.idaho.gov
Copies To:	
Chris M. Bromley Candice McHugh MCHUGH BROMLEY, PLLC P. O. Box 107 Boise, ID 83701 *Attorneys for Bryon Pehrson, Loy Pehrson & Randy Pehrson*	☐ U.S. Mail ☐ Facsimile: 208/287-0864 ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: cbromley@mchughbromley.com; cmchugh@mchughbromley.com
Roger S. Burdick	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: roburd47@gmail.com
Skyler C. Johns OLSEN TAGGART PLLC P. O. Box 3005 Idaho Falls, ID 83403	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: sjohns@olsentaggart.com
Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW 25 North 2nd East Rexburg, ID 83440	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: herickson@rex-law.com; mmortimer@rex-law.com

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Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura

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cmchugh@mchughbromley.com

Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

RECEIVED
Jan 27, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**MOTION TO STRIKE BIG LOST RIVER IRRIGATION DISTRICT'S JOINDER; MOTION TO SHORTEN TIME**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their counsel of record, McHugh Bromley, PLLC, pursuant to IDAPA 37.01.01.220.02 and hereby moves to strike *BLRID's Joinder in Support of Moore Canal Users' Motion to Dismiss* (Jan. 24, 2025), and further requests that the Hearing Officer, pursuant to IDAPA 37.01.01.220.f, and for good cause shown, shorten time to decide this issue before the February 3, 2025 deadline for replies.

I. FACTUAL BACKGROUND

On January 13, 2025, counsel for the Moore Canal Users ("Moore Canal") filed a *Motion to Dismiss*. On January 24, 2025, counsel for Big Lost River Irrigation District ("BLRID") filed

a *Joinder in Support of Moore Canal Users' Motion to Dismiss* ("Joinder"). Therein, BLRID states that it "reserves the right to reply to any response filed in opposition to said motion or to participate in any oral argument on the motion." Emphasis added. On January 27, 2025, counsel for Pehrsons filed a *Response to Moore Canal Users' Motion to Dismiss*.

II. ARGUMENT

Moore Canal filed its *Motion to Dismiss* on January 13, 2025, thereby triggering the date upon which joinders, if any, were required to be filed, with responses to the *Motion to Dismiss* to be filed fourteen days later, by January 27, 2025, pursuant to IDAPA 37.01.01.220.b. BLRID filed its *Joinder* on January 24, 2025, which is eleven days after the *Motion to Dismiss* was filed, and only three days before the response deadline.

In *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007), the Court held that for joinders to be considered timely, they must be filed on the same day when the motion that is being joined was filed:

> The Plaintiff lists as the first issue on appeal, "Timeliness of Filing Motion for Summary Judgment?" In her argument she states, "Dr. Walters' filing of Joinder was filed fifty-five (55) days before trial and only twenty-five (25) days before the scheduled hearing of March 20, 2006, not the sixty days required by the Court Order or the twenty-eight (28) days required by IRCP 56(c). Respondent Walters acted in total derogation of the Court's Order and its rules of procedure, and should not have benefited thereby."
>
> Dr. Dixon's motion for summary judgment and Dr. Walters's motion in limine were timely filed and set for hearing to be held on March 20, 2006. Only Dr. Walters's joinder in Dr. Dixon's motion for summary judgment was untimely.

Id. at 34-35, 156 P.3d at 535-36 (emphasis added).

Here, there is no dispute that BLRID filed its *Joinder* eleven days after Moore Canal's *Motion to Dismiss*, and only three days before Pehrsons filed their *Response to Moore Canal Users' Motion to Dismiss*. There is no indication in the *Joinder* as to what BLRID will be

arguing, thereby preventing Pehrsons from responding and prejudicing their interests. Based on *Ramos*, BLRID's *Joinder* is untimely and should be stricken from the record, with BLRID further prevented from filing a substantive reply to the Pehrsons' *Response to Moore Canal Users' Motion to Dismiss*.

III. CONCLUSION

Based on the foregoing, BLRID's *Joinder* should be stricken from the record with BLRID prevented from filing a reply. For good cause shown, the Hearing Officer should shorten time to decide this matter before the February 3, 2025 reply deadline.

DATED this 27th day of January, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson,
and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

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/s/ Chris M. Bromley
Chris M. Bromley

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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

RECEIVED
Jan 27, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSONS' RESOPNSE TO MOORE CANAL USERS' MOTION TO DISMISS**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their counsel of record, McHugh Bromley, PLLC, pursuant to IDAPA 37.01.01.220. 02.b, and hereby responds to the *Motion to Dismiss* (Jan. 13, 2025), filed by the Moore Canal Users ("Moore Canal"). Pehrsons' response is supported by the *Declaration of Chris M. Bromley*.

I. INTRODUCTION

In summary, Moore Canal argues this matter should be dismissed for two reasons: (1) Pehrsons' failure to cite authority in support of the action; and (2) Pehrsons' use of futile call that somehow violates established principles and implicates diversion of water by Moore Canal's

users. As to these issues, the *Motion* ignores authority cited by Pehrsons and fails to present any reasons as to how futile call has been misapplied as to Moore Canal.

II. ARGUMENT

A. Pehrsons' *Petition* Is Supported By Authority And Cogent Argument

Citing IRCP 12(b)(6) as the standard for review, Moore Canal moves to dismiss the case: "The Pehrsons' Petition does not contain a cite to any authority that they are asking the Department for a declaratory ruling on." *Motion* at 4 (emphasis added). The statement by Moore Canal directly contradicts the record and the requested relief must be denied.

When this matter was originally initiated by Pehrsons, they cited "IDAPA 37.01.01.300. 02.d" as the basis. *Petition for Declaratory Ruling for Watermaster Instructions* at 1 (Feb. 14, 2024) ("Petition"). That Rule states: "Petitions for declaratory orders shall state the declaratory ruling that the petitioner seeks." IDAPA 37.01.01.300.02.d. The *Petition* goes on to explain the two forms of relief that are sought:

> (1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.
>
> (2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Petition at 2.

The *Petition* further explains the relationship between the water rights of the Pehrsons and of Moss Farms, Inc. ("Moss"), the reason for the requested watermaster instructions, as supported by the signed statements from Preston Marcroft and Lucas Yockey, the present and immediately past watermasters for Water District No. 34, respectively. *See Declaration of Chris M. Bromley* (Feb. 14, 2024). Clearly, the *Petition* complies with principles of law by citing authority, supported by cogent facts and argument explaining why relief should be granted.

The *Petition* asks for a declaratory ruling as to the Director's duty and authority to deliver water in priority as required by Idaho law and his statutory duty in light of facts that would make such delivery a futile call.[1] Citing I.C. §§ 67-5232 and 67-5255, Moore Canal argues the *Petition* should be dismissed because Pehrsons do not request a "declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency . . . or ask for clarification on the applicability of any order issued by the Department." *Motion* at 4.

In making this argument, Moore Canal reads subsection (2) out of these code sections, with I.C. § 67-5232 and 67-5255 stating in full:

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.
>
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
>
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

I.C. § 67-5232 (emphasis added).

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any order issued by the agency.
>
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.

[1] Certainly no one is reasonably suggesting that the Director does not have the authority to make such rulings under his duties found in Chapter 6, Title 42, Idaho Code.

> (3) A declaratory ruling issued by an agency under this section is a final agency action.

I.C. § 67-5255 (emphasis added).

Principles of statutory construction requires the statute be read in full, "to give meaning to all of its provisions." *State v. Bever*, 118 Idaho 80, 82, 794 P.2d 1136, 1138 (1990); *see also Smith v. Excel Fabrication, LLC*, 172 Idaho 725, 731, 535 P.3d 1098, 1104 (2023) ("The statute should be considered as a whole."). Idaho Code §§ 67-5232 and 67-5255 provide two pathways for a declaratory ruling: (1) to ask for relief after issuance of an order; and (2) to ask for relief through initiation of a contested case. When these code sections are read in conjunction with IDAPA 37.01.01.300.02.d (contents of a petition for declaratory ruling) and IDAPA 37.01.01.051 (liberal construction of the Department's procedural rules "to ensure just, speed and economical determination of all issues presented to the agency"), it is clear that IDWR may accept the *Petition* to then initiate a contested case that will result in issuance of a final order.

Here, Pehrsons not only requested a declaratory ruling as to the issues cited above through formal proceedings, but also asked IDWR to initiate "informal proceedings" consistent with IDAPA 37.01.01.100: "Pehrsons respectfully request that informal proceedings be used first to resolve the issues presented in this contested case." *Petition* at 8. Throughout the spring and summer of 2024, Pehrsons, through counsel, filed motions with and asked IDWR through email communication, to advance this matter to informal proceedings. *Declaration of Chris M. Bromley, Ex. 1*. As stated in an email response by counsel for IDWR:

> The Department reached out to [counsel for Moss Farms, Inc.] about Moss Farms' interest in informal discussions. [He] indicated that his client opposes informal discussions at this time. <u>The Department has reviewed the filings and has concluded that the matter should move forward to formal proceedings</u>. The Department is in the process of appointing a hearing officer. I expect an order will

be issued in the next two weeks appointing the hearing officer and setting a pre-hearing conference. Be on the lookout for an order.

Id. (emphasis added).

Therefore, IDWR, in its discretion, has already decided that the matter should move forward, through a contested case, with assignment of a docket number and appointment of the Hearing Officer by the Director, which will then result in issuance of an order. *Notice of Prehearing Conference; Order Appointing Hearing Officer* (Aug. 8, 2024).[2]

B. Futile Call Is Correctly Asserted At This Stage Of The Proceedings With The Petition Not Directed At Moore Canal

While Moore Canal correctly cites the doctrine of futile call, *Motion* at 6 citing *Gilbert v. Smith*, 97 Idaho 735, 739, 5522 P.2d 1220, 1224 (1976), the *Motion* is nonetheless procedurally and substantively deficient because Moore Canal fails to define the priority dates of its members and whether all, some, or any have water rights that are senior to Pehrsons. For this reason alone, the *Motion* should be denied.

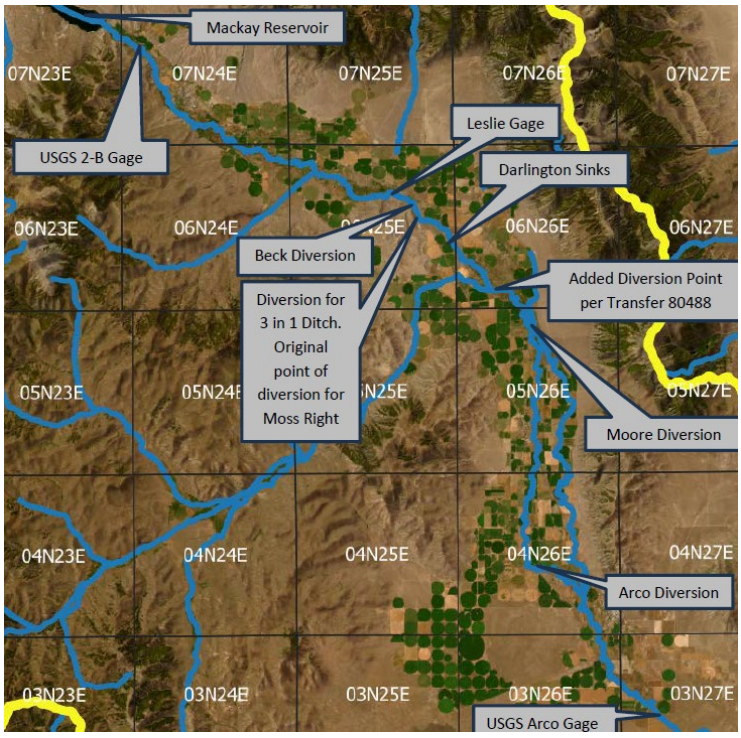
Taken more liberally, Moore Canal is understandably concerned about the consequences of this proceeding for its users. To be clear, the *Petition* is <u>not</u> directed at Moore Canal, it is only asserted against Moss and the need for watermaster instructions as to when Moss' new, alternate point of diversion on the Big Lost River, known as the "River Diversion," may be exercised, and whether storage water may be used as carriage water at the River Diversion.

By way of brief background, and as explained in the *Petition*, the original point of diversion for Moss' water right nos. 34-182 (6/1/1883) and 34-381A (9/26/1894) was decreed in

[2] Moore Canal was granted intervention by the Hearing Officer on October 9, 2024; thus, Moore Canal takes the case as it was found. It should not be lost on Moore Canal that Moss Farms, Inc. previously moved IDWR to dismiss this action, also attempting to read subsection (2) out of I.C. § 67-5255, *Objection to Petition for Declaratory Ruling for Watermaster Instructions* (Feb. 23, 2024), with IDWR then initiating the contested case on August 8, 2024.

the Snake River Basin Adjudication ("SRBA") at the 3 in 1 Ditch. *Petition* at 2. Pehrsons' water rights were likewise decreed in the SRBA and divert from the 3 in 1 Ditch, with Moss' water right no. 34-182 senior to the Pehrsons, while water right no. 34-381A is junior. *Petition* at 4. On April 6, 2015, Moss filed an *Application for Transfer of Water Right* ("Application") with IDWR, seeking to "Add" the River Diversion as a second point of diversion, while also retaining the 3 in 1 Ditch. *Petition* at 3 citing *Application* at 2, ln. A.2. On June 30, 2015, IDWR issued a transfer ("Transfer"), approving the *Application*, wherein the River Diversion and the 3 in 1 Ditch are authorized as alternate points of diversion. Nowhere in the *Application* or the *Transfer* are Moore Canal or its users implicated.

As shown in the expert report of David R. Tuthill, Jr., Ph.D., P.E., the Moore Canal diverts from the Big Lost River below both the 3 in 1 Ditch and the River Diversion; thus, what occurs upstream between Pehrsons and Moss is immaterial when it comes to Moore Canal:



David R. Tuthill, Idaho Water Engineering, Expert Report at 5, Fig. 3 (Dec. 2, 2024) ("Tuthill Report").[3]

Speaking to the use of alternate points of diversion, Dr. Tuthill explained that it is not at all unusual for IDWR to issue watermaster instructions when it comes to the exercise of alternate points of diversion:

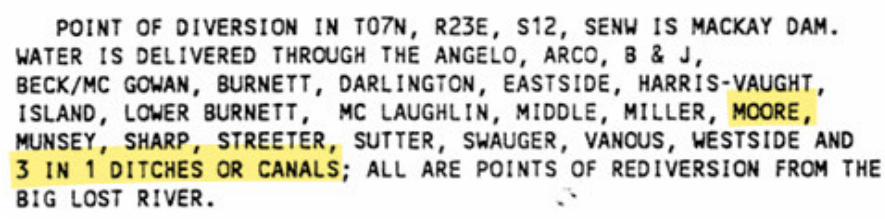
> Based on my experience, when an alternate point of diversion is added, as Moss did here, the watermasters in the basin exercise their judgment when the water is deliverable to that alternate point of diversion, especially in a case like this where the use of storage water is the only way that water is available in low flow periods to that alternate point of diversion.

Id. at 6; *see also City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (generally discussing conditions placed by IDWR on water rights with alternate points of diversion to ensure the priority doctrine is not usurped).

It therefore follows, during periods of low flow – as opposed to during times of plenty – that the Watermaster should be instructed to cease deliveries to the River Diversion, including the use of storage water from Mackey Reservoir as carriage water: "Implementation of the solution posed by Watermasters Yockey and Marcroft would have the effect of allowing the new Moss Farms point of diversion to be used consistent with historic delivery patterns . . . ." *Id*.

Lastly, because the *Petition* is only directed at Moss and his use of the River Diversion during certain low flow regimes, natural flow water rights delivered into the Moore Canal must continue to be administered based on their priority. Furthermore, through this proceeding, Pehrsons are not attempting to rewrite the storage water rights of the Big Lost River Irrigation District ("District"). In the SRBA, the District was decreed certain storage water rights, which plainly authorize the District to deliver water from Makey Reservoir into certain named canals and ditches, including but not limited to the Moore Canal and 3 in 1 Ditch:

[3] The *Tuthill Report* was served on the parties and the Hearing Officer in this case on December 2, 2024.


POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM.
WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J,
BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT,
ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE,
MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND
3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE
BIG LOST RIVER.

See e.g. Water Right No. 34-12, Big Lost River Irrigation District (highlighting added).

Nowhere in the *Petition* are Pehrsons attempting to prevent Moore Canal from utilizing storage water, as authorized by the District's decreed storage water rights.

III. CONCLUSION

Based on the foregoing, Moore Canal's *Motion to Dismiss* should be denied because Pehrsons have cited legal authority and argument in support of the *Petition*.

DATED this 27th day of January, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson,
and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
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/s/ Chris M. Bromley
Chris M. Bromley

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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

RECEIVED
Jan 27, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF CHRIS M. BROMLEY**

CHRIS M. BROMLEY under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of email communication between myself, former counsel for the Big Lost River Irrigation District, and lead counsel for the Idaho Department of Water Resources ("IDWR").

3. Attached hereto as **Exhibit 2** are true and correct copies of water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, in the name of the Big Lost River Irrigation District, for storage of water from the Big Lost River behind Mackey Dam, as partially decreed

in the SRBA on October 15, 2001, with an *Amended Partial Decree Nunc Pro Tunc* for water right no. 34-10935 issued on May 21, 2014.

4. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 27th day of January, 2025.

/s/ Chris M. Bromley
CHRIS M. BROMLEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
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Roger S. Burdick
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mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

From:	Waterdistric Thirtyfour
To:	Chris Bromley
Subject:	Fwd: Big Lost Futile Call
Date:	Wednesday, November 27, 2024 7:12:46 AM

---------- Forwarded message ---------
From: **Preston Marcroft** <presmarc@mackayschools.org>
Date: Tue, Nov 26, 2024, 6:37 AM
Subject: Fwd: Big Lost Futile Call
To: <water34master@gmail.com>

---------- Forwarded message ---------
From: **Whitney, Rob** <Rob.Whitney@idwr.idaho.gov>
Date: Fri, Sep 2, 2022 at 4:56 PM
Subject: Big Lost Futile Call
To: Preston Marcroft <presmarc@mackayschools.org>
Cc: Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>, Luke, Tim <Tim.Luke@idwr.idaho.gov>, Hoekema, David <David.Hoekema@idwr.idaho.gov>, Ferguson, Kara <Kara.Ferguson@idwr.idaho.gov>

Preston,

Randy Pehrson contacted David Hoekema with concerns about futile calls and delivery of both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. You have reported that about 600 inches (12cfs) of water is currently passing the Moss diversion but there are no calls for delivery below Moss. Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified. It appears appropriate to deliver additional water upstream of Moss by adjusting the decree to deliver more 1884 rights, while maintaining delivery to Moss. Your suggestion to adjust the decree date to 8-31-1884 may be a reasonable place to start, but IDWR will defer to your local knowledge of what the demand might be if a certain decree date is set. As we discussed, please stay in contact with Dennis Moss as you deliver additional decrees. If the demand under a new decree date results in a shortage of

water to satisfy Moss, the date should be adjusted accordingly. Please reach out if you have any questions.

Thanks, RW

EXHIBIT 2

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:34

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00012

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 17205.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 02/07/1916

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	17205.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	17205.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N	R26E	S02			NESE		NWSE		SESE	
		S12			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S13			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NESE		NWSE	
	R27E	S05	Lot 4	(NWNW)			SWNW		NWSW	SWSW
		S06	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)			SENW	NESW
			Lot 6	(NWSW)	Lot 7	(SWSW)			SESW	NESE
					NWSE		SWSE		SESE	
		S07			NENE		NWNE		SWNE	SENE
					NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
					NESW		NWSW		SWSW	SESW
					SWSE		SESE			
		S08			NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
		S17			NENW		NWNW		SWNW	SENW
					NWSW		SWSW			
		S18			NENE		NWNE		SWNE	SENE
					NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S19			NENE		NWNE		SWNE	SENE
T04N	R26E	S02	Lot 2	(NWNW)						
		S03	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S04	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S05	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
					SENW		NESW		NWSW	SWSW
					SESW		NESE		NWSE	SWSE
					SESE					
		S07			NENE		SENE		NESE	SESE
		S08			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S09			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S10			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S11			NWNW		SWNW		NWSW	SWSW
		S14			NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S15			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S16			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S17			NENE		SWNE		SENE	NWNW
					SWNW		SENW		NESW	NWSW
					SWSW		SESW		NESE	NWSE
					SWSE		SESE			
		S18			NENE		NWNE		SWNE	SENE
					NESE		NWSE		SWSE	SESE
		S19			NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T04N R26E S19			NESW		SESW	NESE	NWSE
			SWSE		SESE		
	S20		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	NWSE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE				
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	NESE	NWSE
			SWSE		SESE		
	S23		NWNE		SWNE	NENW	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S25		SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S26		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S35		NENE		NWNE	SWNE	SENE
			NENW		SENW	NESE	NWSE
			SWSE		SESE		
	S36		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SESW	NESE
			NWSE		SWSE	SESE	
R27E S31		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
			SESE				
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESE		NWSE	SWSE	SESE
R26E S03			NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			NESE		SWSE	SESE	
	S06		NWNW				
	S08		NENE		SENE	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		SWNE		NENW	NWNW	SWNW
			SENW		NESW	NWSW	SWSW
			SESW		NWSE	SWSE	SESE
	S14		NWNW		SWNW	NESW	NWSW
			SWSW		SESW		
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE		NWSE	SWSE	SESE
	S20		NENE		NWNE	SWNE	SENE

PLACE OF USE: (CONT)

T05N R26E S20		NESE		NWSE		SWSE	SESE
S21		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S22		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S23		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
S26		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
S27		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S28		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S29		NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SWSE		SESE			
S32		NENE		SENE		NESE	SESE
S33		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S34		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW	Lot 4 (SWSW)		Lot 5 (SESW)
		NESE		NWSE		SWSE	SESE
S35		NWNW		SWNW		NWSW	SWSW
T06N R24E S01	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
		NESW		NESE		NWSE	SWSE
		SESE					
S02	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
		NESW		NWSW		SESW	NWSE
		SWSE		SESE			
S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
S11		NENE		NWNE		SWNE	SENE
S12		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NWSW		NESE			
R25E S01		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
S02		SWNE		SWNW		SENW	NESW
		NWSW		SWSW		SESW	NWSE
		SWSE		SESE			
S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S04	Lot 1 (NENE)		Lot 2 (NWNE)		Lot 3 (NENW)		Lot 4 (NWNW)
		SWSW		SESW		SWSE	SESE
S05	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S06	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		Lot 5 (SWNW)		SENW
		NESW	Lot 6 (NWSW)		Lot 7 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
S07		NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T06N R25E S08		NENE		NWNE		NENW		NWNW
		SWNW		NWSW		SWSW		NESE
		NWSE		SWSE		SESE		
	S09	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S10	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S11	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S12	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S13	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S14	NENE		NWNE		SENE		NESE
		SWSE		SESE				
	S16	NWNE		NENW		NWNW		SWNW
	S17	SWNE		SENE		NWNW		SWNW
		SENW		NESW		NWSW		NESE
		NWSE		SWSE		SESE		
	S18	NENE		NWNE		SWNE		SENE
		SWSW						
	S21	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		NESE		NWSE
		SESE						
	S22	NWSW		SWSW				
	S23	NENE		SENE		NESE		SESE
	S24	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S25	NENE		NWNE		SWNE		SENE
		NENW		SWNW		SENW		NESW
		NWSW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S26	SESW		SWSE		SESE		
	S27	NWNW		SWNW		SWSW		SESW
		SWSE		Lot 4 (SESE)				
	S28	NENE		SENE		NESE		SESE
	S33	NENE						
	S34	Lot 1 (NENE)		NWNE		SWNE		Lot 2 (SENE)
		NENW		NWNW		SENW		NESW
		Lot 3 (NESE)		NWSE		Lot 4 (SESE)		
	S35	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S36	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
R26E	S05	Lot 4 (SWSW)		Lot 5 (SESW)				
	S06	SWSW		SESE				
	S07	NENE		SWNE		SENE		Lot 1 (NENW)
		NWNW		SWNW		SENW		NESW
		Lot 3 (NWSW)		Lot 4 (SWSW)		SESW		NESE
		NWSE		SWSE		SESE		
	S08	NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
	S17	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW

PLACE OF USE: (CONT)

T06N R26E	S17		NESE			NWSE			SWSE		SESE
	S18		NENE			NWNE			SWNE		SENE
			NENW		Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
			NESW		Lot 3	(NWSW)		Lot 4	(SWSW)		SESW
			NESE			NWSE			SWSE		SESE
	S19		NENE			NWNE			SWNE		SENE
			NENW		Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S20		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S21		SWNW			NESW			NWSW		SWSW
			SESW			SWSE					
	S27		NESW			NWSW					
	S28		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE			SESE					
	S29		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S30		NENE			NWNE			SWNE		SENE
			NENW		Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
			NESW		Lot 3	(NWSW)		Lot 4	(SWSW)		SESW
			NESE			NWSE			SWSE		SESE
	S31		NENE			NWNE			SWNE		SENE
			NENW		Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
			NESW		Lot 3	(NWSW)		Lot 4	(SWSW)		SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S33		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NWSE		SWSE
T07N R24E	S07	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW		
	S17		SWNW			NWSW			SWSW		SESW
	S18		NENE			NWNE			SWNE		SENE
			NENW			SENW			NESE		NWSE
			SESE								
	S20		NENE			NWNE			SWNE		NENW
			NWNW			NESE			NWSE		SWSE
			SESE								
	S21		NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S26		SWSW			SESW			SWSE		SESE
	S27		NENW			NESW			NWSW		SWSW
			SESW			NESE			NWSE		SWSE
			SESE								
	S28		NENE			NWNE			NENW		NWNW
			SWNW			SENW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S29		NENE			NWNE			SENE		NWSE
			SESE								
	S33		NWNE			SWNE			SENE		NENW
			NESE			NWSE			SESE		
	S34		NENE			NWNE			SWNE		SENE
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE								
	S35		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			SWSW			SESW		NESE
			NWSE			SWSE			SESE		
	S36		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW

PLACE OF USE: (CONT)

T07N R24E S36	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 OCT 15 PM 4:55

DISTRICT COURT-SRBA
TWIN FALLS COUNTY, IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
Case No. 39576	)	Water Right 34-00810

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 3.2 CFS
556.5 AFY

PRIORITY DATE: 06/01/1888

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	556.5 AFY
IRRIGATION FROM STORAGE	Irrigation Season	556.5 AFY
DIVERSION TO STORAGE	05-01 10-15	3.2 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE:

IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)	SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)	SESW	NESE
			NWSE		SWSE	SESE	
	S07		NENE		NWNE	SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)	SENW
			NESW		NWSW	SWSW	SESW
			SWSE		SESE		
	S08		NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S17		NENW		NWNW	SWNW	SENW
			NWSW		SWSW		
	S18		NENE		NWNE	SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S19		NENE		NWNE	SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)				
	S03	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			SENW		NESW	NWSW	SWSW
			SESW		NESE	NWSE	SWSE
			SESE				
	S07		NENE		SENE	NESE	SESE
	S08		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S11		NWNW		SWNW	NWSW	SWSW
	S14		NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		SWNE	SENE	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S18		NENE		NWNE	SWNE	SENE
			NESE		NWSE	SWSE	SESE
	S19		NENE		NWNE	SWNE	SENE
			NESW		SESW	NESE	NWSE
			SWSE		SESE		
	S20		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	NWSE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE				
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22		NESW		NWSW	NESE	NWSE
		SWSE		SESE		
	S23	NWNE		SWNE	NENW	NWNW
		SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S25	SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S26	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S35	NENE		NWNE	SWNE	SENE
		NENW		SENW	NESE	NWSE
		SWSE		SESE		
	S36	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SESW	NESE
		NWSE		SWSE	SESE	
R27E S31	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW	NESW
	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	SWSE
	SESE					
T05N R25E S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
	NESW		NWSW		SWSW	SESW
S02	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
	NESE		NWSE		SWSE	SESE
R26E S03	NWSW		SWSW			
S04	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S05	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	NESE		SWSE		SESE	
S06	NWNW					
S08	NENE		SENE		NESW	NWSW
	SWSW		SESW		NESE	NWSE
	SWSE		SESE			
S09	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S10	SWNE		NENW		NWNW	SWNW
	SENW		NESW		NWSW	SWSW
	SESW		NWSE		SWSE	SESE
S14	NWNW		SWNW		NESW	NWSW
	SWSW		SESW			
S15	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S16	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S17	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESE		NWSE		SWSE	SESE
S20	NENE		NWNE		SWNE	SENE
	NESE		NWSE		SWSE	SESE
S21	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S22	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S23	NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW		SESW		
	S26		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
	S27		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S28		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SWSE		SESE						
	S32		NENE		SENE		NESE		SESE		
	S33		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)		
			NESE		NWSE		SWSE		SESE		
	S35		NWNW		SWNW		NWSW		SWSW		
T06N R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NESE		NWSE		SWSE		
			SESE								
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
	S11		NENE		NWNE		SWNE		SENE		
	S12		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NWSW		NESE						
R25E	S01		NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S02		SWNE		SWNW		SENW		NESW		
			NWSW		SWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)		
			SWSW		SESW		SWSE		SESE		
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW		
			NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S08		NENE		NWNE		NENW		NWNW		
			SWNW		NWSW		SWSW		NESE		
			NWSE		SWSE		SESE				
	S09		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S10		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-00810

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)			
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)	
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)			
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-00810

PLACE OF USE: (CONT)

T06N R26E S20			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S21		SWNW			NESW			NWSW		SWSW
			SESW			SWSE					
	S27		NESW			NWSW					
	S28		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE			SESE					
	S29		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S30		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S31		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S33		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NWSE		SWSE
T07N R24E S07		Lot 3	(NWSW)	Lot 4	(SWSW)				SESW		
	S17		SWNW			NWSW			SWSW		SESW
	S18		NENE			NWNE			SWNE		SENE
			NENW			SENW			NESE		NWSE
			SESE								
	S20		NENE			NWNE			SWNE		NENW
			NWNW			NESE			NWSE		SWSE
			SESE								
	S21		NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S26		SWSW			SESW			SWSE		SESE
	S27		NENW			NESW			NWSW		SWSW
			SESW			NESE			NWSE		SWSE
			SESE								
	S28		NENE			NWNE			NENW		NWNW
			SWNW			SENW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S29		NENE			NWNE			SENE		NWSE
			SESE								
	S33		NWNE			SWNE			SENE		NENW
			NESE			NWSE			SESE		
	S34		NENE			NWNE			SWNE		SENE
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE								
	S35		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			SWSW			SESW		NESE
			NWSE			SWSE			SESE		
	S36		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
R25E S28			SWSW			SESW			NWSE		SWSE
	S31		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:31

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00811

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 1.7 CFS
294.0 AFY

PRIORITY DATE: 06/30/1881

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	294.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	294.0 AFY
DIVERSION TO STORAGE	05-01 10-15	1.5 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)	SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)	SESW	NESE
			NWSE		SWSE	SESE	
	S07		NENE		NWNE	SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)	SENW
			NESW		NWSW	SWSW	SESW
			SWSE		SESE		
	S08		NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S17		NENW		NWNW	SWNW	SENW
			NWSW		SWSW		
	S18		NENE		NWNE	SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S19		NENE		NWNE	SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)				
	S03	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			SENW		NESW	NWSW	SWSW
			SESW		NESE	NWSE	SWSE
			SESE				
	S07		NENE		SENE	NESE	SESE
	S08		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S11		NWNW		SWNW	NWSW	SWSW
	S14		NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		SWNE	SENE	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S18		NENE		NWNE	SWNE	SENE
			NESE		NWSE	SWSE	SESE
	S19		NENE		NWNE	SWNE	SENE
			NESW		SESW	NESE	NWSE
			SWSE		SESE		
	S20		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	NWSE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE				
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22			NESW			NWSW	NESE	NWSE
			SWSE			SESE		
	S23		NWNE			SWNE	NENW	NWNW
			SWNW			SENW	NESW	NWSW
			SWSW			SESW	NWSE	SWSE
			SESE					
	S25		SWNW			SENW	NESW	NWSW
			SWSW			SESW	NWSE	SWSE
			SESE					
	S26		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S35		NENE			NWNE	SWNE	SENE
			NENW			SENW	NESE	NWSE
			SWSE			SESE		
	S36		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SESW	NESE
			NWSE			SWSE	SESE	
	R27E S31	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	SWSE
			SESE					
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW			NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESE			NWSE	SWSE	SESE
	R26E S03		NWSW			SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			NESE			SWSE	SESE	
	S06		NWNW					
	S08		NENE			SENE	NESW	NWSW
			SWSW			SESW	NESE	NWSE
			SWSE			SESE		
	S09		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S10		SWNE			NENW	NWNW	SWNW
			SENW			NESW	NWSW	SWSW
			SESW			NWSE	SWSE	SESE
	S14		NWNW			SWNW	NESW	NWSW
			SWSW			SESW		
	S15		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S16		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S17		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESE			NWSE	SWSE	SESE
	S20		NENE			NWNE	SWNE	SENE
			NESE			NWSE	SWSE	SESE
	S21		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S22		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S23		NENW			NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23	NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S08	NENE	NWNE	NENW	NWNW		
		SWNW	NWSW	SWSW	NESE		
		NWSE	SWSE	SESE			
	S09	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S10	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4 (SESE)				
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1 (NENE)			NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3 (NESE)			NWSE	Lot 4 (SESE)		
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4 (SWSW)		Lot 5 (SESW)				
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3 (NWSW)		Lot 4 (SWSW)			SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S21		SWNW		NESW		NWSW	SWSW
			SESW		SWSE			
	S27		NESW		NWSW			
	S28		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S29		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S30		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S31		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S32		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S33		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
	S17		SWNW		NWSW		SWSW	SESW
	S18		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SESE					
	S20		NENE		NWNE		SWNE	NENW
			NWNW		NESE		NWSE	SWSE
			SESE					
	S21		NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S26		SWSW		SESW		SWSE	SESE
	S27		NENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S28		NENE		NWNE		NENW	NWNW
			SWNW		SENW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SENE	NWSE
			SESE					
	S33		NWNE		SWNE		SENE	NENW
			NESE		NWSE		SESE	
	S34		NENE		NWNE		SWNE	SENE
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE					
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R25E	S28		SWSW		SESW		NWSE	SWSE
	S31		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S32		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-00817B

2001 OCT 15 PM 4:27
DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 0.8 CFS
140.0 AFY

PRIORITY DATE: 03/01/1902

POINT OF DIVERSION:

T03N R26E	S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
T04N R26E	S26	NWNWNW	(REDIVERSION)	
T05N R26E	S04	NWSESE	(REDIVERSION)	
T07N R23E	S12	SENW		Within CUSTER County
T06N R24E	S01	NENESW	(REDIVERSION)	
R25E	S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
R26E	S32	NWSENW	(REDIVERSION)	
T07N R23E	S12	NWNWSE	(REDIVERSION)	
R24E	S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THRCUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANCUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FRCM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	140.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	140.0 AFY
DIVERSION TO STORAGE	05-01 10-15	0.8 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		NESE	NWSE	SESE		
	S12	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S13	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NESE	NWSE		
R27E	S05	Lot 4 (NWNW)	SWNW	NWSW		SWSW
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENW		NWNW		SWNW		SENW
			NWSW		SWSW				
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			SENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S07		NENE		SENE		NESE		SESE
	S08		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S09		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S10		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S11		NWNW		SWNW		NWSW		SWSW
	S14		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S15		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S16		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S17		NENE		SWNE		SENE		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NESW		SESW		NESE		NWSE
			SWSE		SESE				
	S20		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		NWSE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESE						
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T04N R26E S22		NESW		NWSW	NESE	NWSE
		SWSE		SESE		
	S23	NWNE		SWNE	NENW	NWNW
		SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S25	SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S26	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S35	NENE		NWNE	SWNE	SENE
		NENW		SENW	NESE	NWSE
		SWSE		SESE		
	S36	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SESW	NESE
		NWSE		SWSE	SESE	
R27E S31	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW	NESW
	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	SWSE
		SESE				
T05N R25E S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW	SWSW	SESW
	S02	Lot 1 (NENE)		Lot 2 (NWNE)	SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)	SWNW	SENW
		NESE		NWSE	SWSE	SESE
R26E S03		NWSW		SWSW		
	S04	Lot 1 (NENE)		Lot 2 (NWNE)	SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)	SWNE	SENE
		NESE		SWSE	SESE	
	S06	NWNW				
	S08	NENE		SENE	NESW	NWSW
		SWSW		SESW	NESE	NWSE
		SWSE		SESE		
	S09	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S10	SWNE		NENW	NWNW	SWNW
		SENW		NESW	NWSW	SWSW
		SESW		NWSE	SWSE	SESE
	S14	NWNW		SWNW	NESW	NWSW
		SWSW		SESW		
	S15	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S16	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S17	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE		NWSE	SWSE	SESE
	S20	NENE		NWNE	SWNE	SENE
		NESE		NWSE	SWSE	SESE
	S21	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S22	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S23	NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW	SESW
	S26		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S27		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S28		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SWSE		SESE			
	S32		NENE		SENE		NESE	SESE
	S33		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S34		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW	Lot 4 (SWSW)	Lot 5 (SESW)	
			NESE		NWSE		SWSE	SESE
	S35		NWNW		SWNW		NWSW	SWSW
T06N R24E	S01	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NESE		NWSE	SWSE
			SESE					
	S02	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SESW	NWSE
			SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	S11		NENE		NWNE		SWNE	SENE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NWSW		NESE			
R25E	S01		NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S02		SWNE		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NWSE
			SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)		Lot 3 (NENW)		Lot 4 (NWNW)
			SWSW		SESW		SWSE	SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		Lot 5 (SWNW)		SENW
			NESW	Lot 6 (NWSW)		Lot 7 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S08		NENE		NWNE		NENW	NWNW
			SWNW		NWSW		SWSW	NESE
			NWSE		SWSE		SESE	
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE		SESE
	S11		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S12		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S13		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S14		NENE		NWNE		SENE		NESE
			SWSE		SESE				
	S16		NWNE		NENW		NWNW		SWNW
	S17		SWNE		SENE		NWNW		SWNW
			SENW		NESW		NWSW		NESE
			NWSE		SWSE		SESE		
	S18		NENE		NWNE		SWNE		SENE
			SWSW						
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
			SESE						
	S22		NWSW		SWSW				
	S23		NENE		SENE		NESE		SESE
	S24		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S25		NENE		NWNE		SWNE		SENE
			NENW		SWNW		SENW		NESW
			NWSW		SWSW		SESW		NESE
			NWSE		SWSE		SESE		
	S26		SESW		SWSE		SESE		
	S27		NWNW		SWNW		SWSW		SESW
			SWSE	Lot 4	(SESE)				
	S28		NENE		SENE		NESE		SESE
	S33		NENE						
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
			NENW		NWNW		SENW		NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
	S35		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S36		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)				
	S06		SWSW		SESE				
	S07		NENE		SWNE		SENE	Lot 1	(NENW)
			NWNW		SWNW		SENW		NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S20		NENE		NWNE		SWNE		SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S21		SWNW			NESW			NWSW		SWSW
			SESW			SWSE					
	S27		NESW			NWSW					
	S28		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE			SESE					
	S29		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S30		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S31		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S33		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NWSE		SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)				SESW		
	S17		SWNW			NWSW			SWSW		SESW
	S18		NENE			NWNE			SWNE		SENE
			NENW			SENW			NESE		NWSE
			SESE								
	S20		NENE			NWNE			SWNE		NENW
			NWNW			NESE			NWSE		SWSE
			SESE								
	S21		NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S26		SWSW			SESW			SWSE		SESE
	S27		NENW			NESW			NWSW		SWSW
			SESW			NESE			NWSE		SWSE
			SESE								
	S28		NENE			NWNE			NENW		NWNW
			SWNW			SENW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S29		NENE			NWNE			SENE		NWSE
			SESE								
	S33		NWNE			SWNE			SENE		NENW
			NESE			NWSE			SESE		
	S34		NENE			NWNE			SWNE		SENE
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE								
	S35		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			SWSW			SESW		NESE
			NWSE			SWSE			SESE		
	S36		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
R25E	S28		SWSW			SESW			NWSE		SWSE
	S31		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 SEP 26 AM 11: 16

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00818

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 3.2 CFS
556.5 AFY

PRIORITY DATE: 06/30/1880

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE		QUANTITY	
IRRIGATION STORAGE	05-01	10-15	556.5	AFY
IRRIGATION FROM STORAGE	05-01	10-15	556.5	AFY
DIVERSION TO STORAGE	05-01	10-15	3.2	CFS

THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S07		NENE		SENE		NESE	SESE
	S08		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S11		NWNW		SWNW		NWSW	SWSW
	S14		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S15		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S16		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S17		NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S18		NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NESW		SESW		NESE	NWSE
			SWSE		SESE			
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	NWSE
	S21		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE					
	S22		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T04N	R26E	S22		NESW		NWSW	NESE	NWSE
				SWSE		SESE		
		S23		NWNE		SWNE	NENW	NWNW
				SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S25		SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S26		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S35		NENE		NWNE	SWNE	SENE
				NENW		SENW	NESE	NWSE
				SWSE		SESE		
		S36		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SESW	NESE
				NWSE		SWSE	SESE	
	R27E	S31	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
			Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
				SESE				
T05N	R25E	S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
		S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESE		NWSE	SWSE	SESE
	R26E	S03		NWSW		SWSW		
		S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
				NESE		SWSE	SESE	
		S06		NWNW				
		S08		NENE		SENE	NESW	NWSW
				SWSW		SESW	NESE	NWSE
				SWSE		SESE		
		S09		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S10		SWNE		NENW	NWNW	SWNW
				SENW		NESW	NWSW	SWSW
				SESW		NWSE	SWSE	SESE
		S14		NWNW		SWNW	NESW	NWSW
				SWSW		SESW		
		S15		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S16		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S17		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESE		NWSE	SWSE	SESE
		S20		NENE		NWNE	SWNE	SENE
				NESE		NWSE	SWSE	SESE
		S21		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S22		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW		SESW		
	S26		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
	S27		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S28		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SWSE		SESE						
	S32		NENE		SENE		NESE		SESE		
	S33		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)		
			NESE		NWSE		SWSE		SESE		
	S35		NWNW		SWNW		NWSW		SWSW		
T06N R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NESE		NWSE		SWSE		
			SESE								
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
	S11		NENE		NWNE		SWNE		SENE		
	S12		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NWSW		NESE						
R25E	S01		NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S02		SWNE		SWNW		SENW		NESW		
			NWSW		SWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)		
			SWSW		SESW		SWSE		SESE		
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW		
			NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S08		NENE		NWNE		NENW		NWNW		
			SWNW		NWSW		SWSW		NESE		
			NWSE		SWSE		SESE				
	S09		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S10		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4 (SESE)				
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1 (NENE)			NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3 (NESE)			NWSE	Lot 4 (SESE)		
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4 (SWSW)		Lot 5 (SESW)				
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3 (NWSW)		Lot 4 (SWSW)			SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E	S20	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S21	SWNW		NESW		NWSW	SWSW
		SESW		SWSE			
	S27	NESW		NWSW			
	S28	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE		SESE			
	S29	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S30	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S31	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S33	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NWSE	SWSE
T07N R24E	S07	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	
	S17	SWNW		NWSW		SWSW	SESW
	S18	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SESE					
	S20	NENE		NWNE		SWNE	NENW
		NWNW		NESE		NWSE	SWSE
		SESE					
	S21	NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S26	SWSW		SESW		SWSE	SESE
	S27	NENW		NESW		NWSW	SWSW
		SESW		NESE		NWSE	SWSE
		SESE					
	S28	NENE		NWNE		NENW	NWNW
		SWNW		SENW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SENE	NWSE
		SESE					
	S33	NWNE		SWNE		SENE	NENW
		NESE		NWSE		SESE	
	S34	NENE		NWNE		SWNE	SENE
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE					
	S35	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S36	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
R25E	S28	SWSW		SESW		NWSE	SWSE
	S31	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:50
DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-02507

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6000.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 09/02/1959

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	6000.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	6000.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R26E S02			NESE		NWSE		SESE	
S12			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S13			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NESE		NWSE	
R27E S05	Lot 4	(NWNW)			SWNW		NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)			SENW	NESW
	Lot 6	(NWSW)	Lot 7	(SWSW)			SESW	NESE
			NWSE		SWSE		SESE	
S07			NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
S08			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
S17			NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
S18			NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S19			NENE		NWNE		SWNE	SENE
T04N R26E S02	Lot 2	(NWNW)						
S03	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S04	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S05	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
S07			NENE		SENE		NESE	SESE
S08			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S09			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S10			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S11			NWNW		SWNW		NWSW	SWSW
S14			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S15			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S16			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S17			NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
S18			NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
S19			NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T04N R26E S19		NESW		SESW	NESE	NWSE
		SWSE		SESE		
	S20	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	NWSE
	S21	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE				
	S22	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	NESE	NWSE
		SWSE		SESE		
	S23	NWNE		SWNE	NENW	NWNW
		SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S25	SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S26	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S35	NENE		NWNE	SWNE	SENE
		NENW		SENW	NESE	NWSE
		SWSE		SESE		
	S36	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SESW	NESE
		NWSE		SWSE	SESE	
R27E S31	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW	NESW
	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	SWSE
		SESE				
T05N R25E S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW	SWSW	SESW
	S02 Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESE		NWSE	SWSE	SESE
R26E S03		NWSW		SWSW		
	S04 Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S05 Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		NESE		SWSE	SESE	
	S06	NWNW				
	S08	NENE		SENE	NESW	NWSW
		SWSW		SESW	NESE	NWSE
		SWSE		SESE		
	S09	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S10	SWNE		NENW	NWNW	SWNW
		SENW		NESW	NWSW	SWSW
		SESW		NWSE	SWSE	SESE
	S14	NWNW		SWNW	NESW	NWSW
		SWSW		SESW		
	S15	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S16	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S17	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE		NWSE	SWSE	SESE
	S20	NENE		NWNE	SWNE	SENE

PLACE OF USE: (CONT)

T05N R26E	S20	NESE	NWSE	SWSE	SESE		
	S21	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S22	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S23	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		

PLACE OF USE: (CONT)

T06N	R25E	S08		NENE		NWNE		NENW		NWNW
				SWNW		NWSW		SWSW		NESE
				NWSE		SWSE		SESE		
		S09		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S10		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S11		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S12		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S13		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S14		NENE		NWNE		SENE		NESE
				SWSE		SESE				
		S16		NWNE		NENW		NWNW		SWNW
		S17		SWNE		SENE		NWNW		SWNW
				SENW		NESW		NWSW		NESE
				NWSE		SWSE		SESE		
		S18		NENE		NWNE		SWNE		SENE
				SWSW						
		S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
				SESE						
		S22		NWSW		SWSW				
		S23		NENE		SENE		NESE		SESE
		S24		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S25		NENE		NWNE		SWNE		SENE
				NENW		SWNW		SENW		NESW
				NWSW		SWSW		SESW		NESE
				NWSE		SWSE		SESE		
		S26		SESW		SWSE		SESE		
		S27		NWNW		SWNW		SWSW		SESW
				SWSE	Lot 4	(SESE)				
		S28		NENE		SENE		NESE		SESE
		S33		NENE						
		S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
				NENW		NWNW		SENW		NESW
			Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
		S35		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S36		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
	R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)				
		S06		SWSW		SESE				
		S07		NENE		SWNE		SENE	Lot 1	(NENW)
				NWNW		SWNW		SENW		NESW
			Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
				NWSE		SWSE		SESE		
		S08		NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
		S17		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW

PLACE OF USE: (CONT)

T06N R26E	S17			NESE			NWSE			SWSE	SESE
	S18			NENE			NWNE			SWNE	SENE
				NENW	Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
				NESW	Lot 3	(NWSW)		Lot 4	(SWSW)		SESW
				NESE			NWSE			SWSE	SESE
	S19			NENE			NWNE			SWNE	SENE
				NENW	Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
				NESW			NWSW			SWSW	SESW
				NESE			NWSE			SWSE	SESE
	S20			NENE			NWNE			SWNE	SENE
				NENW			NWNW			SWNW	SENW
				NESW			NWSW			SWSW	SESW
				NESE			NWSE			SWSE	SESE
	S21			SWNW			NESW			NWSW	SWSW
				SESW			SWSE				
	S27			NESW			NWSW				
	S28			NWNE			SWNE			NENW	NWNW
				SWNW			SENW			NESW	NWSW
				SWSW			SESW			NESE	NWSE
				SWSE			SESE				
	S29			NENE			NWNE			SWNE	SENE
				NENW			NWNW			SWNW	SENW
				NESW			NWSW			SWSW	SESW
				NESE			NWSE			SWSE	SESE
	S30			NENE			NWNE			SWNE	SENE
				NENW	Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
				NESW	Lot 3	(NWSW)		Lot 4	(SWSW)		SESW
				NESE			NWSE			SWSE	SESE
	S31			NENE			NWNE			SWNE	SENE
				NENW	Lot 1	(NWNW)		Lot 2	(SWNW)		SENW
				NESW	Lot 3	(NWSW)		Lot 4	(SWSW)		SESW
				NESE			NWSE			SWSE	SESE
	S32			NENE			NWNE			SWNE	SENE
				NENW			NWNW			SWNW	SENW
				NESW			NWSW			SWSW	SESW
				NESE			NWSE			SWSE	SESE
	S33			NWNE			SWNE			NENW	NWNW
				SWNW			SENW			NESW	NWSW
				SWSW			SESW			NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)		Lot 4	(SWSW)				SESW	
	S17			SWNW			NWSW			SWSW	SESW
	S18			NENE			NWNE			SWNE	SENE
				NENW			SENW			NESE	NWSE
				SESE							
	S20			NENE			NWNE			SWNE	NENW
				NWNW			NESE			NWSE	SWSE
				SESE							
	S21			NESW			NWSW			SWSW	SESW
				NESE			NWSE			SWSE	SESE
	S26			SWSW			SESW			SWSE	SESE
	S27			NENW			NESW			NWSW	SWSW
				SESW			NESE			NWSE	SWSE
				SESE							
	S28			NENE			NWNE			NENW	NWNW
				SWNW			SENW			SWSW	SESW
				NESE			NWSE			SWSE	SESE
	S29			NENE			NWNE			SENE	NWSE
				SESE							
	S33			NWNE			SWNE			SENE	NENW
				NESE			NWSE			SESE	
	S34			NENE			NWNE			SWNE	SENE
				SWNW			SENW			NESW	NWSW
				SWSW			SESW			NESE	NWSE
				SWSE							
	S35			NENE			NWNE			SWNE	SENE
				NENW			NWNW			SWNW	SENW
				NESW			SWSW			SESW	NESE
				NWSE			SWSE			SESE	
	S36			NENE			NWNE			SWNE	SENE
				NENW			NWNW			SWNW	SENW
				NESW			NWSW			SWSW	SESW

PLACE OF USE: (CONT)

T07N R24E S36	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:54

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-10873

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 20646.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVIOR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 10/02/1905

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	20646.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	20646.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE

PLACE OF USE: (CONT)

T03N R26E S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		NESE		NWSE		SESE		
S12		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S13		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NENE		NWSE		
R27E S05	Lot 4	(NWNW)		SWNW		NWSW		SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
		NWSE		SWSE		SESE		
S07		NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW		NWSW		SWSW		SESW
		SWSE		SESE				
S08		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
S17		NENW		NWNW		SWNW		SENW
		NWSW		SWSW				
S18		NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S19		NENE		NWNE		SWNE		SENE
T04N R26E S02	Lot 2	(NWNW)						
S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		SENW		NESW		NWSW		SWSW
		SESW		NESE		NWSE		SWSE
		SESE						
S07		NENE		SENE		NESE		SESE
S08		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S09		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S10		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S11		NWNW		SWNW		NWSW		SWSW
S14		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S15		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S16		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S17		NENE		SWNE		SENE		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE		SESE				
S18		NENE		NWNE		SWNE		SENE
		NESE		NWSE		SWSE		SESE

PLACE OF USE: (CONT)

T04N R26E S19			NENE		NWNE	SWNE	SENE
			NESW		SESW	NESE	NWSE
			SWSE		SESE		
	S20		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	NWSE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE				
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	NESE	NWSE
			SWSE		SESE		
	S23		NWNE		SWNE	NENW	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S25		SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S26		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S35		NENE		NWNE	SWNE	SENE
			NENW		SENW	NESE	NWSE
			SWSE		SESE		
	S36		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SESW	NESE
			NWSE		SWSE	SESE	
	R27E S31	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
			SESE				
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESE		NWSE	SWSE	SESE
	R26E S03		NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			NESE		SWSE	SESE	
	S06		NWNW				
	S08		NENE		SENE	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		SWNE		NENW	NWNW	SWNW
			SENW		NESW	NWSW	SWSW
			SESW		NWSE	SWSE	SESE
	S14		NWNW		SWNW	NESW	NWSW
			SWSW		SESW		
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE		NWSE	SWSE	SESE

PLACE OF USE: (CONT)

T05N R26E S20		NENE		NWNE		SWNE	SENE
		NESE		NWSE		SWSE	SESE
	S21	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S22	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S23	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
	S26	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
	S27	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S28	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SWSE		SESE			
	S32	NENE		SENE		NESE	SESE
	S33	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S34	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW	Lot 4 (SWSW)		Lot 5 (SESW)
		NESE		NWSE		SWSE	SESE
	S35	NWNW		SWNW		NWSW	SWSW
T06N R24E S01		Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NESE		NWSE	SWSE
		SESE					
	S02	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW		SESW	NWSE
		SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	S11	NENE		NWNE		SWNE	SENE
	S12	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NWSW		NESE			
R25E S01		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S02	SWNE		SWNW		SENW	NESW
		NWSW		SWSW		SESW	NWSE
		SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)	Lot 3 (NENW)		Lot 4 (NWNW)
		SWSW		SESW		SWSE	SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)	Lot 5 (SWNW)		SENW
		NESW		Lot 6 (NWSW)	Lot 7 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S07	NENE		NWNE		SWNE	SENE
		NENW		Lot 1 (NWNW)	Lot 2 (SWNW)		SENW
		NESW		Lot 3 (NWSW)	Lot 4 (SWSW)		SESW

PLACE OF USE: (CONT)

T06N R25E S07		NESE		NWSE		SWSE		SESE
S08		NENE		NWNE		NENW		NWNW
		SWNW		NWSW		SWSW		NESE
		NWSE		SWSE		SESE		
S09		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S10		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S11		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S12		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S13		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S14		NENE		NWNE		SENE		NESE
		SWSE		SESE				
S16		NWNE		NENW		NWNW		SWNW
S17		SWNE		SENE		NWNW		SWNW
		SENW		NESW		NWSW		NESE
		NWSE		SWSE		SESE		
S18		NENE		NWNE		SWNE		SENE
		SWSW						
S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
		SESE						
S22		NWSW		SWSW				
S23		NENE		SENE		NESE		SESE
S24		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S25		NENE		NWNE		SWNE		SENE
		NENW		SWNW		SENW		NESW
		NWSW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
S26		SESW		SWSE		SESE		
S27		NWNW		SWNW		SWSW		SESW
		SWSE	Lot 4	(SESE)				
S28		NENE		SENE		NESE		SESE
S33		NENE						
S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
		NENW		NWNW		SENW		NESW
	Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
S35		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S36		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
R26E S05	Lot 4	(SWSW)	Lot 5	(SESW)				
S06		SWSW		SESE				
S07		NENE		SWNE		SENE	Lot 1	(NENW)
		NWNW		SWNW		SENW		NESW
	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
		NWSE		SWSE		SESE		
S08		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
S17		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T06N R26E S17		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S18	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S19	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S20	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S21	SWNW		NESW		NWSW		SWSW
		SESW		SWSE				
	S27	NESW		NWSW				
	S28	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE		SESE				
	S29	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S30	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S31	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S32	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S33	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NWSE		SWSE
T07N R24E S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
	S17	SWNW		NWSW		SWSW		SESW
	S18	NENE		NWNE		SWNE		SENE
		NENW		SENW		NESE		NWSE
		SESE						
	S20	NENE		NWNE		SWNE		NENW
		NWNW		NESE		NWSE		SWSE
		SESE						
	S21	NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S26	SWSW		SESW		SWSE		SESE
	S27	NENW		NESW		NWSW		SWSW
		SESW		NESE		NWSE		SWSE
		SESE						
	S28	NENE		NWNE		NENW		NWNW
		SWNW		SENW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S29	NENE		NWNE		SENE		NWSE
		SESE						
	S33	NWNE		SWNE		SENE		NENW
		NESE		NWSE		SESE		
	S34	NENE		NWNE		SWNE		SENE
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE						
	S35	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S36	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T07N R24E S36	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED **NUNC PRO TUNC**

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 34-10935

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

OCT 15 2001

By _____ Clerk

_____ Deputy Clerk

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6.4 CFS
1113.0 AFY

PRIORITY DATE: 06/01/1896

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	1113.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	1113.0 AFY
DIVERSION TO STORAGE	05-01 10-15	6.4 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S07		NENE		SENE		NESE	SESE
	S08		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S11		NWNW		SWNW		NWSW	SWSW
	S14		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S15		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S16		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S17		NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S18		NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NESW		SESW		NESE	NWSE
			SWSE		SESE			
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	NWSE
	S21		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE					
	S22		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22			NESW		NWSW	NESE	NWSE
			SWSE		SESE		
	S23		NWNE		SWNE	NENW	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S25		SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S26		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S35		NENE		NWNE	SWNE	SENE
			NENW		SENW	NESE	NWSE
			SWSE		SESE		
	S36		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SESW	NESE
			NWSE		SWSE	SESE	
R27E S31		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
			SESE				
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESE		NWSE	SWSE	SESE
R26E S03			NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			NESE		SWSE	SESE	
	S06		NWNW				
	S08		NENE		SENE	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		SWNE		NENW	NWNW	SWNW
			SENW		NESW	NWSW	SWSW
			SESW		NWSE	SWSE	SESE
	S14		NWNW		SWNW	NESW	NWSW
			SWSW		SESW		
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE		NWSE	SWSE	SESE
	S20		NENE		NWNE	SWNE	SENE
			NESE		NWSE	SWSE	SESE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW		SESW		
	S26		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
	S27		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S28		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SWSE		SESE						
	S32		NENE		SENE		NESE		SESE		
	S33		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)		
			NESE		NWSE		SWSE		SESE		
	S35		NWNW		SWNW		NWSW		SWSW		
T06N R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NESE		NWSE		SWSE		
			SESE								
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
	S11		NENE		NWNE		SWNE		SENE		
	S12		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NWSW		NESE						
R25E	S01		NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S02		SWNE		SWNW		SENW		NESW		
			NWSW		SWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)		
			SWSW		SESW		SWSE		SESE		
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW		
			NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S08		NENE		NWNE		NENW		NWNW		
			SWNW		NWSW		SWSW		NESE		
			NWSE		SWSE		SESE				
	S09		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S10		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)			
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)	
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)			
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-10935

PLACE OF USE: (CONT)

T06N R26E	S20	NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S21	SWNW		NESW		NWSW		SWSW
		SESW		SWSE				
	S27	NESW		NWSW				
	S28	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE		SESE				
	S29	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S30	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S31	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S32	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S33	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NWSE		SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW		
	S17	SWNW		NWSW		SWSW		SESW
	S18	NENE		NWNE		SWNE		SENE
		NENW		SENW		NESE		NWSE
		SESE						
	S20	NENE		NWNE		SWNE		NENW
		NWNW		NESE		NWSE		SWSE
		SESE						
	S21	NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S26	SWSW		SESW		SWSE		SESE
	S27	NENW		NESW		NWSW		SWSW
		SESW		NESE		NWSE		SWSE
		SESE						
	S28	NENE		NWNE		NENW		NWNW
		SWNW		SENW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S29	NENE		NWNE		SENE		NWSE
		SESE						
	S33	NWNE		SWNE		SENE		NENW
		NESE		NWSE		SESE		
	S34	NENE		NWNE		SWNE		SENE
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE						
	S35	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S36	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
R25E	S28	SWSW		SESW		NWSE		SWSE
	S31	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S32	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-10935

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10873.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39
	SWSE	40				
S24	NENW	39	NWNW	38	SWNW	39

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J Wildman
Presiding Judge of the
Snake River Basin Adjudication

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**ORDER GRANTING MOTION TO SHORTEN TIME AND DENYING MOTION TO STRIKE**

BACKGROUND

On October 17, 2024, Hearing Officer Burdick issued an *Order Authorizing Discovery and Email Service; Scheduling Order; Notice of Hearing* ("*Order*"). The *Order* set the deadline to file dispositive motions for January 24, 2025. *Order*, at 3.

On January 13, 2025, Moore Canal Users ("Moore") filed a motion to dismiss the subject action.

On January 24, 2025, Big Lost River Irrigation District ("BLRID") filed a joinder in Moore's motion to dismiss, "reserve[ing] the right to reply to any response filed in opposition to said motion or to participate in any oral argument on the motion." *BLRID's Joinder in Supp. Moore's Mot. to Dismiss*, at 1.

On January 27, 2025, Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively, "Pehrsons") filed a response to Moore's motion to dismiss concurrently with a *Motion to Strike Big Lost River Irrigation District's Joinder; Motion to Shorten Time* ("*Motion to Strike*"). Within the *Motion to Strike*, the Pehrsons request (1) BLRID's joinder be stricken and they be prevented from filing a reply to the Pehrsons' response and (2) the Hearing Officer rule on the *Motion to Strike* before the February 3, 2025 reply deadline. *Motion to Strike*, at 3.

There being no factual issues and only arguments of a legal nature, the Hearing Officer feels no further argument is necessary and renders a decision.

ANALYSIS

With the reply deadline approaching for the Moore's motion to dismiss, the Pehrsons' motion to strike basically seeks to protect the Moore's original motion to dismiss from being morphed to include new issues or expand into other areas. It is a valid concern, from both the standpoint of fairness as well as the efficiency of the administrative proceeding.

The Pehrsons cite to *Ramos v. Dixon*, 144 Idaho 32, 34–35, 156 P.3d 533, 535–36 (2007), to support their assertion that a joinder must be filed contemporaneously with the motion being

joined. *Motion to Strike*, at 2–3. However, because all motions in that case raised identical issues, and counsel opposing the joinder agreed to the motions being heard and then argued the motions during the trial court hearing, the Idaho Supreme Court had no need to address the timeliness issue and did not make a ruling on that requirement. *See Ramos*, 144 Idaho at 34–35, 156 P.3d at 535–36.

In the subject case, BLRID's joinder does not add any additional issues to Moore's original motion to dismiss. Given that, and given the joinder was filed by the dispositive motion deadline set in the *Order* and before the Pehrsons filed their response, the Hearing Officer sees little disadvantage to Phersons' position as a result.

Additionally, the motion to dismiss is a legal argument that seems to need no further factual expansion. Therefore, the motion to strike is denied, however, the joining party is restricted exclusively to the augments raised in Moore's motion to dismiss.

ORDER

IT IS HEREBY ORDERED that Byron Pehrson, Loy Pehrson, and Randy Pehrson's January 27, 2025 motion to shorten time is GRANTED and their motion to strike is DENIED.

DATED this 31st day of January 2025.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

Chris M. Bromley Candice McHugh McHugh Bromley, PLLC cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ Email
Skyler C. Johns OLSEN TAGGART PLLC sjohns@olsentaggert.com	☒ Email
Norman M. Semanko Garrett M. Kitamura Payton G. Hampton PARSONS BEHLE & LATIMER nsemanko@parsonsbehle.com gkitamura@parsonsbehle.com phampton@parsonsbehle.com	☒ Email
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Courtesy copy via email:

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mx222moss@aol.com

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Paralegal

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Attorneys for Big Lost River Irrigation District

RECEIVED
Feb 03, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	BLRID'S RESPONSE IN SUPPORT OF MOSS FARMS' MOTION FOR SUMMARY JUDGMENT

Intervenor Big Lost River Irrigation District ("BLRID"), by and through its counsel of record, Parsons Behle & Latimer, hereby submits this Response in Support of Moss Farms, Inc.'s Motion for Summary Judgment, previously filed in this matter, and states as follows: BLIRID is in full support of Moss Farms, Inc.'s Motion for Summary Judgment and respectfully requests that the Idaho Department of Water Resources grant the relief requested therein.

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///

///

DATED this 3rd day of February, 2025.

PARSONS BEHLE & LATIMER

Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura
Attorneys for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of February, 2025, a true and correct copy of the foregoing document was filed by email to file@idwr.idaho.gov, and I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Original to:	
IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83729 Boise, ID 83720	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: file@idwr.idaho.gov; Garrick.baxter@idwr.idaho.gov
Copies To:	
Chris M. Bromley Candice McHugh MCHUGH BROMLEY, PLLC P. O. Box 107 Boise, ID 83701 *Attorneys for Bryon Pehrson, Loy Pehrson & Randy Pehrson*	☐ U.S. Mail ☐ Facsimile: 208/287-0864 ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: cbromley@mchughbromley.com; cmchugh@mchughbromley.com
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Skyler C. Johns OLSEN TAGGART PLLC P. O. Box 3005 Idaho Falls, ID 83403	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: sjohns@olsentaggart.com

Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW 25 North 2nd East Rexburg, ID 83440	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☐ Email: herickson@rex-law.com; mmortimer@rex-law.com
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Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura

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Attorneys for Moore Canal Users'

RECEIVED
Feb 03, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	**MOORE CANAL USERS REPLY TO PEHRSONS' RESPONSE TO MOTION TO DISMISS**

COMES NOW, Moore Canal Users, by and through their attorney of record, Rigby, Andrus & Rigby Law, *PLLC*, and, pursuant to IDAPA 37.01.01.220 and IRCP Rule 12(b)(6), hereby replies to the *Pehrsons' Response to Moore Canal Users' Motion to Dismiss* (Response) as follows:

ARGUMENT

1. **The Pehrson's Petition Still Lacks an Identifiable Legal Basis Upon Which it is Authorized and Must Be Dismissed.**

The only authority Pehrsons cite in the Petition is IDAPA 37.01.01.300.02.d. (*Response* at 2).The entire IDAPA section is as follows:

> 02. Content of Pleadings and Written Motions. A pleading or written motion *shall fully state*:
> a. The facts upon which it is based;

b. The provision of statute, rule, order, or other controlling law upon which it is based;
c. The relief sought, including any proposed limitation (or the denial) of any right, license, or permit sought in an application.
d. Petitions for declaratory orders shall state the declaratory ruling that the petitioner seeks.

Emphasis Added. However, this rule does not authorize the filing of a petition for a declaratory ruling without further legal basis. (*Id*. at (b)). The *Response* ignores the fact that the Petition does not meet the requirements of this rule. This rule is not made up of separate and distinct segments. It consists of elements that are all required in a pleading or a motion filed with IDWR as evidenced by the use of the words "shall fully state." (*Id*.) A petition for a declaratory order/ruling must include everything described in sections (a), (b), (c), and (d). The Petition completely omits the requirements of section (b) which requires a description of "the provision of statute, rule, order, or other controlling law upon which it based." (*Id*.).

The *Response* alleges that the "Petition asks for a declaratory ruling as to the Director's duty and authority to deliver water in priority as required by Idaho law and his statutory duty." (*Response* at 3). However, Pehrsons cite no statute such as Chapter 6, Title 42, or other statute pertaining to the Director's authority.

Pehrsons fail to provide a legal basis of "any statute, rule, order, or other controlling law" as required by IDAPA 37.01.01.300.02.d. that allows them to seek the requested relief in the Petition. The Petition should be dismissed in its entirety.

2. Pehrsons Intentionally Misinterpret How Idaho Codes §§ 67-5232 and 67-5255 are applied.

Pehrsons should be citing Idaho Codes §§ 67-5232 and 67-5255 as the legal basis for the requested declaratory rulings in the Petition and meeting the requirements of those sections. They do not. The *Response* misconstrues the contents of Idaho Codes §§ 67-5232 and 67-5255

by alleging that the sections in the statues are separate and distinct basis for filing a petition for declaratory ruling. (*Response* at 3). The requirements in the statutes are not different options that can be chosen if the first requirement cannot be complied with. Idaho Code § 67-5232 states,

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

Idaho Code §67-5255 states,

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any order issued by the agency.
> (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.
> (3) A declaratory ruling issued by an agency under this section is a final agency action.

Pursuant to the above statutes, a petitioner may file a petition for a declaratory ruling as to the applicability of any statutory provision, rule, or order administered or issued by an agency. Then, it clarifies that the agency may initiate a contested case in the matter even when a declaratory ruling has been requested. Lastly, it states that if a declaratory ruling is issued, it is classified as a final agency action.

Neither statute says that an agency's decision to initiate a contested case creates a right to a declaratory ruling. Pehrsons have provided no authority under which they ask for the declaratory relief they are seeking. Just because IDWR decided that the matter should move forward to a contested case does not mean that the Petition is not deficient and should not be dismissed. This Petition should be dismissed in its entirety because it fails to cite any legal basis upon which the requested declaratory rulings for watermaster instructions are authorized and because it is inconsistent with Idaho Codes §§ 67-5232 and 67-5255.

3. The Petition does apply to Moore Canal Users.

Pehrsons' assert that the Petition does not apply to Moore Canal Users and is only directed at the delivery of water to Moss' River Diversion. It is clear from the language of the Petition that the second request for relief is general in nature and not just focused on Moss. In the case caption of the Petition, the second matter the Petition seeks a declaratory ruling on is described as "IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR." There is no indication in the case caption or in the body of the Petition that this only applies to Moss and his River Diversion.

The Second form of relief sought in the Petition is described as follows:

> 2. Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Petition for Declaratory Ruling for Watermaster Instructions, at 2.

The Petition continues to assert that "[t]he Department should issue watermaster instructions defining when futile call exists for natural flow water rights but for storage water releases from Mackay Reservoir." (Petition at 7).

It is clear from the language of the Petition that the intent is not to limit this watermaster instruction to Moss' River Diversion only, but generally includes all natural flow and storage diversions from Mackay Reservoir. Moore filed a petition to intervene which was granted because this matter does not only affect Moss and delivery of water to his River Diversion but affects all downstream users.

4. Pehrsons Are Not "Entitled to Same Conditions" and Cannot Preemptively Use Futile Call to Change How Water Is Delivered to Senior Appropriators.

Pehrsons request that the Watermaster of District 34 apply futile call to the detriment of a senior appropriator, even if it were only for delivery of water to Moss' River Diversion, is unsupported in Idaho law. Futile call is a last resort mechanism available to junior appropriators that want to receive water in the event that geological and hydrologic conditions are present that are beyond the control of the senior appropriator that make delivery of water to the senior appropriator impossible. It is not a preemptive tool that can be used to shut off a senior or decide that a senior cannot receive water that is, in reality, deliverable. If futile call is administered in the manner being presented, even if it arguably only applies to Moss, it will still have the effect of shutting off downstream users by reducing the amount of water flowing downstream.

Pehrsons assert that they are entitled to the same conditions that were present when they perfected their water right but provide no authority for this proposition. Pehrsons assertion that junior water right holders are entitled to have the Big Lost River operated consistent with the conditions that existed at the time their water right was perfected is not only unsupported by any authority, but if applied generally in Idaho, would be highly disruptive.

Imagine Water District 01's water master managing the Snake River, not simply by priority, but attempting to ensure that every water right was managed as it would have been before the creation of reservoirs or other alterations to the system that postdate that specific right's priority date. As a brief example only including four reservoirs on the Snake and its tributaries – a 1904 water right would have to be managed as if no reservoirs existed; a 1906 right could be impacted by Milner Dam, but not American Falls, Palisades, or Ririe; a 1960 right by Milner and Palisades, but not American Falls or Ririe; and a 1979 right could be impacted by all four. This is not workable.

Since the Pehrson's water right was perfected, the Mackay Dam was constructed, creating the Mackay Reservoir, and Water District 34 was created. It would be impossible to administer water in Mackay Reservoir as if the reservoir did not exist at all, ignore the IDAPA rules governing Water District 34, and ask the watermaster to apply futile call based on a certain trigger even though in reality, water can still be delivered to a senior appropriator.

Pehrsons' two requested watermaster instructions attempt to incorrectly apply futile call. If granted, the requested relief would negatively affect delivery of water to all users downstream of Moss' River Diversion. The Petition should be dismissed in its entirety.

CONCLUSION

Pehrsons' Petition for Watermaster Instructions should be dismissed in its entirety as it does not provide an identifiable legal basis upon which the requested declaratory rulings are authorized as required, requests an unsupported application of futile call, and if granted, would affect the entire basin and harm all downstream users, not just Moss.

DATED this 3rd day of February, 2025.



Michelle Mortimer

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

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DATED this 3rd day of February, 2025.

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RECEIVED
Feb 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSONS' RESPONSE TO MOSS MOTION FOR SUMMARY JUDGMENT**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their counsel of record, McHugh Bromley, PLLC, and hereby respond to the *Motion to for Summary Judgment* (Jan. 24, 2025), filed by the Moss Farms, Inc. ("Moss"). Pehrsons' response is supported by the *Declaration of Lucas Yockey* ("Yockey Dec."), the *Declaration of Preston Marcroft* ("Marcroft Dec."), the *Declaration of Byron Pehrson* ("B. Pehrson Dec."), the *Declaration of Loy Pehrson* ("L. Pehrson Dec."), the *Declaration of Randy Pehrson* ("R. Pehrson Dec."), the *Declaration of David R. Tuthill, Jr., Ph.D., P.E.* ("Tuthill Dec."), and the *Declaration of Chris M. Bromley* ("Bromley Dec.").

I. INTRODUCTION

Moss misapprehends the case.[1] Moss incorrectly argues Pehrsons are forever barred from contesting the delivery of his water rights because the Pehrsons did not protest *Application for Transfer No. 79972* (Oct. 27, 2015) ("Application"), which was subsequently approved by the Idaho Department of Water Resources ("IDWR" or "Department") on December 14, 2015 ("Transfer"), thereby adding a second point of diversion on the Big Lost River below the Darlington Sinks to Moss' natural flow water rights. As will be explained, what is actually at issue in this proceeding is whether storage water held by the Big Lost River Irrigation District ("BLRID") may be used by Moss as carriage water to the River Diversion when the Big Lost River is broken at the Darlington Sinks. It is Pehrsons' contention that this practice is unlawful, due to the fact that the *Transfer* never addressed the storage water rights of BLRID, with BLRID's rights preventing Moss from receiving storage water at the River Diversion, regardless as to whether the storage water belongs to him or to other users in the basin.

II. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law." *Marchand v. Jem Sportswear, Inc.*, 143 Idaho 458, 458, 147 P.3d 90, 90 (2006). The Hearing Officer is to "construe[] the record in the light most favorable to the non-moving party, and draw[] all reasonable inferences in favor of that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate." *Id*. "If the record contains conflicting inferences or reasonable

[1] On February 3, 2025, Big Lost River Irrigation District filed a *Response in Support of Moss Farms' Motion for Summary Judgment*, wherein BLRID stated it "is in full support of Moss Farms, Inc's Motion for Summary Judgment and respectfully requests that the Idaho Department of Water Resources grant the relief requested therein." Given the joinder, it can also be said that BLRID misapprehends the matter.

minds might reach a different conclusion, a summary judgment must be denied." *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). "All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions." *Id*.

III. STATEMENT OF UNDISPUTED FACTS

Pehrsons generally agree with the numbered paragraphs in Moss' *Statement of Undisputed Facts*.[2] Additional facts that are not contained in the Moss *Statement of Undisputed Facts* and are relevant to the issue at hand are as follows:

A. Moss Water Rights

1. The natural flow water rights that appear in the caption of this case, that are owned today by Moss, were decreed in the Snake River Basin Adjudication ("SRBA") to Catherine M. and Lee J. Watson ("Watson"), for irrigation, with a single point of diversion on the Big Lost River at a location known as the 3 in 1 Ditch, summarized as follows:

	Water Right No. 34-182	**Water Right No. 34-381A**
Quantity:	1.60 cfs	2.40 cfs
Priority Date:	6/1/1883	9/26/1894

Tuthill Dec. at 2-3, Exs. 2-3.

2. On November 16, 2012, IDWR changed ownership of the above-referenced water rights from Watson to Moss. *Id*. at 3, Ex. 5.

[2] It should be noted that there is an error in Moss' *Statement of Undisputed Facts*, found on pages 2-3 of Moss' *Memorandum in Support of Motion for Summary Judgment*, to wit: there is no numbered paragraph 3, 4, or 8, and there is a duplicate paragraph 7.

3. The above-referenced water rights share a 200-acre place of use and a combined diversion rate of 5.2 cfs with water right no. 34-2379F, *Declaration of Skyler Johns in Support of Motion for Summary Judgment, Ex. H* at 2 (Condition of Approval No. 2) ("Johns Dec.").

4. Water right no. 34-2378F is a ground water right with a priority date of August 8, 1960. *Tuthill Dec.* at 3, Ex. 4.

B. Pehrson Water Rights

5. The water rights of Byron Pehrson and Loy Pehrson are summarized as follows:

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-28G	8/31/1884	0.80	40 acres	3 in 1
34-638A[3]	10/12/1884	0.15	7.5 acres	3 in 1
34-14189	6/1/1885	1.54	77 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	96.1 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	154 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	115.5 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

B. Pehrson Dec. at 2; *L. Pehrson Dec.* at 2.

6. The water rights of Randy Pehrson are summarized as follows:

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-733	7/21/1886	1.44	72.4 acres	Burnett
34-10236	5/30/1885	2.00	100 acres	Darlington
34-10933	4/22/1884	1.63	81.40 acres	Darlington
34-10950	5/31/1884	0.72	36 acres	Darlington
34-13874	7/21/1886	1.00	50 acres	Burnett

[3] I recently bought a portion of this water right with the records of IDWR not yet showing the updated ownership.

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-14389	4/22/1884	0.55	27.30 acres	Darlington

R. Pehrson Dec. at 2.

7. The water rights of Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively the "Pehrson Water Rights") are junior to Moss water right no. 34-182 and senior to Moss water right nos. 34-381A and 34-2379F.

8. The Pehrson Water Rights divert water from the Big Lost River at the ditches and canals that are shown in the tables above, all of which are upstream of the Darlington Sinks. *B. Pehrson Dec.* at 2-3; *L. Pehrson Dec.* at 2-3; *R. Pehrson Dec.* at 2.

C. BLRID Storage Water Rights

9. The BLRID storage water rights were decreed in the SRBA on October 15, 2001, authorize water to be stored in Mackey Reservoir, and consist of the following water right nos.: 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935 (collectively the "BLRID Storage Rights"). *Tuthill Dec.* at 3, Ex. 6.

10. The point of diversion element for the BLRID Storage Rights, shown on the following page, explains that water is diverted at and stored behind Mackey Dam, in T07N, R23RE, S12, SENW, and is then diverted and/or rediverted, downstream at twenty-two named ditches and canals, such as the 3 in 1 Ditch and Moore Canal:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id., Ex. 6.

11. In the SRBA, BLRID claimed the above-referenced canals and ditches as points of diversion and/or rediversion. *Id*. at 4, Ex. 7.

12. In the SRBA, IDWR recommended the above-referenced canals and ditches as points of diversion and/or rediversion. *Id*. at 4, Ex. 8.

D. The 2015 Moss Transfers

13. On April 6, 2015, Moss filed the *Application* with IDWR. *Johns Dec., Ex. C*, at 1. In the *Application*, Moss did not seek to remove or eliminate the 3 in 1 Ditch as a point of diversion, instead he sought to add the River Diversion as a second point of diversion. *Johns Dec., Ex. C* at 2, ln. A.2; *Tuthill Dec.* at 5; *Yockey Dec.* at 3.

14. The River Diversion would "allow [Moss] to pump directly from the river," *Johns Dec., Ex. C*, at 1, meaning it is not on a canal or ditch that is referenced as a point of diversion and/or rediversion on the BLRID Storage Rights.

15. After Moss filed the *Application*, then-Watermaster Yockey was asked by IDWR to comment as to the *Application*, *Johns Dec., Ex. E*, with then-Watermaster Yockey checking the box that he did not oppose approval. *Yockey Dec.* at 3.

16. When IDWR addressed the *Application* with Watermaster Yockey, BLRID storage water was not discussed as it related to the Moss Water Rights. *Yockey Dec.* at 3.

17. The River Diversion, which is a second point of diversion for the Moss Water Rights, is what is known by IDWR as an "alternate point of diversion." *Tuthill Dec.* at 5.

18. Neither the *Application* nor the *Transfer* addressed the storage water rights of BLRID. *Johns Dec., Exs. C & H*; *Tuthill Dec.* at 6; *Yockey Dec.* at 3-4.

19. A condition on the face of the *Transfer* states: "This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources." *Johns Dec., Ex. H* at 1.

20. On December 14, 2015, the Moss Water Rights were subject to a second IDWR transfer. *Tuthill Dec.* at 4, Ex. 9 ("2015 Transfer").

21. The *2015 Transfer* is neither included in the *Johns Dec.* nor discussed in the Moss *Motion* or *Memorandum In Support*.

22. The *2015 Transfer* adds a condition to the Moss Water Rights that was not included in the *Transfer*, explaining the use of water right no. 34-2379F, a ground water right with a priority date of 8/8/1960, when it is used in conjunction with the Moss Water Rights. *Tuthill Dec.* at 4.

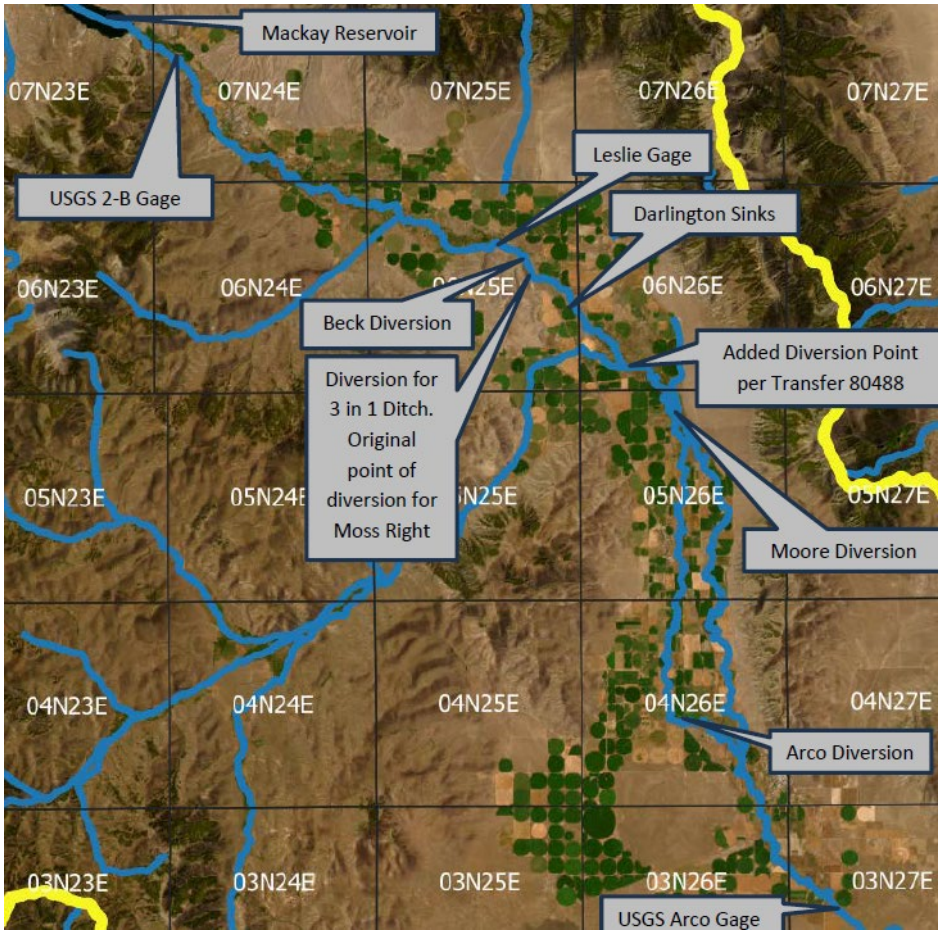
E. Physical Relationship Between Pehrsons, Moss, BLRID, And Moore Canal

23. The River Diversion is located approximately 5.9 miles downstream on the Big Lost River from the 3 in 1 Ditch. *Tuthill Dec.* at 5.

24. Between the 3 in 1 Ditch and the River Diversion is what is known as the Darlington Sinks, which, when flows are low, is a losing reach of the Big Lost River. *Johns Dec.*, *Ex. G* ("the proposed new point of diversion is located downstream from the current point of diversion on a losing river reach"); *Yockey Dec.* at 3; *Marcroft Dec.* at 2.

25. The Moore Canal, also known as the Moore Diversion, is located downstream of the River Diversion.[4]

26. The features mentioned above are shown on the following map:



Tuthill Dec. at 2.

[4] It is germane to discuss the Moore Canal because the Moore Canal Users are party to this case.

27. The Pehrson Water Rights, summarized above, divert from the canals and ditches described in the BLRID Storage Rights, with the Pehrsons holding storage water interests in BLRID. *B. Pehrson Dec.* at 2; *L Pehrson Dec.* at 2; *R. Pehrson Dec.* at 2.

28. Moss holds interests in the BLRID Storage Water Rights that are diverted and/or rediverted at the 3 in 1 Ditch and the Moore Canal. *B. Pehrson Dec*. at 3, Ex. 1.

F. IDWR's 2021 Futile Call Determination And Curtailment Of Rights Below The Darlington Sinks

29. On July 22, 2021, Watermaster Yockey contacted IDWR to "express a concern that a futile call determination request was imminent due to the rapidly diminishing water supply in the Big Lost River . . . ." *Bromley Dec., Ex. 1* at 1.

30. On July 23, 2021, Watermaster Yockey reported to IDWR that "delivery calls for decreed [natural flow] water (appx. 12 cfs) at the Moore Diversion were satisfied at the head of the ditch, but were not making it to the first user in a beneficially usable amount." *Id*.

31. On July 24, 2021, Watermaster Yockey "notified the Department that the priority delivery date had changed from 1884 to 1883, and that [he] would attempt to continue to deliver the senior rights to the Moore Diversion for the remainder of the weekend."

32. On July 26, 2021, Watermaster Yockey sent an email to Tim Luke, former IDWR employee, requesting a determination of futile call:

> Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 7-24-2021 and no water is reaching the Diversion. There is no storage water being delivered to any canal. This makes the river shrink 100%. If the futile call is determined the last point of delivery of water on the Big Lost River would be moved up to the Beck Canal Heading which would allow beneficial use again. As watermaster I have the general consent of the [Water District No. 34] advisory board and The Big Lost River Irrigation District approves WD34's request.

Bromley Dec., Ex. 1 at 7.

33. Through July 26, 2021 email communication between IDWR and BLRID, it was established that, while a majority of the WD34 advisory board supported a determination of futile call, two of the advisory board members, Shawn Anderson and Jason Anderson, did not. *Id*. at 6.

34. On July 26, 2021, the BLRID General Manager responded via email to Mr. Luke, stating: "I spoke with Shawn [Anderson] just now and he agreed to support the futile [call] . . . . When I spoke with Jason [Anderson] he was against making the [f]utile call." *Id*.; *see also id.* at 2 ("Shawn Anderson agreed to support the determination and Jason Anderson did not").

35. Jason Anderson is a water user on the Moore Canal. *B. Pehrson Dec.* at 4.

36. In support of the futile call determination, IDWR employee David Hoekema prepared a series of graphs and tables showing the flow of the Big Lost River during the month of July, including at the 2B Gage. *Bromley Dec., Ex. 1* at 3-5.

37. According to Figure 3, prepared by Mr. Hoekema, between July 22 and July 26, the flow at the 2B Gage was approximately between 200 to 150 cfs, as shown below:

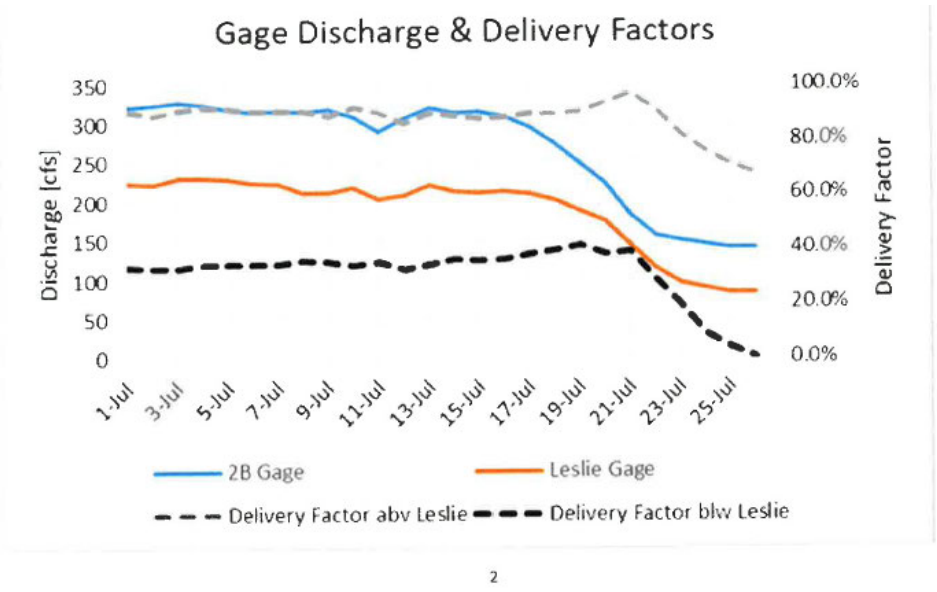


Figure 3 Flow past the 2B Gage is shown by the blue line, flow past the Leslie Gage is shown by the orange line, the delivery factor above the Leslie Gage is shown by the dashed, grey line, and the delivery factor blw Leslie is shown by the dashed, black line.

Id. at 3-4.[5]

38. On July 26, 2021, internal email communication from Mr. Hoekema to fellow IDWR employees, Mr. Luke and Rob Whitney, established: "As the reservoir has been flat-lined, so as to only pass inflows (natural flow), it appears that the natural flow in the river is not adequate to carry water to the Moore Diversion." *Id*. at 3.

39. On July 26, 2021, Mr. Whitney sent a letter to Watermaster Yockey informing him that IDWR supported the determination of futile call:

> It is evident that curtailment of junior surface water rights upstream of the Moore Diversion to satisfy senior surface water rights at the Moore Diversion constitutes a futile call. Therefore, you are instructed to distribute surface water flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate

[5] In the *Petition for Declaratory Ruling for Watermaster Instructions* (Feb. 14, 2024), Watermaster Yockey and Watermaster Marcroft opined that futile call should be determined in this reach when flow at the 2B Gage "is 187 cfs or less for three (3) consecutive days . . ." resulting in curtailment of the Moss Water Rights at the River Diversion and Moss able to divert his Water Rights at the 3 in 1 Ditch. *Petition* at 2. The opinion of the Watermasters is consistent with Figure 3.

> source for the remainder of the 2021 irrigation season, unless it is subsequently determined that delivery of the senior water rights at the Moore Diversion is no longer futile.

Id. at 2 (emphasis added).

G. IDWR's 2022 Futile Call Determination, Curtailment Of Rights Below The Darlington Sinks, And Rescission Of The Same Due To Introduction Of Moore Canal Storage Water To The River Diversion

40. On August 15, 2022, Watermaster Marcroft sent an email to IDWR employees Tim Luke and Rob Whitney, wherein he requested that IDWR make a finding of futile call:

> I would like to request that IDWR, please make a futile call for the delivery of water to the Moore Diversion based on the lack of beneficial use of the decreed water. Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 8-12-2022. I called Dave Hokeman and told him that there was no water making it to the Moore Diversion. so we agreed to curtail all of the 1884 decrees in attempt to dilver the 8-10-1883 decree to the Moore Diverson. All of the 1884 decrees where turned off by 11:30 that day.There is no storage waterbeing delivered to any canal. as of this mourning there is no water making it to the Moore Diversion.This makes the river shrink 100%. if the futile call is determined the last point of delivery of water on the Big Lost River would be be moved up to the Beck Canal Heading which would allow beneficial use again. I have been in contact with Vernon Roche Chairman of advisory borad and 5 of the 9 members support this. I also talked to the chairman of Big Lost River Irrigation Distric and they approve WD"34 request.

Bromley Dec., Ex. 2 at 3.

41. On August 15, 2022, Mr. Luke agreed with a determination of futile call and instructed Watermaster Marcroft to "deliver water to more junior priority rights on the river between Mackey Reservoir and the Beck Ditch." *Id*. at 1.

42. Mr. Luke further stated: "Please note that this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season. . . . . <u>This guidance is consistent with last year's futile call approval</u> . . . ." *Id*. (emphasis added).

43. On August 18-19, 2022, and inconsistent with the prior year, Jason Anderson, Moore Canal water user, communicated with Mr. Luke regarding the determination of futile call, and particularly the Moss Water Rights and delivery of water to the River Diversion. *Id., Ex. 3* at 1-6.

44. Sometime on or before September 2, 2022, IDWR reversed its finding of futile call, as explained through an email from David Hoekema to Mr. Luke and Rob Whitney, with copies to IDWR employees Matthew Anders and Director Mathew Weaver:

> I had a phone conversation with Randy Pehrson this morning. He is very upset that Dennis Moss is able to call for storage water and receive decree (1883 natural flow) at the same time. After the futile call in mid-August, it was determine[d] that decree water in the river was inadequate to carry water to Moss. . . . . His argument is that without storage water deliveries to Moss, it would be impossible to deliver the decree [natural flow] water to Moss.

Id., Ex. 4 at 1 (emphasis added).

45. According to Mr. Hoekema: "When Moss runs out of storage, though I think a futile call is very appropriate . . . ." *Id*. at 2 (emphasis added).

46. On September 2, 2022, Mr. Luke responded to Mr. Hoekema, stating: "I agree with your explanation and perspective. We should probably meet today to discuss this . . . . Rob [Whitney] was going to call Preston [Marcroft] to get an update. I (and maybe Rob) have a meeting at 10 and Mat W[eaver] is over at Gov's office from 10 to 11 approx." *Id*. at 1.

47. Late in the day on September 2, 2022, Mr. Whitney sent an email to Watermaster Marcroft informing him that the August 15, 2022 futile call decision of Mr. Luke had been rescinded, due to Mr. Whitney's belief that Moss had sufficient storage water to carry the Moss Water Rights to the River Diversion:

> Randy Pehrson contacted David Hoekema with concerns about the futile call, and delivering both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-

> 1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. You have reported this afternoon that about 600 inches (12cfs) of water is passing the Moss diversion but there are no calls for delivery below Moss. Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified. It appears appropriate to deliver additional water upstream of Moss by adjusting the decree to deliver more 1884 rights, while maintaining delivery to Moss. Your suggestion to adjust the decree date to 8-31-1884 may be a reasonable place to start, but IDWR will defer to your local knowledge of what the demand might be if a certain decree date is set. As we discussed, please stay in contact with Dennis Moss as you deliver additional decrees. If the demand under a new decree date results in a shortage of water to satisfy Moss, the date should be adjusted accordingly. Please reach out if you have any questions.

Marcroft Dec., Ex. 1 at 1-2 (italics in original) (emphasis added).

48. While Mr. Whitney believed that Moss had sufficient storage water to help carry the decreed right, this was not correct, as Moss had already exhausted his storage. *B. Pehrson Dec.* at 4.

49. The storage water that was used to carry the Moss Water Rights through the Darlington Sinks and to the River Diversion was the BLRID storage water interests of Moore Canal users, including Jason Anderson. *Id*.

50. The introduction of Moore Canal water users' storage water to carry the Moss Water Rights to the River Diversion resulted in curtailment of the Pehrson Water Rights differently and prior to their historical cutoff dates. *Yockey Dec.* at 4-5; *Marcroft Dec.* at 3-4.

H. BLRID Internal Records Do Not Support Moss' Use Of Storage Water At The River Diversion, Nor Did Moss Assert In The Transfer Process That BLRID Storage Water Was Implicated

51. The records of BLRID establish that Moss is allowed to use storage water at the 3 in 1 Ditch and the Moore Canal but not at the River Diversion, consistent with the BLRID Storage Rights. *B. Pehrson Dec.* at 3.

52. BLRID has not filed a transfer with IDWR to add the River Diversion as a point of diversion and/or rediversion to the BLRID Storage Rights. *Tuthill Dec.* at 6.

53. Throughout the *Application* and *Transfer* proceedings, the only water rights at issue were the Moss Water Rights, with Moss never alleging that BLRID Storage Rights would be used differently or as carriage water. *See Johns Dec*.; *Yockey Dec.* at 3; *B. Pehrson Dec.* at 3; *L. Pehrson Dec.* at 3; *R. Pehrson Dec.* at 3.

54. Throughout the *Application* and *Transfer* proceedings, the Watermaster was never asked to comment on the use of BLRID Storage Rights as carriage water for the Moss Water Rights to the River Diversion. *Yockey Dec.* at 3.

55. Because the BLRID Storage Rights were neither at issue in the *Application* nor amended in the *Transfer*, it was not foreseeable that the BLRID Storage Rights would be effectively altered by the *Transfer* and could be used by Moss at the River Diversion and/or differently than they were used by Moss historically at the 3 in 1 Ditch. *Tuthill Dec.* at 6; *B. Pehrson Dec.* at 3; *L. Pehrson Dec.* at 3; *R. Pehrson Dec.* at 3.

56. The BLRID Storage Rights are not authorized to be delivered by Moss at the River Diversion, making the question at issue in this matter unforeseeable.

57. If it had been foreseeable that BLRID Storage Rights would have been used as carriage water to the River Diversion, then-Watermaster Yockey would have opposed approval of the *Application*, *Yockey Dec.* at 5, and Pehrsons would have protested, *B. Pehrson Dec.* at 3; *L. Pehrson Dec.* at 3; *R. Pehrson Dec.* at 3.

I. Opinions Of The Watermasters Support Futile Call

58. It is not uncommon for IDWR to issue watermaster instructions that establish futile call or when a river breaks. *Tuthill Dec.* at 5.

59. Establishing futile call or when a river breaks is factually specific and made on a case-by-case basis. *Id*.

60. According to the Watermaster, when the Big Lost River is connected between the 3 in 1 Ditch and the Moore Canal, the River Diversion may be used by Moss; therefore, when the River is broken at the Darlington Sinks, use of the River Diversion must cease. *Yockey Dec.* at 4-5; *Marcroft Dec.* at 3-4.

61. It is the opinion of the Watermasters and has been their practice, as evidenced in 2021 and 2022, that the Big Lost River is connected between the 3 in 1 Ditch and the Moore Diversion when flow at the 2B Gage is 500 cfs for three consecutive days, with the River broken at the Darlington Sinks when flow at the 2B Gage is 187 cfs or less for three consecutive days. *Petition for Declaratory Ruling for Watermaster Instructions* at 2 (Feb. 14, 2024); *see also Bromley Dec., Ex. 1* at 3-4, Fig. 3 (July 2021 flow at the 2B Gage as presented by David Hoekema).

IV. ARGUMENT

As will be explained below, there are genuine issues of fact and law in this case concerning Moss' use of the River Diversion as an alternate point of diversion when BLRID Storage Rights are used as carriage water; therefore, in construing the matter in the light most favorable to Pehrsons, the Hearing Officer should deny Moss' motion for summary judgment because the *Transfer* did not and could not have addressed storage water.

A. Pehrsons Are Not Collaterally Attacking The *Transfer* Because The *Transfer* Never Addressed And Could Not Have Addressed The Use Of BLRID Storage Water As Carriage Water

Moss states Pehrsons are attempting to undo the *Transfer*, and without directly saying it, argues that this proceeding is a collateral attack of a final order of the Department. "Generally,

final judgments, *whether right or wrong*, are not subject to collateral attack." *Sheperd v. Sheperd*, 161 Idaho 14, 17, 383 P.3d 693, 696 (2016) (italics in original). Here, there can be no collateral attack. This is because Pehrsons are not contesting the use of the River Diversion as an alternate point of diversion for the Moss Water Rights, with genuine issues of fact and law to be established at hearing concerning when delivery of the Moss Water Rights should considered futile and whether they contain the ability to use BLRID storage water as carriage water to overcome a futile call determination, alter the historic delivery patterns of the river, and effectively change the BLRID Storage Water Rights without notice and due process through a transfer proceeding. *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001).

As explained above, the only water Moss put at issue in the *Application* were the Moss Water Rights. It is undisputed, through the SRBA decrees, that the Moss Water Rights are satisfied by natural flow from the Big Lost River. Said differently, at no point in the *Transfer* proceeding were the water rights of BLRID involved. Understanding that only the Moss Water Rights were at issue in the *Application*, Pehrsons did not protest the addition of the River Diversion and then-Watermaster Yockey did not oppose its approval. As explained above, and evidenced in 2021 and 2022, this is because the River Diversion is located below the Darlington Sinks, and when the Big Lost River is disconnected at that location, it is not possible for the diversion rates associated with the Moss Water Rights to be carried through this losing reach to the River Diversion.

As explained through the above correspondence from IDWR in 2022, the only way the Moss Water Rights are being delivered through the Darlington Sinks to the River Diversion is

with the introduction of BLRID storage water as carriage water. This practice is not lawful for three reasons.

First, the Court has consistently held that the plain language of SRBA decrees controls. *See e.g. City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) ("this Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words"). As explained above, the plain language of the point of diversion element that was decreed in the SRBA to the BLRID Storage Rights allows storage water to be used at particular canals and ditches that are listed as points of diversion and/or rediversion:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Because the BLRID Storage Rights intentionally limit the location where they can be delivered, and do not list the River Diversion as a point of diversion and/or rediversion, Moss is prevented from using storage water as carriage water at the River Diversion. As to the point of diversion and/or rediversion element, the claim filed by BLRID with IDWR in the SRBA and the recommendation issued by IDWR to the SRBA is consistent with the partial decrees, meaning there is no ambiguity. *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 808, 367 P.3d

193, 203 (2016) (superseded on other grounds) ("Rangen has not presented sufficient evidence to establish the existence of a latent ambiguity in the partial decrees").

Second, with the plain language of the decrees governing, a transfer must be filed with IDWR to add the River Diversion as a point of diversion and/or rediversion to the BLDIR Storage Rights, consistent with I.C. § 42-222(1) (explaining the process for filing a transfer to add a point of diversion and the requirements for published notice). *3G AG LLC v. Idaho Dept. of Water Res.*, 509 P.3d 1180, 1185 (2022) ("Idaho Code section 42-222(1) sets forth the criteria used by IDWR to evaluate applications to transfer water rights whenever a right holder desires to change a water right's 'point of diversion, place of use, period of use or nature of use.'"). Through its actions in 2008, BLRID understood the need to file a transfer with IDWR to add additional points of diversion to its Storage Rights. *Tuthill Dec.* at 5, Ex. 10. Therefore, because the BLRID Storage Rights have not been modified, Moss' practice of using storage water as carriage water must cease.

Third, even if the point of diversion and/or rediversion element in the BLRID Storage Rights can be broadly interpreted to include the River Diversion without the filing of a transfer (it cannot), and as explained above, Moss' interests in the BLRID Storage Rights only allow him to use his storage water at the 3 in 1 Ditch and Moore Canal. As also explained above, Moss has neither requested BLRID to move his storage interests to the River Diversion nor received permission from BLRID to do so.

When the BLRID Storage Rights – which were never at issue in the *Transfer* – are used as carriage water to the River Diversion, natural flow that would otherwise be lost in the Darlington Sinks is delivered to Moss. When this occurs, Moss is able to take delivery ahead of the Pehrson Water Rights, in contravention of the prior appropriation doctrine. The use of

storage water as carriage water therefore allows Moss to realize the benefit of his water rights contrary to the prior appropriation doctrine, which is inconsistent with the *Transfer* itself, wherein it is stated: "This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources." *Johns Dec., Ex. H (Transfer)* at 1 (emphasis added).

The condition in the *Transfer* is consistent with the prior appropriation doctrine and past precedent of the Idaho Supreme Court, wherein it was held that storage water cannot be used as carriage water for natural flow water rights when a decree does not support its use:

> The stored waters are already appropriated, making them unavailable for redistribution to satisfy Sylte's natural flow water right. *See Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935) ("After the water was diverted from the natural stream and stored in the reservoir, it was no longer 'public water' subject to diversion and appropriation under the provisions of the Constitution."); *see also Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007) ("when water is stored, it becomes 'the property of the appropriators . . . impressed with the public trust to apply it to a beneficial use.'") (quoting *Talboy*, 55 Idaho at 389, 43 P.2d at 945).
>
> The Instructions are in harmony with the Final Decree. The Instructions generally prohibit the watermaster from releasing water to satisfy Rathdrum Creek water rights when seepage and evaporation losses exceed the natural tributary inflow, while still upholding the exception carved out for Sylte and giving it priority over junior rights.

Sylte v. Idaho Dept. of Water Res., 165 Idaho 238, 245, 443 P.3d 252, 259 (2019).

Here, as in *Sylte*, the SRBA partial decrees for the BLRID Storage Rights allow storage water to be used at certain canals and ditches, yet not at the River Diversion.[6] Clearly, Pehrsons' request before the Hearing Officer does not involve a collateral attack of the *Transfer*, with the

[6] In this respect, the BLRID Storage Water Rights are quite different from the storage rights in the Upper Snake, Boise, and Payette river systems. For example, the United States' water rights in American Falls Reservoir (water right no. 1-2064), Palisades Reservoir (water right no. 1-2068), Lucky Peak Reservoir (water right no. 63-3618), and Cascade Reservoir (65-2927A) list the dam as the point of diversion and then do not list canals and ditches as points of diversion and/or rediversion, thereby allowing storage water in those federal projects to be used anywhere within the place of use element.

Transfer never addressing use of storage water, and genuine issues of material fact and law left to resolve through the hearing process.

B. The Doctrine Of *Res Judicata* Does Not Prevent The Pehrsons From Challenging The Use Of The River Diversion As An Alternate Point Of Diversion When Storage Water Is Used As Carriage Water

Citing *Sagewillow v. Idaho Dept. of Water Res.*, 138 Idaho 831, 70 P.3d 669 (2003), Moss argues that the doctrine of *res judicata* bars Pehrsons from seeking relief because "the precise subject matter and issues in which they seek review were previously considered, and adjudicated in the transfer application proceedings." *Memo* at 4 (emphasis added). According to *Sagewillow*:

> The doctrine of res judicata applies to administrative proceedings. In *Joyce v. Murphy Land and Irrigation Company*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), this Court stated that the scope of the doctrine of res judicata was as follows:
>
> > We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.
>
> The "sameness" of a cause of action for purposes of application of the doctrine of res judicata is determined by examining the operative facts underlying the two lawsuits.

Sagewillow at 844, 70 P.3d at 682 (internal citations omitted).

As enumerated more recently by the Court in *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 451 P.3d 446 (2019), the three elements of *res judicata*, which the moving party "must prove by a preponderance of the evidence" are as follows:

> (1) the original action ended in a final judgment on the merits;
>
> (2) the present claim involves the same parties as the original action; and
>
> (3) the present claim arises out of the same transaction or series of transactions as the original action.

First Security at 740-41, 451 P.3d 446, 453-54.

Here, the elements of *res judicata* are not satisfied. First, as explained in more detail above in the argument concerning collateral attack, the *Application* and *Transfer* never addressed the use of storage water as carriage water, with the *Application* and *Transfer* only addressing the addition of an alternate point of diversion for the Moss Water Rights; thus, the *Transfer* did not end in a final judgment on the merits as to the issue herein. Second, Pehrsons did not protest the *Transfer*, meaning they were not party to the proceeding that Moss claims resulted in a final judgment. Third, because the *Application* and *Transfer* only involved the Moss Water Rights and the addition of an alternate point of diversion, the question here – involving use of BLRID Storage Rights as carriage water through the Darlington Sinks to the River Diversion and whether that is allowed – did not arise out of the same transaction or series of transactions involved in the *Transfer*.

C. There Is A Genuine Issue Of Material Fact As To Whether The Storage Water That Was Used As Carriage Water Belonged To Moss Or To Others

According to the September 2, 2022 email from IDWR employee Rob Whitney to Watermaster Marcroft, which reversed IDWR's August 15, 2022 finding of futile call, the decision was rescinded because of Mr. Whitney's belief that Moss had sufficient storage water of his own to carry the Moss Water Rights to the River Diversion: "Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right." *Marcroft Dec., Ex. 1* at 1 (italics in original) (emphasis added). The requirement that Moss must use his own storage water was also stated by IDWR David Hoekema: "When Moss runs out of storage, though I think a futile call is very appropriate . . . ." *Bromley Dec., Ex. 4* at 2 (emphasis added).

If Moss' use of storage water as carriage water was somehow permissible (it was not), the emails from Mr. Whitney and Mr. Hoekema make clear that it was IDWR's position that the practice was contingent on Moss having his own storage water. As explained in the *Declaration of Byron Pehrson*, when Mr. Whitney sent his email to Watermaster Marcroft, Moss had exhausted his storage water, meaning Moss had no storage water left to use as carriage water. *B. Pehrson Dec.* at 4. As also explained in the *Declaration of Byron Pehrson*, the storage water that was then used by Moss belonged to Moore Canal users. *Id*. Accordingly, whether the storage water that was used to carry the Moss Water Rights to the River Diversion belonged to Moss or to others is a genuine issue of material fact to establish at hearing.

D. There Is A Genuine Issue Of Material Fact As To What Led IDWR To Change Its Futile Call Determination From 2021 To 2022

As established above, in 2021, IDWR made a futile call determination, resulting in curtailment of water rights below the Darlington Sinks. As also established above, in 2022, after making a futile call determination in the same reach of the Big Lost River, IDWR then rescinded futile call due to the purported existence of BLRID Storage Water held by Moss as carriage water to the River Diversion. Pehrsons should be entitled, through the hearing process, to determine why futile call was found in 2021, then again for approximately two weeks in 2022, with the determination rescinded on September 2, 2022. Pehrsons should be allowed to understand what led to the change, including but not limited to internal policy changes at IDWR policy or external factors from other water users.

E. There Is A Genuine Issue Of Material Fact Concerning Which Transfer Governs

Throughout the *Motion*, *Memorandum in Support*, and the *Johns Dec.*, Moss argues that the transfer at issue is Transfer No. 79972, dated June 30, 2015. As stated above, the records of IDWR establish that it issued a second transfer, No. 80488, on December 14, 2015, involving the

Moss Water Rights. With Moss failing to address the second transfer, there is a genuine issue of material fact to examine at the hearing as to which transfer is at issue in these proceedings.

IV. CONCLUSION

Based on the foregoing, the *Motion for Summary Judgment* should be denied.

DATED this 7th day of February, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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RECEIVED
Feb 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF BYRON PEHRSON**

BYRON PEHRSON under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. I have irrigated with water from the Big Lost River in Water District No. 34 since 1959.

3. I am co-owner of water right nos. 34-28G, 34-638A, 34-14189, 34-14191, 34-14207, and 34-14209. These water rights are of record with the Idaho Department of Water Resources ("IDWR"), and allow us to divert natural flow from the Big Lost River for irrigation above the Darlington Sinks from certain canals and ditches, summarized as follows:

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-28G	8/31/1884	0.80	40 acres	3 in 1
34-638A[1]	10/12/1884	0.15	7.5 acres	3 in 1
34-14189	6/1/1885	1.54	77 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	96.1 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	154 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	115.5 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

4. I hold storage water interests in the Big Lost River Irrigation District ("BLRID"). The storage water interests that I have in BLRID allow me to divert and/or redivert storage water into the above-listed canals and ditches, which are listed on the BLRID storage water rights that were partially decreed in the Snake River Basin Adjudication ("BLRID Storage Rights").

5. The BLRID Storage Rights list other named canals and ditches where storage may be diverted and/or rediverted.

6. I served as the chairman of BLRID from 2017 to 2022.

7. I am aware of the water rights owned by Moss Farms, Inc. ("Moss") that are at issue in this proceeding, which I understand to be water right nos. 34-182 and 34-381A ("Moss Water Rights"). Water right no. 34-182 has a priority date of 6/1/1883 and a diversion rate of 1.60 cfs. Water right no. 34-381A has a priority date of 9/26/1894 and a diversion rate of 2.40 cfs. Together, the water rights authorize the irrigation of approximately 200 acres. The Moss Water Rights originally diverted water at the 3 in 1 Ditch and later added a second point of diversion, below the Darlington Sinks, known as the River Diversion.

[1] I recently bought a portion of this water right with the records of IDWR not yet showing the updated ownership.

8. When flows are low in the Big Lost River during certain times of year, the watermaster cannot deliver natural flow through the Darlington Sinks.

9. My water rights are junior to water right no. 34-182 and senior to 34-381A.

10. I am aware that Moss filed an *Application for Transfer of Water Right, Transfer No. 79972* ("Application") that was approved by IDWR on June 30, 2015, which added the River Diversion as a point of diversion for the Moss Water Rights.

11. I did not protest the *Application* because it only involved the Moss Water Rights and did not involve or otherwise suggest that Moss' storage water interests in the BLRID Storage Rights were implicated and could be delivered through the Darlington Sinks to the River Diversion.

12. I am aware that Moss has interests in the BLRID Storage Rights at the 3 in 1 Ditch and the Moore Canal. Attached hereto as **Exhibit 1** is a true and correct copy of a BLRID document summarizing Moss' interests in the BLRID Storage Rights at the 3 in 1 Ditch and Moore Canal.

13. As both a shareholder in BLRID and its past chair, it is my experience that if a water user wanted to move their interests in the BLRID Storage Rights from one of the canals or ditches listed on the BLRID Storage Rights to another of the named canals or ditches, they may do so, but a request must be filed with BLRID to make the change, with BLRID agreeing to make the change.

14. During my time as chairman, I do not recall Moss making a request to BLRID to move his storage water interests from either the 3 in 1 Ditch or the Moore Canal to the River Diversion.

15. I am aware that in 2022, Randy Pehrson contacted David Hoekema with IDWR to discuss his concerns regarding delivery of the Big Lost River breaking at the Darlington Sinks and futile call of water rights below the Darlington Sinks.

16. I am aware that IDWR, through a determination made by Tim Luke, initially stated, on August 15, 2022, that when the Big Lost River was broken at the Darlington Sinks, the Moss Water Rights could not be delivered.

17. On September 2, 2022, IDWR, through an email from Rob Whitney, reversed its decision, instructing Watermaster Preston Marcroft to curtail my water rights that are junior to the Moss Water Rights, as well as the junior rights of others, so that the water I was using would be conveyed through the Darlington Sinks, using BLRID Storage Rights as carriage water to the River Diversion.

18. According to Mr. Whitney's email, it was not futile to curtail the Moss Water Rights because Moss "has sufficient storage water to help carry the decreed right."

19. I disagree with this statement made by Mr. Whitney because Moss was out of storage water.

20. The storage water that was used to carry the Moss Water Rights to the River Diversion was the interests of other water users on the Moore Canal who had BLRID storage interests remaining, namely: Derek Nichols, Jay Jensen, Joel Anderson, Jason Anderson, and Travis Anderson.

21. It is my understanding that it has been estimated that when IDWR instructed the watermaster to curtail my water rights and the water rights of others above the Darlington Sinks, approximately 6,000 – 7,000 miners inches of water (120 cfs – 140 cfs) were curtailed to deliver the Moss Water Rights to the River Diversion.

22. Use of BLRID Storage Rights as carriage water through the Darlington Sinks and to the River Diversion was improper and resulted in curtailments that I have not previously experienced.

23. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4 day of February, 2025.

BYRON PEHRSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

Moss, Dennis Account: 397A

Canal: 3 and 1 District: 2

Decree Date	Inches	Total Inches	Storage
6/1/1883	80	80	0
9/26/1894	120	200	5,040

Total Storage: 5,040

Moss, Dennis Account: 397W

Canal: Moore District: 2

Decree Date	Inches	Total Inches	Storage
8/31/1884	29	29	423
6/30/1891	0	29	4,401
6/1/1896	22	51	713
6/1/1897	8	59	20
6/15/1897	8	67	0

Total Storage: 5,557

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RECEIVED
Feb 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF LOY PEHRSON**

LOY PEHRSON under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. I have irrigated with water from the Big Lost River in Water District No. 34 since 1959.

3. I have previously served as the chair for the Water District No. 34 advisory board.

4. I am co-owner of water right nos. 34-28G, 34-638A, 34-14189, 34-14191, 34-14207, and 34-14209. These water rights are of record with the Idaho Department of Water

Resources ("IDWR"), and allow us to divert natural flow from the Big Lost River for irrigation above the Darlington Sinks from certain canals and ditches, summarized as follows:

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34-14189	6/1/1885	1.54	77 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	96.1 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	154 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	115.5 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

5. I hold storage water interests in the Big Lost River Irrigation District ("BLRID"). The storage water interests that I have in BLRID allow me to divert and/or redivert storage water into the above-listed canals and ditches, which are listed on the BLRID storage water rights that were partially decreed in the Snake River Basin Adjudication ("BLRID Storage Rights").

6. The BLRID Storage Rights list other named canals and ditches where storage may be diverted and/or rediverted.

7. I am aware of the water rights owned by Moss Farms, Inc. ("Moss") that are at issue in this proceeding, which I understand to be water right nos. 34-182 and 34-381A ("Moss Water Rights"). Water right no. 34-182 has a priority date of 6/1/1883 and a diversion rate of 1.60 cfs. Water right no. 34-381A has a priority date of 9/26/1894 and a diversion rate of 2.40 cfs. Together, the water rights authorize the irrigation of approximately 200 acres. The Moss

[1] I recently bought a portion of this water right with the records of IDWR not yet showing the updated ownership.

Water Rights originally diverted water at the 3 in 1 Ditch and later added a second point of diversion, below the Darlington Sinks, known as the River Diversion.

8. When flows are low in the Big Lost River during certain times of year, the watermaster cannot deliver natural flow through the Darlington Sinks.

9. My water rights are junior to water right no. 34-182 and senior to 34-381A.

10. I am aware that Moss filed an *Application for Transfer of Water Right, Transfer No. 79972* ("Application") that was approved by IDWR on June 30, 2015, which added the River Diversion as a point of diversion for the Moss Water Rights.

11. I did not protest the *Application* because it only involved the Moss Water Rights and did not involve or otherwise suggest that Moss' storage water interests in BLRID were implicated and could be delivered through the Darlington Sinks to the River Diversion

12. I am aware that Moss has interests in the BLRID Storage Rights at the 3 in 1 Ditch and the Moore Canal.

13. As a shareholder in BLRID, it is my experience that if a water user wants to move his interests in the BLRID Storage Rights from one canal or ditch to another canal or ditch, he may do so, but paperwork must be filed with BLRID to make the change, with BLRID agreeing to make the change.

14. I am aware that in 2022, Randy Pehrson contacted David Hoekema with IDWR to discuss his concerns regarding delivery of the Big Lost River breaking at the Darlington Sinks and futile call of water rights below the Darlington Sinks.

15. I am aware that IDWR, through a determination made by Tim Luke, initially stated on August 15, 2022 that when the Big Lost River was broken at the Darlington Sinks, the Moss Water Rights could not be delivered.

16. On September 2, 2022, IDWR, through an email from Rob Whitney, reversed its decision, instructing Watermaster Preston Marcroft to curtail my water rights that are junior to the Moss Water Rights, as well as the junior rights of others, so that the water I was using would be conveyed through the Darlington Sinks, using BLRID Storage Rights as carriage water to the River Diversion.

17. It is my understanding that it has been estimated that when IDWR instructed the watermaster to curtail my water rights and the water rights of others above the Darlington Sinks, approximately 6,000 – 7,000 miners inches of water (120 cfs – 140 cfs) were curtailed to deliver the Moss Water Rights to the River Diversion.

18. Curtailment of upstream junior water rights would have been futile, but for the use of BLRID Storage Rights to Moss because the Big Lost River was broken at the Darlington Sinks.

19. Use of Moss' interests in the BLRID Storage Rights as carriage water through the Darlington Sinks and to the River Diversion resulted in curtailments that I have not previously experienced.

20. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4 day of February, 2025.

LOY PEHRSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

Skyler C. Johns
OLSEN TAGGART PLLC
PO Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggert.com

Norman Semanko
Garrett Kitamura
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com
gkitamura@parsonsbehle.com

Hyrum Erickson
Michelle Mortimer
RIGBY, ANDRUS & RIGBY LAW
25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

RECEIVED
Feb 07, 2025
DEPARTMENT OF
WATER RESOURCES

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
MCHUGH BROMLEY, PLLC
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PO Box 107
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cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF RANDY PEHRSON**

RANDY PEHRSON under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. I have irrigated with water from the Big Lost River in Water District No. 34 since 1963.

3. I am currently on the recharge committee for the advisory board for Water District No. 34 and am the chairman.

4. I own water right nos. 34-733, 34-10236, 34-10933, 34-10950, 34-13874, and 34-14389. These water rights are of record with the Idaho Department of Water Resources

("IDWR"), and allow me to divert natural flow from the Big Lost River for irrigation above the Darlington Sinks from certain canals and ditches, summarized as follows:

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-733	7/21/1886	1.44	72.4 acres	Burnett
34-10236	5/30/1885	2.00	100 acres	Darlington
34-10933	4/22/1884	1.63	81.40 acres	Darlington
34-10950	5/31/1884	0.72	36 acres	Darlington
34-13874	7/21/1886	1.00	50 acres	Burnett
34-14389	4/22/1884	0.55	27.30 acres	Darlington

5. I hold storage water interests in the Big Lost River Irrigation District ("BLRID"). The storage water interests that I have in BLRID allow me to divert and/or redivert storage water into the above-listed canals and ditches, which are listed on the BLRID storage water rights that were partially decreed in the Snake River Basin Adjudication ("BLRID Storage Rights").

6. I am aware of the water rights owned by Moss Farms, Inc. ("Moss") that are at issue in this proceeding, which I understand to be water right nos. 34-182 and 34-381A ("Moss Water Rights"). Water right no. 34-182 has a priority date of 6/1/1883 and a diversion rate of 1.60 cfs. Water right no. 34-381A has a priority date of 9/26/1894 and a diversion rate of 2.40 cfs. Together, the water rights authorize the irrigation of approximately 200 acres. The Moss Water Rights originally diverted water at the 3 in 1 Ditch and later added a second point of diversion, below the Darlington Sinks, known as the River Diversion.

7. When flows are low in the Big Lost River during certain times of year, the watermaster cannot deliver natural flow through the Darlington Sinks.

8. My water rights are junior to water right no. 34-182 and senior to 34-381A.

9. I am aware that Moss filed an *Application for Transfer of Water Right, Transfer No. 79972* ("Application") that was approved by IDWR on June 30, 2015, which added the River Diversion as a point of diversion for the Moss Water Rights.

10. I did not protest the *Application* because it only involved the Moss Water Rights and did not involve or otherwise suggest that Moss' storage water interests in BLRID were implicated and could be delivered through the Darlington Sinks to the River Diversion.

11. I am aware that Moss has interests in the BLRID Storage Rights at the 3 in 1 Ditch and the Moore Canal.

12. As a shareholder in BLRID, it is my experience that if a water user wants to move his interests in the BLRID Storage Rights from one canal or ditch to another canal or ditch, he may do so, but paperwork must be filed with BLRID to make the change, with BLRID agreeing to make the change.

13. In August of 2022, I contacted IDWR to discuss my concerns regarding delivery of the Big Lost River breaking at the Darlington Sinks and futile call of water rights below the Darlington Sinks.

14. On August 15, 2022, and as summarized in a September 2, 2022 email from Rob Whitney, IDWR determined that there was a break in the Big Lost River "immediately below the Beck diversion but noted that '*. . . this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage water and decreed rights during the remainder of this irrigation season.*'"

15. However, after IDWR made this determination, it adjusted its decision on September 2, 2022, and instructed the watermaster to deliver the Moss Water Rights to the River Diversion using BLRID Storage Rights as carriage water, resulting in my water rights being

curtailed when they have not historically been curtailed, and despite the fact that the River Diversion is not listed on the BLRID Storage Rights as a point of diversion and/or rediversion.

16. It is my understanding that it has been estimated that when IDWR instructed the watermaster to curtail my water rights and the water rights of others above the Darlington Sinks, approximately 6,000 – 7,000 miners inches of water (120 cfs – 140 cfs) were curtailed to deliver the Moss Water Rights to the River Diversion.

17. Use of BLRID Storage Rights as carriage water through the Darlington Sinks and to the River Diversion was improper and resulted in curtailments that I have not previously experienced.

18. On September 27, 2022, I sent a letter to IDWR stating that my water rights were curtailed differently than they were in the past. Attached hereto as **Exhibit 1** is a true and correct copy of this letter.

19. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 5 day of February, 2025.

Randy Pehrson

RANDY PEHRSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

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Michelle Mortimer
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25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

September 27, 2022

Randy Pehrson
4445 Beverland Lane
Mackay, Idaho 83251

Water District 34
Attn. Watermaster
211 E Custer St. Suite B
Mackay, Idaho 83251

To Watermaster District 34:

This letter is to be on record that I believe my 1885 water right was cut off earlier than it should have be
year. This was because of interaction between storage water and a futile call. This is different than it ha
been done in the past and because of this action I was denied my senior water right.

Sincerely

Randy Pehrson

CC James Cefalo
Tim Luke

RECEIVED
Feb 07, 2025
DEPARTMENT OF
WATER RESOURCES

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF CHRIS M. BROMLEY**

CHRIS M. BROMLEY under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of a letter, dated July 26, 2021, from Rob Whitney, Idaho Department of Water Resources ("IDWR"), to Lucas Yockey, then-Watermaster for Water District No. 34 ("WD34"), with associated emails, obtained by me from IDWR on February 5, 2024, through a public records request.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a series of emails, dated August 15, 2022, between Preston Marcroft, Watermaster for WD34, and IDWR employees Rob Whitney, Tim Luke, and David Hokema, obtained by me from IDWR on February 5, 2024, through a public records request.

4. Attached hereto as **Exhibit 3** is a true and correct copy of a series of emails, dated August 18-19, 2022, between Jason Anderson and IDWR employees Rob Whitney, Tim Luke, and David Hokema, obtained by me from IDWR on February 5, 2024, through a public records request.

5. Attached hereto as **Exhibit 4** is a true and correct copy of a series of emails, dated September 2, 2022, between IDWR employees Rob Whitney, Tim Luke, David Hoekema, Matthew Anders, and Mathew Weaver, obtained by me from IDWR on February 5, 2024, through a public records request.

6. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 7th day of February, 2025.

/s/ Chris M. Bromley
CHRIS M. BROMLEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

Skyler C. Johns
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Norman Semanko
Garrett Kitamura
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Hyrum Erickson
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Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700
Website: idwr.idaho.gov • Email: idwrinfo@idwr.idaho.gov

BRAD LITTLE
Governor

GARY SPACKMAN
Director

July 26, 2021

LUCAS YOCKEY
WATERMASTER, WATER DISTRICT NO. 34
211 E CUSTER RD STE B
MACKAY, ID 83251

VIA EMAIL TO: watermaster34@atcnet.net; blridgm@atcnet.net

RE: Request to Determine Futile Call – Big Lost River

Dear Mr. Yockey,

On July 26, 2021, the Idaho Department of Water Resources (Department) received your request for a futile call determination on the Big Lost River. Based on the information you have provided, the apparent support by the advisory committee members, and the Department's analysis of the current water supply conditions (email summary by D. Hoekema attached), the Department concludes your request to determine a futile call on the Big Lost River is justified. This letter is to notify you that the futile call determination request is hereby approved considering the information noted below.

Background

- On Thursday July 22, 2021, you contacted the Department to express concern that a futile call determination request was imminent due to the rapidly diminishing water supply in the Big Lost River and the nearly exhausted storage volume (appx. 3%) left in Mackay Reservoir.

- On Friday, July 23, 2021, you reported that the delivery calls for decreed water (appx. 12 cfs) at the Moore Diversion were satisfied at the head of the ditch, but were not making it to the first user in a beneficially usable amount. Further,

- On the morning of July 24, 2021, you notified the Department that the priority delivery date had changed from 1884 to 1883, and that you would attempt to continue to deliver the senior rights to the Moore Diversion for the remainder of the weekend. The majority of the water called for at the Moore Diversion (appx. 12 cfs noted above) have 1883 priority dates.

- As of this morning, you reported that despite your efforts to deliver the senior water rights to the Moore diversion, there is currently no measureable amount of water reaching the Moore Diversion.

- You stated by email that Advisory Committee Chair, VerNon Roche polled the other committee members on Friday July 23rd regarding their support (or not) of the futile call determination. Shawn Anderson and Jason Anderson were not in support at that time. After you contacted them today, Shawn Anderson agreed to support the determination and Jason Anderson did not.

It is evident that curtailment of junior surface water rights upstream of the Moore Diversion to satisfy senior surface water rights at the Moore Diversion constitutes a futile call. Therefore, you are instructed to distribute surface water flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate source for the remainder of the 2021 irrigation season, unless it is subsequently determined that delivery of the senior water rights at the Moore Diversion is no longer futile.

Please feel free to contact me with any related questions or concerns you have.

Regards,

Rob Whitney

Manager, Water Distribution Section

cc: IDWR Eastern Region

Whitney, Rob

From: Hoekema, David
Sent: Monday, July 26, 2021 12:10 PM
To: Luke, Tim; Whitney, Rob
Subject: Response to Rob's Conversation regarding a Futile Call on the Big Lost River
Attachments: Big Lost River & Resreoivr Conditions_20210726.pptx; FutileCallAnalysis.xlsx

Tim and Rob,

Please see the attached analysis showing diversions in the month of July on the Big Lost River. The attachment also shows the calculated inflow into the reservoir throughout July. The reservoir is down to just 1,310 ac-ft of which the PAT indicates (as of Wednesday the 21st) that 118 ac-ft are rotation water held by Mauthe, Nelson, and Pehrson.

Lucas indicated to me that the users on the Moore Canal have stopped calling for storage water. With the canal down to 1,310 ac-ft Lucas is holding the reservoir flat in order to save storage water for users who indicated that they are planning to call for the water in September.

As the reservoir has been flat-lined, so as to only pass inflows (natural flow), it appears that the natural flow in the river is not adequate to carry water to the Moore Diversion. Figure 1 shows reservoir content and Figure 2 shows reservoir outflow. Figure 3 shows how the delivery factor (i.e. the amount of water that is deliverable within the reach = Outflow / Inflow) has dropped significantly as the flow in the river has been reduced to carry only the natural flow. Losses within the reaches are calculated in the attached spreadsheet.

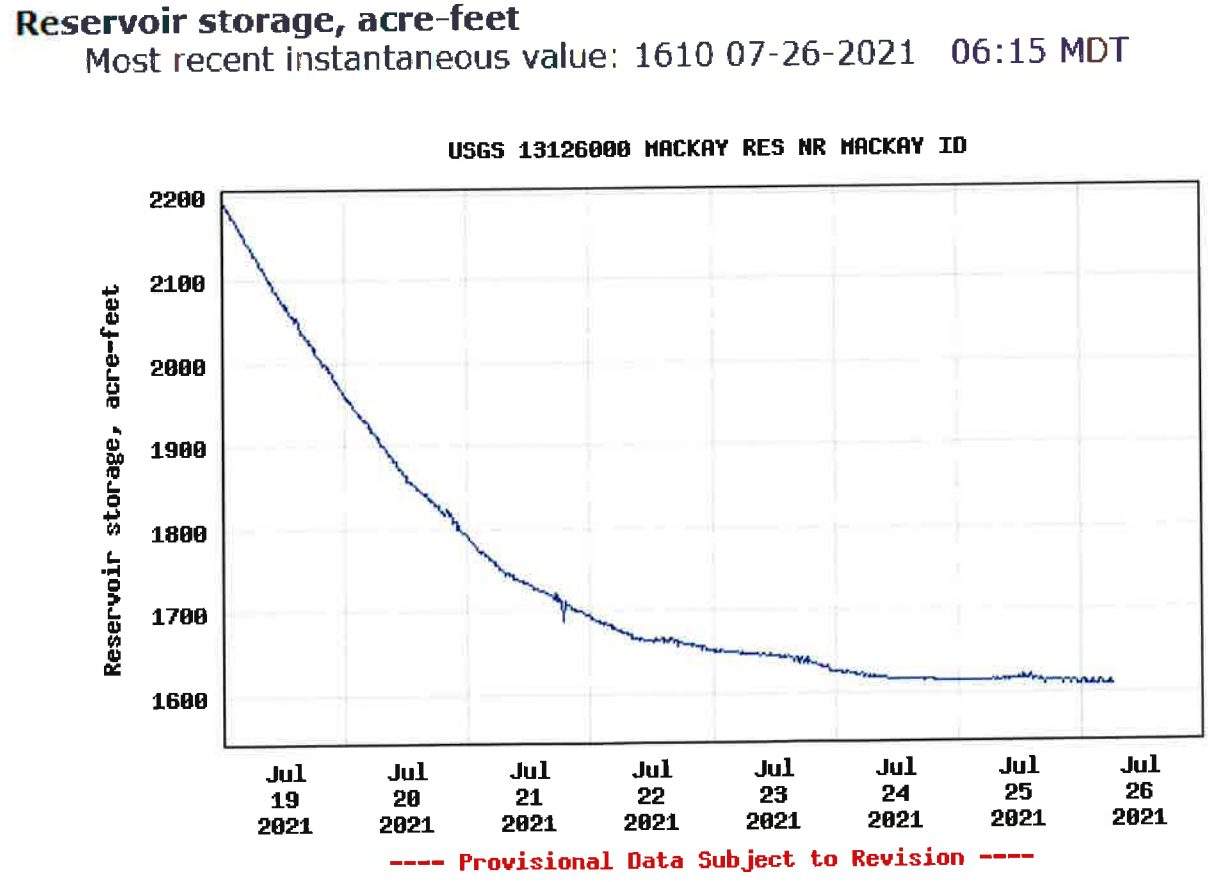


Figure 1 Mackay Reservoir content in the month of July.

Discharge, cubic feet per second
Most recent instantaneous value: 140 07-26-2021 07:45 MDT

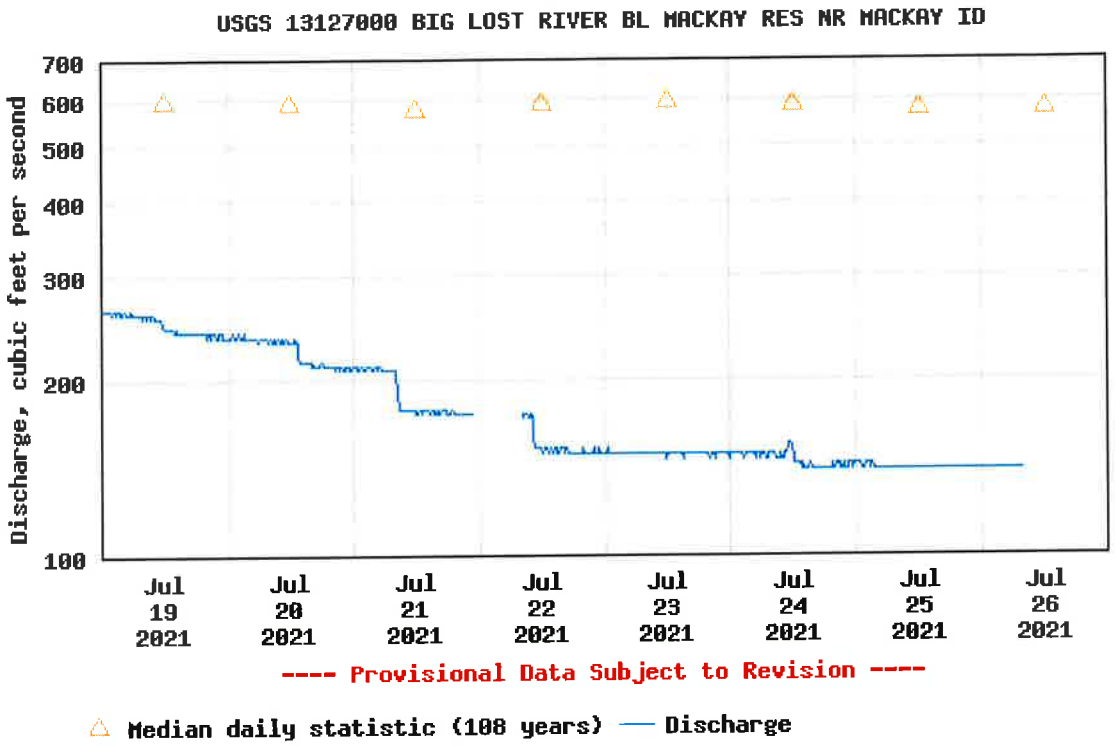


Figure 2 Reservoir outflow as measured at the 2B Gage. With the reservoir flat the natural flow appears to be 140 cfs. This inflow is a close match to the estimated inflow into the reservoir per the attached calculations.

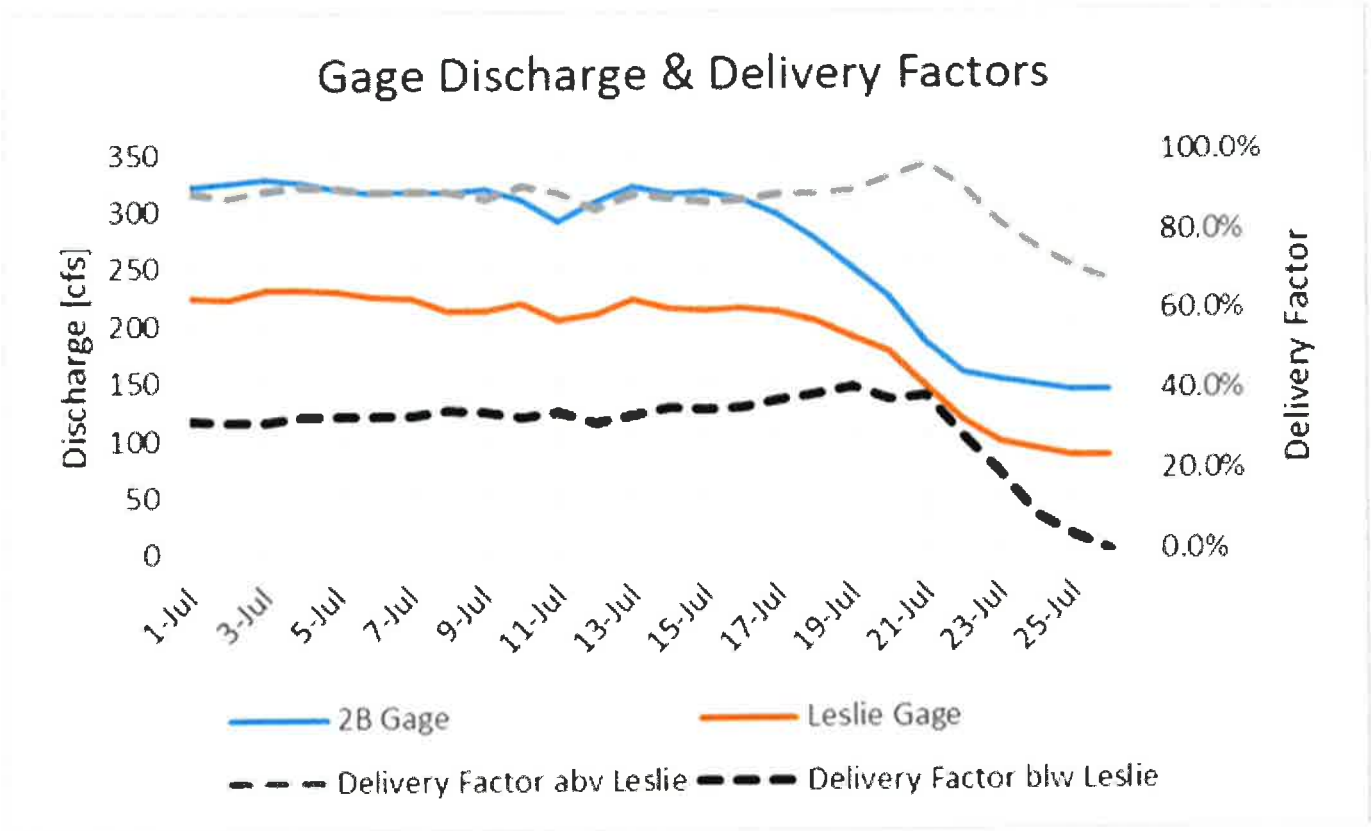


Figure 3 Flow past the 2B Gage is shown by the blue line, flow past the Leslie Gage is shown by the orange line, the delivery factor above the Leslie Gage is shown by the dashed, grey line, and the delivery factor blw Leslie is shown by the dashed, black line.

Whitney, Rob

From: Luke, Tim
Sent: Monday, July 26, 2021 11:49 AM
To: General Manager
Cc: Whitney, Rob; Hoekema, David
Subject: RE: WD 34 Futile Call Request

Thanks Lucas. The additional clarification is appreciated. Rob is preparing a letter as we speak. He will get some updated info from David too. Should have something later today. Thanks for making a good faith effort to deliver the 1883 priority rights on the Moore – I think it helps to make that showing among a number of users in the basin.

Tim

From: General Manager [mailto:blridgm@atcnet.net]
Sent: Monday, July 26, 2021 11:44 AM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; Hoekema, David <David.Hoekema@idwr.idaho.gov>
Subject: RE: WD 34 Futile Call Request

FYI on the advisory members polling. The two members referenced were Shawn Anderson and Jason Anderson. I spoke with Shawn just now and he agreed to support the futile call with the numbers today. When I spoke with Jason he was against making the Futile call.

From: General Manager <blridgm@atcnet.net>
Sent: Monday, July 26, 2021 11:03 AM
To: 'Luke, Tim' <Tim.Luke@idwr.idaho.gov>
Cc: 'Whitney, Rob' <Rob.Whitney@idwr.idaho.gov>; 'Hoekema, David' <David.Hoekema@idwr.idaho.gov>
Subject: RE: WD 34 Futile Call Request

After speaking with Rob on the phone I would like to answer I few questions he had below.

1) On Friday 7-23-2021 Vernon Roche, chairman of the advisory board contact all the board members polling their support for a futile call on the river. All the advisory board members except two, which wanted to wait until the numbers justified it, supported the futile call.
2) PivoTrac gauges still shows minimal amounts of water at the Sharp, Burnett and Beck heading. These heading were shut of as far as they can go and curtailed for the 1883 decree call.
3) The reduction in the river flow from last week to this week was a result on storage water being cut out of the river either from users accounts running out or no demand. The reservoir is only at 3% (1610 aF) which leaves very little to call for.
4) My secretary is out with the flu today. DWR central will be updated as soon as possible. It is only updated once a week during the season and it is typical for the numbers to be entered on either a Monday or a Tuesday.

From: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Sent: Monday, July 26, 2021 10:00 AM
To: General Manager <blridgm@atcnet.net>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; Hoekema, David <David.Hoekema@idwr.idaho.gov>
Subject: RE: WD 34 Futile Call Request

Lucas,

I spoke with Rob regarding your request and information. I asked a couple of questions of him – he will follow up with you this morning.

Tim

From: General Manager [mailto:blridgm@atcnet.net]
Sent: Monday, July 26, 2021 8:45 AM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Subject: WD 34 Futile Call Request

Tim,
I would like to request that IDWR please make a futile call for the delivery of water to the Moore Diversion based upon the lack of beneficial use of the decree water. Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 7-24-2021 and no water is reaching Diversion. There is no storage water being delivered to any canal. This makes the river shrink 100%. If the futile call is determined the last point of delivery of water on the Big Lost River would be moved up to the Beck Canal Heading which would allow beneficial use again. As watermaster I have the general consent of the advisory board and The Big Lost River Irrigation District approves WD34's request. Please review the supporting information below and if you have any questions or need any additional information, please let me know. Thank you

Lucas Yockey
WD34 Watermaster

Daily Data:
7-26-2021
Inflow: 138 cfs
Release: 140 cfs
Sharp: 0 cfs
Swauger: 3.8 cfs (well water)
Burnett: 0 cfs
Darlington: 8.4 (well water)
Beck: 0 cfs
Moore: 0 cfs

7-25-2021
Inflow: 137 cfs
Release: 140 cfs
Sharp: 0 cfs
Swauger: 3.8 cfs (well water)
Burnett: 0 cfs
Darlington: 8.4 (well water)
Beck: 0 cfs
Moore: 2.1 cfs

7-24-2021
Inflow: 134 cfs
Release: 149 cfs
Sharp: 0 cfs
Swauger: 3.8 cfs (well water)

Burnett: 0 cfs
Darlington: 8.4 (well water)
Beck: 0 cfs
Moore: 2.3 cfs

EXHIBIT 2

Whitney, Rob

From: Luke, Tim
Sent: Monday, August 15, 2022 5:46 PM
To: Preston Marcroft
Cc: Whitney, Rob; Hoekema, David; Cefalo, James; Weaver, Mathew; Spackman, Gary
Subject: RE: WD 34 Futile Call Request

Preston,

This email confirms IDWR's receipt of your request for a futile call determination on the Big Lost River. The Department has reviewed data documenting a break in the river between the Beck Diversion and the Moore Canal since the morning of August 12, 2022. The Department has confirmed from available data that BLRID has been holding the reservoir flat since August 11. Reservoir releases since this time has been limited to inflows (or natural flow) only. We understand that the reduction in reservoir releases is due to a lack of storage water demand, including very little demand in the lower valley. It appears that the natural flow in the river is not adequate to carry water to the Moore Canal.

Based on the information you provided, data available to us, and the support by advisory committee members, the Department concludes that a futile call on the river is currently justified. Upon this determination and as per our discussion with you this afternoon, you may deliver water to more junior priority rights on the river between Mackay Reservoir and the Beck Ditch. We understand from you that you will immediately call on all the 1884 decreed priority rights in that reach. Please note that this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season. We understand that some users in the lower valley may still have significant storage balances and may request delivery of both storage and any deliverable decreed rights over the coming days. Please also note that decreed priorities may need to be adjusted if the requested water supply is adequate to connect the river again and can be put to beneficial use. This guidance is consistent with last year's futile call approval in which we directed the watermaster "to distribute surface water flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion, unless it is subsequently determined that delivery of the senior water rights at the Moore Diversion is no longer futile."

Please contact me, Rob Whitney, or David Hoekema if you any questions or need assistance regarding this matter. Thank you for documenting the flow conditions on the river and submitting a formal request.
Regards,

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959

From: Luke, Tim
Sent: Monday, August 15, 2022 1:17 PM
To: Preston Marcroft <presmarc@mackayschools.org>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; Hoekema, David <David.Hoekema@idwr.idaho.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>
Subject: RE: WD 34 Futile Call Request

Preston,

Your email did not address any current requests for storage water from users in the lower valley. I spoke this morning with one of the users (Kieth Waddoups) this morning who also called me on Friday regarding their intent to call for storage. Keith said several users on the Moore, including himself, placed orders for delivery of storage with BLRID on Friday. You said you were going to check with BLRID after we spoke this morning. What did they say about the storage delivery requests/orders? IDWR would like to know about the storage water requests/orders before addressing this futile call request.

Tim

From: Preston Marcroft <presmarc@mackayschools.org>
Sent: Monday, August 15, 2022 1:03 PM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; David.Hokema@idwr.idaho.gov
Subject: WD 34 Futile Call Request

Tim.

I would like to request that IDWR, please make a futile call for the delivery of water to the Moore Diversion based on the lack of beneficial use of the decreed water. Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 8-12-2022. I called Dave Hokeman and told him that there was no water making it to the Moore Diversion. so we agreed to curtail all of the 1884 decrees in attempt to dilver the 8-10-1883 decree to the Moore Diverson. All of the 1884 decrees where turned off by 11:30 that day.There is no storage waterbeing delivered to any canal. as of this mourning there is no water making it to the Moore Diversion.This makes the river shrink 100%. if the futile call is determined the last point of delivery of water on the Big Lost River would be be moved up to the Beck Canal Heading which would allow beneficial use again. I have been in contact with Vernon Roche Chairman of advisory borad and 5 of the 9 members support this. I also talked to the chairman of Big Lost River Irrigation Distric and they approve WD"34 request.

Please review the supporting information and if youhave any questions or need any additional information please let me know.

Thank You
Preston Marcroft
WD34
Watermaster

8-13-2021
Sharp; 0 cfs
Swauger; 6.4 (well water)
Burnett; 0 cfs
Darlington; 11.62 (well water)
Beck; 0 cfs
Moore; o cfs
Inflow; 208 cfs
Release; 173

8-14-2022
Sharp; 0 cfs
Swauger; 6.6 cfs (well water)
Burnett; 0 cfs
Darlington 11.62 cfs (well water)

Beck; 0 cfs
Moore; o cfs
Inflow; 187 cfs Release; 192

8-15-2022
Sharp; 0 cfs
Swauger; 6.6 cfs (well water)
Burnett; 0 cfs
Darlington: 11.62 (well water)
Beck; 0 cfs
Moore; 0 cfs
Inflow; 165 cfs
Release; 195 cfs

EXHIBIT 3

From: Whitney, Rob
To: Preston Marcroft
Subject: FW: [EXTERNAL] Re: WD 34 Futile Call Request

FYI

From: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Sent: Friday, August 19, 2022 12:58 PM
To: Jason Andersen <andejaso66@yahoo.com>
Cc: Hoekema, David <David.Hoekema@idwr.idaho.gov>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Subject: RE: [EXTERNAL] Re: WD 34 Futile Call Request

Jason,

Per your call this morning, I wanted to confirm with you that Moss had two transfers approved in 2015, one of them was did add a river pump station near the heading of the B&J Ditch. That pump and transfer authorizes diversion of right 34-182 plus an 1894 priority right from the river (34-381A). We still show two other pump diversion locations further south on the river for the three rights I described in my prior email. I'm wondering if he has three or just two pumps on the river, and whether diversion for this third pump added in 2015 or 2016 near the B&J is even being recorded by WD34, or maybe it is being recorded under one of the other pump locations.

I'll wait to hear directly from Dennis to clarify these questions. I will be out most of the afternoon.

Tim

From: Luke, Tim
Sent: Friday, August 19, 2022 8:44 AM
To: Jason Andersen <andejaso66@yahoo.com>
Cc: Hoekema, David <David.Hoekema@idwr.idaho.gov>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Subject: RE: [EXTERNAL] Re: WD 34 Futile Call Request

Jason,

Thanks for your identification of that water right number. That right is held in the name of Moss Farms Inc. I would not have known to search under that name based on our conversation. The authorized points of diversion for water right 34-182 are the UC Blaine Canal and the B&J Ditch. Neither of the Moss pumps on the river are authorized points of diversion for this right. As per WD34 delivery records this year, no water has been diverted to either the Blaine Canal or the B&J Ditch.

Dennis can call for delivery of this right (he should contact the watermaster), but it will have to be diverted at the B&J if the right is deliverable to that point. Alternatively, he may be able to file a

temporary change application pursuant to the drought declaration to change the point of diversion to one of his two pumps on the river.

Again, I encourage users with decreed rights and storage balances below Darlington to collectively call for both sources of water if the river is to be connected and have a chance of getting water deliveries to end users.

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959

From: Jason Andersen <andejaso66@yahoo.com>
Sent: Friday, August 19, 2022 12:33 AM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>
Subject: [EXTERNAL] Re: WD 34 Futile Call Request

CAUTION: This email originated outside the State of Idaho network. Verify links and attachments BEFORE you click or open, even if you recognize and/or trust the sender. Contact your agency service desk with any concerns.

Tim, I believe the water right is 34-182. Here is Dennis phone number to verify that. (208) 406-1600
Sent from my iPhone

> On Aug 18, 2022, at 5:59 PM, Luke, Tim <Tim.Luke@idwr.idaho.gov> wrote:
>
> Jason,
>
> I had time late this afternoon to look for rights held by Dennis Moss on the Big Lost River in the vicinity we discussed today. Here is some additional information or facts to consider.
>
> First, I can't even find any Big Lost River water rights in the name of Dennis Moss. However, I do find several rights in the name of Robert and Carol Moss. Those rights can be diverted from two river pumps near the area you described as well as the 3&1 Ditch. Second, the most senior priority date of these three rights is 5/1/1886. The other two rights have a 6/1/1887 priority. These three rights appear to match the points of diversion we have for the Moss pumps in our water right accounting system. These three priority rights were not deliverable last weekend or the past several weeks as per the watermaster's priority cut determinations. I thought you told me Dennis was

diverting water over the weekend. If so, he may also have diverted out of priority since no storage water was released from the reservoir over the past weekend. Perhaps Dennis has some 1883 or 1884 rights that I am overlooking in this area? I did find one 1884 priority Moss right (for 0.2 cfs) on the Moore Canal only (in the name of Estel and Clea Moss). Maybe Dennis or someone can call me to clarify what 1883 priority rights he has in the area you described to me.

Further, I looked at what was diverted this season at the two Moss pumps from the river. According to Water District 34 records, one of the two pumps has not been used at all this year, and one was used to divert 0.8 cfs (40 inches) from June 4 to July 18. There has been no use after July 18 according to the diversion records entered by Water District 34. The 3&1 Ditch has not been used since July 15.

Please call me if I am overlooking information or if my information is not correct.

Respectively,

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959

From: Luke, Tim
Sent: Thursday, August 18, 2022 12:39 PM
To: andejaso66@yahoo.com
Cc: presmarc@mackayschools.org
Subject: FW: WD 34 Futile Call Request

Jason,

Here is the email we sent to Preston on Monday in response to his futile call request. Thanks for your call today.

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959

From: Luke, Tim
Sent: Monday, August 15, 2022 5:46 PM
To: Preston Marcroft <presmarc@mackayschools.org>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; Hoekema, David <David.Hoekema@idwr.idaho.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>; Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Spackman, Gary

<Gary.Spackman@idwr.idaho.gov>
Subject: RE: WD 34 Futile Call Request

Preston,

This email confirms IDWR's receipt of your request for a futile call determination on the Big Lost River. The Department has reviewed data documenting a break in the river between the Beck Diversion and the Moore Canal since the morning of August 12, 2022. The Department has confirmed from available data that BLRID has been holding the reservoir flat since August 11. Reservoir releases since this time has been limited to inflows (or natural flow) only. We understand that the reduction in reservoir releases is due to a lack of storage water demand, including very little demand in the lower valley. It appears that the natural flow in the river is not adequate to carry water to the Moore Canal.

Based on the information you provided, data available to us, and the support by advisory committee members, the Department concludes that a futile call on the river is currently justified. Upon this determination and as per our discussion with you this afternoon, you may deliver water to more junior priority rights on the river between Mackay Reservoir and the Beck Ditch. We understand from you that you will immediately call on all the 1884 decreed priority rights in that reach. Please note that this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season. We understand that some users in the lower valley may still have significant storage balances and may request delivery of both storage and any deliverable decreed rights over the coming days. Please also note that decreed priorities may need to be adjusted if the requested water supply is adequate to connect the river again and can be put to beneficial use. This guidance is consistent with last year's futile call approval in which we directed the watermaster "to distribute surface water flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion, unless it is subsequently determined that delivery of the senior water rights at the Moore Diversion is no longer futile."

Please contact me, Rob Whitney, or David Hoekema if you any questions or need assistance regarding this matter. Thank you for documenting the flow conditions on the river and submitting a formal request.
Regards,

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959

From: Luke, Tim
Sent: Monday, August 15, 2022 1:17 PM
To: Preston Marcroft <presmarc@mackayschools.org>
Cc: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; Hoekema, David <David.Hoekema@idwr.idaho.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>
Subject: RE: WD 34 Futile Call Request

Preston,

Your email did not address any current requests for storage water from users in the lower valley. I spoke this morning with one of the users (Kieth Waddoups) this morning who also called me on Friday regarding their intent to call for storage. Keith said several users on the Moore, including himself, placed orders for delivery of storage with BLRID on Friday. You said you were going to check with BLRID after we spoke this morning. What did they say about the storage delivery requests/orders? IDWR would like to know about the storage water requests/orders before addressing this futile call request.

Tim

From: Preston Marcroft <presmarc@mackayschools.org>
Sent: Monday, August 15, 2022 1:03 PM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; David.Hokema@idwr.idaho.gov
Subject: WD 34 Futile Call Request

Tim.

I would like to request that IDWR, please make a futile call for the delivery of water to the Moore Diversion based on the lack of beneficial use of the decreed water. Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 8-12-2022. I called Dave Hokeman and told him that there was no water making it to the Moore Diversion. so we agreed to curtail all of the 1884 decrees in attempt to dilver the 8-10-1883 decree to the Moore Diverson. All of the 1884 decrees where turned off by 11:30 that day.There is no storage waterbeing delivered to any canal. as of this mourning there is no water making it to the Moore Diversion.This makes the river shrink 100%. if the futile call is determined the last point of delivery of water on the Big Lost River would be be moved up to the Beck Canal Heading which would allow beneficial use again. I have been in contact with Vernon Roche Chairman of advisory borad and 5 of the 9 members support this. I also talked to the chairman of Big Lost River Irrigation Distric and they approve WD"34 request.

Please review the supporting information and if youhave any questions or need any additional information please let me know.

Thank You
Preston Marcroft
WD34 Watermaster

8-13-2021
Sharp; 0 cfs
Swauger; 6.4 (well water)
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Beck; 0 cfs
Moore; 0 cfs
Inflow; 165 cfs
Release; 195 cfs

EXHIBIT 4

From: Luke, Tim
To: Hoekema, David; Whitney, Rob
Cc: Anders, Matthew; Weaver, Mathew
Subject: RE: Randy Pehrson phone call
Date: Friday, September 2, 2022 10:00:32 AM
Attachments: 082107 LTR to WMs RE Futile Call Delivery Guidance.pdf

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David,

I agree with your explanation and perspective. We should probably meet today to discuss this given the pending long weekend. Rob was planning to call Preston to get an update. I (and maybe Rob) have a meeting at 10 and Mat W is over at Gov's office from 10 to 11 approx.

For reference, attached is a letter we've sent to water districts in the past giving some general guidance on futile call determination. Note that there is a reference to futile call in WD34 rules, but that particular rule and reference was deleted about two years ago following the Governor's red-tape reduction act.

Tim

From: Hoekema, David <David.Hoekema@idwr.idaho.gov>
Sent: Friday, September 2, 2022 9:41 AM
To: Luke, Tim <Tim.Luke@idwr.idaho.gov>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Cc: Anders, Matthew <Matthew.Anders@idwr.idaho.gov>; Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>
Subject: Randy Pehrson phone call

Tim and Rob,

I had a phone conversation with Randy Pehrson this morning. He is very upset that Dennis Moss is able to call for storage water and receive decree (1883 natural flow) at the same time. After the futile call in mid-August it was determine that decree water in the river was inadequate to carry water to Moss. Because of the amount of water lost in the river to deliver the 1883 priority to Moss, we were not able to deliver the 1885 priority to Randy Pehrson. His argument is that without storage water deliveries to Moss, it would be impossible to deliver the decree water to Moss. He feels that we have taken away his decree and that we are limiting his use of storage water (66% shrink) to get water delivered to Moss. I tried to explain to Randy that under his argument the folks in Arco would never be able to receive water from August onward (even in nears that were wetter than average), because the degree (or natural flow) is never adequate to carry their water without storage added to on top of the decree at the end of the season.

Randy's argument is that without the dam, Randy would be able to receive his priority (1885) and he would be able to get his storage water with 20% shrink. Because of the dam and the delivery to Moss he is unable to divert his 1885 priority and if he uses his storage water, he gets a 66% shrink

charged to that water. He told me that he wants to get an attorney and fight this in court.

He wonders why we can't make a futile call on Dennis Moss. I would like to hear your thoughts on a futile call. While I understand the concept of a futile call, I'm not familiar with the procedures. But it seems to me that if we are able to deliver 20-25 cfs of natural flow to users from Beck upstream and deliver Moss's 1883 priority it would be awful hard to make a futile call. When Moss runs out of storage, though I think a futile call is very appropriate, unless inflow has increased to the reservoir and demand is down.

Sincerely,



David Hoekema
Hydrologist
Office: (208) 605-4633
Cell: (714) 697-3203
Idaho Dept. of Water Resources

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
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Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

RECEIVED
Feb 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF LUCAS E. YOCKEY**

LUCAS E. YOCKEY under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. I hold a B.S. in Fishery Resources from the University of Idaho (2013).

3. I am the former Watermaster for Water District No. 34 ("WD34") and former General Manager for the Big Lost River Irrigation District ("BLRID"). I served as Watermaster for eight years from 2015-2022, resigning my position in June 2022.

4. I served as General Manager for BLRID for five years from 2018-2022, resigning my position in June 2022.

5. Since August 2022, I have been employed and am currently employed by the Lost River Highway District.

6. Based on my experience, I am familiar with the water rights at issue in this proceeding and the use of BLRID storage water within WD34.

7. I have reviewed *Application for Transfer of Water Right, Transfer No. 79972* ("Application") that was filed by Moss Farms, Inc. ("Moss") with the Idaho Department of Water Resources ("IDWR"), included as Exhibit C to the *Declaration of Sklyer Johns in Support of Motion for Summary Judgment* (Jan. 24, 2025) ("Johns Dec."), the *Transfer of Water Right, Transfer No. 79972* (June 30, 2015), included as Exhibit H to the *Johns Dec.* ("Transfer No. 79972"), as well as all other documents that were attached as exhibits to Mr. Johns' declaration, including Exhibit E, which is the *Recommendation of Watermaster*, dated April 10, 2015, signed by me, and Exhibit G, which is the *Memorandum*, dated June 15, 2015, issued by Michael Holliday, employee of IDWR in Idaho Falls.

8. Prior to the *Application* and the *Transfer*, water right nos. 34-182 and 34-381A ("Moss Water Rights"), held by Moss, were only diverted at the 3 in 1 Ditch.

9. BLRID has storage water rights ("BLRID Storage Rights") that can be delivered to certain canals and ditches, including but not limited to the 3 in 1 Ditch and Moore Canal.

10. Moss has interests in the BLRID Storage Rights that he can have delivered at the 3 in 1 Ditch for irrigation of the land that is associated with the Moss Water Rights.

11. Moss has interests in the BLRID Storage Rights that he can have delivered at the Moore Canal for irrigation of land this is not associated with the Moss Water Rights, the *Application*, or the *Transfer*.

12. Based on my understanding of the *Application*, Moss sought to add a second point of diversion to the Moss Water Rights, thereby retaining and not eliminating the point of diversion at the 3 in 1 Ditch, while adding a new point of diversion some number of miles downstream, through the Darlington Sinks, and directly on the Big Lost River. This second point of diversion has been referred to in this proceeding as the "River Diversion."

13. In certain years and in certain flow regimes, the Darlington Sinks is a losing reach of the Big Lost River. In certain years and in certain flow regimes, the Big Lost River becomes broken at the Darlington Sinks, meaning natural flow water rights that are curtailed above the Darlington Sinks cannot be conveyed below the Darlington Sinks for beneficial use.

14. After the *Application* was filed, and as Watermaster, I was asked by IDWR for my opinion as to whether I opposed the *Application's* approval.

15. As evidenced in Exhibit E to the *Johns Dec.*, I did not oppose approval of the *Application*. I did not oppose the approval because the *Transfer* only involved the Moss Water Rights and did not involve BLRID storage water.

16. As evidenced in Exhibit G to the *Johns Dec.*, I was contacted by IDWR employee, Michael Holliday, regarding the *Application*. I recall discussing the *Application* with Mr. Holliday. I explained to Mr. Holliday how natural flow water rights, like the Moss Water Rights, are delivered in WD34, with conveyance losses charged uniformly to all users. When Mr. Holliday and I spoke, we never discussed the use of BLRID storage water at the River Diversion or the use of BLRID storage water as carriage water for the Moss Water Rights to the River Diversion.

17. I recall reviewing the *Transfer* after it was issued by IDWR, with the *Transfer* only involving the Moss Water Rights and not addressing the use of BLRID storage water rights.

18. Based on my experience as General Manager of BLRID, if a water user wanted to move storage water from one ditch or canal that is listed on the BLRID Storage Rights to another named ditch or canal, he was required to notify BLRID for approval.

19. As I stated, I am familiar with the BLRID Storage Rights, and unlike the 3 in 1 Ditch or the Moore Canal, the River Diversion is not listed as a point of diversion and/or rediversion.

20. The storage water rights of BLRID were not modified by the *Transfer*.

21. I resigned as Watermaster in June of 2022 and did not serve as Watermaster for the rest of the irrigation season.

22. Preston Marcroft was appointed to serve as Watermaster for the remainder of the 2022 irrigation season and was later elected by the WD34 water users to serve as Watermaster and continues to serve in that role.

23. I am aware that during the summer of 2022 issues arose concerning delivery of the Moss Water Rights through the Darlington Sinks to the River Diversion.

24. I am aware that, in the summer of 2022, when the Big Lost River was broken at the Darlington Sinks, Rob Whitney, IDWR, instructed Watermaster Marcroft to curtail natural flow water rights above the Darlington Sinks in order to satisfy the Moss Water Rights. The natural flow water rights that were curtailed were then pushed through the Darlington Sinks with the addition of BLRID storage water as carriage water.

25. Based on my experience, I disagree with the instructions from Mr. Whitney as this practice of using storage water as carriage water to push upstream, curtailed natural flow water rights through the Darlington Sinks when the Big Lost River is broken at that location has

not previously occurred. This practice results in upstream, natural flow water rights being curtailed when they have not been historically curtailed.

26. It is my opinion and belief that without using BLRID Storage Rights as carriage water, the curtailment of upstream junior water rights would have been futile because the Big Lost River was broken at the Darlington Sinks.

27. It is my opinion and belief that use of BLRID Storage Rights as carriage water through the Darlington Sinks and to the River Diversion was improper and resulted in curtailments that I have not previously seen.

28. If I had known in 2015 when I was considering the *Application* that BLRID storage water would be used as carriage water for the Moss Water Rights at the River Diversion when the Big Lost River is broken at the Darlington Sinks, I would have opposed the *Application*.

29. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4 day of February, 2025.

LUCAS E. YOCKEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

Skyler C. Johns
OLSEN TAGGART PLLC
PO Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggert.com

Norman Semanko
Garrett Kitamura
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com
gkitamura@parsonsbehle.com

Hyrum Erickson
Michelle Mortimer
RIGBY, ANDRUS & RIGBY LAW
25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
MCHUGH BROMLEY, PLLC
Attorneys at Law
PO Box 107
Boise, ID 83701
Telephone: (208) 287-0991
Facsimile: (208) 287-0864
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

RECEIVED
Feb 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF DAVID R. TUTHILL, JR.**

DAVID R. TUTHILL, JR. under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. My C.V. is attached hereto as **Exhibit 1**.

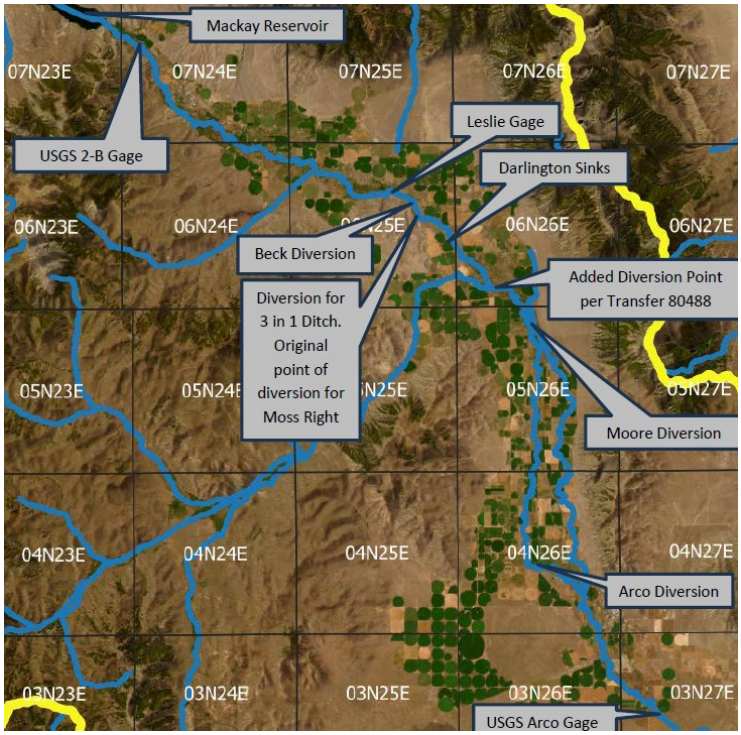
3. Briefly, I hold a B.S. in Agricultural Engineering from Colorado State University (1974), a M.S. in Civil Engineering from the University of Colorado (1975), and a Ph.D. in Civil Engineering from the University of Idaho (2002).

4. I was employed by the Idaho Department of Water Resources ("IDWR") from 1976 until my retirement from IDWR in 2009. During that time, I was employed in various roles and positions, ultimately serving as Director.

5. I am presently a Founder and Co-Owner of Idaho Water Engineering, LLC.

6. I am experienced with the records of IDWR and the Snake River Basin Adjudication ("SRBA"), having issued recommendations in the SRBA, having testified in the SRBA, having reviewed and approved IDWR water right transfers, as well as having issued orders under my signature in all manner of contested case matters.

7. The relevant features that are at issue in this proceeding are shown on the map below that was included in my expert report, dated December 2, 2024:



8. Attached hereto as **Exhibit 2** is a true and correct copy of the SRBA partial decrees for water right nos. 34-182 and 34-381A, dated January 15, 1998, in the names of Catherine M. and Lee J. Watson ("Watson"). Water right nos. 34-182 and 34-381A are natural

flow water rights from the Big Lost River and were decreed with a point of diversion at the 3 in 1 Ditch.

9. Attached hereto as **Exhibit 3** is a true and correct copy of the SRBA district court's *Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decrees an Express Statement Regarding General Provisions, Nunc Pro Tunc* as to water right nos. 34-182 and 34-381A, dated June 3, 2002.

10. Attached hereto as **Exhibit 4** is a true and correct copy of the SRBA partial decree for water right nos. 34-2379F, dated November 20, 1998, in the name Watson. Water right no. 34-2379F is a ground water right, as amended by the SRBA district court's *Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decrees an Express Statement Regarding General Provisions, Nunc Pro Tunc*, dated July 10, 2002.

11. Attached hereto as **Exhibit 5** is a true and correct copy of IDWR's acknowledgment to Moss Farms, Inc. ("Moss") recognizing that ownership of water right nos. 34-182, 34-381A, and 34-2379F was changed from Watson to Moss, dated November 13, 2012.

12. Attached hereto as **Exhibit 6** are true and correct copies of water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, in the name of the Big Lost River Irrigation District ("BLRID"), for storage of water from the Big Lost River behind Mackey Dam, as partially decreed in the SRBA on October 15, 2001, with an *Amended Partial Decree Nunc Pro Tunc* for water right no. 34-10935 issued on May 21, 2014. Among other things, the SRBA partial decrees explain that BLRID storage water is diverted and/or rediverted into named canals and ditches.

13. Attached hereto as **Exhibit 7** is a true and correct copy of the claim BLRID filed with IDWR in the SRBA for water right no. 34-12 in the SRBA, explaining that BLRID storage water is delivered into named canals and ditches.

14. Attached hereto as **Exhibit 8** is a true and correct copy of the recommendation IDWR issued to the SRBA district court regarding the claim BLRID filed for water right no. 34-12 in the SRBA, explaining, consistent with the claim, that BLRID storage water is delivered into named canals and ditches.

15. I have reviewed the *Application for Transfer of Water Right, Transfer No.* ("Application") that was filed by Moss with IDWR, included as Exhibit C to the *Declaration of Sklyer Johns in Support of Motion for Summary Judgment* (Jan. 24, 2025) ("Johns Dec."), the *Transfer of Water Right, Transfer No. 79972* (June 30, 2015), included as Exhibit H to the *Johns Dec.* ("Transfer No. 79972"), as well as all other documents that were attached as exhibits to Mr. Johns' declaration.

16. Based on my review of the records of IDWR, a subsequent transfer was issued on December 14, 2015, *Transfer of Water Right, Transfer No. 80488*, which updated conditions as to water right nos. 34-182, 34-381A, and 34-2379F. Attached hereto as **Exhibit 9** is a true and correct copy of *Transfer of Water Right, Transfer No. 80488* ("Transfer No. 80488").

17. Transfer No. 79972 incorporated ten (10) conditions as to water right nos. 34-182 and 34-381A, whereas Transfer No. 80488 incorporated eleven (11) conditions to those natural flow water rights, as well as to water right nos. 34-2379F and 34-14525, which are sourced from ground water, and share a place of use with water right nos. 34-182 and 34-381A.

18. According to the records of IDWR, Transfer No. 80488 renumbered water right no. 34-14525, with said right originally numbered as water right no. 34-2421.

19. According to Transfer No. 80488, water right no. 34-14525 is owned by Dennis Moss for irrigation of 32 acres, with a diversion rate of 0.64 cfs (112 acre-feet per annum), from ground water, with a priority date of June 6, 1961.

20. The additional condition on Transfer No. 80488, which was not included in Transfer No. 79972, is Condition of Approval 3, stating: "Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres."

21. Attached hereto as **Exhibit 10** is a true and correct copy of Transfer No. 74790, filed by BLRID with IDWR on May 8, 2008, to add two points of diversion to the water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935.

22. Based on my review of the documents that are included as exhibits to the *Johns Dec.*, which includes the *Application* and *Transfer*, in addition to my review of Transfer No. 80488, and the filings addressed the use of water right nos. 34-182, 34-381A, 34-2379F, and 34-14525, the documents do not address the use of BLRID storage water.

23. The *Application* did not seek to omit the 3 in 1 Ditch as a point of diversion for water right nos. 34-182 and 34-381A; rather, it sought to add a second point of diversion from the Big Lost River, approximately 5.9 miles downstream from the Big Lost River.

24. The *Transfer* approved the River Diversion as a second point of diversion, known as an "alternate point of diversion."

25. Also consistent with the *Application*, the *Transfer* did not omit the 3 in 1 Ditch as a point of diversion.

26. It is not uncommon for IDWR to issue watermaster instructions that establish futile call or when a river breaks, with the instructions oftentimes particular to the facts and circumstances associated with the water right.

27. Based on my experience, it was not necessary for IDWR to add conditions in the *Transfer* concerning the use of BLRID storage water as carriage water for the Moss water rights, because the water rights of BLRID were not at issue.

28. Based on my experience, and because the above-referenced documents never addressed BLRID's storage rights, it was not foreseeable that Moss would use BLRID storage water as carriage water to the new River Diversion, or that IDWR would allow the practice to occur, given that the BLRID's storage rights do not list the River Diversion as a point of diversion and/or rediversion.

29. Because the River Diversion is not listed as a point of diversion and/or rediversion for the BLRID storage rights referenced above in paragraph 13, the correct way to allow Moss to use storage water as carriage water would be for BLRID to file a transfer with IDWR to add the River Diversion as a point of diversion and/or rediversion on the BLRID water rights.

30. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 7th day of February, 2025.

DAVID R. TUTHILL, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER
RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

Skyler C. Johns
OLSEN TAGGART PLLC
PO Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggert.com

Norman Semanko
Garrett Kitamura
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com
gkitamura@parsonsbehle.com

Hyrum Erickson
Michelle Mortimer
RIGBY, ANDRUS & RIGBY LAW
25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

Résumé of David R. Tuthill, Jr., Ph.D., P.E.
Dave@idahowaterengineering.com
2918 N. El Rancho Pl. Boise, ID 83704
208-870-0345

Presently Held Professional Positions:

Idaho Water Engineering, LLC. Founder and Co-Owner.
Recharge Development Corporation. Vice President.
Innovative Mitigation Solutions, LLC. Principal.
Clean Water Professionals, LLC. Principal.

Positions with the Idaho Department of Water Resources:

Director. Jan 2007 – Jun 2009. Responsible for planning and administration of water resources in the State of Idaho.
Administrator, Water Management Division. May 2005 – Dec 2006.
Adjudication Bureau Chief. Jul 1997 – Apr 2005.
Western Regional Office Manager. Jul 1985 – Jun 1997.
Water Allocation Section Supervisor. Dec 1978 – Jun 1985.
Payette River Adjudication Supervisor. Sep 1976 – Nov 1978.
Adjudication Section Supervisor. Jan 1976 – Aug 1976.

Professional Registrations and Affiliations:

Idaho Professional Engineering Registration No. 3909 since:	1979
Member, American Society of Civil Engineers since:	1978
Director, Bench Sewer District	2006-2015
Member, Western States Water Council	2007-2009
Commissioner, Bear River Commission	2007-2009
President, Association of Western States Engineers	2008
Member, Idaho Water Users Association since:	2009
Member, Idaho Higher Education Research Council	2008-2011
Steering Committee Member, Idaho Environmental Forum	2011 - 2014
Board Member, Idaho EPSCoR Committee since 2012. Presently Chair.	

Civilian Education:

University of Idaho, Boise, ID	Ph.D. Civil Engineering	2002
University of Colorado, Boulder, CO	M.S. Civil Engineering	1975
Colorado State University, Fort Collins, CO	B.S. Agri. Engineering	1974

Military Education: (Colonel, Retired, U.S. Army Reserves, Engineer Branch)

	Year Completed:
Ranger School (Resident)	1973
Airborne School, (Resident)	1973
Engineer Officer Basic Course (Resident)	1977
Engineer Officer Advanced Course (Resident)	1983

Command and General Staff College (Nonresident)	1990
National Defense University, Information Resource Management College:	
Telecommunication Technology for Managers Course (Resident)	1999
Information Management Planning Course (Resident)	1999
Information Technology Capital Planning Course (Resident)	2000

Selected Recent Presentations:

"Opportunities for Enhanced Water Supplies for Boise River Basin Municipalities via Incentivized Managed Aquifer Recharge," presentation to the Northwest Conference of the American Groundwater Association in Pasco, WA, February 10, 2023.

"Incentivizing Managed Aquifer Recharge in the Boise River Basin," presentation to the American Geophysical Union, Fall Meeting, 2022.

"Selected Private Water Projects in Idaho," presentation to the Boise Chapter of the American Society of Civil Engineers, November 17, 2022.

"Implementing Incentivized Managed Aquifer Recharge at a Basin Scale," presentation (by proxy) to the International Symposium of Managed Aquifer Recharge in Madrid, Spain, May 21, 2019.

"Implementing Credit Trading for Nutrients in Idaho," presentation to EPA Senior Water Staff in Washington DC, February 5, 2019.

"The Nuts and Bolts of Establishing a Private managed Aquifer Recharge Corporation in Your Aquifer," presentation to The Nevada Water Resources Association Fall Symposium, September 26, 2018.

"Incentivized Managed Aquifer Recharge," presentation to the 2018 Summer meeting of the Western States Water Council, August 2, 2018.

"Water Supply Option Evaluation Spreadsheet," presentation to the 2018 Symposium on Eastern Idaho Water Supply Alternatives for Municipal, Subdivision, Commercial and Industrial Users, February 21, 2018.

Selected Recent Publications:

Tuthill, D. and R. Carlson, 2023. Flood Control Benefits and Incentivized Managed Aquifer Recharge – a Powerful Combination. The Water Report Issue #231, published by Sky Islands Insight LLC, Tucson, AZ, pp. 1-13.

Tuthill, D. and R. Carlson, 2019. Implementing Incentivized Managed Aquifer Recharge at a Basin Scale. Proceedings of the 10th International Symposium of Managed Aquifer Recharge, Madrid Spain.

Carlson, R. and D. Tuthill, 2018. Managing Aquifers for Storage. The Water Report Issue #177, published by Envirotech Publications, Inc., Eugene OR., pp. 1-9.

Tuthill, D. and R. Carlson, 2018. Incentivized Managed Aquifer Recharge. The Water Report Issue #176, published by Envirotech Publications, Inc., Eugene OR., pp. 11-21.

EXHIBIT 2

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
Case No. 39576	)	Water Right 34-00182

1998 NOV 20 PM 4:42

SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: CATHERINE M WATSON
LEE J. WATSON
4177 RD L
ORLAND, CA 95963

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 1.60 CFS

USE OF THIS RIGHT WITH RIGHT NOS. 34-00381A AND 34-02379F IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 5.20 CFS.

PRIORITY DATE: 06/01/1883

POINT OF DIVERSION: T06N R25E S14 SENWSE Within Butte County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation		1.60 CFS

PLACE OF USE: Irrigation — Within Butte County

T06N R26E S31	SWNE 40.0	SENE 26.0
	NESE 39.0	NWSE 39.0
	SWSE 25.0	
S32	SWNW 8.0	NWSW 35.0

212.0 Acres Total

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 80 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
USE OF THIS RIGHT WITH RIGHT NOS. 34-00381A AND 34-02379F IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Daniel C. Hurlbutt, JR.
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 34-00381A

1998 NOV 20 PM 4:42

SRBA
IDAHO
FILED

NAME AND ADDRESS: CATHERINE M WATSON
LEE J. WATSON
4177 RD L
ORLAND, CA 95963

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 2.40 CFS

USE OF THIS RIGHT WITH RIGHT NOS. 34-00182 AND 34-02379F IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 5.20 CFS.

PRIORITY DATE: 09/26/1894

POINT OF DIVERSION: T06N R25E S14 SENWSE Within Butte County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation		2.40 CFS

PLACE OF USE:

Irrigation

		Within Butte County
T06N R26E S31	SWNE 40.0	SENE 26.0
	NESE 39.0	NWSE 39.0
	SWSE 25.0	
S32	SWNW 8.0	NWSW 35.0

212.0 Acres Total

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 120 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
USE OF THIS RIGHT WITH RIGHT NOS. 34-00182 AND 34-02379F IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Daniel C. Hurlbutt, JR.
Presiding Judge
Snake River Basin Adjudication

EXHIBIT 3

2002 JUN -3 PM 4:21
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Water Right 34-182**
	)	**ORDER AMENDING IRRIGATION PERIOD OF USE ELEMENT IN PARTIAL DECREE and INCORPORATING INTO PARTIAL DECREES AN EXPRESS STATEMENT REGARDING GENERAL PROVISIONS, *NUNC PRO TUNC***
Case No. 39576	)	

A ***Partial Decree*** was entered for the above-captioned irrigation water right on November 23, 1998. The period of use element was decreed as "irrigation season." In *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), the Idaho Supreme Court remanded with the directive to include specific dates for the period of use element. Following remand, on June 24, 1999, IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions*, which included an irrigation period of use recommendation for this water right. No objections were filed to this *Supplemental Director's Report*

THEREFORE, IT IS ORDERED that the period of use element for the irrigation portion of the above-captioned water right is hereby amended and decreed as:

PERIOD OF USE: 05-01 to 10-15

The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.

IT IS FURTHER ORDERED that the ***Partial Decree*** for the above-captioned water right is hereby amended and decreed to contain the following:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court a point in time no later than the entry of a final unified decree. I.C. section 42-1412(6).

This order is being entered *nunc pro tunc* as of the date the ***Partial Decree*** was issued and is not intended to modify subsequent administrative changes for the water right, if any, which occurred following entry of the ***Partial Decree***.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated June 3, 2002.

Roger Burdick

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUN - 7 2002
By
Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**Water Right 34-381A**
Case No. 39576	**ORDER AMENDING IRRIGATION PERIOD OF USE ELEMENT IN PARTIAL DECREE and INCORPORATING INTO PARTIAL DECREES AN EXPRESS STATEMENT REGARDING GENERAL PROVISIONS, *NUNC PRO TUNC***

A ***Partial Decree*** was entered for the above-captioned irrigation water right on November 20, 1998. The period of use element was decreed as "irrigation season." In *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), the Idaho Supreme Court remanded with the directive to include specific dates for the period of use element. Following remand, on June 24, 1999, IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions*, which included an irrigation period of use recommendation for this water right. No objections were filed to this *Supplemental Director's Report*

THEREFORE, IT IS ORDERED that the period of use element for the irrigation portion of the above-captioned water right is hereby amended and decreed as:

PERIOD OF USE: 05-01 to 10-15

The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.

IT IS FURTHER ORDERED that the ***Partial Decree*** for the above-captioned water right is hereby amended and decreed to contain the following:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court a point in time no later than the entry of a final unified decree. I.C. section 42-1412(6).

This order is being entered *nunc pro tunc* as of the date the ***Partial Decree*** was issued and is not intended to modify subsequent administrative changes for the water right, if any, which occurred following entry of the ***Partial Decree***.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated June 7, 2002.

Roger Burdick

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

EXHIBIT 4

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTR. . OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-02379F

1998 NOV 20 PM 4:42

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: CATHERINE M WATSON
LEE J. WATSON
4177 RD L
ORLAND, CA 95963

SOURCE: GROUNDWATER

QUANTITY: 2.11 CFS
392.00 AFY

USE OF THIS RIGHT WITH RIGHT NOS. 34-00381A AND 34-00182 IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 5.20 CFS.

PRIORITY DATE: 08/08/1960

POINT OF DIVERSION: T06N R26E S31 SWNWSW Within Butte County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation		2.11 CFS 392.00 AFY

PLACE OF USE: Irrigation — Within Butte County

T06N R26E S31	SWNE 36.0	NESE 38.0
	NWSE 38.0	

112.0 Acres Total

USE OF THIS RIGHT WITH RIGHT NOS. 34-00182 AND 34-00381A IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Daniel C. Hurlbutt, Jr.
Presiding Judge
Snake River Basin Adjudication

2002 JUL 10 PM 2:35
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**Water Right 34-2379F**
Case No. 39576	**ORDER AMENDING IRRIGATION PERIOD OF USE ELEMENT IN PARTIAL DECREE and INCORPORATING INTO PARTIAL DECREES AN EXPRESS STATEMENT REGARDING GENERAL PROVISIONS, *NUNC PRO TUNC***

A ***Partial Decree*** was entered for the above-captioned irrigation water right on November 23, 1998. The period of use element was decreed as "irrigation season." In *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), the Idaho Supreme Court remanded with the directive to include specific dates for the period of use element. Following remand, on June 24, 1999, IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions*, which included an irrigation period of use recommendation for this water right. No objections were filed to this *Supplemental Director's Report*

THEREFORE, IT IS ORDERED that the period of use element for the irrigation portion of the above-captioned water right is hereby amended and decreed as:

PERIOD OF USE: 04-01 to 11-01

IT IS FURTHER ORDERED that the ***Partial Decree*** for the above-captioned water right is hereby amended and decreed to contain the following:

> This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court a point in time no later than the entry of a final unified decree. I.C. section 42-1412(6).

This order is being entered *nunc pro tunc* as of the date the ***Partial Decree*** was issued and is not intended to modify subsequent administrative changes for the water right, if any, which occurred following entry of the ***Partial Decree***.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated July 10, 2002.

Roger Burdick

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication

EXHIBIT 5

RECEIVED
NOV 13 2012
Department of Water Resources
Eastern Region

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Notice of Change in Water Right Ownership

1. List the numbers of all water rights and/or adjudication claim records to be changed. If you only acquired a portion of the water right or adjudication claim, check "*Yes*" in the "*Split?*" column.

Water Right/Claim No.	Split?	Water Right/Claim No.	Split?	Water Right/Claim No.	Split?
34-182	Yes ☐		Yes ☐		Yes ☐
34-381A	Yes ☐		Yes ☐		Yes ☐
34-2379F	Yes ☐		Yes ☐		Yes ☐
	Yes ☐		Yes ☐		Yes ☐
	Yes ☐		Yes ☐		Yes ☐

2. Previous Owner's Name: Lee J. & Catherine M. Watson
   Name of current water right holder/claimant

3. New Owner(s)/Claimant(s): MOSS FARMS, INC
   Name of each new owner as listed on the conveyance document

   New owner continued Name connector ☐ **and** ☐ **or** ☐ **and/or**

   3286 N 3350 W
   Mailing address

   Moore | Idaho | 83255
   City | State | ZIP

   208-554-4140
   Telephone Email

4. If the water rights and/or adjudication claims were split, how did the division occur?
   - ☐ The water rights or claims were divided as specifically identified in a deed, contract, or other conveyance document.
   - ☐ The water rights or claims were divided proportionately based on the portion of their place(s) of use acquired by the new owner.

5. Date you acquired the water rights and/or claims listed above: October 23, 2012.

6. This form must be signed and submitted with the following **REQUIRED** items:
   - A copy of the conveyance document – warranty deed, quitclaim deed, court decree, contract of sale, etc. The conveyance document must include a legal description of the property or description of the water right(s) if no land is conveyed.
   - Plat map, survey map or aerial photograph which clearly shows the place of use and point of diversion for each water right and/or claim listed above (if necessary to clarify division of water rights or complex property descriptions).
   - Filing fee (see instructions for further explanation):
     - $25 per *undivided* water right.
     - $100 per *split* water right.
     - No fee is required for pending adjudication claims.

7. Signature: Dennis Mobb - Moss Farms inc. | President | 11-6-2012
   Signature of new owner/claimant | Title, if applicable | Date

   Signature: _____ | _____ | _____
   Signature of new owner/claimant | Title, if applicable | Date

For IDWR Office Use Only:
Receipted by JB Date 11/13/2012 Receipt No. E038147 Receipt Amt. $75.-
Approved by JB Processed by JB Date 11/16/2012

Form 42-248/42-1409(6) Rev. 07/10

000392

SUPPORT DATA
IN FILE # 34-182

EXHIBIT 6

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:34

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00012

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 17205.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 02/07/1916

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	17205.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	17205.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N	R26E	S02			NESE		NWSE		SESE	
		S12			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S13			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NESE		NWSE	
	R27E	S05	Lot 4	(NWNW)			SWNW		NWSW	SWSW
		S06	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)			SENW	NESW
			Lot 6	(NWSW)	Lot 7	(SWSW)			SESW	NESE
					NWSE		SWSE		SESE	
		S07			NENE		NWNE		SWNE	SENE
					NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
					NESW		NWSW		SWSW	SESW
					SWSE		SESE			
		S08			NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
		S17			NENW		NWNW		SWNW	SENW
					NWSW		SWSW			
		S18			NENE		NWNE		SWNE	SENE
					NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S19			NENE		NWNE		SWNE	SENE
T04N	R26E	S02	Lot 2	(NWNW)						
		S03	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S04	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S05	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
					SENW		NESW		NWSW	SWSW
					SESW		NESE		NWSE	SWSE
					SESE					
		S07			NENE		SENE		NESE	SESE
		S08			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S09			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S10			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S11			NWNW		SWNW		NWSW	SWSW
		S14			NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S15			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S16			NENE		NWNE		SWNE	SENE
					NENW		NWNW		SWNW	SENW
					NESW		NWSW		SWSW	SESW
					NESE		NWSE		SWSE	SESE
		S17			NENE		SWNE		SENE	NWNW
					SWNW		SENW		NESW	NWSW
					SWSW		SESW		NESE	NWSE
					SWSE		SESE			
		S18			NENE		NWNE		SWNE	SENE
					NESE		NWSE		SWSE	SESE
		S19			NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T04N R26E S19			NESW		SESW	NESE	NWSE
			SWSE		SESE		
	S20		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	NWSE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE				
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	NESE	NWSE
			SWSE		SESE		
	S23		NWNE		SWNE	NENW	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S25		SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S26		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S35		NENE		NWNE	SWNE	SENE
			NENW		SENW	NESE	NWSE
			SWSE		SESE		
	S36		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SESW	NESE
			NWSE		SWSE	SESE	
R27E S31		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
			SESE				
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESE		NWSE	SWSE	SESE
R26E S03			NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			NESE		SWSE	SESE	
	S06		NWNW				
	S08		NENE		SENE	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		SWNE		NENW	NWNW	SWNW
			SENW		NESW	NWSW	SWSW
			SESW		NWSE	SWSE	SESE
	S14		NWNW		SWNW	NESW	NWSW
			SWSW		SESW		
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE		NWSE	SWSE	SESE
	S20		NENE		NWNE	SWNE	SENE

PLACE OF USE: (CONT)

T05N R26E S20		NESE		NWSE		SWSE	SESE
S21		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S22		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S23		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
S26		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
S27		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S28		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S29		NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SWSE		SESE			
S32		NENE		SENE		NESE	SESE
S33		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S34		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW	Lot 4 (SWSW)		Lot 5 (SESW)
		NESE		NWSE		SWSE	SESE
S35		NWNW		SWNW		NWSW	SWSW
T06N R24E S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
		NESW		NESE		NWSE	SWSE
		SESE					
S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
		NESW		NWSW		SESW	NWSE
		SWSE		SESE			
S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
S11		NENE		NWNE		SWNE	SENE
S12		NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NWSW		NESE			
R25E S01		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
S02		SWNE		SWNW		SENW	NESW
		NWSW		SWSW		SESW	NWSE
		SWSE		SESE			
S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4 (NWNW)
		SWSW		SESW		SWSE	SESE
S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)	SENW
		NESW	Lot 6	(NWSW)	Lot 7	(SWSW)	SESW
		NESE		NWSE		SWSE	SESE
S07		NENE		NWNE		SWNE	SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
		NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T06N R25E S08		NENE		NWNE		NENW		NWNW
		SWNW		NWSW		SWSW		NESE
		NWSE		SWSE		SESE		
	S09	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S10	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S11	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S12	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S13	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S14	NENE		NWNE		SENE		NESE
		SWSE		SESE				
	S16	NWNE		NENW		NWNW		SWNW
	S17	SWNE		SENE		NWNW		SWNW
		SENW		NESW		NWSW		NESE
		NWSE		SWSE		SESE		
	S18	NENE		NWNE		SWNE		SENE
		SWSW						
	S21	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		NESE		NWSE
		SESE						
	S22	NWSW		SWSW				
	S23	NENE		SENE		NESE		SESE
	S24	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S25	NENE		NWNE		SWNE		SENE
		NENW		SWNW		SENW		NESW
		NWSW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S26	SESW		SWSE		SESE		
	S27	NWNW		SWNW		SWSW		SESW
		SWSE		Lot 4 (SESE)				
	S28	NENE		SENE		NESE		SESE
	S33	NENE						
	S34	Lot 1 (NENE)		NWNE		SWNE		Lot 2 (SENE)
		NENW		NWNW		SENW		NESW
		Lot 3 (NESE)		NWSE		Lot 4 (SESE)		
	S35	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S36	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
R26E	S05	Lot 4 (SWSW)		Lot 5 (SESW)				
	S06	SWSW		SESE				
	S07	NENE		SWNE		SENE		Lot 1 (NENW)
		NWNW		SWNW		SENW		NESW
		Lot 3 (NWSW)		Lot 4 (SWSW)		SESW		NESE
		NWSE		SWSE		SESE		
	S08	NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
	S17	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW

PLACE OF USE: (CONT)

T06N R26E	S17		NESE			NWSE			SWSE		SESE
	S18		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S19		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S20		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S21		SWNW			NESW			NWSW		SWSW
			SESW			SWSE					
	S27		NESW			NWSW					
	S28		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE			SESE					
	S29		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S30		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S31		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S33		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NWSE		SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)				SESW		
	S17		SWNW			NWSW			SWSW		SESW
	S18		NENE			NWNE			SWNE		SENE
			NENW			SENW			NESE		NWSE
			SESE								
	S20		NENE			NWNE			SWNE		NENW
			NWNW			NESE			NWSE		SWSE
			SESE								
	S21		NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S26		SWSW			SESW			SWSE		SESE
	S27		NENW			NESW			NWSW		SWSW
			SESW			NESE			NWSE		SWSE
			SESE								
	S28		NENE			NWNE			NENW		NWNW
			SWNW			SENW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S29		NENE			NWNE			SENE		NWSE
			SESE								
	S33		NWNE			SWNE			SENE		NENW
			NESE			NWSE			SESE		
	S34		NENE			NWNE			SWNE		SENE
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE								
	S35		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			SWSW			SESW		NESE
			NWSE			SWSE			SESE		
	S36		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW

PLACE OF USE: (CONT)

T07N R24E S36	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 OCT 15 PM 4:55

DISTRICT COURT-SRBA
TWIN FALLS COUNTY, IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-00810

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 3.2 CFS
556.5 AFY

PRIORITY DATE: 06/01/1888

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	556.5 AFY
IRRIGATION FROM STORAGE	Irrigation Season	556.5 AFY
DIVERSION TO STORAGE	05-01 10-15	3.2 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE:

IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)	SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)	SESW	NESE
			NWSE		SWSE	SESE	
	S07		NENE		NWNE	SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)	SENW
			NESW		NWSW	SWSW	SESW
			SWSE		SESE		
	S08		NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S17		NENW		NWNW	SWNW	SENW
			NWSW		SWSW		
	S18		NENE		NWNE	SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S19		NENE		NWNE	SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)				
	S03	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			SENW		NESW	NWSW	SWSW
			SESW		NESE	NWSE	SWSE
			SESE				
	S07		NENE		SENE	NESE	SESE
	S08		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S11		NWNW		SWNW	NWSW	SWSW
	S14		NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		SWNE	SENE	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S18		NENE		NWNE	SWNE	SENE
			NESE		NWSE	SWSE	SESE
	S19		NENE		NWNE	SWNE	SENE
			NESW		SESW	NESE	NWSE
			SWSE		SESE		
	S20		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	NWSE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE				
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22		NESW		NWSW	NESE	NWSE
		SWSE		SESE		
	S23	NWNE		SWNE	NENW	NWNW
		SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S25	SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S26	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S35	NENE		NWNE	SWNE	SENE
		NENW		SENW	NESE	NWSE
		SWSE		SESE		
	S36	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SESW	NESE
		NWSE		SWSE	SESE	
R27E S31	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW	NESW
	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	SWSE
	SESE					
T05N R25E S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
	NESW		NWSW		SWSW	SESW
S02	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
	NESE		NWSE		SWSE	SESE
R26E S03	NWSW		SWSW			
S04	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S05	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	NESE		SWSE		SESE	
S06	NWNW					
S08	NENE		SENE		NESW	NWSW
	SWSW		SESW		NESE	NWSE
	SWSE		SESE			
S09	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S10	SWNE		NENW		NWNW	SWNW
	SENW		NESW		NWSW	SWSW
	SESW		NWSE		SWSE	SESE
S14	NWNW		SWNW		NESW	NWSW
	SWSW		SESW			
S15	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S16	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S17	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESE		NWSE		SWSE	SESE
S20	NENE		NWNE		SWNE	SENE
	NESE		NWSE		SWSE	SESE
S21	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S22	NENE		NWNE		SWNE	SENE
	NENW		NWNW		SWNW	SENW
	NESW		NWSW		SWSW	SESW
	NESE		NWSE		SWSE	SESE
S23	NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW		SESW		
	S26		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
	S27		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S28		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SWSE		SESE						
	S32		NENE		SENE		NESE		SESE		
	S33		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)		
			NESE		NWSE		SWSE		SESE		
	S35		NWNW		SWNW		NWSW		SWSW		
T06N R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NESE		NWSE		SWSE		
			SESE								
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
	S11		NENE		NWNE		SWNE		SENE		
	S12		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NWSW		NESE						
R25E	S01		NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S02		SWNE		SWNW		SENW		NESW		
			NWSW		SWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)		
			SWSW		SESW		SWSE		SESE		
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW		
			NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S08		NENE		NWNE		NENW		NWNW		
			SWNW		NWSW		SWSW		NESE		
			NWSE		SWSE		SESE				
	S09		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S10		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-00810

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)			
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)	
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)			
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E S20			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S21		SWNW			NESW			NWSW		SWSW
			SESW			SWSE					
	S27		NESW			NWSW					
	S28		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE			SESE					
	S29		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S30		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S31		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW	Lot 3	(NWSW)		Lot 4	(SWSW)			SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S33		NWNE			SWNE			NENW		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NWSE		SWSE
T07N R24E S07		Lot 3	(NWSW)	Lot 4	(SWSW)				SESW		
	S17		SWNW			NWSW			SWSW		SESW
	S18		NENE			NWNE			SWNE		SENE
			NENW			SENW			NESE		NWSE
			SESE								
	S20		NENE			NWNE			SWNE		NENW
			NWNW			NESE			NWSE		SWSE
			SESE								
	S21		NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S26		SWSW			SESW			SWSE		SESE
	S27		NENW			NESW			NWSW		SWSW
			SESW			NESE			NWSE		SWSE
			SESE								
	S28		NENE			NWNE			NENW		NWNW
			SWNW			SENW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S29		NENE			NWNE			SENE		NWSE
			SESE								
	S33		NWNE			SWNE			SENE		NENW
			NESE			NWSE			SESE		
	S34		NENE			NWNE			SWNE		SENE
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE								
	S35		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			SWSW			SESW		NESE
			NWSE			SWSE			SESE		
	S36		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
R25E S28			SWSW			SESW			NWSE		SWSE
	S31		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S32		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:31

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00811

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 1.7 CFS
294.0 AFY

PRIORITY DATE: 06/30/1881

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	294.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	294.0 AFY
DIVERSION TO STORAGE	05-01 10-15	1.5 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S07		NENE		SENE		NESE	SESE
	S08		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S11		NWNW		SWNW		NWSW	SWSW
	S14		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S15		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S16		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S17		NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S18		NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NESW		SESW		NESE	NWSE
			SWSE		SESE			
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	NWSE
	S21		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE					
	S22		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22			NESW			NWSW	NESE	NWSE
			SWSE			SESE		
	S23		NWNE			SWNE	NENW	NWNW
			SWNW			SENW	NESW	NWSW
			SWSW			SESW	NWSE	SWSE
			SESE					
	S25		SWNW			SENW	NESW	NWSW
			SWSW			SESW	NWSE	SWSE
			SESE					
	S26		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S35		NENE			NWNE	SWNE	SENE
			NENW			SENW	NESE	NWSE
			SWSE			SESE		
	S36		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SESW	NESE
			NWSE			SWSE	SESE	
	R27E S31	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	SWSE
			SESE					
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW			NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESE			NWSE	SWSE	SESE
	R26E S03		NWSW			SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			NESE			SWSE	SESE	
	S06		NWNW					
	S08		NENE			SENE	NESW	NWSW
			SWSW			SESW	NESE	NWSE
			SWSE			SESE		
	S09		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S10		SWNE			NENW	NWNW	SWNW
			SENW			NESW	NWSW	SWSW
			SESW			NWSE	SWSE	SESE
	S14		NWNW			SWNW	NESW	NWSW
			SWSW			SESW		
	S15		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S16		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S17		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESE			NWSE	SWSE	SESE
	S20		NENE			NWNE	SWNE	SENE
			NESE			NWSE	SWSE	SESE
	S21		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S22		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S23		NENW			NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23	NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S08	NENE	NWNE	NENW	NWNW		
		SWNW	NWSW	SWSW	NESE		
		NWSE	SWSE	SESE			
	S09	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S10	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)			
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)	
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)			
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S21		SWNW		NESW		NWSW	SWSW
			SESW		SWSE			
	S27		NESW		NWSW			
	S28		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S29		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S30		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S31		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S32		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S33		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
	S17		SWNW		NWSW		SWSW	SESW
	S18		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SESE					
	S20		NENE		NWNE		SWNE	NENW
			NWNW		NESE		NWSE	SWSE
			SESE					
	S21		NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S26		SWSW		SESW		SWSE	SESE
	S27		NENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S28		NENE		NWNE		NENW	NWNW
			SWNW		SENW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SENE	NWSE
			SESE					
	S33		NWNE		SWNE		SENE	NENW
			NESE		NWSE		SESE	
	S34		NENE		NWNE		SWNE	SENE
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE					
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R25E	S28		SWSW		SESW		NWSE	SWSE
	S31		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S32		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-00817B

2001 OCT 15 PM 4:27
DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 0.8 CFS
140.0 AFY

PRIORITY DATE: 03/01/1902

POINT OF DIVERSION:

T03N R26E	S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
T04N R26E	S26	NWNWNW	(REDIVERSION)	
T05N R26E	S04	NWSESE	(REDIVERSION)	
T07N R23E	S12	SENW		Within CUSTER County
T06N R24E	S01	NENESW	(REDIVERSION)	
R25E	S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
R26E	S32	NWSENW	(REDIVERSION)	
T07N R23E	S12	NWNWSE	(REDIVERSION)	
R24E	S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THRCUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANCUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FRCM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	140.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	140.0 AFY
DIVERSION TO STORAGE	05-01 10-15	0.8 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		NESE	NWSE	SESE		
	S12	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S13	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NESE	NWSE		
R27E	S05	Lot 4 (NWNW)	SWNW	NWSW		SWSW
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENW		NWNW		SWNW		SENW
			NWSW		SWSW				
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			SENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S07		NENE		SENE		NESE		SESE
	S08		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S09		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S10		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S11		NWNW		SWNW		NWSW		SWSW
	S14		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S15		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S16		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S17		NENE		SWNE		SENE		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NESW		SESW		NESE		NWSE
			SWSE		SESE				
	S20		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		NWSE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESE						
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T04N	R26E	S22		NESW		NWSW	NESE	NWSE
				SWSE		SESE		
		S23		NWNE		SWNE	NENW	NWNW
				SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S25		SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S26		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S35		NENE		NWNE	SWNE	SENE
				NENW		SENW	NESE	NWSE
				SWSE		SESE		
		S36		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SESW	NESE
				NWSE		SWSE	SESE	
	R27E	S31	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
			Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
				SESE				
T05N	R25E	S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
		S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESE		NWSE	SWSE	SESE
	R26E	S03		NWSW		SWSW		
		S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
				NESE		SWSE	SESE	
		S06		NWNW				
		S08		NENE		SENE	NESW	NWSW
				SWSW		SESW	NESE	NWSE
				SWSE		SESE		
		S09		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S10		SWNE		NENW	NWNW	SWNW
				SENW		NESW	NWSW	SWSW
				SESW		NWSE	SWSE	SESE
		S14		NWNW		SWNW	NESW	NWSW
				SWSW		SESW		
		S15		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S16		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S17		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESE		NWSE	SWSE	SESE
		S20		NENE		NWNE	SWNE	SENE
				NESE		NWSE	SWSE	SESE
		S21		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S22		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW	SESW
	S26		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S27		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S28		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SWSE		SESE			
	S32		NENE		SENE		NESE	SESE
	S33		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S34		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW	Lot 4 (SWSW)	Lot 5 (SESW)	
			NESE		NWSE		SWSE	SESE
	S35		NWNW		SWNW		NWSW	SWSW
T06N R24E	S01	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NESE		NWSE	SWSE
			SESE					
	S02	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SESW	NWSE
			SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	S11		NENE		NWNE		SWNE	SENE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NWSW		NESE			
R25E	S01		NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S02		SWNE		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NWSE
			SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)		Lot 3 (NENW)		Lot 4 (NWNW)
			SWSW		SESW		SWSE	SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		Lot 5 (SWNW)		SENW
			NESW	Lot 6 (NWSW)		Lot 7 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S08		NENE		NWNE		NENW	NWNW
			SWNW		NWSW		SWSW	NESE
			NWSE		SWSE		SESE	
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE		SESE
	S11		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S12		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S13		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S14		NENE		NWNE		SENE		NESE
			SWSE		SESE				
	S16		NWNE		NENW		NWNW		SWNW
	S17		SWNE		SENE		NWNW		SWNW
			SENW		NESW		NWSW		NESE
			NWSE		SWSE		SESE		
	S18		NENE		NWNE		SWNE		SENE
			SWSW						
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
			SESE						
	S22		NWSW		SWSW				
	S23		NENE		SENE		NESE		SESE
	S24		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S25		NENE		NWNE		SWNE		SENE
			NENW		SWNW		SENW		NESW
			NWSW		SWSW		SESW		NESE
			NWSE		SWSE		SESE		
	S26		SESW		SWSE		SESE		
	S27		NWNW		SWNW		SWSW		SESW
			SWSE	Lot 4	(SESE)				
	S28		NENE		SENE		NESE		SESE
	S33		NENE						
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
			NENW		NWNW		SENW		NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
	S35		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S36		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)				
	S06		SWSW		SESE				
	S07		NENE		SWNE		SENE	Lot 1	(NENW)
			NWNW		SWNW		SENW		NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S20		NENE		NWNE		SWNE		SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S21		SWNW		NESW		NWSW		SWSW
			SESW		SWSE				
	S27		NESW		NWSW				
	S28		NWNE		SWNE		NENW		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S29		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S30		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S31		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S32		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S33		NWNE		SWNE		NENW		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NWSE		SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
	S17		SWNW		NWSW		SWSW		SESW
	S18		NENE		NWNE		SWNE		SENE
			NENW		SENW		NESE		NWSE
			SESE						
	S20		NENE		NWNE		SWNE		NENW
			NWNW		NESE		NWSE		SWSE
			SESE						
	S21		NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S26		SWSW		SESW		SWSE		SESE
	S27		NENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S28		NENE		NWNE		NENW		NWNW
			SWNW		SENW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S29		NENE		NWNE		SENE		NWSE
			SESE						
	S33		NWNE		SWNE		SENE		NENW
			NESE		NWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE						
	S35		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		SWSW		SESW		NESE
			NWSE		SWSE		SESE		
	S36		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
R25E	S28		SWSW		SESW		NWSE		SWSE
	S31		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S32		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 SEP 26 AM 11: 16

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00818

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 3.2 CFS
556.5 AFY

PRIORITY DATE: 06/30/1880

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE		QUANTITY	
IRRIGATION STORAGE	05-01	10-15	556.5	AFY
IRRIGATION FROM STORAGE	05-01	10-15	556.5	AFY
DIVERSION TO STORAGE	05-01	10-15	3.2	CFS

THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S07		NENE		SENE		NESE	SESE
	S08		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S11		NWNW		SWNW		NWSW	SWSW
	S14		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S15		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S16		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S17		NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S18		NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NESW		SESW		NESE	NWSE
			SWSE		SESE			
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	NWSE
	S21		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE					
	S22		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T04N	R26E	S22		NESW		NWSW	NESE	NWSE
				SWSE		SESE		
		S23		NWNE		SWNE	NENW	NWNW
				SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S25		SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S26		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S35		NENE		NWNE	SWNE	SENE
				NENW		SENW	NESE	NWSE
				SWSE		SESE		
		S36		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SESW	NESE
				NWSE		SWSE	SESE	
	R27E	S31	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
			Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
				SESE				
T05N	R25E	S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
		S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESE		NWSE	SWSE	SESE
	R26E	S03		NWSW		SWSW		
		S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
				NESE		SWSE	SESE	
		S06		NWNW				
		S08		NENE		SENE	NESW	NWSW
				SWSW		SESW	NESE	NWSE
				SWSE		SESE		
		S09		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S10		SWNE		NENW	NWNW	SWNW
				SENW		NESW	NWSW	SWSW
				SESW		NWSE	SWSE	SESE
		S14		NWNW		SWNW	NESW	NWSW
				SWSW		SESW		
		S15		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S16		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S17		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESE		NWSE	SWSE	SESE
		S20		NENE		NWNE	SWNE	SENE
				NESE		NWSE	SWSE	SESE
		S21		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S22		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW		SESW	
	S26		NENW		NWNW		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
	S27		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
			NESE		NWSE		SWSE		SESE	
	S28		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
			NESE		NWSE		SWSE		SESE	
	S29		NENE		NWNE		SWNE		SENE	
			NENW		SENW		NESE		NWSE	
			SWSE		SESE					
	S32		NENE		SENE		NESE		SESE	
	S33		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
			NESE		NWSE		SWSE		SESE	
	S34		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)	
			NESE		NWSE		SWSE		SESE	
	S35		NWNW		SWNW		NWSW		SWSW	
T06N R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
			NESW		NESE		NWSE		SWSE	
			SESE							
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
			NESW		NWSW		SESW		NWSE	
			SWSE		SESE					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
	S11		NENE		NWNE		SWNE		SENE	
	S12		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NWSW		NESE					
R25E	S01		NESW		SWSW		SESW		NESE	
			NWSE		SWSE		SESE			
	S02		SWNE		SWNW		SENW		NESW	
			NWSW		SWSW		SESW		NWSE	
			SWSE		SESE					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
			NESE		NWSE		SWSE		SESE	
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)	
			SWSW		SESW		SWSE		SESE	
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
			NESE		NWSE		SWSE		SESE	
	S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW	
			NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	
			NESE		NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE		SENE	
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
			NESE		NWSE		SWSE		SESE	
	S08		NENE		NWNE		NENW		NWNW	
			SWNW		NWSW		SWSW		NESE	
			NWSE		SWSE		SESE			
	S09		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	
			NESE		NWSE		SWSE		SESE	
	S10		NENE		NWNE		SWNE		SENE	
			NENW		NWNW		SWNW		SENW	
			NESW		NWSW		SWSW		SESW	

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4 (SESE)				
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1 (NENE)			NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3 (NESE)			NWSE	Lot 4 (SESE)		
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4 (SWSW)		Lot 5 (SESW)				
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3 (NWSW)		Lot 4 (SWSW)			SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E	S20	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S21	SWNW		NESW		NWSW	SWSW
		SESW		SWSE			
	S27	NESW		NWSW			
	S28	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE		SESE			
	S29	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S30	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S31	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S33	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NWSE	SWSE
T07N R24E	S07	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	
	S17	SWNW		NWSW		SWSW	SESW
	S18	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SESE					
	S20	NENE		NWNE		SWNE	NENW
		NWNW		NESE		NWSE	SWSE
		SESE					
	S21	NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S26	SWSW		SESW		SWSE	SESE
	S27	NENW		NESW		NWSW	SWSW
		SESW		NESE		NWSE	SWSE
		SESE					
	S28	NENE		NWNE		NENW	NWNW
		SWNW		SENW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SENE	NWSE
		SESE					
	S33	NWNE		SWNE		SENE	NENW
		NESE		NWSE		SESE	
	S34	NENE		NWNE		SWNE	SENE
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE					
	S35	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S36	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
R25E	S28	SWSW		SESW		NWSE	SWSE
	S31	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:50
DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-02507

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6000.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 09/02/1959

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	6000.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	6000.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R26E S02			NESE		NWSE		SESE	
S12			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S13			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NESE		NWSE	
R27E S05	Lot 4	(NWNW)			SWNW		NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)			SENW	NESW
	Lot 6	(NWSW)	Lot 7	(SWSW)			SESW	NESE
			NWSE		SWSE		SESE	
S07			NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
S08			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
S17			NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
S18			NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S19			NENE		NWNE		SWNE	SENE
T04N R26E S02	Lot 2	(NWNW)						
S03	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S04	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S05	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
S07			NENE		SENE		NESE	SESE
S08			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S09			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S10			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S11			NWNW		SWNW		NWSW	SWSW
S14			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S15			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S16			NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
S17			NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
S18			NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
S19			NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T04N R26E S19		NESW		SESW	NESE	NWSE
		SWSE		SESE		
	S20	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	NWSE
	S21	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE				
	S22	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	NESE	NWSE
		SWSE		SESE		
	S23	NWNE		SWNE	NENW	NWNW
		SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S25	SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S26	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S35	NENE		NWNE	SWNE	SENE
		NENW		SENW	NESE	NWSE
		SWSE		SESE		
	S36	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SESW	NESE
		NWSE		SWSE	SESE	
R27E S31	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW	NESW
	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	SWSE
		SESE				
T05N R25E S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW	SWSW	SESW
	S02 Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESE		NWSE	SWSE	SESE
R26E S03		NWSW		SWSW		
	S04 Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S05 Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		NESE		SWSE	SESE	
	S06	NWNW				
	S08	NENE		SENE	NESW	NWSW
		SWSW		SESW	NESE	NWSE
		SWSE		SESE		
	S09	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S10	SWNE		NENW	NWNW	SWNW
		SENW		NESW	NWSW	SWSW
		SESW		NWSE	SWSE	SESE
	S14	NWNW		SWNW	NESW	NWSW
		SWSW		SESW		
	S15	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S16	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S17	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE		NWSE	SWSE	SESE
	S20	NENE		NWNE	SWNE	SENE

PLACE OF USE: (CONT)

T05N R26E	S20	NESE	NWSE	SWSE	SESE		
	S21	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S22	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S23	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		

PLACE OF USE: (CONT)

T06N	R25E	S08		NENE		NWNE		NENW		NWNW
				SWNW		NWSW		SWSW		NESE
				NWSE		SWSE		SESE		
		S09		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S10		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S11		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S12		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S13		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S14		NENE		NWNE		SENE		NESE
				SWSE		SESE				
		S16		NWNE		NENW		NWNW		SWNW
		S17		SWNE		SENE		NWNW		SWNW
				SENW		NESW		NWSW		NESE
				NWSE		SWSE		SESE		
		S18		NENE		NWNE		SWNE		SENE
				SWSW						
		S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
				SESE						
		S22		NWSW		SWSW				
		S23		NENE		SENE		NESE		SESE
		S24		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S25		NENE		NWNE		SWNE		SENE
				NENW		SWNW		SENW		NESW
				NWSW		SWSW		SESW		NESE
				NWSE		SWSE		SESE		
		S26		SESW		SWSE		SESE		
		S27		NWNW		SWNW		SWSW		SESW
				SWSE	Lot 4	(SESE)				
		S28		NENE		SENE		NESE		SESE
		S33		NENE						
		S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
				NENW		NWNW		SENW		NESW
			Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
		S35		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S36		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
	R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)				
		S06		SWSW		SESE				
		S07		NENE		SWNE		SENE	Lot 1	(NENW)
				NWNW		SWNW		SENW		NESW
			Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
				NWSE		SWSE		SESE		
		S08		NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
		S17		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW

PLACE OF USE: (CONT)

T06N R26E	S17		NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S21		SWNW		NESW		NWSW	SWSW
			SESW		SWSE			
	S27		NESW		NWSW			
	S28		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S29		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S30		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S31		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S32		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S33		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
	S17		SWNW		NWSW		SWSW	SESW
	S18		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SESE					
	S20		NENE		NWNE		SWNE	NENW
			NWNW		NESE		NWSE	SWSE
			SESE					
	S21		NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S26		SWSW		SESW		SWSE	SESE
	S27		NENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S28		NENE		NWNE		NENW	NWNW
			SWNW		SENW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SENE	NWSE
			SESE					
	S33		NWNE		SWNE		SENE	NENW
			NESE		NWSE		SESE	
	S34		NENE		NWNE		SWNE	SENE
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE					
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T07N R24E S36	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:54

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-10873

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 20646.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVIOR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 10/02/1905

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	20646.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	20646.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE

PLACE OF USE: (CONT)

T03N R26E S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		NESE		NWSE		SESE		
S12		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S13		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NENE		NWSE		
R27E S05	Lot 4	(NWNW)		SWNW		NWSW		SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
		NWSE		SWSE		SESE		
S07		NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW		NWSW		SWSW		SESW
		SWSE		SESE				
S08		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
S17		NENW		NWNW		SWNW		SENW
		NWSW		SWSW				
S18		NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S19		NENE		NWNE		SWNE		SENE
T04N R26E S02	Lot 2	(NWNW)						
S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		SENW		NESW		NWSW		SWSW
		SESW		NESE		NWSE		SWSE
		SESE						
S07		NENE		SENE		NESE		SESE
S08		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S09		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S10		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S11		NWNW		SWNW		NWSW		SWSW
S14		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S15		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S16		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S17		NENE		SWNE		SENE		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE		SESE				
S18		NENE		NWNE		SWNE		SENE
		NESE		NWSE		SWSE		SESE

PLACE OF USE: (CONT)

T04N R26E S19		NENE		NWNE	SWNE	SENE
		NESW		SESW	NESE	NWSE
		SWSE		SESE		
	S20	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	NWSE
	S21	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE				
	S22	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	NESE	NWSE
		SWSE		SESE		
	S23	NWNE		SWNE	NENW	NWNW
		SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S25	SWNW		SENW	NESW	NWSW
		SWSW		SESW	NWSE	SWSE
		SESE				
	S26	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S35	NENE		NWNE	SWNE	SENE
		NENW		SENW	NESE	NWSE
		SWSE		SESE		
	S36	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SESW	NESE
		NWSE		SWSE	SESE	
R27E S31	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
		SESE				
T05N R25E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESE		NWSE	SWSE	SESE
R26E S03		NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		SWSE	SESE	
	S06	NWNW				
	S08	NENE		SENE	NESW	NWSW
		SWSW		SESW	NESE	NWSE
		SWSE		SESE		
	S09	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S10	SWNE		NENW	NWNW	SWNW
		SENW		NESW	NWSW	SWSW
		SESW		NWSE	SWSE	SESE
	S14	NWNW		SWNW	NESW	NWSW
		SWSW		SESW		
	S15	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S16	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
	S17	NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESE		NWSE	SWSE	SESE

PLACE OF USE: (CONT)

T05N R26E S20		NENE		NWNE		SWNE	SENE
		NESE		NWSE		SWSE	SESE
	S21	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S22	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S23	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
	S26	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
	S27	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S28	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SWSE		SESE			
	S32	NENE		SENE		NESE	SESE
	S33	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S34	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW	Lot 4 (SWSW)	Lot 5 (SESW)	
		NESE		NWSE		SWSE	SESE
	S35	NWNW		SWNW		NWSW	SWSW
T06N R24E S01		Lot 1 (NENE)	Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)	Lot 4 (NWNW)			SWNW	SENW
		NESW		NESE		NWSE	SWSE
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)	Lot 4 (NWNW)			SWNW	SENW
		NESW		NWSW		SESW	NWSE
		SWSE		SESE			
	S03	Lot 1 (NENE)	Lot 2 (NWNE)			SWNE	SENE
	S11	NENE		NWNE		SWNE	SENE
	S12	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NWSW		NESE			
R25E S01		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S02	SWNE		SWNW		SENW	NESW
		NWSW		SWSW		SESW	NWSE
		SWSE		SESE			
	S03	Lot 1 (NENE)	Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)	Lot 4 (NWNW)			SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S04	Lot 1 (NENE)	Lot 2 (NWNE)		Lot 3 (NENW)	Lot 4 (NWNW)	
		SWSW		SESW		SWSE	SESE
	S05	Lot 1 (NENE)	Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)	Lot 4 (NWNW)			SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S06	Lot 1 (NENE)	Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)	Lot 4 (NWNW)		Lot 5 (SWNW)		SENW
		NESW	Lot 6 (NWSW)		Lot 7 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S07	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW

PLACE OF USE: (CONT)

T06N R25E S07		NESE		NWSE		SWSE		SESE
S08		NENE		NWNE		NENW		NWNW
		SWNW		NWSW		SWSW		NESE
		NWSE		SWSE		SESE		
S09		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S10		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S11		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S12		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S13		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S14		NENE		NWNE		SENE		NESE
		SWSE		SESE				
S16		NWNE		NENW		NWNW		SWNW
S17		SWNE		SENE		NWNW		SWNW
		SENW		NESW		NWSW		NESE
		NWSE		SWSE		SESE		
S18		NENE		NWNE		SWNE		SENE
		SWSW						
S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
	Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
		SESE						
S22		NWSW		SWSW				
S23		NENE		SENE		NESE		SESE
S24		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S25		NENE		NWNE		SWNE		SENE
		NENW		SWNW		SENW		NESW
		NWSW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
S26		SESW		SWSE		SESE		
S27		NWNW		SWNW		SWSW		SESW
		SWSE	Lot 4	(SESE)				
S28		NENE		SENE		NESE		SESE
S33		NENE						
S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
		NENW		NWNW		SENW		NESW
	Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
S35		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
S36		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
R26E S05	Lot 4	(SWSW)	Lot 5	(SESW)				
S06		SWSW		SESE				
S07		NENE		SWNE		SENE	Lot 1	(NENW)
		NWNW		SWNW		SENW		NESW
	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
		NWSE		SWSE		SESE		
S08		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
S17		NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T06N R26E S17		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S18	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S19	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S20	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S21	SWNW		NESW		NWSW		SWSW
		SESW		SWSE				
	S27	NESW		NWSW				
	S28	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE		SESE				
	S29	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S30	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S31	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S32	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S33	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NWSE		SWSE
T07N R24E S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
	S17	SWNW		NWSW		SWSW		SESW
	S18	NENE		NWNE		SWNE		SENE
		NENW		SENW		NESE		NWSE
		SESE						
	S20	NENE		NWNE		SWNE		NENW
		NWNW		NESE		NWSE		SWSE
		SESE						
	S21	NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S26	SWSW		SESW		SWSE		SESE
	S27	NENW		NESW		NWSW		SWSW
		SESW		NESE		NWSE		SWSE
		SESE						
	S28	NENE		NWNE		NENW		NWNW
		SWNW		SENW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S29	NENE		NWNE		SENE		NWSE
		SESE						
	S33	NWNE		SWNE		SENE		NENW
		NESE		NWSE		SESE		
	S34	NENE		NWNE		SWNE		SENE
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE						
	S35	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S36	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T07N R24E S36	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED **NUNC PRO TUNC**

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 34-10935

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

OCT 15 2001

By _____ Clerk
Deputy Clerk

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6.4 CFS
1113.0 AFY

PRIORITY DATE: 06/01/1896

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	1113.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	1113.0 AFY
DIVERSION TO STORAGE	05-01 10-15	6.4 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S07		NENE		SENE		NESE	SESE
	S08		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S11		NWNW		SWNW		NWSW	SWSW
	S14		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S15		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S16		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S17		NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S18		NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NESW		SESW		NESE	NWSE
			SWSE		SESE			
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	NWSE
	S21		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE					
	S22		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22			NESW		NWSW	NESE	NWSE
			SWSE		SESE		
	S23		NWNE		SWNE	NENW	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S25		SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S26		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S35		NENE		NWNE	SWNE	SENE
			NENW		SENW	NESE	NWSE
			SWSE		SESE		
	S36		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SESW	NESE
			NWSE		SWSE	SESE	
R27E S31		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
			SESE				
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESE		NWSE	SWSE	SESE
R26E S03			NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			NESE		SWSE	SESE	
	S06		NWNW				
	S08		NENE		SENE	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		SWNE		NENW	NWNW	SWNW
			SENW		NESW	NWSW	SWSW
			SESW		NWSE	SWSE	SESE
	S14		NWNW		SWNW	NESW	NWSW
			SWSW		SESW		
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE		NWSE	SWSE	SESE
	S20		NENE		NWNE	SWNE	SENE
			NESE		NWSE	SWSE	SESE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW		SESW		
	S26		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
	S27		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S28		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SWSE		SESE						
	S32		NENE		SENE		NESE		SESE		
	S33		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)		
			NESE		NWSE		SWSE		SESE		
	S35		NWNW		SWNW		NWSW		SWSW		
T06N R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NESE		NWSE		SWSE		
			SESE								
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
	S11		NENE		NWNE		SWNE		SENE		
	S12		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NWSW		NESE						
R25E	S01		NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S02		SWNE		SWNW		SENW		NESW		
			NWSW		SWSW		SESW		NWSE		
			SWSE		SESE						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)		
			SWSW		SESW		SWSE		SESE		
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW		
			NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S08		NENE		NWNE		NENW		NWNW		
			SWNW		NWSW		SWSW		NESE		
			NWSE		SWSE		SESE				
	S09		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S10		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE		SESE		
	S11		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S12		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S13		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S14		NENE		NWNE		SENE		NESE		
			SWSE		SESE						
	S16		NWNE		NENW		NWNW		SWNW		
	S17		SWNE		SENE		NWNW		SWNW		
			SENW		NESW		NWSW		NESE		
			NWSE		SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE		
			SWSW								
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE		
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE		
			SESE								
	S22		NWSW		SWSW						
	S23		NENE		SENE		NESE		SESE		
	S24		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S25		NENE		NWNE		SWNE		SENE		
			NENW		SWNW		SENW		NESW		
			NWSW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S26		SESW		SWSE		SESE				
	S27		NWNW		SWNW		SWSW		SESW		
			SWSE	Lot 4	(SESE)						
	S28		NENE		SENE		NESE		SESE		
	S33		NENE								
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)		
			NENW		NWNW		SENW		NESW		
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)				
	S35		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S36		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)						
	S06		SWSW		SESE						
	S07		NENE		SWNE		SENE	Lot 1	(NENW)		
			NWNW		SWNW		SENW		NESW		
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE		
			NWSE		SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
	S17		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S18		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S19		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S20		NENE		NWNE		SWNE		SENE		

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-10935

PLACE OF USE: (CONT)

T06N R26E S20		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S21	SWNW		NESW		NWSW		SWSW
		SESW		SWSE				
	S27	NESW		NWSW				
	S28	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE		SESE				
	S29	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S30	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S31	NENE		NWNE		SWNE		SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S32	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S33	NWNE		SWNE		NENW		NWNW
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NWSE		SWSE
T07N R24E S07		Lot 3 (NWSW)		Lot 4 (SWSW)		SESW		
	S17	SWNW		NWSW		SWSW		SESW
	S18	NENE		NWNE		SWNE		SENE
		NENW		SENW		NESE		NWSE
		SESE						
	S20	NENE		NWNE		SWNE		NENW
		NWNW		NESE		NWSE		SWSE
		SESE						
	S21	NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S26	SWSW		SESW		SWSE		SESE
	S27	NENW		NESW		NWSW		SWSW
		SESW		NESE		NWSE		SWSE
		SESE						
	S28	NENE		NWNE		NENW		NWNW
		SWNW		SENW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S29	NENE		NWNE		SENE		NWSE
		SESE						
	S33	NWNE		SWNE		SENE		NENW
		NESE		NWSE		SESE		
	S34	NENE		NWNE		SWNE		SENE
		SWNW		SENW		NESW		NWSW
		SWSW		SESW		NESE		NWSE
		SWSE						
	S35	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S36	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
R25E S28		SWSW		SESW		NWSE		SWSE
	S31	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S32	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b)
Water Right 34-10935

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10873.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39
	SWSE	40				
S24	NENW	39	NWNW	38	SWNW	39

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J Wildman
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:55

DISTRICT COURT-SRBA
TWIN FALLS IDAHO
FILED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-10935

FILE CONFIRMATION DATE 2001 OCT 15 DD

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6.4 CFS
1113.0 AFY

PRIORITY DATE: 06/01/1896

POINT OF DIVERSION:

T03N R26E	S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
T04N R26E	S26	NWNWNW	(REDIVERSION)	
T05N R26E	S04	NWSESE	(REDIVERSION)	
T07N R23E	S12	SENW		Within CUSTER County
T06N R24E	S01	NENESW	(REDIVERSION)	
R25E	S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
R26E	S32	NWSENW	(REDIVERSION)	
T07N R23E	S12	NWNWSE	(REDIVERSION)	
R24E	S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	1113.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	1113.0 AFY
DIVERSION TO STORAGE	05-01 10-15	6.4 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E	S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW		SENW
			NESW		NWSW	SWSW		SESW
			NESE		NWSE	SWSE		SESE
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE		SENE
			NESE		NWSE	SESE		
	S12		NENE		NWNE	SWNE		SENE
			NENW		NWNW	SWNW		SENW
			NESW		NWSW	SWSW		SESW
			NESE		NWSE	SWSE		SESE
	S13		NENE		NWNE	SWNE		SENE
			NENW		NWNW	SWNW		SENW
			NESW		NESE	NWSE		
R27E	S05	Lot 4	(NWNW)		SWNW	NWSW		SWSW
	S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENW		NWNW		SWNW		SENW
			NWSW		SWSW				
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			SENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S07		NENE		SENE		NESE		SESE
	S08		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S09		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S10		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S11		NWNW		SWNW		NWSW		SWSW
	S14		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S15		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S16		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S17		NENE		SWNE		SENE		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NESW		SESW		NESE		NWSE
			SWSE		SESE				
	S20		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		NWSE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESE						
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T04N	R26E	S22		NESW		NWSW	NESE	NWSE
				SWSE		SESE		
		S23		NWNE		SWNE	NENW	NWNW
				SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S25		SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S26		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S35		NENE		NWNE	SWNE	SENE
				NENW		SENW	NESE	NWSE
				SWSE		SESE		
		S36		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SESW	NESE
				NWSE		SWSE	SESE	
	R27E	S31	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
			Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
				SESE				
T05N	R25E	S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
		S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESE		NWSE	SWSE	SESE
	R26E	S03		NWSW		SWSW		
		S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
				NESE		SWSE	SESE	
		S06		NWNW				
		S08		NENE		SENE	NESW	NWSW
				SWSW		SESW	NESE	NWSE
				SWSE		SESE		
		S09		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S10		SWNE		NENW	NWNW	SWNW
				SENW		NESW	NWSW	SWSW
				SESW		NWSE	SWSE	SESE
		S14		NWNW		SWNW	NESW	NWSW
				SWSW		SESW		
		S15		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S16		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S17		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESE		NWSE	SWSE	SESE
		S20		NENE		NWNE	SWNE	SENE
				NESE		NWSE	SWSE	SESE
		S21		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S22		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N	R26E	S23		NESW		NWSW		SWSW		SESW	
		S26		NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
		S27		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S28		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S29		NENE		NWNE		SWNE		SENE	
				NENW		SENW		NESE		NWSE	
				SWSE		SESE					
		S32		NENE		SENE		NESE		SESE	
		S33		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S34		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW	Lot 4	(SWSW)	Lot 5	(SESW)	
				NESE		NWSE		SWSE		SESE	
		S35		NWNW		SWNW		NWSW		SWSW	
T06N	R24E	S01	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
				NESW		NESE		NWSE		SWSE	
				SESE							
		S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
				NESW		NWSW		SESW		NWSE	
				SWSE		SESE					
		S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
		S11		NENE		NWNE		SWNE		SENE	
		S12		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NWSW		NESE					
	R25E	S01		NESW		SWSW		SESW		NESE	
				NWSE		SWSE		SESE			
		S02		SWNE		SWNW		SENW		NESW	
				NWSW		SWSW		SESW		NWSE	
				SWSE		SESE					
		S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S04	Lot 1	(NENE)	Lot 2	(NWNE)	Lot 3	(NENW)	Lot 4	(NWNW)	
				SWSW		SESW		SWSE		SESE	
		S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)	Lot 5	(SWNW)		SENW	
				NESW	Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	
				NESE		NWSE		SWSE		SESE	
		S07		NENE		NWNE		SWNE		SENE	
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	
				NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
				NESE		NWSE		SWSE		SESE	
		S08		NENE		NWNE		NENW		NWNW	
				SWNW		NWSW		SWSW		NESE	
				NWSE		SWSE		SESE			
		S09		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S10		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	

PLACE OF USE: (CONT)

T06N	R25E	S10		NESE		NWSE		SWSE		SESE	
		S11		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S12		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S13		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S14		NENE		NWNE		SENE		NESE	
				SWSE		SESE					
		S16		NWNE		NENW		NWNW		SWNW	
		S17		SWNE		SENE		NWNW		SWNW	
				SENW		NESW		NWSW		NESE	
				NWSE		SWSE		SESE			
		S18		NENE		NWNE		SWNE		SENE	
				SWSW							
		S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE	
				SESE							
		S22		NWSW		SWSW					
		S23		NENE		SENE		NESE		SESE	
		S24		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S25		NENE		NWNE		SWNE		SENE	
				NENW		SWNW		SENW		NESW	
				NWSW		SWSW		SESW		NESE	
				NWSE		SWSE		SESE			
		S26		SESW		SWSE		SESE			
		S27		NWNW		SWNW		SWSW		SESW	
				SWSE	Lot 4	(SESE)					
		S28		NENE		SENE		NESE		SESE	
		S33		NENE							
		S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)	
				NENW		NWNW		SENW		NESW	
			Lot 3	(NESE)		NWSE	Lot 4	(SESE)			
		S35		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S36		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
	R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)					
		S06		SWSW		SESE					
		S07		NENE		SWNE		SENE	Lot 1	(NENW)	
				NWNW		SWNW		SENW		NESW	
			Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE	
				NWSE		SWSE		SESE			
		S08		NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
		S17		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S18		NENE		NWNE		SWNE		SENE	
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	
				NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
				NESE		NWSE		SWSE		SESE	
		S19		NENE		NWNE		SWNE		SENE	
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S20		NENE		NWNE		SWNE		SENE	

PLACE OF USE: (CONT)

T06N	R26E	S20		NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S21		SWNW		NESW		NWSW		SWSW
				SESW		SWSE				
		S27		NESW		NWSW				
		S28		NWNE		SWNE		NENW		NWNW
				SWNW		SENW		NESW		NWSW
				SWSW		SESW		NESE		NWSE
				SWSE		SESE				
		S29		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S30		NENE		NWNE		SWNE		SENE
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
				NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
				NESE		NWSE		SWSE		SESE
		S31		NENE		NWNE		SWNE		SENE
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
				NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
				NESE		NWSE		SWSE		SESE
		S32		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S33		NWNE		SWNE		NENW		NWNW
				SWNW		SENW		NESW		NWSW
				SWSW		SESW		NWSE		SWSE
T07N	R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
		S17		SWNW		NWSW		SWSW		SESW
		S18		NENE		NWNE		SWNE		SENE
				NENW		SENW		NESE		NWSE
				SESE						
		S20		NENE		NWNE		SWNE		NENW
				NWNW		NESE		NWSE		SWSE
				SESE						
		S21		NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S26		SWSW		SESW		SWSE		SESE
		S27		NENW		NESW		NWSW		SWSW
				SESW		NESE		NWSE		SWSE
				SESE						
		S28		NENE		NWNE		NENW		NWNW
				SWNW		SENW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S29		NENE		NWNE		SENE		NWSE
				SESE						
		S33		NWNE		SWNE		SENE		NENW
				NESE		NWSE		SESE		
		S34		NENE		NWNE		SWNE		SENE
				SWNW		SENW		NESW		NWSW
				SWSW		SESW		NESE		NWSE
				SWSE						
		S35		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		SWSW		SESW		NESE
				NWSE		SWSE		SESE		
		S36		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
	R25E	S28		SWSW		SESW		NWSE		SWSE
		S31		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE
		S32		NENE		NWNE		SWNE		SENE
				NENW		NWNW		SWNW		SENW
				NESW		NWSW		SWSW		SESW
				NESE		NWSE		SWSE		SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10873.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39
	SWSE	40				
S24	NENW	39	NWNW	38	SWNW	39

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT 7

Form No. 42-1409 (2) a 1/88

34-00012

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39356
Ident. Number A34-00012ZO/A34-00012
Date Received 2-19-91
Receipt Number E015704

NOTICE OF CLAIM TO A WATER RIGHT

ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant (s) Big Lost River Irrigation District Phone (208) 588-2231

   Mailing Address P.O.BOX 205 Mackay, Idaho Zip 83251

2. Date of Priority (Only one (1) per claim) 2/7/1916

3. Source of water supply (a) Big Lost River
   which is tributary to (b) _____

4. a. Location of existing point of diversion is: Township 7N Range 23EBM Section 12,
   _____ 1/4 of _____ 1/4 of _____ 1/4, Govt. Lot, _____ B.M., County of Custer

   Additional points of diversion if any: _____

   b. If instream flow, beginning point of claimed instream flow is:

   Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of _____ 1/4,

   Govt. Lot _____ B.M., County of _____

   ending point is: Township _____ Range _____ Section _____, _____ 1/4 of _____ 1/4 of

   _____ 1/4, Govt. Lot _____ B.M., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well.

Mackay Reservoir-ASSV/Burnett/Beck/McGown/Darlington/Harris-Vaught/Lower Burnett/Sharp/Swauger/B & J/Moore/Westside west/westside east/U.C. (Blaine)/Arco/Middle/Eastside/Island/Miller/McLoughlin/Munsey/3 & 1 canals.

Copies: White-State, Yellow-Claimant

6. Water is claimed for the following purposes: (both dates are inclusive) (cfs) (acre feet)

For Irrigation purposes from 5/1 to 10/15 amount 1000 or _____

For Storage purposes from 10/16 to 4/30 amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 1000 (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is _____ acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.) _____

10. Description of place of use:
    a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
    b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RNG	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	

Total number of acres irrigated _____

11. In which county (ies) are lands listed above as place of use located? Butte & Custer

12. Do you own the property listed above as place of use? Yes _____ No xxx
    If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above. or None ( )
    _____

14. Remarks:

Big lost River Irrigation District is a conveyance system who owns these and the right to store in the Mackay reservoir, for delivery to valley members.

Last Name _____ Ident No. _____

Copies: White -State, Yellow-Claimant

15. Basis of Claim (check one) Beneficial Use _____ Posted Notice _____ License _____ Permit _____
Decree _____
If applicable provide IDWR Water Right Number _____
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

16. Signature (s)
(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.
Number of attachments _____

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant (s) _____ Date _____

_____ Date _____

For Organizations: I do solemnly swear or affirm that I am Assistant Secretary-Treasurer (office mgr)
Title
of Big Lost River Irrigation District
Organization
, that I have signed the foregoing document in the space below as Office Manager
Title
of Big Lost River Irrig.Dist.
Organization
and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent Rita M. Hendrix

Title and Organization Office Mgr. Big Lost River Irrig. Dist. Date _____

State of Idaho/or _____)
) SS.
County of Bonneville)

Subscribed and sworn (or affirmed) before me this 19 day of Feb. 19 91

SEAL

Notary Public Ernest Carlson

Residing at Idaho Falls, Id.

My Commission Expires 6-14-1994

Please Print Name

17. Notice of Appearance:
Notice is hereby given that I, _____ will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature _____

Address _____

Date _____

RECEIVED
DEC 1 1 1992

Last Name _____ Ident. Number _____

Copies White-State, Yellow-Claimant

OK
Verified 11-8-91

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: R34-00012
Date Received: 2/19/1990
Receipt No: E015704
Received By: _____

COPY FOR YOUR FILES

NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED UNDER STATE LAW

COPY FOR YOUR FILES

1. Name: BIG LOST RIVER IRRIGATION DISTRICT
   Address: PO BOX 205
   MACKAY ID 83251

2. Date of Priority: FEB 7, 1916

3. Source: BIG LOST RIVER Trib. to: SINKS

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4			Lot		County
03N	26E	1	NE	NE	SW		R	BUTTE
		12	NE	NW	SE		R	BUTTE
04N	26E	26	NW	NW	NW		R	BUTTE
05N	26E	4	NW	SE	SE		R	BUTTE
06N	24E	1	NE	NE	SW		R	CUSTER
	25E	6	SW	NE	SE		R	CUSTER
		10	NE	NE	SW		R	CUSTER
		11	SW	SE	SW		R	CUSTER
		14	SE	NW	SE		R	CUSTER
		24	NW	NW	NE		R	CUSTER
	26E	32	NW	SE	NW		R	CUSTER
07N	23E	12		SE	NW			CUSTER
			NW	NW	SE		R	CUSTER
	24E	18	SE	SW	NE		R	CUSTER
		20	SW	NE	SW		R	CUSTER
		33	NW	SW	NE		R	CUSTER
		34	SE	NW	NW		R	CUSTER

5. Description of diverting works:

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION STORAGE	01/01	12/31			17182.00

MICROFILMED
DEC 09 1992

6. Water is used for the following purposes: Continued

Purpose	From	To	C.F.S (and/or)	A.F.A.
IRRIGATION FROM STORAGE	05/01	10/15		17182.00

7. Total Quantity Appropriated is:
C.F.S. (and/or) 17182.00 A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres

11. Place of use in counties:

12. Do you own the property listed above as place of use? NO

13. Other Water Rights Used:

14. Remarks:
USE OF THIS RIGHT WITH RIGHT NOS. 34-10873, 34-02507 AND 34-00013 IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON.
WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC GOWN, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS.
POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
WATER STORED PURSUANT TO THIS RIGHT IS USED IN COMBINATION WITH WATER DIVERTED UNDER OTHER RIGHTS. THE TOTAL COMBINED CONSUMPTIVE USE AMOUNT FOR THE USE OF THE OTHER RIGHTS WITH STORED WATER IS SHOWN IN THE OTHER RIGHTS.
A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF THE FACILITY DESCRIBED ABOVE, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.
RIGHT NOS. 34-10873 AND 34-02507 ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE.

15. Basis of Claim: DECREED

Case Number:

MICROFILMED
DEC 0 9 1992

Court :

Decree date: / /

UTAH CONSTRUCTION COMP. vs JOHN ABBOTT, ET AL

Decree Plaintiff Decree Defendant

MICROFILMED
DEC 0 9 1992

EXHIBIT 8

POOR ORIGINAL

RIGHT NUMBER	NAME & ADDRESS	PRIORITY DATE	PURPOSE OF USE	PERIOD OF USE FROM	PERIOD OF USE TO	MAXIMUM QUANTITY		BASIS OF CLAIM
SOURCE: BIG LOST RIVER			TRIBUTARY: SINKS					
34-00012	BIG LOST RIVER IRRIGATION DISTRICT PO BOX 205 MACKAY ID 83251	02/07/1916	IRRIGATION STORAGE	01-01	12-31	17205.0	AFY	DECREED
			IRRIGATION FROM STORAGE	05-01	10-15	17205.0	AFY	
			TOTAL QUANTITY:			17205.0	AFY	

POINT OF DIVERSION:

T07N	R23E S12	SENW	
T03N	R26E S01	NENESW	(R)
	S12	NENWSE	(R)
T04N	R26E S26	NWNWNW	(R)
T05N	R26E S04	NWSESE	(R)
T06N	R24E S01	NENESW	(R)
	R25E S06 Pvt	SWNESE	(R)
	S10 Pvt	NENESW	(R)
	S11 Pvt	SWSESW	(R)
	S14	SENWSE Pwb	(R)
	S24	NWNWNE	(R)
	R26E S32	NWSENW	(R)
T07N	R23E S12	NWNWSE	(R)
	R24E S18	SESWNE	(R)
	S20	SWNESW	(R)
	S33	NWSWNE	(R)
	S34	SENWNW	(R)

PLACE OF USE: IRRIGATION STORAGE
SAME AS OTHER USE

PLACE OF USE: IRRIGATION FROM STORAGE
SAME AS OTHER USE

REMARKS: USE OF THIS RIGHT WITH RIGHT NOS. 34-00013, 34-02507 AND 34-10873 IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON.

POINT OF DIVERSION IN SENW SEC 12, TWP 7N, RGE 23E IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

THE AMOUNT OF WATER REDIVERTED FROM THE BIG LOST RIVER SHALL BE REDUCED WHEN NECESSARY TO PREVENT INJURY TO APPROPIATORS OF WATER DOWNSTREAM FROM THE POINT OF REDIVERSION.

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR

000465

MICROFILMED
APR 19 1994

EXHIBIT 9

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT
TRANSFER NO. 80488

This is to certify that: MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

Water Right	Origin/Basis	Priority Date	Diversion Rate	Diversion Volume	Acre Limit	Total Acres	Source
34-2421	WR/DECREED	6/6/1961	1.280 cfs	224.0 af	64.0	70.0	GROUND WATER

Associated Water Rights Also Included in the Transfer Approval (Conditions Updated)

Water Right	Origin/Basis	Priority Date	Diversion Rate	Diversion Volume	Acre Limit	Total Acres	Source
34-381A	WR/DECREED	9/26/1894	2.400 cfs	N/A	120.0	200.0	BIG LOST RIVER
34-182	WR/DECREED	6/1/1883	1.600 cfs	N/A	80.0	200.0	BIG LOST RIVER
34-2379F	WR/DECREED	8/8/1960	2.110 cfs	392.0 af		112.0	GROUND WATER

Purpose of Transfer (Changes Proposed)

Current Number	Split	POD	POU	Add POD	Period of Use	Nature of Use
34-2421	YES	YES	YES	NO	NO	NO

Summary Of Water Rights After the Approved Change

Existing Right	New No. (Changed Portion)	Transfer Rate	Transfer Volume	Acre Limit	Total Acres	New No. (remaining portion)	Remaining Rate	Remaining Volume	Remaining Acre Limit	Remaining Total Acres
34-2421	34-14525	0.640 cfs	112.0 af	N/A	32.0	34-2421	0.640 cfs	112.0 af	N/A	32.0
COMBINED TOTALS		**0.640 cfs**	**112.0 af**	**32.0**	**32.0**		**N/A**	**N/A**	**N/A**	**N/A**

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 14th day of December, 2015.

for Chief, Water Allocation Bureau

Transfer No. 80488

SUPPORT DATA
34-2421
IN FILE

WATER RIGHT NO. 34-2421

As Modified by Transfer No. 80488

In accordance with the approval of Transfer No. 80488, Water Right No. 34-2421 is now described as follows:

Right Holder: WIGHT ENTERPRISES LLC
3798 W 4050 N
MOORE, ID 83255

Priority Date: 6/6/1961

Source: GROUND WATER

BENEFICIAL USE	From		To	Diversion Rate	Diversion Volume
IRRIGATION	04/01	to	10/31	0.640 cfs	112.0 af
				0.640 cfs	112.0 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER NWNW Sec 12 Twp 06N Rge 25E BUTTE County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	25E	12							32.0										32.0

POU Total Acres: 32.0

CONDITIONS OF APPROVAL

1. Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
2. This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

Transfer No. 80488

WATER RIGHT NO. 34-14525

As Modified by Transfer No. 80488

In accordance with the approval of Transfer No. 80488, Water Right No. 34-14525 is now described as follows:

Right Holder: WIGHT ENTERPRISES LLC
3798 W 4050 N
MOORE, ID 83255

Priority Date: 6/6/1961

Source: GROUND WATER

BENEFICIAL USE	From		To	Diversion Rate	Diversion Volume
IRRIGATION	04/01	to	10/31	0.640 cfs	112.0 af
				0.640 cfs	112.0 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER NWSE Sec 31 Twp 06N Rge 26E BUTTE County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31															7.0	13.0	20.0
06N	26E	32											12.0						12.0

POU Total Acres: 32.0

CONDITIONS OF APPROVAL

1. Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres.
2. A lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
5. Upon specific notification of the Department, the right holder shall install and maintain data loggers to record water usage information at the authorized point(s) of diversion in accordance with Department specifications.

Transfer No. 80488

WATER RIGHT NO. 34-14525

As Modified by Transfer No. 80488

CONDITIONS OF APPROVAL

6. Prior to the diversion and use of water under Transfer approval 80488, the right holder shall install and maintain acceptable measuring device(s) at the authorized point(s) of diversion in accordance with Department specifications, or shall obtain an approved variance from the Department to determine the amount of water diverted from power records or to maintain an existing measuring device.

7. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

8. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

9. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

WATER RIGHT NO. 34-381A

As Modified by Transfer No. 80488

In accordance with the approval of Transfer No. 80488, Water Right No. 34-381A is now described as follows:

Right Holder: MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

Priority Date: 9/26/1894

Source: BIG LOST RIVER **Tributary:** SINKS

BENEFICIAL USE	From		To	Diversion Rate
IRRIGATION	5/01	to	10/15	2.400 cfs
				2.400 cfs

LOCATION OF POINT(S) OF DIVERSION

BIG LOST RIVER	SENWSE	Sec 14 Twp 06N Rge 25E CUSTER County
BIG LOST RIVER	SENW	Sec 32 Twp 06N Rge 26E CUSTER County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31			32.0	28.0									35.0	35.0	9.0	16.0	155.0
06N	26E	32							6.0			22.0	17.0						45.0

Right Acre Limit: 120.0
POU Total Acres: 200.0

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 120 acres within the authorized place of use in a single irrigation season.
2. Rights 34-182, 34-381A and 34-2379F when combined shall not exceed a total diversion rate of 5.2 cfs and the irrigation of 200 acres.
3. Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
5. The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.

Transfer No. 80488

WATER RIGHT NO. 34-381A

As Modified by Transfer No. 80488

CONDITIONS OF APPROVAL

6. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.

7. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

8. This right does not grant any right-of-way or easement across the land of another.

9. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

10. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

11. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

WATER RIGHT NO. 34-182

As Modified by Transfer No. 80488

In accordance with the approval of Transfer No. 80488, Water Right No. 34-182 is now described as follows:

Right Holder: MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

Priority Date: 6/1/1883

Source: BIG LOST RIVER **Tributary:** SINKS

BENEFICIAL USE	From		To	Diversion Rate
IRRIGATION	5/01	to	10/15	1.600 cfs
				1.600 cfs

LOCATION OF POINT(S) OF DIVERSION

BIG LOST RIVER	SENWSE	Sec 14 Twp 06N Rge 25E CUSTER County
BIG LOST RIVER	SENW	Sec 32 Twp 06N Rge 26E CUSTER County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31			32.0	28.0									35.0	35.0	9.0	16.0	155.0
06N	26E	32							6.0			22.0	17.0						45.0

Right Acre Limit: 80.0
POU Total Acres: 200.0

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 80 acres within the authorized place of use in a single irrigation season.
2. Rights 34-182, 34-381A and 34-2379F when combined shall not exceed a total diversion rate of 5.2 cfs and the irrigation of 200 acres.
3. Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
5. The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.

Transfer No. 80488

WATER RIGHT NO. 34-182

As Modified by Transfer No. 80488

CONDITIONS OF APPROVAL

6. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.

7. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

8. This right does not grant any right-of-way or easement across the land of another.

9. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

10. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

11. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

WATER RIGHT NO. 34-2379F

As Modified by Transfer No. 80488

In accordance with the approval of Transfer No. 80488, Water Right No. 34-2379F is now described as follows:

Right Holder: MOSS FARMS INC
3286 N 3350 W
MOORE, ID 83255

Priority Date: 8/8/1960

Source: GROUND WATER

BENEFICIAL USE	From		To	Diversion Rate	Diversion Volume
IRRIGATION	04/01	to	11/01	2.110 cfs	392.0 af
				2.110 cfs	392.0 af

LOCATION OF POINT(S) OF DIVERSION

GROUND WATER NESESW Sec 31 Twp 06N Rge 26E BUTTE County

PLACE OF USE: IRRIGATION

			NE				NW				SW				SE				
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06N	26E	31			6.0	18.0									35.0	30.0			89.0
06N	26E	32							3.0			20.0							23.0

POU Total Acres: 112.0

CONDITIONS OF APPROVAL

1. Rights 34-182, 34-381A and 34-2379F when combined shall not exceed a total diversion rate of 5.2 cfs and the irrigation of 200.0 acres.

2. Rights 34-182, 34-381A, 34-2379F, and 34-14525 when combined shall not exceed a total diversion rate of 5.2 cfs, and the irrigation of 200 acres.

3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 34.

4. A lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.

5. Prior to the diversion and use of water under Transfer approval 76291, the right holder shall install and maintain acceptable measuring device(s) at the authorized point(s) of diversion in accordance with Department specifications, or shall obtain an approved variance from the Department to determine the amount of water diverted from power records or to maintain an existing measuring device.

Transfer No. 80488

WATER RIGHT NO. 34-2379F

As Modified by Transfer No. 80488

CONDITIONS OF APPROVAL

6. Upon specific notification of the Department, the right holder shall install and maintain data loggers to record water usage information at the authorized point(s) of diversion in accordance with Department specifications.

7. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the lands above.

8. The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right.

9. If the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use, this right to divert groundwater shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.

10. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

11. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

12. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

EXHIBIT 10

Carlsen, Ernie

From: Big Lost River Irrigation District [blrid@atcnet.net]
Sent: Tuesday, December 16, 2008 9:20 AM
To: Carlsen, Ernie
Subject: Re: test

Ernie
Please send back BLRID's application for the transfer of Point of Diversion of storage water as it pertains to Lower Burnett and Pehrson Ditch. The directors do not want it to go before Pehrson's is approved. And this point I would say refund the funds and we will resubmit new check when we resubmit.

Also could you please enclose a letter that IDWR is reviewing Pehrson's application and while it is not named specificially that IDWR is considering two points of diversion on his application. And whether or not you consider the unanamed item to be the Pehrson ditch. Please enclude any rcomendations that the board should consider based on the interpretation of Pehrson's application.

Please mail back to Big Lost River Irrigation District at POB 205 Mackay, ID. 83251.

Thanks
Dawn

----- Original Message -----
From: Carlsen, Ernie
To: blrid@atcnet.net
Sent: Tuesday, December 09, 2008 12:09 PM
Subject: test

Dawn here is my email address.

Thanks
Ernie Carlsen
Water Resource Program Manager
(208) 525-7161

Form 222 10/07

Page _____ of _____

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Department of Water Resources
Eastern Region

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 74790

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1

Name of Applicant Big Lost River Irrigation District Phone 208-588-2231

Mailing address P.O. Box 205, Mackay, Idaho 83251 Email blrid@atcnet.net

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☒ Add diversion point(s) ☐ Change place of use
   ☐ Change nature of use ☐ Change period of use ☐ Other _____

2. Describe the reason for the proposed changes Update the diversions used by Applicant

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1.

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of Use
See attached Exhibit A				to
				to
				to
				to

2. Total amount of water being transferred _____ cubic feet per second and/or _____ acre-feet per annum.

3. Source of water Big Lost River Irrigation District tributary to _____

4. Point(s) of Diversion: New Points

Lot	¼	¼	¼	Sec	Twp	Rge	County	Local name for diversion
	NE	NW	NE	24	06N	25E	Custer	Pehrson Ditch
	NE	NW	NE	24	06N	25E	Custer	Lower Burnett (new)
Plus existing points of diversion set forth on attached water rights								

5. Lands irrigated or place of use: all lands located within boundary of Big Lost River Irrigation Distric

Twp	Rge	Sec	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

Total Acres _____

PART 1

6. General Information:

a. Description of diversion system headgates, canals, ditches

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts?

_____ Yes n/a No. If yes, provide a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes.

c. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer:

None

d. Remarks:

Total diversions at Pehrson ditch and Lower Burnett (new) shall not exceed 800 af per year.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____

And the said application is hereby _____, subject to the following conditions:

Witness my hand this _____ day of _____, 20 _____.

_____
For the Director

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of Use
34-00012	02/07/1916	17205 afa 17205 afa	Irrigation Storage Irrigation. From Storage	1/01 to 12/31 5/01 to 10/15
34-00810	06/01/1888	556.5 afa 556.5 afa 3.2 cfs	Irrigation Storage Irrigation From Storage Diversion to Storage	5/01 to 10/15 5/10 to 10/15 5/01 to 10/15
34-00811	06/30/1881	294 afa 294 afa 1.5 cfs	Irrigation Storage Irrigation From Storage Diversion to Storage	5/01 to 10/15 5/01 to 10/15 5/01 to 10/15
34-00817B	03/01/1902	140 afa 140 afa 0.8 cfs	Irrigation Storage Irrigation From Storage Diversion to Storage	5/01 to 10/15 5/01 to 10/15 05/01 to 10/15
34-00818	06/30/1880	556.5 afa 556.5 afa 3.2 cfs	Irrigation Storage Irrigation From Storage Diversion to Storage	5/01 to 10/15 5/01 to 10/15 5/01 to 10/15
34-02507	09/02/1959	6000 afa 6000 afa	Irrigation Storage Irrigation From Storage	1/01 to 12/31 5/01 to 10/15

EXHIBIT A

34-10873	10/02/1905	20646 afa 20646 afa	Irrigation Storage Irrigation From Storage	1/01 to 12/31 5/01 to 10/15
34-10934	06/01/1896	1113 afa 1113 afa 6.4 cfs	Irrigation Storage Irrigation From Storage Diversion to Storage	5/01 to 10/15 5/01 to 10/15 5/01 to 10/15

Page _____ of _____ Transfer No. _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 2

(Attach one copy for each right)

A. DESCRIPTION OF RIGHT AS RECORDED See attached Rights - partially decreed.

1. Right as evidenced by:
   a. Decree No. _____ Decreed to _____
      in case of _____ vs. _____
      dated _____ in _____ county of _____
   b. License No. _____ issued by the Idaho Department of Water Resources.
   c. Claim No. _____ on file with the Idaho Department of Water Resources.
   d. Transfer No. _____ which produced this right.
2. Attach copy of last year's tax notice for the property to which the water right is appurtenant or other documents which show ownership. Label document as attachment A. Check appropriate box below:

   ☐ Tax Notice ☐ Warranty Deed ☐ Other _____

3. Source of water _____ tributary to _____
4. Date or priority _____
5. Water is used for the following purposes:

   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)
   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)
   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)
6. Total amount of water under right _____ cubic feet per second and/or _____ acre-feet per annum.
7. Point(s) of Diversion:

Lot	¼	¼	¼	Sec	Twp	Rge	County	Local name for diversion

8. Lands irrigated or place of use:

Twp	Rge	Sec	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

Total Acres _____

9. Describe any other water rights used for the same purpose as described above _____

_____

PART 2

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?

_____ If yes, describe _____

B. DESCRIPTION OF PORTION OF RIGHT BEING TRANSFERRED

(If the entire right is to be changed by the applicant, omit part B and C.)

1. amount_____ for _____purposes from _____ to _____
(cfs/ac-ft)
amount_____ for _____purposes from _____ to _____
(cfs/ac-ft)
amount_____ for _____purposes from _____ to _____
(cfs/ac-ft)

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec	Twp	Rge	County	Local name for diversion

3. Lands irrigated or place of use:

Twp	Rge	Sec	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

Total Acres _____

C. DESCRIPTION OF UNCHANGED PORTION OF RIGHT *(omit if there is no change)*

1. amount_____ for _____purposes from _____ to _____
(cfs/ac-ft)
amount_____ for _____purposes from _____ to _____
(cfs/ac-ft)
amount_____ for _____purposes from _____ to _____
(cfs/ac-ft)

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec	Twp	Rge	County	Local name for diversion

3. Lands irrigated or place of use:

Twp	Rge	Sec	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

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Department of Water Resources
Eastern Region

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-12

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	HOLDEN KIDWELL HAHN & CRAPO C/O KENT W FOSTER PO BOX 50130 IDAHO FALLS, ID 83405-0130 (208)523-0620

Priority Date: 02/07/1916
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	1/01	12/31		17205 AFA
IRRIGATION FROM STORAGE	5/01	10/15		17205 AFA
Total Diversion			17205 AFA	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion | NENESW | Sec. 01 | Township 03N | Range 26E | BUTTE County

BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.		USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.
2.		A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.
3.		THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
4.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

5.	RIGHT NOS. 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935 ARE ALSO DIVERTED THROUGH POINTS OF DIVERSION DESCRIBED ABOVE.
6.	POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

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Eastern Region

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-810

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	LING & ROBINSON C/O ROGER D LING PO BOX 396 RUPERT, ID 83350-0396 (208)436-4717

Priority Date: 06/01/1888
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	5/01	10/15		556.5 AFA
IRRIGATION FROM STORAGE	5/01	10/15		556.5 AFA
DIVERSION TO STORAGE	5/01	10/15	3.2 CFS	
Total Diversion			3.2 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.	S34	THE PERIOD OF USE FOR IRRIGATION DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES.
2.		POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
3.		USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.
4.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

5.		SEE REMARKS UNDER "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION" INCLUDED IN RIGHT NO. 34-10873 FOR ADDITIONAL PLACES OF USE.
6.	C05	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
7.	C04	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
8.		RIGHT NOS. 34-00012, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935 ARE ALSO DIVERTED AT THE POINT OF DIVERSION DESCRIBED ABOVE.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-811

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	LING & ROBINSON C/O ROGER D LING PO BOX 396 RUPERT, ID 83350-0396 (208)436-4717

Priority Date: 06/30/1881
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	5/01	10/15		294 AFA
IRRIGATION FROM STORAGE	5/01	10/15		294 AFA
DIVERSION TO STORAGE	5/01	10/15	1.5 CFS	
Total Diversion			1.7 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.		POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
2.		THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
3.		USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.
4.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

5.	C05	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
6.		RIGHT NOS. 34-00012, 34-00810, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935 ARE ALSO DIVERTED AT THE POINT OF DIVERSION DESCRIBED ABOVE.
7.	C04	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-817B

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	LING & ROBINSON C/O ROGER D LING PO BOX 396 RUPERT, ID 83350-0396 (208)436-4717

Priority Date: 03/01/1902
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	5/01	10/15		140 AFA
IRRIGATION FROM STORAGE	5/01	10/15		140 AFA
DIVERSION TO STORAGE	5/01	10/15	0.8 CFS	
Total Diversion			0.8 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.		POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
2.		THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
3.		USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00818, 34-02507, 34-10873 AND 34-10935.
4.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

5.	C04	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
6.	C05	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
7.		RIGHT NOS. 34-00012, 34-00810, 34-00811, 34-00818, 34-02507, 34-10873 AND 34-10935 ARE ALSO DIVERTED AT THE POINT OF DIVERSION DESCRIBED ABOVE.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-818

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	LING & ROBINSON C/O ROGER D LING PO BOX 396 RUPERT, ID 83350-0396 (208)436-4717

Priority Date: 06/30/1880
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	5/01	10/15		556.5 AFA
IRRIGATION FROM STORAGE	5/01	10/15		556.5 AFA
DIVERSION TO STORAGE	5/01	10/15	3.2 CFS	
Total Diversion			3.2 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.		POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
2.		THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
3.		USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-02507, 34-10873 AND 34-10935.
4.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

5.	C04	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
6.		RIGHT NOS. 34-00012, 34-00810, 34-00811, 34-00817B, 34-02507, 34-10873 AND 34-10935 ARE ALSO DIVERTED AT THE POINT OF DIVERSION DESCRIBED ABOVE.
7.	C05	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.

Dates:
Licensed Date:
Decreed Date: 09/26/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-2507

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	HOLDEN KIDWELL HAHN & CRAPO C/O KENT W FOSTER PO BOX 50130 IDAHO FALLS, ID 83405-0130 (208)523-0620

Priority Date: 09/02/1959
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	1/01	12/31		6000 AFA
IRRIGATION FROM STORAGE	5/01	10/15		6000 AFA
Total Diversion			6000 AFA	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion | NENESW | Sec. 01 | Township 03N | Range 26E | BUTTE County

BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1. A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.
2. POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
3. THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
4. USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-10873 AND 34-10935.

5.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.
6.		RIGHT NOS. 34-00012, 34-00810, 34-00811, 34-00817B, 34-00818, 34-10873 AND 34-10935 ARE ALSO DIVERTED THROUGH POINTS OF DIVERSION DESCRIBED ABOVE.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Permit Proof Due Date:
Permit Proof Made Date:
Permit Approved Date:
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:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number: 34
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-10873

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	HOLDEN KIDWELL HAHN & CRAPO C/O KENT W FOSTER PO BOX 50130 IDAHO FALLS, ID 83405-0130 (208)523-0620

Priority Date: 10/02/1905
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	1/01	12/31		20646 AFA
IRRIGATION FROM STORAGE	5/01	10/15		20646 AFA
Total Diversion			20646 AFA	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion | NENESW | Sec. 01 | Township 03N | Range 26E | BUTTE County

BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.	A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVIOR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.
2.	POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
3.	THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
4.	USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10935.

5.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.
6.		RIGHT NOS. 34-00012, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10935 ARE ALSO DIVERTED THROUGH POINTS OF DIVERSION DESCRIBED ABOVE. THIS RIGHT IS A COMBINATION OF OLD RIGHT NOS. 34-00010 AND 34-00011.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report

04/28/2008

WATER RIGHT NO. 34-10935

Owner Type	Name and Address
Current Owner	BIG LOST RIVER IRRIGATION DIST PO BOX 205 MACKAY, ID 83251 (208)588-2231
Attorney	LING & ROBINSON C/O ROGER D LING PO BOX 396 RUPERT, ID 83350-0396 (208)436-4717

Priority Date: 06/01/1896
Basis: Decreed
Status: Active

Source	Tributary
BIG LOST RIVER	SINKS

Beneficial Use	From	To	Diversion Rate	Volume
IRRIGATION STORAGE	5/01	10/15		1113 AFA
IRRIGATION FROM STORAGE	5/01	10/15		1113 AFA
DIVERSION TO STORAGE	5/01	10/15	6.4 CFS	
Total Diversion			6.4 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENWSE	Sec. 12	Township 03N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWNWNW	Sec. 26	Township 04N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NWSESE	Sec. 04	Township 05N	Range 26E	BUTTE County
BIG LOST RIVER Rediversion	NENESW	Sec. 01	Township 06N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESE	Sec. 06	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NENESW	Sec. 10	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SWSESW	Sec. 11	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	SENWSE	Sec. 14	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWNWNE	Sec. 24	Township 06N	Range 25E	CUSTER County
BIG LOST RIVER Rediversion	NWSENW	Sec. 32	Township 06N	Range 26E	CUSTER County
BIG LOST RIVER	SENW	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	NWNWSE	Sec. 12	Township 07N	Range 23E	CUSTER County
BIG LOST RIVER Rediversion	SESWNE	Sec. 18	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SWNESW	Sec. 20	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	NWSWNE	Sec. 33	Township 07N	Range 24E	CUSTER County
BIG LOST RIVER Rediversion	SENWNW	Sec. 34	Township 07N	Range 24E	CUSTER County

IRRIGATION FROM STORAGE Use:
Acre Limit: 32

Place(s) of use: Large POU Info

Conditions of Approval:

1.		POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
2.		THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.
3.		USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED IN RIGHT NO. 34-10873 IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10873.
4.	C18	THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

5.	C05	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
6.	C04	RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO SECTION 42-1425, IDAHO CODE.
7.		RIGHT NOS. 34-00012, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10873 ARE ALSO DIVERTED AT THE POINT OF DIVERSION DESCRIBED ABOVE.

Dates:
Licensed Date:
Decreed Date: 10/15/2001
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Water Supply Bank Enrollment Date Accepted:
Water Supply Bank Enrollment Date Removed:
Application Received Date:
Protest Deadline Date:
Number of Protests: 0

Other Information:
State or Federal: S
Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Combined Acres Limit: 32000
Combined Volume Limit:
Combined Rate Limit:
Civil Case Number:
Old Case Number:
Decree Plantiff:
Decree Defendant:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

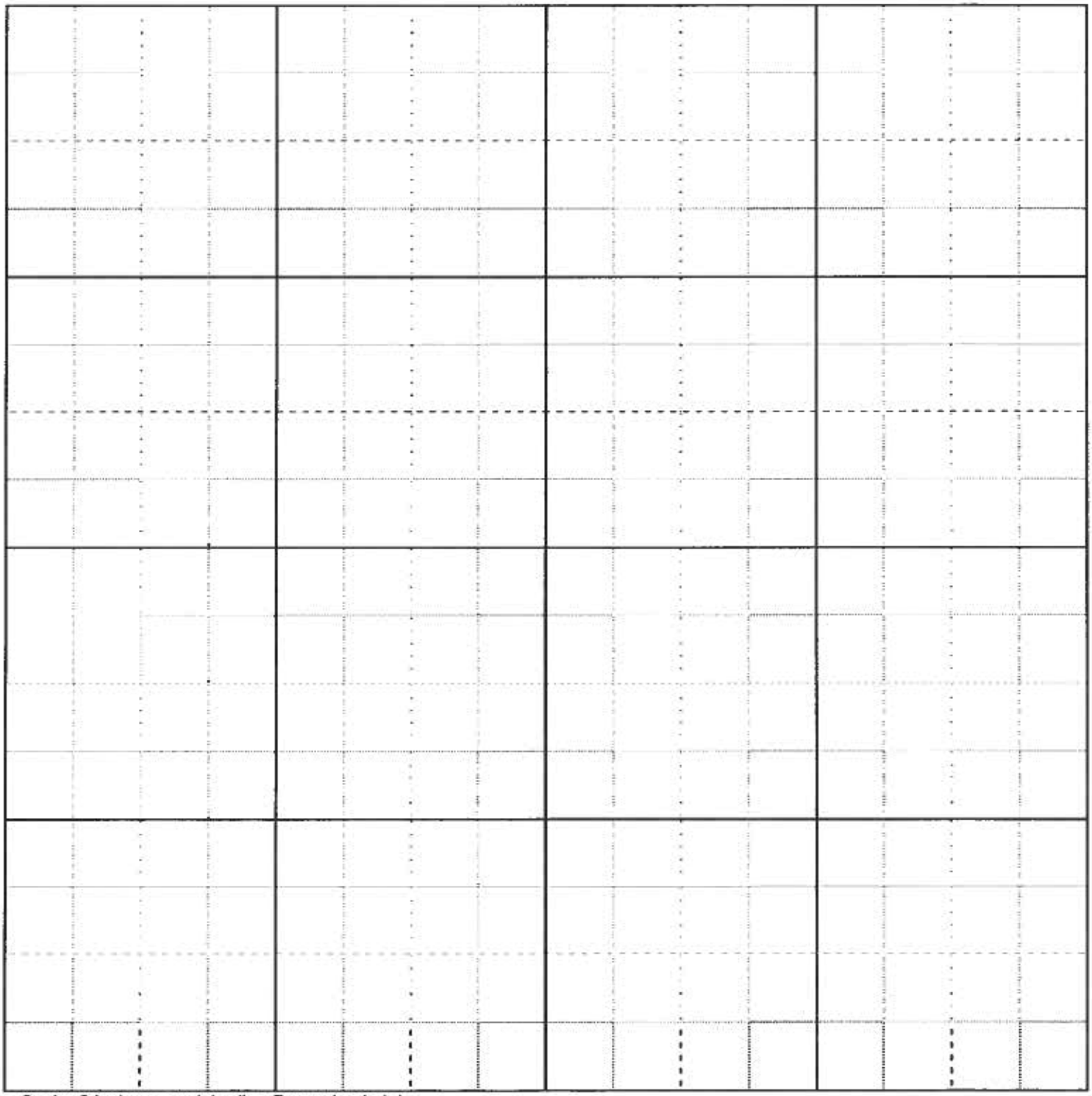
Page _____ of _____

Transfer No. _____
Total Acres _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 3

A. Draw a map or attach a USGS map indicating the new point(s) of diversion and/or the new place of use for the rights described in part 1. Clearly depict the land by section, township and range number.



Scale: 2 inches equal 1 mile. Draw plan in ink.

Page _____ of _____ Transfer No. _____

PART 3

B. CHANGES IN NATURE OF USE

1.	New Nature of Use	Amount(cfs/af-ft)	Hours/days/year	Period of Use
	None			_____ to _____
				_____ to _____

2. Quantity and quality of return flows and location of discharge: n/a

3. Describe effects on other water uses resulting from the proposed change:
None

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.
I understand that any willful misrepresentations made in this application may result in voiding its approval.

J. A. Rindfleisch by Board
(Signature of Applicant)

J. A. RINDFLEISCH, MGR
Print Name (and title, if applicable)

Subscribed and sworn to before me this 6th day of May, 08.

Dawn Brown
(Notary Public)

DAWN M. BROWN NOTARY PUBLIC STATE OF IDAHO

My commission expires 10/16/12

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments
Received by _____ Date _____ Protest filed by _____
Prelim. Check by _____ Fee 530-
Receipted by _____ Date 5/8/08 E034017
Published in _____ Copies of protest forwarded by _____
Pub. Dates _____ Hearing held by _____ Date _____
Watermaster recommendations requested on _____ Recommended for ☐ approval ☐ denial

_____ received _____ by _____
Copy of transfer sent to lien holder _____

Exhibit A

Blaine Diversion
US 93 River Bridge
Evans Lane Bridge
Dry River Bed
Mcafee lane bridge
November 3 2007
Google

CHRIS M. BROMLEY
IDAHO STATE BAR NO. 6530
CANDICE MCHUGH
IDAHO STATE BAR NO. 5908
MCHUGH BROMLEY, PLLC
Attorneys at Law
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Boise, ID 83701
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Facsimile: (208) 287-0864
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

RECEIVED
Feb 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**DECLARATION OF PRESTON MARCROFT**

PRESTON MARCROFT under penalty of perjury states as follows:

1. I am over the age of eighteen and state the following based upon my own personal knowledge.

2. I am the current Watermaster for Water District No. 34 ("WD34"), having succeeded Lucas E. Yockey, and have held this position since Mr. Yockey resigned his position in June 2022.

3. Prior to becoming Watermaster, I served as a Ditch Rider for WD34 from 2013 until 2022.

4. I am familiar with the water rights at issue in this proceeding and the use of BLRID storage water within WD34.

5. I have reviewed *Application for Transfer of Water Right, Transfer No. 79972* ("Application") that was filed by Moss Farms, Inc. ("Moss") with the Idaho Department of Water Resources ("IDWR"), included as Exhibit C to the *Declaration of Sklyer Johns in Support of Motion for Summary Judgment* (Jan. 24, 2025) ("Johns Dec."), the *Transfer of Water Right, Transfer No. 79972* (June 30, 2015), included as Exhibit H to the *Johns Dec.* ("Transfer No. 79972"), as well as all other documents that were attached as exhibits to Mr. Johns' declaration.

6. Prior to the *Application* and the *Transfer*, water right nos. 34-182 and 34-381A ("Moss Water Rights"), held by Moss, were only diverted at the 3 in 1 Ditch.

7. Based on my experience, BLRID has storage water rights ("BLRID Storage Rights") that can be delivered to certain canals and ditches, including but not limited to the 3 in 1 Ditch and Moore Canal.

8. Moss has interests in the BLRID Storage Rights that he can have delivered at the 3 in 1 Ditch for irrigation of the land that is associated with the Moss Water Rights.

9. Moss has interests in the BLRID Storage Rights that he can have delivered at the Moore Canal for irrigation of land this is not associated with the Moss Water Rights, the *Application*, or the *Transfer*.

10. The *Transfer* approved the addition of the River Diversion as a point of diversion for the Moss Water Rights while maintaining the 3 in 1 Ditch as a point of diversion.

11. In certain years and in certain flow regimes, the Darlington Sinks is a losing reach of the Big Lost River. In certain years and in certain flow regimes, the Big Lost River becomes

broken at the Darlington Sinks, meaning natural flow water rights that are curtailed above the Darlington Sinks cannot be conveyed below the Darlington Sinks for beneficial use.

12. During the summer of 2022 issues arose concerning delivery of the Moss Water Rights through the Darlington Sinks to the River Diversion.

13. On September 2, 2022, when the Big Lost River was broken at the Darlington Sinks, Rob Whitney, IDWR, instructed me to curtail natural flow water rights above the Darlington Sinks in order to satisfy the Moss Water Rights. The natural flow water rights that were curtailed were then pushed through the Darlington Sinks with the addition of BLRID storage water as carriage water. Attached hereto as **Exhibit 1** is a true and correct copy of an email from Mr. Whitney to me explaining his instructions.

14. Due to Mr. Whitney's instructions, upstream water rights that are junior to the Moss Water Rights were curtailed differently than they have been historically, due to the introduction of BLRID storage water as carriage water.

15. I disagree with the instructions from Mr. Whitney as this practice of using storage water as carriage water to push upstream, curtailed natural flow water rights through the Darlington Sinks when the Big Lost River is broken at that location has not previously occurred. This practice results in upstream, natural flow water rights being curtailed when they have not been historically curtailed.

16. It is my opinion and belief that without using BLRID Storage Rights as carriage water, the curtailment of upstream junior water rights would have been futile because the Big Lost River was broken at the Darlington Sinks.

17. It is my opinion and belief that use of BLRID Storage Rights as carriage water through the Darlington Sinks and to the River Diversion was improper and resulted in curtailments that I have not previously seen.

18. I certify under penalty of perjury pursuant to the law of the State of Idaho that the foregoing is true and correct.

DATED this 4th day of February, 2025.

PRESTON MARCROFT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

Skyler C. Johns
OLSEN TAGGART PLLC
PO Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggert.com

Norman Semanko
Garrett Kitamura
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com
gkitamura@parsonsbehle.com

Hyrum Erickson
Michelle Mortimer
RIGBY, ANDRUS & RIGBY LAW
25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

From:	Waterdistric Thirtyfour
To:	Chris Bromley
Subject:	Fwd: Big Lost Futile Call
Date:	Wednesday, November 27, 2024 7:12:46 AM

---------- Forwarded message ---------
From: **Preston Marcroft** <presmarc@mackayschools.org>
Date: Tue, Nov 26, 2024, 6:37 AM
Subject: Fwd: Big Lost Futile Call
To: <water34master@gmail.com>

---------- Forwarded message ---------
From: **Whitney, Rob** <Rob.Whitney@idwr.idaho.gov>
Date: Fri, Sep 2, 2022 at 4:56 PM
Subject: Big Lost Futile Call
To: Preston Marcroft <presmarc@mackayschools.org>
Cc: Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>, Luke, Tim <Tim.Luke@idwr.idaho.gov>, Hoekema, David <David.Hoekema@idwr.idaho.gov>, Ferguson, Kara <Kara.Ferguson@idwr.idaho.gov>

Preston,

Randy Pehrson contacted David Hoekema with concerns about futile calls and delivery of both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. You have reported that about 600 inches (12cfs) of water is currently passing the Moss diversion but there are no calls for delivery below Moss. Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified. It appears appropriate to deliver additional water upstream of Moss by adjusting the decree to deliver more 1884 rights, while maintaining delivery to Moss. Your suggestion to adjust the decree date to 8-31-1884 may be a reasonable place to start, but IDWR will defer to your local knowledge of what the demand might be if a certain decree date is set. As we discussed, please stay in contact with Dennis Moss as you deliver additional decrees. If the demand under a new decree date results in a shortage of

water to satisfy Moss, the date should be adjusted accordingly. Please reach out if you have any questions.

Thanks, RW

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF DISPOSITIVE MOTION HEARING**

NOTICE IS HEREBY GIVEN that Hearing Officer Burdick will hold a hearing in this matter on *Moore Canal Users' Motion to Dismiss*, joined by Big Lost River Irrigation District, and Moss Farms, Inc.'s *Motion for Summary Judgment* on **February 21, 2025, at 9:00 a.m. (MT)**, at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Rooms 602B–D, Boise, Idaho. All parties who wish to participate in the hearing shall be present in person.

The hearing will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at https://adminrules.idaho.gov/rules/current/37/370101.pdf.

The hearing will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require reasonable accommodation to attend, participate in, or understand the hearing, please advise the Department no later than five (5) days before the hearing. Inquiries for reasonable accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho 83720-0098, telephone (208) 287-4815, or email sarah.tschohl@idwr.idaho.gov.

DATED this 7th day of February 2025.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of February 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

Chris M. Bromley Candice McHugh McHugh Bromley, PLLC cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ Email
Skyler C. Johns OLSEN TAGGART PLLC sjohns@olsentaggert.com	☒ Email
Norman M. Semanko Garrett M. Kitamura Payton G. Hampton PARSONS BEHLE & LATIMER nsemanko@parsonsbehle.com gkitamura@parsonsbehle.com phampton@parsonsbehle.com	☒ Email
Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW, PLLC herickson@rex-law.com mmortimer@rex-law.com	☒ Email

Courtesy copy via email:

Moss Farms Inc.
mx222moss@aol.com

Sarah Tschohl
Paralegal

RECEIVED
Feb 14, 2025
DEPARTMENT OF
WATER RESOURCES

Skyler C. Johns, ISB No. 11033
OLSEN TAGGART PLLC
P. O. Box 3005
Idaho Falls, ID 83403
Telephone: (208) 552-6442
Facsimile: (208) 524-6095
Email: sjohns@olsentaggart.com
Attorney for Moss Farms, Inc.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc., by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, replies to the *Response to Moss Motion for Summary Judgment* (hereafter "Response") filed by the Petitioners. This Reply is supported by the *Motion to Strike* and the *Declaration of Skyler Johns in Support of Motion to Strike and Reply to Pehrsons' Response* (hereafter "Dec. of Johns II") filed contemporaneously herewith.

I.
OVERVIEW

Moss Farms' request for summary judgment relies on a very narrow set of facts. The Pehrsons Response provides a lot of factual allegations attempting to show that there are many disputes over the material facts. The Response, however, raises issues not in the Petition, states immaterial facts, and at best relies on a mere scintilla of evidence. As will be set forth below, the

numerous declarations, documents, provided by the Pehrsons do not genuinely create a dispute over the narrow facts the Hearing Officer need consider at summary judgment.

II.
STANDARD OF REVIEW

> A party asserting that a fact ... is genuinely disputed must support the assertion by ... citing to particular parts of materials in the record, ... or [by] showing that the materials cited do not establish the absence ... of a genuine dispute. Thus, the party opposing summary judgment must bring to the trial court's attention evidence that may create a genuine issue of material fact .... Mere conclusory allegations will not raise a genuine issue of material fact.

Gordon v. U.S. Bank Nat'l Ass'n, 166 Idaho 105, 119, 455 P.3d 374, 388 (2019) (internal quotations and citations omitted).

> …a mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing the motion.
>
> The party seeking summary judgment bears the initial burden to show that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. The movant may meet this burden by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. This may be accomplished either by an affirmative showing with the moving party's own evidence or by a review of the nonmovant's evidence and the contention that the required proof of an element is lacking. Once such an absence of evidence has been demonstrated, the burden shifts to the party opposing the motion to show through further depositions, discovery responses or affidavits that there is indeed a genuine issue for trial or to show a valid justification for its failure to do so under I.R.C.P. 56(f).

R Homes Corp. v. Herr, 142 Idaho 87, 90, 123 P.3d 720, 723 (Ct. App. 2005) (internal quotations and citations omitted).

III.
ARGUMENT

A. The Pehrsons are collaterally attacking the Transfer Application.

1. Moss Farms' Transfer Application shows that it was taking its BLRID Rights with the Moss Farms Rights from the same point of delivery from the Big Lost.

The Pehrsons knew or should have known that Moss Farms would divert its BLRID Rights at the River Diversion when they reviewed the Transfer Application. Jim Reinflesh provided a letter that was included in the Transfer Application acknowledging that Moss Farms takes its BLRID Rights with the Moss Farms Rights out of the 3-in-1 ditch. Dec. of Johns, Ex. C. Because the 3-in-1 Ditch was unreliable and because others don't use it, the ditch was only used for recharge. *Id.* That is why Reinflesh opined that Moss Farms had to improve his delivery system by taking water from the Big Lost River at the proposed River Diversion. *Id.*

The Pehrsons do not dispute that they reviewed the Transfer Application, so they would have seen Reinflesh's letter discussing the BLRID Rights along with the Moss Farm Rights the need for Moss Farms to improve his delivery system by obtaining the River Diversion. The Pehrsons' claims that the Transfer Application did not "suggest" storage water (i.e.g, the BLRID Rights) would be taken from the River Diversion is refuted by the Transfer Application itself, which is the best evidence to determine what was or wasn't included therein. Again, if the Pehrsons' reviewed the Transfer Application, they would have seen the Reinflesh's letter sent on behalf of BLRID discussing storage water and the need for the River Diversion.

2. Petitioners' argument that BLRID Rights are not divertible from the River Diversion was not an issue raised in their Petition.

Petitioners have not raised any issue with the method of delivery used by BLRID in their Petition. Therefore, that issue is not properly raised at summary judgment. Although the Petition mentioned that Moss Farms used storage water to "shepherd" natural flow, the Petition did not argue that the BLRID Rights are not divertible from the Big Lost River. The Hearing Officer should not permit the Petitioners to raise this argument for the first time in their Response.

3. The BLRID Rights permit Moss Farms and other BLRID Right holders to divert from the Big Lost River.

The Pehrsons argue that the BLRID Rights do not allow Moss Farms to divert its BLRID Rights from the River Diversion. This is contrary to the law and the plain language of the BLRID Rights. Idaho Code title 42 chapter 1. Section 105(1) provides "[t]he water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed…" Idaho Code § 42-110 provides that "[w]ater diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator."

It is undisputed that the BLRID Rights are delivered from Mackay Reservoir down the Big Lost River to Moss Farms who is the owner and appropriator. The Big Lost River is a natural waterway. The Big Lost River is a point of diversion. Moss Farms can divert its BLRID Rights from the River Diversion.

Pehrsons claim that the language regarding "points of rediversion" on the BLRID Rights limits Moss Farms from diverting from the River Diversion. This is not so. Although Idaho Code does not define "rediversion" multiple persuasive authorities support Moss Farm's interpretation that the points of rediversion are from the primary point of diversion – the Big Lost River.

The Idaho Department of Water Resources October 2018 *Idaho Statutes Pertaining to Canals and Laterals* manual defines rediversion as:

> a general term used to describe the location of any secondary point of diversion under a water right. For example: consider a storage reservoir on Creek A where storage water is released to Creek A and diverted downstream at Canal #1. The primary point of diversion for a water right with a storage reservoir on Creek A is the impounding dam across Creek A, while the point of re-diversion is Canal #1.

Dec. of Johns II, Ex. B, p. 26.

Idaho legal commentators have also opined that:

> Many Idaho water rights authorize water to be diverted from one stream, "injected" into another stream, and then "rediverted" to a storage facility or other use.49 An example of this is a storage and direct flow right (no. 63-19893) for the Mountain Home Reservoir operated by Mountain Home Irrigation District. Under the "points of diversion" heading, the right lists the original point of diversion from Little Camas Creek, a point of injection into East Fork Long Tom Creek (a tributary of Canyon Creek), and a point of rediversion from Canyon Creek. Thus, where water is injected back into a natural stream (and thus is outside the control of the appropriator) and subsequently rediverted from that natural stream, the injection and rediversion are considered additional points of diversion. (referring to *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 201, 157 P.2d 76, 77 (1945) (Givens, J.); *American Falls Reservoir District No. 2 v. IDWR ("AFRD")*, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

Dec. of Johns II, Ex. C.

The Idaho Department of Water Resources stated the followoing in a survey of its employees:

> A special case is where water is diverted from one natural stream into a man-made structure that carries the water to another natural stream. The point of re-diversion if defined as the spot where water flows from the first natural stream into the man-made channel, and the point of re-injection is where the water flows from the man-made structure into the second natural stream.

Dec. of Johns II, Ex. C, pp. 42-44.

Applying these sources into a synthetic definition supports Moss Farms' position that the points of rediversion listed on the BLRID Rights are secondary points of diversion from the primary point of diversion – the Big Lost River. Thus, the plain language of the BLRID Rights does not prohibit Moss Farms from taking its BLRID Rights from the River Diversion, which is located on the natural water waterway – the Big Lost River. So long as Moss Farms applies the BLRID Rights to its authorized places of use, which it does, the BLRID Rights may continue to be diverted from the River Diversion.

4. BLRID is authorized to permit the use of storage water at the River Diversion.

The language of the BLRID storage rights is not the only source of authority showing that Moss Farms use of its various water rights is proper. BLRID is also authorized by the Idaho State Legislature to manage the delivery of storage rights among its members. Idaho Code § 43-304 empowers the board of an irrigation district to:

> manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as may be required and prescribe their duties, to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same…

Id.

Simply put, BLRID is statutorily empowered to determine how it will distribute the BLRID Rights among its patrons. Given there are no conditions in the BLRID rights limiting diversions from the Big Lost River, the Pehrsons carry the burden to show that Moss Farms, and BLRID for that matter, failed to follow its Bylaws and Polices. The Pehrsons did not provide the Hearing Officer the very document that governs delivery of the BLRID Rights. They only cited inadmissible statements from the Pehrsons as to what they recall was done or not done by the BLRID and what they recall BLRID required to be done. There is no admissible evidence before the Hearing Officer that supports the Pehrsons' argument that Moss Farms cannot take his BLRID Rights from the River Diversion. At best, the Pehrsons have only presented a mere scintilla of evidence that BLRID is not authorized to permit Moss Farms to divert storage rights from the River Diversion.

Per Idaho Code § 43-304, the BLRID Bylaws and Policies control the procedures for delivering storage water rights to its patrons, not the Pehrsons recollections of what those procedures are. The Pehrsons have not provided sufficient evidence that show that delivery of

storage water to the River Diversion is "illegal." Of note, is the fact that the Pehrsons do not dispute that BLRID Rights were delivered to Moss Farms at the River Diversions.

5. A transfer of the point of diversion is not necessary because the Big Lost is a natural waterway and the Moss Farms BLRID storage rights were delivered to an authorized place of use.

The Pehrsons argue that Moss Farms was required to create a new point of diversion to take his BLRID Rights at the River Diversion. As set forth in section A(4) above, no transfer was required because the Big Lost River is already an authorized point of diversion for the BLRID Rights. Also, a transfer is not required based on the language in Idaho Code title 42 chapter 1. Section 105(1) provides "[t]he water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed…"

As set forth in section A(4) above, the face of the BLRID Rights shows that the Big Lost River is the primary point of diversion. It is undisputed that the BLRID Rights are delivered from the Big Lost River, which is a natural watercourse. All the ditches and canals referenced by the Pehrsons are "points of rediversion" and are, therefore, alternative points of diversion from the primary point of diversion. None of the declarants for Pehrsons pointed to evidence or law showing that delivery of BLRID Rights from the Big Lost River through the River Diversion is expressly prohibited because they cannot. This is because the Big Lost River is already a point of diversion.

6. *Sylte v. Idaho Dept. of Water Res.*, does not apply.

The Pehrsons rest their legal claims on *Sylte v. Idaho Dept, of Water Res.*, 165 Idaho 238, 245, 443 P.3d 252, 259 (2019) to support their request for futile call. However, as was set forth in the *Moore Canal Users Motion to Dismiss* (hereafter "Motion to Dismiss") the situation in this case:

> is distinguishable from the situation in Sylte. In Sylte, releasing storage water from Twin Lakes was expressly barred by the Final Decree. Here, Mackay Reservoir is a storage reservoir with the purpose of storing water for irrigation. There is no general bar on releases of storage water from Mackay Reservoir as there was in Sylte.

Id. at pp. 5-6. Moss Farms agrees with the arguments raised by the Moore Canal Users, and incorporates and refers to the arguments raised in pages 5 through 8 of the Motion to Dismiss. For the reasons, set forth in the Motion to Dismiss, Sylte does not apply to this case.

7. BLRID does not require storage holders to request that their storage rights be moved or otherwise transferred.

As was set forth in sections A(3) through (5), the Pehrsons did not provide any admissible evidence showing that this is a requirement of the BLRID Bylaws and Policies or that such a request is required by Idaho law.

B. The elements of res judicata have been satisfied.

1. The Transfer Application proceedings addressed the issue that BLRID Rights would be diverted along with the Moss Farms Rights.

The Transfer Application proceeding raised the storage water issues, making storage water use part of that proceeding. BLRID's manager specifically identified how Moss Farms takes the Moss Farms Rights and BLRID Rights together and that it was BLRID's opinion that Moss Farms needed to find a better way to deliver these rights, as other users of the 3-in-1 ditch, including the Pehrsons, had chosen to do. The new delivery system was the proposed River Diversion. Because Moss Farms was trying to fix its transmission loss issues in the 3-in-1 Ditch, it would be unreasonable to assume Moss was only planning on taking the Moss Farms Rights and not the BLRID Rights from the proposed River Diversion on the Big Lost River.

A reasonable and prudent water user in Basin 34, especially persons who were part of BLRID's board, would have deduced this from Reinflesh's letter as discussed above. Given the Pehrsons' knowledge and expertise as BLRID Right owners and their involvement in BLRID, they

could reasonably foresee the issues that arose with Moss Farms continuing to take his BLRID rights and the Moss Farm Rights from the same point of diversion, now the River Diversion, as he had always done.

2. Pehrsons were afforded the opportunity to protest or intervene but declined to be a party.

A person need not be added as a party to the proceeding to meet this requirement. *See Wright v. Par.*, 172 Idaho 218, 224, 531 P.3d 1115, 1121 (2023) ("[f]or issue preclusion to bar additional litigation, the following elements must be present: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case…").

Here, the Pehrsons do not dispute that they had received notice and had an opportunity to participate in the proceeding matter. They admit that they were aware of the transfer application and that they decided not to participate. Their claim for declining to participate is irrelevant to this inquiry. Given the nature of the proceedings, and how parties to proceedings are added (i.e., notice and opportunity to protest or intervene), in IDAPA proceedings, a person who is afforded an opportunity to protest and intervene but fails to do so, meets this element.

3. The use of storage water and natural flow rights arose under the same transaction and occurrence.

As set forth above, Moss Farms' historic deliveries of its BLRID Rights along with the Moss Farms Rights and that the River Diversion was intended to adequately deliver these rights was raised in the Transfer Application. Moss Farms' intention to add the River Diversion and take these rights was evident from the letter of Mr. Reinflesh included int the Transfer Application. Moss's need to create a better system for delivering his storage and natural flow rights were inextricably connected. Therefore, the same transaction and occurrence element is met.

C. This proceeding is not the correct forum to address a prior action of IDWR.

The Pehrsons argue that there are genuine issues of fact regarding changes in futile call determinations in 2022. However, any issues with those determinations were required to be raised in 2022 against the watermaster and IDWR 28 days after the decision, not several years later against Moss Farms. *See* Idaho Code § 67-5273. Therefore, any issues of material fact that may exist to this point are irrelevant and immaterial to this summary judgment proceeding.

D. The question of which transfer governs is immaterial to the issues raised at summary judgment and is a question of law, not fact.

This argument is unclear. Which transfer controls is not the issue. The issue is whether Pehrsons time to raise the issues passed when the Pehrsons failed to join the proceedings. References to a second transfer do not create a dispute over the material facts in this case because the Pehrsons did not show that they participated in any transfer proceeding relating to Moss Farms Rights. Even if it was material, the other transfer also occurred long ago and was not protested. Pehrsons still have not shown that genuine disputes exist.

IV.
CONCLUSION

Based on the foregoing, Moss Farms respectfully requests the Hearing Officer grant summary judgment in favor of Moss Farms and dismiss the Petition in its entirety.

DATED: February 14, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 14, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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RECEIVED
Feb 14, 2025
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **MOTION TO STRIKE**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc., by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby moves the Hearing Offer pursuant to Idaho Rules of Civil Procedure 56(c) and the Idaho Rules of Evidence for an order striking statements and documents from the declarations filed by the Pehrsons referenced below. This Motion is supported by the *Declaration of Skyler Johns in Support of Motion to Strike and Reply to Pehrsons' Response* (hereafter "Dec. of Johns II") filed contemporaneously herewith.

I.
ARGUMENT

A. Declaration of Loy Peherson

Paragraph 8: "When flows are low in the Big Lost River during certain times of year, the watermaster cannot deliver natural flow through the Darlington Sinks." Loy failed to lay foundation to testify as to the watermaster's duties and what he can or cannot do.

Paragraph 11: "I did not protest the Application because it only involved the Moss Water Rights and did not involve or otherwise suggest that Moss' storage water interests in BLRID were implicated and could be delivered through the Darlington Sinks to the River Diversion." (Emphasis added). This contains hearsay statement about the rules governing BLRID offered to prove the truth of the matter asserted. Idaho Code § 43-304 dictates that BLRID Bylaws and Policies control the distribution of water among its patrons. Therefore, the BLRID Bylaws and Policies are the best evidence for determining what actions are required. Therefore, the statement should be struck and not considered.

Paragraph 13: "As a shareholder in BLRID, it is my experience that if a water user wants to move his interests in the BLRID Storage Rights from one canal or ditch to another canal or ditch, he may do so, but paperwork must be filed with BLRID to make the change, with BLRID agreeing to make the change." This contains hearsay statement about the rules governing BLRID offered to prove the truth of the matter asserted. The BLRID Bylaws and Policies are also the best evidence for determining what actions are required. Therefore, the statement should be struck and not considered.

Paragraph 16 contains hearsay statements between Rob Whitney and Reston Macroft. If further contains conclusory statements and legal conclusions regarding "carriage water."

Paragraph 17 is speculative, non-specific because it is unclear whether it is 6000 or 7,000 miner inches were curtailed.

Paragraph 18: Loy lacks foundations to testify to these matters. His statements of "futile" and the river being "broken" are vague, ambiguous, and conclusory.

For the reasons stated above, the Court should strike the foregoing paragraphs from the Declaration of Loy Pehrson.

B. The Declaration of Randy Pehrson

Paragraph 7: "When flows are low in the Big Lost River during certain times of year, the watermaster cannot deliver natural flow through the Darlington Sinks." Randy failed to lay foundation to testify as to the watermaster's duties and what he can or cannot do.

Paragraph 10 "I did not protest the Application because it only involved the Moss Water Rights and did not involve or otherwise suggest that Moss' storage water interests in BLRID were implicated and could be delivered through the Darlington Sinks to the River Diversion." (Emphasis added). This contains hearsay statements regarding the contents of the Transfer Application and is offered to prove the truth of the matter asserted. The Transfer Application, Dec. of Johns, Ex. C, is also the best evidence for determining whether or not the transfer would involve storage water being diverted at the River Diversion – not Randy's testimony. Therefore, the statement should be struck and not considered.

Paragraph 12: "As a shareholder in BLRID, it is my experience that if a water user wants to move his interests in the BLRID Storage Rights from one canal or ditch to another canal or ditch, he may do so, but paperwork must be filed with BLRID to make the change, with BLRID agreeing to make the change." This contains hearsay statement about the rules governing BLRID offered to prove the truth of the matter asserted. Idaho Code § 43-304 dictates that BLRID Bylaws and Policies control the distribution of water among its patrons. Therefore, the BLRID Bylaws and Policies are the best evidence for determining what actions are required. Therefore, the statement should be struck and not considered.

Paragraph 14: "On August 15, 2022, and as summarized in a September 2, 2022 email from Rob Whitney, IDWR determined that there was a break in the Big Lost River "immediately below the Beck diversion but noted that ' . . . this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage water and decreed rights during the remainder of this irrigation season.'" This paragraph contains hearsay statements from Rob Whitney.

Randy lacks foundation as to the information in paragraph 16 lacks foundation. The statements are speculative and nonspecific because it is unclear whether 6,000 or 7,000 miner inches were curtailed.

Paragraph 17 and 18 are conclusory as they do not identify any information about past curtailments.

For the reasons stated above, the Court should strike the foregoing paragraphs from the Declaration of Randy Pehrson.

C. Byron Pehrson

Paragraph 8, "When flows are low in the Big Lost River during certain times of year, the watermaster cannot deliver natural flow through the Darlington Sinks." Byron lacks foundation to testify as to what the watermaster can and cannot do and Byron has not established himself as an expert. Although he stated that he was the chair of BLRID, paragraph 6, he did not identify what knowledge or expertise this position gave him.

Paragraph 11 "I did not protest the Application because it only involved the Moss Water Rights and did not involve or otherwise suggest that Moss' storage water interests in the BLRID

Storage Rights were implicated and could be delivered through the Darlington Sinks to the River Diversion." This contains hearsay statements regarding the contents of the Transfer Application and is offered to prove the truth of the matter asserted. The Transfer Application, Dec. of Johns, Ex. C, is also the best evidence for determining whether or not the transfer would involve storage water being diverted at the River Diversion – not Byron's testimony. Therefore, the statement should be struck and not considered.

Paragraph 12 "As a shareholder in BLRID, it is my experience that if a water user wants to move his interests in the BLRID Storage Rights from one canal or ditch to another canal or ditch, he may do so, but paperwork must be filed with BLRID to make the change, with BLRID agreeing to make the change." This contains hearsay statement about the rules governing BLRID offered to prove the truth of the matter asserted. Idaho Code § 43-304 dictates that BLRID Bylaws and Policies control the distribution of water among its patrons. Therefore, the BLRID Bylaws and Policies are the best evidence for determining what actions are required. This should also be struck because due to lack of foundation. Byron did not identify how he came into possession of the document, what the document is, and what it shows.

Paragraphs 13: "As both a shareholder in BLRID and its past chair, it is my experience that if a water user wanted to move their interests in the BLRID Storage Rights from one of the canals or ditches listed on the BLRID Storage Rights to another of the named canals or ditches, they may do so, but a request must be filed with BLRID to make the change, with BLRID agreeing to make the change." This contains hearsay statement about the rules governing BLRID offered to prove the truth of the matter asserted. Idaho Code § 43-304 dictates that BLRID Bylaws and Policies control the distribution of water among its patrons. Therefore, the BLRID Bylaws and Policies are

the best evidence for determining what actions are required. Therefore, the statement should be struck and not considered.

Paragraph 14: "During my time as chairman, I do not recall Moss making a request to BLRID to move his storage water interests from either the 3 in 1 Ditch or the Moore Canal to the River Diversion." This contains hearsay statement about the rules governing BLRID offered to prove the truth of the matter asserted. Idaho Code § 43-304 dictates that BLRID Bylaws and Policies control the distribution of water among its patrons. Therefore, the BLRID Bylaws and Policies are the best evidence for determining what actions are required. Therefore, the statement should be struck and not considered.

Paragraph 15: "I am aware that in 2022, Randy Pehrson contacted David Hoekema with IDWR to discuss his concerns regarding delivery of the Big Lost River breaking at the Darlington Sinks and futile call of water rights below the Darlington Sinks." This statement contains summaries of hearsay statements between Randy Pehrson and David Hoekema regarding Randy's "concerns regarding delivery of the Big Lost River breaking at the Darlington Sinks and futile call of water rights below the Darlington Sinks."

Paragraph 16: "I am aware that IDWR, through a determination made by Tim Luke, initially stated, on August 15, 2022, that when the Big Lost River was broken at the Darlington Sinks, the Moss Water Rights could not be delivered." This statement contains hearsay statements regarding a determination made by Tim Luke…that when the Big Lost River was broken at the Darlington Sinks, the Moss Water Rights could not be delivered.

Paragraph 17: "On September 2, 2022, IDWR, through an email from Rob Whitney, reversed its decision, instructing Watermaster Preston Marcroft to curtail my water rights that are

junior to the Moss Water Rights, as well as the junior rights of others, so that the water I was using would be conveyed through the Darlington Sinks, using BLRID Storage Rights as carriage water to the River Diversion." This statement contains hearsay statements between Rob Whitney and Preston Marcroft whereby Whitney instructed Macroft "to curtail my water rights that are junior to the Moss Water Rights, as well as the junior rights of others, so that the water I was using would be conveyed through the Darlington Sinks, using BLRID Storage Rights as carriage water to the River Diversion."

Paragraph 18 "According to Mr. Whitney's email, it was not futile to curtail the Moss Water Rights because Moss 'has sufficient storage water to help carry the decreed right.'" This statement contains hearsay statements of Rob Whitney that the water call was "not futile to curtail the Moss Water Rights because Moss 'has sufficient storage water to help carry the decreed right.'" The use references to "futile" and "curtail" are vague and ambiguous, and the statement as a whole is conclusory.

Paragraph 19: "I disagree with this statement made by Mr. Whitney because Moss was out of storage water." Byron lacks foundation to testify as to Moss's storage rights and whether he had sufficient rights or not. Furthermore, paragraph 19 is conclusory.

Paragraph 20: "The storage water that was used to carry the Moss Water Rights to the River Diversion was the interests of other water users on the Moore Canal who had BLRID storage interests remaining, namely: Derek Nichols, Jay Jensen, Joel Anderson, Jason Anderson, and Travis Anderson." Byron did not lay foundation qualifying him to testify as to the rights of other water users or other water corporations. Furthermore, the statement is conclusory.

Paragraph 21: "It is my understanding that it has been estimated that when IDWR instructed the watermaster to curtail my water rights and the water rights of others above the Darlington Sinks, approximately 6,000 – 7,000 miners inches of water (120 cfs – 140 cfs) were curtailed to deliver the Moss Water Rights to the River Diversion." This statement lacks foundation, is speculative and nonspecific because it is unclear whether 6,000 or 7,000 miner inches were curtailed.

Paragraph 22: "Use of BLRID Storage Rights as carriage water though the Darlington Sinks and to the River Diversion was improper and resulted in curtailments that I have not previously experience." The statement is vague, conclusory, and non-specific.

For the reasons stated above, the Court should strike the foregoing paragraphs from the Declaration of Byron Pehrson.

D. Declaration of Lucas Yockey

Paragraph 11: "Moss has interests in the BLRID Storage Rights that he can have delivered at the Moore Canal for irrigation of land this is not associated with the Moss Water Rights, the Application, or the Transfer." This contains hearsay statements regarding the contents of the Transfer Application and is offered to prove the truth of the matter asserted. The Transfer Application, Dec. of Johns, Ex. C, is also the best evidence for determining whether or not the transfer would involve storage water being diverted at the River Diversion – not Yockey's testimony. Therefore, the statement should be struck and not considered.

Paragraph 15: "I did not oppose the approval because the Transfer only involved the Moss Water." This contains hearsay statements regarding the contents of the Transfer Application and is offered to prove the truth of the matter asserted. The Transfer Application, Dec. of Johns, Ex.

C, is also the best evidence for determining whether or not the transfer would involve storage water being diverted at the River Diversion – not Yockey's testimony. Therefore, the statement should be struck and not considered.

Paragraph 19: "As I stated, I am familiar with the BLRID Storage Rights, and unlike the 3 in 1 Ditch or the Moore Canal, the River Diversion is not listed as a point of diversion and/or rediversion." The best evidence to determine what the BLRID Right say is the rights themselves which are provided in the Declaration of Declaration of David R Tuthill, Jr. Therefore, the statement should be struck and not considered.

Paragraph 24: "I am aware that, in the summer of 2022, when the Big Lost River was broken at the Darlington Sinks, Rob Whitney, IDWR, instructed Watermaster Marcroft to curtail natural flow water rights above the Darlington Sinks in order to satisfy the Moss Water Rights. The natural flow water rights that were curtailed were then pushed through the Darlington Sinks with the addition of BLRID storage water as carriage water." This statement contains hearsay statements between Rob Whitney and Preston Macroft regarding Whitney instructing Macroft "to curtail natural flow water rights above the Darlington Sinks in order to satisfy the Moss Water Rights.

Yockey lacks foundation to testify as to the remaining portion of the paragraph "The natural flow water rights that were curtailed were then pushed through the Darlington Sinks with the addition of BLRID storage water as carriage water."

Paragraphs 25, 26, 27 are conclusory, as they provide no basis or explanation for the conclusion that storage water was used as "carriage water."

Paragraph 26 is also conclusory, vague, and ambiguous because it no basis or explanation for the what is meant by "Futile."

Paragraph 27 is vague and conclusory.

Paragraph 28 is hypothetical and is therefore speculative. The statement is also immaterial because what Yockey would have done in 2015 is irrelevant at this point.

For the reasons stated above, the Court should strike the foregoing paragraphs from the Declaration of Lucas Yockey.

E. Declaration of David R. Tuthill, Jr.

Paragraph 22: "Based on my review of the documents that are included as exhibits to the Johns Dec., which includes the Application and Transfer, in addition to my review of Transfer No. 80488, and the filings addressed the use of water right nos. 34-182, 34-381A, 34-2379F, and 34-14525, the documents do not address the use of BLRID storage water."

Paragraph 27: "Based on my review of the documents that are included as exhibits to the Johns Dec., which includes the Application and Transfer, in addition to my review of Transfer No. 80488, and the filings addressed the use of water right nos. 34-182, 34-381A, 34-2379F, and 34-14525, the documents do not address the use of BLRID storage water." This contains hearsay statements regarding the contents of the Transfer Application and is offered to prove the truth of the matter asserted. The Transfer Application, Dec. of Johns, Ex. C, is also the best evidence for determining whether or not the transfer would involve storage water being diverted at the River Diversion – not Byron' testimony. Therefore, the statement should be struck and not considered.

Paragraph 28: "Based on my experience, and because the above-referenced documents never addressed BLRID's storage rights, it was not foreseeable that Moss would use BLRID storage water as carriage water to the new River Diversion, or that IDWR would allow the practice to occur, given that the BLRID's storage rights do not list the River Diversion as a point of diversion and/or rediversion." The best evidence to determine what the BLRID rights say is the rights themselves. This statement also is vague and ambiguous because "carriage water" is not defined.

Paragraph 29: "Because the River Diversion is not listed as a point of diversion and/or rediversion for the BLRID storage rights referenced above in paragraph 13, the correct way to allow Moss to use storage water as carriage water would be for BLRID to file a transfer with IDWR to add the River Diversion as a point of diversion and/or rediversion on the BLRID water rights." The best evidence to determine what the BLRID Right say is the rights themselves which are provided in the Declaration of David R Tuthill, Jr. Therefore, the statement should be struck and not considered.

F. Declaration of Preston Macroft.

Paragraph 9: "Moss has interests in the BLRID Storage Rights that he can have delivered at the Moore Canal for irrigation of land this is not associated with the Moss Water Rights, the Application, or the Transfer." This contains hearsay statements regarding the contents of the Transfer Application and is offered to prove the truth of the matter asserted. The Transfer Application, Dec. of Johns, Ex. C, is also the best evidence for determining whether or not the transfer would involve storage water being diverted at the River Diversion – not Macroft's testimony. Therefore, the statement should be struck and not considered.

Paragraph 14: "Due to Mr. Whitney's instructions, upstream water rights that are junior to the Moss Water Rights were curtailed differently than they have been historically, due to the introduction of BLRID storage water as carriage water." This statement is vague, ambiguous, and unspecific because it does not identify how rights were previously curtailed. The statement is also conclusory.

Paragraph 15: "I disagree with the instructions from Mr. Whitney as this practice of using storage water as carriage water to push upstream, curtailed natural flow water rights through the Darlington Sinks when the Big Lost River is broken at that location has not previously occurred. This practice results in upstream, natural flow water rights being curtailed when they have not been historically curtailed." This statement is vague, ambiguous, and unspecific because it does not identify how rights were previously curtailed. The statement is also conclusory.

Paragraph 16: "It is my opinion and belief that without using BLRID Storage Rights as carriage water, the curtailment of upstream junior water rights would have been futile because the Big Lost River was broken at the Darlington Sinks." This statement is vague, ambiguous, and unspecific because it does not define carriage water. The statement is also conclusory.

Paragraph 17: "It is my opinion and belief that use of BLRID Storage Rights as carriage water through the Darlington Sinks and to the River Diversion was improper and resulted in curtailments that I have not previously seen." This statement is vague, ambiguous, and unspecific because it does not identify how rights were previously curtailed nor does it define "futile." The statement is also conclusory.

[CONTINUE TO NEXT PAGE]

II.
CONCLUSION

Based on the foregoing, Moss Farms respectfully requests an order striking the statements from the declarations identified above.

DATED: February 14, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

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/s/Skyler C. Johns

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Attorney for Moss Farms, Inc.

RECEIVED
Feb 14, 2025
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **DECLARATION OF SKYLER JOHNS IN SUPPORT OF MOTION TO STRIKE AND REPLY TO PEHRSONS RESPONSE**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

I, Skyler C. Johns, being first duly sworn, deposes and says:

1. I am over the age of eighteen (18) and competent to testify in this matter. I make this declaration based upon my own personal knowledge unless otherwise stated, and under penalty of perjury.

2. I am counsel for the Moss Farms, Inc. (hereafter "Moss Farms") in the above-captioned matter.

3. I have personal knowledge of the facts to which I am about to testify.

4. Attached hereafter as Exhibit A is a true and accurate copy of the Big Lost River

Irrigation District Bylaws and Policies that I retrieved from the District's website at:

https://www.blrid.com/wp-content/uploads/2018/05/BLRIDBylaws.pdf

5. Attached hereafter as Exhibit B is a true and accurate copy of the Idaho Department of Water Resources October 2018 *Idaho Statutes Pertaining to Canals and Laterals* manual retrieved from the Department's website at:

https://idwr.idaho.gov/wp-content/uploads/sites/2/districts/2018-Canals-Laterals-Statutes.pdf

6. Attached hereafter as Exhibit C is a true and accurate copy of the *Water Law Handbook, The Acquisition, Use, Transfer, Administration, and Management Of Water Rights in Idaho*, Fereday, Meyer, & Creamer, June 11, 2023, edition I retrieved from the Givens Pursley LLP website at:

https://www.givenspursley.com/publications

7. Further, your declarant saith not.

DATED: February 14, 2025

/s/ Skyler C. Johns
Skyler C. Johns
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 14, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

Chris M. Bromley (X) Via Email
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
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cbromley@mchughbromley.com

Candice McHugh (X) Via Email
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/s/ Skyler C. Johns

1530

BIG LOST RIVER IRRIGATION DISTRICT

BY-LAWS AND POLICIES

2010

STATEMENT OF OBJECTIVES

To deliver to landowners the decreed water from the Big Lost River to which they are entitled pursuant to the water rights held by the individual landowner, and to deliver storage water of the Irrigation District to landowners within the district in the amounts to which said storage water has been apportioned to the lands within the district, all in the most efficient manner and consistent with good management practices. It is also an object of the Irrigation District to transport, by agreement, groundwater for use by landowners on lands within the district and for delivery to the outer boundaries of the district for use on lands outside of the district.

It is the further purpose to maintain the total irrigation system to the degree necessary to preserve the capacity and to maintain the condition of the facilities in a manner, which avoids undue depreciation; and to store and deliver irrigation water as required by the landowners within the Irrigation District.

It is also the object of the Irrigation District to maintain sound fiscal policies, including the maintenance of adequate reserves, and to promote the wise and efficient use of available water and the conservation of the lands within the district; and to hold a minimum, system seepage and operational waste, and to be constantly alert to technical advancement and the adoption of new practices which will improve system operating efficiency.

The Irrigation District is a public quasi corporation, organized; however to conduct a business for the private benefit of owners of land within its limits and it holds its property in a proprietary rather than a governmental capacity. Its quasi-municipal character renders Irrigation District subject to the constitutional requirements concerning electors. The Irrigation District is organized for the specific purpose of providing ways and means of irrigating lands with the district and maintaining the irrigation system for that purpose. The Irrigation District is not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray expenses of irrigation systems. It is a mutual cooperative corporation organized not for a profit, but it is not a public service corporation in its broad sense. The Irrigation District though a quasi municipality corporation is nevertheless liable for negligence of its officers.

CONTROL OF FACILITIES

Ownership, operation and maintenance of the distribution facilities, dam and reservoir of the Irrigation District is vested in the Irrigation District, for the benefit of the landowners owning lands with the Irrigation District. The business and affairs of the Irrigation District shall be managed and conducted by the Board of Directors of the Irrigation District, which will employ and appoint such agents, officers and employees as may be required and prescribe their duties.

MEETINGS OF BOARD OF DIRECTORS

The Board of Directors shall hold a regular monthly meeting in the office of the Irrigation District on the first Tuesday in every month or such date each month as it shall fix by resolution and of business. All special meetings shall be ordered by the President or a majority of the Board, the order must be entered of record and the Secretary must give each member not joining in the order five-(5) days' notice of such special meetings. The order must specify the business to be transacted at such special meeting and none other than that specified shall be transacted, provided, that whenever all members of the Board are present, however called, the same shall be deemed a legal meeting and any lawful business may be transacted.

All meetings of the Board must be public, and a majority shall constitute a quorum for the transaction of business; but on all questions requiring a vote, there shall be concurrence of at least a majority of the members of the Board. All records of the Board shall be open to the inspection of any elector during business hours.

Minute Procedures adopted in minutes of June 1, 1999. Minutes are limited to motions and actions made by the Directors.

Written minutes of all meetings of the Board of Directors shall be taken, but neither a full transcript nor a recording of the meeting is required. Minutes of executive sessions may be limited to material the disclosure of which is not inconsistent with the provisions of 67-2345, Idaho Code, but shall contain sufficient detail to convey the general tenor of the meeting.

EXECUTIVE SESSIONS, IDAHO STATUTES 67-2345

Nothing contained in this act shall be construed to prevent, upon a two-thirds vote recorded in the minutes of the meeting by individual vote, a governing body of a public agency from holding an executive session. An executive session may be held: a) to consider hiring a public officer, employee, staff members or individual agent. This paragraph does not apply to filling a vacancy in an elective office; b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student; c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency; d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code. 2) Labor negotiations may be conducted in executive session if either side requests closed meetings. Notwithstanding the provisions of section 67-2343, Idaho Code, subsequent sessions of the negotiations may continue without further public notice. 3) No executive session may be held for the purpose of taking any final action or making any final decision.

ROBERTS RULES OF ORDER

Duties of the Chairman are generally as follows: To open the session at the time at which the assembly is to meet, by taking the chair and calling the members to order; to announce the business before the assembly in the order in which it is to be acted upon, to recognize members entitled to the floor, to state and to put to vote all questions which are regularly moved, or necessarily arise in the course of the proceedings, and to announce the result of the vote; to protect the assembly from annoyance from evidently frivolous or dilatory motions by refusing to recognize them; to assist in the expediting of business in every way compatible with the rights of the members, as by allowing brief remarks when undebatable motions are pending, if he thinks it advisable; to restrain the members when engaged in debate, within the rules of order; to enforce on all occasions the observance of order and decorum among the members, deciding all questions of order (subject to an appeal to the assembly by any two members) unless when in doubt he prefers to submit the question for the decision of the assembly; to inform the assembly, when necessary, or when referred to for the purpose, on a point of order or practice pertinent to pending business; to authenticate, by his signature, when necessary, all the acts, orders, and proceedings of the assembly declaring its will and in all things obeying its commands.

OFFICERS AND EMPLOYEES

No individual member of the Board of Directors may, except when authorized by the Board, interfere with the supervisory functions of any appointed or employed personnel, nor with any district employee in the performance of that employee's duties. Individual Directors should refrain from exercising any direct authority over any employee, and the Board shall act, as a unit, pursuant to decisions made in duly called Board meetings.

MACKAY RESERVOIR

The BLRID manages the Mackay Reservoir, which was purchased in 1935 by the bonding of the people of Lost River Valley for $235,000. The reservoir to elevation 6,062 ft. to elevation 6,066 ft. is an "easement only".

In May 1959, this easement was in a court action with Leland Zollinger. This property is now Six X ranches. This extended easement brings the reservoir capacity to 44,505-acre feet. Since the filling of the reservoir is to easement level, any storage water above the noted 44,505 AF whether by flood or otherwise would be constructed as trespass and be subject to legal action by the property owners being trespassed by the said water. In 1990 a survey was performed by Bill Erickson, to establish the boundaries, the crew installed fence posts. At the same time, the surveyor stated that it appeared that the Six X ranches were farming some the reservoir lands belonging to the BLRID. Attorney Roger Ling

stated that there was not any adverse or prescriptive use against a political entity, so this farming was not a problem.

The river has a capacity to carry a maximum of 2700 CFS during flooding, and even that is subject to river bank erosion.

The court judge in the case of Johnson, Donahue vs. BLRID was advised that the BLRID was only a canal company and to "stay out of the river". In that context, our crew must never be in the river unless it is to protect our headings. We have a 400 feet emergency permit for heading protection from the Corp. of Engineers.

The BLRID owns the following properties: the water rights, dam, reservoir and irrigation system of said project, in their entirety. All of the land where the campground and boat landing belongs to the BLRID and is leased with a 99-year lease to the Bureau of Land Management. Since this property, boat dock etc. is leased. Anyone wishing to do any work must obtain a sub-lease from the BLM. 20 acres in the W2SW4NE4 section 12, T7N, R23E.

Acquired as land patent number 11-69-0059 recorded May 13, 1973. This is the 20 acres where the caretaker's dwelling was for many years. 40 acres described as NW4SE4 section 12, T7N, R23E. Quit claim deed to BLRID from William Clark, June 16, 1942. 160 acres in NW4NW4, S2NW4, NE4SW4 section 12, T7N, R23E acquired by the purchase of the Mackay reservoir. Now being leased to Scott McAffee for $10.00 per year and to Idaho Fish and Game for the campground. VERY IMPORTANT that Scott McAffee is not allowed to forfeit payment because although the BLRID is political sub-division its possible it would require court action if Mr. McAffee filed for prescription or adverse use to claim ownership of the property. This same rule applies to the land that the 6X (according to the surveyor) farm that belongs to BLRID. Lots 18-24 in block 11 Mackay Original townsite, according to the official plat on file with the Custer county recorder. These are the lots where our shop and equipment are stored. Lots 1-3 N2 3 Mackay Original townsite block 11, this is the office.

BY-LAWS
OF
BIG LOST RIVER IRRIGATION DISTRICT
Butte and Custer Counties, Idaho

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ARTICLE I.

NAME, BOUNDARIES AND DIVISIONS.

Sec. 1. The name of this District is BIG LOST RIVER IRRIGATION DISTRICT.

Sec. 2. The boundaries of this District are as shown in the official map thereof and as described in the order of the Board of County Commissioners of Butte County, Idaho, of date July 3, 1920, both of which are on file in the County records of said County, and also in the files and records of said District, reference to which is hereby made for a more complete description thereof. (Together with all additions, changes, and revisions made pursuant to order of the Board and filed in the recorders office of the appropriate county. Reference is made to Idaho Code 43-101 to 43-118.) (Added to By-Laws June 2, 1964)

Sec. 3. The District is divided into five (5) divisions, the boundaries of which have been fixed as provided by law and are as follows: (Changes from three to five divisions made May 10, 1962)

Division No. 1.

All that part of the Irrigation District south and east of the Arco diversion with the District boundaries.

Division No. 2.

All that part of the Irrigation District south and west of the Moore diversion, being west of the Big Lost River and James Creek channels to the Arco diversion.

Division No. 3.

All that part of the Irrigation District east and south from the Moore diversion and east of the Big Lost River and James Creek channels to the Arco diversion.

Division No. 4.

All that part of the Irrigation District east and south of the Pass Creek road between sections 3 & 4, Twp 6N, Rge 25 EBM, across the valley on section lines between sections 5 & 8, sections 4 & 9, and section 3 & 10, all in Twp 5N, Rge 26 EBM to district boundaries.

Division No. 5.

All that part of the District from the Mackay Dam and upper Ceder Creek to the County road running north and south between sections 3 & 4 Twp 6N, Rge 25 EBM (commonly known as Pass Creek road), crossing the railroad from the Leslie store south and following the County road south to the Butte, north and west around the Butte to the Darlington ditch and district boundary.

ARTICLE II.

DISTRICT OFFICE.

Sec.1. The office of the Board shall be located at Mackay, Custer County, Idaho.

ARTICLE III.

BOARD OF DIRECTORS.

Sec. 1. The Board of Directors shall consist of five (5) members, and elected from each division of the District, they shall have the qualifications and exercise the powers conferred upon them by law. (Reference Idaho Code 43-201 & 213)

Sec. 2. The Board of Directors shall meet on the first Tuesday of January following their election and organize as a board, elect a Chairman, and appoint a Secretary and Treasurer and such other officers and employees as they may deem necessary, who shall hold office during the pleasure of the Board and perform such duties as shall be imposed upon them by law. The office of Secretary and Treasurer and that of any other officer may be combined in one person, at the discretion of the Board.

Sec. 3. The Board of Directors shall have power to appoint such agents, or officers or employees as may be required and prescribe their duties and fix their salaries. The Board of Directors shall have such powers as are enumerated in Section 42-304 of the Idaho Code Annotated, 1932, and any acts amendatory thereof, any and all powers which the Statutes of Idaho provide for an Irrigation District.

Sec. 4. The Board of Directors shall hold a regular monthly meeting in their office on the first Tuesday of every month and such special meetings as may be required for the proper transaction of business.

Sec. 5. All special meetings of the Board of Directors shall be ordered by the Chairman or a majority of the Board. The order must be entered of record, and the Secretary must give each member not joining in the order five days' notice of such special meeting. The order must specify the business to be transacted at such special meeting and none other than that specified shall be transacted; provided that all members of the Board are present at a meeting, the same shall be deemed a regular meeting and any lawful business may be transacted. All meetings of the Board must be public and a majority shall constitute a quorum for the transaction of business. On questions requiring a vote, there should be a quorum of at least a majority of all members of the Board. All records of the Board shall be open to the inspection of any elector during business hours.

Sec. 6. The members of the Board of Directors shall each receive a minimum sum per day spent attending meetings of the Board, or while engaged in official business under order of the Board, and actual and necessary expenses. Such actual and necessary expenses shall include all traveling and hotel expenses necessary to be incurred by any Director when absent from his residence in the performance of the duties of his office.

ARTICLE IV.

ELECTIONS.

Sec. 1. Elections shall be held in the District as provided by existing law of the State of Idaho and amendments thereto, The person receiving the highest number of votes for any office to be filled at such election shall be declared elected thereto, and shall hold said office for the time prescribed by the laws of the State of Idaho, and until his successor is elected and qualified. (Per Idaho Code 34-106, if the only petition received is

from the incumbent, there will not be an election and the incumbent shall be sworn in at the next regular meeting.

Sec. 2. Within ten days after receiving certificates of election as provided by law, the officer so elected shall take and subscribe an official oath and file the same in the office of the Board of Directors and execute an official bond in the form prescribed by law in the sum of not less than $1000.00, nor more than $5000.00, for the faithful performance of his duties as such officer the amount of such bond to be determined and approved by the Judge of the Probate Court of Butte county, Idaho, (when required) and recorded in the office of the County recorder of said County and filed in the office of the Board of Directors.

Sec. 3. Any other officers or employees of the District shall furnish bonds at the discretion of the Board and if required by it and in such an amount as the Board may determine.

ARTICLE V.

OFFICERS, THEIR DUTIES AND COMPENSTION.

Sec. 1. The officers of the District shall consist of a Chairman (President), Secretary and Treasurer. The Chairman shall be chosen by the Directors from among themselves. The Secretary and Treasurer shall be appointed by the Board of Directors and they shall serve during the pleasure of the Board of Directors.

Sec. 2. The Chairman of the Board of Directors shall preside at all meetings of the Board of Directors and shall sign, as Chairman, all instruments in writing which have first been approved by the said Board of Directors. He or she shall call meetings of the Board of Directors wherever he deem it necessary, or when requested so to do by any other member of the Board.

Sec. 3. It shall be the duty if the Assistant Secretary-Treasurer to keep accurate records of the business transacted by the Board of Directors at their meetings. The Secretary-Treasurer shall countersign all the warrants drawn upon the treasury of the District, and with the assistance of the Assistant Secretary-Treasurer shall keep proper account books and discharge such other duties as pertain to his office and as shall be prescribed by the Board of Directors and the laws the State of Idaho.

Sec. 4. It shall be the further duty of the Secretary to give notice at the time prescribed by law of all elections held within the District, and of all meetings of the Board of Directors which are held to correct assessments, and shall give all other notices that may be required by the statutes of Idaho.

Sec. 5. The Treasurer shall on his appointment execute and file with the Secretary an official bond in a lawfully qualified Surety Company in such amount as may be fixed by the Board of Directors of the District, which shall not be less than $5000.00, and he shall thereafter from time to time execute and file such further bonds as may be required by said Board in amounts fixed by it, which amounts shall be of at least fifty percent of the maximum amount of money in the Treasurer's hands at any one time.

Sec. 6. It shall be the duty of the Assistant Secretary-Treasurer to safely keep all moneys belonging to the District, making a deposit thereof in such Bank or Banks as may from time to time be directed by the Board of Directors. The Treasurer shall disburse moneys belonging to the District under direct authority of the Board of Directors.

Sec. 7. Representing the Secretary-Treasurer, the Assistant Secretary-Treasurer is hereby required to be in attendance at the time and place specified by the Board of Directors and as provided by law, to receive assessments and tolls, which must be paid in lawful money of the United States or by labor or services performed as may be authorized by said Board. The Assistant Secretary-Treasurer must make the date of payment of any assessments in the assessment book at the proper place, giving a receipt to the person paying, specifying the amount of the assessment, and if delinquent, the amount of costs and penalties thereon.

ARTICLE VI.

GENERAL MANAGER.

Sec. 1. It shall be the duty of the Board of Directors to appoint a General Manager of the District.

Sec. 2. It shall be the duty of the General Manager of the District to take an oath of office and file the same with the Board, to take charge of all property belonging to the District, rendering an account thereof to the Board of Directors from time to time as required; to make returns to the Board of all persons employed by the District and

statement of all expenditures accompanying the same, with the necessary vouchers, and he shall make such reports to the Board as may be from time to time required. The General Manager shall not, however, have the power to sign notes or contracts for the District; neither shall he have power to incur any indebtedness unless authorized by the Board of Directors. He shall have general charge of the distribution of water furnished by the District to consumers, and also general charge of the canals and laterals belonging to the District, and the care and maintenance of the same.

ARTICLE VII.

CONTROL OF DISTRICT'S IRRIGATION SYSTEM AND DISTRIBUTION OF WATER TO CONSUMERS.

Sec. 1. The Mackay Dam and Reservoir, and the control and diversion gates at said Mackay Dam and Reservoir, and all main canals and laterals and all diversion and distribution of water, and all storage and natural flow rights owned by Big Lost River Irrigation District, shall be under the direction and supervision of the General Manager, whose duty it shall be to distribute water to the consumer thereof according to their rights under these By-Laws and the laws of the State of Idaho, and under such special rules as may be from time to time made by the Board of Directors in any emergency.

Sec. 2. It shall be the duty of all consumers of water supplied by the District to build and maintain laterals and measuring headgates whereby water is drawn from main canals or laterals of the District.

Sec. 3. All the headgates or measuring devices shall be built and placed in position under the direction of the general manager, and shall be removed and replaced from time to time if considered necessary by the General Manager. The expense of removing and replacing headgates or measuring devices in main canals owned or operated by the District shall be borne by the District. The General Manager shall have authority, in the event that any headgate or measuring device on any lateral of any consumer of water shall not be in proper condition to have water diverted therefrom, either to construct a new headgate or measuring device and the cost thereof shall be charged to the said water consumer, or to refuse to deliver water to said consumer, or to

refuse to deliver water to said consumer, first serving five (5) days written notice thereof upon said water consumer.

Sec. 4. All measuring devices shall be constructed in accordance with rules of the Department of Reclamation and irrigation practice. Any person desiring to use water upon land owned or controlled by him, must make application therefor at least forty-eight (48) hours before such water is to be turned on or off. [*Nothing herein contained shall be construed to mean that more than one inch of water to the acre, measured on an acre foot basis, shall be used by any consumer unless there is a surplus of water in the canals and storage reservoir of the District.*] **(This paragraph was deleted from By-Laws June 2, 1964).**

Sec. 5. Any water consumer who has a water right under the Assessment and Apportionment of Benefits under the District's bond issue voted May 18, 1935, and approved and confirmed by the District Court of the Sixth Judicial District of the State of Idaho in and for the County of Custer, on January 6, 1936, and thereafter approved by Reconstruction Finance Corporation, shall have the right to any water belonging to him by such storage right or direct flow under said Assessment and Apportionment of Benefits, in the District's Reservoir, [*but such water consumer shall be required first to give forty-eight (48) hours notice to the General Manager of the District or to the office of the District of his intention to store said water, and such water consumer shall likewise give forty-eight (48) hours notice to the General Manager or to the office of the District of his desire again to use water.]* **(This paragraph was deleted from By-Laws June 2, 1964).**

Sec. 6. No water consumer shall be entitled to holdover storage water from year to year in the District's Reservoir whereby he may claim water for irrigation purposes.

Sec. 7. The Board of Directors shall have power to reduce the quantity of storage water demanded by any consumer in case of a shortage in the Mackay Reservoir, or by reason of breakage in the banks of canals, headgates or dams, whereupon it shall be the duty of the Board of Directors to apportion the water available pro rata among all consumers.

Sec. 8. All users of decreed water storing the same in the Mackay Reservoir, shall be charged with their proportion of evaporation losses in such Reservoir.

Sec. 9. No obstructions shall be placed in any of the canals or diversion works of the District without the consent of the Board of Directors in writing. No water wheels for generation of power or elevation of water shall be placed in any of the canals of the District except upon the written consent of the Board of Directors, and the payment of an annual fee therefor, such fee to be in such amount as the Board of Directors shall deem fit and proper.

Sec. 10. Consumers of water must not interfere with gates or measuring devices after the same have been set by the watermaster, or ditch rider.

Sec. 11. The number of headgates necessary for the irrigation of any tract of land may be determined by the Board of Directors, and no unnecessary headgates shall be maintained or operated.

Sec. 12. The banks of canals or laterals must not be out or trampled by livestock. Fences across the banks of canals or laterals must be constructed with proper gate-ways on the banks to be traveled by the watermaster and ditch rider. Fences across canals shall be so constructed as to be above water and so that drift will not collect against them.

Sec. 13. Wasting of water will not be permitted.

ARTICLE VIII.

FISCAL YEAR.

Sec. 1. The fiscal year shall begin January 1st and shall end December 31st of each year.

ARTICLE IX.

BUDGET ESTIMATES.

Sec. 1. It shall be the duty of the Board of Directors at its regular meeting in February of each year to ascertain and determine the amount of money necessary for the transaction and conduct of the District's business and the payment of the outstanding maturing obligations and for such other purposes as may have been specially and lawfully authorized, all as may be required for the twelve months' period commencing on the first day of May of each year.

ARTICLE X.

TOLLS, ASSESSMENTS AND MAINTENANCE CHARGES.

Sec. 1. The toll system has been definitely adopted by the District. For the purpose of defraying the expenses of the care, maintenance, operation, management and repair of the canals, dams, reservoirs, diversion works and other property of the District, and for the payment of the salaries of officers and employees of the District, the Board of Directors shall have the right to levy and collect a toll charge for the payment of such expenses, either in whole or in part. The Board shall meet on its regular meeting date on or before the first Tuesday of March of each year, beginning with the year 1937, levy and fix such toll charges, which toll charges may be either in whole or in part of the total amount required for such expenses.

Sec. 2. The Board of Directors, in its order fixing or levying such tolls each year shall fix the date or dates on or before which the same must be paid, and shall require the same payable in advance of the delivery of any water during the year for which the same are fixed, and may make provision for the collection thereof and the keeping of a toll book by the District Treasurer.

[Sec. 3. If water assessments or toll charges are not paid by July 1 of each year, the Board of Directors shall have the right to redistribute and pro rate the amount of storage water represented by such unpaid water assessments and toll charges among the consumers within the District entitled to water from said District.] **(Minutes of August 1, 1961. NOW THEREFORE, BE IT RESOLVED, that this said Section 3 of the By-Laws be, and hereby, canceled and removed from said By-Laws of the District, effective this date.)**

Sec. 4. No owner or user of decreed water will be permitted to store water in the District's Reservoir until such time as all assessments of every kind and character due said District against said decreed water and against the land to which said decreed water is appurtenant, have been paid.

ARTICLE XI.

SEAL.

Sec. 1. The corporate seal of this District shall have engraved thereon the full name of the District and the name of the State.

Sec. 2. The corporate seal of this District shall always remain in the custody of the Secretary.

ARTICLE XII.

ALTERATION OF BY-LAWS.

Sec. 1. These By-Laws may be altered, amended, or repealed at any meeting of the Board of Directors.

ARTICLE XIII.

POSSESSION OF BY-LAWS.

Sec. 1. These By-Laws shall always remain in the possession of the Secretary of the District and kept in the office of the District.

STATEMENT OF OBJECTIVES

To deliver to landowners the decreed water from the Big Lost River to which they are entitled pursuant to the water rights held by the individual landowner, and to deliver storage water of the Irrigation District to landowners within the district in the amounts to which said storage water has been apportioned to the lands within the district, all in the most efficient manner and consistent with good management practices. It is also an object of the Irrigation District to transport, by agreement, groundwater for use by landowners on lands within the district and for delivery to the outer boundaries of the district for use on lands outside of the district.

It is the further purpose to maintain the total irrigation system to the degree necessary to preserve the capacity and to maintain the condition of the facilities in a manner, which avoids undue depreciation; and to store and deliver irrigation water as required by the landowners within the Irrigation District.

It is also the object of the Irrigation District to maintain sound fiscal policies, including the maintenance of adequate reserves, and to promote the wise and efficient use of available water and the conservation of the lands within the district; and to hold a minimum, system seepage and operational waste, and to be constantly alert to technical advancement and the adoption of new practices which will improve system operating efficiency.

The Irrigation District is a public quasi corporation, organized; however to conduct a business for the private benefit of owners of land within its limits and it holds its property in a proprietary rather than a governmental capacity. Its quasi-municipal character renders Irrigation District subject to the constitutional requirements concerning electors. The Irrigation District is organized for the specific purpose of providing ways and means of irrigating lands with the district and maintaining the irrigation system for that purpose. The Irrigation District is not strictly municipal in the sense of exercising governmental functions other than those connected with raising revenue to defray expenses of irrigation systems. It is a mutual cooperative corporation organized not for a profit, but it is not a public service corporation in its broad sense. The Irrigation District though a quasi municipality corporation is nevertheless liable for negligence of its officers.

CONTROL OF FACILITIES

Ownership, operation and maintenance of the distribution facilities, dam and reservoir of the Irrigation District is vested in the Irrigation District, for the benefit of the landowners owning lands with the Irrigation District. The business and affairs of the Irrigation District shall be managed and conducted by the Board of Directors of the Irrigation District, which will employ and appoint such agents, officers and employees as may be required and prescribe their duties.

MEETINGS OF BOARD OF DIRECTORS

The Board of Directors shall hold a regular monthly meeting in the office of the Irrigation District on the first Tuesday in every month or such date each month as it shall fix by resolution and of business. All special meetings shall be ordered by the President or a majority of the Board, the order must be entered of record and the Secretary must give each member not joining in the order five-(5) days' notice of such special meetings. The order must specify the business to be transacted at such special meeting and none other than that specified shall be transacted, provided, that whenever all members of the Board are present, however called, the same shall be deemed a legal meeting and any lawful business may be transacted.

All meetings of the Board must be public, and a majority shall constitute a quorum for the transaction of business; but on all questions requiring a vote, there shall be concurrence of at least a majority of the members of the Board. All records of the Board shall be open to the inspection of any elector during business hours.

Minute Procedures adopted in minutes of June 1, 1999. Minutes are limited to motions and actions made by the Directors.

Written minutes of all meetings of the Board of Directors shall be taken, but neither a full transcript nor a recording of the meeting is required. Minutes of executive sessions may be limited to material the disclosure of which is not inconsistent with the provisions of 67-2345, Idaho Code, but shall contain sufficient detail to convey the general tenor of the meeting.

EXECUTIVE SESSIONS, IDAHO STATUTES 67-2345

Nothing contained in this act shall be construed to prevent, upon a two-thirds vote recorded in the minutes of the meeting by individual vote, a governing body of a public agency from holding an executive session. An executive session may be held: a) to consider hiring a public officer, employee, staff members or individual agent. This paragraph does not apply to filling a vacancy in an elective office; b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student; c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency; d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code. 2) Labor negotiations may be conducted in executive session if either side requests closed meetings. Notwithstanding the provisions of section 67-2343, Idaho Code, subsequent sessions of the negotiations may continue without further public notice. 3) No executive session may be held for the purpose of taking any final action or making any final decision.

ROBERTS RULES OF ORDER

Duties of the Chairman are generally as follows: To open the session at the time at which the assembly is to meet, by taking the chair and calling the members to order; to announce the business before the assembly in the order in which it is to be acted upon, to recognize members entitled to the floor, to state and to put to vote all questions which are regularly moved, or necessarily arise in the course of the proceedings, and to announce the result of the vote; to protect the assembly from annoyance from evidently frivolous or dilatory motions by refusing to recognize them; to assist in the expediting of business in every way compatible with the rights of the members, as by allowing brief remarks when undebatable motions are pending, if he thinks it advisable; to restrain the members when engaged in debate, within the rules of order; to enforce on all occasions the observance of order and decorum among the members, deciding all questions of order (subject to an appeal to the assembly by any two members) unless when in doubt he prefers to submit the question for the decision of the assembly; to inform the assembly, when necessary, or when referred to for the purpose, on a point of order or practice pertinent to pending business; to authenticate, by his signature, when necessary, all the acts, orders, and proceedings of the assembly declaring its will and in all things obeying its commands.

OFFICERS AND EMPLOYEES

No individual member of the Board of Directors may, except when authorized by the Board, interfere with the supervisory functions of any appointed or employed personnel, nor with any district employee in the performance of that employee's duties. Individual Directors should refrain from exercising any direct authority over any employee, and the Board shall act, as a unit, pursuant to decisions made in duly called Board meetings.

MACKAY RESERVOIR

The BLRID manages the Mackay Reservoir, which was purchased in 1935 by the bonding of the people of Lost River Valley for $235,000. The reservoir to elevation 6,062 ft. to elevation 6,066 ft. is an "easement only".

In May 1959, this easement was in a court action with Leland Zollinger. This property is now Six X ranches. This extended easement brings the reservoir capacity to 44,505-acre feet. Since the filling of the reservoir is to easement level, any storage water above the noted 44,505 AF whether by flood or otherwise would be constructed as trespass and be subject to legal action by the property owners being trespassed by the said water. In 1990 a survey was performed by Bill Erickson, to establish the boundaries, the crew installed fence posts. At the same time, the surveyor stated that it appeared that the Six X ranches were farming some the reservoir lands belonging to the BLRID. Attorney Roger Ling

stated that there was not any adverse or prescriptive use against a political entity, so this farming was not a problem.

The river has a capacity to carry a maximum of 2700 CFS during flooding, and even that is subject to river bank erosion.

The court judge in the case of Johnson, Donahue vs. BLRID was advised that the BLRID was only a canal company and to "stay out of the river". In that context, our crew must never be in the river unless it is to protect our headings. We have a 400 feet emergency permit for heading protection from the Corp. of Engineers.

The BLRID owns the following properties: the water rights, dam, reservoir and irrigation system of said project, in their entirety. All of the land where the campground and boat landing belongs to the BLRID and is leased with a 99-year lease to the Bureau of Land Management. Since this property, boat dock etc. is leased. Anyone wishing to do any work must obtain a sub-lease from the BLM. 20 acres in the W2SW4NE4 section 12, T7N, R23E.

Acquired as land patent number 11-69-0059 recorded May 13, 1973. This is the 20 acres where the caretaker's dwelling was for many years. 40 acres described as NW4SE4 section 12, T7N, R23E. Quit claim deed to BLRID from William Clark, June 16, 1942. 160 acres in NW4NW4, S2NW4, NE4SW4 section 12, T7N, R23E acquired by the purchase of the Mackay reservoir. Now being leased to Scott McAffee for $10.00 per year and to Idaho Fish and Game for the campground. VERY IMPORTANT that Scott McAffee is not allowed to forfeit payment because although the BLRID is political sub-division its possible it would require court action if Mr. McAffee filed for prescription or adverse use to claim ownership of the property. This same rule applies to the land that the 6X (according to the surveyor) farm that belongs to BLRID. Lots 18-24 in block 11 Mackay Original townsite, according to the official plat on file with the Custer county recorder. These are the lots where our shop and equipment are stored. Lots 1-3 N2 3 Mackay Original townsite block 11, this is the office.

Idaho Department of Water Resources

Idaho Statutes Pertaining to Canals and Laterals

October 2018



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Costs associated with this publication are available from the Idaho Department of Water Resources in accordance with Section 60-202, Idaho Code. IDWR, 5/05, 58000

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Preface

This pamphlet provides an index and copy of the various Idaho laws that pertain to water distribution on canals and laterals. It is intended as a reference guide so water users and non-water users may have first-hand knowledge of certain water laws that apply to various aspects of canals and laterals. The pamphlet contains the most relevant and common laws pertaining to distribution of water on canals, ditches and laterals. Individuals are encouraged to consult these statutes when first addressing questions or issues related to ditches and laterals but recognize that these laws and this pamphlet may not answer or address all pertinent questions. Certain questions or assistance may be most appropriately addressed by local canal companies, irrigation districts and lateral organizations. The Idaho Department of Water Resources (IDWR) may provide some assistance in addressing general questions related to Idaho water laws with respect to common water distribution matters. A guide to IDWR office locations and phone numbers is provided on the inside cover of this pamphlet.

In addition to water distribution matters that routinely arise, many misunderstandings between neighbors involve disputes over the existence and scope of water related rights-of-way and easements. In many instances, disputes over these types of property interests can present difficult legal questions involving legal research and analysis requiring the parties to consult their attorneys.

Please note that this pamphlet is not a comprehensive reference of all the laws in Idaho related to irrigation, water use and water delivery. There are numerous laws that address water rights and irrigation. These laws are found in Titles 42 and 43 of the Idaho Code. These and several other laws found in different Titles of the Idaho Code may have some relevance to water delivery but are omitted from this publication since they are not germane to distribution of water on ditches and laterals. Sections 31-3805 and 31-3806, for example, address certain county zoning regulations applicable to water delivery systems in subdivisions.

A complete copy of the Idaho Code related to water rights and irrigation statutes may be viewed online using a link on the IDWR homepage at idwr.idaho.gov, or through the State of Idaho homepage at idaho.gov. A complete copy of the Idaho Code can also be obtained at most Idaho libraries.

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General Information Regarding Ditches and Easements

Irrigation Ditch Questions

Idaho property owners often have some type of ditch crossing their lands that transport water to another place. Two types of ditches are most common:

- Irrigation ditches, which carry needed "live" irrigation water to the place of use, and
- Wastewater-ditches, which carry away excess water from the place of use.

Water users generally maintain some type of easement to pass water through and maintain ditches over the lands of their neighbors. Easements are limited to right of use over the lands of another and pass with the land to subsequent owners. Easements are valuable interests in land and are protected from interference by others. Although many types of real estate easements are reduced to a written document and recorded at the county courthouse, most ditch easements are not. The right to use a ditch over the lands of another is often an implied right that was created about the same time as the water right was created and developed. The scope of the easement and the extent of maintenance practices are often established by historical usage. Under Idaho Code § 42-1207, subject to certain limitations, underlying landowners can relocate a ditch on their lands at their expense provided that there is no injury to the persons using the ditch.

The owners or operators of ditches used for irrigation purposes are responsible for maintenance and repair of ditches to prevent damage or injury to property owners, whether on lands of the owners or operators of ditches or upon other lands (see Idaho Code §§ 42- 1202 through 42-1204).

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Title 42: Irrigation and Drainage – Water Rights and Reclamation

Chapter 1: Appropriation of Water — General Provisions

42-109. Change in Course of Ditch — When Prohibited.

Whenever any ditch or canal has been constructed for the purpose of conveying water and selling the same for irrigating purposes, it is unlawful for the owner or owners of said ditch or canal to change the line of said ditch or canal so as to prevent or interfere with the use of water from said ditch or canal, by any one who, prior to the proposed change, had used water for irrigating purposes from said ditch or canal.

Chapter 9: Distribution of Water to Consumers

42-901. Appointment of Watermaster — Appointment by Court.

It shall be the duty of those owning or controlling any ditch, canal or lateral to appoint a superintendent or watermaster, whose duty it shall be to measure the water from such ditch, canal or lateral through the outlet of those entitled thereto, according to his or her pro rata share: provided, that any vicinity or neighborhood, the inhabitants of which use the waters of any ditch, canal or lateral for the purpose of irrigation, or have or claim a common right to the waters of any ditch or lateral for such purposes, provided the waters so claimed or used have not been allotted to the individual users thereof, shall constitute a water district.

Any one or more of said joint owners so using the water of any ditch, canal or lateral as aforesaid, when the appointment of a watermaster can not be agreed upon, may petition the judge of the district court in whose district the ditch, canal or lateral may be located for the appointment of a watermaster for said ditch, canal or lateral, and shall set forth in said petition the facts of his or her ownership in said ditch, canal or lateral; the ownership and interest of all other joint owners; the location and length of said ditch, canal or lateral, and requesting said district court to appoint a watermaster to take charge of the same. Upon due notice being given to all of the water users under said ditch, canal or lateral, and after hearing before said court, it shall be the duty of the judge of said district court if he deem it necessary or equitable in order that the rights of all water users under said ditch, canal or lateral may be protected, to appoint a watermaster for the ditch, canal or lateral described in the petition. Said watermaster to receive such compensation as the court in his judgment may deem adequate, and shall be paid in the same manner as is provided for the payment of watermasters under chapter 5 [6] of this title, and shall perform the same duties and have the same power and authority as other watermasters appointed or elected in accordance with the provisions of this code.

42-902. Injuring Ditch or Head gate — Triple Damages.

Any person who, without the consent of the watermaster of the district, diverts any water from the ditch or channel where it was placed, or caused, or left to run by the watermaster or his deputies, or who shuts or opens any ditch, gate or dam with intent so to divert any water, and thereby deprive any person of the use of the same during any part of the time he is entitled to such use, or who, without the consent of the watermaster, cuts any ditch or the banks thereof, or breaks or destroys any gate or flume, is liable in a civil action to any person injured thereby in three times the actual damage sustained in consequence of any such wrongful act or acts.

42-903. Head gates and Measuring Devices — Water Companies to Furnish.

Any person, association or corporation delivering or distributing water under any fixed annual charge or rental shall provide the necessary gates and measuring devices to render possible and practicable a measurement of the quantity of water being delivered to any consumer (or number of consumers using a common lateral or distributing ditch); and the price charged for the annual use of the water so distributed shall be in proportion to the quantity of water delivered from the works of such person, association or corporation. Such measuring devices shall be of such a character, and provided with such gauges or scales, that the quantity of water being delivered at any time can be ascertained by inspection; and shall be of such general plan as shall meet with the approval of the department of water resources, which shall inspect any such devices whenever possible to ascertain their character, and the department shall furnish such general information and instructions to any consumer, or the watermaster of any number of consumers of water, as may be necessary to enable him to ascertain the quantity of water flowing through any such measuring device.

42-904. Division of Land into Classes by Priority.

When any ditch, canal or reservoir delivering or distributing water to several users has one or more rights or priorities by reason of enlargements made from time to time, the right of the land being irrigated by such works shall be divided into classes; rights of the first class belonging to those lands reclaimed between the dates of the first and second priorities or rights of such works; rights of the second class belonging to those lands reclaimed between the dates of the second and third priorities of such works; rights of any other class being determined in like manner; but all the rights belonging to the same class shall be equal and subject alike to the regulations of their respective class.

42-905. Point of Delivery.

Any person, association or corporation which may contract to deliver a certain quantity of water to any party or parties, shall deliver the same to such party or parties, together with a reasonable and necessary allowance for loss by evaporation and seepage, at some convenient point on the main ditch, canal or reservoir of said person, association or corporation, or on any branch or lateral thereof belonging to the owner or owners of such ditch, canal or reservoir.

42-906. Amount and Lien of Rental or Maintenance.

The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed by contract, or may be as provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered. But if the title to said tract of land is in the United States or the state of Idaho, then the said amount shall be a first lien upon any crop or crops which may be raised upon said tract of land, which said lien shall be recorded and collected as provided by law for other liens in this state. And any mortgage or other lien upon such tracts of land that may hereafter be given shall in all cases be subject to the lien for price of water as provided in this section.

42-907. Duties of Consumers — Appointment of Manager of Distributing Lateral.

Where two (2) or more parties take water from said ditch, canal or reservoir at the same point, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch, such parties shall, on or before April first of each year, select some person to have charge during the succeeding season of the distribution of water from such lateral, whose duty it shall be to ascertain and see that the amount of water to which each of the parties interested is entitled is properly

apportioned and distributed. It shall be his further duty to see that the said person, association or corporation, contracting to furnish such water shall deliver the amount as provided in section 42-905, [Idaho Code,] and in case of dispute between such person and the said person, association or corporation as to the quantity of water to be delivered, or the amount actually delivered, the matter shall be referred to the department of water resources. The parties entitled to said water shall keep their ditches and laterals in good condition for carrying and distributing the same. In case the parties entitled to the use of water as in this section stated shall neglect or refuse to perform the duties imposed upon them by this section, they shall have no cause for damage against the person, association or corporation furnishing said water for failure to properly furnish and distribute the same.42-908. Manager of Distributing Lateral — Alternative Method of Selection.

Wherever two [(2)] or more persons take water from any main ditch, canal or reservoir, at the same point, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch, as provided in section 42- 905, [Idaho Code,] the person to be selected by such parties on or before April first of each year, as provided in section 42-907 [Idaho Code,] may be selected and appointed by a written instrument designating such person, signed by the majority of such persons so using the said ditch for their said water, and filed with the watermaster or other managing agent or director of such main canal, ditch or reservoir.

42-909. Manager of Distributing Lateral — Appointment by District Watermaster — by Directors of Irrigation District — Payment of Compensation.

If two (2) or more parties taking water from any main ditch, canal or reservoir at the same point to be conveyed to their respective premises for any distance, through the same lateral or distributing ditch, do not select a manager for said lateral, as provided in section 42-907, [Idaho Code,] or section 42-908, [Idaho Code,] the watermaster of the water district, shall on the written demand of any one or more of said parties, appoint a manager for said lateral, who shall have and exercise all the powers and perform all of the duties of a manager of the distributing lateral as provided in section 42-910[Idaho Code]:provided, that if an irrigation district is owner of the main ditch, canal or reservoir, the board of directors of such district shall, upon such demand, make such appointment.

The compensation of said manager shall be fixed by said watermaster, and shall be paid in the manner provided by section 42-910[, Idaho Code,] for the payment of expenses incurred by him. If not paid, it may be collected, with other damages in the action provided by said section: provided, that if an irrigation district is the owner of the main ditch, canal or reservoir, the board of directors of such district shall fix the compensation of said manager; and at the end of the irrigation season upon the request of such manager the secretary of such district shall prorate the amount of such compensation among the several parties taking water through such lateral, or distributing ditch upon the basis of the number of acres irrigated by each, and mail each a statement of the amount prorated to such party, requesting that remittance be made to such secretary for and on behalf of such manager. In the event such parties or either of them, not later than the date when irrigation district assessments are delinquent, remits to such secretary, he shall, upon receiving same, and without making any entry in his books of account, deliver it to such manager. Should such parties or either of them fail or refuse at such time to remit to said secretary, then such manager may collect as hereinbefore provided.

42-910. Duties of Manager of Distributing Lateral — Assessment of Repair and Maintenance costs — Appeals.

Such person shall be known as the manager of such distributing lateral for the season for which he is selected, and in addition to the powers granted to him by section 42-907[, Idaho Code,] he shall have power to require of each user of such lateral such user's proportion of the amount of labor, material or money reasonably necessary for the proper repair and maintenance of such lateral, and to require measuring weirs, head-gates and checks to be installed for distributing the water among the users, and each user of such lateral shall furnish his proportion of such labor, material or money upon three (3) days' notice so to do, and, in default of so doing, such manager may employ other labor in his place, or furnish the material or money necessary, and such user shall pay to the manager the reasonable value of such material or labor so furnished by the manager, upon demand, in case of default in payment by such user the said manager may sue and collect the same in any court of competent jurisdiction, and in addition to all costs, the court shall allow said manager his reasonable attorney's fees incurred in that behalf. In the event such water user or water users shall not furnish his or their respective share of such labor, material or money within three (3) days after notice so to do, as hereinabove provided, then said manager may, if he elects, notify the association or corporation delivering water into said distributing lateral of the failure, neglect or refusal of said water users or any of them to furnish his or their respective share of such labor, material or money for the proper repair and maintenance of such lateral or for the furnishing and installation of measuring weirs, head-gates and checks, and upon receipt of such notice said association or corporation may, if it chooses to do so, proceed to furnish all labor, material and money necessary for the proper repair and maintenance of such lateral and for the furnishing and installation of measuring weirs, head-gates and checks, or it may, if it chooses so to do, proceed to repair and maintain said laterals and furnish and install such measuring weirs, head-gates and checks as it shall deem necessary or proper for the distribution of water among the several water users. The cost of such repair and maintenance and the cost of furnishing and installing such measuring devices, head-gates, and checks shall be apportioned among the several water users on the basis of benefits derived therefrom by said water users, and the said association or corporation furnishing said funds or doing the aforesaid things or any of them shall within thirty [(30)] days after completion thereof give each of such water users written notice of the amount or amounts to be paid by him and demand payment thereof. Should the water users or any of them desire to contest the assessment and apportionment made by such association or corporation, appeal may be taken from such assessment and apportionment to the district court in the county where the principal office of said association or corporation is located within ten (10) days after receipt of said notice and demand for payment, in the same manner as in the case of appeals from the boards of county commissioners. In case of appeal any sum or sums determined by said district court to be due, or in the event no appeal is taken then any sum or sums determined by such association or corporation to be due from any water users, shall be paid by such water user within ninety (90) days and the said association or corporation may refuse to deliver any water to any such water user until the amount due shall have been paid in full.

42-911. Users of Water Defined.

The term "users of water" from a community ditch shall be understood to include the owner of the land on which the water is used, or any tenant or other person in possession and control of said premises.

42-912. Company to Furnish Water on Demand.

Any person, company or corporation owning or controlling any canal or irrigation works for the

distribution of water under a sale or rental thereof, shall furnish water to any person or persons owning or controlling any land under such canal or irrigation works for the purpose of irrigating such land or for domestic purposes, upon a proper demand being made and reasonable security being given for the payment thereof: provided, that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this state.

42-913. Application for Water.

Any person or persons owning or controlling land which has or has not been irrigated from any such canal, shall on or before January first of any year, inform the owner or person in control of such canal whether or not he desires the water from said canal for the irrigation of land during the succeeding season, stating also the quantity of water needed. In distributing water from any such canal, ditch or conduit during any season, preference shall be given to those applications for water for land irrigated from said canal the preceding season, and a surplus of water, if any there be, shall be distributed to the lands in the numerical order of the applications for it. But no demand for the purchase of a so called perpetual water right, or any contract fixing the annual charges or the quantity of water to be used per acre, shall be imposed as a condition precedent to the delivery of water annually as provided in this chapter; but the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land; and the annual charges to be made and to be fixed under the further provisions of this title, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered.

42-914. Sale or Rental Constitutes a Dedication — Domestic Purposes Construed — Liability for Violation.

Whenever any waters have been or shall be appropriated or used for agricultural or domestic purposes under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use upon the tract of land for which such appropriation or use has been secured, and, whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter be deprived of the annual use of the same when needed for agricultural or domestic purposes upon the tract of land for which such appropriation or use has been secured, or to irrigate the land so settled upon or improved, upon payment therefore, and compliance with such equitable terms and conditions as to the quantity used and times of use as may be prescribed by law. "Domestic purposes" shall not be construed to include any manner of land irrigation. Any person, association or corporation violating any of the provisions of this section, shall be liable for all damage to any party or parties injured thereby, which damage shall be determined by the proper court.

42-915. Consumer's Title not Affected by Transfer of Ditch.

When any payment is made under the terms of a contract, by means of which payment a perpetual right to the use of water necessary to irrigate a certain tract of land is secured, said water right shall forever remain a part of said tract of land, and the title to the use of said water can never be affected in any way by any subsequent transfer of the canal or ditch property or by any foreclosure or any bond, mortgage or other lien thereon; but the owner of said tract of land, his heirs or assigns, shall forever be entitled to the use of the water necessary to properly irrigate the same, by complying with such

reasonable regulations as may be agreed upon, or as may from time to time be imposed by law. And said payment for said water right shall be a release of any bond or mortgage upon the canal property of the person or company from whom such right is purchased or their successors or assigns, to the amount of such water right thus purchased and paid for, and said person or company from whom such water right is purchased shall furnish to the party or parties purchasing such right a release, or a good and sufficient bond for a release, from said mortgage or bonded indebtedness to the amount of the water right thus purchased.

42-916. Liability for Waste of Water.

No person entitled to the use of water from any such ditch or canal, must, under any circumstances, use more water than good husbandry requires for the crop or crops that he cultivates; and any person using an excess of water, is liable to the owner of such ditch or canal for the value of such excess; and in addition thereto, is liable for all damages sustained by any other person, who would have been entitled to the use of such excess water, as fixed by this section.

Chapter 11: Rights Of Way

42-1101. Rights of Landowners to Water.

All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed.

42-1102. Owners of Land — Right to Right-of-Way.

When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation. The right-of-way shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. Provided, that in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interests of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

Rights-of-way provided by this section are essential for the operations of the ditches, canals and conduits. No person or entity shall cause or permit any encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures, or other construction or placement of objects, without the written permission of the owner of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way. Encroachments of any kind placed in such right-of-way without express written permission of the owner of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachment, upon the request of the owner of the right-of- way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

This section shall apply to ditches, canals or other conduits existing on the effective date of this act, [March 12, 1996], as well as to ditches, canals or other conduits constructed after such effective date.

42-1103. Owners of Springs and Streams - Right to Right-of-Way.

Where the owners of any spring, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for the purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use, and to accomplish such object it is necessary to cross with ditches, flumes or other conduit, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner above provided.

42-1104. Right of Way Over State Lands.

The right of way over and upon any and all lands owned or controlled by the state of Idaho is hereby granted to any and all persons for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use: provided, that no property shall be taken under the provisions of this section until a just compensation shall be paid therefore, to be ascertained in the manner prescribed by law for the taking of private property for a public use.

42-1105. Right of Way for Riparian Proprietors.

All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel or upon the banks or margin of the same, rams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the following section.

42-1106. Right of Eminent Domain.

In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain.

42-1107. Right of Way for Drains.

Whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, and they cannot agree among themselves or with the parties who own land below through which it is expedient to carry the drain in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigating works of diversion, and the right of way for such drains shall be regarded as equal to that of irrigation canals.

42-1108. Right to Cross Ditches.

Any person, company or corporation, owners of any ditch, flume or other conduit, can not lawfully deny to any other person, company or corporation the right to cross their right of way with another ditch, flume or conduit either upon a higher or lower level, where the same can be done in a convenient and safe manner: provided, that such second person, company or corporation shall be liable for all damages that may accrue from the construction of such ditch, flume or other conduit across the conduit of another.

Chapter 12: Maintenance and Repair of Ditches

42-1201. Ditches to be Kept Full.

Every person, company or corporation owning or controlling any ditch, canal or conduit for the purpose of irrigation shall, during the time from April first to the first day of November of each year, keep a flow of water therein sufficient to the requirements of such persons as are properly entitled to the use of water there from: provided, however, that when the public streams or other natural water sources from which the water is obtained is [are] too low and inadequate for that purpose, or when the board of directors or governing body of an organization or entity furnishing water deem it in the best interests of that organization or entity to adjust the dates of availability and provide for termination of irrigation water, then such ditch, canal or conduit shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priority from the streams or other natural sources as provided by law.

42-1202. Maintenance of Ditch.

The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water.

42-1203. Maintenance of Embankments.

The owner or owners of any irrigating ditch, canal or conduit shall carefully keep and maintain the embankments thereof in good repair, in order to prevent the water from wasting during the irrigation season, and shall not at any time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain or than can be used for beneficial or useful purposes; it being the meaning of this section to prevent the wasting and useless discharge and running away of water. The duties referenced in this section, whether statutory or common law, require reasonable care only, and shall not be construed to impose strict liability or to otherwise enlarge the liability of the owner or owners of any irrigating ditch, canal or conduit. The owners or constructors of such ditches, canals, works or other aqueducts, while responsible for their own acts or omissions, shall

not be liable for damage or injury caused by: (1) The diversion or discharge of water into a ditch, canal or conduit by a third party without the permission of the owner or owners of the ditch, canal or conduit; (2) Any other act or omission of a third party, other than an employee or agent of the owner or owners of the ditch, canal or conduit; or (3) An act of God, including fire, earthquake, storm or similar natural phenomenon. The provisions of this section shall not be construed to impair any defense that an owner or constructor of a ditch, canal, works or other aqueduct may assert in a civil action.

42-1204. Prevention of Damage to Others.

The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others. The duties referenced in this section, whether statutory or common law, require reasonable care only, and shall not be construed to impose strict liability or to otherwise enlarge the liability of the owner or owners of any irrigating ditch, canal, works or other aqueduct. The owners or constructors of such ditches, canals, works or other aqueducts, while responsible for their own acts or omissions, shall not be liable for damage or injury caused by: (1) The diversion or discharge of water into a ditch, canal, works or other aqueduct by a third party without the permission of the owner or owners of the ditch, canal, works or other aqueduct; (2) Any other act or omission of a third party, other than an employee or agent of the owner or owners of the ditch, canal, works or other aqueduct; or (3) An act of God, including fire, earthquake, storm or similar natural phenomenon. The provisions of this section shall not be construed to impair any defense that an owner or constructor of a ditch, canal, works or other aqueduct may assert in a civil action. The owners or constructors have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter.

42-1205. Bridges over Ditches.

All owners of any ditch, canal or conduit, or any other means for conveying water, shall build substantial bridges not less than sixteen (16) feet wide, and with boards not less than two (2) inches in thickness (unless the same shall be on a county or state road, when such boards shall not be less than three (3) inches thick), at all places where any county or state road crosses the same, or any road kept open and used by any neighborhood of people for their benefit and convenience. In case of neglect or refusal of such owners to build such bridges as above required, after a notice of ten (10) days being given by the said board of county commissioners of the proper county, said board shall proceed to the construction of the same, and shall collect the cost thereof together with the costs of suit: provided, that after any bridge shall have been constructed across any ditch, canal or conduit on any county or state road in accordance with the provisions of this section, it shall thereafter be maintained at the public expense.

42-1206. Repair of Community Ditches.

Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three (3) days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the watermaster in his own name.

42-1207. Change of Ditch, Canal, Lateral, Drain or Buried Irrigation Conduit.

Where any ditch, canal, lateral or drain or buried irrigation conduit has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling said land shall have the right at their own expense to change said ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change, his heirs, executors, administrators, successors and assigns.

A landowner shall also have the right to bury the ditch, canal, lateral or drain of another in pipe on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner, his heirs, executors, administrators, successors and assigns, shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner.

The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner.

While the owner of a ditch, canal, lateral, drain or buried irrigation conduit shall have no right to relocate it on the property of another without permission, a ditch, canal, lateral or drain owner shall have the right to place it in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but no longer than thirty (30) days after the completion of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, canal, lateral or drain, provided that the landowner, his heirs, executors, administrators, successors and assigns, shall be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the conduit owner.

42-1208. Easements or Rights-of-Way not Subject to Adverse Possession.

Easements or rights-of-way of irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are not subject to adverse possession, and no person shall prevent free access of authorized personnel on easements or rights-of-way or construct any obstruction on easements or rights-of-way in an effort to adversely possess said easement or right-of-way.

42-1209. Encroachments on Easements and Rights-of-Way.

Easements or rights-of-way of irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association, or drainage district owning the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

Chapter 13: Lateral Ditch Water Users' Associations

42-1301. Organization — Officers — Rules.

When three (3) or more parties each own or possess and control land with appurtenant water rights which each are entitled to receive from the same point or points of delivery in a canal or reservoir, or from the same point or points of diversion from waters of the state, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch or laterals or distributing ditches that are not operated and maintained by an irrigation district, canal company or other water delivery organization, such parties shall be members of and shall constitute a water users' association known as "Lateral Water Users' Association." Such water users' association may meet and organize at any time after thirty (30) days after this chapter shall take effect, and shall meet annually thereafter between January 1 and the last Monday in March of each year, at the call of the secretary of such association, said secretary to give ten (10) days' notice by mail of such annual meeting; provided that if for any reason the secretary should fail to call a meeting, then the annual meeting of such association shall be held on the last Monday in March of each year. At such annual meetings each water user shall be entitled to one (1) vote in person, for each inch and a fractional vote for each fraction of an inch of water which such water user is entitled to receive from such laterals, and a corporation shall vote by one (1) of its officers designated by it. Such association shall organize by the election of a chairman, vice-chairman and a secretary-treasurer, which officers shall also constitute the board of directors of such association, and shall hold office for one (1) year and until their successors are elected. Such association at the annual meeting shall also elect a manager of said lateral or laterals to be known as "lateral manager" for the succeeding season and shall fix the compensation of said manager, and of all officers. Such association may adopt such rules and regulations for the management of said lateral or laterals or distributing ditch or ditches and the delivery of water therefrom as they deem best, and

may, by majority vote, if it be deemed for the best interests of the association, combine one (1) or more laterals and abandon laterals not in use, and do any and all things not in conflict with the provisions of this chapter or the laws of this state wherein the best interests of the association will be furthered.

42-1302. Lateral Manager — Election — Duties

Should any water users' association at its annual meeting fail to elect a lateral manager or fix his compensation such lateral manager may be elected by the board of directors of such association, who may also fix his compensation. The manager of any lateral shall, in addition to the duties prescribed by the association, perform all duties fixed for such lateral manager under the provisions of sections 42-907 and 42-910, [Idaho Code,] except as modified by this chapter

42-1303. Lateral Ditches — Repairs, Improvements, and Maintenance — Assessment of Costs.

The operation, improvement, repair and maintenance of any such lateral or distributing ditch shall be under the direction of the directors of the association. Following the association's annual meeting, the association's directors and the lateral manager shall examine the lateral or laterals or distributing ditch or ditches, and prepare an estimate of the total cost to operate, repair, improve and maintain the lateral or laterals or ditch or ditches to properly deliver water to the water users' lands during the succeeding season, including the compensation of officers and lateral manager. Such total cost shall be assessed to each water user either (1) in the proportion which the quantity of water the water user is entitled to receive from such lateral or ditch bears to the total quantity of water which all association water users are entitled to receive therefrom, or (2) if the water user's land consists of a lot or lots within a city or village, then the assessment may be made upon the basis of each lot, the same to be uniform upon lots of the same size.

42-1304. Assessments — Notice — Penalties for Delinquency.

On or before the fifteenth day of April in each year the secretary of the association shall notify each water user of the amount assessed against him for that year as herein authorized, and the same shall be due and payable on the first day of May of each year and if not so paid on or before the fifteenth day of June of such year, a penalty of ten per cent (10%) shall be added thereto, and the total amount due shall then draw interest at the rate of ten per cent (10%) per annum from said fifteenth day of June of such year until paid.

42-1305. Delinquent Users not Entitled to Water.

No water user shall be entitled to demand or receive water from said lateral whenever any such assessment is due and unpaid, and the lateral manager shall not distribute any water to such water user while delinquent in such payment except upon order of the board of directors of the association who shall have authority to cause such water to be delivered: provided, the water user shall give such security for the payment of such assessment against him as shall be required by the board of directors.

42-1306. Collection and Disbursement of Funds.

The lateral manager shall collect all assessments so made and pay the same to the secretary secretary]-treasurer taking his receipt therefore. The secretary- treasurer of this association shall keep the funds of the association in the name of the association and shall draw warrants or checks thereon to pay the costs and expenses of the management of said lateral as herein provided for upon the order of the

board of directors, and shall perform such other duties as the association may prescribe.

42-1307. Action for Assessment — Attorneys' Fees.

In case any assessment, as herein provided for is due and unpaid the association may sue to collect the same, in the name of its secretary-treasurer as such, in any court of competent jurisdiction, and in addition to the amount due including all penalties and interest, and all costs incurred in said action, may collect a reasonable attorney's fee in such action to be fixed by the court.

42-1308. Appointment of Lateral Manager by Director of Department of Water Resources.

(1) In the event that the water users or the board of directors of any lateral or ditch association do not meet and elect a lateral manager as provided chapter or a lateral manager is not selected as otherwise provided by law, then, the director of the department of water resources may appoint and fix the compensation of a lateral manager, upon the written petition of a water user alleging that water is not being apportioned and distributed properly among the users from the ditch or lateral and that the rights of the water user are being injured thereby.

(2) If the water users also have failed to elect association officers, the lateral manager appointed by the director may exercise the duties of the association officers, including the making and collection of assessments, but not the borrowing of money, as is necessary to achieve the proper allocation and distribution of water from the ditch or lateral and without regard to the statutory dates for the performance of these duties.

(3) The lateral manager appointed by the director shall hold office only for the period of time fixed by the order of appointment and in no event beyond the remainder of the year in which appointed.

(4) If the lateral is located within a water district established pursuant to chapter 6, title 42, Idaho Code, the director shall advise the district watermaster of the receipt of the petition and invite the watermaster to make recommendations concerning the need for appointment of a lateral manager and the person to be appointed.

(5) Upon receipt of a petition filed pursuant to subsection (1) of this section, the director shall make a reasonable effort to provide written notice of the petition to any irrigation district, Canal Company, or other water distribution entity that supplies water to the lateral, and to all persons having rights to the use of water from the lateral. Except in the case of serious threat of imminent injury to person or property, the director shall allow fourteen (14) days for written response to the petition.

(6) Based upon a review of the petition, the responses thereto, the recommendations of the watermaster, if any, and any investigation by the department of water resources, the director shall issue an order with findings either appointing a lateral manager or declining to appoint a lateral manager

Any person aggrieved by the order of the director shall be entitled to request a hearing before the director pursuant to section 42-1701A, Idaho Code.

42-1309. Association Authorized to Borrow Money, Mortgage or Pledge Assets.

Lateral ditch water users' associations are expressly authorized to borrow money from any private or governmental source, to be repaid over a period of years, and to levy assessments over such period of

years for the purpose of repaying said loan, and they are also authorized and empowered to mortgage and/or pledge any of the assets of said associations as security for said loan; providing, however, that before any money can be borrowed or any mortgage or pledge can be made and entered into, all members of said association shall be notified of an election by two (2) weekly publications in a legally authorized newspaper, as defined in section 60-106, Idaho Code, within the county in which the association is located, said notice to provide that an election is being called to determine whether or not the association shall be authorized to borrow money and mortgage and/or pledge its assets, and shall also state the date, time and place of said election, which shall be held within ten [(10)] days after the date of the last publication of said notice. If a majority of the total outstanding shares shall vote at said election in favor of borrowing said money and mortgaging and/or pledging said assets, then said association, through its president and secretary, shall be authorized to borrow said money and mortgage and/or pledge its assets.

42-1310. Lateral Ditches -- Repairs, Improvements and Maintenance by Irrigation Delivery Entities.

In the event that a water users' association of lateral or laterals has not been constituted on a particular lateral or distributing ditch pursuant to this chapter, any individual water user taking water from a canal or reservoir to be conveyed to their respective premises for any distance through such lateral or distributing ditch may authorize the irrigation delivery entity providing water to the lateral or ditch to perform any necessary repairs, improvements, or maintenance to the lateral or ditch. The irrigation delivery entity may agree to perform such work only if it has duly adopted a bylaw authorizing such work to be done for its individual water users, or adopts a resolution authorizing the work. In performing such work, the irrigation delivery entity shall have the same rights and privileges to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the lateral or ditch, and to perform such work, as does the individual water user authorizing the work. By performing such work, the irrigation delivery entity does not assume ownership of the lateral or ditch, or responsibility for or incur liability for any injury to person or property caused by an act or omission of the individual water user authorizing the work, or of any other person. When such work has been authorized, the irrigation entity shall assess the individual water user for the annual cost of any necessary repairs, improvements, or maintenance performed on the lateral or ditch, in addition to the assessments that are levied for the delivery of water to the individual water user, and the same provisions shall apply with regard to delinquent assessments as in the case of assessments levied for the delivery of water. Nothing in this section shall affect the authority of a water users' association of lateral or laterals from assessing its members for work authorized under this chapter.

Title 43: Irrigation Districts

Chapter 11: Exclusion of Lands from District

43-1101. Petition.

Any person or persons owning land within any irrigation district and forming a part thereof may file with the board of directors of such irrigation district a petition in writing requesting the exclusion of the land or lands owned by them and described in the petition from the irrigation district. As many parties owning separate tracts or parcels of lands in any irrigation district or who are united in interest to which the same state of facts apply, may unite in the same petition. The petition shall be signed by all of the petitioners, but need not be acknowledged. A filing fee in the amount of five dollars ($5.00) for each parcel of land described in the petition shall accompany the filing of each petition, plus an exclusion fee in the amount of twenty-five dollars ($25.00) for each lot containing less than one (1) acre which is in a subdivision as defined in section 50-1301, Idaho Code, or an exclusion fee of fifty dollars ($50.00) for each parcel containing less than one (1) acre that is not in a subdivision, or an exclusion fee of fifty dollars ($50.00) for each acre and additional portion thereof in all other parcels of property, for which the district shall provide a suitable receipt evidencing payment. Any petition not accompanied by the required filing fee and exclusion fee shall be returned to the petitioner. The filing fee and the exclusion fee are borne by the petitioner and are not potentially apportionable costs as provided in sections 43-1105, 43-1106 and 43-1107, Idaho Code.

A person or persons purchasing land under a written contract shall be deemed to be the owners of that land for purposes of this section.

Chapter 15: Miscellaneous Provisions of District Law

43-1505. Irrigation Lateral Districts.

For the purpose of constructing, operating, and managing water in distributing systems by means of laterals, sub laterals, ditches, flumes, and pipe lines, an irrigation lateral district may be organized and created within the territory already organized as an irrigation district, in the same manner and by the same process required by the provisions of this title, for the creation of an irrigation district from unorganized territory, and such interior irrigation lateral district, when organized shall through its board of directors, other officers and employees have all necessary powers for the purpose of its creation conferred by this title upon the original irrigation district, including the power to issue, negotiate and sell bonds payable and secured as is in this title provided; to build and construct new works and to levy assessments and taxes necessary for the purpose of conducting its affairs in the same manner and by the same process as are by this title provided in the case of irrigation districts; provided, however, it is distinctly understood that the negotiation and sale of coupons bonds and levying of assessments and taxes and incurring of debts and obligations by any such irrigation lateral district shall not in any way or manner affect any of the bonds, assessments, taxes, or obligations of the irrigation district of which it is a part and shall not in any way or manner limit the power of such original irrigation district to incur the indebtedness, levying of assessments and issue its bonds for any of the purposes for which such district is by this title entitled to levy or issue the same.

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Title 18: Crimes and Punishments

Chapter 43: Irrigation Works

18-4301. Interference with Ditches, Canals, Lateral, Drains or Reservoirs.

Every person who shall, without authority of the owner or managing agent, and with intent to defraud, take water from any canal, ditch, lateral, drain, flume or reservoir, used for the purpose of holding, draining or conveying water for manufacturing, agricultural, mining, or domestic uses, or who shall, without like authority, raise, lower, or otherwise disturb, any gate or other appurtenance thereof used for the control or measurement of water, or who shall empty or place, or cause to be emptied or placed, into any such canal, ditch, lateral, drain, flume, or reservoir, any rubbish, filth, or obstruction to the free flow of water, is guilty of a misdemeanor

18-4302. Wasting Water Used for Irrigation.

Any person or persons, who shall willfully or wantonly waste any of the waters of any stream, the waters of which are used for irrigation, to the detriment of any claimant of such water for irrigation purposes, by diverting the same for an unnecessary use or purpose, or by allowing such water to waste by running into depressions or dry channels so that the same cannot be used for irrigation, nor reach the original channel of the stream from which it has been diverted, are guilty of a misdemeanor.

18-4303. Obstruction of Overflow, Gauge or Waterway in Dam.

Any person or persons who shall obstruct any overflow gauge or waterway, placed in any dam by order of any watermaster, so as to impede the flow of water over such dam as regulated by the water master, shall be guilty of a misdemeanor.

18-4304. Wrongful Diversion of Water.

Any person who without the consent of the water master of the district, diverts any water from a ditch or channel where it has been placed, or caused or left to run by the water master or his deputies, or who shuts or opens any ditch, gate or dam, or in any way impedes or increases the flow of water in any stream or ditch diverting water from a stream, while the same is under the charge of a water master, or who cuts away any embankment of a stream, whereby the water of such stream is diverted, or breaks, injures, or removes any gate, flume or other device used for the equitable distribution of the water of any such stream by the water master, shall be guilty of a misdemeanor.

18-4305. Interference with Head gate – Cutting Banks of Stream.

If any obstruction shall be willfully and maliciously placed on any overflow gauge in any stream of water which is used for irrigation and is under control of a water master, and such obstruction retards or impedes the free overflow of the water of such stream, thereby increasing the pressure against a head gate through which water is diverted by means of such dam, or if any head gate regulated by a water master shall be removed, broken, injured or interfered with so as to disturb the distribution of the water as regulated by the water master, or if any bank of the natural stream, the water of which is being used for irrigation and is being distributed by a water master, shall be cut away so as to increase the flow of water from such stream, thereby interfering with the distribution of the water as regulated by a water master, the person or persons so interrupting the flow of said water as aforesaid, shall be guilty of a misdemeanor.

18-4306. Injuries to Ditches, Canals, Laterals, Drains and Appurtenances.

Any person or persons, who shall willfully cut, break, damage, or in any way interfere with any ditch, canal, lateral, drain, head gate, or any other works in or appurtenant thereto, the property of another person, irrigation district, drainage district, canal company, corporation, or association of persons, and whereby water is conducted to any place for beneficial use or purposes, and when said canal, head gate, ditch, lateral, drain, dam, or appurtenance is being used or is to be used for said conduct or drainage of water, shall be guilty of a misdemeanor..

18-4307. Injury to Measuring Devices.

Any person or persons who shall cut, break, injure, destroy, enlarge, change, or alter any head gate, sluiceway, weir, water box, or other measuring device, the property of any irrigation district, corporation or association of persons, or in the possession of, or in the use of, said irrigation district, corporation, or association, or the property of another, shall be guilty of a misdemeanor. Any person or persons who shall change, alter, destroy, disturb, enlarge, or interfere with any head gate, dam, weir, water box, or other measuring device, made, placed, used or regulated by any duly appointed, elected, or authorized water master, deputy water master, ditch walker, ditch rider, engineer, or other authorized agent of any irrigation company, corporation or association or person, when said measuring device is being used or is to be used for the measurement of water, shall be guilty of a misdemeanor.

18-4308. Change of Ditch, Canal, Lateral, Drain or Buried Irrigation Conduit.

Where any ditch, canal, lateral or drain has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling the said land, shall have the right at his own expense to change said ditch, canal, lateral, drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral, drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A landowner shall also have the right to bury the ditch, canal, lateral or drain of another in pipe on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner.

The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner.

While the owner of a ditch, canal, lateral, drain or buried irrigation conduit shall have no right to relocate it on the property of another without permission, a ditch, canal, lateral or drain owner shall have the right to place it in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and

is restored to the condition of adjacent property as expeditiously as possible, but no longer than thirty (30) days after the completion of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, canal, lateral or drain, provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the conduit owner.

Any person or persons who relocate or bury a ditch, canal, lateral or drain contrary to the provisions of this section shall be guilty of a misdemeanor.

18-4309. Unauthorized Tampering With Measuring Devices.

Every person who shall willfully waste water for irrigation, or who shall willfully open, close, change or disturb, or interfere with, any headgate or water box or valve or measuring or regulating device, without authority, shall be guilty of a misdemeanor. The water masters or their assistants, within their district, shall have power to arrest any person or persons offending and turn them over to the sheriff or the nearest peace officer of the county in which such offense is committed, and immediately upon delivering such person so arrested into the custody of either of such officers, it shall be the duty of the water master making such arrest to make complaint, in writing and under oath, before the magistrate judge of such county, against the person so arrested.

18-4310. Neglect to Deliver Water — Interference with Delivery.

Any superintendent or any person having control or charge of the said ditch, canal or conduit, who hall willfully neglect or refuse to deliver water as provided in chapter 9, of title 42, or person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having a right thereto, shall be guilty of a misdemeanor; and the owner or owners of such ditch, canal or conduit shall be liable in damages to the person or persons deprived of the use of water to which they were entitled as provided in said chapter 9.

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Water Conversion Factors

cfs: cubic feet per second
af: acre feet
gpm: gallons per minute

1 acre-foot	=	enough water to cover 1 acre of land one foot deep		
1 acre-foot	=	43,560 cubic feet	=	325,850 gallons
1 cubic foot of water	=	7.4805 gallons	=	62.37 pounds
1 cfs	=	448.83 gpm	=	26,930 gallons per hour
1 cfs	=	646,315 gallons per day	=	1.9835 af per day
1 cfs	=	59.502 af per month (30 days)	=	723.94 af per year
1 cubic meter per second	=	35.31 cfs	=	15,850 gallons per minute
1 million gallons	=	3.0689 af		
1 million gallons per day	=	1,120.147 af per year		
1 miner's inch	=	9 gpm	=	0.02 cfs

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Glossary

Note: Idaho Code references have been provided wherever possible. All other definitions are those commonly used by IDWR at the present time.

ACRE-FOOT (AF): a unit commonly used for measuring the volume of water; equal to the quantity of water required to cover one acre to a depth of one foot and equal to 43-560 cubic feet of 325,851 gallons.

APPROPRIATION DOCTRINE: the system of water law adopted by most Western States. The basic principles of the appropriation doctrine are: (1) that a private right to use water can be acquired only by diverting the water and applying it to a beneficial use; (2) the first in time of beneficial use is the first in right and the right is maintained only by use.

AQUIFER: a stratum or zone below the surface of the earth capable of producing water as from a well.

BENEFICIAL USE: one or more of the recognized uses of water including but not limited to irrigation, domestic, municipal, commercial, recreation, hydropower, stock watering and fish propagation uses for which permits to appropriate water can be issued. Industrial use includes manufacturing, mining and processing uses of water.

CONSUMPTIVE USE: that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to non-recoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right. Idaho Code Section 42-202B

CUBIC FEET PER SECOND (CFS): a unit used to express a rate of flow of water. One cfs is equal to 50 miner's inches or 448.8 gallons per minute.

DEPARTMENT: a shortened version of the Idaho Department of Water Resources.

DIRECTOR: the Director of the Idaho Department of Water Resources.

DIVERSION: the structure through which water is removed from a water source. A diversion structure, particularly on a natural channel, may also include a check structure in the channel. Diversion also refers to the act of removing water for a specific purpose.

GROUND WATER: water that occupies all the voids within a geologic stratum and occurs in its natural condition below land surface. As defined by Idaho law, ground water is all water under the surface of the ground, whatever may be the geological structure in which it is standing or moving. Idaho Code §§ 42-501 – 42-230(a)

GROUND WATER DISTRICT: a district organized in accordance with the provisions of chapter 52, title 42, Idaho Code. Such districts include holders of ground water irrigation rights and are formed or organized by such ground water users.

GROUND WATER RECHARGE: the introduction of surface or ground water to ground water storage. Ground water recharge can consist of natural recharge, artificial recharge or incidental recharge.

HEADGATE: structures which are constructed to control or regulate the flow of water in a ditch or canal.

HEADWORKS: see 'headgate'

IRRIGATION DISTRICT: a district organized in accordance with the provisions of chapter 1, title 43, Idaho Code.

IRRIGATION LATERAL DISTRICT: a district organized in accordance with Idaho Code § 43-1505; a district created within an area already organized as an irrigation district for the purpose of constructing, operating and managing water in distributing systems by means of laterals, sub laterals, ditches, flumes and pipelines. An irrigation lateral district is organized in the same manner and by the same process required for irrigation districts under chapter 1, title 43, Idaho Code.

LATERAL DITCH: a ditch that supplies water to two or more users. Lateral ditches normally divert water from a main canal or ditch which has its heading from a river or natural stream channel.

LICENSE: see 'water right license'

MEASURING DEVICE: a generally accepted structure or apparatus used to determine a rate of flow or volume of water. Examples are weirs, meters and flumes.

MINER'S INCH: a variable unit used to express a rate of flow of water in the western United States. In Idaho, a miner's inch is equal to 1/50 of a cubic foot per second (cfs), or 0.02 cfs. One miner's inch is the duty of water, or the standard allocated flow, for each acre of irrigated land.

PERIOD OF USE: the time period each year during which water under a given right may be beneficially used in compliance with terms of the water right.

PERMIT: see 'water right permit'

PLACE OF USE: the location where water is used. The place of use under Idaho water rights is given by legal descriptions, or 40 acre quarter-quarter section or government lot land descriptions.

POINT OF DIVERSION: the location at which water is physically diverted by manmade works from the source of water. Points of diversions are identified by legal descriptions in Idaho water rights.

PUBLIC WATER: as defined by Idaho law, all the waters of the state when flowing in their natural channels, including the waters of all-natural springs, lakes and ground water.

PRIORITY: see 'priority date'

PRIORITY DATE: the date of appropriation established in the development of a water right.

PRIORITY OF APPROPRIATION: see 'priority date'

REDIVERSION: a general term used to describe the location of any secondary point of diversion under a water right. For example: consider a storage reservoir on Creek A where storage water is released to Creek A and diverted downstream at Canal #1. The primary point of diversion for a water right with a storage reservoir on Creek A is the impounding dam across Creek A, while the point of re-diversion is Canal #1.

Re-diversion as used in an exchange, is the location where a quantity of water is diverted from source B after an equal quantity of water was diverted from source A and injected into source B.

RESERVOIR: a lake or pond in which water is collected and controlled for some beneficial use.

STORED WATER: water that is diverted to and retained within a reservoir and then released for some beneficial use. Water may be diverted to and stored in a reservoir located either within the stream channel or off of the stream channel. IDWR considers a storage facility as one which will not fill within 24 hours using the maximum authorized flow rate.

SOURCE: the water body at the point of diversion. Examples are Salmon River, Squaw Creek, spring, ground water, etc.

UNAPPROPRIATED WATER: the public water of the state of Idaho in streams, rivers, lakes, springs or ground water in excess of that necessary to satisfy prior rights including minimum stream flows and rights established by law.

WATERMASTER: the person elected or appointed pursuant to Chapter 6, Title 42, Idaho Code, to distribute water in the order of priority to those water users entitled to its use. In more general terms, a watermaster may also refer to a person who serves as the distribution manager of a canal, ditch or lateral.

WATER DISTRICT: a district organized in accordance with the provisions of Chapter 6, title 42, Idaho Code. The Director of the Idaho Department of Water Resources creates water districts in order to distribute water rights from natural water sources in accordance with water right priority dates. Water distribution in water districts is accomplished by watermasters who are elected annually by district water users. Watermasters are supervised by the Director of Idaho Department of Water Resources.

WATER AND SEWER DISTRICTS: districts organized in accordance with the provisions of chapter 32, title 42, Idaho Code. Water districts supply water for domestic, commercial and/or municipal purposes. Sewer districts provide for sewage disposal. A district may be created for a combination of water and sewer purposes. IDWR has no jurisdiction over this type of district.

WATER MEASUREMENT DISTRICT: a district organized in accordance with the provisions of chapter 7, title 42, Idaho Code. Water Measurement Districts are created by the Director of the Idaho Department of Water Resources (IDWR) in order to measure and report water that is diverted from natural water sources under state water rights. Water measurement and reporting in water measurement districts is accomplished by hydrographers who are elected annually by district water users. Hydrographers are supervised by the Director of IDWR.

WATER RIGHT LICENSE: the certificate issued by the director in accordance with Idaho Code § 42-219, confirming the extent of diversion and beneficial use of water that has been made in conformance with the permit conditions.

WATER RIGHT PERMIT: the water right document issued by the Director authorizing the construction of diversion facilities and commencement of use of public water of the state. Idaho Code Section 42-202

WATER USER: a person, corporation, association, firm, governmental agency or other entity entitled to divert and beneficially use water.

Volume 1

Water Law Handbook

The Acquisition, Use, Transfer,
Administration, and Management
Of Water Rights in Idaho

By

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June 11, 2023

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1. INTRODUCTION TO WATER LAW

The prospectors and settlers who traipsed across the plains toward the mountains and valleys of the West more than a century ago encountered a land unlike any they had experienced before. Its soil was rich. Its hills were pregnant with minerals. It was spectacular country. All that was needed to unlock its treasures was water. Water, however, was scarce. Startlingly scarce.

With little more than their own hands, some inspiration, and a stubborn refusal to give in to adversity, they began to change the face of the West. What water they found, they diverted, stored, channeled, pumped, piped, and sprayed in some of the most ingenious and monumental physical undertakings ever conceived. Beginning in the 1860s in Idaho, miners used water for placer and hydraulic mining, milling and other purposes. Mormon settlers devised remarkably elaborate irrigation systems in the upper Snake River Valley. Power companies first harnessed the hydroelectric potential of Idaho's rivers to power mines in 1901. The federal government followed suit with massive dams that powered the nation through World War II and turned the Great American Desert into an irrigated food factory. Idaho's towns and cities grew up where sagebrush once ruled.

In the course of these technological achievements and social transformations, the natural environment has changed dramatically. The hydrology of rivers, streams and aquifers has been altered, fish migration has been disrupted, and pollutants found their way into rivers, lakes, and aquifers. Most Idahoans now experience water's natural scarcity in the West as a byproduct of urban growth. Urban expansion requires water for municipal and industrial uses. Much of this water supply will come from formerly irrigated areas which are now being subdivided, paved over, or otherwise taken out of agricultural production. Today, as urban populations grow, as the environment responds to stress, as economies fluctuate, as politics shift, and as the climate itself threatens global change, the allocation of water grows ever more complicated and controversial.

Growing cities, emerging industries and new coalitions of users flex increasing muscle in a political setting which once knew only agriculture. Fish and wildlife advocates, backed by powerful federal legislation and federal courts, have claimed a seat at the table. Congress seems to run both ways at once—winding down the federal partnership with the states which bankrolled water development for most of this century, while at the same time stepping up its involvement in the regulatory arena. Hydroelectric power generators grapple with the prospect of deregulation, coupled with the challenge of relicensing most of their projects. Farmers and ranchers face tough economic conditions and ponder their future–on the one hand resenting and resisting the market forces which threaten their way of life, and on the other hand wondering what the water market might be capable of doing for them.

These are changing times for water right holders. Yet the basic principles of allocation today are the same ones devised by the first settlers more than a century ago. The first rules to evolve were simple understandings worked out (and sometimes enforced at the end of a gun) in the early mining camps. Today, the legislatures, courts, and regulatory bodies have taken over the task of writing the law. However, the basic premises remain unaltered. First, water is a public resource, owned by the public. Second, a private right to use the public's water can be acquired, but it is a conditional right

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that is founded on continuing beneficial use. When proper procedures are followed, the right to continue using water so "appropriated" ripens into a legally enforceable "water right." Third, when there is insufficient water available to fill all of the water rights diverting from the same source, the state's administrative authority can be brought to bear to allocate the available supply on the basis of who first put it to beneficial use, but only as between those right holders who actually are using the water without waste.

Despite water's enormous economic value, rights to this public resource are awarded to the appropriator free of charge. Except for the cost of complying with state rules and some local delivery charges, the appropriator pays nothing to use the water. Only when a water right is sold to a new user does the right fetch a price—perhaps a substantial one.

The spread in value is tremendous. A gallon of bottled water sold for a dollar in a supermarket translates to $325,851 per acre-foot. That same acre-foot, in some circumstances, may be bought from Idaho's Water Supply Bank or the U.S. Bureau of Reclamation for under five dollars. Meanwhile, the price of a permanent supply in Idaho is slowly being driven up by moratoriums and other obstacles to new appropriations. While Idaho likely remains decades away—or longer—from the frenzied water transactions of Nevada, Colorado, Arizona and California, one thing is for sure. The days of simple, routine appropriation of new rights are over. Water markets—public and private—have arrived. Still in their infancy today, they will play a major role in the allocation of water from here on out.

The market for water, however, is unlike others. Water is not a simple commodity like apples or coal. It flows; it is used and used again; it is lost, recycled and renewed. To the user, its real value lies in the physical and legal reliability of its source. This leads to the central principle of Western water law—priority. The most commonly described attribute of water rights in the West is the rule that "first in time is first in right."[1] This is the essence of the prior appropriation doctrine—the governing law in the allocation of water throughout the West. The basic principles of Idaho's water law system are summarized below.

[1] The U.S. Supreme Court used the phrase "first in time, first in right" to summarize the priority doctrine in *California v. Arizona*, 373 U.S. 546, 555 (1963) (Black, J.). These words are also codified in Idaho Code § 42-106. Finally, our Idaho Supreme Court has employed the phrase: "Nearly every session our Legislature has attempted to improve upon its predecessor by so legislating as to improve the former use of water, and an inspection of the various acts plainly shows that the guiding star has always been to so legislate as to protect all users of water in the most useful, beneficial way, keeping in view the rule existing all over the arid region, 'First in time first in right.'" *Hard v. Boise City Irrigation and Land Co.,* 9 Idaho 589, 594, 76 P. 331, 332 (1904) (Ailshie, J., concurring).

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2. RIPARIAN RIGHTS

The prior appropriation doctrine (to which Idaho subscribes) contrasts with the law of "riparian rights" prevalent in the Eastern United States where water is more plentiful. Riparian water rights are based on the principle of equal sharing of water among all riparian (streamside) landowners, without regard to who got there first. "Its fundamental precept is that usufructuary rights in a stream's water are created as an incident of ownership of riparian land." Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 579, 513 P.2d 627, 631 (1973). Nine of the Western states (California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington) mix together elements of prior appropriation and riparian water law. Even in these "dual system" states, however, the principles of prior appropriation dominate.

Idaho's commitment to the prior appropriation doctrine is spelled out in its Constitution: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho Const. art. XV, § 3. The prior appropriation doctrine was followed even before Idaho's admission to the Union in 1890. *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). In *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909), the court held that riparian rights are repugnant to the constitution and exist only to the extent they do not conflict with rights acquired through prior appropriation. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (noting that Idaho had rejected the riparian rights system of appropriation). *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (rejecting "correlative rights" in ground water).

Curiously, it was not until 2021 that Idaho repealed a statute stating that persons owning riparian land "are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed." H.B. 307, 2021 Idaho Sess. Laws, ch. 250 (repealing Idaho Code § 42-1101). The repealed statute had been on the books (and essentially ignored[2]) since 1887. 1887 Idaho Revised Stat. § 3180. The 2021 Statement of Purpose said that section 42-1101 would be repealed because it "appears to recognize riparian doctrine in Idaho."

[2] The only reference to the statute is the dissent in *Drake v. Earhart*, 2 Idaho 750, 23 P. 541, 546 (1890) (Berry, J., dissenting). The dissent noted that the statute recognized "what are the equivalent to common-law water-rights [i.e., riparian rights]." *Id.* (referring to an 1881 statute, "Section 3180, Rev. St.").

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3. A BRIEF IDAHO HISTORY

Water resource development in Idaho has proceeded under four distinct phases.[3] The first was the "easy" phase. It began with the earliest direct diversion of water from the Boise River in 1843. Other direct diversions of natural flow from the Snake River and its tributaries began in earnest in the 1860s, peaking in the 1880s and 1890s. By the turn of the last century, the direct flows, in large part, were fully appropriated.

Thus began phase two, the era of surface storage. Beginning with Milner Dam in the Magic Valley, ditches, canals and reservoirs were constructed by Carey Act companies, the Bureau of Reclamation, irrigation districts and others. Today the reservoir capacity of the Snake River Plain exceeds nine million acre-feet.

This was followed by a quieter, but just as important revolution. The third phase began after World War II, with the intersection of new technologies, low cost power, and burgeoning agricultural demand. This time, irrigators—acting largely on their own—looked down, to the vast Snake Plain Aquifer. Over the last fifty years, the landscape has been transformed once again by the hand line, the sideroll or wheel line, and the center pivot. Today vast aquifers throughout Idaho and across the West compete with the mighty rivers as the foundation for our water-based economies.

The fourth phase, beginning in the 1960s, again focused on surface water. This is the era of efficiency. Flood irrigation gave way in many parts of Idaho to sprinkler and laser-leveled fields—technologies developed for ground water pumping and adapted for surface water. Lined ditches yielded further gains, and gated pipe delivered water more efficiently to the remaining furrow irrigation operations. Meanwhile, the high-lift pump came on the scene, enabling the irrigation of vast areas of former desert with water pumped from the Snake River as much as 600 feet below. The extent of the change is unmistakable from the air: Circles of green stretching across the horizon. Or from the road: Evening sunlight refracted through the spray of countless pivots and siderolls.

Now, at the turn of the century, we are—perhaps—about to embark upon the fifth phase– reallocation of existing water supplies. This may be accomplished through a variety of means, from simple transfers of water rights, to more complex exchanges, and finally to creative new undertakings such as aquifer storage and recovery (or "ASR") and public betterment aquifer recharge ("PBAR").

[3] *See* Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573 (1992).

4. THE FUNDAMENTALS OF WATER RIGHTS

A. A usufructuary right—a right to use

A water right is created and maintained by "appropriating" it, that is, exerting control over a flow or volume of water and putting it to beneficial use. Idaho, like most Western states, requires that one seeking a water right first must follow an administrative process involving an application to make the appropriation, which, if accepted, results in a permit. Provided its conditions are met, the permit then ripens into a license. The license is the certificate showing the existence of the water right. The appropriator pays nothing to acquire the water right, other than nominal application filing fees.[4] Once obtained, the water right is valuable property.

Although a water right is a property right, the owner does not own the water itself. The owner merely owns the right to use the water for a specific beneficial purpose consistent with various conditions and constraints. The water resource itself is owned by the people of Idaho.[5] In a technical sense, it can be said that once an appropriator diverts public water from a stream or aquifer, or impounds it in a reservoir, it becomes the appropriator's property, simply by virtue of the direct control the appropriator exerts over it. But even then, the water remains "impressed with the public trust to apply it to a beneficial use."[6] Water rights, therefore, often are described by lawyers as "usufructuary," meaning a right to *use* a thing, not ownership of the thing itself. Usufructuary rights are nevertheless property rights—a type of real estate.[7]

A water right may be sold, donated, mortgaged, deeded, leased, devised or otherwise treated in most ways like any other real estate. In Idaho a water right will pass to the purchaser of land any time title to land is transferred, unless the right is specifically reserved in the deed.

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[4] Current filing fees are set out in Idaho Code § 42-221. Other fees associated with general adjudications are codified at Idaho Code § 42-1414. From time to time, proposals are made for a "severance tax" or other use fee to be paid by private parties when they use a public water resource. Such proposals have not been adopted. The same fees apply to changes in point of diversion and other elements of a water right.

[5] The State's ownership of water resources is in its sovereign capacity "for the purpose of guaranteeing that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 64 (1960), quoting *Walbridge v. Robinson*, 22 Idaho 236, 242, 125 P. 812, 814 (1912).

[6] *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935); *see also Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 588-89, 258 P. 532, 534 (1927); *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

[7] Idaho Code § 55-101(1) (definition of real property); *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). As discussed in section 11.A(1) at page 146, permits are deemed personal property, not real property.

Because they are property, water rights are subject to the U.S. (and State) Constitution's prohibition against uncompensated takings.[8] This does not mean that any government interference with a person's water right constitutes a compensable taking. However, the law of takings continues to develop.[9] Generally speaking, any physical invasion or a regulation that completely destroys the economic value of the water right probably constitutes a taking.[10]

B. The elements of a water right

Every water right is described by seven specific "elements" that define and limit its use.[11] Those elements are: source, quantity (either in annual volume or rate of flow, or both), priority date, point(s) of diversion, purpose(s) of use, period of use, and place of use. *See City of Blackfoot v. Spackman*, 162 Idaho 302 (2017) (Burdick, C.J.); *Olsen v. IDWR*, 105 Idaho 98, 666 P.2d 188 (1983).

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[8] The government is required to pay compensation if its action results in a "taking" of property under the Fifth Amendment. U.S. Const. amend. V (takings clause). The Fourteenth Amendment makes the takings clause applicable to actions by state government as well. U.S. Const. amend. XIV.

[9] Traditionally the courts have given wide latitude to regulatory bodies, but the rules for what constitutes a taking remain mushy. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation will be a taking only "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.") No doubt, the courts will be called upon to provide further guidance on this issue. The lower courts do not appear to be applying the rules consistently. *See, e.g.*, *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (denial of a section 404 permit did not constitute a compensable taking), *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand*, 21 Cl. Ct. 161 (1990) (to determine whether there is a complete diminution in value the court must consider the value of the land as sold to speculators), *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990) (regulatory taking found in denial of section 404 permit).

[10] To further complicate matters, a doctrine known as the "navigation servitude" exempts the federal government from the obligation to pay compensation for federal actions which would otherwise constitute compensable takings when the federal action is taken pursuant to the navigation power. *Arizona v. California*, 283 U.S. 423 (1931). Recent U.S. Supreme Court decisions make clear, however, that even the navigation servitude is not a complete defense. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (proposed regulation to require public access to pond newly connected to a bay amounted to a taking); *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979) (proposed regulation to require public access to waterbody amounted to a taking).

[11] The various elements of a water right are identified in various locations of Idaho's water code (Title 42, Idaho Code) dealing with appropriation and transfer of water rights. E.g., Idaho Code §§ 42-203A, 42-217, 42-219 and 42-222. The elements are also set out in the a relatively modern statute describing the Director's Report to be submitted on each water right to the SRBA. Idaho Code § 42-1411(2). Note that the SRBA statutes originally called for quantification of the "consumptive use" as an element of a water right. This requirement was repealed in 1997. 1997 Idaho Sess. Laws, ch. 374. In addition to the elements listed above, Idaho Code § 42-1411(2) lists (1) the name and address of the claimant, (2) conditions, and (3) remarks. Although important, these are not generally understood to constitute "elements" of the water right.

Most elements may be changed, subject to administrative approval. A few elements, however, may not be changed. For instance, a water right user may not change the source of a water right, increase its quantity, or make its priority date earlier. For those elements that are changeable, a water right holder has the legal right to change them, but only where injury to other water users is avoided and other legal standards are met. Any change to an element of a water right requires the approval of the Idaho Department of Water Resources ("Department" or "IDWR") in a transfer proceeding. (See discussion in section 15 at page 190.).

(1) Source

The source of the water supply simply identifies the body of water from which the water is to be appropriated or diverted. In the case of a surface right, the particular stream, spring, or lake is named. In the case of ground water, the source is typically simply labeled "ground water."

Generally, the larger the water source the more secure the right because it will be more likely to provide water during periods of extended drought. Availability of water to satisfy a particular water right is dependent, as well, upon the number and size of any senior water rights from the same source.

Ordinarily the water user may not change the source of a water right, but must instead obtain a new water right in the new source. However, the Department will allow a change in one tributary to another tributary of the same source, if doing so does not result in injury.

All waters of the state when flowing in their natural channels, including springs, lakes and ground water are available for appropriation.[12] However, the Idaho Department of Water Resources is prohibited from issuing a permit to appropriate the water of any lake not exceeding five acres in surface area or any pond, pool or spring located entirely on the lands of a single owner except to the landowner, or if to another, with the acknowledged written permission of the landowner. These are inaccurately referred to as "private waters."

(2) Point of diversion

The point (or points) of diversion refers to a legal description of the location where the water is diverted from a stream, an aquifer, a lake or other water source. Any change in point of diversion requires approval of a transfer application by the Department.

For an instream flow water right, the beginning and ending points of the stream reach are described.

(3) Priority

Early water users are referred to as "senior," while those who come later are called "junior." A senior water right holder is entitled to have his right filled completely before any junior right holder is

[12] Idaho Code §§ 42-101, 42-226.

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entitled to divert at all. (See Appropriation Example 1 below.) This is the principle of "first in time is first in right" that is set forth in Article XV, § 3 of the Idaho Constitution.[13]

The date on which a person (or his predecessor) first began to use the water is known as the user's priority date. Priority, as well as amount, is confirmed in license or a decree. During drought conditions, only senior users on a particular stream (say, with priority dates of 1890 or earlier) might be allowed to divert. Thus, the more senior the priority date, the more secure the water right, regardless of where the user is located on the stream.

When a water right is sold or changed, it ordinarily keeps its original priority date (so long as no other water user is injured). This is one of the most valuable aspects of its existence.

Note that when water rights are obtained by an irrigation delivery entity, such as a canal company or irrigation district, water rights are typically acquired for the project in a single block. Thus within the irrigation entity, all users who have obtained water rights out of that supply hold the same priority date, even if some settlers arrived earlier on the project than others.[14] Of course, if the project subsequently obtains an additional water right or rights, those subsequent acquisitions would have their own priority dates.

A senior water right holder may obtain the state's help in enforcing his or her priority. If a water user is not able to obtain water to achieve his or her beneficial use under the user's entitlement and believes that junior users are diverting water that he or she is entitled to divert, the senior may place a "delivery call" (aka "priority call" or simply "call") on the water source. In such a case, the state will require junior appropriators to reduce or cease their diversions to supply the senior. The curtailment of junior water rights by action of the state to enforce priorities is referred to as "administration" of the rights. On surface streams where the rights have been adjudicated, administration occurs in a routine and organized fashion through a state agent known as a watermaster: When the river flow drops to a pre-determined level, the watermaster closes a certain group of junior headgates; when it drops further, he or she closes the next group, and so forth. Where rights have not been adjudicated, or where both ground and surface water rights are to be administered together, administration often is more complicated, or requires additional processes. These and other issues pertaining to the administration of water rights are discussed in section 14.D(1) at page 183.

(4) Nature of use

The nature of use identifies the particular use that is made of the water under a water right. An appropriation must be for a useful or beneficial purpose.

[13] *See also* Idaho Code § 42-106.

[14] *Faris v. Blaine Cnty. Inv. Co.*, 3 F. Supp. 381 (D. Idaho 1983).

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Most descriptions of the nature of use are quite broad. For instance, an irrigation rights is simply described as "irrigation" without specifying, for instance, the particular crop.[15] Likewise, an industrial facility's water right is typically described generically as "industrial" or, perhaps, "commercial." In some instances, however, it might be described more specifically such as, for instance, a "food production facility." The Department does not have a fixed practice regarding how much specificity is required. From the holder's perspective, the more general the description, the better, to provide maximum flexibility in the future.

(5) Quantity: rate of diversion and annual volume

All water rights must be quantified in some way to determine the amount of the right. Very early irrigation water rights were quantified simply by reference to the lands that were irrigated. (E.g., "water for 40 acres irrigation.") Just how much water this means is left for subsequent administrative or judicial determination.

Older irrigation water rights are often quantified simply in terms of a diversion rate, without any specified annual volume. This is typically expressed in cfs (cubic feet per second) or miner's inches (one fiftieth of a cfs in Idaho). The diversion rate is the rate of flow associated with the water diversion, measured at the point of diversion. If no annual volume is specified for the right, that does not mean there is no annual volume limitation (except in cases of municipal rights). Rather, the annual volume will be estimated based on historical use if the water right subsequently must be quantified, for instance in a transfer proceeding.

Today, new ground water rights and surface water rights typically are described with express terms for diversion rate, period of use, and annual volume. For instance, a water right used to irrigate 100 acres might be issued with a diversion rate of 2 cubic feet per second ("cfs") and an annual volume of 400 acre-feet. The annual volume serves as a critical cap on the water right. If a 2 cfs right were allowed to divert all day, year round, it would yield 1,448 acre-feet.

The question of how much water an irrigator is entitled to, is an evolving one. Prior to the advent of sprinkler systems, the Department issued most irrigation water rights based on the rather generous "inch per acre" rule specified in Idaho Code §§ 42-202(6) and 42-220. Under these statutes, which are still in effect, an irrigator may not exceed a miner's inch (0.02 cfs) for each acre irrigated unless the applicant can demonstrate special circumstances requiring a higher rate of diversion. Thus, based on the example above, 100 acres of irrigated land might have been awarded a water right with a diversion rate of 2 cfs (100 acres x 0.02).

With the advent of sprinklers and other more efficient delivery systems, however, an inch per acre is often more that is required to irrigate efficiently. Consequently, the Department is less likely to approve the full inch per acre at the permit stage. Instead, the Department will take into account the

[15] *Muir v. Allison*, 33 Idaho 146, 191 P. 206 (1920); see note: "Changes in consumptive use do not require a transfer pursuant to section 42-222." Idaho Code § 42-202B(1) (as amended in 2004).

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particular delivery system, and set the permitted quantity accordingly. Many ground water rights in Idaho have been licensed for less than one inch per for this reason.

Thus, an irrigator using less efficient gravity (i.e., flood) irrigation would be able to acquire a larger water right, up to an "inch per acre," than a farmer who has installed more efficient sprinkler irrigation equipment.

At the license stage, the Department will review quantity again based on beneficial use of the as-built irrigation system. Thus, the licensed quantity could be cut back further consistent with on-the-ground conditions. There is a limit, however, to how far the Department evaluates individual circumstances at the licensing stage. For instance, it is not the Department's practice to take into account the particular crop grown, soil conditions, or other individual factors. Thus, to establish the diversion rate at the license stage, the Department ordinarily simply looks only at how much water the system delivers, measured at the point of diversion.

The discussion above relates to the quantification of irrigation rights. Industrial and commercial water rights are quantified based on the specific needs of the appropriator.

Small domestic rights are quantified based on a statutory formula.[16] However, in certain circumstances domestic rights may be aggregated in subdivisions and by non-municipal water providers serving domestic uses.[17]

Note that municipal water rights are quantified differently from others. It is the longstanding practice of the Department that municipal water rights are quantified solely in terms of flow (diversion rate); no separate annual volume is stated. In other words, its annual volume equates to what would be produced if operated at that rate of flow 24 hours per day for 365 days. Thus, a municipal right quantified at 2 cfs would carry (either implicitly or explicitly) an annual volume cap of 1,448 acre-feet (in contrast to 400 acre-feet for a typical 2 cfs irrigation right). As a practical matter, a municipal provider will not pump the full allowable volume for a number of years. Eventually, however, the municipal provider will "grow into" the full annual volume permitted. (See discussion of municipal rights and the "growing communities doctrine" in section 23.D(8) at page 353.)

What happens when an irrigator reduces the quantity of water required at some point after licensing of the right? For instance, suppose an irrigator historically using a gravity/flood irrigation technique switches to a more efficient sprinkler irrigation system. Does this reduce the size of the water right? The quick answer is "no," unless and until the water right is transferred to a new use (or some other change is made in the right's use).

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[16] Idaho Code § 42-111; see also IDAPA 37.03.08.010.08 (definition of DCMI and discussion of domestic) and 37.03.08.010.15 (definition of "Single Family Domestic Purposes").

[17] There is no statutory provision specifically discussing these larger domestic rights. However, it has long been the Department's practice to award domestic rights for subdivision developments and the like. Since the enactment of the Municipal Water Rights Act of 1996, some of these uses may be eligible for a municipal water right, based on the broad definition of municipality. See discussion in section 23 beginning on page 327.

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So long as the right continues to be used for irrigation, the farmer retains the flexibility to convert back and forth among irrigation systems, or among more or less water demanding crops (so long as the diversion quantity specified in the license or decree are not exceeded). Thus, in theory, the farmer could go from gravity to sprinkler and back to gravity without risk of having his or her right cut back in the interim.[18] And, generally speaking, the consumptive use under the right should change little due to such a switch, depending on the comparative amounts of such things as evaporation from ditch losses and sprinkler spray. However, the timing and location of return flows could be quite different as between the two techniques.

The situation is different, however, when that farmer seeks to transfer the water right to a new type of use. If, for instance, the farmer were to sell her water right to an industrial user after having converted to sprinklers, the Department would evaluate the quantity of water available for transfer based on recent historical use, for example, over the last five years. In other words, she may be able to convey only the quantity of water historically required for use in her sprinkler system. (See discussion of transfers in section 15 at page 190.)

Prior to *Hagerman II,*[19] it had been the Department's practice to report water rights to the Snake River Basin Adjudication at the lower quantity reflecting current irrigation practices. The Department first justified this on the basis of partial forfeiture. When the SRBA Judge declared (incorrectly) that there was no such thing as partial forfeiture, the Department changed its theory and justified the practice on the basis of a constantly evolving "beneficial use." In *Hagerman I,*[20] the Idaho Supreme Court reversed the SRBA Court and declared that partial forfeiture does exist in Idaho water law. In the companion case, *Hagerman II*, the court also rejected the Department's "beneficial use" rationale, saying that the forfeiture statute, being more specific, controlled the issue.

At that point, the Department might have taken the position that any change in irrigation practice resulting in a smaller water diversion for five years constitutes a partial forfeiture. *Hagerman II* seemed to invite this. Instead, the Department has accomplished the same result under a different rubric. Rather than declaring that the reduced diversion into a more efficient delivery system results in a partial forfeiture, the Department simply observes that as a principle of the law of transfers, it can allow the transfer of only that diversion then being made of the water, based on recent historical use. This distinction is more than semantic; it allows the Department to be lenient to the irrigator (by not calling the switch to sprinklers a partial forfeiture), while holding to the longstanding rule looking to

[18] If the right were to be adjudicated (for example in the SRBA) at the stage when sprinklers were in place, the right holder would be entitled to a decree for the potentially larger diversion quantity specified in the license, allowing her to revert to that diversion amount to support flood irrigation if need be. A number of water rights, however, were decreed at the lower diversion quantity at a time when that was the Department's practice. The only avenue available for the user who wakes up to discover this uneven treatment is to seek relief from the court. He or she will have to contend with Idaho R. Civ. Pro. 60(b) which limits the reasons for which a final decree may be changed and sets a six month rule for most requests. As a practical matter, it is unlikely that an irrigator would regress from sprinkler to flood techniques.

[19] *State v. Hagerman Water Right Owners, Inc. ("Hagerman II")*, 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.).

[20] *State v. Hagerman Water Right Owners, Inc. ("Hagerman I"),* 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.).

historical beneficial use--or even in some cases historical consumptive use--when it comes to deciding what diversion to allow in a water right transfer.

The quantification of a water right can pose a challenge for a growing company. If an industrial user is still growing the business at the time a water right is licensed, the right will be quantified based on the best year of production during the proof period. There is no cushion for future growth. A growing enterprise must apply for (or acquire by purchase) a new water right to cover the expansion.

(6) Period of use (aka season of use)

The period of use (or season of use[21]) identifies the time of the year when water is authorized to be diverted and used. For example, a water right for irrigation may be used only during the irrigation season.[22] The storage season, on the other hand, is that period of the year when water is not being used for irrigation.

Designation of the period of use is important because different water users often hold rights to the use of water from the same source but during different periods of the year. The period of use also reflects an implicit quantity limit on the water right. For instance, the holder of a year-round hydropower right on a stream may be concerned that irrigators not begin diverting upstream surface diversions too early in the Spring or too late in the Fall.

Older water rights often failed to expressly state the period of use, or simply describe it as, say, "the irrigation season." This creates difficulties in administration, and usually requires the Department or a court to determine the actual period of use based on actual dates, such as April 15-November 15 for irrigation. Current Idaho statutes require that in decreeing water rights the court shall designate the period of the year when water may be used for the authorized purpose.[23] Likewise, the Idaho Supreme Court has ruled that the irrigation season must be defined by specific beginning and ending dates. *A&B Irr. Dist. v. Idaho Conservation League* (aka *Basin-Wide Issue 5*) ("*ICL III*"), 131 Idaho 411, 424, 958 P.2d 568, 581 (1998) (McDevitt, J.).[24]

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[21] The terms period of use and season of use are interchangeable, although it is possible that a particular period of use might correspond to something other than a season.

[22] The irrigation season in Idaho ranges from six to nine months, depending upon the geographic area. A map designating the applicable irrigation season for each area of the state is set out in Appendix B to IDAPA 37.03.08.

[23] Idaho Code §§ 42-1411(2)(g), 42-1412(6).

[24] In *ICL III*, the Director of IDWR included various general provisions (addressing administrative issues broadly applicable to all water rights) in the Director's Reports for three test basins. A&B Irrigation District and others moved the SRBA Court to designate a basinwide issue to consider the appropriateness of the general provisions. The SRBA Court struck the general provisions as unnecessary to define or efficiently administer water rights. The Idaho Supreme Court (opinion by Justice McDevitt) reversed as to the provision on firefighting (holding that was an appropriate general provision), but upheld the District Court in striking the general provisions for stock watering and excess water. On reconsideration (opinion by Justice Walters), the

(7) Place of use

Place of use of course refers to where the water diverted under the right is being beneficially used. A statute provides that for irrigation purposes, a license shall give a description, by legal subdivisions, of the land irrigated.[25] Similarly, rights for industrial and commercial uses will carry a specific description of the place of use.

There are two broad examples where a more general description is acceptable. The first is for municipal purposes. (See discussion of the flexible "municipal service area" in section 23.D(5) at page 346.)

The second exception is for certain irrigation water delivery organizations, such as canal companies and irrigation districts. They may receive a generalized place of use description within which water diverted under the entity's water rights may be moved freely from one irrigated parcel to another, both when they are obtaining licensed rights and when their rights are being adjudicated. Idaho Code § 42-219 applies in the licensing context. Idaho Code § 42-1411(2)(h) requires IDWR during an adjudication to determine "a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219." (emphasis added).

The referenced exceptions are as follows:

> (5) For irrigation projects where the canals constructed cover an area of twenty-five thousand (25,000) acres or more, or within irrigation districts organized and existing as such under the laws of the state of Idaho ….It shall not be necessary to give a description of the land by legal subdivisions but a general description of the entire area under the canal system shall be sufficient. ….

Court remanded for further proceedings concerning general provisions on the season of use and conjunctive management.

In *A&B Irr. Dist. v Idaho Conservation League* ("*ICL II*"), 131 Idaho 329, 955 P.2d 1108 (1998) (Silak, J.), the Court addressed a general provision dealing with excess water included on water rights within the previously decreed Reynolds Creek Basin. In contrast to the "generic" excess water general provision in *ICL III*, this was a stipulated general provision setting out a specific administrative formula for administering the delivery of water during high flow periods. The SRBA District Court struck the provision, and various parties appealed. The Idaho Supreme Court upheld the general provision as necessary for the efficient administration of water rights, noting that it "describe[d] a long-standing system of allowing those who otherwise have water rights in the Reynolds Creek Basin to use excess water when it is available." *ICL II*, 131 Idaho at 334, 955 P.2d at 113. However, the Court also held that the provision did not establish a water right in the excess water because "General Provision 2 does not set forth a priority date, quantity, legal description of the place of use, nor any of the other elements of a water right." *ICL II*, 131 Idaho at 333, 955 P.2d at 112.

[25] Idaho Code § 42-219.

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(6) For an irrigation project developed under a permit held by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for the beneficial use by more than five (5) water users in an area of less than twenty-five thousand (25,000) acres, the license issued shall be issued to the permit holder. For the place of use description in the license issued for the irrigation project, it shall be sufficient to provide a general description of the area within which the total number of acres developed under the permit are located and within which the location of the licensed acreage can be moved provided there is no injury to other water rights.[26]

(8) Consumptive use quantity is not an element

Another important dimension of water quantification is consumptive use, that is, the volume of water consumed in the course of use or otherwise made unavailable to other users.[27] (Consumptive use is typically expressed as an annual volume: acre-feet per annum.) Early in the SRBA process, the Legislature mandated that consumptive use be quantified as part of the adjudication of each right. This requirement was repealed in 1997.[28]

In 2004, the Legislature amended the water code to declare: "Consumptive use is not an element of a water right. . . . Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code."[29] This declaration reinforces the right of a water right holder to modify his or her use of the right (within the bounds of the water right) in a manner that increases the consumptive use. (See discussion in section 15.E(4) at page 198.) The declaration that consumptive use is not an element of a water right does not mean that consumptive use is never considered, however. It remains a vital part of measuring a water right in the transfer process—where water is transferred to a new use, consumptive use, typically, is the measure of the quantity of water that may be transferred without injury to others. Idaho Code § 42-222(1). (See discussion of consumptive use in section 15.E(5) at page 199 and discussion of enlargement in section 15.I on page 231.)

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[26] Idaho Code § 42-219(5) and (6) (emphasis added).

[27] The water code defines "consumptive use" and "authorized consumptive use" as follows: "'Consumptive use' means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. 'Authorized consumptive use' means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." Idaho Code § 42-202B(1).

[28] 1997 Idaho Sess. Laws, ch. 374.

[29] H.B. 636, 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

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(9) Facility volume is not an element

Note: See also discussion in section 15.I(4) (Enlargement in a non-irrigation context) at page 241.

Earlier in the SRBA process, the Department took the position that water rights for fish farms should include a specification of facility volume in the "remarks" section, describing the number and size of the ponds, raceways, settlement basins and the like that could be served by the licensed or decreed diversion rate (rate being the amount of flow per second, potentially on a 24-hour basis). In other words, the facility volume was a statement of the maximum existing capacity of the operation, even though a larger capacity holding a larger volume of water could be served with the authorized diversion rate. The Department did not view facility volume as a separate element, but rather as part of the specification of the elements of quantity, nature of use and place of use.

SRBA District Court Judge Barry Wood rejected this approach in 1999, declaring that facility volume is not an element of a water right.[30] The court's opinion was based on statutory construction of section 42-1411(2), which lists each of the elements of a water right that the Director is to describe in his report to the SRBA Court. Because it does not list "facility volume," the court reasoned that it is not an element of a water right that will be decreed in the SRBA. Moreover, the court rejected the Department's contention that a description of facility volume is necessary to a complete description of the quantity, nature of use and place of use elements. The effect of this ruling was to allow expansion of a facility where the beneficial use takes place (for example, a fish propagation facility) while employing the same rate of diversion.

The more interesting aspect of the decision is the court's forthright discussion of why the Department (or other water users) might want facility volume to be included in the description of a water right. Such an element presumably would not benefit the water right holder, because its effect would be to limit the water right to the particular size of facility currently employed. The implication of having a facility volume described is twofold.

First, the water right holder arguably would be required to go through a change of water right proceeding every time additional raceways or other facilities were added (even though the diversion amount remains the same). In other words, expanding the size of the facility could be seen as an improper "enlargement" and would require the applicant to obtain a new junior priority right for the expansion. Second, if the holder implemented a water delivery call against junior users, any cash mitigation that might be ordered might be limited to the capacity and output of the original facility, not the enlarged (and potentially junior) portion.[31] The court rejected these principles.[32]

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[30] *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) ("*Facility Volume Case*") (Barry Wood, J.).

[31] By the way, there is no established precedent for awarding cash compensation in the context of a delivery call. Ordinarily, the focus is on the obligation of the junior to deliver an appropriate quantity of

> It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law . . . .

The court went on to note that it is improper to attempt to limit a fish farmer to a particular size of production facilities when, by analogy, a domestic right holder is not required to obtain a new water right when she expands the size of her home, when a farmer switches crops or seed varieties to produce more or higher valued product that consumes more water, or when a hydropower user adds additional generating capacity to an existing water flow.[33]

The court did not mention other industrial or hydropower uses, but the implication of his decision is apparent there too. Thus, a description of the internal workings of an industrial facility is not part of a water right. Consequently, for instance, a microchip producer might upgrade its facilities, enabling it to produce twice the quantity of product with the same amount of water, without changing its water right.[34]

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mitigation water to the senior, or else be shut off. Hence the term "delivery call." Whether the Department has the authority to order monetary compensation, rather than water, is an open question. Of course, parties may agree between themselves to resolve a dispute through such an arrangement. Thus a senior might agree to subordinate her water right to a junior in exchange for a payment by the junior to the senior.

[32] *Facility Volume Case* at 9.

[33] IDWR's *Transfer Memo* captures this as follows: "Intensified Use of Water. An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more of the elements of the water right(s) as licensed or decreed. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase the generating capacity of hydroelectric generators, so long as none of the elements of the associated water rights are changed." *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 7 (Dec. 21, 2009). Thus, for example, adding electric generating capacity is permissible so long as the right holder does not increase the amount of water diverted through the penstocks. However, an increase that requires a higher rate of flow presumably would not be allowed without obtaining a new water right.

[34] The court also did not address the situation where the expansion could entail an increase in annual diverted volume and potentially cause injury. This could happen, for example, where a 2 cfs diversion (a well, for example, or a pump in a stream) historically was used an average of 14 hours per day for a particular commercial enterprise, but after facility enlargement it was used at this rate for 20 hours per day.

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C. Diversion requirement

The rule as traditionally stated is that a water right requires a "*diversion* to a beneficial use."[35] That is, it is necessary to artificially remove (or impound) water to obtain a legally protected right to its use. However, Idaho's Supreme Court has ruled that the state Constitution does not require a diversion where none is necessary to accomplish the beneficial use. It is as yet unclear whether instream flow rights can be established in Idaho outside of Idaho's rather restrictive minimum stream flow statute.[36]

D. Beneficial use - generally

Under Idaho's Constitution, an appropriation of water must be for a "beneficial use."[37] It is often recited that beneficial use is "the basis, the measure and the limit" of any water right. *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 111, 157 P.3d 600, 605 (2007) (Schroeder, C.J.). Indeed, Congress included this statement of the rule in the federal reclamation law.[38] The concept arises from the fact that a water right is not a right to the water itself, but rather is a right to *use* water owned by the people of the state.[39] In legal parlance, a water right is a "usufructuary" right. Thus, regardless of what the right holder may believe his right to be, and regardless of what the right's license, decree or other documentation proclaims, the extent of the right is limited to that amount which has actually been

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[35] The diversion requirement is explored more fully in the Section on instream flows, see part 23.E beginning on page 374.

[36] Idaho's instream flow law is codified at Idaho Code §§ 42-1501 to 1505. (See discussion in section 1.C at page 425.)

[37] Idaho Const. art. XV, § 3 ("The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied…."). The Legislature has declared: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-104.

[38] This phrase appears in various places in western water law, and is perhaps the best succinct statement of the fundamentals of the prior appropriation doctrine. Congress included it as an express directive in section 8 of the Reclamation Act of 1902, 32 Stat. 388, 390. *See* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 39 (1968) (an appropriator is held to the quantity of water he is able to apply to a beneficial use at a particular time, within the limit of his appropriation); 3 *Kinney on Irrigation*, § 1579 (2d ed. 1912) (no one is entitled to have a priority adjudged for more water than he has actually appropriated, nor for more than he actually needs); 2 *Waters and Water Rights* § 17.03(b) (1991); Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L. J. 1 (1956) (actual beneficial use is the measure of the right, and the right is not protected from loss by wasteful over-application); Golzé, *Reclamation in the United States* 95 (1961) (an essential part of the appropriation doctrine is the requirement that water be put to beneficial use, and if beneficial use lags, the right may be lost); Meyers, Tarlock, Corbridge & Getches, *Water Resource Management* 282 (3rd ed. 1988) (the concept that beneficial use is the basis, measure and limit of an appropriative right is recognized by state constitutions, statutes and judicial decisions throughout the Western states).

[39] *Coulsen v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P.29 (1924).

placed to beneficial use,[40] and the extent to which a prior right may be enforced as against a subsequent right is limited to the amount that actually is required by the senior.[41] Thus, "paper" water rights in Idaho are subject to challenge, and likely cannot be changed or transferred to a new place of diversion or use, because they are not being put to beneficial use.[42] , Quite simply, to the extent of non-use they are not water rights.

Idaho's Constitution, like those of most Western states, names only a few beneficial uses for which water may be appropriated: agriculture, domestic uses, manufacturing, mining and hydropower.[43] However, the Idaho Supreme Court has ruled that this is not an exclusive list.

> With the exception of those uses elevated to beneficial status by Article 15, § 3, of the Constitution, the concept of what is or is not a beneficial use must necessarily change with conditions. . . . The notion of beneficiality must include a requirement of reasonableness.

State of Idaho, Dep't of Parks v. IDWR, 96 Idaho 440, 447, 530 P.2d 924, 931 (1974) (Bakes, J. concurring).

> While it is well established in western water law that an appropriation of water must be made for a 'beneficial use,' nevertheless in Idaho at least the generic term 'beneficial use' has never been judicially or statutorily defined.

Dep't of Parks, 96 Idaho at 443, 530 P.2d at 927.

Recent Idaho statutes have defined a few specific uses as beneficial.[44] However, the generic term has never been statutorily defined.

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[40] *See e.g., Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943); *Albrethsen v. Wood River Land Co*., 40 Idaho 49, 231 P. 418 (1924) (decree is evidence of beneficial use of the right only as of the date of the decree).

[41] *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

[42] *See e.g., Hillman v. Hardwick,* 3 Idaho 255, 28 P. 438 (1891).

[43] Idaho Const. art. XV, § 3.

[44] For instance, Idaho's Ground Water Recharge Act expressly states that "the appropriation and underground storage of water . . . for purposes of ground water recharge shall constitute a beneficial use." Idaho Code §§ 42-4201(2), 42-4201A(2) (repealed in 2009); s*ee also*, Idaho Code § 42-234(2). In a similar vein, in 1996, the Legislature addressed the issue in the context of municipal water rights. Municipal Water Rights Act of 1996, Idaho Code § 42-222 ("A water right held by municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use . . . ."). In a third example, the Legislature has declared certain instream uses to be beneficial. Idaho Code §§ 42-1501 to 42-1505.

The case law has filled in the constitutional and statutory gaps. For example, Idaho Supreme Court decisions and water right licenses issued by the Idaho Department of Water Resources have approved fish and wildlife habitat, aesthetics, recreation and similar purposes as beneficial uses in Idaho.[45] Today, the idea that only certain types of use are "beneficial" is little more than an historic relic.[46] The plain trend is toward recognition that, so long as the use serves some purpose and is not inherently wasteful, it probably qualifies as a beneficial use.

E. Storage rights

(1) Overview

This section addresses the law and practice of storage rights in Idaho, especially how their elements are described. In the case of natural flow surface water rights and ground water rights, water typically is applied to beneficial use as soon as it is diverted from its natural source.[47] In other instances, a user may desire to store water for later use. Water rights also may be obtained for stored water in either an on-stream or off-stream storage facility. A storage right is obtained just like any other. Even the same application form is used. (Of course, dam construction requires other permits as well as water rights.) See discussion in section 4.D at page 39 regarding storage of water as a beneficial use.

Compared to building a natural flow diversion facility, construction of a reservoir typically involves a considerably larger engineering effort. There are two basic advantages of owning a reservoir. First, a reservoir is capable of capturing flood flows during the pre-irrigation-season runoff period, even though a river's irrigation season flows may be fully allocated to senior natural flow rights. This is one reason why, historically, natural flow rights were developed first, and storage came

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[45] Judge Melanson, then of the SRBA Court, issued a ruling in a basin-wide issue confirming: "Under Idaho law, any person may establish a diversionary water right, including to and from storage, for aesthetic, recreational or wildlife purposes." *In re SRBA, Case No. 39576,* Idaho Dist. Ct., Fifth Judicial Dist. (Basin-Wide Issue No. 00-91014, Amended Consent Decree, Feb. 25, 2009)

[46] An example of such a "relic" is *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913), in which a federal court applying Colorado law denied an instream flow water right to a resort community build around a natural waterfall. "[W]e think complainant [the town] is not entitled to a continuance of the falls solely for their scenic beauty. The state laws proceed upon more material lines. . . . It may be that if the attention of the lawmakers had been directed to such natural objects of great beauty they would have sought to preserve them, but we think the dominant idea was utility, liberally and not narrowly regarded, and we are constrained to follow it." *Id*. at 129. Certainly utility—beneficial use, to be precise— is the dominant idea. It would follow that a diversion to a useful aesthetic purpose, such as golf course ponds or artificial trout streams in a community, would meet this test. Likewise other recreational uses such as snow-making at ski resorts. None of these is expressly provided for in statute.

[47] Aquifer Storage and Recovery ("ASR") and Public Betterment Aquifer Recharge ("PBAR") projects would be exceptions to this. See Section 9.B at page 103.

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later. Second, large storage reservoirs almost always are designed to hold water over for future dry years, thus providing a more reliable supply than natural flow.

After water is captured under a storage right (often during peak flows or in the winter when irrigation natural flow rights are not allowed to divert), the holder of the right is entitled to release that quantity of flow pursuant to the terms of the storage right to serve beneficial uses. Stored water released from a reservoir may even be delivered past the headgates of unfilled senior natural flow rights. Thus, the rights to stored water can give the user considerable flexibility.

Many water users rely on a combination of storage and natural flow rights. They use their natural flow rights as their primary source of supply when available, and then increasingly turn to their storage as the natural flow supply diminishes through the course of the year. Absent speculation, hoarding or other potential abuses, storage water not needed during one season may be carried over to subsequent years.[48]

When an on-stream reservoir is involved, the entitlement to "divert" describes the circumstances under which the dam is allowed to pass less water than is flowing into the reservoir—in other words, store water. The dam must release enough water (but no more than is flowing in upstream) to meet all senior demands downstream. When there is more than enough natural flow entering the reservoir to meet downstream senior demand, and provided the storage right is not limited to a specifically designated storage season, then the reservoir's storage water right is "in priority" and it may store the excess.

No separate water right is required to release water from a reservoir. That may be done at the holder's option (so long as it is for the authorized beneficial use).

(2) Points of diversion

The point of diversion for an on-stream reservoir is the location of the dam or impoundment. The point of diversion for an off-stream reservoir is the location of the diversion facility on the stream or other natural body from which water is diverted and taken to the off-stream reservoir.

(3) Points of rediversion, release, or delivery

Many Idaho water rights authorize water to be diverted from one stream, "injected" into another stream, and then "rediverted" to a storage facility or other use.[49] An example of this is a storage and direct flow right (no. 63-19893) for the Mountain Home Reservoir operated by Mountain Home Irrigation District. Under the "points of diversion" heading, the right lists the original point of diversion from Little Camas Creek, a point of injection into East Fork Long Tom Creek (a tributary of

[48] *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 201, 157 P.2d 76, 77 (1945) (Givens, J.); *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

[49] Exchanges operate in a similar manner. Water may be injected into a stream to offset water diverted from the stream upstream of the point of injection.

Canyon Creek), and a point of rediversion from Canyon Creek. Thus, where water is injected back into a natural stream (and thus is outside the control of the appropriator) and subsequently rediverted from that natural stream, the injection and rediversion are considered additional points of diversion.

In contrast, when water is stored in a reservoir under the control of the appropriator, deliveries therefrom to beneficial uses are not deemed "points of diversion." In an on-stream reservoir, water is released by the dam, where it continues on down the stream to be rediverted later by water users. Typically, these water users also have natural flow rights out of the same stream, which are supplemented with released storage water when natural flow is inadequate. Their natural flow water rights specify a point of diversion, but the released storage water is not diverted under those natural flow rights. The water is simply diverted at the same point of diversion as the natural flow right pursuant to a spaceholder contract or other arrangement with the operator of the reservoir.

Less commonly, water is redirected to ditches directly out of an on-stream reservoir. An example is Payette Lake, a natural lake on the North Fork Payette River whose elevation was raised by a dam to create a manmade impoundment. Water is stored under water right no. 65-2278 held by Lake Reservoir Co. The stored water is then released from the lake into the river for diversion at various points of rediversion operated by several downstream irrigation entities. The water right notes the existence of these points of rediversion, but they are not listed under the description for "points of diversion." Instead, they are noted under the description of "place of use."[50]

Where water is stored in an off-stream reservoir, release or delivery of the water from the off-stream reservoir is not deemed a "point of diversion" for the storage right. An example is Lake Lowell.[51] That system, operated by the Boise Project Board of Control for the benefit of several irrigation districts, diverts natural flow[52] from the Boise River into the New York Canal which delivers the water to Lake Lowell, a man-made lake 15 miles away. After storage in Lake Lowell, water is

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[50] "Points of re-diversion and places of use are those of Emmett Irrigation, Farmers Co-op, Enterprise, Letma, Nobel & Lower Payette Ditches." Partial decree for no. 65-2278, under heading "Place of Use."

[51] Lake Lowell is located in Basin 63 (Boise River) in Canyon County, five miles southwest of Nampa, Idaho. It is a manmade, off-stream storage reservoir with approximately 9,800 surface acres and 28 miles of shoreline containing approximately 173,000 acre-feet of water. The impoundment is created by a set of three dikes and the Deer Flat Upper Embankment, which is an earthen dam completed in 1908 by the Bureau of Reclamation, with a height of 74 feet and 4165 feet long at its crest. Water is diverted from the Boise River into the New York Canal approximately 15 miles to the east of Lake Lowell in the NWSW of Section 3, T2N, R3E. Water right no. 63-301A held by the US Bureau of Reclamation ("BOR") is currently associated with Lake Lowell. This right, decreed by the SRBA Court in 2014, is the latest permutation of a right that originated with a license in 1913, and which was subsequently decreed in a private adjudication in 1929 known as the "Bryan Decree."

[52] In addition to its natural flow water rights, the Boise Project also diverts water stored in and released from federal reservoirs on the Boise River. These diversions of stored water are made pursuant to spaceholder contracts with the Bureau of Reclamation. The Bureau holds its upstream storage rights in trust for the irrigators and other users.

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delivered to systems operated by various irrigation districts. Various facilities controlled by the irrigation districts divert water stored in Lake Lowell to their respective delivery systems. None of these are deemed points of diversion on the Bureau's water right. In essence, it is of no concern to IDWR (the entity that administers the right) what the plumbing is that delivers water out of the off-stream reservoir to the specified place of use.

The practice in Idaho of not treating the rediversion of water from a reservoir as another point of diversion comports with Idaho Code § 42-110, which provides: "Water diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator."

(4) Purpose of use

In Idaho, storage rights typically are issued with multiple "purpose of use" components. As described in IDWR guidance,[53] storage rights will typically contain one or more "purpose of use" couplets: "[Purpose] Storage" and "[Purpose] from Storage." For example:

- "Irrigation Storage" and "Irrigation from Storage"
- "Power Storage" and "Power from Storage"
- "Streamflow Maintenance Storage" and "Streamflow Maintenance from Storage."
- "Stockwater Storage" and "Stockwater from Storage"
- "Wildlife Storage" and "Wildlife from Storage"

The first component (e.g., "Irrigation Storage") describes the right to capture and store the water in the reservoir. The second (e.g., "Irrigation from Storage") describes the right to release the stored water from the reservoir for that stated beneficial use.[54]

A single water right may have more than one of these couplets. For example, Lake Cascade (an on-stream reservoir) stores water for irrigation and hydropower. Its storage right (No. 65-29027A) has these four components:

[53] Norm Young, *Application Processing No. 14* (*Applications for Permit for Storage Rights*) (June 1, 1978).

[54] In addition to listed purposes of use, holders of storage rights may release water for incidental purposes not listed on the water right that are inherent to reservoir operation, such as reservoir maintenance, flood control, or other emergencies.

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Purpose of Use	Quantity	Period of Use
Irrigation Storage	697,500 AFY	1/1 to 12/31
Irrigation from Storage	697,500 AFY	1/1 to 12/31[55]
Power Storage	697,500 AFY	1/1 to 12/31
Power from Storage	697,500 AFY	1/1 to 12/31

In some instances, a reservoir may also have a stand-alone purpose of use, such as "Recreation Storage," with no corresponding "Recreation from Storage" component. This is because the water is not released from storage. Its sole beneficial use is to sit in the reservoir to support a fishery or other purpose.

In addition to the components described above, off-stream reservoirs will have an additional component for "Diversion to Storage." This is the component that authorizes diversion from the river or other natural source to the off-stream reservoir. In contrast to those storage purposes described above, "Diversion to Storage" is quantified as a rate of flow, not a volume.

Finally, some off-stream reservoirs may have yet another component authorizing "direct flow" use.[56] An example of this is Lake Lowell. That system, operated by the Boise Project Board of Control for the benefit of several irrigation districts, diverts natural flow[57] from the Boise River into the New York Canal which delivers the water to Lake Lowell, a man-made lake 15 miles away. After storage in Lake Lowell, water is delivered to systems operated by various irrigation districts. However, some irrigation ditches divert directly from the New York Canal before the water reaches Lake Lowell. Water delivered to beneficial use before it is stored is the so-called "direct flow." This direct flow component is listed on the water right simply as "Irrigation." Thus, the water right for Lake Lowell (No. 63-301A) has these four components:

Purpose of Use	Quantity	Period of Use
Irrigation	1,349.29 cfs	3/1 to 11/15
Irrigation Storage	173,100 AFY	1/1 to 12/31
Irrigation from Storage	173,100 AFY	3/1 to 11/5
Diversion to Storage	1,349.29 cfs	1/1 to 12/31

Note that the "irrigation" and "diversion to storage" components are quantified solely in terms of rate of flow, while the "Irrigation Storage" and "Irrigation from Storage" components are quantified solely in terms of volume.

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[55] The year-round "Irrigation from Storage" period of use shown on this right is an anomaly.

[56] In some instances, water rights for on-stream reservoirs also include a "direct flow" component. An example of this might be a farmer to constructs a reservoir on a stream on his or her property, and seeks a water right allowing diversion of inflow as it enters the reservoir "before it is stored" or when the reservoir is full.

[57] In addition to its natural flow water rights, the Boise Project also diverts water stored in and released from federal reservoirs on the Boise River. These diversions stored water are made pursuant to spaceholder contracts with the Bureau of Reclamation. The Bureau holds its upstream storage rights in trust for the irrigators and other users.

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All of this is consistent with guidance issued by IDWR decades ago (see footnote 53 at page 44). It should be said, however, that not all permits, licenses, and decrees conform to this format.[58]

(5) Period of use

Each purpose of use will have an associated period of use. For example, the period of use associated with "Irrigation Storage" is typically year round (reflecting the right to capture water any time it is legally and physically available and to retain it until it is needed). The period of use associated with "Irrigation from Storage" should be limited to the irrigation season. For hydropower, the period of use is year round.

(6) Quantity

As noted above in section 4.E(4) (Purpose of use), storage rights typically have multiple purposes of use. Each purpose of use will have an associated quantity. Some are measured in volume (acre-feet per year); others are measured by rate of flow (cfs).

As noted, storage rights for on-stream reservoirs are the quantified solely in terms of annual volume (for example the "Irrigation Storage" and "Irrigation from Storage" couplets). The quantity typically reflects the active storage capacity of the reservoir. The absence of a rate of flow for these volume-based components reflects the fact that the storage right may be used to store all physically and legally available water reaching the reservoir. Thus, an on-stream reservoir is required to bypass only water that downstream right-holders are entitled to divert. In other words, these on-stream rights authorize the owner to control every drop of water in the river—but only when they are in priority during a single fill. This maximizes the potential the reservoirs will fill completely and do so at a time least in conflict with other water users. This makes more water available for juniors and maximizes the use of the State's water resources.

As noted above, off-stream reservoirs (such as Lake Lowell) are licensed and decreed in a similar manner, with one critical distinction. In addition to the purposes of use components described

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[58] An example of inconsistency is a water right for Mountain Home Reservoir (no. 61-10421). The reservoir sits on Rattlesnake Creek, but its water right authorizes diversions from two streams (Rattlesnake Creek and Canyon Creek). Thus, with respect to Canyon Creek, the reservoir is "off-stream." But contrary to *Application Processing Memo #14*'s instruction, the right does not contain a "diversion to storage" component for diversions from Canyon Creek. (By the way, the City of Mountain Home originally was known as "Rattlesnake Station.")

The storage components for so-called "Refill 1" and "Refill 2" water rights (nos. 63-33734A and 63-33734B) that were decreed in 2019 as part of the Refill Litigation Settlement at first glance might appear to be a departure from the standard practice, but there is an explanation. These rights each have three storage components ("Irrigation Storage," "Municipal/Industrial storage," and "Streamflow Maintenance Storage"), but they lack any component to take water out of storage ("[Purpose] from Storage"). The reason is found in language on the face of the decree. It explains that water accruing to storage under Refill 1 and Refill 2 supplements water accrued to the storage under the so-called "Base Rights" associated with the reservoirs, and that all such water shall be allocated under the federal contracts as if it had accrued under the Base Rights.

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above (which are quantified in annual volume), they will display an additional purpose of use called "diversion to storage" that is quantified in terms of a flow rate (cfs). This purpose of use component describes the right to divert the water from the stream or other natural source to the off-stream reservoir. Thus, a key difference between an on-stream reservoir and an off-stream reservoir is that on-stream reservoirs are authorized to divert all water that is physically available in the stream and not required to satisfy other water rights, while off-stream reservoirs (like other natural flow and ground water rights) are limited to the rate of flow stated on the face of the right.

It appears that, because off-stream reservoirs are subject to a diversion rate limitation, off-stream rights are not subject to the one-fill rule. However, the authors are not aware of a case or other authority expressly so holding. This conclusion was implicit, however, in the Refill Litigation (see section 4.E(9) below) which spoke of the one-fill rule only in the context of on-stream reservoirs and emphasized that the one-fill rule was needed to counter-balance the absence of any limitation on rate of flow.

Hydropower storage rights licensed or decreed with the standard couplet ("Power Storage" and "Power from Storage") are likewise quantified in terms of volume (AFY). However, some hydropower rights are licensed or decrees with only a "power" component, which is measured in rate of flow (cfs). This presumably corresponds to the "direct flow" component of water right described in IDWR's guidance on storage rights (see footnote 53 at page 44). This might reflect run-of-river use of an on-stream reservoir.

At the time of licensing, each purpose of use must be proven separately. The "[Purpose] Storage" and "Diversion to Storage" components may be proven simply by showing the quantity of water that has been diverted to the reservoir.[59] In contrast, the "[Purpose] from Storage" component (e.g., "Irrigation from Storage") must be proven by showing actual application to the end beneficial use.

Thus, if an irrigation reservoir stored water, but, at the time of licensing, had never actually used any of that water for irrigation, the license would be denied because "Irrigation from Storage" purpose had not been shown. Mere storage of water without an ultimate beneficial use is an insufficient basis to establish a water right. *See*, *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (Albuquerque's storage of San Juan/Chama water for 40 years was not a beneficial use due to evaporation losses).

[59] The same terms, "divert" or "diversion" are used to describe water entering both on-stream and off-stream reservoirs. Thus, for an on-stream reservoir, IDWR considers all water entering the upper end of the reservoir that the right holder is not obligated to release to satisfy downstream rights to be "diverted" to the reservoir and, hence, accrued toward the fill of that storage right. This issue, however, is being litigated as of this writing.

(7) One-fill rule (storable inflow and paper fill)

The Department follows the rule common throughout the West[60] that a reservoir may only be filled under right of priority only once a year (unless the water right expressly authorizes multiple fills under priority). There is no Idaho statute on this point, but the Department has implemented the one-fill rule via a requirement in applications for water appropriations.[61]

See section 4.E(6) at page 46 above for a discussion of whether the one-fill rule applies to off-stream reservoirs.

The one-fill rule operates in that absence of a water right expressly authorizing additional fill beyond the first fill. For example, the Refill Settlement recognized a second water right authorizing additional in-priority fill. See discussion in 4.E(9) at page 50 below.

The one-fill principle has long been recognized as part and parcel of the prior appropriation doctrine. As far back as 1912, it was deemed black letter law in Kinney's treatise:

> As in the case with other rights acquired under the Arid Region Doctrine of appropriation, the rule of priority governs, and it is held that the reservoir having the prior right is entitled to fill the same first from the flow of the stream to the full extent of the capacity of the appropriation made therefor. But having once during any one season filled such reservoir, a later appropriation or a subsequent reservoir may take the surplus of the water flowing in the stream, after the prior reservoir has been once filled.

1 *Kinney on Irrigation*, 2nd ed. § 845, p. 1,484 (1912) (emphasis supplied).

The one-fill rule is based on the concept of "storable inflow." The storable inflow principle requires that if water is legally and physically available to be stored, it counts towards the annual fill of the volume stated on the face of the right. Thus, unless water in the stream must be bypassed to satisfy downstream seniors, it counts toward fill irrespective of whether it is stored or bypassed. Likewise, the release of water stored in the reservoir for flood control (or any other purpose) has no effect on the quantity accrued under the water right. Thus, the one-fill rule does not operate on the basis of "physical fill." Instead, the storage right holder is entitled to one "paper fill."[62] Once the right has been

[60] See, e.g., *City of Westminster v. Church*, 445 P.2d 52 (Colo. 1968); *Orchard City Irr. Dist. v. Whitten*, 361 P.2d 130 (Colo. 1961).

[61] "Impoundment (storage) applications shall show the maximum acre-feet requirement per year which shall not exceed the storage capacity of the impoundment structure unless the application describes a plan of operation for filling the reservoir more than once per year." IDAPA 37.03.08.035.03.b.v.

[62] Counting all "storable inflow" toward fill of a storage water right is frequently described as "paper fill." Thus, the term "paper fill" is simply shorthand for the combination of "one-fill" and "storable inflow." The term "paper fill" has been described as a "term of convenience to describe the cumulative amount of natural

filled on paper (even if water is bypassed for vacated for flood control), the reservoir operator may not fill or refill vacant space under right priority.

In sum, if water is physically present and legally available to store (i.e., "in priority"), the storage right holder is expected to store it. If a storage right holder decides to bypass storable inflow, or stores it and later releases some of it for whatever reason, that does not allow additional water to be stored under priority.[63]

Without calling it "storable inflow," IDWR's Director confirmed that the principle is embedded in IDWR's water rights accounting system:

> Under the accrual procedures of the Water District 63 water rights accounting program, any natural flow available under the priority of an on-stream reservoir water right at its point of diversion (the dam), or that would have been available at the dam if the water had not been stored in an upstream reservoir, is accrued (distributed) toward the satisfaction of the reservoir's water right until the cumulative total reaches the water right's annual volume limit.

Amended Refill Order, ¶ 106, p. 37.

Note that carry-over storage from the prior season counts toward the accrual of the single fill in the following year. *Amended Refill Order*, ¶ 118, p. 40. Thus, if a reservoir were half full at the beginning of the accounting year, the storage right holder would be entitled to store a quantity equal to the empty portion and no more.

The one-fill rule was litigated and ultimately settled in what is known as the Refill Litigation and the Refill Settlement. See section 4.E(9) at page 50 below.

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flow accrued to a reservoir water right in the water rights accounting." IDWR Staff Memo of November 4, 2014 by Liz Cresto, Technical Hydrologist and then operator of the Department's accounting system.

[63] The history, basis, and operation of the one-fill rule is described in detail in a ruling by Director Gary Spackman in a contested case prompted by challenges to the Department's application of the one-fill rule. *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* Idaho Department of Water Resources (Amended Final Order, Oct. 20, 2015) (Spackman, Director) ("*Amended Refill Order*"). This order was appealed in the final round of the Refill Litigation. Ultimately those appeals were dismissed and the district court's ruling on the order was vacated on October 22, 2019 as part of the Refill Settlement (see Stipulation of July 2, 2018, ¶ 13, pp. 6-7). The *Amended Refill Order* was left in place by the settlement and continues to reflect departmental policy.

(8) The free river principle

An important exception or corollary to the one-fill rule is the free river principle.[64] It provides that, although an on-stream reservoir may be filled only once under right of priority, the reservoir owner is free to store any additional water available under so-called "free river" conditions—that is, when there is sufficient flow to satisfy all other water users. The key point is that this free river refill does not occur under right of priority.[65]

(9) The Refill Litigation and Refill Settlement

As discussed above, Idaho, like most western states, follows the rule allowing only one "fill" if a reservoir under priority pursuant to its storage right (except for rare instances where the right expressly or through clear implication authorizes refill). (See section 4.E(7) above at page 48.) For years, IDWR quietly implemented this rule through its accounting procedures with little apparent concern by water users.[66] Beginning in 2007, however, a decade-long battle occurred over the one-fill rule[67] known as the "Refill Litigation."[68]

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[64] The authors borrow the term "free river refill" from Colorado. *City of Westminster v. Church*, 445 P.2d 52, 59 (Colo. 1968).; Casey S. Funk, *Basic Storage 101*, 9 U. Denver L. Rev. 519, 539 n.137 (2006). Idaho employs the more abstruse terminology "excess water" and uses the term "unaccounted for storage" to describe such water once it is held in storage.

[65] In his 2016 order in the Refill Litigation, Director Spackman confirmed that IDWR's accounting system allows the historical practice of refilling vacated space in on-stream reservoirs with "excess flows" after the storage rights are satisfied: *Amended Refill Order*, ¶ 34, p. 67. The order was appealed as part of the Refill Litigation. District Court Judge Wildman affirmed virtually all of Director Spackman's order, but rejected the provision dealing with free river refill. Before the Idaho Supreme Court ruled on appeals of Judge Wildman's decision, the matter was settled and the Wildman order was vacated (see Stipulation of July 2, 2018, ¶ 13, pp. 6-7). (The settlement sidestepped broader free river principle by implementing it instead through recognition of a beneficial use right allowing additional refill subject to subordination.) However, the Refill Settlement left Director Spackman's 2016 order intact. Accordingly, the free river principle described in the order continues to be employed in the Department's administration of all other on-stream reservoirs.

[66] The September 21, 1979 Minutes of Committee of Nine Meeting states: "Lester Saunders asked the Director of the Department of Water Resources, Stephen Allred, to explain the watermaster's process for crediting water to the reservoirs. Steve explained that any water available at a reservoir for storage is credited to that reservoir storage right. Once a right has been filled on paper, even if the water has been released and additional space is available, the priorities of the reservoirs are considered to no longer be in effect."

[67] The origin of the Refill Litigation was objections filed on April 19, 2007 in the SRBA by the Bureau to IDWR's recommendations on two Bureau storage right claims in the Snake River Basin (01-2064 and 01-2068). In its objection, the Bureau asked that a "remark" be added to its water right authorizing it to refill its Snake River projects under right of priority. IDWR declined to do so, instead offering an alternative remark authorizing free river refill. See discussion in *In re SRBA Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017*, Memorandum Decision at page 4 (4th Dist. Idaho Mar. 20, 2013) (Wildman, J.). Irrigators filed a petition to designate a so-called "basin-wide issue." In 2015, parties resolved the refill dispute in the Upper

Snake by the Bureau securing additional junior water rights authorizing refill. In 2019, a similar result was reached in the Boise River Basin.

[68] The "Refill Settlement" resolved the "Refill Litigation," which consisted of the following:

- Basin-wide 17: *In re SRBA Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017*, Order Designating Basin-Wide Issue (4th Dist. Idaho Sept. 21, 2012) (Wildman, J.); *In re SRBA Case No. 39576, Basin-Wide Issue 17, Subcase No. 00-91017*, Memorandum Decision (4th Dist. Idaho Mar. 20, 2013) (Wildman, J.); *A&B Irr. Dist. v. State* ("*Basin-Wide 17*"), 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.).
- Basin 63 Late Claims: *In re SRBA Case No. 39576, Subcase Nos. 63-33732 (consolidated subcase No. 63-33737), 63-33733 (consolidated subcase No. 63-33738), and 63-33734*, Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master (4th Dist. Idaho Sept. 1, 2016) (Wildman, J.). No appeal was taken.
- Basin 65 Late Claims: *In re SRBA Case No. 39576, Subcase Nos. 63-23531 and 65-23532*, Memorandum Decision and Order on Challenges, Final Order Disallowing Water Right Claims (4th Dist. Idaho Oct. 7, 2016) (Wildman, J.); *United States v. Black Canyon Irr. Dist.,* 163 Idaho 54, 408 P.3d 52 (2017) (Burdick, C.J.); *Black Canyon Irr. Dist. v. State,* 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.).
- Basin 63 Contested case: *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Notice of Contested Case and Formal Proceedings, and Notice of Status Conference (IDWR Oct. 24, 2013) (Spackman, Director); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Order Staying Proceeding (IDWR Dec. 27, 2013) (Spackman, Director); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Order Lifting Stay and Notice of Status Conference (IDWR Sept. 9, 2014) (Spackman, Director); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Amended Final Order (IDWR Oct. 15, 2015) (Spackman, Director) ("*Amended Refill Order*"); *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63*, Order Denying Petitions for Reconsideration (IDWR Nov. 19, 2015) (Spackman, Director); *Ballentyne Ditch Co. v. Boise Project Bd. of Control*, Case Nos. CV-WA-2015-21376 and CV-WA-2015-21391, Memorandum Decision and Order (4th Dist. Idaho Sept. 1, 2016) (Wildman, J.) (affirming in large part the Director's order); *Ballentyne Ditch Co. v. Boise Project Bd. of Control*, Case Nos. CV-WA-2015-21376 and CV-WA-2015-21391, Order Denying Rehearing (4th Dist. Idaho Nov. 14, 2016) (Wildman, J.). Three appeals were filed: Idaho Supreme Court Nos. 44677-2016, 44745-2017, and 44746-2017. These appeals were fully briefed and awaiting oral argument when the Refill Settlement was reached in the Stipulation of July 2, 2018. Following the enactment of H.B. 1 and approval of Refill 1 and Refill 2 by the SRBA Court on 7/19/2019, the appeals were withdrawn and Judge Wildman's orders were vacated (see Stipulation of July 2, 2018, ¶ 13, pp. 6-7) in *Ballentyne Ditch Co. v. Boise Project Bd. of Control*, Case Nos. CV-WA-2015-21376 and CV-WA-2015-21391, Order Vacating Orders and Remanding to the Idaho Department of Water Resources (4th Dist. Idaho Oct. 22, 2019) (Wildman, J.).

The litigation centered mainly on IDWR's accounting methodology for water rights associated with federal on-stream reservoirs. (See section 4.E(6) at page 46 above for a discussion of whether the one-fill rule applies to off-stream reservoirs.) The accounting methodology matters because Idaho, like most western states, allows only one "fill" of a storage water right under priority (unless the right expressly provides for additional fill).[69] The core question was whether water vacated[70] for flood control purposes counts (aka, accrues) toward fill (*i.e.*, satisfaction of the water right).

The final round of the Refill Litigation involved challenges to the order issued by Director Spackman in a contested case initiated by the Department in response to prior rounds of the Refill Litigation. *In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63* Idaho Department of Water Resources (Amended Final Order, Oct. 20, 2015) (Spackman, Director) ("*Amended Refill Order*").

Ultimately, the litigation was settled, pursuant to a Stipulated dated July 2, 2018), in a manner that left in place IDWR's longstanding accounting system recognizing that under the one-fill rule all water available to a storage right holder accrues to the right. A key part of the settlement provided that decrees should issue for two new storage rights known as Refill 1 and Refill 2. These rights are discussed in footnote 58 at page 46.

In a nutshell, the settlement terms authorize refill of federal reservoirs with water in excess of the quantity of the original storage rights authorizing the first fill of the reservoirs. These original water rights are referred to as the "Base Rights." The conditions and extent of this refill are governed by two carefully crafted storage rights decreed to the Bureau by the SRBA Court. They are commonly referred to as Refill 1 (no. 63-33734A) and Refill 2 (no. 63-33734B).

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[69] For convenience, we refer to the primary storage right(s) associated with a reservoir or system of reservoirs authorizing the initial fill as the "Base Right(s)." The Base Rights are distinguished from any additional water right(s) (*e.g.*, the "Late Claims" that resulted in Refill 1 and Refill 2) authorizing a second fill of the reservoir(s) under right of priority.

The Bureau's Base Rights for Basin 63 (Boise River Basin) are Nos. 63-303, 63-3613, 63-3614, and 63-3618. The Basin 63 Late Claims are Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738. No. 63-33734 was split into 63-33734A and 63-33734B to become Refill 1 and Refill 2. Except for Refill 1 and Refill 2, all Basin 63 Late Claims were disallowed by the SRBA Court on 7/19/2019 pursuant to the Refill Settlement. The Basin 65 (Payette River Basin) Base Rights are Nos. 65-2927A, 65-2927B, 65-2917, and 65-9483. The Late Claims for Basin 65 are Nos. 65-23531 and 65-23532. The Basin 65 Late Claims were disallowed on *res judicata* grounds.

[70] We employ the term "vacated" to describe space in a reservoir that becomes empty when stored water is released prior to the irrigation season for flood control purposes. In addition, the term "vacated" includes space that is kept empty when water that could have been lawfully stored is bypassed for flood control purposes (*i.e.*, water is passed through the reservoir without being physically stored). Strictly speaking, "vacate" refers to the creation or maintenance of space in the reservoir. Thus, one vacates space by releasing water. However, for convenience and brevity, we also speak of vacating water in order to create or maintain storage space. Thus, "vacated" water includes both releases of previously stored water and bypass of water than is never physically stored.

The Refill 1 and Refill 2 rights are summarized in the table below:

Summary of Settlement Rights – Refill Litigation		
	Refill 1 (63-33734A)	**Refill 2 (63-33734B)**
Purpose	This "beneficial use right" formally implements the concept of free river refill (*i.e.*, refill does not occur under priority, except for 3 carve-outs, where refill does occur under priority).	This is a senior "enlargement right" which, due to its subordinations, functionally operates like a junior appropriation for second fill.
May be exercised under priority?	No. Except for the three carve-outs, Refill 1 is subordinated to all water rights (existing and future). Thus, diversion may occur only under "free river" conditions. However, Refill 1 operates under priority as to the three carve-outs.	Yes. Refill 2 may be exercised under priority against post-2014 water rights (as described in the subordination).
Subordination:	Subordinated to all existing and future water rights.	(1) All water rights included on a list attached to Refill 2. This list includes all known surface water rights through 1/30/2014. (2) All surface rights under 1.0 cfs with priority dates prior to 5/1/2014, even if omitted from the above list.
Carve-outs (which eliminate the subordination and allow the right to be exercised under priority):	(1) Surface water storage rights greater than 1,000 AF issued after 4/15/2019 (as described in Idaho Code § 42 115). (2) Managed ground water recharge rights issued after 4/15/2019. (3) All hydropower rights.	None.
Priority date	Due to the subordination, the 9/30/1965 priority date is irrelevant (except for the hydropower carve-out). For purposes of the other two carve-outs, the priority date is functionally converted to a 2019 priority.	Due to the subordination, the 3/16/1973 priority date functionally converts Refill 2 to a 2014 priority. The 3/16/1973 priority date was based on the date of a 1973 statute allowing storage of up to five AF/acre.
Quantity	3,672,732 AF/year. This corresponds to the largest recorded inflow into the reservoirs. In other words, the right is for the entire river flow.	587,056 AF/year. This is the quantity that could be stored under the 1973 statute's five AF/acre provision beyond the quantity authorized under the Base Rights

Refill 1 confirmed the Bureau's unlimited right to "free river" refill—that is, the right to refill with virtually no limitation when there is sufficient water in the river to satisfy all other priorities. Refill 1 does not include any priority right to call out other users (with three exceptions known as "carve-outs"). Refill 1 has a priority date of September 30, 1965, but the priority date is rendered meaningless due to its complete subordination to existing and future appropriations (except for the carve-outs). Thus, Refill 1 formalizes the Department's longstanding administrative practice of allowing free river refill (*i.e.*, not under right of priority), except for carve-outs that allow some refill under priority.

In contrast, Refill 2 may be exercised under right of priority as to all post-settlement rights (roughly speaking, post-2014 rights). Thus, it allows the reservoirs to "top-off" by curtailing post-settlement rights up to 587,056 AF/year (which is more than half the volume of the federal Boise River reservoirs). By providing a substantial quantity of priority-based refill, Refill 2 renders Condition 908 unnecessary on new water rights.

(10) Place of use

It is well established in Idaho and elsewhere that storage of water in a reservoir is a beneficial use, so long as the storage water is appurtenant to an identifiable area and applied to a beneficial use (either within the reservoir or after release), such as irrigation, hydropower, municipal, or recreation purposes.[71]

However, in Idaho,[72] the fact that storage is a beneficial use does not mean that the place of use corresponds to the location of the storage reservoir. Instead, the place of use looks to the location of the ultimate place of beneficial use (e.g., irrigation or power generation).

Accordingly, the "[Purpose] Storage" component of the right ordinarily does not have an associated place of use (unless the storage itself is the end purpose, e.g., "recreation storage" or

[71] In the irrigation context, storage is seen as protection against recurring drought and as a source of supplemental supply for appropriators whose natural flow rights may not provide them enough to complete the irrigation season. "The supreme court held in 1941 that the maintenance of a dam, under permit from the Department of Reclamation [now the Idaho Department of Water Resources], for the storage of flood and winter-flow waters, could not constitute a wrongful interference with decreed rights on the stream, provided the owner of the dam released during the irrigation season the quantities of water necessary to supply the decreed rights." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 45 (1968) (citing *Knutson v. Huggins*, 62 Idaho 662, 115 P.2d 421 (1941).)

"The storage of water for future uses has long been held to be a beneficial use." Robert E. Beck, 1 *Waters and Water Rights*, § 13.03 at 144 (1991) (citations omitted); "Initially, the system relented on this proposition [requiring immediate use] only with reference to the building of reservoirs to catch otherwise unusable seasonal flows and floodwaters. . . . Now, of course, municipalities are allowed to acquire supplies for projected future use; indeed, in many instances are required to, for long-term growth." Robert E. Beck, 1 *Waters and Water Rights*, § 12.03(c)(2) at 108 (1991) (citations omitted); Samuel C. Wiel, *Water Rights in the Western States* § 378 at p. 410 (1911); 45 Am. Jur. 2d *Irrigation* § 38 (1969). *But see*, *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) (Albuquerque's storage of San Juan/Chama water for 40 years was not a beneficial use due to evaporation losses.).

[72] We understand that this is not the practice in Utah, which treats the storage reservoir as the place of use.

"aesthetic storage").[73] However, this practice is not consistent. On occasion, Idaho storage rights list the reservoir as the place of use for the "[Purpose] Storage."[74]

For example, the three water rights held by Idaho Power Company for its Hells Canyon Complex (no. 3-10247 for Hells Canyon dam, no. 3-10246 for Oxbow dam, and 3-2018 for Brownlee dam) designate no place of use for the "Power Storage" component of those rights. Instead, a place of use at the power plant is designated for the "Power from Storage" component of these rights.

Another example is Lake Lowell, which is not designated as a place of use on water right no. 63-301A. Instead, that right designates 194,498 acres of irrigated land as the place of use.

In contrast, the "[Purpose] from Storage" component does have a place of use; it is the location of that end use. Thus, for "Irrigation from Storage," the place of use might be a specified irrigated land or a more broadly described irrigation district boundary.

In the case of hydropower, the place of use for "Power from Storage" (or "power") is the location of the power generation facility. For an on-stream reservoir, the power plant is often located at the base of the dam—in which case, the point of diversion and place of use are the same. However, the power generation facility may be located elsewhere. For example, Idaho Power's Oxbow dam impounds water at a dam in Adams County, Idaho and delivers it to a power station downstream on the Snake River (after the oxbow turn) in Baker County, Oregon. (See water right no. 3-10246.)

(11) The 24-hour fill policy

As a matter of administrative ease, the Department does not require very small reservoirs to obtain storage rights. The Department's rule of thumb is that if the facility can be filled in twenty-four hours, based on the authorized direct diversion rate of a natural flow or ground water right, then no separate storage right is required.[75] This simplifies the application process for farms, ranches, dairy operations, subdivisions, and the like that often make use of small holding tanks, ponds and other storage facilities.

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[73] For example, the three water rights held by Idaho Power Company for its Hells Canyon Complex (No. 3-10247 for Hells Canyon dam, No. 3-10246 for Oxbow dam, and No. 3-2018 for Brownlee dam) designate no place of use for the "Power Storage" component of those rights. Instead, a place of use at the power plant is designated for the "Power from Storage" component of these rights. The same is true for many rights held by the Bureau of Reclamation for on-stream reservoir storage; these rights designate the large area of irrigation and other uses as the place of use. E.g., No. 63-303.

[74] For example, the *Idaho Appropriation Application* lists Bear Lake as the place of use for each of the "[Purpose] Storage" components (Irrigation Storage, Municipal Storage, etc.). Additional Information, § 9, p. 2, attached to Application for Permit No. 11-7835 (Mar. 23, 2018).

[75] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 284 (1990). See also Norman C. Young, IDWR, *Administrator's Memorandum – Application Processing No. 67*, at 3 (reproduced as Appendix O).

The twenty-four hour rule is discussed in two pieces of IDWR guidance (both are reproduced in Appendix O):

- Jeff Peppersack, *Application Processing No. 73* (*Utilization of the 24-Hour Fill Allowance for Impoundments*) (Apr. 18, 2013).

- Norman C. Young, *Application Processing No. 67* (*Permitting Requirements for Ponds*) (Feb. 28, 2003).

The 2003 memorandum states:

> A water right permit is not required to construct and use a pond or ponds that are part of a system used to distribute and use water in accordance with a valid water right if the pond or ponds do not impound a larger volume of water than authorized for diversion within a 24-hour period under the water right or rights associated with the project. One example would be a pond constructed as part of an irrigation system to provide a higher rate of flow over a short period of time as required in some border irrigation systems.

Application Processes sing Memo No. 67, at 3.

In a 2007 decision, an IDWR hearing officer applied the rule with this explanation:

> Nonetheless, IDWR has recognized the need for short-term storage for irrigation sets of duration less than 24 hours. The shorter, more concentrated irrigations are necessary for golf courses, where irrigation during playing hours would frustrate the purpose of the irrigation. In addition, homeowners may also concentrate irrigation during shorter periods of the day. To accommodate the need for short-term storage, IDWR has allowed water to be delivered to storage by a direct flow water right, but has limited the storage to the volume of water that can be accrued by the direct flow authorized for a period of 24 hours.

IDWR Preliminary Order, Application for Amendment of Permit 95-9045 (Black Rock Utilities, Inc.), ¶ 13 at 6 (June 4, 2007).

(12) Storage and municipal water rights

On occasion, IDWR issues municipal water rights for storage purposes. These may follow the standard breakdown: "diversion to storage," "municipal storage," and "municipal from storage." See, for example, Water Right Permit No. 65-23750 issued to the Tamarack Resort in April 2020.

On other occasions, however, IDWR has recognized that storage incidental to delivery of water to municipal customers is included within the panoply of municipal uses and does not need to be called out on the face of a municipal water right. Two examples follow.

Black Rock Utilities, Inc.

The first involves the golf club and residential development known as Black Rock near Coeur d'Alene. A municipal provider known as Black Rock Utilities, Inc. serves that development. The irrigation system for the golf course employs aesthetic ponds used for storage.

In 2008, Black Rock filed an application to amend its permit No. 95-9045. (Although this was not a new appropriation, the principles with respect to storage rights for municipal water rights would be the same in the context of a new appropriation.)

Initially, the application for amendment of permit followed the standard practice of seeking storage for diversion to storage, municipal storage, and municipal from storage. However, Black Rock changed course and requested IDWR to issue the amended permit as a simple municipal water right without municipal components listed among the elements of the right.

The Department agreed. In 2010 it issuing a final order approving the permit amendment described only as municipal.[76]

Tamarack Resort

The second example is found in recent licenses for the Tamarack Resort between McCall and Cascade (Nos. 65-23811, 65-23812, 65-23813, and 65-23814) issued on March 13, 2019.

The permits for these licenses had been issued, according to traditional practice, for the full panoply of diversion components (diversion to storage, municipal storage, and municipal from storage). When licensed, however, the rights were issued by the Department as a simple municipal use. In doing so, the Department found that the complexity of separately listing storage components in the permit is unnecessary in the case of municipal rights. This is because municipal use is broadly defined to include storage that is incidental to the delivery of water for other municipal purposes.

As noted above, a permit was recently issued to the Tamarack Resort that included storage components. We are advised, however, that this was done only because the application sought those components. We are further advised that those storage components are likely to be removed at the time of licensing, leaving only a simple municipal use.

F. Duty of water

Closely related to the rule of beneficial use is the concept of "duty of water," which is that amount of water reasonably necessary to achieve the purpose for which the water was appropriated,

[76] Conditions were added to the permit, and later to the license, addressing storage quantities associated with the aesthetic ponds. That was a function of the fact that the right holder was constrained by an existing permit with a limited "reserve" that could be carved out for the new storage purpose. That complexity should not come into play in an ordinary application for a new municipal water right. Notably, these conditions were not displayed in the portion of the right showing the purposes and associated quantities as elements of the right.

and no more. The rather odd phrase "duty of water" is understood more easily in the context of the following quotation from an early Idaho case: "It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it." *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P. 865 (1926).

Each water right is limited by its "duty of water" even though the license, decree, or other basis for the right may not quantify that amount. For instance, a person might hold a license for a right to divert 10 cfs to irrigate a particular piece of land. Nevertheless, a competing user could argue that this rate of diversion is more than reasonably required. In making this argument, the other user would contend that the quantity stated in the first user's licensed right exceeded the duty of water and his diversion should be cut back to that duty. Such a challenge would arise ordinarily in a change or transfer proceeding, in a delivery call situation, or in a general adjudication.[77]

The duty of water concept ordinarily applies in the agricultural irrigation context and is often expressed in terms of cfs of diversions from the source per irrigated acre.[78] Some have suggested it has no application outside that context.[79]

In Idaho, a statutory presumption regarding the duty of water has been codified. "[N]o one shall be authorized to divert for irrigation purposes more than one cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary."[80] This amounts to one "miner's inch" of water per acre.[81] Thus, for example, if a farmer irrigates 200 acres, the state will presume the duty of water not to exceed diversions of 200 x 0.02 = 4 cfs, absent a showing that more is needed. Incidentally, diverting at constant rate of one miner's inch throughout a 183-day irrigation season

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[77] Presumably, a challenge based on duty of water also could arise where the complaining party asserts that an appropriator is diverting more than a reasonable duty during a particular time period (such as in the early or late season, when less water might be needed). Such a challenge would essentially be an assertion that the appropriator is wasting water.

[78] "The duty of water in the Payette River Drainage is generally based on not more than 0.02 cfs per acre with consideration given for reasonable losses incurred. . . . [T]he duty of water under the decree is 0.0167 cfs per acre (1.6 cfs/96 acres = 0.0167)." *Dovel v. Dobson*, 122 Idaho 59, 65, 831 P.2d 527, 533 (1992) (Justice McDevitt dissenting).

[79] "Water duty is limited to agricultural uses." A. Dan Tarlock, *Law of Water Rights and Resources,* § 5:66.

[80] Idaho Code § 42-202; *see also* Idaho Code § 42-220 (repeating the requirement in the context of issuance of water right licenses).

[81] A miner's inch is a flow rate equal to 9 gallons per minute. Under the Idaho standard, there are fifty miner's inches in a cubic foot per second ("cfs"); thus, a miner's inch is also expressed as 0.02 cfs.

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()4/15 to 10/15) yields nearly over seven acre-feet of diversions. Because annual consumptive use by crops in Idaho typically is less than three acre-feet (IDWR uses as much as 4.5 AF/year for some irrigation land), the inch-per-acre target is more than ample for most delivery systems. Indeed, Idaho irrigators using wells and sprinklers typically divert little more than the consumptive amount.

The duty of water will include a reasonable amount of seepage, evaporation and ditch carriage loss, and can vary from place to place depending on conditions. In addition, the one-inch-per-acre presumption can be overcome by evidence that more (or less) water is reasonably needed. For instance, a user could obtain a water right for diversions of 11 cfs if he could demonstrate that 10 cfs was required for application to his 500 acres and an additional 1 cfs was lost in transporting the water to the fields. Note that the water right is measured at the point of diversion. Only a portion of the water diverted under a user's water right, perhaps 50 percent, is actually consumed beneficially in many agricultural settings. As indicated above, canal diversions almost always are much higher per acre than ground water diversions.

The duty of water and beneficial use requirements both are central concepts in the corollary rule of Western water law that a water right does not include the right to waste water. In addition, the courts and legislatures of many Western states, Idaho among them, have announced that encouraging (or requiring) "maximum utilization" (or "optimum use") and efficiency also are legitimate subjects of state regulation.[82] This makes sense. The constitutional requirements of priority and beneficial use alone lay a broad foundation for these concepts.

G. Measurement

Water users are required to maintain headgates or other controlling works at the point of diversion suitable to the Department of Water Resources.[83] Water users must monitor and report their water usage only if there is a specific requirement to do so imposed by the Department. Such requirements, if they exist, are typically shown as a condition of the water right.[84]

In 1995, the Idaho Legislature authorized the Director to divide the state into water measurement districts to carry out the water measuring requirements of Chapter 7, Title 42, Idaho Code. The Director of IDWR issued an order on October 24, 1996, creating three water measurement districts covering the Eastern Snake Plain Aquifer in southern Idaho. Another has been added in the Big Wood River basin.

Increasingly, the Department is requiring the installation of more sophisticated measuring devices as a condition of new appropriations and transfers.

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[82] See discussion of maximum utilization and optimum use in section 7.E at page 82.

[83] Idaho Code § 42-701.

[84] Idaho Code § 42-701.

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H. Preferences

See discussion in section 24.A at page 751.

I. Water quality as part of water right holder's interest

The prior appropriation doctrine deals primarily with the allocation of water quantity, not quality. Protection of water quality is left largely to other state and federal laws and regulatory bodies.[85] To a limited extent, however, some courts have recognized the right of an appropriator of water to bar other water right users from polluting a common water source. Professor Davis summed up these authorities as follows:[86]

> Prior appropriation waste discharge cases hold that a senior appropriator cannot expect to retain natural quality of flow, but must expect some deterioration in quality by the activities of upstream junior appropriators. However, he is entitled to be free from unreasonable interference with the fair enjoyment of his prior appropriative right by material deterioration of water quality.

In 1939, the Idaho Supreme Court offered the following summary of the law on the subject of water quality under the prior appropriation doctrine:[87]

> Numerous authorities announce the doctrine that while a proper use of the water of a stream for mining purposes necessarily contaminates it to some extent, such contamination or deterioration of the quality of the water cannot be carried to such a degree as to inflict substantial injury upon another user of the waters of said stream. [Citations omitted] We believe the rule stated in Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 P. 465, 470; *Id*., 230 U.S. 46, 33 S. Ct. 1004, 57 L. Ed. 1384, is controlling in this case, namely: "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, *or even some degree of interference, so long as such do no substantial damage*." [Emphasis by Court.]

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[85] "The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state." *Shokal v. Dunn*, 109 Idaho 330, 341, 707 P.2d 441, 452 (1985) (Bistline, J.).

[86] Peter N. Davis, *Protecting Waste Assimilation Streamflows by the Law of Water Allocation, Nuisance, and Public Trust, and by Environmental Statutes*, 28 Nat. Resources J. 357, 368-69 (1988).

[87] *Ravndal v. Northfork Placers*, 60 Idaho 305, 311-12, 91 P.2d 368 (1939).

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> "What deterioration in quality would injuriously affect the water for irrigation, and whether or not the deterioration to which the defendant company subjected the waters in question injured the land of the plaintiff, were matters of fact;" Montana Company v. Gehring, supra.

The Department's rules for new water right appropriations establish this criteria:[88]

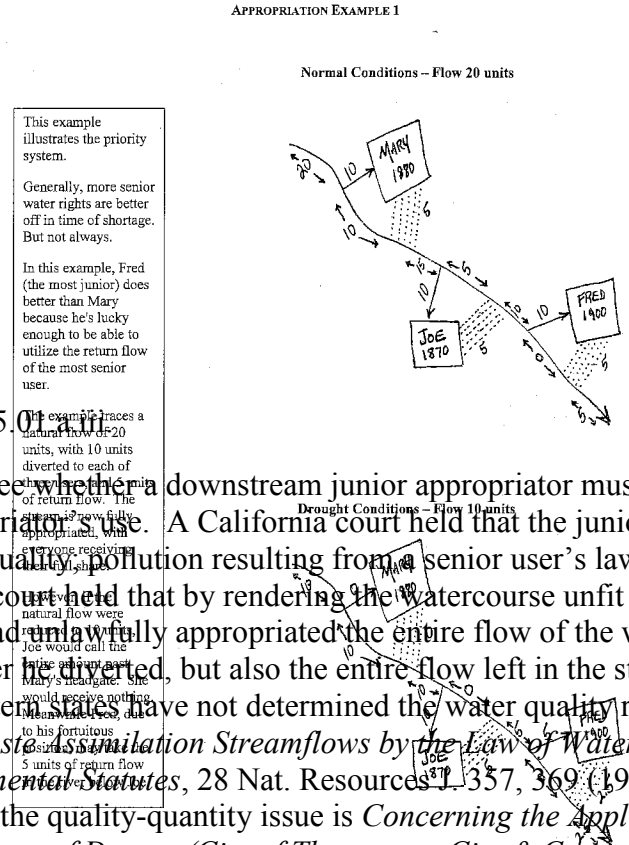
> The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

There has been little further litigation on the subject, and the above statements continue to provide the most complete expression of the law in Idaho.

Idaho's protection of water quality as a component of a water right has support from other states, as well.[89]

J. Priority of right: simple graphic examples

On the following pages, we set out some simple graphic examples demonstrating the operation of the priority system in a surface water context.



[88] IDAPA 37.03.08.045.01.a.iii.

[89] "Jurisdictions disagree whether a downstream junior appropriator must accept degraded water quality resulting from a senior appropriation's use. A California court held that the junior user takes the water as he finds it, both in quantity and quality; pollution resulting from a senior user's lawful use is considered part of his use. By contrast, a Colorado court held that by rendering the watercourse unfit for diversionary uses by a junior user, a polluting senior user had unlawfully appropriated the entire flow of the watercourse. The senior user had not only appropriated the water he diverted, but also the entire flow left in the stream by rendering it unfit for their use. Courts in most western states have not determined the water quality rights of junior appropriators." Peter N. Davis, *Protecting Waste Assimilation Streamflows by the Law of Water Allocation, Nuisance, and Public Trust, and by Environmental Statutes*, 28 Nat. Resources J. 357, 369 (1988) (footnote citations omitted). A Colorado case dealing with the quality-quantity issue is *Concerning the Application for Plan for Augmentation of the City & Cnty. of Denver (City of Thornton v. City & Cnty. of Denver)*, 44 P.3d 1019 (Colo. 2002).

This example illustrates the integration of stored water into the priority system.

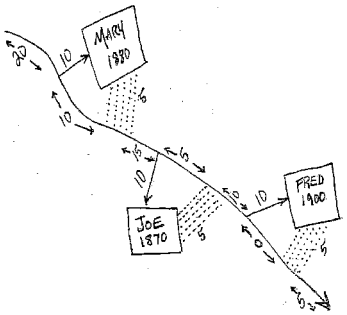
In the first scenario, three diverters each divert 10 units with 5 units of return flow. If under normal conditions 20 units are flowing in the stream, the stream is fully appropriated, with everyone receiving their full share.

If a new user needs water from this source, the only options are (1) to buy out an existing user, or (2) to construct storage.

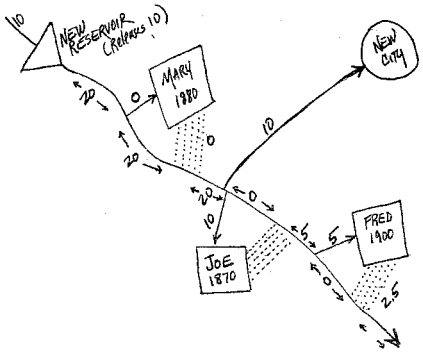
If a new reservoir is constructed on the stream, it will not be allowed to impound water so long as when flows are at 20 units, because it is all called for downstream. But it will be able to store high flows which occasionally occur.

Once stored, that water may be diverted at will by the new user, even calling it past senior natural flow water rights that have been curtailed during times of drought, as shown in the second diagram.

Normal Conditions – Flow 20 units
(Stream Fully Appropriated)



Drought Conditions – Flow 10 units
(Previously Stored Water Available)



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5. WATER USES THAT DO NOT REQUIRE A WATER RIGHT

A. Firefighting

The Department has long recognized that diversion of water from a natural water body to fight an existing fire does not require a water right. (As noted below, this is now codified.) However, routine sprinkling of water to maintain a vegetative barrier against fires is not considered fighting an existing fire and would require a water right.

Similarly, water stored for another purpose may be used to fight and existing fire. However, storage of water specifically for firefighting purposes would require a storage right just like any other storage of water.

In 1998, the Idaho Supreme Court approved the Department's inclusion of a general provision in all water rights decreed by the SRBA stating that the right may be used for firefighting. *A&B Irr. Dist. v. Idaho Conservation League* (aka *Basin-Wide Issue 5*) ("*ICL III*"), 131 Idaho 411, 415-16, 958 P.2d 568, 572-73 (1998) (McDevitt, J.). Indeed, the condition provides that any water, with our without a water right, may be used for firefighting.

The firefighting exemption was later codified, Idaho Code § 42-201(3)(a), along with an exemption for certain minor diversions for forest practices (such as dust abatement), Idaho Code § 42-201(3)(b).

IDWR's guidance documents on both RAFN[90] and non-RAFN[91] water rights provide that municipal ground water or natural flow water rights may not be obtained based on firefighting use. (See discussion in section 23.D(8)(e) at page 360 and section 23.D(8)(g) at page 366.) In other words, in quantifying a municipal water right, the quantity may not include a component for firefighting. The reason is that, as noted above, no water right is needed to fight an existing fire. Of course, a water right is required to store water to fight a future fire.[92]

On the other hand, any person, including a municipal provider, may obtain a non-municipal water right specifically for the purpose of firefighting. Such a right might be used not only to fight active fires, but to test diversion of water for fire flow testing. Such a right would constitute a property

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[90] Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

[91] Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M).

[92] Presumably, the Department would make an exception and allow a municipal right for firefighting if it could be shown that the water would not be physically present but for the existence and administration of the water right. That, however, would be an exceptional situation.

right with a priority right, and, presumably, under the right circumstances, such a right could later be transferred to another use. Since such a right is a non-municipal (and, hence, non-RAFN) right, it must be based and quantified upon present need, not future need.

B. Land application of effluent by municipal providers

In 2012, the Legislature enacted an additional exemption allowing municipalities, municipal providers as defined by Idaho Code § 42-202B, sewer districts, or a regional entities operating publicly owned wastewater treatment works to collect, treat, store, and dispose of effluent or stormwater where doing so "in response to state or federal regulatory requirements." Idaho Code § 42-201(8). See discussion in section 19.F at page 300.

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6. FORFEITURE AND ABANDONMENT

A. Overview

Because beneficial use is the basis for a water right, the failure to use a right, or a part of it, can result in its loss. Note how different this is from other forms of property. One does not forfeit ownership of a piece of land simply because he lets it sit vacant. But this is exactly what can happen to an unused water right; again, it is a right whose very existence is based on beneficial use. In other words, under the prior appropriation doctrine forfeiture is the other side of the beneficial use coin.

Water rights may be lost in several ways, the primary methods being forfeiture (an objective statutory rule) and abandonment (a common law doctrine based on subjective intent). Both rules operate throughout the West. Water rights lost through either abandonment or forfeiture revert to the state as unappropriated water and are either subject to further appropriation or serve to satisfy the rights of existing junior appropriators from the same water source. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). This does not mean that, a forfeited senior-priority water right can be picked up and diverted under that priority by another water user. Rather, by eliminating this right from the priority line, more junior rights effectively "move up the ladder" or become that much more reliable because they have fewer senior rights in front of them.

There has been a trend in Idaho, as in some other Western states, to avoid strict enforcement of the forfeiture statute, and several exceptions have been enacted in recent years. This is an interesting development given the increasing demands for water. Nevertheless, statutes and case law have increasingly provided the means by which an appropriator who has no present need for water, and no present ability to place it to beneficial use, still may retain the water right. On the other hand, any transfer of a water right, or any attempt to curtail other rights to serve it, still must answer to its actual beneficial use. *See, e.g., American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

A detailed discussion of forfeiture in Idaho is found in Peter R. Anderson, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?*, 48 Idaho L. Rev. 419 (2012).

B. Common law abandonment

Abandonment is a common law principle long recognized by western courts. Abandonment of a water right requires (1) an intent to give up the right, and (2) an actual relinquishment or surrender of the right. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); and *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

The "actual relinquishment or surrender" does not require a declaration other affirmative act. Rather it refers to the relinquishment of possession, i.e., the physical act (or non-action) of not using the water.

As Samuel Wiel put it:

> To constitute abandonment, properly speaking, there must be a concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that abandonment is always voluntary, and a question of fact.
>
> It has been said: "To constitute an abandonment of a water-right, there must be a concurrence of the intention to abandon it and the actual failure in its use."

Samuel C. Wiel, 1 Water Rights in the Western State § 567 (1911) (cited as authority in *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976)).

The standard of proof is high. "Intent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment." *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). "Such intent may be evidenced by non-use for a substantial period of time, but mere non-use is not a per se abandonment." *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976).

The "abandonment" doctrine still applies in Idaho. However, it rarely is encountered because the requisite proof of a mental state (i.e., the intent to abandon) can be difficult to make.

C. The forfeiture statute

Idaho's water code has long contained a provision declaring that if a water right is not placed to beneficial use for a period of five years, it is "forfeited"—regardless of the owner's intent.[93] Section 42-222(2) provides, in part:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to water shall revert to the state and be again subject to appropriation under this chapter, except that any right to the use of water shall not be lost through forfeiture by failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

Idaho Code § 42-222(2).[94] *See*, *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992). *See also* Idaho Code § 42-104 declaring that "when the appropriator or his successor in interest ceases to use it for such [beneficial] purposes, the right ceases."

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[93] Predecessors to the current forfeiture provision have been on the books since 1903. 1903 Idaho Sess. Laws, at 223-24 (H.B. 146) (establishing a two year forfeiture period). In 1905, the period was extended to five years. 1905 Idaho Sess. Laws, at 27 (H.B. 19).

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This provision is followed by another authorizing the Department to extend the five-year period for an additional five years upon a showing of "good and sufficient reason for nonapplication." Idaho Code § 42-222(3) (This provision was added in 1933. 1933 Idaho Sess. Laws, ch. 193.) However, this appears to require an affirmative action by the user to obtain the extension prior to the expiration of the first five-year period. Moreover, the time may not be extended further than a total of ten years under this provision.

Courts have interpreted the statute as not to apply to water rights where the non-use results from circumstances beyond the right holder's control. *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). The issue of what qualifies as a circumstance beyond the right holder's control has been treated as a question of fact. Moreover, forfeiture does not apply if there is no need to divert water due to wet weather conditions. For instance, a storage right in a reservoir may be held for many years in anticipation of a drought.

Forfeiture must be proven by "clear and convincing evidence." This is a heightened evidentiary standard applicable in special cases such as abandonment,[95] forfeiture,[96] fraud,[97] and prescription[98] where the outcome is one disfavored in the law.

D. Statutory exceptions to forfeiture

In addition, numerous specific statutory defenses to forfeiture have been enacted over time. Idaho Code § 42-223 (previously codified to section 42-222(2)).[99] The statutory exceptions to forfeiture include:

(1) Water rights appurtenant to lands placed in a federal cropland set aside program.
(2) Water right held by municipal provider for "planning horizon" needs.
(3) Water rights replaced by land application of waste water.
(4) Ground water rights not diverted in compliance with a ground water management plan aimed at bringing ground water withdrawals in balance with ground water recharge.
(5) Water rights placed in the water supply bank.[100]
(6) Nonuse resulting from circumstances over which the water right holder has no control.

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[94] See also Idaho Code § 42-350 (added by 1986 Idaho Sess. Laws, ch. 313). This provision authorized IDWR to issue a show cause order and to initiate proceedings leading to the revocation of a license under which water has not been put to beneficial use for five years. As of this writing, there are no published decisions addressing this statute.

[95] *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (l982).

[96] *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001).

[97] *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245, 1249 (2000).

[98] *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000).

[99] *See*, *Jenkins v. State, Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

[100] The water supply bank protection from forfeiture is repeated in Idaho Code § 42-1764(2).

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(7) Nonuse of water supplied by an irrigation delivery entity (where nonuse is beyond the control of the delivery entity).
(8) Nonuse resulting from exclusion of land from an irrigation district (where nonuse is beyond control of the irrigation district).
(9) Nonuse resulting from a water conservation practice.[101]
(10) Nonuse resulting from the water right being used for mitigation purposes.
(11) Nonuse of a water right for "mining, mineral processing or milling," where the nonuse was "due in whole or in part to mineral prices," and where the water right owner "has maintained the property and mineral rights for potential future mineral production."
(12) Codification of resumption of use under *Sagewillow*.

E. The "no control" issue

Idaho Code § 42-223(6) sets out the defense to forfeiture that "the water right owner has no control."

"Typical circumstances in which this [no-control] exemption might apply include weather-related factors, family or civilian emergencies, financing problems, legal difficulties, or the destruction of diversion facilities." Peter R. Anderson, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?*, 48 Idaho L. Rev. 419, 435 (2012).

There is little Idaho case law on the subject. One issue addressed by the courts is that the defense applies when water under the right is not physically available:

> The availability of water qualifies as a circumstance over which an appropriator has no control. That is, "for a water right to be forfeited water must be available to satisfy the water right during the alleged period of non-use." In *Re SRBA Case No. 39576, Subcase No. 65-05663B, Order of Partial Decree*, Idaho Dist. Ct. for the 5th Judicial District (May 9, 2002), p. 32–33 (Burdick, J.) ("*Wood v. Troutt*"). Similarly, this Court recently held that a senior water right holder was "entitled to the full measure of its rights, subject to availability of water." *Idaho Ground Water Ass'n v. IDWR*, 160 Idaho 119, 132, 369 P.3d 897, 910 (2016).").

Barnes v. Jackson , 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018) (J. Jones, J.).

F. Resumption of use

The courts also have carved out another special exception to forfeiture and abandonment, known as the resumption doctrine.[102] Under this doctrine, forfeiture may be avoided despite a period of nonuse, if the right is resumed before any third party obtains rights that would be impaired by the

[101] See discussion in section 18.C beginning on page 281.

[102] *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Carrington v. Crandall*, 65 Idaho 525, 532-32, 147 P.2d 1009, 1011 (1944); *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.).

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resumption. Until 2003, the scope of this doctrine and, in particular, the nature of third party rights that would defeat the resumption, was unclear.

In *Sagewillow, Inc. v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 70 P.3d 669 (2003) (Eismann, J.), the Supreme Court clarified the circumstances in which resumption will be allowed.[103] In that case, a landowner applied to the Department to change the place of use of numerous ground and surface water rights that originally had been authorized for irrigation of up to 2,390 acres in the Little Lost River Basin. The application was protested, and at the hearing it was established that two of the ground water rights appurtenant to approximately 640 acres had been appropriated in the 1960s to facilitate obtaining federal desert land entry ("DLE") patents, and thereafter had been abandoned. Testimony also showed that between the late 1960s and 1989, no more than 1,412 acres had ever been irrigated under the remaining rights by Sagewillow's predecessor in interest. In 1989, Sagewillow purchased the property and immediately began redeveloping the irrigation system. By 1994, Sagewillow had brought approximately 2,390 acres back under irrigation, and then sought to change the place of use of the rights to reflect how they were then being used. The Department held that the two ground water rights appurtenant to 640 DLE acres had been forfeited in their entirety and that the portions of the remaining rights appurtenant to anything more than 1,412 acres also had been forfeited. The Department approved the transfer on condition that Sagewillow could irrigate no more than 1,412 acres. On appeal, the primary issue was whether Sagewillow had lawfully resumed the water rights and thereby avoided forfeiture.

The Supreme Court held that common law resumption remains a valid defense to forfeiture that can be defeated by a showing that a third party has made a "claim of right" to the water prior to the senior's resumption of use.[104] A third party has made a claim of right to the water if he has: 1) instituted proceedings to declare a forfeiture; 2) obtained a valid water right authorizing the use of such

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[103] A prior case, *Sagewillow, Inc. v IDWR* ("*Sagewillow I*"), 135 Idaho 24, 13 P.3d 855 (2000), involved the same parties and facts. On appeal, however, the Supreme Court vacated and remanded the decision of the District Court, Seventh Judicial District, which had affirmed the Department's findings of forfeiture, on the ground that the Snake River Basin Adjudication Court had exclusive jurisdiction. In response, the 2001 Legislature enacted Idaho Code § 42-1401D to provide that judicial review of Department actions subject to review under the Idaho Administrative Procedure Act (including *Sagewillow I*) were not to be heard in the SRBA district court, but rather in the district courts authorized by Idaho Code § 67-5272. The case was immediately transferred from the SRBA back to the Seventh Judicial District Court, which reissued its original order affirming the Department without further proceedings. The matter was back before the Supreme Court on a Sagewillow's Notice of Appeal by April of 2001.

[104] The court did not address the argument made by the protestants, James Mays and Mays Land & Livestock, that the common law resumption doctrine was abrogated by enactment of Idaho Code § 42-222(4). That statute requires an application to be filed with the Department prior to the running of the forfeiture period requesting an extension of time to resume the use. The statute also establishes a procedure by which the Department determines whether other water rights will be "impaired by granting an extension of time within which to resume the use of the water," and whether good cause exists for the nonuse. Justice Kidwell, in a separate opinion concurring only in the result (joined by Justice Schroeder), found this argument persuasive. *Sagewillow II,* 138 Idaho at 846, 70 P.3d at 684.

water with a priority date prior to the resumption; or 3) used the water pursuant to an existing right. *Sagewillow II,* 138 Idaho at 842, 70 P.3d at 680. The court also held that the resumption need not be made by the original appropriator, but must be upon the lands to which the water right originally was appurtenant. *Id*. Resuming the use of only a portion of the forfeited or abandoned right will not prevent a loss of the non-resumed portion. *Id*.

The Court remanded the case to the Department for further proceedings, in part because:

> [T]he Department did not make any finding that after the statutory period of nonuse and before resumption of use by Sagewillow and/or its predecessors, any junior appropriator used water that was available because of continued nonuse by Sagewillow and/or its predecessors. The Department likewise did not make any finding that during such period any third party applied for and obtained a water right in the same or an interconnected watercourse. For example, the Department did not find that the two watercourses involved in this case were overappropriated and that because of continued nonuse by Sagewillow and/or its predecessor, junior water users received water that they would otherwise not have received.

Sagewillow II, 138 Idaho at 838, 70 P.3d at 676.[105]

Thus, although a water right may have gone unused for a significant period (in *Sagewillow II* nonuse continued for over twenty years), it may be resumed with the original priority date and to the original extent if it can be shown that junior water users did not obtain a determination of forfeiture or directly benefit from the forfeiture.

This is a big "if." As a practical matter, it is unlikely that a valid resumption of use can occur on many water systems in Idaho. This is because these systems already are fully (or over) appropriated.[106] By implication, there are juniors on the system who are benefiting from the senior's non-use and would be harmed by the resumption. Interestingly, although resumption essentially serves as an affirmative defense in the face of facts demonstrating forfeiture or abandonment, the court did not place the burden of proof on the party asserting the resumption defense. Rather, the court held:

> [A]lthough the owner of the water right has the burden of raising defenses to statutory forfeiture, the burden of persuasion remains on the party

[105] Compare *Sagewillow II*'s focus on whether the junior had made use of the water, with the Court's statement in *Jenkins* that a resumption that changes a junior's relative status on the ladder of priority clearly causes injury to the junior. ("Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to the right holder.")

[106] *Sagewillow II,* 138 Idaho at 846, 70 P.3d at 684 (Justices Kidwell and Schroeder concurring in result).

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> claiming that the water right was forfeited, and that party must disprove the defense.[107]

Sagewillow II, 138 Idaho at 842, 70 P.3d at 680.

G. Partial forfeiture

Partial forfeiture refers to forfeiting a portion of a water right when that portion is not beneficially used. The concept of partial forfeiture was challenged by a group contending that a water right cannot be forfeited if any part of it is put to beneficial use. The Idaho Supreme Court rejected that argument and confirmed that the forfeiture statute applies where a portion of the beneficial use served by a water right goes unused, without adequate excuse, for the statutory five-year period. *State v. Hagerman Water Right Owners* ("*Hagerman I*") ("*Basin-Wide Issue 10*")*,* 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.).

The Hagerman Water Right Owners contended that Idaho Code § 42-222(2) contemplates only a total forfeiture, not partial forfeiture. The Idaho Supreme Court found that the statute is ambiguous, but construed it to allow partial forfeiture, based on consistency with longstanding prior administrative practice and sound public policy. In particular, the Court found that partial forfeiture advanced the "goal of securing maximum use and benefit of our natural water resources." *Hagerman I*, 130 Idaho at 735, 947 P.2d at 408.

In a companion case, *State v. Hagerman Water Right Owners, Inc.* ("*Hagerman II*"), 130 Idaho 736, 947 P.2d 409 (1997), the Court said that the Department could not report a water right for less than its prior decreed quantity simply because it was not being beneficially used to the same extent today. The only reason this "beneficial use" issue was raised is that the SRBA judge (Judge Hurlbutt) recently had rejected partial forfeiture (and abandonment is difficult to prove). Consequently, the Department was trying at the time (prior to *Hagerman I*) to find another legal theory on which to justify reporting and recommending water rights at their current level of use.

For example, consider the situation where a farmer has a 4 cfs water right to irrigate 200 acres, but then takes 50 acres out of irrigation for use as a processing facility, a housing development, or some other non-irrigated use. The "forfeiture clock" would begin running as to a portion of the water right. After five years, one-fourth of the water right, or 1 cfs, would be subject to a ruling that it had been forfeited. Such a result is hardly surprising, given that the foundational principles of the prior appropriation doctrine are beneficial use, the avoidance of waste, and maximum use of the resource. Of course, the farmer could avoid forfeiting this portion of the right by transferring it to some other use or placing it in a "water bank" or "rental pool" established pursuant to state law.[108]

Under the above example, one also might argue that the farmer could be deemed to have abandoned that portion of his water right, because his intent clearly was to stop using it. Nonetheless,

[107] *Id.,* 138 Idaho at 842, 70 P.3d at 680.

[108] Idaho Code §§ 42-1761—42-1766.

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abandonment is considered difficult to prove, and requires some type of legal or administrative action to confirm it. As a practical matter, the courts are most likely to allow the five years, as a kind of "grace period," in which the right holder has the opportunity to seek to use the water right elsewhere or for a different use. Of course, in the transfer proceeding the agency will evaluate the amount of historical use under the right, including consumptive use, to determine what conditions must be imposed on the transfer to avoid causing injury to other water rights. Periods of nonuse may come into play in that analysis.

One frequently hears of water right holders who do not actually place some or all of their right to beneficial use but who claim that the right is not subject to forfeiture because they divert waters under the right once every season, or irrigate for a few days, or keep their ditch full. But diverting alone does not suffice to establish beneficial use. Water right holders who are using this technique may be in for a rude awakening if they ever attempt to transfer the right or if the right is subjected to the scrutiny of a water rights adjudication.

Partial forfeiture is triggered by a reduction in beneficial use (such as irrigating only a portion of the lands intended to be served by the right). IDWR takes the position that partial forfeiture does not apply to the diversion rate associated with a water right, so long as the full beneficial use is maintained. For instance, suppose that a farmer initially used the full diversion rate associated with the water right, but later changed the method of irrigation (e.g., from flood to sprinkler) so that the full diversion rate no longer was required to accomplish the beneficial use. The Department's position is that this would not result in a reduction of the diversion rate associated with the right. That farmer would be entitled to return to the previous method of irrigation employing the higher diversion rate (without notice to the Department or anyone else). Other western states have taken a more rigorous view of this issue; the Idaho Supreme Court has yet to address it.

H. The *Peiper* case and its codification

In Idaho, special considerations come into play in dealing with forfeiture of water rights held by irrigation water delivery entities. (For background on various types of water delivery entities *see* discussion in section 6 at page 512.) One reason the analysis is complicated is that the delivery entity typically holds title (at least legal title) to the water rights, while the landowner-irrigator actually applies the water to beneficial use (and may be seen as holding "beneficial title" to his or her share of the water right). The question, then, is what happens when the landowner-irrigator inexcusably fails to irrigate her land for the statutory period? Is the corresponding portion of the water right—which presumably is in the name of the irrigation entity—forfeited?

The obvious answer would seem to be "yes." After all, failure to place a water right to beneficial use (irrespective of who owns it) violates the most basic rule of the appropriation doctrine. One would think that both forfeiture and abandonment would apply. The Idaho Supreme Court seemed to have so held in 1908:

> [T]he appropriation and diversion of water by a ditch company that is not prepared to use the water itself is practically valueless without water

> consumers. In other words, it takes the water user, applying the water to a beneficial purpose, to enable a ditch company that has appropriated waters for sale, rental or distribution, to continue the diversion of the water. If it should cease to have water users or consumers, and cease to apply the water to a beneficial use, its right to divert the water would cease.

Farmers' Co-Operative Ditch Co. v. Riverside Irrigation ., 14 Idaho 450, 458, 94 P. 761, 763 (1908) (Ailshie, C.J.).

And again in 1931:

> And where a ditch is used in common for the conveyance of water for two appropriations, each owner may sell or abandon his right to the ditch, separate from the other [citation], the same right belongs to a stockholder in a mutual ditch company [citation].

In re Dep't of Reclamation, 50 Idaho 573, 579, 300 P. 492, 494 (1931) (emphasis added).[109] There are many instances where suburban landowners, despite paying annual assessments to a ditch company or irrigation district, have elected to stop using the entity's water for a variety of reasons. The water typically still is diverted from the river, but just no longer serves such owners' parcels. Ordinarily, this would suggest forfeiture or abandonment of that portion of the water right.

Nevertheless, in 1999 the Idaho Supreme Court ruled that a Carey Act operating company (a type of mutual irrigation company) does not suffer forfeiture of a portion of the water right issued in its name when one of its shareholders fails to apply his share of the water to a beneficial use. *Aberdeen Springfield Canal Co. v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999) (Silak, J.).

The *Peiper* case arose in an unusual context. This was not a dispute among competing water right holders. Nor did it involve an action or determination by an administrative agency dealing with forfeiture. Instead, the forfeiture issue was raised by the landowners, Mr. and Mrs. Peiper, when the canal company sought to recover assessments that had not been paid. The Peipers refused to pay because they and their predecessors had not used not used any irrigation water from the canal company in over 30 years and contended that the water right (or portion thereof) appurtenant to their property had been forfeited. Based on this, they argued they no longer were obligated to pay assessments.

The Court expressed no sympathy for the Peipers. "The Peipers wish to use forfeiture only to avoid paying maintenance assessments. A finding of forfeiture here would do nothing to advance the policy reasons that motivate the [forfeiture] statute's existence." *Peiper*, 133 Idaho at 87, 982 P.2d at 922. The Court continued:

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[109] *In re Dep't of Reclamation* involved a single ditch shared by (1) a mutual canal company and its shareholders and (2) a private water user who owned a separate water right using the same canal. As noted in the quotation above, however, the rule is the same when dealing with transactions among shareholders.

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> Such a ruling [for forfeiture] would give stockholders, who are not appropriators, the power to determine the fate of ASCC's water rights. If a number of stockholders chose not to use their share of ASCC's water for the statutory period, ASCC's water right would gradually revert to the state through partial forfeiture. If the Peipers' argument were valid, ASCC could only watch helplessly while its water right was lost.

Peiper, 133 Idaho at 87, 982 P.2d at 922 (citations omitted).

The Court's legal reasoning was based on a technical point—the observation that forfeiture applies to the "appropriator" of the water, not to the end user:

> In almost every case where forfeiture has been before this Court, the Court has held I.C. § 42–222(2) provides that an appropriator who fails to apply the water right beneficially for a period of five consecutive years loses all rights to use such water, regardless of intent. . . . The forfeiture statute was not intended to apply to settlers within a Carey Act project who were not themselves the appropriators of the water from the public stream of the state.

Peiper, 133 Idaho at 87, 982 P.2d at 922 (emphasis original) (citations and quotation marks omitted).

One might argue that the *Peiper* case is an anomalous application of the rule of forfeiture that should be limited to its particular facts.[110] But the Court's opinion does not call for such a narrow application. Indeed, it marked a sharp departure from the beneficial use requirement and the principle that the shareholder-irrigator holds beneficial title to that portion of the water right appurtenant to her property and may transfer, sell, forfeit, or abandon it.[111]

[110] In another part of the *Peiper* decision, the Court mentioned that the water not used by the Peipers may have been rented to other users. *Peiper*, 133 Idaho at 87, 982 P.2d at 922. If the *Peiper* decision were limited to situations in which the water company is making some substitute use of the water, that would be a far more limited ruling. If substitute use is not a requirement (and, frankly, it does not appear to be), then the *Peiper* case amounts to overturning *Farmers' Co-operative* discussed above.

[111] Mutual canal companies and irrigation districts hold no more than nominal title to the water right while their shareholders or patrons who use the delivered water hold beneficial title. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, C.J.); *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412 (1937). *See also* discussion ownership of water rights in water delivery entities in sections 6 and 7 of this Handbook.

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Irrigation entities applauded the decision, which was promptly codified by the Idaho Legislature in 2002 at their urging. H.B. 569, 2002 Idaho Sess. Laws, ch. 343. Indeed, the codification applies the non-forfeiture protection even more broadly than did the decision.[112]

The statutory exception to the forfeiture rule now reads:

> (7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

Idaho Code § 42-223(7).

The 2002 amendment provides that forfeiture protection applies not just to Carey Act companies, but to any irrigation distribution entity that holds a water right for use by its shareholders (e.g., a mutual canal company) or distributees (an irrigation district). Indeed, the statutory forfeiture protection is not limited to irrigation entities or irrigation water. Indeed, it applies to "any other company, corporation, association or entity which holds water rights for distribution to its landowners, shareholders or members." That would appear to cover, for example, a homeowners association that operated a water delivery system for its members within a subdivision or planned community development.

The statute does not require that water not used by one landowner be used elsewhere instead. Instead, the protection applies any time the non-use is not "subject to the control" of the company. Given that a water entity would rarely if ever be able to force its members or irrigators to use water, that is an easy test to meet. Indeed, it would also appear to protect from forfeiture a water right licensed to a homeowners association based on the "stub out" rule despite the fact that homes are not built for many years.

The effect of *Peiper* and its codification appears to be that non-use by subject entities is absolutely protected from forfeiture so long as the non-use is occurring for reasons beyond the control of the entity. But the lack of forfeiture still does not settle the question whether the water right was placed to beneficial use, and this will be relevant in any attempt to transfer the water right.

I. Tolling of "forfeiture clock" for SRBA claims

In two sub-cases, the SRBA Court has ruled that the forfeiture statute is tolled for water rights once a claim for them is filed in the SRBA, and that the tolling continues until a partial decree is issued

[112] One could argue that the statue runs afoul of the Idaho Constitution's beneficial use requirement. Likewise, its retroactive effect could be seen as constituting an uncompensated taking of vested property rights. To the authors' knowledge, no one has raised these claims.

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for that right.[113] Moreover, once the partial decree issues, the statutory period for non-use begins to run anew and does not tack on pre-SRBA non-use.[114]

The Department adheres to this policy of restarting the forfeiture clock after the partial decree enters.[115]

Thus, by way of example, if a water right holder ceased irrigating without excuse or exception in 1986, filed a claim the SRBA four years later in 1990, and had that claim adjudicated in 2004, he or she would be entitled to a partial decree without forfeiture, and the five-year clock for forfeiture would begin again in 2004—despite 18 years of nonuse.

In *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Case*"), Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (Barry Wood, J.), the SRBA court held expressly that filing a claim in the SRBA tolls the forfeiture clock. *Facility Volume Case* at 26-28.

In *McCray v. Rosenkrance*, 135 Idaho 509, 516, 20 P.3d 693, 700 (2001) (Kidwell, J.), the Court declined to take up the defense that filing a claim in the SRBA tolls the forfeiture clock because the issue had not been preserved on appeal.

J. Procedure

Unlike the practice in other states, the Idaho Department of Water Resources does not actively evaluate water rights to ferret out potential forfeitures. The forfeiture question arises most often in disputes between right holders, in an adjudication, or in those cases where one seeks to transfer a water right.

In a transfer proceeding, the Department typically will investigate whether there has been a forfeiture or abandonment of the right sought to be transferred; the state will not allow a forfeited water right to be brought "back to life" by transferring it to another user. To do so would result in injury to

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[113] *In re SRBA*, Case No. 39576, Subcase Nos. 36-02708 *et al.* (*Facility Volume* cases) (Idaho Fifth Judicial Dist., May 2002) (R. Barry Wood presiding); *In re SRBA*, Case No. 39576, Subcase No. 65-05663B (*Wood v. Troutt*) (Idaho Fifth Judicial Dist. - SRBA, May 2002) (Judge Roger S. Burdick).

[114] "Once the partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed water right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew." *Wood v. Troutt* at 21.

[115] "The department will presume, absent other information indicating forfeiture, that the right has not been forfeited if the department's water measurement records, aerial photography, remote sensing, or other information, shows use of water during the previous, consecutive, five-year period." *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 22 (Dec. 21, 2009) (reproduced in Appendix L.)).

other users who benefited from, or obtained their rights in reliance on, the prolonged non-use of the water right.[116]

However, the Department is not required in all circumstances to evaluate forfeiture in a change case. It may choose not to do so, for instance, where it is apparent that the SRBA court will review the issue. A hearing officer summed up the law this way in a recent order:

> Determining whether a change does not enlarge a right or injure existing rights requires IDWR, in the first instance to determine whether the right exists at all. The Idaho Supreme Court recognized that this means that IDWR may investigate whether a water right has been forfeited or abandoned. *Jenkins v. IDWR*, 103 Idaho 384, 387 (1982). A logical extension of the *Jenkins* analysis is that IDWR must also determine whether an unadjudicated, beneficial use or common law water right exists at all before it can be changed. The Idaho Supreme Court has also ruled, however, that forfeiture and abandonment do not necessarily need to be adjudicated in a change proceeding. [*Sagewillow v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 70 P.3d 669 (2003).] No similar pronouncement has been made whether IDWR must determine whether a beneficial use right even exists, before it can be changed.[117]

[116] *Jenkins v. Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

[117] Order re Motion for Stay and Scheduling Order, *In the Matter of Application for Transfer of Water Rights in the Name of United Water Idaho, Inc., Integrated Municipal Application Package (IMAP)*, Idaho Dep't of Water Resources (Nov. 12, 2003) (Peter R. Anderson, Hearing Officer).

7. GROUND WATER FUNDAMENTALS

A. Introduction

Idaho's Constitution specifically establishes the appropriation doctrine in Idaho only with respect to water diverted from natural streams. The operative language provides:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . . Priority of appropriation shall give the better right as between those using the water. . . .

Idaho Const. art. XV, § 3.

The Constitution makes no mention of ground water. Nonetheless, nine years after statehood, Idaho's legislature asserted its authority over "subterranean waters," and declared that they were subject to appropriation.[118] And it was not until 1931 that Idaho's Supreme Court had the opportunity to reason, "by analogy," that ground water rights could be appropriated and administered, at least as among themselves, under the prior appropriation doctrine.[119]

As will be discussed in detail below, the ensuing years have seen the dramatic development of Idaho's ground water resources, to the point that significant conflicts between surface and ground water right holders have come to dominate Idaho water management and jurisprudence during the past twenty years. These conflicts are fostered by continuing uncertainties about ground water development's effects on surface water supplies, and by fundamental disagreements about the legal framework that should govern conjunctive administration of interconnected water sources.

B. Ground water is subject to appropriation

When compared to the surface water appropriation and administration system in the West, the history of ground water development and administration has been relatively brief. The complex hydrogeology of ground water sources, and the lack of adequate pumping technology, inhibited early exploitation of this abundant resource. Indeed, early understanding of ground water throughout the West often rested as much on superstition as on scientific observation. Despite these initial hindrances, Idaho now ranks among the top five states in terms of the volume of ground water used.[120]

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[118] *See* 1899 Sess. Laws 380 (codified at Idaho Code 42-103); Idaho Code § 42-101.

[119] *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049, 1053 (1931).

[120] The Idaho Groundwater Quality Council estimates that ninety percent of Idaho's drinking water comes from ground water sources and Idahoans divert approximately 6,500 million gallons of ground water per day. Irrigated agriculture accounts for the majority of ground water usage in the state. Idaho Ground Water Quality Plan, Protecting Ground Water Quality in Idaho, Idaho Ground Water Quality Council (1991).

Court decisions from the late 1800s and early 1900s reflect the limited understanding that people then had of the ground water resource. Like some other prior appropriation states, Idaho's Constitution authorizes appropriations from "natural streams," but does not mention ground water.[121] In 1899, the Idaho Legislature passed an act that provided that appropriations could be made from subterranean waters as well as from rivers, streams, lakes and springs.[122] Despite this statute, disputes continued into the 1930s regarding whether ground water was subject to the prior appropriation doctrine. Several of the early reported court decisions involved contests where each party labored to prove or disprove that a particular diversion was from water that flowed in an underground channel with a defined bed and banks so as to be an appropriation of water from a "natural stream."[123]

In 1931, Idaho's Supreme Court confirmed that ground waters were subject to appropriation under the priority doctrine either by the constitutional method of diversion and application to beneficial use, or by the statutory permit procedures.[124] The subsequent enactment of Idaho's Ground Water Act in 1951[125] established a comprehensive scheme of ground water appropriation, administration and protection, and validated pre-existing ground water appropriations. It also swept aside, through a simple definition, disputes over what is and what is not ground water: "'Ground water' is all water

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[121] Idaho Const. art. XV, § 3.

[122] 1899 Sess. Laws 380 (codified at Idaho Code § 42-103). Idaho's Territorial Statutes provided that "[t]he right to the use of the running water flowing in a river, or stream, or down a canyon or ravine, may be acquired by appropriation." Idaho Rev. Stat. § 3155 (1887).

[123] Occasionally, facts (or assumed facts) actually corresponded with the Stygian conception of ground water, in which subterranean watercourses were believed to flow in well-defined channels. An example is reported in *Medano Ditch Co. v. Adams*, 68 P. 431 (Colo. 1902). Medano Creek prehistorically had flowed west from the Sangre de Cristo Mountains in southern Colorado, and had served as the source of water for Big Springs Creek. Subsequent geologic events formed the Great Sand Dunes, which covered the Medano Creek channel to a depth of several hundred feet. Although a majority of the surface flow of Medano Creek thereafter was deflected by the dunes to the southwest, significant subsurface flows continued to follow the original channel under the dunes to emerge at the head of Big Springs Creek seven miles to the west. In resolving a dispute between appropriators, the Colorado court held that the ground water flows were within a natural stream within a defined bed and banks and the junior's appropriation from Medano Creek was enjoined to protect senior appropriations from Big Springs Creek. Colorado continues to observe legal distinctions between appropriations of surface and ground waters, although most ground waters in that state, deemed "tributary groundwater," are administered conjunctively with surface water courses.

Examples of water flowing in defined channels also exist in the Idaho's Snake Plain Aquifer where lava tubes carry large flows of water for considerable distances and where it has been hypothesized that the Big Lost River flows southwest in one or more ancient buried river channels, then spreading into the basalt- and sediment- layered Eastern Snake Plain Aquifer to emerge from the canyon walls in the Snake River's Thousand Springs reach generally between Twin Falls and Bliss, Idaho. For purposes of appropriation and administration, however, surface and ground waters are treated similarly under Idaho law.

[124] *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931).

[125] 1951 Idaho Sess. Laws, ch. 200 (codified as amended at Idaho Code §§ 42-226 to 42-239).

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under the surface of the ground whatever may be the geological structure in which it is standing or moving."[126]

The Ground Water Act was amended in 1953 to provide, among other things, that the doctrine of first in time is recognized for ground water, but could not be exercised so as to block full economic development of the water resource. Prior ground water appropriations are to be protected through the maintenance of reasonable pumping levels. The 1953 amendments also granted the Department authority to protect ground water from depletion and to prohibit ground water withdrawal from existing wells when necessary to protect senior ground water appropriations.[127]

C. Ground water appropriation

After 1963, the application, permit, and license procedures became the exclusive means of acquiring ground water rights in Idaho.[128] However, the exceptions to the permit/licensing requirements still exist for domestic wells and drainage and recovery wells.[129] In addition to these exemptions, domestic wells drilled prior to March 29, 1978 may be absolutely protected from any significant drawdown by junior ground water diversions—that is, this class of domestic wells are not burdened by the "reasonable pumping level" obligation.[130] Indeed, this view of the law is reflected in a condition that has been included in at least some new ground water permits issued by the Department:

> The right holder is responsible to insure that pumpage under this water right does not directly cause the water level to significantly decline in any domestic well drilled and in use prior to March 29, 1978, or to cause the water level in any other well having a prior right to exceed a reasonable pumping level, unless the right holder provides reasonable compensation or mitigation to the prior water right holder for the reduced water levels as determined by the Director.[131]

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[126] Idaho Code § 42-230.

[127] 1953 Idaho Sess. Laws, ch. 182 (codified as amended at Idaho Code §§ 42-226 to 42-239).

[128] 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

[129] Idaho Code § 42-227. A domestic well is a well that provides water for domestic uses, which under Idaho Code § 42-111 is limited to:

> [t]he use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half acre of land, if the total use is not in excess of thirteen thousand gallons per day . . . or any other uses if the total use does not exceed a diversion rate of four one-hundredths cubic feet per second and diversion volume of twenty-five hundred gallons per day.

[130] *See Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

[131] Condition No. 5 of the City of Eagle's Amended Permit No. 63-11413 (issued by IDWR Nov. 20, 1998).

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The same appropriation procedures set out for surface waters apply to ground water, including the requirements of public notice and an opportunity to protest.[132] The protest must be filed within ten days of the last date of publication of notice of the application. If the would-be protestant misses the deadline, he or she may petition to intervene in the proceeding.

In addition to the permit requirements for appropriation of ground water, a well drilling permit must be issued before a well may be drilled. The Department has not required a well drilling permit for the excavation of gravel pits or ponds greater than eighteen feet that intercept and expose ground water.

All wells, including domestic, drainage and recovery wells, must be drilled by licensed well drillers.[133] An exception to the licensed well driller requirement exists for persons who dig wells by hand on their own property. Idaho Code § 42-238 *et seq*. contains the licensing requirements for well drillers and well drilling standards. The Department has adopted drilling rules establishing standard for well construction. Well drillers must demonstrate their knowledge of Idaho water law and well construction methods and standards before they may be licensed. They must prepare accurate well logs of all wells drilled. Well drillers also are required to obtain a surety bond, which, under certain circumstances, can be charged by the Department for the cost of reconstructing or abandoning wells that have been improperly constructed. Well drillers are subject to civil penalties of up to $10,000 for submitting fraudulent well logs.

D. Protection of ground water supplies from depletion (GWMAs and CGWAs)

The 1953 Amendments to Idaho's Ground Water Act provided the Department with the authority to regulate ground water withdrawals from aquifers that are subject to depletion. The primary mechanism for this regulation is the Department's designation of Ground Water Management Areas ("GWMA") and Critical Ground Water Areas ("CGWA").

A CGWA is any ground water basin without sufficient ground water to provide a reasonably safe supply for irrigation or other uses in the basin at the then current rates of withdrawal.[134] A GWMA is an area identified by the Department as approaching the conditions of a CGWA.[135]

Upon designating a special ground water area under the Ground Water Act, the Department may require measurement and reporting of existing withdrawals, limit or prohibit new appropriations, or curtail or reduce diversions in order of priority to bring withdrawals into balance with the reasonably

[132] Idaho Code § 42-203A(1).

[133] Idaho Code § 42-227.

[134] Idaho Code § 42-233a.

[135] Idaho Code § 42-233b.

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anticipated average rate of future natural recharge within the basin.[136] Most of the designated GWMAs and CGWAs are in Southern Idaho.

In addition, an Idaho statute declares that "[w]ater in a well shall not be deemed available to fill a water right therein" if pumping from the well to satisfy the right would withdraw ground water supply " beyond the reasonably anticipated average rate of future natural recharge."[137] In *Baker v. Ore-Ida,* the court held that this language "forbids 'mining' of an aquifer."[138]

E. Protection of reasonable pumping levels and the Doctrine of Maximum Use

(1) Quick answer

The quick answer is that in Idaho, senior ground water users are entitled to protection against juniors only to the extent of maintaining a reasonable pumping level (as determined by IDWR). Thus, the senior is required to suffer the expense of deepening a well or taking other measures to continue the senior diversion if the junior has not lowered the water level below a reasonable pumping level. An exception, however, applies to pre-1978 domestic ground water rights, which are entitled to protection of their historic pumping levels.

(2) The mechanics of well interference

Modern ground water diversions often involve the use of powerful pumps that are capable of drawing water from great depths in the aquifer. When a ground water pump is turned on it draws water from the surrounding water-bearing material, causing the water level in the well to decline and creating a funnel-shaped area around the well where the water has been evacuated. See the figure below. The shape and extent of this "cone of depression," and its area of influence, depend on hydrogeologic factors such as porosity, permeability, transmissivity and the hydraulic gradient of the surrounding

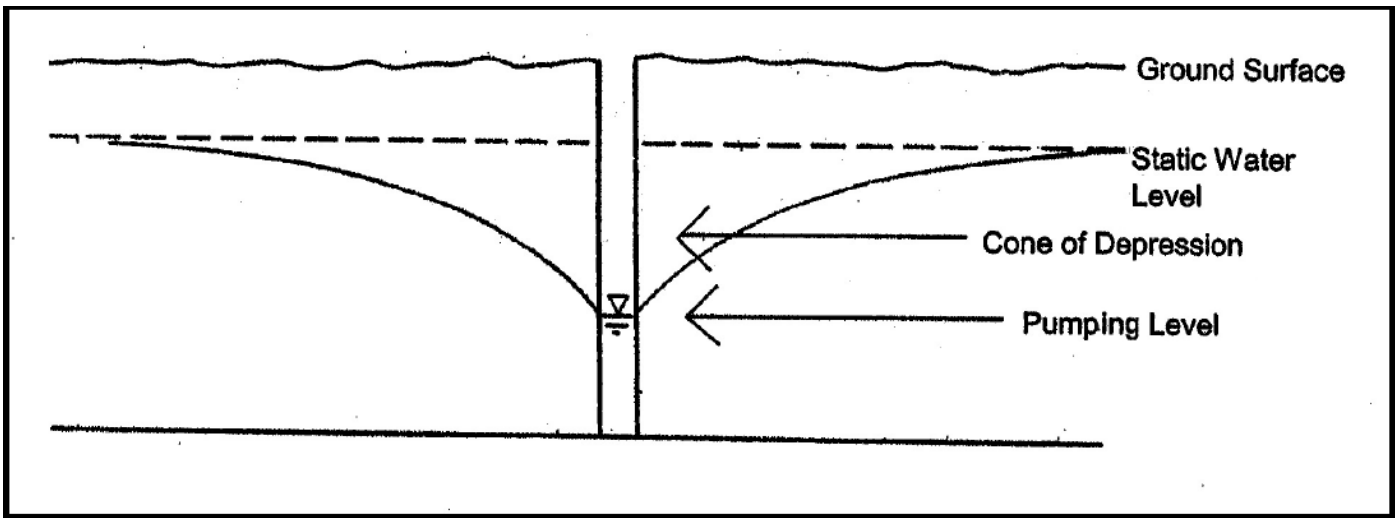
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[136] Idaho Code §§ 42-233a, 42-233b, 42-237a.

[137] Idaho Code § 42-237a(g).

[138] *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 583, 513 P.2d 627, 635 (1973). The concept of "mining" an aquifer is interesting and controversial. Where an aquifer receives significant annual recharge, this Idaho statute—together with other statutory provisions (such as reasonable pumping level requirements) and common law principles of reasonable means of diversion—allows the overall volume of water in an aquifer to be reduced to an equilibrium where annual natural recharge can be expected to produce a relatively steady state, with water levels in wells thereafter declining and rebounding during pumping and non-pumping sequences. The "beyond annual recharge" language appears to be aimed at preventing a sustained and irreversible downward trend in ground water to depths below reasonable pumping levels. On the other hand, there are aquifers (though perhaps not many in Idaho) having virtually zero annual recharge. Some in Arizona and Colorado come to mind. As a practical matter, the only use that can be made of such aquifers is to "mine" them—either that or forego the resource altogether. In these cases, the policy challenge would be to determine the rate of permissible mining and to put in place appropriate plans for alternative supplies when the resource no longer is economically or physically accessible.

medium.[139] Cones of depression of neighboring wells may overlap, which may compound the drawdown effects of the neighboring pumps and further reduce the water level in the wells.



(3) Historic vs. reasonable pumping levels

Like all water rights in Idaho, ground water rights are protected by the priority system. Consequently, a junior appropriation of water will not be allowed to cause material injury to senior ground water rights. The question, then, is what is material injury? Under what circumstances does a reduction in pumping levels (or artesian pressure) constitute material injury?

The question boils down to whether the senior water right hold is entitled to protection of his or her historic pumping level, or whether the senior is only protected from interference with a reasonable pumping level (as determined by IDWR).

At a practical level, this boils down to who pays to deepen the senior's well—the senior or the junior? If the senior's historic pumping level is protected and the junior's well reduces the ground water level (or artesian pressure), then the junior must either curtail her right or pay to deepen the senior's well. If, on the other hand, a rule of reasonable pumping levels is in effect, the senior must pay to deepen his own well to some reasonable level.

(4) The 1953 amendment to the Ground Water Act retroactively established reasonable pumping levels as the standard

As the law has developed in the Western states, the rule generally has been that a senior appropriator is entitled to the maintenance of a reasonable pumping level (but not an unreasonable historic pumping level). Since 1953, Idaho has followed this principle—subject to an exception respecting pre-1978 domestic wells, as discussed below.

[139] *See* Keith E. Anderson, *Ground Water Handbook* at 296 (1998).

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The Idaho law requiring reasonable pumping levels has constitutional and common dimensions as well as a statutory basis under the 1953 Amendments to the Ground Water Act. The concept of reasonable pumping levels is one expression of the rule requiring water users to employ reasonable means of diversion, and not command all or a large portion of the resource to delivery their small part of it.[140]

This principle is codified in Idaho's Ground Water Act of 1951, which reaffirmed the "traditional policy of the state of Idaho" that ground water is subject to the prior appropriation doctrine "requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation." 1951 Idaho Sess. Laws, ch. 200 § 1 (codified at Idaho Code § 42-226). In 1953, the Legislature amended the Act, adding the provision respecting reasonable pumping levels. 1953 Idaho Sess. Laws, ch. 182 § 1 (codified at Idaho Code § 42-226).

The Act, as amended, provides:

> The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state . . . and while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of water resources as provided herein.

Idaho Code § 42-226.[141]

The 1953 Amendment applied retroactively to all ground water rights (except pre-1978 domestics, as discussed below), including those obtained prior to the 1953 Amendment. This is evident in another section of the 1951 Act, which stated: "But the administration of all rights to the use of ground water, whenever or however acquired, shall, unless specifically exempted herefrom, be governed by the provisions of this act." 1951 Idaho Sess. Laws, ch. 200 § 4 (codified at Idaho Code § 42-229). This proviso remained intact and applied to the 1953 Amendment as well.

This conclusion as to the retroactive effect of the reasonable pumping level provision was confirmed by IDWR in *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-*

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[140] The seminal case on reasonable means of diversion is *Schodde v. Twin Falls Canal Co.*, 224 U.S. 107, 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

[141] In 1963, Colorado enacted the Ground Water Management Act, which adopted almost verbatim many of the provisions of Idaho's Ground Water Act including principles of full economic development of water resources, maintenance of reasonable pumping levels and authorities of the state to curtail diversions causing injury to prior rights. The Colorado version of this statute applies only to "designated ground water basins," which are basins containing ground water that is deemed not tributary to surface water sources.

32090 in the Name of the City of Eagle, Final Order at 33 n.2 (IDWR, Feb. 26, 2008)[142] (overruling a prior order containing dictum suggesting that the reasonable pumping level defense recognized in the 1953 Amendment applied only prospectively).[143] IDWR came to the same conclusion on different grounds in a separate case involving a delivery call by ground water users on the ESPA.[144]

The effect of the 1953 amendment was to legislatively overrule the common law rule enunciated in *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933) (Givens, J.) that protected a senior's historic pumping level with a new rule protecting the senior only to the extent of reasonable pumping level. This result was confirmed in *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 513 P.2d 627 (1973) (Shepard, J.).[145] On the other hand, the Court in *Baker* went on to explain that a junior's reasonable

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[142] This is the citation to the subsequent case history: *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (IDWR's Final Order Feb. 26, 2008; Order on Reconsideration July 3, 2008), *appeal dismissed as untimely*, *City of Eagle v. Idaho Dep't of Water Resources*, 150 Idaho 449, 247 P.3d 1037 (2011).

[143] To reach this conclusion, IDWR had to overcome this statement in *Musser v. Higginson*: "[T]he original version of what is now I.C. § 42-226 was enacted in 1951. Both the original version and the current statute make it clear that this statute does not affect rights to the use of ground water acquired before the enactment of the statute." *Musser v. Higginson*, 125 Idaho 392, 396, 871 P.2d 809, 813 (1994) (citation to statute omitted). In its 2008 Order, IDWR explained that this statement in the opinion was "incorrect." Final Order at 31 § 14. Both sections 1 and 4 of the 1951 Ground Water Act made clear that the Ground Water Act applies to pre-1951 ground water rights. The Idaho Supreme Court's confusion arose in a 1987 amendment that imposed certain new restrictions on low-temperature geothermal wells, 1987 Idaho Sess. Laws, ch. 347 § 1, which stated, "This act shall not affect the rights to the use of ground water in this state acquired before its enactment." In context, it is clear that this provision applied only to the "Act" then being enacted, which was a set of amendments relating to geothermal ground water. In any event, the 1987 amendments did not change the provision in Idaho Code § 42-229 (quoted above) clearly stating that the Ground Water Act applies to pre-enactment ground water rights.

[144] *Order Regarding Motion for Declaratory Ruling, In the Matter of Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management District* (Hearing Officer Schroeder, May 26, 2008). In this case, the Hearing Officer found that the *Musser* language noted above did not address the *Baker v. Ore-Ida* ruling or Idaho Code § 42-229, and in any event was not aimed at determining the meaning of the Ground Water Act. Both the *City of Eagle* and *A&B Irr. Dist.* decisions are on appeal to district court as of early 2009.

[145] *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) ("Appellants contend that our Act's use of the phrase 'reasonable pumping levels means that senior appropriators are not necessarily entitled to maintenance of historic pumping levels. We agree . . . ."

Decisions in other states such as Colorado have held that senior pumpers should not be required to improve their diversion facilities "beyond their economic reach." *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961); *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983). These Colorado cases involved alleged injury to senior water rights caused by pumping tributary ground water. *Bender* is often cited for the proposition that, for a ground water user to insist on curtailment of juniors alleged to be causing him injury, he must show that he is producing ground water from a sufficient depth to ensure that the resource is not being hoarded or tied up by those whose wells barely penetrate the water table.

pumping level defense does not come into play if the junior is "mining" the ground water (in the sense of removing ground water at an unsustainable rate so as to ultimately deplete the resource) to the extent that there is not enough to serve both the junior and the senior. *Baker*, 95 Idaho at 583, 513 P.2d at 635.

(5) Constitutional and common law support for reasonable pumping levels

The statutory mandate for reasonable pumping levels has its basis in constitutional and common law principles. "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Full economic development of Idaho's ground water resources can and will benefit all our citizens. . . . Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development." *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Shepard, J.) (citations omitted). On the other hand, whether these principles mandate, or simply allow, reasonable pumping levels is another question.

The underlying basis for what may at first appear to be a departure from a strict application of the priority doctrine is the principle that no appropriator is entitled to maintain an unreasonable "means of diversion" that prevents the optimum use of the state's water resource. The seminal case of *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968) was decided in 1968 by the Colorado Supreme Court.[146] It remains one of the most oft-quoted decisions concerning the tension between a vested private right to the use of the public's water and the public's interest in optimizing the uses of the state's water resources. In *Fellhauer*, the Colorado court noted that the concept of maximum use of water always has been implicit in Western water law. Remarking on the water appropriation provisions in Colorado's Constitution, which were the model for Idaho's, the Court observed:

> It is implicit in these constitutional provisions that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. As administration of water approaches its second century the curtain is opening on the new drama of *maximum utilization* and how constitutionally that

[146] Though extensively cited in Colorado and by commentators, *Fellhauer* has never been cited by an Idaho appellate court. However, the doctrine has also long been recognized in Idaho. In *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 867, 154 P.3d 433, 438 (2007) (Trout, J.), this Court upheld against a facial constitutional challenge the Department's Conjunctive Management Rules which were premised on an integration of the prior appropriation doctrine and "the principle of optimum use of Idaho's water." In the same case, the Court recognized the Department's authority to determine, in the context of a conjunctive use delivery call, when use of a water right is "reasonable." *Id*., 143 Idaho 862, 876-77, 154 P.3d 433, 447-48 (citing *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107) (1912)). See also, *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources"); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."). The doctrine has now been codified in Idaho. Idaho Code § 42-226.

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> doctrine can be integrated into the law of *vested rights*. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer, 447 P.2d at 994 (emphasis original).

There has been some disagreement in Idaho regarding whether the reasonable means of diversion principle reflected in Idaho Code § 42-226 is applicable only to ground water uses. However, the better argument seems to be that all water rights are subject to the reasonable diversion and use requirement (and to the closely-related principle of maximum use) and that § 42-226 simply reiterates or affirms this requirement for wells in the context of the Ground Water Act.

Cases involving surface water consistently have held that an appropriator may not command the entire flow of a stream to effect an appropriation of only a portion. One way to read these cases is that the means of diversion itself is not a protected element of the water right.[147] This was the case in *Van Camp v. Emery*, 13 Idaho 202, 89 P. 752 (1907) (Ailshie, C.J.), where the Court held that an appropriator was not entitled to dam an entire stream merely to raise the water level sufficiently to subirrigate his land.

The same approach was taken by the U.S. Supreme Court in *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912) (*aff'g*. 161 F. 43 (9th Cir. 1908)), where a senior appropriator had used a waterwheel driven by the current of the Snake River to raise irrigation water to his lands. The Supreme Court affirmed the lower court ruling that there is "no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses." *Schodde*, 224 U.S. at 117 (1912). The Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

[147] *See e.g., Doherty v. Pratt*, 34 Nev. 343, 124 P. 574 (1912) (reasonable use requirement applies to methods of diversion); *Tudor v. Jaca*, 178 Or. 126, 164 P.2d 680 (1946) (wasteful methods of diversion common among early settlers do not establish a vested right to their continuance); *Hough v. Porter*, 51 Or. 318, 98 P. 1083 (1909) (old methods of diversion are not a right but a privilege permitted so long as they can be exercised without substantial injury to anyone); *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935) (appropriator may not be compelled to use most scientific diversion method, but it must be reasonable according to the custom of the locality); *Wayman v. Murray City Corp*, 23 Utah 2d 97, 458 P.2d 861 (1969) (applying "rule of reasonableness" in refusing to protect ground water appropriator from diminution of pressure in existing well); *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961) (at his own point of diversion, each diverter must establish some reasonable means of effectuating his diversion).

Another reading of these cases would be that the appropriation of an unreasonable quantity of water to accomplish the diversion of the remainder does not constitute a beneficial use. The result is substantially the same in either case.

As courts have faced this issue in the context of ground water disputes, they have reached much the same result.

(6) Pre-1978 domestics excepted

An important exception to the reasonable pumping level rule was recognized in the 1982 case of *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) (Bistline, J.).

In that case a senior domestic well pumper (Parker) sued to enjoin a junior pumper (appropriately named Junior Wallentine) whose deeper well was interfering with the senior's shallow well. The Idaho Supreme Court ruled that the reasonable pumping level mandate added to the Ground Water Act in 1953 did not apply to domestic wells because the Ground Water Act, when first enacted in 1951, declared that domestic wells "shall not be in any way affected by this act."[148] Because the Act enunciated the reasonable pumping level standard, the Court reasoned that this principle does not apply to domestic well owners. Accordingly, the Court concluded that Parker was entitled to demand that Junior Wallentine either stop pumping or pay to have Parker's domestic well deepened.

However, the Court noted that the Act was changed in 1978 to remove this item of protection for domestic wells.[149] The Court noted that the Legislature could have made the 1978 amendment retroactive, but did not elect to do so. *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982). Consequently, protection of historic pumping levels (i.e., immunity from the reasonable pumping level rule) is limited to pre-1978 domestic wells.

In sum, the reasonable pumping level defense is recognized only when the senior is a non-domestic well or a post-1978 domestic well. In the case of a pre-1978 domestic well, the junior will be curtailed or compelled to compensate for <u>any</u> decline in levels that adversely impairs the senior's beneficial use.

One could argue that the exception of pre-1978 domestics from reasonable pumping levels is contrary to the constitutional principles of maximum beneficial use of water. The authors are not aware of that contention being presented in a reported decision.

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[148] "Section 2. DRILLING AND USE OF WELLS FOR DOMESTIC PURPOSES EXCEPTED. – The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act . . . ." 1951 Idaho Sess. Laws, ch. 200 § 2.

[149] 1978 Idaho Sess. Laws, ch. 324 ch. 324 § 1. This provision removed the provision saying that domestics would "not be in any way affected by this act" replacing it with a statement saying that domestics were exempt from permitting requirements.

F. Domestic water rights

(1) Licensed domestic rights

The Legislature has allowed very few exceptions to the requirement that those seeking to establish new water rights go through the permitting and licensing process.[150] The most notable exception is the one allowing water users to hold water rights for small domestic wells without any permit or license. Idaho Code §§ 42-111, 42-227 and IDAPA 37.03.08.035.01.b. In some cases, however, water users nonetheless elect to obtain a permit and license for their domestic ground water right.

If the domestic right relies on spring or surface water, rather than a well, the domestic exemption does not apply, and, since 1971, the user would be required to obtain a permit and license.

Obtaining a permit and license has the advantage of putting others on notice of the use and reducing the potential for factual disputes. It also can provide the basis for a delivery call by the domestic user. Moreover, domestic rights may be decreed in the SRBA or any other adjudication. (See discussion in section 13.C at page 601.) Indeed, domestic and stock water rights must be claimed in the SRBA, although the requirement for these claims has been postponed. See discussion in section 13.C at page 601.

The statutory definition of domestic use set out in Idaho Code § 42-111(1)(a) (which limits domestic uses to 13,000 gallons per day and irrigation of up to ½ acre of land) is applicable only to exempt domestic ground water rights, not to domestic water rights authorized by permits and licenses. Thus, a right for domestic purposes could be permitted and licensed for more than 0.02 cfs (which equates roughly to 13,000 gallons per day) and could authorize irrigation of more than ½ acre.

(2) Exemption for domestic ground water rights

In the 1951 Ground Water Act, the Legislature provided an exception from permitting requirements for domestic ground water rights:

> The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department

[150] Stock watering directly from a surface stream also is exempt from licensing. Idaho Code § 42-113 and IDAPA 37.03.08.035.01.c. Other exemptions are found in Idaho Code § 42-201. For example, subsection 42-201(3)(a) (2000 Idaho Sess. Laws, ch. 291, § 1) makes it unnecessary to obtain a water right for diversions to fight existing fires. Subsection 42-201(3)(b) (2008 Idaho Sess. Laws, ch. 320, § 1) addresses forest practices and dust abatement. Subsection 42-201(3)(c) (2020 Idaho Sess. Laws, ch. 6, § 1) addresses environmental cleanups. Subsection 42-201(8) (2012 Idaho Sess. Laws, ch. 218, § 1) exempts use or disposal of treated municipal effluent. Subsection 42-201(9) (2016 Idaho Sess. Laws, ch. 139, § 1) exempts incidental hydropower generation in irrigation canals.

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> of water resources and the department of environmental quality and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Idaho Code § 42-227 (originally enacted as 1951 Idaho Sess. Laws, ch. 200 § 2 and amended in 1970, 1978, and 2001). Regulations are found at IDAPA 37.03.08.035.01.b (exemption from application rules for ground water rights for single-family, domestic purposes).

Note that this domestic exemption applies to wells; it does not apply to surface diversions for domestic purposes.

Although persons whose domestic ground water use falls within the statutory definition are not required to obtain a permit or license, they nonetheless have a water right, meaning that their diversion is lawful and that they hold an enforceable real property interest. This is reflected in the last sentence of the statute: "Rights to ground water for such domestic purposes may be acquired by withdrawal and use." Idaho Code § 42-227.

Although domestic wells are exempt from permitting/licensing requirements for water rights, a well drilling permit still is required in all instances (see section 7.F(4) at page 94).

Domestic water rights obtained after 1978 (when the Ground Water Act was amended again) are subject to the same "reasonable pumping level" rules that govern non-domestic ground water rights. See discussion in section 7.E at page 82.

Special treatment also is provided for domestic uses (either exempt or licensed) under certain moratoriums (see discussion in section 20 at page 303). However, those moratoriums do not refer to the definition of domestic uses in section 42-111 (or any other definition). It is the authors' understanding that the use of the term "domestic" in these moratoriums is merely a generic reference to all domestic-type uses, including that portion of a municipal provider's delivery to households and similar purposes, and was not intended to be interpreted strictly within the statutory definition.

The Water Code sets out a detailed definition of domestic uses for purposes of the domestic well exemption:

> (1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:
>
> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (½) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

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> (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.
>
> (2) For purposes of the sections listed in subsection (1) of this section, domestic purposes or domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b) of this section.
>
> (3) Multiple water rights for domestic uses or domestic purposes, as defined in this section, shall not be established or exercised in a manner to satisfy a single combined water use or purpose that would not itself come within the definition of a domestic use or purpose under this section. The purpose of this limitation is to prohibit the diversion and use of water, under a combination of domestic purposes or domestic uses as defined in this section, to provide a supply of water for a use that does not meet the exemption of section 42-227, Idaho Code, and is required to comply with the mandatory application and permit process for developing a right to the use of water pursuant to chapter 2, title 42, Idaho Code.

Idaho Code § 42-111.[151]

The first category, described in section 42-111(1)(a), is applicable only to specific uses: "water for homes, organization camps, public campgrounds, livestock" and purposes incidental thereto. This section also allows for irrigation of up to one-half acre of land around the home or camp, provided that the sum of all the domestic uses do not exceed 13,000 gallons per day. (This equates roughly to 0.02 cfs on a 24-hour basis.) An IDWR regulation roughly tracks the language of this provision in its definition of "Single Family Domestic Purposes."[152]

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[151] Section 42-111 was first enacted in 1899, Gen. Laws 1899, p. 380. In 1890, it defined "domestic purposes" without any quantity precise quantity limitation to include "water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household." It was amended in 1990 to add what appear now as sections 42-111(1) and (2). 1990 Idaho Sess. Laws, ch. 319. Thus, the limitation on use of the domestic exemption for multiple ownership subdivisions dates to 1990. It was amended again in 1995 to add what is now section 42-111(3). 1995 Idaho Sess. Laws, ch. 233.

[152] IDAPA 37.03.08.035.01.b (exemption from application rules for ground water rights for "single family domestic purposes"); IDAPA 37.03.08.010.15 (definition of "Single Family Domestic Purposes" as "Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day.").

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The second category, provided in section 42-111(1)(b), is a catch-all, but for a smaller quantity. This section applies to any "other" uses, but caps the volume at 2,500 gallons per day and the flow rate at 0.004 cfs. This category allows a person to use a small quantity of ground water for any miscellaneous purpose (such as a water amenity or even an industrial use) without obtaining a water right. Thus, the definition of domestic uses includes uses that normally are not associated with the term "domestic" in the household sense. Indeed, to qualify they must be "other" uses (i.e., uses not for homes, camps, or livestock).

The statute contains two limitations. Section 42-111(2) makes "water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments" ineligible for the domestic exemption, "unless the use meets the diversion rate and volume limitations set forth in subsection (1)(b)." Thus, for instance, a subdivision could use the domestic well exemption for irrigation of a small common area or for a water amenity that used a total of no more than 2,500 gallons per day.

The second limitation is found in section 42-111(3). It expressly prevents combining multiple domestic water rights into a "single combined water use or purpose that would not itself come within the definition of a domestic use or purpose." This limitation was added by the Legislature in reaction to efforts by some users to employ multiple domestic exemptions to serve large dairy operations. Thus, in the example above, the subdivision may use only one domestic well exemption for all of its water amenities—meaning that, collectively, they may not exceed 2,500 gallons/day.

The Department's position is that, irrespective of section 42-111(3), the domestic well exemption may be used by multiple individual homeowners within a subdivision, allowing each individual homeowner to drill a well without obtaining a permit or license.[153] In other words, the Department does not view multiple homeowners drilling their own wells as acting "in a manner to satisfy a single combined water use." This is not a settled question, however, and one might argue the contrary where, for example, the developer's plan calls for individual domestic wells in a multi-lot subdivision. The argument would seem particularly strong where the developer of the subdivision drilled the wells on the lots prior to selling them (a situation the Department has not yet faced).

Water uses exceeding the statutory diversion volume or irrigation limits, or for purposes not listed in the applicable definition, do not give rise to a domestic ground water right. For example, a homeowner who uses a "domestic" well to provide indoor uses, to fill a pond, and to irrigate 0.6 acres of lawn (thus violating the ½ acre rule) is violating the statute and therefore has not established a domestic water right, even if the homeowner is within the 13,000 gpd limit. On the other hand, if she

[153] The Department has no rule or guidance on this subject, but generally follows this approach. Conversation with Phillip J. Rassier (Apr. 8, 2005).

is irrigating a half-acre or less, she will be within the domestic exception if she can show that the combined uses, including the diversions to the pond, do not exceed the 13,000 gpd diversion limit.[154]

The domestic well exemptions described above are purely statutory. There is no constitutional entitlement to the domestic water right exemption.

The Department authorizes water users to tack on an exempt domestic ground water right to another permitted or licensed right. Thus, if a user had a license to irrigate 3.0 acres of residential lawn, but was actually irrigating 3.5 acres out of the domestic well, he or she could claim a domestic exception for the additional 0.5 acre of irrigation. This is so even if a moratorium on new water rights is in effect, because domestic water rights are exempt from the moratorium.[155]

(3) Protection from delivery calls.

In theory, domestic water rights are subject to curtailment by priority just like any other water right. This is equally true for undocumented exempt domestic rights and domestic rights for which the owner has obtained a permit, license, or decree. In practice, domestic rights have never been curtailed, and doing so on any significant scale undoubtedly would result in considerable political backlash.

Interestingly, the Department's *Conjunctive Management Rules* provide that domestic rights are not subject to curtailment pursuant to delivery calls by senior surface water right holders:

> A delivery call shall not be effective against any ground water right used for domestic purposes regardless of priority date where such domestic use is within the limits of the definition set forth in Section 42-111, Idaho Code, nor against any ground water right used for stock watering where such stock watering use is within the limits of the definition set forth in Section 42-1401A(12), Idaho Code; provided, however, this exemption shall not prohibit the holder of a water right for domestic or stock watering uses from making a delivery call, including a delivery call against the holders of other domestic or stockwatering rights, where the holder of such right is suffering material injury.

IDAPA 37.03.11.020.11.

Thus, the Department has sought to give domestic and stock ground water rights special treatment in the delivery call context. Is this constitutional? These rights are not singled out in Idaho's

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[154] *See* Norman C. Young, IDWR, *Administrator's Memorandum – Application Processing No. 67* (Feb. 28, 2003) (reproduced in Appendix O) (permissible pond size depends on amount of daily flow necessary to fill it and keep it full).

[155] This was confirmed in a telephone call from Chris Meyer to Phil Rassier, then chief counsel to IDWR, on Nov. 21, 2006. Mr. Rassier consulted with Jeff Peppersack, Chief, Water Allocation Bureau, in confirming this.

Constitution for such treatment. The Idaho Supreme Court was asked to address this in the 2007 *AFRD* litigation, although neither side in the case placed much weight on the question. In its opinion, the Court indicated that the Rule provision exempting domestic ground water rights from delivery calls is not on its face unconstitutional because the Idaho Constitution allows domestic right holders to condemn, or pay for the taking of, senior irrigation or industrial water rights that might be instituting the delivery call. In other words, the Court found that there is a set of circumstances under which domestic water rights could immunize themselves from a delivery call without causing an uncompensated taking of the rights of non-domestic water right holders.[156] Still, if the issue were pressed in an actual delivery call, it is likely that even domestic and stock water right holders will be called to account, either by shutting off their wells, paying for mitigation, or taking some action to implement the constitutional "condemnation" provision (which might add up to the same thing as paying for mitigation).

The Department's practice is to recognize that portion of a municipal provider's ground water usage that falls within the 13,000 gallon-per-day and one-half acre limitations of section 42-111 as qualifying for "domestic purposes" within the above rule. Presumably, a municipal provider delivering surface water would not, to the extent of the surface water, enjoy the same protection. In any event, as indicated, it is quite possible that none of these delivery call exemptions can stand constitutional scrutiny in an as-applied context.

(4) A well drilling permit is required

Although obtaining a water right permit, license, or decree for a domestic right is optional, obtaining a well drilling permit is not. Before drilling a domestic well, the well driller or well owner must obtain a well drilling permit from the Department (which requires a $75.00 filing fee). Idaho Code § 42-235. This provision was first enacted in 1987. 1987 Idaho Sess. Laws, ch. 347, § 4.

Since 1970 (even before the well drilling permit requirement), Idaho Code § 42-227 has required that the project be carried out by a well driller who is licensed under Idaho's well driller statute, Idaho Code § 42-238. 1970 Idaho Sess. Laws, ch. 187, §§ 1, 4. This requirement is reiterated in the Department's rules. IDAPA 37.03.10.020.01.

As to the abandonment of a well—that is, closing and sealing off a well pursuant to specified procedures—section 42-235 explicitly states that this must be done by a licensed driller.

[156] *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

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(5) A few facts about domestic wells in Idaho

(a) Individually, domestic wells use small amounts of water, but together their potential production is significant

An exempt domestic well is considered to involve a de minimis amount of water. However, in the aggregate these wells can pump a significant amount. For example, if the nearly 10,000 domestic wells drilled in the 1987-2004 period in Basin 63 produced half of their full annual entitlement, this group of wells alone would pump 70,000 acre-feet per year, or enough water each year to supply all the current yearly residential uses in Ada and Canyon Counties. In other words, domestic wells in the aggregate can account for much more than a de minimis contribution to aquifer withdrawals.

Two hydrologists reported in 1997 that in the eleven years between 1987 and 1997, almost 7,000 new domestic wells were drilled in Water Basin 63, which includes the Treasure Valley. These wells accounted for 76% of all the wells drilled in the basin during that period.[157] According to this report, as many as a thousand wells have been drilled in a single year in Basin 63. Between 1997 and June 2004, the basin averaged about 670 new domestic wells per year.[158]

(b) Exempt domestic wells often are necessary for single homes in remote locations or for homes in subdivisions where no community water system exists

A homeowner who wishes to build in an area that is not served by a municipal or other community water system either can seek a water right or simply forego the water right permitting process and construct a domestic well. Many take the latter course. In some areas, domestic wells are installed despite the existence of a municipal water supply system. Certainly, going through the application and permit process takes longer and costs more than the exempt domestic procedure, which involves simply obtaining the drilling permit and going ahead.

(c) Exempt domestic water rights may be developed despite aquifer-wide moratoriums that preclude new irrigation, industrial, and commercial water right applications

On the Eastern Snake Plain Aquifer and in Basin 63 (which includes Ada and Canyon Counties), the Department has imposed moratoriums on the processing or granting of new ground water right applications unless they provide one-for-one mitigation. Exempt domestic wells are also exempt from these moratoriums.

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[157] Squires and Dittus, "Implications of Well-Construction to Aquifer Water-Quality: Some Observations," Proceedings of the Annual Meeting of the Pacific Northwest Region of the American Water Well Association (1997).

[158] John Carlson, Idaho Dep't of Water Resources, personal communication (July 1, 2004).

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(6) Domestic wells can present water management challenges

Domestic wells are widespread and proliferating in Idaho, but the State knows relatively little about them. The authors believe that while domestic wells serve an important purpose, particularly where there is no alternative or community water supply available, they also present significant challenges to water management and protection of drinking water aquifers.

(a) Domestic wells are essentially unregulated

The Department's well construction standards, contained in IDAPA 37.03.09, enunciate the general requirement that all wells are to be "constructed in a manner that will guard against waste and contamination of the ground water resources of the state," and specify that domestic wells must meet "all of the siting and distance requirements set forth by the appropriate District Health Department and Idaho Department of Environmental Quality rules." IDAPA 37.03.09.025.01(a). However, the Department's rules are permissive with regard to specific provisions dealing with domestic wells (for example, allowing for verbal approvals), and currently have what some professionals in the well drilling field consider to be minimal casing and sealing requirements for all wells. No water quality sampling, hydraulic testing, or maximum depth is required for either type of well. Typically, domestic wells involve only a 6-inch-diameter, thin-wall casing 18 feet into the ground with no effective seal or well-screen. With the large number of domestic wells drilled in Idaho each year, there is little opportunity for the State to inspect them.

There also is no standard for, or means of quality testing, the driller's report filed with the Department. Often, hydrogeologists find that drillers' logs are inaccurate and that well completion reports for domestic wells generally are not uniformly catalogued or indexed to allow consistent retrieval.

(b) Hydrological considerations—the layered nature of aquifers

As a general matter, most Idaho aquifers consist of layers of water-saturated sandy, gravelly, or fractured material between less permeable layers of clay, mudstone, or similar material. The less permeable layers act as barriers between aquifer zones. For example, in the Eastern Snake Plain Aquifer, the main water-bearing zones are layers of fractured basalt, which are interbedded with numerous sedimentary or unfractured layers that are not readily permeable and contain little or no water.

In most aquifer situations, the uppermost zones (the top 100 feet, for example) contain substantial alluvial gravels and are in hydraulic contact with surface waters such as streams, canals, drains, reservoirs, and lakes. Not surprisingly, most aquifer contamination originates in this uppermost zone, where contaminant spills on the land surface often readily enter the shallow aquifer. For the same reason, the shallow aquifer zone also is the most readily recharged from surface water. In some cases, a shallow aquifer can be created and maintained by leakage—sometimes called "incidental recharge"—from surface irrigation. Indeed, in parts of the Treasure Valley it is estimated that water levels in the shallow aquifer have risen more than 100 feet over natural conditions due to incidental

recharge from canal systems and on-farm irrigation ditches and practices.[159] As the amount of this recharge declines due to commercial and residential development in the Valley, however, so will the water levels in the shallow aquifers.

(c) Well leakage issues

A basic problem presented by any well is how to prevent it from becoming a conduit for water or contaminant flow between layered aquifer zones. Most community drinking water is produced from wells penetrating into deeper aquifers that are separated from shallower aquifers by the largely impervious layers described above. By the same token, most individual domestic wells, particularly older wells, penetrate only the uppermost aquifers—only a small amount of water is needed, and it obviously is cheaper to drill only to a shallow depth. However, for a variety of reasons—including the decline in shallow aquifers due to reductions in incidental recharge and drought cycles (particularly since the late 1980s)—many domestic wells now have been drilled (or re-drilled) through the shallow aquifer and into deeper water-bearing zones.

Domestic wells often are drilled by air-rotary or cable tool methods, neither of which is particularly effective for sealing the well into impermeable layers or maintaining vertical separation between various geologic strata. Although a well may be lined throughout nearly its entire depth with steel or plastic casing (and presumably most new wells are cased), the concern really is the space outside the casing created by the drilling process. Air rotary and cable tool methods can create significant space, and often large and irregular voids, outside the well casing. This outside ring, or "annular" space, throughout the well's depth can act as a conduit for water and contaminants to move between aquifer zones. In most cases, the existence of this space also makes it impossible to actually "abandon" such a well; merely filling the casing with concrete or bentonite does nothing to fill the outside-the-casing space or stop it from continuing to conduct water between zones.

There are other drilling methods, principally mud rotary or similar fluid-assisted techniques, that use drilling fluids such as water or drilling mud to create a hole that can be sealed throughout its depth outside of the casing as the well is constructed. In other words, the well can be constructed to seal the outside of the casing tight against impervious native stratigraphy with grout, bentonite, or concrete, thus sealing off this space as a conduit. Most domestic wells (and presumably many non-domestic wells) are not sealed between the casing and the penetrated layers.

The Department's well construction rules[160] do not specify any particular drilling technique. The rules require only an 18-foot casing at the top of the well that is sealed on the outside. The short distance of this sealed section alone typically means that the casing terminates partway through surficial river floodplain gravel deposits. As the well continues below the upper layer, its annular space typically is not sealed and can provide a conduit for any water or contaminants it encounters.

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[159] This is consistent with the adage that "sooner or later every irrigation district gives rise to a drainage district."

[160] IDAPA 37.03.09.

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(d) Unsealed wells present risks to ground water quality

Any well, unless adequately sealed, provides a conduit for surface contaminants and shallow contaminated ground water to move into the deeper aquifers. When municipal supply or other wells are activated in the deeper zone, their pumping can induce even more flow into these wells from any well in the vicinity, domestic or otherwise, that may not be properly sealed.

At least in the Treasure Valley, most of the municipal drinking water supply comes from deep aquifers that most municipal water providers tap with fully-cased wells constructed with high-quality techniques and proper seals at all levels. Unfortunately, conjunctive management administration of water rights ultimately may lead to drilling or re-drilling domestic wells into these deeper aquifers, since the deeper zones often are not connected to surface streams in areas where the connection may cause controversy. Without substantive changes to the drilling rules, the construction of deeper domestic wells could result in pollution of these all-important deep aquifers.

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8. LOW TEMPERATURE GEOTHERMAL WATER

Water rights for low temperature (85 º to 212º F) geothermal resources in Idaho are acquired by the same permitting process applicable to other ground and surface sources.[161] However, Idaho law includes a special provision applicable to geothermal resources: the appropriator is required to use the resource primarily for heat value and only secondarily for its value as water.[162] Consequently, the usage of low temperature geothermal water for uses other than heat value is not considered a beneficial use of the resource unless the Department exempts the proposed use. The Department may grant such an exemption provided 1) there is no feasible alternative use of the resource, 2) there is no economically viable source of non-geothermal water, and 3) the exemption is in the public interest.

Because the statute is drafted with reference to wells, it appears that it applies only to ground water, not to natural hot springs.

[161] Low temperature geothermal water is defined at Idaho Code § 42-230(a)(1).

[162] Idaho Code § 42-233(1).

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9. CONJUNCTIVE ADMINISTRATION OF GROUND AND SURFACE SUPPLIES

A. Introduction to conjunctive administration

Idaho, like most western states, has long recognized in principal that the prior appropriation doctrine applies to both ground and surface water.[163] Nevertheless, as a practical matter, ground water and surface waters long were managed separately. This is no longer the case. With improving scientific understanding of the physical connection between ground and surface waters, conjunctive administration has become a legal and practical reality.

First a comment on terminology. "Administration" refers to the Department's statutory responsibility to enforce priority, including the curtailment of junior water rights when required to meet senior needs. The term "conjunctive administration" refers to the administration of ground and surface water rights. The term "conjunctive management" is broader. It refers to the full panoply of mostly voluntary governmental and private efforts to reduce conflict between ground and surface water users and promote more effective utilization of all water resources. Thus, while conjunctive administration deals with the brute-force "policing" of priorities, conjunctive management includes such things as research, education, voluntary conservation measures and other demand reduction, recharge projects, provision of substitute water supplies, and other efforts to stabilize or improve water availability. This distinction in terminology, however, is fairly recent. At the time that the Conjunctive Management Rules were adopted in 1994, the term conjunctive administration was not yet in vogue. Using current terminology, those rules would more appropriately be named the Conjunctive Administration Rules.

Today, conjunctive administration and conjunctive management present perhaps the most complex policy issues in Idaho water administration today. Part of this complexity comes from the limited (but steadily increasing) knowledge about the hydraulic operation of the ground water resource itself and its connection to surface supplies. In the past, it was impossible to quantify how pumping a well here might affect a river there. Today sophisticated computer models are capable of predicting such impacts with remarkable precision—at least in parts of the state. Making such predictions is particularly complex because the impacts are not static. The extent and timing of these effects often are delayed, masked, or compounded by other factors, both known and unknown.[164]

In most cases, ground water will be "tributary" (i.e., connected) to surface streams, meaning that it will contribute to, or receive water from, surface stream flows. Localized situations do exist where the ground water is confined in such a way that it will not reach a surface stream, where its movement

[163] This recognition is not universal. For instance, the Supreme Court of Nebraska recently confirmed that Nebraska law ignores the interrelationship of ground water and surface water. In that state, the law of prior appropriation applies only to surface water, while ground water is governed by the common law rule of reasonableness and the statutory Ground Water Management and Protection Act. *Spear T. Ranch, Inc. v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[164] An excellent discussion of the complexities of conjunctive management is contained in Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine*, 22 Land & Water L.Rev. 63 (1987).

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toward a stream is best measured in geologic time, or where the connection is geographically remote from the stretch of river where most wells or headgates are located.

As a matter of law, conjunctive administration is applicable and appropriate anywhere in the state that ground and surface water supplies are hydraulically interconnected. To date, conjunctive administration has been actively undertaken by IDWR only with respect to water rights drawing from the Eastern Snake Plain Aquifer ("ESPA") and hydraulically connected rivers and streams. It is expected that conjunctive administration will reach other areas of the state, perhaps with the Big Wood River basin being next.

The ESPA is a highly productive ground water aquifer underlying a 10,800 square mile area stretching across southern and southeastern Idaho. (See map of the ESPA set out in Appendix G.) As the Idaho Supreme Court has observed, "[i]t is estimated that [the ESPA] contains up to a billion acre-feet of water, which would be roughly the amount of water contained in Lake Erie."[165] The aquifer is connected to the Snake River in various places and to varying degrees. The aquifer discharges to the Snake River approximately 7.5 million acre-feet annually through spring complexes located in the Thousand Springs area and near the American Falls Reservoir. It reportedly receives an average of 8 million acre-feet of recharge. In addition, the Snake River provides irrigation water to some two million acres through natural flow and some 4 million acre-feet of storage in the River's upper reaches. Another two million acre-feet of water is pumped each year from the ESPA to serve over one million acres of farm land.

In 1994, the IDWR promulgated rules governing conjunctive administration of ground and surface waters having a common source of supply.[166] The Department's rulemaking was spurred by the decision in the case of. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). In *Musser*, the Idaho Supreme Court held that the Department's Director had a clear legal duty to "distribute" water to the holder of senior irrigation rights diverted from springs in the Thousand Springs area near Hagerman, Idaho.[167] Because the senior's source of water in *Musser* was a spring discharge from the ESPA at a point on the Snake River canyon wall, there were no junior spring or surface rights that could be curtailed to fill the calling spring right. The implication of this ruling, then, was that the Director could be required to curtail junior ground water rights withdrawing from the ESPA if the curtailment would result in more water being made available to the spring user.

The Department's Conjunctive Management Rules establish a procedure by which senior water right holders may make a "delivery call" by petitioning the Department to administer ground and surface water rights in priority within an area of common ground water supply. These rules set out

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[165] *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011) (this was the Idaho Supreme Court's decision in the "Spring Users' delivery call," discussed below).

[166] *Rules for Conjunctive Management of Surface and Ground Water Resources* ("*Conjunctive Management Rules*" or "*CMR*"), IDAPA 37.03.11, were promulgated by order of the Director on October 7, 1994. The Idaho Legislature took no action to disapprove the rules under Idaho Code § 67-5291.

[167] *Musser v. Higginson,* 125 Idaho at 395, 871 P.2d at 812.

extensive criteria for determining the nature and extent of the interconnection of various water rights, for evaluating whether withdrawals by a junior ground water right will materially injure a senior water right, and for evaluating mitigation plans that might be proposed by a junior right holder who ultimately is found to be subject to the senior delivery call. The rules also provide for phased-in curtailment of ground water rights subject to a delivery call.

Although the Conjunctive Management Rules are applicable statewide, so far the Department has designated only the ESPA as an area having a common ground water supply. This area is defined by the Department by reference to the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho" U.S. Geological Survey Professional Paper 1408-F (1992).

In the SRBA, the court adopted a "general provision" dealing with conjunctive management that places all water users on notice that the designation of a source for their water right does not immunize them from a delivery call from a senior right holder in a separate, but connected, source.[168] The court's decision in what was designated as Basin Wide Issue 5, concluded protracted litigation among SRBA claimants concerning the manner in which the SRBA decree would address conjunctive management. In *A&B Irr. Dist. v. Idaho Conservation League* (aka *Basin-Wide Issue 5*) ("*ICL III*"), 131 Idaho 411, 958 P.2d 568 (1998) (McDevitt, J.), the Idaho Supreme Court observed that "[c]onjunctive management of ground water and surface water rights is one of the main reasons for the commencement of the Snake River Basin Adjudication." *ICL III*, 131 Idaho at 422, 958 P.2d at 579 (quoting 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication, p. 36-37). The Court required the SRBA Court to determine the ultimate source of the ground and surface water rights being adjudicated and the relative priority between surface and ground water rights. *ICL III*, 131 Idaho at 423, 958 P.2d at 580.[169]

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[168] *In re: SRBA Case No. 39576, Memorandum Decision and Order of Partial Decree, Connected Sources General Provision (Conjunctive Management), Basinwide Issue No. 5*, (Feb. 27, 2002).

[169] In response to the SRBA Court's ruling that a conjunctive management general provision was not required because the Department had adopted the Conjunctive Management Rules, the Supreme Court also held that

> [the Rules] do not necessarily overlap the SRBA proceedings. They do not provide for administration of interconnected surface and ground water rights in the SRBA, nor do they deal with the interrelationship of water rights within the various Basins defined by the Director and the SRBA district court, and they do not deal with the interrelationships of those Basins to each other and to the Snake River in the SRBA proceeding. The Rules adopted by the IDWR are primarily directed toward an instance when a "call" is made by a senior water right holder, and do not appear to deal with the rights on the basis of "prior appropriation" in the event of a call as required.

ICL III, 131 Idaho at 422, 958 P.2d at 579. This language could be read to mean simply that the Rules themselves do not determine the relative priorities of rights or the hydrologic interrelationship between those rights or between the various sources and basins, which the Court ruled were issues the SRBA was specifically commenced to conclude. Others have argued that this statement holds that the Conjunctive Management Rules

As water right claims have been recommended[170] or decreed in the SRBA, the Department has incorporated them into Water Districts organized pursuant to Chapter 6, Title 42 of the Idaho Code. Since 2002, the Department has formed five new Water Districts (Water Districts 100, 110, 120, 130 and 140) encompassing much of the ESPA.[171] Administration of ground water rights in these new Water Districts, including conjunctive administration, is to occur pursuant to standing instructions from the Department to the Watermasters.

B. Response to changes in aquifer levels and spring production

(1) Introduction

The early development of Idaho's water resources focused on direct diversions and storage of surface water to beneficial uses—primarily for mining and irrigation. By the time a second period of agricultural expansion began after World War II, much of the surface water supply in Idaho's arid southern region had been fully appropriated, or in some cases, over appropriated. This fact, and the availability of new high-lift pumping technology and relatively cheap electrical power, made ground water the preferred source, and in many cases the only source, for new water development.

At the time, a large supply of ground water (often augmented over pre-development volumes by recharge incident to irrigation) and lack of understanding or concern about the interrelationships between ground and surface water sources made the Department's approval of new ground water appropriations largely perfunctory. But between the 1960s and the late 1980s, the significant new ground water withdrawals for irrigation and growing municipal uses, combined with cycles of drought, increasing efficiencies in surface water irrigation and expanding urbanization significantly altered the water balance in some Idaho aquifers. Consequently, Idaho water managers and water users have begun to express growing concern about declining aquifer water levels in various parts of the state, and to consider alternatives to reverse these trends.

Declining water levels in some regional aquifers increased the pumping costs for local ground water users and affected shallow domestic wells.[172] The ESPA is not in a state of overdraft, but ground water pumping has been deemed to contribute to declining spring discharges to the Snake River.[173]

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violate the prior appropriation doctrine. The Idaho Supreme Court's 2007 ruling that the Conjunctive Management Rules are constitutional on their face, however, is inconsistent with that argument. *See American Falls Reservoir Dist. No. 2 v. IDWR*, 2007 WL 677947 (Idaho).

[170] Some water right claims have been incorporated into Water Districts on the basis of the Department's recommendations of the claims to the SRBA before final determination and decree by the Court. The Department has sought such "interim administration" in areas where it believes it has sufficient information about the water rights and where immediate administration has been deemed necessary.

[171] *See* Appendix D.

[172] See discussion of *Parker v. Wallentine*, *Baker v. Ore-Idaho Foods* and related cases in sections 7.D and 7.D beginning at page 81.

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Although north Idaho generally receives more precipitation than southern Idaho, and (with the exception of Kootenai County) has experienced lower rates of population growth, concerns about declining aquifers and the effects of increasing aquifer withdrawals exist there as well. Like the ESPA, the hydrology of aquifers such as the Spokane-Rathdrum and the Moscow-Pullman is complex. This complexity can make identifying the sources of problems and possible solutions difficult. And in these aquifers, standard notions about aquifer management, including whether or how to conduct aquifer recharge, may need adjustment.[174] Existing research suggests that "more precipitation" does not necessarily translate into "more natural recharge" to some aquifers in the area, particularly the deeper aquifers. Nor is it necessarily correct to assume that increased withdrawals from these aquifers via pumping for irrigation and municipal purposes are primarily responsible for water level declines or that curtailing such diversions will increase water levels.

(2) The effects of drought and increasing irrigation efficiencies on aquifer levels

Coincident with the remarkable expansion of ground water-irrigated agriculture that occurred after World War II, southern Idaho has experienced repeated periods of drought. These droughts reduced the rates of natural recharge to regional aquifers from direct precipitation and snowmelt.[175] They also motivated many surface water irrigators to increase the efficiencies of their water delivery facilities, which in turn reduced the historical rate of incidental recharge to aquifers.[176]

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[173] The fact that there is a correlation between increased ground water withdrawals and declines in spring discharges in the 1000 Springs reach of the Snake River near Hagerman, Idaho has been understood for many years. The actual contributing effect of these withdrawals, in comparison to the effects of drought and reduced incidental recharge, is less well understood. However, the IDWR has estimated that sixty percent of the observed declines in spring discharges is attributable to changes in irrigation practices on the Eastern Snake River Plain that have reduced the historical incidental recharge. This is not surprising given that nearly one hundred percent of the approximately 3,700 cfs increase in spring discharges that occurred between 1902 and 1953 is attributable to incidental recharge from surface water irrigation on the Eastern Snake River Plain that began in the early 1900s.

[174] For example, in the Moscow-Pullman Basin, due in part to rolling topography, the nature of overlying soils and to the spatial relationship of the two primary basalt aquifers, diversions of surface water to recharge basins or injection wells, or through leaky canals, as is common in southern Idaho recharge projects, are unlikely to improve declining water levels in the Grande Ronde basalt aquifer—the primary source of municipal water in the area. Instead, managed recharge in this area conceivably could come in the form of "diversions" of ground water from the shallower Wanapum basalt aquifer to the deeper Grande Ronde aquifer via wells completed through both that essentially would allow ground water from the upper aquifer to leak into the lower.

[175] Natural recharge typically includes recharge to the aquifer from deep percolation of runoff, tributary underflow and to a lesser extent, precipitation.

[176] Incidental recharge is recharge resulting from the use of water diverted for beneficial uses, and includes recharge due to leakage from irrigation water distribution and delivery facilities, and deep percolation of applied irrigation water below the crop root zone. Improved irrigation facilities and practices implemented by surface water irrigators in the upper Snake River Basin following the severe drought of 1977 have reduced

In arid southern Idaho, incidental recharge from surface water diversions can be the primary source of water accruing to aquifer storage. For example, based on 1980 figures, it is estimated that natural recharge through precipitation accounts for only about nine percent of the annual recharge to the Snake Plain Aquifer.[177] However, from sixty to eighty percent of the eight million acre-feet of annual recharge to the Snake Plain regional aquifer is incidental to—that is, it is a byproduct of—surface irrigation, including seepage from canals, ditches, laterals, and irrigated fields.[178]

For aquifers in southwest Idaho's Treasure Valley[179] the numbers are not yet fully developed, but their relative percentages may be similar to those for the ESPA. Preliminary recharge estimates for the Treasure Valley were that 60 percent of ground water recharge is attributable to canal leakage, some 30 percent is attributable to a combination of agricultural flood irrigation and precipitation, and that all of this recharge is primarily to the shallow alluvial aquifer system.[180] The thinking originally was that recharge to the deeper aquifers in the Treasure Valley—from which most of the area's drinking water is pumped— is very slight and/or that the water within them is confined by largely impervious layers.[181] However, more recent studies, and the stable water levels shown in both large-production municipal wells and long-term monitoring wells, have shown that these deeper municipal supply aquifers actually are primarily one large aquifer, now known as the Pierce Gulch Sand Aquifer, which is robustly recharged, likely has a connection to alluvial gravels where the aquifer slants upward across a wide swath of the Valley, and extends into the Payette River Drainage.[182]

(3) Expanding urban landscapes

Conversion of significant areas of agricultural land to subdivisions, shopping malls and roadways can reduce both natural and incidental ground water recharge. In the Treasure Valley, where

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on farm deliveries of surface water by approximately one million acre-feet per year. *Snake River Technical Advisory Committee, Needed Water Resource Programs in the Snake River Basin 3* (Nov. 1983).

[177] S. P. Garabedian, *Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake Plain, Idaho*, U.S. Geological Survey Professional Paper 1408-F at (1992).

[178] G. F. Lindholm, *Summary of the Snake River Plain Aquifer-System Analysis in Idaho and Eastern Oregon*, U.S. Geological Survey Open-File Report 91-98 at 38-39 (1993).

[179] The Treasure Valley is the valley of the Boise River extending generally from Lucky Peak Dam to the Snake River. It includes some of the state's largest cities, including Boise, Nampa, Meridian, Caldwell, Eagle, and other communities, and is Idaho's fastest-growing region.

[180] Idaho Water Resources Research Institute, draft Treasure Valley Aquifer Study (2002).

[181] Idaho Water Resources Research Institute, draft Treasure Valley Aquifer Study (2002) and personal communication, Christian Petrich, University of Idaho, Idaho Water Resources Research Institute (October 29, 2003).

[182] *See, e.g.,* Hydro Logic, Inc., E. Squires, et al., *The Artesian Wells of the City of Meridian, Idaho,* pp. 9-11 (March 17, 2012); and *M3 Eagle Regional Hydrogeologic Characterization, North Ada, Canyon, and Gem Counties, Idaho, Year One Progress Report,* pp. 1-6 (May 4, 2007).

much of Idaho's population growth is occurring, these land use changes are beginning to have noticeable effects on aquifer recharge, particularly recharge to shallow aquifers. Lands that formerly were flood irrigated to grow row crops are giving way to development. Even though urban development's often retain significant areas of irrigated lawn and open space, typically more than half of the land in urbanized areas consists of impervious, non-irrigated surfaces.[183] These impervious surfaces increase surface runoff and preclude infiltration of precipitation.

Moreover, urban landscaped acres usually are served by pressurized irrigation systems that often are more efficient than gravity irrigation systems, and therefore may result in less incidental recharge.[184] Typically, these pressurized irrigation systems deliver the same non-potable surface irrigation water diverted through the same canal system that served the cropland on which the urban development now stands. The canal systems themselves continue to contribute to ground water recharge.[185] But the net effect of urbanization on formerly agricultural areas still appears to be a decline in both the amount of beneficial use for irrigation and natural and incidental ground water recharge. Logically, where the subdivision results in reduced consumptive use of water, as compared to the former farm irrigation, the excess surface water will find its way to drains, other ditches, or the stream or river from which it was originally diverted.

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[183] Personal communication, Zena Cook, Idaho Dep't of Water Resources, October 28, 2002.

[184] Recent studies have suggested that, for several reasons, suburban or commercial site lawn and landscape irrigation likely provides little direct ground water recharge. Many recharge-inducing lateral ditches are abandoned, lined or piped to accommodate urban development; lawn irrigation systems typically use sprinklers; and there is evidence that lawn irrigation itself often results in reduced soil perviousness due to compaction of soils and effects of grading during home construction. *See e.g.*, NRDC, *et al.*, *Paving Our Way to Water Shortages: How Sprawl Aggravates the Effects of Drought* at 5-6 (2002), *citing* EPA, *Clean Water Through Conservation*, EPA 841-B-95-002 (April 1995); Sakrison, R., *Water Use In Compact Communities: The Effect of New Urbanism, Growth Management and Conservation Measures on Residential Water Demands* (University of Washington, 1997); and Schueler, T., *The Peculiarities of Perviousness*, Watershed Protection Techniques, Vol. 2, Issue 1, 1995.

[185] Typically, where formerly flood irrigated farmland has been converted to urban pressurized irrigation in the Treasure Valley, the canal company or irrigation district delivering the water has continued to deliver the full historical amount of appurtenant water to the headgate, even though as much as half of the farmland may be converted to impervious or non-irrigated surfaces. This may provide the developed land up to twice as much water for urban landscaping as the irrigated farm ground received. Several reasons have been advanced for this approach. First, it provides a peaking capability for the irrigation system during periods of extreme temperature and irrigation demand, particularly systems that are not on a strict watering schedule. It also minimizes labor and management costs for the delivery entity and complaints from homeowners. But it also raises several legal and policy issues for future water management. First, this changes the "duty of water" for the water right on the developed land from, on average, one inch per acre to as much as two inches per acre. This presumably is inconsistent with the goal of conservation, the decreed duty of water for the delivered right and Idaho statutes and case law that impose a standard duty of water of no more than one inch to the acre. Also, this can result in development of a delivery and use infrastructure that continues to demand the full historical "head" of water in the system to operate, and thereby can preclude alternative future uses of the water historically allotted to farmland, but now appurtenant to a parking lot or industrial complex.

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(4) Declines in spring discharges to the Snake River and resulting water user conflicts

In addition to the growing awareness of the effects of changes in natural and incidental recharge throughout the state, in south-central Idaho declines in spring flows discharging to the Snake River from the ESPA have been the source of increasing conflict.[186] This conflict reached a peak in August of 2000, again in early 2004, and yet a third time in early 2005.

In August of 2000, anticipating continued severe drought conditions for southern Idaho and significant declines in spring discharges from the ESPA to the Snake River, the Department's Director gave notice to ground water users on the ESPA that he intended to curtail ground water diversions beginning in the spring of 2001 within a band extending from five to ten kilometers from the Snake River in the Thousand Springs and American Falls reaches to increase the water supply to spring and surface water users.[187] On the eve of the Department's intended issuance of curtailment orders,[188] water users presented the Director with an agreement in principle to avoid curtailments. Ground water users would provide up to 68,000 acre-feet of replacement water to surface and spring water users in the 2002 and 2003 irrigation seasons. The parties also would engage in mediation to attempt to reach long-term agreements aimed at managing the ESPA's ground and surface water supplies conjunctively.[189] This agreement in principle ultimately resulted in written agreements among water users above and below Milner Dam (the "2001 Interim Agreements"). These agreements are discussed further in section 9.C(2) below.

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[186] 1953 marked the end of a long-term trend of increased spring discharges to the Snake River that began in the early 1900s due to incidental recharge from widespread surface irrigation across eastern and southern Idaho. North side spring flow contributions to the Snake River below Milner Dam peaked at about 6,900 cfs in 1953 and had declined by approximately 600 cfs by 1980. *See* Jeffrey C. Fereday and Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy* 28 Idaho L. Rev. 573 (1992) for a historical review of Eastern Snake Plain Aquifer hydrology and development.

[187] IDWR, Order *In the Matter of Designating the American Falls Ground Water Management Area* (August 3, 2000) and IDWR, Order *In the Matter of Designating the Thousand Springs Ground Water Management Area* (August 3, 2000).

[188] The Director was proceeding under Idaho Code § 42-233b, which, among other things, requires that an order to ground water users within a Ground Water Management Area to cease or reduce diversions must be issued before September 1, and is effective during the growing season of the next year.

[189] If the full amount of replacement water could not be obtained, ground water users agreed to curtail their diversions by a proportionate amount, up to a maximum of from ten to fifteen percent of historical diversions. In the Upper Snake River, replacement water was delivered into reservoir storage for surface water users' use. However, in the Thousand Springs reach the majority of the replacement water delivered was applied in the vicinity of springs to increase direct recharge through infiltration basins and increase incidental recharge through conversion of ground water irrigated acres to surface water irrigation. In addition to providing some incidental recharge to the aquifer, conversion of agricultural land to surface water irrigation also reduced ground water withdrawals in the vicinity of the springs.

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A second major period of conflict between ground and spring water users on the ESPA began in the fall of 2003 when ground and spring water users in Water District 130 were unable to reach either a long-term agreement or one that would extend the 2001 Interim Agreement. In October of 2003, the Magic Valley and North Snake Ground Water Districts filed a Preliminary Mitigation Plan with the Department proposing a five-year program to mitigate injury to senior spring rights. The Preliminary Mitigation Plan incorporated, in large part, the programs that were initiated under the 2001 Interim Agreements, but also included an adaptive management approach intended to allow changes to the Preliminary Mitigation Plan over its term based on new information, monitoring of results and collaboration with spring users and the Department. That Plan was protested by over sixty individuals and entities.[190] The potential for protracted litigation of the Preliminary Mitigation Plan ultimately was overshadowed by the Department's resolution in late 2003 of two sets of delivery calls made under the Conjunctive Management Rules—the Clear Lakes Call and the Rangen Call. The Musser Call, subsequent delivery calls, and the several resulting interim settlement agreements are discussed in more detail below.

C. Delivery calls and administration in the ESPA

(1) Round One: The Musser call

The current era of conjunctive administration of water rights began with the Musser call on June 16, 1993. Alvin and Tim Musser (together with tenant, Howard "Butch" Morris) (collectively, "Musser") placed a call for delivery of their 1892 priority water right, in the amount of 4.8 cfs. The right was delivered from a natural spring through the Martin-Curran Tunnel located in the 1000 Springs area near Hagerman, Idaho.[191] According to Musser, flows in the spring had declined due to up-gradient ground water pumping, and he was unable to meet their full water needs in 1993.

The Director denied the call on the basis that there had not yet been "a formal hydrologic determination that such conjunctive management is appropriate."[192] Musser sued, seeking a writ of mandate compelling the Director to administer the aquifer in priority to deliver their full senior right, pursuant to Idaho Code § 42-602 (which has since been modified).

Section 42-602 directs the Director to distribute water within designated water districts in accordance with the prior appropriation doctrine. The statute was substantially amended in response to the *Musser* decision (see discussion below). At the time, however, it authorized the Director to curtail unadjudicated water rights outside of a water district, so long as the call came from the holder of an adjudicated right within a water district. Although most water rights in the surrounding ESPA were then unadjudicated and therefore not within water districts, the Musser property was located within a

[190] Proceedings for review of the Ground Water Districts' Preliminary Mitigation Plan were stayed as part of the March 15 Settlement reached among the Legislature, the Ground Water Districts, and spring and surface water users. (See discussion in section 9.C(4)).

[191] *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

[192] *Musser*, 125 Idaho at 394, 871 P.2d at 811.

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small water district known as 36A in which surface and spring water rights had been adjudicated in the 1930s.

The Department initiated rulemaking for conjunctive management and a contested case proceeding for the Mussers, and urged the trial court to dismiss the lawsuit as moot, given that an administrative process was now underway. The trial court found the case was not moot, and issued a writ of mandate requiring the Director to "distribute water" in accordance with the Prior Appropriation Doctrine to serve Mr. Musser's decreed entitlement.

The writ of mandate affirmed by the court soon became moot when Musser received a supply of water from another source, so there was never any litigation over the appropriateness of how the Department responded to the writ. For example, the writ of mandate required that the Director "immediately comply with I.C. § 42-602." Because the dispute was mooted, there was never occasion to determine what immediate compliance means and what factors the Department should consider and what procedures it should employ in responding to such a call. Nevertheless, *Musser* plainly had the effect of jumpstarting the Department's development of conjunctive management rules, which have shaped the debate that continues to unfold.

The Legislature responded immediately to the *Musser* decision by amending section 42-602 and other sections addressed by the Supreme Court.[193] First, the amendments removed the Director's authority under Idaho Code §§ 42-602 to 42-619 to use the watermaster/water district system to curtail rights outside an established water district. The legislation also replaced the Director's specific "duty" to have "immediate direction and control" with a more deferential and discretionary directive that the Director "shall have direction and control of the distribution of water." The Legislature also struck the provision in section 42-602 requiring the Director to "execute the laws relative to the distribution of water in accordance with the rights of prior appropriation." This language was replaced with the provision that the Director is to "distribute water in water districts in accordance with the prior appropriation doctrine." Finally, it amended various other provisions of the water code to expressly recognize the Director's discretion in these matters and his authority to proceed administratively. These changes presumably were intended to recognize and underscore the Director's expertise and discretion in managing the complex interactions of water rights and to reaffirm that there is more to the prior appropriation doctrine than rote enforcement of priorities.

(2) Round Two: The 2001-2003 interim settlement and replacement water obligation

In 2001 the Department issued orders designating the Thousand Springs Ground Water Management Area and the American Falls Ground Water Management Area.[194] As part of these

[193] 1994 Idaho Sess. Laws, ch. 450.

[194] IDWR, Order *In the Matter of Designating the American Falls Ground Water Management Area* (August 3, 2000) and IDWR, Order *In the Matter of Designating the Thousand Springs Ground Water Management Area* (August 3, 2000).

actions, the Director notified ground water users within these GWMAs of his intent to issue curtailment orders to ground water users within an area extending five kilometers from the Snake River in the Thousand Springs Reach ("TSR") of the Snake River (below Milner Dam) and the American Falls Reach (above Milner) due to the extended drought conditions and continuing declines in spring discharges. The Department's orders were based on a general finding of material injury to spring and surface water rights in the reaches. The orders set an August 31, 2001 deadline for ground water users to provide a plan for mitigation to the reaches or face curtailment. The North Snake, Magic Valley, Bingham, Bonneville-Jefferson and Aberdeen-American Falls Ground Water Districts were instrumental in negotiating two-year, interim agreements on behalf of their members. Agreements in principle were reached with spring and surface water users on August 31st that later were reduced to formal written agreements. These agreements avoided IDWR's threatened curtailment of ground water withdrawals for irrigation, industrial and municipal uses. Among other things, the 2001 Interim Agreements required ground water users to acquire and provide up to 68,500 acre-feet of replacement water to surface and spring water users in the 2002 and 2003 irrigation seasons.[195]

The Department's action, although initiated without first holding a hearing, presumably was premised on the following assumptions: (1) that surface and spring water users in the Magic Valley were not receiving their full entitlements; (2) that such shortfalls constituted material injury to senior surface and spring rights; (3) to the extent shortfalls were being experienced, they could not be corrected by the seniors employing reasonable efforts to improve their existing means of diversion; (4) that those claiming shortfalls could beneficially use the higher quantities authorized under their decreed water rights; and (5) that persons holding water rights in springs fed in large part by incidental recharge and return flows from up-gradient surface water irrigation may require continuance of the same quantity of return flows by ground water users when up-gradient surface irrigation and related incidental recharge is reduced. Due to the 2001 Interim Agreements, these and other relevant assumptions have not been tested.

(3) Round Three: The Clear Lakes call

In May of 2003, Clear Lakes Trout Company, Rim View Trout Company and the Estate of Earl Hardy ("Clear Lakes") made demand on the Director of the Department to direct the Watermaster for Water District 130 to "administer water rights in the Water District that deplete the supply of water" to the Clear Lakes water rights that were not being satisfied by the available spring flows (the "Clear Lakes Call").

The Director deemed the Clear Lakes demand to be a "delivery call" under the Department's Conjunctive Management Rules. In October of 2003, the Director issued an Order denying the Clear Lakes Call. Among the reasons given for denying this call, the Director found that for certain of the

[195] Under the separate Interim Agreements, the North Snake and Magic Valley Ground Water Districts agreed to provide 40,000 acre-feet of replacement water to the TSR in 2002 and 2003. The Aberdeen-American Falls, Bingham and Bonneville-Jefferson Ground Water Districts agreed to provide, in conjunction with several commercial/industrial ground water users, 28,500 acre-feet of replacement water per year to the American Falls reach above Milner.

Clear Lakes rights, there was sufficient water available, certain other rights were not receiving their full decreed rate due to natural seasonal variations that had existed since the time the rights were first appropriated, and that the mitigation then being provided by the Magic Valley and North Snake Ground Water Districts under the 2001 Interim Agreement was "an approved and effectively operating mitigation plan" under the Conjunctive Management Rules that provided full mitigation for the effects of ground water pumping under junior rights in Water District 130 through December 31, 2003.[196]

The Order also provided the opportunity for any person aggrieved to petition the Department for a hearing. Clear Lakes did petition for a hearing, and numerous parties intervened. This contested case was stayed as part of the settlement of a subsequent delivery call filed by Rangen, Inc., that the Director determined to honor.

(4) Round Four: The Rangen call

In September and October of 2003, a fish food producer and research facility known as Rangen, Inc. filed a delivery call demanding that the Director shut off junior water rights alleged to be interfering with Rangen's 1962 priority spring water right diverted from the Curren Tunnel—the same source as the Musser water right.[197] On February 25, 2004, after expiration of the 2001 Interim Agreement for Water District 130, the Director recognized the Rangen delivery call and stated his intent to order curtailment of all up-gradient consumptive water rights within the Water District junior to July 13, 1962 unless ground water users submitted, and received approval of, a suitable mitigation plan by April 1, 2004 ("Rangen Order").[198]

Specifically, the Rangen Order provided that members of the North Snake Ground Water District or the Magic Valley Ground Water District would not be curtailed (on a temporary basis) if they provided sufficient replacement water. The replacement water could be either (1) a substitute supply of 16,000 acre-feet directly usable by Rangen, or (2) 53,000 acre-feet of replacement water to the TSR. In either case, the plan for providing the substitute supply would have to be approved by the Director by April 1st. At a status conference held on March 5, 2004, the Department announced that due to the discovery and correction of a computer modeling error after the Rangen Order had been

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[196] Order, *In the Matter of Distribution of Water to Water Right Nos. 36-02659, 36-02680, 36-04032A, 36-04032B, 36-04032C, 36-04032D, 36-07004, 36-07080, 36-07167, 36-07176, 36-07725, 36-07731 and 36-08089* (October 10, 2003).

[197] The delivery call referenced three water rights. The most senior (1957 priority) right has been fully met, however. The most junior (1977 priority) was deemed to have been "incorrectly" issued by the Department and therefore arguably not the proper basis for a call. Consequently, the water right that drove the call was the intermediate priority right with a July 13, 1962 priority date.

[198] Order, *In the Matter of Distribution of Water to Water Right Nos. 36-15501, 36-02551and 36-07694* (February 25, 2004).

issued, the Department had determined that the required quantity of replacement water to the TSR would be reduced to 26,500 acre-feet.[199]

The Rangen Order implicated the potential curtailment of ground water diversions serving approximately 120,000 irrigated acres in the Magic Valley, as well as many municipal and commercial rights held by cities and dairies. To avoid the threat of significant economic dislocation caused by both the declining spring flows and potential curtailment, the Ground Water Districts, Rangen and Clear Lakes sought to reach a further interim agreement that would include significant involvement and commitments by the State of Idaho. On March 15, 2004, following a full day of negotiations, a settlement was reached among water users, the Legislature and the Governor that resulted in the stay of the Clear Lakes and Rangen Calls and the pending curtailment of post-1962 ground water diversions in Water District 130 ("2004 Settlement").[200]

During the 2004 Settlement's one-year term, the parties each agreed to undertake specific actions, the most significant of which were the commitment by the Ground Water Districts to continue to provide 40,000 acre-feet of replacement water to the Thousand Springs Reach and the authorization of the Legislature's Expanded Natural Resources Interim Committee for Water Supply and Management Issues ("Interim Committee"). The Interim Committee was assigned a broad scope of tasks aimed at developing short-term and long-term management goals for the ESPA, investigating and recommending water management and supply programs, and investigating funding and legislative needs to implement identified goals and objectives. The Interim Committee established monthly meetings of the full committee and smaller working groups that were assigned specific tasks for the ESPA and other regions of the State experiencing water supply problems.

(5) Round Five: The Surface Water Coalition's 2005 delivery call and the challenge to the Department's rules in *AFRD*

In January 2005, a group of seven canal companies and irrigation districts diverting at or above Milner Dam on the Snake River and calling themselves the "Surface Water Coalition" (or "SWC")[201]

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[199] Subsequent review of the computer modeling simulations revealed that the 26,500 acre-foot number also was incorrect. However, because of a settlement reached among the State of Idaho, the Magic Valley and North Snake Ground Water Districts and other water users on March 15, 2004, a final quantification of this number never was developed pursuant to the Rangen Call.

[200] Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement (March 15, 2004). The March 15 Settlement also provided for the stay of a pending district court case challenging the validity of the Conjunctive Management Rules brought by Clear Lakes in Ada County and pending contested cases before the Department concerning the dissolution of the Thousand Springs GWMA and amendment of the boundaries of the American Falls GWMA. The March 15 Settlement also provided for a stay of the pending contested case concerning the Ground Water Districts' Preliminary Mitigation Plan.

[201] These are the Twin Falls Canal Company, North Side Canal Company, Milner Irrigation District, American Falls Reservoir District No. 2, Minidoka Irrigation District, A&B Irrigation District, and Burley Irrigation District.

filed a delivery call with the Department seeking curtailment of hundreds of junior ground water rights in the ESPA that they alleged decreased river flows to the injury of their senior water rights. This action resulted in near-immediate emergency orders from the Director, followed by preparations for hearings on the merits (discussed below).

However, even before discovery could be completed, five SWC members and others brought a court challenge in 2005 to the Department's Conjunctive Management Rules under which their call would be heard.[202] This challenge, which sidetracked the delivery calls pending its outcome, led to the Idaho Supreme Court's ruling in *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD*"), 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.). The opinion upheld the facial validity of Idaho's Conjunctive Management Rules ("Rules"), IDAPA 37.03.11.000, *et seq*. The Rules, adopted by the Department in 1994, set forth the process by which ground and surface water rights in Idaho are to be administered together. *AFRD* is given particular attention here because it is seen as a highly significant ruling in the area of conjunctive administration and the confirmation of central principles of water law in Idaho.

In addition to validating the Rules, the decision confirmed, in the context of water rights administration, several foundational principles of Idaho's prior appropriation doctrine—each of which is referenced in the Rules—such as the continuing requirements of beneficial use and reasonable means of diversion, the state policy of full economic development of water resources, the prohibition of waste, and others. The court held that the Rules are consistent with state constitutional principles in allowing the agency to consider the amount of storage water available to a senior surface water right holder before ordering the curtailment of a junior water right. The decision underscores the importance of administrative fact-finding before the state will shut off diversions under junior water rights alleged to be causing material injury to seniors.[203]

The plaintiffs in *AFRD* had criticized the Rules in various ways since their adoption, and in this litigation finally brought their theories to court. Plaintiffs' central premise over the years had been that when a senior water right holder alleges a water shortage and demands curtailment of junior-priority water rights, the Department's job is immediate and ministerial, and watermasters should be directed to shut off ground water pumps without the Director first considering any facts other than the quantity of the senior's water right and the existence of shortage. Plaintiffs' position became even more emphatic

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[202] Joining the five Surface Water Coalition members as plaintiffs challenging the Rules were Idaho Power Company (which maintains hydroelectric facilities on the river at Milner and elsewhere) and holders of water rights in springs flowing from canyon walls in the river reach below Twin Falls. Each of these plaintiffs asserts its water rights are dependent, at least in part, on Idaho's vast Eastern Snake Plain Aquifer ("ESPA" or the "aquifer"). As noted elsewhere in this paper, the aquifer is understood to be connected to the Snake River in various places and to varying degrees across southern Idaho.

[203] The procedure or body of law by which the state uses its power to shut off a junior water right so that a more senior right might obtain its water supply is commonly referred to as water right administration. The senior's request is referred to as a "delivery call."

once the bulk of ground water rights on the ESPA had been decreed in the ongoing Snake River Basin Adjudication and brought into water districts for which watermasters were appointed.

The Rules do not describe a summary curtailment model for conjunctive administration, and instead require fact-finding on various issues. Because of this, Plaintiffs claimed that the Rules violate a number of water law principles, including the "first in time" admonition of Idaho's Constitution; Idaho' water delivery statutes, Idaho Code § 42-601 *et seq*. (setting forth, among other things, watermaster duties in water districts); and the common law. Plaintiffs further asserted that it was illegal for the Rules to allow the Director, when responding to a delivery call, to consider such issues as the seniors' actual beneficial use (such as the number of acres actually being irrigated), whether their means of diversion are reasonable, and how the agency's action would serve the concept of "full economic development of underground water resources." Idaho Code § 42-226. Plaintiffs took the position that any such matters had been resolved in the process wherein their water rights were licensed or decreed and could not be revisited in a delivery call, and that engaging in these inquiries under the Rules would cause a "readjudication" of their water rights. In *AFRD*, the Idaho Supreme Court rejected all of these theories.

(a) Background: the Surface Water Coalition's 2005 delivery call

As noted above, the dispute giving rise to *AFRD* began in early 2005 when the Surface Water Coalition, acting under the Rules' delivery call procedures, formally asked the Department to curtail diversions under unspecified thousands of ESPA ground water rights. The Surface Water Coalition believes ESPA ground water pumping is reducing spring inflows to the river upstream from their headgates and injuring their surface water rights.

The Department responded immediately. Applying various provisions of the Rules, the Director issued emergency orders in February through May 2005 that, on a preliminary basis, determined it reasonably likely that pumping would cause material injury to the water rights of two of the seven[204] SWC members in the upcoming irrigation season. The emergency orders sought additional information from the SWC, but in the meantime required ground water users to provide the SWC with certain amounts of replacement water.

Both sides filed objections to the preliminary orders. The Department established a discovery schedule and scheduled a hearing. Meanwhile, the ground water users provided mitigation water as required by the orders, primarily by renting storage water from upper Snake River reservoirs to provide to the SWC and by fashioning means to idle ground water wells. A final determination in the matter,

[204] The five Canal Companies who were plaintiffs in the *American Falls* case were Twin Falls Canal Company, American Falls Reservoir District No. 2, Minidoka Irrigation District, Burley Irrigation District, and A&B Irrigation District.

including any mitigation requirement, would come after the facts could be sorted out at the hearing, where both sides could put on evidence on various factors enunciated in the Rules.[205]

The Surface Water Coalition took the position that there should be no further fact-finding, that their water right decrees were proof enough of their entitlements, and that their delivery call sufficiently explained to the Director that they were not receiving water to which they are entitled. They maintained that, under the Constitution's "first in time" mandate, the Department was obligated to shut off ground water pumps in the ESPA, and to do so immediately. The Surface Water Coalition also contended that the various Rule provisions on which the Director relied, and under which he intended to receive evidence at hearing, were unconstitutional or otherwise in violation of Idaho water law.

However, rather than wait to raise these claims in the administrative hearing on the delivery call, in August 2005 five of the seven Surface Water Coalition members, joining with Idaho Power Company and a group of aquaculture interests in the Thousand Springs area[206] (collectively, "Plaintiffs"), filed a separate action in Idaho's Fifth Judicial District Court in Gooding County Judge Barry Wood) asking for a declaration that the Rules violate the prior appropriation doctrine as established by the Idaho Constitution. Plaintiffs' arguments were as follows:

- The Rules allow inquiry into several principles other than "first in time" that Plaintiffs believed should not come into play in water right administration, including such concepts as "reasonable means of diversion," whether a senior right can be satisfied using alternate points and/or means of diversion; whether the senior actually is suffering "material injury;" and whether the administration is consistent with "full economic development" of the ground water resource.

- The Rules allow the Department to evaluate a senior's storage water account, including projected "carryover storage," in determining whether senior rights are suffering material injury.

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[205] As of this writing, the hearing still has not been held, although the Department has resumed its analysis of the delivery calls and has issued notified certain ground water right holders that they will be subject to curtailment unless they provide replacement water for 2007. Absent a settlement, these issues presumably will go to hearing.

[206] The Eastern Snake Plain aquifer's western edge is truncated by the deep Snake River canyon along an approximately 40-mile long section downstream from Twin Falls. The aquifer's water, flowing westward, encounters the canyon and literally spills out of the basalt canyon walls through innumerable fissures and springs in the Buhl/Hagerman area. The aquifer discharges in this reach collectively are several thousand cubic feet per second. Large amounts of this cold, clean water are collected to serve, primarily, the water rights of fish farms and irrigated tracts on benchlands situated between the cliffs and the river below, including the Rangen facility referenced above (the "Spring Users"). By the time the Spring Users had joined the Canal Companies in filing the Rules litigation, they too had filed their own delivery calls against ESPA ground water pumpers. These delivery calls also are still pending.

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- The Rules invite factual inquiry that impermissibly "looks behind," "readjudicates," or otherwise gives insufficient legal effect to the senior's water right decrees.
- The Rules impermissibly shift the burden to the senior to prove injury in a delivery call.
- The Rules are illegal in allowing junior right holders to provide mitigation in lieu of curtailment.

Plaintiffs' complaint asked Judge Wood for a declaratory judgment that the Rules are unconstitutional both on their face and as the Director sought to apply them in the delivery calls. Normally, a district court would dismiss such an action for failure to exhaust administrative remedies; the parties had not yet produced evidence in the administrative case, the agency had not applied law to facts, and there was no final agency action or factual record for court review. However, Plaintiffs convinced Judge Wood that their action should be heard because of language in Idaho's declaratory judgment statute, Idaho Code § 67-5278, referring to the statute's applicability where rules are "threatened" to be applied. Plaintiffs argued, in essence, that the Director's current process under the Rules was the "best evidence" of how the Department aimed to apply the Rules. The Department and the ground water users argued against this interpretation, but Judge Wood sided with Plaintiffs and heard their challenge.

(b) The lower court decision in *AFRD*

After motion practice over many months, lengthy briefing, and oral argument, the District Court issued a 127-page opinion granting Plaintiffs' summary judgment motions, relying on "the underlying facts in this case," that is, the actions that had occurred under the delivery calls lodged with the agency.[207] The Judge construed the declaratory judgment statute as vesting the court with jurisdiction over the action based on the "threatened application" of the Rules that Plaintiffs alleged in their briefing. The District Court thus adopted a hybrid approach that considered the Rules constitutionally both facially and as the Department threatened to apply them.[208]

In its Order, the District Court found that the Rules are unconstitutional because they: 1) fail to include express directives as to five "tenets and procedures" that the court believed are constitutionally required; 2) exempt domestic and stock water rights from conjunctive administration; and 3) allow the Director, in determining material injury, to consider a senior's right to store water in reservoirs for potential future use (so-called "carryover storage").

The press reports of Judge Wood's decision were simply that he had declared the Rules unconstitutional. However, the District Court's ruling actually upheld the bulk of the Rules, finding them unconstitutional only on narrow, mostly procedural, grounds. For example, the District Court

[207] Order at 25. References to the "Order" refer to Judge Barry Wood's *Order on Plaintiffs' Motion for Summary Judgment* in *American Falls Res. Dist #2 v. IDWR*, Case No. CV-2005-600, Idaho District Court for the Fifth Judicial Dist., County of Gooding (June 2, 2006).

[208] Order at 25.

rejected Plaintiffs' central premise that the numerous factors the Rules allow the Director to consider "are on their face contrary to the prior appropriation doctrine."[209] Judge Wood held that a "decree is not conclusive as to any post-adjudication circumstances,"[210] and in a delivery call "the Director has the duty and authority to consider" whether the senior is "irrigating the full number of acres decreed under the right."[211] The District Court rejected Plaintiffs' argument that junior users cannot use mitigation or replacement water to avoid curtailment.[212] The court agreed with defendants that the "concept of 'reasonableness of diversion' is also a tenet of the prior appropriation doctrine."[213] Judge Wood specifically noted that the prior appropriation doctrine allows the state "to compel a senior to modify or change his point of diversion under appropriate circumstances."[214]

In a portion of the order that could have particular relevance to the injury claims of the Spring Users in the Hagerman Valley area, the District Court states that, in a delivery call, the Director is entitled to "tak[e] into account whether the senior is protected to historical diversion levels or reasonable aquifer levels."[215] The Judge ruled that "a water user may not command the entirety of a volume of water of a ground or surface source to support his appropriation for a beneficial use involving less than the entire volume," and that "a senior spring user cannot tie up the entire volume of water of an aquifer in order to maintain the natural flow of a spring."[216] The District Court referred to this as the "bath tub" example, wherein "the only time the 'over-flow' produces water is when the bath tub is full."[217]

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[209] Order at 83.

[210] Order at 92.

[211] Order at 92.

[212] Order at 90 and 102.

[213] Order at 88.

[214] Order at 89.

[215] Order at 102.

[216] Order at 88-90.

[217] Order at 90; n. 21. The ESPA actually exhibits greater spring discharges in this area today than it did before any significant water development began on the Snake River Plain. This is due to incidental recharge to the aquifer, and increases in aquifer storage, that resulted from surface water irrigation on the Plain beginning in the late 1800s. Between 1902 and 1953, the spring discharges in this fabled "Thousand Springs" reach increased by approximately 3,700 cubic feet per second, nearly doubling the 1902 discharges. Most of the rights appropriated by the Spring Users were established when the aquifer was in this enhanced state. Since 1953, spring discharges have gradually decreased (although they still are above 1902 levels), due in part to the use of increasingly efficient surface irrigation practices on the Eastern Snake River Plain that have reduced the historical incidental recharge. Ground water pumping and cyclical drought also are seen as causes of spring flow declines.

The District Court acknowledged that juniors subject to a delivery call are entitled to a hearing, and may offer evidence to show, among other things, that the senior is "wasting water," or "to establish a futile call."[218] The lower court agreed that "the policy of the state is to secure the maximum use and benefit and least wasteful use of its resources," and the Rules' "integration of this policy" "is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine."[219] The District Court ruled that a "senior user cannot call for water if the water is not, or will not, be put to a beneficial use, irrespective of whether the right is decree,"[220] and acknowledged "that most of the issues pertaining to the principles comprising the prior appropriation doctrine have developed in the context of surface water only. Applying these same principles to the integration of surface and ground water presents an entirely new set of complexities."[221]

Plaintiffs' arguments to the District Court essentially took the position that in water right administration there is no place for any of the several tenets of Idaho's prior appropriation doctrine except the "first in time" rule. They ended up with a decision from the District Court that disagreed with this theory and with most of their substantive claims. As the Supreme Court was to note in its decision, the "district court rejected [Plaintiffs'] position . . . that water rights in Idaho should be administered strictly on a priority in time basis."[222] The upshot is the unremarkable proposition that all of the doctrine's tenets remain in play not just at the appropriation stage, or at the time a water right is scrutinized in an adjudication, but throughout all periods when the right is being exercised. And especially when its owner asks the state to curtail others to supply it. Plaintiffs did not appeal the District Court's rulings on these issues, although they continued to argue about several of these points in their briefs to the Supreme Court.

The District Court rejected Plaintiffs' core contentions about Idaho water law, but did conclude that the Rules are unconstitutional primarily with regard to certain procedural points. As the Supreme Court put it, "[w]hile the district court largely rejected [Plaintiffs'] arguments, it did grant summary judgment based on its finding that the Rules are facially unconstitutional on a different basis: a lack of 'procedural components' of the prior appropriation doctrine that the court viewed as constitutionally mandated."[223] The District Court perceived constitutional infirmities in the Rules' failure: 1) to describe burdens of proof and evidentiary standards applicable in a delivery call; 2) to give proper legal effect to senior water right decrees; 3) to describe objective criteria necessary to evaluate these factors; and 4) to establish a time frame in which the delivery call process must be completed.

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[218] Order at 101.

[219] Order at 86.

[220] Order at 86.

[221] Order at 91.

[222] *American Falls*, 154 P.3d at 441.

[223] *American Falls*, 154 P.3d at 439.

The District Court had believed that "[s]uch components are necessary to protect and prevent diminishment to vested senior property rights," and that without these elements in place, "seniors are put in the position of re-defending their adjudicated water right every time a call is made for water."[224] Judge Wood had concluded that while "some minimal due process is required" in carrying out a delivery call, "setting up a procedural labyrinth of requiring a senior water right holder to initiate a contested case proceeding . . . which cannot be completed during the irrigation season prevents timely administration to a growing crop and was not what either the framers of the constitution had in mind or what the legislature had in mind in adopting" Idaho's water administration statutes.[225]

As to the substantive issues, the District Court concluded that the Rules' exclusion of domestic and stock water rights from administration amounts to a taking of the senior's water right without compensation. It also struck down the Rules' treatment of a senior's carryover storage in a delivery call.

The carryover storage ruling could be seen as the central substantive water law question in the case on appeal. The question was whether it is constitutional for the Director to ascertain whether "the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies" before curtailing junior well owners, as specified by the Rules. IDAPA 37.03.11.42.01.g (the "Carryover Rule").

The Carryover Rule defines reasonable carryover as the water an appropriator would have left in his reservoir account at year's end "under comparable water conditions" without restricting his ability to divert water to storage and fill his reservoirs when water is available: "In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system." IDAPA 37.03.11.42.01.g. Plaintiffs claimed, and the District Court agreed, that it was unconstitutional for the agency ever to require an appropriator to use some of its storage before curtailing junior rights.

The State and the ground water users appealed to the Idaho Supreme Court. The Plaintiffs did not appeal.[226] The Idaho Supreme Court took up the matter on an expedited schedule. As to their delivery calls, Plaintiffs technically could have gone forward with the administrative hearing during the court challenge and appeal; indeed, the Plaintiffs successfully resisted the State's motion that the Supreme Court stay the administrative action until after it ruled. Nonetheless, Plaintiffs did not press for action before the Department, and the calls effectively were placed on hold while the Rules challenge went through the appeal.

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[224] Order at 90 and 97.

[225] Order at 97-98.

[226] One of the plaintiffs, Clear Lakes Trout Co., had raised an equal protection argument below—arguing that the Rules impermissibly allow different standards to apply to ground water and surface water rights—and did appeal the District Court's rejection of their theory to the Supreme Court. However, the Supreme Court did not address the question.

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Presumably, now that the Idaho Supreme Court has made its decision, the Surface water users' allegations of injury will resume as contested cases before the Department. *AFRD* makes clear that the Rules set forth correct legal standards under which the Department will hear these cases.[227]

(c) The Supreme Court's decision in *AFRD*

(i) The *AFRD* ruling on facial vs. "as applied" constitutionality

To begin with, the Idaho Supreme Court held that the District Court erred in considering a lawsuit that evaluated aspects of the Rules "as applied." The high court held, as defendants had argued below, that the reference to a rule's "threatened application" in Idaho's declaratory judgment statute is intended "to permit standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge."[228] The Court noted that "a district court cannot properly engage in an 'as applied' constitutional analysis until a complete factual record has been developed."[229] However, rather than simply reverse on this single point and dismiss the case as premature, the high court took up, and ultimately reversed, the balance of the District Court's opinion.[230]

(ii) The *AFRD* holding on the Rules' lack of certain procedural components

The Supreme Court analyzed each of the "tenets and procedures" the District Court had concluded the constitution requires be set out in the Rules. As a starting point, the court noted that the Rules expressly incorporate all applicable Idaho law, and found that "it is unnecessary to incorporate every extant law unless specifically necessary to a clear understanding of the particular Rule."[231] This is particularly the case, found the court, in a constitutional challenge where a court is required to seek an interpretation of a rule that upholds its constitutionality.

As to the specific rulings, the court first reversed the District Court's conclusion that the Rules must specify burdens of proof and evidentiary standards. These procedures "have been developed over the years and are to be read into the Rules," and the Rules "do not permit or direct the shifting of the

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[227] Plaintiffs sought rehearing before the Idaho Supreme Court on the carryover storage issue. As of this writing, the Court has not acted on the rehearing petition. Plaintiffs also refiled their delivery calls for 2007.

[228] *American Falls*, 154 P.3d at 442-43.

[229] *American Falls*, 154 P.3d at 442-43.

[230] Actually, the Court affirmed the District Court on one ruling not germane to the water law issues: whether the lower court erred by revoking the City of Pocatello's intervention as a party in the case. The Supreme Court agreed that the District Court had properly exercised its discretion in that regard.

[231] *American Falls*, 154 P.3d at 444.

burden of proof."[232] The court expressed no opinion as to what those burdens are in connection with particular claims, defenses, or factual allegations in a water delivery call.

Second, the Supreme Court rejected the District Court's conclusions about "timely administration" of water rights. "Even if this Court embarked on an analysis of an as applied challenge to the Rules, the facts developed thus far do not support American Falls' contention that it was deprived of timely administration in response to the Delivery Call."[233]

> Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.

AFRD, 154 P.3d at 446.

Third, the court took up the question of whether the Rules violated a constitutional principle for failing to enunciate "objective standards." The high court noted that the Rules catalogue numerous factors the Director may consider "in determining material injury and whether the holders of water rights are using water efficiently and without waste." The court held that these "are decisions properly vested in the Director."[234]

> Those factors, of necessity, require some determination of "reasonableness" and it is the lack of an objective standard—something other than "reasonableness"—which caused the district court to conclude the Rules were facially defective. Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director. . . . [T]he Rules are not facially deficient in not being more specific in defining what is "reasonable" in any given case.

AFRD, 154 P.3d at 446.

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[232] *American Falls*, 164 P.3d at 445.

[233] *American Falls*, 154 P.3d at 445.

[234] *American Falls*, 154 P.3d at 446.

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Fourth, the Supreme Court addressed the District Court's conclusion that the Rules "allow the Director to, in essence, re-adjudicate water rights by conducting a complete re-evaluation of the scope and efficiencies of a decreed water right in conjunction with a delivery call."[235] The Supreme Court noted, with evident approval, that the District Court had ruled that "even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development."[236] The court found that the Rules allow the Director to consider factors such as "the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion."[237]

Plaintiffs had argued that "the Director is not authorized to consider such factors before administering water rights" and "is 'required to deliver the full quantity of decreed senior water rights according to their priority' rather than partake in this re-evaluation. (Emphasis in original brief.)."[238] In rejecting the plaintiffs' position, the court focused on the admonition in the Constitution itself that priority is to be extended only to those actually using water. Consequently, the court found that actual use always is a factor to be considered in water rights administration.

> Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed above in water rights administration. Specifically, the Director "has the duty and authority" to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a readjudication.

AFRD, 154 P.3d at 447-48.

(iii) The *AFRD* ruling on carryover storage

Carryover storage refers to "the unused water in a reservoir at the end of the irrigation year which is retained or stored for future use in years of drought or low-water." *AFRD*, 143 Idaho at 878, 154 P.3d at 449. There is no doubt as to the right of the holder of a storage right to retain such stored

[235] *American Falls*, 154 P.3d at 447.

[236] *American Falls*, 154 P.3d at 447.

[237] *American Falls*, 154 P.3d at 447.

[238] *American Falls*, 154 P.3d at 447.

water for future years. The issue in *AFRD* was whether a person who held both storage rights and natural flow rights could curtail junior users in order to provide a full supply of his natural flow rights despite the availability of water in storage. In other words, is the holder of these rights obligated first to draw on his own storage before curtailing juniors? Or, to put it yet another way, may the Director "refrain from curtailing junior water rights if a senior has sufficient storage rights to meet his needs"? *AFRD*, 143 Idaho at 879, 154 P.3d at 450. The Conjunctive Management Rules said the answer is, essentially, maybe. Specifically, the Rules allow the senior to demand both all natural flow rights necessary to satisfy his beneficial use plus a reasonable quantity of carryover storage. That is, he must use his storage rights before curtailing others to the extent that the storage rights are in excess of what is reasonably needed to protect against future drought.

Judge Wood had concluded that the Rules are unconstitutional in allowing the Department to consider a senior's carryover storage in determining whether to curtail juniors. The Supreme Court also reversed Judge Wood on this issue.

> Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it would be in itself unconstitutional. The CM Rules are not facially unconstitutional in permitting some discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.

AFRD, 154 P.3d at 451. The court further held:

> Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law in Idaho.

AFRD, 154 P.3d at 451.

(iv) The *AFRD* ruling on domestic and stock water rights

The District Court had held that the Rules' exemption of domestic and stock water rights from administration in a delivery call amounted to a taking of the seniors' water rights—in other words, that conjunctive administration should not give this category of water rights a free pass.[239] Neither side

[239] The Rules provide an exemption from administration for domestic and stock water rights. IDAPA 37.03.11.20.11.

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attacked this ruling in its appeal briefs, but the Supreme Court took it up anyway, reversing the District Court. The Supreme Court's position was that the Constitution allows those diverting water for domestic purposes to have "preference" over those using for any other purpose, provided that the domestic right owner provide compensation to the rights taken.[240] Even though the Rule exempting domestic and stock water rights does not reference the "take, but compensate" authority, the court reasoned that because the Rules incorporate all applicable Idaho law and do not prohibit use of this authority, this provision is constitutional.

The court did not explain how a stock water right—presumably an "agricultural" entitlement within the constitutional provision—might be able to have preference over another agricultural water right, such as the irrigation rights the Canal Companies assert in the pending delivery calls. The constitutional provision does not mention stock water rights as such, but expressly provides agricultural rights as a preference only over those using water for "manufacturing purposes."

The Idaho Supreme Court's decision in *AFRD* likely will be seen as a milestone in Idaho water law. It cleared away a number of questions about the Rules and reaffirmed several fundamental principles of the prior appropriation doctrine.

(6) Round Six: The ESPA delivery calls go to hearing before the Department, result in rulings

In the four months between January and April 2008, and following close on the heels of *AFRD*, the Idaho Department of Water Resources ("Department") conducted hearings and issued decisions in three delivery calls in these near-epic contests between holders of ground and surface water rights in or dependent upon the huge ESPA.

The amount of water in ESPA storage increased dramatically after surface water irrigation began in eastern Idaho in the late 1800s—seepage from ditches and fields, and even year-round diversion practices in some areas, put huge amounts of water into the aquifer. With the advent of ground water pumping in about 1950, and later the conversion of flood irrigation techniques to more efficient methods, both the amount in storage and the amount of incidental recharge declined. While aquifer levels still are above those believed to have existed before settlement, aquifer contributions to the Snake River have declined since about 1950, primarily in two reaches. One is upstream from Twin

[240] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the water of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution." Idaho Const. art. XV, § 3.

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Falls where river flows serve the senior rights of the seven irrigation districts and canal companies calling themselves the Surface Water Coalition ("SWC"). The other is at the western edge of the ESPA where the aquifer spills spectacularly out of the walls of the deep Snake River canyon in huge springs whose cold, pure waters supply trout farms (the "Spring Users"), hydropower, and other uses on bench lands situated between the aquifer and the river.

As discussed above, in 2005, believing ground water pumping had injured their water rights, both the Spring Users and the SWC filed delivery calls with the Department's Director by which they sought orders shutting off literally hundreds of junior ground water irrigation wells in the ESPA. This section discusses the outcome (so far) of these delivery calls.

AFRD answered fundamental questions about how delivery calls—particularly those involving disputes between ground and surface water rights—are to be carried out in Idaho, and affirmed the Department's administrative rules governing such calls. While it is appropriate to identify *AFRD*, and now these decisions, as milestones in Idaho water law, to a great extent these rulings all reaffirm—albeit in the new setting of conjunctive administration—principles of water law that have been around for decades. The senior surface water users in these cases contended that such principles do not apply or should be narrowed. These contentions failed. However, the decisions of course still require juniors to answer for actual material injury they cause to senior water rights, subject to several "public interest" limitations.

The first of these post *AFRD* decisions, a hearing officer's post-hearing recommended order to the Director, was issued January 11, 2008 in the Spring Users' delivery call. The second was the January 29, 2008 ruling from the Director in the A&B Irrigation District delivery call. The third, issued April 29, 2008, was the hearing officer's recommended order in the Surface Water Coalition's delivery call. (Below, we discuss the SWC case first, because it provides useful context for considering the others.)

(a) Surface Water Coalition delivery call—the Hearing Officer's Recommended Order

Editor's note: The discussion below was written before the appeal of the Director's ruling. That ruling was largely affirmed by the district court, which, in turn, was affirmed by the Idaho Supreme Court in A&B Irr. Dist. v. IDWR, 153 Idaho 500, 284 P.3d 225 (2012) (Burdick, C.J.).

On April 29, 2008 the Department's Hearing Officer issued his Recommended Order[241] in the case before the Department entitled *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of [the Surface Water Coalition]* (2008).

[241] The Department's Rules specify the process by which the Director assigns a matter to a hearing officer, who then makes a recommended order for the Director's consideration. IDAPA 37.01.01.720 (Rule 720).

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In this case, seven irrigation districts and canal companies holding senior rights to divert from the Snake River, and pursuing their claims jointly under the name "Surface Water Coalition" ("SWC"),[242] filed a delivery call with the Department in early 2005 seeking curtailment of hundreds of ground water wells in Water Districts 120 and 130, which cover a large part of southern Idaho's agricultural land.[243] In response, the Director issued an emergency, pre-hearing order in May 2005 and supplemented it several times thereafter (collectively, the "Emergency Order").[244] The Emergency Order found it likely that ground water pumping in these areas was causing, or had caused, material injury to two of the SWC members' surface water rights, and directed junior ground water right holders (at least pending a full evidentiary hearing) to provide replacement water to these two SWC members. The Emergency Order determined that the other five had not suffered material injury and were not likely to in the coming irrigation season. Both sides filed exceptions to the Emergency Order and asked for a hearing.

The evidentiary hearing in the controversy was delayed for nearly two years while the parties took a side trip to district court and then to the Idaho Supreme Court to test SWC's theory that the Department's Conjunctive Management Rules ("Rules") are unconstitutional. This, of course, resulted in the *AFRD* decision rejecting SWC's theory that the Rules impermissibly allow the Director to evaluate various factors, such as the senior's means of diversion, its actual use of water, and factors pertaining to material injury. In early 2008, the SWC matter finally went to evidentiary hearing on both sides' challenges to the Director's Emergency Order. The Department's Hearing Officer, retired Idaho Supreme Court Justice Gerald F. Schroeder,[245] issued a recommended decision (i.e., a recommendation to the Director) on April 29, 2008 ("SWC Rec. Order").

In most respects, the SWC Rec. Order affirms the Director's Emergency Order, which had projected some material injury to, and required replacement water for, Twin Falls Canal Company

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[242] The SWC participants are Twin Falls Canal Company, North Side Canal Company, Minidoka Irrigation District, Burley Irrigation District, Milner Irrigation District, American Falls Reservoir District No. 2, and A&B Irrigation District. Each diverts from the Snake River at or just above Milner Dam, which is up-river from the City of Twin Falls.

[243] The SWC call actually did not seek to shut off ground water rights in Water District ("WD") 130; it named only the more easterly (upstream) WD 120. However, the Director determined that, based on evidence available to the Department (including results from running various scenarios under the Eastern Snake Plain Ground Water Model), pumping in the adjacent WD 130 also had an effect on river reach gains above Milner, and that therefore WD 130must be included. Ground water pumping in WD 140 is projected by the ground water model to have significant effects in both WDs 120 and 130, so we can expect 140 to be a target of future delivery calls.

[244] Idaho's Administrative Procedure Act authorizes an agency, in certain circumstances, to issue an emergency order before conducting a hearing on the matter, provided the hearing is conducted "as quickly as feasible." Idaho Code § 67-5247(4).

[245] The parties stipulated to former Justice Schroeder's appointment to the case.

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("TFCC") and American Falls Reservoir District No. 2. However, the trial produced several important adjustments to the Director's approach.

These are the most significant portions of the Hearing Officer's Recommended Order:

(i) Neither side should be seen as the bad guy

The Hearing Officer began with language plainly intended to defuse the rhetoric and emotion that has arisen around this multi-year controversy. He noted that both the surface water users and ground water pumpers have valid water rights and both have contributed to the development of the state. The surface water users "have opened vast expanses of land to productivity" and "have done so under a state of law that appeared to provide them with protection ('first in time, first in right') from interference with the rights they developed." SWC Rec. Order at 1-2. The ground water pumpers, he wrote, "are not poachers who sneaked through an unlocked door to take water away from surface water users." SWC Rec. Order at 2. He also concluded that the interconnected Snake River and ESPA system "has not run out of water." SWC Rec. Order at 6.

(ii) The Director is obligated to investigate the senior's injury claims rather than taking them at face value

Hearing Officer reiterated this fundamental ruling from *AFRD,* noting that "to do otherwise would be irresponsible to the public interest and often unduly expensive to the parties." SWC Rec. Order at 28.

(iii) Some SWC members suffered material injury in 2004 as a result of ground water pumping, and, in his Emergency Orders, the Director reasonably predicted the same would occur in 2005

There was not much evidence of crop loss due to lack of water in this case. The SWC failed to identify lands that were not irrigated, or insufficiently irrigated, due to lack of water. However, the Hearing Officer found, based on certain Farm Services Administration information upon which the Department had relied, that there were some instances of water shortages that "adversely impacted crops and influenced crop decisions, e.g. foregoing a cutting of hay to supply water to corn crops." SWC Rec. Order at 30.[246]

[246] Since the SWC delivery call, which is deemed renewed each year, has been in place since 2005, the Department has responded to it in the context of three separate years. After the hearing in the case, Department staff issued a memorandum containing injury calculations for 2007 and the projected injury for 2008. "Surface Water Coalition Call 2007 Final Injury and 2008 Predicted Injury," *Memorandum from Steve Burrell, Hydrology Section, to Director Dave Tuthill* (April 14, 2008). The memorandum calculates a total of 17,345 acre-feet of injury in 2007, all to one SWC member: Twin Falls Canal Company. It projects no injury for any SWC member in 2008.

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(iv) Burdens of proof in a water call

Citing *AFRD*, the Hearing Officer found that the senior users in a delivery call "have the initial burden of establishing their water rights and material injury to those water rights," after which the burden shifts to the junior to present defenses. SWC Rec. Order at 25. The Hearing Officer noted that the Emergency Order does not make clear how the Director applied these burdens, but since the Emergency Order was issued without the benefit of hearing, that could be expected. In any event, the Hearing Officer made it clear that he applied the burdens as the Supreme Court had directed.

(v) The Department appropriately used a regional ground water model to determine several facts about the interaction of the aquifer and the river

The ESPA controversy has proceeded concurrently with the development and refinement of the Eastern Snake Plan Aquifer Model ("ESPAM"), a multi-agency project that has been produced over several years of data gathering, scientific collaboration and number crunching (and continues today). The Hearing Officer noted that ESPAM has limitations. It cannot predict, for example, the effect of a well on a particular spring outflow into the Snake River. However, the Hearing Officer found that the model has scientific basis and is the best tool currently available to make certain predictions. SWC Rec. Order at 33. In summary, the model predicts the effects of ground water pumping on several Snake River reaches across southern Idaho. Among these is the conclusion that "ground water pumping has contributed to a decline in ground water levels ranging between five and 60 feet throughout the ESPA." SWC Rec. Order at 6. This has contributed to a declining trend in reach gains to the river above Milner during the irrigation season. SWC Rec. Order at 10. The Hearing Officer found the evidence to show that about "90% of the total steady-state depletions to ground water pumping have manifested themselves in the Snake River." SWC Rec. Order at 12.

(vi) The Department appropriately applied a ten percent error factor to the model and established a "trim line" to limit the extent of ground water curtailment

In his Emergency Order, the Director had found the model to embody a ten percent margin of error and therefore determined that ground water rights falling within an area having ten percent or less effect on a particular reach would not be curtailed or required to provide mitigation as a result of the SWC delivery call. (He made a similar ruling in the Spring Users case, discussed below.) According to the Hearing Officer, "Application of the trim line was proper to avoid a significant probability that curtailment would extend to ground water users who would suffer significantly without contributing water where necessary to remediate the material injury to the surface water users." SWC Rec. Order at 33. The Hearing Officer observed that as the model is refined, "these improvements should be applied as they occur." *Id.* at 34.

(vii) Not all pumping from the ESPA adversely affects the SWC's water rights; in wetter years, there is no injury

and conjunctive management is "unnecessary or minimal"

SWC Rec. Order at 29. The Hearing Officer found that during recent drought years, "ground water pumping has affected the quantity and timing of water available to SWC members." *Id.* This and other portions of the Recommended Order contradict one of SWC's core contentions—namely, that the ESPA is over-appropriated and that there is ongoing injury that can be solved only by permanently shutting off many wells. *See, e.g.*, SWC Rec. Order at 18. The Hearing Officer found that:

> not all water withdrawn from pumping has an adverse effect on surface water users dependent upon the Snake River. Sometimes there is enough water entering the system to fill all needs. In such circumstances conjunctive management is unnecessary or minimal.

SWC Rec. Order at 29.

(viii) The doctrine of "first-in-time, first-in-right" is to be applied in light of the public interest

The Director has discretion to consider factors that may outweigh a water user's priority, including the senior's actual need and beneficial use, actual acres irrigated and whether the irrigator is using reasonable means of diverting or applying the water. The Hearing Officer cited the case of *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912), for the proposition that "the public interest is a factor to be considered in water rights litigation that impacts the public." SWC Rec. Order at 37. The Hearing Officer concluded:

> The Director is not limited to counting the number of acre-feet in a storage account and the number of cubic feet per second in the license or decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of actual need for the water and the consequences to the State, its communities and citizens.

SWC Rec. Order at 39. The Hearing Officer found that the senior must be placing "the water to a beneficial use," and must not simply have "a desire to use the maximum right in the license or decree." *Id.* The Hearing Officer noted that these conclusions relative to the public interest are embodied in the Rules, and that they

> have significance in considering several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment will not be considered. It affects the Director's consideration of alternatives to curtailment. The public interest affects determination of whether there will be curtailment of other mitigation to provide for carryover storage water, drawing a line between what is

> reasonable and what is hording [*sic*]. It affects consideration of issues of farm efficiency as opposed to achievable farm efficiency. Consideration of the public interest gives relevance to evidence of the economic impact of curtailment upon the State and local communities.

SWC Rec. Order at 39. These are examples of rulings in this case that restate longstanding principles of water law, but ones that the SWC has maintained do not apply in their actions against ground water users.

(ix) In a delivery call, the Department must remove non-irrigated lands from its injury or curtailment calculation

It seems elementary that when an irrigation entity, such as those in the SWC, makes a delivery call to supply its irrigation water rights, it should expect the State to curtail juniors only to the extent necessary to supply actually irrigated acres. However, in their 2005 delivery calls the SWC members did not describe the number of acres that actually are irrigated within their boundaries, relying instead on their more generally described boundaries and the number of shareholders or members they have. This approach was rejected by the Hearing Officer, who found, in his SWC Rec. Order, that some 14,500 acres in three of the seven irrigation entities "are not irrigated" and cannot be considered in calculating their necessary water supply.[247] SWC Rec. Order at 53. Much of this non-irrigated area is comprised of land that, though farmed in the past, now has been developed into residential subdivisions and commercial areas. The Hearing Officer concluded that the "calculation of a water budget in determining if there will be curtailment should be based on acres, not shares." *Id.*

(x) The Director appropriately adopted a "minimum full supply" concept to project material injury, but did not employ it correctly and now must modify it

In the Emergency Order, the Director had calculated the minimum water supply, both natural flow and storage, the seniors needed to meet their crop requirements in the upcoming irrigation season. Then he compared this to the predicted 2005 supply to determine injury. The SWC members objected, again asserting simply that they were entitled to their licensed and decreed amounts. The Hearing Officer approved of the minimum full supply concept, noting that "if it accurately defines need, use of water above that amount would not be applied to a beneficial use and would constitute waste." SWC Rec. Order at 44. However, the Hearing Officer found that the Director's use of 1995 as a baseline year, without adjustment to take into changing conditions, was inappropriate.

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[247] The group of irrigation entities that brought the ESPA delivery call (which calls itself the Surface Water Coalition) is comprised of seven members. It is possible that the other four entities not mentioned by the Hearing Officer in this context also have acres that are not irrigated but for which curtailments are sought. At the hearing, the ground water users offered evidence only on the three noted by the Hearing Officer in the Recommended Order (Twin Falls Canal Co., Minidoka Irrigation District, and Burley Irrigation District).

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(xi) The Director's use of 1995 as a fixed base year for determining minimum full supply was not appropriate.

The Hearing Officer observed that the Director's use, in the Emergency Order, of 1995 conditions as involving the SWC's minimum full supply "was never intended as a final word," that the baseline should not be fixed onto one year, and that it should be "adjustable" to reflect wet and dry years and changing irrigation practices. Specifically, the Hearing Officer concluded that the 1995 baseline should be analyzed and adjusted as necessary to embody the following elements:

- To what degree the need for irrigation water in 1995 was "depressed by the well-above average precipitation" that year compared to a normal year.
- Any significant cropping changes since 1995.
- Changes in facilities, diversion, conveyance, and irrigation practices, such as conversions to sprinklers.
- Soil conditions, such as soil water retention ability.
- The number of non-irrigated acres in the SWC entity's service area (this is discussed further below).
- Calculation of the senior's water needs should be based on acres, not shares in a mutual canal company (such as Twin Falls Canal Co.).
- Twin Falls Canal Company's per-acre full headgate rate of water delivery must be limited to $^{5}/_{8}$ miner's inch (0.0125 cfs), instead of the ¾ inch 0.015 cfs) they claimed (this is discussed further below).

SWC Rec. Order at 49-53.

(xii) Reasonable conservation practices and on-farm efficiencies

The City of Pocatello, which has at least one ESPA ground water right, had argued that the SWC members should be held to the standard of "achievable farm efficiency" in their irrigation practices. The Hearing Officer disagreed, noting that the Rules require the calling senior to employ "reasonable diversion and conveyance efficiency and conservation practices." SWC Rec. Order at 56. He concluded that the SWC members have been reasonably efficient and have employed reasonable conservation practices. However, he noted that if the Director identifies such measures that are not being used, he "may consider that fact in future determination of need." SWC Rec. Order at 57.

(xiii) The SWC members have a right to a reasonable amount of carryover storage, and juniors may be curtailed to provide it

Again, the Hearing Officer turned to the Rules, as supported by the holding in *AFRD*, to conclude that the SWC members are entitled to a reasonable amount of carryover storage. The Hearing Officer concluded that curtailment or a replacement water obligation to supply carryover storage could be imposed only for "the forthcoming year," and that attempting to ensure carryover "for periods of

years" is problematic and presents "too great a likelihood for the waste of water." SWC Rec. Order at 62. "There is no precise amount of reasonable carryover storage, but the amount should be sufficient to assure that if the following year is a year of water shortage there will be sufficient water in storage in addition to whatever natural flow rights exist to fully meet crop needs." *Id*.

(xiv) Juniors are not responsible for storage the seniors lease to others, and if the reservoir system fills, it cancels any need for mitigation

Curtailment cannot be imposed to make up for storage water whose holder sold or leased to others "for purposes unrelated to the original right." SWC Rec. Order at 61 and 64 (again citing *AFRD*). This includes stored water that is leased to other irrigators or for instream flow maintenance or salmon flow enhancements. On the other hand, if storage releases are mandated without compensation to the surface water users, then "ground water users would be subject to a condition for their depletion of the river." SWC Rec. Order at 61. If the senior's storage accounts fill, this "would erase the debits and credits" relative to determining injury and the juniors' responsibility for mitigation. SWC Rec. Order at 62.

(xv) Mitigation or curtailment must be provided in the season when it is needed by the seniors

The ground water users responded to the Emergency Order by offering, in the 2005-2007 period, storage water and other measures to provide replacement water to offset the projected injury to the two SWC members. The Hearing Officer observed that despite these efforts, "the procedural steps for approving a mitigation plan," as outlined in the Rules, were not followed and there never was a hearing or other "protocol for the presentation of objections" on such a plan. SWC Rec. Order at 65. One of the criticisms SWC leveled at the replacement water plans was that they allegedly did not provide "in-season" relief. The Hearing Officer found that the injured seniors "are entitled to curtailment or replacement water in the season of material injury," and suggested that a protocol should be developed to handle these questions. *Id.* He ruled that in-season replacement may occur either by the ground water users "obtaining lease water before the beginning of [the] irrigation season" to provide to the seniors or "underwriting the affected SWC members in their acquisition of the water as needed with a year end accounting." SWC Rec. Order at 66.

(xvi) Desirability of ground water users obtaining their own storage for mitigation

The Hearing Officer observed that it "would be very desirable to have a mechanism for [ground water users] to have an independent right to storage which it could apply as replacement water as an alternative to curtailment . . . ." SWC Rec. Order at 11. To date, the ground water users do not have a permanent storage contract, and instead must obtain storage (typically on a one-year basis) from the Upper Snake Rental Pool.

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(xvii) Likely no curtailment in 2008

The Department expects a full Snake River reservoir system in spring 2008. Accordingly, we anticipate that there will be an adequate water supply for SWC members in 2008 and that ground water users will not be required to curtail pumping or provide mitigation to surface water users in the upcoming irrigation season. However, it seems inevitable that drier years in the future will require ground water users to provide some level of mitigation or replacement water, at least to the two SWC participants who were deemed to have suffered injury in 2005. Assuming the Hearing Officer's recommendations are accepted (and upheld on any appeal), in those years the Director will implement the recommendations and, presumably, make additional findings concerning the issues the Hearing Officer identified but did not answer (these are discussed below).

(xviii) Remaining issues for the Director to address in future years

The Hearing Officer noted that the Director still will have facts to determine in coming seasons. These issues would include, perhaps among others:

- *Conduct further analysis of the base year in calculating minimum full supply*. As noted above, the Director would need to consider additional factors to determine the basis for calculating the seniors' minimum full supply.
- *Determine the acreage served by supplemental ground water rights held by SWC members*. The Hearing Officer found that an "undetermined number" of SWC irrigators may hold supplemental ground water rights. SWC Rec. Order at 10. During the first weeks of the delivery call in 2005, the Director had requested information from SWC about the number and locations of these wells, but this information was not made available then. Evidently it still remains unclear. In any event, the Hearing Officer noted that "[i]t would seem that any such ground water rights would be junior to the surface irrigation rights and subject to curtailment." SWC Rec. Order at 10. This appears to be another area where ground water users could insist on a display of facts in future years.
- *Account for additional non-irrigated acres within SWC*. The proof at hearing pertaining to non-irrigated acres focused on only three of the seven SWC members. Furthermore, even these three can be expected to have additional lands converted from irrigated agriculture to non-irrigated areas in the future. Consequently, it would appear that the Director would need to investigate such conversions in all seven entities before either determining material injury or setting a curtailment or mitigation number in the future.
- *Develop a protocol for considering mitigation or replacement water plans*. The Hearing Officer's decision carries the expectation that the Department will adopt a protocol for either providing storage water before the fact or paying for the seniors' purchase of it. Presumably, the Director will take one of these paths or adopt some other acceptable protocol. SWC Rec. Order at 65-66.

(b) The Spring Users' delivery call

The second part of what we refer to "Round Six" concerns the Spring Users' delivery call. On January 11, 2008, Hearing Officer Gerald Schroeder issued his *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("Springs Rec. Order") after a November 2007 evidentiary hearing in two consolidated delivery calls brought by Blue Lakes Trout Farm, Inc., and Clear Springs

Foods, Inc. (together, the "Spring Users"). These entities are trout producers in Idaho's famed "Thousand Springs" region. Each holds water rights authorizing large diversions from springs that flow from the basalt canyon walls where the Snake River has incised into, and truncated, the Eastern Snake Plain Aquifer. The Spring Users' commercial trout facilities are situated between the aquifer and the river, and they depend on the gravity flow of large quantities of cold, high-quality water from the aquifer into their raceways. Their delivery calls were premised on the claim that junior-priority ground water pumping from the aquifer had depleted flows to their facilities and caused them material injury.

As was the case in the SWC delivery call, the Director had issued a pre-hearing emergency order. The Hearing Officer was in effect reviewing that order based on the evidence at a trial. His order is a recommendation to the Director after hearing.

Following the hearing, Hearing Officer Schroeder issued a recommended order that in nearly all material respects affirmed former Director Karl Dreher's orders that junior ground water users are to provide a certain level of mitigation to increase spring flows for the benefit of the Spring Users, based on injured spring water rights having priorities of 1964 and 1973. Many of the Hearing Officer's conclusions mirror those in the SWC delivery call decision, and these will not be repeated. In addition to those, the following are the key rulings in the Springs case:

(i) Ground water pumpers are not solely responsible for spring declines, but must stop diverting or provide mitigation to the extent their pumping interferes with senior rights

The ground water pumpers, acting through the North Snake and Magic Valley Ground Water Districts (the "Ground Water Districts") and represented by a larger consortium of such districts known as Idaho Ground Water Appropriators, Inc. ("IGWA"), pointed out that the Spring Users made their appropriations at times—primarily the 1960s and 1970s—when aquifer outflows at the springs were higher, due to incidental recharge from inefficient surface irrigation practices, than they were in 1902. "IGWA maintains that there should not be curtailment when the Spring Users' rights are dependent upon an inflated water level that was dependent upon incidental recharge that resulted from inefficient farming practices that cannot now be required." Springs Rec. Order at 7. The Hearing Officer acknowledged the anomalous situation in the ESPA, in which the aquifer holds more water now than it did under pre-development conditions, but applied the basic priority rule nonetheless. He noted that the Spring Users "cannot require the continuance of inefficient flood [irrigation] practices." At the same time, he found that ground water rights still must answer to the priority system. Accordingly, he ruled that the "Spring Users are entitled to curtailment to the extent that the junior ground water users interfere with the water the Spring Users would otherwise have under their water rights." Springs Rec. Order at 8.

(ii) It was proper for the Director to consider historical information about water available to the Spring Users' rights at the time they were appropriated, and not base

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his analysis solely on the maximum amounts stated in the Spring Users' decrees

The Spring Users maintained that they should be entitled to curtail juniors to supply the full amount of their licensed water rights year-round, and that the Director was without power to "go behind" or "readjudicate" their recent SRBA decrees ratifying these amounts. The Ground Water Districts maintained that, at the time the spring rights were established, the supplies from the aquifer fluctuated down seasonally, and did not supply the maximum diversion amounts year-round. The Hearing Officer agreed with the ground water users, as had the Director in his emergency order. The amount of curtailment or mitigation would take into account such fluctuations. Springs Rec. Order at 10-11. The "Spring Users cannot be guaranteed the full amount of the water rights adjudicated every day of the year or every year when that condition has not existed during any relevant time." *Id.* at 18-19.

(iii) The ground water users failed to prove that the Spring Users employed unreasonable means of diversion

AFRD had confirmed that, in a delivery call, juniors can raise the defense that the seniors are not using reasonably efficient means of diversion. In his emergency order, the Director already had found a couple instances where the Spring Users were not using reasonable means, and he had restricted the amount of curtailment accordingly. At hearing, the ground water users argued for additional restrictions, but failed to provide adequate proof. The Hearing Officer found that arguments such as the possibility of horizontal drilling into the aquifer or pump-back arrangements lacked sufficient evidence to support expanding the Director's findings on this issue. Springs Rec. Order at 10-12.

(iv) The ground water pumpers were required to curtail, or provide replacement water equivalent to, some 57,000 acres of irrigated land in a program phased in over five years

As part of their mitigation or replacement water effort, the Ground Water Districts have obtained storage water with which to provide aquifer recharge for the benefit of spring flows, and have shut off several wells in favor of using available surface water to irrigate these same lands. The Hearing Officer found that the Rules appropriately allowed phased curtailment or mitigation over a five year period.

(v) The 10% "trim line," based on model uncertainty, applies to the Spring Users' delivery call

As in the SWC delivery call, the Hearing Officer agreed it was appropriate for the Director to limit the reach of the delivery call to those wells for which the model predicts, with greater than 10% certainty, that their pumping depletes a particular spring reach. The use of the trim line was of huge import in this case. "One of the most startling facts in these cases is the amount of [ground water supplied] acreage that must be curtailed in order to deliver water to the Spring Users facilities."

Springs Rec. Order at 22. The Hearing Officer noted that, without applying the 10% trim line, the number of ground water irrigated acres required to be dried up "for Blue Lakes would go from 57,220 acres to 300,000 acres. The acres curtailed to be applied to [Clear Springs] would rise from 52,740 acres to 600,000 acres." Springs Rec. Order at 22. The Hearing Officer recited the importance of ground water development to several cities and the agricultural industry in southern Idaho, then wrote:

> In this context to say that land will not be dried up when there is a substantial possibility that there will be no significant contribution to the Spring Users water rights is consistent with the policies set forth in the Conjunctive Management Rules, which are consistent with the Idaho Constitution and the legislative policy towards ground water development.

Spring Rec. Order at 23.

(vi) The public interest is to be considered when curtailment is proposed

Again citing *Schodde*, the Hearing Officer found that "the public good" can be considered in delivery calls such as this, and in some cases might "outweigh the private right." Springs Rec. Order at 15.

> "First in time is first in right" is fundamental to water administration but is subject to consideration of the public interest. The Director is not limited to counting the number of cubic feet per second in the decree and comparing the priority date to other priority dates and then ordering curtailment to achieve whatever result that action will obtain regardless of the consequences to the State, its communities and citizens. These conclusions have significance in several issues in this case. They affect the Director's use of the so-called "trim line," a point of departure beyond which curtailment was not ordered. The public interest affects the timing of curtailment. Consideration of the public interest gives relevance to the economic evidence that was presented.

Springs Rec. Order at 17.

(vii) Water quality of the Spring Users' supply is an element that may be considered

The Spring Users argued that the quality of the water they receive from the springs, including its temperature, is essential to fish propagation and should be maintained in any replacement water plan. Although water quality is not an element of a water right, the Hearing Officer concluded nonetheless that "in considering alternate proposals to provide water in a manner different from the practices in place when the rights were licensed and ultimately decreed, the quality of the water may be considered." Springs Rec. Order at 22.

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(viii) Where the senior privately agrees to subordinate its water right, it cannot seek to fill it through a call against other juniors

In his Emergency Order, the Director had reduced the amount of water to which Blue Lakes was entitled by 0.7 cfs, which was the amount of a license that Blue Lakes in an earlier and unrelated dispute had agreed to subordinate to the more junior right held by a neighboring fish facility. The Hearing Officer concurred with the Director's view. "Rather than curtail [junior ground water pumpers] to provide this water, it should be counted as water already available to Blue Lakes Trout Farm." Springs Rec. Order at 25.

(ix) The Ground Water District's replacement water plan for 2008

The Magic Valley and North Snake Ground Water Districts, the only districts among the eight covering portions of the ESPA, submitted a Replacement Water Plan ("Plan") to the Department for 2008 that includes continuation of certain mitigation actions they have implemented in prior years, such as supplying surface water to formerly ground water-irrigated acres. The Plan also incorporates mitigation measures that have been facilitated by the joint purchase of a separate fish farm by the State, the City of Twin Falls and the Ground Water Districts. The purchase makes it possible for this farm's spring water to be redirected to supply the Blue Lakes hatchery, thus alleviating the shortage on which it based its delivery call.

- The Ground Water Districts also propose to use spring water rights currently diverted by the Idaho Department of Fish and Game to supply up to 2 cfs of spring water to Clear Springs.
- Based on this representation by the Districts, the Director found them to be proceeding in good faith and did not curtail junior ground water users. The Idaho Supreme Court ultimately found the Ground Water Districts' Replacement Water Plan for 2008, though it provided sufficient replacement water that year for the seniors, violated the Rules' requirement that only formally approved mitigation plans can be used for this purpose. *In the Matter of Distribution of Water to Various Water Rights, A&B Irr. Dist. et al. v. Spackman*, Slip Op. at 19-20 (Dec. 17, 2013) (discussed below).
- Based on the Emergency Order, which the Hearing Officer largely ratified, the Ground Water Districts are obligated to provide increasing amounts of mitigation over a five-year period (beginning in 2005).

In his July 11, 2008 *Final Order Regarding Clear Springs and Blue Lakes Delivery Calls*, Department Director David Tuthill affirmed the Hearing Officer's Recommended Order in all material respects.

(c) IDWR Director's decision denying A&B Irrigation District's delivery call

This analysis discusses the third part of "Round 6," the Director's January 29, 2008 Order in the case before the Department titled *In the Matter of the Petition for Delivery Call of A&B Irrigation*

District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area ("*A&B Order*").

In the *A&B Order*, IDWR Director David Tuthill denied a water delivery call in which A&B Irrigation District ("A&B") sought to curtail potentially hundreds of junior ground water rights in the ESPA. The Director concluded that A&B had suffered no material injury and that the water supply problems they allege likely stem from poor well construction or location, overly-shallow pumping depths, and similar problems—not from reduced supply due to pumping by junior ground water right holders. In any event, he noted that A&B has sufficient water to fully irrigate its patrons' lands. The Director also denied A&B's request to create a Ground Water Management Area.

A&B is comprised of two divisions. The A Division relies on Snake River surface water to irrigate about 15,000 acres. With respect to these surface water rights, A&B is part of the Surface Water Coalition ("SWC"), and has participated in SWC's delivery call against essentially the same junior ground water rights as are involved in the A&B call (discussed below). The B Division, which serves some 63,000 acres and is the subject of the delivery call, relies on about 177 wells diverting ESPA ground water under 1948-priority rights. This priority is among the most senior ground water priorities in the ESPA, and likely is a chief reason A&B has seen itself aligned with SWC, despite SWC's broad-based attack on ESPA pumping.[248]

A&B's position is that aquifer levels at its wells have dropped an average of 20 to 40 feet since 1959, and that it has had trouble pumping enough water to fully satisfy its rights. A&B alleged that it now can produce only about 974 cfs, about an 11 percent decrease in flow rate from the 1,100 cfs it says was available originally. *A&B Order* at 43. It blames junior ground water users.

A&B's delivery call against junior ESPA ground water users actually was filed in 1994, then put on hold due to a stipulation. In March 2007 A&B petitioned the Department to proceed with the matter, the Department did so, and the *A&B Order* resulted. A&B then challenged the *A&B Order*'s denial of its delivery call, and has petitioned for a hearing. The hearing was scheduled for mid-May 2008 before Hearing Officer Gerald Schroeder. In the meantime, A&B has filed a motion for declaratory order asserting that it is not subject to the Idaho law (or the Conjunctive Management Rule mandate) requiring ground water appropriators, at their own expense, to produce from a reasonable pumping level—that is, a level that is sufficiently deep so as not to command the entire ground water resource to the exclusion of other appropriators.

As he has done in the other two delivery call disputes (Spring Users and SWC), Director Tuthill reviewed the delivery call petition, evaluated information requested from A&B, considered the

[248] It is likely that any ground water curtailment to serve the SWC's surface water rights would not require shut-offs of ground water priorities as senior as 1948. Indeed, the Director's May 2, 2005 emergency order in the SWC delivery call (and subsequent orders supplementing it) affected only ground water rights that, though numerous, were many years more junior. As to a future Spring Users' call, it also is unlikely that ground water rights senior to the early 1960's would be subject to curtailment; most spring rights for fish propagation were granted between the late 1960s and mid-1980s.

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Department's own information about A&B's water rights, and then issued a decision. The Director's *A&B Order* reflects a significant amount of hydrological and geological analysis.

The *A&B Order*'s fundamental conclusion is that A&B failed to demonstrate material injury. The additional information the Director reviewed solidified this finding.

These are the main points from the A&B decision:

(i) A&B has a full water supply

The Director concluded that, in part due to efficiency improvements, such as sprinklers replacing flood techniques, A&B was receiving sufficient water from its wells to fully irrigate all the lands of its patrons (approximately 63,000 acres). Based on studies by the Department, the University of Idaho, and the U.S. Bureau of Reclamation regarding irrigation water requirements within A&B—as well as information from A&B's own hydrogeologist—A&B has pumped a full water supply to its lands every year since 1994. *A&B Order* at 12-14.

(ii) Available date show that none of A&B's lands are short of water

A&B claimed it had 18,525 acres that were "water short," and not receiving the ¾ inch of deliveries per acre that A&B believes its lands require. The Department used an evapotranspiration model, Landsat photos, and other analyses to test this claim, and found that these lands in fact had been receiving adequate irrigation water. *A&B Order* at 15-23.

(iii) A&B has supplemental wells for which it has not accounted

Some 27,000 acres within A&B (including some of the claimed water short areas) receive ground water from private supplemental wells, although the "annual volumes pumped from these private wells were not provided by A&B and are not included in any A&B annual or monthly water use summaries." *A&B Order* at 16. In other words, the Director found A&B's wells annually pumped sufficient water for the entire project, but that over 40 percent of the project lands received at least some water from separate ground water pumps operated by A&B patrons. The Director did not discuss the priorities of these supplemental wells or their potential effects on the A&B wells.

(iv) A&B is subject to the reasonable pumping level mandate

The Director noted that ground water levels in the ESPA have declined some since the 1950s, but "generally remain above" the levels existing before surface irrigation and its attendant incidental recharge began in the late 1800s. *A&B Order* at 5. The Director concluded that A&B is required to produce its water from a reasonably deep level, and that there is no indication that A&B is being asked to pump water from below such a level. *Id.* Furthermore, the Director found that the costs A&B has incurred in deepening its wells "are not unreasonable." *Id.* at 45. In its recent motion for declaratory order, A&B argues that its 1948 priorities immunize it from the reasonable pumping level requirements

of the 1951 Ground Water Act. The motion was argued in late April 2008, and the Director has not yet ruled on it.[249]

(v) Hydrogeology

The Department referenced several hydrological and geological studies of the ESPA in A&B's area to conclude that some of A&B's wells were located in areas having little ground water productivity. The Director noted that other A&B wells were constructed into areas that had not been evaluated for productivity. A&B Order at 24. The Director refused to curtail other ground water rights when A&B's own actions had left it with insufficient water due not to overall supply in the aquifer, but to their having chosen well locations poorly.

(vi) Well design and construction

A&B had asserted, in support of its delivery call, that it abandoned seven wells "because they no longer provide adequate water." *A&B Order* at 26. However, the Director found that only five had been abandoned and that the reasons for abandonment could not be laid at the feet of the junior pumpers (four were in the non-productive sediments in the south of the project and one was abandoned due to a crooked borehole). *Id.* at 27. A&B also maintained that since 1980 it "drilled 8 replacement wells to replace wells that would no longer provide an adequate water supply as a result of the lower ground water tables." *Id*. at 28. Again, A&B's assertions did not square with the facts, since there were only five such replacement wells, one was the well to replace the crooked bore described above, and four were in the difficult hydrogeological zone. In any event, the Director concluded that "[t]he need for well deepening, well replacement, pump lowering, and pump bowl replacement, however, is not a recent development and is attributable, in part, to substandard original well construction, routine operation and maintenance, extraordinary operation and maintenance caused by sand pumping, and a variety of other causes." *A&B Order* at 28.

The Director also found that that A&B did not have geophysical logs of its wells or information about the saturated thickness of the aquifer. *A&B Order* at 32. In the absence of this information, the Director concluded that "it is difficult to assess how serious a problem is posed by potential future water level declines." *Id.* at 32.

The Director ruled that "A&B has not adopted formal standards for the design and installation of wells," and instead designs wells informally with a drilling contractor. *A&B Order* at 44. A&B uses the cable tool drilling technique, "which is not well suited for use in the geological environment in the southwestern portion of the District…." *Id.* A&B's "[f]ailure to use appropriate technology artificially

[249] There is little doubt that the Director will rule that A&B, despite having water rights that predate the 1951 Ground Water Act, is subject to the reasonable pumping level mandate spelled out in that statute. This is because the Director recently ruled, in another case, that pre-1951 rights are subject to the Act. *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (IDWR's Final Order Feb. 26, 2008; Order on Reconsideration July 3, 2008), *appeal dismissed as untimely*, *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037 (2011).

limits access to available water supplies and is not consistent with the requirement for the appropriator to use reasonable access." *A&B Order* at 45.

(vii) Use of the ground water model

A&B sought to extrapolate effects on its wells from ground water pumping that might be deduced from use of the ground water model that has been used to evaluate pumping effects on reach gains to various reaches of the Snake River. The Director noted that the ground water model "does not properly account for local hydrogeologic features within the aquifer or local pumping effects and thus, should not be used to evaluate impacts of one well on another." A&B Order at 33.

(viii) Irrigation of enlargement areas

A&B asserted that it had some 22,700 acres of water-short areas under 39 wells. However, the Director observed that the senior water rights associated with these wells allow irrigation of about 4,100 fewer acres than this. *A&B Order* at 15. These acres may correspond to a similar number of acres that were recognized as enlargements in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.). Enlargement acres received a statutory amnesty but are required to take a priority of 1994, the date of the statute.

(ix) Denial of ground water management area designation

Idaho Code § 42-233b authorizes the Director to designate a ground water management area ("GWMA") covering a ground water basin that he determines "may be approaching the conditions of a critical ground water area." The GWMA statute authorizes the Director to impose certain conditions or restrictions, including curtailment of junior rights, to protect ground water levels and senior water rights. A&B asked that the ESPA be designated as a GWMA, essentially as an alternative means to achieve curtailment of junior ground water rights. The Director denied the petition, concluding that because water districts pursuant to Idaho Code Title 42, Chapter 6, already are in place across the entire ESPA, and because administration of junior water rights can be carried out in these districts, "no additional relief would be provided to A&B by such a designation." *A&B Order* at 47.

(7) Round Seven: The SRBA Court's decision rejecting Idaho Power's attack on the *Swan Falls Agreement*

In its *Memorandum Decision and Order on Cross-Motions for Summary Judgment*, ("IPCo Decision"), Consolidated Subcase 00-92023 (92-93), *In re SRBA, Case No. 39576*, Idaho Dist. Ct., Fifth Judicial Dist. (April 18, 2008), the Snake River Basin Adjudication ("SRBA") Court ruled that the *Swan Falls Agreement*, the 1984 contract between the State of Idaho and Idaho Power Company, will be enforced as Idaho Power's water rights are decreed in the SRBA. The court ruled that, under the *Swan Falls Agreement*, a portion of Idaho Power's hydropower water rights on the Snake River at Swan Falls Dam were placed in trust, with the State as trustee, and that these rights are subject to being subordinated by the State to new water rights licensed upstream or up-gradient that might deplete flows at Swan Falls. Such new rights, for irrigation and other uses, were granted in the ensuing years pursuant to statutory provisions implementing the Agreement.

The dispute arose when the SRBA court, "due to an oversight in uncontested cases," issued partial decrees naming Idaho Power as the sole owner of these water rights. IPCo Decision at 42. The State and others filed late objections seeking to name the State as owner, subject to the trust described in the *Swan Falls Agreement*. In this decision, the court ruled for the State, and will issue the decrees in the name of the State, as legal title holder, noting that Idaho Power and the citizens of Idaho share equitable title to those Idaho Power water rights held in trust pursuant to the *Swan Falls Agreement*. IPCo Decision at 20-21.

This decision thwarted Idaho Power's attempt to evade the *Swan Falls Agreement*'s subordination of the company's rights to junior ground water rights in the ESPA.

(8) Round Eight: The Idaho Supreme Court ultimately upholds most of the lower court (and Department) rulings on the Surface Water Coalition's original ESPA delivery call.

In December 2013, the Idaho Supreme Court issued its decision in the appeal from the protracted litigation that originated with the 2005 delivery call filed by the Surface Water Coalition—the same 2005 delivery call discussed above.[250] The high court had before it only a few issues on appeal, two of which are material here.

First was the question as to how material injury is to be determined. The SWC argued that the Director had abused his discretion with his approach, which:

> considered a "baseline quantity" independent of the decreed or licensed quantity. The baseline quantity represented the amount of water predicted from natural flow and storage needed to meet in-season irrigation requirements and reasonable carry-over [of storage]. The Director then determined material injury based on shortfalls to the predicted baseline as opposed to the decreed or licensed quantities.[251]

The Court ruled that the factors for determining material injury in Rule 042 of the CM Rules require that "a finding of material injury requires more than shortfalls to the decreed or licensed quantity of the senior right."[252] of water to which the senior is entitled for deciding whether material injury has occurred to senior water rights that calculates "minimum full supply" and "reasonable in-season demand."[253] The Court upheld the Director's approach.

Second was the question whether the Director abused his discretion by not requiring the ground water users to implement a mitigation plan containing "contingency plans by which junior water right holders would ensure

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[250] *A&B Irrig. Dist. et al. v. Spackman,* 315 P.3d 828 (Idaho 2013).

[251] *A&B Irrig. Dist. et al. v. Spackman,* 315 P.3d at 836.

[252] *Id.*

[253] *Id.*

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that material injury would not occur to the seniors' carry-over storage rights."[254] The Court agreed with the district court that the Director had, by allowing insufficient "water replacement plans," essentially followed a "wait and see" approach that put the risk of shortfall on the seniors. This approach, found the Court, was not allowed by the CM Rules.[255]

[254] *Id.* at 842.

[255] *Id.*

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10. STOCK WATER RIGHTS

Stock water rights may be obtained based on ground or surface water diversions. Such rights are referred to as "in-stream watering of livestock" rights where the livestock drink directly from a natural stream without use of a constructed physical diversion works.[256]

Holders of stock water rights are exempt from permitting requirements. (This is similar to the exemption for domestic ground water rights, as discussed in section 7.F(1) at page 89.) Of course, stock water users are free to, and often do obtain permits, licenses, and decrees for their stock water rights. Indeed, they must file a claim in the SRBA, although the claim deadline has been postponed. See discussion in section 13.C at page 601.

The Legislature has adopted a statute specifically designed to facilitate stream protection improvements that move cattle out of streams through the construction of off-stream troughs or tanks.[257] This statute requires the water user to file a notice, pay a small fee, and meet certain measurement and technical requirements, but it exempts the user from obtaining an approval of a change in the water right under section 42-222.[258] Water rights under this special provision are limited to 13,000 gallons per day per diversion.[259]

Where grazing occurs on federal lands, the federal government has taken the position that it holds stock water rights. President Coolidge's 1926 Executive Order withdrew and reserved thousands of tracts of public land containing water holes and other water sources used by the public for watering purposes. The SRBA Court concluded that the Executive Order did not create a federal reserved water right. The Idaho Supreme Court reversed, ruling that the Executive Order was an express statement showing an intent to reserve federal water rights in the waters on these lands. *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.).

The Court noted that the purpose of the federal reservation was to ensure that the water would be available for use "by whichever member of the public happens at any time to have the grazing permit for the lands" thereby preventing private appropriations whereby "individuals could monopolize the water." *Basin-Wide Issue 9*, 131 Idaho at 471, 959 P.2d at 452. "To hold otherwise would be in contravention of the policy of this state 'to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Basin-Wide Issue 9*, 131 Idaho at 472, 959 P.2d at 453 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)).

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[256] Idaho Code § 42-113(1).

[257] Idaho Code § 42-113(3).

[258] Idaho Code § 42-113(3)(d).

[259] Idaho Code § 42-113(3)(b).

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An Idaho statute provides that any changes sought in such rights require the approval of the grazing permittee.[260]

Meanwhile, the United States pursued and obtained partial decrees for thousands of stockwater rights on non-reserved BLM land based on beneficial use (as opposed to federal reserved rights). These de minimis stock water claims were subject to deferral, but the United States elected to pursue them. Then, in 2007, the Idaho Supreme Court ruled water rights for stockwatering on unreserved federal land (BLM land) are held by the grazing permittee, not by the federal government. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (Eismann, J.). That shut down any new federal stock water claims on BLM land, but left the thousands of rights already obtained intact. In 2020, however, the Idaho Legislature enacted Idaho Code § 42-224, which provides a mechanism for forfeiture of federal stockwater rights in accordance with the holding in *Joyce Livestock*.

[260] Idaho Code § 42-113(4).

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11. METHODS FOR APPROPRIATING WATER RIGHTS

A. The permit/license method

(1) The "mandatory permit" requirement: Idaho Code § 42-229 (ground water-1963), §§ 42-103 and 42-201 (surface water-1971)

In the early days of settlement, water could be appropriated simply by taking it (see the "constitutional method" discussed below in section 11.B at page 152.) This "do-it-yourself" approach may have worked well enough for the early-arriving miners, all of whom essentially were temporary trespassers on the public domain. Their title, as against all but the federal government, could be perfected solely by the will to take possession of the water and the determination to keep it. It also helped that the relative number of these trespassers was small. But as more people arrived in Idaho and took water from the streams for the new and larger projects necessary to support permanent settlement, this early approach ultimately had two primary shortcomings. First, the appropriation was not confirmed or quantified in any way, and thus always was subject to challenge and uncertainty. Second, there was no way to secure a water right prior to completion of the proposed project.

In response to these problems, the Idaho Legislature soon created a more formal process for obtaining water rights through a state agency. In 1903 the Legislature established a permit-based procedure for the appropriation of water. Thus, since the early days of statehood, a person seeking a water right could file an application seeking a water right with the state reclamation engineer (now the Director of the Department of Water Resources).

In 1951, the Legislature enacted the Ground Water Act, 1951 Idaho Sess. Laws, ch. 200.[261] Section 7 through 12 of the Act established procedures for permitting and licensing of ground water rights. (These procedures were for ground water only, but loosely tracked modern sections 42-202 *et al.*, which today govern permitting and licensing of both ground and surface water rights). However, the 1951 Act expressly provided that the ground water permitting procedures were optional, and that ground water rights could also be created by diversion to beneficial use. 1951 Idaho Sess. Laws, ch. 200, § 4 (codified as amended at 42-229).

In 1963, the Ground Water Act was amended to make the permit process mandatory (with limited exceptions) for ground water rights. 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229). The Act contained an emergency clause making it effective on March 25, 1963.

In 1971, the Legislature enacted legislation mandating permitting for all water rights (with exceptions). 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201) (discussed in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 7, 156 P.3d 502, 508 (2007)). The 1971 amendments did not single out surface water (as the 1963 amendments had singled out ground water).

[261] The 1951 Session Law did not codify the legislation. Parts of it were later codified (section 1 through 6 of the Act became Idaho Code §§ 42-226 through 42-231).

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The 1971 amendments made permitting mandatory for all water rights, subject to exceptions carved out elsewhere. The 1971 Act did not contain an emergency clause, so it went into effect on May 20, 1971.

In 1986 the Legislature amended the mandatory permitting statute by re-numbering Idaho Code § 42-201 as subsection 42-201(1) and adding a new subsection 42-201(2). H.B. 369, 1986 Idaho Sess. Laws, ch. 313, § 2. Since its amendment in 1971, subsection 42-201 provided that the only way to obtain a water right is through the permitting process. But it did not expressly prohibit persons from diverting water to beneficial use without a permit. In other words, a person might lawfully choose to divert water to beneficial without the protection of a water right. The addition of subsection 42-201(2) in 1986 established that, henceforth, the only way to lawfully divert and apply water to a beneficial use is through the permitting process.

Today, the only water uses that are authorized to commence without an approved permit are domestic uses from ground water wells,[262] stock water use where the stock drink directly from a surface source,[263] firefighting,[264] and land application or other disposal of municipal effluent.[265]

The permitting process is a two-step approach, involving a permit and then a license. The first step is to apply for a "permit."[266] The criteria for approval of a permit are discussed in section 16 at page 259. This is typically done before the applicant begins construction of the project. Once the permit is issued, it secures the holder's priority date. The holder then may construct the project with the knowledge that a water right, of known priority, will be available.

After the permit Application is filed, it is advertised according to statute. Other appropriators or members of the public are entitled then to protest the permit application within a fixed period of time. If that happens, the Department will conduct a "prehearing conference" in an effort to resolve the protest. If that does not end the protest, a full-blown administrative hearing takes place in which all parties present argument, testimony and other evidence.[267]

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[262] Idaho Code § 42-227 (exempting domestic wells from licensing requirements); Idaho Code § 42-111 (defining "domestic purposes"); Idaho Code § 1401A(4) (definition of "Domestic use" for purposes of water right adjudications. See also IDAPA 37.03.08.035.01.b (exemption from application rules for ground water rights for "single family domestic purposes"); IDAPA 37.03.08.010.15 (definition of "Single Family Domestic Purposes" as "Water for household use or livestock and water used for all other purposes including irrigation of up to one half (1/2) acre of land in connection with said household where total use is not in excess of thirteen thousand (13,000) gallons per day."); IDAPA 37.03.11.020.11 (delivery calls not effective against exempt domestic water rights). See discussion of domestic ground water rights in section 7.F starting on page 89.

[263] Idaho Code § 42-113; IDAPA 37.03.08.035.01.c.

[264] Idaho Code § 42-201(3).

[265] Idaho Code § 42-201(8).

[266] Idaho Code § 42-202.

[267] Idaho Code § 42-203A(4).

In deciding whether to grant a water right permit, the Department must determine whether the application satisfies statutory criteria. Today, there are seven set out in section 42-203A(5):

> In all applications whether protested or not protested, where the proposed use is such
>
> (a) that it will reduce the quantity of water under existing water rights, or
>
> (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or
>
> (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or
>
> (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or
>
> (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or
>
> (f) that it is contrary to the conservation of water resources within the state of Idaho, or
>
> (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;
>
> the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Idaho Code § 42-203A(5) (formatted added to improve readability).

See also the summary of statutory tests in section 16 at page 259.

Note that Director may grant the permit in full or in part or with conditions.[268]

The Department has promulgated regulations addressing water appropriation. IDAPA 37.03.03. These include regulations governing trust water, IDAPA 37.03.08.000 to 37.03.08.039. It also includes regulations specifying information that must be included in an application for appropriation, IDAPA

[268] The Water Code provides: "[T]he director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions." Idaho Code § 42-203A(5). The Department's rules provide: "The director will use the following criteria in evaluating whether an application . . . should be approved, denied, approved for a smaller amount of water or approved with conditions." IDAPA 37.03.08.045.01.

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37.03.08.040 ("Rule 40").[269] And it includes regulations setting out "evaluation criteria" for new permits. IDAPA 37.03.08.045 ("Rule 45").

There are no comparable rules for transfers.[270]

A permit is not a water right (though it does authorize the holder to divert and use the water under the terms of the permit). A water permit is often described as an inchoate right.[271] The permit is not itself real property, but represents the user's right to perfect an interest in real property. Consequently, it is described as personal property, rather than real property.[272] Consequently, the Legislature may change the rules governing licensing and make the changes applicable to existing permit holders.[273] Other than this, the real versus personal property distinction is largely semantic (but see the discussion of differences in how the two are conveyed).

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[269] More detailed "Additional Information Requirements" are set out in IDAPA 37.03.08.040.05. These requirements are waived for applications of 5.0 cfs or less. However, the Department reserves the right to require submission of this additional information even for small applications when it determines necessary. IDAPA 37.03.08.040.05.c. It has determined that certain additional information is required for municipal water right applications. See discussion in section 23.D(8) at page 353 of this Handbook.

[270] There are no comparable rules for evaluating the local public interest or other requirements in the context of water transfers. Indeed, the Department has not promulgated any rules governing water transfers. One might argue that these rules (applicable to new appropriations) should apply, at least by analogy, to public interest review in the context of water transfers. On the other hand, one might contend that the criteria should not be the same. Arguably a new appropriation (which, in effect, takes water out of the public domain) should be subject to more vigorous public review than the transfer of a water right from one private use to another. Because new appropriations are "free" (meaning that the appropriator pays nothing for the right except a filing fee), the marketplace provides no reality check on the economic value of the use. Water transfers, in contrast, typically are subject to significant marketplace constraints that, to some extent at least, ought to guard against unwarranted uses.

[271] *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

[272] In contrast to a water right (evidenced by a license or decree or by beneficial use), an application for a permit and a permit itself are deemed personal property. By application for permit under such statutes the permittee secures an inchoate right which will ripen into a legal and complete appropriation by compliance with the statutory steps. Such right is merely a contingent right, which may ripen into a complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 402, 263 P. 45, 52 (1927). "An applicant's interest in an application for permit to appropriate water is personal property." IDAPA 37.03.08.035.02.d (Water Appropriation Rules).

[273] *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927); *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981).

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(2) Proof of beneficial use at the end of the "development period."

Once the permit is issued, the holder is authorized to proceed with the project and begin placing the water to beneficial use. Except for very large water rights (over 25 cfs), the holder must begin excavation or construction of the diverting works within one year and proceed "diligently and uninterruptedly to completion."[274]

The permit will specify a period of time of up to five years from the date of permit approval in which to place the water to beneficial use.[275] This is known as the "development period." On or before the last day of the development period, the permit holder must submit proof of beneficial use.

The statute provides various extensions of the deadline for submission of proof of beneficial use. Every permit is eligible for one five-year extension upon showing of good cause.[276] One or more extensions totaling up to ten years are available for certain larger water right permits.[277] Most

[274] "Every holder of a permit which shall be issued under the terms and conditions of an application filed hereafter appropriating twenty-five (25) cubic feet or less per second must, within one (1) year from the date upon which said permit issues from the office of the department of water resources, commence the excavation or construction of the works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted through no fault of the holder of such permit by circumstances, over which he has no control." Idaho Code § 42-204.

[275] "The department shall require that actual construction work and application of the water to full beneficial use shall be completed within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made." Idaho Code § 42-204. Where a shorter time is set, it may be extended back to the full amount provided upon a proper showing. Idaho Code § 42-218.

[276] "In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, or beyond any grant of extension pursuant to the provisions of subsection (1) of this section, upon request for extension received on or before the date set for completion, provided good cause appears therefor." Idaho Code § 42-204(6).

[277] "The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land may be extended by the director of the department of water resources upon application by the permittee for an additional period up to ten (10) years beyond the initial development deadline contained in the permit, or beyond a grant of extension pursuant to the provisions of subsection (1) of this section [dealing with regulatory delays], provided the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension." Idaho Code § 42-204(4). The statute previously provide for only a five-year extension. This ten-year provision was added in 2013. 2013 Idaho Sess. Laws, ch. 82. An informal guidance memorandum from Shelley W. Keen dated May 21, 2013 states: "Furthermore, if the department grants an extension of fewer than ten years under this provision, the permit holder is not limited to filing only one extension request. If the size requirement applies, the Department may grant multiple extensions totaling up to ten years." This guidance is reproduced in Appendix O.

practitioners find that the Department applies a lenient standard in determining good cause under these extension provisions. There are a handful of other special extensions.[278]

However, an applicant for a water right permit is not allowed to assume that an extension will be granted for purposes of showing need for water at the time of application.[279]

An uncodified portion of the 2013 legislation (adding the 10-year extension) provided that the legislation is retroactive: "Permits pending before the department are entitled to the maximum qualifying extension available pursuant to the provisions of section 42-204, Idaho Code, regardless of whether the permittee received a prior extension under section 42-204(6), Idaho Code." 2013 Idaho Sess. Laws, ch. 82 § 2.

In addition, other provisions of the water code provide extensions of time in connection with the submission of proof. Idaho Code §§ 42-218, 42-218(a).

Once the project is completed and the water is put to beneficial use, the permittee must "prove up" his or her water right, that is, demonstrate to the Department's satisfaction, that the water has been put to beneficial use according to the terms of the permit. Idaho Code § 42-217.

The Water Code provides limited statutory exceptions for failure to prove up within the allotted time.[280] If proof is not provided (or excused) within this time, the water right will be deemed abandoned.[281]

The proof is accomplished by submitting a *Proof of Beneficial Use* form to the Department accompanied by either (1) a license examination fee and request for the Department to perform the field exam, or (2) a completed field report prepared by a certified water right examiner retained by the water right holder.

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[278] *E.g.*, Idaho Code § 42-204(2) (for projects irrigating at least 5,000 acres diverting over 25,000 acre-feet per year); Idaho Code § 42-204(3) (for storage projects of more than 10,000 acre-feet); Idaho Code § 42-204(5) (for water projects undertaken by the United States or the Idaho Water Resource Board).

[279] The Department expects the applicant for a non-RAFN municipal appropriation to demonstrate at the time of application that system-wide need for the permit will materialize (and the ability to divert will be in place) within the five-year "development period" after permit issuance. Although extensions of the proof deadline are often obtained for up to a total of 15 years, the Department will not allow the permit quantity to be premised on needs beyond the first five years. Water rights premised on needs more than five years out require a RAFN application. Telephone conference between Jeff Peppersack, [Former] Chief, Water Allocation Bureau, IDWR and Christopher H. Meyer (March 3, 2015); confirmed by email from Mr. Peppersack to Mr. Meyer (Mar. 19, 2015).

[280] Idaho Code § 42-204(1) (extension of time available in the case of litigation retaining to water title and for failure to obtain certain consents and approvals). As noted in footnote 278 at page 150, certain large water projects are accorded additional leniency in the proof date.

[281] Idaho Code § 42-204.

If the proof is not timely submitted, the permit will "lapse" and a *Lapse Notice* will be mailed to the holder. If proper administrative steps are not promptly undertaken, the permit will be forfeited entirely. However, the Department may reinstate the permit if the holder makes a showing of reasonable cause within 60 days of the lapse notice. In such case, the priority date of the permit will be advanced by the number of days that the showing followed the date set for proof. Idaho Code § 42-218a(1). If a showing of reasonable cause is made more than 60 days after the lapse notice, the permit may be reinstated but the priority date will be advanced to the date that beneficial use proof is made. Idaho Code § 42-218a(2).

(3) Issuance of license

Once the proof is satisfactorily completed, the permit holder is entitled to receive a license for that amount of water beneficially used with a priority date relating back to the date of the application for the permit.[282] In many cases, the quantity of water on the license will be adjusted downward from the permitted quantity to reflect actual beneficial use.

The primary advantage of the permit/license process is that a potential water user may determine and secure his priority (or place in line) *before* undertaking a considerable investment in the construction of the water project. Today, every Western state, except Colorado, has adopted a permit system. Colorado achieves much the same result via what it calls a "conditional right" issued by a special water court.

A license, like a decree, is sometimes described as a "paper" water right. It is legal evidence of the right, but that right may be lost through subsequent abandonment or forfeiture. And of course, there is no guarantee that water will be available to fill the water right.[283]

B. Beneficial use (aka "constitutional method") water rights

From the earliest days of the territory, an appropriation of water could be made simply by diverting water to beneficial use with the intent to create a water right. "As early as 1881 a statutory procedure for appropriating water was adopted, providing that a person intending to appropriate water should post a notice at the point of diversion and record the same." *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (Schroeder, J.) (referencing Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1 (1968).

Idaho courts have long recognized that these three acts (intent, diversion and beneficial use) establish a valid water right with a priority date as of the date of application to beneficial use.[284]

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[282] Idaho Code § 42-219.

[283] *State v. Hagerman Water Right Owners, Inc.* ("*Hagerman II*"), 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.).

This do-it-yourself approach is sometimes referred to as the "constitutional method" and claims thereunder are often called "beneficial use" rights. The reference to the constitution reflects the courts' recognition that even without specific statutory authorization, appropriations are lawful under the Idaho Constitution.[285] The "constitutional method" terminology is potentially misleading, however.

The constitutional method is not constitutionally mandated, but merely constitutionally permissible. It is better understood as a creation of the common law, and, as such, is most certainly subject to legislative override (unlike a constitutional right). Consequently, it would be more accurately described as the "common law method." Alas, the "constitutional method" terminology has come to stick.

Prior to the adoption of statutes governing the process of appropriation, the constitutional method was the only means of obtaining a water right. Even after legislation was adopted (which occurred as early as 1881[286]), the constitutional method was deemed by the courts for many years to be an alternative to statutory requirements.[287] Finally, in 1963 (for ground water)[288] and 1971 (for surface water),[289] the Idaho Legislature enacted legislation making clear that statutory methods were henceforth the only methods available for appropriating water.

Because there is no administrative or judicial process involved in obtaining a constitutional method water right—and thus nothing recorded—these rights remain a significant unknown in the administrative system. One of the major objectives of modern adjudications in Idaho, such as the Snake River Basin Adjudication and the Northern Idaho Adjudication, is to review, define and quantify these beneficial use rights, and place them within the administrative system.

It is important to note that, within water districts, beneficial use water rights are administered as junior to decreed, permitted, or licensed rights.[290]

See discussion in section 11.C below regarding requirements to report or claim beneficial use water rights.

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[284] *Sand Point Water and Light Co. v. Panhandle Development Co.*. 11 Idaho 405, 413, 83 P. 347, 349 (1905); *Olson v. Bedke*, 97 Idaho 825, 829-30, 555 P.2d 156, 160-61 (1976); *State v. United States,* 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case).

[285] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho Const. art. XV, § 3 (emphasis added).

[286] See the "posted notice" method discussed below.

[287] *R.T. Hahas Co. v. Hulet ("Nahas II")*, 114 Idaho 23, 752 P.2d 625 (Idaho Ct. App. 1988).

[288] 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

[289] 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201).

[290] Idaho Code § 42-607.

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C. Water rights for certain domestic and livestock uses that are exempt from permitting

The Idaho Legislature has allowed limited water rights to ground water to be established outside the permit system by diverting and beneficially using ground water for statutorily-defined "domestic" uses, which include residential culinary uses and stock watering, provided the overall diversion volume does not exceed 13,000 gallons per day and any irrigation involved is for less than one-half acre.[291] A ground water right within these limits is exempt from the statutory permit/license requirement, but the water user must obtain a drilling permit before the well can be drilled.[292] While water rights for domestic purposes can be obtained by license, and can receive decrees in water right adjudications, often they are evidenced in IDWR's records only by means of a drilling permit and, once the well is completed, the driller's report.

The Idaho Code also authorizes exempt water rights to surface water for certain stock water uses. Idaho Code § 42-113(1) states that "[a] permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock." The statute explains that "the phrase 'in-stream watering of livestock' means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works." *Id.* Despite this "drinking from stream" language, section 42-113(3) provides that a person who has established such a stock water right "may, in addition to the in-stream use, divert the water for livestock use away from the stream" so long as the diversion is to "a trough or tank through an enclosed delivery system," it involves diversions of no more than 13,000 gallons per day per diversion, and it meets several other conditions. *Id.*

D. Statutory claims

Since 1967, Idaho's water code has authorized persons holding beneficial use water rights to file their claims with the Department.[293] In 1978, this option was converted to a mandatory requirement that such claims be filed by June 30, 1983.[294] However, the Legislature later declared that a claim filed in the Snake River Basin Adjudication (or other general adjudication commenced) prior to June 30, 1988 satisfies this requirement.[295]

In a somewhat confusing choice of terminology, the Department refers to beneficial use claims filed under this statute as "statutory claims" (referring to the statute authorizing and later requiring that

[291] Idaho Code § 42-111.

[292] Idaho Code §§ 42-227 and 42-238(2).

[293] Idaho Code §§ 42-243, 42-244. (Section 42-243 was designated section 42-225a prior to 1978.)

[294] 1978 Idaho Sess. Laws, ch. 345 (codified at Idaho Code §§ 42-243 to 42-245).

[295] Idaho Code §§ 42-245.

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such beneficial use claims be filed). The choice of language is confusing because the basis of these beneficial use claims is not statutory law, but common law.

The idea behind this filing requirement was to require water users to declare the existence of their beneficial use claims. Failure to do so would result in non-recognition of a beneficial use right. However, no statute indicates that the IDWR is expected, or even authorized, to subject these claims to any scrutiny once they are submitted. The Department simply publishes notice of the claims and keeps them on file. Presumably, one who asserts a beneficial use claim—such as in opposition to someone else's appropriation or transfer, or in aid of one's own proposed transfer—will be required to answer to the filing requirement.

This statute remains in effect statewide. Within the Snake River Basin, however, the statutory claim requirement has been overtaken by the SRBA, which is reviewing all water rights, including all beneficial use claims. Outside the Snake River basin (e.g., Kootenai River basin, Bear River basin), this statute continues to have practical effect. Those who have not filed statutory claims by the deadline can no longer assert beneficial use claims.

E. Posted notice

There is a special category of beneficial use rights known as "posted notice" rights. Under a statute enacted in 1881[296] and repealed in 1903, an appropriator could physically post notice of his or her intent to appropriate water. The notice would be posted near the proposed diversion (and recorded like a mining claim). In addition, the user was required to record the notice at the county recorder's office. If he or she completed the project within a reasonable time, and applied the water to beneficial use, a water right, based on actual measured use, would be issued with a priority date going back to the original posting.

These rights share with rights under the permit system the advantage of "relation back" to the date of the notice. Nevertheless, they are considered "beneficial use" rights because they are not confirmed by a permit, license, or decree.

This method is no longer available. However, rights created under this method are still valid (assuming they have not been forfeited or abandoned).

F. The curious case of "private waters"

Idaho Code 42-212, enacted in 1911 and carrying the caption "Diversion of private waters," addresses springs or small lakes that are "situated wholly or entirely upon the lands" of a single landowner. This statute prohibits IDWR from granting permits to divert this water "except to the person or corporation owning said land, or with his or its written permission…." Most of the few cases construing the statute have found that the statute does not apply because the water is found to flow off the property in some way. No reported case has considered whether a spring's (or lake's)

[296] 1881 Idaho Sess. Laws, at 267.

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contribution to a regional ground water aquifer—which presumably occurs in nearly every case through percolation—is such a disqualifying circumstance. However, as a matter of hydrology, it probably would be difficult to argue that spring seepage does not eventually reach an aquifer and leave the property in that way, and therefore is not "wholly or entirely" upon the owner's land.

Moreover, and despite the statute's caption, the text of the statute does not address the concept of "private waters." Rather, it simply bars a non-owner from obtaining a permit for waters "situated wholly or entirely" on another's property without that property owner's permission. Moreover, it clearly indicates that the landowner himself still would need a permit or an exemption, such as those provided by sections 42-111 or 42-113, to use this water (section 42-212 simply prohibits IDWR from granting permits for this water "except to the person or corporation owning said land or with his or its permission").

Interestingly, a few Idaho Supreme Court cases, in dictum, and despite the statute's actual language, have stated that section 42-212 establishes the rule that such springs "are appurtenant to and a part of the lands and belong exclusively to the owners of the land." *See, e.g., Maher v. Gentry*, 67 Idaho 559, 566, 186 P.2d 870, 874 (1947). The authors believe that the "private waters" statute would be narrowly construed today, and that it is unlikely a court would follow the *Maher* dictum and conclude that such waters "belong exclusively" to the landowner. Still, based on the *Maher* dictum, a property owner who can make the case that a source is "wholly or entirely" on his or her land would have a plausible argument that there is such a thing as private waters.

G. Private and general adjudications of water rights

Water users also may bring lawsuits to establish their rights and settle disputes. A private water adjudication is analogous to a quiet title action for land. The result is a decree recognizing each party's water rights in a particular reach of stream or other water body. However, an adjudication does not create water rights, it simply recognizes already-established water rights created by some lawful means, either as a valid use exempt from permitting (domestic or stock water), as a right created through the statutory permit method, or as one established before the statutory deadlines by the constitutional method.

In addition to such private adjudications, general adjudications are held from time to time for particular basins. A private adjudication is limited to named parties. In a general adjudication, in contrast, notice is published and every person claiming to hold a water right in the named basin must come forward and prove up his or her water right.

A general adjudication usually is necessary only when the general state of affairs is confused with respect to who holds what water rights, what their amounts and uses are, and so forth. The purpose of the general adjudication is to bring all players into court, resolve all the controversies at once, settle the books, and allow future developments to proceed with greater certainty. Sometimes a general adjudication is deemed necessary so that federal and Indian Tribe water rights can be determined and quantified in state court under the immunity waiver provided by the McCarran Amendment, as discussed in footnote 1091 at page 600.

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The most notable general adjudication is the Snake River Basin Adjudication, discussed in section 13 at page 599.

Water rights obtained through such private or general adjudications are referred to as "decreed" rights.

H. The burden of proof in water appropriations

Idaho's water code does not expressly allocate the burden of proof[297] in water right appropriation.[298] However, the Idaho Supreme Court has squarely placed the burden on the applicant for a new water appropriation to demonstrate that the basic statutory requirements are met.[299]

The court has twice addressed the burden of proof issue in the context of a public interest challenge to a new water right appropriation.[300] In the case of the local public interest, a special rule

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[297] The burden of proof is really composed of two elements: the burden of production—that is, who has to go first—and the burden of persuasion—that is, who wins in an evidentiary "tie." IDAPA 37.03.08.040.04.a.

[298] In the special case of "trust water" appropriations under the *Swan Falls Agreement*, the statute does allocate the burden of proof. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

[299] *Cantlin v. Carter*, 88 Idaho 179, 186, 397 P.2d 761, 765 (1964).

[300] In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the Court quoted District Judge Schroeder in this extended, but lucid, discussion of the burdens of production and persuasion:

> As Judge Schroeder correctly noted below, this burden of production lies with the party that has knowledge peculiar to himself. For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.
>
> However, the burden of proof [that is, the ultimate burden of persuasion] in all cases as to where the public interest lies, as Judge Schroeder also correctly noted, rests with the applicant:
>
> > [I]t is not [the] protestant's burden of proof to establish that the project is not in the local public interest. The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that overweigh the local public interest in favor of the project.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (referring to District Judge Schroeder, now on the Supreme Court) (quoted again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 607, 759 P.2d 891, 898 (1988).

The only other Idaho case to address burden of proof in the context of the local public interest was *Collins Bros.* That case merely recited that "the applicants had not met their burden of proof" and quoted from the Shokal case regarding burden of proof." *Collins Bros.*, 114 Idaho at 606, 759 P.2d at 897.

applies: The applicant bears the initial burden of coming forward with evidence for the evaluation of the local public interest criterion as to any factor of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant bears the initial burden of coming forward with evidence relevant to any factor for which the protestant can reasonably be expected to be more cognizant than the applicant. The applicant then bears the ultimate burden of persuasion.[301]

The Department subsequently adopted regulations allocating the burden of proof in all new appropriation applications:

> b. The burden of coming forward with evidence is divided between the applicant and the protestant as follows:
>
> i. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criteria (a) through (d) of Section 42-203A(5), Idaho Code [injury, supply, speculation, and finance];
>
> ii. The applicant shall bear the initial burden of coming forward with evidence for the evaluation of criterion (e) of Section 42-203A(5), Idaho Code [local public interest, now section 42-202B], as to any factor affecting the local public interest of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant shall bear the initial burden of coming forward with evidence relevant to criterion (e) of Section 42-203A(5), Idaho Code [local public interest, now section 42-202B], of which the protestant can reasonably be expected to be more cognizant than the applicant.
>
> iii. [Deals with "trust water" appropriations.]
>
> c. The applicant has the ultimate burden of persuasion for the criteria of Section 203A, Idaho Code [all standard criteria, including local public interest, which is now defined in section 42-202B], and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C ["for trust water"].[302]

See part 15.L(2) at page 249 for a discussion of the burden of proof in transfer proceedings.

I. One may not appropriate water that has been diverted and stored by another.

Once water is diverted and stored under a water right by one person, another person may not thereafter appropriate that water.

Note that different burden of proof rules apply to the special public interest tests applicable to appropriations of "trust water" pursuant to the *Swan Falls Agreement*. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

[301] *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

[302] IDAPA 37.03.08.040.04.

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> After the water was diverted from the natural stream and stored in the reservoir, it was no longer "public water" subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). It then became water "appropriated for sale, rental or distribution" in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use. A subsequent appropriator claiming a part or all of such waters would be the only person who could question the lack, extent, or nature of its application to a beneficial use.
>
> We are treating the water appropriation here from which this reservoir is supplied as being taken from a natural stream or flow of "public waters." It is not entirely clear from the record, and we accordingly do not pass upon the question, as to whether or not the waters collected in this reservoir are in fact taken from a natural stream or on the contrary are a mere collection of flood waters from rains and melting snow that runs off in the winter and spring and does not actually comprise or enter any natural stream or body of water. If the water impounded belongs to the latter class, then it is the unqualified private property of the owners of the reservoir, and they may do with it as they see fit. *King v. Chamberlin*, 20 Idaho, 504, 118 P. 1099; *Public Utilities Commission v. Natatorium Co.*, 36 Idaho, 287, at page 302, 211 P. 533; *Union Central Life Ins. Co. v. Albrethsen*, 50 Idaho, 196, 202, 294 P. 842; *Hinton v. Little*, 50 Idaho, 371, 374, 296 P. 582; *Vaughan v. Kolb*, 130 Or. 506, 280 P. 518; *Hagerman Irr. Co. v. McMurry*, 16 N. M. 172, 113 P. 823; 1 *Wiel on Water Rights*, (3d Ed.) § 37. Otherwise, it is impressed with the public trust as above indicated.
>
> No one can make an appropriation from a reservoir or canal for the obvious reason that the waters so stored or conveyed are already diverted and appropriated and are no longer "public waters." *Rabido v. Furey*, 33 Idaho, 56, 190 P. 73. This does not mean, however, that the reservoir or canal owner may waste the water or withhold it from persons who make application to rent the same. *Van Camp v. Emery*, 13 Idaho, 202, 89 P. 752; *Gerber v. Nampa & Meridian Irr. District* (on rehearing), 16 Idaho, 22, 26, 100 P. 88; *Niday v. Barker*, 16 Idaho, 73, 79, 101 P. 254; *Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho, 525, 535, 102 P. 481; *Schodde v. Twin Falls Land & Water Co.*, 161 F. 43, 88 C. C. A. 207, affirmed 224 U. S. 107, 32 S. Ct. 470, 56 L. Ed. 686. If, on the other hand, the owner of the reservoir owns land subject to irrigation from such reservoir, he may apply it to his own land or sell it to others, or both, according to the priorities of their applications.

Washington Cnty. Irr. Dist. v. Talboy, 55 Idaho 382, 43 P.2d 943, 945-46 (1935) (Ailshie, J.),

12. ADVERSE POSSESSION OF A WATER RIGHT

It is possible, at least in theory, for one person to adversely possess, and thus come to own, the water right of another. In *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957) (Taylor, J.), the senior irrigation district sought to enjoin an upstream diversion. The defendant contended that he was entitled to divert the water because he had done so for more than five years. (Note that the statutory period to establish adverse possession is now 20 years) The Idaho Supreme Court rejected the defense on the facts, holding that the ditch rider for the irrigation district allowed the upstream diversion only in years when the downstream reservoir did not need the water in order to fill. "The rule that the adverse use must in fact conflict with the owner's right has long been the law in this jurisdiction." *Mountain Home*, 79 Idaho at 443, 319 P.2d at 969.

The Court premised its ruling on the policy of maximum use. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home*, 79 Idaho at 442, 319 P.2d at 968. It described this as a "constitutional policy" that is also grounded in statute. *Id*.

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13. THE MAXIMUM USE DOCTRINE

In a seminal 1907 decision, the Idaho Supreme Court noted that a senior may not take his water inefficiently so as to deprive others:

> In this arid country, where the largest duty and the greatest use must be had from every inch of water in the interest of agriculture and home building, it will not do to say that a stream may be dammed so as to cause subirrigation of a few acres at a loss of enough water to surface irrigate 10 times as much by proper application.

Van Camp v. Emery, 13 Idaho 202, 208, 89 P. 752, 754 (1907) (Ailshie, C.J.) (senior upstream user not entitled to dam stream to subirrigate a meadow resulting in reduced stream flows to junior downstream headgates).

In 1909, the Court allowed a prior decree to be re-opened to examine whether senior appropriators really needed as much water as they had been awarded. *Farmers' Co-operative Ditch Co. v. Riverside Irrigation District, Ltd.,* 16 Idaho 525, 102 P. 481 (1909) (Ailshie, J.). "One farmer, although he has a superior water right, should not be allowed to waste enough water in the irrigation of his land to supply both him and his neighbor simply because his land is not adequately prepared for the economical application of the water." *Farmers' Co-operative*, 16 Idaho at 536, 102 P. at 484.

In 1912, the U.S. Supreme Court, applying Idaho law, handed down the most celebrated maximum use case of all. In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), a German immigrant installed a waterwheel driven by the current of the Snake River to raise irrigation water to his farm. Sometime thereafter, Milner Dam was built. When the placid water behind the dam stilled Schodde's waterwheels, he sued the junior appropriator. The U.S. Supreme Court affirmed the Ninth Circuit's ruling that, while the senior's priority is entitled to protection, he may not use an inefficient diversion to impair all other development of the Snake River. No doubt Schodde's waterwheel was a brilliant engineering feat. And it was efficient, so far as Schodde was concerned. But it was inefficient, so far as the resource as a whole was concerned.

As the *Schodde* Court said, "If the plaintiff were permitted to own the current of the stream appurtenant to his right of appropriation and diversion, he would be able to add indefinitely to the water right he could control and own. . . . It is clear that in such a case the policy of the state to reserve the waters of the flowing streams for the benefit of the public would be defeated." *Schodde*, 224 U.S. at 120. The U.S. Supreme Court cited one of its earlier cases in concluding that a water right "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." *Schodde*, 224 U.S. at 121 (quoting *Basey v. Gallagher*, 20 Wall. 670, 683, 87 U.S. 670, 683 (1874)).

The Idaho Supreme Court held in a 1915 water right transfer case that the quantity transferred is limited to the amount previously put to beneficial use. This principle—which seems obvious enough

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today—was grounded in the Court's recognition that the policy of maximum beneficial use is embedded in the prior appropriation doctrine. "A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty from the waters of the state in the interest of agriculture and for useful and beneficial purposes." *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (Budge, J.).

In 1931, a federal district court ruled that the Twin Falls Canal Company may not compel upstream users to pay for construction of Milner dam, even if they benefit from the increase in water elevation. Doing so would "result in such a monopoly as to work disastrous consequences to the public." *Twin Falls Canal Co. v. American Falls Reservoir Dist. No. 2*, 49 F.2d 632, 635 (D. Idaho 1931). The court said this result was compelled by *Schodde*. *Id.* at 636.

In 1954, the Ninth Circuit, applying Idaho law, rejected a nuisance claim by a farmer who complained that an upstream reservoir increased the flow below the dam thus interfering with his ability to ford the stream. "In our opinion, the *Schodde* case supplies a complete answer to appellant's contentions." *Johnson v. Utah Power & Light Co.*, 215 F.2d 814, 816 (9th Cir. 1954).

In 1957, the Idaho Supreme Court addressed the maximum use doctrine in the context of adverse possession of a water right. In *Mountain Home Irr. Dist. v. Duffy*, 79 Idaho 435, 319 P.2d 965 (1957) (Taylor, J.), the Court rejected the defendant's claim of adverse possession of a water right. The Court premised its ruling on the policy of maximum use. "It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources." *Mountain Home*, 79 Idaho at 442, 319 P.2d at 968 (citing *Van Camp*, *Farmers' Cooperative*, *Duffy*, *et al*.). It described this as a "constitutional policy" that is also grounded in statute. *Id*.

In a 1960 case, the Court held: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960) (Smith, J.) (holding that one party may discharge its irrigation waste into the drainage ditch of another party where that artificial channel substituted for the original channel by which the wastewater would have been returned to natural flows).

In 1964, the Court reiterated that "it is the policy of the law to prevent waste and to secure the maximum beneficial use of the waters of the state." *Ward v. Kidd*, 87 Idaho 216, 226-27, 392 P.2d 183, 190 (1964) (Taylor, J.).

In 1973, the Court upheld a constitutional challenge to the reasonable pumping level restrictions in Idaho's Ground Water Act. "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, § 7." *Baker v. Ore-Ida Foods, Inc*., 95 Idaho 575, 584, 513 P.2d 627, 636 (1973) (Shepard, J.). Accordingly, "senior appropriators are not necessarily entitled to maintenance of historic pumping levels." *Id*.

In 1977, the Court invoked the principle of maximum use in holding that the statute authorizing state water masters to allocate water during times of shortage with preferences for decreed, permitted, and licensed water rights did not work a deprivation of property as to holders of non-adjudicated constitutional use water rights. "The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources." *Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977) (Donaldson, J.).

In 1982, the Court upheld—on the basis of "optimum development" and "maximum use"—a statutory distinction (eliminated in 1978) between treatment of domestic and other wells. "The decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature. The legislature was therefore free to give special consideration to the position of domestic water users in enacting legislation to implement the policy of 'optimum development.'" *Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) (Bistline, J.). The Court continued:

> Furthermore, it is clearly state policy that water be put to its maximum use and benefit. That policy has long been recognized in this state and was reinforced in 1964 by the adoption of article XV, section 7 of the Idaho Constitution.

Parker, 103 Idaho at 513, 650 P.2d at 655 (citing *Poole* and Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 2 (1968)).

In 1985, the Court invoked the policy of maximum use in holding that a prescriptive easement for drainage does not entitle the owner to engage in unnecessarily wasteful irrigation practices. "Regardless of how long such practices had continued, or whether easements had been acquired to discharge certain volumes of water across a lower property, those wasteful practices would contravene the public policy of this state. That policy 'is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Merrill v. Penrod*, 109 Idaho 46, 55, 704 P.2d 950, 959 (Ct. App. 1985) (Swantrom, J.) (quoting *Poole*).

In 1990, the Court reiterated that our arid conditions compel maximum use of our water resources. "Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. 'The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990) (Bakes, C.J.) (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.) (the policy of seeking maximum use of the State's water resources justifies not holding reservoir and canal operators strictly liable for flood damage).

In a 1997 basin-wide decision, the Court recognized partial forfeiture of water rights, which it found was compelled by the longstanding goal of maximum use. "The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources." *State v. Hagerman Water*

Right Owners ("*Basin-Wide Issue 10*") ("*Hagerman I*"), 130 Idaho 727, 735, 947 P.2d 400, 408 (1997) (Schroeder, J.) (quoting *Nettleton* and citing *Kunz*).

In the same year, the Court extended the maximum use ruling in *Kunz* (which limited the liability of irrigation dam owners) to dams constructed for wildlife and other purposes. As in *Kunz*, the Court based its ruling on the policy of maximum use. "It has been the policy of this State to secure the maximum use and benefit of its water resources." *Stott v. Finney*, 130 Idaho 894, 896, 950 P.2d 709, 711 (1997) (Walters, J.).

In another 1998 case, the Court recognized a federal reserved water right for stock watering to benefit permittees on federal lands. *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.). The Court noted that the purpose of the federal reservation was to ensure that the water would be available for use "by whichever member of the public happens at any time to have the grazing permit for the lands" thereby preventing private appropriations whereby "individuals could monopolize the water." *United States v. State*, 131 Idaho at 471, 959 P.2d at 452. "To hold otherwise would be in contravention of the policy of this state 'to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *United States v. State*, 131 Idaho at 472, 959 P.2d at 453 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)).

In 1999, the Court carved out an exception to the forfeiture principle for Carey Act irrigators. In noting that forfeiture is not favored, the Court relied on the "state policy of securing the maximum use and benefit of its water resources." *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (Silak, J.) (quoting *Hagerman I*, which, in turn, quoted *Nettleton*).

In 2007, the Court upheld the constitutionality of the Department's Conjunctive Management Rules which were expressly premised on an integration of the prior appropriation doctrine and "the principle of optimum use of Idaho's water." *American Falls Reservoir District No. 2 v. IDWR* ("*AFRD2*"), 143 Idaho 862, 867, 154 P.3d 433, 438 (2007) (Trout, J.).

In 2011, the Court employed the maximum use doctrine in upholding the Director's conjunctive management curtailment order.

> There is no difference between securing the maximum use and benefit, and least wasteful use, of this State's water resources and the optimum development of water resources in the public interest. . . . The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively.

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011) (Eismann, C.J.) (citing *Niday v. Barker,* 16 Idaho 73, 101 P. 254 (1909), *Farmers' Cooperative*, *Poole*, and *Parker*).

In 2013, the Court invoked the policy of maximum use in upholding the right of an irrigator to condemn a pipeline easement in order to reduce conveyance losses. The Court reiterated that it is "this State's policy to secure the maximum use and benefit, and least wasteful use, of its water resources."

Telford Lands LLC v. Cain, 154 Idaho 981, 987, 303 P.3d 1237, 1243 (2013) (Eismann, J.) (quoting *Poole*).

In 2016, the Court upheld the Director's conjunctive management curtailment order in which the Director relied on the maximum use doctrine in avoiding curtailments beyond a "trim line." "Additionally, the Director relied on the policy of promoting the optimum development of the State's water resources enunciated in Article XV, section 7 of the Idaho Constitution and this Court's decision in *Clear Springs,* where we stated that '[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" *Rangen, Inc. v. IDWR* ("*Rangen II*"), 160 Idaho 119, 129, 369 P.3d 897, 907 (2016) (J. Jones, C.J.) (brackets original)[303]. "As we recently stated in *Clear Springs,* the policy of securing the maximum use and benefit, and least wasteful use of Idaho's water resources, has long been the policy in Idaho." *Rangen II*, 160 Idaho at 131, 369 P.3d at 909 (citing *Clear Springs*, *Niday*, *Farmers' Co-operative*, and *Poole*). "[A]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water." *Rangen II*, 160 Idaho at 140, 369 P.3d at 918 (quoting IDAPA 37.03.11.020.03).[304] The Court also expounded on the importance of *Schodde* and *Van Camp*. *Rangen II*, 160 Idaho at 132-34, 369 P.3d at 910-12.[305]

[303] *Rangen II* is sometimes referred to as *IGWA v. IDWR*. IGWA is included in the "In the Matter of" portion the caption, but Rangen is the plaintiff-appellant. Another Rangen case, *Rangen, Inc. v. IDWR* ("*Rangen I*"), 159 Idaho 798, 367 P.3d 193 (2016) (J. Jones, J.), deals with the finality of decrees and does not implicate the maximum use doctrine. A third case deals with a mitigation plan addressing the same delivery call. *Rangen, Inc. v. IDWR* ("*Rangen III*"), 160 Idaho 251, 371 P.3d 305 (2016) (J. Jones, J.).

[304] In this passage, the Court quoted from IDWR's conjunctive management rule. The Court made clear, however, that the principle of maximum use has its roots not just in the rule but in the Idaho Constitution. "The Director did not treat either [the rule or the Idaho Constitution] as directly granting him discretion to apply a trim line. Instead, the Director recognized, correctly, that each source merely restated a broader understanding of Idaho law . . . ." *Rangen II*, 160 Idaho at 132, 369 P.3d at 910.

[305] The maximum use doctrine is not unique to Idaho. See, *American Fork Irr. Co. v. Linke,* 121 Utah 90, 97, 239 P.2d 188, 192 (1951) (upholding use of water right that "contemplates the more beneficial use of water, a most desired result fully consistent with progress and change, and reflecting the established policy of this state."); *Arave v. Pineview West Water Co.,* 2020 UT 67, ¶33 (holding that the "primary objective" in water disputes is ensuring that "the greatest amount of available water is put to beneficial use").

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14. THE ADMINISTRATIVE SYSTEM

A. Overview of the IDWR

The Idaho Department of Water Resources ("IDWR") has authority over water quantity related issues, including water rights, in Idaho.[306] IDWR's authority primarily resided in title 42 of the Idaho Code. IDWR's administrative rules are located at IDAPA 37. IDWR has other authorities, including jurisdiction over stream channel alterations[307] and injection wells.[308]

The water resource activities of IDWR are divided into two divisions: the water management division and the planning and policy division. (A third division deals with energy issues.) The water management division contains the water right permitting, transferring and enforcement functions. The planning and policy division supports the statewide water resource planning conducted by the Idaho Water Resource Board. It also provides the technical services for the entire Department. An IDWR organizational chart is set out under Appendix E.

The Department administers water rights on the basis of over fifty "administrative basins." They are shown on the map set out under Appendix D. Each permit or water right issued by the Department is assigned a number whose first two digits correspond to the administrative basin in which it is located.

The primary contact with IDWR for most practitioners will be at IDWR's regional offices. Applications for water right permits, transfers, well permits and other administrative approvals can be obtained at these offices and are submitted there as well. A list of addresses and phone numbers for IDWR's offices is provided under Appendix E.

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[306] The IDWR traces its roots to the Office of the State Engineer, established by the Idaho Legislature in 1895. In 1919 the agency's name was changed to the Idaho Department of Reclamation. Initially its it head was known as the Commissioner of Reclamation, but in 1943 the agency's head was renamed the State Reclamation Engineer. In 1965 the Legislature created the Idaho Water Resource Board (discussed in section 14.D(6) at page 187). In 1970, the agency's name was changed to the Department of Water Administration and its head was renamed the "Director." 1970 Idaho Sess. Laws, ch. 12. Four years later, in 1974, the Legislature merged the Idaho Water Resource Board into the Department of Water Administration and changed its name to the Department of Water Resources, as it is known today. 1974 Idaho Sess. Laws, ch. 20 (codified as amended at Idaho Code §§ 42-1701 to 42-1806). In 1981 the Office of Energy was merged into the Department of Water Resources, as an operational division known as the Division of Energy.

[307] Idaho Stream Channel Protection Act, Idaho Code §§ 42-3801 to 42-3813. Implementing regulations are found at IDAPA 37.03.07.

[308] *Waste Disposal and Injection Wells*, Idaho Code §§ 42-3901 to 42-3919.

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B. IDWR hearing procedures

(1) Application and filing fee

All requests for new or transferred water rights begin with an application. Requirements for applications for appropriation of new water rights are discussed in section 11.A at page 146. See section 15.L at page 248 for a discussion of procedures for water right transfers.

Every application must be accompanied by a filing fee, which vary depending upon the type of application and the quantity of water involved. The various filing fees are set out in Idaho Code § 42-221.

When a water right application is filed, the Applicant is entitled to have the Department process the application.[309] The form and timing of IDWR's investigation and hearing are within its discretion, so long as the fundamental rights of the participants are not violated.

(2) Publication

Upon receipt of the application and the filing fee, the Department will prepare a notice for publication.[310] The notice will be published for two consecutive weeks in a newspaper printed or circulated within the county containing the point of diversion.[311] If the application involves more than ten cfs or 1,000 acre-feet of water, the notice must be published in newspapers achieving statewide circulation.[312]

(3) Amendment of application for permit

Idaho Code § 42-211 addresses amendments of applications for permit. It requires, anachronistically, that the amendments "be made by indorsement by the applicant or his agent on the original application" and that the application then be re-published.

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[309] Idaho Code § 42-222(1) ("Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon."); Idaho Code § 42-211 ("Whenever a permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of the diversion or proposed use or uses of the water, he shall file an application for amendment . . . and upon receipt thereof [of an application for amendment of a permit] it shall be the duty of the department of water resources to examine same . . . .").

[310] Idaho Code §§ 42-203A, 42-211 and 42-222(1).

[311] Idaho Code § 42-203A(2).

[312] Idaho Code § 42-203A(2).

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(4) Protests

Anyone wishing to object to an application may do so by filing a notice of protest with the Department within ten days of the last date of publication of the notice. Idaho Code §§ 42-203A(1) and 42-222(1). The protest must be accompanied by a $25.00 filing fee. Idaho Code §§ 42-203A(4), 42-221(L), and 42-222(1).

The statutes do not require a protestant to be a water right holder. However, a protestant initially should be prepared to demonstrate that he or she would somehow be affected by the outcome of the application.[313] An impact on the protestant arising under the local public interest test is a sufficient basis for a protest. (See discussion the local public interest in section 3 at page 467.)

(5) Pre-hearing conference

If a protest is filed, the Department will arrange an informal meeting called a "prehearing conference" with the transfer applicant and the protestants. This will be scheduled at the parties' convenience, typically within a few weeks of the protest. The prehearing conference will be moderated by a departmental employee (frequently the head of the regional office).

Although it is generally a good idea for the parties to have arranged to see each other before hand, the prehearing conference is often the first time the parties meet. The conference provides a good opportunity for the applicant to explain the purpose of the application and for the protestants to identify their concerns. The prehearing conference serves as an informal settlement conference. It also provides an informal opportunity for the parties to narrow the issues, to exchange documents and information, to agree on undisputed facts, to schedule any discovery and set other deadlines. It is worthwhile for both parties to give considerable thought to each of these matters before appearing at a conference, and to make the most of the opportunity to resolve the dispute informally.

To encourage frank discussions, the prehearing conference may be conducted off the record.[314]

(6) Hearing

If the protest cannot be settled by the parties at the prehearing conference stage, the Department will appoint a hearing officer, who will set the matter for hearing in the county where the water right is located.

Note that if no protest is filed (or the protest is withdrawn), the Department will proceed to evaluate the application issue an order without holding a hearing. In the case of an amended permit

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[313] The Department has held that a protestant must "demonstrate some nexus to the issue in controversy." *Hardy v. Higginson*, Case No. 92599 (4th Dist., July 25, 1990) (unpublished Memorandum Decision).

[314] IDAPA 37.01.01.512.

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application,[315] a transfer application,[316] or an exchange application,[317] a disappointed applicant may request a hearing after the Director issues an order to build a record for judicial review.

The hearing is governed by the APA, the Department's Rules of Practice and Procedure, and the Idaho Rules Civil Procedure (to the extent they are adopted by the Department's rules). Litigants should carefully review these rules, which set out important procedures for appearance, pleading and conduct at the hearing.

The hearing will be scheduled far enough out to allow the parties to prepare. Formal discovery (under the Idaho Rules of Civil Procedure) is not automatically available, but may be sought by motion to the Hearing Officer.[318] Subpoenas may be issued by the Director commanding the appearance of witnesses from any place within Idaho.

The hearing is basically an administrative trial. If a party has several applications pending which raise common issues, the Department may agree to consolidate them into a single hearing. The hearing may last anywhere from a few hours to a few weeks. Most are completed within a couple of days. Counsel are often present, although parties are allowed to appear *pro se*.[319] Although strict rules of evidence do not apply, most hearing officers will follow a "common sense" version of the rules of evidence in which irrelevant, immaterial, incompetent or redundant material is excluded.

Testimony is typically presented by live witnesses in a manner similar to a courtroom procedure (with direct examination, followed by cross-examination and re-direct). However, the Department's rules do allow for the use of pre-filed prepared testimony of expert witnesses, at the Hearing Officer's discretion.[320] Prepared testimony is not commonly employed at the Department, but is the standard practice before the Idaho Public Utilities Commission. Prepared testimony can shorten hearing times and enable a more effective and efficient fact-finding exercise.

(7) Building the record

Judicial review of contested cases is conducted "on the record" (as opposed to *de novo*). IAPA, Idaho Code §§ 67-5277, 67-5249; see also Idaho R. Civ. P. 84(b)(2), 84(j), 84(k) and 84(l). Therefore, creating the best possible record in the proceedings below is critical to upholding or overturning an action in court.

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[315] Idaho Code § 42-211.

[316] Idaho Code § 42-222(5).

[317] Idaho Code § 42-240(7).

[318] IDAPA 37.01.01.521.

[319] Natural persons may appear *pro se*. However, corporations must be represented by counsel.

[320] IDAPA 37.01.01.413.01.b and 37.01.01.605 (Rule 605). This is expressly authorized by the APA. Idaho Code § 67-5241(b).

The hearing is tape-recorded by the Department. The hearing officer should ensure that speakers identify themselves and speak clearly and audibly. The recording equipment is cumbersome to use, and attempting to transcribe these recordings is not easy. Anyone wanting a transcript of the hearing should request a court reporter several days before the hearing and arrange to pay for the reporter's presence.[321] An accurate transcript can be a valuable asset on appeal.

The administrative record also includes written materials, including the application, staff reports, maps and any other information submitted into the record. These materials should become part of the record simply by submitting them to the decision-making body. However, it is a good practice to formally request inclusion in the administrative record of any material important to a matter. Parties should also take care to ensure that materials offered by other parties are properly placed in the record.

Winning before the Department is not enough. A decision can be overturned if it is not supported by substantial evidence in the administrative record. Therefore, it is very important to address each of the statutory and regulatory criteria with evidence and argument needed to support party's position.

(8) The decision

Under its rules, the Department may issue four types of orders:

- "Interlocutory orders." These do not decide all previously undecided issues presented in a proceeding. They are issued during the course of a proceeding by either the hearing officer or the Director. Because they are not final, they are not appealable (until a final order is issued).[322] A party[323] may seek review by the director of an interlocutory order at any time during the course of the administrative proceeding.[324] The rule specifies no time limit for such a petition.

- "Recommended orders." This is a type of order typically issued at the end of a proceeding by the hearing officer. Recommended orders do <u>not</u> become effective without action of the Director.[325]

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[321] See IDAPA 37.01.01.651.

[322] IDAPA 37.01.01.710 (Rule 710) and 37.01.01.711 (Rule 711).

[323] Rule 711 says that any "party or person affected by an interlocutory rule" may seek review. Thus, even non-parties may seek review.

[324] IDAPA 37.01.01.711 (Rule 711). The review is in the nature of a petition for reconsideration, but, under the terminology of the rule, is referred to as a petition to review the interlocutory order. It is directed to the officer who issued the interlocutory order (which may be either a hearing officer or the Director).

[325] IDAPA 37.01.01.720 (Rule 720).

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- "Preliminary orders." This is another type of order typically issued at the end of a proceeding by the hearing officer. Preliminary orders will become effective automatically within a fixed period of time, unless the Director affirmatively undertakes to review them.[326] The Department also employs preliminary orders to handle administrative matters, such as error corrections, that do not go before a hearing officer.

- "Final orders." This is either (1) a preliminary order that becomes final automatically, (2) an order issued by the Director in review of a recommended order, or (3) any other appealable order issued by the Director.[327] Typically, a final order concludes the entire proceeding or, in some instances, concludes discrete portions of a proceeding. However, final orders are also employed by the Director in special, emergency circumstances such as cease and desist orders and show cause orders.[328]

In the ordinary course, the Director does not review interlocutory orders issued by a hearing officer until the hearing is concluded and the hearing officer issues either a recommended or preliminary order. However, the hearing officer has the authority to refer interlocutory matters to the Director at any time.[329] Moreover, the Director has the authority to review, *sua sponte*, any interlocutory order of the hearing officer at any time.[330]

The rules do not expressly provide a mechanism for a party to refer or appeal an interlocutory matter to the Director. Presumably, the same could be accomplished by either a motion to the hearing officer or a petition to the Director seeking that he or she exercise his or her discretion under Rule 562. This, however, is not a standard practice.

A party, at its option, may seek review of a recommended order, preliminary order, or final order by way of petition for reconsideration. Petitions for reconsideration are governed by statute and administrative rules. The statute, part of the IAPA (Idaho Code § 67-5246), sets a 21-day deadline for the agency to "dispose of" the petition. The Idaho Supreme Court ruled that this means the agency must issue a ruling on the merits within 21 days, and is not allowed to simply grant the petition and then take the matter under consideration (as is typically done in the judicial context). *A&B Irr. Dist. v. IDWR*, 154 Idaho 652, 301 P.3d 1270 (2012) (Eismann, J.).

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[326] IDAPA 37.01.01.730 (Rule 730).

[327] IDAPA 37.01.01.740 (Rule 740)

[328] IDAPA 37.01.01.740.01 (and statutory authority cited therein).

[329] IDAPA 37.01.01.562 (Rule 562).

[330] IDAPA 37.01.01.562 (Rule 562).

The rules for such petitions are contained in the separate rules for each type of order.[331] In each case, the petition must be filed within fourteen days. Note that the three-day mailbox rule does not apply here.[332] A petition for reconsideration is not mandatory (to exhaust administrative remedies).

An alternative (or supplement) to the petition for reconsideration is the petition for clarification.[333] A petition for clarification may be filed in response to any type of order (interlocutory, recommended, preliminary or final). However, unlike a petition for reconsideration, a petition for clarification does not toll the time to seek further review. Thus, the petition for clarification should be employed only where the party does not object to the merits of the order, but merely seeks clarification of some detail.

A rarely-employed special review procedure is available to persons who are aggrieved by a final decision, but who have not been afforded an opportunity to be heard.[334]

Note that post hearing procedures and deadlines are governed both by the APA[335] and by the Department's own rules.[336] The two dovetail. In a few cases, the Departmental rules provide specific deadlines left up to the discretion of the agency by the statute.

(9) Res judicata

"The doctrine of res judicata applies to administrative proceedings. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *J & J Contractors/O.T. Davis Constr. v. State by Idaho Transp. Bd.*, 118 Idaho 535, 797 P.2d 1383 (1990)." *Sagewillow, Inc. v. IDWR* ("*Sagewillow II*"), 138 Idaho 831, 844, 70 P.3d 669, 682 (2003) (Eismann, J.). However, issue preclusion attaches only to issues actually raised. Thus, a transfer approval in which the issue of forfeiture did not actually arise is not res judicata as to that issue.

By statute, decrees from a general adjudication (such as the SRBA) are given binding effect. "The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system [with certain stated exceptions, e.g., domestic rights excluded by court order]." Idaho Code § 42-1420.

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[331] IDAPA 37.01.01.720 (Rule 720 - recommended orders), 37.01.01.730 (Rule 730 – preliminary orders), and 37.01.01.740 (Rule 740 – final orders).

[332] IDAPA 37.01.01.057 (Rule 57).

[333] IDAPA 37.01.01.770 (Rule 770).

[334] Idaho Code § 42-1701(3); IDAPA 37.01.01.740.02.b.

[335] Idaho Administrative Procedure Act ("APA"), Idaho Code §§ 67-5243 to 67-5249.

[336] IDAPA 37.01.01.720 to 37.01.01.740 (Rule 740).

See also, *State v. Hagerman Water Right Owners, Inc.* ("*Hagerman I*"), 130 Idaho 736, 947 P.2d 409 (1997) (dealing with the non-binding effect in the SRBA of certain prior decrees), discussed in section 13.I(2) at page 605.

(10) Retroactive legislation

There is a good discussion of retroactive water rights legislation in *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999).

In 1978 the Idaho Legislature amended the law governing water rights for domestic wells.[337] The Idaho Supreme Court noted that the Legislature could have made the 1978 amendment retroactive—presumably retroactive so as to affect rights with pre-1951 priorities—but did not elect to do so.[338]

In *Fremont-Madison Irr. Dist.& Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J), the Idaho Supreme Court was asked to consider the constitutionality of the amnesty for illegal enlargements. The question was whether the Legislature retroactively can validate illegal enlargements of water rights by such a waiver. The Idaho Supreme Court's answer is yes, but with a substantial caveat that sharply limits the result. The Court cautioned that a waiver cannot operate so as to injure, such as by dilution of priority, any water right existing on the 1994 date the amnesty statute was enacted. The effect of this ruling is to require mitigation or a condition, such as a subordination, before an enlargement can be given a date-of-enlargement priority.

The Washington Legislature codified the rule in *Theodoratus* and extending it to all water right holders, including municipal providers. Thus, all new certificates for "perfected rights" will be limited to actual beneficial use, not system capacity. The Legislature softened the blow, however, by creating an expansive new definition of "municipal water supply purposes" (Wash. Rev. Code § 90.03.015) and grandfathering water right certificates issued for such purposes (Wash. Rev. Code § 90.03.330). This legislation was challenged as being unconstitutional retroactive legislation, but it survived. *Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010).

(11) Judicial review

As noted above, interlocutory orders are not appealable to district court (until a final order is issued).

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[337] 1978 Idaho Sess. Laws, ch. 324 ch. 324 § 1. This provision removed the provision saying that domestics would "not be in any way affected by this act" replacing it with a statement saying that domestics were exempt from permitting requirements.

[338] *Parker v. Wallentine*, 103 Idaho 506, 511, 650 P.2d 648, 653 (1982).

When a final decision is rendered by the Department, any party to the proceeding may appeal to district court within 28 days of the final decision.[339] The district court's decision may be appealed directly to the Idaho Supreme Court (bypassing the court of appeals).

The standard of review is set out in Idaho's APA.[340] Essentially, the party challenging the agency's decision must show that the Department (1) applied the law incorrectly, (2) made a factual determination which is clearly erroneous, or (3) abused its discretion.

An Idaho statute (which effectively overruled a prior case) states that the SRBA court does not have jurisdiction to review Idaho Department of Water Resources administrative decisions affecting water rights claimed in an adjudication, including a water right transfer decision involving a determination that all or a portion of a water right has been forfeited. Rather, judicial review of Department decisions is to be brought pursuant to the Idaho Administrative Procedures Act.[341] This statute notwithstanding, the Idaho Supreme Court issued an administrative order on December 9, 2009 stating that "all petitions for judicial review of any decision regarding the administration of water rights from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication . . . ."

(12) Exhaustion

The issue of exhaustion of administrative remedies (notably, whether it is necessary to file exceptions or a petition for reconsideration) is addressed in the *Idaho Land Use Handbook*.

(13) Attorney fees and sanctions

EDITOR'S NOTE: A more extensive discussion of Idaho Code § 12-117 and other attorney fee provisions is contained in the *Idaho Land Use Handbook.*

The Department's rules contain no provision addressing the award of attorney fees or other sanctions against a non-prevailing party who engages in unreasonable or frivolous administrative litigation. "Generally, an administrative agency has no power to award attorney's fees unless specifically authorized by statute or agreement between the parties." *In the Matter of Application for Transfer No. 5691 in the Name of Jerome Cheese Company,* Idaho Department of Water Resources (Order Denying Motion for Attorney's Fees, Nov. 11, 2000) at 2 (citing *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981).

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[339] Idaho Code §§ 42-203A(6), 42-211, 42-222(5), 42-240(7), 42-1701A(4), 67-5270, and 67-5273(2).

[340] Idaho Code § 67-5279. *See*, *Dovel v. Dobson*, 122 Idaho 59, 61-62, 831 P.2d 527, 529-30 (1992), and cases cited therein.

[341] Idaho Code § 42-1401D (negating decision of the Idaho Supreme Court in *Sagewillow, Inc. v. IDWR* ("*Sagewillow I*"), 135 Idaho 24, 13 P.3d 855 (2000), which held that venue and jurisdiction provisions of adjudication statutes override those of the Idaho Administrative Procedures Act). The legislation amending Idaho Code § 42-1401 included an express statement of intent. *See* 2001 Idaho Sess. Laws, ch. 31.

However, the Department has recognized that Idaho Code § 12-117 authorizes it to award attorney fees in administrative matters involving litigation between a governmental entity and a private party. *In the Matter of Application for Transfer No. 5691 in the Name of Jerome Cheese Company,* Idaho Department of Water Resources (Order Denying Motion for Attorney's Fees, Nov. 11, 2000) (case involved a protest by a city against a private party applicant). Although the Department declined to award attorney fees in that case, it determined that it could and must do so where the standards of section 12-117 are met. (See the *Idaho Land Use Handbook* for a detailed discussion of attorney fee recovery provisions.) This case, however, is unusual in that the protestant was a governmental entity, thus making section 12-117 applicable. This provision authorizes awards of attorney fees to the prevailing party in litigation involving "a state agency, a city, a county or other taxing district." Idaho Code § 12-117(1). Moreover, it authorizes awards "in any administrative or civil judicial proceeding." *Id*. Idaho courts have interpreted this to allow awards not only in the context of judicial appeals of administrative decisions, but by the administrative body in the administrative hearing itself. *Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989), *see*, *Ockerman v. Ada Cnty. Bd. of Comm'rs*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Idaho Ct. App. 1997).

Where none of the parties to a contested case are governmental entities, there does not appear to be any direct statutory authority for the Department to award attorney fees at the administrative level. For instance, Idaho Code §§ 12-121 and 12-123 authorize attorney fee awards and sanctions, but are limited to civil proceedings.

Note, however, that the Department's Rules do authorize the award of sanctions in the context of discovery abuses. IDAPA § 01.01.01.531. Under Rule 37 of the Idaho Rules of Civil Procedure, discovery sanctions can include the award of attorney fees.

(14) Error correction

The Department does not have express general statutory authority to correct errors discovered in permits, licenses, and other documents. The Department's practice, however, it to correct such errors without instituting special proceedings therefore, where the error is manifest and other parties are not affected thereby. Typically, the Department simply will issue a preliminary order to the water right holder explaining how the error occurred, accompanied by a corrected permit, license, or other document.

(15) Authority of the Department to impose conditions on water rights

The authority to condition water rights is expressly stated in the Water Code. The first applies to transfers:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, <u>or upon conditions</u>, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with

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> the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(1) (emphasis added).

The second applies to permit amendments:

> The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same.

Idaho Code § 42-211 (emphasis added).

The third applies to licensing:

> A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Idaho Code § 42-219(1) (emphasis added).

C. Time lines for IDWR hearings

(1) "Fast" versus "slow" scenario

Predicting how long a hearing before the Department necessarily involves some guesswork. The best we can provide are some illustrative examples. Here we employ two: a "fast" and a "slow" scenario.

The "fast" scenario assumes that a protest is filed, followed by minimal discovery, a short hearing, no briefing, no reconsideration, and no appeal. That scenario would play out in just over five months (from the date of application).

In contrast, the "slow" scenario assumes that protests are filed and that the protestants will take advantage of every opportunity for discovery, briefing, reconsideration and review. The estimated time frame for the slow scenario runs one year and three months (from the date of application). The two scenarios are compared below:

STAGE	FAST SCENARIO	SLOW SCENARIO
From Application to Hearing	88 days	156 days
From Hearing to Initial Decision	30 days	88 days
From Preliminary or Recommended Order to Final Order	14 days	149 days
From Final Order to Deadline to Initiate Judicial Review	28 days	63 days
TOTAL	160 days	456 days

The estimated times for each step are based on a combination of fixed regulatory timeframes coupled with estimates where no fixed deadline applies. Obviously, actual time frames can vary widely.

The slow scenario is not a worst case scenario. Complex discovery, motion practice, remands and other delays could extend this process even further. These time frames take the applicant only to the point of judicial review. As noted above, district court litigation might take eight months or more and a state supreme court appeal could entail another year.

(2) Detailed slow scenario

A detailed breakdown of the "slow scenario" follows.

(a) From application to hearing

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Application Filed			Day 1
Prepare Publication Notice	The Department will prepare the notice of publication and submit it to local newspaper(s). Idaho Code § 42-203A(2).	2 weeks (Depending on the Department's workload, this could be much longer)	Day 15
Notice of Application Published	Notice of the Application must be published once in each of two weeks. Idaho Code § 42-203A(2).	8 days, plus 5 days advance time required by paper	Day 28
Deadline for Protests	Protests must be filed within 10 days of the last day of publication. Idaho Code § 42-203A(1). However, a would-be protestant who misses the deadline may file a petition for intervention.	10 days	Day 38
Prehearing Conference	This is arranged through the Department by mutual agreement of the parties. IDAPA 37.01.01.510 to .513.	2 weeks (this could be much longer)	Day 52

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EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Discovery and Motion Practice	Discovery is not automatic, and must be initiated through petition. The Department will then set a discovery schedule (which will generally conform to the agreement of the parties). IDAPA 37.01.01.521.	3 months (this could be longer or shorter, in some cases much longer)	Day 142
Witness and Exhibit Disclosure	The Department will set a deadline for disclosure and identification of witnesses and exhibits.	Assume 10 days before trial, following discovery cutoff	Day 152
Hearing	This is arranged through the Department by mutual agreement of the parties. Idaho Code § 42-1701A; Idaho Code § 7-5242; IDAPA 37.01.01.550. Note: In addition to the above, the water code contains a separate "catch all" provision that provides a right to a hearing before the Director when no other opportunity for hearing was provided. Idaho Code § 42-1701A(3); IDAPA 37.01.01.730.02.e; IDAPA 37.01.01.740.02.b.	Assume 4 day hearing	Day 156

(b) From hearing to initial decision by hearing officer

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Last day of hearing			Day 0
Post-hearing briefs	There is no provision in the rules for the filing of briefs. Parties should discuss this with the hearing officer.	Assume opening brief 14 days after hearing, response 7 days later, followed by reply in 7 days	Day 28
Recommended or preliminary order	Idaho Code § 67-5243(1)(a); IDAPA 37.01.01.720.01; IDAPA 37.01.01.730.01 Note: Once the recommended or preliminary order is issued, the clock begins to run simultaneously on petitions for reconsideration and administrative appeals.	No deadline. However, IDWR orders usually come out within 60 days.	Day 88

(c) From preliminary or recommended order to final order

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Preliminary Order or Recommended Order	The Hearing Officer may issue either a preliminary order or a final order. If she issues a preliminary order, it will become final automatically if not challenged. If challenged, the agency head will review and issue a final order. If she issues a recommended order, it will be reviewed by the agency head (whether or not it is appealed). The agency head will then issue a final order. Either type of order may be appealed to the agency head. If an appeal is filed, the time frames are identical. Preliminary Order: Idaho Code § 67-5243(3)(b); IDAPA 37.01.01.730. Recommended Order: Idaho Code § 67-5243(3)(a); IDAPA 37.01.01.720.		Day 0

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Optional: Petition for reconsideration of preliminary order.	Preliminary Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.730.02.a. Recommended Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.720.02.a. Note: A party may skip the "petition for reconsideration" and immediately file an administrative appeal. If a petition for reconsideration is filed, the parties will have another opportunity to file an administrative appeal after the petition is resolved. Filing a petition for reconsideration at this stage affords the hearing officer an opportunity to correct the alleged error before the matter is elevated to the agency head. Note that there is a separate provision for a "petition for clarification," IDAPA 37.01.01.770. This serves a similar, but less formal function. Most importantly, a petition for clarification does not suspend the time for appeal.	14 days after preliminary or recommended order. Preliminary Order: If neither petition for reconsideration or administrative appeal is filed within 14 days, the preliminary order automatically becomes final (and appealable). Recommended Order: If neither petition for reconsideration or administrative appeal is filed within 14 days, the recommended order goes to Director for further action.	Day 14
Optional: Response to petition for reconsideration.	The rules do not contemplate the filing of a response to a petition for reconsideration. This follows the appellate model, in which no response is filed unless and until the petition for reconsideration is granted, at which point additional briefing may be ordered. Nevertheless, some people do file responses, and the Department generally accepts them for filing.	None	Day 14
Order "disposing of" petition for reconsideration.	Preliminary Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.730.02.a. Recommended Order: Idaho Code § 67-5243(3); IDAPA 37.01.01.720.02.a. Note: The hearing officer is required to "dispose of" the petition within 21 days. Neither the statute nor the rule say what this means. It could mean that the hearing officer is required to address the merits of the petition within that time. But the Department does not read the rule that way. According to the Department, granting the petition simply means that the hearing officer has agreed to reconsider his or her decision. It does not indicate one way or the other whether the order will be changed in accordance with the request of the petitioner. Moreover, according to the Department, granting the petition essentially "stops the clock." Because the IDAPA and the Department's implementing rule do not say what happens next, the Department takes the view that the hearing officer can take as long as he or she needs to reconsider the matter. Presumably, the end result is a new recommended order or preliminary order, which sends the parties back to step one. But this is not spelled out in the statute or rule. Thus, there is risk of substantial delay in filing a petition for reconsideration.	21 days after petition for re-consideration (or else deemed denied).	Day 35

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Appeal to agency head from preliminary or recommended order	Preliminary Order: Idaho Code § 67-5245(3); IDAPA 37.01.01.730.02.b. The terminology is inconsistent. The statute speaks in terms of "administrative review," "motion for review" and "petition for review." The regulation says a party may "appeal or take exceptions." Note: Even if no one seeks review of the preliminary order, the agency head may, on his own motion, within 14 days, decide to review the order. Idaho Code § 67-5245(3). However, this statutory provision for "sua sponte review" does not appear to be reflected in IDWR's rules. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.b. The statute says a party may "file exceptions." The regulation says a party may "support or take exceptions."	14 days from order, or from denial of petition for reconsideration.	Day 49
Opening brief on petition.	Preliminary Order: Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.b. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.b and .c.	The opening brief is filed simultaneously with the administrative appeal.	Day 49
Opposing brief on petition.	Preliminary Order: Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.c. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.c.	14 days from opening brief.	Day 63
Further briefing and oral argument (optional).	Preliminary Order: Idaho Code § 67-5245(5); IDAPA 37.01.01.730.02.d. Recommended Order: Idaho Code § 67-5244(1); IDAPA 37.01.01.720.02.c.	If the agency head grants the petition, further briefing and oral argument will follow. No deadline set. This schedule assumes (most optimistically) that argument is scheduled within 30 days.	Day 93

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Final order (or remand for further evidentiary hearings).	Preliminary Order: Idaho Code § 67-5245(6)(a); IDAPA 37.01.01.730.02.d. Recommended Order: Idaho Code § 67-5245(2)(a); IDAPA 37.01.01.720.02.c. Note: The 56 day clock does not begin to run until the other parties have had an opportunity to file briefs. So, as a practical matter, this is really 70 days from the filing of the appeal (aka exceptions). Note: The rules provide that the Department may extend the 56 day deadline "for good cause shown" but they do not provide any consequence for failure of the Department to take any action. The Department's position is that its failure to respond by the deadline does not have any legal effect. Specifically, its lack of a response does not have the effect of automatically denying (or granting) the exceptions. Nor does it convert the preliminary order into a final order. Consequently, judicial review continues to be premature, and the clock for filing a judicial appeal has not started to run. A party finding itself in this circumstance may bring the matter to the attention of the Department, or may request a court to force the agency to act. Note: In addition to issuing a final order, the agency head also has the option to conduct further hearings or remand the issue for further factual development of the record. Preliminary Order: Idaho Code § 67-5245(6)(b) and (c); IDAPA 37.01.01.723.d. Recommended Order: Idaho Code § 67-5244(2)(b) and (c); IDAPA 37.01.01.720.02.c. Note: A party may choose to file a motion seeking an administrative stay on further processing of the application to supplement the record or for other stated purposes. However, the party should simultaneously file an appeal.	56 days after briefs and oral argument, if there is one. The agency may take longer, for good cause.	Day 149

(d) From final order to judicial review

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Final Order by agency head (or a Preliminary Order that was not challenged)			Day 0
Optional: Petition for reconsideration of final order by agency head. (Not applicable to preliminary order which becomes final automatically).	Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.a. Note: This is called a "motion for reconsideration" in the statute. Idaho Code § 67-5246(4). However, the regulations refer to it as a "petition for reconsideration." IDAPA 37.01.01.740.02.a. Note: A petition for reconsideration may be filed at this stage only if the final order was issued by the agency head. If a preliminary order has become final automatically (because there was no appeal or petition), then no further administrative review is available.	14 days from final order issued by agency head.	Day 14

EVENT	COMMENT	ESTIMATED TIME	CUMULATIVE TIME
Order disposing of petition for reconsideration.	Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.a.	21 days from petition (or else deemed denied).	Day 35
Final order becomes "effective." Applies only to orders issued by agency head (not to preliminary order which becomes final automatically).	Idaho Code § 67-5246(5). Note: The statute refers to "the order" which apparently relates back to "any final order issued by the agency head" in the previous subsection. This 14 day period runs simultaneously with the 28 day appeal period. Thus, the rule becomes effective halfway through the appeal period, if no petition is filed. Thus, this statutory provision is simply a mechanism to ensure that the parties have an opportunity to file a petition for reconsideration of orders issued by an agency head before the order goes into effect. Note: This rule has no applicability to preliminary orders which become final automatically because no administrative appeal is filed; they become "effective" as soon as they become final—because there is no further mechanism for administrative review. Note also that the Department's rules provide that the effectiveness of any order shall not be stayed automatically on the filing of an appeal.	14 days after issuance of the order, if no petition for reconsideration. If a petition for reconsideration is filed with respect to a final order by an agency head, the final order becomes effective once the petition is disposed of.	(runs concurrently)
Petition for judicial review to district court.	Idaho Code §§ 67-5270 to 67-5279, in particular 67-5273(2); IDAPA 37.01.01.740.02.c.	28 days from final order (that is, 28 days from order issued by the agency head or from date when preliminary order became automatically final). Note, if no petition for reconsideration is filed, the 28 days begins to run immediately from issuance of order. Note: Venue is specified in IDAPA 37.01.01.740.02.c.	Day 63
Cross-petition for judicial review.	Idaho Code § 67-5273(2).	14 days from petition for judicial review.	Day 77

D. Administration of water rights

The curtailment of junior water rights by state action to enforce priorities is referred to as the "administration of water rights." In its simplest terms, administration usually refers to shutting down juniors in accordance with their priorities to meet the needs of seniors. In contrast, the term "water management" or "management of water rights" implies a broader regulatory perspective and the use of a broader range of management tools. For instance, management might involve aquifer recharge and cooperative conservation efforts. Both administration and management of water rights occurs within the framework of the prior appropriation doctrine.

The Department does not have general or blanket authority to administer water rights. Rather, the Director (or a water right holder seeking enforcement) must proceed under one of a handful of specific authorities:

- IDWR (typically acting through a watermaster) may administer decreed rights within a "water district" pursuant to Idaho Code §§ 42-602 to 42-619.
- IDWR may administer ground water rights under the Ground Water Act, Idaho Code § 42-237a(g).[342]
- In the case of conjunctive management of water rights, the Conjunctive Management Rules provide mechanisms for calls under each of these authorities. Rule 40 deals with calls within a water district. Rule 30 deals with calls outside of a district.[343]
- In addition, the Department has authority to shut down diversions by persons without a water right, but this is not technically "administration" in the sense of enforcing priorities.
- Finally, an injured water right holder may seek direct judicial enforcement of his or her priority. Each of these is discussed below.

(1) Administration of water rights within water districts

As discussed in section 6.F on page 524, water districts are created solely in areas where water rights have been adjudicated—that is, where the rights have been through a general or local court action (a "water rights adjudication") brought to determine amounts, priorities, places of use, and other elements of all water rights claimed in a particular source. Around the West, and certainly in Idaho, essentially all major surface streams have had some type of adjudication.

The Department's authority and responsibility to administer water rights within water districts is governed by Idaho Code §§ 42-602 to 42-619. This authority ordinarily is limited to the administration of decreed rights within the water district.[344] A delivery call placed pursuant to Idaho Code § 42-607 cannot reach junior water rights outside the water district, even if they are the cause of the shortage.[345]

The Department also may seek authority from the SRBA Court for "interim administration" of partially decreed water rights,[346] which the Director has done in created Water Districts 120 and 130. On February 19, 2002 the Director issued an order creating Water District 120 (American Falls area) and another order creating Water District 130 (Thousand Springs area) pursuant to Idaho Code § 42-

[342] IDAPA 37.03.11.040.

[343] IDAPA 37.03.11.030.

[344] Idaho Code §§ 42-602, 42-604, 42-607.

[345] Such extra-district calls upon unadjudicated water rights have always been prohibited, except for a two-year period ending in 1994. 1992 Idaho Sess. Laws, ch. 34; 1994 Idaho Sess. Laws, ch. 450. During this window, the *Musser* case was decided (see discussion in section 9.C(1) at page 108).

[346] Idaho Code § 42-1417.

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604.[347] On January 8, 2003, the Director issued an order expanding the boundaries of Water District 130 (Thousand Springs area) to include parts of Administrative Basin 37.[348] On January 22, 2003, the Director expanded the boundaries of Water District 120 to include parts of Administrative Basin 29.[349] The Department is now seeking to further expand the boundaries of Water Districts 120 and 130 to include virtually all ground water within the Eastern Snake Plain Aquifer.[350]

Under the statutory framework set out under Chapter 6 of the Water Code, the distribution of water within water districts is carried out by a locally-elected state official known as a watermaster. Each water district has its own watermaster. The watermaster operates under the authority of the IDWR Director, but typically is not seen as a department employee so much as an agent for a local committee of irrigators and other water users who are empowered by statute to elect the watermaster and (subject to the Department's final approval) set the watermaster's annual budget, which in turn is funded by annual fees levied on the district's water users. The distribution of water is not typically seen as being the result of a "delivery call" (although that is, in effect, what the watermaster is administering on a daily basis). Rather, it is seen as a rote exercise established after the amounts and priorities have been sorted out in an adjudication.

Historically, virtually all water districts were based upon an adjudication of surface water rights, and therefore were organized to administer surface diversions. For example, Water District 1, Idaho's largest such district, administers natural flow surface diversions and surface storage deliveries on the Snake River upstream from Milner Dam. Likewise, in Water District 63, the watermaster opens and shuts headgates, measures surface diversions, and accounts for storage deliveries along the Boise River, all pursuant to a decree of water rights entered in the early part of the twentieth century.

Idaho's water districts typically are labeled with the number corresponding to the Department's administrative water basin in which the district exists. An exception has been in the recent creation of water districts that include decreed ground water rights on the Eastern Snake River Plain. The first two such water districts were numbered Water District 120 and Water District 130. Water Districts 110 and 140 are contemplated as ground water rights in the upper Snake River Basin and in the Oakley Fan area

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[347] On November 19, 2001, the Department sought authority from the SRBA Court for interim administration of partially decreed rights in Administrative Basins 35 and 41 (American Falls area) and Basins 36 and 43 (Thousand Springs area). On January 8, 2002, the SRBA Court issued an order authorizing the requested interim administration.

[348] On August 30, 2002, the Department filed a second motion with the SRBA Court seeking authorization for interim administration of water rights within Administrative Basin 37. The SRBA Court granted the request on November 19, 2002.

[349] On July 10, 2003, the Department filed a third motion with the SRBA Court seeking authorization for interim administration of water rights within a portion of Administrative Basin 29. The SRBA Court granted the request on October 29, 2003.

[350] On April 15, 2005, the Department filed three motions with the SRBA Court seeking authorization for interim administration of rights within Administrative Basins 25, 31, 32, 33, and 45.

that are recommended to be decreed in the next one to two years (as of this writing). The water district covering surface waters in the Boise River drainage, which is administrative Basin 63, is Water District 63. In a few cases, sub-areas have been established to encompass decreed rights in smaller tributaries or sources within a water district. In one unusual situation, the holders of ground water rights within a specific, well-defined ground water source that earlier had undergone the proof and sorting out process of an adjudication, successfully petitioned the Department to establish a water district. The result was Water District 63A, which encompasses a portion of the low-temperature geothermal aquifer in the Boise area. Now that conjunctive management of ground and surface water sources will begin to occur in many areas, there will be additional water districts comprised of ground water rights. Water Districts 120 and 130 on the Eastern Snake Plain Aquifer are two examples.

The essential reality underlying the traditional watermaster's duties is that, on a surface stream, there are a limited number of established diversions—typically, headgates—that can be manipulated and readily measured; shutting or opening each of them has immediate effects on the flow available for other water rights. Such a system usually can be operated on a basis of more-or-less instantaneous cause-and-effect relationships, as headgates are closed or opened. Consequently, the judges who issued the old court decrees—virtually all of which dealt solely with the surface water rights on a stream—faced the relatively straightforward task of determining acres irrigated and sorting out the parties' relative priorities. Once this had been accomplished, the "administration" was a largely ministerial task of closing and opening headgates according to the program set out in the decree. Water users did not have to go back into court to have their water delivered. While there sometimes were controversies (typically involving alleged illegal diversions and the like), rarely was there a "delivery call" as such. It was much more a question of living in the priority system according to the level of stream flows. It was usually obvious whose headgate was to be turned off, when, and for how long. This system incorporated such concepts as futile call, and usually gave rise to a set of local customs and practices for assuring the delivery of water in line with the decree while avoiding controversy or waste of water.

Now that Idaho has begun to administer ground water rights conjunctively with surface water rights, the water district concept is likely to undergo change; as this happens, the concept should be understood in the context of its origins. Because of the complexity of ground water-surface water interactions, simply shutting off ground water rights in priority will not produce the same result, in the same timeframe, as occurs on the surface stream when surface headgates are opened or closed according to the decreed priorities. Rather than having a watermaster carry out a well-defined program of opening and shutting headgates according to river gauge readings and decreed priorities, the watermaster operating in the era of conjunctive management may be called upon to administer mitigation plans or other arrangements involving a widespread group of ground and surface water users, and do so with reference to complex hydrological models, special rulings from the Department, or long-term agreements among the affected water users.

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(2) Administration of ground water rights under the Ground Water Act

The Department is given authority to administer ground water rights pursuant to the Ground Water Act,[351] notably Idaho Code § 42-237a(g). The Department's Conjunctive Management Rules are premised in part on this Act. Even in the absence of the Conjunctive Management Rules, however, the Department presumably would have direct authority to administer ground water rights under this Act.

(3) Administration through the Conjunctive Management Rules

The Conjunctive Management Rules implement the Department's authority under the Ground Water Act and under Chapter 6 (dealing with Water Districts) with respect to the conjunctive management of ground and surface rights. These rules are discussed in section 9 beginning on page 100.

(4) Temporary water rights

The Water Code authorized the Department to issue temporary water rights on an expedited basis for a "minor use of short duration" that is "not intended to become an established water right." Idaho Code § 42-202A. Such rights may not exceed five acre-feet in total diversion and can last no more than one year.

If an entity needs more than five acre-feet, it may rent water from the Idaho Water Supply Bank on a temporary basis.

IDWR also has the authority to issue temporary approval of transfers in a drought emergency. Idaho Code § 42-222A.

Another approach is to rely on an exempt domestic water right. This would provide a permanent right but for a small quantity. Despite the name, "domestic" is defined broadly to include "any other use"—even industrial or commercial. However, the domestic exemption allows only 0.04 cfs capped at a volume of 2,500 gallons per day. Also there are limits on the ability to use multiple such domestic exemptions. Idaho Code §§ 42-111(2) and (3).

(5) Curtailment of illegal water diversions

Under Idaho Code § 42-351 the Director has authority to issue a notice of violation and/or seek judicial enforcement against any person diverting water without a water right. This section, however, does not authorize action against water right holders to enforce priority.

Violations of section 42-351 may give rise to an enforcement action under Idaho Code § 42-1701B. Subsection 42-1701B(6)(a)(i) provides for penalties for illegal water diversion of $50 per 0.1 cfs per day or $50 per 0.2 acre-feet diverted to storage—up to a maximum of $50,000 per year. In

[351] Idaho Code §§ 42-226-239.

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addition, Idaho Code § 42-351(4) authorizes IDWR to seek injunctive relief (in addition to pursuing a notice of violation).

(6) Judicial enforcement of priority

Priorities also may be enforced by recourse to the courts, although, understandably, this typically arises where the water rights have not been decreed and there is no water district.[352] In such cases, the litigants are required to demonstrate the various elements of their water rights vis-à-vis the others, and the plaintiffs must prove material injury from the junior diversions.

It is likely that the plaintiffs seeking judicial enforcement will have to show that they have exhausted available administrative remedies. In the case of undecreed surface water rights outside of a water district, there would be none to exhaust. However, for rights within a water district or covered by either Rule 30 or 40 of the Conjunctive Management Rules, it is possible that the court might require the injured party to exhaust available remedies first.

E. The Idaho Water Resource Board

The Idaho Water Resource Board was created by the Idaho Legislature in 1965 following the passage of a constitutional amendment that established the Board.[353] There are eight Board members, appointed by the governor, who serve four-year terms. The current members of the board are listed under Appendix E.

The Board initially was created as a separate agency with its own staff. In 1974, the Board and the existing Department of Water Administration were combined to form the present Idaho Department of Water Resources. Today, the Department provides administration and staff support to the Board. The Board and IDWR have interrelated functions in areas such as appeals, administrative rules adoption, water bank administration, and water right negotiations with the federal government and Indian Tribes.

Board programs are divided into three general categories: comprehensive state water planning, water management activities, and financial programs.

F. The State Water Plan

In the 1964, partly in response to concerns about proposals to divert Idaho rivers for use in the Southwest, Idahoans approved a constitutional amendment which established the Idaho Water Resource Board and empowered it to "formulate and implement a state water plan for optimum

[352] *See Geertson v. Barrack*, 3 Idaho 344, 29 P. 42 (1892); *Dunniway v. Lawson*, 6 Idaho 28, 51 P. 1032 (1898).

[353] Idaho Const. art. XV, § 7 (adopted in 1964).

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development of water resources in the public interest."[354] In adopting the Plan, the Board must follow criteria including, among other things, means to achieve conservation and optimum use; minimum stream flow for aquatic life, recreation and aesthetics; and maximizing supplies for beneficial uses.

The Board is the agency described in Idaho's constitution to formulate and implement the State Water Plan (reproduced under Appendix F). The Idaho Supreme Court ruled in 1983 that the Board, being a constitutional entity, has authority to adopt a state water plan (including designation of instream flow targets on the Snake River) without legislative approval.[355] This did not sit well with the Legislature. The Idaho Constitution was subsequently amended to expressly provide that legislative approval or acquiescence is required.[356]

The first State Water Plan was adopted in 1976 and approved by the Legislature (with amendments) 1978.[357] The current State Water Plan was adopted in 1996 and is reproduced under Appendix F. The current plan is arranged into numerous short policy statements, each followed by a brief explanation. These policies carry considerable weight with the Department in water allocation decisions and may well be influential with a court. Policies adopted by the Board include recognition of the importance of non-consumptive uses and the need for protection of instream flows, particularly in connection with the state's anadromous fishery resource, endorsement of the Water Supply Bank, closer review of federal water projects, establishment target flow levels for the Snake River (ranging from zero flow below the Milner gauge to 13,000 cfs at Lime Point).

Although the State Water Plan has limited direct legal effect. Applications for new appropriations must be consistent with the minimum flow provisions of the State Water Plan.[358] Under

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[354] Idaho Const. art. XV, § 7 (adopted Nov. 3, 1964, amended Nov. 6, 1984). Implementing legislation is codified primarily at Idaho Code §§ 42-1730 to 42-1736B and 1805(7).

[355] *Idaho Power Co. v. State ("Swan Falls I")*, 104 Idaho 570, 661 P.2d 736 (1983).

[356] Idaho's Constitution now provides: "The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature." Idaho Const. art. XV, § 7. The Legislature implemented this constitutional authority as follows: "The state water plan adopted by the Idaho water resource board pursuant to authority of section 42-1734, Idaho Code, shall not become effective until it has been submitted to the legislature of the state of Idaho and has been affirmatively acted upon in the form of a concurrent resolution which may adopt, reject, amend or modify the same. Thereafter, any change in the state water plan shall be submitted in the same manner to the legislature prior to becoming effective." Idaho Code § 42-1736. (This statute was actually enacted prior to the 1984 constitutional amendment providing for legislative approval.) There appears to be conflict between the Constitution (which contemplates legislative acquiescence) and the statute (which requires affirmative approval).

[357] House Concurrent Resolution No. 48 (1978).

[358] "In addition to the other duties prescribed by law, the director of the department of water resources shall have the following duties: . . . After notice, to suspend the issuance or further action on permits or

the Department's rules, appropriations of "trust water" that have a significant impact on Snake River flows must be shown to be consistent with the State Water Plan.[359] Although not directly binding, the Department will consider the State Water Plan in applying the "local public interest" evaluation applicable to new appropriations and transfers and the special "public interest" evaluation applicable to trust water appropriations.

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 minimum flow provisions of the state water plan." Idaho Code § 42-1805(7).

[359] IDAPA 37.03.08.045.03.f.i.

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15. TRANSFERS OF WATER RIGHTS

A. Background

A change or transfer of a water right simply refers to a change in its use, that is, a change in one of its "elements."[360] That might entail, for instance, moving irrigation water from one farm to another. It might involve moving an irrigation right to a new industrial use. Or it might involve adding a new use, such as a new program of land application of waste water at the tail end of an existing industrial process.

Water transfers are quite common today, but this was not always so. In the early stages of water development, a person seeking to start a new activity using water was often able to appropriate a new water right for the project. There was no point in going through the expense and complexity of a transfer proceeding if a new water right could easily be obtained. As demand on the State's water resources increases, however, new users are increasingly finding it necessary to secure a water supply by acquisition and transfer of existing water rights.

The trend toward transfers has been slower to develop in Idaho than in some other Western states, simply because Idaho is a relatively water-rich state. The Snake River Basin contributes nearly thirty-seven million acre-feet of water to Columbia River flows each year,[361] Idaho has over 12 million acre-feet of surface reservoir storage space, and the Snake Plain Aquifer, which underlies much of the approximately 15,600 square mile Snake River Plain, holds an additional 300 to 500 million acre-feet.[362]

Despite this relative abundance of water in Idaho, shortages do occur on both a regional and seasonal basis. Even during normal precipitation years in areas such as the Upper Snake River Basin, the Big Lost River Basin, and the Boise River Basin, the natural surface flows during the peak of the irrigation season typically are fully appropriated. In addition, most of the feasible water storage projects already have been constructed in Idaho, and the availability of federal or state funding for large new storage projects appears to be limited for the foreseeable future.

Also, modern, large-scale development of ground water resources within the Snake Plain Aquifer and elsewhere have combined with periodic drought and changing surface water irrigation practices to affect recharge to the aquifers and return flows to surface sources. As a result,

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[360] For a detailed treatment of the subject of changes and transfers, see A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249 (1990). In 1990, the author was a senior deputy attorney general assigned to the IDWR. She is now a Magistrate Judge in the Third Judicial District.

[361] Idaho Dept. of Water Resources, *Stream Flows in the Snake River Basin: 1989 Conditions of Use and Management*, Open File Report 27 (June 1989).

[362] U.S. Dept. of Energy, *Geohydrologic Story of the Eastern Snake River Plain and the Idaho National Engineering Laboratory* 2 (Wash. D.C. 1982).

opportunities to make new ground water appropriations have become severely limited in recent years as controversies have erupted and the Department has imposed administrative moratoriums on the acceptance or processing of applications for permits. (See part 20 at page 303 for a discussion of moratoriums.)

Where opportunities for new appropriations now are much more limited, changes of existing water rights to new uses and transfers to new owners, new places of use and new points of diversion represent a practical means of obtaining water for new beneficial uses. Under the prior appropriation doctrine, in areas where existing supplies are fully appropriated, transfers of existing rights may represent the only means of acquiring water to meet the new and growing demands for water for industry, municipalities and environmental protection. Consequently, water transfers are becoming increasingly common in Idaho, as they are throughout the West.

In addition to traditional agriculture-to-agriculture transfers involving changes in points of diversion and places of use, significant amounts of water are being transferred to new beneficial uses—typically from irrigation to municipal and industrial uses. Temporary transfers are facilitated through Idaho's Water Supply Bank programs. The U.S. Bureau of Reclamation,[363] which operates most of Idaho's largest irrigation reservoirs, also is involved in transfers among irrigators of Bureau-stored water. It is likely that the Bureau will play a greater role in future water reallocations as demand increases for new uses of water.

B. Terminology: change vs. transfer vs. conveyance

The terms "change" and "transfer" tend to be used interchangeably. Sometimes we hear the word "transfer" used to describe what is more accurately described as a conveyance—that is, a change in ownership of a water right.

Technically speaking, the term "transfer" is used in Idaho to describe the process for a change in how a water right can be used (that is, a change in one of its elements). These are initiated by filing an *Application for Transfer of a Water Right* under Idaho Code § 42-222(1). Likewise, they are governed by the new *Transfer Processing Policies & Procedures* (Oct. 30, 2002) (reproduced under Appendix L.) Thus, if someone wishes to change the point of diversion or place of use under a water right, the person would file a water transfer application. As noted, this might also be called, at least informally, a "change" application.

[363] The Bureau of Reclamation has developed a transfer policy and an administrative guidance document that govern the Bureau's role in water right transfers in the West. The underlying principle of the Bureau's transfer policy is that the Bureau will involve itself only as a facilitator of voluntary transfers affecting federal water projects and water rights with the goal of mitigating third party effects and preserving existing financial, operational and contractual commitments of the Bureau and its water users. *See* Department of Interior, *Principles Governing Voluntary Water Transactions that Involve or Affect Facilities Owned or Operated by the Department of Interior* (Dec. 16, 1988); U.S. Bureau of Reclamation, *Voluntary Water Transactions: Criteria and Guidance* (1989).

In contrast, a change in the ownership of a water right is accomplished by a conveyance—that is, a deed—and involves no approval process. Once the deed or other proof of title is obtained, the new owner should file a *Notice of Change in Water Right Ownership* form with the Department.[364] Thus, for instance, if the owner of a farm sells the farm to another (along with the water right), and no change in use of the water right is contemplated, the new owner may simply inform the Department that he or she now owns the water right. No regulatory review or approval is required.

In many instances, a change in ownership does contemplate a water right transfer. This would be the case, for instance, where a farmer, without reserving his irrigation water right in the deed, sells a portion of his farm to a land developer, who in turn seeks to use the appurtenant water right for a commercial purpose. Here, Department approval is not required for the water right's conveyance to the developer, but is required for to change its nature of use (that is, from an irrigation to a commercial purpose).

C. The basic entitlement to change the elements of a water right

In Idaho, as in other prior appropriation states, a water right is valuable real property that may be conveyed together with, or apart from, the land to which it is appurtenant.[365] Idaho's courts held early on that a water right holder also has the right to change its type or nature of use provided that the rights of others are not injured as a result.[366] One commentator observed:

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[364] Note that only the buyer (the new owner) signs the notice form. The form must be filed with the Department within 120 days of closing. Idaho Code § 42-248. (As a practical matter, however, this deadline is not generally enforced.)

In some cases, the sale is consummated before the Department has approved the transfer. When this occurs, the new ownership form should be filed (together with a copy of the deed) following closing. When this occurs, the Department will issue the new water right in the buyer's name. If the Department has only been provided a copy of a purchase and sale agreement, the new water right will be issued in the name of the seller, with the expectation that the buyer will notify the Department upon completion of the sale.

A change of ownership notice also is required if a portion of a water right is conveyed to a different owner. This is referred to as a "split." Note, however, that this is applicable only if the water continues to be used on the same ground. If a water right is to be split, and any change is made to any element of the right (such as place of use), then a transfer of the right is required as well.

Where a change in ownership occurs for a right for which an SRBA claim has been filed, notice shall be provided to the IDWR. If no claim has been filed, the new owner is obligated to do so. Idaho Code § 42-1409(6).

[365] Idaho Code § 55-101(1) (definition of real property); *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918); *In re: Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Anderson v. Cummings*, 81 Idaho 327, 334, 340 P.2d 1111, 1115 (1959); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984).

[366] *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930); *In re Dep't of Reclamation*, 50 Idaho 573, 300 P. 492 (1931); *In re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940); *Noh v. Stoner*, 53 Idaho 651, 26 P.2d 1112 (1933) (overturned as to reasonable pumping levels by *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

> It has been held that, absent injury, the right to make a change in use of a water right is inherent in the constitutional right of property ownership and that the statute setting forth the procedure and standards for changes in use neither adds to nor detracts from existing rights. It therefore appears that the right to change is a constitutional right much like the constitutional "right to appropriate," although the right to change is not expressly stated in the Idaho constitution.[367]

Despite this general entitlement, strict standards and procedures apply. The basic point of these is to ensure that injury to existing water rights does not result from the transfer.

Under Idaho law, a transfer of a water right can involve a change in virtually any of the right's essential elements. (See part 4.B at page 28 for a discussion of the elements of a water right.) The most typical elements changed in a transfer proceeding are:

1. point of diversion
2. nature (or type) of use[368]
3. place of use
4. period of use

These four elements are specifically mentioned in the water transfer provisions of Idaho's water code. Under limited circumstances, the Department may permit changes in other aspects of a water right. For instance, although a water user generally may not transfer a water right's diversion point to a completely new source (although it is theoretically possible if no injury results), she may be allowed to switch to a different tributary of the same source, assuming no injury to other users. To some extent, a new method of diversion may be adopted (although this may not entail a formal transfer, so long as it makes no change in return flows or causes no injury to others). Within bounds, the rate or volume of diversion may be reallocated when a water right is split into two or more parts.

D. Basic transfer principles

Idaho's water code lists the basic requirements for a water right transfer:[369] As amended in 2003, the Department's criteria for approving a transfer are as follows (paragraphs added to facilitate reading):[370]

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[367] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 251-52 (1990).

[368] Until 1981 changes in nature of use and period of use were not authorized by statute. *Beker Industries Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 610 P.2d 546 (1980) (McFadden, J.) (denying transfer from agricultural use to manufacturing). In 1981, the Legislature amended the water code to expressly allow such changes, but added a proviso requiring the Department to evaluate the impact of transfers of agricultural rights on "the agricultural base of the local area." 1981 Idaho Sess. Laws, ch. 147 (codified at Idaho Code § 42-222).

[369] Idaho Code § 42-222(1), *see also* Idaho Code § 42-108.

42-222. …

(1) …

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in the use of the original right, the change is consistent with the conservation of water resources within the state of Idaho[371] and is in the local public interest as defined in section 42-202B, Idaho Code,[372] the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates,[373] and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.[374] The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

Idaho Code § 42-222 (footnotes added).

See also summary of criteria in section 16 at page 259.

The Department has not promulgated rules governing water transfers. However, it recently issued guidance for water transfers in the Eastern Snake Plain Aquifer.[375] As a practical matter, that guidance is setting departmental policy statewide.

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[370] Idaho Code § 42-222(1) (emphasis added).

[371] The "conservation of water" test was added in 1990. 1990 Idaho Sess. Laws, ch. 141. The measure was adopted in response to *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.). See discussion in footnotes 875 at page 496.

[372] The "local public interest" test was added in 1981, along with the protection of the local agricultural base. This act also added a provision limiting water rights to one change; this was repealed in 1986. 1981 Idaho Sess. Laws, ch. 147.

[373] This basin-of-origin protection requirements was added in 2003, as one of the amendments to the local public interest test. H.B. 284.

[374] In 1996, the Legislature added "beneficial use" as the fifth criterion, and declared that beneficial use was satisfied in the case of "future need" water rights for municipal providers. Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297.

[375] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec., 21, 2009) (reproduced in Appendix L.)

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E. The "no injury" rule

(1) The fundamental premise

The first principle listed in section 42-222(1) that "no other water rights are injured thereby."[376] This is the foremost requirement in any water right transfer. The basic idea is that no other water user, junior or senior, may be made worse off as a result of the transfer.[377] Thus:

> Injury will result where a change makes a junior appropriator subject to a priority to which the junior was not previously subject or where a change increases the burden on the stream or reduces the volume of water flowing in the stream. The injury, however, must be to a water right and must be real and substantial.[378]

(2) The rule is aimed at protecting all existing water rights

The rule quoted above speaks only about protecting juniors. Seniors, however, are protected too. Idaho Code section 42-222(1) draws no distinction between juniors and seniors. It speaks of protecting all water rights. As a practical matter, however, the injury analysis typically focuses on protection of junior right holders because they are the only ones ordinarily at risk, and if juniors are protected then seniors automatically would be as well. In any event, "[t]he injury or enlargement analysis is generally not concerned with injury to senior appropriators because seniors are protected by their priorities."[379]

An example may illustrate this. Suppose that a junior water right holder were to move her point of diversion upstream of a senior. Ordinarily, the senior would not be injured by this move because she may "call out" (i.e., seek curtailment of) the junior priority in times of shortage. Thus, as a practical matter, the upstream junior headgate is no threat, because the senior below may shut it off as needed to fill her senior right.

Often, however, the senior will oppose the transfer to ensure that the transferred use will not place a greater draw on the system than the pre-transfer condition. A senior also might oppose if the effect will be to compel the senior to repeatedly take actions to protect his right in the future. While

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[376] "The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights." *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (quoted in *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001)).

[377] The Department's rule outlining what constitutes injury is codified at IDAPA 37.03.08.045.1.a.

[378] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 260 (1990).

[379] Krogh-Hampe, 27 Idaho L. Rev. at 254 (1990).

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such may not be grounds for denying the transfer, it may result in the Department's imposing conditions that guarantee, to everyone's satisfaction, that the status quo on the stream will not change.

There are instances, however, where a senior right holder's priority might not adequately protect her against a junior's transfer. These are based on practical considerations. This might occur, for example, where a transfer would change a point of diversion so as to overlap and interfere with a senior right holder's point of diversion, or where a change in the location of a storage reservoir would inundate a senior's water right or increase the rate of evaporation from the stream system.[380] Likewise, it could occur in a conjunctive management context where movement of a ground water right would reduce the supply of water to a down-gradient spring user, but due to hydrological lag times there is no practical way of curtailing the ground water use in time to benefit the senior.

Thus, the general rule is that juniors are entitled to have conditions in the source maintained as they found them when they first made their appropriation.[381] "The fundamental premise underlying the no-injury rule is that a junior appropriator has a vested right to maintenance of stream conditions existing at or after the time of the junior's appropriation."[382] One might think of the fundamental transfer rule as requiring that a water right must not increase its overall net impact on the water source or on the rights of others—that is, its full impact after taking into account all consumption, evaporation, seepage and return flows attributable to the exercise of the right pre-transfer. Evaluating these cases can become complicated when one considers issues of timing and location of return flows and actual historical consumption.

However, not every *effect* is legal *injury*. The injury occurring due to a transfer or, for that matter, an alleged out-of-priority use, must be real, identifiable and material, not merely theoretical or speculative. As the Idaho Supreme Court has said: "The question . . . is whether other users . . . are injured or will be injured by the change, or, as frequently said, substantially injured, not merely a fanciful injury but a real and actual injury."[383] This does not mean that small effects cannot be injury, or that they cannot be considered in light of their effect when accumulated with other small effects. In fact, just the opposite generally is the rule. For example, in the 1998 contested case of *Huf-N-Puf*,[384] the proposed transfer's added effect on a river would amount to 0.02 cfs. The applicant argued that this was so small compared the river's average flow that it could not be measured and, consequently was

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[380] *See e.g., Lionelle v. Southeastern Colorado Water Conservancy Dist.*, 676 P.2d 1162 (Colo. 1984) (increased evaporation from enlargement of existing reservoir site).

[381] *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). The "no injury" rule has been codified at Idaho Code §§ 42-222 and 42-108.

[382] Krogh-Hampe, 27 Idaho L. Rev. at 259.

[383] *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944).

[384] *In the Matter of Applications for Transfer No. 5174 in the Name of Dennis M. Baker and No. 5175 in the Name of Huf-N-Puf Trust* (IDWR, Final Order, Nov. 25, 1998).

not "substantial and material" under *Cassia*. The Department ruled that, small or not, it was "real and actual injury" and would not be allowed absent mitigation.

(3) Change in point of diversion in a surface supply

Reciting the no-injury rule is easy enough. Applying it is trickier. A few examples will demonstrate that the analysis is highly dependent on the unique hydrological factors of each circumstance. (These examples deal with injury in the context of surface diversions. See the discussion in section 15.E(4) at page 198 for examples dealing with injury between ground water users. See part 8 at page 99 for a discussion of ground versus surface water conflicts.)

In a simple example, suppose that two farmers have natural flow water rights, in which the junior is located upstream and the senior is located downstream. Suppose that the senior sought to change her point of diversion to a location upstream of the junior. Would the junior be injured? That cannot be answered without knowing the hydrologic conditions in the stream. (Although, as a practical matter, the junior probably would file a protest to make sure no injury occurred.)

If the stream is neither gaining nor losing and there are no changes in the quantity of water entering the stream, the upstream movement of the senior would have no effect on the junior user. If conditions on the stream do not allow both rights to be fully met, the senior will either call water past the junior (if located downstream) or physically take it out first (if located upstream). The result is the same either way; the junior is no worse off. (In fact, the junior could be made better off by having the senior move upstream, thus allowing the junior to benefit by the senior's return flow.)

Another example would be a situation where a senior several miles upstream from a junior appropriator seeks to move her point of diversion (and place of use) to a point downstream of the junior's headgate. On the face of it, one might conclude that there is no difference: In the original configuration, the senior diverted all her entitlement before it reached the junior's headgate; and, after the change, the senior would be entitled to call all her water past the junior's headgate. But it often is not so simple, primarily because of the changes to the return flow regime that the change may cause. If the junior were relying on return flows from the upstream senior's use, then the senior generally will not be allowed to make the change without providing mitigation for the junior. She would be depriving junior of the pattern of return flows that junior relied upon when he established his right.

A variation on this would be the instance where a stream gains stream flow the farther it flows (that is, water is being added to the stream at various points along its length from the aquifer, from tributaries, or from return flows through drains or otherwise). The movement of the senior to a point upstream of the junior may injure the junior. This is because the senior has moved into the "water-poor" section of the stream. Because she no longer benefits from the stream gain downstream of the junior, her water right must now be served by water that previously flowed to the junior. Thus, the junior would be injured, and this transfer would not be allowed or would require mitigation.

In contrast, if the stream is a losing one (that is, water is being lost naturally to the aquifer as water moves downstream), movement of the senior to a point upstream will probably not injure the

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junior, and may even enhance her position. This is because, in a losing stream, it takes a large quantity of water upstream to deliver a relatively small quantity of water to the downstream senior. If the senior voluntarily moves her point of diversion upstream, into the more "water rich" portion of the stream, that right may be more easily satisfied, with as much or more water left over for the junior.

Now, let us consider movement by an upstream senior to a new diversion point below a junior user. Here, even if the stream is neither gaining nor losing, such a move would injure the junior user. This is because prior to the change the junior probably benefited to some extent from the senior's return flow. Movement downstream means that the return flow from the senior will no longer be available to the junior water user. Instead, if the transfer were allowed, the senior could call the entire diversion quantity past the now upstream junior. Accordingly, to avoid injury, it would be necessary to condition the senior's water right to reduce the quantity transferred (at least in times of shortage).

These examples form the tip of the iceberg. Many more are explored in Judge Krogh's article.[385]

(4) Changes in water consumption in same beneficial use do not require a transfer

It is not uncommon for farmers to switch from one crop to another. Because crops vary in consumptive use, changing crops will affect the amount of return flow available to other users. In 2004 the Legislature adopted legislation to confirm what had generally been understood to be the law before: Such changes may be made freely, despite their impacts on other users, without any oversight by the Department.[386] The Legislature expressly declared: "Consumptive use is not an element of a water right."[387] The legislation further provides: [388]

> "Authorized consumptive use" means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code.

Note that the last sentence of the section, stating that changes in consumptive use do not require a transfer, is not limited to agricultural contexts. Thus, an industrial user presumably could modify its processes, and substantially decrease return flow, without seeking the Department's approval.

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[385] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 266-74 (1990).

[386] 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

[387] *Id*.

[388] *Id*.

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On the other hand, if any element of the water right is changed, a transfer application and approval of the Department continues to be required under section 42-222.[389] Moreover, when such a transfer occurs, consumptive use may not be increased. This is discussed in the following section.

(5) Limitation to historical consumptive use in water right transfer

As discussed above, Idaho law, like the law in other appropriation doctrine states, prohibits enlarging the use under a water right through a transfer. When a water right transfer involves no change in nature of use, quantification and enlargement are usually not issues. For example, if a farmer dries up one forty-acre field and seeks to transfer the water right to an adjacent forty-acre field, the Department ordinarily will simply transfer the right in whatever quantity appears on the face of the license or decree (assuming there is one). Barring exceptional circumstances (such as forfeiture, etc.[390]), the full diversion quantity (both the rate and the volume) can be moved from the old use to the new use. Of course, as indicated above, the location of return flows still may be an issue in an injury analysis, depending upon the hydrology of the situation.

However, when a new use or changes in the points of diversion are involved, more scrutiny is required because the change may alter or eliminate return flows, thus affecting other users.[391] To protect other water users, the rule of thumb is that only the consumptive use component of the water right may be transferred when the transfer involves movement to a new use in a way that disrupts prior return flows. This longstanding principle was codified in 1997,[392] and was recognized by the Idaho Supreme Court in 2001.[393] Of course, consumptive use has always fundamental to the injury/enlargement analysis.

Consumptive use (or "CU") refers to the quantity of water consumed in the course of a particular beneficial use, and therefore is not available to other water users. In an agricultural setting, consumptive use is the water consumed in growing the crops. This includes evaporation in the course

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[389] The 2004 legislation expressly declared that consumptive use is not an element of a water right. 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)).

[390] The Department's memorandum on "Transfer Processing Policies and Procedures" at page 23 (reproduced in Appendix L) mentions another possibility: An agriculture-to-agriculture transfer might be limited to historic beneficial use where sub-irrigation at the original place of use limited actual historic use of the right.

[391] "If the application for transfer proposes to change the nature or purpose of use or the season of use, the applicant must include an attachment documenting the historic extent of beneficial use under the right. . . ." IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) p. 14 (Dec. 21, 2009) (reproduced in Appendix L.)

[392] "The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." 1997 Idaho Sess. Laws, ch. 373 (codified at Idaho Code § 42-222(1)).

[393] *Barron v. IDWR*, 135 Idaho 414, 419, 18 P.3d 219, 224 (2001).

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of water delivery and evapotranspiration from the plants themselves. By limiting the amount of a water right that may be changed to a new use to its consumptive use component, injury to other users is prevented.

Bear in mind that crops typically derive their water from a combination of diverted irrigation water and natural precipitation. The amount of precipitation that the crop is able to use is called the "effective precipitation." Sometimes people use the term "consumptive use" to describe the entire quantity of water used by a crop, regardless of the source. Other people use the term "consumptive use" to describe only that portion of the water consumed by the crops that is attributable to the irrigation water. In an effort to avoid confusion, some people employ the term "consumptive irrigation requirement" or "CIR" to more clearly describe the latter, distinguishing it from total consumptive use. Thus, the CIR is equal to total amount of water consumed by the crop less the portion of consumptive use supplied by precipitation. In a dry climate, most of the water consumed by a crop will come from irrigation, so the CIR will be a large component of the total consumptive use for the crop.

This distinction is important in quantifying changes in water rights. When a person changes a water right to a new use, he or she is only allowed to move the water right itself. The user may not claim credit at the new place of use for the precipitation that was consumed by the crops at the old place of use. Consequently, the Idaho Department of Water Resources will allow the user to transfer only the consumptive use associated with the water right (the CIR), not the effective precipitation.

In Idaho, the CIR typically is determined by reference to tables set out in an analysis by Allen & Robison.[394] These tables take into account the particular crop and the climate in which they crops are grown.

The volume of consumptive use or CIR is likely to be substantially less that the diversion volume shown on the license or decree (and much less than the annual quantity based on the diversion rate). In the case of flood irrigation, less than half the water diverted may be consumptively used. In the case of ground water delivered directly through sprinklers (usually a far more efficient means of irrigation), the consumptive use is likely to be substantially more than half the volume diverted.

The flip side of CIR is return flow. Return flow is the quantity of diverted water that returns to the public source of supply (the stream or aquifer). To avoid injury to others, a user changing a water right typically must avoid any material alteration of the return flow, including its quantity, timing, and location.

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[394] R.G. Allen and C.W. Robison, *Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho*, University of Idaho Research and Extension Center at Kimberly (Sept. 2006, rev'd April 2007) www.kimberly.uidaho.edu/ETIdaho/. Previously, the accepted analysis on this subject was R.G. Allen and C.E. Brockway, *Estimating Consumptive Irrigation Requirements for Crops in Idaho*, Idaho Water and Energy Resources Research Institute, University of Idaho (August 1983). The two analyses do not differ a great deal, and we still see Allen and Brockway cited occasionally.

You will hear people use the term "return flow" in different ways, but we use the term broadly to be everything diverted under a water right that is not consumed.[395] This includes various components. It includes water that seeps from irrigation ditches and laterals and water applied to the crops that is not taken up and passes below the plant root zone. It also includes water that runs off the end of the field as waste water. All this water eventually reaches other water users and is again diverted and applied to other beneficial uses. Indeed, water is often used and reused many times as it works its way down a stream system and even through an aquifer system. All other water users, even juniors, are entitled to have these return flows maintained in the event of a transfer.

The Department limits the transferred quantity to the historical consumptive use.[396] This practice is consistent with that of other prior appropriation states, such as Colorado,[397] and was approved by the Idaho Supreme Court.[398] Thus, for instance, the Department will look to the actual crops irrigated by the water user, and base the consumptive use on the consumptive use rates associated with those crops. Where the farmer has grown different crops over the years, the Department will approve the transfer based on the most consumptive crop, that is, the highest consumptive use in any given year.[399] This policy may give rise to a temptation to switch to a more consumptive crop prior to requesting the transfer. The Department has not yet been confronted with this fact setting.

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[395] As described by the Colorado courts, return flows consist of "irrigation water seeping back to a stream after it has gone underground to perform its nutritional function." *City of Boulder v. Boulder & Left Hand Ditch Co.* 192 Colo. 219, 223, 557 P.2d 1182, 1185 (1976).

[396] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) p. 30 (Dec. 21, 2009) (reproduced in Appendix L.)

[397] "[O]nce an appropriator exercises his or her privilege to change a water right . . . the appropriator runs the real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right . . . which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historical use of the right." *Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist.*, 717 P.2d 955, 959 (1986).

[398] "Under I.C. § 42-222(1), the director may consider historic consumptive use, as defined in I.C. § 42—202B, as a factor in determining whether a proposed transfer would result in an enlargement in use or injure other water rights." *Barron v. IDWR*, 135 Idaho 414, 419, 18 P.3d 219, 224 (2001) (footnote omitted).

[399] The Department's revised Transfer Processing Memorandum No. 24 dated December 21, 2009 ("*Transfer Memo*") (reproduced in Appendix L) contemplates that the transfer applicant will submit the most recent five years of cropping pattern and rotation data. However, the Department will consider information from prior years where "information provided by the applicant supports using a longer historic period." *Transfer Memo* at 30. The Department then will select the year with the highest consumptive use out of the data available.

In 2004, the Legislature adopted an amendment to the water code providing, for the first time, a definition of "authorized consumptive use."[400] However, the legislation's effect was limited to circumstances in which the only thing changed is the consumptive use.[401]

(6) The practical side to determining consumptive use in irrigation: FSA Acreage Reports.

As noted in the proceeding section, when an irrigation water right is changed to another use, the Department will evaluate the quantity of consumptive use and allow transfer of only that quantity reflecting the most water consumptive crop that has been irrigated. Where multiple crops are grown on a particular property in any given year, the Department will look to the highest overall average consumptive use in any year for the land that will be dried up. Thus, it is necessary to know which crops were grown and the acreages for each.

Often the most effective ways to document cropping history is through acreage reports provided by the farmer to the local office of the Farm Service Agency ("FSA"), an agency of the U.S. Department of Agriculture. These records are provided voluntarily by farmers who elect to participate in federal crop subsidy programs. Participation rates in Idaho, however, are very high.

Copies of these reports may be obtained from the FSA only with the permission of the particular farmer who submitted the reports.[402] Thus, the current owner may not be able to obtain older cropping

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[400] 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)). As amended, the water code provides: "'Consumptive use' means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right. 'Authorized consumptive use' means the maximum consumptive use that may be made of a water right. If the use of a water right is for irrigation, for example, the authorized consumptive use reflects irrigation of the most consumptive vegetation that may be grown at the place of use. Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." Idaho Code § 42-202B(1).

[401] As originally introduced, the legislation would have required the Department to quantify a right in a transfer proceeding based on the authorized consumptive use defined as "the maximum consumptive use that may be made of a water right." Thus, the Department would have been required, apparently, to look at the most water consumptive crop that could possibly have been grown on the property, and base the quantity of water transferred on that hypothetical use, irrespective of what was actually grown. This provision of the legislation was dropped prior to passage. Consequently, the limitation to historic (or "historical") consumptive use remains in effect.

[402] The FSA's position is based on a provision of the federal Freedom of Information Act that exempts from disclosure "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). There are agency rules and guidance on the subject, but they do little more than restate statutory language. The FSA nonetheless deems the acreage information in the acreage reports to fall within the "similar files" category. The FSA's take is that any information that tends to reveal the personal wealth of an individual falls into this catch-all exemption. The

records on his or her own farm, unless he has secured a release from the prior owner. This is an important thing to think about at the time of acquiring a property, when the buyer has some leverage. Farm or water sale agreements should include an obligation on the seller to produce these records to facilitate future transfers.

(7) Place of use transfers within irrigation districts and canal companies do not require approval

The Legislature has provided an exemption to the transfer procedure for those situations where water users within a canal company or irrigation district simply are changing the irrigated place of use under the entity's water rights, so long as the new place is within the "generally described place of use" authorized for the entity. The statute still prohibits any increase in the amount of water diverted or the acres irrigated.[403]

Implicit in this authorization is the concept that a canal shareholder or irrigation district patron may change his or her point of delivery as necessary to serve the new location within the entity's service area (again, subject to the non-injury rule). This is not to say that the water user could, without a formal transfer approval, establish a new "point of diversion"—i.e., change or add to the entity's licensed or decreed point of diversion from the source. Rather, the change contemplated in this provision would be to a different headgate, pump or other diversion on the ditch or lateral system, or to different lands, within the entity's boundaries.

A separate statute, Idaho Code § 50-805A, authorizes cities to pool water supplies obtained by contract with multiple irrigation districts and that "such pooling shall not be deemed a change in place of use and shall not require compliance with sections 42-08 or 42-222, Idaho Code." This statute, which is discussed in more detail below in connection with municipal water rights, was enacted in 1981 at the behest of the City of Nampa, with contracts with Nampa & Meridian Irrigation District, Pioneer Irrigation District, and Boise-Kuna Irrigation District for delivery of surface water used in the City's pressurized irrigation water delivery system.

FSA's view is that the type of crop grown is not personal and may be released without the farmer's authorization, but that the acreage numbers tend to reveal wealth and are not disclosable without authorization. The agency has not developed written guidance to this effect, but the position appears to be well entrenched.

[403] Idaho Code § 42-219(7). This provision provides, in part: "Subject to other governing law, the location of the acreage irrigated within a generally described place of use, as defined in accordance with subsections (5) and (6) of this section and as filed with the department pursuant to sections 42-323, Idaho Code, may be changed without approval under the provisions of section 42-222, Idaho Code. However, the change shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights." The process for establishing an irrigation entity's "generally described place of use" is set forth in the referenced subsections.

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F. Ground water transfers

Ground water transfers are subject to generally the same procedural requirements as transfers of surface waters, except that if an applicant proposes an out-of-basin transfer of ground water that will irrigate more than five-thousand acres, or that will involve a volume of more than 10,000 acre-feet per year, the transfer must be approved by both the Director and the Legislature.[404]

An interim policy memorandum issued by the Department in 2002 governs the processing of applications proposing transfers of ground water rights in the Eastern Snake Plain Aquifer ("ESPA"). This policy sets out the information that must be included with an application for it to be accepted and processed, and describes when a transfer application is and is not required. With respect to ESPA transfers, the policy provides that:

> if the application for transfer proposes to move the point of diversion for a water right to divert and use ground water from one location to another within the Eastern Snake Plain Aquifer (ESPA) including any modeled tributary aquifers, the applicant must submit an attachment with the application that sets forth the time series of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the department's current ground water model for the ESPA, or other equivalent analysis acceptable to the department. When using results from or based on the department's ground water model, the time series of calculated depletions must be for the cells containing the points of diversion both before and after the proposed transfer (initiating at the date of priority of the water right and ending at future steady state condition). If the cells are the same, the attachment is not required except as described below. A copy of the department's ESPA ground water model, or associated transfer spreadsheet can be obtained by contacting the department or visiting the department's web site.

IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (footnote omitted) (reproduced in Appendix L).

The stated purpose for this requirement is to provide a basis for evaluating whether the proposed transfer will increase depletions to hydraulically connected reaches of the Snake River. The policy presumes that any increases in depletions will cause injury to existing water rights. This presumption may be rebutted with an appropriate analysis. Absent such an analysis, however, increased depletions are required to be mitigated.[405]

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[404] Idaho Code § 42-226.

[405] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 12 (Dec. 21, 2009) (reproduced under Appendix L).

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Although the October 30, 2002 transfer policy is directed toward ground water transfers within the ESPA, much of the document is applicable to transfers generally, and it has been implemented in each of the several IDWR administrative regions for processing surface and ground water transfers.

G. Water rights mitigation in transfers, appropriations, and delivery calls

(1) Different meanings of mitigation

Before launching into a discussion of mitigation, it is worth pondering that mitigation means different things in different contexts. In the dictionary sense, it means to reduce the extent or intensity of a harm, not to avoid or eliminate it altogether. It is used in that sense in the law of contracts, which calls on the non-breaching party to mitigate (i.e., minimize) the damages caused by the breaching party. In this context, the injured party is called upon to mitigate the damages.

In contrast, in environmental and water law it is the party causing the harm who undertakes the mitigation. For example, federal environmental laws might require a party to mitigate adverse impacts to wetlands or endangered species by taking offsetting actions to restore habitat. Though not usually termed mitigation, the same concept applies in the context of air and water pollution credit trading programs.

In water law, mitigation describes an action by one water user to offset injury that his or her diversion causes to another water user. The duty to mitigate applies differently in the context of delivery calls versus transfers and appropriations. In the context of priority administration (a delivery call), a water right holder owes a duty to avoid material injury only to seniors. That duty to avoid injury expands to include juniors as well as seniors when a water right is changed (aka transferred) in some way. In other words, the change cannot be approved if there will be injury to any other water right (junior or senior). And, in a new appropriation, the appropriator has a duty to everyone, since the new right is the most junior.

In order to avoid injury, the right holder may seek to "mitigate" that injury. This is typically, but not necessarily, accomplished by providing a substitute supply to the injured right holder. This allows an existing use to continue or a new or changed use to be made. Where water rights are concerned, the idea is not just to reduce the harm, but to avoid or eliminate material injury altogether, thus making the other water user whole.

In the water rights context, mitigation may come in various forms. On occasion, notably in the context of settlement of tribal reserved rights claims, mitigation may consist of an array of government funded or facilitated measures addressing environmental and instream flow concerns that may or may not be directly related to the alleged injury to the reserved rights. In other contexts, state or other governmental entities may undertake aquifer recharge or other water replacement programs on a regional scale in response to or in anticipation of delivery calls that could cause economic dislocation.

Elsewhere in the West, water right mitigation is often undertaken in response to extraordinary strains on water supplies that are complicated by federal environmental laws (e.g., the Endangered Species Act), tribal reserved water rights, and/or federal decrees or compacts apportioning water

supplies between states. Idaho, in contrast, enjoys a comparatively abundant water supply. Moreover, most water right mitigation in Idaho is undertaken without the complication of a federal law overlay.[406] Accordingly, Idahoans enjoy ample opportunities for win-win solutions that allow the State's water to be put to optimum use while protecting environmental values.

(2) California's "physical solutions doctrine"

It is not necessary that the injured water right holder agree to the mitigation proposed by the party causing the injury. If the Idaho Department of Water Resources ("IDWR" or "Department") or a court finds that a mitigation plan proposed by the party causing the injury is sufficient to avoid material injury, that plan may be approved over the objection of the injured parties.

California has taken this a step further, allowing mitigation to be designed an imposed by the court. Thus, under what is known in California as the "physical solutions doctrine," California has gone much further than Idaho in imposing mitigation solutions. Although this doctrine has no applicability in Idaho, we discuss it here because, by way of contrast, it sheds light on how mitigation is viewed in Idaho.

Under California's doctrine, a court may craft its own mitigation solution and impose it on both parties. The seminal case dates to 1936: "[I]t is not only within the power, but it is also the duty, of the trial court to admit evidence relating to possible physical solutions, and, if none is satisfactory to it, to suggest on its own motion such physical solution. The court possesses the power to enforce such solution regardless of whether the parties agree." *City of Lodi v. East Bay Municipal Utility Dist.*, 60 P.2d 439, 341 (Cal. 1936) (citation omitted).

More recently, the California Court of Appeals summarized the physical solution doctrine this way: "As noted, a physical solution is an equitable decree designed to implement the constitutional mandate and to maximize the beneficial use of water. The court has power to enforce a physical solution regardless of whether the parties agree to it." *Central Basin Municipal Water Dist. v. Water Replenishment Dist. of S. California*, 150 Cal. Rptr. 3d 354, 360, Cal. App. 4th 943, 950 (2012).

The breadth of the doctrine is captured in this commentary:

> In working out a physical solution to water shortages where more efficient means of diversion and conveyance may be desirable, a court of equity is not limited by physical properties as they stand at the time of trial, or by suggestions and offers made by the parties. If it feels that substantial

[406] Even when no federal environmental laws are applicable, the environmental effects of a mitigation plan are appropriately considered under Idaho law. This is called out in the Conjunctive Management Rules themselves (IDAPA 37.03.11.043.03.j). It is also reflected in the Idaho Water Code's local public interest provisions (Idaho Code §§ 42-202B(3), 42-203A(5)(e), 42-222(1), 42-1763). Finally, the mitigation plan must work within the constraint of any existing instream flow water rights (Idaho Code §§ 42-1501 to 42-1507). On the other hand, it is not the obligation of the mitigating party to enhance environmental conditions. See discussion of instream flows in section 15.G(8)(h) at page 219.

> savings can be effected at reasonable cost by changing some of the works, it has the power, by injunctive order, to cause the change to be accomplished and to apportion the cost as justice may require. The court must, however, keep in mind that prior appropriators have prior rights and cannot be required lawfully to incur any material expense in order to accommodate a later appropriator. In working out a physical solution and determining whether an injunction should be granted, the fact that there is no immediate danger to a water right is an element to be considered. If the trial court needs or desires expert assistance or evidence to determine a physical solution in the problem of putting water resources to beneficial use to the fullest extent possible, it possesses the statutory power either to refer the matter to the division of water rights, or to appoint it as an expert.

Romualdo P. Eclavea, *et al.*, *Physical Solutions as Equitable Remedy in Allocating Water Interests*, 62 Cal. Jur. 3d Water § 456 (2015) (footnotes omitted).

Indeed, commentators have gone so far as to describe as mitigation what amounts to condemnation of the senior water right that is suffering the injury:

> A physical solution is not incompatible with a finding that it will not provide full compensation, and if the facts justify it, an award of damages may be made in addition to the physical solution. Further, a physical solution need not be applied when the remedy in damages is adequate.

Eclavea, § 456 (footnotes omitted).

If this commentary is correct, it means that California's physical solutions doctrine embraces not only the imposition of physical solutions, but financial ones, on the parties to a water conflict. It would allow a court to say, in essence: "I am not impressed with the mitigation strategy urged by the juniors. It is costly and likely to be ineffective in the long run. But it is not in the public interest simply to curtail the juniors. Given the enormous economic benefits of allowing the juniors to continue to divert (in comparison to the economic benefits generated by the senior), the sensible thing is for the senior to stop diverting and the junior to fully compensate the senior for its resulting losses."

(3) Three types of aquifer recharge in Idaho—ASR, PBAR & ARM

Water right mitigation strategies run the gamut—drying up farms, piping water to new places, building dams, you name it. An increasingly common and important mitigation strategy involves aquifer recharge. Indeed, aquifer recharge may be used either as a basis to mitigate other water rights or for storage of water to create new water rights (which is not mitigation at all).

Because aquifer recharge is so important (and complicated), I include here a background discussion that draws distinctions among three very different approaches to aquifer recharge:

- Aquifer Storage and Recovery ("ASR")

- Public Betterment Aquifer Recharge ("PBAR")
- Aquifer Recharge for Mitigation ("ARM")

They have different goals and operate in different ways. Each has value, but sets out a distinct approach that should not be confused with the others.

ASR, PBAR, and ARM are all commonly accepted approaches to mitigation in Idaho (though these labels are not routinely employed).

(a) Aquifer Storage and Recovery ("ASR")

The first category of aquifer recharge is known in Idaho as aquifer storage and recovery ("ASR"). In an ASR project, water is stored underground so that it may later be recovered (i.e., diverted) for the project owner's own use.

ASR is not a mitigation strategy. It is typically a water supply strategy in support of new water rights, though ASR is may also be undertaken for water quality reasons. ASR is conceptually no different than storing water in an above-ground reservoir. Obviously, water put in the ground does not stay put quite as well as water held behind a dam. Accordingly, a major part of any ASR project is the technical challenge of quantifying how much will remain for subsequent diversion over time.

ASR is typically undertaken by private parties to create a stored underground supply for later diversion to beneficial use by the entity undertaking the recharge. For example, Micron Technologies diverts water from the Boise River, stores in it an aquifer, and later pumps and uses a calculated volume based on the amount recharged. In this sense, ASR works conceptually like a surface reservoir (while also providing water purification benefits).[407]

In theory, an ASR project could be undertaken by a governmental agency, just as the Bureau of Reclamation built irrigation dams across the West for the ultimate benefit of individual irrigators. But there is no precedent for this in Idaho.

(b) Public Betterment Aquifer Recharge ("PBAR")

Aquifer recharge may be undertaken by the State or other entities for the general benefit of all water users. I call this "Public Betterment Aquifer Recharge" (or "PBAR").[408] This typically involves

[407] Obviously, aquifers are not tightly confined storage vessels like surface reservoirs. Accordingly, it is typically necessary for the proponent of an ASR project to develop a computer model that predicts how much of the water placed in the aquifer will still be there, over time, for subsequent diversion.

[408] There is one statutory reference to "public betterment" in the context of aquifer recharge. "In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use . . . ." Idaho Code § 42-4201(2).

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large scale, regional efforts to recharge aquifers through infiltration ponds and/or by running water in leaky irrigation canals during the non-irrigation season.

The practice often is undertaken with minimal hydrologic analysis. Unlike ASR, no hydrologic analysis is required for PBAR projects, because the water put in the ground does not result in any specific new or enhanced water right to divert that water. Nor does it serve as a basis for releasing particular water uses from a delivery call.

Thus, a PBAR plan may be quite seat of the pants: "Let's put some water in the aquifer. It will probably do some good. Hard to say how much, but it can't hurt." There is no need to monitor or quantify how much good a PBAR project does, because it is not undertaken as a basis for subsequent diversion under right or as mitigation for particular water right users. Rather, PBAR is simply an effort to create a better supply for all. This "firms up" the rights of all water users connected to the aquifer and reduces the likelihood of conflict among users. It is as if Mother Nature added the water for everyone's benefit.

PBAR may be undertaken as a precautionary measure before delivery calls are made, or it may be undertaken in direct response to a call by holders of senior water rights. The thing that distinguishes "public betterment" aquifer recharge from other aquifer recharge is that PBAR is not undertaken for the specific benefit of particular water users. Thus, in a call situation, a PBAR project might be of sufficient size to completely eliminate the call, or it might only partially satisfy the call thereby reducing the number of juniors called out. In either case, water continues to be allocated in order of priority just as before. No one has a special claim to the water recharged through PBAR.

(c) Aquifer Recharge for Mitigation ("ARM")

A third form of aquifer recharge involves recharging an aquifer for the purpose of providing a replacement supply to senior users who, but for the recharge, would call out juniors. I call this "Aquifer Recharge for Mitigation" or "ARM." This may occur, for instance, where steps are taken to add water to an aquifer which then discharges the additional water to a stream serving senior surface users.

By providing this mitigation, other users may secure new appropriations or avoid having existing rights called out. This sort of mitigation may be undertaken by individual water users for their own benefit, by quasi-governmental ground water districts for the benefit of their members, or by a mitigation project developer who, in turn, sells mitigation plans or credits to junior water users.

Unlike PBAR, ARM is undertaken for the specific benefit of specific junior water users (or a class of them, such as members of a ground water district). An ARM recharge plan is calculated to provide a replacement supply sufficient only to compensate for the impact of the specific diversions providing the mitigation. Thus, other diverters who have not provided mitigation may continue to be called out.

In contrast to PBAR, an ARM plan invariably requires strict attention to hydrogeology, pumping effects, ground water movement, and similar variables; often, a ground water model is involved.

Implementing an ARM allows its sponsor to take credit for providing the replacement supply, thereby allowing it or its members to continue diverting. Meanwhile, other juniors who fail to offer mitigation may face curtailment. In PBAR, by contrast, curtailments continue to occur in strict order of priority, but, one hopes, there will be fewer of them because of the increased water supply.

Summary Comparison	
ASR	Typically undertaken privately for the purpose of storing and diverting the water for the benefit of the person who stored it. If some "leaks" out of the aquifer and is used by others, that is incidental and unavoidable.
PBAR	Typically undertaken at public expense by governmental entities for the purpose of allowing more water to reach surface users. Indeed, if some "leaks" out of the aquifer, that is the whole purpose. If a ground water user diverts some from the aquifer before it "leaks" out, that is incidental and unavoidable.
ARM	Typically undertaken by private parties for profit or by groups of water users (or governmental districts) for mitigation purposes. Unlike PBAR, the entity undertaking the project owns the water, may prevent others from taking it, and may claim the quantifiable mitigation benefits from the quantity that "leaks" out.

(4) Should ARM be undertaken for profit?

No one seems to struggle with the idea of ARM undertaken by the junior water users to avoid a call or by governmental entities to help resolve a call. Indeed, one of the stated legislative purposes of ground water districts is to develop and implement ARM.[409] In contrast, ARM undertaken for profit by third-party mitigation project developers is a new concept in Idaho, and it has encountered some resistance.

This discomfort with the idea of for-profit aquifer recharge is reflected, for instance, in unsuccessful legislative efforts over the last few years. Specifically, there have been efforts to modify Idaho Code § 42-234 (authorizing water rights for aquifer recharge). Some of the legislative proposals appear to reflect a measure of uncertainty or mixed feelings with respect to efforts by private parties to undertake for-profit aquifer recharge programs (particularly those involving new appropriations) in support of mitigation plans that will be sold to other water users. Also involved may be concerns that

[409] In response to growing attention and concern among water users about conjunctive management issues, particularly within the Eastern Snake River Plain, the Idaho legislature enacted legislation authorizing the creation of ground water districts. 1995 Idaho Sess. Laws, ch. 290; Idaho Code § 42-5200 *et seq.* The primary purposes of these special districts were to provide a mechanism for ground water users within a given area to organize and assess themselves for the costs of measuring and reporting annual ground water withdrawals from wells, and as necessary, responding collectively to delivery calls, curtailment orders, or other forms of administration. Thus, ground water districts, unlike water districts, are not water delivery entities.

successful ARM projects, using stream flood flows, will reduce amounts flowing through hydropower projects on the Snake River that cannot demand, but benefit from, these flows.

Some people sense something wrong in someone profiting by selling an interest in a mitigation plan that utilizes a public resource like water. This concern may derive from the prior appropriation doctrine's hostility to speculation and the insistence that only those putting water to beneficial use may obtain rights therein. Others dismiss this concern, pointing out that there is no incompatibility between individual profit and maximum use of the resource. After all, the biggest canal in the Treasure Valley—the New York Canal—is so named because it was conceived and funded by entrepreneurs two thousand miles away in New York City. Likewise, no one doubts the right of a farmer to sell his or her water rights at great profit. Similarly, no one doubts that for-profit water brokers may lawfully make a living matching buyers and sellers of water rights, thereby ensuring that this public resource finds its way to its highest and best use. The fact is, water rights mitigation is increasingly complicated and challenging. Not every water user has the wherewithal to design and undertake a successful mitigation project.

The author of this section sees nothing in the prior appropriation doctrine that should prevent people from putting together such projects and selling credits in them to others. I don't know how to build a car, either. Nor do I care to rely on the government to build all the cars. I am glad that someone does build them, and is willing to sell one to me. For this analogy to work, however, it is essential that the developer of the mitigation project add something of value, rather than just appropriate water and sell it to others. That value may come in the form of engineering, infrastructure (diversion, storage, or delivery), computer modeling, administrative services, and the like.

The concern centering on the for-profit aspect of these efforts is particularly acute in the Big Wood River Valley where plans are being explored by private mitigation project developers to use otherwise unclaimed spring flood flows to recharge the aquifer in the Sun Valley area to support mitigation plans that may be sold to holders of junior surface and ground water rights (or those diverting without any water right) who face all but certain curtailment in the coming years. It conceivably could support some new appropriations as well, a fact that seems hard to swallow for people who have been confronted with the typical seasonal water scarcity in the area.

(5) Statutes addressing mitigation

At its core, mitigation is a common law principle growing out of a water right owner's entitlement to provide a substitute supply to a senior, thereby allowing both parties to enjoy their constitutional right to divert. Idaho statutes provide scant guidance on water rights mitigation.

One of the few statutes speaking to the subject is the aquifer recharge statute mentioned above, Idaho Code § 42-234, which dates to 1978.[410] It is a sweeping statement of public policy extolling the virtues and value of aquifer recharge coupled with maddeningly ambiguous regulatory authority over

[410] 1978 Idaho Sess. Laws, ch. 366 (codified as amended at Idaho Code §§ 42-232, 42-233a, 42-234; *see also* 1978 Idaho Sess. Laws, ch. 293 (codified as amended at Idaho Code §§ 42-4201 to 42-4231).

recharge projects. The statute may have been written with PBAR in mind, but its language is not so limited. For instance, it includes the broad and unambiguous declaration that "the appropriation of water for purposes of ground water recharge shall constitute a beneficial use of water." Idaho Code § 42-234(2). Thus, the statute appears to provide a foundation for private ARM projects, as well.

Another statute touching on the subject is an amendment to Idaho Code § 42-223(10) which expressly protects from forfeiture a water right that is not being diverted because of its use as part of a mitigation plan.

See also Idaho Code § 42-1416B dealing with expanded (i.e., enlarged) ground water rights within a critical ground water area. It provides: "Water shall be deemed unavailable to fill the rights for expanded use, even if decreed in the adjudication, unless the director finds that a management program exists which will, within a time period acceptable to the director, limit the average annual water withdrawals from the aquifer designated in the critical ground water area to no more than the average annual recharge to the aquifer."

Idaho Code § 42-1779 provides for a statewide "a statewide comprehensive aquifer planning and management effort over a ten (10) year period of time beginning in fiscal year 2009."

Since 1978, the Idaho Legislature has provided for the establishment of aquifer recharge districts, which have taxing authority to raise money for and undertake ground water recharge project. Idaho Code §§42-4202 to 42-4231.

(6) Three types of mitigation

In Idaho, private water rights mitigation comes in various forms. One may place them into three broad categories, as follows:

- "Capital-M mitigation" (undertaken pursuant to Idaho's Conjunctive Management Rules in response to an active delivery call)
- "small-m mitigation" (developed outside of the Conjunctive Management Rules (a) in support of an appropriation, transfer, or exchange, (b) in anticipation of a delivery call, or (c) in response to an active delivery call against a surface right (which is not covered by the Conjunctive Management Rules))
- "ESPA mitigation" (a sub-species of "small-m mitigation") involving changes in points of diversion of ground water rights hydrologically connected to surface rights

Each of these is discussed below.

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(7) Mitigation pursuant to the Conjunctive Management Rules: "Capital-M mitigation"

The only formal administrative rules dealing with mitigation are contained within the Conjunctive Management Rules, IDAPA 37.03.11.000 to 37.03.11.050.[411] The Conjunctive Management Rules were promulgated in 1994 (and approved by the Legislature in 1995) in response to calls for the administration (i.e., curtailment) of ground water rights by a trout farm. *See, Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). They set out a carefully crafted set of legal principles governing the difficult subject of delivery calls directed to junior ground water rights. However, the applicability of these rules is limited.

The conjunctive management rules come into play only in response to "a delivery call made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply." IDAPA 37.03.11.001.[412]

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[411] The formal title of the rules is "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37.03.11.001, but they are commonly referred to as the Conjunctive Management Rules. A note on terminology: "Administration" refers to the Department's statutory responsibility to enforce priority, including the curtailment of junior water rights when required to meet senior needs. The term "conjunctive administration" refers to the administration of ground and surface water rights. The term "conjunctive management" is broader. It refers to the full panoply of mostly voluntary governmental and private efforts to reduce conflict between ground and surface water users and promote more effective utilization of all water resources. Thus, while conjunctive administration deals with the brute-force "policing" of priorities, conjunctive management includes such things as research, education, voluntary conservation measures and other demand reduction, recharge projects, provision of replacement water supplies, and other efforts to stabilize or improve water availability. This distinction in terminology, however, is fairly recent. At the time that the Conjunctive Management Rules were adopted in 1994, the term conjunctive administration was not yet in vogue. Using current terminology, those rules would more appropriately be named the Conjunctive Administration Rules.

[412] The rules also require that the Department to establish an "area having common ground water supply." *See* IDAPA 37.03.11.010.01 (definition of area having a common ground water supply); IDAPA 37.01.11.031 (determination of areas of common ground water supply); IDAPA 37.01.11.050 ("Rule 50") (areas determined to have a common ground water supply). The Department has included only one area of common ground water supply in Rule 50—the Eastern Snake Plain Aquifer. In a 2014 rulemaking, Docket No. 37-0377-1101, the Department sought to repeal Rule 50 altogether, explaining that the formality of declaring these areas by rulemaking is unnecessary and that "the administrative hearings and deliberations associated with individual delivery calls is the proper venue to address which ground water right should be subject to administration under a delivery call." The Idaho Legislature (which has the power to veto rules, Idaho Code § 67-5291) rejected the rule in 2015. 2015 House Concurrent Resolution No. 10. The effect of this is somewhat unclear, but there is an argument that areas of common ground water supply must be added by formal rulemaking to Rule 50 before the Department has authority to administer rights in such area under a conjunctive management delivery call.

Arguably, another prerequisite of conjunctive administration is the development of a reliable computer model to evaluate the effect of ground water diversions and recharge on surface rights and other ground water rights. This is not stated in so many words in the Conjunctive Management Rules, but it is difficult to imagine

Notably, they do not come into play until a delivery call is made. Even then, they do not apply to calls against surface water users,[413] and they apply only if an area of common ground water supply has been established.

The Conjunctive Management Rules address a host of issues. One of them is mitigation plans developed in response to a delivery call against ground water users. This is known as "Rule 43" of the Conjunctive Management Rules. IDAPA 37.03.11.043 ("Rule 43") (copy attached.)[414]

Rule 43 borrows heavily from the Colorado concept of "plans for augmentation." This was the first time the concept of private mitigation for the benefit of specific water rights was codified in Idaho.

Here are some of the key points about Rule 43:

As noted, the Conjunctive Management Rules operate in the context of an active (as opposed to anticipated) delivery call. Accordingly, a water user may not obtain advance approval of a Capital-M mitigation plan under Rule 43 in anticipation of a call. A water user may develop a mitigation plan and keep it on the shelf, but the Department will not determine the plan's adequacy until the delivery call is made and everyone's hair is on fire. This may seem odd, but the Department takes the position it does not know what the delivery call will look like until it sees it and cannot approve a plan in the abstract. Likewise, the Department says that senior users should not be required to review and object to every mitigation plan (or forever hold their peace) in advance of an actual delivery call. Furthermore, until the delivery call is made, it is not clear which seniors have an interest in, and must be entitled to respond to, the Capital-M mitigation plan.

Rule 43 recognizes that no two mitigation plans are alike. The rule encourages creative solutions tailor-made to the specific circumstances of the call. Specifically, it notes that mitigation may

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how the Department would fulfill its obligation to evaluate material injury and the futile call defense in the absence of such a model. The whole premise of the Conjunctive Management Rules is that rights should not be curtailed by rote application of the priority system (as is done, more or less, for surface water calls); instead curtailment should be limited to the extent necessary to effectively prevent material injury. *See*, IDAPA 37.03.11.020.04 (application of futile call principle), IDAPA 37.03.11.010.08 (definition of futile call); IDAPA 37.03.11.042 (determining material injury).

[413] The Conjunctive Management Rules do not apply to delivery calls against junior surface rights. The thought was that surface water is easy enough to administer. (When surface rights are involved, a diversion upstream has a clearly quantifiable impact on downstream rights. There is no need to develop a computer model to figure out who is causing the injury, and how and when it radiates from the point of diversion.) This means, however, that junior surface users—who do not fall within the Conjunctive Management Rules—may not develop Capital-M mitigation plans in response to a delivery call. However, they may still craft small-m mitigation plans outside the rules, which may be just as effective.

[414] In addition, "Rule 42" expressly provides: "The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan." IDAPA 37.03.11.042.02 (copy attached).

come in the form of "other appropriate compensation." IDAPA 37.03.11.043.c. For instance, a water user might pay for efficiency improvements in the senior's use of water, thereby enabling the junior to provide less wet water as a replacement supply. Likewise, it is conceivable that a junior user depleting an instream flow might provide offsetting habitat improvements to compensate for the flow reduction. This is known as out-of-kind mitigation (as opposed to in-kind mitigation, which is replacement water). Tradeoffs like these are common in negotiated settlements, but compelling the senior water user to accept out-of-kind mitigation is new territory in Idaho.[415]

Rule 43 established a detailed list of "factors" the IDWR Director must consider in determining whether to approve a plan. The factors control the Director's otherwise broad discretion.

One of the factors is agreement between the junior and senior users. But this is only a factor. In other words, even a stipulation of the parties that the mitigation is adequate may be rejected by the Director. In the absence of a stipulation, a mitigation plan proposed by the junior user may be imposed on the senior making the call. On the other hand, the rules do not appear to go so far as California has under its physical solutions doctrine, which would allow the Department to devise its own mitigation solution and impose it on both parties (see discussion in Section 15.G(2) at page 206).

The plan must address only "material injury," not insignificant or fanciful injury. Rule 42 of the Conjunctive Management Rules sets out various factors (including the efficiency of the senior's use and the reasonableness of the senior's means of diversion) to consider in determining whether an allegation of injury constitutes "material injury." IDAPA 37.03.11.042.

(8) Mitigation when there is no conjunctive management delivery call: "small-m mitigation"

(a) Mitigation plans in support of applications for appropriation, transfer, or exchange

As noted above, Capital-M mitigation plans are available only in the context of responding to an active conjunctive management delivery call against a ground water right. However, the Department will evaluate and recognize on a case-by-case basis what I call "small-m mitigation" plans that fall outside the Conjunctive Management Rules. For instance, the Department will consider a plan to mitigate the impact of new appropriations, transfers, or exchanges.

Suppose a homeowner or real estate development requires a new water right, but water in the area is either fully appropriated or new appropriations are subject to frequent curtailment due to their

[415] California—which faces much more severe water challenges than does Idaho—has embraced out-of-kind mitigation under its "physical solutions" doctrine. See discussion in Section 15.G(2) at page 206. Although out-of-kind mitigation is embraced to some extent in Rule 43 of the Conjunctive Management Rules, it does not appear that Idaho has not gone quite so far in that direction as has California, particularly with respect to allowing the Department or a court to fashion and impose a mitigation plan not embraced at least by the junior water right holders. Likewise, there is no suggestion, to date, in Idaho that damages would be a sufficient remedy for injury to a water right.

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junior priority. (Alternatively, suppose that a domestic well has been illegally diverting water for irrigation or aesthetic purposes in excess of the authorized amount, and the owner wishes to obtain a lawful appropriation.) In such a case, the applicant will need a plan to mitigate the effects of new appropriation by providing a replacement supply for senior water users. The result is to allow water under the new appropriation to be diverted "out-of-priority" so long as the mitigation plan is in effect.[416] For all practical purposes, the junior priority of the new right becomes irrelevant, and the new right takes on the priority date of whatever water right is offered as mitigation. Or, if the mitigation plan is premised on storage (including aquifer recharge), then its ability to divert out-of-priority is effective so long as stored water is physically available to offset any material injury that would otherwise be caused by the diversion.

(b) Mitigation of existing water rights

The owner of a junior water right may be concerned that his or her right will be called out in the future. This is a real threat in the Big Wood River Valley today, where trophy homes and hobby ranches in the Sun Valley area face imminent curtailment of ground water rights in conjunctive administration.[417] Even today, surface water rights as senior as the early 1880s are subject to late-season curtailment in the Big Wood because they are junior to even more senior downstream surface rights.

The difficulty is that a Capital-M mitigation plan under the Conjunctive Management Rules cannot be approved in advance of the delivery call. And, under current policy, the Department will not evaluate a small-m mitigation plan outside the context of an application for appropriation, transfer, or exchange.

A water user wishing to secure approval of a mitigation plan for an existing right prior to a delivery call may get the plan before the Department by subjecting the existing right to some sort of water right application, such as a transfer application to add an alternate point of diversion. Kluges like this are not always available, however.

Even if they cannot obtain advance review and approval of the plan, junior water users are nonetheless well advised to put together a mitigation plan and have it available in the event of a delivery call. At that point, it may be offered as a Capital-M plan, and the user will find out if the

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[416] Diversion "out-of-priority" is a commonly employed shorthand reflecting that the right is not subject to curtailment despite its junior priority. Meanwhile, other junior rights that have not provided mitigation are subject to curtailment in order of priority.

[417] On February 23, 2015, two delivery calls were placed by groups of senior surface water users on the Big and Little Wood Rivers south of Sun Valley. Arguably, these calls are premature, given that the Department has not yet designated the valley's aquifer as a "common source of supply," as is required under the Conjunctive Management Rules. IDAPA 37.03.11.050 ("Rule 50"). In 2014, the Department repealed Rule 50, which would have allowed it to informally declare or adjust the boundaries of common sources of supply (including the Big Wood River Valley aquifer) without formal rulemaking. In 2015, however, the Idaho Legislature overruled the repeal. House Concurrent Resolution 10 (signed Mar. 16, 2015).

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Department deems it good enough. However, if it is developed by competent engineers, hydrogeologists, and water attorneys, the likelihood of it being effective is maximized.

(c) Small-m mitigation must be "like kind."

As noted above, Rule 43 of the Conjunctive Management Rules contemplates the possibility of out-of-kind mitigation (i.e., something other than a replacement supply of water). In contrast, small-m mitigation plans, which operate outside of Rule 43, ordinarily provide like-kind mitigation. In other words, a water user relying on a small-m mitigation plan will probably be required to provide a water supply to the senior of sufficient quantity, quality, and timing to meet the senior's needs to the same extent as those needs would have been met by curtailing the junior.

(d) Small-m mitigation is subject to re-evaluation at time of delivery call

As noted above, Capital-M mitigation plans, once approved, cannot be re-opened during the course of the call. Small-m mitigation plans that are approved in the context of an application for appropriation, transfer, or exchange do not enjoy that certainty. The Department may approve the mitigation plan for purposes of the pending application, thus allowing the permit, transfer, or exchange to be approved.

However, if and when a delivery call is made in the future, the effectiveness of the previously approved mitigation plan may be reevaluated in light of new circumstances and information, including impacts on parties not anticipated at the time the original plan was approved. In other words, approval of a small-m mitigation plan in anticipation of future conjunctive management provides no guarantee that the mitigation plan will be found adequate when the delivery call comes.

Obviously, this uncertainly is a drag on marketplace and financial transactions involving property that requires reliable water rights.

(e) Type I and Type II mitigation

IDWR guidance updated in 2015 breaks down mitigation into two forms:

- Type I – Diversion and delivery of replacement water to offset injury or depletion
- Type II – Non-use of water to offset injury or depletion

Jeff Peppersack, IDWR, *Describing Mitigation in Water Right Records – Application Processing No. 71, Transfer Processing #27* (updated Nov. 4, 2015).

(f) It is no longer required to change the nature of use to mitigation

In the past, the Department required that if the acquired right is left idle for mitigation purposes (Type II mitigation), its nature of use element must be changed through the transfer process to "mitigation," "aquifer recharge," or the like in order to protect the undiverted right from forfeiture.

This requirement to change the nature of use was of no great consequence, so long as the right was fully under the control of the person creating the mitigation plan. In other words, it was just another "t" that needed to be crossed. However, it presented a problem if, for instance, the plan relied on deliveries by a separate irrigation entity whose right cannot easily be changed to some other nature of use. In other words, even if the irrigation district wanted to cooperate, it could not if it perceived that its water rights could not lawfully be changed to a use other than irrigation.

In response, the Legislature amended the forfeiture statute, Idaho Code § 42-223(10), to exempt from forfeiture a water right that is not diverted because of its use in a mitigation plan. Consequently, a mitigation plan may now safely rely on an undiverted water right, without putting that right through its own transfer proceeding to change its nature of use to mitigation.

(g) Example involving mitigation of ponds

In Idaho, a water right is required for every artificial pond (to cover the evaporative loss), even if the pond fills naturally with ground water. Thus, if a developer contemplates construction of an artificial pond fed by ground water, a water right must be obtained. The Department has determined that the consumptive use associated with irrigation is virtually identical to the annualized evaporative loss of ponds on an acre-for-acre basis. In other words, if you dry up an acre of irrigated land to create a one-acre pond, there is no gain or loss of water to the system. Thus, it would seem to be a trivial exercise to convert previously irrigated land to aesthetic ponds. Alas, it can be tricky, and a mitigation plan may be required.

In one example, a developer sought to convert farm land irrigated with surface water to a commercial development with ponds that would fill naturally from ground water with a high water table.

If the farm land had been irrigated with ground water, a portion of those rights readily could have been changed from irrigation use to aesthetic pond use. This would be a straight transfer with no mitigation required. Of course, the aesthetic right would have the same priority date as the ground water right and would thus be vulnerable to being called out in a future conjunctive administration call. The problem is that this is not a risk the pond-owner is allowed to take. If a ground-water-fed pond is found to be not in priority, the water cannot simply be shut off. Water will continue to fill that pond no matter what (unless the pond is filled in). Thus, the owner would be obligated to scramble to develop a new mitigation plan under crisis conditions.

Here, the problem was different. The farm was irrigated with surface water, while the pond is fed by ground water. Surface and ground water are considered to be different "sources" of water, and transfers from one source to another are not allowed. Nor could the developer obtain a new appropriation of shallow ground water to feed the pond, because the shallow ground water is hydrologically related to the fully appropriated Boise River.

Consequently, it was necessary to develop a mitigation plan. The surface water right previously used for irrigation of the land where the ponds were located was left undiverted and dedicated to

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mitigation of the evaporative loss of the ponds. The additional water left in the Boise River thus would offset any claim of injury by downstream seniors. (No one raised an issue about impacts to other ground water users; the "pressure point" was the over-appropriated Boise River. In other words, there was unappropriated ground water available.)

(h) Mitigation and instream flows

Where a junior water right is subject to curtailment (or where there is no unappropriated water available to cover an illegal or new use), one approach is for the user to acquire a senior right and transfer it his or her use. This, of course, is not mitigation; it is a simple transfer. This can be tricky, however, where a point of diversion of a surface right must be moved upstream—which must be done in a manner that protects all other water rights on the river, even juniors. It is all the more challenging where the other water right is an instream flow right.

Such is the case in the Big Wood River Valley where two instream flow waters rights have been imposed on the Big Wood River from Ketchum to Bellevue.[418] As a practical matter, this makes it impossible to move a senior water right upstream within or above the protected reach. Water diverted at a farm below the protected reach has no impact on the protected reach. But if the point of diversion is moved upstream, the depletion will diminish flows in the protected instream flow reach.

This is a big problem on the Big Wood because most of the properties in need of water are within or above the protected reach and nearly all of the senior rights available for purchase are downstream.

The Department has adopted the practice of imposing a condition on such upstream transfers subordinating them to the minimum stream flow rights. The effect is that the transferred right cannot be exercised any time the minimum stream flow right is not being met. Because the minimum stream flow rights on the Big Wood River are quite junior (1981 and 1987), they are often out of priority. As a practical matter, such a condition defeats the entire purpose of the transfer, because the right may only be used in the wettest years despite its early priority.

The good news is that there is a work-around for the minimum stream flow problem—at least for some users. You guessed it, it involves a mitigation plan. The idea is to acquire a senior surface right capable of providing a replacement supply to the seniors downstream. (To be effective, the replacement water right must be upstream of every downstream senior who could place a call on the junior. It would be pointless to eliminate one call and still be subject to another.)

Instead of transferring the acquired right up the river, it is used to provide mitigation to downstream seniors (thereby allowing the out-of-priority upstream diversion to continue). Conceptually, it works like this. One does not change any of the elements of the acquired right. Instead, it is simply not diverted (drying up whatever land it was used to irrigate). In the event of a call

[418] Nos. 37-7919 and 37-8307 have priority dates of 1981 and 1987, respectively. They cover the same stretch of river, but the second right adds additional cfs.

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(or as part of another water application), the user seeks approval of a mitigation plan under which the un-diverted replacement water compensates for any injury caused to the senior user(s).

One might ask why calling it "mitigation" works when simply transferring the same right up river is not viewed as injury to the instream flow. The impact on the minimum stream flow is identical under either scenario. In either case, the continued diversion by the junior will diminish flows that would otherwise be available to the instream right.

The answer is this works if and only if the upstream junior holds a water right that is senior to the instream flow right. Like all water rights, the instream flow right "took the river as it found it," which included the upstream user's right to divert. Thus, the upstream user is entitled to continue to divert to the detriment of the even more junior instream flow right. Moreover, the upstream user is entitled to respond to a call by a downstream senior in any way that satisfies the senior.[419] The instream flow right may "hope" that the upstream right is called out. But, if that happens, it would be only an incidental result of the call. The purpose of the call was to satisfy the downstream senior, not to incidentally benefit the instream flow. The holder of the instream flow right may not complain if the upstream diverter manages somehow to satisfy the call and continue its diversion. Thus, the upstream user may continue to divert, under the mitigation plan, even when the minimum stream flow is not being met.

In contrast, if he or she had sought simply to transfer the replacement right upstream to serve his or her use, the transfer would have been denied. This is because transfers must avoid injury to all other water rights, even the junior minimum stream flow right. In contrast, the mitigation plan essentially amounts to a transfer of the acquired right downstream to the senior, which has no injury effect on the instream flow.

Again, however, this mitigation approach will not be effective if the upstream user does not hold a water right that is at least senior to the instream flow. In other words, it is a shallow accomplishment for the mitigation plan to resolve the call by the downstream diverter if the junior upstream right is still subject to curtailment by a more senior instream flow right.[420] The upshot is that a seemingly worthless upstream junior water right is quite valuable indeed so long as it is senior to the instream flow rights and is coupled with a mitigation plan that addresses injury to senior diverters further downstream.

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[419] For example, the junior could go to the senior and offer enough money to simply buy the senior out. Doing so would allow the junior to divert more (in priority with other rights), and the instream flow right would have no basis to complain. A mitigation plan based on a substitute supply closer to the senior is no different. Yes, every user (including the instream flow) "takes the river as he or she finds it." But one of the things they "take" is the potential that a downstream senior will no longer need or desire to call for as much water.

[420] If the mitigation plan involved idling a senior right upstream of both the instream flow right and the senior downstream diverter, then it could effectively respond to both calls. The problem in the Big Wood River Valley is that nearly all of the senior rights available for purchase are located within or downstream of the instream flow reach. To be effective in a call by the instream flow right, the mitigation would need to benefit the entire reach.

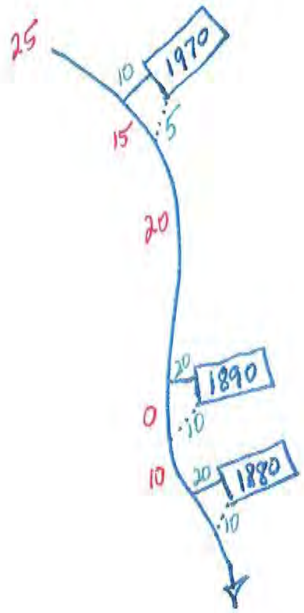
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There is one possible glitch. Because the mitigation cannot be approved as a Capital-M mitigation plan until there is a delivery call (nor as a small-m mitigation plan outside of water right application), the non-diverted replacement water is subject to forfeiture. (Idaho Code § 42-223(1) protects from forfeiture Capital-M and small-m mitigation plans, but only if they have been approved by the Department.) Accordingly, steps should be taken to either keep the replacement water in use until needed for mitigation or to get it into the water supply bank.

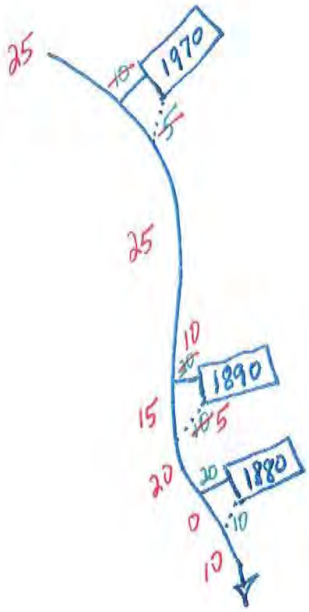
This concept of mitigating a downstream senior to benefit a diversion upstream of (or within) a reach protected by an instream flow right is conceptually tricky. The simplified schematics on the pages that follow may assist the reader in seeing how this works. Scenarios A1, A2, and A3 show how much easier it is to move water rights around in the absence of an instream flow right. These scenarios illustrate how an upstream junior may respond to a delivery call by a downstream senior by buying another right and moving it upstream. Scenarios B1, B2, and B3 show how this does not work if there is an intervening instream flow. Scenario B4 illustrates how a mitigation plan may work where moving the right upstream does not.

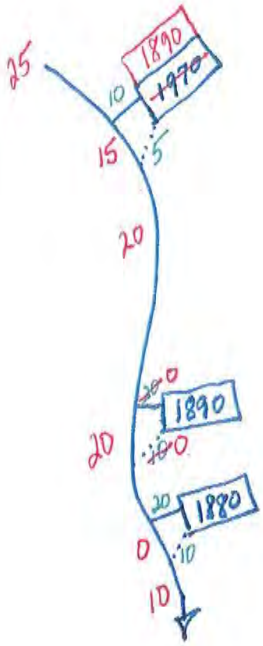
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***Scenario A1*: Shortage before call.**
In this scenario, 25 units of water is insufficient water to satisfy all three users. The downstream 1880 right is short 10 units and is entitled to call for water.



***Scenario A2*: Result after call.**
The 1880 right will initiate a delivery call resulting in the complete curtailment of the 1970 right and a partial curtailment of the 1890 right. The 1880 right is made whole.

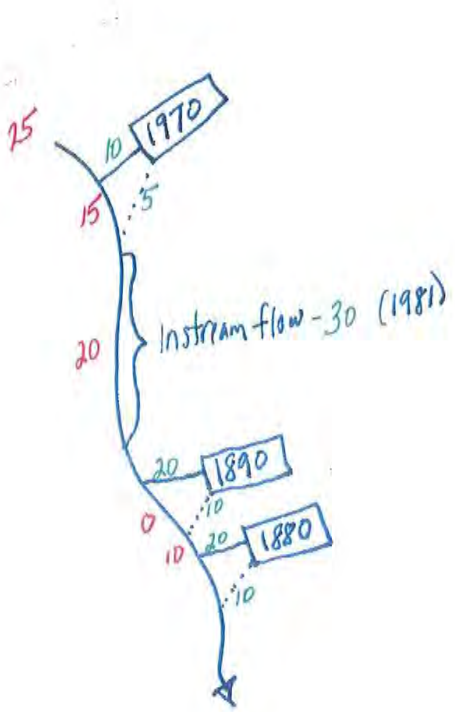




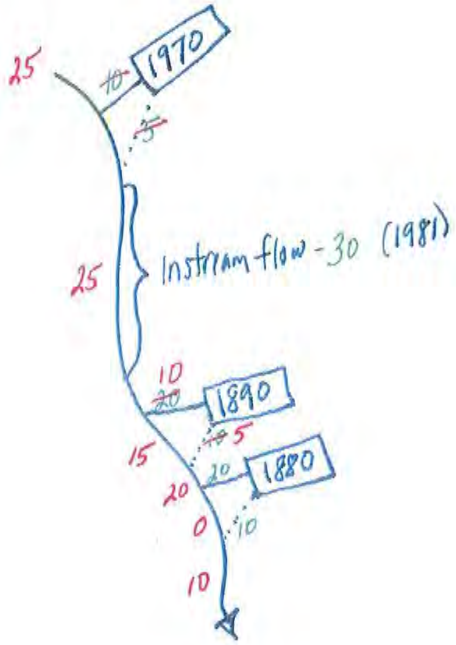
***Scenario A3*: Result after transfer of 1890 right.**
Faced with being called out, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and move its point of diversion up to her property.

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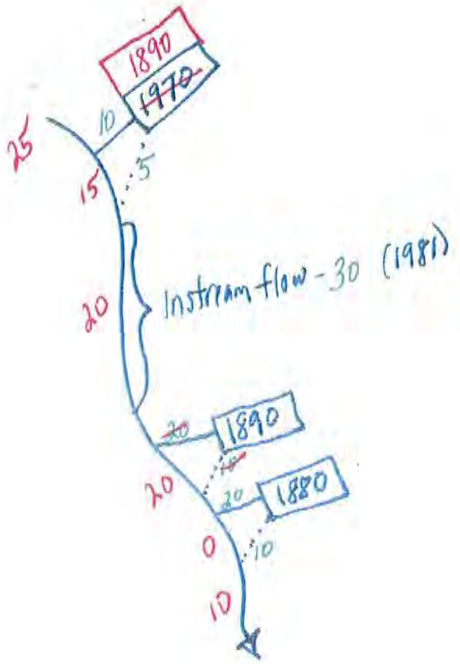


***Scenario B1*: Shortage before call.** This is same as Scenario A1, except for the addition of an instream flow right of 30 units with an 1981 priority date. Again, 25 units of water are insufficient to satisfy all water rights. The downstream 1880 right and the instream right are each short 10 units. The 1880 right is entitled to call for water. In contrast, the 1981 instream flow right may not, because it is junior to the upstream user. It must suffer the 10 unit shortage.

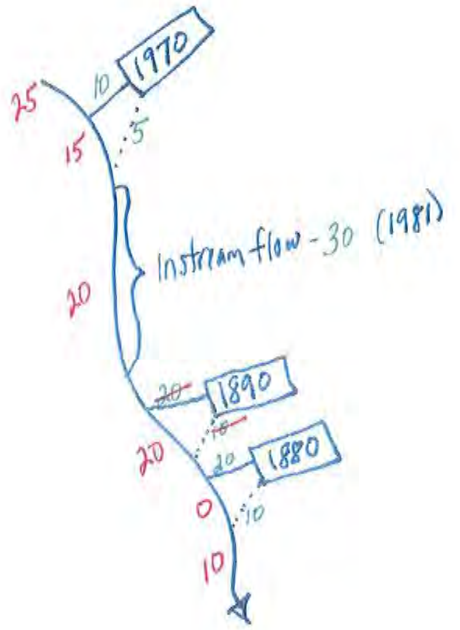


***Scenario B2*: Result after call.** The 1880 right will initiate a delivery call resulting in the complete curtailment of the 1970 right and a partial curtailment of the 1890 right. The 1880 right is made whole. The 1880 right will not call out the junior instream flow, because doing so would not add any new water. This result is identical to Scenario A2 (without the instream flow).

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***Scenario B3*: Result after attempted transfer of 1890 right.** As in *Scenario A3*, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and attempt to move its point of diversion up to her property. Doing so would not be allowed, however, because a change in the point of diversion will only be allowed if no injury occurs. Moving the 1890 right upstream would reduce the instream flow to 20 units (compared to 25 units before the transfer as shown in *Scenario B2*). Accordingly, this transfer would be denied.



***Scenario B4*: Result after mitigation plan using 1890 right.** Alternatively, the owner of the junior 1970 right may acquire the 10-unit portion of the 1890 right that survives the call and use it in a mitigation plan that dries up the farm. The additional 10 units now flows to the 1880 right, making it whole and allowing the 1970 right to continue to divert. The other 10 units under the 1890 right would continue to be called out by the 1880 right, but that is of no concern to the holder of the 1970 right, whose only duty is to mitigate for the injury her diversion causes. Meanwhile the instream flow continues to suffer a 10-unit shortage, but, it can do nothing about it. The instream flow cannot call out the 1970 right, because it is junior to that right. Nor can it complain of the mitigation plan, which involves no change in point of diversion and, in any event, does not affect water rights above it on the stream.

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(i) If a senior water right is acquired as a replacement supply, why not simply transfer it to the acquiring junior user?

The basic premise of many mitigation plans is to acquire a senior right and make it available to the senior to offset the adverse effects of the junior's diversion. One might ask, having gone to the trouble of acquiring the senior right, why not simply transfer it to serve the junior's use? The effect is identical. Either way, the junior user gets to operate under the priority of the newly acquired water right.

That is a good question—one that sometimes people skip over. The answer is that, if the acquired right can be transferred to the acquiring party's place of use and point of diversion, that is probably the way to go. In short, one should keep the solution as simple as possible. There are times, however, when a direct transfer of the replacement supply to the junior will not work.

For example, there may be times (particularly where the replacement supply results from aquifer recharge or other storage) when it is not physically possible to get the new water to the place where the junior needs it. In other words, the only option may be to deliver the water to the senior under a mitigation plan. This might entail, for example, dry up of land irrigated by ground water where the land is located down-gradient from the junior but above-gradient from the senior, thus allowing the undiverted water to flow downward to the satisfy the call.

The mitigation water right may be owned by a water district or other entity that is unwilling or unable to allow a portion of its water right to be split off and transferred to a new use. But the district may be willing to let a portion of its water right go "idle" to serve as mitigation.

In some cases, the senior surface right acquired as a replacement supply cannot be moved upstream without injury to other rights—notably where the stream is subject to an instream flow right. (See discussion below in section 15.G(8)(h) at page 219.)

(9) Mitigation of ground water transfers within the ESPA

Ordinarily, it is fairly simple to move points of diversion for ground water from one place to another within the same aquifer. There may be individual well interference issues (cone of depression issues). But, other than that, one may "move a straw from one end of the bathtub to the other" without any impact on the water resource or other users. Thus, mitigation is usually not required as between ground water users.

The situation is different, however, where ground water is hydrologically connected to surface water. Moving the point of diversion of a ground water right from one well to another well may affect hydraulically connected surface rights and entail mitigation. This is a special sub-category of small-m mitigation.

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It arises most notably in the Eastern Snake Plain Aquifer ("ESPA") in the Magic Valley of Idaho. The Snake River runs for hundreds of miles along or near the southern boundary of the ESPA, a massive aquifer covering 10,800 square miles and holding as much water as Lake Erie.[421]

Water within the ESPA flows underground toward to the Snake River. Thus, every consumptive diversion of ground water from the ESPA results in a corresponding reduction in flows somewhere in the Snake River. Each well affects the river in a different way, however. To put it simply, wells in the upper (eastern) part of the aquifer reduce flows most significantly in the upper part of the Snake and have gradually less impact on each succeeding lower reach of the river. And vice versa.

As a result, moving a point of ground water diversion from "point A" to "point B" will increase flows in one part of the Snake while reducing flows in another. The net depletion effect (once steady state is achieved) will be zero, but the effect on specific reaches of the river may be substantial as the impact is redistributed up and down the river. This change benefits some users and injures others.

Because the ESPA is administered as being fully appropriated, new users (notably dairies, industries, and cities) must buy water rights from farms, dry them up, and transfer the water right to the new location.

For a while during the 1990s, the Department refused to approve any ground water transfers due to the then-unquantifiable injury to surface users. Ultimately a computer program (known as the Eastern Snake Plain Aquifer Model or "ESPAM") was developed to model the effect of every possible change in location on every reach of the river.

This methodology, and the Department's implementation of it to date, is focused solely on mitigating the adverse effects of a transfer on the affected reaches of the Snake (and tributaries thereto). The same methodology also quantifies the corresponding and offsetting positive impacts on other reaches of the river. A major piece of unfinished business is the establishment of a "credit" system to reflect these positive benefits. So far, the Department has approved water right transfers recognizing those benefits and securing the right of water right holders to claim them in the future once a system is put in place to quantify and trade those credits.

The result is that a person seeking to transfer a point of diversion to a new location in the ESPA may be required to leave some of the water behind. For instance, if the right authorized diversion of 5

[421] "The Eastern Snake Plain Aquifer ('ESPA') is defined as the aquifer underlying an area of the Eastern Snake River Plain that is about 170 miles long and 60 miles wide as delineated in the report 'Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho.' U.S. Geological Survey ('USGS') Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The ESPA is also defined as an area having a common ground water supply. See IDAPA 37.03.11.050." *Order*, Finding No. 1 at 2, *In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irr. Dist., American Falls Reservoir Dist. #2, Burley Irr. Dist., Milner Irr. Dist., Minidoka Irr. Dist., North Side Canal Co., and Twin Falls Canal Co.* (IDWR, Feb. 14, 2005).

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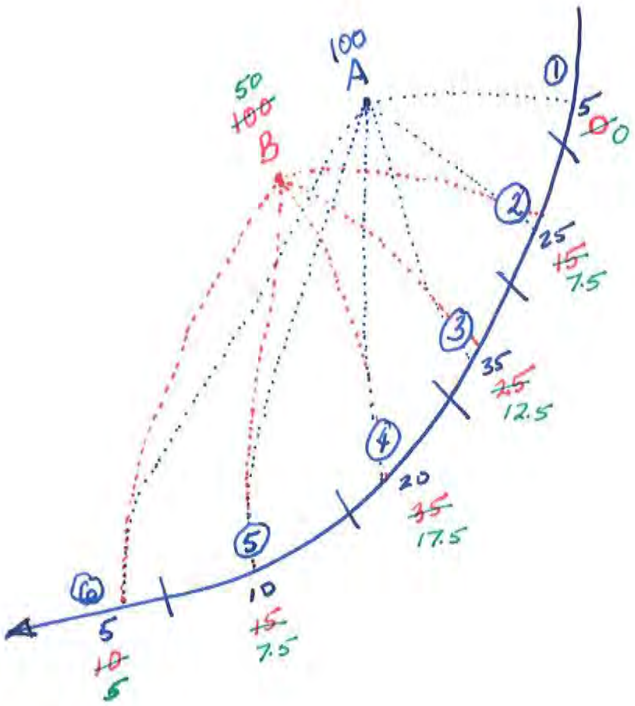
cfs at the original location, the Department might approve a transfer of only 4 cfs, if the computer model showed that pumping that amount in the new location would leave no surface user of the Snake River worse off. The greater the distance the water is moved up and down the aquifer, the more water must be left behind to prevent injury.

Of course, in such a transfer, some water users will be made better off. There are two ways in which the transferring party may capture this benefit. First, the Department has recognized a "credit" for the improvement to other reaches of the Snake River. That credit (in theory at least) may be used to offset some future transfer in the other direction. Alternatively, the water user (or water broker) may arrange various simultaneous transfers in opposing directions whose impacts on various reaches of the river cancel each other out, thus allowing the rights to be transferred at full face value (or close to it).

The reduction in transferred quantity based on the ESPAM is different from other mitigation plans in several ways. First, it is not undertaken in response to or anticipation of a conjunctive administration delivery call. Second, no new, alternate supply of water provided to the other potentially injured rights. Instead, injury is avoided by cutting back the quantity of an existing right (the transferred right) or by using credits or offsets from other transfers. (That quantity may be defined to change over time, reflecting the gradual impact of the transfer until steady state is achieved.) Third, once the transfer is approved, there is no ongoing mitigation plan to implement. Fourth, the effect of the mitigation is only to allow approval of the transfer. It has no effect in protecting the ground water user from a future delivery call. However, when that delivery call comes, it will be evaluated on the basis of the post-transfer impacts of new (lower) quantity being diverted from the new place of diversion.

An illustrative example of a ground water transfer within the Eastern Snake Plain is set out on the following page. This is, of course, grossly simplified. It communicates, however, the idea that a change in the point of diversion may be accomplished without injury to any of the river reaches if the diversion quantity is reduced at the new point of diversion. This amounts to "leaving money on the table," because other reaches are benefited and the overall impact of the diversion is reduced. To some extent, this "money on the table" effect may be avoided by combining two or more transfers that to some extent cancel out each other's impact. This may be done simultaneously, or at different times through retention of credits after the first transfer.

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Eastern Snake Plain Aquifer Ground Water Transfer Scenario. In this scenario, 100 units of water are initially pumped from location A and consumptively used. The computer model calculates that this will diminish flows in each of six reaches of the Snake River as shown in blue.

If the point of diversion is moved to location B, the computer model predicts that the steady-state impact on each river reach will be as shown in red. The effect of the move from A to B is to improve flows in reaches #1, #2 and #3, but to reduce flows in reaches #4, #5, and #6. This equates to injury, and the transfer will not be approved for the full 100 units.

By restricting the diversion at point B to 50 units, the steady-state impact on each reach is reduced by half (as shown in green). The result is that reaches #1, #2, #3, #4, and #5 all experience a decline in impact compared to pumping 100 units at point A (meaning more flow and no injury), while reach #6 is neutral.

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H. Change in source of water

(1) Underlying theory

Idaho's transfer statute authorizes changes in "point of diversion," but says nothing about changes in the "source" of the water. Nevertheless, it is well understood that a change in point of diversion is permissible (assuming no injury, etc.), while a change to an entirely new source of supply is prohibited. Instead, it will be treated as a new appropriation.[422] The trick is telling the difference.

If the user simply moves the point of diversion from one location to another within the same source, that is an ordinary transfer, and will be evaluated on the basis of injury, enlargement, and so on. If approved, the old priority will be retained.

If, on the other hand, the user is really moving the point of diversion to an entirely new source of supply, that is not a change. It is really a new appropriation (and abandonment of the old one). This matters in several ways. First, it may affect the injury analysis, because there is no *status quo* diversion against which to measure the new appropriation. Also, the new appropriation will have a new priority date, rather than keeping the old one. Moreover, it may not be allowed at all if, for instance, a moratorium on new appropriations is in place.

How does one determine whether a change in point of diversion is a change in water right or a new appropriation? It boils down to whether the new location is tributary (that is, hydraulically connected) to the old location. "Since the original right did not include any right to non-tributary sources of water, the use of water from a non-tributary source is a new appropriation. Therefore, a purported change to a source that is not tributary to the original source must be considered a new appropriation."[423]

(2) Surface-to-surface changes

Thus, for instance, a surface user may switch from one fork of a stream to another, and a downstream user below the fork would have no right to complain if the overall impact is unchanged.[424]

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[422] In *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.), SRBA Judge Melanson (who retained the case after his appointment to the Idaho Court of Appeals) rejected the City of Pocatello's argument that the accomplished transfer statute does not apply to pre-1969 water rights. The same court also held that the accomplished transfer statute does not allow changes in the source of water, but only changes in place of use, point of diversion, nature or purpose of use, or period of use. The court observed: "A change in source is essentially the appropriation of a new water right." *Id*. at 11. The Idaho Supreme Court affirmed in 2012.

[423] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 260-61 (1990).

[424] *Saunders v. Robinson*, 14 Idaho 770, 95 P. 1057 (1908). Of course, such a move might change the overall impact. For example, suppose the new fork had more consistent flows than the old fork, thereby

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Such a move might be barred if it impaired uses on the other tributary, but that would be a function of injury analysis, not an absolute prohibition based on being a different source.[425] In contrast, obviously, a move from one river to an entirely different river system would be considered a different source and would be treated as a new appropriation, not a transfer.

(3) Ground-to-surface and surface-to-ground changes

The same principles would appear to apply to a change from surface to ground water. One commentator has stated: "Applying the general rules applicable to changes in source, a purported change from a surface source to a non-tributary aquifer would be a new appropriation while a change from a surface source to a tributary aquifer would be evaluated as a change in use."[426] Another commentator (who is also a departmental official) has a more circumspect viewpoint.[427] In any event, even if the source is determined to be tributary and therefore the "same source," the user seeking the change still must demonstrate no injury to both surface and ground water users which might be affected. This would entail a potentially complex hydrological analysis. A special master in the SRBA has concluded, in a recommended order, that "IDWR will recognize a well as an alternate point of diversion for a surface water source if the two are very closely connected."[428]

A change from ground water to surface water may be accomplished, assuming that the ground water is tributary to the surface stream. However, the injury questions are hydraulically complicated. A recently developed model for the ESPA, for instance, would allow a user to buy up and shut down ground water rights, and predict, subject to the model's limitations, the resulting increases in flows in the Snake River. Of course, the impact will not be immediate, but the model would predict how much could be diverted without injury in any given year. Another complicating factor, however, would be time of use. A shutdown of irrigation wells would result in a year-round increase in flows in the river.

A change from surface water to ground water is also permissible, if and only if a close hydraulic connection can be demonstrated.

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enabling the water user to fill her right more often. In such a case, a downstream junior could complain of injury, even though the transfer was deemed to be from the same "source."

[425] S*ee*, *Clear Springs Foods, Inc. v. Clear Lakes Trout Co*., 136 Idaho 761, 40 P.3d 119 (2002) (holding that two streams fed by different springs flowing from the Snake Plain Aquifer are the same sources, however holding depended in part on the fact that diversion structures commingled the water).

[426] Krogh-Hampe at 261.

[427] "It is not a given that the Department will allow a change in point of diversion of a surface water right to a tributary ground water source. Despite the interconnection, this normally is viewed as a change in source and not allowed except in extraordinary circumstances that I am not presently able to describe." Email from Phillip J. Rassier, Chief Counsel, IDWR (April 30, 2003).

[428] *Master's Report and Recommendation and Order on Motion to Reconsider*, Subcase Nos. 29-00271 *et al.*, *In re: SRBA,* Case no. 39576 Dist. Ct. for 5th Jud. Dist. of Idaho (October 2, 2007) at 6.

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The Department's 2002 transfer guidance addresses the topic of ground-to-surface and surface-to-ground water changes. It provides that an appropriation for transfer proposing such a change is approvable if the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day).[429]

A 2007 decision from Special Master Bilyeu of the SRBA Court rejected a claim by the City of Pocatello, which sought recognition of its wells as alternate points of diversion for its surface rights.[430] The Special Master concurred with the conclusion in the Director's Report that the wells (which were between ¼ and 1 mile from the creeks) were not sufficiently hydraulically connected. Special Master Bilyeu offered this useful summary: "IDWR does not usually recognize wells as alternate points of diversion for surface water sources. However, IDWR will recognize a well as an alternate point of diversion for a surface water source if the two are very closely connected. For example, IDWR recognized that a well as an alternate point of diversion near the Salmon River. In that case, a point of diversion on an abandoned ditch was changed in favor of a nearby well. IDWR determined that the two points of diversion were close to each other and the well was so shallow that the ditch and the well essentially withdrew the same water." *In re SRBA*, Case No. 39576, Subcases: See Attached Exhibit A, Master's Report and Recommendation, Idaho Fifth Dist. Ct, at 6 (Oct. 2, 2007). The Special Master explained that it is insufficient to show that a stream contributes substantially to an aquifer. The person seeking to divert a former surface right from the aquifer must demonstrate that the hydraulic connection is so tight that "the two are essentially diverting the same water." *Id*. at 12.

I. The rule against enlargement

(1) The basic concept

Enlargement is a concept closely related to injury, but it is not the same. Injury is a consideration for both new water appropriations and changes of existing rights; enlargement is only applicable only to changes in rights. Both injury and enlargement are aimed at avoiding actions that increase the burden on the water system or otherwise make less water available to other water users protected by the priority system. Changes in water use that result in injury typically result in enlargement, and vice versa. But this is not always the case.

Injury analysis is typically fact-specific and is evaluated with respect to a specific injured party. In contrast, enlargement may be thought of as *per se* injury—injury that is presumed and need not be shown as to particular water users. Here are some examples:

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[429] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (reproduced under Appendix L).

[430] Her decision was affirmed by the SRBA Court in *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), and was affirmed by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).

- If a user sought to increase the rate of diversion beyond that specified on the original right or to increase consumptive use in the context of expanded irrigation acres or a new nature of use, this would result in injury. Indeed, it constitutes is *per se* injury (meaning it is presumed to hurt someone) and is therefore deemed an enlargement.

- If a user sought an earlier priority date than he or she was entitled to, that too would constitute *per se* injury. This might or might not also be described an enlargement, but it hardly matters because it is impermissible.

- If a user sought to move a point of diversion from point A to point B (without changing the quantity or any other element), that may or may not result in injury depending on the circumstances. If, for instance, it reduced return flows relied on by another user, that would constitute injury. But even if there were injury, it would not be described as an enlargement because there is no overall increase in burden on the water system and no *per se* injury.

It is generally understood that any change in use that increases the rate or volume of diversion, the number of irrigated acres, or the duration of the period of use[431] constitutes an enlargement. Such changes can be predicted to cause injury to some other water right, if not immediately then in the future at a time of administration. This is the reason that enlargement is described as a *per se* injury rule. In such a case, it is deemed an enlargement and there is need to go through the exercise of identifying and proving injury to a specific water user.

In some cases, enlargement is discussed in terms of increases in beneficial use (see footnote 445 on page 242). Most of the time, references to increased "beneficial use" is really just shorthand for increases irrigated acreage—which increases consumptive use. The one reported decision addressing enlargement in a non-irrigation context found that an increase in beneficial use where nothing else changed and the burden on other water users was not increased did not constitute enlargement.[432] Nevertheless, for reasons that are unclear, IDWR's transfer guidance continues to suggest that an increase in beneficial use alone may, in some contexts, constitute enlargement. See discussion in section 15.I(4) (Enlargement in a non-irrigation context) at page 241.

One way to think about enlargement is that it is, in effect, a new appropriation. It cannot be carried out unless it is separately approved. Even though a new ground water right, for example, might be shown to cause no injury to existing water rights, it still must take its place as the newest right in the system and be assigned a junior priority. Its owner cannot be assigned a senior priority simply because

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[431] As for changes in the period of use, see discussion in section 15.J on page 245.

[432] *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Case*"), Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (Barry Wood, J.). This SRBA decision was not appealed. The *Facility Volume Case* has been cited by the Idaho Supreme Court, but not with respect to the enlargement issue. *North Snake Ground Water Dist. v. Gisler*, 40 P.3d 105, 108-08 (Idaho 2002) (Kidwell, J.).

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there is no evident injury to another user. For example, if a farmer appropriated 3.2 cfs to irrigate 160 acres, and then later sought to irrigate an additional 40 acres with the water she "conserved" through the use of more efficient irrigation methods, she would be obliged to obtain a new water right for the 40 acres and accept a junior priority for it. The reason is simple. Despite the fact that farm is diverting no more water than before, 200 acres of crops will consume more water than the original 160 acres, resulting in less water available for others.

Thus, the rule against enlargements really is another way of stating a more fundamental rule: each new water right must take its place in line behind all existing water rights. Put simply, an enlargement is a new or additional use that must have a new water right, with a junior priority. If it cannot obtain a new-priority right (due, for instance, to a moratorium), then, legally, it cannot exist.

The most common fact setting for enlargement is "water spreading." This is the practice of expanding the number of irrigated without increasing the quantity of water diverted, which can be accomplished through the adoption of more efficient irrigation techniques.[433] Addressing water

[433] A farmer might switch from flood irrigation to pressurized sprinklers, or from an earthen ditch to a pipeline. The improvements appear to result in more water, and there is no question that water has been conserved. Irrigating the same field now requires diversion of less water: less water per unit diverted escapes through percolation, ditch leaks, and the like, and a higher percentage is delivered to the crop. But the amount of consumptive use per acre remains the same. The irrigator then would find herself with "extra" water without increasing the rate of diversion. One having additional water might conclude she is allowed to bring additional acreage under irrigation.

Many have done this, believing it acceptable because they did not increase their original diversion rate and achieved the enlargement through a conservation practice. However, as more acreage is brought under irrigation, the total consumptive use necessarily increases (as does the place of use, which typically is another limiting element in a water right). In short, water is illegally taken from the system, return flows reduced—and other water right holders injured or at least placed more at risk of a shortage—even though the appropriator's diversion rate stays the same. Such water spreading is illegal in Idaho.

Thus, the only way to bring new acres under irrigation with the same water right, is to dry up an equal number of previously irrigated acres. There are several reasons for the dry-up requirement. First, the prior appropriation doctrine limits a water right to the amount that reasonably can be placed to beneficial use. If the original lands could continue to be irrigated after some portion of the appurtenant water right had been transferred to other lands, then the amount being transferred away presumably was never needed for the beneficial use in the first place. Second, any increase in the total acres irrigated under the right after the transfer would increase the right's consumptive use and reduce return flows, including ground water recharge, supplying other rights.

Note that in some instances, a conservation measure actually can decrease consumptive use somewhat. For example, if an open ditch is replaced with a pipeline, this will eliminate the evaporation from the ditch surface and the evapo-transpiration through phreatophytes along the ditch—actual consumption of water is reduced. (Phreatophytes are plants growing along streams and canals.) The authors sometimes refer to this as the "sliver" of consumptive use that can be freed-up by implementing a conservation measure. However, this amount usually is so small that it is impractical to quantify or use it—although it could be practical if, say a large ditch were piped, reducing evaporation from acres of water surface. In any event, a proposal to put such saved water to use on new land or in some other new use still would require a new water right. Finally, the courts (at least in other states) have discouraged or disallowed the use of this type of saved consumptive use in

spreading in general adjudications is the purpose of the accomplished transfer statute (Idaho Code §§ 42-1425 and 42-1426). The accomplished transfer statute uses the term "enlargement" to describe this practice. As the Court said in reference to this statute:

> The term "enlargement" has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. See I.C. § 42–1426(1)(a). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J).

Injury must be addressed in both in new appropriations and in transfers. Enlargement, in contrast, arises only in the context of a change to an existing water right. Enlargement is addressed in the transfer statute (Idaho Code § 42-222[434]) and in the accomplished transfer statute (Idaho Code

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part for policy reasons. For example, in *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1971), appropriators cut down portions of a cottonwood forest growing along the Arkansas River and then attempted to claim the "saved" water resulting from the elimination of these phreatophytes. The Colorado Supreme Court rejected the attempt, and refused to recognize a new water right free from call on the river. In its opinion, the Court reviewed the extremely narrow circumstances in which one might acquire such a water right based on a "salvaged water" or similar theory. The *Shelton Farms* ruling could be seen as stemming in part from the Colorado court's concern about the environmental degradation that could result if the decision when the other way. To a similar effect is *RJA, Inc. v. Water Users Association of District 6*, 690 P.2d 823 (Colo. 1984) (appropriator was denied the attempt to enlarge his water supply by draining a peat bog).

[434] The transfer statute provides in pertinent part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the

§§ 42-1425[435] and 42-1426[436]).[437] There are no IDWR rules addressing enlargement, but there is a guidance document.[438]

> original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

Idaho Code § 42-222(1) (emphasis added).

[435] Section 42-1425 of the accomplished transfer statute provides in full:

> (1) Legislative findings regarding accomplished transfers and the public interest.
>
> (a) The legislature finds and declares that, prior to the commencement of the Snake River basin adjudication, the northern Idaho adjudications, and the Bear River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.
>
> (b) The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.
>
> (c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.
>
> (2) Any change of place of use, point of diversion, nature or purpose of use, or period of use of a water right by any person entitled to use of water or owning any

land to which water has been made appurtenant, either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, prior to January 1, 2006, for the northern Idaho adjudications authorized by section 42-1406B, Idaho Code, and prior to the date of commencement of the Bear River basin adjudication authorized by section 42-1406C, Idaho Code, may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use, or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

(b) This section is not applicable to any claim based upon an enlargement of use.

Idaho Code § 42-1425 (emphasis added).

[436] Section 42-1426 of the accomplished transfer statute provides in pertinent part:

(1) Legislative findings regarding enlargements:

(a) The legislature finds that several adjudications of water rights were commenced or will be commenced in the state of Idaho subsequent to the mandatory permit system provided in sections 42-201 and 42-229, Idaho Code. These adjudications include the following, with associated commencement dates:

[list of adjudications]

Persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. Enlargements have been done with the knowledge of other water users, and water has been distributed based upon the right as enlarged. Junior water users made appropriations based upon a water system that reflected these enlarged uses. Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit

Although the Water Code sets out the obligation to avoid enlargement in a transfer or accomplished transfer, it does not define the term. The only guidance on the meaning of enlargement found in section 42-222 is this sentence: "The director may consider consumptive use . . . as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Idaho Code § 42-222(1). This suggests that enlargement, like injury, is aimed at avoiding changes to a water right that would increase its burden on the water supply.

Section 42-1426 of the accomplished transfer statute (which applies only in the context of general adjudications) sets out legislative findings and limitations with respect to enlargement (see footnote 436). However, these provisions boil down to a traditional injury analysis. In a nutshell, an enlargement made in violation of the mandatory permit statute may be decreed with its own priority

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> requirements for these enlargements in use prior to the commencement of a general adjudication, as long as such enlargements in use did not increase the rate of diversion of the original water right or exceed the rate of diversion for irrigation provided in section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the enlargement in use.
>
> . . .
>
> (2) The mandatory permit requirements of sections 42-201 and 42-229, Idaho Code, are waived, and a new water right may be decreed for the enlarged use of the original water right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before the commencement date of an adjudication; provided however, that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right; and further provided, that the enlargement in use did not injure water rights existing on the date of the enlargement of use. An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act. If injury to a water right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement. It is further provided that any such enlargement of use allowed in a general adjudication shall not constitute an abandonment or forfeiture of the original water right to the extent of current use.

Idaho Code § 42-1426 (emphasis added).

[437] A special provision of the transfer statute allows an expanded number of acres in transfers involving stored water, so long as injury is avoided. Idaho Code § 42-222.

[438] See, *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) § 2 (Changes in Consumptive Use), p. 4, § 2 (Intensified Use of Water), p. 7, § 5d (Enlargement of Use), pp. 28-33 (revised Dec. 21, 2009) (reproduced in Appendix L).

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date which must be advanced as necessary to assure that no other water user is injured thereby. Indeed, as the Idaho Supreme Court found, the priority date will always be advanced.[439]

(2) Increase in carriage losses

Enlargement of a water right also can occur where an appropriator seeks to transfer a point of diversion to a location farther from the original place of use, or vice versa. Often the increased distance between the point of diversion and place of use will increase conveyance or carriage losses of the water because of increased exposure to canal seepage and evaporation. If the diversion rate were to be increased to compensate for the increased loss, an enlargement of the water right would occur. In Idaho, the burden of increased conveyance loss must be borne by the one seeking the transfer and not by other appropriators.[440] This is consistent with the principle that a water right is measured for its sufficiency at the point of diversion and not at the place of use.[441]

(3) Stacked water rights (primary and supplemental rights) (the *3G* case)

A primary water right is the principal (or only) water right supporting a particular use. In some instances, water users may obtain an additional "supplemental" water right to serve as a back-up supply, in the event that the primary right is unavailable. A combination of primary and secondary rights serving the same purpose and place of use are referred to as "stacked rights." If those rights are separated and transferred or conveyed to separate uses, that is referred to as "unstacking" of rights.

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[439] The accomplished transfer statute was held constitutional in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J), owing to the act's built-in protections against injury and enlargement. See discussion of this statute and the related enlargement statute in section 13.I(9) beginning on page 611. Nine years later, the Court confirmed that *Fremont-Madison* did indeed create a *per se* injury rule requiring that expansions of acres irrigated seeking protection under the amnesty statute are subject to a mitigation condition subordinating the expanded portion of the right to all rights existing on April 12, 1994 (the enactment date of the amnesty statute, Idaho Code § 42-1426). *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.). This was confirmed again in *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) and *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) (Stegner, J.).

[440] *Glen Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972).

[441] *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900); *State v. Twin Falls Canal Co.*, 21 Idaho 410, 121 P. 1039 (1911); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). *See also, State v. Dickcon*, In Re: SRBA Case No. 39756, Memorandum Decision re: Petition for Preliminary Injunction, Docket No 91-07-009 (5th Dist. 1991) (recognizing that conveyance losses incurred by changing place of use are to be borne by transferor and do not justify increase in rate of diversion of the original right). *See generally Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.,* 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J) and Idaho Code § 42-1426 (making clear that such enlargements, even if they result from "conservation practices," are not authorized under a water right and must be approved, if at all, under the amnesty provided by this statute).

In a typical situation, a water user may hold a surface right as the principal means of irrigation, but will also obtain a supplemental ground water right that she uses only when the surface right is not available. The supplemental ground water right is granted subject to the condition that it may be used only when the primary water right is not available.

The distinction between a primary and supplement right often receives the most attention when the holder seeks to transfer one of the rights. The rule of thumb is that a supplemental right cannot be converted to a primary right (because doing so would constitute a *per se* enlargement). This issue is addressed in IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) at 26-27 (Dec. 21, 2009) (reproduced in Appendix L.)

In *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001) (Walters, J.), the Idaho Supreme Court upheld the Department's denial of a transfer application that sought to transfer a portion of a primary surface right to a new location, leaving the supplemental ground water right in place at the original location. The applicant argued that doing so would not cause injury or enlargement, because the Department could and should curtail the ground water right. But the Court said that it was the applicant's responsibility, not the Department's, to avoid injury and enlargement. In addition to unstacking, *Barron* involved the applicant's failure to provide evidence of his historical use.

At least in theory, a supplemental water right may be separated from its primary water right and transferred to a new primary use. However, to prevent an enlargement—an increase in its diversion, volume, or consumptive use under the right as it was used as originally appropriated—the post-transfer elements must be no greater than the pre-transfer elements.

The Department's guidance on supplemental rights provides:

> When it is necessary to determine the historic consumptive use under a supplemental right, the average annual historic consumptive use, over an appropriately representative time period that may be greater than five years, will be the basis for the volume available for transfer. . . .

IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24), § 5d(5), p. 30 (Dec. 21, 2009) (reproduced under Appendix L.)

For example, if a supplemental well had been used an average of fifteen days per year at a flow rate of one cfs, then its transferable amount should be about 30 acre-feet per year (1 cfs x 1.98 AF/day x 15 = 29.7 AF), not the 723 acre-feet that such a well would produce if pumped year-round (1 cfs x 1.98 AF/day x 365 = 722.7 AF). As a result of the transfer, of course, the original primary right loses the supplemental back-up. Often, attempting to transfer supplemental uses is not practical because of these complications. Typically, the supplemental water right will continue to be tied to the primary water right in a transfer.

In *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) (Stegner, J.), the Court affirmed IDWR's rejection of a transfer that sought to unstack irrigation water rights. In *3G*, an irrigator used both a licensed ground water right and a surface water entitlement (shares in Aberdeen-Springfield

Canal Company) to irrigate a 53.9 acres of land. The irrigator stopped using the ground water right and sought to transfer it to other land, thus doubling the number of irrigated acres. The district court and then the Idaho Supreme Court affirmed IDWR's rejection of the transfer. Both courts agreed with IDWR that the unstacking was an unlawful enlargement under Idaho Code § 42-222(1) because it would have allowed twice as much land to be irrigated as before, thereby increasing consumptive use and constituting *per se* injury.

The significance of the *3G* case is that it confirmed or clarified that ground and surface rights that serve the same land for the same purpose are deemed stacked even if the water rights themselves contain no express language linking them together. In other words, the stacked rights concept is inherent to the enlargement/injury analysis and is compelled by the statutory directive in Idaho Code § 42-222(1) that IDWR "shall examine all the evidence and available information." The stacked water analysis is not dependent on the presence of condition language on the face of the water rights (e.g., a combined use condition or a condition requiring that the supplemental right be used on when the primary right is unavailable.) In the *3G* case, there was no such language in the ground water right, notwithstanding the fact the IDWR became aware of the canal company shares at the time of licensing. Indeed, the record apparently did not reveal which came first—the permit or the shares. The Court said, in essence, "who cares?" It found it unnecessary to decide which right was primary and which was supplemental. Either way, the transfer would have allowed more acres to be irrigate than before, which constituted both enlargement and *per se* injury. *3G*, 170 Idaho at 264-65, 509 P.3d at 1193-94.

The *3G* case plowed no new ground. It is a "no brainer" analysis of enlargement in a traditional irrigation context. It affirmed longstanding IDWR guidance (the *Transfer Memo*) based on settled law (*Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J) and *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001) (Walters, J.)). It addresses enlargement in the context of a change in use bringing more land under irrigation. The proposed increase in beneficial use would have increased consumptive use and constituted *per se* injury thereby burdening the public water supply and making less water available to other users.

The *3G* Court summed up enlargement as follows:

> Thus, there are two types of enlargement: (1) "an increase in the number of acres irrigated"; and (2) "an increase in the rate of diversion or duration of diversion."

3G, 170 Idaho at 264-65, 509 P.3d at 1193-94 (quoting *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Schroeder, J)).

The Court also confirmed that when it speaks about increases in beneficial use, it means increases in irrigated acreage.

> The two "enlargement" issues in *Barron* were whether: (1) the transfer would cause an increase in the rate or duration of diversion at the two proposed points of diversion; and (2) whether unstacking the overlapping surface and ground water rights would cause an increase in the total number of acres irrigated, i.e., an increase in overall beneficial use. Id. at 419-420, 18 P.3d at 224-25.

3G, 170 Idaho at 517, 509 P.3d at 1188.

In other words, an increase in beneficial use standing alone is not a problem. It is the increase in consumptive use resulting from increasing the number of acres irrigated or the quantity of diversion that gives rise to enlargement. Thus, nothing in the *3G* case is at odds with the teaching of the *Facility Volume Case*: An increase in beneficial use that does not burden the public water supply by increasing diversion quantity or consumptive use is not enlargement. That kind of increase in beneficial use is a good thing.

(4) Enlargement in a non-irrigation context

Except for the *Facility Volume Case* discussed below, all reported decisions on the subject of enlargement have arisen in the irrigation context (water spreading,[442] stacked water rights,[443] or changes in consumptive use[444]). In the irrigation context, enlargements are all about *per se* injury—that is, injury arising from increases in the amount of water diverted or consumed, thereby reducing the water available to other water right holders. As noted above, the accomplished transfer statute was specifically aimed at water spreading. Accordingly, the language in that statute and in the *Fremont-Madison* case refer to increases in irrigated acreage as "enlargements" and "increases in beneficial

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[442] E.g., *Fremont-Madison Irr. Dist.& Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J). This case is also known as "Basin-Wide Issue 4" in the SRBA.

[443] E.g., *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001) (Walters, J.); *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) (Stegner, J.).

[444] Typically, consumptive use comes into play when the user seeks to change the nature of use or period of use or to unstack water rights. For example, in addition to unstacking, *Barron* involved the applicant's failure to provide evidence of historical use. The statutory definition of consumptive use was amended in 2004 to provide: "Consumptive use is not an element of a water right. . . . Changes in consumptive use do not require a transfer pursuant to section 42-222, Idaho Code." H.B. 636, 2004 Idaho Sess. Laws, ch. 258 (codified at Idaho Code § 42-202B(1)). Thus, a change in consumptive use alone (that does not violate the terms of the water right) is permissible and no transfer is required. But increases in consumptive use may come into play if a transfer is required for other reasons. "The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." Idaho Code § 42-222(1) (added in 1997). IDWR's *Transfer Memo* addresses changes in historic consumptive use in a variety of contexts, see, e.g., *Transfer Memo* § 2, p. 4, § 5d(5), pp. 29-30.

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use."[445] Likewise, the transfer statute (which says IDWR may consider consumptive use in evaluating enlargements) and the accomplished transfer statute (which is aimed at preventing *per se* injury via water spreading) reinforce the idea that the prohibition of enlargement is directed to increases in beneficial use that have the potential to harm others.

In a non-irrigation context (as in any other context), enlargement should also be thought of as *per se* injury resulting from actions that increase the burden on other water users. However, language arising in the irrigation context equating "enlargement" and "increase in beneficial use" led IDWR to re-conceive enlargement as arising any time there is an increase in beneficial use—even if no other water user is impacted.

IDWR's strict view of enlargement was rejected in the *Facility Volume Case* discussed below. Yet IDWR's transfer guidance continues to state that any transfer involving a change in the nature or place that also results in a net increase in beneficial use constitutes an enlargement. It is difficult to reconcile IDWR's guidance on this point with the *Facility Volume Case* and the Maximum Use Doctrine. This is explored further below.

(a) The *Facility Volume Case*

The only reported case to address enlargement in a non-irrigation context is the SRBA court's decision in *In re SRBA Case No. 39576, Subcase Nos. 36-02708 et al, Order On Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* ("*Facility Volume Case*"), Idaho Dist. Ct., Fifth Judicial Dist. (Dec. 29, 1999) (Barry Wood, J.).[446] This case is discussed further in section 4.B(9) at page 37.

The *Facility Volume Case* did not arise in the context of a transfer. It arose as part of the SRBA's adjudication of existing water rights held by various fish farmers.[447] IDWR sought to include a "facility volume remark"[448] on each water right describing the extent of the existing hatchery

[445] *Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305 ("The term 'enlargement' has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. *See* I.C. § 42-1426(1). An enlargement may include such events as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.").

[446] The *Facility Volume Case* has been cited by the Idaho Supreme Court, but not with respect to the enlargement issue. *North Snake Ground Water Dist. v. Gisler*, 40 P.3d 105, 108-08 (Idaho 2002) (Kidwell, J.).

[447] The *Facility Volume Case* involved challenges to IDWR's recommendations brought by Clear Lakes Trout Company, Clear Springs Foods Inc., Blue Lakes Trout Farm Inc, and John W. Jones, Jr. When each of three special masters ruled in favor of the trout farmers, irrigation water right holders brought this consolidated appeal to the SRBA judge.

[448] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

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facilities. The effect of the facility volume remark was to prevent the fish farmer from adding additional raceways in the future.

In this unappealed ruling affirming all three special masters, the SRBA court rejected IDWR's inclusion of a facility volume remark. The court held that a trout farm may increase the beneficial use made of its water right by adding more raceways to a fish hatchery, so long as it does not increase the diversion rate, annual volume, or consumptive use. The court held that IDWR view of enlargement was overly strict and would needlessly punish the water right holder for increasing beneficial use in a way that harmed no one. This, said the court, was contrary to Idaho's constitutional doctrine of maximum utilization. The court noted that the only reason any other water user might care about such an increase in beneficial use was if the other water user was injuring the fish farmer and wished to provide financial compensation (rather than wet water) to mitigate that injury. The court said the goal of the prior appropriation doctrine is to encourage maximum utilization, not to minimize the cost of mitigation in response to a delivery call.

> It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water.

Facility Volume Case at 9.

The court concluded that an increase in beneficial use that does not burden other water users is not an enlargement.

> The court cannot limit "the extent of beneficial use of the water right" in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right. . . . In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these

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> circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.

Facility Volume Case at 17.

Accordingly, the SRBA court determined that it was not proper to describe and thereby limit the size of the trout-rearing facility. *Facility Volume Case* at 18. Water users are allowed and encouraged to increase the extent of beneficial use, so long as the water available to others is not reduced.

(b) IDWR's *Transfer Memo*

Ten years after the *Facility Volume Case*, IDWR adopted its revised version of *Administrator's Memorandum, Transfer Processing No. 24* (Dec. 21, 2009) ("*Transfer Memo*"). This guidance addresses a range of subjects including enlargements.

The *Transfer Memo* first addresses the subject in the context of when a transfer is not required.

> Intensified Use of Water. An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more of the elements of the water right(s) as licensed or decreed. For example, an application for transfer is not required to increase the number or volume of raceways in a fish propagation facility, increase the number of cows at a dairy, change irrigation to a more water consumptive crop, or increase the generating capacity of hydroelectric generators, so long as none of the elements of the associated water rights are changed.

Transfer Memo, § 2, p. 7 (emphasis original).

This is a direct and straightforward implementation of the court's ruling in the *Facility Volume Case*. In other words, if the only thing that changes is the amount of beneficial use (aka intensity of use), the increase is permissible and no transfer is required.

The harder question is when a transfer is required for some other reason. First, the *Transfer Memo* states that, in a transfer application, the extent of beneficial use is not an enlargement consideration for nonconsumptive water rights.

> Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer.

Transfer Memo, § 5d, p. 28. This conclusion flows directly from the *Facility Volume Case*. If the use is nonconsumptive, any increase in beneficial use will not harm other water users. Thus, there can be no *per se* injury, and enlargement should not come into play.

In the next breath, however, the *Transfer Memo* reaches the opposite conclusion if a non-consumptive use is added to an existing consumptive use:

> An application for transfer proposing to change the place of use or nature of use for all or part of a water right or water rights, which change would not result in an equivalent reduction in beneficial use under the original right(s), will be presumed to enlarge the water right(s). For example, hydropower use cannot be added to a right used for irrigation, even though no additional water would be diverted for the hydropower use. The irrigation use, or part thereof, could be changed to hydropower use by reducing the irrigation use by an equivalent amount, or the new use could be provided without reducing the irrigation use by obtaining a new permit to appropriate water for hydropower use.

Transfer Memo, § 5d(2), p. 28 (emphasis added).

IDWR does not explain why adding a new hydropower use to an irrigation right is an enlargement, while adding additional hydropower capacity to a facility served by an existing hydropower right is not enlargement.[449]

In addition, the quoted provision from section 5d(2) could be read to say that an existing nonconsumptive use (e.g., hydropower) cannot increase its beneficial use (e.g., add new generating capacity) if the transfer also entails a change in place of use. That conclusion, however, cannot be reconciled with earlier quoted portion of section 5d saying that increased beneficial use is not a consideration for nonconsumptive water rights. Accordingly, it may be appropriate to understand the section 5d(2) guidance as limited to the situation where a user seeks to add an entirely new beneficial use to an existing water right (as in the example of adding a hydropower right to an irrigation right).

Even that conclusion (that adding hydropower to an irrigation right is enlargement) is at odds with the teaching of the *Facility Volume Case*, which held that the purpose of the prior appropriation doctrine and the maximum utilization doctrine is to encourage the full use of water where doing so does not injure others.

J. Change in period of use

Change in period of use (aka season of use[450]) is permissible, but it can raise injury and enlargement issues. For instance, if a surface water user wished to expand her period of use from six months to seven, that would plainly constitute an impermissible enlargement (absent an annual volume

[449] Elsewhere, the *Transfer Memo* states that increasing the generating capacity of hydroelectric generators is not an enlargement and does not even require a transfer. *Transfer Memo*, § 2, p. 7 ("Intensified Use of Water").

[450] We use the terms period of use and season of use interchangeably, although it is possible that a particular period of use might correspond to something other than a season.

limit or other restrictive condition). Suppose, on the other hand, she simply sought to shift her entire period of use forward by a few weeks, the result of which was no increase in the quantity diverted or consumed. Thus, there arguably would be no enlargement. Such a shift might nevertheless constitute injury if other surface users on the stream had rights to divert during those last weeks of the season, and were now subjected to a new senior priority during this critical period.

Take another example. Suppose an entity acquired a surface irrigation right and sought to change it to a year round municipal or industrial use on the same stream—thus spreading out the impact of the use over twelve months. Out the outset, it is clear that this could only be done subject to an annual volume limitation, to avoid enlargement of the right. Assuming such a volume limit, the result would be less stress on the river during peak irrigation season, but more stress on the river during the winter. If there were other junior right holders with entitlements during the winter, they could object to any new senior demand during those months that would impair their ability to divert. In such a case, the transfer could be approved only if they were protected, for instance by subordinating the changed right to the junior winter users.[451]

Suppose, however, there were no junior winter users on the stream. Under this unusual fact setting, it is conceivable that an irrigation right might be converted to a year-round right. Then again, this is really no different than requiring the person to obtain a new appropriation. If there are no other users on the stream, priority is irrelevant.

One way of accomplishing a change in period of use while avoiding injury to other users is through the use of storage. If water can be lawfully stored when it is "in priority" then it may be diverted out of storage at any time without injury to others. Thus, in theory, one could divert a surface irrigation right during the historical irrigation season, place it in storage, and divert it out of storage irrespective of period of use—without injury to any other user. Storage might come in the form of an on-stream reservoir, an off-stream reservoir, or, notably, an aquifer (a natural storage reservoir). In such cases, a ground water right might be converted to a year round use without any impact on other users within the same aquifer.

The SRBA Court held that expansion of the season of use of a ground water right by an industrial user does not constitute an enlargement, and is permissible so long as no injury occurs to other users.[452] In this case, Magic West, Inc. held two water rights for a potato processing plant in Glenns Ferry. Although the rights were licensed for 7 and 10.5 months per year, respectively, Magic West actually used the rights year round. The company claimed in the SRBA that it was entitled to an "accomplished transfer" for the year-round use under Idaho Code § 42-1425. The accomplished

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[451] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 284 (1990).

[452] *In re SRBA Case No. 39576, Subcases 61-02248B and 61-07189* (Order Modifying Memorandum Decision and Order on Challenge; I.R.C.P. 11(a)(2)(B); & Order of Partial Decree) (Idaho Dist. Court for Fifth Judicial Dist. – SRBA, Jan. 4, 2002) (the *Magic West* case). The opinion (which reversed a prior decision by the same judge) was authored by Roger S. Burdick, who now sits on the Idaho Supreme Court.

transfer statute allows recognition of such transfers, so long as there was no enlargement of the right or injury to others.

The *Magic West* court concluded that the change did not constitute an improper enlargement, so long as there was no increase in the volume of water diverted annually.[453] The court was careful to note, however, that this case involved a ground water use, and, consequently, that it made no difference to other users during what part of year the water was diverted. Indeed, the court noted that in other hydrological situations, a change in season of use might well injure other users. The thrust of the decision seems to be that, so long as the volume is not increased and no injury results, an expansion in season of use does not constitute enlargement.

The decision leaves open whether a surface water right may be changed to a different season of use. However, as noted above, it would seem that if there is any other junior user on the stream during the time period into which a new user sought to expand her season of use, that user would be in a position to assert injury.

K. Changes in rate of diversion

In Idaho, water rights typically are quantified in terms of rate of diversion (the maximum instantaneous flow rate) and often also an annual volume. (There are exceptions. See discussion in section 4.B(5)31.) When a water right is split in two, the associated quantities ordinarily are allocated to each of the new rights, maintaining the same proportion as in the original right.

For instance, suppose a farmer held a water right to irrigate 100 acres. If the diversion rate was originally calculated based on an "inch per acre," the total diversion rate would be listed as 2 cfs. Let us further suppose that the right was based on a duty of water equal to three and a half acre-feet per acre. Its volume cap would then be 350 acre-feet per annum. Suppose the farmer decided to sell to a dairy the water right appurtenant to half of his acreage. Assuming that the new dairy use was 100 percent consumptive use, the farmer would be entitled to transfer only the former "consumptive use" associated with the fifty acres he has agreed to dry up. That consumptive use will be calculated by the Department based on historic cropping patterns. Assuming that his consumptive use is calculated to be 2.75 acre-feet per acre the dried-up 50 acres will produce an annual volume of water available to the dairy equal to 50 x 2.75 = 137.5 acre-feet per annum.

Ordinarily, the diversion rate would be split as well. Because fifty percent of the land was taken out of production, the new dairy right would be allocated 1 cfs, and the water right retained for the other fifty acres would be allocated the other 1 cfs.

Suppose, however, that the two parties agree to allocate the rate of diversion more heavily in favor of the dairy. Is there any reason they could not, for instance, allocate 1.2 cfs to the dairy and 0.8

[453] The SRBA court initially held that the expansion of season of use constituted a *per se* enlargement. The court then reconsidered its decision and reached the opposite conclusion.

cfs to the retained 50 acres of irrigation? The answer presumably would be no, so long as the original beneficial use on the retained 50 acres can still be achieved at that lower maximum pumping rate.

On the other hand, the parties would not be free to allocate 1.2 cfs to the remaining fifty acres of irrigation, unless they were able to justify exceeding the statutory "inch-per-acre" rule of thumb.[454]

A word of caution: Transfers of this nature are new to the Department, so there is little or no precedent for this sort of reallocation. However, the principles of water law seem to clearly dictate the result. There can be no injury or enlargement. Consequently, the "before" and "after" diversion rates must be equal. However, so long as the total remains unchanged, and each beneficial use remains viable, the parties should be free to reallocate the diversion rate so as to maximize the beneficial use.

L. Administrative procedures for water transfers

(1) The application process

The procedures for obtaining a transfer are contained in Idaho's water code, the APA, and the Department's rules. Note in particular the Department's guidance documents entitled "Transfer Processing Policies & Procedures" dated October 30, 2002 (set out in Appendix L).[455]

The transfer process is initiated by filing an application form with the Department describing the existing right and the way it will be exercised after the transfer.[456]

If the transfer involves water that is represented by shares in a corporation or irrigation district, then consent to the transfer is required from the corporation or district.[457] Applications for change in period of use or nature of use for a quantity exceeding 5,000 acre-feet of stored water or fifty cfs of any water requires the approval of the Legislature.[458]

The procedures for publication, protests, pre-hearing conference, hearing, decision and review thereof are the same as for applications for appropriation. These are discussed in section 14.B at page 167.

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[454] Idaho Code §42-202(6).

[455] The guidance memorandum applies on its face only to transfers of ground water in the Eastern Snake River Plain. However, the Department's practice appears to be to follow this guidance for all water right transfers.

[456] Idaho Code § 42-222(1).

[457] Idaho Code § 42-108. This restriction is discussed further in section 7.D beginning on page 539.

[458] Idaho Code § 42-108.

(2) The burden of proof in water right transfers

Idaho's water code does not address the burden of proof in either transfers or new appropriations. The Department has adopted regulations allocating the burden of proof in new appropriations,[459] but there are no regulations governing water transfers. Nor does IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (revised Dec. 21, 2009) address the subject.

In *Barron v. IDWR*, the Idaho Supreme Court placed the burden of proof on the applicant for a water transfer to prove non-injury and non-enlargement.[460] The court noted that this is the case even where there are no protestants to the application.[461] This is consistent with informal guidance issued by the Department on protested transfer applications.[462] This is also consistent with the general law of burden of proof in civil litigation.[463]

Even where the burden of proof rests with the applicant, however, it does not follow that protestants should be allowed to "put the applicant to its proof" for purposes of strategic delay or expense.[464]

The court has twice addressed the burden of proof issue in the context of a public interest challenge to a new water right appropriation.[465] In the case of the local public interest, a special rule

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[459] IDAPA 37.03.08.040.04.

[460] *Barron v. IDWR*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001).

[461] *Barron v. IDWR*, 135 Idaho 414, 421, 18 P.3d 219, 226 (2001).

[462] IDWR's "Conference and Hearing Procedures."

[463] A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 253 (1990) (the author is now a Magistrate Judge in the Third Judicial District).

[464] In the authors' opinion, the Department should use the prehearing conference, and discovery if necessary, to determine whether the applicant is prepared to present a *prima facie* case and, if so, whether the protestant has any meaningful and relevant rebuttal. If the applicant is prepared to go forward, but the protestant has not shown that it will be capable of presenting a relevant rebuttal case, then, on the applicant's motion, the protest should be dismissed prior to hearing. In such a case, the applicant should not be subjected to the costs of "fishing-expedition-type" discovery nor the costs of retaining experts and presenting a formal case on the public interest.

If the protestant is allowed to proceed, the Department should specify with reasonable clarity the bounds of allowable issues and evidence, so that both protestant and applicant may effectively and efficiently prepare for hearing.

If the Department summarily denies a protest or excludes an issue area, the protestant should be allowed to make a brief record of the nature of the evidence which would have been sought or produced. But neither the protestant nor the applicant should be put to the expense of fully developing evidence on that issue unless and until a reviewing court overrules the Department and remands for further proceedings.

applies: The applicant bears the initial burden of coming forward with evidence for the evaluation of the local public interest criterion as to any factor of which he is knowledgeable or reasonably can be expected to be knowledgeable. The protestant bears the initial burden of coming forward with evidence relevant to any factor for which the protestant can reasonably be expected to be more cognizant than the applicant. The applicant then bears the ultimate burden of persuasion.

(3) Conditions on transfers

Numerous conditions can be placed on an approved transfer to prevent injury or to protect the public interest. Some common transfer conditions include:

1. Limit the amount transferred to the consumptive use;
2. Require measuring devices to document diversions and/or return flows;
3. Require water releases at specified times to guarantee water availability at a junior's point of diversion;
4. Require basin-of-origin protection such as construction of additional storage for out-of-basin transfers;
5. Retain administrative jurisdiction for a reasonable period to evaluate and fine-tune the transfer; and
6. Restrict the rate of diversion or period use to avoid expansion of the right and/or to guarantee the timing of return flows.

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[465] In *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985), the Court quoted District Judge Schroeder, who now sits on the Idaho Supreme Court in this extended, but lucid, discussion of the burdens of production and persuasion:

> As Judge Schroeder correctly noted below, this burden of production lies with the party that has knowledge peculiar to himself. For example, the designer of a fish facility has particularized knowledge of the safeguards or their lack concerning the numbers of fish that may escape and the amount of fecal material that will be discharged into the river. As to such information the applicant should have the burden of going forward and ultimately the burden of proof on the impact on the local public interest. On the other hand, a protestant who claims a harm peculiar to himself should have the burden of going forward to establish that harm.
>
> However, the burden of proof [that is, the ultimate burden of persuasion] in all cases as to where the public interest lies, as Judge Schroeder also correctly noted, rests with the applicant:
>
> > [I]t is not [the] protestant's burden of proof to establish that the project is not in the local public interest. The burden of proof is upon the applicant to show that the project is either in the local public interest or that there are factors that overweigh the local public interest in favor of the project.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (referring to District Judge Schroeder, now on the Supreme Court) (quoted again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 607, 759 P.2d 891, 898 (1988).

The only other Idaho case to address burden of proof in the context of the local public interest was *Collins Bros.* That case merely recited that "the applicants had not met their burden of proof" and quoted from the Shokal case regarding burden of proof." *Collins Bros.*, 114 Idaho at 606, 759 P.2d at 897.

Note that different burden of proof rules apply to the special public interest tests applicable to appropriations of "trust water" pursuant to the *Swan Falls Agreement*. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.

M. Amendments to permits and pending applications

(1) Amendment of issued permits prior to or at time of licensing

The discussion in this section deals primarily with changes in final water rights (that is, licensed rights, decreed rights or beneficial use claims). Similar principles govern the amendment of a permit (where the permit has been issued, but the right has not yet been licensed).

Permit amendments are governed by a separate statute that sets out a more limited set of criteria. It authorizes amendment of an issued permit, subject to two criteria:

> [I]t shall be the duty of the department of water resources to examine the same [an application for amendment of a permit] and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder.

Idaho Code § 42-211 (emphasis added). (Idaho Code § 42-211 also provides for changes to applications for permits, where no permit has yet been issued).

These two criteria are the familiar "enlargement" and "injury" criteria applicable to a transfer of a licensed right. One might ask why the other criteria do not apply as well. The Idaho Supreme Court pondered this question in *Hardy v. Higginson*,[466] concluding that the local public interest test should also apply. Accordingly, the Department now applies the local public interest test to permit amendment applications in addition to the injury and enlargement tests set out above.

On the other hand, the Department does not apply the other tests for water right transfers set out in Idaho Code § 42-222 (e.g., no adverse effect on the local economy of the watershed for trans-basin transfers). Nor does the Department apply the criteria set out in Idaho Code § 42-203A(5) applicable to an application for permit (e.g., financial qualifications).

Publication of notice of the application for amendment of a permit is discretionary. "The director of the department of water resources shall give such notice to other affected water users as he deems appropriate . . . ."[467]

(2) Amendment of pending permit applications

Suppose an applicant files an application for a permit, but then seeks to change the terms of the application before the permit is issued. Idaho Code § 42-211 (paragraph 2) provides that changes to

[466] *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993).

[467] Idaho Code § 42-211 (paragraph 1).

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applications for permits (where no permit has yet been issued) may be handled informally simply by modifying the application form.[468]

Rules governing amendments of pending permit applications are set out at IDAPA 37.03.08.035.04. The Department has also issued informal guidance on this subject.[469]

Although amendments are freely allowed, republication may be required if there is any enlargement. Likewise, if more water is sought, the priority date is advanced to the date of the amendment.

Filing fees associated with such amendments are set out in Idaho Code § 42-221(A) (if the quantity is increased) and Idaho Code § 42-221(F) (for all amendments).[470]

(3) Amendment of pending transfer applications

Suppose an applicant for a transfer seeks to modify the terms of the transfer application after it has been filed, but before it has been approved. No statute or rule addresses this circumstance. However, the Department recently issued the following guidance:

> Amendment of Application. An applicant may revise or amend an acceptable application for transfer to clarify or correct information on the application. Significant changes to the place, period, or nature of the proposed use, amount of water, method or location of diversion, or other substantial changes from those shown on a pending application for transfer, will require filing a new application for transfer to replace the original application. If the revisions are not substantial, the application may be revised or amended with an initialed, dated endorsement by the applicant, or by the applicant's representative, on the original application, or by a notarized letter describing the amendments in sufficient detail. Changes to the application or supporting information are not to be made by staff under any circumstances. A replacement application must be identified as "changed" or "revised" on its face so that it can be distinguished from the original application, and the original application must be marked as "superseded." An additional filing fee may be required if the revised or replacement application involves more water than proposed in the original application for transfer. A re-advertisement fee, as provided in Section 42-

[468] Idaho Code § 42-211 (paragraph 2). The first paragraph of section 42-211 deals with changes made after a permit has been issued (but before licensing). The second paragraph of section 42-211 deals with changes to an application for permit before the permit is issued.

[469] Norman C. Young, IDWR, *Administrator's Memorandum – Amended Application Processing No. 9* (Jan. 12, 2000).

[470] IDAPA 37.03.08.035.e.

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221F, *Idaho Code*, will be required if notice of the original application has been published and changes to the original application are significant and warrant re-notice. (See Transfer Processing Memorandum No. 20 for additional information regarding changes to applications.)[471]

(4) Assignment of pending applications to new owner

Department guidance expressly provides that transfer applications are freely assignable.[472] The only requirement is notice to the Department.

Applications for permit are also assignable. However, the Department's rules provide: "An assignment of interest in an application must include evidence satisfactory to the director that the application was not filed for speculative purposes." IDAPA 37.03.08.035.02.d

There is a reason for this difference in the treatment of permit and transfer applications. In the case of an application for a permit, the priority date of the water right is tied to the application date. In contrast, the priority date of a water right involved in a transfer is not affected by the date of the transfer application. Consequently, whether a modification is treated as an amendment or a new application matters more in the case of a permit. Moreover, the Department is obligated by statute to consider the speculative purpose and financial feasibility of the proposed use in the case of a new permit, while this is not a factor in transfer applications. Thus, if the Department determined that the initial applicant for a permit was a speculator, the Department would not allow the purchaser of the permit application to step into the shoes of the speculator and retain the original priority date.

N. Exchanges of surface water

An exchange is essentially a swap of one water right (or portion thereof) for another (or portion thereof). For example, one water right holder might agree to allow a second water user to divert water under the first user's water right in exchange for a substitute supply provided by the second user. Exchanges have been used informally for decades.

A good introduction to exchanges is found in Michael White's article:

> When exchanges first came on the scene, well before the turn of the [last] century, they were relatively simple. To divert or store water "by exchange," an upstream junior water right owner simply kept downstream seniors whole by insuring that they received a specifically designated substitute supply of water sufficient to satisfy their senior water rights. Typically, . . . the upstream junior controlled downstream reservoir releases

[471] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (reproduced in Appendix L.)

[472] IDWR's *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (Dec. 21, 2009) (reproduced in Appendix L.)

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which it could not use itself but which could be used as a substitute supply for the seniors' benefit. For the better part of this century, such exchanges were routine in several states — usually carried on under the administrative supervision of state water officials.

More recently, however, the practice of exchange has taken on new dimensions. Instead of simply using storage releases to satisfy senior direct flow rights, exchanges now appear in every conceivable combination of direct flow and storage. Instead of operating primarily upstream-to-downstream, exchanges now also operate downstream-to-upstream and "around the horn" (from one tributary of a river to another of its tributaries). In addition, exchanges are now made not only between groundwater and surface water users but also between groundwater users themselves. With the proliferation of exchanges, water right administration is becoming increasingly demanding if not overwhelming.

Michael D. White, *Water Quality Exchanges*, 39 Rocky Mtn. Min. L. Inst. § 18.03 (1993).

Although changing water rights to accommodate new needs is recognized in all the western states, alternate devices exist in some states. Instead of being changed, the old water right is used to generate a substitute supply for downstream seniors, thereby satisfying the senior calls and, as a result, allowing junior or out-of-priority diversions for the new need. Most frequently these devices are called "exchanges," although they and their variations are also known as substitute supply plans, replacement plans, augmentation plans, rotation plans, in lieu plans, make up plans, commingling, secondary use, physical solutions, mitigation plans, and repositioning plans. With the caveat that there are significant differences, all these devices will be referred to in this paper as "exchanges."

Of the western states, exchanges (or close relatives) appear to be accepted in some form by Arizona, California, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. They do not appear to be available in Alaska, Hawaii, Kansas, North Dakota, Oklahoma, South Dakota, and Texas.

When they first came on the scene more than 100 years ago, exchanges were relatively simple. In order to divert or store water "by exchange," an upstream junior water right owner simply needed to make sure that downstream seniors were kept whole through the receipt of a specifically designated substitute supply of water sufficient to satisfy their senior water rights. Typically, reservoir releases which the junior could not use himself were designated as a substitute supply for the downstream seniors' benefit. Such exchanges have become routine in several states and are administered by state water officials. With increased competition for water, however, exchanges now appear in every conceivable combination of direct flow and

storage. With the proliferation of exchanges, their administration is becoming increasingly demanding if not overwhelming.

Exchanges make sense under only certain conditions:

> A water exchange is usually appropriate when at least four or, perhaps, five conditions exist. Obviously, water must be physically available at the exchanger's headgate, reservoir, or well. The exchanger must control a substitute supply of water which can satisfy senior water rights by replacing the water to be diverted by exchange. Upon operation of the exchange, there may be no resulting injury from reduced flows to intervening senior water rights diverting within the exchange reach, i.e., the stream segment between the exchange's diversion and the point of introduction of the exchange's substitute supply. In some instances, where surface streams are involved, another requirement is imposed, necessitating a "live stream" between the exchanger's headgate and the introduction point of substitute supply. Based on the futile call doctrine, this requirement is designed to insure that the water diverted in the exchange would have actually reached the senior right. In addition, without a live stream, upstream diversions may establish a "hole" in the alluvial aquifer which will continue long after termination of exchange operations.

Michael D. White, *Water Transfers* (presented at CLE International's Western Water Law Conference in Denver, Colorado on March 5, 1998).

Amendments to the Idaho water code in 1998 codified and regularized the practice of informally exchanging surface water rights between users.[473] The 1998 amendments ensure that informal exchanges end, and that all further exchanges be subject to a level of departmental review functionally the same as for the ordinary transfers.[474] This includes opportunity for protests and requires local public interest review.

The exchange concept is statutorily limited to surface rights. However, natural flow rights may be exchanged for storage rights.

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[473] Idaho Code §§ 42-105, 42-240. The 1998 enactment replaced an older exchange statute (adopted in 1969) that was repealed in 1986, inadvertently leaving a gap until the 1998 enactment.

[474] Idaho Code § 42-105(3).

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Two examples of exchanges of storage releases for natural flow water rights were approved by the Idaho Department of Water Resources in 1999 and 2004.[475] In these two nearly identical cases, diversions under Snake River water rights are foregone in exchange for a like amount of diversions on the Boise River. These exchanges involved an interesting twist, essentially amounting to a program of making temporary use of instream flow releases. It works like this. The federal government makes annual summertime storage releases from reservoirs above Boise to provide additional stream flow far downstream in the lower Snake River—all as part of a NOAA Fisheries program believed to aid endangered salmon and steelhead migration. Veolia Water Idaho Inc. (then United Water), the municipal water provider for households and businesses in the City of Boise and surrounding areas, maintains two water treatment plants and diversion facilities on the Boise River. It also owns irrigation water rights with licensed diversion points on the Snake River above the mouth of the Boise River. Under these approved exchanges, United Water diverts a portion of the federal government's flow augmentation releases from the Boise River while simultaneously replacing these withdrawals by foregoing an equivalent amount of diversions under its Snake River rights.

Exchanges such as these achieve the same result as a new appropriation made subject to a mitigation condition requiring an offsetting release of water from another water right. Whether one chooses to approach this as a new appropriation or as an exchange may depend on other considerations. Calling it an exchange has the benefit of emphasizing that there will be no increase in total diversions thereby avoiding injury—and thus minimizing protests. Calling it a new appropriation has the benefit of producing an asset (a new water right) that may be easier for lenders and others to understand. An appropriation may also allow more flexibility as to the source of the mitigation water.

O. Accomplished transfers

The discussion above relates to formal transfers pursuant to Idaho Code § 42-222. In launching the SRBA, the Legislature quickly came to recognize that many water right holders had moved points of diversion or otherwise changed elements of their water rights over the years without bothering to apply for a transfer under the Water Code. The Legislature granted a broad amnesty to such "accomplished transfers" in Idaho Code § 42-1425. In 2006, the accomplished transfer statute was amended to include the Northern Idaho Adjudication ("NIA").

This statute was held constitutional in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Schroeder, J), owing to the act's built-in protections against injury and enlargement. See discussion of this statute and the related enlargement statute in section 13.I(9) beginning on page 611.

The statute allows a claimant in a general adjudication to base the claim on changes to the place of use, point of diversion, nature of use, or period of use that have occurred on the ground

[475] *In the Matter of Application for Exchange of Water in the Name of United Water Idaho*, Preliminary Order, July 22, 1999 (this order since has become final); and *In the Matter of Exchange of Water by United Water Idaho Inc.*, Water Right No. 63-31871 (Preliminary Order issued May 11, 2004). Both of these orders now are final.

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(notwithstanding the absence of a formal transfer) if the changes occurred before the commencement of the adjudication. Idaho Code § 42-1425(2). For the SRBA, that is November 19, 1987. For the NIA, the cutoff date is January 1, 2006. Idaho Code § 42-1425(2).

The critical caveat is that the change must not result in injury to other water rights or enlargement of the right. Idaho Code § 42-1425(2).

Per longstanding IDWR policy interpretation, the accomplished transfer provision does not apply to a claim based on a permit. In other words, the Department will base its recommendation on the elements as described in the permit. If a change has occurred since the permit was issued, the permit holder should file an application to amend the permit.

P. Modifications of existing conditions on water rights

In some instances, the holder of a water right may desire a modification of a condition imposed by the Department on the water right. Some conditions directly affect an "element" of a water right.[476] For instance, conditions might be imposed on a group of water rights limiting the total quantity which they may collectively divert. Any modification of a condition affecting an "element" of a water right must be accomplished through the formal procedures for a "change" in a water right discussed above in this section.

On the other hand, some conditions do not relate to the elements of a water right. For instance, the water right might be conditioned to require a particular procedure for monitoring and reporting of diversions. If the water right holder wished to substitute a new technology or less cumbersome procedure, what procedure should he or she follow?

Neither the water code nor the Department's regulations specifically address how the holder and the Department should process such a request.

In some instances, the conditions themselves may set out a procedure for their own modification. For instance, a condition on the water right might expressly provide that the Director is retaining jurisdiction to re-evaluate a particular requirement. Where that is the case, obviously, any procedures set out in the conditions will control.

In most circumstances, however, the water right will not spell out any mechanism for the modification of conditions. In these situations, the Department has relied on its general authority under the Idaho Administrative Procedure Act ("APA") to entertain and act on such a request.[477] The water

[476] The "elements" of a water right are identified and discussed in section 4.B beginning on page 28.

[477] For example: "An agency shall not revoke, suspend, modify, annul, withdraw or amend a license, or refuse to renew a license of a continuing nature when the licensee has made timely and sufficient application for renewal, unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute." Idaho Code § 67-5254.

right holder should initiate consideration of the matter by filing a request setting out the proposed modification and justification therefore.

As a practical matter, the Department will act informally (without initiating a contested case) where it is apparent that no other person would be adversely affected by the requested modification. Where there is any potential for such adverse effect on others, the Department will initiate a formal contested case proceeding, with notification to known interested parties and the public.

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16. STATUTORY CRITERIA FOR WATER RIGHT APPROPRIATIONS AND TRANSFERS

A. Summary of all statutory criteria

Three sets of statutory criteria are potentially applicable to water right permit and transfer applications:

- Criteria applicable to water permit applications (for new appropriations) are set out in Idaho Code § 42-203A(5).
- Criteria applicable to water transfer applications are set out in Idaho Code § 42-222(1).
- Both of these, as well as six other criteria (or called "factors") are applicable to out-of-state water transfers.

One would think that only the transfer criteria would be applicable, but that is not the case. The Idaho Water Export Act arguably applies. (This is discussed at length in the Master Memo.) If it does (and we are assuming that it will if Idaho asserts jurisdiction), the export act makes the permit criteria applicable as well. Accordingly, we analyze all three sets of criteria.

They are summarized in the tables below. The permit and transfer criteria overlap to some extent, so they are presented in the first table. The six additional water export criteria are presented in the second table.

Permit criteria (Idaho Code § 42-203A(5)) *Paraphrasing:* The Director may reject, condition, or partially approve an application where the proposed use is such:	**Transfer criteria (Idaho Code § 42-222(1))** *Paraphrasing:* The Director shall approve in whole or in part or upon conditions, provided that:
(a) that it will reduce the quantity of water under existing water rights, or	[1] no other water rights are injured thereby, [2] the change does not constitute an enlargement in use of the original right,
(b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or	
(c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or	
(d) that the applicant has not sufficient financial resources with which to complete	

the work involved therein, or	
(e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or	[3] the change is consistent with the conservation of water resources within the state of Idaho and [4] is in the local public interest as defined in section 42-202B, Idaho Code,
(g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;	[5] the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and
	[6] the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

In addition to satisfying the criteria above, all applications for out-of-state uses are subject to the Director's consideration of the following six factors:

Export criteria **(Idaho Code § 42-401(3))**
Paraphrasing: To approve an out-of-state application, the Director must find the use is consistent with section 42-203A(5) criteria for new appropriations. [Implicitly, the section 42-222(1) criteria for transfers would also be applicable to an out-of-state transfer.] In addition, the Director shall consider the following factors:
(a) The supply of water available to the state of Idaho;
(b) The current and reasonably anticipated water demands of the state of Idaho;
(c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;
(d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
(e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
(f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

These are discussed in more detail in the sections below.

B. Tests applicable to both new appropriations and transfers

Beneficial use. An appropriation of water must be for a beneficial use.[478] In the case of a municipal provider who has an approved planning horizon and quantification of future needs, water rights sought to satisfy those needs automatically satisfy the beneficial use test.[479]

No injury. A water permit application may be rejected where "it will reduce the quantity of water under existing water rights."[480] Likewise, a transfer application may be rejected where "other water rights are injured thereby."[481] Although worded differently, the two tests mean the same thing. The "no injury" test is closely related to the "no enlargement" test discussed below.

Conservation. Appropriation and transfer applications may be rejected if the new use is "contrary to conservation of water resources within the state of Idaho."[482] (Adopted in 1990.[483])

Local public interest. Both new appropriations and transfers may be rejected where found to "conflict with the local public interest."[484] (Adopted in 1978.[485])

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[478] Idaho Code §§ 42-104 (appropriations); 42-222(1) (transfers).

[479] Idaho Code §§ 42-222(1), 42-223(2).

[480] Idaho Code § 42-203A(5)(a); *see* IDAPA 37.03.08.040.05.a and IDAPA 37.03.08.045.01.a (appropriations).

[481] Idaho Code § 42-222(1).

[482] Idaho Code §§ 42-203A(5)(f) (appropriations), 42-222(1) (transfers). Note that the Department's water appropriation rule does not address this requirement. This provision was used in 2002 to deny two water right applications filed in connection with two proposed gas-fired power projects near Rathdrum, Idaho. *In the Matter of Application for Permit No. 95-09069 in the Name of North Idaho Power LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002); *In the Matter of Application for Permit No. 95-09086 in the Name of Kootenai Generation LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002). Both applications were denied because the proposed natural gas-fired power projects proposed to employ water-based cooling technologies where other technologies were available. The Department concluded that the inefficient use of water threatened the Rathdrum Prairie Aquifer. Note that this decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1)), not the local public interest test.

[483] 1990 Idaho Sess. Laws, ch. 141, §§ 4, 5. Note that the Department's water appropriation rule does not address this requirement.

[484] Idaho Code §§ 42-203A(5)(e) (appropriations); 42-222(1) (transfers); 42-202B (definition); *see* IDAPA 37.03.08.040.05.g (appropriations). The scope of the public interest evaluation in Idaho was narrowed by the Legislature in 2003 and is now limited to an evaluation of impacts on the water resource itself (as opposed to broader social impacts). 2003 Idaho Sess. Laws, ch. 298 (H.B. 284) (amending Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763) (limiting the scope of the local public interest to "interests

Basin-of-origin protection. As part of the 2003 amendment to the local public interest legislation, the Legislature grafted onto the water code new protections against out-of-basin water uses. When water is moved from one basin to another (in an appropriation, transfer, or other context), the Director must determine that the move "will not adversely affect the local economy of the watershed or local area in which the source of water originates" (i.e., the basin of origin).[486] Note: This is one of two "basin-of-origin" provisions, the other being Idaho Code § 42-226, which is limited to large new ground water appropriations. See discussion in section 20.C(3) (Basin-of-origin protection (avoiding harm to local economy)) at page 709.

Out-of-state. Out-of-state water uses are required to follow special procedures to satisfy five additional tests aimed generally at evaluating the relative ability of water in the sending and receiving states.[487] (Adopted in 1990.[488]) Likewise, out-of-state water bank rentals are subject to the same five special tests.[489] (Adopted in 1992.[490]) See further discussion of export restrictions in section 20.C(2) at page 705.

C. Tests applicable to new appropriations only

Available water. A water permit application may be rejected where "the water supply itself is insufficient for the purpose for which it is sought to be appropriated."[491] (Adopted in 1935.[492])

Note that additional information requirements relative to the impact of the proposed use on other water rights are required of applicants seeking to appropriate more than 5 cfs, 500 acre-feet of storage, or 200 acres of irrigation.[493] Unlike the other tests described in this chapter, these

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that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.").

[485] 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)); 1979 Idaho Sess. Laws, ch.193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763); 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)); H.B. 284 (2003).

[486] 2003 Idaho Sess. Laws, ch. 298 (H.B. 284). It is codified in multiple places: Idaho Code §§ 42 203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank).

[487] Idaho Code §§ 42-401(3).

[488] 1990 Idaho Sess. Laws, ch. 141, § 3.

[489] Idaho Code §§ 42-1763.

[490] 1992 Idaho Sess. Laws, ch. 101 § 1.

[491] Idaho Code § 42-203A(5)(b); *see* IDAPA 37.03.08.040.05.d.

[492] 1935 Idaho Sess. Laws, ch. 145, § 2.

[493] IDAPA 03.08.040.05.c.

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requirements are imposed by administrative rule, not be statute. The rule provides, however, that the Director, in his discretion, may impose these information requirements on any applicant.

Speculation. A permit application also may be rejected "where it appears to the satisfaction of the director that such application is not made in good faith [or] is made for delay or speculative purposes."[494] (Adopted in 1935.[495]) Although the statute does not expressly so provide, presumably water rights acquired by a municipal provider to meet an approved future needs plan would be deemed not to be speculative.

Financial resources. An appropriation application may be denied where "the applicant has not sufficient financial resources with which to complete the work involved therein."[496] (Adopted in 1935.[497]) In *Shokal v. Dunn*, 109 Idaho 330, 335-36, 707 P.2d 441, 446-47 (1985) (Bistline, J.), the Idaho Supreme Court ruled that it is not necessary for the applicant to demonstrate that he or she can "then and there" obtain the necessary financing to complete the project. Rather, the applicant must show that it is "reasonably probable" that financing can be secured to complete the project within the time constraints of the permit.[498]

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[494] Idaho Code § 42-203A(5)(c); *see* IDAPA 37.03.08.040.05.e. This was the basis for rejecting a water right application for expansion of a CAFO in October, 2002. The Department determined that the application was speculative in light of the fact that the Applicant had been denied a "request for variance" from the county and would not be able to obtain one without a change in the county ordinance. *In the Matter of Application for Permit of Water Right No. 61-11954 in the Name of Rocky Mountain Land & Cattle Co.* (IDWR Preliminary Order, Oct. 21, 2002). The decision also cited "local public interest" concerns.

[495] 1935 Idaho Sess. Laws, ch. 145, § 2.

[496] Idaho Code § 42-203A(5)(d); *see* IDAPA 37.03.08.040.05.f.

[497] 1935 Idaho Sess. Laws, ch. 145, § 2.

[498] The court explained:

> The ultimate question under the financial resources requirement of I.C. § 42-203A is this: who should bear the risk of failure. . . . The 'then and there" standard, while admirably encouraging pecuniary caution, goes beyond a reasonable reading of the statutory requirement of "sufficient financial resources." I.C. § 42-203A(5)(d).
>
> The "reasonably probable" standard used by Water Resources shifts the risk of failure and shows that the state is more willing to take a risk by providing individuals with the opportunity to put water to beneficial use. It indicates a willingness on the part of the state to take a chance that a proposed water use with sound prospects of financing will become a successful venture, thereby benefiting both the water user and the state. We believe this to be a more reasonable standard for the financial resources requirement of I.C. § 42-203A. The water resources of this state are not so limited that they must be safeguarded with permits issued *only* when the applicant has secured all necessary financing prior to the water permit application. At the same time, the applicant must make a

Over 25 cfs, 500 horsepower, or 10,000 acre-feet. An applicant seeking more than 25 cfs, the development of more than 500 theoretical horsepower, or the storage of over 10,000 acre-feet in active storage may be required by the Director to provide detailed financial information.[499] (Adopted in 1967.[500])

Instream flow. All new appropriations must respect all prior instream flow appropriations.[501] (Adopted in 1978.[502]) Note also that all instream flow appropriations must meet a set of statutory criteria, including a finding that it is in the "public, as opposed to the private, interest."[503] (Adopted in 1978.[504])

> showing that it is reasonably probable he or she will obtain necessary financing within five years [the date when proof is due under the permit]. The extent of the applicant's own investment is a strong factor to be considered.
>
> The financial resources requirement, added in 1935, was clearly intended to prevent the tying up of our water resources by persons unable to complete a project because of financial limitations. The financial requirement provision was added at a time when unscrupulous promoters were obtaining permits and lulling unsuspecting investors into purchasing worthless securities on worthless projects. *See* Eighth Biennial Report of the Department of Reclamation, State of Idaho, 1933-1934, R.W. Faris, Commissioner of Reclamation, pp. 28-29. The legislature has provided Water Resources with the authority to weed out the financially insufficient applications. I.C. § 42-203A. We believe a showing by the applicant that it is "reasonably probable" that financing can be secured to complete the project within five years serves the purpose of screening out undeserving projects without being destructive of growth and development in the state. Any concern which may exist about tying up the water to the prejudice of a potential junior applicant is adequately satisfied by other statutory provisions requiring timely commencement, progress and completion of works. I.C. §§ 42-204 and 42- 301. Thus we hold proper the "reasonably probable" standard originally applied by Water Resources.

Shokal, 109 Idaho at 335-36, 707 P.2d at 446-47 (emphasis original). In this case, the Court found it sufficient that the applicant for a water right for a fish farm had a $4,500 "base" (presumably referring to money in hand) for a project that would cost over $265,000.

[499] Idaho Code § 42-202(5).

[500] 1967 Idaho Sess. Laws, ch. 374, § 1.

[501] Idaho Code § 42-1736B(1).

[502] 1978 Idaho Sess. Laws, ch. 345, § 2.

[503] Idaho Code § 42-1503.

[504] 1978 Idaho Sess. Laws, ch. 345, § 11.

Out-of-basin ground water - over 5,000 acres or 10,000 acre-feet. An appropriation for use of ground water for use "outside the immediate ground water basin" for irrigation of over 5,000 acres or for a total volume of over 10,000 acre-feet (apparently for any purpose) per year must meet special tests related to "the local economic and ecological impact" and must be specifically approved by the Legislature.[505] (Adopted in 1980.[506]) Note: This is one of two "basin-of-origin" provisions, the other being Idaho Code §§ 42 203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank).

D. Tests applicable to water right transfers only

No enlargement. The Department may reject a transfer application if it would "constitute an enlargement in the use of the original right."[507]

Agricultural base. The Department may reject a transfer application involving "a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area."[508] (Adopted in 1981.[509])

Over 50 cfs/5,000 acre-feet. Specific legislative approval (presumably in the form of a concurrent resolution) is required of any change in the nature or period of use of any water right involving over 50 cfs or 5,000 acre-feet of storage water.[510] (Adopted in 1981.[511]) Note that this provision is triggered only if the period or nature of use is changed. Thus, it does not apply to changes in point of diversion or place of use, even on a very large scale. Also, the Department is allowed to approve temporary transfers of large water rights for less than three years without legislative approval.[512] Although the statute does not specify a sequence, IDWR has expressed the view (informally) that legislative approval would not be sought until after the Department has acted to approve the transfer.

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[505] Idaho Code § 42-226.

[506] 1980 Idaho Sess. Laws, ch. 186, § 1.

[507] Idaho Code § 42-222(1).

[508] Idaho Code § 42-222(1).

[509] 1981 Idaho Sess. Laws, ch. 147, § 3.

[510] Idaho Code § 42-108.

[511] 1981 Idaho Sess. Laws, ch. 1.

[512] Idaho Code § 42-108.

E. Tests applicable to water exports

The Idaho Water Export Act, Idaho Code § 42-401(3), sets the following out six criteria (called "factors") to be applied by the Director in evaluating an out-of-state transfer. See discussion in section 20.C(2)(a) (Idaho Water Export Act) at page 705.

The supply of water available to the state of Idaho.

The current and reasonably anticipated water demands of the state of Idaho.

Whether there are current or reasonably anticipated water shortages within the state of Idaho.

Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho.

The supply and sources of water available to the applicant in the state where the applicant intends to use the water.

The demands placed on the applicant's supply in the state where the applicant intends to use the water.

F. Tests applicable to inter-basin transfers (aka out-of-basin transfers)

See discussion in section 20.C(3) (Basin-of-origin protection (avoiding harm to local economy)) at page 709.

G. Statutory history of tests

The following chart traces the legislative enactments leading to several of the key current statutory tests applicable to new appropriations and transfers.

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1935	Idaho Code § 42-203A(5)(b).	1935 Idaho Sess. Laws, ch. 145, § 2, p. 358	Appropriation	The director must find "that the water supply itself is insufficient for the purpose for which it is sought to be appropriated".	Requires a showing of sufficient hydrological availability to support the use.
1935	Idaho Code § 42-203A(5)(c).	1935 Idaho Sess. Laws, ch. 145, § 2, p. 358.	Appropriation	The director must deny an application upon finding "that such application is not made in good faith, is made for delay or speculative purposes".	Speculative applications may be rejected. Was used to deny an application for an expanded CAFO.
1935	Idaho Code § 42-203A(5)(d).	1935 Idaho Sess. Laws, ch. 145, § 2, pp. 358-59.	Appropriation	The director must deny an application upon finding "that the applicant has not sufficient financial resources with which to complete the work involved therein".	Authorizes evaluation of the applicant's ability to carry out the project.

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Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1935	Idaho Code § 42-202.	1935 Idaho Sess. Laws, ch. 145, § 1, p. 355.	Appropriation	If the application involved more than twenty-five (25) cubic feet per second of water or the development of more than five hundred (500) theoretical horsepower . . .."	Establishes a set of special criteria for large appropriations. The applicant must provide detailed financial and corporate disclosure data, etc.
1978	Idaho Code §§ 42-202B(3), 42-203A(5)(e).	1978 Idaho Sess. Laws, ch. 306, § 1, pp. 767-69.	Appropriation	The director may reject an application where he finds "that it will conflict with the local public interest" where the local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the pubic water resource." (Note, the above language reflects 2003 amendment.)	The "local public interest test" was first adopted in 1978, when it applied to water appropriations only. See below amendments of 1981 (extending to water right transfers) and 2003 (limiting scope of the test). Note that the Department's implementing criteria (IDAPA 37.03.08.045.01.e) have not been updated to reflect the 2003 legislation.
1978	Idaho Code § 42-1503.	1978 Idaho Sess. Laws, ch. 345, § 11, p. 893.	Appropriation	To be approved, the director must find that a proposed instream flow "is in the public, as opposed to private, interest".	Section 11 of chapter 345 (1978) created the minimum flow law. It contained its own public interest determination provision (quoted here).
1978	Idaho Code § 42-1736B.	1978 Idaho Sess. Laws, ch. 345, § 2, p. 886.	Appropriation	"All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the daily maintenance level of the affected lake or reservoir."	Section 2 of chapter 345 (1978) (quoted here) requires future appropriations to protect prior established instream flows.
1979	Idaho Code § 42-1763.	1979 Idaho Sess. Laws, ch. 193, § 3, p. 561.	Water Bank	Rental of water from water supply bank must not "conflict with the local public interest where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use."	This is the same language as section 42-203A(5)(e), but there is no cross-reference to this section. It was made part of the original water supply bank legislation in 1979, and has not been changed since then.
1980	Idaho Code § 42-226.	1980 Idaho Sess. Laws, ch. 186, § 1, p. 414.	Appropriation	"Any application for a water permit that seeks to transfer ground water outside the immediate ground water basin as defined by the director of the department of water resources for the purpose of irrigating five thousand (5,000) or more acres on a continuing basis or a total volume in excess of ten thousand (10,000) acre feet per year, the application must first be approved by the director of the department of water resources and then by the Idaho Legislature. Each shall give due consideration to the local economic and ecological impact of the project or development so proposed."	Sets up a special public interest review for large agricultural transfers outside the basin of origin. Also requires legislative approval.
1981	Idaho Code § 42-222(1).	1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.	Change	The director must find that an application for change of water right "is in the local public interest" as defined in section 42-202B(3).	This 1981 act extended 1978 local public interest test to changes in water rights. See 2003 amendment (restricting scope of test).

Date	Current Citation	Session Law	Applies to	Operative Language (as codified today)	Comment
1981	Idaho Code § 42-222(1).	1981 Idaho Sess. Laws, ch. 147, § 3, p. 256.	Change	"[T]he director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area."	The same 1981 act contained a provision to protect the local agricultural base from changes in the nature of use of water rights.
1981	Idaho Code § 42-108.	1981 Idaho Sess. Laws, ch. 147, § 1, p. 254.	Change	"[A]ny permanent or temporary change in period or nature of use in or out-of-state for a quantity greater than fifty (50) cfs or for a storage volume greater than five thousand (5,000) acre-feet shall require the approval of the Legislature, except that any temporary change within the state of Idaho for a period of less than three (3) years may be approved by the director without legislative approval."	Note that this provision applies only to changes involving a change in period or change in nature of use. Thus, it appears that the Act is aimed at transfers from agricultural use to new industrial, municipal or other uses. The provision applies equally to in-state and out-of-state transfers.
1990	Idaho Code § 42-401.	1990 Idaho Sess. Laws, ch. 141, § 3, pp. 316-17.	Appropriation and Change	"Applications for use of public waters outside the State. . . . The director shall consider the following factors: (a) The supply of water available to the state of Idaho; (b) . . ."	Repealed former statute specifically providing for use of Idaho water rights in Oregon. Added new section 42-401 requiring all out-of-state users to meet five additional criteria relating to the relative availability of water in Idaho and the receiving state.
1990	Idaho Code §§ 42-203A(5)(f), 42-222.	1990 Idaho Sess. Laws, ch. 141, § § 4, 5.	Appropriation and Change	Requires that applications be consistent with (or not contrary to) "conservation of water resources within the state of Idaho."	The same act (ch. 141) also amended the appropriation and change provisions affecting all water rights, to include this new criterion. This was used to deny water right applications for energy projects.
1992	Idaho Code § 42-1763.	1992 Idaho Sess. Laws, ch. 101, § 1, pp. 319-20.	Water Bank	"The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code."	Out-of-state rentals from the water bank were previously prohibited. This act allows out-of-state uses, but subjects them to the test set out in section 42-401 for permanent out-of-state uses.
2003	2003 Idaho Sess. Laws, ch. 298 (H.B. 284).	2003 Idaho Sess. Laws, ch. 298 (H.B. 284).	Appropriation, Transfer, Exchanges and Water Bank	Limited the scope of the local public interest to "interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource."	Clarified that local public interest test authorizes review only of issues related to protection of the water resources, not other social or environmental concerns.
2003	Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763.	2003 Idaho Sess. Laws, ch. 298 (H.B. 284).	Appropriation, Transfers, Exchanges and Water Bank	Prohibits inter-basin transfers which "will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates."	The same bill which limited the scope of the local public interest review added an entirely new basin-of-origin protection feature to the water code.

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17. WATER RIGHTS CONVEYANCING

At the outset, it bears emphasis that transferring (aka changing) a water right is different from conveying a water right. (See discussion in section 15.B.) A conveyance changes ownership of something from one person to another. For instance, a seller may convey land and appurtenant water rights to a buyer without making any change in the water rights themselves. However, where the parties wish to separate the water (or part of it) from the land to which it previously was appurtenant, they will need both to convey the water right (a purely private matter between the parties) and to transfer the water right (a regulatory procedure over which the Department of Water Resources has control).

Previous chapters have explored water right transfers. This chapter deals with conveyancing.

A. Introduction

Water rights are real property.[513] As such, they are conveyed by deed, just like any other real property.[514] As with other real property, water rights may be conveyed by warranty deed, special warranty deed, grant deed, or quit claim deed. These terms are not defined by Idaho statute, except for Idaho Code § 55-612 discussed below and another statute which has very narrow application.[515]

In real estate transactions involving land, title insurance may be obtained to protect the buyer in the event title is not properly conveyed. As a practical matter, title insurance companies do not issue title policies for water rights. Consequently, the onus falls on the parties to ensure that title is properly conveyed, and the selection of the proper form of conveyance is all the more important.

In the world of conveyancing, form sometimes matters, but substance always does. The practitioner should never rely upon the title of a deed or other document. If you want to know what the deed does, you should read the deed to see what, if any, covenants and warranties are included.[516]

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[513] Idaho Code § 55-101.

[514] Water rights of all types may be conveyed, including water rights represented by licenses or decrees, beneficial use claims, domestic rights, and water rights provided by canal companies and irrigation districts.

[515] Idaho Code § 42-2604 provides, on its face, that all "contracts and deeds for the sale of water rights shall be of the form approved by the department . . . ." Despite the over-broad language of this section, it applies only to particular circumstances involving the initial creation of canal companies and their conveyance of water rights to settlers within the project; this was the case with Carey Act Companies. There is no standard departmental form of contract or deed.

[516] As a practical matter, the verbs "covenant" and "warrant" are used interchangeably by most drafters. Technically, a covenant is a promise to do something (or to refrain from doing something) in the future, such as a covenant to defend title. A warranty is an assertion of a condition in the present, such as a warranty of ownership. Thus, a covenant may be breached in the future, while a warranty may be breached at the time of execution of the conveyance document. This is a semantic nicety which is of no particular consequence.

B. The purchase and sale or option agreement

Water rights, of course, may be conveyed as appurtenances to land. However, they are often conveyed separately from the land, particularly when the purchaser intends to change them to a new use. Because of the uncertainties of the transfer process, transactions in water often rely on an option agreement, rather than a direct purchase and sale. This enables the purchaser to undertake due diligence and pursue the transfer before exercising the option and moving to closing.

In some cases, simple form purchase and sale or option agreements have been employed to accomplish this. With the increasing value of water, and the increasing complexity of the transfer process, the stakes have been raised. Accordingly, option agreements are increasingly sophisticated and individually tailored to the circumstances of the transaction, allocating risks and contingencies, establishing duties and entitlements, defining representations and warranties, and setting deadlines and penalties. In a high value transaction, the option agreement may run dozens of pages.

Among many other issues to be considered in tailoring a purchase and sale or option agreement are the following (in no particular order):

- Unit definition & pricing. There are many ways to define the price terms, and many pitfalls resulting from misunderstandings about how quantity terms work. Typically annual volume is of more relevance to the buyer than the diversion rate. However, depending on the needs of the buyer, other measures of quantity that may be critical.
- Quantification before or after transfer. Likewise, the timing of quantification is significant. Do the parties intend for the price term to be applied to the quantity prior to transfer, or after? Will it be diminished to the extent of mitigation requirements, consumptive use restrictions, etc.?
- Shortfall in quantity. Does the seller have a responsibility to provide additional water in the event that transferable quantities are less than anticipated? How will the source of that water be identified?
- Identification of individual acres. Each of the above consideration has potential ramifications under *Lexington Heights v. Crandlemire.*[517] Failure to provide mechanisms for resolving uncertainty at any stage of the contract, under any possible scenario, may result in giving one of the parties an unintended way out of the agreement. See discussion in section 17.D at page 273.
- Partial forfeiture. If partial forfeiture is identified during the course of the transaction, how will that affect the price term?
- Duration / option periods. The duration of the option may be fixed, keyed to other contingencies, or extendable at the option of the buyer. These provisions may have their own price terms.
- Sequencing of payments. The timing of option and purchase payments may be simple or quite complex. It is important to think through the all contingencies and to clarify any offsets.
- Incremental transfers. The parties should consider whether the buyer is entitled to exercise the option incrementally—with respect to parts of the water right. If that is permissible, the agreement should include a mechanism to determine what is being acquired. Lack of specificity may void the contract.

[517] *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004). See discussion in section 17.D at page 273.

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- Due diligence period. One or more diligence periods may be required. The parties should define the authority of the buyer to continue investigations after the due diligence period(s). The scope of access granted should be clarified. The parties should clarify the seller's obligation to be forthcoming, particularly with FSA records and other documentation (including records of prior owners).

- Initiation of transfer prior to exercise. The parties should consider under what circumstances the buyer is authorized to initiate the transfer proceeding prior to exercise of the option. The agreement should clarify the duties of the parties in the event that the transfer is denied, approved with conditions unacceptable to buyer, and other potential circumstances. The agreement should allocate the obligations and costs associated with transferring the water back in the event the sale does not go through.

- Recording. Depending on the parties' needs, the agreement may provide for recording of a memorandum of option agreement, pending closing. In any event, it should define what either party is entitled to record and under what circumstances.

- Dry up obligation. The agreement should carefully address the scope of the dry-up obligation. Does the seller have a right and/or duty to continue farming (or other water use) pending transfer approval, after transfer approval (to end of irrigation season), etc.? What rights do the buyer and seller have to change the use during the middle of the irrigation season?

- Representations and warranties. The agreement must carefully consider and define disclosure obligations, representations and warranties regarding the use and validity of the water right. As with other issues, there is no cookbook answer for what these obligations should be. Key issues to address (in addition to the usual real estate representations and warranties) would include:

  - quantities and forfeiture,
  - the accuracy of information and good faith disclosures,
  - the presence of supplemental water rights,
  - existing mitigation obligations, and
  - subordinations.

- Encumbrances. The parties should develop and define financial disclosure obligations and mechanisms for dealing with encumbrances and refinancing during the option period and at closing.

- Confidentiality. The parties should consider their interest in confidentiality and carefully define confidentiality obligations and penalties.

- Form of deed. The parties should come to terms at the time of the option agreement as to the form of the deed. This, in turn, raises key questions regarding warranties.

- Easements. The parties should think through whether any easements need to be conveyed in conjunction with the water rights.

- Wells and equipment. The parties should consider whether any wells or equipment is to be conveyed along with the water rights.

- Closing(s). Closing provisions vary greatly from agreement to agreement. The agreement should resolve confusion over whether closing refers to closing on the option agreement or closing on the exercise of the option (or closing on an incremental exercise).

- Survivability. The agreement should define which provisions survive closing and for how long.
- Walk-away provisions. The agreement should carefully define under what circumstances either party may walk away from the transaction (without triggering a default), and who keeps what.
- Remedies. The parties should carefully identify the cures and remedies available for each potential default. Boilerplate should be avoided where it does not fit the needs of the parties.

C. Conveyance of perfected water rights by deed

(1) Quitclaim deed

The most minimal form of conveyance is the quitclaim deed. A quitclaim deed provides simply that the grantor conveys whatever interest the grantor may then have in the property. It includes no warranties of any kind.

In essence, the grantor says: "I'm not saying I own this water right. I may have even sold it to someone else. But whatever interest I may have in it is now yours."

The operative words in a quitclaim deed are "I hereby quitclaim."[518] The drafter should not use the verb "grant" in a quitclaim deed. Doing so will likely convert it to a grant deed, as discussed below.[519] To put it colloquially, a quitclaim deed would be the proper vehicle (from the seller's perspective) to repeatedly sell the Brooklyn Bridge.

A quitclaim deed is appropriate where the purpose of the conveyance is to remove a cloud (as to any claim by the grantor) and thus help to clarify title in a particular party.

(2) Grant deed

An Idaho statute states that the use of the term "grant" in any conveyance carries by implication two and only two covenants, unless otherwise expressly set out in the deed.[520] Thus, if the grantor simply declares that he "grants" (or grants, conveys, etc.) his or her water rights to a named person, and says nothing else, the court will imply the following two covenants: first, that he or she has not previously conveyed the property to another and, second, that he or she has not encumbered or suffered an encumbrance on the property as of the time of execution.

In plain English, the seller is saying: "I don't know if I own this water right, but I promise you that I have not previously sold or encumbered it, and whatever I own is now yours." This is basically a glorified quitclaim deed, enhanced only by the promise that the seller has not previously sold or

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[518] To express it as a lawyerly redundancy: "I hereby convey, release, remise and forever quitclaim . . . ."

[519] Oddly, most quitclaim deeds employ the noun "Grantor" while avoiding the verb "grant." Presumably, and according to the statute, it is only use of the verb that triggers the "grant deed" warranties.

[520] Idaho Code § 55-612.

encumbered the property. To put it even more colloquially, one might say: "Here is a deed to the Brooklyn Bridge. This is the first time I have ever sold the Brooklyn Bridge."

In other words, you may convey the Brooklyn Bridge by quit claim as often as you like without violating any warranty, but you may convey it by grant deed only once.

Such an unadorned grant deed may be employed in water transactions where there is some reason for uncertainty about whether the seller actually owns the rights. In such cases, it is reasonably preferred and expected over a simple quitclaim deed, because the seller, even if he cannot promise that he or she owns the right, should be able to promise at least that he or she has not sold it twice.

(3) General warranty deed

A general warranty deed goes a substantial step further and includes warranties of fee simple ownership coupled with promises to defend title to the property if it is challenged. From the buyer's perspective, a warranty deed is always preferred. From the seller's perspective, a warranty deed may be problematical if there is any question about the validity of the underlying water rights. On the other hand, the warranty arguably only extends to the defense of title, not to the validity of the water right.

(4) Special warranty deed

The parties to a transaction are not limited to the three models set out above, but are free to devise other covenants or warranties. Such hybrid deeds go by various labels including "special warranty deed," "limited warranty deed," "bargain and sale deed," and even "grant deed" (despite the fact that it contains more than the statutory covenants). Others prefer the name "special warranty deed." For all practical purposes, the name makes no difference, so long as the covenants and warranties are themselves clear.

Thus, special covenants and warranties may be devised to handle particular purposes. These are not very common in ordinary real estate transactions (where a cookie cutter deed is generally appropriate), but are common for water right deeds (where the issues of validity and ownership can be murkier).

For example, the parties to a transaction might agree to assurances that more clearly define what warranties are included, for example including a defense of title but not of the validity of the water right. The deed might also include a warranty to the effect that the seller has acted in good faith in acquiring and using the water rights and knows of no defect in them.

D. Specificity/particularity and the statute of frauds (*Lexington Heights* and its progeny)

In the case of *Lexington Heights v. Crandlemire*, 140 Idaho 276, 92 P.3d 526 (2004) (Eismann, J.), the Idaho Supreme Court imposed a rigorous standard for specificity of the lands to be conveyed. Although the case dealt with the sale of land, presumably it would apply equally to water right deeds.

A more detailed discussion of this topic is found in the *Idaho Land Use Handbook*.

E. Conveyance of permit by assignment

In contrast to a perfected water right, a water right permit is an inchoate right authorizing the holder to proceed with diverting water to beneficial so as to perfect an interest in real property in the future.[521] As such, the permit is deemed personal property, not real property.[522] Consequently, water right permits traditionally are formally conveyed by assignment (and/or bill of sale[523]), rather than by deed.

The Idaho Department of Water Resources provides a form entitled *Assignment of Permit* for this purpose. It is intended to be executed and acknowledged by the assignor and filed with the Department, along with a required filing fee. Unlike the Department's *Change of Ownership,* form, which is used to provide the Department with notice that a perfected water right has been conveyed by deed to a new owner, either as an appurtenance or separate from land, the Assignment of Permit form can serve the dual purpose of effecting the legal conveyance of the permit and providing notice to the Department of the conveyance of the permit.

What happens if an assignment is not used where a permit authorizing development of a water right on a particular tract of land exists? Suppose first that a seller conveyed her land, which was being irrigated pursuant to an inchoate water right represented by a permit. Suppose also that she used a "silent" deed (which simply conveyed the land and all appurtenances, without expressly naming them), and suppose there was no separate assignment or bill of sale concerning the permit. Would the deed effectively convey the right to irrigate the land represented by the permit even though it is deemed personal property? The authors are not aware of a judicial decision on point. Arguably the right to develop a water right on a particular piece of real property (i.e., the permit) could be considered an appurtenance, and a "silent" conveyance of the land would convey all appurtenant interests in water, both real and personal. On the other hand, Idaho law requires that water rights be treated with the same formalities as other property. But, again, we are not aware of precedent on this point.

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[521] *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993).

[522] "An applicant's interest in an application for permit to appropriate water also is personal property." IDAPA 37.03.08.035.02.d (Water Appropriation Rules).

[523] Technically, a bill of sale is used to convey tangible personal property to which title attaches. Intangible personal property interests to which title does not attach (such permits, shares of stock, and contract rights) are conveyed by assignment. Nevertheless, this subtle distinction is not always followed. Indeed, parties often employ a separately drafted bill of sale in addition to the Department's *Assignment of Permit* form. Perhaps this is an unnecessary belt and suspenders exercise, but it is a common practice and, until our courts tell us otherwise, probably a good idea.

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F. Assignments in conjunction with water right deeds

It is sometimes appropriate to include other assignments along with the conveyance of a water right. This is appropriate where there are physical documents that reflect title or other interests in the water right, such as claims to water rights filed in a water right adjudication, stock certificates or contracts. Assignments may be included as part of a deed. Note, however, that water delivery organizations typically have their own procedures and forms of documents for the transfer of water rights on their books or assessment rolls. These organizations should be consulted prior to closing a transaction that involves water rights that they deliver.

For instance, if the water right is represented by shares in a mutual canal company (aka mutual ditch company, including Carey Act companies), it is important not only to convey to the buyer the water rights themselves but also to assign and deliver the shares in the canal company to the purchaser.

Another example of an appropriate use of an assignment is for SRBA claims. Where a water right has been claimed in the SRBA, but not yet decreed, the conveyance document should include a deed for the water right (or assignment for the permit) coupled with an assignment of the SRBA claim. When conveying land with appurtenant water rights that are the subject of a claim in a water rights adjudication, the authors prefer to use a single document styled as a "deed and assignment" that describes not only the underlying real property with specificity, but also all water rights intended to be conveyed as appurtenances to the land, together with an express assignment of all notices of claim to water rights pending in an adjudication.

In transactions involving a water right evidenced by a license, the parties sometimes assign and deliver the original license certificate in addition to conveying the water right by deed.

G. Conveying a portion of an existing facility

Most commercial and industrial facilities are served by municipal water providers and do not own their own water rights. However, some of the larger ones do have their own wells, as do dairies and other remotely located industrial operations.

If the entire facility is being conveyed as a unit, it is a simple matter to convey the appurtenant water rights. Indeed, it is no different from conveying irrigated land. Since no change in use is entailed, this is not a "transfer" event requiring approval from the IDWR. It is simply a matter of providing the appropriate new ownership notice to the Department.[524]

Likewise, if a commercial, industrial, or agricultural property is being divided and a portion of it sold to a user who will maintain the same nature of use, this will entail what the Department calls a "split" of the right. Again, this is not a "transfer" event (within the meaning of section 42-222), so no Department approval is required. But the Department must be made aware of the change in ownership,

[524] The proper form is known as a "Notice of Change in Water Right Ownership." This is described in footnote 364 at page 192.

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whereupon the Department will change its records to show that the water right has been divided into two separate rights, each with a new number.[525] Naturally, in the conveyance documents the parties should be explicit about the quantity of water, preferably expressed in both cfs and acre-foot amounts, each resulting right holds.

[525] Formerly, the Department assigned "A," "B," "C" suffixes to split water rights. Its current practice, however, is to assign entirely new numbers to the two resulting rights, retiring the old number.

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18. CONSERVED WATER

A. Public policy

In recent years, attention has focused on efforts to squeeze more water out of a given diversion stream through conservation measures.[526] These measures can include lining ditches, increased use or maintenance of pipelines, tighter scheduling of irrigation applications to meet actual crop consumptive irrigation requirements, and the use of sprinkler application rather than flood irrigation. In the domestic or municipal water context, conservation measures may include water conservation education programs or restricting lawn watering to specific days or times of the day. Experience has demonstrated that these kinds of conservation methods can significantly reduce instantaneous and annual water demand, although per unit pricing of water surely remains the primary means to induce conservation.

Some conservation measures involve substantial capital investments to minimize seepage, evaporation or flow-through of waste water. Idaho law and policy already mandate that the right to use the waters of the state does not include the right to waste it. However, for water users who already employ reasonable diversion and application methods, such laws and policies likely are less important in their decision to employ water conserving methods than the simple need to reduce labor and maintenance costs, or to improve product quality and profit margins.

In recent years, water conservation has become a significant theme in the debate on water policy. Seeing enormous "waste" in water use, many policy makers have seized upon the idea that the gains achieved recently in energy conservation—such as improvements in electrical appliances, gas mileage, and insulation—should set the pattern for water conservation.

"Shouldn't we encourage water users to become more efficient?" the thinking goes. More specifically, the suggestion is made that water right holders who adopt conservation measures should be entitled to retain the benefits of that conservation. That is, they should be allowed to use the "conserved" water for a new use, or sell it to someone else.

Other Western states, such as California and Oregon, have adopted precisely this approach, with statutes that expressly allow conserved water to be sold, leased, transferred or exchanged.[527]

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[526] We use the term "conserved water" to describe water saved as a result of efficiency improvements or other changes made in the delivery or application of a water right. The term can also be used to describe efforts to reduce consumer demand in the context of municipal water rights.

"New" water can also be created through modifications of natural conditions aimed at reducing system losses to evaporation and the like. These rights are often referred to as "developed" water, or sometimes, "salvaged" water. Although there are some parallels between conserved water and developed water, judicial treatment of the two often differs.

[527] Cal. Water Code § 1011(b); Or. Rev. Stat. §§ 537.455 to 537.500 and 540.510 (allowing a water right holder to retain up to 75 percent of conserved water, with the balance going to the State to maintain return flows).

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Unfortunately, these state statutes fail to distinguish carefully between true conservation and recapture of return flows. Thus they overlook the most difficult issue: increases in consumptive use causing injury to others. As a result, they have proven largely ineffective in their policy goal. The discussion in the prior section outlines the law governing the use of conserved water. In addition to those theoretical problems, practical problems are encountered by those seeking to apply or market such water.

A few states–Oregon comes to mind–have been quite direct about the issue. The Oregon Legislature has created a system aimed at encouraging water conservation through more efficient water uses.[528] Under this Oregon statute, if changes are made which "save" surface water through greater efficiency, the bulk of the "conserved" water is retained by the owner of the water right, while a fraction (25 percent) is automatically committed to instream flows.

Even in places like Oregon, which actively encourage conserved water projects, there have been relatively few successful examples of conserved water to date. One reason is it is hard to find cases where the expanded use made possible by the improved efficiency will not injure some other water users. In other words, water conservation often involves robbing Peter to pay Paul.[529] In this way, water conservation is much more complicated than, say, energy conservation.

B. The practical problem of finding conserved water

Water is used over and over by a series of people. A change in use by one user is likely to affect everyone else downstream. An example may help to illustrate the point.

Consider the hypothetical situation above involving two rather inefficient irrigators. Suppose that Farmer Hanson and Farmer Rodriguez each own water rights to divert 10 cfs of water, and that each farm consumed only 3 cfs while returning 7 cfs to the stream through leaky ditches and so on. (The relative priorities of the farms are not relevant here.) Regardless of priority, neither farmer may make any change which injures the other.

As a result of these diversions, what would have been a natural flow of 13 cfs, is reduced to 3 cfs between points A and B, 10 cfs between points B and C, zero between points C and D, and 7 cfs downstream of D. Thus, the stream is "fully appropriated" in the sense that no new consumptive user can divert upstream of either farmer.

Now suppose that for one reason or another (for instance, a federal subsidy, a regulatory requirement, or a mitigation banking effort), Farmer Hanson decides to undertake an extensive irrigation efficiency improvement project. Let us suppose that by lining his ditches, converting to drip irrigation, or what have you, Farmer Hanson is able to significantly improve his efficiency and cut his diversions in half. Thus, after the efficiency improvements, Farmer Hanson only needs to divert 5 cfs

[528] Or. Rev. Stat. § 540.510.

[529] An efficiency improvement saves a watt of energy, a watt of energy has been saved, and one less needs to be created. Water, in contrast, is used and reused by many people.

to grow the same crop while consumptive use stays at 3 cfs. This would leave 8 cfs in the stretch between points A and B (compared to 3 cfs before the improvements).

Moving downstream, however, the water savings vanish. As Farmer Hanson reduced his diversion by 5 cfs, his return flow also was reduced by 5 cfs (from 7 to 2 cfs). Downstream of his return flow (between points B and C), the flow remains at 10 cfs, the same as it was before the costly efficiency measures were installed. And Farmer Rodriguez continues to divert all of it onto his crops.

Presumably, most efficiency improvements are worthwhile to the water right holder, who will be able to reduce labor or maintenance expenses or increase yields. However, whether the efficiency improvements are worthwhile in changing conditions instream depends upon whether the object was to improve flows within the depleted stretch upstream of the return flow (between points A and B) or downstream of the return flow. For instance, if an endangered snail lived between points A and B, the efficiency improvements could be of significant value in improving that habitat. If, on the other hand, the object of the improvements was to provide more water to flush endangered salmon through reservoirs somewhere far downstream of point B, the efficiency improvements may not have increased the total volume of downstream flow.

This example, of course, is highly simplified. It assumes (1) instantaneous return flows, (2) discrete, non-overlapping return flow points, (3) no conjunctive use of ground water, (4) no change in consumptive use, (5) no storage of water, (6) no inter-basin transfers, (7) no water quality effects, and (8) no cumulative effects. Changing any of these assumptions might change entirely the outcome of the analysis.

First, in the real world, return flow is not instantaneous. The component of return flow that returns water to a river at the end of the irrigation system is close to instantaneous, but the component which returns via ground water may involve considerable delays. To the extent that return flows are delayed, water conservation measures may result in temporary net inputs to the river until a new equilibrium is reached. This would occur as diversions are reduced, but recharge (from old diversions) continues for a period at the same rate. While the bonus is temporary, it might nevertheless be a critical component of a species recovery program.

Second, water which returns to the stream via the ground water return usually does not come in at a particular point and may not return for long distances. Consequently, the area of improved flow resulting from efficiency improvements may be both less discrete and much larger than in the example above. Thus, flows may be improved not just down to the next farm, but for hundreds of miles.

Third, the example above does not include a ground water component. A more realistic example may be that Farmer Hanson's excessive diversion is not only returning to the stream to be used by downstream diverters, but is recharging a large aquifer which also is supplying down-gradient ground water pumpers. If Farmer Hanson then implements irrigation improvements which reduce his diversions, there will be more water in the river and less water for the ground water pumpers.

Assuming the ground water pumpers cannot prevent Farmer Hanson from reducing his diversion,[530] they are the loser, and the river is the winner.

Fourth, the example in the figure above assumes no change in consumptive use. That is probably a fair assumption in most cases. Lining a ditch, for example, has little impact on evaporative loss and does not change the quantity of water lost to evapotranspiration. On the other hand, some conservation measures may change consumptive use. Where that happens, "real" savings are realized. For instance, if water is lost from a leaky ditch to a contaminated aquifer whose waters cannot be used, lining the ditch puts "new" water back into the system. Switching from sprinkler to drip irrigation will reduce evaporation. And, of course, switching crops may produce huge changes in consumptive use.

Fifth, while the example above produced no change in the total *volume* of water below point B, the timing of flows may have changed due to a variety of real-world factors. In a particular situation, it may be that flows could be "shaped" to improve habitat or advance other goals. This ability to shape flows may be enhanced if the water not diverted may be put into storage (or may be left in storage).

Sixth, if the water savings occur on a trans-basin diversion (or involve crossing other hydrologic or legal barriers, such as state lines), the results may be substantially different from the example above. For instance, if Denver diverts water on the Western slope of the Rockies but provides return flows to the Platte River system on the other side of the Continental Divide, municipal water conservation (if it actually leads to reduced diversions) would increase flows on the Western Slope while reducing flows in the Platte.

Seventh, even if water quantity is not increased below Farmer Hanson's return point, water quality may be improved. For instance, the addition of flow may improve the stream's capacity to assimilate discharges within the reach.

Eighth, the example above focuses on conservation measures adopted only by a single farmer. Perhaps a more meaningful scenario would involve water conservation adopted throughout a basin. If that were the case, the incremental savings between points A and B could be replicated over a larger area.

In short, while water conservation is an important goal, it is not as simple as screwing in a lower wattage bulb. A gallon saved is not necessarily a gallon earned. Whether habitat is improved as a result of efficiency improvements is highly situation specific, a fact sometimes not fully appreciated by advocates for efficiency improvements. By better understanding the dynamics of water conservation and water reuse, we can better target investments in conservation to ensure the biggest return for increasingly scarce dollars.

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[530] This is probably the correct result. While ground water users are entitled in Idaho (and most Western states) to complain of injury just as is a downstream diverter, it is unlikely that a court would consider Farmer Hanson's efficiency improvements to constitute a "change" in use, because he has not changed his point of diversion, place of use, or time of use. It must be said, however, that this is merely a prediction of a legal outcome. The authors are not aware of this situation having been tested in the courts.

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C. Idaho's 2003 Water Conservation Statute

The costs of employing conservation measures, and the potential that they will allow more water to be available for actual beneficial use, raises the question of who is entitled to make use of the conserved water, and for what purposes. In Idaho, the law appears to be that the original appropriator may use the "additional" water for the original beneficial use, provided the water has not yet left his control, and provided the use does not result in an expansion of the original use. These, however, are significant conditions.

One of the early Idaho cases to consider the question is *Reno v. Richards*.[531] In *Reno*, the appropriator had removed brush and logs from the stream, and excavated channels through gravel bars in the streambed. In doing so, the appropriator increased the amount of water flowing through the channel and available for diversion. The Idaho Supreme Court held that:

> A person who, by removing obstructions from a stream and constructing artificial works, prevents the loss of water flowing therein through seepage and evaporation, and materially augments the amount of water available from the stream for a beneficial use, has the right to make use of the amount of water so conserved by his efforts in excess of the natural flow of the stream.[532]

Actually, the *Reno* case is more accurately treated as an "augmented supply" case rather than as one involving the right to conserved water. In *Reno*, the facts show that the actual supply of water at the source was increased by the appropriator's efforts.[533] In contrast, "conserved water" might best be defined as that water which results from making better use of the water once it has been diverted.

In 2003, the Legislature enacted a measure expressly exempting conserved water from forfeiture.[534] Thus, a water right user, having managed to "conserve" a fraction of her water right through the institution of conservation measures, is assured that the conserved portion will not be forfeited. Thus, the user retains the option of reverting to the pre-conservation practice. This merely

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[531] *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918).

[532] 32 Idaho at 1, 178 P. at 82-83.

[533] *See also Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085 (1922) (party who augments streamflow by 10 percent by constructing pipeline should be decreed prior right to the quantity saved). Compare the cases of *Southeastern Colorado Water Conservation Dist. v. Shelton Farms, Inc.,* 529 P.2d 1321 (1975), and *R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6*, 690 P.2d 823 (Colo. 1984), in which the Colorado Supreme Court held that there is no right to appropriate water made available by removing water consuming vegetation along a stream. The rationale in the Colorado cases is that such water already is a part of the stream, and when it becomes available, belongs to appropriators from the stream in the order of their priority. These Colorado cases also focus on the potential for severe environmental effects that would result from a policy that encouraged destruction of riparian vegetation to salvage additional water from the stream.

[534] H.B. 1100 (2003) (codified at Idaho Code §§ 42-223(9), 42-250).

confirms what is already departmental policy. (See discussion of partial forfeiture in section 6.G at page 71.)

The Act provides a new definition of conservation practice:

> For purposes of this section, "water conservation practice" means any practice, improvement, project or management program, that results in the diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) authorized by the water right. Water conservation practices include, but are not limited to, practices that result in reductions in consumptive use as defined in section 42-202B, Idaho Code, reductions in conveyance losses, and reductions in surface and seepage losses occurring at the place of use.[535]

Consumptive use, in turn, is defined as follows:

> "Consumptive use" means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right.

Idaho Code § 42-202B(1).

Thus, under the 2003 Act, conserved water may be created and protected from forfeiture through practices such as ditch lining. As noted above, however, ditch lining and similar practices often result in a material reduction in return flows to other users—or, more likely, they alter the location and timing of return flows. Thus, presumably, no such conserved water may be transferred to a new use, because doing so would result in injury.[536] Thus, the practical applicability of the legislation appears to be quite limited.

Although there are no Idaho cases directly addressing the right to conserved water, Idaho cases dealing with the right to recapture and use waste water or seepage (discussed below) are instructive.

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[535] Idaho Code § 42-250(2).

[536] The act only addresses forfeiture. It does not change the rules governing transfer of the "conserved" portion for transfer to a new use. Such transfers would remain subject to basic no-injury principles. Thus, for instance, a user who lined a leaking canal could not sell the "conserved" portion of the right, if other users had formerly relied on return flows from the leaking canal.

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19. RECAPTURE AND REUSE, AND THE APPROPRIATION OF WASTE WATER

A. Overview

Few water uses consume one hundred percent of the water they divert. For example, a surface water irrigator typically diverts considerably more water than is applied to the crops. What is left over goes by various names such as waste water, return flow, tail water, seepage water, and drain water—whose definitions are sometimes vague and overlapping.

We use the terms "waste water"[537] and "return flow" interchangeably to describe, collectively, tail water accruing at the end of an irrigated field, the seepage water that leaks out of canals or reservoirs, the excess water applied to crops that percolates into the soil, and effluent or sewage generated or collected by an industrial user, a municipality, or a sewer district.[538]

This section explores the rights of the original appropriator to recapture his or her own waste water and the rights of third parties to obtain an appropriation of waste water released by another. This section also addresses the rights of municipal entities and industrial users to retain and use effluent (aka "wastewater") from their municipal treatment facilities or industrial operations. It also addresses the rights of a municipal provider to contract with another entity for reuse of wastewater. Finally, it addresses broader questions of land application of wastewater, with and without a water right.

B. Right of the original diverter to recapture waste water for use on the original place of use

It is a basic premise of the Prior Appropriation Doctrine that water diverted and not used be returned to its source.[539]

> It is elementary that the waters of the public streams of this state belong to the people, and that appropriators acquire only a right of use. It is also settled law that an appropriator is limited in his use of water to his actual needs. He must not waste it, and if there is a surplus remaining after use, it must be returned to the stream whence it came.

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[537] Note that wastewater—typically written without a space—refers to effluent from industrial uses or municipal treatment plants. In the irrigation context, waste water—typically written with a space—has a somewhat different meaning; it refers to any water left over after the initial irrigation. This also is sometimes referred to as "tailwater."

[538] In *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.) (emphasis omitted), the Idaho Supreme Court (quoting the SRBA Court) defined waste water as: "(1) water purposely discharged from the project works because of operation of necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it."

[539] A good overview of the entire subject of water rights in waste water and reuse is James W. Johnson, et al., *Reuse of Water: Policy Conflicts and New Directions*, 38 Rocky Mtn. Min. L. Inst. § 23 (1992).

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Water Supply and Storage Co. v. Curtis, 733 P.2d 680 (Colo. 1987) (quoting *Pulaski Irr. Dist. v. City of Trinidad*, 203 P. 681 (Colo. 1922).

This principle is counterbalanced with the equally important principle that an appropriator may recapture and reuse water previously diverted so long as the reuse occurs within the geographic and other limitations of the original water right. This is not so much an exception to the obligation to return water to the common source as it is a clarification of what is "unused." Simply put, the water that is lawfully recaptured and used within scope of the original water right is not "unused" water that must be returned to the common supply.

The right to recapture has long been recognized Idaho law. "It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing to put it to beneficial use." *Reynolds Irr. Dist. v. Sproat* ("*Reynolds II*"), 70 Idaho 217, 222, 214 P.2d 880, 883 (1950) (Taylor, J).[540] This is true even if the recapture and reuse comes years after the initial water right was established. And, most importantly, it is true even if the change reduces the water available to other water users downstream.[541] It is generally recognized that the recapture must occur before the appropriator relinquishes control (i.e., before the water reaches natural water bodies where it becomes available for appropriation by others).

For example, a farmer may capture tail water running off the low end of a field and pump it back to a portion of that field which, due to topography or other factors, was chronically under-irrigated. Since the right of recapture is considered part of the original water right, it would be allowed under the priority date of the original diversion—provided the recaptured waste water is put to beneficial use on the original parcel (for example to water an area that previously was under-irrigated). Others who may have come to rely on the waste water may not insist that the original appropriator maintain the artificial conditions from which they have benefited.

This is not to say that all seepage and waste water literally "belongs" to the original appropriator in the sense that they may do with it as they like. In fact this right to recapture and reuse is quite limited, particularly in the irrigation context. As discussed below, however, the situation is considerably more flexible tor municipal providers.

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[540] *See also Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980); *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (third parties may appropriate waste water, subject to the original appropriator's right, in good faith, to cease wasting it and put it to a beneficial use); and *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.). None of these cases addresses the question whether one may reduce waste, then transfer the surplus to some new use. Later opinions make clear that an appropriator may not do this. *See, e.g., Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J).

[541] One principle governing waste water is that an irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

Notably, the right to recapture and reuse waste water does not override other principles of water law, such as the rule against enlargement. In *United States v. Haga*, 276 F. 41 (Dist. Idaho 1921), the federal court suggested that the beneficial use of the conserved waste or seepage must occur within the same lands for which the water originally was appropriated.[542] This limitation—that recaptured waste or seepage water may be used only on the original lands—reinforces Idaho's anti-enlargement policy. Allowing a water user to make more complete use of water under his or her water right within the licensed or decreed place of use, and for the licensed or decreed purpose, promotes efficiency and the full beneficial use of water under the right; doing so logically has been seen by Idaho courts as fully within the original right. Obviously, however, the limitation to the original land and purpose of use sharply constrains the right to recapture and reuse. Notably, the farmer is not free to use that recaptured water to bring new lands under cultivation.

This rule against enlargement was articulated again by the Idaho Supreme Court in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J). It was reinforced a few years later in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.). In the 2005 opinion, the Court ruled that "A&B may use the [reclaimed waste] water on its original appropriated lots." *A&B*, 141 Idaho at 752, 118 P.3d at 84.[543] But it may not rely "on an unappropriated source, that of recaptured drain and/or waste water to irrigate its additional acres." *Id*. The *A&B* Court not only emphasized this point, but went beyond it to state that an excess of waste water obligates the appropriator to diminish its diversion to reduce the waste:

> As the Ground Water Users and the State appropriately note, should A&B find itself in the unique situation of having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion. Reclamation Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388, 390.

[542] The court referred only to the beneficial uses on the "project" lands, which in that case included a federal irrigation project in the Boise River Basin.

[543] The central dispute in the *A&B* case concerned 2,363 acres the irrigation district was irrigating but which were in excess of the water right's licensed acreage. The district explained that the acres were irrigated with waste water originating from both the district's ground water delivery system and natural runoff, and argued that it should be allowed to do this because it "owned" the waste water. The plaintiffs, who were junior ground water users, asserted that these additional acres were illegal enlargements and that a water right to irrigate them could be recognized, if at all, only under Idaho's amnesty statute, Idaho Code § 42-1426, in which case the right would have to take a subordinated priority tied to the 1994 date the statute was passed. This had been the essential ruling in *Fremont-Madison*. Indeed, the amnesty statute itself explains the Legislature's recognition that enlargements arose "through water conservation and other means" that allow more acres to be irrigated with the same diversion. Reducing or recapturing waste water is a classic example of water conservation.

A&B, 141 Idaho at 752, 118 P.3d at 84. [544]

Thus, if recapture and onsite reuse proves so effective that less water is required to accomplish the licensed or decreed beneficial use, the user may be required to reduce his or her diversion accordingly. However, as discussed below, the user typically retains the right to cease the recapture and revert to the prior regime.

The *A&B* Court took an exacting approach in its discussion of recaptured drain or seepage water which again emphasizes that this water cannot serve new lands without a new water right. The irrigation district had contended that the "source" of water to irrigate the extra acres is waste water, and not ground water under the district's original water right (even though the waste water originated primarily from the ground water supply). Although the Idaho Supreme Court ultimately rejected this and agreed with the district court that the source was the district's original ground water source, it did entertain the question of what would happen had it viewed the source as simply "waste water" not originating from the district's licensed diversion. It found that, if that were the case, the water user would be required to obtain a new water right by appropriation of the waste water:

> A&B's additional 2,363.1 acres neither qualifies as an enlargement or for amnesty under I.C. § 42-1426 based upon a finding that the water source is recaptured drain and/or waste water. A&B is not seeking to expand the number of acres it irrigates with original ground water under right no. 36-02080. Rather, it relies on an unappropriated source, that of recaptured drain and/or waste water to irrigate its additional acres. This is in violation of the mandatory water permit requirements. Idaho Code § 42-229 (2003). Treating the water as something other than ground water, A&B must seek a new water right for this water source prior to any further use on the 2,363.1 acres.

A&B, 141 Idaho at 751-52, 118 P.3d at 83-84.

In a footnote, the Court held that the waste water did not qualify as "private water" and therefore "appropriation under the mandatory permit scheme is the only method by which this water can now be put to beneficial use." *A&B*, 141 Idaho at 752 n.1, 118 P.3d at 84 n.1. Ultimately, the Court found that the district's source was water diverted under its original ground water right (although recaptured on the surface as seepage or waste), and that the irrigation district therefore did qualify for the amnesty. Accordingly, the district was able to continue irrigating the enlarged acres, but was required to accept the subordination condition on the new water right for them.

Provisions of Idaho's water code other than the amnesty provision discussed above also are consistent with the non-enlargement principle when it comes to an appropriator's collection and use of

[544] The reference to the Reclamation Act, presumably, is intended to embrace Congress' recognition that beneficial use of water is "the basis, the measure and the limit" of a water right. See discussion in section 4.D at page 39.

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waste water arising from his irrigation practices. An Idaho statute authorizes the construction of wells by a person owning irrigation works "for the sole purpose of recovering ground water resulting from irrigation under such irrigation works for further use . . . on lands to which the established water rights of the parties constructing the wells are appurtenant." Idaho Code § 42-228.[545] In other words, this statutory pronouncement on the recapture of waste or seepage water expressly restricts the use of the recaptured water to the original place of use—that is, enlargements are not allowed. Likewise, Idaho's transfer statute expressly prohibits enlargements as a result of any transfer. Idaho Code § 42-222(1).

In summary, although the earlier cases authorizing an appropriator's recapture and reuse of waste water[546] did not expressly address the enlargement issue, it now has been addressed, and in clear terms. If additional lands or other uses are to be added to a water right through the recapture of waste water, a new water right will be necessary.

The author of this section offers this additional commentary. It would seem that the *A&B* decision was unnecessarily preoccupied with an obscure semantical question about the "source" of the water—distinguishing ground water from waste water. The decision got to the right place in the end, essentially saying that it does not matter what you call it. The author suggests that the Court's holding may be articulated as follows:

The original appropriator may recapture and reuse its own waste water (derived from its own water right, recaptured before it reaches the public water supply) if and only if he or she applies the recaptured waste water to lands or uses within the scope of the original right. If someone else (a third party) wishes to capture and use that same waste water after it reaches the public water supply (e.g., in a drain that the third party may legally access), he or she must appropriate that waste water. If the original appropriator wishes to recapture and reuse the same waste water for use outside the ambit of the original right (i.e., on expanded acreage), he or she has two choices: (1) obtain a new, junior appropriation for the new acres or (2) fit under the amnesty statute, if one can, and accept subordination to April 12, 1994 under the amnesty statute (Idaho Code § 42-1426). In A&B's case, the district ended up with the second option.

C. There is no right to compel another appropriator to continue discharging waste water.

There are instances in which a third person may make a new appropriation of waste water generated by another or even by the same user.[547] However, waste water loses its characterization as

[545]This statute allows shallow ground water wells to recapture seepage originating from the surface irrigation of a parcel, roughly equivalent to a seepage ditch at the end of a field from which the farmer pumps water back to fully irrigate the parcel.

[546] E.g., *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927); *Application of Boyer,* 73 Idaho 152, 248 P.2d 540 (1952) (Givens, C.J.); *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

[547] In *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) (Varian, J.), the Court confirmed the basic right to appropriate waste and seepage water made available as a by-product of the diversions of other appropriators.

such when released back to the public water supply. Thereafter, it is subject to appropriation (and available to satisfy prior appropriations) just like any other public water.

In either case, an important caveat is that the appropriator (whether of waste water or of water whose supply is enhanced by waste water) has no guarantee that the waste water will continue to be available. An irrigator "is not bound to maintain conditions giving rise to the waste of water from any particular part of its system for the benefit of individuals who may have been making use of the waste." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 100 (1968).

For instance, the original appropriator who generates the waste water could cease diverting altogether so as to leave the new appropriator without a water source. Likewise, the original appropriator might alter his or her operation to reduce the amount of waste water generated (e.g., by ditch lining). Finally, as noted, the original appropriator may recapture the waste water for use within the scope of his or her water right.

Indeed, in *Sebern*, the waste water appropriator was allowed to re-establish his diversion of waste water after a waste ditch was relocated by another appropriator. The Court added the now-familiar caveat, however, that the waste water appropriation is "subject to the right of the owner [that is, the person generating the waste water] to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418, 258 P. at 178. This is significant given that in a change or transfer application, the prior appropriator is <u>not</u> allowed to make any change (even in good faith) that would injure a junior.

In 1956, the Idaho Supreme Court held that a neighbor could not obtain a waste water appropriation that essentially compelled the original appropriator to continue to discharge waste water:

> It is a rule long recognized that a landowner cannot acquire a prescriptive right to the continued flow of waste or seepage water from the land of another, that is, seepage water or waste water running from one's land to that of another need not be continued and it may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant.

Thompson v. Bingham, 78 Idaho 305, 308, 302 P.2d 948, 949 (1956) (Keeton, J.) (citing cases in Utah and Colorado) ().

In *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980), the Idaho Supreme Court unanimously reaffirmed the principle that an appropriator of waste water may not compel the original diverter to continue the practices leading to the generation of the waste water.

"We conclude that surface waste and seepage water may be appropriated under the provisions of C. S. § 5562, subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use." *Sebern*, 44 Idaho at 418, 258 P. at 178. (Prior to this decision, there was some thought that appropriations might be limited to water naturally occurring.) See also, *A&B*, 141 Idaho at 752, 118 P.3d at 84 (an appropriation of "recaptured drain and/or waste water" requires compliance with the mandatory permitting requirements).

> No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former. *Crawford v. Inglin*, 44 Idaho 663, 258 P. 541 (1927). While the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water.

Hidden Springs, 101 Idaho at 681, 619 P.2d at 1134. The *Hidden Springs* Court emphasized that it makes no difference whether the waste water arises before the use (from a leaky canal) or after the use (from post-irrigation tail water, for example). The original appropriator may at any time cease the practice giving rise to the waste water, even to the detriment of those who hold valid water rights in that waste water (subject, of course, to the limitations as to non-enlargement and beneficial use as described in *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 752, 118 P.3d 78, 84 (2005) (Schroeder, C.J.)).

Thus, the original appropriator is free to abandon or modify the activity producing the waste water. For example, an irrigator is free to replace a leaky ditch with a pipeline or otherwise improve the efficiency of his or her application. After the improvement is made, less water is applied to the field and/or less water escapes along the conveyance. As a result, the neighboring hydrology may be affected and water available to serve other water rights could be reduced. Holders of those rights, however, have no legal basis to object to such efficiency improvements by their neighbors.

These legal principles pertaining to waste water have been followed in the Snake River Basin Adjudication ("SRBA"). Special Master Terry Dolan reiterated these principles in *Special Master's Report*, *In re SRBA,* Case No. 39576, Subcases 75-4471 and 75-10475 (Silver Creek Ranch Trust) at 4 and 6-7 (September 28, 2009). Similarly, in *In re: Janicek Properties, LLC, Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA*, District Court of the Fifth Jud. Dist. of the State of Idaho, Subcase No. 63-27475 (May 2, 2008), the Bureau of Reclamation and its contracting irrigation district argued that they constructed a drain and could trace most or even all of the water in it to seepage and return flows from the district's irrigated lands. They contended that the drain was not a natural watercourse and that they should be deemed the owner of the drain and the water in it. Based on this reasoning, they asked the adjudication court to invalidate a farmer's 1951-priority licensed water right pursuant to which he pumped water from the drain to irrigate his crops. The Special Master rejected this challenge to the farmer's drain water right, ruling that, regardless of who constructs a drain, the water in it is "public water of the state of Idaho and subject to appropriation and beneficial use." *Janicek Properties*, slip op. at 6. The SRBA Court found that whether the drain is a natural watercourse "is immaterial—what matters is that the water is water of the state" and is subject to appropriation. *Id.* at 8.

Once water is released by the original appropriator and is beyond his or her control (whether that be to an artificial conveyance such as a drain or to a natural stream or aquifer), it becomes public water once again and subject to appropriation. Referring to such a source as "waste water" undoubtedly has led to some confusion over the years. Other than the caveat discussed above (that the new appropriator cannot complain if the waste water is no longer supplied), there is little to be gained in attempting to distinguish it from water occurring naturally. Even a constructed drain at times will carry natural runoff. Similarly, natural stream flows in agricultural areas nearly always contain some measure of

return flow and seepage, either those flowing to the stream as surface returns or those arriving through ground water discharge. The essential rule is simply that public waters are subject to appropriation regardless of their origin or whether they are found in drains or similar structures.

D. Reuse of municipal effluent.

The principles of recapture and reuse that were developed in the context of irrigation apply as well in the context of municipal wastewater. In short, a city may recapture and reuse effluent from its sewage treatment plant before it is released to a public water body. Likewise, irrigators or others who had come to rely on the prior discharge of that wastewater cannot complain when the city recaptures and reuses it.

Although the same general principles apply, there are important practical differences when it comes to municipal wastewater. Under Idaho law, municipal water rights are different from others in two important respects.

First, they do not have a fixed place of use. Instead, a municipal service area grows over time as does demand. Idaho Code § 42-202B(9). (See discussion in section 23.D(5) at page 346.) This moots the constraint applicable to irrigators and industrial users limiting the reuse to the original place of use (at least, without a transfer or a new appropriation). "This rule [limiting reuse to the original irrigated land] was changed for municipalities, without an adjustment period for those who had relied on the return flow, when the courts allowed municipalities to start consuming their sewage effluent through disposal methods that no longer sent it back to the stream as return flow." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

Second, municipal use encompasses a broad range of uses from low consumptive domestic uses to high consumptive uses by industries served by the municipal provider. This mix may change over time. Accordingly, the Department deems municipal water rights to be potentially 100 percent consumptive.[548] As a result, cities may recapture wastewater and reuse it for other municipal uses (such as watering parks, golf courses, or lawns) and such use is not deemed to be an enlargement.

While Idaho courts have not yet had occasion to address the issue, other state courts have consistently upheld the right of municipal providers to recapture and reuse municipal effluent and even, in some cases, to sell it to others.[549] The only limitation seems to be that the recapture occur before the

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[548] *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) p. 31 (revised Dec. 21, 2009) (reproduced in Appendix L). This section of IDWR's guidance addresses the disposal of dairy, industrial, and municipal wastewater. It notes that "the use of water [for such purposes] is considered fully consumptive."

[549] In addition, at least five states have adopted statutes regulating, facilitating, and encouraging the reuse of municipal effluent. Or. Rev. Stat. §§ 537.131, 537.132, 540.510; Cal. Water Code §§ 13551-13556; Nev. Rev. Stat. Ann. § 533.024; Wash. Rev. Code §§ 90.44.062 to 140; Utah Code Ann. §§ 73-3c-1 to 73-3c-8.

water reaches a public water body.[550] These principles have been confirmed in informal guidance from the Idaho Department of Water Resources.[551]

A city's right to recapture and reuse municipal effluent was recognized in *Reynolds v. City of Roswell*, 654 P.2d 537 (N.M. 1982). This case dealt with a water system on the former Walker Air Force Base, all of which had been acquired by the city. The city filed an application to add additional points of diversion and change the place of use, the effect of which would be to integrate the original air force water right into the city's municipal system. Prior to the application, the city (and the Air Force before that) sold some of the sewage effluent associated with the air base to farmers and to a golf course and discharged the rest into the Hondo River. The State Engineer approved the change application but added a condition requiring the city to continue to discharge into the river at the same ratio as under prior practice. "The State Engineer's conditions required that the city either continue selling treated effluent to the farmers east of the City and to the Roswell Country Club or to continue discharging treated effluent directly into the Hondo River." *City of Roswell*, 654 P.2d at 538. The city

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[550] Perhaps a city could engage in an aquifer storage and recovery project employing treated effluent. Doing so would require affirmative steps to measure and control the stored water, as well as the acquisition of corresponding water rights and/or approval of a mitigation plan. See discussion in section 22.C at page 320.

[551] "You confirmed my understanding that a city may recapture and reuse its municipal effluent and apply it to other municipal uses within its growing service area, and that doing so does not cause legal injury to other water uses. You also confirmed that, if required to meet environmental regulations, treatment utilizing an infiltration basin would be viewed as being within the existing municipal use. You also confirmed that the uses could be modified over time. For example, as conditions change and demand grows, the City could put less water into treatment of effluent by infiltration and use some or all of the effluent to serve new customers (e.g., for lawn or open space irrigation). Finally, you confirmed that these uses would not require a transfer—assuming that the reuse of the effluent was required in order to satisfy environmental requirements." Letter from Christopher H. Meyer to Garrick L. Baxter and Jeff Peppersack (May 24, 2011) and response from Garrick L. Baxter (May 26, 2011) (edits from reply are reflected in quotation).

"This responds to your letter of August 18, 2011 requesting confirmation that the City of McCall ("City") has authority to land apply its municipal effluent to lands located beyond the city limits but within the City's service area. I have reviewed your letter with the staff of the Idaho Department of Water Resources ("IDWR") and am able to confirm that on the issue of whether municipal reuse of waste water comes within the original use of the municipal right, your analysis is consistent with current IDWR policy. Waste water treatment necessary to meet adopted state water quality quality requirements is considered by IDWR as part of the use authorized under a municipal right so long as the treatment process complies with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction. For new uses of municipal wastewater that are not necessary to meet water quality requirements, an application for permit to appropriate water should be files as required by Idaho Code § 42-202." Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 7, 2011). The September 7, 2011 letter went on to say that, under the 1996 Municipal Water Rights Act, the land application could occur outside the boundaries of the city so long as "the constructed water delivery system for the area outside the city limits shares a common water distribution system with lands located within the corporate limits." The city limits issue, however, is mooted by S.B. 608 (Idaho Code § 42-201(8)) enacted in 2012.

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challenged the condition, contending that it should be allowed to recapture and reuse the effluent in its municipal system if and when it saw fit. The Wyoming Supreme Court sided with the city. It affirmed the district court's ruling that "[t]he City of Roswell's sewage effluent is private water which the City may use or dispose of as it wishes." *City of Roswell*, 654 P.2d at 538.

The court limited its ruling, however, noting that the recapture must occur before the city loses control of the effluent:

> The City readily acknowledges, and we agree, that once the effluent actually reaches a water course or underground reservoir [i.e., an aquifer], the City has lost control over the water and cannot recapture it. That is what the courts state in the cases relied upon by the State Engineer. *See Brantley v. Carlsbad Irr. Dist.*, 92 N.M. 280, 587 P.2d 427 (1978); *Kelley v. Carlsbad Irrigation District*, 76 N.M. 466, 415 P.2d 849 (1966); *State v. King*, 63 N.M. 425, 321 P.2d 200 (1958); *Rio Grande Reservoir and Ditch Co. v. Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 P. 129 (1920).
>
> We stress that the specific legal issues on appeal in this case do not concern the recapture of water which has escaped into and have become commingled with the natural public waters, whether surface or underground. The issue here is whether Roswell may take the sewage effluent before it is discharged as waste or drainage water and reuse it for municipal purposes.

Reynolds, 654 P.2d at 540-41.

In reaching its decision, the *Reynolds* Court quoted at length from a 1925 decision by the Wyoming Supreme Court directly addressing the right of a city to reuse its wastewater to extinction:

> It is not strange that we are unable to find any cases considering the right of a city to dispose of its unpurified sewage for irrigation purposes. Most of the controversies with respect to sewage that have gotten into the courts concern the rights of those who claim that in disposing of its sewage the city is guilty of maintaining a nuisance. In this case both the plaintiff and defendant are satisfied, for the present at least, and in fact insist, that the city discharge its sewage in such a way and at such place as will permit them to use it. It is well known that the disposition of sewage is one of the important problems that embarrass municipalities. In order to dispose of it without injury to others, a city may often be confronted with the necessity of choosing between several different plans, and in the selection of the plan to be followed we think it should be permitted to exercise a wide discretion. In determining how it will make a proper disposition of that which may be termed a potential nuisance, we think the city should not be hampered by a rule that would always require the sewage to be treated as waste or surplus

> waters. Sewage is something which the city has on its hands, and which must be disposed of in such a way that it will not cause damage to others. It would often be considered the height of efficiency if it could be disposed of in some other manner than by discharging it into a stream. Even in this state, where the conservation of water for irrigation is so important, we would not care to hold that in disposing of sewage the city could not adopt some means that would completely consume it.

Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764, 772 (Wyo. 1925) (emphasis added). This 1925 decision continues to be cited and quoted for its bedrock principles.

In *Wyoming Hereford*, the City of Cheyenne contracted with a packing company for the disposal of the city's sewage effluent, which had previously been discharged into a creek. Under the contract it was delivered to the packing company "in such a way and at such place as will permit [the packing company] to use it." *Wyoming Hereford*, 236 P. at 772. The court ruled that whether this was permissible depended on whether the sewage effluent was delivered directly to the new use or via a public stream. There were two sewage lines in this case. Under the contract, one of them (the sanitary sewer east of Lake Minnehaha) delivered water straight to a ditch on land owned by the packing company. The other (the sanitary truck line) discharged into Crow Creek where it flows across the lands of the packing company. The court upheld the city's right to recapture and convey to the packing company with respect to the first but not with respect to the second. Once the water "becomes commingled with the waters of the stream" it is no longer the city's to recapture. *Wyoming Hereford*, 236 P. at 773. This limitation on the right to recapture is consistent with that in *Reynolds*, discussed above, and *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d (Texas Ct. App. 2004), discussed below. Where water is delivered straight to the new use, the court perceived no problem:

> It might, we think, be diverted to waste places, or to any chosen place where it would not become a nuisance, without any consideration of the demands of water users who might be benefited by its disposition in some other manner. In providing such a place, the city might acquire the right to discharge the sewage on the lands of any person willing to suffer such a use of his lands, and we see no reason why this right might not be gained by the city in consideration of the landowner's right to use or dispose of the sewage in any lawful way. From these views with reference to the city's rights, it follows that the sewage deposited from the so-called "sewer east of Lake Minnehaha" should not be considered as a part of the public waters of the state subject to the rights of the appropriators from Crow creek. It is our opinion, therefore, that the plaintiff, as an appropriator of waters of Crow creek, has no right to question the contract between the city and the defendant in so far as it provided for the discharge and use of sewage from the sewer line last mentioned.

Wyoming Hereford, 236 P. at 772-73.

This Wyoming case, in turn, was relied on by the Arizona Supreme Court in reaching a similar conclusion confirming the right to recapture municipal effluent in that state. *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989).[552] In the Arizona case, holders of junior downstream irrigation rights had come to rely on effluent discharged by Phoenix and other cities. They sued to stop the cities from selling that effluent to a utility that would use it for cooling water at a nuclear power plant. The Arizona Supreme Court upheld the cities' right to do so, holding that they could put their sewage effluent to any reasonable use that would allow them to maximize its use and its economic value. The Arizona Court of Appeals confirmed these principles in *Arizona Water Co. v. City of Bisbee*, 836 P.2d 389 (Ariz. Ct. App. 1991), a case involving a city's sale of effluent to Phelps Dodge for use in copper leaching operations.[553]

In *Barrack v. City of Lafayette*, 829 P.2d 424 (Colo. Ct. App. 1992), the Colorado Court of Appeals released the City of Lafayette from liability for no longer providing effluent water under a contract with plaintiffs when environmental regulations made that delivery illegal. In so ruling, the court ruled that plaintiffs' procedural due process was not violated because they had no property interest in the effluent.

In *City of San Marcos v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d (Texas Ct. App. 2004), the Texas Court of Appeals found that the City of San Marcos did not have the right to recapture its wastewater effluent in a river three miles downstream of the sewage treatment plant. The city sought to recapture the water, treat it, pipe it back to the city, and add it to its municipal supply. The purpose of leaving it in the river for so long was to allow the effluent to be diluted with cleaner river water, thus reducing the cost of treatment after recapture. In rejecting the plan, the court concluded that the character of the water changed once the city released it to the river, whereupon it became public water. "By intentionally discharging its effluent into the river, where it eventually commingles with the State's water, the City effectively abandons its control over the identifying characteristics of its property. This physical reality suggests that the City is voluntarily and intentionally abandoning its ownership rights over the effluent." *San Marcos*, 128 S.W.3d at 277. By clear implication, however, the city would have been allowed to recapture and reuse its wastewater if it had done so before returning it to the river. Indeed, as the court noted, that was exactly what the city's opponents said: "If

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[552] This important case is discussed in Ginette Chapman, Note, *From Toilet to Tap: The Growing Use of Reclaimed Water and the Legal System's Response*, 47 Ariz. L. Rev. 773 (2005), and 2 Robert E. Beck, *Waters and Water Rights* § 13.04 (2000).

[553] The *Arizona Public Service* Court rejected the reasoning found in an early Colorado "en decision in which two justices dissented and one did not participate." *Arizona Public Service*, 773 P.2d at 993. The case was *Pulaski Irrigation Co. v. City of Trinidad*, 203 P. 681 (Colo. 1922). *Pulaski* held that the City of Trinidad was required to return its purified waste water to the stream, unless the cost of purification was too high. "Thus, *Pulaski* appears to state that water may be reused or otherwise disposed of but only if it is uneconomical to return it to the common supply." James W. Johnson, et al., *Reuse of Water: Policy Conflicts and New Directions*, 38 Rocky Mtn. Min. L. Inst. § 23 (1992).

the City wants to reuse its wastewater, it should use it directly rather than unnecessarily mixing it with the pure river water." *San Marcos*, 128 S.W.3d at 267.[554]

In *City of Aurora v. N. Colorado Water Conservancy Dist.*, 236 P.3d 1222 (Colo. 2010), the Court examined a contract for reuse of wastewater between the Conservancy District and the City of Aurora. The Court focused on the contract details without questioning the right of a municipal water provider to enter into a contract authorizing the city to reuse water collected in the city's sewer system.

E. Land application of municipal or industrial wastewater

(1) IDEQ permit

Certain land applications of effluent require a permit from the Idaho Department of Environmental Quality, pursuant to the Department's Recycled Water Rules (formerly Wastewater—Land Application Rules) at IDAPA 58.01.17. A discussion of these permitting requirements is beyond the scope of this Handbook.

(2) Background

In recent years "land application" of waste water has become increasingly common. This refers to the disposal of wastewater from industrial processes or municipal sewage effluent by applying it to land to irrigate crops or grasses. Typically, the untreated waste water is applied directly to crops (with little or no pre-treatment), though it is often mixed with clean (or at least irrigation-quality) water to dilute it.[555] The basic goal is to use natural processes to eliminate pollutants in the waste water and, at least to a large degree, consume the water. At the risk of oversimplification, the pollutants in the industrial or municipal wastewater (such as phosphorus or other nutrients) are broken down and/or taken up by the plants and thereby kept out of soils and water. In some cases, valuable crops are produced. In other cases, the application irrigates grasses or other plants of little or no economic value, which are mowed and discarded.[556]

The law on this subject is premised in large part on the general principles of recapture and reuse discussed above. In addition, IDWR has issued specific guidance on the subject of land application. Nearly all of it, however, is in the context of land application of <u>industrial</u> wastewater. Two guidance

[554] Texas, by the way, is the only western state that applies a rule of capture (rather than the prior appropriation doctrine) to ground water. (The City's water supply, and hence its effluent, was based entirely on ground water.) The court discussed the rule of capture at some length, but it does not seem that the outcome would be any different had the prior appropriation doctrine applied instead.

[555] In one project (now proposed in Gooding County) waste water would be treated, before irrigation, to remove all pollutants. Biosolids removed from the treated waste water would be metered back in to the clean water before being applied to crops. This technologically sophisticated approach is very different from the typical land application project.

[556] In some cases, crops or cut grasses may be removed from the immediate watershed to prevent their up-taken nutrients from entering the water system.

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documents were issued by the Department in 1996. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* (Sept. 5, 1996); Norm Young, IDWR, *Administrator's Memorandum – Application Processing No. 61* (Sept. 27, 1996). (These are reproduced under Appendix N.) This guidance has be updated and modified to some extent by a broader guidance document, *Transfer Processing Policies & Procedures* (Transfer Processing No. 24) (revised Dec. 21, 2009) (reproduced under Appendix L.) Note footnote 1 on page 3 of Transfer Proceeding No. 24, which expressly overrides certain guidance in Application Processing No, 61.

This raises the question whether the discharger must obtain a new water right or a change in water right to apply the waste water to the land. In other words, should the land application be viewed simply as part of the original industrial or municipal water right (requiring no transfer)? Or should the land application be viewed as a new beneficial use that requires a new water right or a change in the original industrial water right? Likewise, will a change in place of use be required? Will a new water right be required for the water used to dilute the waste water?

The answers to the last two questions are not difficult. First, if the land application falls outside the originally described place of use, then a change in place of use will be required. Second, a water right for the make-up water (i.e., water used to dilute the effluent before land application) will be required, just like any other use of water. The original industrial water right could serve this purpose, if the land application is close enough to be physically supplied by it, and the additional quantity is available under the right. Or it might be obtained from another source (e.g., a new appropriation or a transfer of an irrigation water right).

The trickier question is whether the land application use falls within the original place of use authorized for the water right. According to the Department's 1996 guidance, the answer depends on whether the land application is "mandated" by environmental requirements, or is being undertaken for the independent purpose of producing crops. This is discussed in more detail below.

(3) Required land treatment

Let us suppose that an existing industrial facility with an existing industrial water right decides to switch its disposal strategy to land application. IDWR has announced that land application of wastewater by the industrial facility will be considered part of the industrial use (hence a beneficial use) if it is mandated by environmental requirements and is consistent with best management practices established by the State.

This discussion assumes that the owner of the industrial water right is authorized to consume 100 percent of the water. If that is not the case (that is, if the owner is obligated to return a certain portion of the water diverted to a natural source as return flow), then none of the discussion below applies.

This discussion also assumes that the water user does not relinquish physical control over the water resource in accomplishing the land application. In other words, the wastewater from the industrial use should be delivered directly (e.g., through a pipe) to the industrial use. If the wastewater

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is allowed to reenter the public domain, there is a strong argument that it is no longer part of the original water use. In this case, it could be recaptured, via a separate water right with a junior priority.

If the land use application involves the cultivation of crops or any other new beneficial use, a change in nature of use (and presumably place of use) must be sought by the water right holder and approved by IDWR. (If the original use was municipal use, no change would be needed, because such uses fall within the included "related purposes" in the definition of municipal uses.) If the land application does not entail the cultivation of crops or otherwise produce value, the land application will be deemed part of the original industrial purpose.[557] Even so, the land application may require approval by the Department of a change in place of use, if the land application does not occur on the industrial site. Thus, the requirement of a change application may be avoided only where the new treatment method is within the original place of use and entails no new beneficial use.

The Department's guidance states that consumptive use can increase up to the amount determined to be consistent with the original water right, but diversion rate, annual volume diverted, and period of use cannot change. Thus, if the industrial user initially had the right to use and reuse the water to exhaustion, but was not actually doing so, the user may switch to land application. If, on the other hand, the original water right was expressly or implicitly restricted to its prior consumptive use, then it cannot be changed to expand the consumptive use; in this case a new water right must be obtained for the land application.

(4) Optional land treatment

The discussion above was premised on the assumption that land application (or some other form of treatment) is required to meet environmental regulations (and, therefore, is "part of" the industrial process). Suppose, on the other hand, that land application is not required to meet water quality requirements, but is merely convenient or economical. In this case, the Department has said it will view the cultivation as a separate use, requiring a separate appropriation of water.

Although the Administrator's Memorandum does not address this, the new water right presumably could be obtained by filing for a junior "waste water" right at the point of discharge from the industrial facility.

(5) Mixing water

If additional fresh water is required to dilute the waste water, the fresh water must be obtained pursuant to a water right. If the existing industrial right allows additional pumping (without exceeding

[557] In many instances, even though there is income from the sale of crops, the overall farming operation may be unprofitable or negligibly profitable. In other words, the economic purpose of the operation is not to make money farming, but to dispose of the contaminants. The Department's guidance does not address whether such minimal, incidental economic benefit would be treated as creating a "new beneficial use." Until the situation is clarified, however, it is safer to assume that the Department will treat this as a change in use.

the right's established rate and volume), it may be used for this purpose. Otherwise, the operator will have to obtain another water right by appropriation or transfer for this purpose.

(6) Land application where land has existing water right

The 2009 version of Transfer Processing Memorandum No. 24 includes new provisions reflecting a more liberal approach to land application by the Department. Specifically, it provides (in several places) that no transfer application is required "for a proposed change in the place of use under a water right for uses such as industrial, dairy, or confined animal feeding operations that would allow land application of wastewater from that use or change the location of lands used for application of wastewater, when there is a full existing water right for irrigation of the place of use receiving wastewater." *Transfer Processing Memo No. 24* § 2 at page 7.

(7) Where industrial user relies on municipal water

The Administrator's 1996 Memorandum is based on the assumption that the industrial user holds its own industrial water right. The Memorandum then addressed the issue of when the land application could be viewed as "part of" the original industrial right.

The memorandum does not address the situation where the industrial user purchases water from a municipal provider. (In this case, the municipal provider is the water right holder.) In this circumstance, can the land application be viewed as "part of" the municipal right?

Municipal purposes are broadly defined in Idaho.[558] On the other hand, municipal uses do not ordinarily include crop irrigation. Does that mean they cannot be part of a municipal right, where the economics allow municipal water to be used for crop irrigation?

A strong argument can be made that <u>any</u> beneficial use made by a customer of a legitimate municipal provider, with the approval of the provider, is a municipal use. Under this theory, it should not matter whether the land application were "required" or "optional." Moreover, under this theory, there would be no need to obtain a change in place of use (assuming the new land application use physically occurred within the municipal provider's broadly described service area).

On the other hand, the industrial user may choose to file for a <u>new</u> appropriation in its own name.[559] This would eliminate any uncertainty regarding use of the right for irrigation purposes, and create a valuable property right and asset.

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[558] Idaho Code § 42-202B(6) (definition of "municipal purposes"). This broad statutory definition is consistent with case law across the West.

[559] A waste water appropriation will not be allowed, if there is no release of control of the water back into the natural environment. However, the industrial user may obtain a new water right that piggy-backs the original municipal right and adds an additional use (but with a junior priority).

(8) Land application of municipal effluent by cities pursuant to water rights

In 2012, the Idaho Legislature amended the water code to allow land application and other disposal undertaken pursuant to environmental requirements to occur without a water right. That is discussed in section 19.F at page 300. This section addresses the law prior to that amendment. This section is also applicable to the extent that the municipality or similar entity elects to undertake land application pursuant to a water right (in order to protect the right) or where Idaho Code § 42-201(8) is for some reason not applicable.

Very few cases, and none in Idaho, deal with land application of municipal effluent. (One that does, from Wyoming, is the *Wyoming Hereford* case discussed above.) Likewise, the guidance discussed above is focused on land application by industrial users. The 1996 guidance is expressly limited to land application of industrial wastewater. The 2009 *Transfer Memo* mentions municipal effluent only in one place:

> Disposal of Waste Water. An application for transfer filed to provide for the disposal of wastewater, by land application, resulting from use of water under non-irrigation uses such as a dairy or other confined animal feeding operation, or "municipal" or "industrial" water rights where the use of water is considered to be fully consumptive, is not considered an enlargement of the commercial, municipal, or industrial water right. While not an enlargement of the water right, such use of wastewater must not injure other water rights (see Application Processing Memorandum No. 61 as revised under Section 1 of this memorandum) and must comply with the best management practices required by the Idaho Department of Environmental Quality, the U.S. Environmental Protection Agency, or other state or federal agency having regulatory jurisdiction.

Transfer Processing Policies & Procedures (Transfer Processing No. 24) § 5d(9) at page 31 (revised Dec. 21, 2009) (reproduced in Appendix L). This confirms that, because municipal uses are 100 percent consumptive, land application does not constitute an illegal enlargement of the water right. However, the statement is in the context of a discussion of transfer applications. This raises the question of whether a transfer is required at all.

Arguably, no transfer should be required for land application of municipal effluent, so long as the land application is within the municipal service area and so long as the land application is deemed part of the municipal use. Moreover, the requirement in paragraph 3 on page 3 of the 1996 Rassier memorandum (saying that a transfer is required for land application on cultivated fields) has been overridden by the 2009 version of Transfer Processing Memorandum No. 24, which provides that no transfer is required if the land application occurs on lands that were previously cultivated under another water right. In other words, so long as no new land is brought under cultivation, it us unnecessary to determine whether the land application falls within the previously authorized municipal uses.

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Another complication for land application of municipal effluent is that, unlike industrial effluent, it cannot be assumed that all of the water physically derives from the original diversion. Municipal effluent may contain other sources of water, such as storm water or water from domestic wells with their own water rights. The situation is further complicated if the municipality or sewer district operating the sewage collection system was not itself the supplier of municipal water. In such a case, it may be appropriate to think about this as entailing an appropriation of water or, in the case of recapture of water from domestic wells, an appropriation of waste water.

Such has occurred in the past. Phil Rassier's 1996 legal memorandum notes the precedent of issuing "waste water permits" (Nos. 29-7431 and 29-7437) to the City of Pocatello and the J.R. Simplot Company, respectively, in connection with land application of the city's effluent. Phil Rassier, Chief Counsel, *IDWR Memorandum: Land Application of Industrial Effluent* at page 3 (Sept. 5, 1996). This would appear, however, to predate the Department's current thinking that the land application use may be viewed as a part of the original right.

F. 2012 statute (H.B. 608): A separate water right or transfer not required where wastewater is reused or disposed of in order to comply with environmental requirements.

In 2012, the Idaho Legislature enacted H.B. 608, 2012 Idaho Sess. Laws, ch. 218 (codified at Idaho Code §§ 42-201(8), 42-221(P)). The legislation was prompted by concerns of the City of McCall (which sought the legislation) that its land application of effluent might require a new water right. In communications with the Department, the City determined that no new water right (or change in its municipal water rights) was required to land apply effluent derived from its own municipal water rights outside of the city limits. The problem was that the City's sewage treatment plant was treating both the City's own wastewater and sewage from collected by a nearby sewage district serving unincorporated areas.

In order to resolve uncertainty with respect to the need for a water right to land apply the sewage from the sewage district, the City worked with IDWR and the Idaho Water Users Association to develop legislation clarifying that no water right is required when a governmental entity engages in land application or other measures to dispose of effluent pursuant to environmental regulatory requirements.

The legislation provides:

> Notwithstanding the provisions of subsection (2) of this section [which requires a water right for all diversions], a municipality or municipal provider as defined in section 42-202B, Idaho Code, a sewer district as defined in section 42-3202, Idaho Code, or a regional public entity operating a publicly owned treatment works shall not be required to obtain a water right for the collection, treatment, storage or disposal of effluent from a publicly owned treatment works or other system for the collection of sewage or stormwater where such collection, treatment,

> storage or disposal, including land application, is employed in response to state or federal regulatory requirements. If land application is to take place on lands not identified as a place of use for an existing irrigation water right, the municipal provider or sewer district shall provide the department of water resources with notice describing the location of the land application, or any change therein, prior to land application taking place. The notice shall be upon forms furnished by the department of water resources and shall provide all required information.

Idaho Code § 42-202(8).[560] Idaho Code § 42-221(P) sets the fee for filing a notice of land application.[561]

This section is contained in the same part of the water code that exempts certain other uses from the requirement to obtain a water right. (For example, a water right is not required to fight an existing fire. Idaho Code § 42-201(3)(a).) The basic premise is that if a municipality, sewer district, or similar entity is engaged in land application or some other treatment or disposal strategy in order to comply with environmental regulations, the entity is not required to obtain a water right. This is analogous to fighting a fire. (It is something they must do, not something they wish to do.) This legislation makes clear that no water right is required, even if some beneficial use (such as growing crops) is entailed. The legislation also makes clear that if a municipality stops directing its effluent to a stream and instead directs it to a land application or other treatment or disposal use, water users downstream who had come to rely on that effluent have no legal complaint.

This legislation does not preclude a municipality from obtaining a water right for its land application or other use. It simply says that it is not required to obtain a right. As a practical matter, there is not likely to be any consequence to not having a water right. Without a water right, the municipality may not "call" for the water to be delivered to its land application. But that is probably the least of the city's concerns. The practical fact is that the sewage effluent will be there.

For reasons discussed above, this legislation is not necessary for a city that is land applying water traceable to its own municipal water rights and connected via a common water distribution system. Cities have the right to use and reuse their water rights to extinction. However, the legislation would make a difference in the following situations:

(1) Sometimes the entity undertaking the land application does not have a municipal water right. For example, a sewer district typically does not provide municipal water. Likewise, some cities (such as McCall) land apply treated sewage that is collected from outside the city's municipal water service

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[560] This legislation was recommended for passage unanimously by both germane committees, and adopted by unanimous vote in both the House and Senate.

[561] The Idaho Department of Water Resources sought and obtained language requiring the municipality to notify it of land application. This way, the Department is able to reconcile satellite imagery showing irrigation with information about municipal land application not undertaken pursuant to a water right.

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area and thus cannot be traced to a municipal water right. In other situations (such as the City of Boise), a city may provide wastewater treatment, but is not in the business of providing municipal water.

(2) Sometimes the land application occurs at a location outside the city limits that is not physically plumbed to the city's municipal water treatment system. For example, it may rely on delivery via an irrigation district's canal system. There is uncertainty as to whether this is covered by the "service area" description in the 1996 Municipal Water Rights Act.

Although the legislation was drafted to address a question involving land application of effluent, the statute's language was broadly crafted to encompass the "collection, treatment, storage or disposal [of effluent], including land application." In 2021, the Department ruled on a petition for a declaratory ruling addressing whether H.B. 608's language means that neither the City of Nampa nor Pioneer Irrigation District is required to obtain a new water right in connection with a reuse project approved by IDEQ that entails the delivery of the city's treated wastewater to a canal operated by the irrigation district.

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20. MORATORIUMS

The Department is authorized to suspend processing of permits and applications for new water rights upon a determination that such action is necessary to protect existing water rights, including the state's minimum stream flow rights.[562] From time to time since 1989 the Department has acted under this authority to impose moratoriums on the appropriation of new water rights.[563] Some of these orders remain in effect, substantially restricting new appropriations in significant portions of the state.

The discussion in this chapter traces the history of the 1992 Moratorium Order originally covering the entire Snake Plain Basin. (Appendix K contains a detailed summary of these moratoriums as well as copies of the orders and other documents.) The reader is referred to IDWR's web site for information on additional specialized moratoriums, including the Twin Falls Geothermal GWMA Moratoriums, the Salmon and Clearwater Basins Moratorium, the Big Lost River Drainage Moratorium, the Mud Lake Area Moratorium and the Wilderness Water Rights Moratorium. Key moratoriums, and a summary chart, are set out under Appendix K. Some, but not all of the Department's moratorium orders are listed on the Department's web site (www.idwr.idaho.gov).

Although the statute authorizes the Department to halt processing of both new applications and permits, the Department has never suspended the processing of issued permits. Instead, the moratoriums have been limited to the processing of applications for permit. Holders of existing permits, licenses, and beneficial use rights are unaffected. Likewise, transfers of existing rights are unaffected.

These moratoriums apply within defined geographic areas based on hydrological boundaries. They are based on a determination by the Director that the area is fully appropriated and that any new water rights are likely to impair other uses and interfere with the administration of water rights generally.

Due to an extended drought beginning in 1986, the Director issued the first large-scale moratorium in 1992.[564] It prohibited the issuance of new permits for consumptive use of both ground

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[562] Idaho Code § 42-1805(7); IDAPA 37.03.08.055. The Department's practice is to issue moratoriums by way of order, without public hearing or comment.

[563] In 1980, the Department issued a memorandum expressing its view that there is no surface water available for appropriation during the irrigation on the Boise River upstream of Lucky Peak Reservoir. See Appendix K. That memorandum remains in effect as an expression of the Department's viewpoint. However, it does not have operative effect as a moratorium order. In other words, an application for a new appropriation could still be filed and processed, but the applicant should be aware of the Department's predisposition regarding the unavailability of additional water for appropriation.

[564] *In the Matter of Applications for Permits for Diversion and Use of Surface and Ground Water Within the Snake River Basin Upstream from the USGS Gauge on the Snake River Near Weiser* (IDWR Moratorium Order, May 15, 1992). (See Appendix K.) Two previous orders, affecting the Big Lost River drainage and the Mud Lake area, issued in 1989 and 1990 respectively, were subsumed within this order.

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and surface water in the Snake River basin upstream from Weiser, Idaho, covering a large portion of southern Idaho.

The moratorium was amended on January 6, 1993 to eliminate the "non-trust water area" (an area in the southeast of Idaho, mostly outside of the ESPA in the vicinity of American Falls Reservoir, where ground water is tributary above the Milner Dam).[565] The non-trust water area was then made subject to a separate five-year moratorium,[566] which has since expired.[567]

The 1992 moratorium was amended again on April 30, 1993, limiting its applicability to the Boise River Drainage Area and the Eastern Snake Plain Area (still, very substantial areas).[568] The Eastern Snake Plain Area is defined as the trust water area on the Snake River upstream of the King Hill gage.

In 1994, the Legislature adopted a statute preventing the Director from removing that portion of the April 1993 amended moratorium applicable to the Eastern Snake Plain Aquifer prior to December 31, 1997.[569] That prohibition has now expired, but the moratorium remains in effect.

The moratorium was modified again in 1995 to largely exempt the Boise River drainage area.[570] Shortly thereafter, however, the Department issued an "Administrator's Memorandum" which

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[565] *In the Matter of Applications for Permits for Diversion and use of Surface and Ground Water Within the Snake River Basin Upstream from the USGS Gauge on the Snake River Near Weiser* (IDWR Moratorium Order, Jan. 6, 1993) (the first of two moratorium orders issued on this day). (See Appendix K.)

[566] *In the Matter of Applications for Permits for Diversion and Use of Surface and Ground Water Within the Snake River Basin Upstream from Milner Dam* (IDWR Moratorium Order, Jan. 6, 1993) (the second of two moratorium orders issued on this day). (See Appendix K.)

[567] "This moratorium shall be in effect on and after its entry and shall remain in effect until December 31, 1997." Order at ¶ 1. However, paragraph 9 of the Order contemplated that the Director would issue an order affirmatively ending the moratorium, which action never occurred. For some time after 1997, an internal debate occurred within the Department as to whether the moratorium remained in effect and at least one order recognized its continuing effect. More recently, the Department has concluded that the moratorium has indeed expired. Despite the expiration, however, the Department views the non-trust water area as fully appropriated (with the exception of occasional spills over Milner dam) and is unlikely to approve new appropriation applications in the non-trust water area. *Conversation between Shelley Keen (Manager, Water Right Permits Section) and Christopher H. Meyer* (May 18, 2009).

[568] *In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Eastern Snake River Plain Area and the Boise River Drainage Area* (IDWR Moratorium Order, Apr. 30, 1993). (See Appendix K.)

[569] 1994 Idaho Sess. Laws. ch. 449, § 1 (formerly codified at Idaho Code § 42-1806). (See Appendix K.)

[570] *In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Boise River Drainage Area* (IDWR Moratorium Order, May 3, 1995). (See Appendix K.) Despite lifting the moratorium, the order imposed restrictions on the processing of new surface water applications for diversions from the Boise River upstream of the Star Bridge, unless mitigated to avoid injury. However, the

effectively re-imposed the moratorium on an informal basis, but only with respect to the Lower Boise River Basin below Lucky Peak Dam.[571]

In recognition of the fact that small domestic water users are exempt from statutory permit requirements, these moratoriums exempt such uses from their coverage.[572] The current moratoriums also authorize the Director to make special exceptions based on the public interest or a determination that the particular appropriation will have no effect on other users.

Moratoriums are issued on a summary basis.[573] That is, the Director does not engage in a public hearing or contested case process before issuing the moratorium. However, a moratorium may be challenged after issuance.[574] To date, no one has challenged either the Director's authority to issue moratoriums or the propriety of any specific moratorium.

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effect was simply to limit new appropriations to flood water, which would be the case anyway. Thus, the practical effect was to eliminate the moratorium as to the Boise River Drainage Area.

[571] Norman C. Young, IDWR, *Administrator's Memorandum – Application Processing No. 59* (June 20, 1996). (Reproduced in Appendix K.)

[572] The moratorium does not reference the definition of domestic uses in section 42-111 (or any other definition). Thus, it is not clear whether or not the use of the term "domestic" in those moratoriums is intended to pick up the nuances under the statute discussed in section 7.F at page 89.

[573] IDAPA 37.03.08.055.01.b.

[574] IDAPA 37.03.08.055.01.c.

21. THE "TWO RIVERS" CONCEPT ON IDAHO'S SNAKE RIVER

A. Separate administration generally

Ordinarily, water sources that are hydraulically interconnected are administered as a single source. For example, a river and its upstream tributaries are ordinarily treated as a single source, even though diversions from that river may be separated by tens or hundreds miles. Likewise, surface water and tributary ground water are administered conjunctively as a single source. However, in some instances two tributaries (or even different parts of the same river) may be administered separately, as if they were two unrelated bodies of water.

This may come about through the institutionalization of historical practices and understandings that may not reflect hydrologic reality—or may reflect only some of it (such as the facts concerning surface water flows, but not ground water). In some instances, separate administration simply institutionalizes a legitimate "futile call" situation. An example would be where it has been shown that closing headgates on an upstream tributary will not deliver surface water to diversion points on the downstream river because the tributary sinks before reaching the river. Portions of the Little Lost River system near Howe, Idaho are administered in this way. In a 2004 delivery call situation, the IDWR Director issued an order finding that, due to "extremely high losses" in both the river channel and the senior users' ditch, certain upstream junior diversions from the Big Lost River would not be curtailed because doing so would not deliver water to the downstream seniors.[575]

In the case of an actual futile call, water administration effectively separates hydraulically connected sources; this is a well-established rule that is supported by both hydrologic reality and the legal mandate against waste of the water resource. In other situations, separate administration of hydraulically connected sources might be more a legal fiction, an accepted custom, or a political compromise. In these cases, one might argue that separate administration is inconsistent with property rights and entitlements under the prior appropriation doctrine and the state constitution. After all, it inherently (and perhaps unconstitutionally) results in changing the set of "winners" and "losers" from what would be the case under normal administration. No one has ever tested this in Idaho.[576]

B. The administration of the Snake River above and below Milner Dam

Idaho has its own notable example of separate administration that plainly falls into the second of the two categories discussed above: The "Two Rivers Concept" in the administration of water rights on the Snake River.

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[575] *In the Matter of Determining a Futile Call for the Delivery of Surface Water in Water District No. 34, Big Lost River* (July 30, 2004) (citing Rules Governing Water Distribution in Water District No. 34, IDAPA 37.03.12.20.04)

[576] A challenge in Colorado failed, however. *Alamosa-La Jara Water Users Protection Assn. v. Gould,* 674 P.2d 914 (Colo. 1983). And a case can be made that separate administration is consistent with the no-injury rule, where separate administration simply reflects long-standing expectations. A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers,* 27 Idaho L. Rev. 249, 263 (1990).

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The idea is that the Snake River should be viewed as two rivers. The first begins in the headwaters and continues to Milner Dam; the second begins immediately below Milner Dam and continues until it leaves Idaho. The basis for this fiction is the fact that virtually all of the Snake's water is diverted into a series of huge irrigation canals at or above Milner Dam. Thus, the river is seen as "starting over" below Milner, where it is fed by return flows, tributaries and springs.

Milner Dam, located several miles upstream of Twin Falls, Idaho, was constructed in 1905 to serve the Twin Falls South Side Project (operated by the Twin Falls Canal Company).[577] Today it also serves the North Side Canal, the Milner Low-Lift Canal, and the Milner-Gooding Canal. On occasion, virtually the entire flow of the Snake River is diverted into canals fed by the dam.

Return flows and springs—resulting from diversions at Milner and many more at other diversion facilities farther upstream on the Snake—quickly feed the river below the dam, allowing a whole new set of appropriations to be made downstream of Milner. The Two Rivers Concept reflects this unusual (and artificial) hydrological circumstance, and the practical reality that for a century people have viewed the source of below-Milner appropriations to be springs and ground water, rather than the river above Milner. Thus the concept emerged that water users below Milner should be allowed to call out only water users tributary to them, that is, water users on or tributary to the river below Milner.

The Two Rivers concept has its origins in actions of and positions taken by Idaho Power Company and the U.S. Bureau of Reclamation in the development of American Falls and other storage projects in the upper Snake.[578] The concept, though probably based on faulty legal premises,[579] was sufficiently solidified in practice that by the time Idaho Power filed its general protest in 1978 of all water rights interfering with its Swan Falls rights, it only called for curtailment of below-Milner rights.[580]

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[577] Milner Dam was built at the western most point in the upper Snake at which significant amounts of water could be diverted from the river by gravity systems. The large canals on the north and south sides of the river at Milner divert under water rights carrying priorities ranging from 1900 to 1939.

[578] A detailed analysis of this concept is beyond the scope of this Handbook. For a more detailed discussion of the Two Rivers Concept, see Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573, 589-94 (1992).

[579] Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573, 591-92, n.82 (1992).

[580] Protest of Idaho Power Company to Applications for Permit to Divert and Consumptively Use Water, *In the Matter of Applications Filed for Water Diversions for Consumptive Use on the Surface and Subterranean Tributaries of the Snake River Between Milner Dam and Hells Canyon* (Dec. 30, 1977, filed with the Idaho Dept. of Water Resources Jan. 5, 1978). The relief sought by Idaho Power in the subsequent Swan Falls litigation was also limited to below Milner diverters. See discussion in of the Swan Falls controversy in section 11 at page 583.

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The Two Rivers concept also has been institutionalized in Idaho's State Water Plan, which first recognized a zero instream flow at that point in 1976.[581] (This zero flow is a fiction. Flows have never been zero.[582]). What was described in earlier State Water Plans as an actual zero minimum instream flow is now more accurately described this way: "The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero."[583]

The above/below Milner distinction also is recognized by the Water Supply Bank. (See discussion of the price difference for below-Milner rentals in section 5 beginning at page 507.) Likewise, storage rights from the above-Milner Palisades Reservoir placed in the tribal water bank operated by the Shoshone-Bannock Tribe pursuant to a 1990 settlement agreement may not be rented or delivered for use anywhere below Milner Dam.[584]

The most notable legal basis for the Two River concept is a statute adopted in 1985 implementing the *Swan Falls Agreement*. Note, however, that the statute in not limited in its application to Idaho Power's water rights. It applies to all affected water users. It provides in pertinent part:

> For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream of Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

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[581] State Water Plan (Dec. 1976). The zero instream flow was not discussed in the text of the plan, but was simply reflected in a table showing river flows that will be "protected." The same table showed instream flows of 3,300 cfs at the Murphy gage and 4,750 cfs at the Weiser gage. The zero flow provision for Milner has been carried forward, with some modification in how it is described, through each subsequent State Water Plan.

[582] "Over the period from 1914 to about 1923, these diversions [at Milner Dam] had drastically reduced the average August flows past Milner from over 2,000 cfs to less than 100 cfs. Still, some water almost always passed American Falls, where Idaho Power had an early power plant, and Milner during the irrigation season. But the long list of senior natural flow appropriations on the Upper Snake River guaranteed that these amounts would be small in most years. From 1924 through the late 1970s the average August flows were as low as approximately fifty cfs in the irrigation season, and overall averages during that period were about 150 cfs." Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Ever Water Rights Controversy*, 28 Idaho L. Rev. 573, 590 (1991-92). Today, water flows at Milner are not really zero, despite the statutory zero instream flow. Some water is bypassed for hydropower generation at Milner. Additional water is bypassed in connection with the federal government's program of providing salmon "flushing" flows (See discussion in section 19 at page 689).

[583] It has been carried forward through the current State Water Plan, Policy 5B at 17 (Dec. 1996, ratified Mar. 1997) (reproduced under Appendix F).

[584] 1990 Fort Hall Indian Water Rights Agreement, By and Between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, The State of Idaho, The United States, and Certain Idaho Water Users § 7.3.4(i) (1990).

Idaho Code § 42-203B(2). In other words, surface water users downstream of Milner may not call out either surface or ground water rights above Milner to satisfy their rights, regardless of relative priority.

This bifurcation of the Snake River adds some complexity and uncertainty to the task of moving water rights from above to below Milner. For instance, does Idaho Code section 42-203B(2) simply limit the scope of a call for Snake River water, or does it impair the ability to move water across the Milner threshold? One commentator has suggested it is the latter.[585] However, the authors suggest that this reads too much into the statute, particularly considering its Swan Falls context.

The better reading, and the one to which the Department subscribes,[586] is that the statute applies only in the context of the implementation of Idaho Power's subordination of its hydropower rights and the development of so-called "Trust Water." (See discussion in section 11.C at page 590.) This view is consistent with the Department's Trust Water Regulations.[587] It does not mean that water rights can never be moved past Milner.[588]

Thus, putting aside other legal obstacles (injury, etc.) and practical considerations (the ability to administer such a changed right), one should be able to purchase a ground or surface water right whose diversion point is located above Milner and whose return flows are tributary above Milner, and change the diversion point and return flow to a location below Milner. This, of course, would entail moving the water past Milner Dam. Such a transfer has never been sought before, so the issue has not been tested. Administration of such a right would require some adjustment's in the computerized water rights accounting programs used to administer rights above Milner Dam. However, there does not appear to be any sound practical or legal basis for objection to such a change, again, assuming other legal requirements are met.[589]

Implementing the Two River concept is further complicated by determining where to draw the line. The river is divided not on the basis of a water right's point of diversion (which is easy to pinpoint), but on whether its return flow is tributary above or below Milner. The Department's

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[585] "Based on this statute, a change in point of diversion from the Snake River upstream from Milner Dam to a point of diversion downstream from Milner Dam should be treated as a new appropriation." A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 263 (1990).

[586] Telephone conference between Phillip J. Rassier, Chief Deputy Attorney General for the Department, and Christopher H. Meyer (June 10, 2004).

[587] IDAPA 37.03.08.030.03(e). The rule recognizes section 42-203B(2) as serving to define the scope of Trust Water

[588] Indeed, such a reading would raise serious constitutional questions.

[589] This is a critical, and perhaps difficult, assumption. Under current conditions, many water rights above Milner are threatened by potential calls from surface users at the Milner diversion, not to mention Thousand Springs. Attempting to move one of these rights past Milner raises another set of problems not addressed in this discussion.

delineation of above-Milner and below-Milner ground water rights set out in its regulations.[590] This map places most of the Eastern Snake Plain in the "below-Milner" category.

This map may accurately reflect those areas where at least a part of the return flow is tributary below Milner. It ignores, however, the hydrological reality that ground water rights in the area are tributary partially above and partially below Milner. Thus, no ground water right in the Eastern Snake Plain Aquifer can be moved any significant distance without affecting flows both above and below Milner. Modern realities suggest that the time has come to dispense with the Two Rivers fiction, or at least limit it to the statutorily mandated call limitation in section 42-203B(2) and the moribund provisions on Trust Water.

[590] "Geographic Area From Which Groundwater Is Determined To Be Tributary To the Snake River In The Milner Dam To Swan Falls Reach," IDAPA 37.03.08 (Appendix A). (Reproduced under Appendix H).

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22. AQUIFER ENHANCEMENT

A. The need for additional water storage options

Idaho's population is growing rapidly, and with it the demand for reliable public water supplies. At least in portions of the Treasure Valley, municipal providers are beginning to look to surface water to augment their historically reliable ground water supplies. At the same time, the acreage devoted to irrigated crops is static or declining in the Treasure Valley and other areas, suggesting that irrigation storage water should be more available for conversion to municipal and industrial uses. Idaho has some 12 million acre-feet of surface water storage reservoirs, virtually all of it devoted to agricultural irrigation. However, obtaining irrigation storage supplies for these new uses is not a straightforward process, and involves several political and institutional constraints. One example is the demand for storage water releases from these typically federally-owned reservoir facilities to address Endangered Species Act concerns.

As to the supply side—that is, building and finding water rights for more storage facilities—the reality is that most of the feasible above-ground storage projects in Idaho already have been constructed. In addition, large surface water storage projects face significant obstacles in obtaining necessary approvals, as exemplified by the Denver Water Board's inability to obtain federal Clean Water Act permitting to construct its proposed Two Forks Dam in the late 1980s. Present economic, social and environmental factors suggest that most new large-scale storage projects will remain infeasible for some time to come. Indeed, the Bureau of Reclamation, which built and operates many of the water storage projects in Idaho, has long since moved away from a primary focus on new water development projects in favor of a redirected focus on existing facilities management, demand-side management and water transfers.[591]

But that still does not relieve the need for municipal, commercial, and industrial users to obtain access to stored water. Even though these users increasingly will rely on former irrigation storage in existing reservoirs, a viable alternative is to use aquifers as storage reservoirs. This is not new, of course; aquifer storage is being used extensively in other more populous parts of the West. In comparison to surface storage facilities, aquifers can provide vast amounts of water storage with comparatively less planning, physical and environmental engineering, capital construction, and operation and maintenance costs than above-ground storage projects. As part of a comprehensive conjunctive management scheme, aquifer storage can be operated much the same as surface reservoirs—inject surface water into the aquifer when surpluses are available, store it in the aquifer, and then either pump it up as needed or, in the case of recharge to augment spring flows, simply allow it to discharge naturally to surface sources. As explained below, the Idaho Legislature has taken steps over the years to allow and encourage aquifer storage, and the common law of appropriation also is at home with the concept.

[591] *See*, U.S. Dept. of Interior, Bureau of Reclamation. Strategic Plan FY2000-2005.

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The remainder of this section of the Handbook surveys the major statutory provisions pertaining to aquifer recharge in Idaho, and discusses some of the issues about recharge that have arisen in recent years.

B. Public betterment aquifer recharge ("PBAR")

(1) The evolution of Idaho's ground water recharge statutes: Idaho Code § 42-232; Idaho Code § 42-234; and Idaho Code §§ 42-4201 to 42-4231

Idaho's ground water appropriation statutes were first enacted in 1951. 1951 Idaho Sess. Laws, ch. 200. But statutes expressly addressing aquifer recharge[592] were not passed until 1978. (See discussion below.) Aquifer recharge originally was a narrow concept—only "recharge districts" or specified "pilot projects" could make diversions to recharge, and then only pursuant to the application, permit and license process. The Legislature later modified the relevant statutes to allow anyone to engage in aquifer recharge.

The 1978 Idaho ground water recharge statute, 1978 Idaho Sess. Laws, ch. 366 (codified as amended at Idaho Code § 42-234), ratified and encouraged a "pilot project to recharge ground water basins in the vicinity of St. Anthony and Rexburg," and recognized appropriation of water for recharge in this vicinity "as a beneficial use."[593] That same year, the Legislature authorized formation of a "ground water recharge district" in the Jerome-Gooding area and sanctioned the district's appropriation and subsequent underground storage of unappropriated waters of the Snake River and its tributaries. 1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code §§ 42-4201 to 42-4231). Water appropriated for recharge by the recharge district also was declared to be a beneficial use. That act also provided for the establishment of aquifer recharge districts. Idaho Code § 42-4202.

(2) Idaho's "public betterment aquifer recharge" statute

The intended beneficiaries of the projects authorized by the 1978 statutes and their subsequent amendments were to be ground water users and others[594] in the general area, perhaps simply the water

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[592] In its most general sense, "aquifer recharge" refers to any planned project that intentionally places more water into an aquifer than otherwise would accrue either through natural processes or incidental to beneficial uses of the water. Department rules define "artificial ground water recharge" as "a deliberate and purposeful activity or project that is performed in accordance with Section 42-234(2), Idaho Code and that diverts, distributes, injects, stores or spreads water to areas from which such water will enter into and recharge a ground water source in an area having a common ground water supply." IDAPA 37.03.11.010.01.

[593] The reference in the 1978 statute to the pilot projects is no longer included in the statute.

[594] Projects located above Thousand Springs may benefit not only ground water users, but springs in the Hagerman area and surface flows in the Snake River below the springs. Furthermore, section 42-4201 states that, "[i]n view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by the aquifer recharge district" authorized by the statute "shall constitute a beneficial use and hereby authorizes the department of

resource itself. For this reason, the authors refer to activities undertaken pursuant to these statutes as "public betterment aquifer recharge" ("PBAR"), the key mark of which is that no one obtains a new water right specifically to remove and use the water stored in the aquifer.[595] Rather, the new water introduced to an aquifer reinforces the natural resource that supports the community of existing ground water rights in the area. It is as if Mother Nature added the water for everyone's benefit. At that point, anyone with a valid water right may pump that water—in priority, of course—or may benefit from any resulting increases in stream flows that supply a surface diverter's water right.

These public betterment aquifer recharge projects are unlike other reservoir projects. A typical reservoir holds water for the benefit of specific water right holders. Thus, only the entity diverting and storing the water (or the entity's shareholders or beneficiaries) is entitled to take the stored water out for its own benefit. In contrast, a PBAR project has no particular identified beneficiaries other than the public resource itself or perhaps water right holders in the area generally. In other words, once the water has been added to the ground water supply, the recharging entity relinquishes control and the water becomes part of the public supply. Even though a PBAR diversion is for the general benefit, there is nothing in Idaho law requiring the operator to continue the practice.

For these reasons, PBAR projects are atypical in the West where ordinarily capital is invested by, and water is appropriated and diverted for the benefit of, the appropriator. Consequently, it was necessary for the Legislature to declare that ground water recharge is a beneficial use to confirm that unappropriated surface water can be appropriated and placed "in storage" for no purpose other than to make more water available in the public ground water supply for existing or future appropriators to take out according to their separate rights.

(3) Appropriations versus water right transfers for aquifer recharge

From their inception, the Idaho recharge statutes have expressly authorized the "appropriation and underground storage of water" and tied this authority to the Department's authority to issue permits and licenses in connection with recharge projects. It remains unclear whether the statutes actually contemplate using existing water rights for recharge purposes through a transfer or change proceeding. Certainly the original statutes could be read as allowing recharge only through appropriation of new water rights for this purpose. However, in 1995 and 1996 the Jerome-Gooding ground water recharge district in fact used rented storage water—i.e., an existing water right—in a recharge project carried out through the Snake River Water Bank with full legislative support and funding.[596] In the 2002 irrigation

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water resources to issue a permit" for it. This language is part of the reason the authors refer to the Public Betterment Aquifer Recharge concept.

[595] There are several statutory references to "public betterment" in the context of aquifer recharge. For example: "In view of the public betterment to be achieved by the completion of aquifer recharge projects, the legislature hereby declares that the appropriation and underground storage of water by an aquifer recharge district hereinafter created for purposes of groundwater recharge shall constitute a beneficial use . . . ." 1982 Idaho Sess. Laws, ch. 204 (previously codified at Idaho Code § 42-4202(2)) (repealed in 2009).

[596] In 1994, the Legislature appropriated $75,000 to allow the Jerome-Gooding recharge district to acquire and deliver storage water for recharge through the North Side Canal Company conveyance system.

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season, rented storage again was used in fulfillment of an interim agreement between certain ground and surface water users, with the water being placed in the North Side Canal Company's ditches for recharge purposes aimed at increasing the Eastern Snake Plain Aquifer and, by extension, the Thousand Springs outflow. So, presumably, a new water right or an existing water right, through transfer, could be used for recharge under the statute. However, no court has yet been asked to confirm this.

(4) Aquifer recharge as a designated beneficial use; allowing any entity to appropriate water for recharge

Importantly, the 1978 "recharge district" law declared that "the appropriation and underground storage of water by the aquifer recharge district hereinafter created . . . shall constitute a beneficial use" of water.[597] It also contained a separate provision declaring that recharge is a beneficial use and authorizing IDWR, without reference to who might apply, "to issue a permit for the appropriation and underground storage of unappropriated waters in an area of recharge."[598] Thus, any person or entity, not just recharge districts, could appropriate water for recharge. In 2009, the Legislature revised this to clarify that IDWR could issue both permits "and licenses" for recharge, "in compliance with other applicable Idaho law and the state water plan."[599]

One might ask why the Legislature thought it important to expressly recognize ground water recharge a beneficial use. The answer, as indicated above, may be that traditionally diversion of water into storage for its own sake may not be considered a beneficial use. It is only when water has been diverted to storage for some other specific beneficial use such as stock watering, recreation or aesthetic purposes, or for later diversion from storage for irrigation, commercial or municipal purposes, that the placement of water in storage has been deemed "beneficial" in the water law sense. Of course, the definition of beneficial use has never been seen as restricted to a precise list of purposes, and has evolved to meet changing needs; aquifer recharge understandably was not a concern or goal in the State's earlier decades. Nonetheless, aquifer recharge—at least in the PBAR context—arguably could have qualified for a water right only after the 1978 enactment, and then only in the hands of those entities specified in the statute.

In any event, the 1978 recharge district statute listed several reasons why aquifer recharge in the Jerome-Gooding area will "serve the interests of the public and advance the multiple use water policy of this state," including "sustaining and increasing the flow of springs in the general vicinity of the

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[597] Idaho Code § 42-4201(2). The statutes now allow any person to appropriate water for aquifer recharge. *See also* Idaho Code § 42-234(2).

[598] Idaho Code § 42-234(2).

[599] 2009 Idaho Sess. Laws, ch. 242 (codified at Idaho Code § 42-234(2)). The 2009 amendment also repealed a highly controversial provision, inserted into section 42-234 in 1994, that made all recharge water rights subordinate to the water rights of "any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation."

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Hagerman Valley" (i.e., the Thousand Springs area); increasing the water available for withdrawal from wells; "providing additional aquatic habitats" for wildlife; and "increasing and sustaining the flow of the Snake River during the summer months and in times of drought when additional flow is needed for the generation of hydroelectric power and the maintenance of water recreation facilities."[600] In 1982 the Legislature added a new section to the recharge district statute that made it possible for recharge districts to be formed in areas other than just the Jerome-Gooding area.[601] The 1982 amendment did not recite this list of benefits.

The 1994 amendments also removed all references to the St. Anthony-Rexburg pilot project and thereby transformed Idaho Code § 42-234 into a generalized approval of the acquisition of recharge water rights.

Finally, the 1994 amendments addressed the issue of "incidental recharge." In pertinent part, Idaho Code § 42-234, as amended in 1994 now provides that:

> (5) The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right. Incidental recharge of aquifers which occurs as a result of water diversion and use that does not exceed the vested water right of water right holders is in the public interest. The values of such incidental recharge shall be considered in the management of the state's water resources.[602]

Subsection (5) disallows a claim for a separate water right or an expanded water right for incidental recharge, while acknowledging that recharge incident to the lawful diversion and use of a water right is "in the public interest." This at least implies that such incidental recharge, while not being recognized as an element of a water right, will not be prohibited.[603] The practical effects of the incidental recharge provision are two-fold: it precludes claims in water right adjudications that a water right originally developed for irrigation use also includes ground water recharge as a beneficial use

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[600] 1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code § 42-4201(1)).

[601] 1982 Idaho Sess. Laws, ch. 204 (codified at Idaho Code §§ 42-4201A, *et seq*.).

[602] In 1994, the Legislature also passed Senate Concurrent Resolution 140 which recites, inter alia, that "artificial recharge of Idaho's ground water aquifers has been and continues to be a useful and productive utilization of Idaho's water and shall be encouraged wherever possible; . . . ." 1994 Idaho Sess. Laws, Sen. Con. Res. 140, at 1524.

[603] One question that arises under this statute is whether a third party benefiting from the recharge could use this provision to block an efficiency measure by, say, a canal owner that would reduce the incidental recharge.

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element;[604] and it precluded assertions by surface water users of ownership of the incidental recharge resulting from their irrigation. At the same time, where an irrigation entity continues to divert the same amount into its canal system despite serving decreasing irrigated acres (which is the case in many urbanizing areas), this language provides at least a "public interest" argument that the diversions should be allowed to continue.

Arguably, because section 42-234(5) declares incidental recharge to be in the public interest, an appropriator seeking to increase the efficiency of his or her water use—and thus reduce recharge—might find this declaration an obstacle to doing so, at least if the beneficiaries of the incidental recharge complained. Such a ruling, however, presumably would collide with the Idaho Supreme Court's ruling in the *Hidden Springs* case, discussed above.

(1) Voidance, then partial reinstatement, of Idaho Power's Swan Falls subordination with respect to certain water rights acquired for aquifer recharge

Interestingly, the 1978 recharge district law included a provision stating that "the rights acquired by the aquifer recharge district pursuant to any permit and license were to be secondary to all prior perfected water rights, including those held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation."[605]

The first clause of this provision presumably was unnecessary since by definition any new appropriation, for aquifer recharge or otherwise, would be junior to all prior water rights. The second clause is more interesting, however. Because Idaho Power Company's Hell's Canyon dam complex held water rights that the Company had agreed to subordinate to upstream development as a condition of licensing by the Federal Energy Regulatory Commission ("FERC"), the second clause of the 1978 legislation may have been inserted in an attempt to override that subordination—that is, to give Idaho Power priority over water rights the recharge district might seek to divert to aquifer storage, and thus to nullify Idaho Power's existing FERC license subordination as to such rights.

Regardless of the intent and applicability of this original 1978 provision, in 1994 the Legislature substituted express language making it clear that at least the subordination of Idaho Power's water

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[604] At the time, certain water users or water user organizations were concerned that either the Department or the SRBA Court would determine the annual volumes of water diverted under their water right claims for irrigation (in some instances up to sixteen acre-feet per acre per year to accommodate local customs of "sub-irrigation") were unreasonable, and that their claims might therefore be decreed for a lesser amount. One potential means of avoiding that result, given the 1978 recharge statute's declaration that recharge is a beneficial use, would have been to assert that the significant incidental recharge resulting from this irrigation method is an element of the water right with the same priority as the underlying irrigation right. Arguably this could have been done through the use of Idaho Code § 42-234 (recharge is a beneficial use) and Idaho Code § 42-1426 (allowing claims for enlargements of water rights occurring prior to November 19, 1987).

[605] 1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code § 42-4201(2)).

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rights that occurred pursuant to the 1984 *Swan Falls Agreement*[606] would not apply with respect to water rights acquired for aquifer recharge. The 1994 statute amended section 42-234 to read:

> The rights acquired ~~by an aquifer recharge district or irrigation district~~ pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those ~~held by any privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation~~ water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

1978 Idaho Sess. Laws, ch. 293 (codified at Idaho Code § 42-4201(2)).

By expressly addressing Idaho Power's Swan Falls subordination, the 1994 amendment could be read to imply that the Company's Hells Canyon FERC-subordinated rights remain subordinated to all subsequent upstream appropriations, regardless of the intended new beneficial use. But it specifically removed the subordination benefit provided by the *Swan Falls Agreement* when it comes to new permits or licenses for aquifer recharge. It is not clear what purpose the Legislature sought to achieve with this amendment, or whether, in doing so, it secured any consideration from Idaho Power.

It could be argued that the Legislature believed the amendment necessary to protect all past-Milner flows for hydroelectric power production. But this would be contrary to the *Swan Falls Agreement*. Likewise, it would be contrary to a 1986 amendment to Idaho Code § 42-203B, which remains a part of the statute and provides that "[f]or the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner Dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner Dam shall be considered."[607] Read together, the non-subordination and separate administration provisions would appear to mean that the Legislature's voiding of the Swan Falls subordination with respect to recharge appropriations still does not permit Idaho Power to

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[606] In 1984, Idaho Power Company and the State of Idaho entered into the *Swan Falls Agreement*. In that Agreement, Idaho Power agreed that its hydropower water rights, including the portion of its hydropower rights in excess of specified seasonal minimum flows at its Swan Falls plant were "subordinate to subsequent beneficial upstream uses upon approval of such uses by the State. . . ." This subordination was ratified by the Legislature in 1985 with amendments to the water appropriation statutes. *See, e.g.*, Idaho Code §§ 42-203B, 42-203C, and 42-203D. Neither the Agreement nor the legislation implementing it limited the types of future water rights that would be entitled to enjoy this subordination, so new water rights for recharge would be entitled to the Swan Falls subordination. For a discussion of the Swan Falls issue, see Jeffrey C. Fereday and Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal, and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573 (1992).

[607] 1986 Idaho Sess. Laws, ch. 117.

call out a junior above-Milner recharge water right to fill Idaho Power's below-Milner hydropower rights.

When the Idaho Water Resource Board established a minimum flow of zero at Milner Dam, it was based on the premise that the Snake River is "fully appropriated upstream from Swan Falls except for trust water and occasional flood waters."[608] On this premise one also might assume that the 1994 amendment partially voiding the Swan Falls subordination gave little to Idaho Power since there would be limited opportunities for junior recharge appropriations anyway. However, in 1998, the Department of Water Resources issued an interim report that concluded that in most years, up to three hundred thousand acre-feet of surface water could be available in the upper Snake River (above Milner) to be used for managed aquifer recharge *provided the recharge was not subordinated to existing water rights held for power purposes by Idaho Power.*[609] The Department later concluded that if Idaho Power enforced the 1994 amendment partially removing its water right subordination, then recharge diversions could occur only once in about every fifty years.[610]

Thus, the Legislature's partial reversal of the Swan Falls subordination effected by the 1994 amendment to Idaho's aquifer recharge statutes—both the "recharge district" statute in section 42-1401 and the general authority to permit recharge projects in section 42-234—cast a cloud on PBAR projects, or at least on those that would rely on any permit or license acquired for recharge purposes. In addition to this cloud on above-Milner water rights appropriated for recharge, another provision in the recharge statute authorizes the IDWR Director to regulate (that is, to reduce) the amount of water diverted for a PBAR project, even when the water right is in priority.[611] This regulatory authority to override a recharge water right reflects a sharp departure from the fundamentals of the prior appropriation doctrine, and potentially undermines the value and integrity of PBAR projects.

In 2009, the Legislature removed the Swan Falls subordination reversal language from section 42-234, but left it in section 42-1401. The 2009 amendment also added to section 42-234 language that already exists in section 42-1401 (pertaining to recharge districts), including the provision that IDWR "may reduce" the amount allowed for diversion to recharge under a permit or license "even though there is sufficient water to supply the entire amount originally authorized by permit or license."[612]

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[608] State Water Plan (Jan. 3, 1992).

[609] IDWR, Eastern Snake River Plain Aquifer Managed Recharge Project Interim Report (October 1998).

[610] IDWR, Feasibility of Large-Scale Managed Recharge of the Eastern Snake Plain Aquifer System 43 (December 1999).

[611] Idaho Code § 42-4201(4). See also Idaho Code § 42-4201(4) authorizing the Director to curtail water rights for PBARs under certain circumstances. Finally, see Idaho Code § 42-234(2) which provides that water rights obtained for PBARs are subject to "depletion for surface storage or direct uses after a period of years sufficient to amortize the investment of the appropriator."

[612] 2009 Idaho Sess. Laws, ch. 242 (codified at Idaho Code § 42-234(3).

(2) Summary of the public betterment aquifer recharge experience

The 1978 Legislature adopted a measure supporting the concept of recharge projects and their implementation by recharge districts on a limited basis.[613] In subsequent enactments it has expanded the authorization to allow any person, not just special districts, to appropriate water for recharge, and it has even appropriated funds to acquire and deliver water for recharge in the Jerome-Gooding area of south-central Idaho. Numerous studies and investigations into the ground water hydrology and recharge capabilities of various aquifers have been conducted. In addition to this authority and information, there appear to be increasing incentives to initiate aquifer recharge projects. So the question must be asked: Why have there not been more large-scale recharge projects undertaken in Idaho? Several reasons seem likely.

Aquifer recharge for its own sake (i.e., PBAR), has some inherent disincentives. The first is the relationship of cost and benefit. It presumably is difficult to justify the costs inherent in developing an aquifer recharge project—costs that will be borne by a specific, limited group of sponsors—where the benefits that might be realized are generalized, spread across poorly-defined areas, and are difficult to quantify. Absent significant declines in water levels that jeopardize the ability of ground water users to fill their rights,[614] or the immediate threat of curtailment to fill senior ground or surface water rights, investments in aquifer recharge to stabilize or increase water levels are not likely. In fact, the Idaho aquifer recharge projects that have been implemented on a consistent basis to date tend to be projects like those of the South West Irrigation District near Oakley, Idaho to stabilize water levels in the critical ground water areas within its own boundaries for the direct benefit of the District's ground water pumpers.

Before these potentially large investments will be made, those making the investments presumably will want some level of certainty that water will be available to divert to recharge. Uncertainty in this area of water law is heightened by the questions surrounding the 1994 legislative waiver of Idaho Power's Swan Falls subordination with respect to water rights the recharge district in Lincoln, Jerome, and Gooding Counties might acquire for recharge under Idaho Code 42-4201(2). However, all other recharge appropriations and transfers presumably will not have to contend with this impediment because it was removed from section 42-234(2) in 2009.

The physical and economic feasibility of aquifer recharge depends in large part on a delivery system that can put water where it will do the most good when it is most available. In many situations, this means using existing irrigation diversions, canals and laterals to divert and distribute recharge

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[613] Idaho Code § 42-234(1) ("It is the policy of the state of Idaho to promote and encourage the optimum development and augmentation of the water resources of this state. The legislature deems it essential, therefore, that water projects designed to advance this policy be given maximum support.")

[614] A mass measurement of ground water levels in wells throughout the ESPA was conducted by the U.S. Geological Survey in 1980. When ESPA ground water levels were again measured in 2000, the Department of Water Resources found that over the ensuing twenty-years changes in water levels in most areas of the aquifer were insignificant, including many areas with substantial ground water development.

water through leakage. But even though surface water may be available in the stream, and in priority, to divert to aquifer recharge, there may not be sufficient capacity in these irrigation facilities to carry both irrigation water and recharge water.

As noted in the Department's 1999 Managed Recharge Feasibility Report for the ESPA, there are other institutional, environmental and land use issues that affect the feasibility of large-scale aquifer recharge. These include addressing the requirements of the federal Endangered Species Act, Clean Water Act and National Environmental Policy Act ("NEPA"), as well as requirements of various statutes, regulations and contracts controlling the use of U.S. Bureau of Reclamation facilities and storage water.[615] They also include federal, state and local land use regulations such as those governing use of lands controlled by the U.S. Forest Service or Bureau of Land Management. The Department's feasibility report concluded that for the ESPA, large-scale managed recharge appeared to be hydraulically and economically feasible, but also that institutional controls and environmental priorities create many uncertainties about overall feasibility. Some or all of these factors will come into play in any aquifer recharge project in Idaho.

C. Private Aquifer storage and recovery or "ASR" projects

(1) The difference between PBAR and ASR

The Legislature's various pronouncements about aquifer recharge do not address private aquifer storage and recovery ("ASR") projects, except to the extent that they do confirm that aquifer recharge is a beneficial use of water. Unlike the PBARs discussed above, which require some special treatment under the prior appropriation doctrine, ASR projects conceptually are very familiar—they simply are ordinary storage projects that have been moved underground.

Consequently, no special legislative authorization is required, and, indeed, the Legislature has as yet said nothing on the subject. More importantly, the unique legislative restrictions applicable to PBAR projects are inapplicable to ASR projects. What this means is that an entity seeking to undertake an ASR project should be able to obtain a water right (through appropriation or transfer) allowing the entity to divert water from some source (surface water, ground water or storage) and place the water into the aquifer without regard to the non-subordination provisions applicable to PBAR projects.

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[615] At first blush, agreements, or amendments to agreements, to allow use of federal facilities to divert or carry water for aquifer recharge or to obtain needed rights-of-way on federal lands would appear to be straightforward tasks. However, as "federal actions" they would be subject to the environmental impact review required by NEPA. And, given the potential impacts on federally listed endangered species in the Columbia River Basin, and the existence of pending federal and tribal water right claims in the Snake River Basin, extensive consultation with the National Marine Fisheries Service and U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act and consultation and/or negotiation with the Tribes almost certainly would be required.

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(2) Water diversions and ASR

What about the other end? Is a separate water right required to take the water out again?

In the limited ASR matters that have come before the Department it has required the project proponent to obtain a water right permit to recover water intentionally stored in an aquifer.[616]

Arguably, there is no legal requirement for obtaining a new water right to recover ground water once it has been lawfully placed into storage.[617] Once water has been diverted in priority and placed into aquifer storage, it should be available for withdrawal from the aquifer by the project sponsor without regard to priority. This seems consistent with the analogy to diversion from a surface reservoir. So long as the water remains under the appropriator's "control," the water is no longer public water, but rather has become private property. Provided that the water has been properly diverted, in priority, into storage in the first instance, and the water can thereafter be accounted for using an approved ground water model or other means, one could argue that the ASR proponent remains in constructive "control" of the water, in the same manner as the owner of an on-stream reservoir. Wells into which water can be injected can be constructed and used pursuant to rules implementing the statutes pertaining to Waste Disposal and Injection Wells, Idaho Code §§ 42-3901 through 42-3919; IDAPA 37.03.03.

The Department also attaches a priority date to aquifer storage recovery permits. This too seems antithetical to the entire purpose of an ASR project—to divert water to storage when it is available and draw upon it later without regard to priority when it is needed. The Department has obtained the same effect–in a roundabout way–through the inclusion of a condition in the water right approval that allows "out of priority" diversions of ground water to the extent that they are mitigated by ground water recharge activities. To the authors, this is a needless complication.

There is no magic in ASR projects. Like any reservoir, an ASR project typically does not create new water in the hydrologic system.[618] The issue is primarily one of timing—making water available when needed. In some cases, ASR projects may be employed because they improve the quality of water. In others, the project goal may simply be to make the water physically available in a different

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[616] See discussion of Micron Technologies ASR project below.

[617] Typically, once water has been diverted into storage, it is for all practical purposes the appropriator's property, and may be diverted from storage as the appropriator deems necessary, provided the amounts diverted are reasonable and can be beneficially used. *See Washington Cnty. Irr. Dist. v. Talboy, supra* (although water diverted to storage no longer is public water, reservoir owner may not waste it); *City & Cnty. of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992 (1954) (the "Blue River" case) (all water impounded must be put there only temporarily; otherwise its capture from the stream defeats beneficial use). For example, in Idaho, a storage right for a surface reservoir will note the priority of the right to divert water into storage (i.e., to capture water behind the dam), and also will identify the ultimate use(s) for which water may be released from the reservoir. However, reservoir releases of captured water are not subject to any priority constraint.

[618] The "hydrologic system" here being the interconnected surface and ground water source.

place. Except in the limited example of diversion of water from a foreign source into a closed ground water basin, no ASR project, increases the overall quantity of water in the system.

As with any reservoir, there must be a mechanism for determining what water within the reservoir belongs to the storage right older. In the case of a surface reservoir, that calculation is relatively simple. In the case of an underground reservoir, the technical computations may be more complex. The question of control over the water, and where it goes after it is injected into the subsurface, are matters of hydraulics and hydrogeology that need to be answered by an expert, preferably one who is using reliable monitoring wells and other data. In addition, proper well construction is essential. How much of the injected water will be available for recovery will depend on such analyses. Because water in aquifers moves according to geology and hydraulic head, there also will be questions of timing: will the water placed in storage still be present when the appropriator seeks to withdraw it? Thus, ASR projects raise questions not faced by surface storage owners, whose reservoirs are understood to fully capture and hold the water placed there, less seepage and evaporation (both of which generally can be calculated more accurately than movement of water underground).[619]

(3) Examples of ASR projects

The authors currently are aware of three ongoing projects that can be considered ASR projects: South West Irrigation District's program on the Oakley Fan aquifer; a small pilot program being carried out by United Water Idaho in Boise, and a program—also still in the pilot stage—being implemented by Micron Technology in the Southeast Boise Ground Water Management Area.

Southwest Irrigation District ("SWID"), which is served primarily by ground water in Cassia and eastern Twin Falls Counties south of Burley, Idaho, has applications pending for the use of several injection wells in an aquifer storage and recovery (or mitigation) project. The applications have been filed in connection with SWID's proposed mitigation plan it filed with IDWR in late 2009 in response to delivery calls affecting the Eastern Snake Plain Aquifer.

For a number of years, SWID has used surface water to recharge the aquifer underlying its members' lands, using a variety of infiltration and injection methods. These methods have included injection of surface water into the aquifer through some 13 wells installed beginning in 1991.[620] SWID annually has recharged approximately 3,900 acre-feet of surface water through these injection wells,

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[619] The practitioner may wish to consult published papers or other literature in this field before implementing an ASR project. Two sources are: R. Pyne, *Groundwater Recharge and Wells, A Guide to Aquifer Storage Recovery*, Lewis Publishers (1995); and J.H. Peters, *et al.*, eds., *Artificial Recharge of Groundwater*, A.A. Balkema Publishers (1998).

[620] B. Higgs, *Groundwater Management Plan of Southwest Irrigation District* (Draft) at 5 and 19 (September 2001). The plan using these 13 wells is now being replaced by a larger plan involving 25 injection wells, all of which are awaiting permitting by IDWR. Permitting requires water quality monitoring of the injected water.

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using diversions from Cottonwood Creek, Dry Creek, and Murtaugh Lake. It also maintains a constructed infiltration ditch about 8 miles in length.[621]

SWID's program is probably better described as a mitigation project, not an ASR program. As indicated above, SWID recently proposed a mitigation plan that further explains the program.[622]

In the Micron ASR project, the Department has required a permit to remove the water from the aquifer once it has been stored. The permit issued includes a 2001 priority date, and states that the permit is "subject to all prior water rights." Nevertheless, conditions of approval allow out-of-priority diversions to the extent that 1) the diversions are mitigated by ground water recharge activities and 2) the diversions do not injure senior rights through direct well interference. The Micron permit allows one hundred percent of the water injected into the aquifer to be diverted under the permit provided the diversion is in the same calendar year. To the extent water injected in any given year is not diverted in the same calendar year, recharge credits may be carried forward to subsequent years, subject to a ten percent reduction per year.[623] This system of accounting for recharge credits is based upon computer modeling of aquifer hydrology prepared by Micron's consultant and approved by the Department. It is logical that such accounting would be accomplished on a case-by-case basis.

Micron annually injects approximately 1,200 acre-feet of Boise River water into the Boise Fan Aquifer, where the Company's production wells are located. Before being injected, the river water is put through a sophisticated membrane water treatment facility capable of treating some 2 million gallons per day. The injected water exceeds (i.e., is cleaner than required by) drinking water standards. In addition to water quantity, water quality and temperature are important considerations. For example, Micron's ASR project employs river water to cool the warmer aquifer water to the temperature needed for the Company's manufacturing processes.

United Water Idaho is the municipal water provider for the City of Boise and surrounding areas. During the winter low-demand season, United Water is injecting drinking water pumped from elsewhere in its system into nine of its production wells and recovering it in the same year over several weeks during the period of peak municipal water demand in the summer. The purpose is not to enlarge production per se, but to improve the water quality available to each of these wells. So far it has proven successful.[624]

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[621] Personal communication with Brian Higgs (October 22, 2009).

[622] Other entities on the ESPA in the past have injected water through wells. An example is A&B Irrigation District, which for many years injected wastewater from its project back into the aquifer through wells.

[623] Idaho Dep't of Water Resources, Permit to Appropriate Water No. 63-31183 (February 14, 2002).

[624] Personal Communication with Roger Dittus, United Water Idaho (October 12, 2009). The constituents subject to maximum contaminant levels (mcls) in the Boise area typically are arsenic, manganese, uranium, and ammonia. In addition, some wells are affected by dissolved solids, such as calcium carbonate, which cause problems with equipment.

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Moreover, improving an aquifer's quality also usually increases its usefulness. Thus, an ASR project focused on the quality question can effectively augment supplies because it makes productive those wells that otherwise might be off-limits.

The Department issued United Water an injection well permit for each of the injection points, but did not require new diversion permits, presumably because there is no out-of-source water being brought to the system. The water being injected has been diverted originally pursuant to one or more of United Water's existing municipal water rights in the area and it is recovered pursuant to the water right associated with the injection well. The injection well was drilled originally in connection with the development of a municipal water right held by United Water. Hence, no new permit was required. Because the injected water is of drinking water quality, the project carries no additional treatment requirement.[625]

(4) Aquifer mitigation

"Aquifer mitigation" is used here to refer to a situation that arguably is the opposite side of the ASR coin. In this scenario a project sponsor adds a particular amount of water to an aquifer (or retires a particular amount of pumping) not for the public betterment, but rather to allow the sponsor to appropriate specified amounts of ground water right that otherwise would not be in priority. The project mitigates the junior right holder's depletion and maintains the status quo for senior pumpers using the aquifer or for tributary surface water rights. An example from Colorado is the project managed by Groundwater Appropriators of the South Platte ("GASP"), where pumpers divert flood flows and non-irrigation season from the river into leaky ditches and infiltration basins, carefully account for the amounts recharged, account for the timing of return flows of the recharged water to the South Platte River and then are entitled to pump their junior tributary wells according to a schedule that recognizes the mitigation to senior surface water rights provided by the recharge.

IDWR's Conjunctive Management Rules specifically list recharge as an appropriate mitigation device available to any appropriator facing water right administration. IDAPA 37.03.11.43.3.d.

In Idaho, the authors are aware of several mitigation proposals involving aquifer recharge that have allowed the Department to process applications to appropriate ground water despite the Department's current moratorium on processing new applications in the Boise Basin.

In one instance, the Department has approved a relatively small appropriation of ground water from the shallow aquifer for irrigation use where the applicant proposed to divert an existing surface

[625] The requirement that water injected be of drinking water quality and subject to a permit can be essential in these cases. Recently, the Idaho Federal District Court found criminal liability where a feedlot operator injected surface water into the Eastern Snake Plain Aquifer without permits. *United States v. King*, Case No. CR-08-002-E-BLW (D. Idaho 2009).

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water right into infiltration basins near the well. The applicant provided measurements of the rate of infiltration to the aquifer from the basins and was authorized to divert the same volume from a well.[626]

The Department also has processed applications involving the appropriation of ground water exposed by the construction of ponds that intercept shallow ground water. The ponds are to be constructed for aesthetic purposes in residential and commercial subdivisions and no ground water was proposed to be diverted from the ponds. To account for the evaporative losses from the ponds, however, the applicants proposed to change the nature of use of natural flow water rights represented by their shares of stock in mutual irrigation ditch companies from irrigation to ground water recharge. Each share represented the right to receive up to 0.02 cfs of water per appurtenant acre within the development. One "share" was offered as mitigation for each acre of pond and an equivalent area of "dry up" (i.e., no future irrigation) was proposed to insure no net increase in consumptive use of water following the pond construction and transfer.[627] The transferred water rights were proposed to be diverted directly into one or more of the ponds as recharge to offset evaporative losses.

Typically, "mitigation" has meant the avoidance or offset of injury to senior water rights.[628] But in the above cases, there was no indication that pumping the small well or evaporation from the ponds

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[626] The conditions imposed on the new right concerning recharge were as follows:

> The right holder shall mitigate the groundwater diversion authorized under this right by directing water diverted from the Boise River under existing water rights into unlined ponds and causing it to seep into the ground. The volume of water directed into the ponds for mitigation purposes shall equal or exceed the volume of groundwater diverted under this right each year. The ponds shall be modified and/or constructed and the seepage shall be quantified in accordance with the plan proposed [by the applicant's consultant]. If the proposed mitigation proves to be inadequate or cannot be maintained, the Director retains jurisdiction to require modifications to maintain sufficient recharge in order to offset diversion from the aquifer under this right. The Director retains jurisdiction to require measurement and reporting of the amount of surface water supplied to the ponds for mitigation purposes.

State of Idaho Dep't of Water Resources, Water Right No. 63-12092 (issued November 18, 1999).

[627] The assumption here is that the annual evaporative loss (consumptive use) of ground water per exposed surface acre is equivalent to the annual consumptive use attributable to the same acre due to irrigation. Hence the dry up of an acre of historical irrigation offsets the depletive effect of exposing one surface acre of ground water. Depending on the consumptive use values appropriate for evaporation and irrigation in the location where the mitigation is being proposed, the applicant could be required to provide more or less mitigation water.

[628] The Department's draft Water Management Rules define "mitigation" as "[t]he result of an action taken by or for the benefit of the holder of a junior priority water right to prevent injury to a senior priority water right, or to provide compensation acceptable to the holder of a senior priority water right for injury caused by the diversion and use of water under the junior priority water right." This is consistent with the use of the word in the context of a mitigation plan which is defined in the Department's Conjunctive Management Rules, IDAPA 37.03.11.010.15, as "a plan submitted by the holder(s) of a junior-priority ground water right and approved by the Director . . . that identifies actions and measures to prevent, or compensate holders of senior-

would interfere with water levels in neighboring wells. Nor was there any indication that they actually would cause injury to senior surface water rights, although that assumption is the basis for the Department's processing moratorium. Nor was the recharge proposed to benefit a specified senior water right or to avoid a delivery call. Rather, it was to have no net effect on the water system and water users in that system as a whole—much like the PBAR projects discussed previously. In its most simple terms, the mitigation was offered because it was a prerequisite to being able to have the permit application processed.

(5) Injection of spent geothermal water

Both to conserve the volume of a geothermal aquifer and maintain its heat energy, several holders of geothermal water rights inject the water from which varying amounts of heat has been extracted. The City of Boise's geothermal system is an example. The U.S. Department of Administration in Boise is another. The injection is carried out pursuant to a permit under the injection well statute (discussed below), but it provides no right to the injected water as such, and it is not considered aquifer storage.

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priority water rights for, material injury caused by the diversion and use of water by the holders of junior-priority ground water rights within an area having a common ground water supply."

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23. MUNICIPAL WATER RIGHTS AND RAFN

A. The growing communities doctrine—an exception to the anti-speculation rule

The prior appropriation doctrine, born during the frenzied settlement of the western states in the nineteenth century, embodies the entrepreneurial energy that characterized that era. It entrusts private initiative with the duty to efficiently allocate a public resource. Caution as to environmental and other public interest considerations was not grafted onto the doctrine for many decades.

From the start, however, there was a tension within the prior appropriation doctrine. While it embraces laissez faire capitalism, it eschews one of the driving forces of the capitalist market place—speculation. In other contexts, speculation (and the investment resources it brings to the table) is considered the engine of private development and one of the hallmarks of the American success story. In water law, however, speculation is seen as the enemy of beneficial use, which is elevated to the prior appropriation doctrine's most prominent position. Beneficial use is more important even than being first in time: The law condemns the water speculator while rewarding the farmer who actually applies water to the land, regardless of who got there first.

Why the hostility toward the speculator? Simple. Water is a public resource. A speculator is someone who seeks to appropriate water without having an immediate need for it in the hope of selling it later to someone who can put the water to work. Water law views the speculator harshly as someone who has contributed nothing and should not be allowed to profit by tying up a public resource. While our economic system embraces speculation in virtually every other aspect of the economy—from land to futures markets—we have always treated public resources differently. Thus, while speculation in privately owned real estate is allowed and even encouraged, the public domain, by and large, was not sold to the highest bidder but was doled out for free to homesteaders, miners, and others who actually put the land to work. The same is true for water. Once reduced to private ownership, however, both land and water may be bought and sold, and speculation is allowed to play its appropriate economic role of allocating the resource.

This tension—in which speculation is excluded from the marketplace, at least at the time of initial allocation—is important to understand in the context of municipal water rights and the special treatment accorded to municipal water providers.

In the early days, before permit systems were established in Idaho and most other Western states, a water right came into existence only by actual diversion to beneficial use.[629] The statutory

[629] "The procedure for appropriating water contained in the act of 1881, providing that an intending appropriator should post a notice at the point of diversion and record the same, was replaced in 1903 by the present procedure which places the regulation of appropriation of waters under the jurisdiction of [what is now Idaho Department of Water Resources]." Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1, 21 (1968). Except for certain small domestic wells, the permit/license process is now mandatory in Idaho. Idaho Code §§ 42-103, 42-201 (for surface water diversions, effective May 19, 1971) and Idaho Code § 42-229 (for ground water diversions, effective March 25, 1963). Implementing regulations are found at IDAPA

permit system provided critical assurance to the developer of a new water right. Rather than engage in a risky race to develop a water supply, the user could obtain a water right permit in advance, which secured the quantity and priority of the water right sought. With permit in hand, the user then could obtain financing and proceed to construction of the diversion and delivery system with reasonable confidence that water would be available. Once the project was completed and in use, a license would be awarded with a priority date relating back to the date of the application for the permit. Idaho Code §§ 42-202, 42-219.

In Idaho, the user may spend up to five years getting from permit to license, with another five to ten-year extension upon a showing of need. Idaho Code §§ 42-204.[630] In specified (and very limited) circumstances, further extensions may be obtained.[631] In most cases, that has proven sufficient time to design, fund, and construct a water project, at least for the typical Idaho irrigation project.

37.03.08.035.01.a. (may not "commence the construction of any project works" until permit application has been approved).

[630] Idaho Code § 42-204 provides that "actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of [permit] approval. . . ." An extension of up to ten years is available for larger water right permits: "The time for completion of works and application of the water to full beneficial use under any permit involving the diversion of two (2) or more cubic feet per second or the development or cultivation of one hundred (100) or more acres of land may be extended by the director of the department of water resources upon application by the permittee for an additional period up to ten (10) years beyond the initial development deadline contained in the permit, or beyond a grant of extension pursuant to the provisions of subsection (1) of this section, provided the permittee establishes that the permittee has exercised reasonable diligence and that good cause exists for the requested extension." Idaho Code § 42-204(4). (This 10-year provision was added in 2013, 2013 Idaho Sess. Laws, ch. 82. It used to be just five years.)

An extension of unlimited duration is available for permits held by the United States or the Idaho Water Resource Board. Idaho Code § 42-204(5).

All others are eligible for one five-year extension: "In all other situations not governed by these provisions the department may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, or beyond any grant of extension pursuant to the provisions of subsection (1) of this section, upon request for extension received on or before the date set for completion, provided good cause appears therefor." Idaho Code § 42-204(6).

Most practitioners find that the Department applies a lenient standard in determining good cause under this provision. Other provisions deal with extensions of time in connection with the submission of proof. Idaho Code §§ 42-218, 42-218(a).

[631] For example, further extensions may be provided for certain, specified permitting delays. Idaho Code § 42-204(1). An extension for up to 12 years is allowed for certain large irrigation projects. Idaho Code § 42-204(2). Extensions are allowed for large reservoir projects. Idaho Code § 42-204(3). Extensions are allowed for federal or Idaho Water Resource Board projects. Idaho Code § 42-204(5).

The system has not been entirely satisfactory, however, for cities and other municipal water providers.[632] Municipal providers shoulder an obligation unlike that of other water users. Cities and municipal water utilities are bound to serve all those customers who find it desirable to locate within their service area.[633] Municipal providers never know how many customers they will be obligated to serve in the future, but must serve them when they come. Thus, cities cannot wait for the future to unfold and simply hope that water may be obtained as needed. Although some uncertainty is inherent in growth projections, practical necessity demands that cities and utilities lay the foundation today to meet the water needs of the coming decades.

In short, water rights to serve these municipal systems generally must be acquired long before the systems are in operation at full capacity. The planning horizon for these endeavors typically is longer than the five to fifteen years allowed under Idaho's water licensing statute. Cities have argued that they should not be subject to such a limitation. By and large, courts and legislatures have agreed.

B. Development of the doctrine in Colorado

Special treatment for municipal providers was first recognized by the courts, with legislative enactments coming along more recently. The courts of Idaho and other Western states long ago recognized the unique obligations of municipalities and have treated them differently than other water users.

> Of course, as the West began to urbanize, the prohibition against speculation served as a barrier to planning and development of adequate municipal supplies to accommodate future needs. Most states eliminated this barrier by providing special protections for municipalities, allowing them to hold, or at least acquire rights to, water supplies for future use. But for everyone else, the requirement of actual beneficial use remained.

Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 Envtl. L. 919, 965 (1998) (footnote omitted).

As discussed in the next section, Idaho was the first state to recognize the principle of special treatment for municipal providers. Colorado was quick to follow, and the doctrine has been most

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[632] The term "municipal provider" is a defined term in Idaho. Idaho Code § 42-202B(5). The term is also commonly used in Colorado. Most other western states refer to cities and public utilities that provide water to customers as "municipal water suppliers."

[633] "Public utilities have a duty to serve all customers within a service area, provided that the system as a whole can absorb the cost and still yield a reasonable rate of return. A leading California case extended the duty to serve to include a duty on water providers to acquire the necessary supplies to meet projected demands." A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33, 59 (2006) (citing *Lurawka v. Spring Valley Water Co.*, 146 P. 640, 645-46 (Cal. 1915)).

thoroughly discussed by the courts of that state. The seminal exposition comes from the Colorado Supreme Court, writing in 1939:

> The concern of the city is to assure an adequate supply to the public which it serves. In establishing a beneficial use of water under such circumstances the factors are not as simple and are more numerous than the application of water to 160 acres of land for agricultural purposes. A specified tract of land does not increase in size, but populations do, and in short periods of time. With that flexibility in mind, it is not speculation but the highest prudence on the part of the city to obtain appropriations of water that will satisfy the needs resulting from a normal increase in population within a reasonable period of time.

City & Cnty. of Denver v. Sheriff, 96 P.2d 836, 841 (Colo. 1939) (emphasis added).

The "growing communities doctrine,"[634] as the teaching of *Sheriff* and its progeny has come to be known, recognizes that long-term planning by municipalities is prudent and necessary, and that the prior appropriation doctrine can accommodate the need for cities to hold water rights for long periods before they are put to use.

Subsequent decisions of the Colorado Supreme Court have reinforced the holding in *Sheriff*. "We cannot hold that a city more than others is entitled to [a] decree for water beyond its own needs. However, an appropriator has a reasonable time in which to effect his originally intended use as well as to complete his originally intended means of diversion, and when appropriations are sought by a growing city, regard should be given to its reasonably anticipated requirements." *City & Cnty. of Denver v. N. Colorado Water Conservancy Dist.* (the "*Blue River*" case), 276 P.2d 992, 997 (1954). "Courts should not intrude their own opinions to override the studied good-faith opinions of governmental agencies as to future needs of the public for facilities or commodities." *Metro. Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 289 (Colo. 1961). "The

[634] We use the phrase "growing communities doctrine" in reference to this body of the case law. The label has been employed by the Washington Supreme Court, *State of Washington, Dept. of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998) (dissent) and by a number of commentators, e.g., Janis A. Carpenter, *Water for Growing Communities: Refining Tradition in the Pacific Northwest*, 27 Envtl. L. 127 (1997); Sandra Zellmer, *The Anti-Speculation Doctrine and its Implications for Collaborative Water Management*, 8 Nevada L. J. 994 (2008); A. Dan Tarlock, *The Progressive Growth Doctrine Meets Old and New Stresses on the West's Variable and Perhaps Shrinking Water Supplies*, 11 No. 2 ABA Water Resources Committee Newsletter 12 (2009); Lora Lucero and A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era*?, 42 Nat. Resources J. 803 (2003); A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33 (2006). Although this shorthand description has not yet been employed by the Idaho Supreme Court, and differs somewhat from the "great and growing cities doctrine" which has taken hold in Colorado, we think it captures the idea. The doctrine plainly applies to all growing communities, large and small, not just to great cities. For instance, in *Village of Peck v. Denison*, 92 Idaho 747, 751, 450 P.2d 310, 314 (1969), the doctrine was applied to a community of 200 inhabitants.

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Sheriff decision clearly counsels against a strict application of the anti-speculation doctrine to municipalities seeking to provide for the future needs of their constituents. . . . Thus under *Blue River*, a city may appropriate water for its future needs without violating the prohibition on speculation so long as the amount of the appropriation is in line with the city's 'reasonably anticipated requirements.'" *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 37-38 (Colo. 1996).

C. Recognition of the doctrine in Idaho

This common law principle has long been recognized in Idaho.[635] Two Idaho cases and one federal case applying Idaho law have ruled squarely that cities may obtain water rights of sufficient quantity to meet future population growth. The first of these predated *Sheriff*.

In *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff'd, Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914), the City of Pocatello granted a franchise to Murray and his associates to provide water to the city.[636] The city complained that while Murray had delivered some water from Mink Creek, he had not obtained the entire supply physically available in the creek. Applying Idaho law, the federal court found Murray indeed had failed to fulfill his contractual obligation. The court rejected Murray's argument that it was against public policy for the city to appropriate more water than was then needed. The court declared that the leeway accorded agricultural users "should and doubtless would, be applied with even greater liberality to the superior and more elastic needs of a growing municipality." *Murray*, 206 F. at 80.

In *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.), the Idaho Supreme Court upheld the city's right to purchase irrigation water rights and hold them for future municipal needs. The court went on to hold that such water need not be applied to irrigation in the meantime to avoid forfeiture.[637]

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[635] Special treatment accorded to municipal providers in other western states is summarized in the discussion in section 23.I at page 379 and the table in section 23.I(14)(b) at page 395.

[636] The appeals court affirmed on the narrow basis of the construction of the municipal ordinance. However, the appeals court noted that one of the purposes of the water supply agreement between the city and defendants was to provide "as well for their future use." *Murray*, 214 F. at 220.

[637] In support of its decision, the Idaho court quoted from a Wyoming case, *Holt v. Cheyenne*, 137 P. 876 (Wyo. 1914):

> [T]he Supreme Court of Wyoming had before it . . . the identical question presented in this case. The court held: "A city's right to appropriate the waters of a stream is not limited to the needs of its citizens at the time of the adjudication of its rights, but is entitled to appropriate for the probable future demands of its population."
>
> The court then reviewed numerous authorities holding that property may be held by a municipality for its future growth and development without being subject to adverse claims of others, and then continues: "Such, we think, is the better reasoning, and is supported by the great weight of authority and to which

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> A municipality may purchase lands, if that be necessary, to acquire water for its municipal needs, but is not required, after purchase, to irrigate the lands or cause the same to be irrigated, to avoid a loss of the water on a charge of abandonment. To require that would amount to nullifying the power granted to a municipality to acquire and hold water for future needs—an absolute necessity to the life and existence of a municipality.

Beus, 62 Idaho at 7, 107 P.2d at 154 (emphasis added).

In addition to the common law, the Court found support for special treatment of municipalities in Idaho statute.

> Finally, the view that a municipality may acquire and hold water for future needs seems to be placed beyond serious controversy by Section 49-1132, supra, which, among other things, provides that a municipal corporation has power to supply excess water to persons or corporations outside its corporate limits. If a municipality may only acquire water for the existing needs of its inhabitants-those residing within its corporate limits-there could be no excess water to sell outside the limits of a city.

Beus, 62 Idaho at 7, 107 P.2d at 154.[638]

In the case of *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (McQuade, J.), the court upheld the right of the village to obtain an unquantified water right for "all the flow" from a particular source. Whether the water was needed for current or future needs is somewhat unclear from the decision. Thus, the discussion of future needs is arguably dictum. In any event, the Court noted in a footnote:

> many courts have in later cases acceded, although a contrary doctrine has been announced in earlier decisions."

Beus, 62 Idaho at 6, 107 P.2d at 154 (this quotation, which *Beus* attributed to *Holt*, is actually from the headnote to *Holt*). The *Holt* court did state: "The city was not limited in the amount of its appropriation to the needs of its citizens at the time of the adjudication." *Holt*, 137 P. at 880. The court further stated that "the securing of water sufficient not alone for its present but such as may be necessary for its future inhabitants was and is within its governmental powers." *Holt*, 137 P. at 881.

[638] The referenced statute, Idaho Code § 49-1132, has been repealed. It may have been replaced by Idaho Code § 50-323, which was created in a comprehensive re-codification of municipal statutes in 1967. H.B. 41, 1967 Idaho Sess. L. ch. 429, § 20. However, this is difficult to trace, because the bill language is in an un-codified format. Nor does the legislative history of the 1967 act provide any information specific to this provision. In any event, an extraterritorial provision similar to that in the prior Idaho Code § 49-1132 is now found in the Idaho Revenue Bond Act, Idaho Code § 50-1030(a).

Idaho Code § 49-1132 may be traced back to 1901. 1901 Idaho Sess. L. ch. 41. However, the 1901 version does not contain the extra-territorial language.

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> [A]lthough the Village of Peck became a municipality only after the events giving rise to this litigation, we would have found it difficult not to allow the appropriation of some excess water (had there been any in fact) under I.C. § 50-323 and its predecessors and *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940); see Hutchins, op. cit. at p. 44 (municipal use of water).

Village of Peck, 92 Idaho at 751, n.4, 450 P.2d at 314, n.4.

The court's reference in the quotation above is to an article published a year earlier by Wells Hutchins, the distinguished water law scholar, Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho L. Rev. 1 (1968). Mr. Hutchins concluded that Idaho law does recognize water rights for future municipal growth:

> [A] city is not limited in the amount of its appropriation to the needs of its citizens at the time of adjudication of its water right, but may dispose of and apply the surplus water to beneficial use up to the amount of its application.

Hutchins, 5 Idaho L. Rev. at 44 n.211. The *Village of Peck* Court thus adopted Mr. Hutchins' observation. This shows that the Court viewed the doctrine has having a continuing vitality and a basis independent of the since repealed statute referenced in *Beus* (former Idaho Code § 49-1132, whose successor statute is discussed section 23.L(5) at page 411).

Thus, Idaho case law consistently has recognized and accommodated the special burdens on municipal water providers—providing them a measure of protection from the statutory forfeiture laws and common law abandonment principles.[639] As one commentator put it: "Therefore, when a municipal corporation acquires a water right, the city generally will not lose the water right due to nonuse." Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 294 (1990). In the same vein, the Department's chief legal counsel noted: "The general law regarding the quantity of a municipal water right appears to be that a city may acquire a preferred right to store or appropriate more water than is immediately needed, thus allowing for growth of the city." Phil Rassier, Chief Counsel, *IDWR Memorandum: Municipal Water Rights – Statutory Background* at 1 (May 7, 1979) (reproduced in Appendix M).

D. The Municipal Water Rights Act of 1996

(1) Text of the statute (as amended)

In 1996, the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by

[639] These three Idaho cases on the Growing Communities Doctrine are analyzed by former Deputy Attorney General Philip Rassier in his Memorandum of May 7, 1979 (reproduced in Appendix M).

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appropriation or transfer) for long-term growth. Municipal Water Rights Act of 1996 ("1996 Act" or the "Act").[640] Because the text of the Act is important, we set it out here in full (with subsequent amendments) for reference. The following reflects amendments through 2020:

Idaho Code § 42-202(2)	An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.
Idaho Code § 42-202(11)	Provided further, that water rights held by municipal providers prior to July 1, 1996, shall not be limited thereby.
Idaho Code § 42-202B(4)	"Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.
Idaho Code § 42-202B(5)	"Municipal provider" means: (a) A municipality that provides water for municipal purposes to its residents and other users within its service area; (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.
Idaho Code § 42-202B(6)	"Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

[640] 1996 Idaho Sess. Laws, ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 Act. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 Act but came a year later. The text in the table has been updated to reflect amendments to the 1996 Act, most recently S.B. 1316 (2020 Idaho Sess. Laws, ch. 164) (providing for incremental licensing of RAFN rights).

Idaho Code § 42-202B(7)	"Planning horizon" refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.
Idaho Code § 42-202B(8)	"Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.
Idaho Code § 42-202B(9)	"Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

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Idaho Code § 42-204	. . . (3) The provisions of this subsection [setting a five-year development period] shall not apply to permits held by municipal providers for reasonably anticipated future needs. . . . (4) For permits held by municipal providers for reasonably anticipated future needs, the permit development period shall correspond to the planning horizon authorized by the permit, which may not be extended. During the permit development period, the municipal provider shall periodically submit to the department incremental statements of completion showing proof of beneficial use consistent with the provisions of section 42-217, Idaho Code. Each such incremental statement shall document the extent of application of water to beneficial use during the most recent reporting interval. Each incremental statement shall be prepared by a certified water rights examiner, unless the permit holder is not asserting any additional increment of beneficial use during that reporting interval. The department shall set and may later adjust the duration of any reporting interval for any permit, which shall be made a condition of the permit, to any duration not shorter than five (5) years. Sixty (60) days before the end of each reporting interval, the department shall forward a notice to the municipal provider by certified mail to its address of record specifying the date the incremental statement is due. Unless an extension of the deadline for the incremental statement is requested by the municipal provider prior to the deadline, and the extension is approved by the director upon a showing of good cause, failure to timely submit an incremental statement shall result in a lapse of that portion of the permit that has not previously been licensed or for which an incremental statement of completion showing proof of beneficial use has not been submitted. Such lapsed permit portion may be reinstated only in accordance with the provisions of section 42-218a, Idaho Code. For reasonably anticipated future needs permits existing on July 1, 2020, the department shall have one (1) year from July 1, 2020, either to issue a license, where proof already has been submitted, or to modify the permit to conform to the provisions of this section by establishing future reporting intervals for periodic proof statements, by establishing the date for the final proof statement corresponding with the end of the planning horizon authorized by the existing permit, and by updating approval conditions to clarify whether information that must be submitted with proof of beneficial use is due at each reporting interval or only with the final proof statement. . . . (6) Subject to the provisions for reinstatement as provided in section 42-218a, Idaho Code, a permit holder who fails to comply with the provisions of this section within the time or times specified shall be deemed to have relinquished all rights under its permit or, in the case of a permit held by a municipal provider for reasonably anticipated future needs, the permit holder shall be deemed to have relinquished all rights under any portion of the permit that has not previously been licensed or for which an incremental statement of completion showing proof of beneficial use has not been submitted.

Idaho Code § 42-217	(1) On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, or the date set for submission of an incremental statement of completion showing proof of beneficial use, the permit holder shall submit a statement on a form furnished by the department of water resources that the permit holder has used such water for the beneficial purpose allowed by the permit. The statement shall include: (a) The name and post office address of the permit holder; (b) The permit number; (c) A description of the extent of the use; (d) In the case of a municipal provider, a description of the current service area; (e) The source of the water used; and (f) Such other information as shall be required by the department's form. (2) Such written statement shall include fees as provided in subsection K. of section 42-221, Idaho Code, or a field examination report prepared by a certified water right examiner. For permits held by a municipal provider for reasonably anticipated future needs, such statements shall be provided in accordance with section 42-204(4), Idaho Code. (3) Upon receipt of such written statement and the fee as required in section 42-221, Idaho Code, the department shall examine, or cause to be examined: (a) The place where such water is diverted and used and, if the use is for irrigation, the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use. (b) The capacities of the ditches or canals or other means by which such water is conducted to such place of use and the quantity of water that has been beneficially applied for irrigation or other purposes. (4) The department or the person making such examination under the direction of the department shall prepare and file a report of the investigation: provided, that whenever an irrigation project is developed in the name of an association, company, corporation, irrigation district or the United States as provided in section 42-219, Idaho Code, proof of beneficial use shall be made by the permit holder. The lands upon which the water has been used need not be described by legal subdivisions, but may be described as provided in section 42-219, Idaho Code, and it shall only be necessary to show in such cases that the quantity of water beneficially applied for irrigation has been applied within the limits of the project.

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Idaho Code § 42-218a	(1) A permit upon which the proof of beneficial use, or an incremental statement of completion showing proof of beneficial use, has not been submitted, or a request for extension of time has not been received on or before the date set for such proof or incremental statement, shall lapse and be of no further force nor effect. For a permit held by a municipal provider for reasonably anticipated future needs, such lapse shall not apply to any portion of the permit that has been previously licensed or for which an incremental statement of completion showing proof of beneficial use has been submitted. Notice of said lapsing shall be sent by the department to the permit holder at the address of record by regular mail. . . .
Idaho Code § 42-219	(1) Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license corresponding to the beneficial use. Such license shall state the name and post office address of such user, the purpose for which such water is used and the quantity of water that may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied. For permits held by a municipal provider for reasonably anticipated future needs, a license may be issued incrementally for an amount corresponding to the beneficial use demonstrated to the satisfaction of the department in each incremental statement of completion showing proof of beneficial use submitted pursuant to section 42-204(4), Idaho Code, which amount, together with any previously licensed portion of said permit, shall not exceed the initial quantity authorized under the permit. The final incremental license at the end of the planning horizon shall be issued for an amount corresponding to the beneficial use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate. (2) If such use is for irrigation, such license shall give a description, by legal subdivisions, of the land irrigated by such water, except that the general description of a place of use described in accordance with subsection (5) or (6) of this section may be described using a digital boundary, as defined in section 42-202B, Idaho Code. If the use is for municipal purposes, the license shall describe the service area as provided in section 42-202B(9), Idaho Code. . . .
Idaho Code § 42-222(1)	Any person, entitled to the use of water whether represented by license

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	issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate. When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that

	generally will be made. When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use. The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.
Idaho Code § 42-223(2)	A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(2) The 1996 Act recognized the common law as its foundation

In enacting the Municipal Water Rights Act of 1996, the Legislature affirmed the growing community doctrine's role in Idaho water law, while placing clear sideboards on how it is to be applied. By requiring careful planning and full disclosure by those who seek future needs water rights, the statute establishes a cautious approach to the municipal water rights consistent with the objectives of maximum use and conservation of water resources.

In the law's statement of purpose, the Legislature recognized that it was not writing on a blank slate and specifically recognized and embraced the common law doctrine of special treatment for municipalities:

> The appropriation doctrine as applied throughout the western states provides flexibility for municipal providers to obtain and hold water rights needed to assure an adequate water supply for reasonably anticipated future needs. While this concept is recognized in Idaho case law, it should be further described in statutes in order to guide the actions of the Department of Water Resources, water users and the courts, and to assure that the use of this concept is appropriately controlled. The legislation seeks to define and limit the authority of municipal water providers to develop and hold water rights for reasonably anticipated future needs and to allow water to be supplied to expanding service areas. This statute addresses future licensing of water rights for municipal purposes (including those currently permitted) as well as future changes in water rights to municipal purposes. The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights. Municipalities would be required to provide information to describe their service area, to establish a reasonable planning horizon, and to show that the water rights are necessary for reasonably anticipated future needs.

Statement of Purpose, R.S. 06104, which became S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297.

The 1996 Act is more than a codification of the common law, however. It contains several new concepts and reflects a much more precise regulatory interpretation of the doctrine. The structure of the new approach is reflected in several newly defined terms of art, all contained in the following one-sentence summary of the statute: "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all "reasonably anticipated future needs" (aka "RAFN") within an expanding "service area" during a specified "planning horizon."

The following sections address each of these terms of art.

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(3) Who is a municipal provider?

The term "municipal provider" is defined to include more than cities who provide water to their customers. Idaho Code § 42-202B(5). The Act defines four types of municipal provider: (1) cities, counties and the state, (2) water utilities, like United Water Idaho, (3) water and sewer districts, and (4) subdivision developers and homeowner associations. Each is discussed below.

(a) Cities, counties, and state

The first category of municipal provider is simply: "A municipality that provides water for municipal purposes to its residents and other users within its service area." Idaho Code § 42-202B(5)(a). The reference to "municipality" is somewhat broader than it sounds because that term is defined elsewhere to include cities, counties, and state entities. "'Municipality' means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution." Idaho Code § 42-202B(4). Thus, for instance, a state university or state prison providing drinking water to students or prisoners would fall within the definition of "municipality" and, hence, "municipal provider." In another example, the Idaho Transportation Department has obtained a municipal water right under the Act to irrigate landscaping at the Bliss rest stop.[641] To the authors' knowledge, no county in Idaho provides municipal water. But a county would fall within this definition if it chose to do so.[642]

(b) Municipal water utilities

The second category is regulated utilities: "Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area." Idaho Code § 42-202B(5)(b). This would include large utilities such as United Water Idaho (which happens to be the largest municipal provider in the state) and small ones like Eagle Water Company serving portions of Eagle.

(c) Other political subdivisions (such as water and sewer districts)

The third category also includes "a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area." Idaho Code § 42-202B(5)(b) (the same subsection of the act includes both the

[641] This and other RAFN rights are identified in the table found in section 23.G at page 376.

[642] The term "municipality" is defined differently in other parts of the Idaho Code. For example: Idaho Code § 50-1702 defines municipality very broadly (to include such things as highway districts and sewer districts) in the context of local improvement districts. The term is also broadly defined in Idaho Code § 67-8702 (to include such things as school districts and special purpose districts) in the context of the Idaho Bond Bank. Idaho Code § 50-2018 defines municipality more narrowly (to include only cities, towns, and counties) in the context of urban renewal law. Another narrow definition is found in Idaho Code § 50-2702 (including only cities, towns, and counties) in the context of the municipal industrial development program.

second and third categories described here). This would include, for instance, water and sewer districts that provide municipal water to their customers.[643]

(d) Private developers and homeowners' associations

The fourth category includes private land developers and homeowner groups: "A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a 'public water supply' as described in section 39-103(12), Idaho Code." Idaho Code § 42-202B(5)(c). The definition of "public water supply" is quite broad. It includes small private residential water systems serving at least 15 connections or 25 individuals.[644]

The Department takes the position that in order to qualify as a municipal provider seeking a RAFN right, the applicant must already be providing municipal water to others. This conclusion is based not on the definition of municipal provider, but on another provision of the 1996 Act which states:

> An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. . . .

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[643] There is no doubt that water and sewer districts are political subdivisions of the state. "The judges of election shall certify the returns of the election to the district court having jurisdiction. If a majority of the votes cast at said election are in favor of the organization, the district court shall declare the [water or sewer] district organized and give it a corporate name by which, in all proceedings, it shall thereafter be known, and designated the first board of directors elected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation." Idaho Code § 42-3207 (providing for the creation of water and sewer districts) (emphasis provided). See also, Idaho Code § 42-3218C (providing that subdistricts of water and sewer districts are political subdivisions). This is consistent with other broad definitions of political subdivision found throughout the Idaho Code. E.g., Idaho Code §§ 6-902(2), 7-1303(6), 12-117(6)(b), 44-2013(2)(a), 46-1002(4), 56-1402(5), 58-1102(c), 59-802(5); 63-3622*O*(2)(j), and 67-2809(2)(b)(i). Only a few definitions, which are not applicable here, provide a more restrictive scope. E.g., The Idaho Video Services Act, Idaho Code § 50-3002(12).

[644] This definition was amended in 2010, increasing the minimum number of service connections from 10 to 15. It now provides: "'Public water supply' or 'public drinking water system' means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen (15) service connections, regardless of the number of water sources or configuration of the distribution system, or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. Such term includes any collection, treatment, storage and distribution facilities that are under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control that are used primarily in connection with such system. Such term does not include any special irrigation district." Idaho Code § 39-103(12).

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Idaho Code § 42-202(2) (emphasis added).[645]

Focusing on the present tense of the verb "qualifies," the Director ruled that to obtain an appropriation for RAFN, the applicant must qualify as a municipal provider at the time of the application.[646] This ruling is now codified in the Department's guidance. Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29*, at 5 (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

What this means is that the applicant's expressed intent and demonstrated ability to provide municipal water is insufficient to presently "qualify" as a municipal provider. In order to obtain a RAFN right, the applicant already must be a municipal provider providing municipal water to someone else. This obviously presents a chicken and egg problem. The only way for a developer (or a newly formed water utility) to become a municipal provider is to serve its homeowners or customers solely with non-RAFN municipal rights.[647] Then, when seeking to expand its development or operation, the municipal provider may presently "qualify" as a municipal provider and therefore be able to apply for RAFN rights. It is unclear what public policy is advanced by this two-step process. The legislative history sheds no light on the matter, but the authors doubt that the drafters intended the statute to be read so narrowly. It would appear that the Department's adoption of this narrow reading of the Act (and reversal of prior precedent) reflects its anti-sprawl philosophy.

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[645] Similar "qualification" language is found in Idaho Code § 42-222(1) applicable to transfers of existing water rights to municipal RAFN purposes.

[646] "The interim director interprets the verb [qualifies] to mean that the applicant must be a municipal provider as defined by Idaho Code 42-202B(5) at the time the application is considered by the Department." *In the Matter of Application to Appropriate Water No. 63-32573 in the Name of M3 Eagle LLC ("M3 Decision")*, at 9-10 (IDWR Amended Final Order, Jan. 25, 2010). This order was appealed, *M3 Eagle LLC v. Idaho Dep't of Water Resources*, Case No. CVOC1003180, Petition for Judicial Review (4th Dist. Idaho Feb. 19, 2010), but the case was settled and the appeal dismissed. The Department ruled that M3 Eagle LLC ("M3") did not qualify as a municipal provider because it was not then providing municipal water to others in Idaho. M3's parent company is an established developer and municipal provider in Arizona; this was its first project in Idaho. This was the first time the Department applied this qualification rule in this way. Indeed, the M3 decision departed from prior precedent. A RAFN water right was awarded by the Department to the developer of the Tamarack ski resort (then known as West Rock). *In the Matter of Application for Permit No. 65-22357 in the Name of West Rock Associates, LLC* (IDWR, Final Order, Dec. 20, 2002) (Conclusion of Law No. 5) (on appeal as of June 2011). Tamarack was a first-time developer, not an existing municipal provider. The Department said it was not bound by the Tamarack precedent because the qualification issue was not discussed in the Tamarack decision. *M3 Decision* at 12.

[647] This is doable because, under the Department's parsing of the Act, first-time developers may be deemed municipal providers for purposes of obtaining a non-RAFN water right even though they do not "qualify" as municipal providers eligible for future needs water rights.

To the authors' knowledge, this qualification issue has arisen only once, in the context of a private residential developer (M3 Eagle LLC, discussed in footnote 646 above). It is now addressed in IDWR's guidance on this topic:

> As set forth in M3 Eagle Final Amended Order (M3 Final Amended Order) a corporation or association seeking to qualify as a municipal provider under subsection c above for RAFN must qualify as a municipal provider at the time application is considered by the Department. In other words, at the time of application, the applicant must already supply water for municipal purposes through a water system that is regulated by the state of Idaho as a public water supply. It is insufficient for the applicant to merely be "*ready, willing and able*" to be a municipal provider once the permit is issued.

Mat Weaver, Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29, at 5 (Mar. 16, 2015) (italics original, footnote omitted) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("2015 Weaver Memo") (reproduced in Appendix M).

As a practical matter, it is this third category of municipal provider that is most likely to face this issue; existing cities and water utilities already are in the business of providing municipal water. Hence, qualification is not an issue for them. It is unclear why IDWR's guidance says that it is legally limited to subsection (c) municipal providers. It would seem that the principle would apply equally to all categories of municipal provider. Thus, if a new water utility were formed or if a county or city decided to get into the water supply business for the first time, one would think that it too would face the chicken and egg conundrum discussed above. That is, they cannot "qualify" as a municipal provider for RAFN purposes unless they already are a municipal provider. But that is not what the Department's guidance says.

(4) What are municipal purposes?

The term "municipal purposes" is broadly defined to include "residential, commercial, industrial, irrigation of parks and open space, and related purposes." Idaho Code § 42-202B(6) (definition of "municipal purposes"). This list was broadly drawn and is intended to serve as a catch-all for virtually any use that may arise within the provider's service area.[648]

The only use expressly excluded from municipal purposes is "water from geothermal sources for heating." Idaho Code § 42-202B(6) (definition of "municipal purposes"). However, geothermal water used for non-heat purposes (such as irrigation) does fall within the exclusion.

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[648] A 1979 IDWR policy statement defined municipal use as including "domestic, irrigation, stockwater, fire protection, recreation, commercial, industrial, and any other water use incidental to the functioning of a city." Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979). This list, like the one in the 1996 Act, was intended to embrace any use a municipal provider might be called upon to provide.

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Departmental policy recognizes that treatment of municipal effluent that is mandated by environmental regulations falls within the definition of municipal purposes. This would include both land application and infiltration projects.[649]

(5) The flexible service area

The Act provides for substantial flexibility in the establishment of a "service area." Idaho Code § 42-202B(9). One of the basic elements of every water right is its place of use. For most water rights, the exact boundaries of the place of use (or larger "permissible place of use") must be identified, and any change in these boundaries requires that the water right holder seek departmental approval of a change in place of use.[650] This presents a problem in the case of traditional municipal water rights because the place of use changes as the city grows.

The Department has long recognized this special feature of a municipal water right, and allowed it to be described simply by reference to the "city limits" of the community or the licensed service area of a water utility. Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979) (reproduced in Appendix M).

But what if a municipal provider serves customers outside the city limits? Prior departmental guidance limited the service area to a municipality's city limits. E.g., Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979) (reproduced in Appendix M). This was never tested in court. In any event, this issue was resolved in the 1996 Act, which expressly expanded the scope of the service area.[651] Under the 1996 Act, a municipal provider's place of use is not limited to a city's corporate limits. A city may provide service outside of its city limits, if it is within the municipality's planning area[652] and the delivery system outside the city is physically connected to the city's delivery system inside the city.[653] Note that these limitations do not apply to municipal providers

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[649] Personal communication between Jeff Peppersack and Garrick Baxter of IDWR and Christopher H. Meyer of Givens Pursley, May 16, 2011.

[650] In the case of irrigation rights, the water right must identify the place of use by "legal subdivisions"– that is, down to the forty acre "quarter-quarter" of a one-square-mile section. Idaho Code § 42-202(6).

[651] "'Service area' means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued." Idaho Code § 42-202B(9) (definition of "service area").

[652] See discussion of the meaning of "planning area" in this context in footnote 717 at page 408.

[653] See broader discussion the authority of cities to serve outside their city limits in section 23.L at page 407.

other than cities. In the case of water utilities, the service area is the certificated area approved by the Idaho Public Utilities Commission, which may include one or more cities and/or unincorporated areas. The Act also clarifies that a general description of the service area is sufficient. There is no need to identify a precise boundary.[654]

More significantly, the service area is not fixed in time, but automatically includes any future "changes therein after the permit or license is issued." Idaho Code § 42-202B(9) (definition of "service area"). This confirms longstanding practice that cities and water utilities are not required to seek a formal change in place of use each time the area it serves is expanded. As codified, this now applies to all those meeting the statutory definition of municipal provider.

The 1996 Act does not specify whether or how often a municipal provider must update its description (other than a requirement to update all estimates and descriptions at the time of licensing[655]). The Act seems to contemplate a narrative description of the service area, but the Department does not require even this. As a practical matter, the Department is more interested in keeping its computerized GIS "shape file" for the service area reasonably up to date. It is conceivable that a municipal provider could have more than one service area description, if it operated in multiple, distinct geographical areas.

Municipal use encompasses some uses that might be considered "irrigation," such as irrigation of lawns, parks, open space, and greenery around commercial areas. Likewise, it could encompass irrigation of plants in in a greenhouse that was served by the municipal provider. We are not aware of any formal guidance on this subject, but the authors would suggest that any water lawfully provided to a customer of a municipal provider as part of its general delivery system is a municipal right, and this is true irrespective of what the customer does with the water.

On the other hand a separate farming operation that happens to be owned by a municipality, and is not connected to land treatment of municipal discharge, will most likely be viewed as not a municipal use.

On the other hand, a municipal provider plainly has the authority under the 1996 Act to acquire an irrigation water right and transfer it to municipal use for RAFN purposes. However, if the right is not presently needed, and the municipal provider wishes to continue to operate the farm in the interim, the Department will likely not recognize the right as an irrigation right so long as the farm operation continues. This raises some questions that have not yet been worked out. Should the irrigation right be

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[654] "The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made." Idaho Code § 42-202(2) (application requirements for municipal service providers).

[655] The proof of beneficial use statement required at the time of licensing shall require "[i]n the case of a municipal provider, a revised estimate of the reasonably anticipated future needs, a revised description of the service area, and a revised planning horizon, together with appropriate supporting documentation." Idaho Code § 42-217(¶4).

considered part of the provider's portfolio of municipal rights for "gap analysis"? Is there a way to transfer the right today, so that the provider may be confident that it will be part of its municipal portfolio, even though it continues to be used in the interim for non-municipal purposes?

(6) How long is the planning horizon?

The first step in quantifying future needs is to establish the duration of the planning horizon. The 1996 Act defines the term as follows: "'Planning horizon' refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." Idaho Code § 42-202B(7) (definition of "planning horizon"). The 1996 Act provides no guidance and sets no limit on the duration of the "planning horizon."[656] It is up to the municipal provider to present its case for what it believes is a reasonable period to fit its circumstances. Thus, the duration of the planning horizon is decided on a case-by-case basis by the Department. Two obvious factors are the size of the community and its rate of growth. For a small, slowly growing town or a private subdivision, this might be as little as 15 years. A mid-sized city or a large planned community might require a somewhat longer time, perhaps 20 to 30 years. For a large growing city, a considerably longer planning horizon would seem to be appropriate. Colorado has recognized 50-year planning horizons for the City of Thornton (a medium-sized Front Range suburb, population 78,000) and for Pagosa Springs area (population 9,500). See discussion in section 23.I at page 379 and the table in section 23.I(14)(b) at page 395 for a discussion of future needs water rights in other states.

Idaho's Municipal Water Rights Act imposes on the Department the responsibility to determine the reasonableness of the applicant's asserted planning horizon.

In 2013, the Department issued its first guidance on the subject of the duration of the planning horizon. It was updated in 2014. Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

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[656] The Act's definition of RAFN provides that it includes "future uses of water . . . [that] are reasonably expected to be required within the planning horizon of each municipality." Idaho Code § 42-202B(8). This definition was somewhat garbled during the enactment process. The reference to "the planning horizon of each municipality" makes no sense in the context of a private water utility. This is because cities do not have planning horizons (within the meaning of the Act) unless they are the municipal provider. Where water is provided by a utility, it is the water utility, not the municipality, that has a planning horizon. The original draft of the legislation provided: "'Reasonably anticipated future needs' refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of the municipal provider and are generally consistent with the comprehensive land use plans for each municipality within the service area." Draft legislation by Christopher H. Meyer (Nov. 27, 1995) (on file with author). The change appears to be inadvertent.

The *2015 Weaver Memo* does not provide any specific criteria or limits on the duration of planning horizons, but does include the following general observations:

> The data presented in Tables 1 and 2 suggest that planning horizons between 10 and 55 years are the standard amongst the planning profession and in the actual adoption of planning documents within the State of Idaho.
>
> The Department must guard against over-appropriation of the resource and against speculative water right filings. Longer planning horizons increase the level of uncertainty associated with predicted values and must be considered by the Department with greater caution. Planning horizons of 15-20 years are generally reasonable and require little scrutiny unless there is substantiated competition for the resource or some other justification for additional scrutiny arises. Planning horizons of greater than 20 years can be considered by the Department, but when proposed they should be supported by long-term planning documents such as those listed in Table 2 and by professionally prepared demographic studies substantiating the duration of the planning horizon period.
>
> . . .
>
> As a final measure, the planning horizon period proposed by the applicant must not only be reasonable, but also consistent with the adopted Comprehensive Plan of the City. This can be interpreted to mean no greater in length than the planning horizon period associated with the Comprehensive Plan if no other pertinent planning document exists. When another pertinent planning document exists, such as a master water plan, then the planning document should be consistent with the master plan for the coincident period of time shared between the planning horizons of both documents.

2015 Weaver Memo at 8-9.[657]

[657] The last paragraph appears to have been written in contemplation of situations in which the municipal provider is a city. It is unclear how it would apply in the case of a water utility or a water and sewer district that serves multiple municipalities and/or unincorporated areas. First, there is the question of which comprehensive plan controls and what happens when different plans have different planning durations. Next, it is unclear what a "master water plan" is. Presumably this would include a master plan prepared by the non-city water provider itself. The guidance concludes by stating that "the planning document should be consistent with the master plan for the coincident period of time shared between the planning horizons of both documents." This language is difficult to parse. Presumably, "the planning document" refers to the RAFN application, and "both documents" refers to the RAFN application and the master water plan. Thus, it would appear, for example, that the guidance would allow a longer master water plan (e.g., 50-year) to be used to support a 50-year RAFN application, despite the existence of shorter comprehensive plan (e.g., 20-year). Such a reading makes sense. The two documents have different purposes. The 1996 Act only requires that the quantification of RAFN be based on "planning data . . . [that is] not inconsistent with comprehensive land use plans approved by each municipality. Idaho Code § 42-202B(8). Thus, for example, a future needs projection could not be based on a

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(7) Reasonably Anticipated Future Needs ("RAFN")

The central feature of the 1996 Act is its provision for "reasonably anticipated future needs" (or "RAFN"). While the statute speaks in terms of "future" needs, the Act expressly recognizes that these rights serve a beneficial use now (by allowing cities to plan for growth in an orderly fashion) despite the fact that they may not be physically diverted for decades.[658]

The statute defines RAFN as follows:

> "Reasonably anticipated future needs" refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs").

As noted above, the concept of "future needs" water rights is derived from the common law growing communities doctrine, which accords considerable latitude to cities and municipal water utilities in acquiring rights for long-term needs. The statute attempts to put some sideboards on the concept by requiring that their future needs be documented with "population and other planning data" provided by the municipal provider to the satisfaction of the Idaho Department of Water Resources.[659]

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high population density in an area which the comprehensive plan has designated for open space. Nothing in the Act says that the duration of the planning horizon is capped by the duration of the comprehensive plans. Indeed, some comprehensive plans do not even have clear "durations."

[658] "A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute a beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs." Idaho Code § 42-223(2).

[659] This additional planning burden is found in three places in the statute. *Definition:* "'Reasonably anticipated future needs' refers to the future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required . . . ." Idaho Code § 42-202B(8) (emphasis added). *For new applications:* "An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter." Idaho Code § 42-202(2) (emphasis added). *For transfers:* "When the nature of the use of the water right is to be changed to municipal purposes and some or all of the water right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that

To date, the Department has considered only a few actual "future needs" water right applications (see table in section 23.G at page 376). Depending on the circumstances of the case, the Department may require sophisticated statistical analyses in connection with approving a municipal provider's planning horizon. In the case of a large application by United Water Idaho (a regulated utility), these analyses have taken into account such factors as price elasticity of water demand, the availability of non-potable lawn irrigation, shifts in demographics, and the composition of population, changes in lifestyle, and conservation incentives. In contrast, a RAFN projection for a defined number of housing units in a subdivision or planned community to be built by a private developer who qualifies as a municipal provider would be a simpler proposition.

In 2013, the Department issued extensive guidance on the methodologies that should be employed in quantifying an application for a RAFN water right. This was revised is 2014. Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M). This memorandum basically codifies the methodologies that were developed in the United Water application.

In order to obtain a new RAFN right (either by appropriation or transfer), the provider must demonstrate that additional diversion quantity is required. This is referred to in the *2015 Weaver Memo* as a "gap analysis." *2015 Weaver Memo* at 16-17. In other words, the applicant for a RAFN right must compare its current and future needs with the size of its existing portfolio. An application for RAFN water rights will be approved only on a showing that the provider's existing portfolio is insufficient to meet its long-term needs.

In some cases, the gap analysis may be as simple as summing the authorized diversion rates for each right in the relevant portfolio and comparing that to the total peak diversion rate required to meet current and future demand (with an appropriate safety factor). In other cases, it may be more complex. For example, the quantification of available rights in the portfolio may need to take into account redundant supplies (e.g., primary and supplemental rights, backup supply systems, flood flow rights and other rights with limited or seasonal availability, and so on). There may be other complications such as storage rights, rental or other temporary rights, exchanges, mitigation plans, subordinations and other special conditions. Evaluating the demand side could also be complicated by different delivery systems (e.g., irrigation and potable systems). Finally, some portfolios may include water rights for non-municipal purposes or for specialized purposes within the municipal system.

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the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter." Idaho Code § 42-222(1) (emphasis added). The additional burden was referenced in a 2008 decision by the Department: "To appropriate water for reasonably anticipated future needs, the municipal provider carries an extra evidentiary burden to establish the 'planning horizon' for the municipality or municipalities served, and to submit 'population and other planning data' in support of the anticipated needs within the planning horizon." *In the Matter of Applications To Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle* (IDWR's Final Order Feb. 26, 2008; Order on Reconsideration July 3, 2008), *appeal dismissed as untimely*, *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037 (2011).

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As discussed below in section 23.D(8) at page 353, under its 2009 guidance, the Department will look at a municipal provider's entire portfolio in any event—whether the application is for RAFN or only to meet short-term needs under a non-RAFN right. The difference is that if the new right is sought for RAFN, the portfolio quantity will be compared against a demand number that includes not just short-term requirements but long-term future needs.

It bears emphasis that the Act does not create any entitlement or obligation on the part of municipal providers to obtain water rights for long-term needs. If establishment of a planning horizon and quantification of RAFN reveals that a municipal provider has inadequate rights in its portfolio to meet those needs, it is the provider's burden to acquire such rights by appropriation, transfer, rental, or otherwise. In doing so, the municipal provider will be subject to all the usual rules and protections regarding injury and the local public interest.

IDWR has issued guidance on the quantification of RAFN projections. Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

(8) Quantifying a municipal water right at licensing: Before and after the 1996 Act

(a) Common law rule for cities: Installed capacity/no annual volume limit

Note: Permitting, licensing, and transfer of both RAFN and non-RAFN municipal water rights requires a quantification of both system wide installed capacity and system wide demand (or production). Whichever is less will control. A summary of IDWR guidance explaining the role and interaction of installed capacity and demand is set out in a spreadsheet package prepared by author Chris Meyer. A copy of the spreadsheet package is included at the end of Appendix M to this Handbook (IDWR Guidance on Municipal Water Rights).

For decades before the 1996 Act, the Department provided special treatment for municipal water rights by quantifying them more generously than other rights. This is one way in which the growing communities doctrine was implemented prior to the 1996 Act.[660]

First, it has long been the Department's policy to quantify municipal water rights solely in terms of a diversion rate with no annual volume cap.[661] A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975) (reproduced in Appendix M); Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1*, at 1-2 (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M)[662];

[660] "The growth of a city should be recognized in recommending the rate of diversion for which a license is issued. Therefore, normally the rate of diversion recommended should be that of the capacity of the system unless it exceeds the permitted amount. The annual use in 'acre feet per year' should be omitted from the license for municipal use." A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975) (reproduced in Appendix M). "A municipal right should not be limited by volume. . . . These three preferences allow the city to increase water use under an existing right." Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979) (reproduced in Appendix M). "In the past, municipal water right holders generally already utilized the benefits offered by the amended code sections [the 1996 Act], since the department has issued municipal water rights which provide for future development up to the volume of water capable of being produced by the installed diverting works." L. Glen Saxton, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998) (reproduced in Appendix M).

[661] Irrigation and other non-municipal water rights are usually quantified in terms of a maximum diversion rate coupled with a maximum annual volume. The annual volume limit is typically a fraction of what would be pumped were the water right to be diverted at its full rate 24 hours a day for 365 days. This reflects the fact that most irrigation water rights are not diverted around the clock; doing so would far exceed beneficial use in most cases. The annual volume is intended to reflect the actual use pattern and to make that a permanent feature of the right.

[662] The *2009 Peppersack Memo* replaced two earlier administrative memoranda: A. Kenneth Dunn, *Administrator's Memorandum – Licensing Procedures* at 1 (Apr. 7, 1975); Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979). Both are reproduced in Appendix M.

Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M). Thus, for example, a new well, when first installed, might be used only occasionally to meet peak demand. Over time, however, the city is allowed to "grow into" the right, ultimately using the water right 24 hours a day, every day as part of its full-time base load.

The exemption from the requirement for a volume limit is now reflected in the Department's Beneficial Use Examination Rules, as amended on March, 29, 2012.

> j. . . . The following water uses are exempt from the volume reporting requirement:
> . . .
> vii. Municipal use by an incorporated city or other entity serving users throughout the incorporated city, except the following situations that do require a volume to be reported:
> (1) The permit or amended permit was approved with a volume limitation; or
> (2) The permit was not approved for municipal use but can be amended and licensed for a municipal use established during the authorized development period for the permit.

IDAPA 37.03.02.035.01.j.vii.

Traditionally, at the time of licensing, beneficial use for municipal water rights was measured based on the installed physical capacity of the diverting works, not the extent of actual diversions to customers.[663] This is commonly known as the "installed capacity" rule.[664] This, too, allows the municipal provider to "grow into" a water right over time.

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[663] A 1979 Departmental memorandum stated: "A municipal right should not be quantified by the rate of flow beneficially used at the time of the examination, but rather by the capacity of the diversion works." Norman Young, *Administrator's Memorandum – Definition of Municipal* at 1 (Nov. 5, 1979). A footnote to this sentence provided: "This quantification must be limited to a 'reasonable' extent. For example, the diversion of an entire stream when only a small portion is beneficially used may not be reasonable." *Id*. at 1, n.1. A more recent departmental memorandum described the test as being based on "the volume of water capable of being produced by the installed diverting works." Karl J. Dreher, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998) (superseded by *1999 Dreher Letter*, but rescinded in 2013 by the *2015 Weaver Memo*) (reproduced in Appendix M). The installed capacity rule is also discussed in other guidance, Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M).

[664] Despite the name, the installed capacity "rule" is not based on a formal rule, but on guidance documents and longstanding practice.

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(b) RAFN rights at licensing: the "capacity of the system" standard (now repealed)

Although the 1996 Act allows a municipal provider to obtain a RAFN water permit based on a long-term planning horizon, the Act does not extend the date on which the permittee must prove beneficial use for licensing purposes. Licensing still occurs five or, at most, 15 years after permit issuance irrespective of the length of the planning horizon. This presents the question: How does a municipal provider prove up a water right in just a few years when the provider will continue to grow into the right over a much longer period?

IDWR struggled with this question for 24 years, before the statute was amended in 2020 (as discussed in section 23.D(8)(d) at page 359 below).

This section of the Handbook addresses the question under the original 1996 language. Although this discussion is now obsolete, it is retained in the Handbook to provide background and context.

The 1996 Act does not provide much guidance on how RAFN rights are to be quantified at the time of licensing. Before the 2020 amendment, it stated:

> A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use.

Idaho Code § 42-219(1) (emphasis added).

If this "capacity of the system" language means that the municipal provider must construct the entire water delivery system by the time of permitting, that would frustrate the purpose of the Act. Accordingly, in 1999, former Director Karl Dreher issued guidance addressing this issue in which he recognized that requiring a municipal provider to have completed construction of its entire diversion and delivery system at the time of licensing would defeat the Act's central objective of allowing the appropriator to gradually, economically, and efficiently develop its system over time within the proven planning horizon.[665] The *1999 Dreher Letter* interpreted the "capacity of the system" language as

[665] "Some might construe this [capacity of the system] limitation to require that a municipal provider fully construct the system used to divert or deliver water associated with a water right for an amount "reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area . . . ." However, such interpretation would not be consistent with the intent of the 1996 Municipal Water Rights Act." Karl J. Dreher, *Administrative Memorandum – Application Processing No. 63,* at 2 (June 15, 1999) ("*1999 Dreher Letter*") (emphasis added) (reproduced in Appendix M) (the *1999 Dreher Letter* consists of a letter from Karl J. Dreher to Christopher H. Meyer dated June 14, 1999 which L. Glen Saxton designated as

requiring tangible evidence of the provider's commitment to complete the system within the planning horizon.[666]

In 2013, the Department, under Director Gary Spackman, rescinded the *1999 Dreher Letter* and issued new RAFN quantification guidance. Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

The *2015 Weaver Memo* continues to recognize that complete system construction is not required at the time of licensing. "A key distinction of the RAFN right is the allowance of components of the water right, namely the diversion rate, to be perfected without physically completing diversion and use in establishing beneficial use during the development period of the permit." *2015 Weaver Memo* at 4.

Nevertheless, the *2015 Weaver Memo* provides what appears to be a more rigorous standard for proof than that set out in the *1999 Dreher Letter*.

The *2015 Weaver Memo* states:

> Idaho Code §42-219(B) states "A license may be issued to a municipal provider for an amount up to the full capacity of the system **constructed or used** in accordance with the original permit…" (emphasis added [by Weaver]). IDWR interprets the restrictive language in §42-219 to limit the authority of the agency to only license RAFN permits up to the full capacity of the system constructed or used. Full capacity constructed means significant infrastructure has been constructed to accommodate delivery of water throughout the RAFN service area. Full capacity constructed entails more than engineering plans or in-place financing.

Administrative Memorandum – Application Processing No. 63 on the following day). As noted, this guidance was rescinded in 2013.

[666] Under the *1999 Dreher Letter*, a bald assertion by the right holder it intended to complete the entire delivery system would not suffice, the Dreher guidance required the municipal provider to provide evidence of "a definitive plan for fully constructing the system" and a "substantial investment in the unconstructed capacity of the total system." *1999 Dreher Letter* at 3. Likewise, a municipal provider of ground water must demonstrate that "the constructed portions of the system were shown to be significant, integral phases of implementing a detailed plan to provide the full capacity of the system and there was substantial planning, design, and investment in the unconstructed capacity of the complete system." *1999 Dreher Letter* at 3. The guidance then listed seven criteria that the Department would evaluate in determining whether the "capacity of the system" standard is met, including such things as a detailed overall design, a financing plan, environmental studies, land acquisition, construction of mains, storage, or other system components, and development of an operations protocol. *1999 Dreher Letter* at 3-4.

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Components of significant infrastructure will always include at least the following:

• For ground water diversions a constructed well or series of wells and their associated capacities, for surface water diversions constructed diversion facilities and their associated capacities, or for mixed sources some combination thereof.

• Storage tanks when included as an integral part of the design.

• Trunk lines (major supply conduits) sized and constructed to anticipate service beyond the physically constructed limits of the delivery system at the time proof of beneficial use is submitted.

Significant infrastructure does not have to include the following:

• Service laterals (i.e. stub outs to lots that have not been built out)

• Main line and/or lateral line extensions beyond the physically constructed limits of the delivery system at the time proof of beneficial use is submitted.

• Water quality treatment facilities for diversions in excess of the demand at the time proof of beneficial use is submitted.

• Pumping capacity for diversion in excess of the demand at the time proof of beneficial use is submitted.

Significant infrastructure will never include the following:

• Diversion works and distribution system capacity available for fire protection and/or redundant supply. (The additional capacity provided does not require a water right, so licensing the additional capacity would unintentionally increase the estimated demand to provide for unsupported future growth.)

Therefore, when reviewing the "description of the extent of use" and accompanying documentation, Department staff must review the improvements that have been made, which will typically lie somewhere between full system build out and no system build out, to determine to what extent the RAFN permit should be licensed.

2015 Weaver Memo at 19 (footnotes omitted) (bolding original; underlining supplied).

Although the *2015 Weaver Memo* strictly requires that wells or surface water diversion infrastructure, as well as trunk lines, be constructed by the time of licensing, it continues to recognize that not everything be in place. Notably, the last sentence provides that additional pumping capacity may be installed after licensing. It remains unclear whether this provision for additional pumping capacity is limited to expanding capacity at wells constructed at the time of licensing, or whether the right holder will be allowed to expand pumping capacity by adding additional wells in order to continue to fully develop the RAFN component after licensing. If new well construction is not allowed under a RAFN right after licensing, this would appear to render the 1996 Act nearly useless. The only difference between a RAFN right and an non-RAFN right would be the ability to quantify the diversion rate based on a well with less than fully installed pumping capacity. It is difficult to imagine that the

Legislature would have intended to require cities and other municipal providers to promptly construct all wells that will be required over the course of planning horizon that might last decades. It should be obvious that such a requirement would result in wells being constructed prematurely and, very likely, in the wrong place. The 1996 Act was intended to promote good planning, not bad planning.

The *2015 Weaver Memo* recognizes that the practice of licensing municipal rights based on a diversion rate alone, with no annual volume limit.[667]

(c) Peaking factor calculation

Note that the discussion in this subsection is applicable equally to RAFN and non-RAFN rights (except for the discussion of storage).

Generally speaking, a water right holder will seek to obtain the highest possible measure of a water right at time of application, permitting, licensing, and adjudication.

Water right diversion rates vary depending on whether measured on the basis of average daily demand (ADD), maximum month average daily demand (MMAD), maximum day demand, i.e., peak day (MDD), peak hourly demand (PHD), or peak instantaneous demand (PID). These measures, and how they are calculated, are discussed in 2015 IDWR guidance on RAFN rights.[668] The portion of the guidance dealing with peaking factors is equally applicable to non-RAFN municipal rights.

The IDWR guidance identifies a default peaking factor of 3.0 for converting ADD to PHD and a peaking factor of 2.0 for converting from ADD to MDD. *Weaver Memo* at 15. It does not set out a conversion factor for ADD to PHD, but that factor may be interpolated from the above as 1.5. Water users are invited to provide their own calculations grounded in customer demand and other water usage data from their own delivery systems.

The IDWR guidance states that the water user should address the extent to which storage is available to meet peak demand surges. *Weaver Memo* at 15.

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[667] "RAFN water right licenses should not be limited by volume except in those instances where a volume limitation is necessary to protect the water supply source." *2015 Weaver Memo* at 18. "RAFN water rights created by transfer from an existing non-RAFN municipal right should not be limited by volume except where a volume limitation existed in connection with the water right's use prior to the transfer. A transfer to change the nature of use of an established water right from non-municipal to municipal purposes for RAFN shall limit the volume of water to the historic consumptive use established prior to the change." *2015 Weaver Memo* at 19. It would seem, however, that the municipal provider should be allowed to elect to eliminate the volume limitation by reducing the diversion rate to a rate that would achieve the prior volume if diverted around the clock. A municipal provider might elect to do so for purposes of administrative convenience in instances where the size of the water right is relatively small anyway.

[668] Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M), pp. 13-16.

The IDWR guidance contains a discussion of storage (e.g., water tanks or ponds) that are often part of a municipal delivery system. *Weaver Memo* at 15. The guidance suggests that if storage is available to smooth out demand, it may not be appropriate to boost future demand projections by a mathematical conversion factor to reflect peak hour demand. That is a consideration that will need to be considered based on the particular design and operation of the municipal delivery system. However, it would seem that there would be no reason not to use peak hour production numbers (if they are available) at the time of licensing (or incremental licensing) of a RAFN or non-RAFN right. That is because production numbers are actual historic numbers, and the availability of storage is reflected in what production actually occurred.

(d) Incremental licensing of RAFN rights under the 2020 amendment

In 2020, the Legislature resolved the "capacity of the system" conundrum (discussed in section 23.D(8)(b) at page 355) by amending the 1996 to provide for incremental licensing of RAFN rights with long term planning horizons. S.B. 1316 (2020 Idaho Sess. Laws, ch. 164, codified at Idaho Code §§ 42-204, 42-217, 42-218a, 42-219, 42-220).[669]

The Legislature struck the confusing language in section 42-219 calling for licensing a quantity "up to the full capacity of the system." Instead it implemented a new mechanism allowing long-term RAFN rights to be licensed incrementally. The legislation pushed out the development period for RAFN rights to correspond to the duration of the planning horizon. It then calls on the permit holder to submit incremental statements of proof (in periods of not less than five years. Idaho Code § 42-204(4)). The Department is then authorized (but is not required) to issue incremental licenses reflecting the additional quantity of water put to beneficial use during that period. Idaho Code § 42-219. Then, at the end of the planning horizon (which is also the development period), the Department will issue a final license reflecting the total beneficial use achieved at that time.

If the actual demand proves to be less than the projected RAFN quantity stated in the permit, the quantity will be cut back at the end of the development period. Idaho Code § 42-219. In other words, the sum of the incremental licenses will be less than the projected RAFN quantity. The statute does not contemplate any mid-course adjustment to the RAFN quantity. In other words, if the growth trajectory in the early years of the planning horizon proves to be slower than anticipated, that will be reflected in relatively small incremental licenses. But the municipal provider will still have the opportunity to "catch up" to the total RAFN projection in the later years of the planning horizon.

The legislation requires that submissions of proof by holders of RAFN rights be prepared by a certified water rights examiner (unless no additional increment of beneficial use is claimed). Idaho Code § 42-204(4). The legislation also contains new lapse provisions stating that failure to submit an

[669] This legislation was drafted with the assistance and involvement of IDWR working in conjunction with a work group of municipal providers and other interested parties assembled by the Idaho Water Users Association. The resulting work product earned the backing of IDWR and the IWUA—and a broad array of municipal entities—and was approved unanimously by both Houses.

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incremental statement of proof will result in lapse, but only of that portion of the RAFN right not yet incrementally licensed. Idaho Code §§ 42-204(4), 42-218a.

(e) Non-RAFN rights for traditional municipal providers after the 1996 Act

Given the substantial benefits extended by the 1996 Act, one might think that most municipal providers would want to take advantage of these benefits. Generally speaking, however, this has not been the case.[670] In any event, the Department views doing so as optional.[671]

In 2009, the Department issued guidance specifically addressing how the Department will handle applications for municipal water rights by municipal providers who elect not to establish RAFN under the 1996 Act.[672] Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M). A detailed spreadsheet summary of the *2009 Peppersack Memo* (also reflecting the guidance in the *1999 Dreher Letter*) is also included in Appendix M.

The *2009 Peppersack Memo* continues the practice of licensing municipal rights for traditional municipal providers (cities and water utilities) based on installed capacity with no annual volume cap—subject to a reasonableness test.[673] But the guidance makes one critically important change. In

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[670] Until the *2009 Peppersack Memo* was issued, many cities saw little benefit in undertaking a more complex RAFN application because they assumed they could continue to get generous treatment under the installed capacity rule without any examination of need for additional quantity. As discussed below, the *2009 Peppersack Memo* brought this to an end.

[671] "If the extent of the proposed development will be completed during the permit development period, the applicant does not need to provide the additional information relative to RAFN/PH [reasonably anticipated future needs/planning horizon]." L. Glen Saxton, *Memorandum – Water Rights for Municipal Use* at 1 (Mar. 18, 1998). "There are times when a municipal provider will choose to file an application to appropriate water solely for use to meet needs in the short-term . . . ." *2009 Peppersack Memo* at 3.

[672] The 2009 guidance prohibits holders of non-RAFN permits issued after the date of the guidance from amending the permit to allow the right to be held for RAFN purposes. *2009 Peppersack Memo* at 5, 6. As for permits issued before the guidance, the Department retains some flexibility to consider the circumstances. "Existing permits issued prior to the date of this memorandum should be handled on a case-by-case basis when determining beneficial use for licensing purposes. Determination of beneficial use for permits pre-dating this memorandum [of 10-19-2009] may depend on the date the permit was issued in relation to the 1996 Municipal Water Rights Act and/or any specific intent to limit the beneficial use that could be developed under the permit at the time it was issued." *2009 Peppersack Memo* at 1.

[673] "The permit should not be limited by volume except under circumstances where a volume limitation is necessary to protect the water resource or, in the case of an amendment of permit, when the original permit was issued or intended for a use other than municipal. The rate of flow must be reasonable when considered against the water flows available from the source (e.g., it may not be in the public interest to dewater a stream to satisfy the municipal needs)." *2009 Peppersack Memo* at 4. "The license should not be limited by volume

the past, the Department issued new permits and licenses whenever a municipality sought a right for a new well or other diversion. It did so without any evaluation of the size of the municipal provider's existing portfolio of rights vis-à-vis current demand for water. The *2009 Peppersack Memo* signals an important change in policy.

Henceforth, cities and other municipal water providers will be required to demonstrate at the permit stage that their portfolios are inadequate to meet short-term needs (i.e., customer demand that will materialize within five years[674]):

> An applicant for a non-RAFN municipal application must demonstrate short-term needs to justify the amount of water required for appropriation.
>
> . . .
>
> The applicant must also demonstrate that the new appropriation is not intended for RAFN by providing total system capacity and existing demand within the municipal service area and comparing that capacity and demand to the entire municipal portfolio of water rights. If existing municipal water rights exceed existing demand and short-term needs, then an applicant for RAFN would be necessary for an additional appropriation of water. If the applicant desires additional points of diversion without the need for a new appropriation of water, then an application for transfer to change existing rights would be appropriate.

2009 Peppersack Memo at 3 (emphasis added).[675]

Although the language of the guidance references both system capacity and demand (which are entirely different things), the Department looks primarily to a showing that short term customer demand (not physical diversion capacity) is or will very soon be in excess of authority to divert under

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except under circumstances where the permit was limited for reasons described above." *2009 Peppersack Memo* at 5. As discussed below, non-traditional municipal providers who elect not to seek RAFN rights get different treatment.

[674] The Department expects the applicant for a non-RAFN municipal appropriation to demonstrate at the time of application that system-wide need for the permit will materialize (and the ability to divert will be in place) within the five-year "development period" after permit issuance. Although extensions of the proof deadline are often obtained for up to a total of 15 years, the Department will not allow the permit quantity to be premised on needs beyond the first five years. Water rights premised on needs more than five years out require a RAFN application. Telephone conference between Jeff Peppersack, [Former] Chief, Water Allocation Bureau, IDWR and Christopher H. Meyer (March 3, 2015); confirmed by email from Mr. Peppersack to Mr. Meyer (Mar. 19, 2015).

[675] The *2009 Peppersack Memo* speaks to permits and licenses. Presumably, the Department would apply the same standards to a municipal provider seeking to acquire a water right via transfer without establishing RAFN.

the applicant's existing rights. System capacity comes into play more prominently at the licensing stage.[676]

The *2009 Peppersack Memo* also contains very direct language aimed at ensuring that applicants for non-RAFN permits and licenses base their showing of short-term needs on actual customer demand that is not inflated by including water for fire flows.[677] This caution is intended to ensure that cities do not end run the 1996 Act by claiming large fire flow needs and then, over time, growing into use of that fire flow requirement for ordinary municipal use.[678] After all, no water right is needed to divert water to fight an existing fire. *2009 Peppersack Memo* at 4.

A separate guidance document addressing RAFN rights also prohibits obtaining a municipal right based on firefighting need.[679] See discussion of firefighting in section 5.A at page 63. This is counter-intuitive, because including firefighting needs in a RAFN application is, *per se*, not an end-run of the 1996 Act. Nevertheless, it reflects a level of hostility or suspicion within the Department

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[676] Telephone conference between Jeff Peppersack, Chief, Water Allocation Bureau, IDWR and Christopher H. Meyer (March 3, 2015); confirmed by email from Mr. Peppersack to Mr. Meyer (Mar. 19, 2015).

[677] "A non-RAFN application for municipal use that includes additional [diversion] rate justified for fire protection purposes should not be permitted for that additional rate under a municipal use, particularly where the applicant has not sought water for RAFN and offered no evidence to support the future appropriation and use of additional water." *2009 Peppersack Memo* at 4. "Additional rate for fire protection should be listed as a separate use [on a non-RAFN application] to ensure that the rate, if approved, does not become part of the flows under the permit that may be required for future use of the municipal provider . . . ." *2009 Peppersack Memo* at 5. "As described above, additional rate justified solely for fire protection should be listed as a separate use on the [non-RAFN] permit to ensure that the rate, if approved, does not create a de facto water right for RAFN." *2009 Peppersack Memo* at 6.

[678] This guidance codifies the position the Department took in the litigation culminating in *City of Eagle v. IDWR*, 150 Idaho 449, 247 P.3d 1037 (2011) (city challenged IDWR's ruling on fire flows, but appeal dismissed as untimely). In that case, the City of Eagle sought to appropriate water for municipal purposes, claiming 2.23 cfs for general municipal use and 6.68 cfs for fire protection. The City expressly declined to pursue a future needs (RAFN) component under the 1996 Act, instead stating that its application was justified on the basis of needs that would be experienced in the next five years. Accordingly, the City established no planning horizon and presented no evidence of long-term need. IDWR responded by limiting general municipal use under the permit to 2.23 cfs and limiting the extra 6.68 cfs to fire protection use. "Recognizing the entire 6.68 cfs for fire protection within the broad municipal definition would create a de facto water right for reasonably anticipated future needs." Final Order at 11. Essentially, the City had hoped to obtain a large water right based on fire protection needs, and then use that water for any municipal purpose. IDWR rejected this approach, noting that the City had elected not to pursue the permit based on its "future needs" under the 1996 Act.

[679] Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

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regarding "inflating" municipal water right claims with firefighting needs. (See footnote 678 at page 362.)

If the applicant cannot show a short-term need for the new permit, then the applicant must either seek a RAFN right or forgo any new system-wide quantity associated with the new right. In other words, instead of obtaining a new appropriation, the non-RAFN applicant may instead change one or more existing rights to allow a new point of diversion to support the new well or surface diversion:

> If existing municipal water rights exceed existing demand and short-term needs, then an application for RAFN would be necessary for an additional appropriation of water. If the applicant desires additional points of diversion without the need for a new appropriation of water, then an application for transfer to change existing rights would be appropriate.

2009 Peppersack Memo at 3-4.

If a municipal provider obtains a non-RAFN permit but then fails to develop additional beneficial use during the development period to justify the additional quantity, it will be licensed with zero additional system-wide quantity.

> In situations where a new point of diversion authorized under the permit is developed, but an additional increment of capacity or beneficial use is not developed for the municipal system, a license may be issued limiting the diversion rate in combination with other rights in the municipal system to the existing capacity of the municipal system.

2009 Peppersack Memo at 5.

This solution is referred to informally as the "Tuthill compromise" after then-Director David Tuthill. It is a compromise in the sense that, rather than deny the license altogether, a license is issued authorizing diversion from the new point of diversion, but with no additional system-wide diversion authority.

The Department has employed the following combined use condition language to implement the Tuthill compromise:

> The diversion rate associated with this water right in combination with all other water rights is limited to the combined diversion rate of all other [name of city] water rights and the diversion rate of this water right shall not be included in any assessment of the combined diversion rate authority of the [name of city] both prior and subsequent to the priority date of this right.

Letter from Mat Weaver, IDWR, to Christopher H. Meyer (Apr. 19, 2011) (on file with author). This is simply a different way of getting to the same place; it accomplishes the same thing as a transfer of existing rights to add a new point of diversion.

In sum, the longstanding practice of allowing municipal providers to add additional municipal water rights with no showing of need on an ad hoc, incremental basis has come to an end. From now on, municipal providers—even those seeking non-RAFN rights—will be required to quantify their entire existing portfolio and present evidence that, on a system-wide basis, an additional increment of diversion quantity will be used by the time of licensing. If municipal providers wish to obtain rights to more water than they will need by the time of licensing, they must undertake the additional burdens of planning and proof mandated by the 1996 Act.

Despite this sharp change in policy, the *2009 Peppersack Memo* continues to provide some leeway for traditional municipal providers seeking non-RAFN water rights. At the time of licensing, the municipal provider will be allowed to quantify beneficial use based on a modified version of the installed capacity rule.

> When licensing a permit for a municipal use for an entity serving an incorporated city, the extent of beneficial use established under a non-RAFN permit should be determined based on the installed capacity developed and operational during the development period of the permit and cannot exceed the amount permitted.

2009 Peppersack Memo at 5.

Under prior practice, the installed capacity rule looked to the capacity of an individual well or other diversion. (This was because a new water right typically was obtained for each new point of diversion.) Under the *2009 Peppersack Memo*, installed capacity is evaluated on a system-wide analysis.

> When determining the installed capacity for licensing purposes, the entire municipal portfolio of water rights must be considered to determine the actual increase in installed capacity provided by the permit for the municipal use. Note that the installed capacity of the system is not necessarily the sum of the individual capacities for each pump or diversion into the system.

2009 Peppersack Memo at 5.

The *2009 Peppersack Memo* adds a key caveat to the installed capacity rule: "However, beneficial use may be further limited if the intended use described in the application as justification for the permit was not accomplished." *2009 Peppersack Memo* at 5. This guidance affords the Department considerable discretion. It allows the Department to license the non-RAFN right based on increased installed capacity (even if demand has not fully materialized) so long as the anticipated development upon which the permit was issued has more-or-less come to fruition. However, the Department has reserved its authority to cut back the licensed quantity where there is a glaring shortfall. For instance, if a city installed new wells to serve a new subdivision, but the subdivision was not completed and some or all of the wells have never been used, one can imagine that the Department

would use this language to restrict or eliminate the incremental quantity associated with the new water right(s).

In sum, traditional municipal providers (cities and water utilities) who elect to forgo the benefits and burdens of the 1996 Act may no longer obtain new water right permits authorizing additional diversion quantity unless they make a showing that their existing portfolio is inadequate. If they can make that showing, however, the municipal provider will be subject to a relatively generous installed capacity evaluation at the time of licensing (but subject to great departmental discretion). But they may not take advantage of the more flexible "capacity of the system" provision applicable to RAFN rights.

(f) Water rights for subdivision developers prior to the 1996 Act: Stub-in rule

Before the 1996 Act, a subdivision developer who acquired water rights and built a potable water delivery system for the project was not viewed as a municipal provider (or a public utility, for that matter). Such entities simply obtained ordinary domestic, commercial, and/or irrigation water rights for the system and made proof within the statutory periods for licensure.[680] Often, the system would be turned over to the homeowners association to own and operate.

A strict application of proof requirements would require all the subdivision's water right to be put to beneficial use at the time of proof—that is, the licensed amount would be limited to actual diversions necessary to serve all houses or other facilities built, occupied, and actually using water at the time of licensing. However, the Department has not applied such a strict interpretation of the beneficial use rule to this type of non-municipal appropriator.

Instead, even before the 1996 Act, the Department extended a degree of leniency to subdivision developers by way of the informal "stub-in" practice, under which the water right would be licensed for the amount of flow necessary to serve each lot in the subdivision to which an actual "water delivery system has been installed" and connected to an operational diversion facility.[681] The stub-in practice

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[680] Before the 1996 Act, the Department's rule was this: "Only the city or its delivery agent, for example Boise Water Corporation [known today as United Water Idaho], can obtain a municipal water right. Unincorporated cities, subdivisions outside of city limits and other users of common water systems must identify the separate uses of domestic, irrigation, commercial, etc., and identify the specific place of use." Norman Young, *Administrator's Memorandum – Definition of Municipal* (Nov. 5, 1979).

[681] This rule is set out in the Department's draft (but operational) *Field Examiner's Handbook*, which states:

> Many subdivisions are not fully developed at the time of the examination. When in this situation, you should confirm that a water delivery system has been installed to provide water to each lot listed in the subdivision. Then you should confirm that the installed pumping plant capacity will supply the expected demand when the subdivision is fully occupied. If the water delivery system serves each lot and if the pumping plant is capable of supplying the full demand, then recommend all of the lots identified on the permit or subdivision. If the pumping plant is not capable of supplying the full demand, then estimate the

refers to having a service line "stubbed in" to a buildable lot from the water main. Accordingly, a subdivision developer may obtain a license for the diversion rate necessary to serve the lots that are stubbed-in and capable of being served, even if there are no houses or other structures (and therefore no current beneficial use of water) on them. But the right will not include water required to serve those portions of the subdivision that have not yet been stubbed-in.

In 2009 guidance, the Department explained the reason for the stub-in practice this way: "The Department's stub-in practice recognized that the full build out of a subdivision can take longer than the number of years the Department could authorize for completion of a water appropriation project. By issuing a water right license for domestic uses that were yet to be completed, the Department avoided a parade of individual water right filings as each lot was sold. The stub-in practice also helped subdivision developers obtain financing by providing some assurance to lending institutions that a development project would not fail due to water right availability issues that may have arisen as the individual lots were built out over time." Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*"), at 2 (reproduced in Appendix M).

(g) RAFN rights for non-traditional municipal providers

As noted above, the 1996 Act added a definition of municipal provider that expanded the class beyond those recognized under the common law and prior departmental practice. Notably, private developers of residential subdivisions and planned communities may now qualify as municipal providers.

A qualifying non-traditional municipal provider who elects to accept the benefits and burdens of the 1996 Act may establish a planning horizon and quantify its RAFN just like cities and water utilities. "Municipal providers that do not serve incorporated cities can receive the full benefit of the 1996 Municipal Water Rights Act if they file an application for RAFN, provide qualifications as a municipal provider, and demonstrate future needs over an established planning horizon consistent with requirements of [the 1996 Act]." *2009 Peppersack Memo* at 5. This would enable the developer to secure a water right for a long-term build-out, beyond the 15 year maximum for non-RAFN rights. This is particularly important for planned communities, which may take many years to complete.

However, the Department takes the view that only developers who are presently serving other municipal customers at the time of permit application "qualify" as municipal providers. See discussion in section 23.D(3)(d) at page 343. Under this interpretation, first-time developers would be unable to obtain such RAFN rights and would have to launch the project without a long-term water supply.

> maximum number of units that could receive full supply or recommend water for the units developed at the time of inspection.

Field Examiner's Handbook at 4 (emphasis omitted).

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(h) Non-RAFN municipal water rights for non-traditional municipal providers

For those subdivision and planned community developers who elect not to pursue RAFN rights, the 1996 Act has done nothing to clarify how their water right applications should be evaluated. This is because the Act defined "municipal provider" more broadly to encompass some private developers but failed to address permitting and licensing requirements for those applicants who elect to not prove a planning horizon and RAFN.

To date, most developers in Idaho have elected not to seek RAFN protection for their water rights. Instead, they typically file a simple, short-form water right application that offers little in the way of overall design, time horizons for full build-out, engineering designs, and the like.

Under the *2009 Peppersack Memo*, non-RAFN municipal rights sought by non-traditional municipal providers are subject to the same "disclosure of need" requirement at the permit application stage as non-RAFN municipal rights sought by traditional municipal providers. To wit, they must demonstrate short-term needs based on examination of the quantity of their existing portfolio versus system-wide capacity and demand. *2009 Peppersack Memo* at 5-6. As noted before, fire flows may not be used to demonstrate short-term needs. *2009 Peppersack Memo* at 5, 6.

Unlike cities and water utilities, non-traditional municipal providers are not entitled to the "diversion rate only" treatment. Their water rights will be subject to a volumetric cap. *2009 Peppersack Memo* at 6.

Even if they are not seeking RAFN rights, non-traditional municipal providers do get the benefit of the expanding service area definition afforded by the 1996 Act. *2009 Peppersack Memo* at 6.

At licensing, a non-RAFN right held by a non-traditional municipal provider continues to receive the benefit of the stub-in rule described above. "Beneficial use shall be based on development within the service area during the authorized development period of the permit and shall include stubbed-in lots for domestic purposes (i.e., a service line is available to each lot to hook up to the municipal delivery system)." *2009 Peppersack Memo* at 6. Thus, the right will be licensed to include an additional increment of rate and volume beyond current actual production to existing customers to serve homes or other domestic uses that are physically stubbed-in to an operational delivery system.

The guidance goes on to explain that, as a practical matter, the Department may not insist on such a precise calculation and may agree instead to license based on incremental system-wide installed capacity—but only if doing so would not substantially inflate the amount available under the stub-in practice. "The rate should be determined based on the installed capacity if reasonable to serve the needs within the established service area." *2009 Peppersack Memo* at 6-7. A footnote explains this further: "The installed capacity may not represent beneficial use if significantly greater than the diversion required to meet the needs of the developed service area (including stub-ins), even if it does not exceed the amount permitted. For example, if fewer lots are stubbed-in than permitted, the required

diversion rate would likely be smaller than the permitted rate." *2009 Peppersack Memo* at 7 n.3. The volume is also based on the stub-in practice. *2009 Peppersack Memo* at 7.

As modified by the *2009 Peppersack Memo*, the stub-in rule has moved closer to the installed capacity rule applicable to traditional municipal providers seeking non-RAFN rights. Both gravitate toward installed capacity as the measure of the right if that is not significantly out of sync with actual current demand plus stub-ins. For traditional municipal providers, the Department starts with installed capacity but may move downward "if the intended use . . . was not accomplished." For non-traditional municipal providers, the Department starts with the stub-in rule but may move upward to installed capacity if not "significantly greater" than the stub-in quantity. Both are rather generous standards in that the municipal provider is allowed to obtain a license to serve homes that are not yet sold or even constructed. However, this is a much less generous approach than the "capacity of the system" standard applicable to holders of RAFN rights.

In summary:

- Private subdividers/planned community developers may obtain municipal water rights that take advantage of the expanding service area provision of the 1996 Act without seeking to show RAFN or a planning horizon.

- To date, many developers have opted to apply for a municipal water right without identifying a long-term planning horizon or quantifying future needs. In so doing, they forego the principal benefit of the 1996 Act. Under IDWR's 2009 guidance, these applicants will be subject to stricter limits in quantifying the right at the time of licensing. Traditional municipal providers seeking non-RAFN rights are subject to the modified installed capacity rule; non-traditional municipal providers are subject to the modified stub-in practice. Neither will get the benefit of the "capacity of the system" standard at licensing.

- Applicants for non-RAFN water rights must demonstrate that they will divert and put to beneficial use the additional increment of capacity within five or at most ten years.

- Applicants for non-RAFN water rights may not inflate the quantity of their water rights by including fire flows. (See footnote 677 at page 361.) (Other guidance[682] provides that one may not obtain a RAFN right for firefighting either. See also discussion of firefighting in section 5.A at page 63.)

- Non-RAFN permits may not be amended to allow water to be held for RAFN. (See footnote 672 at page 360.)

[682] Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29* (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

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(9) Forfeiture protection for RAFN rights.

In Idaho, water rights not used for five years (with various exceptions) are subject to forfeiture. Idaho Code §§ 42-222(2), 42-223. The 1996 Act expressly exempts a municipal water provider's municipal water rights held for reasonable anticipated future needs from forfeiture:

> A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

Idaho Code § 42-223(2).

This forfeiture exemption provision is reinforced by the express declaration in the 1996 Act that water rights held for future needs constitute a present beneficial use:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided . . . the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code §§ 42-222(1).

(10) Conditions to address changed circumstances in RAFN rights.

EDITOR'S NOTE: Former Chief Deputy Attorney General Phillip J. Rassier recently issued a memorandum evaluating this subject. His analysis differs from that set out below. This section will be revised.

Section 42-223(2) makes clear that the municipal provider's water right becomes subject to forfeiture for nonuse at the end of the planning horizon.[683] But what about before? If conditions

[683] Although somewhat ambiguous, the Department's prior guidance on the subject of forfeiture of RAFN rights appears to contemplate forfeiture evaluation only at the end of the planning horizon. The guidance (which was replaced by other guidance in 2013, which seems to be of the same view on this issue) reads:

> If sufficient proof of beneficial use is submitted before the end of the permit development period and the municipal water right is licensed for an amount of water for "reasonably anticipated future needs," the requirement that the full system capacity needed to provide water for the reasonably anticipated future needs be constructed by the end of the municipality's planning horizon will continue as a condition of the license. If the municipal provider fails to construct

change during the course of the planning horizon and it becomes apparent that not all the water rights held by the municipal provider are needed to meet RAFN, may the municipal provider be required to relinquish some of its portfolio? In the case of a permit, the Act provides for a downward adjustment if conditions have changed at the time of licensing. But what if conditions change after licensing? Or what if a transfer to RAFN is approved, in which case there is no further mechanism for automatic review?

The Department has articulated the view that once a RAFN right is quantified at licensing it cannot be adjusted downward if it later becomes apparent that the anticipated needs are not materializing. Thus, the concern has emerged that long-term planning may result in overstated RAFN rights being locked in for the duration of the planning horizon.

There appears to be a ready solution to this concern. The Department has authority to impose conditions in approving a permit, license, or transfer that would mandate re-evaluation of long-term need from time to time (perhaps every decade) during the planning horizon.[684] Under this approach, future demand quantification would not be a one-time exercise but, rather, a permanent, ongoing responsibility of the municipal provider. The additional risk imposed on the municipal provider by periodic quantification of future needs presumably could be offset by allowing the municipal provider to provide evidence justifying the need to "push out" its planning horizon for a corresponding period of time. But the municipal provider would still be exposed to risk. If it became apparent that growth was over-projected, a municipal provider could be required to relinquish those water rights that it could no longer justify under a new RAFN quantification based on an extended planning horizon. This sort of rolling review and updating of the planning horizon would balance the municipal provider's need for certainty against the larger community's need to know what water is tied up and what supplies might

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> the full system capacity needed to provide water for the reasonably anticipated future needs by the end of the planning horizon for the municipality, or the anticipated future needs do not materialize by the end of the planning horizon, the quantity of water under the license may be reduced to the capacity of the constructed system or the amount of water required to meet the needs that actually exist at the end of the planning horizon. Although a municipal provider can revise the planning horizon and amend its projections of reasonably anticipated future needs subsequent to the water right license being issued, provided the criteria in Idaho Code § 42-202B(5) are fully satisfied, the water right remains subject to being reduced or forfeited if actual use of the water does not occur.

Karl J. Dreher, *Administrative Memorandum – Application Processing No. 63* ("*1999 Dreher Letter*"), at 5 (June 15, 1999) (footnotes not in original) (reproduced in Appendix M) (the *1999 Dreher Letter* consists of a letter from Karl J. Dreher to Christopher H. Meyer dated June 14, 1999 which L. Glen Saxton designated as *Administrative Memorandum – Application Processing No. 63* on the following day). The citations to definitions have changed over the years as the Legislature has added new defined terms. The reference in the *1999 Dreher Letter* is probably to what is now Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs").

[684] Idaho Code § 42-219(1) (conditions in licenses); Idaho Code § 42-222(1) (conditions on transfers); Idaho Code § 42-211 (conditions on permit amendments).

be freed up as conditions change. In the case where a municipal provider maintains its future needs portfolio but simply extends the date of its planning horizon through such a periodic review, other water users presumably would not be prejudiced because the effect would be to delay full portfolio development.

(11) The Act contains strong anti-speculation provisions

(a) The Act seeks to avoid municipal "water wars" seen in other states.

Cities in other states have engaged in races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The authors of the 1996 Act were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to limit the possibility that the special treatment accorded municipal providers would trigger similar "water wars" in Idaho.

For example, in *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979), the Colorado Supreme Court denied a conditional water right to a private developer who hoped "to sell water to municipalities on the eastern slope for general municipal use but had not obtained firm contractual commitments binding those municipalities to purchase or receive the water." *Vidler*, 594 P.2d at 568-69. The Colorado Legislature codified the *Vidler* rule. 1979 Colo. Sess. Laws (S.B. 481) (codified at Colo. Rev. Stat. § 37-92-103(3)(a)). In doing so, however, the legislature exempted "governmental agencies" from the anti-speculation rule. Colo. Rev. Stat. § 37-92-103(3)(a)(I). The net result is that Colorado cities are incentivized to acquire as much water as possible. If it turns out they do not need it, they may sell it to their neighbors. It is precisely this phenomenon that Idaho's Municipal Water Rights Act was intended to prohibit.

(b) The Act imposes three unique anti-speculation rules.

In order to avoid these problems encountered in other states, the 1996 Act imposes three anti-speculation requirements. First, the Act requires that the asserted future needs must not be "inconsistent with comprehensive land use plans approved by each municipality" within the service area. Second, the quantification of RAFN may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). Third, RAFN rights may not be sold. Idaho Code §§ 42-219(1), 42-222(1).

(i) Comprehensive plan consistency

The first requirement—that projected future needs be consistent with comprehensive plans—is straightforward and not overly rigorous. Comprehensive plans are broad, conceptual planning documents, not specific descriptions of what is permitted where.[685] Nor do comprehensive plans

[685] Virtually all state zoning laws require local governments to adopt comprehensive plans. Idaho's requirement is found in the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6508. See the *Idaho Land Use Handbook* for a detailed discussion of this subject.

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contain detailed population or economic projections. Thus, not too much should be read into this consistency requirement. On the other hand, the consistency requirement means something. It requires that future needs projections take into account the local government's vision of the future, at least on a macro scale. For example, if the comprehensive plan (or its associated future land use map) described an area as dedicated open space or preserved agricultural use, that, presumably, would be inconsistent with a quantification of RAFN based on high density development in the area.

(ii) Comprehensive plan overlap

The second requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, future needs within that area may not be included in the quantification of any RAFN right. In other words, such areas must be excluded from what is informally known as the "planning area" for RAFN quantification.

As a practical matter, however, such conflicts are rare in Idaho. The Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6537, does a good job of resolving disputes between cities over the direction of future growth. Each city is required to establish an "area of city impact" that defines the area beyond its current city limits where a city anticipates growing and, more specifically, extending city services and annexing. (See discussion in section 23.L beginning on page 407 regarding the authority of cities to provide water service beyond the city boundary.) LLUPA provides a mechanism for cities and counties to resolve disputes over the boundaries of areas of city impact (to ensure that they do not overlap) and to determine whether the city's or the county's comprehensive plan and zoning ordinances will apply within the area of city impact. Idaho Code § 67-6526. The Act provides mechanisms for negotiation and, if necessary, judicial or political resolution. Even so, LLUPA has not eliminated all such conflicts.

The 1996 Act's prohibition against serving areas "overlapped with conflicting comprehensive land use plans" (Idaho Code § 42-202B(8)) applies equally to municipalities and to private utilities providing municipal water. Thus, a water utility cannot base its RAFN quantification on service to lands where two municipalities have an unresolved area of city impact dispute.

It bears emphasis that the "conflicting plans" probation applies only to water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing or short-term needs within areas overlapping, conflicting plans.

Likewise, there is no prohibition against two municipal providers having overlapping municipal service areas. This would be unusual. But it could occur, for example, if one provided non-potable water and another provided potable water. It could also occur where a municipality's service area included lands outside the city for land application of treated effluent, which might overlap with another municipal provider's service area.

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(iii) Prohibition against selling future need water rights

Finally, the Act removed the incentive for hoarding water rights. By making RAFN rights unsalable, it eliminated the promise of financial gain that has driven municipal water right speculation in other states. To our knowledge, Idaho is the only state in the nation to have enacted such provision. Specifically, the Act prohibits the transfer of RAFN water rights by a municipal provider to a place of use outside its service area or to a new nature of use.

This provision is stated twice in the Act. It appears first in the context of licensing such water rights:

> The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Idaho Code § 42-219(1). The restriction is repeated in the section of the water code dealing with transfers of water rights:

> When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B, Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use.

Idaho Code § 42-222(1).

In other words, while the statute accords substantial leeway to a city, water utility, or other municipal water provider to hold water rights for long-term future needs, the *quid pro quo* is that the municipal provider may not profit from this arrangement by hoarding water rights and then selling unused rights to another user who would change the nature of use or place of use. Rights acquired under the 1996 Act are limited to municipal use within the provider's service area. That service area may grow with the city, but the RAFN right may not be transferred to serve a different city or industry outside the provider's service area.

On the other hand, this restriction should not apply where one provider conveys a service area to another provider who continues serving the original customers. For example, United Water Idaho could obtain a RAFN right to serve a new subdivision. Later, United Water Idaho could agree with the City of Nampa that it made more sense for the subdivision to be served by the city. In such a case, the water utility could convey the RAFN right to the city without violating the Act. This is because there would be no change in the nature of use or the service area—the same customers are being served in the same place by the same water right—even though the ownership of the right has changed. This is

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true even if the subdivision is carved out of the larger service area of the water utility and added to the service area of the city.[686]

In another example, a RAFN right could be obtained by a private developer for a planned community (assuming the developer could qualify as a municipal provider). In the future, that provider might convey the water right (and likely the delivery system) to the city or a municipal provider serving the city. Presumably, the new municipal provider would then integrate the water right into its larger service network.

In sum, this restriction reflects the Legislature's determination to remove one stick from the property owner's bundle of rights (free transferability) in recognition of the fact that municipal providers hold a stick that other water right holders do not (the right to acquire water rights to meet long-term needs).

E. The transition from common law to statutory scheme

Even after the 1996 Act, the common law growing communities doctrine remains significant in Idaho. Existing municipal water rights held by traditional municipal providers such as cities and regulated water utilities are not affected by the 1996 Act.[687] Because most municipal providers have not taken the affirmative steps required to bring their water right portfolios within the 1996 Act, the common law continues to apply to the vast majority of municipal water rights in Idaho.

The principal effect of this is that the common law doctrine continues to provide defenses from forfeiture to traditional municipal providers that have acquired water right portfolios authorizing diversions in excess of their current peak demand. But this protection is not absolute. A 1999 IDWR guidance suggests that forfeiture and abandonment apply to common law municipal rights when the municipal water provider has no current or future need for them. "Municipal water rights established prior to the 1996 Municipal Water Rights Act might also be subject to common law abandonment or forfeiture if the rights are not required to satisfy reasonable future needs of the municipality." Karl J.

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[686] In sum, the prohibition on changing the place of use of a RAFN right should not apply where: (1) there is a transfer of service area and associated RAFN rights between two adjacent municipal providers, (2) there is ample demand within the prior place of use, i.e., there is no intent to "sell off" unneeded RAFN rights to another entity, and (3) the purpose of the transfer is only to simplify administration within the acquiring entity's larger service area and not to evade the anti-hoarding purpose of the statute.

[687] One might argue that in adopting a codified municipal rights law for some water rights, the Legislature intended to repeal common law protections for other municipal water rights. This does not appear to be the intent of the Legislature, however. As noted above, the Act's *Statement of Purpose* expressly disclaims any intent to change the common law. "The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights." Statement of Purpose, R.S. 06104, which became, S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws, ch. 297. Moreover, the Act contains a savings clause which preserves the common law's protection for pre-1996 municipal rights. Idaho Code § 42-202(11). In the end, of course, the common law is whatever the State's courts say it is.

Dreher, *Administrative Memorandum – Application Processing No. 63* ("*1999 Dreher Letter*"), at 5 (June 15, 1999) (reproduced in Appendix M) (the *1999 Dreher Letter* consists of a letter from Karl J. Dreher to Christopher H. Meyer dated June 14, 1999, which L. Glen Saxton designated as *Administrative Memorandum – Application Processing No. 63* on the following day).

Thus, even under the common law, the municipal provider's portfolio should be reasonably sized to meet anticipated future demand. A court could determine that a municipality or water utility holds more municipal water rights than it will ever be able to put to use, and declare the surplus forfeited.[688] By taking steps to establish RAFN protection for its water rights, municipal providers may obtain greater certainty in protection from forfeiture during the planning horizon.

F. Converting non-municipal rights to RAFN rights

How does a municipality or other municipal provider bring its existing portfolio of rights under the protection of the 1996 Act? The Act does not specifically address this. However, the Department's 1999 guidance concludes that existing municipal permits and water rights may be brought under the 1996 Act by transfer, for example by adding alternate points of diversion. *1999 Dreher Letter* at 1-2 (reproduced in Appendix M).[689] This 1999 guidance was superseded by new RAFN guidance in 2015.

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[688] Presumably, the *res judicata* effect of recent SRBA decrees will protect municipal rights for some period of time. (By statute, decrees from a general adjudication are given binding effect. Idaho Code § 42-1420.) At some point, however, courts may find it appropriate to evaluate the continued need for these rights in light of changed conditions.

[689] For instance, a municipality or utility relying on a network of wells with a separate water right for each may wish to make each point of diversion an alternate point of diversion for each of the others. This allows the city the flexibility to pump water anywhere from the system and enhance efficiency, so long as injury is avoided.

Adding alternate points of diversion to a municipal system (or to any water right) raises interesting injury questions. The Department's position on this is quite clear. Let's take a simplified example. Suppose a city owns two wells, one with a 1950 priority for 1 cfs and one with a 1980 priority for 2 cfs. Suppose further that the city transfers the rights to bring them under the 1996 Act and makes them alternate points of diversion for each other. Next, suppose that the 1980 well becomes involved in a well interference dispute with a nearby 1970 irrigation well. May the city defend the interference claim by asserting that it is pumping 1950 water out of the 1980 well? The answer is clearly no. Despite each well being an alternate point of diversion for each other, the Department will continue to administer the wells on the basis of the pre-transfer priorities <u>for purposes of well interference</u>. But suppose instead that due to declining aquifer conditions, an aquifer-wide regulation of pre-1960 wells was imposed. (Such an aquifer-wide call might result from hydrological conditions, a mandate to protect endangered species, conjunctive administration rules, etc.) Note, this is <u>not</u> a well interference call, but an aquifer-wide regulation of wells. In this case, the city could continue to pump up to 1 cfs of "1950 water" out of either the 1950 well or the 1980 well, as it saw fit. In sum, going through the process of assigning alternate points of diversion will make no difference at all with respect to local well disputes, but can add a great deal of flexibility in the event of a regional regulation of ground water supplies.

How is this implemented? The Department will maintain a record of the original priority date associated with each water right at each well. These would become relevant in the event of a call based on well

The 2015 guidance is not as specific as the 1999 guidance on this transition issue, but it appears to be consistent with the 1999 guidance in recognizing that non-RAFN municipal rights may be changed by the municipal provider to RAFN rights through the transfer process.[690] The 2015 guidance is not entirely clear, but it may be read to say that it is sufficient to change the nature of use from non-RAFN municipal to RAFN, without changing any other element, such as points of diversion. If so, that would be a relaxation of the 1999 guidance, which suggested that it is necessary to change some other element of the right as the vehicle for the transfer application.

G. Early experience with the 1996 Act

In first two decades following enactment of the 1996 Act, surprisingly few RAFN municipal water rights were sought. The first application filed under the Act was a massive transfer application covering the entire portfolio of municipal water rights owned by SUEZ Water Idaho ("SUEZ") (then known as United Water Idaho), the privately-owned utility providing water to Boise and surrounding communities. The application, termed the Integrated Municipal Application Package ("IMAP"), sought to transfer SUEZ's portfolio of municipal water rights to achieve alternate points of diversion and to bring them within the 1996 Act. In so doing, the applicant sought to establish a 50-year planning horizon and RAFN needs that substantially exceeded its total portfolio. This application engendered considerable controversy, some of which may have been due in part to misunderstanding its nature. The IMAP did not seek to appropriate any new water rights. If approved, however, the 50-year planning horizon and RAFN would have authorized SUEZ to acquire other water rights by appropriation or transfer to make up the difference between its current portfolio and its projected needs.

After contentious pre-hearing litigation, the Director of IDWR stayed the proceeding in 2003. He determined that it made more sense to allow the controversial forfeiture issues faced by the applicant to be resolved by the Snake River Basin Adjudication ("SRBA") which was just then getting

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interference. However, they would not be relevant (and the provider would have the advantage of additional flexibility) in the event of an aquifer-wide call on the reservoir. *1999 Dreher Letter* at 2.

[690] The 2015 guidance provides:

> When a transfer proposes changing the nature of use of a water right to municipal purposes for RAFN, the municipal provider shall provide to the Department sufficient information and documentation to establish the transfer applicant qualifies as a municipal provider at the time of application, is providing water to a municipality or municipalities, and that the RAFN, the service area, and the planning horizon are consistent with Idaho Code. Supporting documentation must be included with the transfer application including the same RAFN support material that would be submitted with an RAFN application as outlined and described in Section 2 of this document. As discussed in Section 3, gap analysis including a current portfolio of existing water rights must also be included with the transfer application.

Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29*, at 20 (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*2015 Weaver Memo*") (reproduced in Appendix M).

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underway for Ada County. (Resolving forfeiture arguments was the first step toward RAFN approval. Before the Department could determine whether UWID had sufficient rights in its portfolio to serve RAFN, it needed to determine how many of those rights were valid.) The Director's intuition proved correct. SUEZ's claims were reviewed and, for the most part, recommended for approval by IDWR. For reasons that are not entirely clear, perhaps including litigation fatigue, no one objected to SUEZ's claims in the SRBA. The SRBA court then issued decrees (known as "partial decrees" in SRBA parlance) for virtually all of SUEZ's portfolio. Thus, the SRBA court resolved in SUEZ's favor the potentially most difficult issue presented by the IMAP.

Of course, the SRBA process does not establish a planning horizon or quantify RAFN. Instead, the SRBA court approves existing municipal water rights without quantification of future needs under the common law growing communities doctrine. As a result, UWID (like many other water providers) now holds a portfolio of water rights whose total pumping capacity exceeds its current peak demand. In essence, the SRBA has created a common law future needs portfolio for most Idaho water providers on an *ad hoc* basis without benefit or the burden of the 1996 Act.

This occurred as a result of happenstance. For decades, it was the practice in Idaho for municipal water providers (and everyone for that matter) to obtain new water rights for each new well they drilled—rather than transferring existing water rights to the new point(s) of diversion.[691] As old wells were abandoned, their water rights were retained and added to new rights. This resulted in an accumulation of water rights typically exceeding the current needs of the provider. Rather than going through the rigorous, planning-based evaluation process contemplated by the 1996 Act, the SRBA simply confirmed the existing municipal portfolios. All this happened, incredibly, without litigation. There were, and continue to be, litigations over side issues regarding municipal water rights in the SRBA.[692] None of them, however, have challenged the quantity of rights in these municipal portfolios. The result is decrees recognizing substantial portfolios of future need water rights with common law forfeiture protection. See footnote 688 at page 375 regarding the res judicata effect of these decrees.

Going forward, however, these municipal providers will need to pursue applications under the 1996 Act if they wish to expand their portfolios beyond what was decreed in the SRBA (unless they

[691] "Note that even though a municipal system may have included multiple wells and pumps, the Department typically licensed a water right based on the diversion capacity of an individual well and pump listed as a single point of diversion on the water right. The Department typically did not review the overall system capacity and evaluate the new well as an additional increment of diversion capacity or beneficial use under the entire system due to that point of diversion." Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*") (reproduced in Appendix M).

[692] For instance, the City of Pocatello challenged conditions imposed by IDWR on each of its water rights dealing with alternate points of diversion. *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).

can demonstrate a deficit in their current portfolio to meet short-term needs). Establishing a planning horizon and RAFN for new rights will have the added advantage of better insulating both the new rights and their existing portfolios from any potential attack based on post-SRBA forfeiture arguments.

As of January 2010, the following water rights have been approved for RAFN:

	Municipal Provider	Acquired by	Status	Planning Horizon	Flow Rate	Annual Volume	Water Right Number
1.	Tamarack Resort (originally WestRock)	Appropriation	Permit	15 years	8.6 cfs	1,248 AFA	65-22357
2.	City of Nampa	Appropriation	License	21 years	4.5 cfs		63-33022
3.	City of Nampa	Appropriation	Permit	21 years	5.0 cfs		63-32835
4.	City of Bonners Ferry	Appropriation	License	20 years	3.8 cfs		98-7825
5.	Ross Point Water District	Appropriation	License	20 years	5.25 cfs		95-9009
6.	City of Fruitland	Appropriation	Permit	20 years	8.09 cfs		65-23088
7.	Idaho Transportation Department (highway rest area)	Transfer	Decreed	22 years	0.13 cfs	19.8 AFA	37-20853
8.	Moreland Water & Sewer District	Appropriation	Lapsed	30 years	n/a		35-13365
9.	City of Eagle (conveyed to city by M3 Eagle LLC)	Appropriation	Permit	30 years	23.18 cfs	6535 AFA 1836 AFA 1660 AFA	63-32573
10.	Three Mile Water District	Appropriation	Permit	20 years	4.9 cfs		98-7843
11.	Shoshone Bannock Tribes	Appropriation	License/Decree	n/a[693]	0.5 cfs		27-7000
12.	Harmons Property Owners Association	Appropriation	License	20 years	0.18 cfs		95-8996
13.	Star Sewer & Water District	Appropriation	Permit	25 years	7.31 cfs		63-32644

H. The path forward under the 1996 Act

The promise of the 1996 Act remains largely unfulfilled. One would have expected that in all these years, a considerable body of experience, insight, and precedent would have been established. That has not occurred. Only a handful of RAFN applications have been submitted. IDWR shut down

[693] IDWR has listed this right in a PowerPoint identifying RAFN water rights. At some point a condition was added referencing RAFN, but it is unclear why. The right is based on a license issued in 1971 predating the 1996 Act.

the largest RAFN application (United Water Idaho's "IMAP"), deferring instead to an *ad hoc* approach under the SRBA.

The Department's 2009 and 2013/2014 guidance (the *2009 Peppersack Memo* and the *2015 Weaver Memo* referenced above) demonstrate a renewed commitment by the Department to implement the legislative vision in the 1996 Act. These documents also reflect, however, a much stricter approach than that employed in prior administrations.

For years, municipal providers failed to take advantage of the benefits of the 1996 Act, and the Department—by treating RAFN rights as "optional"—did little to change that inertia. The 2009 guidance changes the game by making it clear that municipal providers may no longer simply pile on additional water rights as each new well is drilled without showing that the existing portfolio of rights is insufficient. Thus the 2009 guidance should encourage RAFN applications. The 2013 guidance, however, might be seen as working in the opposite direction, particularly with respect to the re-interpretation of the "capacity of the system" issue at the time of licensing. Frankly, this latest guidance appears to reflect a degree of skepticism about the whole idea of long-term water planning.

I. Future needs water rights in other western states

This section discusses the law of other states regarding water held by municipalities for future needs. A table summarizing examples of laws, regulations, and planning horizons used in the western states is included following the discussion. See section 19.D at page 290 for a discussion of the rights of municipalities to recapture and reuse sewage effluent.

A good survey of municipal water rights in the western states is found in Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. 7-1 (2010).

(1) Arizona

Arizona statutes do not directly address the right of municipal providers to acquire water rights for future needs, but they do so by implication. This is reflected in the requirement to identify future needs in the application to appropriation. This has been a requirement since 1919. 1919 Ariz. Sess. Laws, ch. 164 § 6, at 280 ("if for municipal water supply, it shall give the present population to be served, and, as near as may be the future requirements of the city").[694] The permit application statute now provides: "The application also shall set forth: . . . If for municipal uses, the population to be served, and an estimate of the future population requirements." Ariz. Rev. Stat. § 45-152(B)(4).

Another Arizona statute further provides preferential treatment for municipal water providers. "Applications for municipal uses may be approved to the exclusion of all subsequent appropriations if

[694] This statute is not available on Westlaw. The statute's language is set out in Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[3][a], n.65 (2010).

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the estimated needs of the municipality so demand after consideration by and upon order of the director." Ariz. Stat. Rev. Ann. § 45-153(B).[695]

In 2005, Arizona enacted a new, stand-alone statute requiring community water systems to engage in water planning, but this statute does not appear to address water rights. 2005 Ariz. Sess. Laws, ch. 223 (codified at Ariz. Rev. Stat. §§ 45-330 *et seq.*). This statute requires small community water systems to prepare an "analysis of present and future water supply demands for the next five, ten and twenty years." Ariz. Rev. Code § 45-342(H)(5). This is a minimum planning requirement, not a maximum. And it does not apply to a "large municipal provider." Ariz. Rev. Code § 45-342(E).

(2) California

Since 1943, California has recognized by statute the right of municipalities to seek rights for future need: "If for municipal water supply the application shall state the present population to be served, and, as near as may be, the future requirements of the city." Cal. Water Code § 1264 (enacted by 1943 Cal. Stat. ch. 368, p. 1617, § 1264).

Another part of the 1943 act authorized the issuance of temporary permits to other uses allowing them to use a city's future needs water right in the interim: "Where permission to appropriate is granted to any municipality for any quantity of water in excess of the existing municipal needs therefor, the board may, pending the application to beneficial use of the entire appropriation permitted, issue permits for the temporary appropriation of the excess of the permitted appropriation over and above the quantity being applied to beneficial use from time to time by the municipality." Cal. Water Code § 1462 (enacted by 1943 Cal. Stat. ch. 368, p. 1623, § 1262).

In 1983, California adopted the Urban Water Management Plan Act ("UWMPA"). Cal. Water Code §§ 10610 *et seq*. This act requires municipal water providers to prepare urban water management plans with a planning horizon of 20 years "or so far as data is available." Cal. Water Code § 10631(a). The 20-year planning requirement is a mandatory minimum. It does not set an upper limit on how far municipal providers may plan and obtain future need water rights.

The UWMPA provides:

> It is the intention of the Legislature, in enacting this part, to permit levels of water management planning commensurate with the numbers of customers served and the volume of water supplied.
>
> A plan shall be adopted in accordance with this chapter that shall do all of the following:
>
> (a) Describe the service area of the supplier, including current and projected population, climate, and other demographic factors affecting the

[695] The annotations to this statute recite that the constitutionality of this legislation was challenged in *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999). However, that case challenged a unrelated part of the statute (Ariz. Stat. Rev. Ann. § 45-153(B)) which, in any event, was upheld.

> supplier's water management planning. The projected population estimates shall be based upon data from the state, regional, or local service agency population projections within the service area of the urban water supplier and shall be in five-year increments to 20 years or as far as data is available.

Cal. Water Code §§ 10630, 10631.

The UWMPA was described by the California Court of Appeals as follows:

> "In 1983, the Legislature adopted [UWMPA] to promote the active management of urban water demands and efficient water usage in order to protect the people of the state and their water resources. (Stats. 1983, ch. 1009, § 1, p. 3555.)" (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal. App. 4th 1, 8, 19 Cal. Rptr. 3d 625 (*Friends of the Santa Clara River*).) In UWMPA, the Legislature declared that "[t]he conservation and efficient use of urban water supplies are of statewide concern; however, the planning for that use and the implementation of those plans can best be accomplished at the local level." (§ 10610.2, subd. (a)(2).) "To achieve the goal of water conservation and efficient use, [local] urban water suppliers are required to develop water management plans that include long-range planning to ensure adequate water supplies to serve existing customers and future demands for water. (§ 10610.2, subds. (d) & (e).)" (*Friends of the Santa Clara River*, at p. 8, 19 Cal. Rptr. 3d 625.) A plan is intended to function as a planning tool to guide broad-perspective decisionmaking by the management of water suppliers. "The plans must consider a 20–year time horizon (§ 10631, subd. (a)) and must be updated 'at least once every five years on or before December 31, in years ending in five and zero' (§ 10621, subd. (a))." (*Friends of the Santa Clara River*, at p. 8, 19 Cal. Rptr. 3d 625.)

Sonoma Cnty. Water Coal. v. Sonoma Cnty. Water Agency, 116 Cal. Rptr. 3d 616. 622 (Cal. Ct. App. 2010) (brackets original).

(3) Colorado

As noted above (section 23.A starting on page 327), Colorado is a leader in the development of the growing communities doctrine. E.g., *City & Cnty. of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939); *City & Cnty. of Denver v. N. Colorado Water Conservancy Dist.* (the "*Blue River*" case), 276 P.2d 992, 997 (1954); *Metro. Suburban Water Users Ass'n v. Colorado River Water Conservation Dist.*, 365 P.2d 273, 289 (Colo. 1961).

In Colorado, water for growing cities is addressed under the State's mechanism for conditional water rights. Unlike Idaho, which has a fixed "prove-up" period, Colorado provides a more flexible

system of due diligence with proof of continued diligence required every six years. Thus, a municipal provider may hold water rights for future use indefinitely, so long as it can pass a due diligence review every six years.

In 1975, the Colorado Legislature enacted a statute limiting the authority of cities to condemn water rights to water that the city would need within 15 years. The Colorado Supreme Court declared the statute unconstitutional in *City of Thornton v. Farmers Reservoir & Irr. Co.*, 575 P.2d 382 (1978). Although the Court relied in large part on a direct constitutional grant of condemnation power to cities, the Court's decision necessarily embodies recognition that cities are entitled to obtain water rights to meet all reasonably anticipated future needs. "We wish to make it clear, however, that we do not hold that a home rule city may condemn water for its needs which cannot reasonably be anticipated." *Farmers Reservoir*, 575 P.2d at 538.

In *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979), the Colorado Supreme Court denied a conditional water right to a private developer who hoped "to sell water to municipalities on the eastern slope for general municipal use but had not obtained firm contractual commitments binding those municipalities to purchase or receive the water." *Vidler*, 594 P.2d at 568-69. The Colorado Legislature codified the *Vidler* anti-speculation rule. 1979 Colo. Sess. Laws (S.B. 481) (codified at Colo. Rev. Stat. § 37-92-103(3)(a)). In doing so, however, it exempted "governmental agencies" from the provision. Colo. Rev. Stat. § 37-92-103(3)(a)(I). As a result, Colorado municipalities are allowed to acquire future need water rights for their own purposes and later sell those rights to others.

In *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 38 (Colo. 1996), the City of Thornton on Colorado's Front Range (population 78,000 at that time) sought conditional water rights for a new water project expected to cost $427 million. Citing *Sheriff* and *Blue River*, the Court rejected an argument that the City could only obtain water rights for future needs within its existing municipal boundaries. The Court then approved the conditional water rights based on a 50-year planning horizon.[696]

[696] The opinion does not expressly state the duration of the planning horizon. At one point, the Court makes reference to Thornton's projection that its population "can be expected to rise steadily and substantially over the next fifty years." *City of Thorton*, 926 P.2d at 19. Later, however, it appears to base its approval of the water rights on that fact that "demand within Thornton's water service area may exceed 93,000 acre feet by the year 2056." *City of Thorton*, 926 P.2d at 19. This was 70 years out from 1986, the priority date of the rights awarded to Thornton. *City of Thorton*, 926 P.2d at 32. However, in a subsequent decision, the Idaho Supreme Court, referring back to the *Bijou* decision, described its approval of a fifty-year planning horizon. "It concluded that the 50-year planning period approved in Bijou is appropriate for the Districts' conditional water rights application." *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* ("*Pagosa II*"), 219 P.3d 774, 780 (Colo. 2009). Other commentators have also referred to Thornton's planning horizon as a 50-year horizon. Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010).

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In *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* (*"Pagosa I"*), 170 P.3d 307, 315 (Colo. 2007), the court found statutory support for special treatment of municipalities in the 1979 amendment to the definition of "appropriation" (Colo. Rev. Stat. § 37-92-103(3)(a)) that exempts municipalities from strict anti-speculation rules created under *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 594 P.2d 566 (Colo. 1979). From this, the court concluded that "[a city] may conditionally appropriate water to satisfy a projected normal increase in population within a reasonable planning period." *Pagosa I*, 170 P.3d at 315.

In *Pagosa I*, two water districts serving a small Colorado city and surrounding area (population 9,500) sought a "conditional water right" to meet future needs under Colorado's common law governing municipal water rights. The new water right would supply an off-stream reservoir they hoped to construct. They initially sought to establish a 100-year planning horizon. The Colorado Supreme Court remanded for further evidence regarding the need for such a long planning horizon.

On remand, the applicants changed their request to a 70-year planning horizon, which the water court cut back to 50 years. *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* ("*Pagosa II*"), 219 P.3d 774 (Colo. 2009). The water court also included in the decree various post-decree "reality checks" requiring re-evaluation of needs every six years. On the second appeal, the Colorado Supreme Court approved a 50-year planning horizon, but remanded to allow development of further evidence that the requested quantity was needed.

> The *Pagosa* court expressed concern that "[t]hose in line behind a conditional appropriation for a long planning period risk losing any investment they may make in the hope that the prior conditional appropriation will fail. They also may not be able to raise the necessary funds in the first instance. . . ." While saying that the *Bijou* 50-year period is "not a fixed upper limit" the court noted that the water court "should closely scrutinize" a planning period longer than 50 years. After the remand, the water court approved a conditional appropriation based on a 50-year planning period. While the supreme court sustained the 50-year planning period, it found fault with amounts of water decreed and again reversed and remanded.

Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.03[2][b] (2010).

The Colorado Supreme Court was particularly concerned that the water districts included in the quantification of their future needs a substantial quantity of water to cover reservoir releases to meet instream flow requirements that might be imposed in the future. The Colorado Supreme Court disallowed this portion of the conditional water rights, describing the need for such releases as "speculative" and "hypothetical." *Pagosa II*, 219 P.3d at 780. The court noted that the districts could have made in-channel water right applications of their own, but chose not to do so. "Instead, they have attempted to appropriate water quantities they may not need within their service system in order to obtain a priority over a potential City of Pagosa Springs kayak course." *Pagosa II*, 219 P.3d at 783.

The problem, as the court saw it, was not with the concept of the water districts appropriating municipal water rights to allow diversion and release to meet instream flow requirements. Rather, it was the hypothetical nature of the instream flow needs. "Thus, an applicant might obtain a conditional water right to benefit Colorado Water Conservation Board instream flow rights, to benefit in-channel diversion rights of another governmental entity, and/or to meet federal bypass flow requirements, if it demonstrates a substantial probability that it will use such amounts during the water supply planning period, thereby justifying the decree award." *Pagosa II*, 219 P.3d at 783.[697]

We are aware of no circumstance in Idaho in which a municipal water provider has sought to appropriate water to meet instream flow needs. On the other hand, United Water Idaho did enter into a stipulation whereby a junior, 1993-priority "flood right" out of the Boise River was subordinated to future instream flow water rights of a particular quantity if and when such instream flow rights are established. Water Right No. 63-12055.

(4) Montana

Montana was one of the Western states to recognize the "progressive growth doctrine." *St. Onge v. Blakely*, 245 P. 532 (Mont. 1926). This doctrine applied in the context of irrigation, allowing an irrigator to a reasonable amount of time to grow into (or prove up) his or her water right. "It is not requisite that the use of water appropriated be made immediately to the full extent of the needs of the appropriator. It may be prospective and contemplated, provided there is a present ownership or possessory right to the lands upon which it is to be applied, coupled with a bona fide intention to use the water, and provided that the appropriator proceeds with due diligence to apply the water to his needs." *St. Onge*, 245 P. at 539. This doctrine is seen by some as the predecessor of the growing cities (or growing communities) doctrine. A. Dan Tarlock, *Law of Water Rights and Resources* § 5:71 (2013); Lora Lucero & A. Dan Tarlock, *Water Supply and Urban Growth in New Mexico: Same Old, Same Old or a New Era?*, 43 Nat. Resources J. 803, 829 (2003); Sandra Zellmer, 8 Nev. L. J. 994, 1013-14 (2008).

(5) Nebraska

Nebraska provides statutory protection from forfeiture for municipal rights. Neb. Rev. Stat. § 46-229.04(5).

(6) Nevada

Nevada authorizes municipalities to appropriate water for future use, but does not set any specific duration of the planning horizon. The statute simply requires that the application for a

[697] For a more detailed look at the *Pagosa* cases, see Casey S. Funk & Daniel J. Arnold, *Pagosa—The Great and Growing Cities Doctrine Imperiled: An Objective Look from a Biased Perspective*, 13 U. Denver Water L. Rev. 283, § 7.03[2][b] (2010); Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[4] (2010)..

municipal water right shall contain "the approximate number of persons to be served, and the approximate future requirement." Nev. Rev. Stat. § 533.340(3).

(7) New Mexico

Since 1985, New Mexico has provided by statute that municipal water rights held for future use pursuant to a development plan are protected from forfeiture for up to 40 years:

> A. It is recognized by the state that it promotes the public welfare and the conservation of water within the state for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources. The state further recognizes the state engineer's administrative policy of not allowing municipalities, member-owned community water systems, counties and state universities to acquire and hold unused water rights in an amount greater than their reasonable needs within forty years.
>
> B. Municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties shall be allowed a water use planning period not to exceed forty years, and water rights for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to such municipalities or counties shall be based upon a water development plan the implementation of which shall not exceed a forty-year period from the date of the application for an appropriation or a change of place or purpose of use pursuant to a water development plan or for preservation of a municipal, county, school district, member-owned community water system or state university water supply for reasonably projected additional needs within forty years.

N.M. Stat. Ann. §§ 72-1-9 (emphasis added) (first enacted 1985 N.M. Laws, ch. 198).

By statute, municipal rights for future needs are exempt from forfeiture:

> Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute.

N.M. Stat. Ann. § 72-12-8(F) (first enacted 1985 N.M. Laws, ch. 198) (an identical provision appears in N.M. Stat. Ann. § 72-5-28(C)).

The New Mexico Supreme Court cited N.M. Stat. Ann. § 72-1-9 in noting that "[a] municipality may be given a more substantial 'reasonable time' for its population growth than a typical water user would have to complete an appropriation." *State ex. rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 59 (N.M. 2004).

Even before this statute, New Mexico recognized the common law growing communities doctrine in 1967. Citing *City and Cnty. of Denver v. Sheriff*, 96 P.2d 836 (Colo. 1939), the New Mexico Supreme Court said: "We see no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase in population within a reasonable period of time." *State ex. rel. State Engineer v. Crider*, 431 P.2d 45, 49 (N.M. 1967). The Court continued, "We add, however, that the cities' rights to the appropriation of water for future use is subject to the condition that the needed water be applied to beneficial use within a reasonable time. If not so applied such right may be lost." *Id*.

The court reiterated this point (albeit in dictum) in 1981: "When determining the extent of a municipal water right, it is appropriate for the court to look to a city's planned future use of water from the well caused by an increasing population. *State v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967). Thus, the amount of water a city is presently using from a well may not be the limit of its water right. Likewise, the size of the well casing at the present may not be the limit of that right." *State v. Rio Rancho Estates, Inc.*, 624 P.2d 502, 506 (N.M. 1981).

In 2004, the court again reiterated the *Cridler* principle. "We have applied this principle to municipalities in order to allow for "normal increase in population within a reasonable period of time." *State ex. rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 59 (N.M. 2004). In so doing, however, the court overruled the even more expansive pueblo rights doctrine that allowed certain cities unlimited protection from forfeiture.[698] The court then noted that this common law special treatment of municipal providers has been codified at N.M. Stat. Ann. § 72-1-9, providing up to 40 years of protection from forfeiture. *Id*.

The municipal water right statute was discussed in *Albuquerque-Bernalillo Cnty. Water Utility Auth. v. New Mexico State Engineer*, 2013 WL 5309895 (N.M. Ct. App. 2013) (unpublished) (cert.

[698] "In *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64, 79–85, 343 P.2d 654, 664–69 (1958), this Court adopted the pueblo rights doctrine. Under this doctrine, municipalities that are the successors-in-interest to colonization pueblos established by antecedent sovereigns possess a pueblo water right. This water right entitles a municipality to take as much water from an adjacent water course as necessary for municipal purposes and permits expansion of the right to accommodate increased municipal needs due to population increases. Upon reexamination, we conclude that the pueblo rights doctrine is inconsistent with New Mexico's system of prior appropriation. As a result, we overrule *Cartwright*. We conclude that municipal water rights must be determined by prior appropriation based on beneficial use regardless of a colonization grant from preceding sovereigns." *State ex. rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 49 (N.M. 2004).

denied). Because the issue was not properly presented, the court declined to address the question of whether municipal water rights held unused for more than 40 years should be deemed abandoned.

(8) North Dakota

Since 1985, North Dakota has provided by statute for municipal providers to acquire water rights for "reasonable projections for future water needs":

> The state engineer may issue a conditional permit for less than the amount of water requested, but in no case may the state engineer issue a permit for more water than can be beneficially used for the purposes stated in the application except that water permits for incorporated municipalities or rural water systems may contain water in excess of present needs if based upon reasonable projections of future water needs of the municipality or the rural water system. The state engineer may require modification of the plans and specifications for the appropriation. The state engineer may issue a permit subject to fees for water use, terms, conditions, restrictions, limitations, and termination dates the state engineer considers necessary to protect the rights of others and the public interest. Conditions and limitations so attached must be related to matters within the jurisdiction of the state engineer; provided, however, that all conditions attached to any permit issued prior to July 1, 1975, are binding upon the permittee.

N.D. Cent. Code § 61-04-06.2 (emphasis added) (enacted as 1985 N.D. Laws ch. 670).

> Any appropriation of water must be for a beneficial use, and when the appropriator fails to apply it to the beneficial use cited in the permit or ceases to use it for the beneficial use cited in the permit for three successive years, unless the failure or cessation of use has been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause, the state engineer may declare the water permit or right forfeited. For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit may reasonably be necessary for the future water requirements of the municipality or the rural water system. The state engineer shall, as often as necessary, examine the condition of all works constructed or partially constructed within the state and compile information concerning the condition of every water permit or right and all ditches and other works constructed or partially constructed thereunder.

N.D. Cent. Code § 61-04-23 (emphasis added) (enacted as 1985 N.D. Laws ch. 670).

However, a 1989 regulation implementing these statutes limits the protection to 30 years:

> "Reasonably necessary for the future water requirements of a municipality or rural water system" means the amount of water estimated to be required thirty years in the future. The total quantity of water a municipality or rural water system may hold under all permits for municipal use may not exceed the quantity the municipality or rural water system can reasonably expect to use thirty years in the future.

N.D. Admin. Code 89-03-03-04.

(9) Oregon

Since at least 1991,[699] Oregon has provided by statute that municipalities may appropriate water to meet reasonably anticipated future needs:

> (4) The right of all cities and towns in this state to acquire rights to the use of the water of natural streams and lakes, not otherwise appropriated, and subject to existing rights, for all reasonable and usual municipal purposes, and for such future reasonable and usual municipal purposes as may reasonably be anticipated by reason of growth of population, or to secure sufficient water supply in cases of emergency, is expressly confirmed.

Or. Rev. Stat. § 540.610(4) (emphasis added). The statute sets no time limit for the duration of the planning horizon.

The same statute provides protection from forfeiture for municipal rights:

> (2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing one or more of the following:
>
> (a) The water right is for use of water, or rights of use, acquired by cities and towns in this state, by appropriation or by purchase, for all reasonable and usual municipal purposes.
>
> (b) A finding of forfeiture would impair the rights of such cities and towns to the use of water, whether acquired by appropriation or purchase, or heretofore recognized by act of the legislature, or which may hereafter be acquired.

Or. Rev. Stat. § 540.610(2).

Another Oregon statute authorizes municipal providers to take up to 20 years to construct the diversion works:

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[699] The earliest Oregon Session Law amending this act that is available on Westlaw is Or. Laws ch. 370 (1991) (S.B. 204). It shows that the relevant language predates 1991.

> (2) The holder of a permit for municipal use shall commence and complete the construction of any proposed works within 20 years from the date on which a permit for municipal use is issued under ORS 537.211. The construction must proceed with reasonable diligence and be completed within the time specified in the permit, not to exceed 20 years. However, the department may order and allow an extension of time to complete construction or to perfect a water right beyond the time specified in the permit under the following conditions: . . .

Or. Rev. Stat. § 537.230(2).

This statute was amended in 2005 in response to the court of appeals' decision in *Waterwatch of Oregon, Inc. v. Water Resources Comm'n,* 88 P.3d 327, 341 (Or. Ct. App. 2004), *decision vacated*, 119 P.3d 221 (Or. 2005). In this case, the Oregon Water Resources Commission approved a permit sought by a municipal provider (the Coos Bay-North Bend Water Board) for municipal water supply based on showing of future needs over 60 year planning period (from 1990 to 2050).[700] It was challenged by an environmental group. The court of appeals read a public interest standard into the state's due diligence statute, Or. Rev. Stat. § 537.230, which at the time required construction of works to be completed within five years. The appeals court concluded that the issuance of a permit for a proposed municipal diversion that would not apply the water to beneficial use many years beyond the statutory period was not in the public interest.

While the case was on appeal to the state supreme court, the legislature amended the statute. Or. Laws ch. 410 (2005). First, the legislation specifically exempted from judicial review permits issued prior to 2005. Based on this action, the Oregon Supreme Court vacated the appeals court decision. 119 P.3d 221 (Or. 2005). Second, the legislation amended section 537.230 exempting municipal providers from the five-year requirement and allowing them up to 20 years to "complete the construction of any proposed works," with further extensions available upon a proper showing.[701] An implementing administrative regulation provides for extensions of time for construction of works required for municipal providers.[702]

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[700] The 2050 endpoint is referenced in the Oregon decisions. The 1990 starting point is referenced in Kathleen Booth, *Court Report-State Court: Oregon*, 8 U. Denver L. Rev. 309, 310 (2004).

[701] This is discussed in Michelle Henrie, *Oregon's Municipalities Can Take the Time They Need to Grow*, 7 Water Resources Impact 12 (2005) and A. Dan Tarlock & Sarah B. Van de Wetering, *Western Growth and Sustainable Water Use: If There Are No "Natural Limits," Should We Worry About Water Supplies?*, 27 Pub. Land and Res. L. Rev. 33, 50, n.75 (2006).

[702] "[H]olders of municipal and quasi-municipal water use permits may apply to the Department for an extension of time to complete construction and/or apply the water to full beneficial use pursuant to ORS 537.230 or 537.630. . . . Extension requests for greater than 50 years must include documentation that the demand projection is consistent with the amount and types of lands and uses proposed to be served by the permit holder." Or. Admin. R. 690-315-0070(3)(l).

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Note that the 20-year deadline (plus extensions) applies to the construction of works, not to the application of the water to beneficial use. Thus, an Oregon municipal provider may secure a water right for an even longer term so long as the physical diversion works are constructed within 20 years. Indeed, the purpose of the 2005 legislation was to uphold Coos Bay's water permit based on a 60-year planning horizon.

Another statute deals with partial perfection of municipal water rights.[703]

(10) South Dakota

South Dakota provides by statute that a municipal provider "can acquire and hold rights to use water for existing and future uses, but cannot prevent someone else from using the excess in the interim until "necessity therefor exists." Robert E. Beck, *Municipal Water Priorities/Preferences in Times of Scarcity: The Impact of Urban Demand on Natural Resource Industries*, 56 Rocky Mtn. Min. L. Inst. § 7.02[3][a], n.70 (2010) (internal quotations omitted). The text of the referenced statute provides:

> It is the established policy of this state:
> . . .
> (2) That the state may, through its institutions, facilities, and properties, and a water distribution system may acquire and hold rights to use water, which rights shall be protected to the fullest extent necessary for existing and future uses, but neither the state nor any water distribution system may acquire or hold any right to waste any water, to use water for other than its own purposes or to prevent the appropriation and application of water in excess of its reasonable and existing needs for useful purposes by other persons, subject to the rights of the state or a water distribution system to apply the water to use whenever necessity therefor exists.

S.D. Codified Laws § 46-1-5(2).

Another provision of the water code authorizes municipal providers to "reserve water for contemplated future needs upon a showing of availability of unappropriated water and future need." S.D. Codified Laws § 46-5-38. The legislation further provides for review of such reservations (called "future use permits") every seven years, making them subject to cancellation if the provider cannot show they continue to be needed:

> Water Management Board approval of an application to appropriate water for future use is a reservation of a definite amount of water with a specified priority date and is not a grant of authority to construct the works or to put the water to beneficial use. Before the time that the holder of a future use permit initiates construction of the works and puts water to

[703] "A municipality may partially perfect not less than 25 percent of the water authorized by its permit without loss of priority or cancellation of the municipality's permit under this section. . . ." Or. Rev. Stat. § 537.260(4).

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> beneficial use, the holder shall file an application for a water permit pursuant to the procedure contained in chapter 46-2A. If the holder of the future use permit is granted a water permit to develop only a portion of the water reserved by the future use permit, the holder shall apply for and receive an additional water permit, or permits, before developing and using the remaining water reserved in the future use permit. Permits for future uses shall be reviewed by the board every seven years and are subject to cancellation if the board determines that the permit holder cannot demonstrate a reasonable need for a future use permit.

S.D. Codified Laws § 46-5-38.1. The legislation sets no upper limit on the provider's planning horizon.

(11) Utah

In 1945, Utah enacted its first statute providing special treatment of municipal water rights held for future needs. 1945 Utah Sess. Laws, ch. 134, § 1, at 262 (recognizing as reasonable cause for extending time before forfeiture "holding of a water right without use by any municipality, metropolitan water district or other public agencies to meet the reasonable future requirements of the public"). However, this statute did not provide blanket exemption from forfeiture. Instead, it provided an opportunity for cities to affirmatively request an extension of time under the state's forfeiture statute.

In 2008, Utah enacted statutory protection from forfeiture for municipal rights. 2008 Utah Sess. L. ch. 380. Under this statute, water rights held by "a public water supplier" are exempt from forfeiture if "conserved or held for the reasonable future water requirement of the public." Utah Code Ann. § 73-1-4(2)(e)(vii)(B). The statute further provides for a 40-year planning horizon: "The reasonable future water requirement of the public is the amount of water needed in the next 40 years by the persons within the public water supplier's projected service area based on projected population growth or other water use demand." Utah Code Ann. § 73-1-4(2)(f)(i).

(12) Washington

Washington allows municipal providers to obtain inchoate water rights (the equivalent of a permit in Idaho) sized to meet future needs. However, since 2003, the municipal provider may only obtain a water right certificate (the equivalent of a license in Idaho) for water actually applied to beneficial use.

Under prior administrative practice, the Washington Department of Ecology granted certificates to municipal providers based on the installed capacity of the diversion and distribution system—known as "pumps and pipes." In *State of Washington, Dept. of Ecology v. Theodoratus*, 957 P.2d 1241 (Wash. 1998), the Washington Supreme Court invalidated this practice. It held that a private water right appropriator seeking water for a subdivision must demonstrate actual application of water to beneficial use, not merely construction of "pumps and pipes" capacity to deliver the water once the demand for it

arises. In so ruling, the court cautioned that it was not ruling with respect to municipal water rights, which it recognized generally receive more liberal treatment with respect to proof and forfeiture. "[W]e decline to address issues concerning municipal water suppliers in the context of this case. We do note that the statutory scheme allows for differences between municipal and other water use." *Theodoratus*, 957 P.2d at 1247.

The Washington Legislature responded by codifying the rule in *Theodoratus* and extending it to all water right holders, including municipal providers. 2003 Wash. Legis. Serv. 1st Special Sess. Ch. 5. "After September 9, 2003, the department must issue a new certificate under subsection (1) of this section for a water right represented by a water right permit only for the perfected portion of a water right as demonstrated through actual beneficial use of water." Wash. Rev. Code § 90.03.330(4). Thus, as of 2003, all new certificates for perfected rights are limited to actual beneficial use, not system capacity.[704]

This does not mean that there is no such thing as municipal water rights for future needs in Washington, however. It simply means that a municipal provider may not obtain a final certificate (known in Washington as a perfected right) based on future needs. Municipal providers may obtain permits (known in Washington as inchoate rights (Wash. Rev. Code § 90.03.460) for future needs. The court in *Theodoratus* emphasized that there is sufficient flexibility under this provision to allow water users to grow into their rights, so long as they are prosecuted with reasonable diligence. *Theodoratus*, 957 P.2d at 1248. *Theodoratus* was speaking there in terms of private water right development. But the same would apply, and presumably all the more so, to municipal providers. "Therefore, although the holder of a system capacity based certificate of water right may not have a vested right in unused water, the certificate holder's inchoate right to the quantity of water in her certificate might not be affected by the decision in Theodoratus. Of course, such an inchoate right is dependent upon the 'reasonable diligence' requirement for perfecting inchoate water rights. Presumably, a certificate holder with 'unused capacity' could preserve that inchoate right by applying for a permit or extension and pursuing the actual beneficial use of the water with reasonable diligence." Darryl V. Wareham, Note, *Washington Water Rights Based on Actual Use or on Delivery System Capacity? Department of Ecology v. Theodoratus*, 24 Seattle U. L. Rev. 187, 210 n.181 (2000).

Washington's water code provides, simply, that municipal water providers may appropriate water to meet the "future requirement of the municipality": "If for municipal water supply, the application shall give the present population to be served, and, as near as may be estimated, the future requirement of the municipality." Wash. Rev. Code § 90.03.260(5) (emphasis added). There is no statutory limit to the time frame that may be considered.

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[704] The Legislature softened the blow, however, by creating an expansive new definition of "municipal water supply purposes" which included both traditional municipal providers and private developers of subdivisions (Wash. Rev. Code § 90.03.015) and grandfathering water right certificates for such purposes issued prior to the date of enactment (Wash. Rev. Code § 90.03.330(3)). This legislation was challenged as being unconstitutional retroactive legislation, but it survived. *Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010).

Once an inchoate right is issued, the municipal provider may gradually grow into its full use without risk of forfeiture. Washington has codified a municipal use exemption from its five-year forfeiture statute: "Notwithstanding any other provisions of RCW 90.14.130 through 90.14.180, there shall be no relinquishment of any water right . . . (d) if such right is claimed for municipal water supply purposes under chapter 90.03 RCW." Wash. Rev. Code § 90.14.140(2)(d). Although "a water right for municipal water supply purposes is exempt from statutory forfeiture of water rights through nonuse," a city may nevertheless intentionally abandon the right. *Okanogan Wilderness League, Inc. v. Town of Twist*, 947 P.2d 732 (Wash 1997) (abandonment found based on nonuse of diversion since at least 1948).

Another statutory provision provides additional guidance on water conservation requirements for municipal water providers. This provision reinforced the authority of a municipal provider to hold inchoate rights for future use:

> (3) A municipal water supplier must implement cost-effective water conservation in accordance with the requirements of RCW 70.119A.180 as part of its approved water system plan or small water system management program. In preparing its regular water system plan update, a municipal water supplier with one thousand or more service connections must describe: (a) The projects, technologies, and other cost-effective measures that comprise its water conservation program; (b) improvements in the efficiency of water system use resulting from implementation of its conservation program over the previous six years; and (c) <u>projected effects of delaying the use of existing inchoate rights</u> over the next six years through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use. When establishing or extending a surface or ground water right construction schedule under RCW 90.03.320, the department must take into consideration the public water system's use of conserved water.

Wash. Rev. Code § 90.03.386(3) (emphasis added).

Another statutory provision instructs the Washington Department of Ecology to develop conservation planning requirements for municipal providers. Wash. Rev. Code § 70.119A.180. These include methodologies for "determining reasonably anticipated future water needs." Wash. Rev. Code § 70.119A.180(4)(a)(E).

In addition, Washington has a separate administrative mechanism enabling municipal providers to "reserve" water for future needs. Wash. Admin. Code § 173-590 (implementing the Water Resources Act of 1971, Wash. Rev. Code § 90.54). This approach, however, provides less certainty for the municipal provider and greater authority for the State to change its mind: "From time to time, any reservation established under this chapter shall be reviewed and, when it appears appropriate to the department in implementing RCW 90.54.050, modified. No change shall be made without consultation of interested parties. The water resource program and the coordinated water system plan shall be

reviewed whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions." Wash. Admin. Code § 173-590-140.

(13) Wyoming

An early Wyoming case established the right of municipalities to acquire water rights for future needs. In *Holt v. Cheyenne*, 137 P. 876 (Wyo. 1914), an irrigator challenged the quantity of water decreed to the City of Cheyenne. The court upheld the city's water right, stating: "The city was not limited in the amount of its appropriation to the needs of its citizens at the time of the adjudication." *Holt*, 137 P. at 880. The court further held that "the securing of water sufficient not alone for its present but such as may be necessary for its future inhabitants was and is within its governmental powers." *Holt*, 137 P. at 881.

The Idaho Supreme Court relied on and quoted from the *Holt* case in *Beus v. City of Soda Springs*, 62 Idaho 1, 6, 107 P.2d 151, 154 (1940).

(14) Municipal water supply in the western United States

(a) Texts and handbooks on water planning

Note: The studies in the following table are focused primarily on planning for water infrastructure and physical supply availability purposes, not for water rights acquisition. However, their discussion of water demand planning shows that planning horizons of substantial duration are typically employed. [705]

STUDY	PLANNING HORIZON DURATION	QUOTATIONS
Gordon Fair, *Elements of Water Supply and Wastewater Disposal* (2nd Ed.), John Wiley & Sons, New York, NY (1971).	Up to 50 years	A table lists "Large dams and conduits" under "Type of Structure" and identifies a Design Period, Years" as "25-50." Fair at 18.
Duane Baumann, John J. Boland & W. Michael Hanemann, *Urban Water Management and Planning*, McGraw-Hill, Inc., New York, NY (1997).	50 years or more	"Even today, the need to ensure efficient and reliable water supply leads to periodic assessments of the long-term outlook. Future water use is forecast, sometimes for a planning period of fifty years or more. Based on this forecast, a cost-effective supply system is planned, including the designation of future water sources, if they are needed. These long-range plans are used as a basis for policy and as a framework for shorter-range capital improvement programs and investments." Baumann at 78. "Long-range forecasts should be performed regularly, based on the best available information at the time." Baumann at 79.
David W. Prasifka, *Current Trends in Water-Supply Planning Issues, Concepts, and Risks*, Van Nostrand Reinhold Co., New York, NY (1988).	Up to 100 years	"Since planning, design, and construction of water facilities proceed slowly, and since most facilities are relatively long-lived, water use is customarily forecast over long periods—20, 30, 50, or even 100 years." Prasifka at 62.
AWWA, *Water Resources*	50 years or more	Identifies long-term planning horizons of 50 years or more. "For the very long term (30 to 50

[705] The short planning horizon mentioned in passing in the Stephenson book is an outlier. This publication from the Netherlands addresses global water development, with an emphasis on developing nations. In this context, it notes: "In general there appears to be a decline in growth rate and greater uncertainty in projections." Stephenson at 172. Moreover, the demand projection discussion arises in the context of projecting needs for new water supply infrastructure, not water rights.

STUDY	PLANNING HORIZON DURATION	QUOTATIONS
Planning, AWWA Manual M50 (2nd Ed.), American Water Works Assn., Denver, CO (2007).		years or more), highly accurate forecasts are usually not critical, especially if a realistic range of demand is developed. Several stepped increments of supply may occur during the lengthy period that allows adjustments to changing projections." AWWA at 42-43.
Andrew A. Dzurik, *Water Resources Planning* (3rd Ed.), Rowman & Littlefield Publishers, Inc., Lantham, MD (2003).	Up to 50 years	"Water use forecasts in most cases are long-range, covering up to fifty years, and typically measure average daily use. Such long-range planning is necessary because water use projections are usually used to plan major facilities such as dams, reservoirs, and treatment plants."
David Stephenson, *Water Resources Management*, Krips The Print Force, Meppel, The Netherlands (2003)	10-20 years	"In planning and design of water supplies the sizing of works, the locality of sources and discharge of wastewater are dependent on a planned demand. The procedure is to plan for a number of years into the future, e.g., 10 to 20 years for unlimited sources and demand. The actual planning horizon can be selected by economic procedures." Stephenson at 171.

(b) State-by-state summary

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Arizona	No fixed upper limit	50 years	Arizona statutes do not directly address the right of municipal providers to acquire water rights for future needs, but they do so by implication. This is reflected in the requirement to identify future needs in the application to appropriation. Ariz. Rev. Stat. § 450152(B)(4). Another Arizona statute further provides preferential treatment for municipal water providers. "Applications for municipal uses may be approved to the exclusion of all subsequent appropriations if the estimated needs of the municipality so demand after consideration by and upon order of the director." Ariz. Stat. Rev. § 45-153(3).	Tucson used a 50-year planning horizon in its 2000 Water Plan: "These water demand projections are developed to ensure that adequate water supplies will be available to meet the needs of the community during the 50-year planning period and to identify the water-resource opportunities and challenges that lie ahead." *City of Tucson's Water Plan: 2000-2050*, at 3-1. http://cms3.tucsonaz.gov/files/water/docs/wp-ch03.pdf

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
California	20 year minimum, no fixed upper limit	50 years	Since 1943, California has recognized by statute the right of municipalities to seek rights for future need: "If for municipal water supply the application shall state the present population to be served, and, as near as may be, the future requirements of the city." Cal. Water Code § 1264 (enacted by 1943 Cal. Stat. ch. 368, p. 1617, § 1264). Another part of the 1943 act authorized the issuance of temporary permits to other uses allowing them to use a city's future needs water right in the interim. Cal. Water Code § 1462 (enacted by 1943 Cal. Stat. ch. 368, p. 1623, § 1262). In 1983, California adopted the Urban Water Management Plan Act ("UWMPA"). Cal. Water Code §§ 10610 et seq. This act requires municipal water providers to prepare urban water management plans with a planning horizon of 20 years "or so far as data is available." Cal. Water Code § 10631(a). The 20-year planning requirement is a mandatory minimum. It does not set an upper limit on how far municipal providers may plan and obtain future need water rights.	In its 2009 *Water Plan Update*, California forecasted water supply and demand through 2050: "Update 2009 maps out the role of State government and the water community to ensure that California has sustainable water uses and reliable water supplies in 2050 for all beneficial uses." *California Water Plan Update 2009,* at 2-12. http://www.waterplan.water.ca.gov/cwpu2009/index.cfm In its 2009 *Framework For the Implementation of Water Management Planning*, the California Partnership for the San Joaquin Valley Water Work Group used a 50-year planning horizon: "The [framework] effort is critical to identify the Valley water needs and determine water management solutions for a fifty-year planning horizon." *California Partnership for the San Joaquin Valley, Framework for the Implementation of Water Management Planning*, at 2. http://www.sjvpartnership.org/uploaded_files/WG_doc/CWIfinalversionExtractCPSJV10222009.pdf
Colorado	50 years, but that is not a "fixed upper limit"		Fifty-year planning horizons were approved in *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 38 (Colo. 1996) and *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* ("*Pagosa II*"), 219 P.3d 774 (Colo. 2009). In *Pagosa II*, the Court said that 50 years is not a "fixed upper limit" but that the water court "should closely scrutinize" planning periods longer than 50 years. *Pagosa II*, 219 P.3d at 780 (quoting *Pagosa I*, 170 P.3d at 317).	In its 2002 *Integrated Water Resource Plan,* Denver Water (the state's largest water provider) forecasted water demand through 2050: "Analysis was performed to evaluate the forecasts of future demands in relation to the availability of undeveloped land within Denver Water's Combined Service Area including plans for major known future developments and redevelopments. This analysis indicates that the Combined Service Area will be fully developed by 2050." *Denver Water's Water for Tomorrow: An Integrated Water Resource Plan, at 44.* http://www.dcwater.org/pages/conservation/DenverWaterIRP2002MasterDocIRP.pdf

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Idaho	No fixed upper limit	50 years	Idaho's Municipal Water Rights Act of 1996 authorizes municipal providers to acquire water rights to meet reasonably anticipated future needs. The 1996 Act provides no guidance and sets no limit on the duration of the "planning horizon." "'Planning horizon' refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." Idaho Code § 42-202B(7).	In 2011, the Idaho Water Resource Board adopted the Rathdrum Prairie Comprehensive Aquifer Management Plan, which projected water demand over a 50-year planning horizon: "The Rathdrum Prairie Aquifer Water Demand Projections study provides projections of Rathdrum Prairie water demand over the next 50 years." *Rathdrum Prairie Comprehensive Aquifer Management Plan*, at 3. http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/RP_CAMP/pdf/2011/RP_CAMP_final_Adopted_Plan.pdf In 2012, the Treasure Valley Comprehensive Aquifer Management Plan Advisory Committee submitted a proposed plan projecting water demand over a 50-year planning horizon: "The Treasure Valley Comprehensive Aquifer Management Plan (Plan) provides a framework for long-range management of the aquifer. The Plan describes the overarching goals and actions that can be implemented to successfully accomplish the stated goals for local residents and the state of Idaho and to promote productive regional cooperation to benefit the area over the next 50 years." *Proposed Treasure Valley Comprehensive Aquifer Management Plan, at 1.* http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/TV_CAMP/pdf/2012/ProposedTVCAMPPlanv5-08-2012_resized.pdf
Kansas		40 years		In its 2010 *Integrated Local Water Supply Plan*, the City of Wichita forecasted water supply and demand through 2050: "The City of Wichita is currently implementing an Integrated Local Water Supply Plan (ILWSP) to proactively develop their water supplies to meet demands through the planning horizon of 2050. The ILWSP was initially approved in 1993 and includes many components to maximize the use of the City's existing water supply sources and ensure the future of those sources." *Wichita Water Utilities Water Supply Plan*, at 1-1. http://www.wichita.gov/NR/rdonlyres/5B8212F3-3601-4075-A412-3C0838F249A2/0/WichitaFinalReport_FINALw_TablesFigures.pdf
Montana	No fixed upper limit		"In a determination of abandonment made under subsection (3), the legislature finds that a water right that is claimed for municipal use by a city, town, or other public or private entity that operates a public water supply system, as defined in 75-6-102, is presumed to not be abandoned if the city, town, or other private or public entity has used any part of the water right or municipal water supply and there is admissible evidence that the city, town, or other public or private entity also has… conducted a formal study, prepared by a registered professional engineer or qualified consulting firm, that includes a specific assessment that using the water right for municipal supply is feasible and that the amount of the water right is reasonable for foreseeable future needs" Montana Code Annotated § 85-2-227	
Nebraska			(None found.)	

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STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Nevada	No fixed upper limit	50 years	Nevada authorizes municipalities to appropriate water for future use, but does not set any specific duration of the planning horizon. The statute simply requires that the application for a municipal water right shall contain "the approximate number of persons to be served, and the approximate future requirement." Nev. Rev. Stat. § 533.340(3)	In 2009, the Southern Nevada Water Authority used a 50+ year planning horizon for their water demand projections: "The 2009 Water Resource Plan forecasts demands through 2060 based on the June 2008 Clark County Population Forecast prepared by the University of Nevada Las Vegas Center for Business and Economic Research" *Southern Nevada Water Authority 2009 Water Resource Plan*, at 40. http://www.snwa.com/assets/pdf/wr_plan_chapter3.pdf
New Mexico	40 years	46 years 60 years	Since 1985, New Mexico has provided by statute that municipal water rights held for future use pursuant to a development plan are protected from forfeiture for up to 40 years. N.M. Stat. Ann. §§ 72-1-9. By statute, municipal rights for future needs are exempt from forfeiture. N.M. Stat. Ann. §§ 72-5-28(C); 72-12-8(F)).	In 2004, the Middle Rio Grande Water Assembly forecasted water supply and demand through 2050: "In 2001 and 2002, the Water Assembly conducted a Water Balancing Exercise to see if the region's water budget could be balanced by the year 2050. Constituency Groups were given a set of baseline numbers assembled from the best available data, and were asked to set targets for each water use sector based on the group's values. . . . With this information, the Constituency Groups worked to balance the water budget by 2050." *Summary of the Middle Rio Grande Regional Water Plan 2000-2050*, at 25-27. http://waterassembly.org/archives/MRG-Plan/C-Summaries/Rio Grande General Summary.pdf In 2009, the U.S. Bureau of Reclamation recognized the validity of planning horizons of up to 60 years: "The planning horizon considered in this EA is 2060, which is within the normal range for water supply projects (40- to 60-year planning horizons are common). The Project is anticipated to supply water well beyond the planning horizon." *U.S. Bureau of Reclamation, Eastern New Mexico Rural Water System Environmental Assessment,* at 1. http://www.usbr.gov/uc/albuq/envdocs/ea/eastNM/ea.pdf
North Dakota	No fixed upper limit		"For purposes of this chapter, an incorporated municipality or rural water system has good and sufficient cause excusing the failure to use a water permit, if the water permit may reasonably be necessary for the future water requirements of the municipality or the rural water system." North Dakota Code § 61-04-23	
Oklahoma		50 years		In its *2012 Oklahoma Comprehensive Water Plan*, Oklahoma used a 50-year planning horizon: "Projecting water demands 50 years into the future is a difficult task. Nevertheless, this is the foundational element of future water supply planning." *2012 Oklahoma Comprehensive Water Plan Executive Report*, at 59. http://www.owrb.ok.gov/supply/ocwp/pdf_ocwp/WaterPlanUpdate/draftreports/OCWP Executive Rpt FINAL.pdf In a 2009 paper summarizing Oklahoma's water planning, the U.S. Army Corps of Engineers wrote favorably of Oklahoma's 50-year planning horizon: "The 50 year planning horizon was selected because it represents a reasonable, foreseeable time period and encompasses the minimum life span of most large water resources projects in Oklahoma." *U.S. Army Corps of Engineers, Building Strong Collaborative Relationships for a Sustainable Water Resources Future: State of Oklahoma Summary of State Water Planning*, at 7.

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Oregon	No statutory limit on appropriations, but 20 years (with extensions) to complete system 60 years approved by grand-fathering	50 years	Since at least 1991, an Oregon statute has provided that municipalities may appropriate water to meet all reasonably anticipated future needs. Or. Rev. Stat. § 540.610(4). The statute sets no time limit for the duration of the planning horizon. The same statute provides protection from forfeiture for municipal rights. Or. Rev. Stat. § 540.610(2). An Oregon statute provides that municipal providers have up to 20 years (with further extensions possible) to complete construction of the physical works required for a municipal water right. Or. Rev. Stat. § 537.230(2). This statute was enacted to overrule the holding in *Waterwatch of Oregon, Inc. v. Water Resources Comm'n*, 88 P.3d 327, 341 (Or. Ct. App. 2004), *decision vacated*, 119 P.3d 221 (Or. 2005). The effect was to approve a water right permit issued to a municipal provider based on future needs over a 60-year planning horizon.	Eugene Water & Electric Board (the municipal water provider for the city of Eugene, Oregon) states that it holds sufficient water rights "to meet projected demand beyond the current 50-year planning horizon." http://www.eweb.org/sustainability/report/water The 2009 Statewide Water Needs Assessment, prepared as a component of the Oregon Water Supply and Conservation Initiative, projected demand through 2050. http://www.oregon.gov/owrd/law/docs/owsci/owrd_demand_assessment_report_final_september_2008.pdf
South Dakota	No fixed upper limit	50 years	South Dakota provides by statute that a municipal provider may acquire and hold rights to use water for existing and future uses, but cannot prevent someone else from using the excess in the interim until necessity therefor exists. S.D. Codified Laws § 46-1-5. Another provision of the water code authorizes municipal providers to "reserve water for contemplated future needs upon a showing of availability of unappropriated water and future need." S.D. Codified Laws § 46-5-38. The legislation further provides for review of such reservations (called "future use permits") every seven years, making them subject to cancellation if the provider cannot show they continue to be needed. S.D. Codified Laws § 46-5-38.	In its 2005 *Future Water Supply Evaluation*, the City of Sioux Falls used a 50-year planning horizon: "A planning period of 50 years beyond the implementation deadline of year 2012 was established due to the complexity, limited expandability, and significant costs associated with the construction of new water supply, transmission, and treatment system infrastructure. As a result, the year 2062 served as the basis to develop concepts for evaluation and consideration by the City of Sioux Falls. The 50-year planning period was divided into two equal 25-year planning periods, thereby creating planning horizons in year 2037 and year 2062." *City of Sioux Falls Future Water Supply Evaluation Executive Summary*, at ES-1. http://www.siouxfalls.org/~/media/Documents/publicworks/water/future_water/final_executive_summary.pdf
Texas		50 years	"The committee is specifically charged to review…(2) projections for Texas' future water and wastewater needs to the year 2050" Texas S.B. No. 1, 1997, Section 8.02(a)	As required by the Texas legislature in 1997, regional water supply planning extends to 2050: "The first step in the regional water planning process is to quantify current and projected population and water demand over the 50-year planning horizon." *Texas 2012 State Water Plan*, at 129. http://www.twdb.state.tx.us/publications/state_water_plan/2012/03.pdf
Utah	40 years		In 2008, Utah enacted statutory protection from forfeiture for municipal rights. 2008 Utah Sess. L. ch. 380. Under this statute, water rights held by "a public water supplier" are exempt from forfeiture if "conserved or held for the reasonable future water requirement of the public." Utah Code Ann. § 73-1-4(2)(e)(vii)(B). The statute further provides for a 40-year planning horizon. Utah Code Ann. § 73-1-4(2)(f)(i).	In its 2001 *Utah State Water Plan*, Utah's Division of Water Resources projected water supply demand to 2050: "Estimates of present municipal and industrial water use by basin have been made and are shown . . . . Projections of water use in 2020 and 2050, based on present use rates and future population, are also shown." *Utah's Water Resources Planning For The Future*, at 21. http://www.water.utah.gov/waterplan/

STATE	STATUTE OR CASE LAW	PLAN	CASES / STATUTES / REGULATIONS	EXAMPLES OF WATER SUPPLY PLANNING HORIZONS
Washington	No fixed upper limit	50 years	Washington allows municipal providers to obtain inchoate water rights (the equivalent of a permit in Idaho) sized to meet future needs. Wash. Rev. Code §§ 90.03.260(5); 70.119A.180(4)(a)(E). These so-called inchoate rights are exempt from forfeiture. Wash. Rev. Code § 90.14.140(2)(d). The statute sets no limit or the duration of the planning horizon for future needs. However, since 2003, the municipal provider may only obtain a water right certificate (the equivalent of a license in Idaho) for water actually applied to beneficial use. Wash. Rev. Code § 90.03.330(4). Washington has a separate administrative mechanism enabling municipal providers to "reserve" water for future needs. Wash. Admin. Code § 173-590 (implementing the Water Resources Act of 1971, Wash. Rev. Code § 90.54). This approach, however, provides less certainty for the municipal provider	The City of Olympia, Washington used a 50-year planning horizon to project future needs and secure adequate supplies in their *Comprehensive Plan*: "Goals and Policies: PF6.1- Reserve water supply rights for at least 50 years in advance of need, so that supplies can be protected from contamination and they are not committed to lower priority uses." *Comprehensive Plan For Olympia And The Olympia Growth Area*, at ch. 5, p. 7. http://olympiawa.gov/plans/comp-plan/utilities
Wyoming		30 years		Wyoming used a 30-year planning horizon in its 2007 Water Plan: "This current Wyoming Framework Water Plan provides information for decision making for a 30 year planning horizon." *Wyoming Water Development Comm'n, The Wyoming Framework Water Plan: A Summary*, at 1. http://waterplan.state.wy.us/plan/statewide/execsummary.pdf The City of Gillette used a 30-year planning horizon in its 2007 water supply study: "[T]he only source that could reliably and economically provide the needed water for the 30-year planning period was the Madison aquifer." *City of Gillette Long-Term Water Supply Study Executive Summary*, at 7-17. http://www.ci.gillette.wy.us/Modules/ShowDocument.aspx?documentid=5428

J. Alternate points of diversion ("APODs")

A point of diversion ("POD") is the location of the well or other diversion structure from which a water right is authorized to divert. The point of diversion is a defined "element" of every water right.

When a water right is allowed to divert from more than one point of diversion, it is said to have "alternate points of diversion" or "APODs" (or "alternative points of diversion"). APODs are used most commonly for a ground water right diverting from multiple wells. Surface rights also could have multiple points of diversion (e.g., different pumps out of a lake).

Operational advantages

The purpose of identifying APODs is to give the water user the flexibility to "move" its water rights from one well to another as needed. This may be useful in the following circumstances:

- If a well is shut down (permanently or temporarily for any reason), water under the water right associated with that well may be pumped from another well without seeking approval from IDWR.

- APODs also may be used to add a new well to an existing water right in order to authorize diversion from the new well without obtaining a new appropriation. This could be important, for instance, if a moratorium on new appropriations were in place. Of course, this approach would work only if there is sufficient authorized diversion authority in the existing water right to support adding the new APOD.

- Similarly, APODs coupled with a combined use limit may be employed at the time of licensing a non-RAFN municipal water right where the municipal provider is unable to demonstrate an additional increment of system capacity or beneficial use. The latter is referred to informally as the Tuthill Compromise (after former Director David Tuthill). See discussion in section 23.D(8)(e) on page 360.

- Most importantly, however, APODs provide flexibility to municipal providers in the context of future water right curtailments. If a city's junior water rights were curtailed, APODs would allow it to employ its remaining non-curtailed rights in the most effective manner to provide some level of service under the circumstances. For instance, a city might restrict lawn irrigation on a rotating basis, moving its non-curtailed rights accordingly. See discussion below under scenarios 2 and 3 under the APOD condition.

Avoidance of injury

Any change in the point of diversion of a water right (including adding an APOD) requires a transfer approved by the Idaho Department of Water Resources ("IDWR" or "Department"). The corresponding mechanism to add an APOD to a permit is an application for amendment of permit. In a general adjudication of water rights such as the Snake River Basin Adjudication ("SRBA") or the Northern Idaho Adjudications ("NIA"), transfers that were never formally sought nonetheless may be recognized under a statutory provision authorizing "accomplished transfers."

The transfer (or application for amendment of permit) will be approved only if the change injures no other water users, including juniors. This may require the addition of limiting conditions that avoid injury.

The Department will recognize alternate points of diversion for a water right only if the points of diversion are from the same source. *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).[706]

[706] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

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Historically, water rights (particularly for municipal supply systems) were often acquired one well at a time as the system expands, with a new water right obtained as each well was added. The result is that the municipal provider accumulates a portfolio of water rights with different priority dates, each associated with a different well. It is often desirable to integrate these points of diversion by making each well an APOD for every water right. Thus, for example, if there were 16 water rights associated with 16 wells, the rights could be transferred so that all 16 APODs were listed as points of diversion for each water right. This way, the water right holder may pump any water right from any well, as well as multiple water rights from a single well.

Ordinarily, conversion of single-well water rights to water rights with APODs must be accomplished through a formal transfer proceeding. In a formal transfer, other water users are put on notice and given an opportunity to protest on the basis of injury.

In the SRBA, many municipal providers held multiple one-well water rights that were used in integrated delivery systems in which water diverted from various wells was co-mingled. Thus, as a practical matter, these providers had accomplished an APOD transfer. Accordingly, they claimed "accomplished transfers" of their water rights (under Idaho Code § 42-1425) in which each ground water right was authorized to divert from every well in the integrated delivery system.[707]

The APOD condition

These accomplished transfer APODs were recommended for approval by the Department and ultimately decreed in virtually all cases, but with a condition. The condition recognized that, since there was no formal transfer proceeding with notice to the public and an opportunity to protest, the rights should be conditioned to allow senior users the right to allege well interference even after the APODs are approved.

Accordingly, the following language became the standard APOD language for accomplished transfers:[708]

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[707] In the SRBA, APODs were limited to those rights shown to have been used in an integrated delivery system. Otherwise, the municipal providers could not show an accomplished transfer. In a new appropriation or a formal transfer, however, APODs could be established at separate locations outside of an integrated system, so long as they all diverted from the same source (i.e., the same aquifer).

[708] More recently, IDWR has included a modified version of the APOD condition where APODs are added at the time of licensing via an informal "license amendment." Here is an example from the license for No. 95-9129 issued to North Kootenai Water District on 2/5/2021 and subsequently decreed in the CSRBA. The licensing amendment authorized 26 APODs. The APOD condition reads:

> To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, this right retains its priority established in the permit reinstatement order issued on 09/04/2008 for well locations authorized under this right as identified in permit 95-9129 dated 03/26/2003.

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> To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from [name of well] located in [quarter-quarter description].

This condition was developed in the context of accomplished transfers—that is transfers accomplished (informally, by operation of law, without a formal transfer application) by the water user simply putting them into effect on-the-ground without any review or approval from the Department. But for Idaho Code § 42-1425, accomplished transfers would be illegal (at least since 1963 for ground water[709] and since 1971 for surface water[710]). In *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Schroeder, J), the Idaho Supreme Court found the accomplished transfer statute was constitutional because it contained built-in protections that make it unavailable to transfers that result in injury or enlargement. The APOD condition is intended to effectuate this obligation to avoid injury.

The APOD condition was challenged by the City of Pocatello in the SRBA, which claimed that, in the absence of timely objections by other water users, the City's right to pump water from any well should be decreed without any limitation. However, the APOD condition was upheld by the SRBA court and the Idaho Supreme Court. *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternate points of diversion in City of Pocatello municipal water rights litigation).[711]

The effect of the APOD condition language is that, where necessary for administration, the Department may look back to the original well location of the water right. Essentially, this allows the Department to roll the clock back, as if the accomplished transfer had not yet been approved, and evaluate whether injury would result if the transfer was sought now for the first time. This may arise in three contexts, each of which is discussed below.

These discussions employ the following hypothetical. Suppose Little City had two water rights, a 1920 right for 1 cfs out of Well A and a 1985 right for 1 cfs out of well B. In the SRBA these were decreed listing both wells as APODs for both rights, subject to the condition quoted above.

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[709] The Ground Water Act was adopted in 1951, 1951 Idaho Sess. Laws, ch. 200. However, the application process for ground water rights did not become mandatory until the act was amended in 1963, 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

[710] 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201).

[711] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

Context 1: Well interference

The first context in which the APOD condition might come into play is well interference. Let us suppose that neighbor Bob owns a water right with a 1970 priority that pumps out of Well C, which is near Little City's Well B. The 1 cfs pumped out of Well B has never interfered with Bob's water right. Then, in the year 2015, Little City decides to abandon Well A and improve Well B to pump the full 2 cfs. Bob now complains that the increased pumping from Well B is interfering with his water right. If there were no APOD condition, he would lose. But the APOD language allows the Department to take into account the fact that the city's first water right was originally associated only with Well A. The Department would then ask itself, in effect, will transferring the point of diversion to allow this water to be pumped of Well B result in injury? Under these facts, the answer is "yes" and Bob would prevail.

The same would be true if, for many years Little City pumped its 1985 water right out of Well B for eight hours a day without injury to Bob. Then the City began pumping the right 24 hours a day,[712] thereby causing injury to Bob's right. In a contest between Bob's 1970 right and the City's 1985 right, Bob would win. But could the City, relying on its new APODs say that it was pumping its 1920 water out of the well and thus prevail over Bob? The APOD condition prevents this. Again, APOD language allows the Department to roll the clock back. If the accomplished transfer results in injury to Bob, then the City may not rely on the APOD.

Context 2: Geographically isolated curtailment

The APOD language would also preclude Little City from using its newly acquired APODs to circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area. For example, suppose the Department curtailed pumping of post-1980 junior wells in a Ground Water Management Area ("GWMA") that included Little City's Well B. Suppose Little City's Well A was located outside of that area. Could Little City, relying on the APODs associated with its senior 1920 right declare that it was now going to pump its 1920 water from Well B, thereby defeating the effort to restrict pumping in the GWMA? If there were no APOD condition, it could do so. But, as in the well interference scenarios, the APOD condition allows the Department to roll the clock back and "undo" an accomplished transfer that is causing this sort of injury. Thus, the city would not be allowed to pump its 1920 water right from the well within the curtailment area because, at the time the 1920 right was issued it was not authorized to be diverted out of that well.

Note, however, that Little City would be allowed to pump its 1985 right from Well A located outside of the curtailment area. Pumping in that remote location does not stress the ground water in the Ground Water Management Area. Thus, it is not undermining or circumventing the curtailment. Consequently, the city would be allowed to take advantage of the APOD for the 1985 right by pumping it from a remote well just as if there were no curtailment.

[712] Municipal water rights typically have no volume limitation. Thus, cities are allowed to grow into their rights over time, pumping them more and more as needed.

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Context 3: Broad regional curtailment

While the examples discussed above are important considerations for application of the APOD condition, those scenarios are not the driver for why municipal providers seek APODs. In addition to the other operational advantages listed in the bullet points above, the main advantage of APOD authority arises in the context of a broad regional curtailment.

Take this hypothetical. Suppose there is a call by a down-gradient senior surface user. As a result, the Department curtails pumping ground water rights throughout the valley that are junior to 1980. At this point, Little City can no longer pump its 1985 water right, but it can pump its 1920 right out of either well due to the APODs. In responding to the curtailment, the city's ability to move its most senior water rights to its most critical well may be beneficial. Since it makes no difference to the senior surface user whether the city pumps its water out of one well or the other, then the APOD condition does not restrict pumping the senior right out of the junior well. The city, of course, will still have to find make-up or mitigation water elsewhere, or just provide less water. But at least it is able to use those senior water rights that remain in priority in the most efficient manner.

In its approval of the APOD language, the Idaho Supreme Court did not include a detailed explanation of how the condition works. *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).[713] However, the SRBA decision affirmed by the high court expressly discussed and confirmed the understanding described above. The district court recited the three scenarios and concluded: "The Providers assert that the Special Master's determination could be read too broadly to preclude under any circumstances the use of alternate points of diversion any time priority administration is implicated. The court concurs that in a circumstance involving regional priority administration a municipal provider may still be able to exercise alternate points of diversion within the region undergoing administration so long as the well under which the original right was established is also located within the region subject to the administration."[714] Memorandum Decision at 16-18, *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009) (Melanson, J.) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).[715]

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[713] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

[714] The Providers referenced in the quotation by the district court were three municipal providers (United Water Idaho, the City of Nampa, and the City of Blackfoot) who submitted an amicus curiae brief and were allowed to argue this point. The district court quoted extensively from the Provider's brief in describing the three scenarios. *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).

[715] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

K. Situations in which the APOD condition should not be applied

At the outset, it is important to understand what is meant by whether the APOD condition should apply. The APOD condition is not the thing that authorizes diversion from the APODs. The thing that authorizes diversion from APODs is simply listing those points of diversion on the face of the water right. The APOD condition is a limitation on the use of the APODs. Specifically, it authorizes "rollback" of the right to use APOD authority that was added by a subsequent transfer of the water right. Thus, when we say the APOD condition should not apply, that means the rollback should not apply and the right holder should be allowed to divert the full authorized quantity from any and all APODs listed on the water right (subject to any applicable combined use condition).

No APOD condition is necessary for water rights with APODs from the outset

The APOD condition only makes sense in the context of adding new APODs (via accomplished transfer or formal transfer) to an existing water right. If APODs are included in the original permit (and later the license) from the outset, there is APOD authority that might be rolled back by the APOD condition. In other words, the world is on notice from the outset that that water right can be diverted from multiple APODs, and no injury results from the full exercise of that right according to its priority.

Accomplished transfers vs. formal transfers

As noted above, the APOD language was developed in the context of accomplished transfers and are designed to protect against injury in the context of Idaho Code § 42-1425 (which authorizes accomplished transfers to the extent injury is avoided). APODs may also be added via other procedures including formal transfer (Idaho Code § 42-222), an amendment of permit (Idaho Code § 42-211), or a less formal "licensing amendment" in which IDWR modifies the terms of a water right at the time of licensing to reflect current conditions.

Whether the standard APOD condition language is appropriate in the context of a formal transfer is a different question. One could argue that that because the world is put on notice and all users have an opportunity to protest a transfer, failure to protest should result in approval of APODs without condition or limitation. On the other hand, if the Department had information showing that future injury was a real possibility, the Department might be justified in imposing conditional language along the lines of the APOD condition developed in the SRBA context. Likewise, other water right holders might reasonably contend that they should not be expected to evaluate every potential use of APODs (e.g., how "a super-well" authorized by multiple water rights with APODs might affect them). Arguably, they should be allowed to rely on their priority to protect them in the event that injury occurs at some time in the future. In other words, they should not be required to file a protest or forever hold their peace.

The APOD condition in the context of subsequent appropriators

Another question is, which water users are intended to be protected by the APOD language? Plainly, the rollback provision in the APOD condition protects water uses whose rights predate approval of the additional APODs added by accomplished transfer. As suggesting in the discussion

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immediately above, the same is probably true in the context of formal transfers. Thus, the APOD condition gives these users the ability to bide their time and complain later if and when they experience well interference.

In contrast, if a new water user appropriates water after APODs are established (by transfer or otherwise), it would seem that the new user is on notice of the APOD holder's right to use those APODs. Consequently, the author of this section contends that, even if an APOD condition is attached, it should not have any effect (i.e., there should be no rollback) as rights junior to the creation of the APOD authority. In other words, looking back to the original points of diversion would not be "necessary for administration" because, being junior, the new user suffers no legal injury when a senior diverts water in accordance with the senior's water right.

L. Authority of cities to provide water outside of their city limits

(1) The police power and inherent proprietary authority

Article XII, section 2 of the Idaho Constitution grants the police power directly to cities and counties (without need for implementing legislation). This section states:

> Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho Const. art. XII, § 2.

Idaho's police power has been read narrowly by Idaho courts. (See *Idaho Land Use Handbook*.) It appears that the police power extends only to regulatory matters, not to what Idaho courts often describe as "proprietary" matters (including the provision of services).

On the other hand, cities generally have the power to provide city services. 56 Am. Jur. 2d *Municipal Corporations* § 516 (2000). Moreover, it is recognized as a general principle of municipal law that cities may provide such services beyond their boundaries where doing so is of benefit to the city. "Municipal corporations that act outside of their territorial boundaries must do so for the benefit of the citizens within those boundaries in order to be public, rather than private, corporations." 56 Am. Jur. 2d *Municipal Corporations* § 521 (2000).

The Idaho Supreme Court has noted the authority of cities "to operate their own utility systems and provide water, power, light, gas and other utility services within the city limits." *Alpert v. Boise Water Corp*., 118 Idaho 136, 143, 795 P.2d 298, 305 (1990) (Boyle, J.) (citing Idaho Code §§ 50-323 and 50-325) (emphasis added). However, this observation was not made in a context that addressed whether cities had authority to deliver water outside of their city limits. Rather, the case dealt with, and affirmed, the authority of cities to charge franchise fees to utilities operating within the city.

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(2) Idaho Code § 42-202B(9) (Municipal Water Rights Act of 1996)

Most water rights have a specifically delineated place of use, and any change in the place of use (or any other element of a water right) requires express approval by IDWR in what is known as a "transfer" or "change" proceeding. Idaho Code § 42-222.

The Municipal Water Rights Act of 1996 provides more flexible treatment for holders of municipal water rights. The place of use for a city or other municipal water provider is defined as its "service area," and the service area may change or expand over time without any requirement for a transfer approval by IDWR. Idaho Code § 42-202B(9).

More importantly, the 1996 act defines "service area" as for a city to include areas outside of its city limits. The statute reads:

> (9) "Service area" means that area within which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes. For a municipality, the service area shall correspond to its corporate limits, or other recognized boundaries, including changes therein after the permit or license is issued. The service area for a municipality may also include areas outside its corporate limits, or other recognized boundaries, that are within the municipality's established planning area if the constructed delivery system for the area shares a common water distribution system with lands located within the corporate limits. For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.

Idaho Code § 42-202B(9) (emphasis added).[716]

The term "planning area" used in this section is not a defined term in the 1996 Act or elsewhere, and its meaning is obscure. However, it does not appear to be a significant constraint on the authority of cities to serve customers or dispose of their municipal wastewater outside of their city limits so long as the use is generally within the scope of city's water planning process.[717]

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[716] Section 42-202B(9) was enacted as part of the Municipal Water Rights Act of 1996, which deals with "reasonably anticipated future needs" (aka RAFN) water rights. However, IDWR has adopted guidance stating that this definition of service area also applies to non-RAFN municipal water rights. "The Department considers the definitions for 'municipality,' 'municipal provider,' 'municipal purposes,' and 'service area' from the 1996 Municipal Water Rights Act to apply to non-RAFN permits." Jeff Peppersack, *Administrator's Memorandum – Processing Applications and Amendments and Determining Beneficial Use for Non-RAFN Municipal Water Rights – Application Processing No. 18; Licensing No. 1* (Oct. 19, 2009) ("*2009 Peppersack Memo*"), at 3 (reproduced in Appendix M)

[717] A letter seeking the Department's view of this provision in the context of land application of wastewater outside the city stated:

The requirement that the area served outside the city limits "shares a common water distribution system with lands located within the corporate limits" is means that there must be "[a] measure of control and supervision" by the city in

(3) Idaho Code § 50-301 (home rule)

> Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

Idaho Code § 50-301 (emphasis added). See discussion of this provision in the *Idaho Land Use Handbook*.

(4) Idaho Code § 50-323 (authorizing municipal water systems)

Title 50, which sets out the powers of municipalities, provides:

> Domestic water systems. Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation,

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> First, the land application must be "within the municipality's established planning area." "Planning area," however, is not a defined term. It is an informal term generally understood to refer to the area used by a city for water rights planning purposes as it plans for current and future water requirements. [footnote: The term 'planning area' in the 1996 Act should not be confused with the city's 'area of city impact.' The latter is a distinct term meaningful in the context of annexation rules under the Local Land Use Planning Act, Idaho Code § 67-6526.] In other words, the 1996 Act requires that land application outside the city limits must be undertaken as part of a city's long-term water planning effort.

Letter from Christopher H. Meyer to Garrick L. Baxter (Aug. 18, 2011). Mr. Baxter replied (following further information submissions):

> Based upon the representations in your letter, the Department agrees that the lands served outside the City of McCall's corporate limits share a common water distribution system with lands located within the corporate limits. So as long as the City of McCall is land applying its captured municipal effluent as part of a treatment process to meet adopted state water quality requirements (this issue was discussed in my letter to you dated September 7, 2011), the Department agrees that the use (and location) is in conformance with City of McCall's municipal water right.

Letter from Garrick L. Baxter to Christopher H. Meyer (Sept. 19, 2011) (parentheticals original).

a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.

Idaho Code § 50-323 (emphasis added).

This provision authorizes the provision of service "to the inhabitants of the city." It includes no express authorization to serve persons or businesses outside of a city. A letter between Chris Meyer and IDWR confirms the Department's view that this provision should not be read as limiting a city's authority to provide water service outside its city limits:

> After the meeting at IDWR, I reviewed your letter to Mr. Fife. I then called you to confirm that nothing in that letter expresses a contrary view, particularly with respect to location of the infiltration facility outside of city boundaries. The letter to Mr. Fife, of course, addressed a different and more complex question: Can a city provide water to customers in another state? Thankfully, we need not grapple with that issue here. In answering that question, the Fife letter made reference to statutory provisions and case law dealing with the issue of water service by a municipality outside of its boundaries. As I understand it, you agree that none of those authorities pose a problem here. I will step through this conclusion briefly.
>
> The Fife letter references Idaho Code § 50-323 which provides:
>
> > Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems; provide for domestic water from wells, streams, water sheds or any other source; provide for storage, treatment and transmission of the same to the inhabitants of the city; and to do all things necessary to protect the source of water from contamination. The term "domestic water systems" and "domestic water" includes by way of example but not by way of limitation, a public water system providing water at any temperature for space heating or cooling, culinary, sanitary, recreational or therapeutic uses.
>
> Idaho Code § 50-323 (emphasis supplied).
>
> The first authorizing clause ("Cities are hereby empowered to establish, create, develop, maintain and operate domestic water systems") is not limited to the city limits. The clause mentioned in your letter ("provide for storage, treatment and transmission of the same to the inhabitants of the city") might be read as a geographic constraint but, in context, should not be so understood. First, as noted, other clauses provide express authorization that are not so limited. Second, the reference limiting a city's authority to "inhabitants of the city" is written in terms of water deliveries to customers and should not apply to limit the physical location of post-use water treatment. Instead, post-use water treatment would more properly fall under the final clause ("to do all things necessary to protect the source

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of water from contamination") which is not limited geographically. In any event, the language in section 50-323 must be read in light of the more recently enacted definition of "service area" in the 1996 Act, discussed above, which expressly authorizes deliveries outside of a city's boundaries. Moreover, common sense indicates that cities have general police power authority to own and operate facilities outside of their city limits. Surely, for example, a city could operate a garage for city vehicles outside of its boundaries. A treatment facility should be no different.

This is not to say that the "inhabitants of the city" language is meaningless surplusage. The meaning, however, is found in other contexts. For example, the language is meaningful in the context of the authority of a city to enter into franchise agreements, as noted in the case you cited, *Albert v. Boise Water Corp.*, 118 Idaho 136, 143, 795 P.2d 298, 305 (1990). Thus, it makes sense that cities should be allowed to enter into exclusive franchise agreements (exempt from anti-trust laws) only within their city limits. Likewise, they could not issue regulations governing water use (such as a requirement to hook up to city water) outside of the city's boundaries. But geographic boundaries should not come into play in other contexts, such as where to locate a treatment facility.

I trust that this letter fairly summarizes our discussion. If, instead, you believe that the City of Nampa may not be authorized to operate a water treatment facility (e.g., an infiltration basin) outside of its city limits, please let me know. I will copy Jeff Peppersack and Garrick Baxter, and ask that they, too, let me know if I have failed to accurately summarize their understandings.

Letter from Christopher H. Meyer to Steven W. Strack (May 19, 2011).

(5) Prior Idaho Code § 49-1132 and current Idaho Code § 50-1030(a)

At one time, the Idaho Code provided very clear authority for cities to provide municipal water service outside of the boundaries. Prior Idaho Code §49-1132 (1932) provided:

> Water, light, and power plants—Acquisition and operation. [Cities have the authority] . . . to supply any excess water, light, and power, or either, to persons (including municipal and private corporations) without the limits of the municipality, and to charge therefor; . . . .

Idaho Code § 49-1132 (1932) (emphasis added).[718]

[718] Idaho Code § 49-1132 may be traced back to 1901. H.B. 41, 1901 Idaho Sess. Laws, ch. 41. (This version of the statute was referenced in *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245 (1933) (Givens, J.)) It was also previously codified to Idaho Rev. Codes § 2315 (which was discussed in *Ostrander v. City of Salmon*, 20 Idaho 153, 117 P. 692 (1911) (Stewart, J.). By 1948, it had been recodified to Idaho Code § 50-

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This statute was relied on by the Idaho Supreme Court in *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.). That case upheld the city's right to purchase irrigation water rights and hold them for future municipal needs. The Court found support for this conclusion both in the common law and in Idaho Code § 49-1132, which authorized cities "to supply excess water to persons or corporations outside its corporate limits." *Beus*, 62 Idaho at 7, 107 P.2d at 154.

One would think that the successor to former section 49-1132 would be today's Idaho Code 50-323, which contains the general grant of authorities to cities. Instead, this provision has found its way to the Idaho Revenue Bond Act, Idaho Code §§ 50-1027 to 50-1042.

The Idaho Revenue Bond Act was enacted in 1951.[719] Section 4 of the 1951 act provided:

> Section 4. POWERS.—In addition to the powers which it may now have, any municipality shall have power under and subject to the following provisions of this act:
>
> (a) To acquire by gift, purchase or the exercise of eminent domain, to construct, reconstruct, improve, better or extend any works, within or without the municipality, or partially within or partially without the municipality, or within any part of the municipality, and to acquire by gift, or purchase, or the exercise of the right of eminent domain, lands or rights in lands or water rights in connection therewith, including easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs.

S.B. 5, 1951 Idaho Sess. Laws, ch. 47 §4 (emphasis added).

This provision is now found in Idaho Code § 50-1030(a). The key language is functionally unchanged:

> In addition to the powers which it may now have, any city shall have power under and subject to the following provisions:
>
> (a) To acquire by gift or purchase and to construct, reconstruct, improve, better or extend any works within or without the city, or partially within or partially without the city, or within any part of the city, and acquire by gift or purchase lands or rights in lands or water rights in connection therewith, including easements, rights-of-way, contract rights, leases, franchises, approaches, dams and reservoirs; to sell excess or surplus water under such terms as are in compliance with section 42-222,

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1132 (which contained identical language to the 1932 version). The 1901 version does not contain the extra-territorial language. I have not determined when it was added, but it was there in 1932 codification and remained there until the statute was repealed.

[719] S.B. 5, 1951 Idaho Sess. Laws, ch. 47. A successor (the present Act) was enacted in 1967. 1967 Idaho Sess. Laws, ch. 429. Earlier versions were in place early in the last century.

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> Idaho Code, and deemed advisable by the city; to lease any portion of the excess or surplus capacity of any such works to any party located within or without the city, subject to the following conditions: that such capacity shall be returned or replaced by the lessee when and as needed by such city for the purposes set forth in section 50-1028, Idaho Code, as determined by the city; that the city shall not be made subject to any debt or liability thereby; and the city shall not pledge any of its faith or credit in aid to such lessee;

Idaho Code § 50-1030(a) (emphasis added).[720]

While the language of the Idaho Revenue Bond Act is not identical to the earlier section 49-1132, it is very close. The key point is that they both authorize cities to provide water outside of the city limits.

The language of section 49-1132 is a bit more direct in this regard. It speaks of "supplying" excess water and "charging therefor." The language of the current act speaks instead in terms of the right to "sell" excess water. However, given the history of the act, it seems likely that no change was intended. That is, it appears that the current Idaho Revenue Bond Act serves exactly the same function as the original language and thereby authorizes sales outside of the city limits.

It may seem odd that this general authority of cities appears within the in Idaho Revenue Bond Act. This, in turn, might lead one to wonder whether by including the authority in the Idaho Revenue Bond Act, the Legislature intended to limit its applicability to projects that are funded by revenue bonds.

The answer is that it makes no difference where the language is found, and the language is effective irrespective of whether a city issues revenue bonds. This was the conclusion of the Idaho Supreme Court in *Viking Const., Inc. v. Hayden Lake Irr. Dist.*, 149 Idaho 187, 233 P.3d 118 (2010) (Eismann, C.J.). In *Viking*, a land developer challenged a domestic water system connection fee of $2,700 per home imposed by an irrigation district.[721] *Viking* did not arise under the Idaho Revenue Bond Act. Instead, it arose under the functionally identical provisions of the Irrigation District Domestic Water System Revenue Bond Act ("Irrigation District Bond Act") §§ 43-1906 to 43-1920. However, the *Viking* Court expressly equated the two provisions.[722] Accordingly, *Viking* is good

[720] The term "works" referenced in subsection 50-1030 is defined to include "water systems, drainage systems, sewerage systems, recreational facilities, off-street parking facilities, airport facilities, air-navigation facilities, [and] electrical systems." Idaho Code § 50-1029(a) (also traceable to the original 1951 enactment, S.B. 5, 1951 Idaho Sess. Laws, ch. 47 §3(a)).

[721] Unlike many irrigation districts, this one also provided domestic water supplies.

[722] The Idaho Supreme Court noted: "The [district] court compared this provision with the identical language in Idaho Code § 50-1030(f), which this Court held in *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991), authorized a city to collect a sewer and water connection fee. Since there is no basis for giving differing constructions to the identical language in the two statutes, Idaho Code § 43-1909(e) authorizes

authority for how both the Irrigation District Bond Act and the Idaho Revenue Bond Act are construed. Although the irrigation district had not issued revenue bonds to construct the facilities, it relied on a provision of the Irrigation District Bond Act, Idaho Code § 43-1909, authorizing the imposition of fees. The plaintiff in *Viking* argued that the irrigation district could not rely on the bond act's authorization of user fees because it had not issued revenue bonds.[723] The Idaho Supreme Court squarely rejected the plaintiff's argument. The Court found that the identical language in both bond acts provides express authority for cities "to construct, reconstruct, improve, better or extend any works." *Viking*, 149 Idaho at 197, 233 P.3d at 128 (construing Idaho Code § 43-1909(a), which is identical to Idaho Code § 50-1030(a)). This is the very provision that I quoted above. Thus, by analogy, the authority of cities to sell excess water outside of their city limits does not rest on any sale of revenue bonds.

(6) Idaho Code § 50-222(4)(b)(ii) (consent to annexation)

Idaho's annexation statute implicitly contemplates that cities may extend water and other services beyond their city limits. Idaho Code § 50-222(4)(b)(ii) deems such extra-territorial service to constitute consent to be annexed if requested in writing or completed before July 1, 2008.

(7) Idaho Code § 50-324 (cooperative operation of out-of-state water system)

Idaho Code § 50-324 authorizes Idaho cities "in cooperation with adjoining cities of states bordering this state" to acquire and operate a privately-owned, out-of-state water distribution system using water "from an out of state source."

> Cities authorized to jointly purchase or lease, maintain or operate a joint water system. All cities of this state are empowered by ordinance to negotiate for and purchase or lease, and to maintain and operate, in cooperation with adjoining cities of states bordering this state, the out of state water distribution system, plant and equipment of privately owned utilities used for the purpose of supplying water to the purchasing or leasing cities from an out of state source; provided, the legislature of the state in which such water distribution system, plant, equipment and supply are located, by enabling legislation, authorizes its cities to join in such purchase or lease, maintenance and operation. The city council of the cities acting jointly under this section shall have authority, by mutual agreement, to

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charging a connection fee to connect to an irrigation district's domestic water system." *Viking*, 149 Idaho at 191, 233 P.3d at 122. Although Viking dealt primarily with Idaho Code § 43-1909(e) (and corresponding Idaho Code § 50-1030(f)), it also relied on Idaho Code § 43-1909(a) (which corresponds to Idaho Code § 50-1030(a)). *Viking*, 149 Idaho at 197, 233 P.3d at 128.

[723] "According to Viking, 'The power granted in I.C. § 43–1909(e) is contingent on the issuance of revenue bonds, after and only after, approval of the electorate.'" *Viking*, 149 Idaho at 191, 233 P.3d at 122.

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> exercise jointly all powers granted to each individual city in the purchase or lease, maintenance and operation of a water supply system.

Idaho Code § 50-324 (emphasis supplied).

An opinion letter provided by IDWR to the City of Moscow observed: "While Idaho Code § 50-234 [sic, should be 50-324] addresses the joint use of out-of-state water sources, it is silent as to use of Idaho water sources to serve out-of-state customers." Letter from Steven W. Strack to Randall D. Fife (June 16, 2005).

(8) Joint Services—Idaho Code §§ 50-1022 to 50-1025

Idaho cities are authorized to enter into joint service agreements with other municipalities where it is more practical to construct and maintain a unified water or sewer system than for each city to provide its own utility service. Idaho Code §§ 50-1022 to 50-1025.

> Joint services. In addition to the authority contained in the foregoing sections and in sections 67-2326 through and including 67-2333, Idaho Code, it shall be lawful for two (2) or more cities, so situated with reference to each other that it is practicable and convenient to furnish the said inhabitants thereof with water, power or sewerage from a single plant and system, to join in the construction or purchase of such plant or system upon a substantial compliance with the provisions of sections 50-1022 to 50-1025, Idaho Code, and not otherwise.

Idaho Code § 50-1022.

> Joint services—Agreement on apportionment. Whenever two (2) or more cities desire jointly to construct water, power or sewage [sewerage] systems, it shall be necessary for the councils to agree among themselves as to the kind and character of construction of the said plant and system, the amount of service to which each city shall be entitled, the approximate cost of such systems and the proportionate part thereof which shall be borne by each city, which proportionate part shall be as nearly just and equitable as possible, and shall be determined in such manner as may be agreeable to all concerned.

Idaho Code § 50-1023. (See also Idaho Code §§ 50-1023 to 50-1025.)

An opinion letter provided by IDWR to the City of Moscow recognized that under the Joint Powers Act, the service area of a water right could be extended to include multiple cities:

> Cities within Idaho are also allowed to enter into joint service agreements with other municipalities where it is more practical to construct and maintain a unified water or sewage system than for each city to provide

> separately such services to their respective residents. Idaho Code §§ 50-1022 to -1025. In such a case, each city's water rights would presumably be amended so that the service area included all lands within the corporate boundaries of the two cities.

Letter from Steven W. Strack to Randall D. Fife (June 16, 2005).

(9) Joint Exercise of Powers Act (Idaho Code §§ 67-2326 to 67-2333)

The Joint Exercise of Powers Act, Idaho Code §§ 67-2326 to 67-2333, authorizes "public agencies" in Idaho cities to enter into cooperative agreements with other public agencies in Idaho and other states. "Public agencies" is defined to include cities. Idaho Code § 67-2327.

An opinion letter provided by IDWR to the City of Moscow recognized that the Joint Exercise of Powers Act (if combined with an agreement under the Joint Powers Act) could be used to authorize water service across a state line. Letter from Steven W. Strack to Randall D. Fife (June 16, 2005).

(10) Contracts with irrigation districts providing water within cities (Idaho Code §§ 50-1805, 50-1805A)

Where the boundary of an irrigation district overlaps a city, the city and irrigation district are authorized to enter into a contract under which the city assumes the duty of distribution of if irrigation water "to the persons within such city having the right to the use thereof." The contract may provide for the city to act as agent for the irrigation district in the collection of assessments that the irrigation district is authorized to levy upon land within the city. The city will then remit the money it collects to the irrigation district, less a commission agreed to under the contract. Idaho Code § 50-1805. Provision for pooling of water rights from multiple irrigation districts is made in Idaho Code § 50-1805A.

Volume 2

Water Law Handbook

The Acquisition, Use, Transfer,
Administration, and Management
Of Water Rights in Idaho

By

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June 11, 2023

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VOLUME 2

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1. INSTREAM FLOW RIGHTS

A. The traditional diversion requirement

Traditionally, Western states required a "diversion" to beneficial use before a water right could be recognized.[724] Thus, a legally enforceable right to the use of water could be obtained only for water removed from a natural watercourse. A person seeking to protect natural (or, for that matter, artificial) stream flows from subsequent appropriation and diversion simply could not do so.

In a classic early case, a federal court sitting in Colorado denied a water right to a resort town constructed around a cascading waterfall whose spray created an oasis of lush vegetation in the desert mountains near Colorado Springs. The waterfall, the court suggested, was an "inefficient" means of irrigation.[725] The decision would have authorized a hydropower company to destroy the central attraction of a thriving town by diverting the falls. As it turns out, the project was never built.[726] In today's thinking, the decision may seem strangely reasoned. While it is true that using a waterfall may be an inefficient means of irrigating flora, it is certainly an efficient way of supporting a resort community—a point seemingly lost on the court.

As recently as 2000, the Idaho Supreme Court confirmed that the diversion rule still applies in Idaho. In *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case), the Court rejected a "constitutional method" water right claimed by the United States in the SRBA. The claim was for 1.16 cfs of water flowing from Smith Springs at the Minidoka Wildlife Refuge. The spring maintains wetlands and other habitat used by migratory birds.[727] However, it has never entailed any manmade diversion structure. The Idaho Supreme Court (reversing the district court) rejected the

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[724] Although Idaho has no explicit statutory requirement for a diversion, the water code does speak of water rights in terms of diversion, Idaho Code §§ 42-101, 42-202, as does the state constitution, Idaho Const. art. XV, § 3. Likewise, Idaho cases long have spoken of a diversion requirement (though, arguably in *dictum*). "In order to acquire a prior or superior right to the use of such water, it is essential that a riparian owner locate or appropriate the waters and *divert* the same as it is for any other user of water to do so." *Hutchinson v. Watson Sough Ditch Co.*, 16 Idaho 484, 493, 101 P. 1059 (1909); "We deem it clear that until the time of the enactment of the statute in question herein [the 1971 Malad Canyon statute] Idaho's statutory scheme regulating the appropriation of water has contemplated an actual physical diversion." *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924, 928 (1974).

[725] *Empire Water and Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913). Strictly speaking, this case was not decided on the diversion issue. Indeed, it recognized that a water right could be obtained for natural *irrigation* without a diversion, but not so for aesthetic purposes. *Id.* at 129.

[726] On remand the parties consented, for reasons not recorded, to a decree providing that the town had a senior right for all of the water of Cascade Creek except for one-half cfs. *Empire Water and Power Co. v. Cascade Town Co.*, Case No. 413, In Equity (U.S. District Court for the District of Colorado Decree issued Oct. 15, 1915).

[727] The United States might have claimed a federal reserved right in connection with the executive order creating the refuge. Instead, the claim was filed solely on the basis of state law.

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federal claim, noting that Idaho law has always required a diversion except in three circumstances: (1) stock watering, (2) claims under the minimum stream flow statute (discussed in section 1.C at page 425), and (3) specific legislative directives to appropriate water for instream purposes.[728]

The diversion requirement may seem arbitrary—a sort of Catch-22 for instream uses. In fact, however, the diversion requirement is based on a sensible public policy—particularly in the pre-permit era. It protected against three types of abuse: First, it prevented speculators from obtaining water rights simply by asserting a claim to unappropriated water—and then selling the water to legitimate users arriving later. Second, it served an important notice function. In days prior to sophisticated record keeping and administration, about the only way a user could determine the state of water rights was to take a look at the stream. If people could hold rights for water left flowing in the stream, subsequent users could be misled into thinking that more water was available for appropriation than actually was the case. Third, the diversion requirement eliminated wasteful uses, for instance by users who sought to command the entire flow of a stream simply to run a waterwheel or irrigate adjacent lands by natural overflow.[729]

In addition, the diversion requirement simply reflected the pragmatic view of the early settlers that eking out a living was more important than protecting the natural environment. Indeed, this clash of values has fueled decades of hostility between traditional consumptive water users and a growing cadre of river activists. Water users have charged that environmentalists simply fail to appreciate the economic benefits we all enjoy as a result of the sweat and determination of those who reclaimed the West. Some environmentalists, on the other hand, have charged that the prior appropriation doctrine callously ignores natural values. Others have come to recognize that the prior appropriation doctrine is well suited to accommodate both environmental and developmental interests.

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[728] In *Bedke v. City of Oakley*, 10.7 ISCR 77 (March 10, 2020), the Idaho Supreme Court rejected a claim that one water user could claim as his own the diversion of another. In that case, the water user was seen as merely a customer of the city's municipal water system, not a water right holder in his own right.

[729] In *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1912), the U.S. Supreme Court, applying Idaho law, denied relief to a senior appropriator when a junior appropriator built a downstream reservoir which stilled the waters upstream and rendered the senior's waterwheels ineffective. This conclusion was based on the fact that to command the entire flow for a marginal benefit was unreasonable. Likewise, in *Walsh v. Wallace*, 26 Nev. 299, 67 P. 914, 917 (1902), early appropriators claimed a water right in the natural overflow of the Reese River upon which they relied to irrigate their adjoining land. The court rejected the right, declaring "[T]here must be an actual diversion of the same, with intent to apply it to a beneficial use . . . ." *Cf.*, *Thomas v. Guiraud*, 6 Colo. 530, 533 (1883) (allowing an appropriation of bank overflow for irrigation). Clark, ed., *Waters and Water Rights*, vol. 1, § 19.5 (1967), contains an interesting discussion entitled "Judicial tolerance of wasteful practices." The thrust is that the courts tolerate waste until demand outstrips supply. A good example is that irrigation by bank overflow initially was viewed as beneficial, but eventually came to be regarded as wasteful.

Today most Western states have determined that these policy goals can be achieved without sacrificing instream values.[730] Recognizing that instream uses serve legitimate economic as well as environmental goals, sixteen of the nineteen Western states—including Idaho—have taken steps to accommodate them within the prior appropriation doctrine. Of these, however, not one puts instream flow water rights on a par with consumptive uses.

Typically, states which recognize instream flow rights have adopted special statutory restrictions. Many states allow only a single state agency—not private parties, municipalities, or others—to hold instream flow rights. Additional procedures, such as special tests or legislative approval, often are required to obtain instream flow rights. A variety of conditions may be attached. They may be sharply restricted in quantity (e.g., to the "minimum" needed to sustain fish life). Their duration may be limited, or they may be subject to subsequent re-evaluation. Some states limit their availability to specific geographic areas. Their transfer may be restricted. Even their priority date may be modified. In short, while most Western states, including Idaho, now have recognized instream water rights, they have been accorded by the Legislatures a "second class" status.

B. The mechanics of instream flows

Instream flow rights are no different in concept from ordinary water rights. They must be approved by the state just like any other right. They are then placed on the state's books with a fixed priority date, a specified quantity, time and place of use, and are administered like any other water right. Thus, if the instream flow right is "in priority," it can "call out" junior users upstream and force them to bypass water to support the instream flow. (To "call out" means to demand that upstream diverters forgo their uses so that water remains available for the downstream senior user). Of course, this does not guarantee that enough water will be in priority to meet the instream flow. In this sense, the term "minimum flow" used in the Idaho statute is misleading. Flows may well drop below the minimum. Whether the minimum flow will be met is a function of mother nature and senior rights.

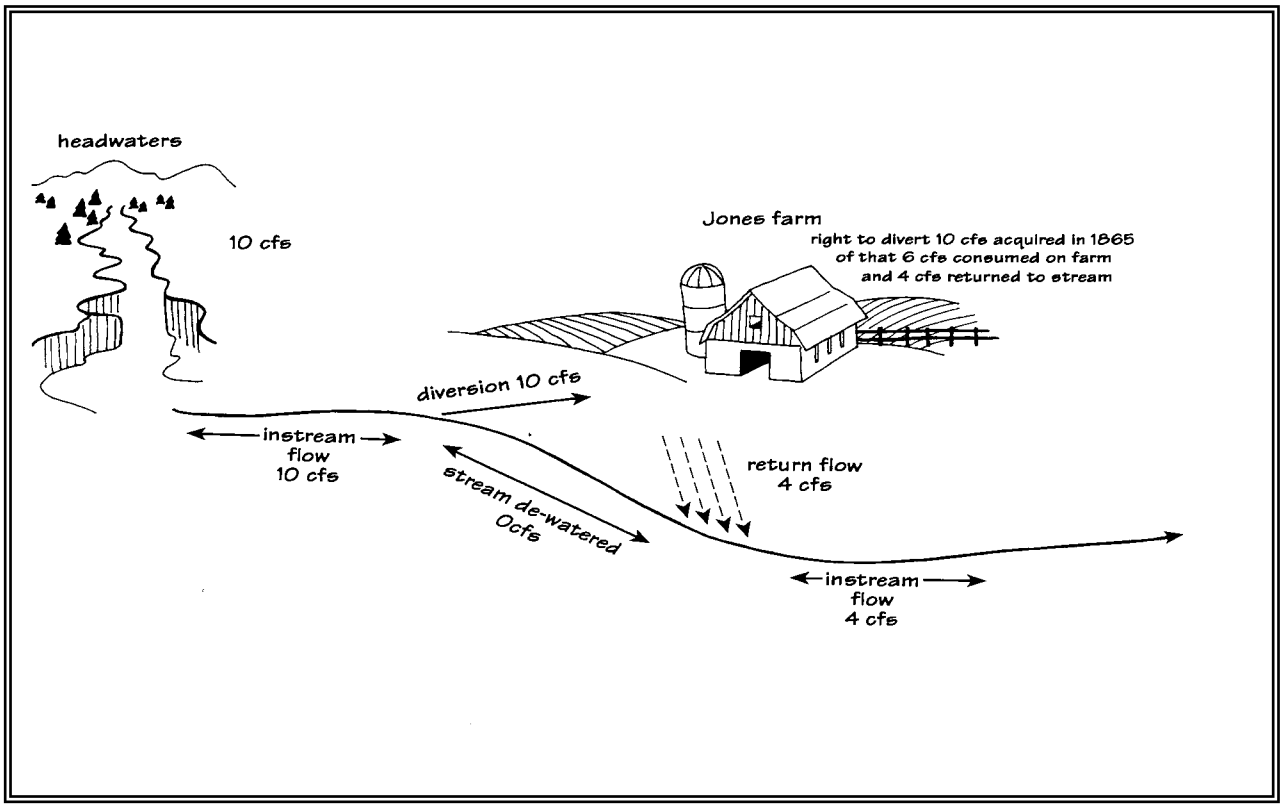
The only difference in administration is that a consumptive water right has one or more discrete points of diversion, while an instream flow right applies throughout a specified reach of the stream (from one point to another). How one determines the endpoints of an instream flow is a matter of judgment. Theoretically, an instream flow could reach all the way from the headwaters to the state line. As a practical matter, they ordinarily are limited to some discrete reach, e.g., the location of an important fishery. If an existing consumptive use is transferred to an instream use, the protected reach might be anywhere downstream of the point of diversion. Arguably it could include the reach upstream of the point of diversion, too. The previous water right served as a sort of *de facto* instream right down to the point of diversion, in that it could call flows to that point. The new owner should be able to claim the same right by stepping into the shoes of the previous owner.

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[730] "Most western water experts agree that the actual diversion requirement serves no function that cannot be served by other water law doctrines and statutory procedures. . . . For these reasons instream uses should be valid without the requirement of an actual diversion, and these uses should be presumed beneficial." A. Dan Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 Utah L. Rev. 211, 221.

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Despite its name, an "instream" right does not have to be in a moving stream. It may also be obtained for a lake (or other standing body of water) or even a wetland. In such a case, the right would be for whatever quantity of water is needed to maintain a particular lake level or other condition.



There are many misconceptions about how instream flow water rights integrate with other water rights. Some people believe that a gallon of water committed to instream use is a gallon of water unavailable for other uses. Other people believe that because instream flow rights consume no water, they have no adverse effect on other users. While either conclusion might be right in a particular situation, neither statement is accurate across the board. The truth generally lies somewhere in between: A junior instream appropriation cannot impair an existing senior water right, but it will serve to lock in the *status quo* thus constraining both new appropriations and changes in existing water rights.

Consider the somewhat oversimplified example illustrated in the figure above. Suppose that the stream flows at 10 cfs. And suppose that Farmer Jones has a senior water right to divert the entire 10 cfs of water from the stream, but that 4 cfs of that diversion finds its way back to the stream as return flow below the Jones Farm. Because instream rights must take their place in the priority system along with all other water rights, instream rights may only be obtained for what is left flowing in the stream. As a matter of law, Farmer Jones *cannot* be injured by a newly appropriated instream flow (or any other new appropriation, for that matter.) Thus, instream flow rights could be obtained today for up to 10 cfs for the reach between the headwaters and the point of diversion, for up to 4 cfs downstream of the Jones Farm return flow, and for none in between. (An instream right would not necessarily be

sought or approved for the entire remaining flow. It might claim considerably less if a lesser amount is all that is needed to achieve the beneficial use sought.)

Because instream rights are administered within the priority system, Farmer Jones will always be able to make his diversion first, even if it has the effect of reducing flows below his farm to less than 4 cfs. In short, the prior appropriation system guarantees that existing uses are not to be affected by junior instream rights.

If an instream flow right cannot take water away from existing uses, what is the point of securing an instream flow water right with a junior priority? The answer is that it preserves the *status quo*. It does this in two respects.

First, if there is any water left in the stream after the seniors satisfy their needs, that remaining flow may be protected from subsequent new appropriators. For instance, a new user could not build a hydroelectric diversion project upstream of the Jones Farm. (If it consumed no water and returned the water to the stream prior to the Jones diversion, the project would not injure Jones, but it would injure the instream flow right upstream of the Jones farm). Nor could a new user take additional water out of the protected stretch downstream of the Jones Farm.

Second, and this is important, the junior instream right prevents seniors (like Farmer Jones) from moving their points of diversion upstream into the protected reach. Suppose that in 1995 Farmer Jones decides to sell his water right to Big City, and Big City wants to take out the water farther upstream toward the headwaters (so that it will flow into town without pumping). Even though Big City steps into Farmer Jones' shoes and obtains a senior water right, it may *not* change the point of diversion if to do so would injure any other water right—including junior instream flow rights. In other words, it is possible to protect pristine mountain streams with very junior instream flow water rights.

This point was confirmed in a 2005 decision of the Colorado Supreme Court, *Colorado Water Conservation Board v. City of Central City*, 125 P.3d 424 (Colo. 2005). A commentator summed up the key point this way:

> Instead, the nature of the [instream flow] right appears to be such that it can, in effect, ride on top of the downstream senior water rights to obtain a supply of water despite its junior priority, and it may prevent any new upstream depletion that would reduce the stream flow below the minimum instream quantity decreed, whether such changes result from changes of water rights, augmentation plans, exchanges, or other new water supply arrangements.

William A. Baddock, *Colorado Supreme Court Clarifies Protection for Instream Flow Water Rights*, Rocky Mtn. Mineral Law Foundation Water Law Newsletter, at 3 (Vol. 39, No. 1, 2006).

The long and the short of it is that instream flow rights pose no threat to any existing use of water. On the other hand, they may block or complicate further development (in the form of changes,

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transfers and new users). But then again, so do all water rights. For example, a major hydroelectric dam or other project downstream on a river has the effect of preventing all new upstream consumptive use of that water. This is the way the prior appropriation doctrine always has operated.

C. Idaho's minimum stream flow act

In 1978, in response to citizen pressure (including an initiative petition drive) the Idaho Legislature enacted the Minimum Flow Act.[731] The legislation expressly recognized that instream flows for "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" are beneficial uses. Idaho Code § 42-1501. Thus, minimum flow water rights might be obtained for a variety of purposes, besides fish protection. Permissible purposes would include whitewater recreation, aesthetics, and protection of the assimilative capacity of a stream. The act, by implication, did away with the diversion requirement.[732] The act also requires the Department to take into account established minimum flows or lake levels before granting any new appropriation.[733]

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[731] The Minimum Flow Act was part of a larger piece of legislation dealing with water resources. 1978 Idaho Sess. Laws, ch. 345, §§ 1, 2, 11, amended by 1980 Idaho Sess. Laws, ch. 238, § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736A, and 42-1736B). Section 42-1736A (which established minimum flows at Milner, Weiser, and Murphy) was repealed by 1985 Idaho Sess. Laws, ch. 204. The Minimum Flow Act is now codified at Idaho Code §§ 42-1501 to 42-1507, 42-1736A, and 42-1736B.

[732] A similar statutory provision was so construed in Nevada. In 1969 the Nevada Legislature amended the state's water code to recognize recreation as a beneficial use: "The use of water . . . for any recreational purpose, is hereby declared to be a beneficial use." 1969 Nev. Stat. 141 (codified at Nev. Rev. Stat. § 533.030(2)). In 1988 the Nevada Supreme Court ruled unanimously that this action implicitly repealed Nevada's statutory diversion requirement and allowed instream flow water rights to be protected under state law. *State v. Morros*, 766 P.2d 263 (Nev. 1988). The case involved an application for a water right by the U.S. Bureau of Land Management to protect a trout fishery at Blue Lake in northwestern Nevada. While the court did not squarely address the issue, its reasoning would support recognition of instream flow water rights by private parties as well.

[733] "All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the maintenance level of the affected lake or reservoir." Idaho Code § 42-1736B. "In addition to the other duties prescribed by law, the director of the department of water resources shall have the following duties: . . . 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 minimum flow provisions of the state water plan." Idaho Code § 42-1805(7). A provision in the Minimum Flow Act provides: "Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum stream flow or minimum lake level specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application." Idaho Code § 42-1505. The authors read this provision as intended to apply in the context of delivery calls by the holder of the instream right. (Essentially it is a legislative statement that this is a real water right that can call out other water rights.) On the other hand, it could be read to apply in the context of determining whether

The act provides that the Idaho Water Resource Board (a policy-making body) may apply to the Department of Water Resource for a permit and license establishing a minimum stream flow or lake level. Idaho Code § 42-1503. Any person may request the Board to file such an application.[734] Idaho Code § 42-1504. The statute expressly precludes judicial review of any denial by the Board of such a request. Idaho Code § 42-1504.

The statute specifies that the amount approved for this use must be found to be the "minimum flow or lake level and not the ideal or most desirable flow or lake level." Idaho Code § 42-1503. The requesting agency often uses the "Instream Flow Incremental Methodology" developed by the U.S. Fish and Wildlife Service to establish the flow upon which to base an application. The use of this methodology may help to ameliorate the otherwise harsh effect of the statute's "not the most desirable" language. In one unusual case (Minnie Miller Springs), the Board and the Department agreed that the "minimum" was the entire amount of flow available.[735] More typically, however, the minimum flow will be set by the State at or even below what is required for a healthy and diverse aquatic habitat.

The act appears to limit instream appropriations natural flow appropriations, and does not encompass the appropriation of storage of water for later release to instream flow purposes. This is implicit in the definition of minimum stream flow as "the minimum flow of water in cubic feet per second of time or minimum lake level in feet above mean sea level." Idaho Code § 42-1502(f). Storage rights are measured in acre-feet, not cfs. Indeed, this was the conclusion of the SRBA Court in *In re SRB*A, Case No. 39576, Subcase No. 63-3618 (Sept. 23, 2008) (Melanson, J.) (the "Lucky Peak Case").

The statute also provides that the approved minimum stream flow or lake level permit must be submitted to the Legislature by the fifth legislative day of the session to give the body an opportunity to veto the permit.[736] Although such "legislative vetoes" contained in federal laws have been invalidated

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unappropriated water is available to a new appropriator. In any event, that effect is made explicit in Idaho Code § 42-1736B quoted above.

[734] As a practical matter, however, the Board follows a policy of looking to other *public* agencies, such as the Departments of Fish and Game, Parks and Recreation, and Health and Welfare, as well as county commissions and federal land management agencies for these recommendations.

[735] In a Nebraska Supreme Court decision, *Nebraska Game and Parks Commission v. The 25 Corporation, Inc.*, 236 Neb. 671, 463 N.W.2d 591 (Neb. 1990) (aka *In re Application A-16642*), the court sidestepped the limitation in Nebraska's statute to the "minimum necessary to maintain the instream use", Neb. Rev. Stat. §§ 46-2,107 to 46-2,119. The court observed that the minimum necessary depended upon what the use was. If the use was to keep fish alive, that was not much water. But where, as in this case, the objective was to maintain a high quality trout fishery, the "minimum" flow was necessarily the "optimum" flow.

[736] "Approved applications shall be submitted to each legislature by the fifth legislative day of each regular session, and: (i) shall not become finally effective until affirmatively acted upon by concurrent resolution of the Idaho legislature; or (ii) except that if the legislature fails to act prior to the end of the regular session to which the application was submitted, the application shall be considered approved." Idaho Code § 42-1503.

under the federal constitution,[737] the Idaho Supreme Court has ruled them valid under Idaho's Constitution.[738] In any event, the legislative veto provision has the effect of subjecting minimum stream flow applications to delays and legislative oversight not experienced by most other water right applicants.

As with all other water rights, the application must seek to appropriate only "unappropriated" waters. Idaho Code § 42-1503.[739] Keep in mind, however, that even streams that are "fully appropriated" in the traditional, consumptive-use sense, would be eligible for new appropriations of nonconsumptive water rights. For instance, a stretch of stream might be "fully appropriated" in the sense that substantial downstream rights leave no room for new diversions upstream. Nevertheless, a new, junior nonconsumptive use (such as an instream flow right or a hydropower right) may be placed on the stream without any injury to downstream seniors.

D. Statutes appropriating water for specific water bodies to be held by the State in trust

The 1978 minimum stream flow statute was not the Idaho Legislature's first recognition of instream flow rights. Actually, as early as the 1920s, the Legislature enacted statutes which protect lake levels in Idaho's large lakes for "scenic beauty, health, recreation, transportation and commercial purposes."[740]

Moreover, in the early 1970s, the Legislature adopted several more statutes which directed the State Parks and Recreation Board to appropriate "for scenic beauty and recreational purposes" the remaining unappropriated flows in certain scenic springs and streams.[741] These statutes have been

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[737] *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (legislative veto violates the federal constitutional separation of powers requirement).

[738] *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). The decision in *Mead* effectively invalidated a prior Idaho Attorney General Opinion concluding that the legislative approval requirement of the instream flow law was unconstitutional, *Idaho Attorney General Opinions* 87-6. For a critical analysis of *Mead*, see Dale Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 Idaho L. Rev. 81 (1990-91). Despite the scholarly criticism, the principle of legislative vetoes now appears well established in Idaho.

[739] *Cantlin v. Carter*, 88 Idaho 179, 187, 397 P.2d 761, 766 (1964) (only "unappropriated" water is available for appropriation).

[740] Idaho Code §§ 67-4301 to 67-4303 (Big Payette, 1925); Idaho Code §§ 67-4304 to 67-4306 (Priest, Pend d'Oreille and Coeur d'Alene, 1927).

[741] Idaho Code §§ 67-4307 (Malad Canyon, 1971 & 1974), 67-4308 (Niagra Springs, 1971, 1974 & 2015), 67-4309 (Big Springs, 1971 & 1974), 67-4310 (Box Canyon, 1971 & 1974), 67-4311 (Thousand Springs, 1971 & 1974), and 67-4312 (authorizing permits for appropriation for all protected waters in this Chapter, 1971 & 1974).

interpreted by the Idaho Supreme Court as authorizing the recognition of instream flow water rights (prior to the minimum stream flow act).[742]

The Malad Canyon case[743] arose when the Legislature specifically authorized the Department to "appropriate" water in Malad Canyon for recreational purposes. The Idaho Supreme Court held that the concept of "beneficial use" encompasses "aesthetic and recreational values,"[744] that Idaho's constitutional guarantee of a "right to divert"[745] did not require an actual physical diversion, and that the Legislature must have intended to do away with the diversion requirement, at least for this particular appropriation.[746]

In short, these statutorily-directed appropriations of water create water rights that are enforceable in the priority system just as any other water right.

E. Transfers to instream uses

Another interesting question is whether a person holding a valid consumptive use right, such as an irrigation right, may change the nature of the right to an instream flow use. Although this is done routinely in other states,[747] it has not yet been attempted in Idaho.

The Minimum Flow Act speaks only in terms of appropriation of unappropriated waters, not the transfer, exchange, or rental of existing water rights for instream flow purposes. Idaho Code § 42-1503. This is reinforced by the statement that the priority date shall be the date of the application. Idaho Code § 42-1505.

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[742] *State of Idaho, Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) (Shepard, C.J.).

[743] Another Idaho decision holding that a diversion is not always required is *R.T. Nahas Co. v. Hulet ("Nahas I")*, 106 Idaho 37, 674 P.2d 1036 (Idaho Ct. App. 1983) (appropriation for stock watering does not require a physical diversion).

[744] *Dep't of Parks*, 96 Idaho at 444, 530 P.2d at 928.

[745] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho Const. art. XV, § 3. In implementing this provision, the Idaho Legislature enacted statutes providing that "the right to use any of the waters of the state for useful or beneficial purposes is recognized and confirmed," Idaho Code § 42-101, and that "[t]he appropriation must be for some useful or beneficial purpose." Idaho Code § 42-104. The Idaho Constitution does not place any limiters on the phrase "beneficial uses," and the Legislature's choice of words here does not appear to restrict what "some useful or beneficial purpose" can be.

[746] *Parks*, 530 P.2d at 929.

[747] As enacted in 1973, Colorado's law also was silent on whether it authorized transfers to instream use. In 1986 the Legislature clarified that instream flow water rights could be obtained by transfer of existing rights as well as appropriation of unappropriated water. Senate Bill 91, 1986 Colo. Sess. Laws, ch. 235 (codified at Colo. Rev. Stat. § 37-92-102(3)).

In the 1991 and 1992 sessions, the Idaho Legislature considered but rejected legislation drafted by the Department of Water Resources which would have established a procedure for transfers to instream uses.[748] The legislation would have allowed a willing holder of a water right to assign or donate the right to the Water Resource Board, which, in turn, would seek approval to hold the right for instream purposes, without loss of priority.[749] The proposed legislation failed to clarify whether "conserved water" (e.g., water saved by lining ditches) may be transferred to an instream use.

As water rights become increasingly scarce, private willing seller transactions may become essential to an effective instream flow program. Indeed, they would benefit not only those interested in protecting habitat, but also farmers (who could gain income and forestall forfeiture actions), cities and industries (who could buy rights to protect investments in waste discharge permits, parks, and so on), and developers (who increasingly will be called upon to mitigate for habitat loss to obtain federal permits).

In the authors' view, a sound instream flow transfer program would allow transfers of water rights to instream flows when such transfer avoided injury to all other existing or permitted users (junior as well as senior) and satisfied Idaho's public interest criteria.[750] When transferred, either permanently or temporarily, the water right should retain its original priority date, just as other transferred water rights are entitled to, while being conditioned appropriately to prevent injury to other rights.

Just how much of the original water right could be committed to the new instream use would depend on the facts of the particular transaction. For instance, suppose Farmer Jones (in the figure above) sold his 10 cfs water right to the Nature Conservancy. If users downstream relied upon his return flow of 4 cfs, Farmer Jones could convey a water right only for the reach downstream of his return flow equal to his consumptive use (6 cfs). However, he should be able to convey an instream flow right for the full 10 cfs in the reach between his point of diversion and the return flow. This distinction was overlooked in the bill before the Legislature in 1992.

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[748] The 1991 version was designated Senate Bill 1087. The 1992 version was not even printed by the committee.

[749] Strangely, the legislation would have empowered the Department to adjust the priority date if necessary to "prevent injury." Such a concept is foreign to the prior appropriation doctrine, whose central premise is protection of priority of right. Only that portion of a water right which can be changed without injury should be eligible for transfer. Typically, this is the amount of water that is consumptively used. Because no injury results, the priority date should never be changed in a transfer proceeding. (If injury can be shown, and cannot be prevented by conditions or mitigation, the transfer should be denied.)

[750] To be approved under the minimum stream flow statute, the instream flows must be found to be "in the public, as opposed to the private, interest." Idaho Code § 42-1503. Other water rights are subjected to a similar test in which they may be denied "where the proposed use . . . will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use." Idaho Code § 203A(5)(e).

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It would seem that, for the same reasons discussed above, rental of water rights (either natural flow or storage) to support instream flow is also problematic. To the authors' knowledge, doing so has never been tried or tested.

F. Water amenity rights

In Idaho, water rights are routinely granted (or, more often, transfers approved) for diversions to man-made water features such as ponds and constructed streams that provide aesthetic amenities, wildlife habitat, and related benefits. These "amenity" water rights—or uses of irrigation water rights for these purposes—are particularly common in new residential developments, particularly those constructed on previously irrigated agricultural land. Although these uses may look a little like "instream rights," they are not instream rights because they entail a diversion from either surface or ground water. New water rights acquired for these purposes, whether from ground or surface water, are processed and approved like ordinary water rights, and the holder is not subject to the statutory restrictions on minimum stream flow rights. On-stream reservoirs for these purposes also entail a diversion, into storage.

These water uses sometimes are assumed to be non-consumptive, and perhaps in some cases they are close to non-consumptive. However, a good rule of thumb is that the surface area of a pond or ditch causes about the same evaporation as the evapotranspiration involved in the same surface area planted with a reasonably consumptive crop. Partly because of this, the Department has adopted guidance that imposes requirements for mitigation and accounting on constructed ponds.[751]

Many of these amenities actually do not obtain new water rights, but rather rely on the irrigation water already delivered to the area by a mutual ditch company or irrigation district. A few of these irrigation water delivery entities have applied for and obtained changes in type of use under their water rights to add aesthetics and wildlife habitat as approved purposes. The South Boise Water Company, Ltd., is an example. However, it appears that, in most cases, the entity's water right continues to be diverted and delivered solely for irrigation, but the residential developer incorporates ponds and retains open ditches as part of the non-potable irrigation system often used in these developments. The surface water features doubtless are seen with the subdivision as serving a double duty, as both aesthetic amenities and (in the case of ponds) as temporary storage and delivery facilities to provide peaking flows to the development's pressurized non-potable irrigation system. .

With regard to new appropriations for "non-consumptive" amenities, there is some law from Colorado considering the question of whether the water is sufficiently "diverted" to create a water right. The first is *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992). The City of Fort Collins sought an instream flow water right of 55 cfs along a segment of the Cache La Poudre river which runs through parks and open space areas within the city. The Colorado Water Conservation Board ("CWCB") objected because, as in Idaho, only the state agency can hold an instream right. The city agreed to amend its application.

[751] Lester, Steve, *Ponds in Basin 63*, Idaho Department of Water Resources, Western Region (November 2004)

The amended application characterized the water right as a traditional "diversion," rather than an instream right, making reference to "the Fort Collins Nature Center Diversion Dam" and "the Fort Collins Power Plant Diversion Dam" as the diversion points. The Nature Dam was then built by the city to divert the river back into its historic channel and away from a channel cut during heavy rains in 1983 and 1984. Despite its name, the Power Dam does not supply hydropower, but is so named after a nearby power plant. The Colorado court found that a kayak chute and fish ladder in the so-called Power Dam each constituted a sufficient "structure or device" to qualify as a diversion because they "concentrate the flow of water to serve their intended purposes." So the city was able to obtain an essentially instream water right to serve these in-river amenities, based on the finding that a diversion was present. Clearly, if the city had obtained a diversion to an off-river amenity, no such evaluation would have been required.

Another case, decided later that year, went even further. In *Board of Cnty. Comm'rs of the Cnty. of Arapahoe v. Upper Gunnison River Water Conservancy Dist.,* 838 P.2d 840 (Colo. 1992), the court approved a water right for reservoir storage which is used both for irrigation and to enhance a downstream fishery. The court approved an accounting methodology that counted "pass-through" water toward the storage right—in other words, water that could have been stored, but was passed through the reservoir and released for fishery purposes. This pass-through (or instantaneously stored and released) water was deemed a proper storage right that could be held by the water district and was not an instream flow right that could only be held by a statutorily-designated state agency.

These cases offer dramatic evidence both of the ingenuity of western water lawyers and of the willingness of western courts to find ways to accommodate new uses of water that make sense and (of course) cause no injury. In short, instream use is an idea whose time is arriving—even if one has to call it something else.

G. Boise River minimum flow releases

In 2008, the Snake River Basin Adjudication upheld the use of storage rights in Lucky Peak Reservoir held by the United States for purposes of releases to maintain minimum streamflows in the Boise River. *In re SRB*A, Case No. 39576, Subcase No. 63-3618 (Sept. 23, 2008) (Melanson, J.) ("*Lucky Peak Case*").[752]

In this case, numerous irrigation districts, canal companies, and other irrigation entities challenged a storage water right (in the amount of 152,300 acre-feet per annum) claimed in the SRBA by the United States (and recommended by IDWR) for purposes of streamflow maintenance downstream of Lucky Peak Reservoir. The claimed right was consistent with a license issued by IDWR in 2002 (which the irrigators had not bothered to protest). The irrigators contended that the use of water for streamflow maintenance below the dam constitutes a de facto instream flow and was

[752] The diversion requirement can also be met by removing water from its natural channel and placing it in an artificial stream. For example, privately-held water rights serve trout-rearing water amenities in residential developments in Boise. Colorado has gone even further, recognizing boulders placed in a stream to improve kayaking as meeting the diversion requirement.

therefore is illegal since it was not obtained by the Idaho Water Resources Board under the Minimum Flow Act.

The SRBA Court rejected this argument. The Court concluded that a storage right is not an instream flow right because it entails a diversion to storage within the reservoir, even if that water is later released for purposes with "apparent similarities" to instream flow rights. *Lucky Peak Case* at 21. Judge Melanson explained:

> While the subject streamflow maintenance water right accomplishes a number of the same purposes for which the IMSFA [Minimum Flow Act] was created, it does so in a different manner. The water is not an *in situ* right in that the water is not being appropriated in its natural state. Instead, the entire flow of the natural stream has been diverted and stored and become subject to controlled releases. The storage and releases are made possible by the massive and costly structure known as the Lucky Peak dam and reservoir. The BOR has flexibility in releasing the water when needed to accomplish such purposes. Rather than taking no action, as is the case with an IMSFA water right, the BOR monitors and manages the stream flow releases from the reservoir on a day-to-day if not an hour-to-hour basis. This is not the same "no action" water right as is contemplated by the IMSFA.

Lucky Peak Case at 22.

H. Snake River minimum stream flows

In five instances (the gages at Milner, Murphy, Weiser, Johnson's Bar, and Lime Point), the State of Idaho holds minimum flows on the Snake River. None of these were created through applications by the Idaho Water Resource Board for water rights pursuant to the Minimum Flow Act.[753] Instead, four of them (Milner, Murphy, Weiser, and Johnson's Bar) were created by legislative fiat in another section of the Minimum Flow Act, which has since been repealed.[754]

Moreover, each is included in the State Water Plan.[755] Two of them (Murphy and Weiser) are described in the State Water Plan as "management and permitting constraints"[756] meaning that they may

[753] Idaho Code §§ 42-1501 to 42-1505.

[754] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[755] 1996 State Water Plan, § 5B.

[756] 1996 State Water Plan, Comment to § 5B, at 17.

form the basis for delivery calls.[757] The Murphy and Weiser rights may also serve as constraints to new appropriations,[758] although this is not entirely clear.[759] They also have served as the basis for the imposition of moratoriums.

On July 1, 1988, the Idaho Water Resource Board filed SRBA claims on each of the rights. To date, three have received partial decrees (Weiser, Johnson's Bar, and Lime Point), and two are pending (Milner and Murphy).

These five Snake River minimum flows are described in more detail below.

(1) Milner Dam (No. 2-200): 0 cfs - 1976 priority

A zero minimum flow at Milner Dam has been reflected in the State Water Plan since the first plan was adopted in 1976 and approved by the Legislature in 1978.[760] In addition, it was codified in

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[757] When the 4,750 cfs minimum flow on the Snake River at Weiser was threatened during the 1992 drought, IDWR sent letters to the holders of water rights with priority dates junior to the December 29, 1976 adoption of the minimum stream flows under the State Water Plan. When the minimum flow was violated, IDWR sent a second letter notifying the junior water users to cease diversions or face civil penalties of up to $100.00 per day. The flows recovered and no enforcement actions were taken.

[758] Two, and possibly three, Idaho statutes could come into play here. They provide: "All future filings, permits and decrees on the unappropriated waters of this state shall be determined with respect to the effect such filings, permits and decrees will have on the minimum daily flow of the affected stream or river, or on the maintenance level of the affected lake or reservoir." Idaho Code § 42-1736B. "In addition to the other duties prescribed by law, the director of the department of water resources shall have the following duties: . . . 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 minimum flow provisions of the state water plan." Idaho Code § 42-1805(7). A provision in the Minimum Flow Act provides: "Water shall not be deemed to be available to fill any water right of later priority date if diversion of such water would result in a decrease in the flow of the stream or level of the lake below the minimum stream flow or minimum lake level specified in said approved application for appropriation of minimum stream flow at the locations described in said approved application." Idaho Code § 42-1505. It appears that this provision is intended to apply in the context of delivery calls by the holder of the instream right. On the other hand, it could be read to apply in the context of determining whether unappropriated water is available to a new appropriator. However, this third statute presumably does not apply in any event, because these rights were not obtained pursuant to the Minimum Flow Act.

[759] Presumably the Department could and would allow new appropriations of available unappropriated water despite occasional anticipated failures to meet the minimum flow targets on the Snake River. The new appropriation would be junior to these minimum flow rights and subject to possible curtailment (at least by the Murphy and Weiser rights). Accordingly, the new appropriation would not impair the senior minimum flow rights. The burden would then fall on the new appropriator to provide a reliable back-up supply for times when the junior appropriation was unavailable—or be prepared to suspend diversions on those occasions when the minimum flow is not met.

[760] House Concurrent Resolution No. 48 (1978).

1978 as part of the Minimum Flow Act, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar.[761] It continues to be reflected in the current State Water Plan.[762]

The State never filed water right applications for the Milner Dam right pursuant to the Minimum Flow Act. However, the Idaho Water Resource Board filed an SRBA claim for the right on July 1, 1988 seeking a priority date of December 29, 1976. As of this writing, no partial decree has issued.

Of course, a priority date on a zero flow right is meaningless. Indeed, this is not really an instream flow right at all. Rather, it is a statement of policy recognizing the fact that there is no requirement that water be left in the river at this point. Indeed, the Twin Falls and North Side Canals divert nearly all of the flow at Milner Dam during the irrigation season. This reality gives rise to the "Two Rivers" concept on the Snake River discussed in section 21 at page 306.

(2) Murphy Gage (aka Swan Falls) (Nos. 2-201, 2-223, and 2-224): 3,900 cfs / 5,600 cfs – 1976/1985 priorities

The State holds three minimum stream flow rights at the Murphy gage five miles downstream of Idaho Power's Swan Falls Dam. Combined, these rights establish a minimum flow of 3,900 cfs during the summer (April 1 to October 31) and 5,600 cfs in the winter (November 1 to March 31).

The State holds a year-round minimum flow right at the Murphy Gage with a December 29, 1976 priority date for 3,300 cfs (Water Right No. 2-201). This right dates to the first State Water Plan adopted in 1976 and approved by the Legislature in 1978.[763] In addition, it was codified in 1978 as part of the Minimum Flow Act, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar.[764]

Pursuant to the *Swan Falls Agreement* in 1984, the State added on two additional minimum flow rights with July 1, 1985 priority dates:[765] one for 600 cfs (year round) to bring the Murphy gage minimum flow up to 3,900 cfs during the irrigation season and another for 1,700 cfs (non-irrigation

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[761] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[762] 1996 State Water Plan, § 5B (reproduced at Appendix F).

[763] House Concurrent Resolution No. 48 (1978).

[764] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[765] The priority date is based on the *Swan Falls Agreement* as implemented in Idaho Code § 42-203B, whose effective date was July 1, 1985. 1985 Idaho Sess. Laws, ch. 17. It is also the effective date of the Legislature's approval of the Idaho Water Resource Board's amendments to Policy 32 of the Idaho Water Plan. 1985 Idaho Sess. Laws, ch. 204.

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season only) to bring the minimum flow up to 5,600 cfs during the non-irrigation season (Water Right Nos. 2-223 and 2-224, respectively).

The State never filed water right applications for the Murphy gage rights pursuant to the Minimum Flow Act. However, the Idaho Water Resource Board filed SRBA claims for each of these rights on July 1, 1988 seeking a priority date of December 29, 1976 for No. 2-201 and a priority date of July 1, 1985 for Nos. 2-223 and 2-224. As of this writing, no partial decree has issued.

These flow requirements are now embodied in section 5B of the State Water Plan (reproduced under Appendix F). For a history of how these flows were established under the *Swan Falls Agreement*, see discussion in section 11.B at page 585.

(3) Weiser Gage (No. 3-6): 4,750 cfs – 1976 priority

Water Right No. 3-6 establishes a year-round minimum flow at the Weiser gage (near the City of Weiser, upstream of Brownlee Reservoir) for 4,750 cfs with a priority date of December 29, 1976. This right dates to the first State Water Plan adopted in 1976 and approved by the Legislature in 1978.[766] In addition, it was codified in 1978 as part of the Minimum Flow Act, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar.[767]

The State has never sought a water right for the flows at the Weiser gage under the Minimum Flow Act. However, the Idaho Water Resource Board filed an SRBA claim for the right on July 1, 1988 seeking a priority date of December 29, 1976. A partial decree in the SRBA was issued for this water right on July 9, 2007. It states, "Place of use is within the reach above and below benefiting from the minimum stream flow at the point of measurement [the Weiser gage] for this right."

(4) Johnson's Bar (No. 3-7): 5,000 cfs - 1978 priority

Water Right No. 3-7 establishes a year-round minimum flow of 5,000 cfs at Johnson's Bar with a July 1, 1978 priority date.[768] The Johnson's Bar flow requirement (as well as the Lime Point right discussed below) have their origin in FERC-imposed bypass flow requirements in Article 43 of the license for the Hells Canyon project issued in 1955.[769]

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[766] House Concurrent Resolution No. 48 (1978).

[767] 1978 Idaho Sess. Laws, ch. 345, § 1 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[768] The Johnson's Bar gage is located 17 miles below Hells Canyon Dam at river mile 247.5. Accordingly, this minimum flow controls releases from the Hells Canyon project. The State Water Plan (and other documents) refer to this point as Johnson's Bar. The water right decree (and other documents) refer to it as Johnson Bar.

[769] The original license was issued in 1955 for fifty years. It expired on July 31, 2005, and has been extended by annual licenses while relicensing continues. Article 43 provides: "The project shall be operated in the interest of navigation to maintain 13,000 c.f.s. flow in the Snake River at Lime Point (river mile 172) at a

The Johnson's Bar flow requirement was first recognized in Idaho law as part of the Minimum Flow Act of 1978, which expressly created minimum flow requirements at Milner, Murphy, Weiser, and Johnson's Bar.[770] The Johnson's Bar right was not part of the State's first Water Plan approved by the Legislature in 1978, but has been included in every subsequent State Water Plan and is now reflected in section 5B of the 1996 Plan.

The State has never sought a water right for flows at the Johnson's Bar gage under the Minimum Flow Act. However, the Idaho Water Resource Board filed an SRBA claim for the right on July 1, 1988 seeking a priority date of July 1, 1978 (based on the effective date of the Minimum Flow Act). A partial decree in the SRBA was issued for this water right on July 9, 2007. It states, "Place of use is the reach of the river benefited by the minimum flow past Johnson Bar."

As a practical matter, the 5,000 cfs requirement at Johnson's Bar is not much of an additional constraint on other water right holders, given the senior 4,750 cfs minimum flow upstream at the Weiser gage already in effect. Likewise, Idaho Power is typically able to achieve the 5,000 cfs flow. The real constraint on the Hells Canyon project is the Lime Point minimum flow discussed below. Failure to meet Lime Point flows has resulted in Idaho Power agreeing to even higher flow targets at Johnson's Bar, but these do not constrain other water right holders. In addition, there has been discussion about raising the Johnson's Bar bypass flow in Idaho Power's new license for the Hells Canyon Complex. Of course, any changes in Article 43 bypass flow requirements would be applicable only to Idaho Power.

(5) Lime Point (3-8): 13,000 cfs – 1985 priority

Water Right No. 3-8 establishes a year-round minimum flow of 13,000 cfs at Lime Point[771] (75 miles below Hells Canyon dam) with a priority date of July 1, 1985.[772] This right corresponds to the

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minimum of 95% of the time, when determined by the Chief of Engineers to be necessary for navigation. Regulated flows of less than 13,000 c.f.s. will be limited to the months of July, August, and September, during which time operation of the project would be in the best interest of power and navigation, as mutually agreed by the Licensee and the Corps of Engineers. The minimum flow during periods of low flow or normal minimum plant operations will be 5,000 c.f.s. at Johnson's Bar, at which point the maximum variation in river stage will not exceed one foot per hour. These conditions will be subject to review from time to time as requested by either party." Article 43, FERC Project No. 1971.

[770] 1978 Idaho Sess. Laws, ch. 345 (codified at Idaho Code § 42-1736A), repealed by 1985 Idaho Sess. Laws, ch. 204.

[771] Lime Point is at river mile 172, about three miles upstream of the mouth of the Grande Ronde River (river mile 168.7) and 75 miles downstream of the Hells Canyon Dam (river mile 247.6) on the Snake River. Until 2003, there was no gage that could measure flows at Lime Point (river mile 172). There is now a gage at China Bar (aka China Garden Creek aka McDuff Rapids) approximately three miles upstream from Lime Point. Prior to 2003, flows at Lime Point could be estimated by taking the flow at Anatone (river mile 167.2) and subtracting the inflows from the Grande Ronde River, which enters the Snake River between Lime Point and Anatone.

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by-pass flow requirement imposed by FERC on the Hells Canyon project.[773] It must be met 95 percent of the time, with departures allowed only during June, July, and August.

Historical documents show that this flow requirement was included in the Hells Canyon license to ensure that a navigable shipping channel to Lewiston, and from there to Portland, would be available for mining operations proposed at the time.[774] These mining operations were never developed. As a consequence, the reason for establishing the license's 13,000 cfs flow requirement is no longer relevant.

Despite this fact, the Lime Point flow requirement has been reflected in every State Water Plan since 1982. The 1982 Plan described the FERC flow requirements as "in the public interest," but did

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[772] The July 1, 1985 priority date derives from the effective date of the act approving the Water Resource Board's amendments to Policy 32 of the State Water Plan. 1985 Idaho Sess. Laws, ch. 204. Ordinarily, State Water Plan amendments are approved by joint resolution, not by statute. In this case, the Legislature acted by statute because it also needed to repeal former Idaho Code § 42-1736A, which set a now obsolete instream flow for the Murphy Gage of 3,300 cfs.

[773] The terms of Article 43 of the 1995 FERC license are set out in footnote 769 at page 435.

[774] In Idaho Power's pending relicense application for the Hells Canyon project, the company states: "The significance of the 13,000-cfs flow requirement at Lime Point originated when Lower Granite Dam was constructed [from 1965 to 1972]. In hearings held in Boise, Idaho, on June 22, 1944, two separate limestone companies—owners of large lime deposits near the Snake River above Lewiston, Idaho—submitted statements that development of their resources awaited a satisfactory water channel through Lewiston. As a result, a minimum flow of 13,000 cfs at Lime Point was determined to be necessary 95% of the time to allow lime, copper, and iron ore to be shipped downstream to Portland, Oregon." *IPCo Statement of Project Operation and Resource Utilization* at B-18.

In 2006, the Army Corps of Engineers submitted proposed new license conditions for the Hells Canyon project. The submission contained this discussion of the history of the Lime Point flow requirement:

> Basis for 1955 License Requirements.
> An open river navigation channel, 150 feet wide and 6 feet deep at a flow of 13,000 cubic feet per second (cfs), was proposed between river mile (R.M.) 142 near Lewiston and R.M. 172 near Lime Point in Appendix I of the October 1, 1948 Review Report on Columbia River and Tributaries ("308 Review Report") prepared by the U.S. Army Corps of Engineers (Corps) and published as House Document 531, 81st Congress. Studies in connection with the preparation of this "308 Review Report" indicated that a satisfactory navigation condition would exist if a minimum flow of 13,000 cfs was equaled or exceeded for 95 percent of the time. This proposed navigation project on the Hells Canyon reach of the Snake River is interpreted to be the basis for the 13,000 cfs navigation flow requirement at Lime Point in Article 43 of the existing license for Project No. 1971.

Hells Canyon Project, FERC No. 1971-079, Proposed Provisions for Navigation – New License Application, Hells Canyon Reach – Snake River – Idaho, Oregon, and Washington, Walla Wall District, Corps of Engineers, at 2-3 (Jan. 24, 2006).

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not establish them as state minimum flow rights. A revision adopted in 1985 (following the *Swan Falls Agreement* of 1984) recognized the Johnson's Bar and Lime Point flow requirements as state policy for the first time. In doing so, however, the 1985 amendment drew a contrast between its treatment of the Murphy and Weiser minimum flows (which are intended to constrain water development) and the Johnson's Bar and Lime Point flow requirements (which were simply reflections of FERC's Article 43 requirements):[775]

> The minimum flows established for the Snake River at Murphy and Weiser gauging stations are management constraints . . . .
>
> The minimum flows established for Johnson's Bar and Lime Point are contained in the original Federal Power Commission license for the Hells Canyon hydropower complex.

Thus, the 1985 amendment expressly recognizes that Lime Point and Johnson's Bar flows are state policy but are not "management constraints." In other words, the Lime Point and Johnson's Bar flows were not intended to operate as water rights with the ability to call out juniors. This distinction has been carried forward through subsequent Water Plans.[776]

In any event, the Lime Point minimum flow is frequently violated. The 13,000 cfs flow target was not achieved more than five percent of the time in fourteen of the years between 1958 and 2006. IDWR has never administered this right. As a practical matter, flow management in the Hells Canyon reach is addressed as a matter of negotiation between Idaho Power and the Corps, as provided in Article 43. Article 43 authorizes Idaho Power to deviate from the flow targets set in the license if it is able to secure Corps approval based on the Corps' assessment of what is in "the best interest of power and navigation." The parties have routinely reached these agreements over the last two decades.

For instance, pursuant to a 1988 agreement between the Corps and Idaho Power, the Company has maintained a minimum flow of 6,500 cfs at Johnson's Bar during normal operating conditions, resulting in considerably lower flows at Lime Point.[777]

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[775] 1985 Amendment to Policy 32 (emphasis added) (adopted on Mar. 1, 1985) (set out as an appendix to the Minutes of Meeting No. 1-85 dated Jan. 17, 1985, at 1).

[776] The 1996 State Water Plan, at 17, describes only the Murphy and Weiser minimum flows as "management and permitting constraints." The 1996 version expressly noted that modifications of the flow requirement may occur during the summer "as determined by the Corps of Engineers and Idaho Power Company as owner of the Hells Canyon power facilities." 1996 State Water Plan, § 5B at 17. This statement reinforces the conclusion that the Board did not view the Lime Point flow as a water right that could constrain other water users. Rather, it was a matter to be resolved between FERC and Idaho Power. Obviously, a state water right cannot be subject to such informal modifications delegated to third parties.

[777] A 1991 letter from the Corps to IDWR offers this summary:

> Since Hells Canyon Dam has been in operation, flows less than 13,000 cfs at Lime Point have occurred in numerous low flow years during the July through September period. Each time before that occurred, Idaho Power Company and the Walla Walla District Corps of Engineers jointly determined an operation that

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Idaho Power's pending application for relicensing of the Hells Canyon project calls for flows at Johnson's Bar of 6,500 cfs from June 1 through October 20, subject to various exceptions that would allow flows to be reduced to 5,000 cfs.[778]

In the interim, the parties have been successful in working out interim arrangements which take advantage of the flexibility offered by Article 43.[779] This flexibility is important to maximizing competing interests on the river and to allowing experimentation with different flow strategies. Thus, administration of the Water Board's Lime Point flow target via delivery calls (which happen in the case of the Murphy or Weiser rights) would be inconsistent with the reality of how the river is adaptively managed today to balance competing interests.

> was considered to be in the best interest of both power and navigation. Varying schedules and releases have been tried and modified through the years. . . . During the last few years, Idaho Power Company has been using minimum releases of 6,500 cfs from Hells Canyon Dam for navigation flows during some of the July through September period. This operation often results in flows of approximately 10,000 cfs at Lime Point.

Letter from Robert D. Volz, District Engineer, Corps, to Keith Higginson, Director, IDWR, at 2 (Oct. 17, 1991) (responding to inquiry from Mr. Higginson about how Article 43 is implemented). More recently, with the introduction of larger jet boats in Hells Canyon (resulting from limits on the number of boat trips), the recreational community had argued for higher flows at Johnson's Bar. Idaho Power has endeavored to achieve flows of 8,500 cfs where practicable, but has not always succeeded. See Letter from James C. Tucker, Idaho Power, to Kimberly D. Bose, Secretary, FERC (July 3, 2007) (responding to concerns raised by flow reduction from 8,500 to 6,500 cfs during July 2007).

[778] Letter from James C. Tucker, Idaho Power, to Kimberly D. Bose, Secretary, FERC, at 3 (July 3, 2007).

[779] Article 43 requires that the flow targets be met 95% of the time. However, this requirement is ambiguous. "This exception and wording has resulted in some confusion because the timeframe for the 95 percent is unclear, and there is no defined absolute minimum for Lime Point during July through September." Letter from Robert D. Volz, District Engineer, Corps, to Keith Higginson, Director, IDWR, at 2 (Oct. 17, 1991). As a practical matter, the 95% rule has not served as a constraint at all. After all, Article 43 provides only "when determined by the Chief of Engineers to be necessary for navigation."

2. THE PUBLIC TRUST DOCTRINE

A. The doctrine in a nutshell

Depending on one's perspective, the public trust doctrine may be a powerful tool of judicial oversight over irresponsible governmental action or a narrow rule of law applicable primarily to title disputes over submerged land. Both are true, depending on the jurisdiction and the inclination of the court applying the doctrine. In some states, the doctrine has emerged since the 1970s as a broad overlay over virtually every governmental allocation of public land and water. In others, including Idaho, it has been cut to the bone.

Although the doctrine has federal roots traceable to the equal footing doctrine, the doctrine has taken shape principally as a matter of state law—hence the huge variation from place to place. Occasionally, however, litigants have sought to establish that there exists as well a federal public trust doctrine that protects public lands and other federal resources. That body of law remains largely unresolved.

Since the 1970s the doctrine has been championed by environmental advocates who see it as a way to "democratize" governmental decision-making—in other words, as a means for courts to second-guess resource allocation decisions. The doctrine, however, is potentially a two-edged sword. Particularly in the federal setting where there is a long history of public and private use of public resources, the doctrine could be used to protect those historical uses against overly-protective governmental restrictions. That would require stretching the doctrine a bit. But, that is nothing new.

What, then, is the public trust doctrine? It is simply a body of judge-made law holding that title to certain public resources (traditionally, submerged lands) is held in trust by the states (or, possibly, the federal government) for the benefit of the public. It operates, in its classic form, as a limitation on alienation, thus ensuring that no legislative or administrative entity may convey vital public resources to exclusive private use in a way that destroys recognized public values.

The doctrine began as a recognition of the unique property interest that states (and before that, the King) hold in submerged land and shores. In its traditional American form, it served two disparate purposes: (1) to determine whether title to submerged lands traced to federal or state grants prevailed and (2) to ensure that the public interest in submerged lands for navigation, commerce, and fishing was protected from inconsistent private uses. More recently, the doctrine has been expanded to embrace a broader range of public resources (such as public lands and privately held water rights). Likewise, the values it protects have been expanded to embrace a broad range of public environmental values, often focused on preservation.

What is the basis of this doctrine? Despite its lofty name and legendary history, the public trust doctrine, at its core, is simply common law. Although there has been some confusion on the point,[780]

[780] Justinian said the trust was based on "natural law." (See discussion in section 2.B(1) at page 443.) In the seminal case of *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892), the Court failed to explain the basis of the law it applied. But it spoke in absolute terms, as if it were describing some sort of natural law

the common law basis of the doctrine is intuitively apparent and consistent with the observations of courts and commentators.[781] Accordingly, like all common law, it may be confirmed, revoked, or limited by statute.

In some instances, however, courts have found a state constitutional foundation (or at least reinforcement) for the doctrine.[782] In these cases, of course, the doctrine is more than common law and could be modified only by constitutional amendment or judicial interpretation of the constitution.

What is the nature of the restraint on governmental action with respect to trust property? In other words, if violated, what relief does the doctrine provide? That depends. As noted above, if it is constitutionally based, the trust actually may trump legislative action. Absent a constitutional basis, however, the doctrine cannot be used to overturn a statute or a statutorily mandated action, even one that seems inconsistent with the protection of trust values.

Even in those jurisdictions that recognize the doctrine solely as common law, the doctrine still has teeth—so long as the legislature has not seen fit to overrule it. A common-law-based public trust doctrine may serve a variety of purposes:[783]

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beyond the control of the other branches. Indeed, the New Jersey case which the Court quoted in *Illinois Central* invoked reference to natural law (although it repeatedly spoke elsewhere of the common law). "The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." *Illinois Central*, 146 U.S. at 456 (quoting *Arnold v. Mundy*, 6 N.J.L. 1, 53 (N.J. 1821)).

This has led to some confusion. For example, the Idaho Supreme Court stated in 1983, "Final determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary." *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629, 671 P.2d 1085, 1092 (1983). That does not sound like a description of the common law. Since the court described no constitutional basis for the doctrine in Idaho, it is difficult to understand on what basis the court declared that it had the final say.

[781] "From this origin in Roman law, the English common law evolved the concept of the public trust . . . ." *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). "The public trust doctrine has its roots in English common law. . . . American cases have developed the public trust doctrine in a way that is consistent with its common-law heritage." *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 486-87 (1988). "More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984). Idaho is in accord. "The public trust doctrine is based upon common law equitable principles." *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 517, 733 P.2d 733, 738 (1987). This point was reiterated by the Idaho Legislature in 1996. "'Public trust doctrine' means the common law rule relating to the title to the beds of navigable waters . . . ." Idaho Code § 58-1202(5).

[782] E.g., *United Plainsmen Assoc. v. North Dakota Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999). It is doubtful that there is a constitutional basis for the public trust doctrine in Idaho. That question is discussed in section 2.D(2) at page 456.

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1. In its most famous application, the doctrine authorizes the legislature to take back, without paying compensation, a public resource improperly alienated to private use, as occurred with the lake shore of Chicago in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892). In this case, the government (not a citizen group) initiated the action. The doctrine served to justify, not attack, the government's action.

2. Another instance in which the doctrine has been employed by government (rather than against it) is in the context of natural resource damage actions. Here the doctrine has been employed successfully to buttress claims for damage to public resources.

3. In other cases, it may be used as a prod against a government reluctant to make hard choices that interfere with property rights. The classic example of this is the Mono Lake case in which the state court insisted that the California Water Resources Board carefully consider the impact of its actions (including prior actions allocating water rights) on public values. *National Audubon Society v. Superior Court of Alpine County,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983). In that case, the court did not dictate any particular outcome, but clothed the water board with authority to reallocate vested water rights to different public uses, if necessary.

4. The doctrine also could be employed to judge the correctness of agency decision-making regarding the management of public resources. This may occur in various permutations:

    - For instance, the doctrine may be seen as a canon of construction (that is, a rule for interpreting statutes or agency rules)—and a powerful one at that. It may provide the hook for a court to read into an otherwise ambiguous statutory or regulatory scheme a clearer mandate to weigh and protect trust values. Likewise, the doctrine may demand clear and express legislative direction to support actions that appear inconsistent with the protection of trust values.

    - In a similar vein, the doctrine may be seen as a limitation on the discretion of agencies. In this way, the doctrine might allow a court to go beyond the usual "arbitrary and capricious" review of agency decision making, allowing the court greater leeway in mandating a substantive outcome favoring well-recognized public trust values. This is sometimes referred to by commentators as enabling the court to take a "hard look" at governmental decision-making.

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[783] Few court decisions contain a broad discussion of the various and different purposes to which the public trust doctrine has been employed; they typically focus on the particular relief sought in the case at hand. A discussion of the range of uses to which the public trust doctrine has been and might in the future be employed is found in various articles including Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 310-14 (1980), and Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U. Calif. Davis L. Rev. 233, 243-44 (1980).

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- The doctrine could be employed in an action-forcing way to force the government to take steps to protect public resources that are in threat of being lost by the government's inaction. This has been tried, so far without clear success, in the cases described in section 2.E(3) at page 460.

- Similarly, the doctrine might be employed to challenge the government's decision when it justifies its action (or failure to act) on the basis that it lacks sufficient information. Thus the public trust doctrine might create an affirmative obligation to study a problem or get the information necessary to enable it to carry out its trust responsibilities.

- Finally, the doctrine may serve as a test for excessive delegation of decision-making authority regarding public resources.

In sum, the doctrine may take various forms. The key is that it has the potential to add a substantive component to any litigation challenging governmental action. Unlike litigation against the government that is predominated by procedural attacks giving rise to remands and more procedural attacks, the public trust doctrine allows litigants to address (or at least get closer to addressing) the merits of the government's action.

B. The doctrine's origins—the State's property interest in submerged lands

(1) Roman law

Courts and commentators routinely describe the public trust doctrine as being of ancient origin.[784] It may be traced from Sixth Century Roman law, to the restoration of the common law by the Magna Carta in 1215, to commentaries by Renaissance-era English legal scholars, to the American Reception of British law. These early sources describe certain public resources, notably the seashore and riverbanks, as being inherently "public" and therefore unalienable.

Here is the law as announced by Emperor Justinian in Constantinople:

> In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.
>
> Thus, the following things are by natural law common to all--the air, running water, the sea, and consequently the sea-shore. No one is therefore

[784] E.g., Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U. Calif. Davis L. Rev. 195 (1980).

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> forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. On the other hand, all rivers and harbors are public, so that all persons have a right to fish therein.

The Institutes of Justinian, Book II, at D2 (J.B. Moyle, English trans. 5th ed. 1928) (Nov. 21, 533 C.E.).[785] This Roman codification employed the Latin phrase *jus publicum* to describe these rights for the public good, distinguishing them from *jus privatum* (rights held by private persons or by the emperor in his private capacity).[786]

The first American public trust case quoted Justinian, in Latin no less. *Arnold v. Mundy*, 6 N.J.L. 1, 49 (N.J. 1821). Early Supreme Court public trust cases do not cite to these Roman authorities, but they cite *Arnold* as well as noted English commentators who relied on the *Institutes*.[787] It was Professor Sax (see discussion in section 2.C(1) at page 452) who reintroduced these Roman sources into the modern conversation in 1970. Since that time, courts and commentators have come invariably to recite Roman and medieval law whenever explaining the doctrine.[788] One commentator, however, has cast doubt on the historical accuracy of the doctrinal roots, describing the much heralded Roman and English protection of public resources as "mythology."[789]

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[785] Translations vary, but all say essentially the same thing.

[786] Three major legal texts in Latin comprising the *Corpus Juris Civilis* were issued under Justinian's rule in Constantinople. The third (the *Institutes*) was intended as a legal textbook for law schools. Justinian later issued a number of other laws, mostly in Greek.

[787] For instance, in 1892 the Supreme Court quoted English legal scholar, Lord Hale: "The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use." *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, 458 (1892).

[788] For example, in the important Mono Lake case, the California Supreme Court recited: "From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.'" *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (additional internal quotation marks omitted).

[789] "The only problem with these ambitions for the public trust doctrine is that they rely on a mythological history of the doctrine. There was nothing resembling the modern idea of public trust in Roman law and the claimed restraint on alienation of state owned waters and lands is belied by a history of pervasive private ownership in both Rome and England. Magna Carta had little or nothing to do with such public rights, nor is there significant support in Bracton, Hale, or Blackstone for the imagined doctrine." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 1-2 (2007). Professor Huffman's writings, by the way, have stirred the hornet's nest. Professor Blumm, responding to one of Huffman's articles, described Huffman's writing as "hyperbole reminiscent of an eighteenth century pamphleteer." Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 599 (1989).

(2) *Illinois Central* (1892)

Although there are earlier references to a public trust, most agree that the first modern formulation of the doctrine is contained in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892). Accordingly, we begin with this case.

Illinois Central dealt with the conveyance by the Illinois Legislature in 1869 of the entire lake shore of the city of Chicago to the Illinois Central Railroad. Four years later, the Legislature thought better of its generosity and repealed the grant.[790] The railroad sued. The United States Supreme Court sided with the Legislature. It held that, from the outset, the shoreline property was subject to an unstated, but paramount, public trust. When the land was conveyed to the railroad, it was conveyed subject to this trust, thereby allowing the Legislature to rescind the conveyance—without compensating the railroad.

The Court did not hold that all conveyances of trust lands are void. It recognized that submerged lands could be, and frequently are, conveyed free of the trust to private parties for the construction of wharves, docks, and the like—all uses that are in furtherance of trust purposes. But the Court found that the state legislature lacked the power to convey the entire waterfront free of the trust. This was, in essence, an abdication of its responsibility to protect the trust and therefore was void or, at least, voidable. The Court explained:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

Illinois Central, 146 U.S. at 453.

[790] This tale of greed and corruption, and the implicit need for vigorous judicial oversight, has underpinned the resurgence of the public trust doctrine beginning in the 1970s. One commentator, however, has questioned the accuracy of the story recounted in the Supreme Court's opinion. "That story is a fable, and can justify the doctrine only if we already believe in it for reasons independent of the lesson the case supposedly teaches." Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, 931 (2004).

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A key feature of the public trust doctrine is to enable the government to reclaim ownership or control of private property without paying just compensation.[791] The state always has the power to take (or to take back) property for public use under its condemnation power. The public trust doctrine is a way of declaring that the property belonged to the state in the first instance, and therefore no compensation need be paid.[792]

Thanks in large part to Professor Sax's influential article,[793] *Illinois Central* has come to be known as the case in which the public trust doctrine protected a public resource from greedy developers. The reality is more nuanced. "[Justice Field's] public trust doctrine was designed to preserve access to the lake for commercial vessels at competitive prices, not to preserve Lake Park or the shoreline from further economic development. . . . Thus, the public trust doctrine, as invoked in the Illinois Central litigation, was scarcely an anti-development doctrine." Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799, 924-25 (2004).

(3) *Arnold v. Mundy* (1821)

In order to understand *Illinois Central* and the modern public trust doctrine, it is necessary to trace several early cases upon which the doctrine traces its origins and upon which *Illinois Central* relied. We begin with *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821), a case generally identified as the foundation of public trust law in the United States.[794]

It dealt with title to an oyster bed in mud flats along the Raritan River in Perth Amboy, the first capital of New Jersey. The plaintiff claimed title to the oyster beds traceable to a grant from King Charles II to this brother, the Duke of York in 1664. The King's grant was for the purpose of

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[791] The Court said, "Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay . . . ." *Illinois Central*, 146 U.S. at 455. The clear implication is that compensation is due for expenses incurred in detrimental reliance only, not for loss of the land itself.

[792] In *Summa Corp. v. California*, 466 U.S. 198, 200 (1984), the Court candidly noted that the City of Los Angeles "indicated that it wanted to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner's property." The Court sidestepped the public trust issue, however, finding that whatever public trust the state of California obtained in the tidelands did not survive the patenting of the lands under the Act of 1851. Also see the quotation from the Mono Lake decision in footnote 804 at page 452. Commentators, too, have noted this effect. "The property right nature of the public trust is also evident in the second major manifestation of the doctrine: an insulation against takings claims." Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 584 (1989).

[793] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). This article is discussed in section 2.C(1) at page 452.

[794] See, for example, Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Envtl. L. 573, 580 (1989), describing *Arnold* and *Illinois Central* as the "foundation cases" of the doctrine.

establishing the colony of New Jersey. Ownership later was conveyed to 24 "proprietors of East New Jersey" who, in turn, conveyed tracts of land to various private parties. The plaintiff sued the defendant for trespassing on his oyster bed and taking the oysters. The defendant responded that the plaintiff's title extended only to the high water mark, and that the defendant was entitled to partake of the common fishery below. The New Jersey court agreed with the defendant, tracing the public trust back through English and Roman law to reach the following conclusion:

> Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.

Arnold, 6 N.J.L. at 52.

Interestingly, *Arnold* was overturned by the New Jersey Supreme Court in *Gough v. Bell*, 22 N.J.L. 441 (N.J. 1850) and by the court of Errors and Appeals in *Bell v. Gough*, 23 N.J.L. 624 (1852),[795] but not before the case became the foundation for the doctrine recognized by the U.S. Supreme Court in *Martin v. Waddell*, 41 U.S. 367 (1842). The fact that *Arnold* had been overturned was overlooked or perhaps unknown to the U.S. Supreme Court which continued to rely on the case in *Illinois Central*, describing it as "entitled to great weight" and a "decision [that] was made with great deliberation and research." *Illinois Central*, 146 U.S. at 456.

(4) *Martin v. Waddell* (1842)

Martin v. Waddell, 41 U.S. 367 (1842), is another early a case relied on by the Court in *Illinois Central. Martin* was a case in ejectment. Curiously, it also dealt with title to oyster beds in Perth Amboy. Like the plaintiff in *Arnold*, the plaintiff in *Martin* traced his title to the same royal grant from Charles II. Unlike the defendant in *Arnold*, however, the defendant in *Martin* claimed an exclusive license to the oyster fishery based on state law. The plaintiff sought to eject the defendant, claiming

[795] Until 1947, the New Jersey Supreme Court was an intermediate appellate court whose decisions were reviewed by the highest state court, the Court of Errors and Appeals of New Jersey.

superior title that, if valid, would trump the state-issued license. The question, then, was whether the royal grant, which included the submerged lands in question, authorized subsequent conveyance to private parties.

The Court observed that the King's grant to his brother the Duke retained the character of the King's ownership. The Court concluded that under English law the King held the land in trust, and the trust recognized a right to a common fishery in lands below tidal waters. Because of this, the Court concluded the conveyance to a private party was defective, and New Jersey instead acquired title to the submerged lands.

Ironically, the Court failed to answer why, if the King could not convey an exclusive interest in the submerged lands, New Jersey later could grant an exclusive license to the defendant.[796] The Court in *Illinois Central* also ignored New Jersey's apparent ability to convey an interest in submerged lands to a private party, focusing instead on the limitations seen in the King's ability to alienate trust lands.[797] Citing *Martin*, it said, "Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted." *Illinois Central*, 146 U.S. at 457-58. Ironies and subtleties aside, *Martin* has come to be recognized as standing for the simple proposition that states hold submerged lands in trust, and that the trust prevents the state from alienating the property to private interests in conflict with trust purposes.

(5) *Pollard's Lessee* (1845)

Illinois Central also relied on the case of *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). To understand this case, it is necessary to digress to a discussion of the "equal footing doctrine." (This doctrine did not arise in *Arnold* or *Martin*, because New Jersey was one of the 13 original colonies.)

Pollard's Lessee, like *Martin*, was, at its core, a title dispute. The dispute in *Pollard's Lessee* involved lands below the high watermark of the Mobile River in Mobile, Alabama. The plaintiff, claiming title under a federal patent issued after statehood, sought to eject the defendant. The Court found the federal conveyance to be a nullity, because the federal government had nothing to convey. Under the equal footing doctrine, whatever interest the federal government had in the submerged lands had passed to the state upon statehood.

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[796] This irony was not lost on the dissenting justice. "And I must again repeat, if the king held such lands as trustee, for the common benefit of all his subjects, and inalienable as private property, I am unable to discover, on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals." *Martin*, 41 U.S. at 432 (J. Thompson, dissenting).

[797] As one critical commentator has noted, it is "puzzling why *Martin* has persisted as authority for a modern public trust doctrine understood to constrain the state's power to alienate submerged lands." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 45 (2007).

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What does this have to do with the public trust? Only this: The Court explained that when the lands that now comprise the State of Alabama were ceded to the federal government by the states of Virginia and Georgia, they were impressed with a trust. The United States held those lands temporarily for the purpose of conveying them to private persons in order to "convert the land into money" to help pay the Revolutionary War debt. *Pollard's Lessee*, 44 U.S. at 224. Thereafter the United States was to "erect new states over the territory thus ceded." *Id*. The Court described this process as a trust. "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories." *Pollard's Lessee*, 44 U.S. at 222-23. Professor Wilkinson explains, "Its trust duty was to sell off the lands for the common benefit so that new states, with land in private ownership, could operate as sovereigns on an equal footing with the original states and not as 'colonies.'" Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 280 (1980). What is interesting is that the "trust" in *Pollard's Lessee* had to do with the government's obligation to sell off public lands and to create states out of the territory. The case had nothing to do with protecting public resources from disposal. The only question was which government—the federal government or the state—had the right to dispose of the river shore.

Upon this tenuous foundation, and cases similar, today's public trust doctrine rests. When the Court handed down *Illinois Central* 47 years later, it relied on *Pollard's Lessee* for the following proposition:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

Illinois Central, 146 U.S. at 435. But did *Pollard's Lessee* really say that? *Pollard's Lessee* supports the first part of that contention—that states have title to submerged lands—and it is consistent with the idea that states have the right to convey or not to convey those submerged lands. But the limitation that the conveyance can occur only if it "can be done without substantial impairment of the interest of the public in the waters" is found nowhere in *Pollard's Lessee*. The Court in *Illinois Central* addressed the fact that it was extending the reach of the trust from tidewaters to land under non-tidal navigable waters. But it was less forthcoming about the nature of the trust. *Central Illinois* took the "trust" found in *Pollard's Lessee* (the federal responsibility to "convert land to money" and then to create new states) and, without any real explanation, turned it into a different trust (the state's responsibility to protect the submerged lands from improvident disposal).

(6) *Shively v. Bowlby* (1894)

Two years after its decision in *Illinois Central*, the Court decided the case of *Shively v. Bowlby*, 152 U.S. 1 (1894). *Shively* has more recently been described by the Supreme Court as the "seminal case in American public trust jurisprudence."[798] *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 484 (1988).

Shively involved a title dispute over submerged lands in the Columbia River in Oregon—a dispute very much like the one in *Pollard's Lessee*. Like the plaintiff in *Pollard's Lessee*, Shively traced his title to a pre-statehood federal patent. Bowlby claimed title under a state grant. For the same reasons as in *Pollard's Lessee*, the Court sided with Bowlby. The Court recognized that "lands flowed by the tide water" were charged with a trust and vested in the states, and that new states have the same rights in such lands as do the thirteen original states.

The *Shively* Court went on to explain that the United States is empowered, under some circumstances, to dispose of submerged land within the territories prior to statehood. *Shively*, 152 U.S. at 48. However, the Court noted the Congress's power to dispose is limited by the public trust and that such lands ordinarily "shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states."

The quotation above demonstrates that while the case does stand for a public trust, it is not the anti-use one embraced by environmentalists today. Rather, the purpose of the trust was to promote such things as commerce and navigation. In the words of Professor Huffman, "If the Supreme Court majority in *Phillips Petroleum* had in mind to expand the reach of the public trust doctrine in the way advocated by environmentalists, *Shively* is an odd case to have identified as seminal." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 28 (2007).

(7) *Knight* (1891)

Knight v. United Land Ass'n, 142 U.S. 161 (1891) was yet another case in ejectment, a dispute over title to a block of land in San Francisco that was submerged at the time of statehood in 1850. The details of the dispute (involving such complexities as the Treaty of Guadalupe Hidalgo) are not relevant here. The case is known and cited for its summary of the law of the public trust.

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide-waters in the original states were reserved to the several states, and that the new states

[798] From time to time, each of *Arnold*, *Martin, Pollard's Lessee, Illinois Central*, and *Shively* has been awarded the title of being the "seminal" pubic trust case.

> since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders. Upon the acquisition of the territory from Mexico the United States acquired the title to tide-lands equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory. Authorities last cited.

Knight, 142 U.S. at 183 (citation to Martin and other cases omitted).

(8) *Phillips Petroleum* (1988)

The most recent U.S. Supreme Court case to address the public trust doctrine is *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469 (1988). It is included at this point in the discussion because, despite its youth, it is not a "modern" public trust case. It did not expand the trust, or even comment on the expansion by other courts. Rather, it follows in line with and confirms the teaching of each of the cases discussed above addressing the narrow issue of title to submerged lands.

In this case, the oil company held title to submerged lands in a non-navigable Mississippi bayou influenced by the tide in the Gulf of Mexico. It traced its title to pre-statehood Spanish land grants. When the State of Mississippi issued oil and gas leases located on those submerged lands, the company brought a quiet title suit aimed at blocking the leases. The state contended that it held title to the submerged lands under a public trust by virtue of the equal footing doctrine. Neither Phillips Petroleum nor, apparently, any of the amici curiae argued against the existence of the public trust doctrine. Instead, the whole case turned on whether the doctrine was limited to land under navigable waters or whether it also reached the land here under a non-navigable tidal bayou. The majority sided with the State of Mississippi, holding that the trust reached both navigable and non-navigable tidal lands.[799]

What is most interesting is that the case contains not a hint that the state's public trust responsibilities limit its ability to alienate the trust lands. To the contrary, the Court was quite clear that it was up to each state what they wanted to do with the lands. "[M]any coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent property owners long ago. Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here." *Phillips Petroleum*, 484 U.S. at 483.

In the words of one commentator, "The supreme irony of the case is that the State of Mississippi did not assert its claim of ownership on the basis of its desire to protect the traditional public uses of navigable waters, nor on the basis of a concern for the ecological integrity of those waters as the modern advocates of the public trust doctrine would have it. The State's belated and opportunistic interest in the lands was based on its desire to derive revenue from the lease of those lands for

[799] The dissent complained that this made no sense. "Because the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of the federal admiralty jurisdiction." *Phillips Petroleum*, 484 U.S. at 488 (J. O'Connor dissenting).

petroleum development." James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 68 (2007) (internal quotation marks omitted).

C. The modern doctrine—a trust for the protection of natural resources

(1) The Sax articles (1970 and 1980)

A review of the Supreme Court decisions discussed above, from *Arnold* to *Phillips Petroleum*, would not lead most people to the conclusion that the public trust doctrine is an engine of reform empowering courts to overturn cavalier governmental action that is contrary to public values. *Illinois Central*, after all, employed the doctrine in government's defense. Indeed, the Supreme Court described the doctrine in much more mundane terms as recently as 1988: "Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit." *Phillips Petroleum*, 484 U.S. 472.

Professor Sax, however, saw a great deal more in the doctrine than a mechanism for resolving title disputes. His seminal 1970 article,[800] followed by another prod in 1980,[801] changed the face of doctrine, leading to its expansion and reinvisioning as a judicial tool for blocking private development of natural resources. Professor Huffman later described the impact of Sax articles:

> At the dawn of the modern environmental movement, on the heels of the first Earth Day and before the enactment of most of today's environmental regulations, Professor Joe Sax published an article that anticipated the challenges environmentalists would face in the legislative process and the successes they would achieve in the courts. The little known public trust doctrine, wrote Sax, could be a powerful tool for "effective judicial intervention" on behalf of environmental protection and natural resource conservation. Sax's article spawned a still raging flood of academic commentary on the public trust doctrine and encouraged environmentalists across the country to petition for judicial intervention in the name of the public trust. Sax later recognized the limited application of the doctrine historically, but he was optimistic about how the general concept of public rights might be expanded to impact all manner of natural resource and environmental management issues.

James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1, 3 (2007) (footnotes omitted).

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[800] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

[801] Ten years later, he published another article urging again for expansion of the doctrine. Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U. Calif. Davis L. Rev. 185 (1980). Indeed, the entire volume of this law review was devoted to articles about the public trust doctrine, most of which urged its expansion.

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Professor Sax described *Illinois Central* as the "Lodestar in American Public Trust Law", Sax, 68 Mich. L. Rev. at 489. His article collected state court decisions from around the nation[802] that followed suit in some way, and offered them up as a "doctrine." He concluded, "Perhaps the most striking impression produced by a review of public trust cases in various jurisdictions is the sense of openness which the law provides." Sax, 68 Mich. L. Rev. at 553. "Certainly the principle of the public trust is broader than its traditional application indicates. Sax, 68 Mich. L. Rev. at 557.

To a large extent, Professor Sax's urging has been followed. As a recent commentator, Professor Tuholske of Vermont Law School, has noted, "Courts have focused less on the state's property rights in the lands underlying the water, and more on the state's duty as trustee to balance private property rights in common natural resources against the public's interest in water as a common natural resource." Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 Vt. J. Envtl. L. 189, 216 (2008).

(2) Mono Lake and other recent state decisions

The most celebrated of the modern public trust decisions is the California Supreme Court's protection of Mono Lake in *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 718 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).[803] In this case the environmental group challenged diversions by the City of Los Angeles from tributaries to Mono Lake, contending that they harmed the lake's ecosystem. The court extended the reach of the public trust doctrine to non-navigable tributaries of navigable rivers and lakes. *National Audubon*, 658 P.2d at 721. Although Los Angeles held water rights authorizing the diversion, the court held those rights could be trumped by the public trust doctrine. "Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water." *National Audubon*, 658 P.2d at 728. The net effect was to subject virtually every water right in the state to potential, ongoing re-distribution, all without compensation.[804]

In so ruling, the court noted that it had earlier extended the reach of the public trust doctrine to embrace not just navigation, commercial, and fishing interests but "environmental and recreational

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[802] In particular, Professor Sax highlighted *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966) (invalidating a lease of park land for development of a tramway); *Priewe v. Wisconsin State Land and Improvement Co.*, 67 N.W. 918 (Wis., 1896) (invalidating legislative action allowing draining of a lake to allow private land development); *People v. California Fish Co.*, 138 P. 79 (1913) (holding that persons who took title to tidelands in San Francisco took them subject to the public trust and, in particular, the public right of navigation).

[803] The Mono Lake case was foreshowed by an article by Professor Johnson in 1980, in which he argued that the doctrine should be expanded to include water rights. Ralph W. Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U. Calif. Davis L. Rev. 233 (1980).

[804] "Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required." *National Audubon Society v. Superior Court of Alpine Cnty.,* 658 P.2d 709, 723 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983).

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values." *National Audubon*, 658 P.2d at 712 (citing *Marks v. Whitney*, 491 P.2d 374 (1971)). "There is a growing public recognition that one of the most important uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state." *National Audubon*, 658 P.2d at 719 (citing *Marks v. Whitney*, 491 P.2d 374 (1971)).

A handful of other state court decisions have followed suit. A few examples follow.

- In extending the doctrine to private sandy beaches, the New Jersey Supreme Court declared, "[T]he public trust doctrine [is] not to be 'fixed or static' but [may be] 'molded and extended to meet changing conditions and needs of the public it was created to benefit." *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (internal quotation omitted).

- In *Montana Coal. For Stream Access, Inc. v. Curran*, 682 P.2d 163, 170 (Mont. 184), the Montana Supreme Court extended the reach of the doctrine to all waters of the state in the context of stream access.

- Drawing heavily on *National Audubon Society* as well as recent amendments to its own constitution, the Hawaii Supreme Court extended the public trust doctrine to all waters of the state, including ground water. *In the Matter of Water Use Permit Applications ("Wai' Hole Ditch)*, 9 P.3d 409 (2000).[805]

These decisions and others like them have shaped a modern public trust doctrine that may be used to protect a broad range of public and environmental values, not just the traditional uses of navigation, commerce, and fishing.[806] They have, as Professor Sax urged, liberated the public trust doctrine from its historical shackles.

[805] Also see *Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982), *reconsideration denied* 66 Hawaii 528, 726 P.2d 1133 (1983).

[806] There are limits to how far the public trust doctrine can be stretched. In one case illustrating the dangers of an overly creative legal mind, counsel for a group of publishers argued that a statute extending copyright protection violated the public trust doctrine. The court, citing *Phillips Petroleum* and *Air Florida*, dismissed this argument in one sentence. "Insofar as the public trust doctrine applies to navigable waters and not to copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine." *Eldred v. Reno*, 74 F. Supp. 2d 1, 4 (1999) (in extensive appeals, the public trust doctrine was not discussed again).

D. The public trust doctrine in Idaho

(1) Idaho case law

Idaho has recognized since 1915 that the state holds title to the beds of navigable waters below the high water mark. *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (reversing *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908).[807]

More recently, the Idaho Supreme Court has recognized the applicability of the public trust doctrine to submerged lands. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc. ("KEA")*, 105 Idaho 622, 671 P.2d 1085 (1983). In *KEA*, the environmental group challenged the issuance by the State of Idaho of a 10-year encroachment right into Lake Coeur d'Alene to the yacht club. Relying extensively on the 1970 Sax article, the Idaho Supreme Court recognized the applicability of the doctrine in Idaho. It found that this particular grant of a temporary right did not violate the trust. However, the court, citing *Mono Lake*, emphasized that the grant was subject to the trust and that "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance." *KEA*, 105 Idaho at 631, 671 P.2d at 1094. The court also recognized that the trust encompasses and protects a broader range of uses, including fish and wildlife habitat, recreation, aesthetic beauty, and water quality. *KEA*, 105 Idaho at 631, 671 P.2d at 1094.

In *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 733 P.2d 733 (1987),[808] the Idaho Supreme Court reaffirmed its decision in *KEA*, describing the holding (not quite accurately) as being that "public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty and water quality." *Idaho Forest*, 112 Idaho at 516, 733 P.2d at 737. However, the court limited the applicability of the doctrine to land under navigable waters. "There is no 'public trust doctrine' relating to land which is wholly independent or unconnected with such navigable waters." *Idaho Forest*, 112 Idaho at 516, 733 P.2d at 737.

In *Selkirk-Priest Basin Ass'n v. State*, 127 Idaho 239, 899 P.2d 949 (1995), the Idaho Supreme Court again confirmed the applicability of the doctrine. This time, the court found that there were genuine issues of material fact (thus precluding summary judgment) as to whether a timber sale on state lands might violate the public trust due to its environmental impact on a navigable stream.

In *Idaho Conservation League, Inc. v. State ("ICL I")*, 128 Idaho 155, 911 P.2d 748 (1995), various environmental groups sought to intervene in the Snake River Basin Adjudication (a general adjudication of water rights) in order to protect the public's interests under the public trust doctrine. The environmental groups contended that the SRBA court should "consider the public trust as an element of each water right subject to the adjudication." *ICL I*, 128 Idaho at 156, 911 P.2d at 749. The

[807] For further discussion of navigability, see discussion in section 21 at page 717.

[808] In a subsequent appeal, the court applied the law to the facts, holding that lands above a dike were not subject to the public trust. *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist.*, 135 Idaho 316, 17 P.3d 260 (2000).

ICL I court declared, "The water rights adjudicated in the SRBA, as with all water rights, are impressed with the public trust." *ICL I*, 128 Idaho at 157, 911 P.2d at 750. (Nevertheless, the court found that the public trust doctrine is not an "element" of a water right, and therefore fell beyond the jurisdiction of the SRBA court.)

In the Matter of the Ownership of Sanders Beach, City of Coeur d'Alene v. Macklin, 143 Idaho 443, 147 P.3d 75 (2006), dealt with public access to a beach in Lake Coeur d'Alene. The Idaho Supreme Court confirmed its holdings in prior cases, again noting that "the public trust doctrine has been expanded to include uses other than those strictly incident to navigation" and that it now encompasses "fish and wildlife habitat, recreation, aesthetic beauty and water quality." *Sanders Beach*, 143 Idaho 453, 147 P.3d at 85. The court concluded, "Granting the Lakeshore Owners the right to exclude the public from this portion of the state land [below the high water mark] would be inconsistent with the public trust doctrine." *Id*.

(2) 1996 statute limiting the public trust doctrine

In 1996, acting in response to the *ICL I* case, the Idaho Legislature declared that the public trust doctrine does not apply to water rights or anything else besides land below navigable waters. Idaho Code §§ 58-1201 to 58-1203. In so declaring, the legislation repeatedly noted that the doctrine is merely common law, which can always be overridden by statute. Idaho Code §§ 58-1201(4), 58-1201(6), 58-1202(5). So far, no litigant has challenged the authority of the Legislature to limit the public trust doctrine in this way.

Three commentators have suggested that the Legislature lacks that power. Michael C. Blumm, Harrison C. Dunning & Scott W. Reed, *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 Ecology L. Q. 461 (1997); *see also*, A. Dan Tarlock, *Law of Water Rights and Resources*, § 5.59. These commentators offer two basic theories.

First, they contend that, under the equal footing doctrine, the Legislature lacks power to abdicate its public trust responsibility over navigable waters and their beds. This argument is difficult to reconcile with the clear statements of the U.S. Supreme Court that states are free to do as they wish in recognizing or abolishing the doctrine. "But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S. at 475 (citing *Shively*, 152 U.S. at 26).

Second, the authors contend that the Idaho Constitution (specifically Article 15, sections 1, 4, 5, and 6) implicitly constitutionalizes the public trust doctrine. These constitutional provisions deal with the sale, rental, and distribution of water, declaring such to be a "public use." These constitutional provisions predate public utility regulation in Idaho and were aimed primarily at protecting irrigation customers of commercial irrigation companies.[809] These companies (which do not exist in Idaho any more[810]) operated in a Wild West environment that the drafters plainly intended to bring under control.

[809] The "public use" constitutional provisions are explored in section 6.H beginning on page 526.

[810] This anachronistic corporate form is discussed in section 6.B beginning at page 514.

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EXHIBIT C
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For instance, the provisions require ditch companies to provide continuous, fair, and equitable service to their customers.

The Idaho Supreme Court has expressly ruled that these provisions do not shift title to water rights held by commercial irrigation companies (which would be the case if the public trust doctrine applied).[811] To the extent that the Idaho courts have recognized trust-like responsibilities on the suppliers of water rights, those duties are to the entity's customers, not to the public at large.[812] Moreover, sections 4 and 5 of the Article 15 are expressly limited to agricultural water, making them ill-suited to support a broad public trust doctrine. In conclusion, reliance on these constitutional provisions in support of the public trust doctrine appears to be misplaced.

The effect of the statute is to limit the public trust doctrine to its historical application under *Shively v. Bowlby* to conveyances or other actions by the state impairing public ownership in lands beneath navigable waters. Indeed, it specifically limits the applicability of the doctrine to "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters." Idaho Code § 58-1203(1). In belt and suspenders style, the statute goes on expressly to disclaim any applicability of the doctrine to the appropriation, use, or transfer of water rights. Idaho Code § 58-1203(2)(b). It also blocks the application of the doctrine in the context of the disposal of school lands. Idaho Code § 58-1203(2)(a). Finally, the act declares the public trust doctrine inapplicable with respect to the "protection or exercise of private property rights within the state of Idaho." Idaho Code § 58-1203(2)(c).[813]

Despite the statute's express limitation of the doctrine to issues dealing with the alienation or encumbrance of title to submerged lands, the Idaho Supreme Court found that the doctrine afforded a right to public access to such lands in *In the Matter of the Ownership of Sanders Beach, City of Coeur d'Alene v. Macklin*, 143 Idaho 443, 147 P.3d 75 (2006).

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[811] "Mr. Chief Justice Morgan, speaking for this court in *Witherding v. Green*, 4 Idaho 733, 45 Pac. 134, in considering the purposes of article 15 of the Constitution, made it very clear that the framers of that instrument were only dealing with the "use" of the waters, and not the property right in the waters. Indeed, it can be of no consequence to the state as to where the property in the waters is vested so long as the people have reserved to themselves the right to regulate the use." *Hard v. Boise City Irrigation Co.,* 9 Idaho 589, 600-01, 76 P. 331, 334 (Justice Alilshie, concurring) (quotation marks and italics appear only in Idaho Reports).*; See also, Farmers' Co-operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 457-59, 94 P. 761, 763 (1908). See discussion of ownership of commercial irrigation company rights in section 7.C beginning on page 534.

[812] See discussion in section 6.H beginning on page 526. The authors of the Ecology Law Quarterly article acknowledge this: "While the recognized beneficiaries of the fiduciary obligation imposed by the Idaho constitution thus far have been primarily agricultural and municipal water consumers, the public's use of the waters of the state is hardly limited to agricultural and municipal consumption." Blumm, Dunning & Reed, at 499.

[813] The meaning of this third point is unclear; the language appears to be surplusage.

The upshot is that the Legislature has taken the "modern" public trust doctrine out of play and thereby eliminated from Idaho law a major area of potential contention. As a result, the statutory law governing evaluation of the "local public interest" (discussed below in section 3) will provide the primary legal forum for raising public interest issues in connection with water allocation and re-allocation in Idaho.

E. Is there a federal public trust doctrine?

The classic formulation of the public trust doctrine establishes ownership and trust responsibilities in state government. Indeed, in the title-dispute variety of public trust cases (*Arnold*, *Martin*, *Pollard's Lessee, Shively, Knight,* and *Phillips Petroleum*), the public trust doctrine was used to defeat title claimed through the federal government and uphold title claimed through the states. Yet, the push to recognize a broader public trust doctrine at the state level has been accompanied by a push to recognize a public trust doctrine that operates at the federal level applicable to inland federal resources.

Obviously, this requires a departure from the classic formulation of the public trust in a number of ways. It would be held by a different party (the federal government) with respect to different resources (public lands) for different purposes (ranging from the promotion of environmental protection on the one hand to the promotion of public and private utilization of these resources on the other).

(1) The Wilkinson article (1980)

In his 1980 article urging recognition of such a federal trust, Professor Wilkinson admitted, "The federal public lands are at the outer reaches of the public trust doctrine. . . . Put another way, inland federal lands are not 'trust resources' according to the classic formulation of the doctrine." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 273 (1980).

Despite this caution, Professor Wilkinson observed that "some thirty-six opinions over the years have described inland public lands as being held in trust." Wilkinson, 14 U. Calif. Davis L. Rev. at 298.

The article concludes with an interesting examination of potential sources of law for the public trust doctrine. Wilkinson recognizes that if the doctrine is seen as a restraint on the power of Congress, then it must be constitutionally based (presumably in the Property Clause). He concedes that, while there is some authority for that, the proposition is unlikely as "there is nothing in the constitutional debates to indicate such a trust." Wilkinson, 14 U. Calif. Davis L. Rev. at 307. He says that courts "might be more likely to tie the trust to a comprehensive statutory scheme." Wilkinson, 14 U. Calif. Davis L. Rev. at 307. He concludes that even if the doctrine were seen as having a constitutional basis, it is not likely to provide a basis for overturning federal statutes. Wilkinson, 14 U. Calif. Davis L. Rev. at 310.

Whatever its basis, however, Wilkinson suggests that the public trust might prove important in any of several ways. He notes, for instance: "The public trust could also operate as a limitation on the

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discretion of administrative agencies." Wilkinson, 14 U. Calif. Davis L. Rev. at 310. Wilkinson also suggests that the doctrine could play a role as a rule of construction. Wilkinson, 14 U. Calif. Davis L. Rev. at 313. This, he says, could be true regardless of whether the doctrine is viewed as based on the Constitution or statute. Wilkinson, 14 U. Calif. Davis L. Rev. at 314. Essentially, Wilkinson is saying that the doctrine should be used to construe ambiguous federal land management statutes in a manner that favors protection of the public resource.[814] Finally, Wilkinson notes that the doctrine could be invoked in an "action forcing" role. He gives the example of suing the federal government to force it to assert federal water rights. As discussed in section 2.E(3) at page 460, this has not proved successful to date.

(2) Early federal cases

When Professor Wilkinson wrote his article, he relied on a smattering of early cases describing a federal public trust. None of these provide much detail or analysis of the basis or scope of the trust. Examples include the following.

(a) *Beebe* (1888)

The case of *United States v. Beebe*, 127 U.S. 338 (1888) is cited in cases dealing with the public trust for the following statement: "The public domain is held by the government as part of its trust. The government is charged with the duty, and clothed with the power, to protect it from trespass and unlawful appropriation, and, under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. *Beebe*, 127 U.S. at 342. The case involved a challenge to patents issued. It turned primarily on the issue of laches. The commentary on the trust was prologue.

(b) *Trinidad Coal* (1890)

United States v. Trinidad Coal & Coking Co., 137 U.S. 160 (1890), dealt with persons who fraudulently obtained patents to public lands. In construing the statute governing the patenting of coal lands for a low price, the Court invoked trust language in describing the government's role in managing the public lands. "In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. . . . [The lands] were held in trust for all the people . . . ." *Trinidad*, 137 at 170.

(c) *Light* (1911)

In *Light v. U.S.*, 220 U.S. 523 (1911), the federal government enjoined a rancher from grazing his cattle on the Holy Cross Forest Reserve in Colorado because he had failed to obtain a permit. The rancher sued, asserting the government lacked the authority to restrict grazing on public lands unless the government fenced the lands in accordance with a state statute. At its core, the case dealt with the

[814] It would seem that the doctrine just as well could be applied in the other direction—in support of recognition of the heritage of public use and public access to public lands. Elsewhere in the article, Wilkinson suggests as much. See quotation in section 2.E(4) at page 465.)

issue of supremacy of federal law. However, the case contains important foundational commentary on the public trust responsibility of the federal government with respect to public lands: "It is true that the 'United States do not and cannot hold property as a monarch may, for private or personal purposes.'" *Light*, 220 U.S. at 536 (quoting *Van Broklin v. Anderson*, 117 U.S. 158). The Court continued:

> "All the public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose.

Light, 220 U.S. at 537.

Professor Wilkinson described *Light* as "a cornerstone of broad federal management authority over the public lands." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 282 (1980). The case was relied on in *Sierra Club v. Block*, 622 F. Supp. 842 (1985), discussed below.

(3) Modern federal public trust cases

Beginning in 1980, several cases have addressed the idea of a federal public trust applicable to federal lands and/or water rights. Three are negative, but, arguably, not controlling precedent. *Sierra Club v. Andrus*, 487 F. Supp. 443 (D. D.C. 1980), *aff'd, Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir.), *Sierra Club v. Block*, 622 F. Supp. 842 (1985), and *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1 (1999).[815] The others are all supportive. None are definitive.

(a) *Sierra Club v. Andrus* (1980)

In *Andrus*, various energy projects were seeking water rights in a Utah general adjudication. The U.S. had not been joined under the McCarran Amendment and was taking no action to assert senior federal water rights. The Sierra Club sued DOI for its failure to join the adjudication and assert federal reserved water rights on various federal lands. The district court granted summary judgment and motions to dismiss against Sierra Club.

[815] In addition, an unreported decision, *Alaska Constitutional Legal Defense Conservation Fund v. Kempthorne*, 2006 WL 2460719 (9th Cir. 2006), states, "The Plaintiffs conceded in the district court that the Public Trust Doctrine is currently applicable only to states . . . ." In *Conservation Law Found. v. Clark*, 590 F. Supp. 1467, 1480 (D. Mass. 1984), the court never reached the environmental group's public trust claim as to federal lands, noting "any further consideration of such general implied public trust duties would be inconsequential to the court's ultimate decision."

The court recognized various statutory duties of the federal agencies to manage federal lands and waters. However, the court rejected Sierra Club's argument that, in addition to these statutory duties, the National Park Service and Bureau of Land Management had independent "trust duties." (Note that the court spoke in terms of "trust obligations" and "trust duties." There is no mention in the opinion of the public trust doctrine as such.) The court held that any "trust duties" are subsumed by the various organic statutes.

With only the statutes to interpret, the court found that DOI had discretion in selecting the most effective way of protecting public resources. The court's key point was that federal reserved water rights, if they exist, would be senior to any new water rights being sought, and that they would be unaffected by the state court proceeding to which the U.S. was not a party. Accordingly, the district court concluded that it was not unreasonable for DOI to sit out the state proceedings. The district court held that in the event of a "real and immediate" threat, DOI must take appropriate action.

The Sierra Club took a narrow appeal, limited to the question of whether the Federal Land Policy and Management Act ("FLPMA") created federal reserved water rights. Just prior to oral argument, the U.S. was made a party to the Utah general adjudication. Accordingly, the Court of Appeals reached the merits of this claim. The appeals court found no federal reserved water rights because (1) there was no "reservation" of public lands and (2) the savings clause in FLPMA precluded creation of new federal water rights. The appeals court recited the holdings of the district court regarding trust duties, but it did not address them because they had not been appealed.

Professor Wilkinson criticizes the case, calling it the "leading authority against the existence of a public trust on the public lands." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Calif. Davis L. Rev. 269, 290 (1980). He may have accorded the case more dignity that it deserves. The appeals court did not address the trust argument, and the district court's discussion of the trust may be seen as dictum. It appears that the trust duties argument was a throw-away or makeweight argument. The statutes already established that the government had a duty to protect the federal resources. The real holding of the district court case is that federal reserved rights were not threatened by the state court proceeding, in any event. The existence of a public trust would not have changed this. Dictum or not, the case is unhelpful to those seeking recognition of the trust at the federal level. Indeed, it was relied on in *Sierra Club v. Block*, 622 F. Supp. 842 (1985), discussed below.

(b) *Steuart Transportation* (1980)

In *In the Matter of the Complaint of Steuart Transportation Co*., 495 F. Supp. 38 (E.D. Vir. 1980), both the federal government and the Commonwealth of Virginia sought damages for destruction of wildlife caused by an oil spill. With virtually no discussion, the district court concluded: "Under the public trust doctrine, the State of Virginia and the United States have the right and duty to protect and preserve the public's interest in natural wildlife resources." *Steuart*, 495 F. Supp. at 40. The court in *Steuart Transportation* cited *Toomer v. Witsell*, 334 U.S. 385, 408 (1948), which it says upheld a state's right "to conserve or utilize its resources on behalf of its own citizens."

(c) *1.58 Acres of Land* (1981)

In *United States v. 1.58 Acres of Land in the City of Boston,* 523 F. Supp. 120 (D. Mass. 1981), the U.S. Coast Guard sought to condemn property for expansion of its facilities in Boston Harbor. The condemnation action was opposed by the Commonwealth of Massachusetts on the ground that the United States could not obtain fee simple title to land below the low water mark. The district court ruled that the federal government could condemn the entire fee, including the *res publicum* (probably the same thing as Justinian's *jus publicum*) held by the state and that neither sovereign may alienate this land free and clear of the public trust. The case contains a brief but thoughtful history of the public trust doctrine, taking it back to Roman law. This case is helpful in that it recognizes that public trust principles may operate on the federal level, too. But it does not go so far as to recognize any inherent public trust doctrine that operates on the federal level. Here, the federal government was required to condemn this interest. Moreover, it is very traditional and very explicit in speaking about the trust in the context of unique public resources—submerged lands. On the other hand, it contains no statement that the trust could not reach further.

(d) *Air Florida* (1984)

The case that offers the most comprehensive discussion of the topic, albeit in dictum, is *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984). In this case, the District of Columbia sued Air Florida for recovery of costs associated with providing extraordinary emergency services in response to an airplane crash in the Potomac River. The district court dismissed the case. On appeal, the city raised for the first time the novel theory that Congress implicitly delegated its federal public trust responsibilities for the Potomac River to the city. In a thoughtful opinion by judge and former law professor Harry Edwards, the appellate court declined to consider this "novel" argument because it had not been raised below. *Air Florida*, 750 F.2d at 1078. Nevertheless, the court included carefully researched and analyzed dictum on the public trust doctrine. Essentially, the court concluded that the public trust doctrine might extend further than its historical roots to embrace federal resources, but that this is too important a question to be resolved without a full record and the United States as a party.

First, the court observed that the doctrine is evolving at the state-law level:

> Traditionally, the doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes. More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs. The doctrine has been expanded to protect water-related uses such as swimming and similar recreation, aesthetic enjoyment of rivers and lakes, and preservation of flora and fauna indigenous to public trust lands. It has evolved from a primarily negative restraint on states' ability to alienate trust lands into a source of positive state duties. As the California Supreme Court observed, "the public trust . . . is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands . . . ."

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Air Florida, 750 F.2d at 1082-83 (quoting *National Audubon*, 658 P.2d at 724; footnotes omitted).

Next, the court recognized that its scope may be expanded to encompass a federal trust: "In this country the public trust doctrine has developed almost exclusively as a matter of state law." *Air Florida*, 750 F.2d at 1082. "To our knowledge, neither the Supreme Court nor the federal courts of appeals have expressly decided whether public trust duties apply to the United States. There appear to be only two district court cases which explicitly hold that this common-law rule applies to the federal government as well as to the states." *Air Florida*, 750 F.2d at 1083 (citing *Steuart Transportation* and *1.58 Acres of Land)*.

The court clearly recognized that if the public trust doctrine is applicable to federal resources, it is based on federal common law. The court noted, cautiously, that federal common law is subject to preemption and that "Congress has legislated extensively with regard to many of the interests which the public trust doctrine protects." *Air Florida*, 750 F.2d at 1085-86. But, said the court, this is a "complex question" for another day. *Air Florida*, 750 F.2d at 1086.

(e) *Sierra Club v. Block* (1985)

The holding in *Sierra Club v Andrus*, discussed above, was followed in *Sierra Club v. Block*, 622 F. Supp. 842 (1985).[816] The facts of the two cases are similar. In both cases, the Sierra Club sought to force the federal government to assert federal reserved water rights in an ongoing general adjudication. In both cases, the central focus of the case was the extent to which the government's position would be harmed by failing to assert these rights and whether the failure to do so violated statutory responsibilities. In *Block*, the relevant statute was the Wilderness Act. In both cases, the Sierra Club tacked on the public trust doctrine argument as a back-up to the statutory violation argument.

The district court in *Block* expressly recognized that there is a federal public trust over public lands. "Under the 'public trust doctrine', which is a common law concept, 'all the public lands for the nation are held in trust [by the government] for the people of the whole country." *Block*, 622 F. Supp. at 866 (quoting *Light*, 220 U.S. at 537) (brackets original). However, it held that, in this case, those trust duties were subsumed by the Wilderness Act:

> However, "it is not for the courts to say how that trust shall be administered. That is for Congress to determine." *Light*, 220 U.S. 523, 537, 31 S. Ct. 485, 487. Where Congress has set out statutory directives, as in the instant case, for the management and protection of public lands, those statutory duties "compris[e] *all* the responsibilities which defendants must

[816] The *Block* case dealt with whether the government's failure to claim federal reserved water rights for a wilderness violated the public trust doctrine. It was followed by two others in the same chain of litigation. *Sierra Club v. Lyng*, 661 F. Supp. 1490 (D. Colo. 1987), *rev'd on ripeness grounds*, *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990). They dealt solely with the reserved rights issue; neither addressed the public trust issue.

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> faithfully discharge." *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980) (emphasis in original) . . . .

Block, 622 F. Supp. 866.

This language sounds like a repudiation of the public trust doctrine with respect to wilderness lands, and perhaps all public lands. But it need not be read so broadly. The *Block* court relies on *Light* for the proposition that it is for Congress to determine how the trust shall be administered. Those words, however, are taken out of context. The Court in *Light* was simply affirming the right of Congress to withdraw land for forest purposes and to impose rules requiring grazing permits, even where inconsistent with state law governing grazing. The rest of the quotation from *Light* makes clear that Congress has discretion in making decisions about how to administer the trust and that it may favor one trust purpose over another. But in the end, it must "devote the property to some other national and public purpose." *Light*, 220 U.S. at 537. Thus, under *Light* and *Block*, it would seem that where the Congress has clearly and affirmatively declared a particular management decision and that decision is consistent with overall trust purposes, the court may not second-guess that decision—hardly a remarkable conclusion. But there may be other times when Congress has been less than clear in mandating a particular management outcome. And there may be times when the public trust doctrine may continue to play a role in interpreting the words of Congress. *Block* recognized as much when it limited its holding to those situations "[w]here Congress has set out statutory directives." *Block*, 622 F. Supp. at 866.

In sum, *Block* is a significant case. It expressly recognizes that federal lands are impressed with a public trust. It recognizes that those trust purposes may be controlled and subsumed by express statutory directives.[817] In the absence of controlling comprehensive federal legislation, however, *Block* may be read to support (or at least be consistent with) a continuing role for the public trust impressed on federal lands.

(f) *Burlington Northern* (1989)

In *United States v. Burlington Northern Railroad Co.*, 710 F. Supp. 1286 (D. Neb. 1989), the federal government sued the railroad for damages for loss of wildlife at the Harvard Waterfowl Protection Area resulting from a fire caused by the railroad. The United States claimed these damages based on a public trust doctrine theory. The railroad sought summary judgment, noting that the public trust doctrine has historically been asserted by the states, not by the federal government. The district court declined to grant summary judgment, noting that it has also been applied in the federal context, noting several cases. No appeal is reported.

[817] This is consistent with the court's citation (without discussion) to *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), which held that the federal common law of nuisance was pre-empted by the Clean Water Act and found no implied private cause of action under the Clean Water Act other than the citizen suit provisions contained in the act.

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(g) *Edmonds Institute* (1999)

In *Edmonds Institute v. Babbitt*, 42 F. Supp. 2d 1 (1999), environmental groups challenged the decision of the Department of the Interior to allow "bioprospecting" for microorganisms in geysers in Yellowstone National Park. Along with numerous other legal theories, they claimed that the action violated the public trust. The court noted the similarity of the claim to the one rejected in *Sierra Club v. Andrus*. Technically, however, the court never reached the merits, due to how the case was pled. The environmental groups raised the public trust claim solely as a backup to their statutory claims. Since the court did not dismiss the statutory claims, it found it unnecessary to rule on the public trust claim. *Edmonds Institute*, 42 F. Supp. 2d at 17.[818]

(4) Would a federal public trust doctrine support public access and private utilization of natural resources?

Although they are something of a mixed bag, the cases discussed in the previous section lend some support to the idea of a federal public trust. Each of them, however, arose in a narrow factual setting limiting the value of the precedent. At this point, all that can be said is that there remains potential for application of the doctrine to constrain the management of federally controlled public resources.

Commentators and advocates who have pushed for such recognition see the doctrine as a vehicle for environmental protection and preservation. It would seem just as plausible, however, that a federal public trust doctrine could be employed on behalf of the public's right to use public resources. This might include public access or even consumptive uses such as mining, timber, and grazing.

Indeed, one might suggest that application of the public trust for preservation purposes is more of a stretch than application of the doctrine for traditional use purposes. After all, the doctrine at its very foundation was created to protect and promote private use of public resources—notably navigation, commerce, and fishing. Application of the public trust doctrine to protect uses of the federal lands like grazing, timbering, mining, and road use that are deeply engrained in American development of the West calls for no departure from precedent but rather a return to the doctrine's roots.[819]

Professor Wilkinson recognized as much. "As such, it would be a doctrine advanced by environmentalists and by industry and would have no ideological content. The doctrine could be

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[818] Although the court did not rule on the matter, its language does not suggest much enthusiasm for the doctrine. In a subsequent round of litigation, the same judge, reciting the prior procedural history, referred to the "so-called public trust doctrine." *Edmonds Institute v. Babbitt*, 93 F. Supp. 2d 63, 66 (2000).

[819] Although no court has squarely addressed this, one can find statements in the cases that reinforce a use-oriented application of the public trust doctrine. For instance, in *In the Matter of the Complaint of Steuart Transportation Co*., 495 F. Supp. 38 (E.D. Vir. 1980), the court upheld a state's right "to conserve or utilize its resources on behalf of its own citizens." The reference to "utilize" recognizes that the public trust doctrine is not just about protecting public resources but using them.

invoked by industry, for example, to emphasize the high standard of care incumbent on the Forest Service if it mishandled a timber sale, or on the BLM if it unreasonably delayed the processing of competitive bidding on a mineral lease." Wilkinson, 14 U. Calif. Davis L. Rev. at 310.

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3. LOCAL PUBLIC INTEREST REVIEW

A. Brief overview of the local public interest review

Note: This section of the *Handbook* deals with the "local public interest" as defined in Idaho Code § 42-202B(3). A separate part of the Water Code sets out "public interest" criteria applicable to certain hydropower applications. Idaho Code § 42-203C(2). The latter is not addressed in this *Handbook*.

Prior to 1978, applications for water right appropriations and transfers were decided solely on the basis of the traditional issues, such as injury, enlargement, beneficial use and speculation. Neither the Department nor affected citizens had authority to address the impacts that a water right appropriation or transfer might have on the environment.[820] Indeed, in the early days of mining development, water uses often had horrific consequences on the local environment. At one time, that was considered a cost of progress, and the law of water rights provided no mechanism for anyone to object.

That changed dramatically in 1978[821] when the Idaho Legislature added a "local public interest" review requirement to the steps required for approval of appropriations of new water rights. 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)). This test was soon applied in other settings. In 1979, when the water supply bank was created, the local public interest test was made applicable to water bank rentals. 1979 Idaho Sess. Laws, ch. 193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763). In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights. 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

As originally enacted, the public interest provision stated as follows:

> [W]here the proposed use is such . . . that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, . . . the director of the department may reject such application . . . .

1978 Idaho Sess. Laws, ch. 306, § 1 (emphasis added) (formerly codified to Idaho Code § 42-203A(5)(e)).

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[820] *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (in which the Idaho Department of Water Resources had ruled that water quality concerns were an "inappropriate consideration" prior to the adoption of the local public interest test).

[821] There is a pre-1978 ancestor of sorts to the public interest test. An oblique reference to the "public interest" in the context of certain water right applications requiring approval by the Idaho Water Resource Board was made a part of the water code in 1967. 1967 Idaho Sess. Laws, ch. 374, § 2. It was repealed two years later. 1969 Idaho Sess. Laws, ch. 468, § 1. However, this short-lived provision did not provide a basis for a broad public interest review.

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This broad language opened the door for the Department to consider other matters, such as environmental protection. In the next two decades, there was surprisingly little debate over this provision. Water appropriations and transfers were not routinely challenged on public interest grounds. Only five cases resulted in appellate decisions.[822] Of those, only one contained any real analysis of the scope of the statute, and its language was equally broad.[823]

Beginning in its twentieth year (1998), however, the local public interest statute began to generate a substantial number of contested cases. Concerned citizens, environmental groups, local protective associations, and even municipalities began filing protests of water right applications, contending that the new use would impair the local public interest. This burst of activity coincided with the growth of the large-scale dairy industry in Idaho. Local public interest litigation, however, was not limited to dairy conflicts. Public interest battles were also waged by those opposing such things as ski development, power plants, fish production facilities, and competing municipal water supplies.[824]

In prior years, these cases might have sailed through the administrative process. With active protestants involved, however, applicants were obligated to hire experts, undertake studies, produce reports, and defend their conclusions in a formal contested case.

The instances in which the end result was changed by this process appear to be few and far between. In other words, most applicants received the approvals they sought, albeit sometimes with additional conditions. Where applications have been rejected, the rejection usually has been premised on grounds other than the local public interest. The real impact of the public interest litigation, from the perspective of water right applicants, was transaction costs. These protests often delayed projects for a year or more, and could result in huge bills for technical and legal costs.

These administrative and, occasionally, judicial contests set off a firestorm of debate over the proper scope of the local public interest test. Those bringing the protests insisted that there is nothing wrong in requiring developers to slow down a bit and justify their actions, even if that entails increased costs and delay. After all, they observed, in many cases there simply was no other forum available to publicly air issues raised by the proposed developments.

Those on the receiving end of the regulatory process, however, complained that the local public interest test was being used to address things far beyond its intended scope and outside the expertise of the IDWR. Applicants were required to present evidence to IDWR officials on issues as far afield as dairy odor, lifestyle impacts, competitive economic impacts, and transportation system impacts. The resulting hue and cry ultimately resulted in an amendment to the local public interest language in 2003, over the vigorous objection of environmental groups and others.

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[822] Each of these is discussed in section 3.C beginning on page 476.

[823] *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (discussed in section 3.C at page 476).

[824] These cases are summarized in section 3.D at page 486 (district court cases) and in section 3.E at page 488 (IDWR decisions).

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In 2003, the Legislature redefined "local public interest" to limit its scope as follows:

> "Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

H.B. 284, 2003 Idaho Sess. Laws, ch. 298 (codified in pertinent part at Idaho Code § 42-202B(3)). This definition was made applicable to new appropriations, transfer, water bank transactions, and exchanges. See discussion in section 3.B at page 472.

The effect of the language is to re-focus the Department's local public interest review on issues within its jurisdiction relating to the affected water resource. The Statement of Purpose accompanying the legislation carefully explained this purpose, emphasizing that the local public interest test should not be used as an impediment to the full development of Idaho's water resources. The Statement of Purpose is set out in the footnote.[825]

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[825] The Statement of Purpose reads:

> This legislation clarifies the scope of the "local public interest" review in water right applications, transfer and water supply bank transactions. This legislation is intended to ensure that the Department of Water Resources has adequate authority to require that diversions, transfers and other actions affecting water resources do not frustrate the public's interest in the effective utilization of its water resources. The "local public interest" should be construed to ensure the greatest possible benefit from the public waters is achieved; however, it should not be construed to require the Department to consider secondary effects of an activity simply because that activity happens to use water. For example, the effect of a new manufacturing plant on water quality, resident fish and wildlife and the availability of water for other beneficial uses is appropriately considered under the local public interest criteria. On the other hand, the effect of the manufacturing plant on the air quality is not within the local public interest criteria because it is not an effect of the diversion of water but rather a secondary effect of the proposed plant. While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested" in other agencies.
>
> Water Resources' role under the "local public interest" is to ensure that proposed water uses are consistent with securing "the greatest possible benefit from [the public waters] for the public." Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that "[t]he relevant impacts and their relative weights will vary with

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Thus, the clear effect of the 2003 change is that an opponent of a development project which happens to require a water right may no longer use the water right application process to complain about the project's environmental or land use impacts unrelated to the water resource itself. It is no longer permissible to put on evidence about dairy odor, noise, dust, traffic, etc. These are land use matters that must be taken up with municipal and other authorities with proper jurisdiction.

The appellate courts have not said much about the 2003 amendment except to recognize that "the legislature narrowed the definition of local public interest considerably." *Chisholm v. IDWR*, 142 Idaho 159, 164 n.3, 125 P.3d 515, 520 n.3 (2005) (Burdick, J.).

The 2003 legislation put to rest a number of vexing issues, but left others unresolved. The following examples illustrate what is clear and what remains to be worked out.

A water diversion that threatened to dewater a trout stream would plainly fall within the scope of the new local public interest test. Dewatering a stream is undeniably a direct impact on the water resource itself, hence falling squarely within the scope of the test.

On the other hand, the legislation provides no real guidance as to how the Department is to weigh that impact. Presumably, opponents would put on evidence of the value of the stream to the community (including both its economic value and its social value), coupled with evidence that the fishery would be severely impacted.

The applicant might counter with evidence showing that the adverse impact would not be so great. In doing so, the applicant might offer conditions to mitigate the impact. Those conditions might limit the timing of the diversion, or affirmatively require the provision of other environmental benefits, such as substitute habitat, for example. The applicant, presumably, also would be allowed to offer evidence showing that other economic benefits to the community outweighed by the impairment of the fishery. The protestant, of course, would be allowed to counter that economic evidence.

> local needs, circumstances, and interests." "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion."
>
> In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public's water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose purpose has nothing to do with those issues.
>
> This legislation also clarifies that the effect on the local economy of a watershed or local area that is the source of a proposed use of water but not the place of use for the proposed use shall be considered. The purpose of this criteria is to ensure that out of basin transfers do not deprive a local area of use of the available water supply.

Statement of Purpose, H.B. 284 (2003).

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How all the evidence would be weighed by the Department (and by appellate courts) remains to be seen. Eventually, however, we can expect the development of a body of precedent. In the meantime, applicants will have a strong incentive to design their projects with the smallest negative environmental consequences, and to add positive features where possible.

Presumably, the new legislation also encompasses water quality impacts. For instance, if a diversion from a stream would reduce the quantity of water remaining, and, thereby, the assimilative capacity of the stream, this impact would appear to fall within the scope of the 2003 language and would be a proper matter for the Department to evaluate.

The examples above dealt with impacts from the diversion of water. What about adverse impacts resulting from the use of the water? For instance, suppose an applicant sought a water right for use in a facility that would contaminate the water with pollutants, and that the resulting waste water would eventually reach a nearby aquifer raising the level of contaminants in the aquifer. The 2003 language speaks in terms of impacts of "a proposed water use" (and not just the diversion). This suggests that the Department is authorized to consider impacts including contaminated return flow, seepage or waste water.

The scope of the legislation becomes a little less clear when it comes to more remote impacts. Suppose, for instance, that an applicant sought a water right for a computer production facility, and that there would be zero discharge of contaminated waste water. Could a protestant, nonetheless oppose the application on the ground that eventually those computers are likely to end up in landfills, which will then leach contaminants into the ground water? The authors doubt that the Legislature intended to follow the line of causation that far. The "proposed water use" surely applies to the use of water in the manufacture of computers, but was not intended to allow the Department to trace the life of the product through all its possible impacts on rivers and aquifers. As the Legislature noted in the Statement of Purpose: The local public interest test "should not be construed to require the Department to consider secondary effects of an activity simply because the activity happens to use water."

Eventually, the Department and the courts will articulate guidelines establishing the extent to which it is appropriate to inquire into water quality issues. A major issue here is the extent to which the Department will rely in making its determination on other state and/or federal agencies with more specific responsibilities over water quality. Presumably, for instance, the Department will defer to a large extent to other agencies who have substantial expertise and overlapping regulatory authority in this area.

After all, this is what the Court called for in *Shokal v. Dunn*:

> We believe this to be a correct assessment of the law, but add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the

> primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards. Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.

Shokal v. Dunn, 109 Idaho 330, 340-41, 707 P.2d 441, 451-52 (1985) (Bistline, J).

Note that as part of the 2003 amendment to the local public interest legislation, the Legislature grafted onto the water code new protections against out-of-basin water uses.[826] Unlike the newly restrictive local public interest test, the basin-of-origin protection is quite broad, allowing IDWR to consider effects on the local economy in the area from which the water will be diverted.

One final note. Idaho Code § 42-234(3) expressly provides that incidental recharge of ground water aquifers is in the public interest.

B. Proceedings in which the local public interest is considered

Idaho's water code references the local public interest test in a variety of contexts. The key ones are discussed below.[827]

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[826] Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank). Note that the Department's water appropriation rule does not address this requirement.

[827] In addition to those listed below, the water code addresses the local public interest test in two other contexts: temporary changes during drought conditions, Idaho Code § 42-222A(5), and exchanges, Idaho Code § 42-240.

The local public interest also is mentioned (as a legislative finding) in connection with accomplished transfers. Idaho Code § 42-1425 (declaring that such transfers are in the local public interest). There is no independent public interest test for accomplished transfers. *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995).

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(1) Applications for new permits

The first step in the appropriation of a new water right is the submission of an application for a permit to the Department of Water Resources. Section 42-203A(5) of the water code sets out seven criteria that the Department shall use to evaluate such applications, including the local public interest test. When the test was first adopted in 1978, this is the only place it appeared in the Idaho Code.

The Department's Water Appropriation Rules include information submission requirements applicable to large permits[828] and a set of evaluation criteria applicable to all new permits.[829] Note,

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Finally, a special set of public interest tests (with their own burden of proof rules) apply when "trust water" is sought to be appropriated pursuant to the *Swan Falls Agreement*. Idaho Code § 42-203C; IDAPA 37.03.08.040.04.b.iii, 37.03.08.40.05.h, and 37.03.08.45.03.

[828] "Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows: The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company, within which the proposed project is located and from other entities as determined by the director." IDAPA 37.03.08.040.05.g.

This information requirement (and several others) are applicable only to projects seeking 5 cfs or more, 500 acre-feet of storage or more, or over 200 acres of irrigation. IDAPA 37.03.08.040.05.c. Note that this paragraph is difficult to parse. It appears that the final sentence should have begun a new sub-paragraph but instead was collapsed into subsection "c". This makes it difficult to understand what "The following information" refers to. Plainly, however, the additional information requirements (and the 5 cfs exception) apply not only to sub-paragraph c but also to the following sub-paragraphs as well.

[829] The so-called "Evaluation Criteria" for all new permits include this provision dealing with the local public interest:

> e. Criteria for determining whether the project conflicts with the local public interest. The director will consider the following, along with any other factors he finds to be appropriate, in determining whether the project will conflict with the local public interest:
>
> i. The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both short and long term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;
>
> ii. The effect the project will have on recreation, fish and wildlife resources in the local area affected by the proposed project; and
>
> iii. Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local and state government jurisdictions.
>
> iv. An application which the director determines will conflict with the local public interest will be denied unless the director determines that an over-riding state or national need exists for the project or that the project can be approved with conditions to resolve the conflict with the local public interest.

however, that these rules predate the 2003 amendment and have not yet been amended to reflect the narrower scope of the local public interest test in effect today.[830] These rules also establish the burden of proof for evaluation of the local public interest test.[831]

(2) Transfers of existing water rights

Section 42-222(1) of the water code sets out criteria applicable to the transfer of existing water rights (that is, licensed, decreed, or beneficial use water rights).[832] Among these is the local public interest test.

There are no departmental rules for evaluating the local public interest in the context of water transfers. Indeed, the Department has not promulgated any rules governing water transfers.[833] However, the Department has adopted guidance on the subject in its *Transfer Processing Policies & Procedures* (Oct. 30, 2002) (reproduced under Appendix L.) Note that the discussion of the local public interest in this guidance document predates the 2003 amendment and is now obsolete.

(3) Amendment of issued permits

Where a change in a water permit is sought after permitting but prior to licensing, the applicant proceeds under section 42-211 (paragraph 1).[834] This section authorizes amendment of a permit application, subject to two criteria: "no enlargement" and "no injury."[835]

IDAPA 37.03.08.045.01.e. A separate provision, IDAPA 37.03.08.45.03, deals with the evaluation of the public interest in the context of trust water applications.

[830] For example, the rule's requirement that the effect of the project on the local economy is plainly inconsistent with the current definition of the local public interest. On the other hand, it is possible that some of the factors listed here might properly be considered by the Department under some other applicable authority. The Department has not yet worked this out in new rules. Nor has any appellate court addressed the subject since the 2003 amendments.

[831] IDAPA 37.03.08.40.04.b.ii. See discussion of burden of proof in section 11.H at page 157.

[832] Also see Idaho Code § 42-108, which reiterates the injury rule and adds a special provision requiring legislative approval of certain large water transfers.

[833] One might argue that these rules (applicable to new appropriations) should apply, at least by analogy, to public interest review in the context of water transfers. On the other hand, one might contend that the criteria should not be the same. Arguably a new appropriation (which, in effect, takes water out of the public domain) should be subject to more vigorous public review than the transfer of a water right from one private use to another. Because new appropriations are "free," the marketplace provides no reality check on the purported beneficial use. Water transfers, in contrast, typically are subject to significant marketplace constraints that, to some extent at least, ought to guard against unwarranted uses.

[834] In *Shokal*, the Department conditionally issued a permit, and required the applicant to revise its construction plan to accommodate effluent limitations. In response, the applicant made substantial changes to its proposed fish farm, and submitted a new plan to the Department. The Department approved the new plan,

However, the Idaho Supreme Court ruled in *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) that the Department should apply the full set of public interest criteria just as in an initial permit application. (See section 3.C(5) on page 484.) This holding is difficult to reconcile with the plain language of the statute (both pre- and post-2003 amendment) which clearly contemplates a more limited scope of review for amendment of permits.

Consequently, despite the more limited statutory language, applicants seeking to transfer permits should be prepared to pass the same hurdles as those seeking to transfer licenses.

(4) Water supply bank rentals

Since the establishment of the water supply bank in 1979, rentals from the bank have required consideration of the local public interest.[836] The local public interest test also appears in the regulations, which make clear that it applies to leases as well as rentals.[837]

(5) Exchanges of surface rights

As discussed in section 15.N at page 253, the Legislature acted in 1998 to codify the practice of exchanging surface water rights. (An exchange is basically two transfers folded into one.) The exchange statute repeats the criteria applicable to other water transfers, including the requirement that the Department determine that the exchange is in the "local public interest."[838]

(6) Minimum stream flows

As mentioned above, Idaho's minimum stream flow law contains its own "public interest" standard. To be approved, the proposed instream flow must be found to be "in the public, as opposed to the private, interest."[839] It is not clear whether this is the same as the "local public interest" standard referenced elsewhere in the water code, or is intended to establish a different standard.

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without holding a hearing on it. The Idaho Supreme Court found that this procedure violated the hearing requirement in section 42-211 (first paragraph). The court apparently viewed the conditional grant of a permit as a permit. Thus, the changed plan was submitted after the permit had been issued, bringing the applicant into paragraph 1 of the section. The result would be the same, however, under paragraph 2 (if the applicant sought to amend an application for permit after hearing, but prior to permit issuance). In either case, the applicant must undergo a new hearing process.

[835] Idaho Code § 42-211.

[836] 1979 Idaho Sess. Laws, ch. 193, § 3 (codified at Idaho Code § 42-1763).

[837] IDAPA 37.02.03.025.06.f; IDAPA 37.02.03.030.01; IDAPA 37.02.03.040.01.i.

[838] Idaho Code § 42-240.

[839] Idaho Code § 42-1503.

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C. Appellate case law applying the local public interest test

The statutes quoted above provide no clear guidance as to what the local public interest means or how the Department should evaluate a water right's impact on public interest. Only a handful of cases have even touched on the question. This discussion will address each of the five Idaho cases that have addressed the subject.[840] Bear in mind that each was decided before the 2003 amendment.

(1) *Hidden Springs Trout Ranch* (1981)

The first case to apply the local public interest test was *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (Donaldson, J.). The case addressed only the threshold issue of applicability of the newly enacted local public interest statute to an ongoing proceeding.

A downstream appropriator challenged an application for a water permit by Hidden Springs on the basis that the company's proposed trout farm would impair water quality. The Department declined to take evidence on the subject, noting that water quality was an "inappropriate consideration." *Hidden Springs*, 102 Idaho at 623, 636 P.2d at 745. However, while the application was still pending, the Legislature amended the water code to add the local public interest criterion. In response, the Department allowed protestants to reopen the proceeding to raise water quality issues under this rubric. On appeal, the Idaho Supreme Court held that an applicant for a water permit has no vested right to the water at the time of the application (even though the permit application did reserve the priority date). Consequently, the Court determined that the legislation could properly be applied to an ongoing permit application proceeding.[841] In so ruling, the *Hidden Springs* Court distinguished its holding in *Cooper v. Ada Cnty. Comm'rs*, 101 Idaho 407, 412, 614 P.2d 947, 952 (1980) (Donaldson, C.J.) in which it held that land use applications (an application for a zone change in this case) must be evaluated on the basis of the law, ordinances, and comprehensive plan in effect at the

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[840] Burden of proof issues are discussed in section 15.L(2) at page 249.

[841] This decision contrasts with the result reached in the following cases. *Chisholm v. Twin Falls Cnty.,* 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003) ("It is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit."). *Urrutia v. Blaine Cnty.,* 134 Idaho 353, 359, 2 P.3d 738, 744 (2000) ("Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application.") (citing *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Co*., 132 Idaho 551, 555, 976 P.2d 477, 481 (1999)); *South Fork Coalition v. Bd. of Comm'rs of Bonneville Cnty. ("South Fork II")*, 117 Idaho 857, 865-86, 792 P.2d 882, 885-86 (1990) ("Although a majority of courts from other jurisdictions have adopted that line of reasoning and held that a change in the law following an application for a building permit will be applied to the application, Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit.") (footnote omitted). See also the discussion of *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) elsewhere in this Handbook. In that case, the Idaho Supreme Court ruled that when an applicant submits an application to amend an existing permit, the Department is empowered to impose new conditions on the permit. This case did not involve the retroactive application of new legislation, but it did discuss the prior precedents on that subject.

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time of application. See *Idaho Land Use Handbook* for a more detailed discussion of retroactive legislation.

The case did not directly address the scope of the local public interest evaluation. However, the Court apparently assumed that the local public interest included water quality impacts resulting from the diversion and return flow, because that was the sole issue raised by the protestants.

(2) *Shokal v. Dunn* (1985)

The first appellate case to substantively explore the application of the local public interest review as *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (Bistline, J.). The applicant, a trout raising facility known as Trout Co., applied for a water right to divert 100 cfs from Billingsley Creek to supply a fish propagation facility and hydropower project it planned to build in the Thousand Springs area. Numerous protests were filed. After hearing, appeal, and rehearing, the Department ultimately issued the permit.

The permit was issued conditionally, contingent upon the applicant submitting a new construction and operation plan showing compliance with prescribed effluent limitations. The applicant did so. Despite requests by protestants, the Department refused to hold a hearing on the new plan. The Court ruled that the changes proposed by the applicant were so substantial as to require an amendment to its permit under Idaho Code § 42-211. The Idaho Supreme Court then remanded the matter for further hearings.

The rest of the Court's opinion addressed what should be considered by the Department at that upcoming rehearing. The Court focused on two items: the "financial resources" evaluation (under Idaho Code § 42-203A(5)(d)) and "local public interest" evaluation (under Idaho Code § 203A(5)(e)). This discussion will address only the latter.

Noting that this was a case of first impression, the Court took on what it described as the "difficult task" of defining the local public interest. *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

Justice Bistline led off with a footnote noting that the statutory local public interest review process is "related to" the common law public trust doctrine. *Shokal*, 109 Idaho at 336 n.2, 707 P.2d at 447 n.2. The authors suggest, however, that resemblance is superficial at best. Although they both deal at some level with the public interest, they share few genetic traits.[842] In any event, the public trust doctrine was effectively eliminated from water rights considerations by legislative fiat in 1996.[843] The Legislature expressly noted that the doctrine is merely common law, which can always be overridden

[842] The local public interest requirement is a specific, codified, unqualified instruction from the Idaho Legislature to a particular state agency acting on particular matters. The public trust doctrine is an amorphous, gap-filling, judge-made rule with historical roots in England and ancient Rome whose modern function, in large part, is prodding legislative bodies to be more clear about what exactly they intend to convey when they confer private rights in the beds of navigable streams and lakes and, perhaps, the water itself.

[843] 1996 Idaho Sess. Laws, ch. 342 (codified at Idaho Code § 58-1201 to 58-1203).

by statute.

The Court then briefly surveyed decisions and statutes from other western states.[844] Citing California's *East Bay Municipal Utility Dist. V. Dept. of Public Works*,[845] Utah's *Tanner v. Bacon*,[846] and *Young & Norton v. Hinderlider*,[847] Justice Bistline concluded that that the Department of Water Resources is authorized to force an applicant to subordinate its position (or even be denied the right to appropriate altogether) in favor of other potential water uses that the Department, in its wisdom, determines are of "greater importance—in effect prioritizing among uses according to the public interest." *Shokal*, 109 Idaho at 337, 707 P.2d at 448.

The Court noted that the local public interest statute provided "little guidance" on the scope of the evaluation. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. However, the Court concluded that Idaho's

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[844] For instance, the Court referenced Alaska's public interest review statute—which contains a list of explicit factors—and seemed to suggest that it should serve as a model for interpreting Idaho's terser statute. The court's wholesale embrace of a statute from a different state, as a guide to interpreting the state's own legislation, was sharply criticized by the Nevada Supreme Court in *Pyramid Lake Paiute Tribe v. Washoe Cnty.,* 918 P.2d 697, 700 (Nev. 1996).

[845] *East Bay Municipal Utility Dist. v. Dept. of Public Works*, 35 P.2d 1027 (Cal. 1934). In *East Bay* the California Supreme Court upheld the state's decision to subordinate a water right to future agricultural and municipal development.

[846] *Tanner v. Bacon*, 136 P.2d 957 (Utah 1943). Utah has long recognized the state engineer's authority to deny a water right application on the basis that it "will prove detrimental to the public welfare." Utah Code Ann. § 73-3-8 (1980). (A predecessor statute enacted in 1903 provided authority to reject an application which "threatens to prove detrimental to the public interest". 1903 Utah Laws ch. 100 § 40.) This provision was construed in *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943), a case involving a choice between two competing applications. Tanner filed the first application. Subsequently, another applicant sought a water right from the same source for a much larger multipurpose project to serve irrigation, municipal and industrial uses. The state engineer granted the first permit, but subordinated the water right to the filing for the subsequent larger project.

[847] *Young & Norton v. Hinderlider*, 110 P. 1045 (N.M., 1910). In *Young & Norton*, the Court determined that a statutory instruction to determine "the public interest" authorized the territorial engineer to chose between two competing applications for water projects (without reference to which was filed first). The determination is not a narrow one "limited to cases in which the project would be a menace to the public health or safety", but a broad one including the economic feasibility of the project and project cost. For instance, the engineer might chose the smaller of the two projects if the larger is likely to fail. *Young & Norton*, 110 P. at 1050. The court then remanded for a determination of the facts. The court recognized the need for an active determination of the public interest: "If it were a matter of private interest alone, a question simply between two rival applications for the right to use the waters in question, we should content ourselves with affirming the decision of the district court. But the question is much broader than that, and includes the public interest as well . . . ." *Young & Norton*, 110 P. at 1050.

minimum flow law[848] provided insight into what the local public interest test encompassed. *Id*. The Court determined that the two statutes could be read together because both contain the phrase "public interest" and were passed on the same day.[849] The Court declared:

> Clearly, the legislature in § 42-203A must have intended the public interest on the local scale to include the public interest elements listed in § 42-1501: "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality."

Shokal, 109 Idaho at 338, 707 P.2d at 449.

The list did not stop there, however. The Court continued:

> The above elements of the public interest are not intended to be a comprehensive list. . . . By using the general term "the local public interest," the legislature intended to include any locally important factor impacted by proposed appropriations.
>
> . . .
>
> The determination of what elements of the local public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion.

Shokal, 109 Idaho at 338-39, 707 P.2d at 449-50.

Essentially, it seems, the court gave the Department carte blanche to consider whatever it determined appropriate. The Idaho Supreme Court concluded by quoting the district court:

> [I]f the Department gives weight to the economic benefits of the project, it should also give consideration to the economic detriments. The effect of the project on water quality should be considered. . . . The effect of the project on alternative uses of the watercourse should be considered—e.g., the impact on recreational and scenic uses. The effect on vegetation, wildlife, and other fish should be considered. This is not a catalogue of all

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[848] 1978 Idaho Sess. Laws, ch. 345 §§ 2, 11, amended by 1980 Idaho Sess. Laws, ch. 238 § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736B).

[849] Reading two statutes together merely because they were passed on the same day and contain common words may be stretching it a bit, as a form of statutory construction. As it turns out, however, the Court probably was justified in doing so in this case. As discussed above, the two statutes were each drafted in response to strong political pressure from the conservation community to do something about the destruction of stream habitat in the state. Moreover, as a matter of historical fact, instream flow protection measures and the creation of mechanisms for public interest review emerged simultaneously and out of the same political mix in this period in many states throughout the West. Thus, there is a sound basis for linking public interest review and instream flow protection. In terms of legal history, they are two sides of the same coin.

> factors that may relate to the public interest element, but is a suggestion of factors to be weighed in determining whether the project will or will not be in the public interest.

Shokal, 109 Idaho at 339, 707 P.2d at 450 (quoting District Judge Schroeder, later a Supreme Court Justice).

Despite these far-reaching descriptions of the Department's authority, in the end, the Court ordered the Department to take evidence on only three items: (1) the finality of design (whether the proposed diversion was clearly enough defined), (2) the effect of de-watering the source stream on fish, and (3) the health effects resulting from de-watering the source stream.

While the Court accorded the Department substantial latitude in evaluating the public interest,[850] it did set some bounds. For instance, the Court drew a bright line limiting responsibility for review along agency lines. While the Department of Water Resources was authorized to consider "health" issues directly resulting from the diversion itself, it was not authorized to invent its own regulatory system.

The distinction is significant. The Court held that IDWR should take steps to ensure that the applicant will comply with existing environmental laws. In doing so, however, the Department is expected to defer to regulatory entities charged with protecting the environment. Here is the critical language, in full:

> Judge Smith opined that the law will not allow Billingsley Creek to become a nuisance or a health hazard, adding also that "a permit cannot issue which would allow construction of a project contrary to the authority of the Board of Health in policing water for pollution." Hence, Judge Smith concluded that the Director had authority to consider whether the design of any particular facility will meet all environmental requirements.
>
> We believe this to be a correct assessment of the law, but add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which,

[850] "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

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> when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet mandatory water quality standards. Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.
>
> The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state, and can exercise *in personam* jurisdiction over those who violate the state's water pollution laws. While it often may be both more feasible and more reasonable for Health and Welfare to take remedial steps against one violating the pollution laws, either by forcing compliance or shutting down a facility, than to resist an application for a permit in the first instance, Health and Welfare certainly has the right to be heard in proceedings before Water Resources. And, as appointed guardian of the quality of Idaho water, its views are entitled to consideration.
>
> In sum, we agree with the district court, Judge Smith, that Water Resources cannot issue a permit which would allow construction of a project violative of the laws regulating water quality. However, later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare.

Shokal, 109 Idaho at 340-41, 707 P.2d at 451-52.

Thus, IDWR may require an applicant for a water right to be in compliance with environmental standards set by other agencies. However, the quoted language suggests that the Department should not make up new regulatory standards, nor hear evidence on the need for new regulatory programs that the Legislature and other agencies with appropriate regulatory authority have not seen fit to create.

See further discussion of the issue of agency deference in section 3.H (Deference to other agencies in evaluating the local public interest) on page 499.

Although the *Shokal* case pre-dated the 2003 amendment to the local public interest statutes, it remains good law in most respects. Most notably, its instruction to defer to other state agencies with expertise in environmental matters continues to make sense and comports well with the 2003 amendments. Indeed, the Statement of Purpose for the 2003 amendments expressly embraces this part

of *Shokal*.[851] However, the portion of the *Shokal* decision giving IDWR carte blanche to consider any public interest matter under the sun is plainly and directly overridden by the 2003 legislation. Indeed, that was the whole purpose of the legislation.

(3) *Collins Bros. Corp. v. Dunn* (1988)

Three years later, the Idaho Supreme Court addressed the issue again in *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 759 P.2d 891 (1988). Collins Brothers sought a water right for geothermal water. The company intended to use the hot water to heat 110 homes and for irrigation purposes. The Department issued the permit for heating use only, disallowing the proposed irrigation use (except for supplemental use). The restriction was based on the premise that it is not in the public interest to deplete a geothermal aquifer for irrigation.

On appeal the restriction was upheld. The Court said, quoting *Shokal*, that the determination of what elements are part of the local public interest is committed to the "sound discretion" of the agency.[852]

What does this case add to our understanding of the local public interest? Very little. While it contains the broad suggestion that determining the scope of the public interest is committed to agency discretion, the Court offers no guidance on the bounds of that discretion. In short, the case certainly charted no new ground.

Arguably, denying a permit for geothermal water could have been justified even without reference to the public interest. It would seem that this case could be approached more simply and directly under the more traditional rubric of "waste." In its classic form, the public interest test involves an effort to balance various goods and harms which the free market and other governmental programs fail to address. The waste concept is much simpler. It is a one-dimensional concept: Does the proposed use yield a benefit which reasonably exploits (i.e., does not waste) the resource's potential? A simple rule rejecting any use of geothermal water for non-heating purposes fits squarely into the waste concept, because most of the value of the water (the heat) is not utilized at all.

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[851] The Statement of Purpose included this observation:

> While the impact of the manufacturing plant on air quality is important, this effect should be evaluated by DEQ under the EPHA. As noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), "[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested" in other agencies.

Statement of Purpose, H.B. 284 (2003).

[852] If the issue is one of agency <u>discretion</u>, one would think that the decision would be subject to review based on the "abuse of discretion" standard. That is, since there were no facts in dispute, the issue here was really one of policy, i.e., discretion. Instead, however, the Court reviewed and upheld the agency's action under the "clearly erroneous" standard. (The "clearly erroneous" standard was then codified at Idaho Code § 67-5215(g)(5). Its functional replacement is the "substantial evidence" standard found today at Idaho Code § 67-5215.)

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The core point of the *Collins Bros.* decision—prohibiting use of geothermal water for non-heating purposes—readily survives the 2003 amendment to the local public interest statutes. That consideration falls squarely within the new definition's focus on "the effects of such use on the public water resource." Idaho Code § 42-202B(3).

(4) *Dovel v. Dobson* (1992)

In the case of *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992) (Johnson, J.), Dobson sought both a new water right and to change a decreed right he held. Another farmer, Dovel, challenged both applications on various grounds. Among them was his claim that both violated the "local public interest" because use of the ditch carrying the existing water right had on occasion caused flooding where the ditch crossed a road. The Department rejected the protest, and granted the applications. Dovel appealed.

The Court easily disposed of the local public interest challenge saying that it "fail[ed] to see the logic" in the claim. The Court might have stopped there. Oddly, it went on to state that the conditions attached to the permit were sufficient to protect the public interest, the protection of which is "committed to the department's sound discretion." In fact, the conditions were all standard conditions which had nothing to do with the local public interest claim (flooding of the road). It would have been more accurate for the Court to say that the Department properly rejected the local public interest claim and declined to attach conditions addressing the issue. The broad language about agency discretion—essentially dictum—was attributed to *Shokal v. Dunn*.

Apparently the facts supporting Dovel's claim about road flooding were weak, and were rejected for that reason, rather than because they fell entirely outside the scope of the public interest test. But the facts of the case—alleged flooding caused by the diversion—do not call for any broad extension of the local public interest test. The impact alleged was direct and immediately related to the diversion itself.

In any event, whether dictum or not, the teaching of the case is that the Court is likely to defer largely to the Department's judgment when it comes to determining the scope and applicability of the local public interest test.

To the extent the *Dovel* case stands for the proposition that protection against flooding caused by the proposed new water use falls within the local public interest, that would not appear to violate the 2003 amendment to the definition of the local public interest—at least where it appears that the flooding is a direct, immediate, and unavoidable consequence of the new water use. On the other hand, the new definition of local public interest probably does not authorize the Department to look much further down the road when it comes to flood protection. Likewise, it is probably appropriate for the Department to condition approval of the application on compliance with federal and other flood control requirements.

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(5) *Hardy v. Higginson* (1993)

In 1993, the Idaho Supreme Court decided *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993) (Reinhardt, J. Pro Tem.), the "Box Canyon" case. Just like the applicants in *Hidden Springs* and *Shokal*, Hardy was seeking to develop a trout farm near Hagerman. (There is no connection between the applicants or their projects.) Hardy sought to amend two water permits which had been issued in 1971 and 1975. The changes were sought to correspond to a new right of way granted by the BLM. (The amendment itself was probably environmentally beneficial.) Various protestants, who did not live in the area, opposed the amendment on the basis of impacts of the project on recreation, fishing and aesthetics. The Director granted the application, but imposed certain conditions (aimed at protecting a sculpin pool) based on protection of the "local public interest" to which Hardy objected.

The Court relied heavily on *Shokal v. Dunn* for its reasoning about the scope of the local public interest. The Court did not specifically delineate the bounds of the public interest concerns that may be considered, but noted that the Box Canyon area had been designated an Area of Critical Environmental Concern by the BLM, and that the area included four candidate threatened and endangered species. The Court concluded (without any real analysis): "Clearly, the protection of this habitat falls within the local public interest as defined in *Shokal*."[853]

This holding added little if anything to the understanding of the reach of the public interest review. In any event, the 2003 amendment to the definition of local public interest clearly embraces the concern raised in the *Hardy* case—the impact of the project on local aquatic species using the water resource.

The case is more important for its procedural rulings.

The case involved an application for amendment of permits under Idaho Code section 42-211. As discussed above, this statute does not mention the local public interest. The Court ruled that the Director nonetheless may consider the local public interest under section 42-211. This ruling ignores the plain language of the statute (pre- and post-2023 amendment), which provides that permit amendments are subject to a more limited review (addressing injury and enlargement). The 2003 amendments continued to omit any reference to the local public interest review in Idaho Code § 42-221 (dealing with amendment of existing permits). Whether *Hardy* is good law after the 2003 amendment remains to be tested. (See section 3.B(3) on page 474.)

The Court also ruled that the Director may consider habitat issues raised by persons who do not live in Box Canyon, despite the pre-2003 language in the statute defining the local public interest as "the affairs of the people in the area directly affected by the proposed use." This aspect of the local public interest definition does not appear to have materially changed under the 2003 amendment. In any event, this question is better addressed under the law of standing.

[853] *Hardy*, 123 Idaho at 490, 849 P.2d. at 951.

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Finally, the Court found that the Department could impose new conditions on the permit, based on the public interest, despite the fact that the original permits had been obtained prior to the adoption of the local public interest statute in 1978.

In conclusion, each of the appellate cases discussed above involve an application of the public interest test focused on the water itself—the direct effects of the diversion and return flow. Despite some broad language in *Shokal v. Dunn*, the local public interest test has not been employed to date by the Department of Water Resources to serve as a justification either for second-guessing other regulatory agencies or for overriding marketplace-driven economic allocation decisions.

(6) *Chisholm v. IDWR* (2005)

In *Chisholm v. IDWR*, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) two *pro se* anti-dairy protestants challenged IDWR's approval of a water right transfer issued to Adrian Boer and the K&W Dairy. The applicant sought to transfer irrigation water to a new dairy operation. The Department took extensive evidence on the local public interest, including the potential impact of the proposed dairy operation on the local economy, potential ground water contamination, and potential odor issues.

After the hearing, the Department approved the application, with the condition that the applicant switch from a "flushing" system to a mechanical scraping system for removing dairy waste. The latter was determined by the Department to produce less objectionable odor.

Protestants appealed the approval to the district court. Judge Wood, of the Fifth District, upheld most of the Department's order, but reversed on the odor issue, finding that the Department's findings and conclusions were insufficient. The district court ruled that the Department should have determined what is an acceptable level of odor, and measured the proposed dairy against that standard. The district court also ruled that the Department may not satisfy its obligations to address the odor issue simply by requiring the applicant to comply with Idaho Department of Agriculture rules on odor management: "IDWR cannot legally 'side-step' this statutory standard at the transfer application stage and 'pass it down the line' to the next agency to subsequently regulate."[854] In this regard, the district court went considerably further than the outcome in *Box Canyon Dairy*. Finally, the district court ruled that IDWR failed to take into account the cumulative impact of other dairies in the Magic Valley.

On remand, IDWR issued a second approval of the water right transfer. This time the district court (Judge Butler) affirmed IDWR's order, and the protestants appealed to the Idaho Supreme Court, which affirmed IDWR's transfer approval. By this time, the local public interest test had been modified and limited, but the appeal proceeded on the basis of the pre-2003 statute. The Court affirmed.

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[854] *Bill Chisholm and Lee Halper v. IDWR (the "K&W Dairy" case)* at 20, Fifth Judicial Dist., Idaho, Case No. CV 01-00239 (Order on Judicial Review, Nov. 30, 2001).

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The Legislature's enactment of the 2003 amendments was in direct response to IDWR's consideration of odor issues in cases like *Chisholm*. Plainly, consideration of such issues is now out-of-bounds for IDWR.

D. District court rulings

There have been no appellate cases interpreting the local public interest since *Hardy v. Higginson* in 1993. However, several recent decisions at the district court level have called for a broad application of the provision. These cases provide historical context to the policy discussion, but should not be considered good law after the 2003 amendment.

(1) *Box Canyon Dairy* (2000)

The first of the recent local public interest cases to reach the district court was *Halper v. IDWR ("Box Canyon Dairy")*.[855] Box Canyon Dairy sought to transfer a water right to facilitate the expansion of its Dairy No. 3 from 300 to 1,000 cows. The application was protested on local public interest grounds (among others). When IDWR approved the transfer applications, the protestants brought suit.

The district court, Judge Higer, overruled the IDWR's approval, finding that its analysis of the local public interest issue was insufficient. The court remanded to the agency, instructing it to weigh and consider evidence on a broad range of specific issues, including "obnoxious odors."

On remand, the Department again approved the transfer, but this time with two conditions relating to environmental quality. The conditions simply required the applicant to obtain necessary permitting and approvals from the Idaho Division (now Department) of Environmental Quality, from the Idaho Department of Agriculture and from local zoning officials.

(2) *DeKruyf Dairy* (2001)

In *Halper v. IDWR ("DeKruyf Dairy")*,[856] the Department approved a water right transfer for an existing dairy, the sole protestant appealed. The district court, Judge Wood, upheld the Department's approval of the transfer, concluding that the evidence of environmental harm was purely speculative. "Any future environmental degradation potential must, like future damages in a regular civil case, be proven to a reasonable degree of certainty . . . ."[857] In so doing, the court applied a very broad reading of the local public interest standard. (The court also rejected an argument based on violation of the Clean Water Act.)

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[855] *Lee Halper and Bill Chisholm v. IDWR and Box Canyon Dairy*, Fifth Judicial Dist., Idaho, Case No. CV-00-00300 (Nov. 29, 2000).

[856] *Lee Halper v. IDWR and Calvin and Mark DeKruyf*, Fifth Judicial Dist., Idaho, Case No. CV-SP TO 00-00120 (Aug. 28, 2001).

[857] *DeKruyf* at 11.

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(3) *Wybenga* (2002)

In April, 2002, Judge Wood handed down a similar decision in *Wybenga v. IDWR*, Fifth Judicial Dist., Idaho, Case No. CV 01-00577 (Apr. 11, 2002). The Wybengas purchased a small dairy in 1996, and expanded its operation from 200 to 950 cows. They failed to obtain the necessary water rights to support the expanded operation. In 1999 the IDWR notified the Wybengas that they must obtain additional water rights. In response, the Wybengas filed an application to transfer additional water rights to the dairy to bring it into compliance. The transfer was protested on local public interest grounds alleging that the dairy had serious odor and fly problems. After a hearing, in which graphic testimony was presented by the protestants, IDWR denied the transfer application. The Wybengas appealed.

Judge Brown found that the Department properly applied the local public interest standard. Relying primarily on *Shokal v. Dunn*, the Court found that the focus of the local public interest test was not limited to water quantity and quality issues. The court further ruled that IDWR was not obligated to craft conditions on the transfer to address the odor and fly issues, but was entitled to deny the transfer application outright. Finally, the court rejected the argument that odor issues are the concern of another agency.

This decision was appealed to the Idaho Supreme Court, but was settled while the appeal was pending. Consequently, there will be no appellate decision.

(4) *Eden's Gate v. IDWR* (2022)

In *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Memorandum Decision, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Wildman, J.), Judge Wildman overturned IDWR's denial of water right applications on local public interest grounds. No appeal was taken. Although the case involves some unique facts, the district court's ruling has broader implications for local public interest review.

The original applicant, One More Mile, LLC, sought 14 ground water permits, one for each two-acre lot in a subdivision in Canyon County that it hoped to develop for residential housing. The lots had been platted in 1910, but never developed. At the time, the land was irrigated based on shares of surface water from Farmer's Co-Operative Ditch Company.[858] After the contested case hearing and before the decision was issued, One More Mile sold the land to a new developer, Eden's Gate. The sale, however, included the land only. The original owner stripped off and retained the shares of the ditch company.

[858] The Farmer's Co-Operative Ditch Company, apparently, is a mutual irrigation company. The district court noted: "It is undisputed that the Ditch Company shares are not appurtenant to any particular parcel of land and can freely be moved by a shareholder within the service area." *Eden's Gate* at p. 2. "In the Court's experience this fact is unique to the bylaws of the Ditch Company, as delivery entity shares are generally made appurtenant to the land on which they are used." *Eden's Gate* at p. 8, n.4.

Director Spackman found all this contrary to the local public interest. He noted that Idaho's Local Land Use Planning Act ("LLUPA"[859]) encourages the use of surface water, when available, requiring that it be used when land use changes are made. Idaho Code § 67-6537. Director Spackman recognized that this statute was not applicable to his consideration of a water right application, but he concluded that this legislatively expressed preference for the use of surface water to be "a relevant and important factor when analyzing the local public interest." *Eden's Gate* at p. 6.

The district court rejected this analysis. The court emphasized that the 2003 amendment to the local public interest criterion "was intended in part to limit the Department's ability to consider impacts to the local public interest delegated to other state and local agencies." *Eden's Gate* at p. 7. The court quoted from the Statement of Purpose for the 2003 amendment: "[A]s noted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330 (1985), '[i]t is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested' in other agencies." *Eden's Gate* at p. 7. The court concluded that allowing IDWR to independently evaluate this LLUPA factor would result in "duplicative litigation and potential inconsistent results." *Eden's Gate* at p. 7. See discussion in section 3.H (Deference to other agencies in evaluating the local public interest) on page 499.

The court went on to say, "Even if the Director correctly relied on the legislative policy set forth in Idaho Code § 67-6537 in reaching his decision, the Court finds the Director's findings with respect to the local public interest are not supported by substantial evidence. "The Court is unaware of any stated 'blanket' state-wide legislative policy setting forth a preference for the use of surface water over unappropriated ground water in the context of an application to appropriate water." *Eden's Gate* at pp. 6-7.

E. Unappealed IDWR contested case decisions on the public interest

A number of water right transfer applications have been protested and gone to hearing on local public interest issues. A summary of notable decisions (which have not been appealed to district court) is provided below.

Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5197	*Applicant:* F.F. Gunning and G.C. Gunning *Counsel:* Patrick D. Brown	*Protestant:* City of Wendell (*et al.*) *Counsel:* Craig D. Hobdey	*Final Order:* Sept. 26, 1999 *Application:* Apr. 3, 1997	The City and other challenged the expansion of a dairy operation. It is unclear from the order what evidence was presented. The Department concluded that the application was in the local public interest, so long as the applicant complied with zoning requirements and environmental regulations.

[859] The act is usually referred to by the acronym LLUPA. IDWR and the district court referred to it as LUPA.

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Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5401 (Sandy Right)	*Applicant:* Jerome Cheese Co. *Counsel:* Christopher H. Meyer	*Protestants:* Bill Chisholm, Lee Halper, Michael Ihler, & Darcy Thornborrow *Protestants' Counsel:* None *Objecting Public Witness:* City of Jerome *City's Counsel:* Robert E. Williams	*Preliminary Order (now final):* Oct. 12, 1999 *Application:* Dec. 23, 1998	The hearing officer denied Applicant's motion to limit the scope of the hearing on public interest issues. Consequently, the Applicant presented a broad public interest case in response to the Protestants' assertions that the cheese plant will promote dairies which are not in the public interest. IDWR found that the transfer was in the public interest and approved the application.
Transfer No. 5436 (Hincks Right)	*Applicant:* Jerome Cheese Co. *Counsel:* Christopher H. Meyer	*Protestants:* Bill Chisholm, Lee Halper, Michael Ihler, & Darcy Thornborrow *Protestants' Counsel:* None *Objecting Public Witness:* City of Jerome *City's Counsel:* Robert E. Williams	*Amended Preliminary Order (now final):* Nov. 12, 1999 *Application:* Mar. 8, 1999	Same as Transfer No. 5401 (cases were consolidated for hearing). IDWR found that application was in public interest, but denied the application on unrelated hydrological grounds (injury to Snake River).
Transfer No. 5464	*Applicant:* Salmon Falls Land & Livestock Co. *Counsel:* Roger Ling and Timothy J. Schneider	*Protestant:* William K. Chisholm *Counsel:* None	*Preliminary Order:* Mar. 7, 2001 (administrative appeals underway) *Application:* Mar. 12, 1999	Applicant seeks to construct a new dairy adjacent to the Snake River overlooking Thousand Springs. The planning and zoning commission originally denied the application for Livestock Confinement Operation ("LCO"). The applicant then reduced the size of the proposed operation (to 2,142 dairy cows) so that the local hearing requirements did not apply. The downsized facility was then automatically approved by the county. IDWR denied the transfer application on the basis that the dairy's location, near important recreational areas, was not in the local public interest.
Transfer No. 5487	*Applicant:* Tony Visser c/o Big Sky Dairy *Counsel:* Robert E. Williams	*Protestants:* Michael Miketa, Luke Phillips & Vonnie L. Peterson *Counsel:* None	*Preliminary Order (now final):* Dec. 29, 1999 *Application:* Mar. 2, 1999	The applicant sought water for a new dairy of over 6,000 cows. Protestants expressed concern about the concentration of dairies in the vicinity, and expressed concern about air and water quality, but offered no technical evidence. The Department ruled that the application was in the local public interest.

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Water Right	Applicant	Protestants	Dates	Outcome
Transfer Nos. 5522 & 5523	*Applicant*: Southfield Dairy *Counsel*: Robert E. Williams	*Protestant:* Bill Chisholm *Counsel:* None	*Preliminary Order (now final):* Dec. 30, 1999 *Application:* June 3, 1999	The applicant sought to construct a dairy of nearly 6,000 cows. The protestant raised concerns about the concentration of dairies in the area, and cumulative effects on air quality, water quality and the overall environment. The protestant offered no technical evidence. The Department approved the application, conditioned upon compliance with environmental permitting requirements.
Transfer No. 5510	*Applicant:* Gary R. & Carolyn Coleman *Counsel:* Robert E. Williams	*Protestant:* Lee Halper *Counsel:* None	*Preliminary Order (now final):* Jan. 24, 2000 *Application:* Apr. 1, 1999	Applicants proposed a 3,000 cow dairy near Wendell. The protestant raised concerns about the concentration of dairy cows in the vicinity and the cumulative effect of the dairies on air quality, water quality and the general environment. The Department approved the application, conditioned upon compliance with IDEQ rules and other environmental requirements.
Transfer Nos. 5474 & 5475	*Applicant:* Henry C. Haflinger *Counsel:* None Stated	*Protestant:* Max D. Hatfield *Counsel*: None	*Final Amended Order:* Mar. 13, 2000 *Application:* Not Stated	The Department overrode a local public interest challenge and approved the application.
Permit No. 47-08429	*Applicant:* Leo and Judity Ray *Counsel:* Lloyd Webb	*Protestant:* Fred Kippes and Floyd Kaufman *Counsel:* None	*Preliminary Order (now final):* Mar. 23, 2000 *Application:* May 7, 1999	Applicant sought to construct fish propagation facility. Water right was sought for mitigation of phosphorous, as required by IDEQ. Protestants contended that fish farms generally have degraded water quality in the area. The Department approved the application, conditioned on compliance with water quality standards.
Transfer No. 5503	*Applicant:* Jack or John Van Beek *Counsel:* Robert E. Williams	*Protestant:* Colin Maxey *Counsel:* None	*Preliminary Order (now final):* Mar. 27, 2000 *Application:* May 7, 1999	Applicants sought to enlarge an existing dairy near Jerome (from 360 to 660 milking cows). The protestant objected that there are too many diaries in the area, and that the enlargement will impact water quality and the general environment. The Department approved the application, subject to compliance with environmental regulations.
Transfer No. 5538	*Applicant:* Jack or Margaret Verbree *Counsel:* Robert E. Williams	*Protestant:* Lee Halper *Counsel:* None	*Preliminary Order (now final):* Mar. 28, 2000 *Application:* July 12, 1999	The applicant sought to add 1,187 dairy cows to an existing dairy of 463 cows. The protestant contended that existing statutes and rules are not sufficient to protect the ground water quality. The application was approved, conditioned on compliance with environmental regulations.

Water Right	Applicant	Protestants	Dates	Outcome
Transfer No. 5691 (Bragg Right)	*Applicant:* Jerome Cheese Co. *Counsel:* Christopher H. Meyer	*Protestant:* City of Jerome *Counsel:* Robert E. Williams	*Final Order:* Nov. 24, 2000 *Application:* Mar. 15, 2000	Cheese plant sought independent water supply. City protested water right transfer, complaining that loss of revenue from sale of municipal water was not in public interest (and related issues). The hearing officer rejected motions to limit the scope of the public interest determination. Applicant put on case addressing broad range of economic, technical and public financing issues. IDWR ruled that transfer was in the public interest and approved application. IDWR denied motion for attorney fees against City, but recognized that attorney fees could be awarded under Idaho Code § 12-117.
Transfer No. 5804 (Hincks Right)	*Applicant:* David Bloxham *Counsel:* Robert E. Williams	*Protestant:* Idaho Rural Council (with Bill Chisholm as public witness) *Counsel:* Richard A. Carlson	*Preliminary Order (now final):* Mar. 6, 2001 *Application:* July 27, 2000	Applicant sought water right for proposed dairy of 2,100 cows. Case focused primarily on hydrological issues. Although the denial of the application was framed in terms of the local public interest, it was really based on traditional hydrological issues. IDWR never reached the broader local public interest issues presented.
Transfer No. 69051	*Applicant:* John & Agnes Schilder *Counsel:* Robert E. Williams	*Protestant:* Bill Chisholm *Counsel:* None	*Amended Preliminary Order:* Oct. 18, 2001 *Application:* Apr. 18, 2001	Applicant sought water right to enable expansion of existing dairy, from 775 cows to 1,900 cows. The county approved a Livestock Confinement Operation ("LCO") permit. The Idaho Dept. of Agriculture approved a nutrient management plan. IDEQ water quality requirements were met. Protestant, who lives 15 miles from dairy, objected that there were too many cows in the Magic Valley and their cumulative effect may impair water quality and air quality. IDWR ruled that the transfer application was in the local public interest. Application was approved subject to various environmental conditions.
Permit No. 95-09086	*Applicant:* Kootenai Generation LLC *Counsel:* Robert A. Maynard	*Protestants:* REBOUND and a number of others *Counsel:* Teresa Hampton and Rachael Osborne	*Preliminary Order:* July 18, 2002 *Application:* May 8, 2001	Applications were denied because the proposed gas-fired power project employed water-based cooling technologies where other technologies were available. The Department determined that this inefficient use of water threatened the Rathdrum Prairie Aquifer. NOTE: This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1)), not the local public interest test.

Water Right	Applicant	Protestants	Dates	Outcome
Permit No. 95-09069	*Applicant:* Cogentrix Energy, Inc. *Counsel:* Kevin J. Beaton	*Protestants:* REBOUND and a number of others *Counsel:* Teresa Hampton and Rachael Osborne; C. Matthew Anderson and Mark E. Wilson	*Preliminary Order:* July 18, 2002 *Application:* Mar. 29, 2001	This was a competing power project. Same result as in Kootenai Generation LLC (see above). NOTE: This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1)), not the local public interest test.
Transfer No. T69606	*Applicant:* C.E. Brackett Cattle Co. (Chet Brackett) *Counsel:* Robert E. Williams	*Protestants:* John K. and Pat Courtnay *Counsel:* None	*Amended Preliminary Order (now final):* Aug. 27, 2002 *Application:* Nov. 5, 2001	Applicant sought water right for beef cattle feeding operation for 999 animal units (mostly calves). Most of the attention in the hearing focused on traditional hydrological issues, but the parties also presented evidence on the public interest. IDWR approved the transfer application, conditioned as follows: (1) Applicant to obtain county land use approval, (2) Applicant to remain in compliance with zoning requirements, (3) Applicant to comply with IDEQ water quality requirements.
Permit No. 65-22357	*Applicant:* WestRock Associates LLC (now Tamarack Resort, Inc.) *Counsel:* Jeffrey C. Fereday, John M. Marshall & Deborah E. Nelson	*Protestant:* Citizens for Valley County *Counsel:* William M. Eddie	*Final Order:* Dec. 20, 2002 *Application:* Mar. 16, 2001	Applicant sought new "future needs" municipal water right (8.6 cfs) to support proposed four season resort in Valley County. On September 16, 2002, the hearing officer rejected a challenge to the application on local public interest grounds. The permit was granted after hearing.

Water Right	Applicant	Protestants	Dates	Outcome
Permit No. 61-11954	*Applicant:* Rocky Mountain Land & Cattle Co. *Counsel:* Kent W. Foster	*Protestants:* BLM; King Hill Domestic Water & Sewer Assn. (KHDW); Bross Family *BLM Counsel:* Floyd P. DeWitt *KHDW Counsel:* Richard A. Carlson	*Preliminary Order:* Oct. 21, 2002 *Application finalized on:* Jan. 14, 2002	The Applicant sought a new appropriation of water (1) to cover an existing cattle feedlot for 2,800 head in Elmore County (whose water rights were inadequate), and (2) to provide for expansion of the CAFO to 15,000 head. Protestants raised a broad range of concerns under the local public interest, from odors to traffic impacts. IDWR granted the application only for the existing CAFO operation. However, IDWR denied additional water sought for the expansion of the CAFO as in violation of the local public interest. Specifically, IDWR found that the expanded CAFO: (1) would present a traffic hazard, (2) would be a nuisance to local residents, and (3) was contrary to the public interest review undertaken by the county in rejecting a "request for variance" necessary for the CAFO expansion. NOTE: It was not necessary for IDWR to reach these public interest issues; IDWR also rejected the application the independent statutory ground that the project was "speculative" because local land use requirements could not be met without a change in an ordinance.
Permit No. 13-7697	*Applicant:* Twin Lakes Canal Co. ("TLCC") *Counsel:* Robert L. Harris	*Protestants:* Idaho Rivers United PacifiCorp Great Salt Lake Keeper IDFG Bear Lake Watch Trout Unlimited Franklin Cnty. F & G Assn. Greater Yellowstone Coalition Oneida Narrows Organization	*Final Order* Oct. 18, 2012	TLCC sought a permit to appropriate water from the Bear River for power and irrigation. Environmental entities protested, contending that the project would harm fisheries. Relying on *Shokal*, TLCC contended that IDWR should defer to FERC with respect to its evaluation of the local public interest. Director Gary Spackman denied the application on public interest grounds, saying that deferring to FERC (on a hydro license application that had not even been filed yet) would be an abdication of the Department's statutory responsibility. In so ruling, the Director considered harms and benefits of the project, including other uses that could be made of the water. This appears to be the only post-*Shokal* decision addressing the role of deference to other agencies.

F. Historical background on the local public interest test

Historically, in Idaho and throughout the West, the allocation of water under the prior appropriation doctrine has involved little if any governmental direction or interference. So long as the applicant could demonstrate that the proposed use was beneficial, feasible and not speculative, and

involved no injury or enlargement, that was the end of the matter. It was not considered the government's job to critique the applicant's business plans or decide who, among competing applicants, could make the best use of the resource. Rather, the determination of which is the highest and best use of water is left to the competition of private initiatives in the marketplace.[860]

In the decades beginning in the 1960s, however, considerable attention has been directed to the question of whether the government ought to play a more active role in the allocation of water rights and the protection of the public's water resources. This was driven by two strong political factors.

First, there was a growing perception that something must be done to stem environmental losses and protect remaining vital habitat. The objection was made that the playing field was not level, particularly with respect to the protection of instream flows. Throughout the West, the diversion requirement stood as a barrier to those who wished to obtain water rights to protect river flows and lake levels.[861] Today, statutes and judicial decisions have addressed this perceived imbalance to some extent at least. Idaho, like virtually all western states, has incorporated protection of instream flows into the prior appropriation system.[862] Nevertheless, the perception that the prior appropriation doctrine is "anti-environmental" is difficult to shake.[863]

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[860] The Idaho Constitution does provide preference for certain water uses. Idaho Const. art. XV, § 3. However, this so-called "preference" is a misnomer. Courts consistently have interpreted these provisions– which are common throughout the West–as conferring a right of condemnation on certain uses. Thus, a higher preference user can buy out a lower preference user (in a forced sale), but a higher preference user cannot simply demand that water be allocated or reallocated to it on the basis of preference.

[861] The rule, as traditionally stated, is that a water right requires a "diversion to a beneficial use." That is, it is necessary to artificially remove (or impound) water to obtain a legally protected right to its use. The Idaho Supreme Court recently confirmed that the diversion requirement remains a part of Idaho water law (except as provided under the minimum flow statute). *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case).

[862] Idaho's minimum stream flow act was adopted in 1978. 1978 Idaho Sess. Laws, ch. 345, §§ 2, 11, amended by 1980 Idaho Sess. Laws, ch. 238 § 14 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1763B). This was not the first legislative recognition of the role of instream flows. As early as the 1920s, the Legislature enacted statutes which protect lake levels in Idaho's large lakes for "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code §§ 67-4301, 67-4302, 67-4303 (Big Payette), 67-4304, 67-4305, 67-4306 (Priest, Pend d'Oreille and Coeur d'Alene). Moreover, in the early 1970s the Legislature adopted several more statutes which directed the State Parks and Recreation Board to appropriate for scenic beauty and recreational purposes. The remaining unappropriated water flows in certain scenic springs and streams. Idaho Code §§ 67-4307 (Malad Canyon), 67-4308 (Niagra Springs), 67-4309 (Big Springs), 67-4310 (Box Canyon), 67-4311 (Thousand Springs), 67-4312.

[863] An abiding distrust of the prior appropriation doctrine is reflected, for example, in the writing of Professor Charles Wilkinson. Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (1992) (in which Prof. Wilkinson describes the prior appropriation doctrine as one of five "Lords of Yesterday"); Charles F. Wilkinson, *In Memoriam: Prior Appropriation*, 21 Envtl L. v (1991) (in which Prof. Wilkinson announces the "death" of the prior appropriation doctrine at age 152).

Second, there was fear of "water grabs." During this time, water policy was strongly influenced by concern that Idaho (and other intermountain states) were vulnerable to massive water transfers to thirsty and powerful out-of-state interests.[864] The late 70s and 80s were dominated by proposals and rumors of proposals for all manner of trans-basin diversions, from coal slurry pipelines, to water barges, to re-engineered rivers, to towing icebergs.

These seemingly disparate political forces—for environmental protection, local control, and states' rights—combined and gained momentum. Some might characterize the combination of political forces as improbable or coincidental, but the result was real. Water codes throughout the West were amended in the 1970s to give local citizens a stronger voice in water allocation decisions.

The result was often a three-pronged reform. The first prong was express legislative recognition of instream flow rights. The second prong was a requirement that water right applications be subjected to "public interest" scrutiny. The third prong was the provision of additional procedural and substantive protections specifically aimed at deterring out-of-state or out-of-basin water transfers.

Idaho was no exception. Legislation on each of these subjects was enacted in the final decades of the last century.

In 1978, the Legislature responded to citizen pressure (in the form of a grassroots petition drive) by adopting the state's minimum stream flow law.[865] The provision expressly recognized that instream flows for "fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" are beneficial uses.[866] In so doing, the act implicitly did away with the diversion requirement.[867]

In the same year, the local public interest law was made applicable to all new appropriations.[868] When the water supply bank was created in 1979, the local public interest test was made applicable to water bank rentals.[869] In 1981, the local public interest test was extended to apply to transfers of

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[864] "In late 1963, public attention was directed toward a proposal by out-of-state interests to divert water from the Snake River in Idaho south through Nevada for use in California and the Southwest. The proposal was firmly opposed within the state, and it was generally recognized that as long as Idaho had 'surplus' water it would continue to be viewed as a source for supplying other states' increasing needs." *Idaho Power Co. v. State ("Swan Falls I")*, 104 Idaho 570, 571, 661 P.2d 736, 737 (1983).

[865] 1978 Idaho Sess. Laws, ch. 345 §§ 2, 11 (codified at Idaho Code §§ 42-1501 to 42-1505, 42-1736B).

[866] Idaho Code § 42-1501.

[867] Idaho's minimum stream flow law contains its own "public interest" standard. To be approved, the proposed instream flow must be found to be "in the public, as opposed to the private, interest." Idaho Code § 42-1503.

[868] 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)).

[869] 1979 Idaho Sess. Laws, ch.193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763).

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existing water rights.[870] Public interest consideration also arises today in the context of exchanges, temporary changes during droughts, accomplished transfers, and trust water appropriations (see discussion in section 3.B at page 472).

In 1980, the Legislature established special rules for "out-of-basin" uses for ground water rights involving over 5,000 acres or 10,000 acre-feet per year. Such uses must meet special tests related to "the local economic and ecological impact" and must be specifically approved by the Legislature.[871]

In 1981, the Legislature enacted two more "anti-water-grab" protections. First, it prohibited any change in the nature of use of a water right (e.g., a change from agricultural to industrial or municipal) that "would significantly affect the agricultural base of the local area."[872] Second, it required affirmative legislative approval of any change in the nature or period of use of any water right involving over 50 cfs or 5,000 acre-feet of storage.[873]

In 1990, the Legislature enacted detailed legislation specifically dealing with any new out-of-state uses of water.[874] The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the federal commerce clause for the circumstances under which states may restrict water exports to other states.[875] The Water Export Act included two primary elements. First, it added a

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[870] 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

[871] 1980 Idaho Sess. Laws, ch. 186, § 1 (codified at Idaho Code § 42-226).

[872] 1981 Idaho Sess. Laws, ch. 147, § 3 (codified at Idaho Code § 42-222(1)).

[873] 1981 Idaho Sess. Laws, ch. 147, § 1 (codified at Idaho Code § 42-108). This provision applies only to changes involving a change in period or change in nature of use. An "agriculture" to "agriculture" transfer of over 50 cfs or 5,000 acre-feet of storage would not require legislative approval. (Legislative approval, presumably, would come in the form of a concurrent resolution.) Thus, the Act appears to be aimed at transfers from agricultural use to new industrial or municipal uses. By its own terms, the provision applies equally to in-state and out-of-state transfers. This even-handed treatment is required to comply with the Commerce Clause of the U.S. Constitution. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.).

[874] 1990 Idaho Sess. Laws, ch. 141 (codified at Idaho Code §§ 42-222, 42-401(3) and elsewhere).

[875] In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), the Supreme Court struck down parts of Nebraska's water export statute which violated the "dormant commerce clause" of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3. The Court voided Nebraska's absolute ban on water exports to "non-reciprocating" states, but upheld those provisions reasonably relating to the "conservation" of water. Thus, so long as restraints on exportation are expressed in terms of legitimate state concerns (which the Court found to include conservation), a limited preference for in-state use may not constitute an unconstitutional burden on commerce. In Nebraska's case, the Court commended the state's objective "to conserve and preserve diminishing sources of groundwater," ruling that "[t]he purpose is unquestionably legitimate and highly important" and that this purpose was "advanced" by the conservation requirements imposed on exporters of water. 458 U.S. at 954-55. Accordingly, for Idaho to make the restrictions on export stick, it was necessary to add the water conservation test to the requirements for <u>all</u> new and transferred water rights.

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requirement applicable to all water right applications (not just those out-of-state): Every new water right appropriation or transfer must be shown to be consistent with (or not contrary to) the "conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f), 42-222(1). Second, the Water Export Act repealed earlier measures aimed particularly at water use in Oregon, and replaced them with a set of rules applicable to all out-of-state water transfers. Such out-of-state uses were required to follow special procedures and to satisfy five additional tests aimed generally at evaluating the relative availability of water in the sending and receiving states. Out-of-state water bank rentals were made subject to the same five tests in 1992.[876]

In 2003, the Legislature included a new basin-of-origin protection measure as part of the bill amending the local public interest review. 2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code §§ 42-203A(5)(g), 42-222(1), 42-240(5), 42-1763).

In sum, the local public interest test as enacted in 1978 was part of a broad package of legislative measures responding to a series of perceived threats to Idaho's water resources.

G. Making sense of the public interest test

In Idaho and throughout the West, water is recognized as a public resource. But what does this mean? Rights in water are distributed on a first-come, first-served basis to private parties, at no cost. Once acquired, water rights are valuable private property, which may be traded on the market and sold to the highest bidder.

Is this consistent with the "public" nature of the resource? Or, as some would suggest, is there an inherent conflict between public and private values in water?

The authors suggest this is no fundamental conflict. The simple answer is that the people of Idaho have determined that the public interest is best advanced by placing control of this public resource to a very large extent in private hands. A fundamental premise of the prior appropriation doctrine is that, by and large, the public benefits when water is put to use privately.

This is not a novel concept. As with so much of our nation's wealth, we trust the marketplace more than the government to allocate this natural resource to its highest and best use. Thus, in processing applications for appropriations, the Department of Water Resources asks whether the proposed use is a beneficial use. It does not inquire whether some other use of the water might be "more" beneficial.

On the other hand, however, the allocation of water rights is in one sense fundamentally different from other resources allocated within a free market system. That unique feature, of course, is the "use it or lose it" requirement.

[876] 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

The rules of abandonment and forfeiture do not ensure, nor are they intended to, that every use made of water will be its highest and best use. But these rules are intended to ensure that some beneficial use is made.

As virtually all uses these days are deemed "beneficial," the rule serves primarily to ensure that water remains "in play" somewhere in the economic system. The holder of a water right may not take that water right out of economic circulation, like a trunk load of coins stored in the attic. Water must work, one way or another, or its holder loses all rights therein. Except for certain, statutory exceptions, the prior appropriation doctrine requires that water be subjected to the rigors of the marketplace, day in and day out.

The marketplace, not the government, lets Grandpa and Grandma decide, after a lifetime of farming, whether they would be better off trading in their farm and water for a condominium in Arizona and a nest egg for their children. If they decide to sell, the marketplace will select the next use for that water, whether that be washing dairy equipment, providing water amenities in a new residential community, cleaning microchips, or flushing salmon to the sea.

Those are hard choices. But few would rather have the government make those decisions for them. This is not to say that the government does not influence the allocation of resources. It does. Tax policies, trade rules, zoning regulations, environmental rules, subsidies, grants, outlays and a host of other regulations substantially influence what shows up in the marketplace and for what price. But despite all the regulatory prodding, the consumer still makes the choice in the end.

Yet, when it comes to water transactions, the guiding hand of the government is a little closer. The Legislature has expressly provided that in both new water appropriations and in transfers of existing rights, the Department of Water Resources shall insure that the outcome is in the "local public interest."

Just what this means, and how far this intrusion into the marketplace reaches, is the subject of this discussion. Is this a *carte blanche* for governmental second-guessing of the marketplace? Or is its goal more discrete? Is there a logical boundary that can be put on this analysis? Or is it a slippery slope with no real bounds?

As the 2003 amendment made clear, the meaning of the local public interest, though broad, is not unbounded. Most importantly, it should not be construed to undermine the prior appropriation doctrine's basic commitment to marketplace allocation. Rather, the goal of the public interest evaluation is to enable the Department to scrutinize the environmental and social impacts of the proposed diversion of water and return flows that are not addressed by the marketplace or by other governmental programs.[877]

[877] Economists call these "externalities." For instance, if a company is allowed to pollute freely (at no cost to the company), the company will likely choose to pollute more and more, even if the cost borne by the public in the form of impaired health and environmental degradation outweighs the company's profit. This is a classic externality. The marketplace will not and cannot correct this error on its own: Because the cost of the

H. Deference to other agencies in evaluating the local public interest

As discussed above, the 2003 amendment limited the scope of IDWR's evaluation of the local public interest, but did not eliminate it. IDWR retains authority to evaluate the impact on the local community of effects the proposed project on the water resource itself.

This presents two questions (one substantive, one procedural):

- To what extent should the Department rely on or defer to other state and federal regulatory entities with expertise and jurisdiction over issues pertinent to the local public interest?

- Can and should the Department employ "forward-looking" conditions requiring the water right applicant to comply with yet-to-be determined environmental and mitigation requirements imposed by other agencies in other permitting contexts?

Although there are dozens of cases addressing the local public interest test, as of this writing, there are only three addressing these particular questions. The first is the Idaho Supreme Court's seminal decision on the local public interest, *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (Bistline, J.). This well-known case provides a careful analysis of the issue. Although decided before the 2003 amendment, nothing in that amendment would alter the basis of the Court's reasoning. Indeed, the Statement of Purpose accompanying the 2003 amendment expressly embraces *Shokal*. See footnote 825 on page 469. The second is IDWR's unappealed decision a contested case known as *In the Matter of Application for Permit No. 13-7697 in the Name of Twin Lakes Canal Co.*, Final Order Denying Application for Permit (Oct. 18, 2012) (G. Spackman, Director) ("*Twin Lakes*"). The third is *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Memorandum Decision, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Wildman, J.). These cases are discussed, in turn, below.

The Shokal decision

In *Shokal*, a trout raising facility known as Trout Co. applied for a water right to divert 100 cfs from Billingsley Creek to supply a fish propagation facility and hydropower project it planned to build in the Thousand Springs area. When the Department issued the permit, those who had protested the application appealed. The district court reversed, and the applicant appealed.

The Idaho Supreme Court remanded to IDWR, instructing the Department to hold a new hearing on the permit (due to other procedural concerns). The Court included extensive direction for how the Department should consider and apply the local public interest test and the financial viability test.

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pollution to the manufacturer is zero, the marketplace equation will necessarily be lopsided. The government must step in, in some form. It may add the public costs to the company's ledger. It may simply ban or restrict the pollution. Or it may mandate a technological fix.

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The Court noted that the local public interest statute provided "little guidance" on the scope of the evaluation. *Shokal*, 109 Idaho at 337, 707 P.2d at 448. It went on to conclude that the scope of the evaluation is broad. *Shokal*, 109 Idaho at 338-39, 707 P.2d at 449-50.

While the Court accorded the Department substantial latitude in evaluating the public interest,[878] it did set some bounds. Most notably, the Court drew a bright line limiting responsibility for review along agency lines. While the Department of Water Resources was authorized to consider "health" issues directly resulting from the diversion itself, it was not authorized to invent its own regulatory system.

The distinction is significant. The Court held that IDWR should take steps to ensure that the applicant will comply with existing environmental laws. In doing so, however, the Department is expected to defer to regulatory entities charged with protecting the environment. Here is the critical language, in full:

> Judge Smith opined that the law will not allow Billingsley Creek to become a nuisance or a health hazard, adding also that "a permit cannot issue which would allow construction of a project contrary to the authority of the Board of Health in policing water for pollution." Hence, Judge Smith concluded that the Director had authority to consider whether the design of any particular facility will meet all environmental requirements.
>
> We believe this to be a correct assessment of the law, but add a word of caution regarding the differing functions of Water Resources and the Department of Health and Welfare. Water Resources must oversee the water resources of the state, insuring that those who have permits and licenses to appropriate water use the water in accordance with the conditions of the permits and licenses and the limits of the law. It is not the primary job of Water Resources to protect the health and welfare of Idaho's citizens and visitors—that role is vested in the Department of Health and Welfare, including compliance with the water quality regulations and monitoring effluent discharge in our state's waterways. Nevertheless, although these agencies may have separate functions, Water Resources is precluded from issuing a permit for a water appropriation project which, when completed, would violate the water quality standards of the Department of Health and Welfare. It makes no sense whatsoever for Water Resources to blindly grant permit requests without regard to water quality regulations. Hence, Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet mandatory water quality standards. Under this rule, Water Resources has the authority to withhold a permit application until it receives a proposed

[878] "The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources' sound discretion." *Shokal*, 109 Idaho at 339, 707 P.2d at 450.

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> design which appears to be in compliance with the water quality standards. Once the conditional permit is granted, Water Resources has continuing jurisdiction over compliance with the conditions of the permit, including suspension or revocation of the permit for proven violations of the permit's conditions regarding water quality.
>
> The Department of Health and Welfare continues to have the primary responsibility for policing water quality control in this state, and can exercise *in personam* jurisdiction over those who violate the state's water pollution laws. While it often may be both more feasible and more reasonable for Health and Welfare to take remedial steps against one violating the pollution laws, either by forcing compliance or shutting down a facility, than to resist an application for a permit in the first instance, Health and Welfare certainly has the right to be heard in proceedings before Water Resources. And, as appointed guardian of the quality of Idaho water, its views are entitled to consideration.
>
> In sum, we agree with the district court, Judge Smith, that Water Resources cannot issue a permit which would allow construction of a project violative of the laws regulating water quality. However, later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare.

Shokal, 109 Idaho at 340-41, 707 P.2d at 451-52.

Thus, IDWR may require an applicant for a water right to be in compliance with environmental standards set by other agencies. However, the quoted language suggests that the Department should not make up new regulatory standards, nor hear evidence on the need for new regulatory programs that the Legislature and other agencies with appropriate regulatory authority have not seen fit to create.

The Twin Lakes decision

In the *Twin Lakes* proceeding, Twin Lakes Canal Company ("TLCC") sought a permit to appropriate water from the Bear River for power head storage, power, irrigation storage, and irrigation. Director Gary Spackman denied the application, concluding that the project was not in the local public interest.

Relying on *Shokal v. Dunn*, the canal company took the position that IDWR should not make an independent determination of the overall local public interest but should instead defer to FERC's overall evaluation of the public interest. The canal company urged IDWR to simply issue the water right permit conditioned upon subsequent FERC issuance of the hydropower license and the applicant's compliance with any conditions therein. In other words, according to the canal company, there was no need for the Director to independently weigh and balance the various factors bearing on the local public interest; instead, the Director should defer to FERC's overall assessment of the public interest. Director Spackman adamantly rejected this approach:

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> TLCC's reading of Shokal is too broad and if adopted, would result in an impermissible, wholesale abdication of the director's responsibilities related to the local public interest. TLCC would have the state skip any evaluation of the local public interest when considering an application for a hydropower project in Idaho, leaving the evaluation and determination of the local public interest to a federal entity. It is an incredible argument that the Idaho legislature intended to abdicate to FERC – a federal entity – the state's authority to weigh the local public interest when considering a water right application. . . . . This suggestion of abdication is even more surprising in the present case because TLCC asked IDWR to consider its water right application prior to submitting a final application to FERC for a FERC license. IDWR has a responsibility to consider all the criteria contained in Idaho Code § 42-203A, including the local public interest. This is particularly true when no other jurisdiction has made any determination on the subject. Furthermore, the interpretation suggested by TLCC cannot be sustained in light of Idaho's constitutional and statutory authorizations to the Department to regulate the use of water in Idaho for power purposes. Idaho Const. Art. XV, § 3; Idaho Code § 42-203B(l).
>
> The present case is factually distinguishable from *Shokal*. In *Shokal*, the protestants raised a question about whether a proposal for water use would satisfy water quality standards. Water quality was one small aspect of the local public interest criterion. In contrast, TLCC is attempting to extend *Shokal* to eliminate all public interest review by the director. Nothing in *Shokal* can be read to suggest such a complete abdication of authority.

Twin Lakes at 6-7.

Thus, it is evident that any deference to other agencies sought by the applicant must not be to the overall public interest determination. But *Twin Lakes* does not appear to preclude deference to individual evaluations undertaken by agencies with expertise and authority found in environmental regulatory frameworks.

Reading *Shokal* and *Twin Lakes* together, it is evident that IDWR is the ultimate "decider" when all pros and cons are weighted. But an applicant may ask IDWR to defer to other state and federal agencies (through enforceable conditions requiring compliance with any requirements those agencies impose) with respect to findings on specific factors that would be factored into IDWR's overall weighing of the local public interest. Thus, for example, IDWR could defer to agencies with expertise and regulatory authority over issues such as wetland mitigation and fish and wildlife protection.

Where the other agency already has completed its evaluation and established permit or other requirements, deference by IDWR to that decision is straightforward. It is a trickier matter when the other agency is proceeding in parallel with the IDWR proceeding, and even more so when the other agency action will be completed subsequent to IDWR's action on the application. *Shokal* plainly

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requires that the project design be sufficiently settled that IDWR knows what it is evaluating. Thus, the applicant appearing before IDWR must be in a position to articulate with sufficient clarity the nature of the environmental review that will be undertaken by the other agency and the range of possible outcomes. IDWR might then be able to impose a forward-looking condition on the water right requiring a satisfactory resolution of the environmental issue through mitigation or otherwise, the specifics of which would be subsequently determined by another agency. IDWR could then complete its overall evaluation of the local public interest based in the assumption and condition that the environmental issue will be addressed and resolved.

Having first rejected the canal company's argument that it should defer to FERC's overall assessment of the public interest, the Director engaged in his own assessment. He concluded that the project was not in the local public interest because, among other things, it eliminated the opportunity to develop irrigation water storage at the site. "Granting a permit to TLCC for its proposed dam and storage that is dominated by a hydropower use would limit the ability of the state to utilize the Bear River Narrows as a future storage site for uses other than hydropower." *Twin Lakes* at 14.

Eden's Gate (2022)

The most recent decision touching on this subject is Judge Wildman's decision in *Eden's Gate*. Language in that case, and its specific reference to the Statement of Purpose for the 2003 Act, reinforces the conclusion the 2003 amendment "was intended to limit the Department's ability to consider impacts to the local public interest delegated to other state and local agencies." *Eden's Gate* at p. 7. See further discussion of *Eden's Gate* in section 3.D(4) on page 487.

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4. STANDING

See the *Idaho Land Use Handbook* for a more complete discussion of the law of standing.

A. Standing in matters before the IDWR

A principal effect of the local public interest test is to expand the grounds upon which one may protest a water right application.

If one's protest is based on injury, for example, it is necessary to own a water right which will be injured. The law of standing will not permit one to protest a water right application on the basis that it might injure someone else's water right.

When it comes to the local public interest, however, anyone who can legitimately demonstrate the he or she is affected by the alleged adverse impact on the local public interest has standing to raise the claim. Thus, the practical effect of the local public interest test is to broadly expand the number of potential protestants to a water right application.

This does not equate to a *carte blanche*, however, for anyone to protest any water right on any basis. The federal case law on this subject is becoming increasingly restrictive, requiring evidence of actual impact on the person raising the protest.[879] Idaho law may not be far behind. In the past, the Department of Water Resources has been quite liberal in this area. In response to an increasing volume of transfers and public interest protests in recent years, however, there is some indication that the Department is beginning to more rigorously review a protestant's standing and basis for objection.

B. Standing in general adjudications

There are two controlling Idaho appellate cases on the issue of standing in general adjudications: *Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 157 P.3d 610 (2007) (Schroeder, C.J.) and *Fort Hall Water Users Ass'n. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996) (Silak, J.). The teaching of these cases is that we must forget everything we know about the law of standing. Instead, standing in a general adjudication is defined by statute. Specifically, Idaho Code § 42-1401A(1).

In *Bray*, the Court held that Idaho's general adjudication statute broadens the scope of standing. In this case a group of "conservation-minded water right claimants" were found to have standing to challenge the water rights of others.

> The Boise Project Control Board contends that Bray, *et al*. lack standing to participate in this matter since they have failed to show that any decision by this Court could affect their water rights, reasoning that Bray, *et al*. does "not point to any injury that is not shared alike by all citizens," as required under *Young v. City of Ketchum*, 137 Idaho 102, 106, 44 P.3d

[879] *Lujan v. National Wildlife Federation ("Lujan I")*, 497 U.S. 871 (1990): *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

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> 1157, 1161 (2002). However, adjudication statutes define the standing requirements for the SRBA. *In re: SRBA, Fort Hall Water Users Assoc.*, 129 Idaho at 42, 921 P.2d at 742. Idaho Code § 42–1412 provides that any "claimant" can file an objection or response to a water right reported in the director's report. This Court agrees with the SRBA court that Bray, *et al*. have standing to pursue their claims.

Bray, 144 Idaho at 118, 157 P.3d at 612. In short, anyone with a water right claim in a general adjudication may challenge the water right of any other claimant, without any particular showing of injury.

In an earlier case, *Fort Hall Water Users Ass'n. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996) (Silak, J.), the Court ruled that the statutory definition of standing in general adjudications narrows the definition of standing. In *Fort Hall*, an association of non-Indian water users filed objections in the SRBA to the Director's Report of water rights that earlier had been agreed upon in a settlement between an Indian tribe, the State, and numerous other parties. The Idaho Supreme Court held that because the association was not itself a water right "claimant" within the meaning of Idaho Code § 42-1401A(1), it lacked standing to file objections to the proposed water rights of others. Specifically, the Court found only those asserting an ownership right (or on whose behalf ownership rights are being asserted) are claimants. While the United States asserted ownership of the rights "for use on land owned by non-Indian individual," but that was not good enough. These were only contractual rights, not ownership rights.

Justice Schroeder wrote a most interesting concurrence, pointing out that this seemingly anomalous holding is strictly a function of the statute:

> On its face it might appear that this case is inconsistent with the decision in *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996), in which this Court found standing to adjudicate an issue when only one plaintiff stated a conclusory and speculative potential injury. It is obvious in this case that a very large body of water users have a clear interest in the events that have taken place and that rights which they have may be adversely impacted by those events. It appears incongruous that this Court has opened its doors to a vaguely defined possible injury that almost certainly will not occur in *Boundary Backpackers* and closed its doors to water users in this case whose contract rights are well-defined and whose futures are clearly threatened. The apparent discrepancy is explained by the fact that in this case standing is determined by statute, I.C. § 42–1401A(1), not the policy of this Court. I concur in this case because the water users are precluded by statute from being heard, though their interests are clearly at stake. No similar statute limited the plaintiff in Boundary Backpackers.

Fort Hall, 129 Idaho at 42-43, 921 P.2d at 742-43 (Schroeder, J., concurring).

It would seem that the decision in *Fort Hall* may be called into question by *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, J.), which held that the federal government holds bare "legal" title to water rights in federal projects, while irrigation districts hold "beneficial use" title as trustees on behalf of the water users within the district. *Pioneer Irrigation* would seem to suggest that water users may hold some sort of actual ownership interest, as opposed to mere contract rights.

In two unappealed decisions, Special Master Terrance A. Dolan ruled that the principles of associational standing (e.g., *Glengary-Gamlin Protective Assn., Inc. v. Bird*, 106 Idaho 84, 675 P.2d 344 (Ct. App. 1983) (Burnett, J.)) are not applicable in a general adjudication.[880] Accordingly, the Idaho Ground Water Appropriators (an organization that represents water right claimants, but does not itself own water rights) was not allowed to participate in 51 subcases in the SRBA. Ironically, IGWA's standing was challenged by the Surface Water Coalition, another organization that represents water right claimants, but does not itself own water rights. The Surface Water Coalition, however, was careful to file its objections in the names of its members, and only then, for purposes of convenience, was allowed to litigate collectively in on behalf of its party-members. Ultimately, IGWA did the same thing.

[880] *In re SRBA, Case No. 39576 (Subcases 01-1J, et al.),* Order Denying Motion to Participate and Setting Status Conference (Idaho Dist. Ct., Fifth Jud. Dist. Aug. 28, 2007); *In re SRBA, Case No. 39576 (Subcases 01-1J, et al.),* Order Denying IGWA's Motion for Reconsideration (Idaho Dist. Ct., Fifth Jud. Dist. Jan. 3, 2008).

5. THE WATER SUPPLY BANK

Idaho's Water Supply Bank (usually referred to simply as the "water bank") was created by the Legislature in 1979 to provide a mechanism to facilitate the movement of "excess" water rights to those who could put them to use, particularly on a short-term basis. Such arrangements could always be made independently of the water bank through private lease agreements, but that would entail IDWR approval of transfer applications, which do not contemplate "re-transfer" of the water back to the original use at the end of the lease term. The water bank is intended to provide a convenient and efficient clearinghouse function, to streamline the approval process, and to provide a degree of state oversight.

The Water Supply Bank is administered by the Idaho Water Resource Board through the Idaho Department of Water Resources. The Department operates under rules adopted by the Idaho Water Resource Board.[881]

The practice of leasing and renting water rights predates the establishment of the water bank in 1979. After Idaho's irrigation storage reservoirs began to come on line in the early part of the twentieth century, it became evident that in many years there was more storage available than the contract holders of the storage space would need for the upcoming irrigation season. (This is not surprising. A central purpose of storage is to provide for supplies in dry years, not necessarily all years.) Consequently, there developed a market for at least a portion of the annually unneeded storage water. Beginning in the 1930s, informal annual leases began to occur, some perhaps without formal transfer proceedings, primarily within water delivery organizations in Eastern Idaho.[882] In 1979, the practice was formalized and authorized by the same statute establishing the water bank.[883]

The water bank handles both natural flow water rights (the definition of which includes ground water right[884]) and storage rights.[885] To be eligible for lease, the water right must be decreed, licensed or permitted.[886] Thus, an unadjudicated "beneficial use" right may not be leased to the Water Supply Bank. Although the Water Supply Bank handles primarily leases and rentals, it may also acquire water rights on a permanent basis (by sale or gift) and sell them to others.

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[881] IDAPA 37.02.03 (Water Supply Bank Rules); IDAPA 37.02.04 (Shoshone-Bannock Tribal Water Supply Bank Rules).

[882] The first known rental occurred in 1932, when 14,700 acre-feet of water were rented for 17 cents per acre- foot.

[883] Idaho Code §§ 42-1761 to 42-1766.

[884] Natural flow rights are defined to include ground water rights. IDAPA 37.02.03.010.07.

[885] Storage rights are defined in terms of surface storage. IDAPA 37.02.03.010.10. It is not clear how an "aquifer storage and recovery" water right might be handled.

[886] IDAPA 37.02.03.025.02(a). Technically a water permit is not a water right, but they may be traded through the water bank nonetheless.

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Transactions involving non-storage water rights are handled directly by the Board; most storage right transactions occur through local rental pools.

The Water Resource Board's rules speak in terms of "lease" and "rental" of rights in a way that departs from the ordinary meaning of these terms. The rules provide that water right holders may "lease" a water right to the water bank, and that others may "rent" those rights from the water bank.[887]

The process begins with the holder of the right offering the water right to the Board for sale or lease. (Forms for lease and rental are available from the Department.) The holder may attach conditions, such as a minimum rental price and the duration of the rental period. The statute authorizes the Board to pay the holder for the lease or sale of the right. In practice, however, the Board typically accepts the water right on a contingency basis under which no payment is made to the lessor unless a third person steps forward to rent (or purchase) the right.[888]

The Board is not required to accept every water right offered to it for lease, sale, or gift. It will consider each offer based on criteria set out in the implementing rules, including whether the right has previously been abandoned or forfeited,[889] the reasonableness of the proposed price[890] consistency with the State Water Plan,[891] consistency with the local public interest,[892] likelihood that the right will be sold or rented,[893] and other factors deemed appropriate.[894] Although the rules have not yet been updated, the statute was amended in 2003 to add an additional criterion dealing with interbasin transfers.[895] If the Board determines to accept the right, it will issue a resolution to that effect, which may be accompanied by conditions.[896] If the holder finds the conditions unacceptable, he or she may withdraw the right from the Water Supply Bank within 30 days.[897]

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[887] This terminology is found in IDAPA 37.02.03.010.05; 37.02.03.010.08; Idaho Code §§ 42-1762(2), 42-1763.

[888] IDAPA 37.02.03.025.06(h).

[889] IDAPA 37.02.03.025.06(c).

[890] IDAPA 37.02.03.025.06(d).

[891] IDAPA 37.02.03.025.06(e).

[892] IDAPA 37.02.03.025.06(f).

[893] IDAPA 37.02.03.025.06(g).

[894] IDAPA 37.02.03.025.06(i).

[895] Idaho Code § 42-1763.

[896] IDAPA 37.02.03.025.07.

[897] IDAPA 37.02.03.025.08(a).

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The water bank regulations make no special provision for public notice or hearing with respect to a lease to the water bank, however, leases are considered at public meetings of the Board.[898] Once a water right is accepted by the Board and placed into the bank, the holder of the right must cease using the right, even if it is not rented out to another.[899] However, the forfeiture provisions are tolled during the time the right is in the water bank, even if it is not rented out.[900]

Water right holders typically see the water bank procedures as providing three primary benefits. First, while a water right is in the water bank, it is protected against forfeiture. Second, the rental and use of water under a right that has been placed in the bank may proceed without going through the statutory transfer process.[901] Third, the water bank helps to identify buyers and match them with sellers. The water right holder who places a right in the bank receives a lease payment if the right is rented.

Rental of a water right from the water bank is initiated by an application to the Director. There are no rules governing how the Department matches up water rights leased to the Board with renters seeking the water. As a matter of Departmental practice, this is handled on a first-in, first-out basis. Although water bank rentals are not subject to the "change" requirements under Idaho Code § 42-222, they are nonetheless subject to substantial scrutiny by the Director. The Director evaluates proposed rentals to ensure no injury, no enlargement, beneficial use, sufficient supply, and consistency with the local public interest.[902] Although forfeiture is not evaluated at the rental stage, it is considered by the Board when the water right was offered for lease.[903]

The Director is authorized to act on his own with respect to rentals of up to five years; Board approval is required of all sales and rentals in excess of five years.[904] Public notice and hearing with respect to rentals discretionary with the Director (unless for a rental period five years or more).[905]

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[898] IDAPA 37.02.03.025.05.

[899] IDAPA 37.02.03.025.08(b). There is an exception to this rule for water used for hydropower which is rented by the federal government for salmon flow augmentation. *Id*.

[900] Idaho Code §§ 42-223(5) and 42-1764(2); IDAPA 37.02.03.025.08(e).

[901] The statute provides that "[t]he approval of a rental from the water supply bank may be a substitute for the transfer proceeding requirement of section 42-222, Idaho Code." Idaho Code § 42-1764(1). In actual practice, rentals have not been required to undergo a transfer proceeding. In addition, the statute establishes no limit on the duration of a water bank transaction; however, the rules governing local rental pools typically restrict water bank leases and rentals to one year. While the District 01 rental pool allows longer term transactions, none have occurred as of this writing.

[902] Idaho Code § 42-1763; IDAPA 37.02.03.030.01.

[903] IDAPA 37.02.03.025.06(c).

[904] IDAPA 37.02.03.030.05.

[905] IDAPA 37.02.03.030.02 ("The Director may give notice . . . .").

The Department charges a ten percent fee for all water bank rentals.[906]

The statute also authorizes the Board to appoint "local committees," as that term is used in the water distribution statute,[907] to manage local rental pools for the banking and rental of storage water under the auspices of the water supply bank.[908] As it has turned out, almost all of the activity pursuant to the Idaho water bank statute occurs through the local committees that the Board has authorized to manage storage water rental pools on the Boise River, the Payette River, and the Snake River above Milner Dam.[909] As the statute provides, the local committee meets yearly to set the amount of the administrative fee the committee will charge per acre-foot for rentals from the pool.[910] Typically, the storage water spaceholder places a specified number of acre-feet of water with the bank in the spring when he or she is confident that the leased amount will not be needed that year.

No fixed price is set for non-storage water leased through Board-managed portion of the water bank. Rather, the lessor names a minimum rental price when the water right is offered to the Board. Renters then have the option to rent at that price. In contrast, the price of stored water leased through the local rental pools is set by each rental pool with the approval of the Water Resource Board. Prices vary from pool to pool and are based on conditions set for each pool. Rental prices for 1999 in the Upper Snake (Water District 01) were $2.95 per acre foot for water use above Milner Dam and $10.50 per acre foot for use below Milner Dam. (See discussion of "Two Rivers Concept" in section 21 at page 306.) The rental price in the Boise River basin (Water District 63) was $6.50 per acre-foot for in-basin use and $6.93 for out-of-basin use. In the Payette basin (Water District 65) it is $3.20 per acre-foot in-basin and $5.65 out-of-basin. The rental price of storage waters from federal reservoirs is subject to the approval of the Bureau of Reclamation which operates the facilities. When a water right is leased from the bank, the Water Board or local committee extracts a small transaction fee from the rental payment; the balance then goes to the owner/lessor.[911]

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[906] IDAPA 37.02.03.035.

[907] Idaho Code § 42-605(6).

[908] Idaho Code § 42-1765. This provision entitles a local committee to "market stored water" between space holders and renters "under rules and regulations adopted by the [Idaho Water Resource] board."

[909] Pursuant to a settlement of its on-reservation reserved water rights, the Shoshone-Bannock Tribe also has authority to operate a rental pool. The Shoshone-Bannock Water Supply Bank is governed by a separate set of rules. IDAPA 37.02.04.

[910] The provision states that the local committee "shall determine . . . that portion of the proceeds for the year from the lease of stored water to be paid to consenting contract holders of the storage rights as reimbursement for their costs and that portion to be retained by the district in which the committee is located." Idaho Code § 42-1765. The statute does not expressly empower the local committee to set rental rates; these are set by means of the Water Board's rules and regulations under which the local committee operates.

[911] Idaho Code § 42-1765 (authorizing local committee to determine the portion to be "retained by the district in which the committee is located"); IDAPA 37.02.03.035.01.

Although the water bank and local committee statutes make no distinction between classes of water users, the local rental pools all have rules preferring rentals to irrigators over non-irrigators,[912] and in-basin rentals over out-of-basin rentals. For example, the rental of one's irrigation storage right for a non-irrigation purpose results in the storage space involved being accounted the next year as the last to fill.

The water bank is currently being used as the mechanism for making substantial quantities of storage water—up to 427,000 acre-feet per year—available for rental by the federal government from a combination of the three local rental pools mentioned above in connection with salmon recovery efforts.[913]

[912] For example, Rule 3.2 of the Water District #63 Rental Pool Procedures states: "Operation of the Rental Pool will be by and for the irrigators within the district through the Committee. These procedures are designed to assure that stored water is maintained and first made available for irrigation use."

[913] Idaho Code §§ 42-1763B. This legislation sunsetted in January 2005, but is expected to be renewed.

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6. WATER DELIVERY AND MANAGEMENT ENTITIES

Note: See section 7 beginning on page 528 for a discussion of water rights ownership issues.

A. The basic types of water delivery organizations

A variety of institutions are involved in the development and distribution of water. State government, municipalities, for-profit corporations, non-profit corporations, quasi-municipal entities, individuals, and the federal government all have a hand in the business of water supply. This section provides an overview of the basic forms of water delivery entities listed below.[914]

Commercial irrigation companies (aka commercial ditch companies and carrier ditch companies) (including private utilities). Unlike most other entities discussed in this chapter, commercial irrigation companies are organized for profit. They are in the business of delivering irrigation water, which they divert under water rights they hold, to consumer-irrigators under a rental, sale or similar contract arrangement. Commercial irrigation companies are either "private contract companies" or public utilities.[915] Private contract companies (predating public utility regulation) were common in Idaho's formative days, but few remain.[916] Most, if not all, commercial irrigation companies today are private utilities. There is no difference between the two with respect to their ownership of the water rights. *See*, *Eagle Creek*, 165 Idaho at 474-75, 447 P.3d at 922-23.

Mutual irrigation companies (aka mutual canal companies or mutual ditch companies) and Carey Act operating companies. These entities, often simply called "canal companies," are not-for-profit corporations that deliver irrigation water at cost to their shareholder-members. They are formed by a group of irrigators who join together for the purpose of constructing and/or assuming the management of a water project and delivering water to themselves for mutual benefit. In the early days of Idaho, for profit commercial irrigation companies created so-called "operating companies" (essentially mutual irrigation companies) to take advantage of the land settlement program established by the Carey Act.

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[914] Names of irrigation entities can be confusing. One should be careful not to reach conclusions about the type of entity involved on the basis of its name. Occasionally, one will encounter a mutual canal company with a name ending in the word "District" (for example, the Capital View Irrigation District in Boise). More often, one will observe canal and ditch companies referring to themselves informally as "irrigation districts."

[915] *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (Burdick, C.J.) (identifying private contract companies and public utility companies as being types of commercial ditch companies).

[916] "The commercial ditch company's heyday was in the 1880's; almost none persist today." *Eagle Creek*, 165 Idaho at 474, 447 P.3d at 922.

Irrigation districts. These are quasi-governmental entities formed pursuant to a statutory election process. They rely on taxing authority to undertake and manage water delivery efforts. They provide irrigation water to all irrigable lands desiring such within a prescribed boundary.[917] They can be analogized to school districts or sewer districts.

Bureau of Reclamation. This federal agency, within the Department of the Interior, plays a substantial role in the delivery of water throughout the West. Its history and structure is discussed in section 9 at page 568.

In addition, the reader should be aware of other organizational forms which play a significant role in connection with the delivery and management of water supplies. They include:

Water districts and ground water districts. "Water districts" and "ground water districts" sound like synonyms for irrigation districts, but they are completely different forms of governmental entity. (See discussion in sections 0 and 6.G.) These statutorily created entities do not hold water rights for delivery purposes. Nor do they supply irrigation water. They may, however, hold water rights for other purposes, such as to facilitate their members' mitigation obligations.

Water measurement districts. In 1995 the Idaho Legislature enacted Idaho Code § 42-706 which authorized IDWR to create water measurement districts to facilitate measurement and reporting of diversions outside of established water districts. In 1996, the Director created three such districts within the Eastern Snake Plain Aquifer. These entities do not hold water rights, and are not discussed further in this section.

Unique entities. The reader should also be aware of various unique or hybrid water entities. For instance, the Boise Project Board of Control was formed to manage the delivery systems for the Bureau of Reclamation's Boise Project. The Board of Control is made up of representatives of the various irrigation districts which have water supply contracts along with other officials.

The Water Supply Bank. Naturally, the water bank and the local rental pools are involved in the provision of irrigation water. These are discussed in section 5 at page 507.

Idaho Department of Water Resources. Of course, a major player in the management of irrigation water is the state agency which oversees the administration of water rights. The organization of the IDWR and the Idaho Water Resource Board which oversees it are discussed in section 12 at page 160.

Municipal Water Providers. Although this chapter and the next deal primarily with entities supplying irrigation water, some of the same principles could be applicable (or at least analogous) in

[917] There of course are many types of irrigation water delivery organizations in the West. One treatise reports that, as of 1978, there were at least 7,000 irrigation water delivery organizations in the 17 Western states, which together delivered about half of the irrigation water in the region. Robert E. Beck, 3 *Waters and Water Rights* § 25.01 at 470 (1991), *see also* Meyers, Tarlock, Corbridge and Getches, *Water Resource Management* at 704 (1988).

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evaluating the ownership of municipal water rights. Consequently, a brief discussion of this topic is included in section 7.G at page 563. A more detailed exploration of municipal water rights is found in section 23 at page 327.

B. Commercial irrigation companies (aka commercial ditch companies or carrier ditch companies)

In the early days of western development, commercial irrigation companies (also known as commercial ditch companies or carrier ditch companies) were prevalent in the business of supplying irrigation water to newly-settled lands.

The early homesteaders lacked the capital required to construct irrigation projects. In those days, there were no governmental entities to turn to. The first wave of settlement pre-dated the federal laws and programs that were to become critical to Idaho's agricultural development, such as the Carey Act (1894), and, especially, the federal Reclamation Act of 1902. Idaho did not enact its irrigation district laws until 1903. Consequently, many of the first western water projects were constructed with private investment money. Investors in places as far away as New York and London often undertook the expense and risk of constructing diversion facilities. (For example, the New York Canal in Boise was named after the home of its investors.) Irrigators were then encouraged to settle the lands under one of the homestead acts and begin farming, with the promise of reliable irrigation water. In the end, if all went right, the commercial irrigation company could make a profit.

Today, we would recognize these private carrier companies as having many of the attributes of investor-owned public utilities. (And most of those that have survived are public utilities today.) In the early days, however, they operated before the concept of public utility regulation took hold. (Idaho's public utility law was enacted in 1913,[918] although there were some earlier attempts at utility regulation.) Predictably, there were abuses, miscalculations, and shattered expectations—such as when a carrier company went bankrupt and the foreclosing bank sought to repossess the company's water right. Just as predictably, government institutions of the day (legislatures, courts and constitution-framers) responded to these problems as best they could, without the benefit of experience in public utility regulation.

In 1889, following California's lead, Idaho adopted constitutional provisions imposing a form of utility regulation on the private irrigation water suppliers. In Colorado, the courts did essentially the same thing, using common law principles.

[918] "The public utilities commission was created by act of the legislature in 1913. 1913, S.L. Chap. 61. By that act such powers as municipalities may have had to control and regulate public utilities was withdrawn and transferred to the commission." *Village of Lapwai v. Alligier*, 299 P.2d 475, 478 (Idaho 1956) (Taylor, C.J.).

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The heyday for these ventures in private, for-profit irrigation water systems was the 1880s, but their glory was short-lived.[919] The advent, beginning at the turn of the last century, of massive federal assistance and extensive state involvement in the facilitation of irrigation reduced the need for for-profit commercial irrigation companies.[920]

The nineteenth-century experience with commercial irrigation companies left a legacy of case law and constitutional provisions that remains in play today. This body of law deals with the often confusing concept of "public use" in the delivery of irrigation water. This subject is explored in section 7.B at page 530.

In any event, and as background for understanding this legacy, it is appropriate to explore the commercial irrigation company concept. Beck defines a commercial irrigation company as an entity that holds a water right in its own name, for its own benefit, pursuant to which it rents or sells water to consumers for a profit. Robert E. Beck, 2 *Waters and Water Rights* § 26.03 (1991). Hutchins noted their essential features this way: "The commercial irrigation company is an organization designed to construct and operate irrigation works for the profit of persons who build the works and retain temporary or permanent ownership. It thus differs essentially from the mutual irrigation company and the irrigation district, which are nonprofit community enterprises." Wells A. Hutchins, *Commercial Irrigation Companies*, USDA Tech. Bull. 177 (1930). Notably, the commercial irrigation company's shareholders could live in places like New York, and in any event were not the persons making use of the water that the company delivered.

Commercial irrigation companies were organized in any of three ways. See discussion in section 7.C on page 534 (in particular, the Fereday quotation from the *Eagle Creek* case). In some instances, they were temporary entities that would later transfer their water rights to the irrigators, a mutual irrigation company or a Carey Act operating company, where after the commercial irrigation

[919] "Irrigation development in Idaho passed through four somewhat overlapping stages, "first was individual effort, then corporate enterprise [the ditch companies], then government aid to private enterprise [1894 Carey Act], and finally large-scale federal reclamation [1902 Newlands Act]." The Ditch Companies which so dominated the development of water resources at the time of the 1889 Convention were burdened heavily by the Water Article incorporated into the Constitution. The companies were further damaged in the financial crash of 1893, and disappeared from Idaho shortly after the turn of the century. This, in turn, rendered much of the language in Article XV dead letter." Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 21 (Dec. 2010) (footnote omitted) (brackets original).

[920] *See, e.g.,* Barton H. Thompson, *Institutional Perspectives on Water Policy and Markets*, 81 Cal. L. Rev. 103, 118, Table 2 (1993) (indicating that the state with the greatest reliance on commercial irrigation companies is Colorado, where they now supply only 1.6% of the irrigation water delivered in that state). "No known commercial companies are being organized now." Robert E. Beck, 2 *Waters and Water Rights* § 26.03 at 496, n. 110 (1991).

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company would be dissolved. In other instances, the commercial irrigation company might continue to operate permanently as a private contract company or a public utility.[921]

C. Mutual irrigation companies (aka mutual canal companies or mutual ditch companies) and Carey Act operating companies

The next form of water distribution entity we take up is the mutual canal company (aka mutual ditch company, mutual irrigation company, or cooperative ditch or canal company). In contrast to the commercial irrigation companies discussed in the preceding section, these are companies "formed expressly for the purpose of furnishing water to shareholders, not for profit or hire." *Jacobucci v. Dist. Ct. in and for Jefferson Cnty*, 541 P.2d 667, 671 (Colo. 1975). They are formed by and for the irrigators themselves. They are engaged in the business of storing and/or transporting irrigation water for use by its shareholders, in return for payment of assessments levied on the shares to meet operating expenses of the company (without profit). *Nelson v. Lake Canal Co.*, 644 P.2d 55, 57 (Colo. App. 1982). The water users hold shares in the company, the number of shares is based on the amount of irrigation water the shareholder requires. The mutual canal enterprise—and not the commercial or carrier company—is the type of non-profit, corporate irrigation supplier we see in Idaho today.

Dean Trelease notes that "a mutual water company is a non-profit corporation that owns diversion or storage works and delivers water at cost to users who own its stock, and that derives its operating funds from assessments levied against the stockholders." Trelease, *Water Law, Resource Use and Environmental Protection*, ch. 6 at 612, n. 1.

Trelease notes that mutual irrigation companies come in a variety of forms; he considers Carey Act operating companies (see below) to be mutual irrigation companies. Trelease, *Water Law, Resource Use and Environmental Protection*, ch. 6 at 613. The Idaho Supreme Court has said, "In form, [Carey Act] operating companies acted much like mutual irrigation companies because they operated to deliver water to their shareholders at cost." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 4756, 447 P.3d 915, 923 (2019) (Burdick, C.J.). The only difference between Carey Act operating companies and other mutual irrigation districts pertains to whether the water rights held by the irrigators are appurtenant to individual tracts of land. See discussion in section 7.D beginning on page 539.

According to Trelease, the distinguishing feature of a mutual canal company appears to be its direct control by its shareholders, and its lack of any purpose beyond supplying the shareholders with irrigation water (meaning no profit motive, even though, in some cases, these may be organized under the state's general corporation laws).

[921] For an early discussion of the nature and duties of commercial irrigation companies in California, *see* Kenneth L. Blanchard, *The Relation Between Irrigation Water Users and Distributing Companies With Special Reference to Right Arising Out of Contract*, 7 Cal. L. Rev. 295 (1919).

Hutchins' view is to the same effect: "The distinctive feature of the mutual irrigation company is service rendered at cost to the lands of members only." Wells A. Hutchins, *Mutual Irrigation Companies*, USDA Tech. Bull. No. 82 at 3 (1929).

Wiel describes mutual canal companies as "a special kind of private service companies . . . [which] are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only." Samuel C. Wiel, 2 *Water Rights in the Western States* § 1266 at 1170-71 (1911). Wiel's treatise distinguishes mutuals from ordinary "public service" entities:

> [I]t is very important to note that, being in private service only, [mutual irrigation companies] are not subject to the public control which obtains as to public service companies. Nor can a mutual company be forced to deliver water to others than its stockholders.

Samuel C. Wiel, 2 *Water Rights in the Western States* § 1266 at 1171 (1911).

As discussed above in connection with commercial irrigation companies, a company engaged in public service is subject to special requirements and obligations, including most notably the obligation to continue to supply all those to which service has been initiated. Samuel C. Wiel, 2 *Water Rights in the Western States,* ch. 54 at 1179 (1911). *See also* Kinney, 3 *Irrigation and Water Rights* § 1480 (2d ed. 1912). (See footnote 949 at page 533.)

Many mutuals were formed by individual water right holders who pooled assets, incorporated the ditch company and conveyed their water rights to it in return for stock. *See, e.g.,* historical discussion in *Jacobucci v. Dist. Ct. in and for Jefferson Cnty*, 541 P.2d 667, 671 (Colo. 1975). This pattern was followed in establishing the "cooperative" ditch company—another term sometimes used to describe this form of company—which was the subject of *Fuller v. Azusa Irrigating Co. Fuller v. Azusa Irrigating Co.*, 71 P. 98 (Cal. 1902). However, it is clear that mutuals were formed in a "variety of ways." Robert E. Beck, 2 *Waters and Water Rights* § 26.02 at 477 (1991). There seems to be no reason, in law or logic, to distinguish between a mutual canal company formed in such a way and one formed before any shareholder had acquired water rights. In either case, the resulting arrangement is the same. The shareholders own the company and the water rights.

A unique type of mutual canal company is the Carey Act company. The federal Carey Act of 1894, as amended, 43 U.S.C. § 641, is a homestead law under which Congress guaranteed to make up to 1,000,000 acres of public domain available for settlement in each of the seventeen Western states, provided the state would carry out a water development and land settlement program as specified in the statute. The state would contract with a for-profit "construction company" (a commercial irrigation company) which would obtain water rights in its own name, build the irrigation project and sell to settlers stock in a successor "operating company"—a private water delivery corporation formed pursuant to state statutory procedures established to implement the Carey Act.

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In other words, the construction company was the promoter of the project; the operating company, through its shareholders, purchased the promoter's interest in the facilities and water rights. The construction company operated the project only in the interim, before this conveyance occurred. Once the project was completed and all (or nearly all) of the operating company stock sold to entrymen, the construction company departed (presumably with its profit), conveying to the operating company all of its remaining interest in the project facilities and water rights. The federal government issued land patents directly to the settlers, who proceeded with the non-profit stock company in place.[922]

The Idaho Supreme Court provided this helpful summary of the Carey Act:

> In 1894, Congress passed the Carey Act, a homestead law that guaranteed up to a million acres of the public domain to Western states if the states would carry out a water development and settlement plan. Mikel H. Williams, Idaho Dep't of Reclamation, *the History and Development and Current Status of the Carey Act in Idaho* 1 (1970). The Carey Act was enacted to encourage westward expansion into desert lands when the 1890's land rush stalled because most areas with readily available water had been settled. *Id*.
>
> To implement the Act, the federal government agreed to convey lands to the states once an ample supply of water was furnished to areas. *Id*. at 2-3. To provide the supply of water, for-profit "construction companies" would seek the state's approval to build irrigation projects. *Id*. at 6. The state would then determine whether there was enough unappropriated water for the venture. *Id*. If satisfied by the proposal, the State would determine the water rights that the construction company could sell. *Id*. The construction company would then sell stock in a nonprofit "operating company" (formed according to state statutory procedure) to settlers who would perfect the water right by putting the water to beneficial use on the land. *Id*. (citing *In re Robinson*, 61 Idaho 462, 103 P.2d 693 (1940)). In form, operating companies acted much like mutual irrigation companies because they operated to deliver water to their shareholders at cost. *Id*. Once the irrigation system was completed and the construction company had sold all (or most) of the stock in the operating company, the construction company would convey all its interest in the irrigation system and water rights to the operating company. *Id*. The federal government would then issue land patents directly to the settlers. *Id*.
>
> As a result, the "origin and purpose of Carey Act companies are distinct from those of ordinary water corporations [and] have been generally recognized by the statutes and by the court as forming a distinct

[922] For a discussion of the Carey Act process, *see* Robert E. Beck, 3 *Water and Water Rights* § 26.02(g) (1991).

> class of water corporations." *In re Johnston*, 69 Idaho 139, 145, 204 P.2d 434, 438 (1949). Under Idaho law, "water rights to all lands acquired under the [the Carey Act implementation chapter] shall attach to and become appurtenant to the land as soon as title passes from the United States to the state." I.C. § 42-2025. Thus,
>
> > [i]t seems clear that by virtue of the statutory conditions and these contracts, and the certificate issued pursuant to them, that the company sells, and the purchaser buys a water right dedicated to his land . . . It seems clear that the certificate in carrying out the whole plan represents and must represent a water right sold to the settler and dedicated to his land, and of which he is the beneficial owner. And further, at least in the absence of any showing of separation, the water right is an appurtenance to the land to which it was dedicated and is part of that property.
>
> *Leland v. Twin Falls Canal Co*., 51 Idaho 204, 3 P.2d 1105, 1107 (1931). Thus, a Carey Act operating company's shares document the settler's ownership of the water right. *See* Williams, *supra*, at 7 ("It must be remembered that corporations organized to construct irrigation systems under the Carey Act do not become owners of water rights or irrigation systems; but are only given the right to sell water rights for the purpose of recovering the cost of the construction of the works with a reasonable profit.") (citing I.C. 42-2504 (1917)).

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 475-76, 447 P.3d 915, 923-24 (2019) (Burdick, C.J.) (brackets original).

Idaho, Wyoming, Montana, and Oregon saw the most lands patented under the Carey Act process, with 630,000, 200,000, 92,000 and 73,000 acres patented, respectively. The other Western states each patented less than 40,000 acres under the Act, and therefore today have relatively few Carey Act operating companies. In Idaho, water lawyers frequently encounter Carey Act operating companies.[923] In other western states, such as Colorado, these companies are rare.

The Carey Act operating company provides water deliveries on a per-share basis in return for an assessment. It operates not for profit, but merely to deliver irrigation water at cost to its shareholders. Shareholder-irrigators control the company. Thus, Carey Act operating companies are mutual irrigation companies. The Idaho Supreme Court also has referred to a Carey Act operating company as a "mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests . . . ." *Ireton v. Idaho Irrigation Co., Ltd.*, 30 Idaho 310 (1917). However, the statutory scheme under which they were formed entitles them to powers in dealing with

[923] Four prominent examples of mutual canal companies created in Idaho pursuant to the Carey Act are the North Side Canal Company, Twin Falls Canal Company, Aberdeen-Springfield Canal Company, and the Big Wood Canal Company.

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their shareholders which other mutuals may not have absent a charter, article, or by-law provision (such as the right to impose liens against lands and water rights of shareholders for failure to pay assessments).

Interestingly, the Carey Act program was carried out using both a commercial irrigation corporation (the construction company which sold water entitlements to settlers), and a mutual canal company (the operating company established to take over from the construction company and operate the project on behalf of the stockholders/entrymen).

D. Lateral Ditch Water Users' Associations

Idaho Code sections 42-1301 through 1309 establish and set forth the powers and duties of lateral ditch water users' associations. Section 42-1301 states that "[w]here three (3) or more parties take water from the same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users association…." Accordingly, such associations arise as a matter of statutory mandate when these conditions are met, not through the ditch users' own initiative. These "lateral ditch associations" (or "lateral water users associations") thus manage a ditch system that is subsidiary to, and receives irrigation water from, a primary canal operated by an irrigation district or canal company.

The statute requires the lateral ditch association to elect a board of directors, and authorizes it to "adopt rules and regulations for the management of said lateral or laterals or distributing ditch or ditches and the delivery of water therefrom as they deem best,"[924] to combine or abandon ditches, to elect a manager, assess fees for ditch maintenance and repair, borrow money for projects[925] and to carry out other actions pertaining to operating the association's water delivery system.

Lateral water users' associations often are informally operated, may not have published rules or bylaws, may not have regular meetings. They often consist of very few water users (as noted, the statute requires only three) and may lack the assessment base to fund the operation, repair, maintenance, and facility improvement normally associated with larger canal companies or irrigation districts.

E. Irrigation districts

The term "irrigation district" as used here is a generic term including any type of quasi-municipal entity with taxing authority that was formed pursuant to statute to deliver water from an irrigation project to landowner-consumers within a specific geographic boundary. The term distinguishes this type of entity from mutual irrigation companies and includes water conservancy

[924] Idaho Code § 42-1301.

[925] Idaho Code § 42-1309 (authorizing lateral water users' associations to borrow money and mortgage or otherwise pledge their assets as security).

districts, reclamation districts and other similar forms of "special water districts" that are concerned with irrigation supply.[926]

Irrigation districts are water distribution organizations formed pursuant to state statutory procedures which vest them with quasi-municipal powers, the most important of which are the powers to issue bonds and to levy assessments, backed up by liens, on lands within the district.[927] These lands typically are the irrigable lands within certain boundaries that could be served by the district's canal system.[928] Irrigation districts are governed by boards elected by property owners within the district.[929] Districts also often have authority to operate drainage or power facilities, or to carry out other water-related purposes. Irrigation district facilities are tax-exempt.

Each irrigation district was established through a petition process which designated specific irrigable lands which are to be served by the district. These lands are eligible for irrigation water deliveries from district facilities, which typically consist of a main canal, subsidiary canals and related facilities.

Irrigation districts may operate their own storage reservoirs. In Idaho, however, most have entered into long-term contracts with the Bureau of Reclamation which entitle them to receive storage water from federal reservoirs. In some cases, such as on the Boise River system and in the Upper Snake, several districts will form an operating board which contracts with the Bureau with regard to the operation of those federal projects which serve large areas encompassing several irrigation districts and other water delivery entities. In addition to providing irrigation water, districts often operate drainage facilities or carry out other drainage functions for lands within the district.

In general, legal authority for the formation of irrigation and other special water districts in the West (such as water conservancy districts) can be traced to the Wright Act,[930] an 1887 California law, and to *Fallbrook Irr. Dist. v. Bradley,* 164 U.S. 112 (1896), which upheld the Act's constitutionality.[931]

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[926] This chapter does not investigate any issues that may be peculiar to special districts concerned only with municipal water supply. Note also that the term "irrigation district" is to be distinguished from special statutory entities in Idaho known as "water districts" and "ground water districts." These are discussed below.

[927] Title 43 of the Idaho Code is devoted to irrigation districts. Idaho Code §§ 43-101 to 43-2501.

[928] Procedures for exclusion of lands from an irrigation district are codified at Idaho Code §§ 43-1101 to 43-1121.

[929] Because the Supreme Court has found irrigation districts to be special purpose entities which do not exercise normal governmental functions, it has affirmed their entitlement to restrict voting to landowners, despite the constitutionally-grounded "one-person, one-vote" rule. *Ball v. James*, 451 U.S. 355 (1981).

[930] 1887 Cal. Stat., ch. 34 at 29.

[931] For discussions of irrigation and other special water districts, *see* John Leshy, "Special Water Districts—The Historical Background," in James Corbridge, Ed., "Special Water Districts: Challenge for the Future," Natural Resources Law Center, Boulder, Colorado (1983); Wells A. Hutchins, "Irrigation Districts,

In Idaho, irrigation districts rarely allow transfers of water use to areas outside their boundaries. However, such transfers are typically permitted within district boundaries. This technique has been used to provide "supplemental" water to some district lands during droughts, for example. Moreover, state approval of a water right transfer is not required for such intra-district transfers (owing to a special statutory exception to the transfer requirement, codifying longstanding practice.)[932] See discussion in section 15.E(7) at page 203.

Three Idaho cases deal with the question of whether an irrigation district may deliver water outside the boundary of the district.[933] They hold that a district may do so if and only if the water is not

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Their Organization, Operation and Financing," U.S. Dept. of Agriculture Technical Bulletin No. 254 (1931); Comment, "Desert Survival: The Evolving Western Irrigation District" 1982 Ariz. St. L. J. 377 (1982); and Robert E. Beck, 3 *Waters and Water Rights* § 27.02 (1991).

[932] Idaho Code § 42-219(7). This provision provides, in part: "Subject to other governing law, the location of the acreage irrigated within a generally described place of use, as defined in accordance with subsections (5) and (6) of this section and as filed with the department pursuant to sections 42-323, Idaho Code, may be changed without approval under the provisions of section 42-222, Idaho Code. However, the change shall not result in an increase in either the rate of flow diverted or in the total number of acres irrigated under the water right and shall cause no injury to other water rights." The process for establishing an irrigation entity's "generally described place of use" is set forth in the referenced subsections.

[933] In *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250 (1923), the an irrigation district sought to be relieved from a contract it had entered to deliver water to Ms. Yaden whose land was outside the boundary of the irrigation district. The court sided with the irrigation district, declaring that the contract was *ultra vires* (beyond the authority of the board) because, under applicable statutes, the district held its water rights in trust for the benefit of landowners within the district. However, the Court noted an important exception: "However, the foregoing provisions of the statutes do not prohibit the delivery of water to users outside of the district when the same is not needed by users within the district." *Yaden*, 37 Idaho at 308, 216 P. at 252. Thus, *Yaden* established the principle, albeit in dictum, that service beyond district boundaries is authorized where the water is not needed within the district.

In *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755 (1954), the irrigation district contracted to supply seepage and waste water collected within the district boundary to a landowner outside of the district. The Court ruled that since seepage and waste water, by definition, is not needed by the landowners within the district, the district was authorized to enter into a contract with the landowner outside of the district. The Court relied on and quoted extensively from *Yaden* in reaching this conclusion. Thus the dictum in *Yaden* became the holding in *Jensen*.

The third case, *Jones v. Big Lost River Irr. Dist.*, 93 Idaho 227, 459 P.2d 1009 (1969), was more narrowly decided. It dealt with a claim for damages by Jones, an irrigator who previously had been served with water from the Big Lost River Irrigation District ("Big Lost"). During a drought, Big Lost stopped delivering water to Jones. The court sided with Big Lost, finding that it "had no duty or obligation to deliver storage water outside the boundaries of the district." *Jones*, 93 Idaho at 229, 459 P.2d at 1011. In so ruling, the Court relied extensively on *Yaden* and *Jensen*. The *Jones* case, however, did not present the issue of delivery of excess or unneeded water. Accordingly, it does not appear to contradict the exception laid out in those cases. Big Lost, by the way, is not an irrigation district. Despite its name, it is actually a mutual canal company. The court ignored this difference, with the implication that the rule is the same for all types of irrigation entities—a

needed to serve landowners within the district. While these cases recognize an important exception allowing delivery of excess water beyond district boundaries, they also suggest that if conditions change and the water becomes needed to irrigate district lands, the district may stop serving the lands outside the district.

In any event, an Idaho statute enacted in 1946 (after *Yaden* but before *Jensen* and *Jones*) makes a far broader declaration of the authority of an irrigation district to provide water for irrigation of lands outside of its boundary. The statute holds that a district may serve lands outside its boundary so long as the district's board of directors makes a determination of feasibility: "Service through such system may be provided both to lands within the district and to other lands that the district's board of directors determines can be served feasibly and economically." Idaho Code § 43-1901.

It is odd that *Jensen* and *Jones* do not mention this statute. The statute plainly goes beyond the exception first laid out in *Yaden* (that water not needed within the district may be delivered outside the district). The statute establishes a more flexible standard that delivery outside the district is permissible any time the board determines that the action is feasible and economical. Given that *Yaden*, *Jensen*, and *Jones* were based on statutory authority rather than an immutable constitutional limitation,[934] it appears that the grant of authority found in Idaho Code § 43-1901 overrides and expands the narrower rule laid out in the case law.

The cases and statute discussed above address only Idaho law. Many irrigation districts and canal companies provide only water under water rights that they own outright, in which case Idaho law is all that matters. In other cases, however, irrigation districts firm up their own water supplies with storage water from federal reservoirs pursuant to contract with the Bureau of Reclamation.[935]

Although the Reclamation Act of 1902 expressly provides that water rights in these federal projects shall be acquired pursuant to state law, there is authority that the United States may impose additional conditions in the contracts they enter into with irrigation districts and others.[936] A common condition prohibits delivery outside of the district's boundaries without permission of the Bureau's

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conclusion that overlooks the fact that the earlier cases were based on statutory provisions dealing with irrigation districts.

The issue was presented in a fourth case, *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993), but the Court never reached the issue deciding the case instead on a technical point of jurisdiction.

[934] The *Yaden* Court noted: "Irrigation districts are creatures of the statutes. They are quasi public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily implied." *Yaden*, 37 Idaho 300, 308, 216 P. 250, 252 (1923).

[935] Curiously, the *Jensen* case discussed above dealt with the Boise-Kuna Irrigation District which, unlike the irrigation entities involved in *Yaden* and *Jones*, does deliver federal reclamation water and, so far as we know, did so at the time the case was decided. Yet the issue of federal constraints on delivery outside of district boundaries was not mentioned in that decision.

[936] A. Dan Tarlock, *Law of Water Rights and Resources,* § 5:81 (2009).

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contracting officer. In addition to contract constraints, the authorizing legislation for specific projects sometimes contains site-specific statutory limitations.

In the case of municipal entities that have contracted with irrigation districts, another state statute comes into play. The statutory title dealing with city irrigation systems was amended in 1981 to authorize pooling of irrigation district water for delivery. 1981 Idaho Sess. Laws, ch. 31 (codified in relevant part at Idaho Code §§ 50-1805 and 50-1805A). Since pooling inherently involves service outside of district boundaries, this statute reflects further legislative approval of the practice. On the other hand, one might argue that the restrictions on delivery of water outside district boundaries do not apply to a pooling situation. With pooled water rights, the city may be able to show through accounting that all the water from each district is being used (at least in an accounting sense) on that district's lands. No court, however, has addressed this question.

F. Water districts

Unlike irrigation districts and canal companies, water districts do not hold water rights or operate water projects. Rather, in Idaho, a water district is a legal entity designated according to statute to administer water rights through a watermaster.[937] The watermaster oversees water distribution within the district boundaries and is also responsible for record keeping, measurement, and general district management. Watermasters are state employees and are under direction of the Director; however, they are elected and compensated directly by district water users, and their annual budgets are approved by the water users. In essence, a water district is an administrative area constituting a specific drainage basin or aquifer area (or both) where water rights are interrelated and have been adjudicated.

The watermaster, acting under the supervision of the Director, delivers water rights according to the prior appropriation doctrine.[938] However, the statute expressly provides that beneficial use water rights (see section 11.B at page 152) are treated as junior to all decreed, licensed, or permitted rights.[939]

By statute, water districts may be created only on those streams and/or aquifers where water rights have been adjudicated.[940] However, water districts also may be established on an interim basis during the pendency of an adjudication.[941] Before the SRBA resulted in decrees for thousands of Idaho

[937] Idaho Code §§ 42-602 to 42-619 (not to be confused with a different type of water district, which provides domestic water to customers, as provided for under Idaho Code §§ 42-3201 to 42-3239).

[938] Idaho Code §§ 42-602, 42-607.

[939] Idaho Code § 42-607.

[940] Idaho Code § 42-604.

[941] Two water districts have been created on an interim basis pending resolution of the SRBA. "On November 19, 2001, the State of Idaho sought authorization from the SRBA District Court for interim administration of water rights by the Director in all or parts of the Department's Administrative Basins 35 and 41 overlying the ESPA in the American Falls area and all or parts of Basins 36 and 43 overlying the ESPA in the Thousand Springs area. On January 8, 2002, the SRBA District Court issued an order authorizing the

ground water rights, most water districts historically administered only surface water rights. That is changing due to the adjudication of ground water rights, particularly those in the Eastern Snake Plain Aquifer that now are being administered together with surface water rights on the Snake River and in springs situated between the Aquifer and the River. Elsewhere, the State is still in the process of working adjudicated ground water rights into the priority system through conjunctive administration.

The boundaries of each water district correspond to the particular adjudicated area of water rights and follow watershed lines.[942] Most of the adjudications upon which water districts are based occurred early in the 20th century, so most of the districts have been in existence for many years. New water districts are being formed as a result of the adjudication of previously unadjudicated water rights in the Snake River Basin Adjudication.

Large portions of Idaho are now divided into over 100 non-overlapping water districts. Of these, more than 70 are currently active. Some are as small as the watershed of a moderately-sized creek system; others are quite large. For instance, Water District 01 covers most of the Upper Snake River basin above Milner Dam and includes numerous streams and tributaries with thousands of individual water users.

The statute controlling water districts provides that the holders of decreed water rights, licenses and permits within a district shall elect a watermaster and establish the water master's budget. Voting is by these individuals or entities only, and the number of votes one has corresponds to the amount, in cubic feet per second, of one's water right. (Special rules apply for "non-consumptive" water rights.) Technically, the watermaster is an employee of the state and can be removed for cause by the Director of the Department of Water Resources. As a practical matter, watermasters are agents of the water users, primarily irrigators, within their districts.

Water districts are entitled to establish certain rules for water administration within the district. Business is conducted during an annual water users' meeting, usually held early in the year and prior to the irrigation season. The statute refers to "rules and regulations of the respective districts, adopted at the annual water users' meeting," but does not make clear the type of rules that the water users might adopt beyond those pertaining to the annual term during which the watermaster is to perform services. Idaho Code § 42-608.

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interim administration by the Director. After notice and hearing, the Director issued two orders on February 19, 2002 creating Water District 120 and Water District 130 pursuant to the provisions of Idaho Code § 42-604. Subsequent orders of November 19, 2002, October 29, 2003, and August 29, 2003 expanded and altered the boundaries these water districts to include parts of Administrative Basins 29 and 37. Further adjustments are anticipated at this writing. See maps in Appendix D.

[942] Water districts should not be confused with IDWR Administrative Basins, which also follow watershed lines. See discussion in section 14.A beginning on page 166.

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G. Ground water districts

In response to growing attention and concern among water users about conjunctive management issues, particularly within the Eastern Snake River Plain, the Idaho legislature enacted legislation authorizing the creation of ground water districts. 1995 Idaho Sess. Laws, ch. 290; Idaho Code § 42-5200 *et seq*. The primary purposes of these special districts were to provide a mechanism for ground water users within a given area to organize and assess themselves for the costs of measuring and reporting annual ground water withdrawals from wells, and as necessary, responding collectively to delivery calls, curtailment orders, or other forms of administration. Thus, ground water districts, unlike water districts, are not water delivery entities.

The Ground Water District statute also specifically authorizes these districts to acquire water rights and water delivery facilities, to enter into contracts with the United States and Indian tribes, to develop and operate mitigation plans designed to mitigate material injury to senior water rights that might be caused by ground water withdrawals within the district, to develop and operate aquifer recharge projects, and to represent district members in general stream adjudications such as the Snake River Basin Adjudication and in other legal or administrative proceedings. Idaho Code § 42-5224-25.

As of 2010, nine ground water districts, all situated within the Eastern Snake River Plain, have been formed under this statute.[943] These districts have been active in measuring and reporting ground water withdrawals, and in cooperation with the Department of Water Resources and interested water user groups, attempting to accurately quantify the effects of ground water withdrawals on surface and spring sources through computer modeling, and developing long-term plans for conjunctive management and administration.

In 2001 the North Snake, Magic Valley, Bonneville-Jefferson, Bingham, and Aberdeen-American Falls Ground Water Districts were instrumental in negotiating an interim agreement on behalf of their members that avoided a threatened curtailment of ground water withdrawals for irrigation, industrial and municipal uses by the Department of Water Resources. Among other things, the interim agreement required these three districts to acquire and provide up to 68,500 acre-feet of surface water to surface and spring water users in the 2002 and 2003 irrigation seasons.

H. City irrigation systems

Idaho law allows cities "to establish a city irrigation system" to supply irrigation water "within the limits of such city." Idaho Code §§ 50-1801 through 50-1835. Although the code is not completely clear on this subject, it appears that a city can form such a system essentially in the abstract, and then go about acquiring the water rights and facilities, such as ditches and pipes, necessary to provide irrigation service to city residents. The statute also provides that landowners within a city who receive irrigation water "from any ditch or canal" may petition to have the city "regulate, control and

[943] These are the North Snake, Magic Valley, Aberdeen-American Falls, Bingham, Bonneville-Jefferson, Madison County, Carey Valley, Jefferson-Clark, and Raft River Ground Water Districts.

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supervise the distribution of all water used by the inhabitants thereof for irrigation purposes." Idaho Code § 50-1802. A city is not required to act on the petition.

If a city's residents own shares in a mutual ditch company and wish to be served by a city irrigation system, the citizens are required to convey their stock shares in the company to the city to be held in trust. Then the city represents the interests of these citizens in all ditch company matters. Idaho Code § 50-1803. Boise, Nampa, and Caldwell have used this authority. They often refer to these systems as "municipal irrigation districts," although that term does not appear anywhere in the Idaho Code.

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7. WHO OWNS THE WATER DIVERTED BY WATER DELIVERY ENTITIES?

Note: See discussion in section 6 beginning on page 512 for additional background information on the various forms of water entities. The table below briefly summarizes the law of ownership of water rights among the common types of irrigation water delivery entities.

Summary of ownership rules for various water delivery entities in Idaho

Type of water delivery organization	Legal title held by	Beneficial title held by	Comment
Commercial irrigation companies (aka commercial ditch companies or carrier ditch companies)	Company	Company	These for-profit companies hold full legal title to their water rights. In this type of organization, the shareholders are investors; they are not the consumer-irrigators served by the company. However, the consumer-irrigator is protected by express constitutional provisions requiring these private companies to charge fairly and to continue to serve paying customers that are in compliance with their obligations. Some commercial irrigation companies (especially in the early days) were created as temporary entities for construction and financing purposes, in which case their water rights were later conveyed to individual irrigators, Carey Act operating companies, or mutual irrigation companies whereupon the commercial irrigation company dissolved. Other commercial irrigation companies were created as permanent operating entities (private contract companies or public utilities), in which case they permanently retain full ownership of the water rights. This is not unfettered ownership, however. Commercial irrigation companies owe duties of continued service to their consumer-irrigators under to Article 15, §§ 1 4, 5, and 6 of the Idaho Constitution.
Mutual irrigation companies (aka mutual canal companies or mutual ditch companies)	Company	Depends on whether the water rights are deemed appurtenant.	These are non-profit entities. They do not provide service to the public at large, but only to their shareholders. The unique aspect of these companies is that the shareholders are not investors; they are the very irrigators served by the company. In some cases (depending on the governing documents), the company's water rights are deemed appurtenant to the individual irrigated tracts. In that case, each shareholder-irrigator holds equitable title to the portion of the company's water right that is appurtenant to their land. In other cases, the company owns water rights with a "general" appurtenancy to the large permissible place of use served by the company and the rights are not deemed appurtenant to individual tracts. In that case, the irrigators hold only an undivided, collective interest in the water rights reflected in their ownership of stock, and those rights may be terminated in accordance with the governing documents.

Summary of ownership rules for various water delivery entities in Idaho			
Type of water delivery organization	**Legal title held by**	**Beneficial title held by**	**Comment**
Carey Act operating companies	Company	Shareholder-irrigators	Carey Act operating companies are also non-profits, created pursuant to the Carey Act. They are generally thought of as a type of mutual irrigation company or, as the *Eagle Creek* Court put it, they act "much like mutual irrigation companies." Unlike other mutual irrigation companies, the water rights held by Carey Act companies are always appurtenant. Hence, irrigators always hold equitable title.
Bureau of Reclamation (BOR) (aka Bureau or USBR)	BOR	Irrigators	*Ickes v. Fox* and its progeny have established that the federal government owns only "legal title" to the water rights, while the landowner-irrigators within the project own the "beneficial" interest in the rights. *Pioneer*, however, did not employ this split ownership language. Instead, it recognized that irrigators hold some sort of undefined "title to the use of water" that is appurtenant to the entire irrigation district, not to individual water users.
Irrigation districts holding spaceholder contracts for storage in BOR reservoirs	BOR	Irrigators	The Court in *Pioneer* was vague about what interest, if any, irrigation districts hold in BOR water rights. However, the Court's recognition that the rights are appurtenant to the entire district (rather than to individual farms and urban residences) evidently means that the irrigation districts retain practical control of the water.
Irrigation districts holding natural flow, ground water, or drainage rights	Districts	Irrigators	When an irrigation district appropriates natural flow water rights in its own name, those rights are subject to a constitutional duty not to cut off supplies to its users who maintain their payments.
Municipal water providers	Provider	Provider	Municipal water providers stand in the same position as mutual irrigation companies. They hold full title to water rights used to serve their customers. This is not unfettered ownership, however. Municipal water providers owe duties of continued service to their consumer-irrigators under to Article 15, §§ 1 and 6 of the Idaho Constitution. In the case of a private municipal provider, it is also subject to regulation by the Idaho Public Utilities Commission.

A. Overview

An interesting question about the various irrigation water delivery entities is, who owns the water right which is being delivered? Unfortunately, much of the discussion on this subject occurs in the abstract, without any clear articulation of what is meant by "ownership."[944] In fact, the term can mean a number of things—all of which compose the "bundle of sticks" making up a real property right.

[944] For a discussion of the nature of "ownership" in the context of water resources, see Dean Release's amusing and insightful article, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638 (1957). While not dealing with the subject of water right ownership within irrigation delivery organizations, the article provides useful insights on this sometimes evasive concept.

Differences of opinion about ownership are sometimes based on inconsistent understandings about which "stick" one is talking about.

For instance, a person may "own" a water right in the sense of being able to exclude others from its use and demand that it be delivered to him or her. Then again, it might be said that a person does not "own" the right, if she lacks the ability to convey it to a third person and effect a transfer thereof (despite the absence of injury).[945] Moreover, the discussion may be sprinkled with talk of "rights" (such as the right to nondiscriminatory service) which are not real property rights at all. Consequently, one should always ask "for what purpose?" before answering a question about ownership of a water right or other rights to water.

Because the answer to the ownership question depends, at the outset, on the type of entity involved, we discuss them separately. (See section 6 at page 512 for an overview of the nature of each entity.) "There are three main types of water-delivery organizations in Idaho: the mutual irrigation company, the commercial ditch corporation, and the irrigation district." *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 447 P.3d 915 (2019) (Burdick, C.J.).

B. The "Public Use" concept in Idaho's Constitution

Before launching into an entity-by-entity analysis of the ownership issue, it is necessary to digress into a discussion of a series of obscure but potentially important constitutional provisions on the subject.

An interesting, and today seemingly curious, development relative to the delivery of irrigation water concerns the "public use" concept. We discuss it here because it provides useful background on the development of Idaho constitutional language pertaining to water rights and water delivery systems; it also bears on the questions of ownership of water rights in water delivery organizations.

The delivery of water to water users, for irrigation or otherwise, in certain circumstances can be deemed a "public use" pursuant to which the appropriation is found to be subject to some degree of public control. In these circumstances "all who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." Samuel C. Wiel, 2 *Water Rights in the Western States* § 1261 at 1160 (1911) (*quoting Hildreth v. Montecito Water Co.*, 72 P. 395, 398 (Cal. 1903)). Essentially, the "public use" language in Idaho's Constitution was a product of an era before there was a law regulating public utilities. The language was intended to impose a type of constructive

[945] Here are some of the other rights which have been litigated under the broad rubric of "ownership" of a water right: May the water delivery entity file for water rights in its own name in a general stream adjudication? Must the individual irrigators be named as parties in such a suit? Is an irrigator entitled to move his or her place of use within the boundaries or reach of the delivery entity? May the irrigator move his or her interest in the water to a location outside of the boundaries or reach of the delivery entity? May a private, regulated delivery entity include the value of its water rights in its rate base? May an irrigator refuse to pay an assessment or fee for water which he or she is not using? May a supply entity refuse to accept a new customer, even though water is available? May a supply entity curtail service to a current customer?

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trust for the benefit of water users who were ready and willing to pay for service but were dependent upon a delivery organization for their water supply.

Wiel points out that "[t]he common law of public service agencies is, since *Munn v. Illinois*, familiar, being, in general terms, that property devoted to the public service or use is affected with the public duty of performing reasonable service to all; that to secure this end, rates and terms of service must be reasonable, and service is compulsory upon tender of a reasonable rate; that there must be no discrimination; that the courts will enforce these things, and it needs no statute to give them the power." Wiel § 1247 at 1145 (footnote citation to *Munn* omitted). The case Wiel refers to, *Munn v. Illinois*, 94 U.S. 113 (1876),[946] spelled the end of the era when "companies of capitalists" distributed water supplies according to contracts, on a *laissez faire* basis. As Wiel noted, *Munn* was "to the effect that one who devoted his property to public use owes the public corresponding duties, even at common law . . . ." Wiel § 1247 at 1146. The "public use" language in Idaho's Constitution arose from such a theory.

Idaho's Constitution, which was adopted in 1889, contains four sections that relate to the public use or public dedication concept. The sections quoted below declare certain types of irrigation water deliveries to be a "public use."[947] The pertinent sections are Article 15, section 1, 4, 5, and 6:

> **§ 1. Use of waters a public use.** — The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law. . . .
>
> **§ 4. Continuing rights to water guaranteed.** — Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have been once sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived

[946] *Munn v. Illinois* did not deal with water delivery or water rights. Rather, it broadly upheld the authority of states to regulate public utilities, rejecting the argument that such regulation unconstitutionally deprived the utilities of their property.

[947] The first of the "public use" constitutional provisions (Idaho Const. art. XV, § 1) apparently applies to municipal water providers. *Murray v. Public Utilities Comm'n,* 27 Idaho 603, 619-20, 150 P. 47, 50-51 (1915). In contrast, Sections 5, 6 and 7 are limited by their own terms to entities providing water for agricultural purposes.

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of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and time of use, as may be prescribed by law.

§ 5. Priorities and limitations on use. — Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

§ 6. Establishment of maximum rates. — The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful purpose.

Idaho Const. art. XV, §§ 1, 4, 5, and 6.

Note that sections 4 and 5 are limited to water supplied for agriculture, while sections 1 and 6 have no such limitation and presumably would apply, for example, to municipal water providers.

These provisions are similar to, although perhaps more elaborate than, those adopted in some other Western states, evidently because of problems that irrigators experienced in the early years of Western settlement with a plethora of private commercial irrigation companies that either failed financially or were not scrupulously managed.[948] As noted above, the framers of the Idaho Constitution were deeply concerned with curbing potential abuses of consumers by commercial irrigation companies. Consequently, they grafted onto the Idaho Constitution these remarkably specific provisions aimed at solving the problem.

At the time of the adoption of the Constitution, the framers were primarily concerned with problems associated with the then-common commercial irrigation companies. Indeed, Carey Act companies and irrigation districts did not even exist then. However, the applicable constitutional language ("sale, rental or distribution" of water) arguably applies to all forms of irrigation water delivery entities now in existence, including mutual canal companies, irrigation districts, and the

[948] *See* Samuel C. Wiel, 2 *Water Rights in the Western States* at §§ 1244-46 (1911); Paul Lloyd Murphy, *Irrigation in the Boise Valley,1863-1903: A Study in Pre-Federal Irrigation* at pp. 55-56 (College of Idaho thesis, 1947).

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Bureau of Reclamation.[949] To understand these provisions, however, the reader should keep in mind the historical influence of the commercial irrigation company.

To some extent, the constitutional provisions discussed below are superfluous with respect to the more modern entities (Carey Act operating companies, irrigation districts, and the Bureau), due to the fact that irrigators under those systems (individually or collectively) are deemed to hold a property interest (equitable title) in the water right itself. Nevertheless, these constitutional provisions reinforce the idea that all irrigators served by delivery entities are entitled, at a constitutional minimum, to continued service at reasonable, nondiscriminatory rates.

The Idaho Supreme Court, in construing the "sale, rental, or distribution" language of art. 15, §§ 4, 5 and 6 of the Idaho Constitution, has ruled: "Companies or individuals may appropriate and take out the water of a stream for sale, rental or distribution, for any beneficial purpose. When so taken out, it becomes a public use, and the sale or rental of it for pay is a franchise." *Wilterding v. Green*, 4 Idaho 773, 45 P. 134, 135 (1896) (Morgan, C.J.). Because the Idaho Constitution declares that appropriation of waters for sale, rental or distribution is a "public use," the Court found that deliveries under a commercial irrigation company gave rise to the "exclusive dedication" to the consumer's use mentioned in Article 15, section 4.

California's Constitution provided the basis for the above provisions in Idaho's Constitution. California's Constitution provides:

> The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law.

Calif. Const. art. X, § 5.

In *Glenn Colusa Irr. Dist. v. Paulson*, 242 P. 494, 499 (Cal. App. 1925), a commercial irrigation company became insolvent and transferred its water rights and canal facilities to an irrigation district. A customer of the carrier company argued that he held a perpetual easement—that is, a water right[950] that the district was bound to honor under the original scheme. The court disagreed. Construing this California constitutional provision, it concluded that a water delivery such as that being made by the carrier company constitutes a public use, and it is the company, not the landowner, who holds the water

[949] On the other hand, one might argue that these constitutional provisions do not apply to a mutual canal company. Read in historic context, the "public use" provisions are plainly aimed at abuses of irrigators by shareholders. In the case of a mutual, these are one and the same; hence there is substantially less potential for abuse. Whether this is enough to take them out of the constitutional "public use" provisions remains to be seen. The Idaho Supreme Court has never addressed the question.

[950] For the notion of a water right being a "perpetual easement," *see Ruhnke v. Aubert*, 113 P. 38, 40 (Or. 1911).

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right, because "no private estate can be created in property devoted to a public use." At least in such situations, the landowner in California holds only a "right of service."

Idaho and California implemented the "public use" principle through explicit constitutional provisions. Colorado, whose jurisprudence also has influenced the development of the appropriation doctrine in Idaho, is an example of a state that did so by interpreting more general constitutional language. *E.g., Wheeler v. Northern Colorado Irrigating Co.*, 17 P. 487 (Colo. 1888). Both approaches reach essentially the same result in terms of the obligations placed on the commercial irrigation company, though they vary somewhat on the "ownership" analysis.[951]

C. Water right ownership in commercial irrigation companies

Commercial irrigation companies—owned by investors, not by the farmers—were important in Idaho's early days. They are rare today, except for those that survive as public utilities, such as power companies that also provide irrigation water via contracts. See background discussion of these entities in section 6.B beginning on page 514.

The majority rule throughout the West,[952] and the rule in Idaho, is that the water rights vest in the commercial irrigation company, and the consumer-irrigator has only a right of service.

The Idaho Supreme Court provided this overview (which cites this Handbook):

> In contrast to the mutual irrigation company, a commercial ditch company [aka commercial irrigation company] holds water rights for profit. Jeffrey C. Fereday, *Ownership of Water Rights in Irrigation Water Delivery*

[951] Colorado's Constitution, art. XVI, § 8, authorizes county commissioners to establish "rates to be charged for the use of water, whether furnished by individuals or corporations." Section 5 declares that waters within the state are "the property of the public," and is "dedicated to the use of the people of the state." See also Colo. Rev. Stat. § 37-85-110 (protecting a distributees entitlement to continue receiving water).

The Colorado Constitution does not contain the explicit "public use" language which the California and Idaho Constitutions apply to those entities appropriating water "for sale, rental, or distribution." Nevertheless, the Colorado Supreme Court still has found these commercial entities to be subject to essentially the same duties as those imposed in these other states. In *Combs v. Agricultural Ditch Co*., 28 P. 966 (Colo. 1892), quoting *Wheeler v. Northern Colo. Irrigating Co.,* 17 P. 487 (Colo. 1888), the Colorado court ruled that the Colorado Constitution requires a carrier ditch company to supply water to anyone whose lands are susceptible of being supplied from the canal and who tenders the established rate for water delivery; the court forbade the commercial carrier from imposing additional costs or "unreasonable regulations or demands."

[952] In contrast, a minority of states have sought to protect the consumer-irrigator served by a for-profit commercial irrigation company by shifting ownership of the water right away from the commercial irrigation company. *Wheeler v. Northern Colorado Irrigating Co.,* 17 P. 487, 490 (Colo. 1888). This essentially transforms the commercial irrigation into a mutual for purposes of analogizing ownership of water rights. Kinney's treatise identifies *Wheeler* as using "strained" reasoning, but concludes that it stands for the proposition that Colorado adheres to the rule that commercial irrigation companies do not hold title to water rights. 3 Kinney, *Irrigation and Water Rights* § 1476 at 2653 (2d ed. 1912).

Organizations: An Outline of the Major Issues, in Water Organizations in a Changing West (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1993). The shareholders of a commercial ditch company are those who built it, not those who make use of the water. *Id*. This was the main type of irrigation company in operation when the framers of Idaho's Constitution imposed Constitutional restrictions on ditch companies. *See* Fereday, Jeffrey C., et al., *Water Law Handbook* 345-46 (2019). The commercial ditch company's heyday was in the 1880's; almost none persist today. *Id*.

Commercial ditch companies were generally organized in one of three ways:

> (1) The first form is a "construction or development company," a carrier ditch company that would construct the canals and other facilities, convey lands to farmers, and enter into water delivery contracts with these settlers. Once all lands had been irrigated and the canal's capacity fully subscribed, the carrier ditch company would convey the water rights and facilities to the farmers or, more likely, to a mutual irrigation company that the construction company would set up with the settlers as its shareholders. At this point, the carrier ditch construction company would go out of business, presumably at a profit for its backers. This is precisely the formula used in implementing the Carey Act.
>
> (2) The "private contract company" is one set up for perpetual service to farmers with whom it would contract; they would pay for the water delivery at established rates, whether they used the water or not. The users never acquire any interest in the water rights or facilities. Historically [before state Constitutional provisions provided otherwise], such a company was not subject to state control of rates.
>
> (3) A true "public utility company," is one which holds itself out to serve all comers, so long as there is adequate water supply, on an annual fee for service based primarily on the amount of water used. The deliberate entry into public service caused a dedication to public use and subjected these companies to public utility regulation (at least after public utility commissions came into being).

Fereday, *Ownership of Water Rights in Irrigation Water Delivery Organizations: An Outline of the Major Issues* at 4 (citing Wells A. Hutchins, *Commercial Irrigation Companies* USDA Tech. Bull. 177 at 5–6 (1930)).

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 474-75, 447 P.3d 915, 922-23 (2019) (Burdick, C.J.) (emphasis supplied).[953]

In sum, commercial irrigation companies (aka commercial ditch companies) always acquire and own the water rights, at least at the outset. Depending on the circumstances, those rights later may be passed to the individual irrigators, or not.

- Commercial irrigation companies that are formed solely as a construction and financing entity (and that are intended to later go out of business) always pass their water rights to the irrigators (either individually or to a mutual irrigation company). This is particularly true in the case of Carey Act entities, whose water rights are deemed appurtenant to the individual farm tracts.

- In contrast, commercial irrigation companies that are intended to continue as a permanent operating entity or as a public utility continue to hold full legal title to the water rights.

The Idaho approach to commercial irrigation companies is strongly influenced by the "public use" language of the Idaho Constitution discussed in the previous section. Idaho Supreme Court precedent, built on these constitutional provisions, guarantees protection for irrigation water consumers while also definitively stating that the commercial irrigation company retains full title to the water right. The key cases are discussed below.

Wilterding

In *Wilterding v. Green*, 4 Idaho 773, 45 P. 134 (1896) (Morgan, C.J.), the Court found that the Idaho Constitution, Article 15, sections 1 and 4, mean that "all waters appropriated before or after the adoption of the constitution, for sale, rental or distribution, are declared to be a public use, and are exclusively dedicated to such use." *Wilterding*, 45 P at 135. The Court further observed that individuals "who are in a condition to use such waters, have a constitutional right to the use of such waters, under such reasonable rules and regulations, and upon such payment, as may be prescribed,

[953] The Eagle Creek Irrigation Company is a mutual irrigation company formed in 1973. Eagle Creek held decreed water rights that served a permissible place of use within its water delivery system. The issue in this case was whether shares of stock representing a fractional share of the company's water rights were appurtenant to the individual irrigated tracts and hence passed with a deed that was silent as to water rights and appurtenances. The Court held that water rights held by irrigators served by Carey Act operating companies are always appurtenant to the land (owing to language in the Carey Act). In contrast, the Court held that water rights held by all other mutual irrigation companies may or may not be appurtenant, depending on the governing documents. It remanded to the district court for a determination of whether the governing documents of the mutual irrigation company direct that the water be appurtenant to the land. In undertaking this analysis, the Court began with a comprehensive overview of the three basic types of water right entities and their water right ownership. The *Eagle Creek* Court did not speak in terms of title. Had it used that terminology, it presumably would have said that the mutual irrigation company holds either full title (if the rights are not appurtenant) or holds only nominal title (if the shares are appurtenant).

which payments and regulations must at all times be reasonable." *Wilterding*, 45 P. at 135. The Court noted that Article 15, section 4 also means that:

> a party, having once used the water upon his land, cannot be thereafter deprived of it without his consent, if needed, when he shall pay therefor, and shall comply with such equitable terms and conditions as the law prescribes. This section also gives the party using such water under the conditions a perpetual right to such use.

Wilterding, 45 P. at 135.

The *Wilterding* Court also concluded that the Idaho Constitution was intended "to deal only with the 'use' of water, and not with the property rights of appropriators therein . . . . The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein." *Wilterding*, 45 P. at 138.

Thus, the Court in *Wilterding* indicates that the public use provisions in the Idaho Constitution do not address the question of water right ownership, but specify only that the use by consumers or distributees is a dedication to their lands that cannot thereafter be interrupted so long as they pay reasonable assessments.

Hard

The Court in *Hard v. Boise City Irrigation and Land Co.*, 9 Idaho 589, 76 P. 331 (1904) (Ailshie, J., concurring) underscored that the right to continued service and ownership of the water right are different things, and the Constitution addresses only the former:

> Mr. Chief Justice Morgan, speaking for this court in *Wilterding v. Green*, 4 Idaho 733, 45 Pac. 134, in considering the purposes of article 15 of the Constitution, made it very clear that the framers of that instrument were only dealing with the "use" of the waters, and not the property right in the waters. Indeed, it can be of no consequence to the state as to where the property in the waters is vested so long as the people have reserved to themselves the right to regulate the use.

Hard, 9 Idaho at 600-01, 76 P. at 334 (Ailshie, J., concurring) (quotation marks and italics appear only in Idaho Reports).

The *Hard* Court said that both the canal owner and the water user have rights: "The fundamental law, as well as the statutes of our state, have both attempted to protect the canal owner as well as the user in their respective rights." *Hard,* 9 Idaho at 596, 76 P. at 332 (Stockslager, J., for the majority). Specifically, the Court determined that Article 15 assured the customer-irrigator of a

commercial irrigation company a perpetual right to use the water, upon payment of annual rentals, and also the right to change its place of use to another location served by the same ditch.[954]

Farmer's Co-Operative

The clearest statement on ownership of water is found in *Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 P. 761 (1908) (Ailshie, C.J.). The Court, relying on *Wilterding* and *Hard*, ruled squarely that the owner of the ditch is the owner of the water right.[955] The Court stated:

> Whatever the differences may be in the facts with reference to the use and application of the water, the ditch owners in every instance are necessarily the appropriators of the water within the meaning of the constitution and the statute. . . .
>
> . . . The appropriation of waters carried in the ditch operated for sale, rental and distribution of waters does not belong to the water users, but rather to the ditch company.

Farmers' Co-operative, 14 Idaho at 457-59, 94 P. at 763 (emphasis supplied) (quoted in *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916, 919 (1935) (Ailshie, J.).

In sum, the Idaho Supreme Court has applied the "public use" provisions of the state Constitution to ensure fair treatment of and continued service to irrigators served by commercial irrigation companies. But these provisions accomplish that task without any shifting of the title, which remains in the hands of the commercial irrigation company. Thus, the commercial irrigation company may not use or transfer the rights to the disadvantage the irrigators. But the company continues to hold

[954] Although the water user is free to move the water about on lands lying under the canal, the Court said that the consumer-irrigator could not move his or her water right "if it were shown that the change would in any manner interfere with the rights of the canal company." *Hard ,* 9 Idaho at 596, 76 P. at 332 (Justice Stockslager, for the majority). Thus, by strong implication at least, it appears that the Court has adhered to the majority rule that a consumer-irrigator of a commercial irrigation company may not transfer his or her interest in the water right off the canal system, thereby depriving the canal company of its right to payment. Consequently, whatever label one might apply to the interest of the consumer-irrigator, it is not a full fee ownership. Although Justice Ailshie speaks in *Hard* of the consumer's water right, it is evident that he and the author of the majority opinion were speaking only of the perpetual right of continued service by the canal company secured by the Idaho Constitution. This is made all the more clear by Justice Ailshie's opinion four years later in *Farmers' Co-Operative*, discussed below.

[955] Interestingly, in making this pronouncement about ownership, the court drew no distinction between commercial irrigation companies and mutuals. This can be reconciled, however, with subsequent decisions of the Idaho Supreme Court (discussed below) which have held that, in the case of mutual canal companies, the shareholder-irrigators are the owners of the water rights. In the case of mutuals, the owners of the ditch (the shareholders) are also the irrigators. Consequently, the court's statement in *Farmers' Co-operative* that in either case the owners of the ditch also own the water right remains accurate.

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title to the rights and may use them in ways that do not disadvantage the irrigators' perpetual right to continued service.

D. Water right ownership in mutual irrigation companies (including Carey Act operating companies)

Unlike commercial irrigation companies, which are rare today (except for those operating as public utilities), significant quantities of Idaho water are controlled today by mutual irrigation companies.

> The mutual irrigation company is formed expressly for the purpose of furnishing water to shareholders, not for profit or hire. *Jacobucci v. Dist. Court In & For Jefferson Cnty.*, 189 Colo. 380, 386, 541 P.2d 667, 671 (1975). Thus, the defining feature of the mutual irrigation corporation is that it operates to supply and transport water, at cost, for the lands of its members. *See* Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* Vol. I, at 479 (1971). The mutual irrigation company should be distinguished from ordinary "public service" entities, because "being in private service only," it is "not subject to the public control which obtains as to public service companies." Samuel C. Wiel, *Water Rights in Western States* Vol. II, at 1266 (3rd ed. 1911). As such, a mutual irrigation company cannot be "forced to deliver water to others than its stockholders." *Id*. They are largely autonomous, subject to their own bylaws, articles of incorporation, the law generally applicable to corporations, and a few specific statutes and Constitutional provisions. *Gasser v. Garden Water Co*., 81 Idaho 421, 425, 346 P.2d 592, 593 (1959).

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 474, 447 P.3d 915, 922 (2019) (Burdick, C.J.).

The position of "shareholder-irrigators" of mutual irrigation companies stands in stark contrast to the position of "consumer-irrigators" in commercial irrigation companies. Consumer-irrigators served by commercial irrigation companies are entitled to fair treatment and continued service, but they do not "own" the water rights under Idaho law. In contrast, water rights held by mutual irrigation entities are owned by the irrigators either individually or collectively (through their ownership in the company).

Whether the rights are held individually or collectively depends on whether they are appurtenant to the individual farm properties. Where the rights are deemed appurtenant to the land, the individual farmers hold equitable title to that portion of the water right held by the company that is appurtenant to their land. For Carey Act operating companies, this is always the case (based on language in the Carey Act itself). For other mutual irrigation companies, the water may or may not be deemed appurtenant, depending on the governing documents of the mutual irrigation company. See *Eagle Creek* decision discussed above and in footnote 953 on page 536

Where the rights are appurtenant, the Idaho Supreme Court has held their shareholder-irrigators actually "own" that portion of the water rights corresponding to their shares.

For instance, in *In re Dep't of Reclamation*, the Idaho Supreme Court ruled squarely:

> And where a ditch is used in common for the conveyance of water for two appropriations, each owner may sell or abandon his right to the ditch, separate from the other [citation], the same right belongs to a stockholder in a mutual ditch company [citation].

In re Dep't of Reclamation, 50 Idaho 573, 579, 300 P. 492, 494 (1931) (the Pacific Report version entitles this case "*In re Johnson et al.*" and employs slightly different punctuation).[956]

In other cases, the water rights are not deemed appurtenant to the land. In that situation, the mutual irrigation company holds full title and the individual irrigator holds no title (equitable or other) to the water rights. However, in such case, all irrigator-shareholders hold an undivided, collective interest (represented by their shares of stock) in the water rights held by the mutual irrigation company.

> [M]utual irrigation companies, like Eagle Creek, own water rights with a "general" appurtenancy—that is, the water right is appurtenant to all of their serviceable land. Determining whether a particular share is appurtenant to a specific tract of land depends upon the factual inquiry into the mutual irrigation company's governing documents and the history of the water right. While a share in a mutual irrigation company can be appurtenant to a specific tract of land within an irrigation company's serviceable area, such specific appurtenancy is not an integral feature.

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 474, 447 P.3d 915, 922 (2019) (Burdick, C.J).

> Because no appurtenancy statutes apply specifically to mutual irrigation companies, whether a share is appurtenant to specific tract of land is a matter of contract and corporate governance. See Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, Vol. I, at 479 (1971). ("Appurtenance of a water right, which is a legal matter . . . is to be distinguished from appurtenance of mutual-company stock to land, which is a contractual matter between the company and its shareholders."); Samuel C. Wiel, *Water Rights in Western States*, Vol. II, at 1173 (3rd ed. 1911) ("Whether the water right is appurtenant to the stockholder's land is a question of fact in each case, as is also whether on a sale of the land the

[956] *In re Dep't of Reclamation* involved a single ditch shared by (1) a mutual ditch company and its shareholders and (2) another family who owned a distinct water right using the same canal. As noted in the quotation above, however, the rule is the same when dealing with transactions among shareholders.

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> water right passes as an appurtenance."); *cf. Gasser v. Garden Water Co.*, 81 Idaho 421, 425, 346 P.2d 592, 593 (1959) (stating that the relationship between a mutual irrigation company and a shareholder is contractual).
>
> . . .
>
> The physical shares are part of this contractual inquiry. A mutual irrigation company's shares can either be attached to specific tracts or they can "float" among all the tracts within the mutual irrigation company's system . . . .

Eagle Creek, 165 Idaho at 476-77, 447 P.3d at 924-25.[957]

In contrast, shares in a Carey Act mutual irrigation company are always appurtenant to the land. This owes to the nature of the Carey Act.

> As noted, Idaho statutes which implement the Carey Act (and the Carey Act-based contract at issue in *Ireton*) declare that the water rights attach to the land as soon as the federal government issues the patent. Thus, shares in a Carey Act company "evidence title" to particular land because the water right is statutorily granted to the individual settlors (and their specific parcels of land), and thus reflect individual water rights. However, this logic does not mesh with the concept of floating shares because floating shares do not "evidence any title" to specific land.

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 476-77, 447 P.3d 915, 924-25 (2019) (Burdick, C.J.).

The Idaho position is in line with that taken in other western states. For example, in *Jacobucci v. Dist. Ct. in and for Jefferson Cnty*, 541 P.2d 667, 672-73 (Colo. 1975), the Colorado Supreme Court observed there is some authority for the proposition that the ditch company holds the water right subject only to a trust in favor of the shareholders. *Jacobucci*, 541 P.2d at 673 (quoting Kinney, *Irrigation and Water Rights* § 1482 (2d ed. 1912)[958]). However, the Colorado Court rejected the trust

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[957] For example, in *Eden's Gate LLC v. IDWR*, Case No. CV14-21-10116, Memorandum Decision, Idaho Dist. Ct., Third Judicial Dist. (June 9, 2022) (Wildman, J.), the district court concluded that the Farmer's Co-Operative Ditch Company is a mutual irrigation company. The court noted: "It is undisputed that the Ditch Company shares are not appurtenant to any particular parcel of land and can freely be moved by a shareholder within the service area." *Eden's Gate* at p. 2. "In the Court's experience this fact is unique to the bylaws of the Ditch Company, as delivery entity shares are generally made appurtenant to the land on which they are used." *Eden's Gate* at p. 8, n.4. (See footnote 858 on page 487 discussing the Farmers Co-Operative Ditch Company. The district court noted that its shares are not appurtenant to any individual parcel of land within the service area, describing this as "unique to the bylaws of the Ditch Company.")

[958] Kinney states that, in a mutual water corporation, "legal title to these rights is in the corporation, while the equitable title remains in the original owners, or their grantees. In other words, the company holds the legal title to the property in trust for its respective shareholders, the terms of the trust to be governed by the

theory in favor of "actual ownership . . . in the shareholder." *Jacobucci*, 541 P.2d at 673. The Colorado Court explained:[959]

> As a mutual ditch company, Farmers is "merely the vehicle by which its owners operate and manage its affairs." . . . The ownership of the shares of stock is merely incidental to the ownership of the water rights by the shareholders. .
> While the "naked title" may stand in the name of [the mutual ditch corporation], the ditch, reservoir, and water rights are actually owned by the farmers who are served thereby.

Jacobucci, 541 P.2d at 672-73.

The dispute in *Jacobucci* was about whether the ditch company's shareholders were indispensable parties in a city's action seeking to condemn the ditch company's water rights. Because individual shareholders are the "owners" of the water rights, the court ruled that they should have been joined.[960]

Most of the attention in Idaho has focused on a particular type of mutual known as a Carey Act company. Under the Carey Act land settlement program, the state entered a contract with the project construction company. The terms of this contract (to take one example described in *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105 (1931) (McNaughton, J.)) were that the construction company's contracts with settlers would involve a "sale or contract of the water right to the [settler, which] shall be a dedication of the water to the land to which the same is applied and the water right so dedicated shall be a part of and relate to the water right belonging to the said system of canals." In turn, the stock certificate issued to the settler entitled him or her "to proportionate interest in the dam, canal, water rights and all other rights and franchises of the [Carey Act operating company], based upon the number of shares finally sold . . . ." The Carey Act operating company received deeds from the construction company for both the water rights and the irrigation water delivery system; the local county records will reflect this "naked title." However, the operating company is a mutual irrigation company, and beneficial title to the water rights and facilities rest with the shareholders.

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articles of incorporation, or the by-laws of the same." Kinney, 3 *Irrigation and Water Rights* § 1481 at 2661-62.

[959] The court in *Jacobucci* also emphasized that the shares of stock represent, in addition to "a definite and specific water right," "a corresponding interest in the ditch, canal, reservoir, and other works by which the water right is utilized." *Jacobucci*, 541 P.2d at 672. For a comment on this subject, *see* Jeffrey J. Kahn, "Who Owns Mutual Ditch Company Assets," publication available from Natural Resources Law Center, Boulder, Colorado.

[960] This argument was also raised in Farmers' *Co-Operative Ditch Co. v. Riverside Irr. Dist., Ltd.*, 14 Idaho 450, 456-57, 94 P. 761, 762-63 (1908), discussed in the previous section dealing with commercial irrigation companies. However, the question was not properly preserved by the appellant in that case, so the Idaho Court declined to answer it.

In *Leland*, the Court ruled:

> It seems clear that the certificate [for shares of stock] in carrying out the whole plan represents and must represent a water right sold to the settler and dedicated to his land, and of which he is the beneficial owner. And further, at least in the absence of any showing of separation, the water right is an appurtenance to the land to which it was dedicated, and is part of that property.

Leland, 3 P.2d at 1107 (emphasis supplied). The Court continued:

> It was clearly the intention of the Legislature, as well as the construction company, that the individual contract holder or settler should be the owner of the water right upon the completion of the construction works.

Leland, 3 P.2d at 1108 (quoting *Adams v. Twin Falls-Oakley Land & Water Co,* 29 Idaho 357, 161 P. 322, 326 (1916) (Budge, J.)).

The Court in *Leland* also stated that, under the contract, the settler obtains "an interest in the remaining property of the corporation, to wit: the dam, franchises and other remaining property to be used in connection with the water right."[961] *Leland*, 3 P.2d at 1108.

Despite these judicial statements to the effect that the stockholder-irrigator "owns" the water right, the nature of that ownership is not as straightforward as an ordinary fee interest in land. There is still something of a tug-of-war between the interests of the company and its shareholders. This becomes evident when the shareholder tries to do something different with her water right.

The *Jacobucci* Court noted that "[t]he relationship between the mutual ditch corporation and its shareholders arises out of contract, implied in a subscription for stock and construed by the provisions of a charter or articles of incorporation." *Jacobucci* at 671 (citing *Supply Ditch Co. v. Elliot,* 10 Colo. 327, 15 P. 691 (1887) and C. Kinney, *Irrigation & Water Rights* § 1482 (2d ed. 1912)). Kinney's perspective is that "[t]he relations between private incorporated water companies, whether organized as mutual corporations, or as corporations for profit or hire, is that of contract, and the rights and duties of both parties grow out of the contract implied in a subscription for stock, and construed by the provisions of their charters, or articles of incorporation." Kinney, *Irrigation and Water Rights* § 1482 at 2662 (footnotes omitted). It follows that the exact dimensions of a shareholder's ownership, or what flexibility that ownership affords (such as the conditions that may limit transferring the right) may depend upon the terms of the corporation's "contract" with the water user.

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[961] *But see, Hobbs v. Twin Falls Canal Co.*, 24 Idaho 380, 394 (1913), where the Court at first appears to presume that a Carey Act operating company is a commercial irrigation corporation whose duty to supply water arises from the constitutional "public use" provisions. However, the Court ultimately concludes that the corporation "is nothing more than a holding company" for the interests of the irrigators.

For example, the courts and the legislature have both dealt with the extent to which a mutual canal company effectively can limit a shareholder's right to deal freely with his water right.

Idaho statutes support the proposition that Carey Act company shareholders, as opposed to the corporation itself, own the water rights.[962] Idaho Code § 42-2025 provides that "[t]he water rights to all lands acquired under [the state's Carey Act procedures] shall attach to and become appurtenant to the land as soon as title passes from the United States to the state."

Idaho Code § 42-219(5) provides that, in the case of large canal companies (serving over 25,000 acres) and all irrigation districts, the water license shall be issued to the company which, in turn, shall submit final proof to the Department. This provision, however, speaks only to the administrative issues of licenses and proofs, and would appear to have no conclusive effect on the question of actual ownership. Logically, one of the mutual canal company's roles would be to file for water rights on behalf of its shareholders, rather than having each shareholder (or all of them jointly) do so in their own names. However, to follow the *Jacobucci* rationale, a shareholder still would be a proper party to litigation affecting the water right.

In some cases, statutory provisions provide the primary authority for imposing these limitations on ownership. Idaho Code § 42-108, which grants general authority for holders of water rights to change the place of use, nature or time of use, or point of diversion under a water right, contains the following proviso:

> [I]f the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change . . . shall be made or allowed without the consent of such corporation or irrigation district.

Idaho Code § 42-108.

In *Bishop v. Dixon*, 94 Idaho 171, 175, 483 P.2d 1327, 1331 (1971), this proviso was held inapplicable to a lateral ditch association because it was not a corporation. Therefore, the association's bylaw prohibiting any transfer was held to violate section 42-108's grant of authority to make such a change.

However, in *Johnson v. Pleasant Valley Irrigation Co., Ltd.*, 69 Idaho 139 (1949), the proviso in section 42-108 was enforced in favor of the mutual canal company which opposed shareholder's proposed change. Shareholder appealed, asserting primarily constitutional arguments. The Idaho Supreme Court ruled that section 42-108 does not violate the 14th amendment to the U.S. Constitution because the administrative procedure involved in considering the transfer afforded plaintiff a hearing.

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[962] *See, e.g.*, Idaho Code §§ 42-2501 through 42-2509, which recognize a Carey Act corporation stockholder's right to transfer the " water right" appurtenant to his land to other lands within the same Carey Act system.

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Furthermore, absent a statute to the contrary, a mutual irrigation corporation is not required to hold a hearing on a matter having to do with "the handling of its affairs and in dealing with its stockholders." *Johnson*, 69 Idaho at 145.

Section 42-108 does not impermissibly delegate legislative power. The stockholder in *Johnson* had cited land use cases overturning legislation granting consent power to neighboring landowners. The court found the analogy inapt:

> [T]here is no analogy between the relation of a property owner to his neighbors and the relation existing between a stockholder and his corporation. The refusal of a corporation to permit one of its shareholders to substantially withdraw from the corporation and change his relationship to the other stockholders without its consent, does not involve legislative power but is concerned with the internal affairs of the corporation."

Johnson, 69 Idaho at 145-46. The Court found no authority recognizing the right of

> a shareholder in a water corporation to change his point of diversion and place of use *without the consent of the corporation*, to a place where he could not be served by the irrigation system of the corporation. The exercise of such a right would tend to disrupt the unity of the corporation, and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation.

Johnson, 69 Idaho at 145 (emphasis in original). The Court cited no facts to support the conclusion that Johnson's proposal would "disrupt the unity of the corporation."

It would appear that, despite the language of *Johnson*, there would be solid legal and public policy arguments for the position that statutes like Idaho's section 42-108 should be interpreted to mean that the company can withhold permission only for reasons of actual injury to the corporation or other shareholders. In other words, the company's consent, while required, cannot be unreasonably withheld.

In sum, the Idaho Supreme Court, the Legislature, and the founders have been solicitous of the interests of both the irrigator-shareholder and the irrigator-consumer. But they have accomplished the task in fundamentally different ways, giving the first a true property interest and the second something substantially less.

E. Water right ownership in irrigation districts

Irrigation districts often are the primary contracting party for water supply from Bureau of Reclamation projects in Idaho. In these instances, the irrigation districts enter into contracts with the United States which assure particular quantities of water for their members during the contract period. The ownership of these water rights is discussed in section 7.F on page 548.

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In other cases, irrigation districts directly hold title to irrigation works and the associated water rights. These are most often maintained for natural flow surface water delivery systems, however irrigation districts may also operate ground water delivery systems or even reservoir projects.

(1) Natural flow, ground water, or drainage rights held by irrigation districts

As to the later, at least, the Idaho Supreme Court has been clear that water rights acquired and held by drainage districts (which are presumably in the same position irrigation districts) belong to the districts, not to the farmers receiving the water. In *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935) (Ailshie, J.), the issue was whether the irrigators are necessary parties to litigation concerning rights to water the district delivers. The Idaho Supreme Court held: "The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. . . . The consumers possess no water right . . . ." *Barclay*, 47 P.2d at 918-19 (1935) (quoting *Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist.*, 14 Idaho 450, 94 P. 761, 763 (1908) (Ailshie, C.J.) (emphasis supplied). The Court explained, however, that even though the irrigator does not "own" the water right, she has substantial rights under the Idaho Constitution—a perpetual right of continued service so long as payments are made. *Id*. (See further discussion of *Barclay* in section 7.F(2)(c) on page 556.)

Idaho Code § 43-316 provides that water rights (and all property) owned by an irrigation district are held in trust for "the uses and purposes set forth in this title."[963] Saying that the water rights are held "in trust" is not the same as saying that the irrigators hold equitable title. The language of the trust says no such thing. Rather, it imposes the obligation on the irrigation district to use the water rights to advance "the uses and purposes set forth in this title." That presumably means that the district must ensure that needs of the irrigators are satisfied before any other use of the water is made. This is essentially a statutory codification of the principles underlying the constitutional protections set out in Idaho Const. art. XV §§ , 4, 5, and 6. The fact that this trust does not convey formal equitable title is made clear in *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755, 759 (1954) (Taylor, J.) ("However, the foregoing provisions of the statutes do not prohibit the delivery of water to users outside of the district when the same is not needed by users within the district.") (quoting *Yaden v. Gem Irr. Dist*., 37 Idaho 300, 216 P. 250, 252 (1923) (Budge, J.)). See also, *Barclay* discussed above.

Aside from this "trust" interest, users of irrigation district water are also entitled to protection under the "public use" provisions of the Idaho Constitution discussed above (Idaho Const. art. XV, §§ 1, 4, 5, and 6). As the Idaho Supreme Court has said:

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[963] The statute provides in full: "The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided." Idaho Code § 43-316 (emphasis added).

> The defendant [irrigation] district, having acquired by purchase the rights of the original appropriator and having itself made subsequent appropriations and purchases of water, stands in the position of appropriator for distribution to the landowners within the district, within the meaning of Const., Art. 15, § 1 . . . . The landowners, to whose lands the water has become dedicated by application thereon to a beneficial use, have acquired the status and rights of distributees under Const., Art. 15, §§ 4 and 5.[964]
>
> The framers of Idaho's Constitution clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.

Mellen v. Great W. Beet Sugar Co., 21 Idaho 353, 359, 122 P. 30, 31 (1912).

Thus, the right to continue to use the water delivered by the district is a perpetual entitlement, subject only to continued demand—and, presumably, the ability to place it to beneficial use and the payment of any fees or charges.[965]

In sum, the irrigation district holds title to water rights held in its name, subject to a trust to use those water rights consistent with the uses and purposes of the governing statute. As shown in *Yaden*, *Jensen*, and *Barclay,* the irrigators have a right to continued service, but they do not hold equitable title to the district's water rights.

(2) Storage rights in federal reservoirs held by irrigation districts

In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, C.J.)., the Court held that beneficial title to Bureau of Reclamation storage water delivered by irrigation districts to irrigators is held by the irrigators. See discussion in section 7.F(2) on page 552.

In a post-*Pioneer* decision, the Idaho Supreme Court said that landowners served by irrigation districts do not hold individual water rights:

> Lastly, irrigation districts are formed pursuant to statute. I.C. §§ 43-101–2554; *Yaden v. Gem Irr. Dist*., 37 Idaho 300, 216 P. 250, 252 (1923) ("Irrigation districts are creatures of the statutes."). Thus, irrigation districts "are quasi public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily

[964] *Bradshaw v. Milner Low Lift Irrigation District*, 85 Idaho 528, 545, 381 P.2d 440, 457 (1963). *See also Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935).

[965] See footnote 962 and accompanying text at page 544 dealing with the effect of recently enacted Idaho Code § 42-219(5), providing that irrigation districts shall hold the license and submit the requisite proof.

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implied." *Id*. Landowners served by irrigation districts do not hold individual water rights in connection with their service.

Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc., 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (Burdick, C.J.) (emphasis supplied).

The quoted statement, by the way, was dictum; *Eagle Creek* did not deal with irrigation districts. Perhaps it should be understood to be in reference to natural flow water rights held by irrigation districts. See discussion above in section 7.E(1) on page 546.

Alternatively, it may be understood mean that the irrigators hold beneficial title collectively. If so, that would be consistent with the second holding in *Pioneer* (part IV of the opinion), in which the Court held that it was unnecessary to include a "remark"[966] in the Bureau of Reclamation's water rights identifying each irrigation entity (much less, which individual farmers) and the quantity of water beneficially owned by each irrigation entity. *Pioneer*, 144 Idaho at 115-16, 157 P.3d at 609-10. Moreover, the *Pioneer* Court ordered the inclusion of a "remark" stating: "The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Thus, while the water right is appurtenant to the land, it is not appurtenant to individual tracts of land, but rather to the land within the irrigation district boundaries as a whole. Thus, an individual farmer or a residential homeowner serviced by the district does not own an individual water right, and may lose the right to service by failing to pay fees or electing to be excluded from the district, in which case that water would become available to other users served by the district.

F. Water right ownership in federal reclamation projects

(1) Federal reclamation law background

Over the last century, the Bureau of Reclamation ("Bureau," "BOR," or "USBR") has built water reclamation projects throughout the West.[967] The federal government has acquired water rights for its projects in the various states in two ways. Primarily, the Bureau has applied to state authorities and received a permit, license, or decree, as the case may be, recognizing the water right pursuant to state law. In other instances, the federal government has obtained water rights by conveyance from entities or individuals (such as those who either failed to fully develop their own storage project or chose for other reasons to throw in with the federal project).

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[966] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

[967] Bureau of Reclamation projects constructed in Idaho include Anderson Ranch, Arrowrock, Black Canyon, Boise River Diversion Dam, Cascade, Deadwood, Jackson Lake, Ririe Reservoir, Lake Walcott, American Falls Reservoir, and Palisades Reservoir.

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In either case, the United States holds the water rights in its name. In the past, the United States contended that it held the entire ownership interest in those water rights, and that the only interest held by others existed by virtue of and under terms of repayment contracts with irrigation districts. However, that theory did not prevail in federal court. The U.S. Supreme Court has consistently held that, while the federal government holds legal title to project water rights, the private landowners within the project lands (i.e., the irrigators) own "beneficial" or "equitable" title to project water.

Underpinning this conclusion is the observation that the United States, in carrying out the mandates of the Reclamation Act of 1902, must proceed pursuant to state water law, at least so long as such law does not frustrate the purposes of the federal act.[968]

The first case to test the ownership issue was *Ickes v. Fox*, 300 U.S. 82 (1937) (Sutherland, J.). In that case, the Bureau of Reclamation attempted to reduce long-standing water deliveries to irrigators, who received their water under repayment contracts. The United States argued that it had acquired water rights in its own name under state law in compliance with section 8, and that its distribution of water under the rights gave the irrigators no property interest in the water rights, but only "contract rights against the distributor."

The Supreme Court disagreed. It held that the appropriation was made for the irrigators, not for the government:

> Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the landowner.

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[968] "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or in any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such law, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or waters thereof." Section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372 and 383.

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Ickes v. Fox, 300 U.S. at 94-95 (citations omitted).

The rule in *Ickes* was reaffirmed in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (Douglas, J). This was an original jurisdiction case arising out of a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law, and that "[t]he property right in the water rights is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator." *Nebraska v. Wyoming*, 325 U.S. at 614. The Court found that the appropriators were the ones who put the water to beneficial use, thus perfecting the water right that had been issued in the name of the United States. In this way, the landowners had "become the appropriators of the water rights, the United States being the storer and the carrier." *Nebraska v. Wyoming*, 325 U.S. at 615.

The third Supreme Court case to address the subject was *Nevada v. United States*, 463 U.S. 110 (1983) (Rehnquist, J.). This case involved an attempt by the United States to obtain additional water rights for the Pyramid Lake Indian Reservation by undoing the 1944 Orr Ditch decree for Truckee River waters. After reviewing *Ickes* and *Nebraska v. Wyoming*, the Court concluded that the landowners, not the government,[969] hold the beneficial interest in the water rights. Therefore, said the Court, the government is not at liberty to reallocate the project water rights as if it owned these rights in fee. *Nevada*, 463 U.S. at 128. The Court concluded:

> [T]he Government is completely mistaken if it believes that the water rights confirmed to it by the Orr Ditch decree in 1944 for use in the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.

Nevada, 463 U.S. at 126 (emphasis added).

It is worth noting that the U.S. Supreme Court's decisions all speak in terms of the ownership interest held by the ultimate landowner (i.e., irrigator). Thus, no one has suggested that the irrigation districts which have contracted with the Bureau for repayment and water supply have thereby become "owners" of the water rights used to meet those supply obligations. Rather, the irrigation districts serve

[969] The Court concluded that the federal government retains legal title to the water rights. *Nevada*, 463 U.S. at 127.

as a sort of "pass through" from the federal government to the irrigators. This conclusion is confirmed by the Idaho Supreme Court in *Pioneer*, discussed in section 7.F(2) on page 552.

These federal decisions have repeatedly stated that legal title is held by the United States while beneficial title is held by the end user, but what does this mean? One commentator contends this simply means that the United States has some responsibility to treat its irrigation customers fairly. According to Professor Sax, the irrigator relying on federal water project supplies has no more than "a right to fair treatment" by the federal government, which is "essentially the same as that to which he is entitled as a public utility user."[970]

The more predominant view, however, appears to be that beneficial ownership is a true ownership interest, in the property law sense. The federal government holds title as trustee for the landowner-irrigator who actually applies the water to beneficial use on a particular parcel of land. Thus, the landowner-irrigator's interest is analogous (if not identical) to the interest held by the beneficiary of a trust.

The Interior Department Solicitor has opined that, as to waters held in Bureau of Reclamation storage reservoirs, the state-granted water right—the "paper" entitlement—rests "exclusively with the distributor," that is, with the United States.[971] However, the opinion also notes that "it is [the individual irrigators] and not the distributor who actually put the water to a beneficial use as required by state law," and concludes that *Nevada v. United States* "conclusively reaffirmed the concept that beneficial ownership of a reclamation project water right is in the water users who put the water to a beneficial use."[972]

On the other hand, the Solicitor also concluded that the federal government's "legal title" interest is not meaningless. The Solicitor concluded, based on the ruling in *Nevada v. United States*, that the legal title held by the Bureau carries with it an obligation "to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States."[973] Thus, the Bureau has the obligation to file for and defend project water rights in any general stream adjudication in which the federal government might be joined.[974] The Solicitor noted that such a filing is the means by

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[970] According to Professor Sax, the irrigator relying on federal water project supplies has no more than "a right to fair treatment" by the federal government, which is "essentially the same as that to which he is entitled as a public utility user." Joseph L. Sax, *Federal Reclamation Law,* in 2 *Waters and Water Rights* § 118.3 at 187 (R. Clark ed., 1967).

[971] *Filing of Claims for Water Rights in General Stream Adjudications*, Dept. of the Interior Solicitor's Opinion No. M-36966, 97 I.D. 21, 23 (July 6, 1989).

[972] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 27.

[973] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 28.

[974] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 28.

which the water user, the beneficial title holder, can effectively participate in the proceeding with actual proof of beneficial use to back up the agency's filing.[975]

Accordingly, the Solicitor's opinion found that *Ickes* did not contradict the Supreme Court's earlier ruling in *Ide v. United States,* 263 U.S. 497, 505 (1924) (Van Devanter, J.),[976] and that, primarily to protect project water entitlements and the project itself, the federal government retains some "control over the water" in federal reclamation projects, as well as those rights "incident to the appropriation" not placed in the hands of the appropriator. Likewise, the Solicitor cited *United States v. Humboldt Lovelock Irrigation Light & Power Co.,* 97 F.2d 38 (9th Cir. 1938), *Hudspeth Cnty. Conservation & Reclamation Dist. v. Robbins,* 213 F.2d 425 (5th Cir. 1954), and *United States v. Tilley*, 124 F. 850 (8th Cir. 1942) for the proposition that the federal government retains some control over the water right and is entitled and obligated to protect it.

It is also clear that the Secretary of the Interior is empowered to transfer the operation and management of irrigation works in a reclamation project to project landowners once payments for a major portion of the project lands are made. Even then, title to the reservoirs and works remains in the government, despite any transfer of operation and management responsibility. 43 U.S.C. § 498. "The lack of mention of water right title in this section implies that title to the water right had already passed to the farmers with their land patents."[977]

In *Madera Irr. Dist. v. Hancock,* 982 F.2d 1397 (9th Cir. 1993), the circuit court ruled that the federal government may end subsidies to federal water project beneficiaries despite the fact that the beneficiaries hold "a vested property right to a permanent water supply." For further comment on this issue, *see* Richard Roos Collins, *Voluntary Conveyance of the Right to Receive a Water Supply from the United States Bureau of Reclamation,* 13 Ecology L. Quarterly 773, 835 (1987).

(2) The *Pioneer* decision

(a) The irrigators hold "title" (of some sort) to Bureau water.

Most Idaho irrigation districts rely in part on storage water rights in federal reclamation projects. These rights are acquired under state law by the Bureau of Reclamation and held in the name of the United States. In *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) (Schroeder, C.J.), the Idaho Supreme Court held that the irrigators receiving the Bureau water hold

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[975] *Filing of Claims for Water Rights in General Stream Adjudications*, 97 I.D. at 28.

[976] In *Ide* at 505, the Court noted that the Bureau operated the Shoshone Project in Wyoming subject to state water law, which recognized the "beneficial use is the basis, measure and limit of all appropriation."

[977] *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877, 879 (D. Nevada 1980). *See* also *U.S. v. Union Gap Irrigation Co.*, 209 F. 274 (1913); *Westside Irrigation Co. v. U.S.,* 246 F. 21 (D. Wash. 1916), both holding that the United States is the appropriator of water in reclamation projects and others have merely contract rights against the U.S.

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"title to the use of the water" stored in Bureau of Reclamation projects.[978] Chief Justice Schroeder's decision affirmed Judge Melanson's ruling below, except that it substituted a new "remark" to be included in the water rights.[979]

Pioneer arose in the context of the SRBA. The Bureau of Reclamation filed water right claims in connection with its three Boise River Project facilities (Arrowrock, Lucky Peak, and Anderson).[980] IDWR recommended that water rights be issued in the Bureau's name and that competing claims filed by irrigation districts and other entities be denied. The SRBA court rejected IDWR's recommendation. Instead it issued an order declaring that the federal government holds nominal legal title and the irrigation entities hold equitable title in trust for their landowners. The United States appealed and irrigation entities cross-appealed.

On appeal, the Idaho Supreme Court largely agreed with the SRBA court. The holding is summed up in the "remark"[981] that Court ordered be placed in the Bureau's water rights:

> The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The

[978] The decision in *Pioneer* should come as no surprise. The U.S. Supreme Court has repeatedly held that BOR holds only nominal title to its water rights. *Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Nevada v. United States*, 463 U.S. 110 (1983). BOR argued in *Pioneer* that Idaho was different from all other states and that Idaho law granted BOR full legal title. That argument did not prevail.

[979] There were three decisions below: *In re SRBA,* Case No. 39576, Consolidated Subcase No. 91-63 (Idaho, Fifth Judicial Dist., Sept. 1, 2004) (Melanson, J.) ("*Melanson #1*") (instructing the parties to negotiate a "remark"); *In re SRBA,* Case No. 39576, Consolidated Subcase No. 91-63 (Idaho, Fifth Judicial Dist., Jan. 7, 2005) (Melanson, J.) ("*Melanson #2*") (ordering inclusion of a "remark"); *In re SRBA,* Case No. 39576, Consolidated Subcase No. 91-63 (Idaho, Fifth Judicial Dist., Mar. 3, 2004) (Melanson, J.) ("*Melanson #3*") (on reconsideration, modifying the "remark"). These decisions are not available on Westlaw, but may be found in the SRBA website under "Presiding Judge Documents."

[980] "Water right claim 63-00303 was filed by the BOR and pertains to the Arrowrock Dam and Reservoir Project. IDWR recommended the right in the name of BOR based on a former decreed right. The individual corresponding claims filed by the Irrigation Entities recommended as disallowed include 63-05262A (Pioneer Irrigation District), 63-05262B (Settlers Irrigation District), 63-05262C (Nampa Meridian Irrigation District), and 63-00303A (Farmers Cooperative Ditch Co.). The BOR also filed 63-05262 which IDWR recommended as disallowed but included the right in the recommendation for the 63-00303 right." *Melanson Decision* at 2-3, n.2.

[981] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

> irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Pioneer, 144 Idaho at 115, 157 P.3d at 609 (emphasis added).

Although the Court largely affirmed the SRBA Court's decision, it rejected District Court Judge Melanson's "remark" and substituted its own—without any explanation.[982] Judge Melanson's "remark" expressly articulated the concept of divided title, in which the United States held bare legal title and the irrigators held beneficial or equitable title.[983] *Pioneer*, 144 Idaho at 109, 157 P.3d at 603. Chief Justice Schroeder avoided all use of the divided title terminology (except in summarizing reclamation law precedent). Instead, he simply said the irrigators held "title to the use of the water" without explaining the nature of that title. Whether that is different or the same as equitable title is anyone's guess.

It may be that the Justice Schroeder's "remark" was just a different way of saying the same thing as Judge Melanson said his "remark." Or the Court may have intended to provide something less than full equitable title to the irrigators. The latter is supported by two observations.

First, the Court spoke about the irrigators' interest as being "stronger than a mere contractual expectancy," noting that Article XV, § 4 of the Idaho Constitution and Idaho Code § 42-220[984] (both of

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[982] The changed remark is described in a law review article by Clive Strong and his fellow deputy attorneys general:

> The SRBA Court's "remark" was modified, however, to set forth the Idaho Supreme Court's analysis. The Court deleted the reference to "divided" ownership, and replaced the statement that the irrigation districts held "[b]eneficial or equitable title . . . in trust" with provisions stating that "as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water," and the irrigation entities "act on behalf of the consumers or users to administer the use of the water for the landowners" in the quantities specified in federal spaceholder contracts.

Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 117 (2016) (brackets original, citation footnotes omitted). The article offers no insight as to why the change was made.

[983] The terms "equitable title" and "beneficial title" (held by the beneficial user of the water) are synonymous. Likewise, the terms "legal title" and "nominal title" held by the trustee are synonymous.

[984] The referenced statute is entitled "Effect of license." It provides, in pertinent part: "The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the

which ensure that irrigators who pay their contract charges may not be cut off but instead have what the Court called a "perpetual right" to service). *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. The "perpetual right" arising under those provisions is not a property right. It is no more than the right to continued service that commercial irrigation companies owe their water users under the Idaho Constitution and Idaho Code § 42-220. In keeping with this, Justice Schroeder's "remark" says merely that the irrigators' "interest is derived from law and not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. In other words, the irrigators have something more than a contract, but not necessarily a full property right.

Second, Justice Schroeder's "remark" says: "The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations." *Pioneer*, 144 Idaho at 115, 157 P.3d at 609. Thus, while the irrigators' interest is appurtenant to the land, it is not appurtenant to individual tracts of land. Rather, this interest is appurtenant to the land within the irrigation district boundaries as a whole. Thus, an individual farmer or a residential homeowner[985] serviced by the district does not own an perpetual entitlement to a portion of the storage water, and may lose the right to service by failing to pay fees or electing to be excluded from the district, in which case that water would become available to other users served by the district. That is fundamentally different from and less than a full-blown property right held by the individual irrigator.

In sum, the *Pioneer* Court gave some sort of "title to the use of water" to irrigators, which title is "more than a mere contractual expectancy." Although the term title is ordinarily associated with a property right, the Court never referred to the irrigator's "interest" as a property right. It would appear that the Court has left the nature and extent of irrigators' interest as a matter for future courts to decide.

(b) Why did ownership matter to the irrigators in *Pioneer*?

One might ask, why did the irrigation districts think it so important to litigate the ownership issue in *Pioneer*? After all, the Bureau has long acted as a cooperative partner and supporter of the irrigation entities, and there has never been any substantial disagreement with respect to project operation.

The *Pioneer* Court mentioned two recent cases that were of particular concern to the irrigators, motivating them to confirm they held an actual title to the water rights. The first was *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504 (2005). In that case, the federal court of claims rejected a takings claim brought by irrigators in response to temporary reductions in the amount of project water made available for irrigation. The federal court rejected the claim, saying that the property remedy lay

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failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water . . . ." Idaho Code § 42-220.

[985] Irrigation districts do not serve only farmers. Vast areas of former irrigation land is now within cities, where the irrigation districts provide non-potable irrigation water to homeowners and businesses for lawns, open space, etc.

in breach of contract, not a taking claim. The other was *Orff. v. United States*, 545 U.S. 596 (2005) (Thomas, J.), in which the Supreme Court rejected a third-party beneficiary claim by irrigators on sovereign immunity grounds. See also, *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001) (restrictions on water use required by the Endangered Species Act result in a compensable "physical taking" of contractual water rights).

(c) The holding in *Pioneer* should be limited to water rights for Bureau projects.

For reasons discussed below, the authors conclude that the holding in *Pioneer*, whatever it is, does not apply outside the context of federal reclamation law and other situations in which Idaho law has recognized enhanced rights for irrigators served by other entities (such as mutual irrigation companies, including Carey Act operating companies).

The Court's decision in *Pioneer* consists of a recitation of the facts, the constitutional and statutory law, and the prior case law followed by a holding in the form of a "remark"[986] to be included in the Bureau's partial decrees. The Court did not explain how the recited law led to the holding, nor did it address the extent to which its holding should serve as precedent in contexts other than federal reclamation projects.

The authors conclude that the holding in *Pioneer* is applicable only in the context of federal reclamation law and other situations in which Idaho law has recognized enhanced rights for irrigators served by other entities (mutual irrigation companies, including Carey Act operating companies). The *Pioneer* Court discussed but did not overturn prior precedent that has consistently held that commercial irrigation companies hold full title to their water rights, subject to constitutional guarantees of continued service and fair dealing for the irrigators the companies serve. This conclusion is reinforced by a post-*Pioneer* decision (*Eagle Creek*, discussed below in section 7.F(2)(c)(iv) on page 562).

This conclusion is supported by four lines of reasoning, discussed below.

(i) First reason – *Pioneer* is grounded in reclamation law.

First, the *Pioneer* decision is articulated by the Court with extensive reference to the law, history, and purpose of the Reclamation Act. The Court said:

- "The Reclamation Act of 1902 set in motion a massive program to provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Pioneer*, 144 Idaho at 109, 157 P.3d at 603.

[986] Idaho Code § 42-1411(2)(j) authorizes the Director to include in the Director's Report setting out recommended water rights in a general adjudication "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." If approved by the adjudication court, these remarks will be included in the partial decree and become part of the water right.

- "The Reclamation Act provides that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, measure, and limit of the right.' 43 U.S.C. § 372." *Pioneer*, 144 Idaho at 110, 157 P.3d at 604.

- "The intent of the Reclamation Act was to allow large projects to be built, providing federal funds to states that were not able to build and maintain storage facilities alone. This is particularly significant in this case since the contracts between the United States and the irrigation districts provide for the repayment to the United States for the cost of constructing the federal facilities and the continuing operation and maintenance costs. The irrigation districts have fully repaid the construction costs, except for Lucky Peak, and they have paid for development of the stored water." *Pioneer*, 144 Idaho at 114-15, 157 P.3d at 608-09.

In short, the federal government did not undertake these projects for its own benefit, but for the sole benefit of the irrigators. The whole reclamation undertaking was aimed at providing water to irrigators, with water rights based on beneficial use that would be appurtenant to the irrigated land.[987]

Thus, under the Reclamation Act and the Carey Act, the entity undertaking the irrigation project is a mere conduit of the water right to the farmers for whom the projects are undertaken. The situation is similar for other mutual irrigation companies. (See section 7.D beginning on page 539.) The situation is different, however, for commercial irrigation companies and irrigation districts, which are subject to different legal principles respecting ownership of the subject water rights. The *Pioneer* Court's emphasis on the history and role of reclamation law supports the conclusion that its holding should be limited to that context.

(ii) Second reason – *Pioneer* left the commercial irrigation district cases intact.

The second reason that the *Pioneer* holding arguably does not apply in other contexts is that prior precedents calling for a different outcome in the context of commercial irrigation companies were acknowledged by the Court and left in place. Specifically, the Bureau of Reclamation drew the Court's attention to three Idaho cases which it said showed "that Idaho law does not require a beneficial user to hold title to water rights." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. Those cases are:

- *Wilterding v. Green*, 4 Idaho 773, 45 P. 134 (1896) (Morgan, C.J.),

- *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935) (Ailshie, J.), and

[987] The discussion of reclamation law in *Pioneer* dovetails with the Court's description in both pre- and post-*Pioneer* cases of how irrigators served by Carey Act entities ultimately become the title holders to the water rights. See, e.g., *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 476-77, 447 P.3d 915, 924-25 (2019) (Burdick, C.J.); *Leland v. Twin Falls Canal Co.*, 51 Idaho 204, 3 P.2d 1105, 1107 (1931) (McNaughton, J.). (See discussion in section 7.D beginning on page 539.)

- *Nampa & Meridian Irr. Dist. v. Barclay*, 56 Idaho 13, 47 P.2d 916 (1935) (Ailshie, J.).

These cases demonstrate that, outside the context of water rights held by the Bureau of Reclamation, Carey Act companies, and other mutual irrigation companies, water delivery entities may appropriate water and hold full title to the water rights, notwithstanding that the water is used by someone else.[988] These water rights are subject to constitutional and statutory obligations to treat irrigators fairly and to assure continued delivery of water to them so long as they pay reasonable charges. But those obligations do not shift ownership of the rights to the irrigators.

These three cases are discussed below.

Wilterding (1896)

In *Wilterding*, a farmer sought a writ of mandate to compel the owner of the Ridenbaugh Canal to rent surplus water to him at the prevailing rate of $1.50 per acre rather than the new rate of $10.00 per acre demanded by the commercial irrigation company. Before sustaining the defendant's demurrer based on a pleading defect, the Court opined on the constitutional provisions in article XV protecting irrigators and the effect of those provision on ownership of the underlying water right. (See discussion in section 7.B beginning on page 530.) The Court concluded that the Idaho Constitution was intended "to deal only with the 'use' of water, and not with the property rights of appropriators therein . . . . The sale, renting, and distributing of the water is a dedication, and brings its use under the control of the state, but it in no sense destroys or abrogates the property rights of the appropriator therein." *Wilterding*, 45 P. at 138 (emphasis added). Thus, the Court held that the public use provisions in the Idaho Constitution do not address the question of water right ownership; they specify only that the use of water by consumers or distributees is a dedication to their lands that cannot thereafter be interrupted so long as they pay reasonable assessments.

Talboy (1935)

In *Talboy*, the Court held that the water rights associated with an irrigation reservoir were owned by the companies that owned the reservoir, not the "consumers" (farmers) to whom water was delivered.[989] The project was owned by three water supply entities that owned the facilities as joint tenants. Two of them were called "irrigation districts" and one was called a "company." All three were entities that distributed the water to consumers for a rental payment.[990] In short, notwithstanding

[988] In addition to these three cases, two other cases reinforce this conclusion: *Hard v. Boise City Irrigation and Land Co*., 9 Idaho 589, 594, 76 P. 331, 332 (1904) (Ailshie, J., concurring) and *Farmers' Co-Operative Ditch Co. v. Riverside Irrigation* ., 14 Idaho 450, 458, 94 P. 761, 763 (1908) (Ailshie, C.J.). These are discussed in section 7.C beginning on page 534.

[989] The *Talboy* case involved a damage claim by one of the three joint-tenants of the project against the other joint-tenants and against the water master. The Court ruled that the plaintiff was entitled to damages to reimburse it for the extra water taken by the others.

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their nomenclature, they fell into the category known as "commercial irrigation companies," at least to the extent that they engaged in water rentals to farmers outside their own district boundaries.

The *Talboy* Court held that these delivery entities were the sole owners of the water rights they had acquired for the project:

> Appellant, respondent, and Weiser Bench Irrigation Company had a water right or water rights in the waters of Crane creek sufficient for the full capacity of the reservoir and to supply each its amount of water provided for by the contract. . . .
>
> After the water was diverted from the natural stream and stored in the reservoir, it was no longer "public water" subject to diversion and appropriation under the provisions of the Constitution (article 15, § 3). It then became water "appropriated for sale, rental or distribution" in accordance with the provisions of sections 1, 2, and 3, art. 15, of the Constitution. The waters so impounded then became the property of the appropriators and owners of the reservoir, impressed with the public trust to apply it to a beneficial use.

Talboy, 43 P.2d at 945. As noted in the quotation, the water rights held by these companies were subject to the obligations spelled out in the Constitution that are protective of the farmers receiving the water. But there is no ambiguity in this decision that the distributing entities, not the farmers, held the water rights.

Barclay (1935)

In *Barclay*, Nampa & Meridian Irrigation District sued various persons and entities including Drainage District No. 4 of Ada County, which is described as a quasi-municipal corporation. *Barclay*, 47 P.2d at 918. The Drainage District obtained an order from the district court requiring the Irrigation District to ensure that all individuals served by the Irrigation District be made parties. On appeal, the Idaho Supreme Court overturned this ruling. The Court made clear that water rights acquired and held by the Drainage District belong to the District, not to the farmers receiving the water. (This case was dealing with natural flow water rights held by the Irrigation District and drainage water appropriated by the Drainage District; no Bureau storage water was involved.)

> The question was mooted [argued] in Farmers', etc., D. Co. v. Riverside Irr. Dist., 14 Idaho, 450, 94 P. 761, 763, and this court said: "The appropriation of waters carried in the ditch operated for sale, rental, and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the use of such water, after having once been

[990] "Now it appears from the record here that these irrigation districts were not actually using this water on their own lands but were each distributing their appropriations to the landowners in their respective districts and collecting rents therefor; or, possibly more accurately stated, assessments. *Talboy*, 43 P.2d at 946.

> sold, rented, or distributed to any person who has settled upon or improved land for agricultural purposes, becomes a perpetual right, subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use. Section 4, art. 15 of the Constitution . . . ." . . .
>
> . . . The consumers possess no water right which they can assert as against any other appropriator; their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under section 1, art. 15, "for sale, rental or distribution," is not the owner of the appropriation and does not acquire the rights of an appropriator, but he simply acquires the rights of a user and consumer, as distributee of the water under sections 4 and 5, art. 15, of the Constitution.

Barclay, 47 P.2d at 918-19 (emphasis added) (additional citations and internal quotation marks omitted).

As noted in the quotation above, even though the irrigator does not "own" the water right, she has substantial rights under the Idaho Constitution—a perpetual right of continued service so long as payments are made. Thus the Drainage District (which is not a mutual irrigation company or a Carey Act operating company) was given treatment similar to that of commercial irrigation company.

Importantly, the *Pioneer* Court did not overrule the holdings in *Wilterding*, *Talboy*, or *Barclay*. Instead, it found them inapplicable in the context of water rights secured under the Reclamation Act. It began by noting that *Wilterding* was "issued prior to the creation of the Reclamation Act." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. It then continued:

> Notably, none of these cases deals with the BOR or the Reclamation Act. In fact, the United States Supreme Court has indicated through *Ickes* and its progeny that a strong argument exists that the framers of the Reclamation Act did not intend to deprive the irrigation entities of an equitable interest in project water rights. The intent of the Reclamation Act was to allow large projects to be built, providing federal funds to states that were not able to build and maintain storage facilities alone. This is particularly significant in this case since the contracts between the United States and the irrigation districts provide for the repayment to the United States for the cost of constructing the federal facilities and the continuing operation and maintenance costs. The irrigation districts have fully repaid the construction costs, except for Lucky Peak, and they have paid for development of the stored water.

Pioneer, 144 Idaho at 114-15, 157 P.3d at 608-09.

In short, the *Pioneer* Court acknowledged that, in contexts other than the Reclamation Act and other situations in which Idaho law has recognized enhanced rights for irrigators served by other entities (such as mutual irrigation companies, including Carey Act operating companies), Idaho law holds that title to water rights remains in the water delivery entity notwithstanding any constitutional or statutory obligations requiring the continued delivery of water to irrigators using that water. It did not overrule that precedent, because it was not applicable to the *Pioneer* case.

(iii) Third reason – Judge Melanson expressly recognized that the outcome would be different in the context of commercial irrigation companies.

As noted in "Second reason" above, Chief Justice Schroeder determined that the commercial irrigation company cases were not applicable to his analysis because "none of these cases deals with the BOR or the Reclamation Act." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. Thus it is evident that the Idaho Supreme Court concurred with the district court on this point.

While the Chief Justice merely swept aside commercial irrigation company cases, the underlying decision by Judge Melanson was more thorough in its analysis of the issue. Judge Melanson explained the United States urged that BOR should be given the same treatment as a commercial irrigation company. Judge Melanson recognized that commercial irrigation companies hold full title to its the water rights, but said concluded BOR is not entitled to that treatment under the reclamation law.

> A commercial ditch company . . . owns the water rights and rents or distributes the water to end users. Any interest the end water users have in the water rights is solely limited to their service contracts or leases. The ditch company is not the actual beneficial user of the water right.
>
> The BOR would argue that its relationship with the Irrigation Entities (or end water users) is similar to the relationship between a commercial ditch company and the parties who contracted for use of the water owned by the company. The BOR argues that because the Idaho Constitution allows this manner of appropriation (most states do not) that state law dictates that the BOR should be named the exclusive owner of the water right. The BOR argues that any interest that the Irrigation Entities may have is limited to the contract and that any relief for the BOR's failure to perform is limited to a breach of contract action. The problem with this argument is that was the very issue and concern which was addressed by the United States Supreme Court in *Ickes v. Fox*, *Nebraska v. Wyoming*, and *Nevada v. United States*. Those cases specifically defined the relationship between the BOR and the project water users. The very essence of those decisions is that the project water users have more than simply a rental or contractual interest in the project rights. As discussed earlier, the Act, the regulations issued in accordance with the Act and the solicitor's opinion regarding the treatment of project water in general

> adjudications all support this conclusion. Therefore, the BOR is not free to do as it pleases with the water and leave the water users to resort to a breach of contract action against the BOR as the sole remedy. Simply put, the relationship between the BOR and the Irrigation Entities or end water user is not the same as the relationship between a commercial ditch company and the water users to which it distributes water.

Melanson #1, at 28 (emphasis added).

This conclusion was affirmed on appeal in *Pioneer*. Chief Justice Schroeder's opinion did not provide this level of analysis, but it reached the same conclusion. As discussed in the "Second reason" above, the Chief Justice acknowledged the holdings to this effect the commercial irrigation company cases, but said they were not applicable to his analysis because "none of these cases deals with the BOR or the Reclamation Act." *Pioneer*, 144 Idaho at 114, 157 P.3d at 608. Thus it is evident that the SRBA court and the Idaho Supreme Court concur that the *Pioneer* holding does not apply to commercial irrigation companies, and the opposite result would be reached in that context.

(iv) Fourth reason – The *Eagle Creek* decision confirms that commercial irrigation companies may hold full title to their water rights.

Finally, the need to limit the application of *Pioneer* to reclamation projects, Carey Act operating companies, and mutual irrigation companies is confirmed by the Idaho Supreme Court's more recent decision in *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 447 P.3d 915 (2019) (Burdick, C.J.). (See further discussion of this case in 7.C beginning on page 534.)

In *Eagle Creek*, the Court described the various types of irrigation water delivery entities and the law applicable to each. It confirmed the longstanding Idaho case law recognizing that for-profit commercial irrigation companies (including private contract companies and public utilities) that deliver irrigation water hold full title to their water rights:

> The "private contract company" is one set up for perpetual service to farmers with whom it would contract; they would pay for the water delivery at established rates, whether they used the water or not. The users never acquire any interest in the water rights or facilities.

Eagle Creek, 165 Idaho at 475, 447 P.3d at 923 (citing the *Idaho Water Law Handbook* and quoting from an article by Handbook author Jeffery C. Fereday).

The fact that this 2019 decision—which discusses *Pioneer*—continues to recognize that commercial irrigation companies hold title to their water rights is further confirmation that *Pioneer*'s holding should not be applied outside of its Bureau of Reclamation context.

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(v) In sum

There is broad language in *Pioneer* that could be read to suggest that title to irrigation rights is held by the irrigator in all contexts.[991] But that conclusion cannot be reconciled with the *Pioneer* Court's decision to distinguish, rather than overrule, *Wilterding*, *Talboy*, and *Barclay*. Indeed, the *Pioneer* case affirmed the SRBA's decision, which explicitly recognized that commercial irrigation companies hold full title to their water rights. It is further reinforced by the *Pioneer* Court's emphasis on the law, history, and policy of the Reclamation Act, as discussed above. And the limited applicability of the decision is confirmed by the Court's subsequent decision in *Eagle Creek*.

G. Water right ownership for municipal providers

The ownership of municipal water rights held by private municipal providers is analogous to that of ditch companies. Like ditch companies, these are private, for-profit entities subject to regulation by the Idaho Public Utilities Commission. In *Eagle Creek Irrigation Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (Burdick, C.J.), the Court described the third category of mutual irrigation company as follows:

> (3) A true "public utility company," is one which holds itself out to serve all comers, so long as there is adequate water supply, on an annual fee for service based primarily on the amount of water used. The deliberate entry into public service caused a dedication to public use and subjected these companies to public utility regulation (at least after public utility commissions came into being).

Eagle Creek, 165 Idaho at 475, 447 P.3d at 923.

Although this description was in the context of irrigation entities, it would seem to apply equally to municipal water delivery. Accordingly, there should be no doubt that water rights held by such

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[991] The *Pioneer* Court's references to general principles of beneficial use are summarized in this article:

> The Idaho Supreme Court's analysis was based on Idaho's "well-settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law." It was undisputed "that the [Bureau of Reclamation] does not beneficially use the water for irrigation. It manages and operates the storage facilities." Rather, "[i]rrigation of the lands serviced by the irrigation districts was the basis upon which original water right licenses were issued." Thus, "[w]ithout the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law." The Court also concluded "[t]he underlying principle" of the United States Supreme Court decisions--that application of water to beneficial use is required to perfect a water right--"is the same" as Idaho law, and "[b]eneficial use is enmeshed in the nature of a water right" under Idaho law.

Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 117 (2016) (brackets original, citation footnotes omitted).

entities are owned by those entities, not by the individual customers who come and go. Indeed, it is entirely unthinkable that every home or business served by a municipal provider has a property interest in the provider's water rights.

Although we are aware of no law on the subject, the same would surely apply to a municipal provider who is a municipality rather than a private company.

There is very little law on whether the constitutional principles of "public use" apply to municipal providers. Sections 4 and 5 of Article 15 are expressly limited to entities providing agricultural water, and therefore do not apply to municipal providers. Sections 1 and 6, however, do not contain this limitation.

In a 1915 decision involving application of the public utility act to water rights, the Idaho Supreme Court held that sections 1, 2 and 3 of Article 15 do apply to municipal providers. *Murray v. Public Utilities Comm'n,* 27 Idaho 603, 150 P. 47 (1915). The issue in that case was not the rights of the water customers. Rather, the question was whether the utility owned the water rights and was entitled to include them in its rate base. The state Supreme Court answered with a definitive "yes" to both questions:

> When the provisions of the Constitution and statutes of this state relating to water rights are carefully read together, it is apparent that, if one appropriates water for a beneficial use, and then sells, rents, or distributes it to others who apply it to such beneficial use, he has a valuable right which is entitled to protection as a property right. This right has been recognized in almost every adjudication of water rights by the courts of this state . . . . To be sure, the person who takes water from the water company or carrier also acquires a right to the use of it, dependent upon user and payment, but this does not alter the fact that the water company has a right.

Murray, 27 Idaho at 619-20, 150 P. at 50-51 (emphasis added).

In other words, the water right is the municipal water provider's "property right," but the customer has some rights, too. Just what "right" the municipal customer holds was not described by the Court. Presumably, it is simply the right, as provided in public utility law, to fair, nondiscriminatory, continued service upon payment. This is essentially the same as the right constitutionally conferred upon customer-irrigators served by commercial irrigation companies under Article 15, section 4.

A city entering into a franchise agreement with a private water provider (which provider, of course, would be a regulated public utility) would have whatever rights are in the franchise contract. But the existence of the franchise would not have the effect of shifting title to the provider's assets.

In analyzing the water right ownership issue, caution should be exercised in drawing analogies between irrigation water providers and municipal water providers. There are fundamental differences between the two.

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Take irrigation water providers first. They provide a supply of agricultural water to a relatively fixed group of irrigators. Available supplies would be allocated to the irrigators to irrigate lands specified in a district's charter (in the case of landowner-irrigators within an irrigation district), on the basis of stock ownership (in the case of a mutual canal company), or pursuant to contract entitlement (in the case of commercial irrigation companies. In contrast to the municipal provider, an irrigation water provider owns a fixed canal system that typically has been in place for decades and which is not changed or extended to meet new demand. The irrigation water provider often does not even deliver directly to the headgate of a shareholder or district landowner (in the way a municipal provider delivers directly to the home or business), but rather to a lateral ditch operated informally by the landowners. The irrigation water provider has no obligation to provide service to new customers, to persons outside a district's boundaries, or to non-shareholders. It is not in the business of serving all those who might set up homes or businesses in a growing community, and certainly is not obligated to construct an ever-expanding system of reservoirs, wells, pipes and pumps.

In contrast, a municipal water provider (like any public utility) is obligated to serve all comers and to serve a growing population of domestic, commercial, municipal and industrial users, and their incidental irrigation needs. To meet this obligation, it is apparent that the water utility must own and control (and judiciously augment) its portfolio of water rights. If every departing customer could take with her a fractional interest in the company's water rights portfolio, its water portfolio would dwindle and there would be no sense to the requirement that a "public" or "municipal" water provider have the water available to serve a growing community.

Of course, one irrigation supply entity does have parallels to the municipal provider: the commercial irrigation company. They were common in the late 19th century and gave rise to concerns about protecting the consumer-irrigator against unfair treatment or company bankruptcy. As indicated above, the courts in Colorado and the constitution framers in Idaho and California declared such for-profit, commercial enterprises to be, in essence, "public utilities" before public utility regulation had been invented. Now, as then, commercial irrigation companies and municipal providers are deemed to hold full title to the water rights, but are bound to provide fair and reasonable service to their customers.

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8. FLOOD CONTROL DUTY

The owner/operator of an on-stream or off-stream reservoir capable of providing flood control has a right and obligation to release water for flood control purposes. In the case of federal reservoirs, this duty arises under federal statutes governing the reservoir. For non-federal reservoirs, this duty arises under Idaho common law, which requires all owners and operators to operate reservoirs reasonably. The three Idaho cases on this subject are discussed below.

The obligation to manage for flood control arises where one assumes a duty of flood control. In *Kunz v. Utah Power & Light Co*. ("*Kunz I*"), 526 F.2d 500 (9th Cir. 1975), flooded landowners sued a power company that operated an off-stream reservoir (Bear Lake fed by the Stewart Dam on the Bear River). The plaintiffs contended that the company should have kept more reservoir space empty so that water could be stored later to prevent the flooding. The power company insisted that it owed no duty of flood control and that it released no more water at any time than was entering the reservoir. The Ninth Circuit held that the power company had assumed a duty of flood control. Ordinarily, one owes no affirmative duty to prevent harm to another, so long as he or she has not brought about the condition that threatens the harm. An exception arises, however, where one voluntarily undertakes to assist another, which Utah Power had done in this case by consulting with landowners about flood-control efforts.

However, the assumed flood control duty does not give rise to strict liability. In *Kunz v. Utah Power & Light Co*. ("*Kunz II*"), 117 Idaho 901, 792 P.2d 926 (1990) (Bakes, C.J.), the Idaho Supreme Court, responding to certified questions from the Ninth Circuit, held that the power company operating Bear Lake "is only held to a standard of reasonableness, i.e., negligence" in operating the reservoir, thereby rejecting recovery based on various strict liability theories. *Kunz II*, 117 Idaho at 906, 792 P.2d at 931. In so ruling, the Court distinguished a line of cases calling for strict liability where a landowner alters a natural channel by placing barriers to prevent flooding on its property that diminishes the carrying capacity of the stream and causes flooding on other properties.[992] The Court said the distinction found in these two lines of cases is based on broad policy considerations. "Because Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource. 'The policy of the law of this State is to secure the maximum use and benefit, and lease wasteful use, of its water resources.'" *Kunz II*, 117 Idaho at 904, 792 P.2d at 929 (quoting *Poole v. Olaveson*, 82 Idaho 496, 502, 502 P.2d 61, 65 (1960) (Smith, J.)). Thus, the need for maximum use of water resources justifies not holding reservoir and canal operators strictly liable for flood damage.

More recently, the Idaho Supreme Court held that even reservoir operators that do not affirmatively assume a duty of flood control are held to a duty of reasonable care. This amorphous standard is something less that the flood control duty assumed by Utah Power in *Kunz I* and *Kunz II*. In *Burgess v. Salmon River Canal Co., Ltd.*, 119 Idaho 299, 305, 805 P.2d 1223, 1229 (1991) (McDevitt, J.), the Idaho Supreme Court distinguished *Kunz I* on the facts, concluding that the operators of the

[992] The dissent by Justice Bistline complained that the majority failed to address two cases holding the power company is held to a strict liability standard for flood damage, *Johnson v. Utah Power & Light Co*., 215 F.2d 814 (9th Cir. 1954) and *Grossner v. Utah Power & Light Co*., 612 P.2d 337 (Utah 1980).

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Salmon Falls Dam had not undertaken a duty of flood control. "Diversion of a stream by itself without other overt actions does not indicate a voluntary assumption of a flood control duty. To hold as the trial court did would impose a duty of flood control upon every dam operator in this state." *Burgess*, 119 Idaho at 304, 805 P.2d at 1228. The *Burgess* Court nonetheless held that the owners have a "duty of reasonableness" in discharging water from the reservoir. *Burgess*, 119 Idaho at 305, 805 P.2d at 1229. Many factors must be weighed, said that Court, and the fact that "it did not release any more water than was flowing into the reservoir" does not prevent it from being held liable. *Burgess*, 119 Idaho at 306, 805 P.2d at 1230. *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 903 P.2d 730 (1995) (McDevitt, C.J.). Ultimately, upon remand, the dam operator paid millions of dollars in damages.

9. FEDERAL RECLAMATION LAW

By the turn of the century, settlers of the West already had demonstrated their remarkable resourcefulness and stamina. In the inhospitable mountains and plains, they scratched out mines, farms and towns. Despite the odds, these hardy folk survived, and many prospered. But their ability to transform the Western landscape was limited—by water. Monumental change required monumental water projects. And monumental water projects required monumental financing.

Enter the U.S. Congress. In 1902 it created the federal reclamation program,[993] a plan of great vision and enormous proportions. The newly created Bureau of Reclamation[994] quickly embarked on the construction of hundreds of reservoirs—many larger than anything ever before conceived—at every promising site across the desert. The plan to reclaim the desert has been achieved with such success that it would astonish the minds of Lewis, Clark, Powell, and Fremont, not to mention Captain Bonneville.

In undertaking this great enterprise, the federal government might have chosen to develop a *federal* law for the allocation of water. It certainly has the power.[995] Instead the Congress stated from the outset that it would look primarily to state law to allocate water from the federal projects:

> Nothing in . . . this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws . . . .[996]

Reclamation Act of 1902, § 8, 43 U.S.C. § 383.

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[993] Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457).

[994] The Service has undergone several bureaucratic transmutations. In July 1902, the Secretary of the Interior created the "Reclamation Service" under the Geological Survey. In March 1907, the Service was separated from the Survey. In June 1923 the name was changed to the "Bureau of Reclamation." The name was changed again to the "Water and Power Resources Service" in November 1979 (under the Carter Administration) by Secretarial Order No. 3042, and was changed back again to the "Bureau of Reclamation" by Secretary James Watt in May 1981 by Secretarial Order No. 3064. 52 Fed. Reg. 3354 (Feb. 3, 1987).

[995] U.S. Const. art. I, § 8, cl. 3 (commerce clause); U.S. Const. art. IV, § 3, cl. 2 (property clause); U.S. Const. art. VI, cl. 2 (supremacy clause).

[996] A most useful compendium of federal reclamation laws is contained in the multi-volume set, *Federal Reclamation and Related Laws Annotated (Preliminary)* (2001), published by the U.S. Department of Reclamation.

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Of course, nothing is that simple. It was easy enough for Congress to say that it was deferring to state law. It was another matter to say what that meant. When push comes to shove, the courts have held in some very limited instances that federal law may override state water law if the state law frustrates the purposes of the federal program.[997]

Despite the ambiguity and uncertainty surrounding the interaction of federal reclamation law and state water law, however, the general premise still holds true. The federal government complies with state water law (at least the formalities of state law) when it builds reclamation projects: It files for and obtains water rights in the name of the federal government.

But who actually owns the water? This subject was treated extensively in section 7.F at page 548. To briefly re-cap, in *Ickes v. Fox*, 300 U.S. 82, 95 (1937), the Supreme Court declared that reclamation water rights are held by the user, not by the federal government.

In *Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945), the Court followed *Ickes* and declared, "Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." Similarly, in *Nevada v. United States*, 463 U.S. 110 (1983), the Court held that equitable title to water provided by the Bureau is held by individuals who put the water to beneficial use, not by the Bureau or the contractors.

This much appears plain. While the federal government holds paper title to Bureau water rights, the actual users of those rights have an equitable interest in those rights. The nature and contours of that interest are not so easy to determine.

Part of the difficulty is the sheer quantity of relevant law. The core federal legislation, the 1902 Act, is surrounded by an additional body of law and policy represented by statutes including reclamation related legislation[998] and other environmental and planning acts,[999] as well as project

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[997] *California v. United States*, 438 U.S. 645 (1978); with respect to hydropower licensing see, *California v. FERC*, 495 U.S. 490, *red's denied*, 110 S. Ct. 3304 (1990).

[998] The following is a list of selected reclamation statutes:

1894: Federal Desert Lands Act (aka the Carey Act), ch. 301 § 4, 28 Stat. 422 (codified at 43 U.S.C. § 641). N.B., This is not truly a federal reclamation statute. Rather, it provides for the transfer of federal lands to private ownership to assist states in developing arid lands.

1902: Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457). [N.B., legislative history at 35 Cong. Rec. 6677 (1902).]

1906: Townsite Act of 1906, ch. 1631, 34 Stat. 116 (codified at 43 U.S.C. §§ 561-562, 566-567): Amended 1902 Act, which limited reclamation water to agricultural purposes, to authorize the Department of the Interior ("DOI") to furnish water to new towns in the immediate vicinity of irrigation projects).

1911: Act of Feb. 2, 1911, ch. 32, 36 Stat. 895 (codified at 43 U.S.C. § 374): Sale of lands acquired in connection with irrigation project.

1911: The Warren Act (Act of Feb. 21, 1911), Pub. L. No. 61-406, 36 Stat. 925 (codified at 43 U.S.C. §§ 523-525): Provides authority to sell surplus water to non-project lands.

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1911: Act of Feb. 24, 1911, ch. 155, 36 Stat. 930 (codified as amended at 43 U.S.C. § 522): Lease of water power.
1914: Act of Aug. 13, 1914, ch. 247, 38 Stat. 686 (codified at 43 U.S.C. §§ 373 *et seq.*).
1920: Miscellaneous Purposes Act of 1920 (Surplus Water), 43 U.S.C. § 521 (Pub. L. No. 66-796, ch. 86, 41 Stat. 451): Allowed delivery of water to non-irrigators meeting three criteria: (1) approval by water users associations, (2) no other practicable source of water, and (3) no impairment of service to irrigators). The act was construed in *El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894 (W.D. Texas 1957), *aff'd,* 243 F.2d 927 (5th Cir. 1957), *cert. denied* 355 U.S. 820 (1957), in which the court upheld the authority of the Bureau of Reclamation to enter into contracts with El Paso to supply water under an agreement entailing the city's purchase of up to 2,000 acres of irrigated land.
1920: Act of May 20, 1920, ch. 192, 41 Stat. 605 (codified at 43 U.S.C. § 375): Provides for the sale of land improved at the expense of the reclamation fund.
1928: Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617ff (enacted Dec. 21, 1928).
1926: Omnibus Adjustment Act of 1926: Ended the ability of the United States to contract with individuals for water rights in reclamation projects and required the United States to enter into contracts with irrigation districts.
1939: Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 485-485k): First general reclamation statute to recognize multi-purpose projects. Authorizes DOI to furnish water "for municipal or miscellaneous purposes" from an irrigation project provided that "it will not impair the efficiency of the project for irrigation purposes". Requires municipal user to pay its appropriate share of costs and O&M.
1956: Colorado River Storage Project Act ("CRSPA"), ch. 203, 70 Stat. 105 (codified as amended at 43 U.S.C. §§ 620-620o).
1956: Small Reclamation Projects Act of 1956, ch. 972, 70 Stat. 1044 (codified at 43 U.S.C. §§ 422(a) *et seq.*).
1958: Water Supply Act of 1958, Pub. L. No. 85-500, title III, 72 Stat. 319 (codified at 43 U.S.C. § 390b): Allowed local interests to contract with Bureau and the Corps for the inclusion of excess storage capacity in dams to provide for domestic, municipal, industrial, and other purposes. This Act provides a "separate and distinct" procedure which the Secretary may employ for the letting of an M&I water contract. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037, 1044 (D. Mont. 1976), *modified on other grounds sub. nom. Environmental Defense Fund v. Andrus*, 596 F.2d 848 (9th Cir. 1979). Under the Water Supply Act the Secretary must apply for and receive congressional approval for modification of a pre-1958 project if the project requires "substantial modification". Act contemplates that municipal users will pay no more for the water than agricultural users.
1965: Federal Water Project Recreation Act of 1965, 79 Stat. 216 (codified at 16 U.S.C. § 4601-18): Authorizes DOI to operate reclamation projects to provide for recreational, fish or wildlife benefits "in a manner coordinated with the other project purposes".
1968: The Colorado River Basin Project Act, Pub. L. No. 90-537, 82 Stat. 885 (codified throughout 43 U.S.C. including §§ 1521-1528, 1551-1556): authorized the Central Arizona Project and numerous others.
1982: Reclamation Reform Act of 1982, Pub. L. No. 97-293, title II, 96 Stat. 1263 (codified at 43 U.S.C. §§ 373a, 390aa to 390zz-1, 425b, 485h).
1987: Reclamation Reform Act, Pub. L. No. 100-203, Title V, § 5302(a) and (b), 101 Stat. 1330-268m 1330-269 (codified at 43 U.S.C. §§ 390uu, 390ww).

[999] For example, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e, the Federal Power Act, ch. 285, 41 Stat. 1063 (codified at 16 U.S.C. §§ 791a-825r), and the Northwest Power Planning Act.

operations plans, contracts and contracting procedures, solicitor opinions, court opinions, and interstate compacts.

The bigger problem is that little of that law is dispositive. This is largely a function of the fact that few people worried much about it until quite recently. Projects were built with particular lands in mind. Users outside project lands (e.g., municipalities) frequently turned to the federal government seeking a share of *excess* supplies—requests which Congress often satisfied. (See footnote 998 at page 569.) Until recently, however, there has not been much interest in transferring rights in use for irrigation to other purposes. We are still at the cutting edge of determining how that can be accomplished.

Generally speaking, transfers of water rights are governed by state statutes. In Idaho, that requires application to the Director of the Department of Water Resources, who must review and approve the application.[1000] Presumably, water rights acquired by the federal government pursuant to state law also are subject to the state transfer provisions. The Bureau of Reclamation recently sought approval of a transfer—actually a change—of some of its storage rights in Idaho to allow them to be released to enhance flows for Salmon migration. The application has been protested.

Contracts for reclamation water may inhibit the free transfer of project water. Typical contract language for water in Snake River reclamation projects states that "no assignment or transfer of this contract, or any part thereof, or interest therein, shall be valid until approved by the Secretary." The Department of Interior has taken the position that this means the Secretary has discretion whether to approve a transfer or not. An opinion by the Department of Interior's legal counsel suggests that where a transfer would result in a change in the project's operating regime and would be controversial, without clear congressional authority, the change could be barred.

On December 16, 1988 the Department of Interior released its written policy to govern voluntary water transfers which affect Department of Interior facilities. This policy reiterates that primacy in water allocation and management decisions rests principally with the states. The policy also states that the Department of Interior will become involved in voluntary transfers of water only when the involvement will not affect other parties being served by the federal project and the transfer will affect federal project operations and only when requested to participate by a state or tribal authority. The Department of Interior's goal is to facilitate transfers in accordance with state and federal law.

The policy of the Northwest Region of the Bureau of Reclamation is to allow local irrigation district committees (such as the Committee of Nine in the Upper Snake and the Boise Project Board of Control on the Boise River) to oversee temporary transfers of water through their respective water banks.

[1000] Idaho Code § 42-222.

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10. HYDROPOWER SUBORDINATION

REFERENCES TO MATERIAL ADDRESSING HYDROPOWER SUBORDINATION AND THE *SWAN FALLS AGREEMENT*:

Clive J. Strong & Michael C. Orr, *Understanding the Swan Falls Settlement*, 52 Idaho L. Rev. 223 (2016).

Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119 (2009).

Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573 (1991-92).

Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company*, ch. 17 &18 (1991) (published by the Idaho Power Company).

Dennis Colson, *Idaho's Constitution, The Tie That Binds* at 161-79 (1991) (addressing the 1928 constitutional amendment).

A. The meaning and effect of subordination

Holders of water rights may enter into subordination agreements in which the senior right is subordinated to one or more named junior water rights (a "selective subordination"). A water right may also be subordinated to all other existing and future junior water rights (a "general subordination").[1001] The effect of the subordination is that the senior water right will be treated as if were junior to the other water rights in all respects.

Subordination of water rights may be implemented by agreement or may be imposed by regulatory authority. If subordination is imposed by governmental action (e.g., a condition on a license), the effect is the same as in a private subordination agreement.

In Idaho, there is relatively little precedent for private subordination agreements.[1002] Most subordinations are imposed by governmental action (e.g., conditions imposed on permits and licenses

[1001] In *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (Shepard, J.), the Court rejected an argument that private subordination of water rights is unlawful in Idaho.

[1002] In contrast, in Utah (which has no government-imposed subordination of hydropower rights), private subordination agreements are common. In Utah, they are called power loss compensation agreements. In these agreements, a power company agrees to subordinate its senior hydropower rights to a farmer's junior rights in exchange for compensation paid by the farmer for the loss of power production.

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issued by IDWR). Or they are agreed to as part of a global settlement of complex litigation. For example, the *Swan Falls Agreement*[1003] or the Refill Settlement.[1004]

A senior who has entered into a private selective subordination agreement may still call for water against other juniors that are not parties to the agreement. This could affect those third parties. IDWR will recognize and enforce private selective subordination agreements with an important caveat: The Department will enforce them in a manner that avoids disadvantage to third parties. Thus, the holder of the senior subordinated water right may not issue a call for water that simply "skips over" the junior water right benefiting from the subordination so that some other less junior water right is called out instead. IDWR will enforce the call, but will treat the junior's quantity as if it had been called out and delivered to the senior.[1005]

B. No-call agreements distinguished (upstream and downstream effects)

A true subordination adjusts the priority date of the subordinated right rendering it junior vis-à-vis whatever water rights are named as the beneficiaries of the subordination. This has a two-way effect. First, it means that the subordinated senior may not call out junior. Second, it means that the junior may call out the subordinated senior.

[1003] *Agreement between State of Idaho and Idaho Power Company*, § 7(D) (Oct. 25, 1984) ("*Swan Falls Agreement*"). The *Swan Falls Agreement* resolved litigation and legislative battles regarding Idaho Power's unsubordinated Swan Falls water rights.

[1004] Litigation known as the Refill Litigation resolved augments over how to apply Idaho's "one-fill" rule for on-stream storage reservoirs. In 2018, the parties settled the litigation pursuant to an agreement that recognized two water rights for the Bureau of Reclamation's Boise River projects. The "Refill 1" right (No. 63-33734A) was subordinated to all existing and future rights (the "free river right")—subject to certain "carve-outs" allowing the Refill 1 right to be exercised under priority against certain rights, including all hydropower rights. The "Refill 2" right (No. 63-33734B) was subordinated to specific existing water rights.

[1005] Here is a hypothetical example of how this might work. Suppose Hydrosystems, Inc. held a senior water right which it subordinates to Farmer Jones' junior water right of 2 cfs. Then, in time of drought, Hydrosystems makes a delivery call. In response to the call, IDWR would first curtail the most junior users (junior to Farmer Jones). Let's suppose that totaled 3 cfs. Farmer Jones would be next in line to be curtailed. Due to the subordination agreement, IDWR would not curtail Farmer Jones but would treat her as if she had been curtailed and her 2 cfs had been delivered to Hydrosystems. At this point, Hydrosystems has obtained 5 cfs (on paper). IDWR would then curtail the remaining juniors (those senior to Farmer Jones but junior to Hydrosystems) to the extent necessary to satisfy Hydrosystems' call. The end result is that, due to the subordination, Hydrosystems will receive 2 cfs less that the amount it would have received absent the subordination.

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A variant of the subordination agreement is the "no-call" agreement, which has a more limited effect than a full-blown subordination.[1006] As the name implies, the senior gives up the right to call out the junior. But the no-call agreement does not give the junior the right to call out the senior.

Either a subordination or a no-call agreement might limit the ability of the holder of the senior right to effectively protest the transfer of any covered junior right (unless it could be shown that the change somehow impaired the now limited senior right). The same could be true for new appropriations, if the subordination or no-call provision were applicable to future water rights (as in a "general subordination").

In a surface water context, subordination plays out differently depending on which right is upstream. Typically, the subordinated senior is downstream and the benefited juniors are upstream.[1007] In this situation, the thing that matters is that the subordinated senior may not call out the upstream junior. The junior has no need to call out the downstream senior; it may simply take the water before it reaches the senior. Thus, where the subordination is directed to the benefit of upstream juniors, it functions essentially as a "no-call" agreement (coupled with restrictions on protests directed to the junior). If instead (or in addition) the subordination is set up to benefit downstream juniors, it would give them the right to call water past the subordinated senior.[1008]

Similarly, in a groundwater context, a no-call agreement is only a promise not to call out the junior; it does not include a promise not to assert seniority if the junior seeks to call out the senior.

[1006] The distinction between a true subordination and a no-call agreement was explored by the Colorado Supreme Court:

> No-call agreements and subordination agreements are similar in that senior appropriators in each are effectively contracting away part of the bundle of sticks that compose their water rights, with the general result that water that could otherwise go to the senior appropriator is made available to some or all junior appropriators. However, the agreements are fundamentally different in terms of what is being contracted away by the senior appropriator. . . . Thus, a no-call agreement contracts away the right to place a call to the Division Engineer requesting more water to fulfill the senior right whereas a subordination agreement contracts away the senior appropriator's more senior priority status (either to specific junior appropriators in a selective subordination or all junior appropriators in a general subordination).

City of Englewood v. Burlington Ditch, Reservoir & Land Co., 235 P.3d 1061, 1068 (Colo. 2010) (emphasis original) (citations omitted).

[1007] For example, the hydropower subordination authority in Idaho Code § 42-203B(6) operates only vis-à-vis "upstream beneficial depletionary uses." In contrast, IDWR's implementing rule arguably operates in both directions. (See footnote 1022 on page 579 and discussion in section 10.F on page 577.)

[1008] In the case of a non-consumptive hydropower right, this less consequential. The hydropower right may still generate power as it passes water to the downstream junior. But it would limit the ability of the hydropower right to store water when the call is in effect.

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For surface water rights, the absence of subordination has effect only with respect to upstream junior rights because those are the only rights that could be called out. Thus, for example, Idaho Power's senior unsubordinated hydropower rights located far downstream on the Snake River (near Boise) had the potential to curtail upstream juniors in much of the Snake River Plain prior to the *Swan Falls Agreement*. In contrast, unsubordinated hydropower rights higher in the basin, such as PacifiCorp's Bear Lake rights, have comparatively less potential impact because there are fewer upstream juniors subject to curtailment. (Moreover, in PacifiCorp's case, some of the upstream juniors have subordination protections imposed by the *Amended Bear River Compact* and the *Three-State Agreements*.)

C. 1928 amendment to the Idaho Constitution

Until 1928, Idaho law provided no special treatment for hydropower rights. Today, however, all new appropriations of water for hydropower purposes are subordinated and limited in duration.[1009]

In 1928, the provision of the Idaho Constitution stating that the right to divert shall never be denied was amended to add the proviso "except that the state may regulate and limit the use thereof for power purposes."[1010] Idaho Const. art. XV, § 3 (proposed by H.J.R. No. 13, 1927 Idaho Sess. Laws, p. 591, ratified Nov. 6, 1928). Thus, if it chooses, the State may impose special burdens or limitations on hydropower water rights. For instance, the State may attach conditions to hydropower rights subordinating them to other water uses, limiting their duration, or otherwise relegating them to second-class status. This constitutional authority has been implemented by statute in 1985 and rule in 1993, as discussed below.

[1009] In contrast to Idaho, there is no Utah statutory hydropower subordination. Parties may subordinate priority by agreement. Sometimes the Utah State Engineer will issue a subordination condition when approving an application, certificating a perfected right, or adjudicating a right.

[1010] "The 1928 amendment was, in large part, a reaction to a group of proposals in the early 1920s to develop private hydropower facilities at a number of sites on the Snake River downstream from Milner Dam." Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119, 124 (2009). "It seems the Pacific Power & Light Company decided that it wanted to appropriate some of those vacant sites in the Seven Devils canyon of the Snake river [where Idaho Power eventually constructed the Hells Canyon Dam]. Now the reclamation department has no authority to refuse the permit, but it successfully fought the question before the federal power commission . . . . Then, it occurred to the powers that be that an amendment giving specific control over power sites to the state might be in order." Strong & Orr, at 124 n.22 (quoting a column in the *Idaho Statesman* from October 20, 1928). For further discussion of the history of this constitutional provision see Dennis C. Colson, *Idaho's Constitution, The Tie That Binds* at 161-79 (1991) and Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company* at 191-92 (1991) (published by the Idaho Power Company).

D. Not self-executing

The 1928 amendment authorizes the State to regulate (i.e., subordinate) hydropower. Presumably, this requires some sort of implementing legislation.[1011] No such legislation was enacted until 1985 (see discussion below). In the interim, Idaho Power's C.J. Strike and Hells Canyon water rights were issued subject to subordination. See footnotes 1017 and 1018 beginning on page 578. However, those subordinations were agreed to by Idaho Power, so it cannot be said that they were imposed pursuant to authority directly granted by 1928 amendment.

In any event, the 1928 constitutional amendment did not itself subordinate any hydropower right. It simply authorized the State to do so. Absent some affirmative act by the State, hydropower rights remain equal in status with other water rights.

E. Retroactive subordination

The language of the 1928 amendment is not expressly prospective or retroactive. In other words, it does not say whether the State has the power to retroactively subordinate an existing hydropower right.[1012] However, the question appears to be academic. This provision has never been applied retroactively, and the implementing legislation and IDWR rule operate prospectively only.

In response to the Swan Falls controvery (in which Idaho Power sought to curtail junior irrigation rights), the Idaho Legislature briefly contemplated legislation that would have retroactively subordinated Idaho Power's rights. However, it was broadly recognized that retroactive application, assuming it was even authorized by the Constitution, would constitute a taking.[1013] Ultimately, the

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[1011] Conceivably, IDWR could take the position that the 1928 amendment is self-executing in the sense that it directly authorized the Department (acting on behalf of the State) to regulate and limit hydropower rights irrespective of the existence or scope of authorizing legislation. However, the Department has never acted in that manner.

[1012] Idaho courts deem legislation to be prospective unless expressly stated otherwise. *State v. Leary*, 160 Idaho 349, 353, 372 P.3d 404, 408 (2016) (W. Jones, J.) ("Accordingly, statutory amendments are not deemed to be retroactive unless there is an express legislative statement to the contrary."). It would seem that the same should apply to constitutional amendments.

[1013] "Subordination was seized upon as a possible remedy in part because of the 1928 amendment to Article 15, section 3 of Idaho's constitution. This section guarantees that the right to divert and appropriate the unappropriated waters "shall never be denied"; the 1928 amendment added the clause, "except that the state may regulate and limit the use thereof for power purposes." The 1928 amendment presumably provides the State with authority to subordinate or otherwise limit any water right granted for hydropower purposes, and this has been done with several of Idaho Power's other water rights, such as that for the powerplant at C.J. Strike Dam, which was completed in 1952 upstream from Swan Falls. But since Idaho Power's Swan Falls rights predate the 1928 amendment and carry no limitation in any event, the retroactive application of a subordination condition would have been problematic for the State, and obviously would have given rise to a claim of taking without compensation, a point that Idaho Power made repeatedly during the public debates over Swan Falls." Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573, 597 n.104 (1991-92).

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issue was avoided when Idaho Power agreed to a limited and extraordinarily convoluted subordination in the *Swan Falls Agreement*.

In contrast to the 1928 constitutional provision, the implementing legislation adopted in 1985 appears to authorize subordination only with respect to newly issued permits and licenses. In any event, the last sentence of subsection (6) explicitly limits the subordination authorization to post-1985 licenses. See footnote 1020 on page 578.

Whether the 1985 legislation "occupies the field" and sets the limit for IDWR's authority to subordinate hydropower rights has never been tested (see footnote 1011 above). And it is unlikely ever to be tested. Given the likelihood of a successful taking claim, it is doubtful that the State (for example, acting through IDWR) would seek to retroactively subordinate existing hydropower rights.

F. Idaho statutes, regulations, and other regulatory actions

Idaho Power's early reservoirs, beginning with Swan Falls in 1901,[1014] obtained water rights with no subordination or other special restrictions.[1015] The fact that these rights were not subordinated gave rise to the Swan Falls controversy and litigation discussed in section 11 on page 583.[1016] The resolution of the Swan Falls controversy, in turn, gave rise to the Snake River Basin Adjudication.

Subsequent to 1928, the State of Idaho has acted in the following ways to implement its constitutional authority to regulate hydropower:

- On occasion, even prior to the enactment of section 42-203B(6) in 1985, IDWR has issued new hydropower licenses that were subject to subordination. These were voluntary subordinations agreed to by Idaho Power. The first subordination of a hydropower right came in 1953 when the C.J. Strike Reservoir water right was

[1014] Swan Falls was constructed as a private hydropower project by a predecessor of Idaho Power.

[1015] The Federal Power Commission imposed a limited subordination of Idaho Power's Twin Falls project in 1934. However, this subordination apparently is not reflected in the water rights issued by the state for the project. *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 579, 661 P.2d 741, 745 (1983).

[1016] Idaho Power's pre-1953 water rights were either unsubordinated or contained subordination language with provisions rendering them essentially illusory. However, for decades, Idaho Power engaged in a practice of informal subordination coupled with subordination effectuated through the Bureau of Reclamation and FERC. See, Clive J. Strong & Michael C. Orr, *Understanding the Swan Falls Settlement*, 52 Idaho L. Rev. 223 (2016); Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119 (2009); Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573 (1991-92).

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licensed.[1017] Subsequently, Idaho Power's three dam Hells Canyon complex, built in the 1960s, was subordinated to future upstream development.[1018]

- Idaho Code § 42-203B(6)[1019] gives the Director of IDWR the authority to subordinate newly issued hydropower rights,[1020] though it does not require the Director to do so. It

[1017] Responding to pressure from Governor Len Jordan, Idaho Power agreed to subordinate its water right for C.J. Strike Reservoir (No. 21671). "Idaho Power agreed to subordinate their state water right license at C.J. Strike to future upstream depletion. That water license was issued in 1953 and contained the first unrestricted subordination language on record." *Idaho Power Co. v. State*, 104 Idaho 575, 580, 661 P.2d 741, 746 (1983). The subordination language reads: "The rights herein granted are subject to the condition that the Project shall be operated in such manner as will not conflict with future depletion in flow of the waters of Snake River and its tributaries, or, prevent or interfere with the future upstream diversion and use of such waters, for the irrigation of lands and other beneficial consumptive uses in the Snake River watershed." This amounts to an upstream no-call provision. It might also be read to limit Idaho Power's ability to object to new appropriations or transfers on the basis of this subordinated right.

[1018] The Hells Canyon project subordination was also voluntary (albeit with some arm twisting). It occurred by way of both the federal power license for the project and state water right conditions. For some reason, only two of the state water licenses contained the subordination. This did not matter to the Idaho Supreme Court: "Whether the subordination language was omitted from the state water licenses through administrative oversight or because the appropriate state officials felt its insertion unnecessary in light of the federal license language, we need not speculate. We hold only that when the FPC has authorized the obtention [obtaining] of only subordinated state water rights, and where, as here, the state and the licensee power company both intended the subordination of those water rights, failure to include a subordination clause in the state water licenses does not render those rights unsubordinated." *Idaho Power Co. v. State*, 104 Idaho 575, 588, 661 P.2d 741, 754 (1983) ("*Swan Falls II*").

[1019] Section 42-203B was first enacted in 1985 as part of larger legislation (including sections 42-203C and 42-203D) designed to implement the *Swan Falls Agreement*. H.B. 186, Idaho Sess. Laws, ch. 224 (superseding S.B. 1008, Idaho Sess. Laws, ch. 17). Subsections (1) through (5) implement the so-call "trust water" concept in the *Swan Falls Agreement*. Subsections (6) through (9) authorize IDWR to impose subordination and term limits on hydropower rights that are permitted or licensed after 1985. The key language is in subsection (6), which reads (as amended):

> The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a term, which may be in the form of a fixed date or by reference to a federal energy regulatory commission (FERC) license or other authorization issued or contract executed, in connection with the power project.
>
> Subsection (6) of this section shall not apply to licenses which have already been issued as of July 1, 1985.

also gives the Director the authority to specify a term (duration) for the new hydropower permit or license. In other words, the water right might include an "expiration date." The statute provides that the expiration date may be a fixed date or it may be set to correspond to the duration of a FERC license or a contract. The fact that it is limited to permits and licenses shows that it does not apply to decreed rights or to rights based on beneficial use.

- IDWR's water appropriation rules provide that new appropriations for hydropower will be subordinate to all non-hydropower rights initiated later than the priority date of the hydropower application or permit.[1021] The rule also mandates that the new permit or license include a term (i.e., "expiration date"). The rule basically tracks the 1985 legislation.[1022] In other words, the discretionary authority to subordinate granted by the

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Idaho Code § 42-203B(6). The provision regarding the duration of the term was amended in 2012 to add the reference to FERC. H.B. 50, 2013 Idaho Sess. Laws ch 45, § 1. Subsections (7), (8), and (9) also address the term (duration) of a subordinated hydropower right.

[1020] The authority to subordinate applies to "the rights granted in a permit or license." Permits and licenses (in contrast to transfers and adjudications) are issued for new appropriations not existing rights. Saying that the subordination applies to "rights granted" reinforces the idea that the subordination is to occur when rights are granted, not sometime later. Even if this language were interpreted to allow retroactive subordination of previously issued licenses, the last sentence of subsection (6) makes clear that such retroactive effect could apply only to post-1985 licenses.

[1021] IDWR's subordination rule states:

> 03. Applications And Existing Permits That Are Junior And Subordinate. Applications and existing permits approved for hydropower generation shall be junior and subordinate to all rights to the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of the application or existing hydropower permit. A subordinated permit shall not give rise to any right or claim against future rights to the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of the application or existing hydropower permit. A permit issued for hydropower purposes shall contain a term condition on the hydropower use in accordance with Section 42-203B(6), Idaho Code.

IDAPA 37.03.08.050.03 (adopted July 1, 1993).

[1022] IDWR's rule deviates from the "upstream only" language in the statute, instead declaring the hydropower right subordinate to all water rights. This deviation may have been inadvertent. If so applied, it would have the effect of going beyond the upstream "no-call" restriction contemplated by the statute. If also allow a downstream junior to call for water controlled by an upstream hydropower right. If the hydropower facility operates run-of-river, that is of little practical consequence. But it could matter (in terms of timing) with respect to hydropower storage. (One cannot make a delivery call for release of previously stored water, but one could call for pass-through of water that the power facility would have preferred to store.) If that is the effect, it would exceed the authority granted by the statute to the Director.

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statute is converted to a nondiscretionary requirement for subordination under the rule. The rule expressly applies only to new appropriations.[1023]

- Pursuant to the *Swan Falls Agreement*,[1024] Idaho Power's early water rights were made subject to subordination. This agreement grew out of The Swan Falls litigation which confirmed that Idaho Power's Swan Falls rights were not subordinated.[1025] A central feature of the agreement was to establish a new "minimum flow" at the Murphy Gage (immediately below Swan Falls Dam) on the Snake River. It was believed that the river could absorb about 600 cfs in additional development without violating the new minimum flow. The water that was thought to be available for new appropriation (that would not impair the minimum flow at Murphy Gauge) came to be known as "trust

[1023] The rule calls for subordination with respect to "applications and existing permits approved for hydropower generation." IDAPA 37.03.08.050.03. Thus, it applies only to new appropriations.

[1024] *Agreement between State of Idaho and Idaho Power Company* (Oct. 25, 1984) ("*Swan Falls Agreement*"). See discussion of the *Swan Falls Agreement* in section 11 at page 583.

[1025] The Swan Falls controversy has its roots in a successful campaign by citizens opposed to the proposed Pioneer coal-fired power plant that Idaho Power sought to build near Boise. In 1976, the Idaho Public Utilities Commission ("IPUC") denied permission to build the plant. In 1977, fresh off the Pioneer victory, a group of Idaho ratepayers filed a petition with the IPUC demanding that Idaho Power make better use of its Swan Falls water rights by enforcing their priorities against other users.

Idaho Power essentially took the side of the petitioners. In doing so, it reversed course after decades of acquiescence to new upstream ground water irrigation reliant on electric pumps served by Idaho Power. In 1978, while the IPUC matter was pending, it filed with IDWR a blanket protest against "all past and future water applications" below Milner Dam. This came on the heels of a declaratory judgment action filed by Idaho Power in 1977 seeking "a decree that its Swan Falls rights were not subject to upstream depletion [i.e., were not subordinated]." *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 582, 661 P.2d 741, 748 (1983) (Shepard, J.). A related appeal growing out of the same lawsuit was decided a day earlier; it dealt with the State Water Plan and did not address subordination. *Idaho Power Co. v. State ("Swan Falls I")*, 104 Idaho 570, 661 P.2d 736 (1983) (Huntley, J.).

To everyone's surprise, the Idaho Supreme Court ruled in *Swan Falls II* that the Swan Falls rights were not subordinated. But the Court remanded for a determination of affirmative defenses that Idaho Power had abandoned, forfeited, or waived its right enforce its Swan Falls rights against upstream irrigators. *Idaho Power Company v. State*, Ada County Civil No. 81375 (4th Judicial Dist.).

In 1983, while the remand was underway, Idaho Power filed a second lawsuit against the State and several thousand water right holders upstream. *Idaho Power Co. v. IDWR*, Ada County Civil No. 81375 (4th Judicial Dist.). This suit, which came to be known as "*Idaho Power versus the World*" or the "*7,500 suit*" because of the approximate number of defendants, sought injunctive relief enforcing the company's Swan Falls rights. This second suit went further that the first lawsuit and its blanket protest. For the first time Idaho sought to curtail irrigators above Milner Dam. This violated the sacrosanct "two rivers concept" and was the Idaho equivalent of crossing the Rubicon. This provoked an angry legislative response. Negotiations followed. The two pending lawsuits were settled and the parties entered into the *Swan Falls Agreement*. Implementing legislation following (including Idaho Code § 42-203B(6) and the initiation of the Snake River Basin Adjudication ("SRBA")).

water." As it turns out, very little of that was developed before a moratorium was put into place.

- Water rights known as "Refill 1" and "Refill 2" decreed to the United States as part of the settlement of the Refill Litigation contain complex subordination provisions. See footnote 1004 on page 573.

- The *Three-State Agreements*[1026] entered into by Idaho, Utah, Wyoming, and PacifiCorp, recite the "historic practice" of PacifiCorp not making a delivery call.[1027] This amounts to a no-call agreement prohibiting PacifiCorp from placing calls solely for hydropower purposes against any existing or future upstream junior.[1028] The reference to "PacifiCorp's water rights" should be understood as applying solely to PacifiCorp's natural flow rights for its hydroelectric plants on the Bear River downstream of Stewart Dam. These are the only PacifiCorp rights that could make a delivery call solely for hydropower purposes.[1029] PacifiCorp's Bear Lake Reservoir Decreed Rights are diverted and used for a combination of hydropower and other purposes, and would thus not be subject to the no-call provision.

- The *Bear River Compacts*[1030] authorize two blocks of new storage upstream of Bear Lake.[1031] The *Compacts* provide that storage rights for this new construction shall "not be

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[1026] The *Three-State Agreements* consist of (1) *Agreement Regarding the Bear River System* (October 5, 1999) ("*System Agreement*") and (2) *Operations Agreement for PacifiCorp's Bear River System* (April 18, 2000) ("*Operations Agreement*"). A third agreement entitled *Addendum Interpreting Agreement Regarding the Bear River System* (December 7, 1999) ("*Addendum*") followed the *System Agreement* of October 5, 1999. The *Addendum* simply extended the 60-day deadline for the parties to enter into the *Operations Agreement*.

[1027] "PacifiCorp's water rights are constrained by the historic practice of not making a delivery call for hydropower generation." *System Agreement*, ¶ 1(a), p. 1 (emphasis added). This provision is repeated (quoted in full) in the Sixth Whereas of the *Operations Agreement*, pp. 1-2. It is referenced again in paragraph 1(B) the *Operations Agreement*.

[1028] This provision limiting calls for hydropower use only should not be confused with other provisions in the *Amended Bear River Compact*, the *Three-State Agreements*, and elsewhere addressing circumstances in which water stored in Bear Lake Reservoir is to be released primarily for irrigation purposes and only incidentally for hydropower purposes. Those are important, but they are not subordination provisions.

[1029] PacifiCorp's downstream power rights are listed in Attachment N, Tables 12 and 13, of the *Idaho Transfer Application Package* (Transfer No. 85695) ("*ITAP*").

[1030] The first Bear River Compact, Pub. L. No. 85-348, 72 Stat. 38 (1958) ("*Original Compact*") was approved by Congress and signed by President Eisenhower on March 17, 1958. The Bear River Compact as Amended, Pub. L. No. 96-189, 94 Stat. 4 (1980) ("*Amended Compact*") was approved by Congress and signed by President Carter on February 8, 1980. They are referred to collectively as the "*Bear River Compacts*" or "*Compacts*."

subordinate to any water in Bear Lake or elsewhere below Stewart Dam." *Original Compact*, art. V, § A; *Amended Compact*, art. VI, § A, p. 8. Although the phraseology is odd, saying that new storage shall "not be subordinate" means, in effect, that new storage rights will not be treated as junior to downstream rights including PacifiCorp's Bear Lake Decreed Rights. Essentially, the new storage blocks are given "super-priority." The practical effect is to make all downstream rights (including PacifiCorp's rights) subordinate to the new blocks of storage.

[1031] The original compact authorized 35,500 acre-feet of new storage above Bear Lake. The amended compact authorized another 74,500 acre-feet. Of this, only 30,000 acre-feet has been developed. Wallace N. Jibson, *History of the Bear River Compact* (Nov. 1991), p. 11.

11. THE *SWAN FALLS AGREEMENT*

A. History of the controversy

In the 1970s, Idaho Power Company ("Idaho Power") faced increasing agricultural development on the Snake River, particularly projects relying on high-lift pumping in the reach below Milner Dam. This, and other factors, increased demand for hydropower while at the same time reducing the Company's ability to produce power. Meanwhile, the Company's actions in encouraging upstream surface and ground water development over the last fifty years had contributed at least in part to the development of the "Two Rivers" concept, which meant that the Company had to rely on discharges from the Snake River Plain Aquifer and below-Milner tributaries to satisfy its hydropower rights below Milner Dam. (See discussion of the Two Rivers concept in section 21 at page 306.)

In response to these pressures, Idaho Power proposed to construct the Pioneer coal-fired power plant near Boise. The Idaho Public Utilities Commission turned down the project in 1976.[1032] During the course of that proceeding, however, public attention was focused on Snake River flow conditions.

The Swan Falls controversy was initiated in the aftermath of the Pioneer controversy by a group of Idaho ratepayers. Informed by the information that emerged during the Pioneer proceedings, they filed a petition with the Idaho Public Utilities Commission alleging that the Company had failed to

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[1032] Idaho Power announced its plans to construct the Pioneer project in November 1974. The coal-fired power plant was to be located near Orchard, Idaho, 24 miles southeast of Boise. Idaho Power had recently been a partner in the successful construction of the Jim Bridger coal-fired project in Wyoming. There were no significant opportunities to build new hydroelectric dams, and the Company was facing rapidly growing power demand in its south Idaho service area. To Idaho Power, it seemed only logical to move forward with a thermal plant closer to home.

The increasing demand was fed, in large part, by large new agricultural undertakings based on high lift pumping. These operations, including many more than planned, were increasing power demand at the same time they were reducing water availability for hydropower production. Opponents of Pioneer pointed out that Idaho Power was acquiescing in the invasion of its senior water rights, while proposing what was then a very costly new thermal source that would drive up prices for all Idaho power consumers.

Idaho Power seemingly failed to anticipate the strength of the opposition, and declined to acknowledge the need for any kind of emission scrubber, proposing only basic electrostatic precipitators. Stacy at 184 . The Company also did not effectively answer economic criticisms, which ultimately came not simply from the environmental community but from agricultural interests and main street businesses in several communities. The opposition exploded into a referendum on energy conservation, consumer control, and electricity rate stability.

Ultimately, Governor Cecil Andrus, who had kept his powder dry during the many months of the controversy, testified against the project in an unprecedented appearance before the IPUC. The IPUC denied the Company's application for a certificate of convenience and necessity.

Two years later, Idaho Power engaged in a limited effort to revive the project in a location further to the east. However, the Company made no changes in the project design. This did not go anywhere, and the Company eventually abandoned the project.

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protect and enforce its senior water rights at Swan Falls.[1033] This failure, they alleged, was pushing the Company toward new thermal power construction and higher electric rates.[1034]

Idaho Power reacted by, essentially, agreeing with the ratepayers. The Company took three actions. First, in January 1978, it filed a blanket protest with the Idaho Department of Water Resources objecting to "all past and future water applications" below Milner Dam.[1035] (For why the call was limited to below Milner Dam, see discussion of the Two Rivers concept in section 21 beginning on page 306.) Second, the Company filed a declaratory judgment action in district court seeking confirmation that its Swan Falls water rights were not subordinated and thus could call out virtually every below-Milner water right.[1036] Third, after winning the first round in the Idaho Supreme Court (discussed below), the Company filed a second lawsuit in district court, an action that came to be known as "Idaho Power Versus the World."[1037]

Idaho Power's position was vindicated by the Idaho Supreme Court in 1983.[1038] Although the Company's licenses for its Hell's Canyon, Oxbow and Brownlee dams (the "Hell's Canyon complex") included an express subordination of Idaho Power's water rights in favor of future upstream development, the state Supreme Court found that Idaho Power's Swan Falls rights had not been subordinated to upstream junior depletions. This caused a furor and led to the Department's decision to impose a moratorium on new water right approvals.

However, the Supreme Court only decided the first question—whether Idaho Power's Swan Falls rights were subordinated. Idaho Power still faced a court trial on remand on the question of whether it had waived, abandoned or would be estopped from asserting that portion of its rights that it

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[1033] The Swan Falls Dam is located well downstream on the river; its rights could call out or prevent licensing of potentially thousands of junior rights upstream. However, Idaho Power had never acted to prevent developments that depleted flows at Swan Falls.

[1034] Reportedly, Idaho Power was planning to act even before the ratepayers' petition. "The ratepayers beat us to the courthouse, in the sense that they got to the PUC before we got to district court." Deposition of Thomas G. Nelson, *Higginson v. United States*, No. 39576, District Court of the Fifth Judicial District in and for the County of Twin Falls 53 (1987).

[1035] Protest of Idaho Power Company to Applications for Permit to Divert and Consumptively Use Water, *In the Matter of Applications Filed for Water Diversions for Consumptive Use on the Surface and Subterranean Tributaries of the Snake River Between Milner Dam and Hells Canyon* (Dec. 30, 1977, filed with the Idaho Dept. of Water Resources Jan. 5, 1978).

[1036] Amended Complaint, *Idaho Power Co. v. State of Idaho*, No. 62237, In the District Court for the Fourth Judicial District, in and for the County of Ada (filed Nov. 8, 1977).

[1037] *Idaho Power Co. v. IDWR*, No. 81375 (Ada County District Court, filed Mar. 30, 1983). This suit was brought against approximately 7,500 defendant water right holders, holding rights tributary below Milner Dam.

[1038] *Idaho Power Co. v. State ("Swan Falls II")*, 104 Idaho 575, 661 P.2d 741 (1983).

had allowed upstream juniors to divert over many years of irrigation development. There was substantial historical evidence that Idaho Power had stood by, and in some instances, encouraged the recent development in the upper Snake (particularly high-lift surface water pumpers below Milner Dam and well pumpers in the Eastern Snake Plain Aquifer, much of which is tributary to the Snake River above Swan Falls Dam).

B. Terms of the agreement

Despite its Supreme Court victory, Idaho Power still had some exposure. Rather than litigate against thousands of upstream irrigators and the State of Idaho—which took the side of the irrigators and other upstream water users—Idaho Power settled the Swan Falls litigation by means of an agreement with Idaho's Governor and Attorney General.[1039]

The *Swan Falls Agreement* subordinated Idaho Power's water rights to all below-Milner,[1040] pre-October 1, 1984 water rights, under all stream flow conditions.[1041] Thus, pre-1984 rights are completely protected from call by Idaho Power, even if Idaho Power were unable to meet its stipulated minimum flow. Idaho Power also subordinated its water rights to future development (that is, to post-October 1, 1984 water rights) when flows at Murphy gage are in excess of 3,900 cfs during the

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[1039] The *Swan Falls Agreement* is simply titled, "Agreement." It is dated October 25, 1984 and was executed by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power Company CEO James E. Bruce. A copy of the *Swan Falls Agreement* is set out as Appendix J.

The parties signed a second agreement on the same day entitled "Contract to Implement Chapter 259, Sess. Laws, 1983," which provided, among other things, for dismissal of the pending lawsuits in accordance with the provisions of Senate Bill 1180, Idaho Code § 61-540. Chapter 259 refers to S.B. 1180, 1983 Idaho Sess. Laws, ch. 259 (codified at Idaho Code §§ 42-639 and 640).

The Agreement followed an earlier document in the nature of a term sheet entitled "Framework for Final Resolution of Snake River Water Rights Controversy" dated October 1, 1984 and executed by the same parties. A copy of the Framework is set out as Appendix I.

Based on the Agreement, the two pending district court actions were dismissed with prejudice with respect to Idaho Power and the State, and without prejudice with respect to all the other parties. Consent Judgment, *Idaho Power Co. v. State*, Idaho Fourth Judicial District Court, Case No. 62237 (entered Mar. 7, 1990); Consent Judgment, *Idaho Power Co. v. State*, Idaho Fourth Judicial District Court, Case No. 81375 (entered Feb. 12, 1990).

[1040] The Agreement did not expressly limit its scope to below-Milner rights. However, this limitation was inherent in the litigation (which only applied to below-Milner rights) and was well understood by the parties. It had been reflected since 1976 in the State Water Plan and was codified 1985 in response to the *Swan Falls Agreement* in Idaho Code § 42-203B(2). See discussion of "Two Rivers Concept" in section 21 at page 306.

[1041] The *Swan Falls Agreement* defines the subordination beneficiaries according to whether or not they "have beneficially used water prior to October 1, 1984" and "have filed an application or claim for said use by June 30, 1985."

irrigation season and 5,600 cfs during the non-irrigation season.[1042] Thus, post-1984 rights are subject to call by Idaho Power whenever flows in the Snake River fall below the stipulated minimum. The body of potential new water rights made available for appropriation under this subordination is referred to as "trust water."

A central feature of the Agreement was to establish a new "minimum flow" at the Murphy Gage (immediately below Swan Falls Dam) on the Snake River: 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season.[1043] At the time, the river had never experienced flows that low. Indeed, it was believed that the river could absorb about 600 cfs in additional development without violating the new minimum flow.[1044] The water that was thought to be available for new appropriation (that would not impair the minimum flow at Murphy Gauge) came to be known as "trust water." As it turns out, very little of that was developed before a moratorium was put into place.

It is critical to understand, however, that the 3,900 cfs so-called minimum flow is not a guarantee of that flow. Idaho Power is not entitled to call out pre-1984 uses upstream or up-gradient to meet that flow at Swan Falls.

The reason is that in a separate provision of the *Swan Falls Agreement*, Idaho Power subordinated its water rights to all uses in place in 1984:

> The Company's rights . . . are also subordinated to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

Agreement between State of Idaho and Idaho Power Company, § 7(D) (Oct. 25, 1984) ("*Swan Falls Agreement*").

By all appearances, this section 7(D) language is an absolute subordination to all uses existing on that date in 1984.[1045] This is confirmed by the language of the State Water Plan subsequently adopted to implement the *Swan Falls Agreement*:

> The 8,400 cfs claimed at Swan Falls is reduced by the agreement to that flow available after satisfying all applications or claims that demonstrate

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[1042] The irrigation season flows are specified for April 1 through October 31 (7 months); the non-irrigation season flows are specified for November 1 through March 31 (5 months).

[1043] The new minimum flow of 3,900 cfs replaced a prior minimum flow target of 3,300 cfs adopted in a prior state water plan.

[1044] See discussion in section 11.B at page 585 for explanation of how the 3,900 cfs flow compromise was reached.

[1045] The requirement that the rights to which the subordination applies must be reflected in "an application or claim for said use by June 30, 1985" would exclude beneficial use claims for which no claim was filed by that date.

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> water was beneficially used prior to Oct. 1, 1984, even if such use would violate the minimum flows established in Policy 5B [the 3,900/5,600 cfs minimums]. Any remaining water above these minimum flows may be reallocated to new uses by the state providing such use satisfies existing Idaho law. [1046]

Thus, the minimum flow of 3,900/5,600 cfs operates as a prospective subordination solely with respect to post-1984 water rights. If flows fall below 3,900 cfs at Murphy Gage, Idaho Power may call out post-1984 rights (i.e., trust water rights that were granted due to the existence of the subordination of portions of the Company's water rights in trust), but may not call out any right in effect prior to 1984. Put differently, the minimum flow has a 1984 priority (not the 1901 priority associated with Idaho Power's Swan Falls rights). The bottom line is that rights falling under the section 7(D) subordination (basically all rights with licensed priority dates prior to October 1, 1984)[1047] are not subject to call by Idaho Power.

In evaluating the impact of the Swan Falls subordinations on particular situations, bear in mind that the subordinations apply only to the eleven Idaho Power Projects listed in the Agreement. This consists of every project except C.J. Strike and the Hells Canyon complex.[1048] C.J. Strike and the Hells Canyon complex have their own unqualified subordination provisions.

There is no provision in any of these laws that subordinates any other water rights, such as the rights of spring users in the Hagerman reach or the irrigation diverters at Milner; these senior water right holders remain entitled to seek curtailment of any junior ground or surface water right causing material injury to the seniors' water rights.

The term "trust water" is misleading because it might suggest that a "block of water" was so designated, or that Idaho Power placed a part of its water rights portfolio in trust for use by others under Idaho Power's priorities. If the block of water theory were correct, the State would be seen as having designated certain waters as subject to special appropriation rules, even though the water was subject to Idaho Power's senior priorities. If the trust portfolio theory were correct, those obtaining permits and licenses subject to the Swan Falls statutes would step into the shoes of Idaho Power and would receive Idaho Power's senior priority. This is not how the trust works, however. The trust idea placed a portion of Idaho Power's water rights in a trust administered by the State, which is entitled to subordinate this portion, piece by piece, as new water rights are permitted and licensed that otherwise

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[1046] The 1996 State Water Plan at 18 (adopted Dec. 1996, ratified by the Idaho Legislature March 1997) (emphasis added).

[1047] The *Swan Falls Agreement* defines the subordination beneficiaries according to whether or not they "have beneficially used water prior to October 1, 1984" and "have filed an application or claim for said use by June 30, 1985."

[1048] The projects falling within the scope of the *Swan Falls Agreement* are: (1) Thousand Springs, (2) Lower Malad, (3), Upper Malad, (4) Clear Lake, (5) Sand Springs, (6) Upper Salmon, (7) Lower Salmon, (8) Bliss, (9) Twin Falls, (10) Shoshone Falls, and (11) Swan Falls.

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would be blocked by Idaho Power's senior priority. The effect of the subordination was to free up a tightly allocated—arguably over-appropriated—resource to some extent (though not as much as was believed at the time of the Agreement.) While an actual trust exists in the traditional sense of the word, its effect is to enable water right subordinations under which new appropriators may appropriate new junior rights in the same fashion as any other appropriator, but with the benefit of knowing they cannot be called out by the still-existing but subordinated Idaho Power water rights.[1049]

The *Swan Falls Agreement* also gave rise to the concept of the "trust water area." This is the geographic area from which ground water is determined by IDWR to be tributary to the Snake River in the reach between Milner Dam and Swan Falls Dam. The trust water area also includes surface water between Swan Falls and Milner. A map of the area is set out in Appendix H. The trust water area includes most but not all of the Eastern Snake Plain Aquifer (see map in Appendix G) and continues further west all the way to Swan Falls. Somewhat counter-intuitively, much of this area lies to the northeast of Milner dam. Why would land up-gradient of Milner Dam be tributary below Milner? This is because the trust water area is defined to include any place where at least some portion of a ground water withdrawal would impact the river below Milner. Areas up-gradient from Milner will likely impact the Snake River above Milner, but, to some extent at least, they are also tributary to the Snake below Milner. In contrast, wells pumped in the "non-trust water area" (which lies along the Snake River in the vicinity of American Falls to Idaho Falls and further to the east) are exclusively tributary to the Snake River above Milner Dam. The trust water area is relevant today to the trust water appropriation rules (see section 11.C at page 590) and certain moratoria (see section 20 at page 303.

The compromise on the irrigation season flow was the hardest fought. The range for potential compromise fell between 3,300 and 8,400 cfs. The lower number was the existing instream flow at Murphy Gage, imposed by the Idaho Water Resource Board in 1976 (based on its assessment at that time of how much water would be left in the river if all water permits then issued were developed). The higher number was Idaho Power's entitlement under its unsubordinated water rights.

At first, Idaho Power offered to drop its entitlement from 8,400 to 6,100 cfs, but the offer did not fly.[1050] Eventually, the parties settled on 3,900 cfs. This was arrived at by splitting the difference between the state's 3,300 cfs legal minimum flow and 4,500 cfs, which was then perceived to be the "current actual minimum" flow on the Snake at Swan Falls.[1051] Since the compromise number was 600

[1049] Those seeking to make new appropriations of "trust water" are required to meet a special set of more stringent criteria for appropriation. See discussion in section 11.C at page 590.

[1050] Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company* at 198 (1991) (published by the Idaho Power Company).

[1051] "The best available hydrologic data indicate that existing uses result in a potential irrigation season low flow of approximately 4,500 c.f.s. at Murphy Gage on an average daily basis. . . . [B]y setting the irrigation season minimum flow at 600 c.f.s. below the current actual minimum [4,500 cfs], the state can allow a significant amount of further development of water uses without violating the minimum streamflow." *Framework for Final Resolution of Snake River Rights Controversy* at 2 (Oct. 1, 1984) (signed by representatives of Idaho Power and the State of Idaho). According to historian Susan M. Stacy, the actual

cfs below the perceived "current actual minimum" for the river, the parties believed at the time that an additional 600 cfs in new consumptive use—measured at Murphy Gauge (i.e., just below Swan Falls Dam)—could be developed without violating the new minimum flow.

Prior to the Agreement, Idaho Power presumably could have "called out" (sought the curtailment of) all junior upstream rights tributary below Milner to fill its 8,400 cfs Swan Falls water rights. As a result of the *Swan Falls Agreement*, Idaho Power now has a right to call only up to 3,900/5,600 cfs, and that call may be placed only against post-October 1, 1984 water rights (again, below Milner).

The following chart summarizes Idaho Power's water rights at Swan Falls, as affected by the *Swan Falls Agreement*:

IDAHO POWER COMPANY'S WATER RIGHTS AT SWAN FALLS		
	When flows are below 3,900 (5,600 in non-irrigation season), Idaho Power's water rights:	When flows are above 3,900 (5,600 in non-irrigation season), Idaho Power's water rights:
As to pre-October 1, 1984 below-Milner rights held by others:	SUBORDINATED. Idaho Power subordinated its rights to all pre-1984 rights, irrespective of stream flow.	SUBORDINATED. Idaho Power subordinated its rights to all pre-1984 rights, irrespective of stream flow.
As to post-October 1, 1984 below-Milner rights held by others:	NOT SUBORDINATED. Idaho Power may call out post-1984 rights to the extent required to maintain flows at 3,900/5,600 cfs.	SUBORDINATED. Idaho Power subordinated its rights to post-1984 rights, when the river is above the established minimum. This is the amount giving rise to the term, "Trust Water," the amount (measured at Swan Falls) supposedly made available for new appropriation.

Pursuant to the settlement,[1052] the Idaho Legislature enacted a package of legislation. That legislation codified the 3,900/5,600 cfs "minimum flow" at the Murphy Gage and established a procedure by which additional new irrigation and DCMI (domestic, commercial, municipal, and industrial) development could proceed on the Snake River Plain despite the presence of the Swan Falls rights.

The Department's implementation of the actions of the Legislature and the State Water Board, however, did not exactly mimic the *Swan Falls Agreement*. Instead, it retained the prior state-held minimum flow at the Murphy Gage with a 1976 priority date for 3,300 cfs (Water Right No. 2-201). It

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minimum flow was 4,530 cfs, which was experienced on June 18, 1981. Apparently the 4,500 cfs number also reflected the Department's revised estimate of what flows would be at Murphy gage if all existing permits were developed. (Recall that the 3,300 cfs minimum imposed in 1976 was also based on this.) Susan M. Stacy, *Legacy of Light: A History of the Idaho Power Company* at 200 (1991) (published by the Idaho Power Company).

[1052] The settlement was challenged by an Idaho ratepayer in *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989). The Supreme Court found that the ratepayer had standing to litigate but rejected his argument that the settlement violated the Equal Protection clause of the Constitution.

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then added on two additional minimum flow rights with 1985 priority dates: One for 600 cfs (year round) to bring the Murphy Gage minimum flow up to 3,900 cfs during the irrigation season and another for 1,700 cfs (non-irrigation season only) to bring the minimum flow up to 5,600 cfs during the non-irrigation season (Water Right Nos. 2-223 and 2-224, respectively).

The combined effect of the Idaho Power water rights (as subordinated) and the State's instream flows at the Murphy Gage are shown below:

COMBINED EFFECT OF IDAHO POWER'S RIGHTS AND STATE'S MINIMUM FLOW RIGHTS			
Priority	Flows at Murphy Gage		
	Flows below 3,300 cfs	Flows between 3,300 and 3,900 cfs	Flows above 3,900 cfs
Post-1985 water rights (very junior)	Subject to call by both Idaho Power and the State	Subject to call by both Idaho Power and the State	Not subject to call by Idaho Power or State
1977-1984 water rights	Subject to call by the State	Not subject to call by Idaho Power	Not subject to call by Idaho Power
Pre-1976 water rights (very senior)	Not subject to call by Idaho Power or State	Not subject to call by Idaho Power or State	Not subject to call by Idaho Power or State

C. Appropriations in the "trust water area" pursuant to the Swan Falls statutes

The *Swan Falls Agreement* was ratified and implemented by statutory program.[1053] The Swan Falls statutes placed Idaho Power's subordinated water rights in trust for both Idaho Power and for the people of the State. The statutes establish a procedure by which proposed new rights that will have a significant effect on hydroelectric generation dependent upon Swan Falls flows must undergo a special "public interest" evaluation. The Department developed regulations for processing new permit applications within the so-called "trust water area" that would affect Swan Falls flows,[1054] and began processing several thousand long-delayed applications for permit pursuant to these rules. (See map of trust water area in Appendix H and discussion of it in section 11.B at page 585.) The Department's imposition of a moratorium on processing applications in 1992, however, effectively meant no significant new development of water rights has occurred—under the trust water concept or otherwise.[1055]

The Swan Falls statutes and rules require that each application in the area where Swan Falls flows could be affected (most seek ground water diversions from the Snake Plain Aquifer) first must be evaluated according to the standard considerations applicable to every proposed new right. But, as indicated above, the Department also will evaluate whether its proposed diversions would result in a "significant reduction" in water available for hydropower production. In the context of the area

[1053] Idaho Code §§ 42-203B, 42-203C and 40-203D

[1054] IDAPA 37.03.08 (Water Appropriation Rules).

[1055] This remains the case today, not so much because of the Swan Falls statutes but because of the delivery calls and related litigation concerning the ESPA.

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upstream from Swan Falls, the department will evaluate whether Idaho Power's Swan Falls generation capacity will be significantly affected.

If a significant reduction is predicted, then the application must undergo a *second* level of review to gauge how the proposal matches up against five criteria, including economic impact, impact on utility rates, "promotion of the family farming tradition," promotion of full economic development of Idaho's water, and whether the proposed development conforms to a "staged development policy of up to twenty thousand acres per year" of new agricultural development. The Department has adopted both formal rules and an informal "policy" concerning the processing of applications for new rights in the part of the state where diversions would affect Swan Falls flows. (However, due to a prohibition in the Swan Falls statutes, diversions that would affect river flows above Milner Dam are not to be considered in the evaluation of whether the proposed diversion would affect Swan Falls flows.)[1056]

Because of the creation of a trust containing a portion of Idaho Power's water rights, and the use of the term in a portion of the Swan Falls statutes, the Department refers to those areas whose waters are tributary to the below-Milner, above-Swan Falls reach of the Snake River as the "trust water" area, and it suggests that the Swan Falls statutes effectively set aside for future development a "block of water" (primarily tributary ground water in the ESPA). It refers to this as "trust water."

The Department has determined that the first 43,000 acres of irrigation development affecting this below-Milner reach would not have a significant effect on flows for hydropower. Consequently, the Department has not yet processed any of these permit applications under the more searching second level review. However, the Department's 1992 moratorium order ceased processing of pending and new applications to appropriate water in the trust water area and other areas of the state due to an extended drought. (See discussion in section 20 at page 303.) This moratorium, through subsequent amendments, remains in effect. In addition, the Department's Conjunctive Management Rules, which establish extensive criteria for determining and mitigating injurious impacts to senior surface rights attributable to junior wells, may play a larger role in any future evaluation of the effects of trust water diversions on Idaho Power's rights at Swan Falls.

[1056] Idaho Code § 42-203B(2).

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12. GENERAL ADJUDICATIONS

Five general adjudications are now underway in Idaho, covering virtually the entire state. In each case, the Legislature has played an active role in structuring and funding the adjudications.[1057] They are briefly identified below.[1058]

A. SRBA (Snake River Basin Adjudication) (No. 39576)

The first and the largest is the SRBA, which was initiated in 1987.[1059] After 27 years, the SRBA concluded the adjudication of over 158,600 non-deferred water right claims with the issuance of a 275,000-plus page *Final Unified Decree* on August 25, 2014. The Court retained jurisdiction over the unfiled *de minimis* claims.

B. NIA (North Idaho Adjudication) (Nos. 49576, 59576, and 69576)

Meanwhile, in 2006, the Idaho Legislature authorized a petition to commence what is collectively known as the NIA.[1060] The NIA consists of three separate adjudications:

- Phase 1: Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") (Basins 91-95) (No. 49576)[1061]
- Phase 2: Palouse River Basin Adjudication ("PRBA") (Basin 87) (No. 59576)[1062]

[1057] The statutes governing general adjudications make up an entire chapter of the Idaho Water Code, Idaho Code §§ 42-1401 to 1428.

The SRBA legislation provided that the Director of IDWR "shall petition the district court to commence an adjudication." (See footnote 1059.) The legislation for the NIA and BRBA provided that the Director "is authorized to petition the district court." (See footnotes 1060 and 1064.) In fact, no legislation is required to authorize the Director to petition a court to initiate a general adjudication. Before the SRBA, general adjudications were initiated without any legislative prompting or oversight. But the precedent set in the SRBA has been followed in all subsequent adjudications.

[1058] Curiously, the five adjudications were assigned case numbers with the first digit in sequence: 39576, 49576, 59576, 69576, and 79576.

[1059] Legislation authorizing a petition for commencement of the SRBA was enacted in 1985. 1985 Idaho Sess. Laws, ch. 18, § 1 (formerly codified at Idaho Code § 42-1406A), as amended by 1985 Idaho Sess. Laws, ch. 118, § 1, and then amended and uncodified by 1994 Idaho Sess. Laws, ch. 454, § 11). The SRBA was commenced on November 19, 1987. *Commencement Order*, *In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Nov. 19, 1987) (Hurlbutt, J).

[1060] 2006 Idaho Sess. Laws, ch. 222 (codified at Idaho Code § 42-1406B), as amended by 2008 Idaho Sess. Laws, ch. 149 and 2008 Idaho Sess. Laws, ch. 159.

[1061] The CSRBA was commenced on November 12, 2008. *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., Nov. 12, 2008) (Melanson, J.).

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- Phase 3: Clark Fork-Pend Oreille River Basins Adjudication ("CFPRBA") (Basins 96-97) (No. 69576)[1063]

C. BRBA (Bear River Basin Adjudication) (No. 79576)

The last adjudication to get underway is the BRBA. In 2020, the Legislature enacted legislation authorizing a petition to commence the BRBA.[1064] The State's petition to commence was filed seven months later.[1065] The adjudication was commenced on June 15, 2021.[1066]

D. The deferral process

(1) Overview

In all recent Idaho general adjudications, beginning with the SRBA in 1987, the District Court has established a mechanism that defers (postpones) the mandatory adjudication of *de minimis* domestic[1067] and stockwater claims.[1068] The deferral process enables the adjudication court to focus its attention on the more significant water rights, while deferring actions on the smallest rights. In the SRBA, *de minimis* water rights were estimated to account for over half of the anticipated claims while constituting less than one percent of the volume of all water rights within the basin.[1069]

[1062] The PRBA was commenced on March 1, 2017. *Commencement Order for the Palouse River Basin General Adjudication, In re PRBA*, Case No. 59576 (Idaho, Fifth Judicial Dist., Mar. 1, 2017) (Wildman, J.).

[1063] The CFPRBA was commenced on June 15, 2021. *Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1064] 2020 Idaho Sess. Laws, ch. 50 (Mar. 9, 2020) (codified at Idaho Code § 42-1406C).

[1065] *Petition to Commence Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., Nov. 20, 2021).

[1066] *Commencement Order for the Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1067] The *SRBA Stipulation* (described in footnote 1070) defined *de minimis* domestic claims by reference to the definition then codified at Idaho Code § 42-1401A(5) (based on 1986 Idaho Sess. Laws, ch. 234). That definition was amended and recodified by 1990 Idaho Sess. Laws, ch 319 to Idaho Code § 42-111 while Idaho Code § 42-1401A(5) was changed to a mere cross-reference. The cross-reference in Idaho Code § 42-1401A(5) was recodified to Idaho Code § 42-1401A(4) by 1997 Idaho Sess. Laws, ch. 374.

[1068] The *SRBA Stipulation* (described in footnote 1070) defined *de minimis* stockwater claims by reference to the definition then codified at Idaho Code § 42-1401A(12) (based on 1986 Idaho Sess. Laws, ch. 234). That definition was recodified by 1997 Idaho Sess. Laws, ch 374 to Idaho Code § 42-1401A(11).

[1069] *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Jan. 17, 1989)

The federal challenge to the deferral process alleges non-compliance with the McCarran Amendment, 43 U.S.C. § 666. That is the statute that waives sovereign immunity allowing the United States to be joined in general adjudications in state courts. In order to comply with the McCarran Amendment, the state adjudication must be comprehensive. That means it must include all ground and surface rights within the designated basin.

The deferral process was initially worked out by the parties in the SRBA. In subsequent adjudications, it has been legislatively mandated.[1070]

For over three decades, the United States affirmatively and expressly acquiesced in this deferral process. (The only exception being its tacit support for the tribal challenge to the process in 2008. See footnote 1076.) Recently, however, it reversed course and raised objections to the deferral process in the CFPRBA and the BRBA.

(Hurlbutt, J.), § 1, pp. 1-2; Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 62 (2016).

[1070] In the SRBA, the deferral of *de minimis* claims was not required by statute, but was negotiated with the United States in the early stages of the general adjudication. The SRBA commenced on November 19, 1987. Just over a year later, Idaho and the United States entered a stipulation agreeing to the deferral process. *Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Dec. 20, 1988) ("*SRBA Stipulation*"). The stipulation effectively waived the claim filing deadline for holders of small domestic and stockwater rights. Thus, holders of *de minimis* claims had the option to file claims on the same schedule as non-deferred claims, but were not required to do so.

Subsequent stipulations filed in the CSRBA (see footnote 1075) and the PRBA (see footnote 1079) are functionally identical.

In more recent general adjudications, the Idaho Legislature included a requirement for deferral of *de minimis* claims. Idaho Code § 42-1406B (Northern Idaho Adjudication; Idaho Code § 42-1406C (Bear River Basin Adjudication).

In each adjudication, the District Court has established procedures regarding the deferral of *de minimis* claims. These procedures follow the procedures set out in the stipulations. This is true even for the adjudications in which there was no stipulation (the CFPRBA and the BRBA).

For example, the implementing orders in the SRBA are as follows: *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Jan. 17, 1989) (Hurlbutt, J.) (adopting the procedures agreed to in the stipulation); *Administrative Order No. 10, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Mar. 22, 1995) (Hurlbutt, J.) (authorizing claimants with deferred claims to have such claims adjudicated); *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., June 28, 2012) (Wildman, J.); *Order Granting State of Idaho's Motion for Interim Order Implementing the Order Governing Procedures of Adjudication of Deferred De Minimis Domestic and Stock Water Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Dec. 18, 2013) (Wildman, J.); *Order Amending Procedures in the SRBA for Adjudication of Deferred De Minimis Stockwater Claims, In re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Oct. 17, 2017) (Wildman, J.). Similar orders are found in each of the subsequent adjudications.

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(2) Legal status of deferred claims

Deferred *de minimis* rights are still water rights. Water may be lawfully diverted under those rights (as is true of any other beneficial use right that has not been extinguished by an adjudication). They are entitled to protection from interference caused by new appropriations or transfers.[1071] However, holders of deferred rights are not allowed to transfer (change) those rights[1072] or to place a delivery call[1073] until such time as the deferred right is decreed.[1074]

There is a mechanism for holders of deferred rights to seek adjudication of their *de minimis* rights after the deadline has passed for other claims and even after the final unified decree has been issued for that basin. Water users employ this from time to time (typically when they wish to transfer the right, place a delivery call, or simply firm up the right for financing, sale, or other purposes). As of now, however, no deadline has been established for doing so.

(3) Deferral in the CSRBA and PRBA

Although the United States stipulated to the deferral process in the CSRBA,[1075] the deferral issue was challenged and litigated by the Coeur d'Alene Tribe.[1076] On November 12, 2008, the District Court entered an order rejecting the Tribe's challenge and holding that the deferral process satisfies the

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[1071] A protestant to a water right application alleging injury to a deferred right would need prove the validity of the deferred right. If that proof is made, the deferred right should be treated as any other. So long as it was established prior to the date of the competing application for appropriation or change, the deferred right is entitled to protection from injury.

[1072] See, e.g., *SRBA Stipulation*, §3, p. 3.

[1073] See, e.g., *SRBA Stipulation*, §3(B), p. 4. Technically, the stipulation provides that the Director is not obligated to deliver water.

[1074] It is curious and seemingly inconsistent that deferred rights cannot place a call or be transferred, but are entitled to injury protection in a contested case initiated by another water right holder (see footnote 1071).

[1075] *Stipulation for Establishment of Procedure for the Adjudication of Domestic and Stock Water Claims, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., July, 8, 2008) ("*CSRBA Stipulation*").

[1076] The tribal objection to the deferral process put the United States in an awkward position. When the United States stipulated to deferral in the CSRBA (see footnote 1075), it inherently acted on behalf of itself and as trustee for any affected tribe. This may explain why the United States, in response to the Tribe's challenge to deferral, filed a post-hearing brief insisting that the Court was not bound by the stipulation and that the Court should consider the jurisdictional issue independent of the stipulation. In so doing, the United States implied that the Tribe's substantive arguments had merit and expressly supported the Tribe's procedural arguments against commencement. *United States' Post-Hearing Memorandum, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., Sept. 8, 2008). This shift in position in 2008 foreshadowed the actions taken by the United States in 2021.

requirement for a comprehensive adjudication under the McCarran Amendment.[1077] No party appealed.[1078]

In 2017, the United States agreed by stipulation to the deferral of *de minimis claims* in the PRBA.[1079]

(4) Challenges by the United States in the CFPRBA and BRBA

After stipulating to deferral in the SRBA, the CSRBA, and the PRBA, the United States reversed course in 2021.

The two most recently initiated general adjudications are the CFPRBA and the BRBA (both of which were ordered commenced on June 15, 2021, but which orders are currently on appeal to the Idaho Supreme Court). The United States has opposed deferral in both.

On April 30, 2021, the United States filed its opposition to the deferral process in the CFPRBA and the BRBA.[1080] Following briefing and an oral argument on May 24, 2021, Judge Wildman issued decisions in both adjudications on June 15, 2021 rejecting the United States' position and confirming that the deferral process complies with the McCarran Amendment.[1081] The decisions were accompanied by commencement orders.[1082]

[1077] *Memorandum Decision on Petition to Commence, In re CSRBA*, Case No. 49576 (Idaho, Fifth Judicial Dist., Nov. 12, 2008) (Melanson, J).

[1078] When the United States later challenged the deferral process in the CFPRBA and BRBA, the State argued that the unappealed decision in the CSRBA is *res judicata* (issue preclusion) binding on the United States in all adjudications. *State of Idaho's Reply in Support of the Proposed Deferral Procedures for De Minimis Domestic and Stockwater Claims, In Re CFPRBA and BRBA*, Case Nos. 69576 and 79576 (Idaho, Fifth Judicial Dist., May 14, 2021), pp. 18-20. In ruling against the United States on the merits, the District Court found it unnecessary to address this argument. *Memorandum Decision on Optional Deferral Process, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.), p. 10.

[1079] *Stipulation for Establishment of Procedure for the Adjudication of De Minimis Domestic and Stock Water Claims, In re PRBA*, Case No. 59576 (Idaho, Fifth Judicial Dist., Mar. 1, 2017) ("*PRBA Stipulation*").

[1080] *United States' Special Appearance and Opposition to State of Idaho's Proposal to Defer Adjudication of Certain Water Rights, In re CFPRBA and BRBA*, Cases No. 69576 and 79576 (Idaho, Fifth Judicial Dist., Apr. 30, 2021).

[1081] *Memorandum Decision on Optional Deferral Process, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Memorandum Decision on Petition to Commence Clark Fork-Pend Oreille River Basins Adjudication, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Memorandum Decision on Optional Deferral Process, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.);

(5) Appeal in the CFPRBA and BRBA

On July 27, 2021, the United States filed notices of appeal to Judge Wildman's decisions in the CFPRBA and BRBA.[1083] The appeals are in the initial stages; the United States has asked for a 120 day extension on its opening brief—presumably to give time for its motion to the SRBA Court to play out. Although no order has been issued as of this writing, the delay in Supreme Court briefing is likely to be approved, and further extensions could follow. The appeals could be resolved in as little as six months after the proceedings resume.

The challenge to the deferral process now on appeal is particularly troublesome because, if found to be valid, it is not simple to fix. As noted in footnote 1070, in the SRBA, the deferral process was negotiated by the parties and adopted by the District Court. In all subsequent adjudications, however, the deferral process is statutorily mandated. Thus, it may not simply be dispensed with if found to be improper. Moreover, if the deferral process is determined to not be in compliance with the McCarran Amendment, the validity of all decrees issued to date would be called into question.

It is curious, by the way, that the United States is pursuing these appeals in State Court. In both cases, the United States entered special appearances so as to avoid subjecting itself to jurisdiction. The basis of the challenge is that the Court has no jurisdiction over the United States. Thus, it would seem, the United States could simply ignore the state proceedings (as it routinely does when entities ignore the Federal Quiet Title Act and litigate R.S. 2477 roads in Idaho courts). Or it could file suit in federal court seeking declaratory or other relief to establish that the state adjudications are not binding on the federal government. But, for one reason or another, it has not done so and is instead subjecting itself to the Idaho appellate process (with the possibility of review by the U.S. Supreme Court review).

(6) Motion to adjudicate deferred claims in the SRBA

In its briefing in opposition to the United States in the CFPRBA and BRBA,[1084] Idaho suggested that setting a deadline for filing *de minimis* claims was premature in those adjudications because they

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Memorandum Decision on Petition to Commence Bear River Basin Adjudication, In re BRBA, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1082] *Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, In re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.); *Commencement Order for the Bear River Basin Adjudication, In re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., June 15, 2021) (Wildman, J.).

[1083] *United States' Notice of Appeal, In Re CFPRBA*, Case No. 69576 (Idaho, Fifth Judicial Dist., July, 27, 2021); *United States' Notice of Appeal, In Re BRBA*, Case No. 79576 (Idaho, Fifth Judicial Dist., July, 27, 2021).

[1084] *State of Idaho's Reply in Support of the Proposed Deferral Procedures for De Minimis Domestic and Stockwater Claims, In Re CFPRBA and BRBA*, Case Nos. 69576 and 79576 (Idaho, Fifth Judicial Dist., May 14, 2021), pp. 10, 16.

are just getting underway. "If what the United States is really seeking is closure of *de minimis* claims in the SRBA, its remedy is to file a motion with the Court in that action asking for such relief."[1085]

On November 15, 2021, the United States did just that. It filed a motion in the SRBA asking the Court to set a deadline for filing deferred *de minimis* claims.[1086] The United States contends that it entered into the stipulation for deferral in the SRBA in good faith, with the understanding that deferral would not be forever. It contends, not unreasonably, that the Court should set a deadline for the filing of deferred claims

It is our understanding that the federal motion followed efforts by the counsel for the United States and the Idaho Attorney General's office to agree to a schedule for the adjudication of deferred claims. We are informed that the Attorney General's office agrees that the claims should not be deferred indefinitely, but was unable to agree to the more aggressive timetable sought by the United States. One would expect that there will be more behind-the-scene efforts to resolve this prior to a ruling by Judge Wildman. But the fact that the motion was filed indicates that the parties are far apart.

(7) Reasons for the federal challenge

The reason stated on the face of the pleadings in the various challenges to deferral is that the United States has grown tired of waiting for the *de minimis* claims to be addressed. The United States points out that it has been seven years since the final unified decree was issued for the SRBA, and there has been no movement toward setting a deadline for *de minimis* claims. That is a legitimate observation (albeit one that ignores the fact that the State has been busy with four other general adjudications).

It has been suggested that the federal action amounts to a tit-for-tat in response to Idaho's enactment of Idaho Code § 42-224 in 2020, which provides a mechanism for forfeiture of federal stockwater rights.[1087] Indeed, the United States says as much in its briefing, which sets out a litany of perceived hostile actions by Idaho with respect to federal stockwater rights.[1088]

[1085] *Id*. at 17.

[1086] *Motion to Adjudicate Deferred De Minimis Domestic and Stockwater Claims, In Re SRBA*, Case No. 39576 (Idaho, Fifth Judicial Dist., Nov. 15, 2021).

[1087] The United States' federal reserved water rights have been litigated in the SRBA and were upheld by the Idaho Supreme Court. *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.). Meanwhile, the United States pursued and obtained partial decrees for thousands of stockwater rights on non-reserved BLM land based on beneficial use (as opposed to federal reserved rights). These de minimis stockwater claims were subject to deferral, but the United States elected to pursue them. Then, in 2007, the Idaho Supreme Court ruled water rights for stockwatering on unreserved federal land (BLM land) are held by the grazing permittee, not by the federal government. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (Eismann, J.). That shut down any new federal stockwater claims on BLM land, but left the thousands of rights already obtained intact. In 2020, however, the Idaho Legislature enacted Idaho Code § 42-224, which provides a mechanism for forfeiture of federal stockwater rights in accordance with the holding

13. THE SNAKE RIVER BASIN ADJUDICATION ("SRBA")

Note: A comprehensive overview of the SRBA is found in Ann Y. Vonde, et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53 (2016). See also, Clive J. Strong, *SRBA Retrospective: A 27-Year Effort*, The Advocate (Nov./Dec. 2014) and Eric J. Wildman, *Completion of the SRBA and Status Update Regarding the CSRBA* at 8 (Aug. 25, 2014), http://legislature.idaho.gov/sessioninfo/2014/interim/resources0917_wildman.pdf.

A. Overview

The Snake River Basin Adjudication ("SRBA") was commenced on November 19, 1987 by the Fifth Judicial District Court of the State of Idaho in response to a petition filed by the Idaho Department of Water Resources at the direction of the Legislature.[1089] The SRBA is a statutorily-created lawsuit to inventory all surface and ground water rights in the Snake River Basin.

The Idaho Supreme Court originally appointed District Judge Daniel C. Hurlbutt, Jr., as Presiding Judge for the SRBA and designated Twin Falls as the county of venue. Following Judge Hurlbutt's retirement from the bench in December 1998, the Supreme Court appointed Barry Wood who served as presiding judge until December 2000. Roger Burdick was appointed to preside over the SRBA December 15, 2000. In June 2003, Judge Burdick joined the Idaho Supreme Court, and Judge John Melanson was appointed SRBA Presiding Judge. When Judge Melanson was appointed to the Idaho Court of Appeals at the end of 2009, Judge Eric Wildman took his place as Presiding Judge of the SRBA.

A special court system was created to manage this large and complex case. The court uses Special Masters to conduct hearings and make recommendations on contested rights. Partial and final decrees are entered by the Presiding Judge. The case is governed by the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. Under authority granted by the Idaho Supreme Court to modify portions of these rules, the SRBA has adopted Administrative Order 1.

The establishment of the SRBA was called for in the *Swan Falls Agreement*:

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in *Joyce Livestock*. This action is said to have infuriated the federal land managers, giving rise to the recent challenge to the deferral process.

[1088] *United States' Special Appearance and Opposition to State of Idaho's Proposal to Defer Adjudication of Certain Water Rights, In re CFPRBA and BRBA*, Cases No. 69576 and 79576 (Idaho, Fifth Judicial Dist., Apr. 30, 2021), pp. 17-19.

[1089] Legislation authorizing a petition for commencement of the SRBA was enacted in 1985. 1985 Idaho Sess. Laws, ch. 18, § 1 (codified at Idaho Code § 42-1406A), as amended by 1985 Idaho Sess. Laws, ch. 118, § 1, and then amended and uncodified by 1994 Idaho Sess. Laws, ch. 454, § 11). The District Court issued an order commencing the SRBA on November 19, 1987. Commencement Order, *In re SRBA Case No. 39576* (November 19, 1987).

> Only through a general adjudication will the state be in a position to effectively enforce its minimum streamflow rights, protect other valid water rights, and determine how much water is available for further appropriation. A general adjudication will also result in quantification of federal and Indian water rights which until now have been unresolved. A further benefit of the adjudication is that it will enable the establishment of an efficient water market system, which will encourage the highest and best use of our water resources.[1090]

The adjudication is the largest general stream adjudication in the history of the West. It involves claims to some 175,000 water rights in the 53 separate sub-basins comprising Idaho's portion of the Snake River Basin, including over a thousand instream flow claims filed by Indian tribes and federal agencies on the basis of the federal reserved rights doctrine. The SRBA involves over 80 percent of all of Idaho's water sources. All ground water rights within the basin also are included.

Ordinarily the federal government may not be sued in state court. To resolve federal and tribal claims, however, the United States was made a party to the suit pursuant to a federal statute known as the McCarran Amendment.[1091]

B. Post-commencement claims

All persons claiming to own water rights are required to file their claims in the SRBA, or lose them. Idaho Code §§ 42-1409(4), 42-1420. (The same is true in the Northern Idaho Adjudication ("NIA"), see discussion in section 14 at page 618.) This requirement applies to (1) all beneficial use water rights (including statutory claims) and (2) all permits and licenses for which proof of beneficial use was filed as of the commencement of the SRBA (November 19, 1987).[1092] Those holding "post-commencement" applications, permits, and licenses are not required to file SRBA claims, but may do so at their option. The only reason to file such a claim would be to obtain a judicial decree confirming the right, which may have certain res judicata effects. (See discussion of res judicata in section 14.B(9) at page 172.) Where claims for post-commencement applications and permits have ripened into licenses by the time they are ready to be reported by the Department, the Department will report them

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[1090] *Framework for Final Resolution of Snake River Water Rights Controversy* at 6 (Oct. 1, 1984).

[1091] In 1952 the Congress enacted the McCarran Amendment, 43 U.S.C. § 666, which waived sovereign immunity and allowed the United States to be joined in state court actions to quantify water rights. The act applies, however, only to general stream adjudications of an entire river basin, and not to lawsuits over individual water rights. The act also does not waive the federal government's sovereign immunity for administrative proceedings. *U.S. v. Puerto Rico*, 287 F.3rd 212 (1st Cir. 2002).

[1092] Holders of licensed rights, permits, or applications for permit for which proof of beneficial use was not filed as of the date of commencement (November 19, 1987) were not required to file a claim in the SRBA. Idaho Code §§ 42-1409(4), 42-1420(1)(b) to (d). The SRBA statute, Idaho Code §§ 42-1420(1)(c) and (d), authorizes the Director of the Department to order such "post commencement" claims to be filed. To date, however, he has not done so, nor is any such order anticipated.

based on their status as licenses. However, if they are still at the permit stage, the SRBA statute calls for them to be decreed subject to ultimate approval by the Department.[1093]

C. Domestic and stock water rights in the SRBA

Small domestic and stock water claims are in something of a limbo. Plainly, holders of domestic and stock water claims are subject to the SRBA, just like any other water right holder—despite the fact that these rights may be exempt from permitting and licensing requirements. (See discussion in section 7.F(1) at page 89.) This means that they are parties to the general adjudication and are bound by all of the determinations of other rights, even if they do not file a claim or otherwise participate.

A provision in the SRBA statute authorizes the SRBA Court to "exclude" certain domestic and stock water rights.[1094] Initially, no action was undertaken pursuant to this authority, and, consequently, many domestic and stock water claims were filed. This resulted in complaints that the Department and the court were wasting time dealing with minor claims with little impact on the system, instead of focusing their resources on more significant water rights.

Subsequently, the court issued an order allowing domestic and stock water rights claimants to "postpone" their adjudication.[1095] This was generally understood to mean that these rights did not have to be claimed at all. Now, however, there has been some discussion that the court may need to require these rights to be claimed at some point before the conclusion of the SRBA to ensure that the SRBA is a proper McCarran Amendment proceeding capable of binding the federal government.

D. Procedure

The SRBA proceeds under Idaho's adjudication statute.[1096] The SRBA Court has adopted special rules covering a variety of matters in the case, such as pleading requirements, forms for various motions, rules for reconsidering special masters' ruling, and the like. *See* SRBA Court Administrative Order No. 1 (Amended October 10, 1997).

The SRBA Court has consolidated the 53 subbasins into 22 "reporting areas" for which the Department, acting through its Director, will produce reports to submit to the court ("Director's Reports") detailing the facts the Department's investigation has shown as to current uses under each state-law-based water right claimed. As to claims arising under federal law—that is, federal and Indian reserved rights claims—the Director's Reports provide only an abstract of what is claimed.

[1093] Idaho Code § 42-1421(3).

[1094] Idaho Code § 42-1420(1)(a).

[1095] SRBA Court Order No. 89-01-012 (Jan. 17, 1989) (Judge Hurlbutt presiding).

[1096] Idaho Code §§ 42-1401 to 1428.

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The Director's Reports contain the foundational information about each water right; unless successful objections are received, these will form the basis for the decrees for each water right in each reporting area. Ultimately, all of these "partial decrees" will be consolidated into one enormous final decree.

Claimants may object to the way their water right was recommended in a Director's Report, and they may file responses to objections filed by others. The litigation over objections and responses occurs in "subcases," individual cases involving discovery, motions and ordinary trial practice which usually are heard first by special masters appointed by the SRBA Court. (Currently there are three special masters.)

The SRBA Court posts large amounts of information about the case (including water right claims, rules, orders, and recent decisions) on the web at www.srba.state.id.us.

E. Post-commencement legislation affecting the SRBA

In 1994, the Legislature amended several portions of Idaho's water adjudication statutes[1097] to remedy several perceived problems with the SRBA. Among other things, the Legislature did the following:

1. It removed the Department (and, thus, the Director) as a party to the adjudication, instead designating the Director an "independent expert and technical assistant to assure that claims to water rights . . . are accurately reported . . . [1098]." Removing the Director as a party may have caused more problems than it solved. (See discussion of "one-party subcases" in section 13.H at page 604.)

2. It declared that the Director's Reports no longer are pleadings in the case, but are to be received by the court as "prima facie evidence" of the nature and extent of the water rights they describe.[1099] The statute still places the ultimate burden of persuasion on the claimant to establish each element of the claimed water right,[1100] and authorizes the Department to conduct fact-finding hearings as necessary "for a full and adequate disclosure of the facts."[1101] To date, the Department has not yet conducted any such hearings, and the SRBA court has not indicated that it would welcome such hearings.

3. Enacted two "amnesty" provisions for those water right holders who, prior to 1987, changed or transferred a water right without going through the statutory procedure (Idaho

[1097] Idaho Code §§ 42-1401 to 1428.

[1098] Idaho Code § 42-1401B.

[1099] *See* Idaho Code § 42-1411(4).

[1100] Idaho Code § 42-1411(5).

[1101] Idaho Code § 42-1410(1).

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Code § 42-1425) or who enlarged the use under their water right without increasing the rate of diversion (Idaho Code § 42-1426). Both of these provisions include conditions designed to prevent injury to any existing water rights—including those water rights existing on the date the statutes were enacted. The more controversial of these two provisions, section 42-1426 (amnesty for certain enlargements) was the subject of two Idaho Supreme Court rulings and is discussed below. See section 13.I(8) at page 608.

4. Enacted a provision stating that, where a prior decree is "ambiguous," the Department is to look to conditions existing in 1987 (when the SRBA began) to determine the elements of a water right. This provision promises to generate more controversy in the case. It is being advanced by some water users to assert that the Department essentially is supposed to don blinders and ignore any other facts that come to light about a water use other than those occurring in 1987.[1102] The Idaho Supreme Court also has spoken, if briefly, about this provision, indicating that the Department is not limited to those facts existing in 1987.

F. Early history and initial perceptions

In 1992 and 1993, Director's Reports were filed for the first three reporting areas (Subbasins 34, 36, and 57). The SRBA Court refers to these three subbasins as "test basins" because they were selected on the presumption that they would give rise to a wide variety of issues that should be resolved early in the process. That presumption proved correct. A lot of litigation has arisen from these three reports, including some so-called "Basin-Wide Issues," discussed below.

The Department also has produced Director's Reports for certain categories of claims, such as federal and tribal instream flow claims and *de minimis* domestic and stock water claims, that are handled outside of the reporting area structure. So far, more than half of the water right claims in the SRBA have been decreed, most of these small and unopposed domestic and stock water claims. The federal and tribal claims, with the exception of the on-reservation water rights claims of the Shoshone-Bannock Tribe in eastern Idaho, are mostly all now in active litigation (also discussed further below).

One of the more significant single achievements in the SRBA to date is the final decree accepting the settlement between the Shoshone-Bannock Tribes, the State, and water users. This partial decree approved 27 federal water rights claims for these Tribes for on-reservation uses.

The SRBA is perceived by many, including some legislators and water users, as a protracted process with little to show for itself and no end in sight. It likely has given rise to far more litigation—including litigation of seemingly basic water law questions—than many observers or participants expected. With the appointment in 1996 of Karl Dreher as the Department's new Director, the working relationship between the SRBA Court and the Department improved. Certainly, a productive relationship between the court and the Department is essential. Nonetheless, there are varying levels of frustration over the costs, to the state and to the parties, the perceived slow pace, and the concern that

[1102] Idaho Code § 42-1427.

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one-party subcases or other circumstances will lead to overstated water rights. Many water users are not convinced that the process will result in an accurate accounting of actual water rights based on actual beneficial use and a reasonable duty of water.

G. Basin-wide issues

The SRBA Court also has designated and decided several "Basin-Wide Issues"—questions of law seen to have overriding importance. All of those raised to date have been decided by the Idaho Supreme Court. As noted below, the high court also has decided other important legal questions outside of the Basin-Wide Issue format.

H. The "One-Party Subcase" and the limited role of the Director

Since the 1994 legislation the Department has not been a party to the SRBA. Consequently, many of the subcases proceed as "one-party subcases," where only the claimant objects to his or her water right (invariably arguing that the Director's report understated it) and no other claimants enter the case as respondents. The special masters generally have afforded little opportunity for testimony from the Department beyond the Director's Report itself, and often have allowed no real examination of the claimant's position in these one-party affairs.

However, as noted above, the Legislature designated the Department an "independent expert and technical assistant" in the SRBA and charged it with the duty to "assure that claims to water rights . . . are accurately reported," and retained its authority to hold its own fact-finding hearings to produce "a full and adequate disclosure of the facts" supporting each water right. It would seem that this and similar statutory language would afford the court ample latitude to involve the Department in a meaningful way as it determines the facts about each objecting claimant's water right.

Most claimants outside the one-party subcase are unaware of the precedent the case might set, or are unable to afford getting in. Others may simply believe that somehow the process will end up with water decrees for reasonable, supportable amounts and uses of water, but this remains to be seen. Although the Idaho Supreme Court ruled that these one-party subcases are inappropriate for summary judgment (because that presumes an adversarial process), many of these cases continue to proceed to a "trial" of sorts where the claimant faces little contrary factual evaluation.

I. Significant SRBA decisions

The SRBA has given rise to several important water law issues, and promises to produce more. Some of the more noteworthy are listed below:

(1) Can one forfeit a portion of a water right?

One of the central decisions so far in the case, designated by the SRBA Court as Basin-Wide Issue No. 10, is whether Idaho's water right forfeiture law, Idaho Code § 42-222(2), allows the court to find forfeiture of only a part of a water right, or whether the use of any water under a right protects the entire right from forfeiture. The SRBA Court ruled that there is no such thing as "partial forfeiture"

under Idaho law —in other words, the use of any portion of a water right maintained the validity of a long-unused (or even unusable) portion.

Obviously, there was a grave concern among many water right claimants—especially juniors—that a ruling upholding the SRBA Court would result in the decreeing of thousands of "paper" water rights in the SRBA and placing rights at risk. Not surprisingly, the Idaho Supreme Court found that a water right can be forfeited either in whole or in part and overturned the SRBA Court.

(2) What is the effect of prior decrees in the SRBA?

Are decrees in prior private water rights adjudications, though affecting only those who were parties, nonetheless "conclusive" and "binding" on the Department and on all SRBA parties as the Department investigates actual beneficial uses under water rights today, absent a finding of forfeiture or abandonment? This was one of several questions in *Hagerman II.*[1103]

The Supreme Court, overturning the SRBA Court, ruled that such prior decrees are not binding on the Department or other parties. Also involved in the *Hagerman II* case was the issue whether the Director's Report should be treated as a mere "presumption" in the adjudication which can be overcome by virtually any evidence offered by the claimant. The Idaho Supreme Court ruled that the report is actual evidence that must be weighed against any other evidence.

(3) Inclusion of "general provisions" in the water rights decree

Idaho's general stream adjudication statute under which the SRBA proceeds states that the decree of water rights is to include, in addition to the basic elements of each water right, "such general provisions necessary for the definition or efficient administration of the water rights."[1104] In Basin-Wide Issues 5, 5A and 5B, the SRBA Court had rejected as unnecessary several general provisions the Department had recommended. The SRBA Court also had suggested that a general provision should not be included unless it applied to all water rights in the basin equally. The general provisions rejected by the SRBA Court included guidance on the use of water for firefighting, the definition of "irrigation season" for particular areas, the practice of using "excess water" outside the irrigation season, the use of irrigation water for incidental stock watering, and language regarding the relationship between ground and surface waters.

In *A&B Irrigation District*[1105] the Idaho Supreme Court rejected the SRBA Court's view that a general provision must apply to all rights or none, finding instead that such a provision could apply to less than all water rights in the basin.

[1103] *State v. Hagerman Water Right Owners, Inc. ("Hagerman II")*, 130 Idaho 736, 947 P.2d 409 (1997) (Schroeder, J.).

[1104] Idaho Code § 42-1412(6).

[1105] *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d. 568 (1998).

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The court upheld some of the Department's general provisions and rejected others: for example, a general provision authorizing the use of water for firefighting without a water right was held permissible because it was deemed necessary for the efficient administration of water rights. But a provision addressing the practice of diverting "excess water" was improper because such diversions could not be protected by a water right.

The court also held that, with respect to each irrigation water right, the decree must identify a "specific period of use setting forth a beginning date and an ending date." Consequently, the court rejected the SRBA Court's determination that the period of use should simply be generally described as "the irrigation season."[1106] *See also State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998) (pertaining to general provisions regarding rotation of diversions, treating a stream as two separate sources, and specially addressing storage water rights in a particular system).

(4) Conjunctive management of ground and surface water rights

An important part of the Supreme Court's decision on Basin-Wide Issue 5 was its ruling vacating the SRBA Court's order rejecting the Department's general provision addressing conjunctive management of ground and surface waters.[1107] The Idaho Supreme Court stated that the Legislature, in launching the SRBA, intended ground and surface water rights to be decreed and managed together, and ordered the SRBA Court to conduct hearings to determine whether general provisions on this subject are necessary. On remand, the court and the parties were faced with the prospect of complex and lengthy hearings concerning the specific interrelationships among thousands of water rights. Following the court's denial of the parties' cross-motions for summary judgment the parties stipulated to the inclusion of a generic general provision that simply provides notice to water users whether their rights are from interconnected sources and may be subject to conjunctive administration.[1108]

The conjunctive management issue also arose, at least implicitly, earlier in the SRBA in response to *Musser v. Higginson*.[1109] There, the Idaho Supreme Court ruled on a narrow point: that the Director has a mandatory duty under the version of Idaho's water distribution statute then in force[1110] to deliver water upon demand to a holder of decreed water right.

[1106] *See* In re SRBA Case No. 39576, Subcase 91-00005, Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits (July 2, 2001); Connected Sources General Provision Memorandum Decision and Order of Partial Decree (February 27, 2002).

[1107] *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d. 568, 580 (1998).

[1108] *See* In re SRBA Case No. 39576, Subcase 91-00005, Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits (July 2, 2001); Connected Sources General Provision Memorandum Decision and Order of Partial Decree (February 27, 2002).

[1109] *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

[1110] Idaho Code § 42-602.

The court upheld the SRBA Court's writ of mandate requiring the Director to deliver water to serve Mr. Musser's decreed entitlement, even though the delivery statute applies to adjudicated streams where there are watermasters to administer rights in priority. In this case the adjudicated stream was a canyon-wall spring fed by the vast Snake Plain Aquifer, and rights in the aquifer had not yet been adjudicated, declared part of the spring water source, or placed under the management of a watermaster. While there were others who diverted from the spring, the presumed real targets of the action were the ground water pumpers up-gradient.

The court's opinion in *Musser* does not address how the statute was to apply to the ground water right holders, who had not yet had an opportunity to have their rights adjudicated as against the spring diverters' water rights, or how the ground water pumpers would be provided some sort of due process in the matter.

The *Musser* decision was one of the factors leading to the Department's adoption of conjunctive management rules, which set forth the considerations that are to apply when a delivery call is imposed on ground water rights by senior surface rights. As to the writ of mandate itself, the matter became moot when Mr. Musser received a supply of water from another source.

(5) Geographic scope of the SRBA

Early on in the SRBA the Idaho Supreme Court ruled that the Idaho Legislature intended to include, in the adjudication, water rights on previously adjudicated tributaries. Part of the court's decision was based on the observation that the Legislature intended to leave no doubt that it would have McCarran jurisdiction.[1111]

(6) Can the United States be required to pay filing fees in the SRBA?

The Idaho Supreme Court thought so, but the U.S. Supreme Court gave this question a unanimous "no."[1112]

(7) Is it Constitutional for the Legislature to make changes in the SRBA after this court case has begun?

As noted above, in 1994, seven years after the SRBA began, the Legislature mandated certain procedural changes in the SRBA and removed the Director as a party. The Idaho Supreme Court upheld virtually all of the significant changes.[1113]

[1111] *In re Snake River Basin Water System*, 115 Idaho 1, 832 P.2d 289 (1992), *cert. denied* 490 U.S. 1005 (1989).

[1112] *United States v. Idaho*, 113 S. Ct. 1893 (1993).

[1113] *State ex rel. Higginson v. United States* ("*Basin-Wide Issues 2 and 3*"), 128 Idaho 246, 912 P.2d 614 (1995).

(8) Amnesty for illegal enlargements of water rights

Beginning in 1971 for surface water diversions, and 1963 for ground water, the Idaho Legislature prohibited the use of the "beneficial use" or "constitutional" method of appropriation. After these dates, all water rights could be acquired only by obtaining a permit and, ultimately, a license, from the Department. However, when it was writing the general adjudication statute to govern the SRBA, the Legislature became aware that many water users had, after the 1963 or 1971 dates, enlarged the number of irrigated acres in violation of the mandatory permit requirements by (in the typical case) irrigating additional acres outside the authorized place of use under the water right license or decree. These illegal enlargements often were accomplished through water conservation resulting from more efficient irrigation techniques, such as sprinklers and pipelines, that seemingly made more water available. In other cases, drain water was recaptured and reused. This water was then applied to newly developed land in a practice known as water spreading. In other words, they were able to irrigate more acres with the same quantify of diversion.

This may seem to be of zero practical consequence to other water users, but it is not. As more acres are brought under irrigation, consumptive use increases even if the quantity diverted remains the same. The increased consumptive use has to some for somewhere. It means that less water will remain in the aquifer and/or surface supplies to support other water rights.

In structuring its general adjudication statutes, the Legislature recognized that thousands of acres have been enlarged in violation of the mandatory permit requirements due to water "conservation or other means" whereby the same diversion under the original right is used to serve an enlarged use, such as new, unlicensed acres.[1114] One option, of course, was to cut off these uses altogether. But, by enacting section 42-1426, the Legislature opted to allow these uses to continue, and to receive recognition in an adjudication as valid water rights, provided they were commenced before the 1987 date the Snake River Basin adjudication began.

Usually referred to as the "enlargement" or "amnesty" statute, section 42-1426 retroactively waives the mandatory permit requirements of the water code and provides that "a new water right may

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[1114] Idaho Code § 42-1426(1)(a). The current enlargement statute, Idaho Code § 42-1426, is part of a trilogy of amnesty statutes aimed at shielding otherwise illegal water uses. Each of these also has a predecessor. The Legislature substituted the new versions when the older versions were declared unconstitutional by Judge Hurlbutt of the SRBA Court in 1994, thus mooting an appeal to the Idaho Supreme Court. They are:

- The "Accomplished Transfer Statute," Idaho Code § 42-1425 (formerly, Idaho Code §42-1416A).
- The "Enlargement Statute," Idaho Code § 42-1426 (replacing the second presumption in the presumption statute, 1985 Idaho Sess. Laws, ch. 19 (formerly codified at Idaho Code § 42-1416(2)).
- The "Ambiguous Decree Statute," Idaho Code § 42-1427 (replacing the first presumption in the presumption statute, 1985 Idaho Sess. Laws, ch. 19 (formerly codified at Idaho Code § 42-1416(1)).

These precursor statutes are discussed briefly in *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456-57, 926 P.2d 1301-02, 1304 (1996) (Schroeder, J).

be decreed for the enlarged use," provided measures, including mitigation or advancement of the new right's priority, can be imposed to prevent injury to other water rights, including those existing on the statute's 1994 effective date but having priorities junior to the date enlargement took place (the authors refer to these as "post-enlargement rights").[1115]

Enlargement rights are conditioned so that they authorize irrigation of acres not previously authorized. But they do not allow any addition in total diversion quantities. This is accomplished by combined use conditions. Thus, the quantities stated on the face of the enlargement right add nothing when those rights are used in combination with the enlarged rights.

In *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J), the Idaho Supreme Court was asked to consider the constitutionality of the amnesty for these illegal enlargements. The question was whether the Legislature retroactively can validate illegal enlargements of water rights by such a waiver. The Idaho Supreme Court's answer is yes, but with a substantial caveat that sharply limits the result. The court cautioned that a waiver cannot operate so as to injure, such as by dilution of priority, any water right existing on the 1994 date the amnesty statute was enacted. The effect of this ruling is to require mitigation or a condition, such as a subordination, before an enlargement can be given a date-of-enlargement priority.

Based on the statute and the court's ruling in *Fremont-Madison*, the Department, which recommends water rights to the adjudication court, added this "subordination remark" to all of these new enlargement water rights:

> This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority right is the superior right.

Thus, these otherwise illegal water appropriations can be recognized as new water rights in the Snake River Basin Adjudication, but they are treated as junior to all other non-enlargement water rights existing as of the April 12, 1994 date the amnesty statute became effective.

Nevertheless, a few holders of enlargements resisted this conclusion. For example, ground water pumpers in the A&B Irrigation District contended, first, that the Court's decision in *Fremont-Madison* did not establish a *per se* injury rule, thus allowing some room to argue that their recapture of waste water and use on expanded acreage did not injure other users. They also argued that, under the common law, water right holders are entitled to recapture and reuse waste water even if it does injure

[1115] Idaho Code § 42-1426(2).

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other users. The Idaho Supreme Court, upholding both the IDWR and the SRBA Court, unanimously rejected both arguments.[1116]

The SRBA Court's order affirmed in *A&B* clearly explains why the subordination condition is important in these amnesty cases—to protect priority among rights:

> [T]o the extent a previously unauthorized enlargement claim is retroactively given senior priority over an existing right on the same source, without mitigation (i.e., a substitute source of water), the injury is essentially *per se* because the priority of the affected right on the system has been diminished.[1117]

The court noted that at the time an enlargement occurs the enlargement's effect on other appropriators "may not be physically apparent" because there may be sufficient water at that point to satisfy all.[1118] But when there is insufficient water for all rights on the system, the court observed that priority dates are significant.

> Hence, the essence and value of a water right in a prior appropriation system is the priority date. To the extent a claimant is entitled to retroactively receive a valid water right with a priority date senior to other appropriators on the same source the juniors are *per se* injured irrespective of the extent of the water supply. The mitigation provision [i.e., the subordination remark] preserves the order of priorities on a system by preventing the available water supply to juniors from being diminished as a result of the new or enlarged right.[1119]

In *A&B*, the Supreme Court upheld the SRBA Court. First, it held that *Fremont-Madison* did indeed create a *per se* injury rule requiring that expansions seeking protection under the amnesty statute are subject to a mitigation condition subordinating the expanded portion of the right to all rights existing on April 12, 1994 (the enactment date of the amnesty statute, Idaho Code § 42-1426). Second, the court ruled the amnesty statute does not apply at all to recapture of waste water. Third, it held that to the extent recapture of waste water is allowed, it is limited to reuse on the "original appropriated lots," not on expanded acreage.[1120] Indeed, the court observed that if recapture of waste water results in

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[1116] *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2005) (Schroeder, C.J.).

[1117] Order on Challenge (*A&B Irr. Dist.*) at 25.

[1118] Order on Challenge (*A&B Irr. Dist.*) at 25.

[1119] Order on Challenge (*A&B Irr. Dist.*) at 25.

[1120] *A&B Irr. Dist. v. Aberdeen-American Falls Ground Water District*, 141 Idaho at ___, 118 P.3d at ___ (2005)

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the user "having more excess drain and/or waste water than it can reuse on its appropriated properties, Idaho water law requires the district to diminish its diversion."[1121]

(9) Accomplished transfer statute upheld

In *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Schroeder, J), the same "Basin-Wide Issue 4" case that addressed enlargements, discussed above, the Idaho Supreme Court upheld the "accomplished transfer" statute, Idaho Code § 42-1425, noting that it contained built-in protections which make it unavailable to transfers that result in injury or enlargement.

In *In re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.),[1122] SRBA Judge Melanson (who retained the case after his appointment to the Idaho Court of Appeals) rejected the City of Pocatello's argument that the accomplished transfer statute does not apply to pre-1969 water rights. The Court noted that, while it is true that the current transfer statute (Idaho Code § 42-222) dates to May 26, 1969, a prior statute required transfer proceedings and even longer-standing common law imposed a no-injury rule on transfers. Accordingly, the Court ruled that IDWR has authority to recommend water rights that had been changed before 1969 without complying with the transfer statute and, more importantly, the agency has authority to evaluate those rights and recommend conditions to prevent injury.

The same Court also held that the accomplished transfer statute does not allow changes in the source of water, but only changes in place of use, point of diversion, nature or purpose of use, or period of use. The Court observed: "A change in source is essentially the appropriation of a new water right." *Id*. at 11.

Relying on *Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996) (Schroeder, J), the Court again ruled that injury to priority is *per se* injury under the accomplished transfer statute. *Id*. at 12. Finally, the Court concluded that the accomplished transfer statute is, by its terms, unavailable to licenses issued subsequent to the commencement of the SRBA. *Id*. at 15.

(10) Public trust doctrine's applicability to water rights: The Court says yes, the Legislature says no

Conservation groups sought to intervene in the SRBA to assert public interest and public trust concerns. They argued that the SRBA Court is to consider and apply the public trust doctrine as a part of its evaluation of water right claims in the adjudication. The Idaho Supreme Court agreed with the SRBA Court that the public trust doctrine is not properly considered in the SRBA, and therefore upheld

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[1121] *Id*.

[1122] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

the denial of intervention. However, the high court stated that "the water rights adjudicated in the SRBA, as with all water rights, are impressed with a public trust."[1123] The Idaho Legislature responded to this ruling by abrogating the public trust doctrine's application to water in Idaho.[1124]

(11) State common law instream water right for wildlife refuge

In 1996, the SRBA Court concluded that the United States had obtained a "beneficial use" or "constitutional method" state water right in the instream flows of a stream and creek system by creating a wildlife refuge and managing wildlife there, despite the fact that it diverted no water. The State and several water user organizations appealed.

In the "Smith Springs" opinion issued March 9, 2000, the Idaho Supreme Court reversed the district court, thus denying the United States' claim to a water right under Idaho law for an instream wildlife use.[1125] Although the holding applies specifically to the federal claim involved, the decision presumably would apply to any party claiming a "private" instream flow water right under Idaho's "constitutional method." The *Smith Springs* decision lends weight to the argument that the Idaho minimum flow statute provides the only way to establish instream flows under Idaho law, at least where no diversion is involved. (This case is discussed further in section 23.E at page 374.)

(12) Whether federal reserved water rights were created by public water reserve no. 107

President Coolidge's 1926 Executive Order withdrew and reserved thousands of tracts of public land containing water holes and other water sources used by the public for watering purposes. In Basin-Wide Issue No. 9, the SRBA Court concluded that the Executive Order did not create a federal reserved water right. The Idaho Supreme Court reversed, ruling that the Executive Order was an express statement showing an intent to reserve federal water rights in the waters on these lands. *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998) (Walters, J.).

(13) Denial of federal reserved right for instream flow in the Snake River to protect islands within wildlife refuge

In 1937 President Franklin Roosevelt established the Deer Flat National Wildlife Refuge near the Snake River, and included within it numerous islands in the river itself. The U.S. Fish & Wildlife Service claimed that Roosevelt's executive order established federal reserved water rights to instream flows in the Snake River to preserve these lands as islands, including channel scouring flows and flows necessary to maintain patterns of land accretion on them. The SRBA Court ruled that there is no

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[1123] *Idaho Conservation League v. State*, 128 Idaho 155, 911 P.2d 748, 750 (Idaho 1995).

[1124] *See* Idaho Code § 58-1201.

[1125] *State v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) ("Smith Springs" case).

federal reserved water right for these purposes.[1126] The U.S. Fish & Wildlife Service appealed to the Idaho Supreme Court, which upheld the lower court ruling.[1127] The United States did not seek certiorari to the United States Supreme Court, so the decision is final. This decision is discussed further in section 16.D(7) at page 641.

(14) Municipal water rights

A special master's ruling in 1995 noted that there is substantial authority in Idaho that municipal water suppliers have flexibility, under the prior appropriation doctrine, to acquire water rights for future, reasonably projected growth even though they have not yet fully developed them. While the decision did not rule on this point, it did conclude that the city's water right at issue would not be restricted to specified boundaries as the place of use other than the general notation of the "city limits."[1128] The decision was consistent with the position advanced in the case by United Water Idaho Inc., a municipal water supplier serving the Boise area. In 1996 the Idaho Legislature passed a statute specifically recognizing, and placing limitations upon, water rights for municipal purposes.

(15) Whether the United States has federal reserved water rights for wilderness areas and other special designations

Wilderness areas.[1129] The SRBA Court ruled in favor of the federal government on the wilderness reserved water rights question.[1130] On appeal, the Idaho Supreme Court first upheld this ruling, then reheard the matter in early 2000 and reversed its earlier ruling. This issue is discussed further in section 16.D(3) at page 633.

National Recreation Areas. The Idaho Supreme Court ruled that in establishing the Hells Canyon National Recreation Area in 1975,[1131] Congress expressly reserved sufficient water to satisfy the purposes of the reservation. The court noted that the Hell's Canyon reservation was of both "land

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[1126] *Memorandum Decision Granting State of Idaho's Motion for Summary Judgment*, In re SRBA, Deer Flat Wildlife Refuge Claims, Consolidated Subcase No. 02-10063, Idaho Fifth Judicial District Court (December 31, 1998).

[1127] *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001).

[1128] *Special Master's Report, Findings of Fact and Conclusions of Law*, In re SRBA, Case No. 39576, Subcase No. 10030 (April 8, 1997).

[1129] *Potlatch Corporation v. United States*, Idaho Supreme Court Docket Nos. 24545-48 and 24557-59 (appeal filed February 24, 1998).

[1130] The SRBA Court's decision finding federal reserved water rights for wilderness can be found at In re SRBA, Consolidated Subcase No. 75-13605 *Order Granting in Part and Denying in Part United States' Motions for Summary Judgment,* Idaho Fifth Judicial District Court (Dec. 17 1997).

[1131] Hells Canyon National Recreation Act of 1975, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg(1)-(13)).

and water"[1132] and contained language exempting claims of water rights on certain rivers and tributaries. This issue is further discussed below at 16.D(4). On the other hand, in *Idaho v. United States*,[1133] the court found no reserved water rights were created for the Sawtooth National Recreation Area.[1134] The government had not asserted an express reserved right, so the case turned on whether the establishment of these recreation areas carried with it an implied reservation of water rights.[1135] This issue is discussed further in section 16.D(6) at pages 638 and 640.[1136]

Wild and scenic rivers.[1137] The SRBA Court found that the language in the Wild and Scenic Rivers Act, 16 U.S.C. § 1284(c), expressly created a reserved water right, but denied the United States' motion for a ruling that the reservation was for all unappropriated flows—leaving this second question for trial.[1138] The Idaho Supreme Court upheld this ruling, noting that the Wild and Scenic River Act expressly created federal reserved water rights for wild and scenic river designations.[1139] This decision is discussed further in section 16.D(5) at page 639. The State, the Forest Service, and various private water right holders mediated and ultimately settled the quantification question.

Channel maintenance flows in National Forests under 1897 Organic Act. The SRBA Court denied the State of Idaho's motion for summary judgment seeking a ruling that the United States had no claim to channel maintenance flows under the Forest Organic Act of 1897.[1140] Accordingly, the

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[1132] 16 U.S.C. § 460gg(b).

[1133] *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) ("Smith Springs" case).

[1134] *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) ("Smith Springs" case). The statute involved was the Act creating the Sawtooth National Recreation Area, Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (codified at 16 U.S.C. §§ 460aa *et seq*.).

[1135] The State and Hecla Mining Company urged that the "no claim or denial" language contained in virtually all recent federal reservations—the "section 4(d)(6)" language in the Wilderness Act, for example—constitutes an express denial of water rights. The court rejected this claim, essentially saying that this statutory boilerplate (which commentators have debated for years) means nothing at all. *Idaho v. United States*, 12 P.3d at 1288.

[1136] For the SRBA District Court's rulings on these claims, *see* SRBA Consolidated Subcase Nos. 79-123597 (Hell's Canyon) and 65-20766 (Sawtooth).

[1137] *Potlatch Corporation v. United States*, *In re SRBA (Wild and Scenic Rivers Claims,* Nos. 25153 and 25154, (Idaho Supreme Court) (appeal filed November 25, 1998) (currently being briefed to the Idaho Supreme Court).

[1138] *Memorandum Decision Granting in Part and Denying in Part the United States' Motion for Summary Judgment*, Consolidated Subcase No. 75-13316, Idaho Fifth District Court (July 24, 1998).

[1139] Wild and Scenic Rivers Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287).

[1140] *In re SRBA, Case No. 39576, Organic Act Claims Consolidated Subcase 63-25243*, Memorandum Decision Denying State of Idaho's Motion for Summary Judgment (5th Dist. Idaho Dec. 22, 1998).

United States was entitled to put on evidence at trial on the necessity for channel maintenance flows in streams in National Forest reservations. The State and other parties appealed this decision to the Idaho Supreme Court (appeal filed January 5, 1999). However, the matter was settled, with the United States withdrawing its claims.

Federal reserved water rights in National Forests under 1960 Multiple Use-Sustained Yield Act. The SRBA Court ruled that the Multiple Use-Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, did not establish any reserved water rights. The United States appealed this decision to the Idaho Supreme Court, which affirmed the SRBA Court's decision. The Idaho Supreme Court found that the United States Supreme Court had already rejected such claims in its 1978 decision in *United States v. New Mexico*.[1141] The United States did not seek review of this decision by the United States Supreme Court. This decision is discussed further in section 16.D(2) at page 633.

(16) Whether the Nez Perce Tribe has Indian reserved water rights for substantial instream flows at off-reservation locations in the Snake River, the Clearwater River, the Salmon River, and most of their tributaries

These claims raise the question whether the "Stevens Treaty" of 1855, particularly in light of subsequent treaties and agreements, reserved any instream flow water rights in favor of the Nez Perce Tribe. The claims encompass vast portions of the Snake River Basin in Idaho, including the Salmon River drainage, the Clearwater, and significant portions of the Snake. (See discussion in section 16.D(8) at page 642.)

(17) Duty of water

Several disputes have been fought about the duty of water question. Probably the most notorious to date have been the disputes in the Hagerman Valley along the Snake River west of Twin Falls where many claimants assert a right to more than three miner's inches of water per acre. (A miner's inch in Idaho is .02 cfs; 3 inches per acre would account for diversions of about 18 acre-feet per acre in a 150-day irrigation season.) There are instances of claimants asserting the right to over 6 inches per acre. In other instances, claims have been filed on more water than a pipeline or other conveyance system can accommodate.

Other examples:

Decrees for aesthetic and fish propagation dating back to the original priority date based on an early-century decree that specified only domestic, irrigation and "other uses."

[1141] *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999).

Decrees for more water than claimed, due to the theory that each water right on a ditch is entitled to have a decree for the entire amount of carriage water needed to deliver the water to the claimant's place of use, and should not be limited to a sharing of conveyance water with other rights.[1142]

(18) Jurisdiction of the SRBA

The Idaho Supreme Court has held that the commencement of the SRBA in 1987 precluded all private actions for adjudication of water rights within the Snake River Basin water system.[1143] As a result, persons asserting a right to the use of water within the Snake River Basin that accrued prior to November 19, 1987 are required to file a claim for such right in the SRBA. (See discussion of post-commencement claims in section 13.B at page 600.)

To the extent a water right claim is within the SRBA's jurisdiction, an action that would involve the determination of the nature or extent of the claimed right must be brought there. This exclusive jurisdiction also extends to actions for the supplemental adjudication of water rights originally heard in the SRBA.[1144] However, although an action may involve a water right within the SRBA's jurisdiction, if the issues to be determined at trial do not involve a determination of the water right's elements, the SRBA does not have jurisdiction.[1145]

Regarding the SRBA court's authority to hear other water right matters, see the discussion of judicial review in section 14.B(11) at page 173.

J. General observations about Idaho's SRBA

General water rights adjudications pose a simple question to the claimant: What is your water right? With the exception of the legal issues raised by some of the federal and Indian reserved water rights claims (or an occasional dispute between private claimants), the answer to this question usually is not difficult to answer, and is tied as much to physics as to law: how many acres actually have been irrigated? What is the capacity of your diversion facility? What is the actual annual volume of water used in your manufacturing plant? When did the use begin? Is it continuing today?

The question may be simple, but in the SRBA achieving the answer often has proved difficult to wrest from the process. With respect to the state-law-based claims, most of the problems, and most of the costs to the parties, can be traced to one or more of the following:

[1142] *See, e.g., Findings of Fact and Conclusions of Law, Subcase Nos.36-0003A et al.,* SRBA District Court, Special Master Haemmerle (July 29, 1998).

[1143] *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

[1144] Idaho Code § 42-1424.

[1145] *Bischoff v. Salem Union Canal Co.*, 130 Idaho 455, 943 P.2d 45 (1997) (until underlying issues of fraud and self-dealing are determined by the trial court, determination of water right elements is not necessary and the SRBA Court has no jurisdiction).

- ✓ The difficulty and contentiousness that arise when one claims a larger water right than one has, "mistakes paper for water," disputes the usufructuary nature of water rights, or does not know (or neglects to tell) the truth about one's water right and its use. Coupled with this is the fact that there is no incentive for claimants not to overstate their water rights.

- ✓ A failure of the fact-finder to cut through the hail of legal arguments and procedural wrangling that litigants marshal in defense of what they believe their water rights to be—in other words, a failure to zero in on the essential simplicity of the proceeding as to most disputes.

- ✓ The problems inherent in determining or implementing the judicial procedures for carrying out a general water rights adjudication. These actions are *sui generis* (one-of-a-kind); in large measure, they have to be invented especially for this purpose and often adjusted as they go along. And they are of such a large size that they are bound to be slow and unwieldy in the best of circumstances. There are strong arguments that an adjudication based on initial administrative fact-finding would be more efficient than the formal judicial model, and Idaho's statute actually allows the Department to conduct hearings as necessary. Idaho Code § 42-1410(1) (in carrying out his investigation of a claimant's use, the Director "may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.") However, so far there has been no attempt to use this power.

- ✓ The Legislature attempting to override or shade the appropriation doctrine in favor of certain groups, practices, or types of uses. Such efforts often lead to more litigation. An example in Idaho is the passage of the so-called "amnesty" statutes, whereby the Legislature retroactively waived the mandatory permit requirement for enlargements of use under existing water rights.[1146] It took two trips to the Idaho Supreme Court for junior water right holders to show that they could not have additional water rights created now with priorities ahead of them. See section 13.I(8) at page 608.

[1146] Idaho Code § 42-1426.

14. NORTHERN IDAHO ADJUDICATION ("NIA")

The Northern Idaho Adjudication ("NIA") consists of three separate river basin adjudications:

- Phase 1: Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") (Basins 91-95)[1147]
- Phase 2: Palouse River Basin Adjudication ("PRBA") (Basin 87)[1148]
- Phase 3: Clark Fork-Pend Oreille River Basins Adjudication ("CFPRBA") (Basins 96-97)[1149]

The CSRBA is the first of three adjudications that will occur within the larger Northern Idaho Adjudication. The Northern Idaho Adjudication will later extend to the Palouse River Basin and the Clark Fork-Pend Oreille River Basins.

In 2006, the Idaho Legislature authorized IDWR to proceed with planning and designing the mechanisms for implementing an adjudication of water rights in the Coeur d'Alene and Spokane River drainages. Idaho Code § 42-1406B.[1150] This is known as the Coeur d'Alene Spokane River Basin Adjudication ("CSRBA").

[1147] The CSRBA was commenced in 2008. Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication, Case No. 49576 (Nov. 12, 2008).

[1148] The PRBA was commenced in 2017. Commencement Order for the Palouse River Basin General Adjudication, Case No. 59576 (Mar. 1, 2017).

[1149] The CFPRBA was commenced in 2021. On October 23, 2020, the State of Idaho filed a Petition to commence the CFPRBA (Case No. 69576). A commencement order was issued in 2021. Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, *In re CFPRBA Case No. 69576* (June 15, 2021).

[1150] The legislation authorizing the adjudication was amended in three ways in 2008. First, the Legislature provided for the deferral of the adjudication of small domestic and stock water claims. 2008 Idaho Sess. Laws, ch. 149 (codified at Idaho Code § 42-1406B(1)). Under this provision, holders of these rights are given the option of not filing adjudication claims at this time. Similar deferral is provided in the SRBA adjudication. Second, the Legislature carved out the Kootenai River Basin from the scope of the adjudication. 2008 Idaho Sess. Laws, ch. 148 (codified at Idaho Code § 42-1414). A major motivation for the Northern Idaho Adjudication is the desire to strengthen Idaho's position in documenting its water use and management vis-à-vis the State of Washington. The Kootenai River is tributary to the Columbia River, which in turn flows through Washington. However, the Kootenai joins the Columbia in Canada, not Washington. Moreover, there are no significant water right conflicts on the Kootenai River. (There are significant environmental and flood management issues concerning water flows and storage releases on the Kootenai, particularly with respect to the operation of Libby Dam. But these are not conflicts driven by water rights.) Consequently, it was felt unnecessary to adjudicate the Kootenai River at this time. Third, the Legislature reduced the fees charged for

The State of Idaho petitioned the district court to initiate the CSRBA litigation on July 3, 2008. *Petition* (July 3, 2008). The CSRBA was commenced by order of the district court on November 12, 2008. *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* (Nov. 12, 2008); *Memorandum Decision on Petition to Commence Coeur d'Alene-Spokane River Basin General Adjudication* (Nov. 12, 2008); *Order Establishing Procedures for the Adjudication of DeMinimus [sic] Domestic and Stockwater Claims in the Coeur d'Alene-Spokane River Basin Adjudication* (Nov. 12, 2008).

On September 29, 2006 the Idaho Supreme Court issued a provisional order assigning the SRBA Judge (then John M. Melanson) to serve as presiding judge over the Northern Idaho Adjudication. The presiding judge is now Eric J. Wildman.

Like the SRBA, the Northern Idaho Adjudication is a McCarran Amendment proceeding. 43 U.S.C. § 666. This means that the federal government has waived its sovereign immunity, and that federal water rights may be adjudicated in this state court proceeding.[1151]

This adjudication will be modeled largely on the SRBA process, which has been underway for decades in southern Idaho and is now nearing its completion. A big difference, however, will be how the Department handles beneficial use claims. In the SRBA, a claimant simply filed a form asserting the existence of such a right. The Department initiated an often time-consuming process of soliciting and evaluating evidence in support of the claim. The Department has learned, the hard way, to demand such evidence up front. The end result is expected to be a more streamlined process (from the Department's perspective) and a more rigorous process (from the applicant's perspective).

The process is also expected to move much faster because the parties can build on the substantial body of law developed in the course of the SRBA. That process was stalled for years as the Idaho Supreme Court heard a series of "basin-wide" issues on interlocutory appeal. That cumbersome process, one would hope, need not be repeated.

Finally, the state of computer technology and data interconnection is far superior to what it was when the SRBA was initiated. IDWR will now be able to take advantage of extensive data bases at the local government level (which often bear indirectly on water use).

This is a general adjudication of water rights in which every person claiming to own a water right must file a *Notice of Claim* for each right. As was the case with the SRBA, the obligation to claim *de minimis* domestic and stockwater rights (as defined Idaho Code §§ 42-111 & 42-1401A) is

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claims to match the fees set for the SRBA in 1987. 2008 Idaho Sess. Laws, ch. 148 (codified at Idaho Code § 42-1406B(1)).

[1151] This entailed the negotiation of a stipulation with the federal government confirming that the State may defer domestic and stock water claims consistent with the McCarran Amendment, as contemplated under 2008 Idaho Sess. Laws, ch. 149 (codified at Idaho Code § 42-1406B(1)).

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"deferred," meaning that they need not be filed now. Idaho Code § 42-1406B(1).[1152] Relatively modest fees are required for each claim, which are set out in Idaho Code § 42-1414.

Except for deferred claims, claims must be filed for all water rights based on a license, decree, or historic use in existence on the date of commencement (November 12, 2008), or on a permit for which proof of beneficial use was filed on or before the date of commencement (November 12, 2008).[1153] Idaho Code § 42-1420(c). If no claim is filed, the water right will be lost forever once the adjudication is completed. Claims may be filed, but are not required to be filed, for permits for which proof of beneficial use has been filed after November 12, 2008.

Note that the *Notice of Claim* is filed with the IDWR.[1154] *Objections* and *Responses to Objections* (discussed below), and everything else in the adjudication, are filed in District Court for the Fifth Judicial District.[1155]

[1152] The deferral of these claims in the Northern Idaho Adjudication is authorized in Idaho Code § 42-1406B(1), which instructs IDWR to including in the petition for commencement a request for such deferral. This deferral is also described extensively in the *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* (Nov. 12, 2008) and a separate *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims in the Coeur d'Alene-Spokane River Basin Adjudication* (Nov. 12, 2008). This deferral could be indefinite. Filing of such claims is still allowed, but is optional. Given the value of these rights, and the value of their documentation for purposes of sales or borrowing, it would be foolish, in the authors' view, not to file a claim.

[1153] "All claimants asserting rights to the use of surface or ground waters under state law from the above-described water system, including pursuant to state license, historic use, federal or state court decree and holders of permits for which proof of beneficial use was filed on or prior to the date of entry of this Commencement Order for the Coeur d'Alene-Spokane River Basin Adjudication ('Commencement Order'), shall file a notice of claim with the director as provided in Idaho Code § 42-1409 (Supp. 2008), unless claimants elect to defer the adjudication of domestic and stock water rights as defined in subsections (4) and (11) of Idaho Code 42-1401(A). All claimants asserting rights to the use of surface and ground waters under federal law from the above-described water system shall file a notice of claim as required by the *Notice of Order Commencing a General Adjudication* prepared by the Director or as otherwise ordered by the Court, unless claimants elect to defer the adjudication of domestic and stock water rights as defined in subsections (4) and (11) of Idaho Code 42-1401(A)." *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication* at 5 ¶ 7 (Nov. 12, 2008).

[1154] This is confusing, because the *Notice of Claim* form itself (which is prepared by IDWR) has a caption reading "In the District Court . . .". But it is not filed with the District Court. It is filed with the IDWR, which then forwards the *Notice of Claim* to the District Court. Indeed, the *Notice of Claim* may be filed in hard copy or online at IDWR's website.

[1155] This, too, is curious, because the Fifth Judicial District does not cover North Idaho. The Fifth Judicial District Court, in Twin Falls, was designated as the court to handle the Snake River Basin Adjudication. Indeed, they built a separate building for it. That court, including Judge Wildman, the Special Masters, and entire staff will now be the court handling all of the Northern Idaho Adjudication, including the CSRBA. To

IDWR sent a notice of commencement to the owner of each water right of record. That notice specified a deadline for filing a *Notice of Claim* for that water right. Each of the deadlines (typically in 2011) for filing a *Notice of Claim* in the CSRBA has passed. (There are ways to still file a late claim. See discussion below.)

For non-federal claims, the next step is for the Director of IDWR to prepare a *Director's Report* in which he evaluates each claim and makes a recommendation to the CSRBA Court as to whether and how it should be decreed. This is done in an iterative process in which the Director first issues a *Preliminary Director's Report*. This allows minor errors to be called to the attention of the IDWR and corrected administratively without judicial action.[1156]

Once the *Director's Report* issues, any water right claimant may file an *Objection* (known as Standard Form 1) to any water right listed in the *Director's Report*. For example, if a water right owner filed a *Notice of Claim* claiming a water right for 0.5 cfs, and the Director issued a *Director's Report* recommending approval of the right but only for 0.25 cfs, the owner should file an *Objection* to the *Director's Report* if he or she objects to the downsizing. Likewise, any other water right claimant (such as a neighbor) could file an *Objection* to the recommendation. The *Objection* identifies the particular "element" of the water right that is objected to and also allows the objector to generically object by checking a box saying, "This water right should not exist." This terminology is a bit confusing, because both the proponent of the right (the owner/claimant) and someone who opposes the right (e.g., the neighbor) would file a document called an *Objection*. This terminology reflects the fact that they are not objecting to the water right; they are objecting to the *Director's Report.*

The next step is for water right claimants to file something called a *Response to Objection* (known as Standard Form 2). This might be filed by the claimant responding to an *Objection* filed by another party. Or it might be filed by another party. Following the example above, the neighbor might agree with the *Director's Report* recommending downsizing to 0.25 cfs and therefore file no *Objection*. But after the owner/claimant filed an *Objection* saying that the right should be decreed for the full 0.5 cfs, it is incumbent on the neighbor to file a *Response to Objection*. Otherwise, IDWR might agree with the owner/claimant's *Objection* and allow the water right to be decreed for the full 0.5 cfs, and the neighbor would have no standing to object.

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the extent required, the Judge and the Special Masters will travel to North Idaho for hearings. However, many of the proceedings will probably be conducted via video linkups with the courtroom in Twin Falls.

[1156] As noted in my June 18, 2014 memorandum, this is known as the error correction process. Neither the Idaho Code nor the *CSRBA's Administrative Order 1* address this process. However, early on in the Snake River Basin Adjudication, the IDWR filed a motion with the District Court seeking authorization to implement a "notice of error" process to informally resolve disagreements claimants had with the IDWR's recommendation of their water rights. No order approving use of the notice of error process has been entered in the CSRBA. However, Carter Fritchle, with IDWR's Adjudication Bureau, informed my partner, Mike Creamer, that the notice of error process is being used in the CSRBA even though it is not provided for in any order of the Court. This error correction process, by the way, is not to be confused with the "error correction process" addressed in *CSRBA Administrative Order 1* at page 15, which deals with the correction of errors in partial decrees.

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In other words, the only way to get a seat at the table (that is, to secure a right to receive notice of further actions, to disagree, and to litigate) is to file either an *Objection* or a *Response to Objection* (or both). This is the equivalent of intervening in a lawsuit. Even though every water right claimant is a party to the adjudication as a whole, the water right holder has no right to participate in any sub-case (that is, the determination of any particular water right) unless he or she files an *Objection* or *Response to Objection* to the water right.

Note, however, that the Director includes only non-federal claims in the *Director's Report*. The various federal claims, including the tribal claims, go directly to adjudication without any recommendation from the Director. This is the reason that the tribal and other federal claims are on a faster track.

Persons who filed claims in the CSRBA received a *Notice of Filing Federal Reserved Water Right Claims*. That notice established a deadline of September 29, 2014 to file an *Objection* and November 28, 2014 to file a *Response to Objection*. However, CSRBA Administrative Order 1 at page 7 requires notification of the Court seven days earlier where the more than 25 *Objections* or *Responses to Objections* are involved.

In order to file an *Objection* or *Response to Objection*, it is necessary first to file a *Notice of Claim*. In other words, persons not claiming water rights may not participate in the CSRBA.

There is a mechanism for filing a *Motion for Leave to File a Late Notice of Claim* (known as Standard Form 4). *CSRBA Administrative Order 1* at page 8. Certain additional fees apply to late claims. Idaho Code § 42-1414(3). Based on the prior general adjudications, it is safe to assume that these late claims routinely will be allowed, at least during the early stages of the adjudication. Moreover, prior to the filing of the *Director's Report*, it is not even necessary to file a motion. Instead, the claimant may simply file the *Notice of Claim* along with the late fee.[1157]

[1157] An order issued by the District Court Judge provides: "In reporting areas where a Director's Report has not been filed, a late notice claim shall be filed with IDWR. A *Motion to File a Late Notice of Claim* is not required to be filed with the Court." *CSRBA Administrative Order 1* at page 8.

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15. BEAR RIVER BASIN ADJUDICATION ("BRBA").

In 2020, the Legislature enacted legislation authorizing a petition to commence the Bear River Basin Adjudication ("BRBA").[1158] The petition to commence was filed seven months later.[1159]

[1158] H.B. 382, 2020 Idaho Sess. Laws, ch. 50 (Mar. 9, 2020) (codified at Idaho Code § 42-1406C).

[1159] Petition to Commence Bear River Basin Adjudication, *In re BRBA Case No. 79576* (Nov. 20, 2020).

16. FEDERAL RESERVED WATER RIGHTS

A. Recent decisions

Note the following decisions, which are not reflected in the discussion of this topic below.

See the following decision on limiting the transfer of federal reserved rights held by Indian Tribes from irrigation to instream uses: *United States v. Truckee-Carson Irr. Dist.*, 429 F.3d 902 (9th Cir. 2005). This case has not yet been incorporated into the discussion below.

In 2006, SRBA Judge Melanson rejected a novel argument by the City of Pocatello that it was entitled to a federal reserved water right based on the Pocatello Townsite Act. *In re SRBA* Case No. 39576, Subcase No. 29-11609, City of Pocatello – Federal Law Claims, (Idaho, Fifth Dist. Ct., Memorandum Decision and Order Oct. 6, 2006).

The reader should also note other recent decisions, such as *Skokomish Indian Tribe v. United States*, 401 F.3d 979 (9th Cir. 2005) (Tribe's reservation of the right to fish in the usual and accustomed fishing grounds under 1855 treaty did not establish a reserved right to water under the Winters doctrine.), *superseded by* 410 F.3d 506 (2005) (deleting section dealing with federal reserved water rights).

B. Introduction

The federal reserved rights doctrine has become deeply ingrained in lore of western water law. It is a favorite of law professors and law students, of Native Americans, of environmentalists, and, generally, of those who support bigger government. It is not so popular with just about everybody else.

Like the weather, people love it or cuss it, but no one ever does anything about it. Not until a series of recent cases in Idaho, that is.

C. Background

(1) Federal deference to State water law

The federal reserved rights doctrine is a curious example of the exercise of a federal power which is at once great and restrained.

It is great, in that the federal government has the authority to preempt state law when it acts under its delegated powers (e.g., the commerce and property powers of the Constitution) coupled with the Supremacy Clause of the Constitution.[1160] Given the breadth of the commerce power, in particular, there is little doubt that Congress has the power to override state water law where it chooses to do

[1160] U.S. Const. art. VI, cl. 2 (Supremacy Clause); U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. art. IV, § 3, cl. 2 (Property Clause).

so.[1161] When it exercises that power, the result is to upset often settled expectations of property rights. Those on the losing end are left without recourse.[1162]

[1161] For six decades, the U.S. Supreme Court upheld every federal statute challenged on the basis of exceeding the Congress' power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 (Commerce Clause). E.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (federal crop limitations applying to wheat grown and consumed on farm are a proper exercise of the commerce power because the wheat consumed may have displaced interstate wheat which the farmer otherwise would have had to purchase on the interstate market); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (application of the Civil Rights Act as a proper exercise of the commerce power where the only effect on interstate commerce was purchase of interstate meat and serving of interstate customers by Ollie's Barbecue).

In 1995 the Supreme Court startled some in the legal community with its decision in *United States v. Lopez*, 514 U.S. 549 (1995). This 5-4 decision (with two concurrences and three dissents) struck down a federal law which made it a crime to possess a gun within 1,000 feet of a school. The Justice Department argued that guns near schools hinder students' ability to learn, which hinders their ability to compete in the global economy. This connection was so general and so broad that it would sustain federal regulation of virtually any activity, said the Court. If this sort of "but-for" logic was sufficient to sustain the connection to interstate commerce, it would "obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557.

The perception of a sea change in constitutional law was substantially diminished one week later, however, when the Supreme Court handed down its unanimous, two-page long, per curium decision in *United States v. Robertson*, 514 U.S. 669 (1995). Robertson (who happened to be a decorated Vietnam veteran, former prosecutor, and former criminal defense lawyer) was a drug dealer who invested the proceeds of his illegal activity in an Alaska gold mine. The federal government charged him with RICO violations. The mine plainly was engaged in interstate commerce, the Court concluded. Despite the fact that the gold produced primarily was sold within the state, Robertson had hired miners and purchased equipment from outside the state.

Five years later, the Supreme Court took another, but somewhat more careful, swipe at the broad application of the Commerce Clause. In *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court struck down, again, by 5-4, the Violence Against Women Act. This law provided a new federal cause of action to victims of gender-based violence. The Court said the problem, though serious, is essentially local, that is, a matter of state concern and not a proper subject for federal legislation.

Interestingly, the *Morrison* Court did not question—much less overturn—*Wickard* and the other broad-application cases. Rather, it limited them to situations in which Congress was regulating commercial activity. *Morrison*, 120 S. Ct. at 1740 n.4. Thus, it appears that the Court will continue to allow federal regulation of commercial activity "based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 120 S. Ct. at 1754. But it will not employ this looser chain of causality where the activity to be regulated is not commercial activity at all, but activity which falls within areas of traditional state control, most notably criminal and family law. *Morrison* pointedly omitted saying anything about federal regulation of the environment, so it remains to be argued whether that is ordinary commerce (federal) or general welfare (state). Opponents of federal regulation might use *Morrison* as a wedge. They might challenge certain environmental laws on the basis that, at their core, their objective is not to regulate commerce, but to protect human health and enjoyment (thus falling more within the States' traditional welfare power). However, absent a further shift in the Court, this appears to be a long shot.

On a separate constitutional track, the *Morrison* decision continues to prop up federal regulation resting on the more traditional regulation of the "instrumentalities" of interstate commerce (e.g., navigable waters) as

On the other hand, the Congress has long hesitated to use this great power. Congress, particularly in earlier years, kept mostly to the sidelines when it came to western water disputes by deferring to state law.[1163]

When one considers the broad range of natural resource matters that Congress has subjected to national control—from mineral extraction to hydropower to air pollution—it is perhaps surprising that Congress has been so reluctant to do likewise with respect to water allocation. Indeed, while Congress has moved aggressively to preempt the field of water *quality* by enacting the Clean Water Act and other statutes, it has historically given the states relatively free rein with respect to water *quantity* (i.e., water allocation).

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well as "persons or things" in commerce. But the door remains open for challenges at the edge of navigability, e.g., the regulation of isolated wetlands.

In 2005, the Court decided *Gonzales v. Raich*, 545 U.S. 1 (2005) (Stephens, J.), the medical marijuana case. Plaintiffs grew marijuana at their homes for personal consumption in accordance with medical treatment by their doctors pursuant to California's Compassionate Use Act. When the federal agents seized their plants, they sought a declaratory judgment that the federal Controlled Substances Act, as applied to them, was an unconstitutional exercise of the Commerce Clause. Plaintiffs argued that the Controlled Substances Act was similar to the laws struck down in *Lopez* and *Morrison*. The Supreme Court rejected that analogy, emphasizing that the Controlled Substances Act regulates economic behavior. The Court explained that *Lopez* dealt with "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Gonzales*, 545 U.S. at 24 (Stevens., J.). The Court said that "our 'substantial effects' cases generally have upheld federal regulation of economic activity that affected interstate commerce." *Gonzales*, 545 U.S. at 44 (Scalia, J., concurring). "Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.' Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Gonzales*, 545 U.S. at 25-26 (Stevens., J.).

Thus, despite the initial excitement (or panic) caused by the *Lopez* decision, it now appears that the Supreme Court intended a more modest correction with respect to what remains a broad application of the Commerce Clause. Consequently, it appears safe to assume that most federal environmental and natural resource statutes will continue to pass muster under the Commerce Clause—so long as they are perceived as regulating commercial activity.

[1162] The central, but unstated, purpose of the reserved rights doctrine is to allow government action without compensation under the Takings Clause.

[1163] "When Congress has addressed expressly the subject of water rights, it generally has deferred to state law. *See*, *e.g.*, Reclamation Act of 1902, 43 U.S.C. § 383 (1982); Forest Service Organic Act of 1897, 16 U.S.C. § 481 (1982); Desert Land Act of 1877, 43 U.S.C. § 321 (1982); Act of July 9, 1870, 43 U.S.C. § 661 (1982); Mining Act of 1866, *Id.* The leading judicial interpretations of these statutes are *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978) (Rehnquist, J.); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)." Brian E. Gray, *No Holier Temples: Protecting the National Parks through Wild and Scenic River Designations*, 58 U. Colo. L. Rev. 551 (1988).

This dichotomy is founded not so much in logic or policy, as in history. The first settlers in the West were really squatters. The land and all of its resources, including water, were owned almost entirely by the federal government. Miners, farmers, and ranchers took what they needed from the federal land, usually scratching out an existence and occasionally amassing great wealth.

When Congress got around to actively managing the nation's vast western estate, resource use patterns already had been established by local custom. Although Congress quickly passed laws controlling (and encouraging) the exploitation of its land resources through such legislation as the Homestead Act of 1862[1164] and the General Mining Law of 1872,[1165] when it came to water, Congress enacted statutes deliberately not repudiating the pattern of development established by the settlers.[1166] In the language of the day, by these land statutes Congress "severed" the water flowing on public lands from the land itself. Thus, for instance, when Congress issued patents conveying land to homesteaders and miners, those conveyances did not include water rights. Water was "severed" from the land, so that it might remain a public resource, subject to appropriation on the basis of beneficial use by private parties under state law.

In so doing, the Congress seemingly washed its hands of any role in allocating water in the West—or at least so thought a lot of Western water lawyers. In fact, the federal government's power over water on federal lands was merely dormant.

(2) Origins of the reserved rights doctrine

Federal power over water was first articulated in a once-obscure Indian law decision handed down by the U.S. Supreme Court in 1908 known as *Winters v. United States*, 207 U.S. 564 (1908) (McKenna, J.). In 1888 the United States entered into a treaty with the Gros Ventre and Assiniboine bands or tribes of Indians creating the Fort Belknap Indian Reservation along the Milk River in Montana. In the Court's words, the purpose of the treaty was to convert "a nomadic and uncivilized people" into a "pastoral and civilized people."[1167] The Court found that the Indians' former means of subsistence was made impossible by their forfeiture of lands under treaty, and that their only opportunity for survival was irrigated agriculture. The Court then concluded that while the treaty failed

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[1164] Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (previously codified in part at 43 U.S.C. §§ 161-163) (repealed by FLPMA).

[1165] General Mining Law of 1872, 30 U.S.C. § 22.

[1166] This deference to state water laws and established allocation systems was articulated in three federal statutes governing the allocation of water on federal lands. The Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (codified at 30 U.S.C. § 661) ("the Lode Law"); the Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (also codified at 43 U.S.C. § 661) ("the Placer Law"); and the Desert Land Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. § 321). Of course, other statutes reflected congressional deference to state water law in other contexts. *See*, *e.g.*, Reclamation Act of 1902, quoted in section 9 at page 568.

[1167] *Winters*, 207 U.S. at 576.

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to reserve explicitly any water rights for the Indians, such a reservation must have been implied for the Indians to sustain themselves. The Court construed the treaty to mean that water was intended.

For many decades, Westerners viewed the *Winters* case as an anomaly of Indian law, and nothing more. The first clue that this might not be so came in 1955. In the Pelton Dam case,[1168] the Court first hinted that this implied reserved rights doctrine might extend to other federal reservations. It held that the Desert Land Act[1169] (which made water on public land subject to private appropriation) was inapplicable to reservations for purposes of developing hydroelectric power. While Pelton Dam was not decided under the rubric of the reserved water rights doctrine, and did not involve the government's use of water on a federal reservation, it implied that the federal government's private licensee was exercising a water right held by the United States that had been withheld from state control as a function of the power site reservation.

What Pelton Dam presaged was confirmed in 1963 by the Supreme Court's holding in *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.). The so-called Winters doctrine, said the Court, could be applied to all federal "reservations" where water was necessary. Suddenly national parks, forests, and wildlife refuges—any federal land area "reserved" from settlement, sale, or entry under the mining and homestead laws—were seen as potentially carrying federal reserved water rights just like the Fort Belknap Tribes won in 1908.

The federal reserved water rights doctrine now has been applied by the U.S. Supreme Court eight times[1170] and may be condensed to this simple principle quoted from a 1976 case:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

Cappaert v. United States, 426 U.S. 128, 138 (1976) (Burger, J.).

Some may see this "doctrine" as a substantive rule of law, with the effect that whenever federal land is reserved, a federal reserved water right is automatically created. But it clearly is not a substantive rule of law. Rather, it is a rule that guides a court's construction of a statute, treaty, or

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[1168] *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (Burton, J.) (the "Pelton Dam" case).

[1169] See footnote 1166 at page 627 for citations to the Desert Land Act and related statutes.

[1170] *Winters v. United States*, 207 U.S. 564 (1908) (McKenna, J.); *United States v. Powers*, 305 U.S. 527 (1939) (McReynolds, J.); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (Burton, J.); *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.); *United States v. District Court for Eagle Cnty.,* 401 U.S. 520 (1971) (Douglas, J.); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (Brennan, J.); *Cappaert v. United States*, 426 U.S. 128 (1976) (Burger, J.); *United States v. New Mexico*, 438 U.S. 696 (1978) (Rehnquist, J.).

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executive order whose text fails to address the water question. This rule of construction comes into play in those cases where Congress or the Executive, in creating a reservation, inadvertently failed to address the question of water in the situation where water is necessary to carry out the primary purposes of the reservation. More on this below.

Once established, these federal reserved water rights share many of the attributes of private appropriative rights under state law. First and foremost, they fit into the state priority system. They may be quantified in state court proceedings[1171] to a specific flow at a particular place with a fixed priority date. In this respect, federal reserved rights operate very much like ordinary appropriative rights.

In other significant respects, however, federal water rights differ from appropriative rights acquired under state law. Most importantly, federal reserved rights arise by implication drawn from federal statute, not through notice, an express intent to appropriate water or other compliance with state procedures. They are then inserted into the state's priority line-up of water rights, carrying a priority essentially "back-dated" to the date of the federal reservation, making them senior to any private state water rights arising after that.

Federal reserved rights also need not conform to state substantive law. For instance, a federal reserved right may be obtained for instream flow rights even in a state which does not recognize instream rights or which recognizes them only when held by a state agency.[1172] Federal reserved water rights thus intrude on the authority of states to grant or deny water rights, they arise by implication and without any express quantity element, and they carry a priority potentially disruptive to existing water rights.

Note that federal reserved water rights must be based on a "reservation" of land. In *Sierra Club v. Watt*, the court of Appeals for the District of Columbia ruled that the Federal Land Policy Management Act of 1976 (which governs non-reserved BLM lands) does not create federal reserved water rights.[1173]

[1171] In 1952 the Congress enacted the McCarran Amendment, 43 U.S.C. § 666, which waived sovereign immunity and allowed the United States to be joined in state court actions to quantify water rights. The act applies, however, only to general stream adjudications of an entire river basin, and not to administrative proceedings or lawsuits over individual water rights.

[1172] For instance, the Idaho Supreme Court recently rejected claims for instream rights asserted by the federal government under state law. *Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000) (the "Smith Springs" case). The Idaho court determined that the diversion requirement is alive and well, and is excused only for water right claims made pursuant to specific state instream flow statutes. Those statutes authorize only certain state agencies to hold these instream rights.

[1173] In *Sierra Club v. Andrus*, 487 F. Supp. 443 (D. D.C. 1980), *aff'd, Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir.), the Sierra Club sued DOI for its failure to assert federal reserved water rights on various federal lands. Various energy projects were seeking water rights in a Utah general adjudication. The U.S. had not been joined under the McCarran Act and was taking no action to assert senior federal water rights. The district court

(3) Primary purposes only

By 1978, the reserved rights doctrine was firmly in place. What was unsettled at that point was how much water was reserved—more specifically, for what purposes were water rights reserved? That question was addressed in *United States v. New Mexico*, 438 U.S. 696 (1978) (Rehnquist, J.), the first Supreme Court case to substantially cut back on the doctrine. The case arose in a general adjudication of water in New Mexico, which included claims of the United States for rights to the water of the Rio Mimbres in the Gila National Forest.

The state district court and later the New Mexico Supreme Court recognized the federal government's claim to a reserved right, but not for the broadly claimed environmental, recreational, and other purposes (including instream flows) asserted by the federal government. The U.S. Supreme Court affirmed, holding that the designation of the national forest in 1899 by President McKinley pursuant to the Organic Administration Act of June 4, 1897, 30 Stat. 34 (codified at 16 U.S.C. § 473 *et seq.*) (which created the U.S. Forest Service) was limited to two narrow purposes identified in the original legislation. The Court rejected the argument that the more recent Multiple Use Sustained Yield Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531) ("MUSYA") expanded the reservation to include more water for a broader range of purposes. In essence, the Court held that MUSYA has no retroactive effect.

The Court began by recognizing its holding in *Cappaert* that "Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" *New Mexico* at 700 (quoting *Cappaert* at 141). The Court then held that a doctrine built on mere implication of congressional intent should only go so far.

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that

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granted summary judgment and motions to dismiss against Sierra Club. The court held that alleged "trust duties" are subsumed by the various organic statutes and that DOI had discretion as to most effective way of protecting public resources. (The court spoke in terms of "trust obligations" and "trust duties." There is no mention in the opinion of the public trust doctrine as such. Court's basic point was that federal reserved water rights, if they exist, would be senior to any new water rights being sought, and that they would be unaffected by the state court proceeding to which the U.S. was not a party. Accordingly, the district court concluded that it was not unreasonable for DOI to sit out the state proceedings. The district court, however, did not gut the idea of the federal government's responsibility to take action. It held that in the event of a "real and immediate" threat, DOI must take appropriate action. The Sierra Club took a narrow appeal, limited to the question of whether FLPMA created federal reserved water rights. Just prior to oral argument, the U.S. was made a party to the Utah general adjudication. Accordingly, the Court of Appeals reached the merits of this claim. The appeals court found no federal reserved water rights because (1) there was no "reservation" of public lands and (2) the savings clause in FLPMA precluded creation of new federal water rights. The appeals court recited the holdings of the district court regarding trust duties, but it did not address them because they had not been appeal.

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> without the water the purposes of the reservation would be entirely defeated.
>
> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

New Mexico at 700-02 (footnotes and citations omitted).

The Court concluded that the Organic Act authorized the designation of national forests for two and only two primary purposes: "timber preservation and enhancement of water supply." *New Mexico* at 713 n.21.[1174] On this basis, the Court concluded that water rights for other purposes, including instream flows and stock watering, were not impliedly reserved.[1175]

It should be kept in mind that *New Mexico* dealt only with the primary purposes of national forests, not other reservations.[1176] Indeed, the decision expressly noted that other reservations (such as those for national parks) were made for more extensive primary purposes.

[1174] The repeated references in the decision to the importance of national forests to water supply is best understood in historical context. In early days of settlement, forests were stripped bare. The result was catastrophic flooding to communities hundreds and even thousands of miles downstream. Thus, the reference to "securing favorable conditions of water flows" in the Organic Act was not a reference to securing instream flows within the forest. It was a reference to the role of forest vegetation in stabilizing flows downstream.

[1175] Justice Powell's dissent in this 5-4 decision includes a compelling rejoinder to Justice Rehnquist's conclusion that only two primary purposes where mentioned in the Organic Act. The dissent notes that the first-listed purpose is to "improve and protect the forest within the boundaries." *New Mexico* at 720 (quoting the Organic Act, 16 U.S.C. § 475).

[1176] The *New Mexico* Court applied an essentially nationwide standard to all national forests. The Court's cookie-cutter approach was criticized in Meg Osswald, *Seeing the Forest for the Trees: The Case for Individualized Analysis of Implied Federally Reserved Water Rights on National Forests*, 7 Ariz. J. Envtl. L. & Pol'y (2016). Ms. Osswald urges that courts should take into account not only the Organic Act, but any legislation specific to the designation of the particular national forest.

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It would appear that the *New Mexico* Court may have had an incomplete understanding of the practical impact of federal reserved water rights on other water users. Early in the decision, the Court describes a "gallon-for-gallon" reduction in water available to others:

> The quantification of reserved water rights for the national forests is of critical importance to the West, where, as noted earlier, water is scarce and where more than 50% of the available water either originates in or flows through national forests. When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests.

New Mexico at 705 (emphasis added, footnote omitted).

That effect on other water users is a possible, but relatively rare case. Non-consumptive uses, such as instream flows, have zero effect on the water available to downstream water users. To the extent the reservation lies in the headwaters, reserved rights for instream flows have no impact downstream. On the other hand, where reservations are located downstream of existing or future development, instream flow protections would be senior to any water right created after the date of the reserved water right. This is discussed further below in the context wilderness reserved rights. (The Colorado battle was purely academic—albeit precedent setting, involving headwater wilderness. The Idaho litigation involved downriver wilderness that had real implications for upstream water development.)

D. Federal reserved rights litigation in Idaho

Idaho, long an important source for the development of new theories of water law,[1177] again finds itself on the front lines. In the last few years, more federal reserved rights jurisprudence has been produced by the Idaho Supreme Court than any other.

(1) Stock watering on federal land

In 1998, the Idaho Supreme Court ruled on Public Water Reserve No. 107 ("PRW 107") in *United States v. State* ("*Basin-Wide Issue 9*"), 131 Idaho 468, 959 P.2d 449 (1998). In that case, the United States asserted claims in the SRBA to federal reserved water rights under PRW 107, a federal executive order issued by President Calvin Coolidge in 1926. The executive order withdrew and reserved to the United States all springs and watering holes on unreserved federal land.

[1177] *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912) (reasonable means of diversion); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) (optimum development of water resources); *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985) (local public interest).

The government's claims were denied by the district court, but the Idaho Supreme Court reversed, holding that the 1926 executive order created federal reserved water rights. Whether the court viewed this as an express or an implied right is somewhat unclear. The state supreme court recited the law of implied reserved rights as the basis for the decision. Yet, the court declared: "After considering the plain and ordinary words of the enabling statutes and executive order underlying PRW 107, we conclude that PRW 107 evidences an express intention by Congress that reserves a water right in the United States." *Basin-Wide Issue 9*, 131 Idaho at 471, 959 P.2d at 452.

First, the language is oxymoronic. If it is merely an intention (something unstated), how can it be express? Moreover, if it were an express reservation, then what was the point of reciting all the law of implied federal reserved rights? The more sensible understanding of what the court said is that it meant that there was an "express intention by Congress to protect the water resource which gives rise to an *implied* reserved right." The unfortunate upshot of all this is that the Idaho Supreme Court's language did not clarify, but further confused the debate over the nature of the reserved rights doctrine.

(2) MUSYA

Whether the Court's discussion of MUSYA in *New Mexico* was dictum or not, the Idaho Supreme Court caught the U.S. Supreme Court's drift, and rejected any notion of federal reserved rights under MUSYA in *United States v. Challis*, 133 Idaho 525, 988 P.2d 1199 (1999). The Idaho Court ruled that the reserved rights doctrine only applies to "reservations" of land. Whatever MUSYA did, it did not reserve (or "re-reserve") land. Hence, no implication of reserved rights could follow.

Neither the PWR 107 nor the MUSYA cases offered any startling new insights into the reserved rights doctrine. These cases set the tone, however, for a more measured and skeptical application of the doctrine. This tone would more fully resonate in the cases that followed.

(3) Wilderness areas

Note: Two of the authors of this Handbook published an article on this subject, focusing on the Idaho litigation: Jeffery C. Fereday & Christopher H. Meyer, *What is the Federal Reserved Water Rights Doctrine, Really? Answering this Question in Idaho's Snake River Basin Adjudication*, 51 Idaho L. Rev. 341 (2016). A rebuttal to that piece was published simultaneously (and without notice to the authors of the first article): Michael C. Blumm, *Federal Reserved Water Rights as a Rule of Law*, 52 Idaho L. Rev. 369 (2016).

No doubt, the highest visibility battles over water rights in Idaho have been fought over wilderness water rights. The issue has always inflamed passion, and Idaho proved no exception.

The Idaho courts were not writing on a blank slate. The question of whether wilderness areas carry implied reserved water rights was vigorously debated during the 1980s. First, in 1984 the Sierra Club brought suit in Colorado to force the federal government to claim reserved water rights on existing wilderness areas in that state. The federal district court issued an opinion finding that reserved rights indeed arise from wilderness reservations. The court ordered the federal government to develop a plan to protect water flows in wilderness areas (which might or might not include adjudication of

these rights). *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985). In another iteration in the same litigation, *Sierra Club v. Lyng*, 661 F. Supp. 1490 (D. Colo. 1987), the court reiterated that with Wilderness Act implicitly created federal reserved water rights. On appeal, however, the Tenth Circuit dismissed the case and vacated the opinion on the ground that the matter was not ripe for review (because Sierra Club had not pointed to any imminent harm). *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

In the Idaho litigation, not even the federal government cited the vacated *Ling* opinion as precedent for what the Idaho courts should do. Consequently, this line of litigation left no clear judicial statement on the status of reserved rights for wilderness areas.

Meanwhile, a federal court in New Mexico reached the opposite conclusion with respect to both wilderness areas and wild and scenic rivers. *New Mexico v. Molybdenum Corp. of America ("Red River Adjudication")*, CV No. 9780 C (D. N.M., Order Approving and Affirming Report of Special Master, Feb. 2, 1988).

On yet another front, Democratic and Republican administrations issued predictable "pro" and "con" opinions on the subject. The latest in this line of flip-flops was issued in 1988 by then-Attorney General Edwin Meese who joined with then-Secretary of the Interior, Donald Hodel, in issuing a non-binding advisory opinion on the subject of wilderness water rights during Mr. Meese's final week in office under the Reagan Administration.[1178] Mr. Meese concluded that in enacting the Wilderness Act,

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[1178] Federal Reserved Water Rights in Wilderness Areas, Opinion M-36914, Supp. III (July 26, 1988) (by Solicitor Ralph W. Tarr). This opinion followed a series of opinions on the subject of federal water rights issued by the Interior Department. Much of the discussion in these opinions focused on the theory of "nonreserved water rights"—a theory conceived in the Carter Administration, but which has never gotten off the ground. The nonreserved rights theory argues that the federal government may appropriate water notwithstanding state law not only to achieve the primary purposes of federal reservation (under the reserved rights doctrine), but also for secondary purposes and for the purposes of nonreserved lands.

The first and the broadest articulation of the administrative authority to appropriate was that found in the Krulitz Opinion in 1979. Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management (Opinion M-36914), 86 Interior Dec. 553 (June 25, 1979) (by Solicitor Leo Krulitz) ("Krulitz Opinion"). Solicitor Krulitz determined that the federal government is empowered to preempt state law as necessary when four conditions are met: (1) the Congress assigns a land management function to a federal agency, (2) the Congress did not expressly prohibit the preemption, (3) unappropriated water is available, and (4) the water is in fact put to use.

This was followed, in the same year, by the *Martz Opinion*, which embraced the general reasoning of the Krulitz Opinion, but concluded that as applied to the Taylor Grazing Act and FLPMA, no authority to preempt state law was intended. This left the theory in tact but of vastly diminished applicability. *Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management (Opinion M-36914, Supp.)*, 88 Interior Dec. 253 (Jan. 16, 1981) (by Solicitor Clyde O. Martz). (The first supplement is called "Supp." The second is called "Supp. I.")

Solicitor Coldiron did an about-face with his 1981 Opinion which flatly announced, "[T]here is no federal 'non-reserved' water right." *Nonreserved Water Rights—United States Compliance with State Law (Opinion M-36914, Supp. I)*, 88 Interior Dec. 1055, 1064 (Sept. 11, 1981) (by Solicitor William H. Coldiron).

the Congress intended to defer to Western water law and create no implied water rights.[1179]

None of this, nor any of the thousands of pages of law review articles on the subject, bothered to explore the fundamental nature of the federal reserved rights doctrine we outline above—that is, its status as only a rule of statutory construction, a tool to determine Congressional intent when Congress fails to address the water question. Instead, one partisan after another recited the mantra of the U.S. Supreme Court—if land reservation and primary purpose needing water, then implied water right—hoping to put just the proper spin on it.

The Idaho litigation contrasts with the shadow boxing over wilderness rights in the *Sierra Club v. Block* line of cases. In *Block*, an environmental group sought to provoke a fight, but never managed to engage. It was, from start to finish, an academic dispute over access to water in headwaters wilderness areas. Because these wilderness areas were in the headwaters, the wilderness act itself prevented any real threat to the water. (Only the President, in a national emergency, could overcome that protection.) Tacking on a federal water right was, thus, a belt and suspenders operation.

The situation in Idaho is far different, and prompted a fresh look at what the doctrine really entails. Three wilderness areas were at issue: the Frank Church-River of No Return, the Gospel-Hump, and the Selway-Bitterroot. The first two of these are anything but headwater areas. Significant resorts, industries, agricultural properties, and even whole towns are located upstream of these areas. Indeed, a significant part of the debate over the boundaries of the Frank Church Wilderness was aimed at making sure that certain upstream mining properties were excluded through the time-honored "cherrystem" technique of gerrymandering.

Thus, federal reserved rights with priority dates reaching back to 1964 (Selway-Bitterroot), 1978 (Gospel-Hump), and 1980 (Frank Church) would have the power to curtail uses upstream that have come on line since that date, and potentially to block all future development in these upstream valleys

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Even Solicitor Coldiron, however, did not doubt the Congress' power to preempt, but he concluded that Congress has not exercised it beyond the scope of reserved rights and the navigation servitude.

The next to be released—with great fanfare by the Department of Justice—was the *Olson Opinion*. *Legal Memorandum: Federal "Non-Reserved" Water Rights*, Office of Legal Counsel, U.S. Dep't of Justice (June 16, 1982) (by Assistant Attorney General Theodore B. Olson). The agency's press releases announced, "The nightmare is over." The Opinion itself, however, was a far cry from what the public posturing on both sides would have suggested. In fact, the Opinion is a thoughtfully reasoned rejection of the Coldiron Opinion; it articulates a theoretical basis for asserting preemptive federal appropriative water rights. After 80 pages of analysis, however, the Opinion stopped short of applying its reasoning to particular statutes, settling instead for the observation that "such rights probably cannot be asserted under the current statutory schemes."

See also a subsequent opinion by Solicitor Coldiron, Purposes of Executive Order of April 17, 1926, *Establishing Public Water Reserve No. 107 (Opinion M-36914, Supp. II)* (Feb. 16, 1983) (by Solicitor William H. Coldiron). (N.B., this opinion does not appear in the appropriate volume of Interior Decisions.)

[1179] A thoughtful rebuttal to the Meese/Hodel opinion was issued by the Congressional Research Service, *CRS Report for Congress: Wilderness Areas and Federal Water Rights* (Jan. 4, 1989) (by staff attorney Pamela Baldwin).

and inholdings—despite the fact that these areas had been excluded from the wilderness specifically so that they could continue to grow. Indeed, the claims reached not only upstream surface users, but up-gradient ground water users.

Needless to say, it came as quite a shock to many who had participated in this compromise when the federal government showed up some twenty years later in the Snake River Basin Adjudication claiming all the water.[1180]

Perhaps the most curious thing about the federal claims in Idaho is their flip side. On the one hand, they posed very real threats to upstream water users. Indeed, in response to the federal wilderness claims, the Director of the Idaho Department of Water Resources issued a moratorium on all new appropriations upstream and up-gradient of the wilderness areas. On the other hand, the impact of the reserved rights (had they been recognized) on the environment was (as in Colorado) purely academic.

Even the United States conceded that there was no threat, current or foreseen, to Idaho wilderness values as a result of any reasonably predicted upstream ground or surface water diversions. Thus, while these federal water right claims would have had immediate adverse economic effect on hundreds of upstream users outside the wilderness, they would do nothing to improve the wilderness. They were sought by the government on a purely "just in case — you never know" basis. Or on the basis that the principle was what mattered.

When the issue reached the Idaho Supreme Court, it at first upheld the federal government's claims, in a 3 to 2 decision. *Potlatch Corp. v. United States* ("*Potlatch I*"), 1999 WL 778325 (Oct. 1, 1999) (unpublished opinion). A year later, following the grant of a motion for reconsideration, further briefing and argument, the Court reversed itself and rejected the federal claims, again by a 3 to 2 vote, one justice having changed her mind.[1181] *Potlatch Corp. v. United States ("Potlatch II")*, 134 Idaho 916, 12 P.3d 1260 (2000).

In the end, the Court did what no other court or commentator had done before. It rejected the wooden application of the reserved rights doctrine, in favor of recognition that the "doctrine" is nothing more than means to divine congressional intent. No mechanical test based on the application of primary and secondary purposes was necessary. In briefing and oral argument, the Court was asked to

[1180] After winning the first round before the Idaho Supreme Court, and facing a motion for reconsideration (and a mountain of bad publicity), the federal government backed off its claim for all the water, insisting that it never expected that much.

[1181] All this took place against the backdrop of intense political discussion. Justice Silak, who authored the original majority opinion, was challenged in her retention election by then District Judge Daniel Eismann, who openly criticized the water rights decision and ultimately prevailed in the election. Following the election, on rehearing of the decision, Chief Justice Trout changed sides and became the author of the new majority opinion. The makeup of the Court had not changed at this point. Justice Silak was still on the Court at the time of the rehearing, and authored the new dissenting opinion.

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recognize that after the Pelton Dam decision Congress no longer was silent on the water rights issue, and in fact began debating it in the process of passing every subsequent land reservation or management statute. In stark contrast to the pre-Pelton Dam reservations, Congress vigorously debated the water issue before enacting the Wilderness Act and the two other Idaho wilderness statutes enacted thereafter. Given this, the essential point made in the briefs submitted on behalf of Potlatch was that Congress could not have intended to create federal reserved water rights by implication when it debated the point but did not include an express water reservation in the statute. Potlatch pointed out that Congress' intentional inaction on the water question was doubly confirmed by the "neither yes nor no" language in section 4(d)(6) of the Wilderness Act: "Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."[1182] Which amounts to Congress saying, "We're not saying whether we intend to create a federal reserved water right for these purposes." This is not language that creates anything.

The practical reality also was not lost on the Idaho Supreme Court. Idaho's former Senators Frank Church and Jim McClure would never have promoted legislation containing a preemptive federal water right whose very existence would require shutting down all new water-dependent activity upstream of the wilderness areas being created. On rehearing, the Idaho Supreme Court recognized as much:

> Congress could not and would not have passed a bill that implied a water right that would prevent the appropriation of water under state law beyond the boundaries of the wilderness areas. There was no more important person than Frank Church in the development of wilderness legislation. A review of the Frank Church papers brings home the reality that Senator Church would not have advocated or voted for the Wilderness Act but for his understanding that the Act would not cripple the economic growth of portions of Idaho outside the wilderness.[1183]

This "focus on Congress' intent" analysis is a far cry from the wooden application of a law-review based doctrine that has dominated the debate for the last thirty years or more. As Justice Schroeder said, "Little about the background and principles of *Winters* is applicable to this case."[1184]

The concurrency by Justice Trout (whose vote changed the result) was even more direct: "I have come to question the continued vitality of the doctrine."[1185] In the end, the "implication" at the center of the reserved rights doctrine was turned on its head by the Idaho court:

[1182] 16 U.S.C. § 1133(d)(6).

[1183] *Potlatch II*, 12 P.3d at 1268 (Justice Schroeder for the majority).

[1184] *Potlatch II*, 12 P.3d at 1264.

[1185] *Potlatch II*, 12 P.3d at 1270 (Chief Justice Trout, concurring). Presumably, Chief Justice Trout was questioning the vitality of the doctrine to interpret post-*Pelton* reservations, where the reserved water issue was debated and, typically, evasive words such as "neither claiming nor denying" water rights were inserted.

> Because [at the time of *Winters*] Congress was not yet aware of the potential conflict between state and federal water rights, it was understandable that Congress could have remained silent about the existence of a water right, and yet still intended to reserve water for purposes of the reservation. Thus, through the holding in *Winters* and its progeny, the United States Supreme Court recognized a federal reserved water right where, had Congress thought about it, it would have believed water was necessary to accomplish the purposes of the reservation. . . . Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a water right is necessary to fulfill the purposes of the reservation.[1186]

The United States—whose briefing and argument had studiously avoided debating the points Potlatch raised about legislative intent in light of Congress' post-Pelton Dam attention to the water question—determined not to seek U.S. Supreme Court review of this decision.

(4) Hells Canyon National Recreation Area

In the very same decision, *Potlatch II*, the Idaho Supreme Court ruled that in establishing the Hells Canyon National Recreation Area in 1975,[1187] Congress expressly reserved sufficient water to satisfy the purposes of the reservation. The court noted that the reservation was of both "land and water"[1188] and contained language exempting claims of water rights on certain rivers and tributaries.

The Court remanded for a determination of quantity, the minimum necessary to fulfill the purpose of the reservation. Here the court cited *Cappaert*. The federal reserved rights doctrine, it seems, is being converted from a theory for implying new water rights into a mechanism for filling in the details of unartfully articulated but nonetheless express water rights. This is consistent with how the Idaho court handled the PWR 107 claims, discussed above.

The United States, the State of Idaho, and various water users ultimately settled the federal government's claims to various amounts and locations of instream flows and lake levels under this reserved right. Adopting the stipulation, the SRBA Court decreed some 25 separate reserved water rights, all for streams and lakes within the Hells Canyon NRA that are tributary to the Snake River in this reach; the rights do not include any flows in the Snake River itself.[1189] The decree subordinates the

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[1186] *Potlatch II*, 12 P.3d at 1270-71 (J. Trout, specially concurring).

[1187] Hells Canyon National Recreation Act of 1975, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg(1)-(13)).

[1188] 16 U.S.C. § 460gg(b).

[1189] *Order Approving Stipulation and Entry of Basin 79 Partial Decrees,* Subcase No. 79-13597, Hells Canyon National Recreation Area Act Claims, In re SRBA, District Court for the Fifth Judicial District of Idaho (November 16, 2004).

reserved rights to all water rights and permits existing when the SRBA began in 1987, and also to future domestic and stock water rights. Due to the scant private land ownership in the area, there likely is only limited opportunity for conflict between such future uses and the reserved water rights decreed by the SRBA Court.

(5) Wild and scenic rivers

In *Potlatch Corp. v. United States ("Potlatch III")*, 134 Idaho 912, 12 P.3d 1256 (2000) (Schroeder, J.) (a companion case to *Potlatch II*), the Idaho Supreme Court recognized federal reserved water rights for wild and scenic river designations.[1190] This, too, however, was done on the basis of an express reservation, found in section 13(c) of the Act.[1191]

Potlatch had urged that the odd, negative language employed by the Wild and Scenic Rivers statute reflected a common misunderstanding about how the doctrine worked, and was intended merely to set an upper limit on quantity—in the event that a court might someday find reserved water rights were intended for the reservation. The Idaho Supreme Court rejected this argument, concluding that while the language is awkward, it was clear enough to constitute an express, affirmative federal reserved right. (This is consistent with what the majority of commentators have suggested over the years.[1192])

In a subsequent settlement similar to that reached in the Hells Canyon case—but significantly more complicated with respect to the instream flows established for certain of the rivers—the federal government, the state, and private water users stipulated to the decree of wild and scenic reserved water rights in the following rivers: Salmon, Middle Fork Salmon, Rapid, Selway, Lochsa, and Middle Fork Clearwater.[1193] This settlement contained similar subordinations of the federal water right in favor of future domestic and stock water rights. With respect to some of the rivers, it also set forth limited subordinations to future municipal, commercial, and industrial uses.

[1190] Wild and Scenic Rivers Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287).

[1191] "Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes." Section 13(c), 16 U.S.C. § 1284(c).

[1192] E.g., Pamela Baldwin, *Water Rights and the Wild and Scenic Rivers Act*, Congressional Research Service Report for Congress (Mar. 30, 1990).

[1193] *Order Approving Stipulation and Entry of Partial Decrees*, Consolidated Subcase No. 75-13316, In re SRBA, Case No. 39576, District Court for the Fifth Judicial District of Idaho (November 16, 2004).

(6) Sawtooth National Recreation Area

In *Idaho v. United States*,[1194] the court found no reserved water rights were created for the Sawtooth National Recreation Area.[1195] No party asserted an express reserved right.[1196] The case turned on whether the establishment of these wilderness and recreation areas in 1972 carried with it an implied reservation of water rights.

The court's conclusion was consistent with its analysis in the companion case, *Potlatch II*. In reaching its decision on the Sawtooth, however, the court reverted to a more traditional analysis under the reserved rights doctrine.

The court began with a recitation of the traditional reserved rights analysis (primary versus secondary purpose; entire defeat of primary purpose). It then divided the Sawtooth into its wilderness and non-wilderness components. (This national recreation area contains both.) In each case, the court identified a relatively limited primary purpose (e.g., "protect that area from the dangers of unregulated mining") and then concluded that the purpose could be accomplished without a reserved water right.

While this "primary-secondary/entirely defeat" analysis seems logical, in practice it provides minimal structure to guide a court's analysis of the reserved water right question. For instance, the district court seized on references to fish and wildlife, took judicial notice of the fact that "fish need water," and then concluded that a reserved right was essential to prevent the entire defeat of a primary purpose. The Supreme Court rejected this analysis: "While we agree that fish require water, we do not agree judicial notice of this fact establishes that without such water the purposes of the non-wilderness portion of the Sawtooth NRA will be entirely defeated."[1197] The Idaho Supreme Court's simultaneous ruling in *Potlatch II* appears to present a more predictable and appropriate analysis: instead of attempting to divine what purposes are "primary" or which would be "entirely defeated," the court indicated that the real question is whether Congress *intended* to establish a federal purposes water right where it actively debated the point and then declined to insert statutory language clearly doing so. With regard to post-*Pelton* legislation such as the 1972 Sawtooth National Recreation Area Act, and given the Idaho Supreme Court's decision in *Potlatch II,* it is not clear why this same court used a traditional "purposes" analysis in *Sawtooth.*

[1194] *Idaho v. United States ("Sawtooth")*, 134 Idaho 940, 12 P.3d 1284 (2000).

[1195] Act creating the Sawtooth National Recreation Area, Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (codified at 16 U.S.C. §§ 460aa *et seq*.).

[1196] The State and Hecla Mining urged that the "no claim or denial" language contained in virtually all recent federal reservations constitutes an express denial of water rights. The Court rejected this claim, essentially saying that the boilerplate (which commentators have debated for years) means nothing at all. *Idaho v. United States, 12 P.3d at 1288*.

[1197] 134 Idaho at 946, 12 P.3d at 1290.

This may be explained in part by the fact that Potlatch Corporation, whose briefing was reflected in the court's decision in *Potlatch II*, was not a party to the *Sawtooth* litigation—the parties to which argued the case on the more traditional theories adopted by the court. Nevertheless, it is odd that decisions in such high visibility litigation would not be more thoughtfully integrated.

In any event, the court in *Sawtooth* stepped through a traditional analysis, beginning with a ritual separation of primary and secondary purposes, before reaching the ultimate question: did Congress intend to create reserved water rights?

In this opinion, Justice Schroeder did not repeat his observation that *Winters* has little to do with these modern, post-*Pelton* statutes. Nor did Justice Trout, author of *Sawtooth*, question the continued vitality of the reserved rights doctrine as it applies to this post-*Pelton* statute. One is left with the question why, if the implied reservation of water rights doctrine has no vitality in these modern land statutes, did the court apply it at all in the very next case, on the very next page in the reporter?

Perhaps the answer is that the implied reserved rights doctrine is deeply ingrained in the thinking of water lawyers; its status as a "doctrine" is difficult to criticize when it comes to pre-*Pelton* land reservations. It likewise is difficult to shake the doctrine's inherent elegance, or perhaps its talismanic appeal. Like the recitation of Latin phrases, the doctrine has a certain constancy, and it surely provides some intellectual comfort. With respect to modern statutes, however, it is time to recognize that the doctrine must be treated for what it really is: a canon of statutory construction. In each of these, Congress could not reasonably be seen as having implied a federal reserved water right by statutory silence (or dissembling) when the matter was front-and-center in the lawmakers' debates and in the national debate carried out by various interest groups.

(7) Deer Flat National Wildlife Refuge

The cases above suggest that the courts, at least those in Idaho, will no longer be as willing to indulge Congress when, in modern (post-1955) land legislation, it invariably grapples with the issue of federal water rights, but then fails to expressly state its intentions. But what of the "old" reservations? Is the reserved water right question still just a question of determining whether water is necessary, or is there a willingness to look beyond that and attempt to actually divine congressional *intent* as to the question of a federal water right? If the most recent Idaho cases on the subject are any clue, the answer is "yes, the courts may be willing to look at what Congress must have intended, and put the water right question in the context of the overall purpose of the land designation.

In *United States v. Idaho*,[1198] the Idaho Supreme Court rejected a claim for federal reserved water rights associated with the Deer Flat National Wildlife Refuge on the Snake River in 1937. The federal government asserted that the establishment of the refuge—and particularly the inclusion of certain river islands—carried with it implied reserved water rights; islands need water to remain islands.

[1198] *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001).

In rejecting this argument, the Idaho Court stepped through a traditional analysis of the doctrine, identifying the primary purposes and then determining whether water was essential to their achievement. In clinging to this rigid outline, the court appears, at first glance, to be more concerned with the rituals of the doctrine than with the ultimate goal of divining congressional intent. But when we turn to the merits of what the Court did, we find it focusing once again on what Congress intended.

Here is an example:

> It is inconceivable that President Roosevelt in 1937, in the context of the dust bowl years, intended to give preference to waterfowl, or any other migratory bird over people. The reclamation projects themselves assure that water in the Snake River will be controlled for the benefit of agriculture. . . . The presidents and other executives promulgating policy had the ability, and most likely the knowledge, that they could reserve a federal water right if that were essential. They did not do so expressly. And they did not do so by implication, considering the historical context in which they acted.[1199]

This strongly suggests that the Idaho Court's adherence to the rigid analysis of the implied reservation of water rights doctrine is more cosmetic than substantive. The Court may continue to step through the minuet dictated by the doctrine. At the end of the dance, however, it is plainly more interested in the political reality of the congressional grant—what did Congress intend, and what was the context?

Thus, it appears that in Idaho both "old" and "new" reservations are being subjected to an increasingly vigorous inquiry when it comes to the implication of federal reserved water rights. Simply reciting that "this reservation needs water" no longer appears to be sufficient.

(8) Nez Perce tribal claims

This conclusion is accentuated by the district court's decision in the *Nez Perce* litigation. *In re Case No. 39576, Consolidated Subcase 03-10022 ("Nez Perce")*, Idaho Fifth Judicial District Court. (Order on Motions for Summary Judgment, Nov. 10, 1999). This decision by Judge Wood, who was then presiding judge in the Snake River Basin Adjudication, dismissed arguments by the Tribe that it was entitled to off-reservation, instream flow reserved water rights under *United States v. Winans*, 198 U.S. 371 (1905), a variant of the reserved rights doctrine.

Judge Wood's analysis is grounded in the same reality checking as expressed in the Idaho Supreme Court's recent decisions:

> It is inconceivable that the United States would have intended or otherwise agreed to allow the Nez Perce to reserve instream flow off-reservation

[1199] *United States v. Idaho*, 135 Idaho at 666-67, 23 P.3d at 128-29.

> water rights appurtenant to lands intended to be developed and irrigated by non-Indian settlers. . . . [I]t defies reason to imply the existence of a water right that was both never intended by the parties and inconsistent with the purpose of the Treaty. The Nez Perce submit that the issue pertaining to the quantity of water reserved is beyond the scope of these proceedings. However, for illustrative purposes it is helpful to point out that the Nez Perce's amended instream flow claim for the lowermost point on the Snake River is for 105% of the average annual flow of the Snake, Clearwater, and Salmon Rivers combined.

Id. at 38.

The parties subsequently entered into a settlement of the Nez Perce claims. The "settlement" actually is a framework for settlement contained in an unsigned document entitled "Mediator's Term Sheet" dated April 14, 2004, herein referred to as the "Agreement" or the "Term Sheet." Federal and state legislation, as well as certain actions by the SRBA Court and federal agencies, later rendered the settlement final.

(9) Shoshone-Bannock tribal claims

The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation reached an agreement with the State of Idaho and irrigators designed to settle their claims to water in the Upper Snake River. The Shoshone-Bannock claims to this water derive from the Second Treaty of Fort Bridger of July 3, 1868, and supplemental executive orders and agreements. The agreement involves over a million acre-feet per year of Tribal natural flow, storage and ground water rights.

(10) National forest reservations

The United States also filed reserved rights claims on various national forests throughout Idaho. These claims were ultimately withdrawn as part of a settlement.

E. Conclusion as to reserved water rights

There is no turning back the clock to the days of single-minded development of water resources. At both the state and federal level, we should expect to see environmental evaluation increasingly integrated into water allocation decisions.

On the other hand, it is likely that courts are less willing to accomplish this goal by a doctrine relying on implication. One might say the courts are tiring of congressional failure to deal with the hard questions, and are increasingly reluctant to read meaning into statutory silence amounting to informed legislative avoidance. Where the silence occurs in legislation where the debates reveal no discussion about water, the traditional reserved water rights analysis presumably will be in play—though perhaps subject to more scrutiny. However, those statutes enacted after debate on exactly the point of whether to establish a reserved federal water right likely will not get the traditional treatment. Indeed, in the wilderness and similar land-designating statutes enacted since 1980, Congress has expressly dealt with the issue of creating water rights, either expressly doing so or expressly disclaiming them. It is unlikely that Congress ever again will enact a statute where it is silent on the water right question, or

where such silence could be said to give rise to an implied federal entitlement. The water question is too much a front-and-center issue now.

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17. CLEAN WATER ACT AND OTHER FEDERAL REGULATION OF WATER

Fifty or a hundred years ago, a fight over water meant a fight over water rights. Increasingly, however, the question of who owns the water right is proving to be only a part of the larger water puzzle. Control of water today is a function not just of *ownership* of the water right, but also of the extent of government *regulation* of the activities involved.

Over the years, the federal government has enacted a host of environmental laws that significantly affect the allocation of water. While these laws do not create water "rights" as such,[1200] they clearly affect water allocation. For instance, ownership of the water is a moot question if the Corps of Engineers refuses to issue a permit for a proposed diversion project.

Three federal laws deserve special attention: the Clean Water Act, the Federal Power Act[1201] and the Endangered Species Act.[1202]

A. The Clean Water Act

(1) Overview of the Act

The states have always had the power (under the general police power) to regulate water quality. Historically, however, they did so on a limited basis.

Beginning in the 1970s (and to some extent earlier), the federal government took the lead in regulating water quality. Of the many federal statutes dealing with water quality, the one which has the most potential to affect water rights and related activities is the Clean Water Act ("CWA" or, in this section, the "Act"), as it has been known since 1977.[1203]

[1200] One legal scholar has suggested that federal laws, such as the Clean Water Act's section 404 program, should be viewed as creating a new breed of "federal regulatory water rights." Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1 (1985). If that argument were taken to its logical extreme, virtually any governmental regulation—from zoning restrictions to dumping regulations to the fire code—may as well be viewed as creating "property" rights in the government. (Could not they all be viewed as government "easements"?) These new labels really add nothing to our understanding. The sounder intellectual approach is to maintain the legal distinction between property rights and government regulation of property.

[1201] Federal Power Act, 16 U.S.C. §§ 791a-825r. Originally the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063.

[1202] Endangered Species Act, 16 U.S.C. §§ 1531-1543. The Endangered Species Act applies both to private development requiring a federal permit (such as section 404) and to federal water projects (for example, those built by the Corps of Engineers or the Bureau of Reclamation).

[1203] Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 to 1387. The precursor to the modern CWA was enacted in 1948. Federal Water Pollution Control Act, ch. 458, 62 Stat. 1155 (1948). It emphasized state enforcement of water quality standards. The Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903

The Act contains some mechanisms for addressing nonpoint sources, primarily through incentives and trading programs.[1204] It regulatory program, however, is limited to point sources of pollution.[1205]

Traditionally, point sources might be thought of pollution coming from the end of an industrial pipe, while nonpoint sources might be thought of as diffused sources of water pollution. The definition of point source, however, has been expanded by Congress, EPA, and the courts to include much more than pollution at the end of a pipe. Indeed, point sources include many things that, intuitively, would seem to be nonpoint sources, for example, CAFOs, stormwater, and dredge and fill activities.

The basic scope of the Act is quite broad: it flatly prohibits the "discharge of any pollutant" from a point source into waters of the United States[1206] unless the discharge is permitted under section

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(1965), marked the first assertion of primary federal authority in national water pollution control efforts. Its approach allowed some pollution, up to ambient standards set by the states. When this approach proved ineffective, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972). This Act adopted direct restrictions on discharges and made it unlawful to discharge a pollutant without obtaining a permit. The 1972 Act also created federal minimum effluent standards. The Act established goals which have not been met (e.g., "fishable and swimmable" waters by the year 1983, and zero discharge by the year 1985). The Act was amended in 1977, Pub. L. 95-217, 91 Stat. 1567 (1977) (renaming it the Clean Water Act), and again in 1987, Pub. L. No. 100-4, 101 Stat. 60 (1987).

[1204] The term nonpoint source is not defined in the Act. It is generally understood to be any source of water pollution that is not a point source. Conceptually and traditionally, a nonpoint source is pollution from diffuse runoff. There are many statutory and regulatory exceptions, however, such as CAFOs and stormwater, which are regulated as point sources. "Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean." *Northwest Envtl. Defense Ctr. v. Brown*, 617 F.3d 1176, 1181-82 (9th Cir. 2010).

[1205] "Point source" is defined at CWA § 502(14), 33 U.S.C. § 1362(14).

[1206] Like everything in the Act, it takes some parsing to get there: The Act declares that "the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a). This section says nothing about where or into what a person must not discharge. Nor does it contain a limitation to point sources. However, in another section, the Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." CWA § 502(12)(A), 33 U.S.C. § 1362(12)(A). "Point source," in turn, is defined at CWA § 502(14), 33 U.S.C. § 1362(14). Finally, the term "navigable water" is defined as "waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). Section 404 also speaks in terms of discharges to "navigable waters" CWA § 404(a), 33 U.S.C. § 1344(a).

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402 (NPDES permits) or section 404 (dredge and fill permits).[1207] Moreover, in addition to requiring a section 402 or 404 permit, the applicant must obtain from the affected state a "water quality certification" under section 401 of the Act confirming compliance with state water quality standards.[1208]

(2) Waters of the United States

As noted above (See footnote 1206 at page 646), the Clean Water Act prohibits discharges of pollutants from point sources to waters of the United States. But what, exactly, are "waters of the United States"?

This jurisdictional question arises under both section 402 (administered by EPA) and section 404 (administered by the Corps of Engineers). In 1979, the U.S. Attorney General issued an opinion to the effect that the jurisdictional reach of the Act is identical under both sections, and that since EPA is charged with administering the Act, EPA would have final authority to determine the scope of federal jurisdiction for section 404 as well as section 402.[1209]

The administrative and judicial interpretation of this phrase has evolved considerably over the years. Initially, the Corps interpreted its jurisdiction narrowly—interpreting the word "navigable" as meaning navigable in some literal sense. Gradually, as a result of numerous challenges, the courts began to extend that jurisdiction. Over the years, the limitation to physically navigable waters was eroded, and the meaning of the definition was expanded to include virtually anything reachable under the Commerce Clause of the U.S. Constitution.[1210] For a while, it seemed that anything "wet" was a "water of the United States" including virtually all wetlands.[1211] As one commentator noted, "In the years leading up to the Supreme Court's pivotal decision in *SWANCC*, the Corps of Engineers exerted

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[1207] "Except as in compliance with this section and sections [402 and 404, among others], the discharge of any pollutant by any person shall be unlawful." CWA § 301(a), 33 U.S.C. § 1311(a); CWA § 402(k), 33 U.S.C. § 1342(k) (compliance with section 402 permit satisfies section 301); CWA § 404(p), 33 U.S.C. § 1344(p) (compliance with section 404 permit satisfies section 301). See footnote 1206 at page 646 for discussion of definition of discharge.

[1208] CWA § 401, 33 U.S.C. § 1341.

[1209] 43 Op. Att'y Gen. 197 (1979). Accordingly, the Corps amended its regulations in 1986 to adopt EPA's definition of "navigable waters." 51 Fed. Reg. 41206 (Nov. 13, 1986).

[1210] *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D. D.C. 1975). In a terse, one-page opinion, the court invalidated the Corp's restrictive reading of its jurisdiction in its 1974 regulations, declaring "Congress by defining the term 'navigable waters' in [the CWA] to mean 'waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." *Calloway*, 392 F. Supp. at 686.

[1211] For a history of these the early cases, see Christopher H. Meyer, *Navigating the Wetlands Jurisdiction of the Army Corps of Engineers*, 9 Resource L. Notes 3 (Nat. Resources L. Center, 1986).

federal jurisdiction to 'the maximum extent possible under the Commerce Clause' as ordered years ago by the *Calloway* Court."[1212]

Then the pendulum began to swing back. In *United States v. Riverside Bayview Homes, Inc.*,[1213] the Supreme Court upheld the Corp's jurisdiction over adjacent wetlands, but left hanging the authority of the Corps to regulate isolated wetlands. The Supreme Court took a much more aggressive swipe at the Corps' jurisdiction in *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*.[1214]

SWANCC held that, as a matter of statutory construction, Clean Water Act jurisdiction does not extend as far as the Commerce Clause permits. This came as a surprise to many courts and commentators who, for decades, have debated the CWA's reach with reference to the contours of the Commerce Clause, only to discover that it is not the applicable standard under the Act. The upshot was that the Supreme Court invalidated a guidance document (inspired by *Callaway* and its progeny) that claimed jurisdiction over every wetland or isolated pond used by migratory birds (*SWANCC* involved a former gravel pit that had become a pond).[1215] Although *SWANCC* did not overrule *Bayview Homes*, it seems to have limited that decision to wetlands or isolated ponds that are very closely connected, geographically and hydraulically, to navigable waters. What is clear under *SWANCC* is that the Corps has no jurisdiction over truly isolated wetlands.

Just how the *SWANCC* decision plays out remains to be seen. Although the authors read it as a dramatic reversal of decades of thinking about the CWA's jurisdictional limits, the majority of courts are reacting to it more cautiously.[1216] For example, in *Idaho Rural Council v. Bosma*,[1217] Judge Winmill acknowledges *SWANCC*, but goes on to rely on older precedents that are difficult to reconcile with

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[1212] Tyler Moore, *Defining "Waters of the United States": Canals, Ditches and Drains*," Summer Water Law and Resources Issues Seminar, Idaho Water Users Association, at 3 (June 21, 2004) (Mr. Moore is a lawyer in the Corps' Walla Walla office).

[1213] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[1214] *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001).

[1215] The Court stated: "Permitting respondents to claim federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use. Rather than expressing a desire to readjust the federal-state balance in this matter, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 121 S. Ct. at 684 (citations omitted).

[1216] A number of federal courts have issued rulings interpreting *SWANCC* – inconsistently. They are summarized in Raymond Takashi Swenson, *Continuing Chaos at the Corps: The Turbulent State of Clean Water Act Jurisdiction*, Idaho Advocate (Aug. 2004).

[1217] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001).

SWANCC. Thus, most courts continue to view the agency's jurisdiction as reaching wetlands and ground water where any clear physical and hydraulic connection with jurisdictional surface streams can be shown, no matter how geographically remote.

The most significant post-*SWANCC* bombshell is the *Talent Irrigation District* case, a case involving section 402, not 404.[1218] In *Talent*, the Ninth Circuit ruled that the Talent Irrigation District in Oregon was in violation of the Clean Water Act because it failed to seek and obtain an NPDES permit before applying aquatic herbicides to its canal water (which it discharged to prevent weed growth in the canals). The court reasoned that the irrigation canals in that case divert from and (more significantly) flow into rivers that are indisputably waters of the United States. Thus, said the court, they are "tributaries" that fall within EPA's definition of waters of the United States at 40 C.F.R. § 122.2.[1219] The courts have long held that the Act reaches not only navigable waters but tributaries thereto. This was the first time, however, that a court declared a manmade canal to be a tributary of a navigable stream. The *Talent* court, however, made that leap effortlessly, and concluded that the longstanding inclusion of tributaries within the reach of the Act was not affected by *SWANCC*, which overruled only the extension the Clean Water Act to isolated wetlands.

In *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002), the Ninth Circuit relied on *Talent* in determining that discharges by a CAFO into a canal (that eventually reached the Yakima River) constitute a discharge into waters of the United States.

In 2005, the Ninth Circuit limited the applicability of *Talent* in *Fairhurst v. Hagener*.[1220] The *Fairhurst* court distinguished *Talent* on the basis that *Talent* involved residual chemicals left in the canal water after the weed control purpose was completed. In *Fairhurst*, the Ninth Circuit ruled that "pesticides that are applied to water for a beneficial purpose and in compliance with FIFRA, and that produce no residue or unintended effects, are not 'chemical wastes,' and thus are not 'pollutants' regulated by the CWA."[1221] While *Fairhurst* took a narrow view of what constitutes a pollutant, nothing in the case called into question the jurisdiction analysis in *Talent* regarding what are waters of the United States.

Thus, under *Talent* and subsequent cases, the courts are continuing to extend the geographic reach of the CWA far from historically navigable streams, despite the limitations imposed by *SWANCC*. Ironically, they are doing it through the very system of manmade irrigation canals that crisscross the West and once were seen as reflecting western independence. Indeed, if the decision in

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[1218] *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526 (9th Cir. 2001).

[1219] The court also rejected that argument that the labeling provisions of Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) overrode the CWA's NPDES requirement.

[1220] *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005).

[1221] *Fairhurst*, 422 F.3d at ___.

Talent ultimately holds, the Act's reach may extend to many of the same isolated wetlands, so long as they are near enough to an irrigation canal.

All this assumes that *Talent* remains good law under *Rapanos*. A quick take is that it remains good law under Kennedy's concurrence, but perhaps not under the plurality decision. This is being fought out in the courts below now, in cases which have not been tracked in this section. It would appear, however, that the Kennedy approach is prevailing.

(3) Applicability to ground water

It was established early on that the Clean Water Act does not apply to ground water.[1222] However, there is a big exception to this general statement. EPA states in its guidance: "As a general matter, ground water is not considered a water of the United States; therefore, discharges to ground water are not subject to NPDES requirements. If, on the other hand, there is a discharge to ground water that has a 'hydrological connection' to a nearby surface water, the discharger may be required to apply for an NPDES permit because the discharge is then considered a water of the United States."[1223]

The courts are divided on the correctness of EPA's view.[1224] However, the *Bosma* (discussed above) followed the principle that a hydrological connection to navigable surface water is sufficient to create jurisdiction.[1225]

[1222] *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1997); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975). Shortly after the Fifth Circuit decided *Exxon Corp*., the Seventh Circuit reached the opposite conclusion in *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). However, EPA adopted the conclusion reached by the Fifth Circuit, and it is now viewed as settled law that the CWA does not apply to ground water. In another irony, while the EPA has no direct authority over ground water itself, it requires states seeking delegation of NPDES authority to adopt rules regulating the discharge of pollutants to wells. This does not apply in Idaho, however, because Idaho has no delegated NPDES program.

[1223] *Water Permitting 101* (EPA, Office of Wastewater Management, Water Permitting, undated).

[1224] "*Compare, e.g., Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir.), *cert. denied*, 115 S. Ct. 322 (1994) (EPA has no jurisdiction over discharges to ground water regardless of hydrological connection to surface water); *Umatilla Water Quality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997) (NPDES program does not apply to discharges to ground water); *Kelley v. U.S.*, 618 F. Supp. 1103 (W.D. Mich. 1985) (discharges to ground water not within Act's prohibition even though contaminants eventually were discharged into bay); *with Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993) (Act's prohibition on discharges to navigable waters extends to discharges reaching navigable water as result of discharge to connected ground water); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182, 1193-96 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir.), *cert. denied*, 116 S. Ct. 51 (1995) (discharge to ground water that has effect on surface water may violate Act); *United States v. GAF Corp.*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) (permit not required for disposal of wastes into ground water which does not flow into or otherwise affect surface waters)." *Clean Water Handbook, Third Edition*, 14, n. 36 (2003) (Government Institutes).

[1225] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001).

The Ninth Circuit is likely to rule on these issues on the appeal of the *City of Healdsburg* case, now before it.[1226]

The bottom line is that, unless one is willing to shoulder the burden and substantial risk of challenging EPA's current position, an NPDES permit (or exemption there from) should be obtained where pollutants may be discharged into ground water. This is so even if the operator already has obtained the necessary water rights under state law.

(4) Section 402 (NPDES permits)

(a) Overview

Section 402 establishes the National Pollutant Discharge Elimination System ("NPDES"), requiring a permit for all point source discharges, other than those covered by section 404. The NPDES (section 402) program is implemented by the U.S. Environmental Protection Agency ("EPA"). In most cases, EPA has delegated its NPDES authority to state environmental regulatory agencies.[1227] Idaho, however, has not sought such authority. Consequently, NPDES matters in Idaho are handled by the local EPA office.

Any discharge requiring a section 404 permit does not require a section 402 permit. 40 C.F.R. § 122.3(b).

Under the *Talent* decision discussed in section 17.A(2) at page 647, farmers are required to obtain NPDES permits if they apply herbicides to water in irrigation canals. The *Talent* case involved the direct addition of herbicides to canal water. Presumably, this ruling would not apply (though other restrictions would) to the application of herbicides to the sides of a canal or elsewhere, because that would be a nonpoint application.

In 2004 the United States Supreme Court ruled that an entity that moved water from a canal into a reservoir may be required to obtain an NPDES permit, where the transported water contained pollutants (even though no additional pollutants were added).[1228] The *Miccosukee* cased involved a flood water project in which ground and runoff water were collected in a canal and then pumped into a wetland. The collected water contained phosphorous from fertilizers, which resulted in increased algae and foreign plant growth in the wetland area. The Court remanded for a determination of whether the

[1226] *Northern California River Watch v. City of Healdsburg*, 2004 WL 201502 (N.D. Cal., Jan. 23, 2004) (now on appeal to the Ninth Circuit).

[1227] Delegation to the states is authorized under CWA § 402(b), 33 U.S.C. § 1342(b).

[1228] *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

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canal and wetland were distinct water bodies, because of a factual dispute over whether the polluted water would have entered the wetland in any event.[1229]

(b) Components of the NPDES permit

The NPDES permit system is administered by EPA or, where properly delegated, by individual states. NPDES permitting authority has been delegated in Washington and Oregon (and most other states), but not in Idaho.

NPDES permits (like 404 permits) may be individual permits or general permits. General permits are established through rulemaking and apply to broad classes of dischargers. Individual NPDES permits are tailored to individual permit-holder based on information about that particular discharge. Individual NPDES permits establish specific standards and requirements governing the discharge of pollutants by the permit-holder.

These standards and requirements include (1) technology-based limitations and (2) water quality-based effluent limitations.

Technology-based limitations are established by regulation for various categories of industry and other sources of pollution based on EPA's determination of the availability and cost of various pollution control technologies.

The NPDES permit reflects the particular technology-based requirements applicable to a particular permit-holder. Although some interpretation may be involved, the identification of technology-based requirements for a particular NPDES permit is a largely ministerial function in which the permit issuer simply applies the regulation.

The technology-based standards apply irrespective of and without consideration of the quality of the water body into which the discharge is made. In other words, the same requirements apply to discharges into pristine and contaminated water bodies. Thus, for example, if the discharger is a cheese-maker, the NPDES permit will dictate certain technologies that all cheese-makers must employ to reduce or eliminate water pollution caused by various stages of the cheese-making process. In effect, the technology-based requirements describe the minimum set of pollution-control measures that must be employed by the point-discharger.

Congress determined, however, that technology-based controls alone are not always sufficient to address all water pollution problems. Accordingly, Congress overlay the technology-based controls with water quality-based limitations.

[1229] In 2006, a district court in Florida handed down *Friends of the Everglades, Inc. v. South Florida Water Management Dist.*, Case No. 02-80309-CV-Altonga/Turnoff (D. Fl. Dec. 11, 2006), which found, in accord with *Miccosukee*, that transfer of water containing pollutants to a new water source requires an NPDES permit.

Unlike technology-based limitations, water quality-based limitations are based on the impact that a discharge has on its receiving waters. Water quality-based controls are focused on the quality of the water being discharged by the permit-holder measured "at the pipe" where the discharge is made to the waters of the United States or, in some cases, at another "point of compliance."

Water quality-based limitations come in various forms. The first is based on maintaining ambient water quality standards established by EPA and the states for particular water bodies.[1230] The first type of water quality-based limitation prevents the discharger from discharging effluent that would violate any of those ambient standards.

The Act requires each state to adopt water quality standards for all water bodies within the state.[1231]

Water quality-based limitations also take into account the quality of the water in the water body to which the discharge is made. Unlike technology-based requirements, water quality-based limitations are absolute requirements that do not take into account technological feasibility or economic reasonableness.

(c) CAFOs

Given the common understanding of a point source being a discharge coming from a pipe or other discrete conveyance, most people would not think of CAFOs as point sources—particularly where the discharge occurs because of a rain event that moves manure off of a field into a nearby stream. But common usage does not control. The Clean Water Act expressly defines "point source" to include a discharge from a CAFO.[1232] Thus, even "uncollected" discharge from a CAFO (such as precipitation draining off a feedlot) is a point source.

EPA has promulgated regulations governing NPDES permits for CAFOs.[1233] Under the rule, a CAFO operator is obligated either to apply for an individual NPDES permit or to file a Notice of Intent ("NOI") for a general permit, unless the operator affirmatively demonstrates to the satisfaction of EPA that the operator has "no potential to discharge" (under a standard that is very hard to achieve).[1234]

[1230] These ambient standards are set to ensure that, where possible, water quality provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water. CWA § 101(a)(2), 33 U.S.C § 1251(a)(2). In addition, the Act provides that water quality standards will take into account the use and value of public water supplies, propagation of fish and shellfish, recreational purposes, and agricultural, industrial, navigation, and other purposes. CWA § 303(c)2)(A), 33 U.S.C. § 1313(c)(2)(A).

[1231] CWA § 303(c), 33 U.S.C. § 1313(c).

[1232] CWA § 502(14), 33 U.S.C. § 1362(14).

[1233] 40 C.F.R. § 122.23; 68 Fed. Reg. 7,179 (Feb. 12, 2003) (preamble and final rule).

[1234] 40 C.F.R. § 122.23(d)(2) and (f).

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In *Waterkeeper Alliance, Inc. v. EPA*, the federal appeals court invalidated this and other aspects of EPA's CAFO Rule.[1235] As a result, under *Waterkeeper*, a CAFO operator may elect not to seek NPDES coverage if the operator is confident that no discharge will result under any circumstance. In other words, so long as no discharge does result, the operator is not in violation of the Act. However, the operator who relies on *Waterkeeper* as a basis for avoiding application for an NPDES permit does so at his or her peril. Under *Talent*, the CAFO operator must not only avoid discharges to rivers and streams but discharges to any irrigation canal. Moreover, by forgoing NPDES coverage, the operator foregoes the permit shield defense.[1236] If a CAFO operator with an NPDES permit designs his or her facility to withstand a 25-year rain event (as the permit requires), and then experiences a 50-year event that causes a discharge, the operator will be protected by the "permit shield" defense. If the same operator with the same well-designed facility relied on *Waterkeeper* and decided not to seek an NPDES permit, the defense will be unavailable when the 50-year event occurs.

(d) Stormwater

In addition to CAFOs, stormwater discharge permits under section 402 are also required for certain industrial facilities and construction projects.[1237] Unlike CAFOs which are specifically listed as point sources, these "wet weather" discharges are not expressly defined as point sources under the Act. However, the Act was amended in 1987 to add section 402(p) creating a regulatory program for industrial and municipal stormwater discharges.[1238]

EPA has implemented the stormwater regulation program in two phases. The first phase required permits for certain categories of industrial facilities[1239] as well as construction activity of five

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[1235] *Waterkeeper Alliance, Inc. v. EPA*, 2005 WL 453139 (2nd Cir. Feb. 28, 2005). The environmental plaintiffs sought rehearing on April 14, 2005.

[1236] The CWA excludes "agricultural stormwater discharges" from the definition of point source. CWA § 502(14), 33 U.S.C. § 1362(14)—a provision that seems to contradict the definition of CAFOs as point sources. EPA has sought to reconcile the two provisions through the permit shield defense. The CAFO rule provides that CAFO operators are not subject to the CWA for precipitation-related discharges so long as the operator has and is operating in compliance with an NPDES permit. The federal court of appeals upheld this part of the regulation in *Waterkeeper*.

[1237] Stormwater is defined in EPA regulations as "storm water runoff, snow melt, runoff, and surface runoff and drainage" that crosses over an industrial site on its way to a surface water source. 40 C.F.R. § 122.26(b)(13).

[1238] Water Quality Act, Pub. L. No. 100-4, 101 Stat. 1987 (codified at CWA § 402(p), 33 U.S.C. § 1342(p)). The 1987 amendments did not refer to stormwater, but instead to industrial activity. EPA defined industrial activity to include stormwater discharges from certain construction activities. 40 C.F.R. § 122.26(b)(14)(x). "Construction, as described in 40 C.F.R. § 122.26(b)(14)(x), is a point source activity." *Na Mamo O 'Aha'ino v. Galiher*, 28 F. Supp. 2d 1258, 1261 (D. Hawaii 1998).

[1239] Industrial facilities are specifically defined by regulation and include industrial activities defined by Standard Industrial Classification codes, including "food and kindred product" and "general warehouse and storage." 40 C.F.R. § 122.26(b)(14)(xi).

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acres or more.[1240] The second phase, effective only after 1994, expanded the construction activity to cover activity on as little as one acre and added coverage for "Small Municipal Separate Storm Sewer Systems" (known as "MS4").[1241] Both are codified at 40 C.F.R. § 122.26.

Even if a permit is required, an industrial facility may be exempt from the permit requirement if it falls into the "no exposure" exemption.[1242] No exposure means all industrial materials and activities are protected by storm resistant shelters to prevent exposure to rain, snow, snowmelt and/or runoff.

If the "no exposure" exemption does not apply, the industrial facility may be able to seek coverage under the Multi-Sector General Permit ("MSGP"), which is a general NPDES permit EPA has promulgated to cover industrial runoff. This general permit obviates the need to obtain an individual NPDES permit for stormwater. To obtain coverage under the MSGP, the facility operator must submit to EPA a Notice of Intent ("NOI") and a Storm Water Pollution Prevention Plan ("SWPPP").

EPA has also promulgated general permits for construction activity. They require each of the parties involved in construction activity to file an NOI (Notice of Intent). To qualify for the permit, the applicant must meet a variety of other requirements, notably submission of a Storm Water Pollution Prevention Plan ("SWPPP") that incorporates Best Management Practices ("BMPs").

The regulations governing construction activities (under both phases) contain a key provision requiring a stormwater permit even if the construction activity is under the size cutoff when the activity is part of a "larger common plan of development or sale." 40 C.F.R. § 122.26(b)(15)(i). This phrase is not defined in the regulation, but is addressed in guidance issued by EPA:

> If your smaller project is part of a larger common plan of development or sale that collectively will disturb one or more acres (e.g., you are building on 6 half-acre residential lots in a 10-acre development or are putting in a fast food restaurant on a 3/4 acre pad that is part of a 20 acre retail center) you need permit coverage. "Common plan" is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. You must still meet the definition of operator in order to be required to get permit coverage, regardless of the acreage you personally disturb. As a subcontractor, it is unlikely you would need permit coverage.

[1240] 55 Fed. Reg. 47,990 (Nov. 16, 1990).

[1241] 64 Fed. Reg. 68,722 (Dec. 8, 1999).

[1242] 40 C.F.R. § 122.26(g).

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EPA Fact Sheet, "Large and Small Construction Activities" at 6 (Jan. 21, 2005) (emphasis added).

In *Hughey v. JMS Development Corp.*, 38 ERC 1568, 1993 WL 738623 (N.D. Georgia 1993) (not reported in F. Supp.), the defendant developer was sued by a downstream landowner under the Clean Water Act's citizen suit provision. The developer had disturbed less than five acres of land in the course of road construction and readying lots for sale. (This was before EPA's regulation requiring permits for disturbances of over one acre.) The court ruled that the developer should have obtained a stormwater permit because the construction activities were part of the common plan for development of the 19-acre subdivision. The court rejected the developer's argument that all subsequent construction activity would be undertaken by individual homeowners who purchased lots, that the developer had no control over their activities, and that such construction was therefore not part of a common plan.

(e) Agricultural return flows exempted (Section 402)

In 1977, Congress amended definition of "point source" to state: "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."[1243] Thus, pesticide-laden irrigation water discharged by drains back into canals and rivers is not subject to CWA regulation. The purpose of the exemption was to alleviate EPA's burden in having to permit "every source or conduit returning water to the streams from irrigated lands," which was what the text of the statute had required. 123 Cong. Rec. 38949, 38956 (Dec. 15, 1977) (Statement of Rep. Roberts); see CWA §§ 402(l), 502(14), 33 U.S.C. §§ 1341(l), 1362(14).

(f) Silvicultural rule invalidated

In 1976, EPA promulgated the Silvicultural Rule which exempted from permitting certain discharges from silvicultural (forestry) activities. 40 C.F.R. §§ 122.3(e), 122.27.[1244] The rule defined "silvicultural point source" to include certain activities (rock crushing, gravel washing, log sorting, or log storage facilities) but to exclude all others. In *Northwest Envtl. Defense Ctr. v. Brown* ("*NEDC*"), 617 F.3d 1176 (9th Cir. 2010), NEDC challenged this rule as violative of the broader definition of point source in the CWA. The Ninth Circuit agreed with NEDC, holding that EPA cannot define whole categories of point sources out of the Act. The case dealt with forest roads in California that were maintained by logging companies under the direction of the U.S. Forest Service. A system of ditches, culverts, and channels collected sediment-laden runoff from the roads and delivered it to adjacent streams. The Ninth Circuit ruled that the stormwater collection system constituted a point source subject to section 402 notwithstanding the Silvicultural Rule.

The same logic would appear to apply to other roads, such as mining roads. (Technically, mining roads never had the protection of the Silvicultural Rule to begin with.) In any event, under the reasoning of *NEDC*, it would seem that any stormwater collection system entailing a "discernible, confined and discrete conveyance" to waters of the United States would be subject to section 404. On

[1243] "Point source" is defined at CWA § 502(14), 33 U.S.C. § 1362(14).

[1244] The rule was originally codified at 40 C.F.R. § 124.85 (1976).

the other hand, it appears that roads could still be built and maintained without section 404 permitting if they entail no ditches and other man-made structures for controlling stormwater and delivering it to waters of the United States.

(g) Dams as point sources

The Clean Water Act ("CWA") requires either a section 402 or a section 404 permit for any "addition" of a "pollutant" from a "point source" to "waters of the United States." Section 404 permits are limited to dredge and fill operations (including filling of wetlands) and are issued by the U.S. Corps of Engineers. Section 402 permits cover everything else, and are issued by the U.S. Environmental Protection Agency. Given this simple statutory directive, one might think that a section 402 permit would be required to operate a dam (which releases sediment, high temperature water, and other pollutants into navigable waters through a point source).

Two early federal appellate cases held otherwise. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (1982); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (1988). Those cases were not based on the merits of what the statute requires. Rather, they were based on deference to the federal agency's interpretation of the CWA. Thy have been criticized since for misapplying the deference standard. E.g., Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Env't L. Rep. News & Analysis 1-0770 (Sept. 2014).

In more recent years, a handful of other federal cases have held that section 402 permits are required in varying contexts involving dam-like water conveyances. *E.g.*, *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) (sluice box discharges from placer mining require section 402 permit); *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (water transfer from one meaningfully distinct water body to another requires a section 402 permit).

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA*, 2017 WL 192707, ___ F.3d ___ (2nd Cir. 2017), the Second Circuit upheld EPA's Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. Part 122). The rule concludes that transfers of water from one navigable water body to another, without subjecting the transferred water to intervening industrial, municipal, or commercial use, do not fall within the scope of the Clean Water Act and thus do not require a section 402 permit. The court's ruling was based on *Chevron* deference to EPA's unitary waters theory, which treats all navigable waters of the United States as a single water body.

(5) Section 404 (dredge and fill permits)

(a) Background

In contrast to section 402 (which is administered by the EPA), section 404[1245] is administered by the U.S. Army Corps of Engineers ("Corps").[1246] Its scope is limited to the discharge of "dredged or fill

[1245] CWA § 404, 33 U.S.C. § 1344. Section 404 is by no means the only legal authority for federal regulation of private activities affecting rivers. The Corps' section 404 authority parallels its authority under

material," requiring that persons obtain a permit before any such discharge. Dredged material is anything which is lifted up out of the water (or wetland). The regulatory definition of dredged material is found at 40 C.F.R. § 323.2(c) and 40 C.F.R. § 232.2. The regulatory definition of fill material is found at 40 C.F.R. § 323.2(e) and 40 C.F.R. § 232.2. To put it simplistically, fill material includes pretty much everything solid (including a dams, culverts, and other infrastructure).

Section 404 permits are often referred to as wetland permits, because that is such an important part of their application today. However, the application of section 404 to wetlands was really something of an afterthought not articulated in the Act itself. Although some would dispute this, it is fair to say that the principal congressional purpose behind section 404 was dredging and filling operations in bays, harbors, and rivers, not wetlands.[1247] Be that as it may, it is indisputable that the CWA applies at least to some if not most wetlands today (see discussion in section 17.A(2) at page 647).

Under the Clean Water Act, the Corps is obligated to consider the effect of proposed activities on the broad public interest in determining whether to issue or deny a section 404 permit. This means that the Corps may prohibit a dam project, the filling of wetlands, or any other activity requiring a 404 permit, if it determines that the project is not in the public interest. Of course, figuring out what is in the public interest is a rather subjective task. Consequently, courts tend to defer to the Corps' public interest determinations.

Section 404(b)(1) of the Clean Water Act mandates that the Corps evaluate the proposed project pursuant to guidelines developed by the EPA in conjunction with the Corps.[1248] These guidelines are known as the 404(b)(1) guidelines and are codified at 40 C.F.R. Part 230.[1249]

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section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403. Indeed, the Corps typically issues a combined section 10/404 permit. Private hydropower projects are licensed by the Federal Energy Regulatory Commission. Federal Power Act, 16 U.S.C. §§ 791a-825r as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). Moreover, any water project involving public lands is subject to a variety of controls by the federal land manager.

[1246] The EPA is the primary implementing agency of the Clean Water Act, and logically should have been assigned the role of administering section 404 of the Act as well. However, a political compromise resulted in the section 404 responsibility being handed to the Corps, while the EPA retains a veto power over all 404 permits and is responsible for promulgating some of the regulations governing the program. CWA § 404(c), 33 U.S.C. § 1344; 40 C.F.R. part 231. EPA is also the entity responsible for bringing enforcement actions under section 404.

[1247] "Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of 'navigable waters.' . . . [N]either this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation." *SWANCC*, 121 S. Ct. at 680.

[1248] When section 404 of the Clean Water Act was first adopted in the 1970s, there was a fierce battle in Congress over whether it would be administered by the Corps or by EPA. The result, predictably, was a compromise. The Corps is the primary implementing agency. However, EPA has veto power over all section

The central feature of the 404(b)(1) guidelines is the establishment of a presumption against filling wetlands if there is a practicable alternative to the proposed discharge that would have less adverse environmental impact. Consequently, the 404(b)(1) analysis is all about alternatives.[1250]

A key threshold question is what alternatives must be evaluated. This, in turn, is largely determined by the articulation of the "purpose and need" for the project. If the project's need is narrowly defined (e.g., to build a housing project on this site) then there are few or no alternatives. If it is defined broadly (e.g., to expand available housing opportunities in Ada County), then there will be many alternatives to review.

Historically, the Corps has favored the narrow description (based on deference to the applicant's stated need) while the EPA has favored the broader description (based on an independent determination of the public's need). In 1988, the Corps came around, in large part, to adopt the EPA's broader approach.

The Corps' regulation now provides: "[W]hile generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective." 53 Fed. Reg. 3136 (Feb. 3, 1988), codified at 33 C.F.R. § 325, App. B § 9(c)(4).

This debate over the proper way to describe the project's need has been and continues to be much litigated.[1251] The decisions are conflicting, and there is still no clear-cut answer. Much depends upon what can be negotiated with the Corps on a case-by-case basis.

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404 permits issued by the Corps. And, as discussed here, EPA was charged with developing the alternatives analysis.

[1249] In addition to EPA's 404(b)(1) guidelines, the following regulations are also applicable: 33 C.F.R. Part 320, in particular § 320.4(b)(4) (Corps' "General Regulatory Policies"); 33 C.F.R. Part 325 (Corps' regulations on "Processing of Department of the Army Permits"); 33 C.F.R. Part 230 (Corps' NEPA regulations); 40 C.F.R. Part 1500 to 1508 (Council on Envtl. Quality's NEPA regulations). The following guidance materials are also applicable: U.S. Army Corps and EPA, *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines* (Nov. 15, 1989); U.S. Army Corps, Walla Wall District, *Proposed Mitigation and Monitoring Guidelines* (Dec. 16, 2003).

[1250] "Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. § 230.10(a).

[1251] The seminal case is *Bersani v. EPA*, 674 F. Supp. 405 (N.D. N.Y. 1987), *affirmed,* 850 F.2d 36 (2d Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989) (the "Sweden's Swamp" case, aka "Attleboro Mall" case). Many other cases are discussed in William L. Want, *Law of Wetlands Regulation* §§ 6.13 to 6.21 (2003).

(b) Farming, silviculture, and ranching exemption

Congress exempted a variety of dredge and fill activities from section 404 permit requirements, notably "discharge of dredged or fill material from normal farming, silviculture, and ranching activities." CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). [1252]

Both the Corps and EPA have adopted implementing regulations.[1253]

EPA's implementing regulations expressly limit this exemption to nonpoint source activities in the context of NPDES permitting.[1254] Thus, the exemption does not protect point source agricultural activities such as the direct discharge of herbicides into canals involved in cases like *Talent Irrigation District*[1255] discussed below. The agricultural exemption expressly does not apply to confined animal feeding operations (CAFOs), which in most cases are required to obtain NPDES permits.[1256]

Another exemption applies to discharges "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."[1257] A third exemption applies to "construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches."[1258] The fourth applies to the "construction of temporary sediment basins . . . ."[1259] The fifth applies to certain roads.[1260]

[1252] In the last sentence of section 404(f)(1), there is a reference to these activities also not being subject to regulation under section 402. This appears to be surplusage, because the exemption applies only to discharge of dredged or fill material, which is only covered by section 404.

[1253] The implementing regulations are found at 33 C.F.R. § 323.4 (Corps dredge and fill regulations); 40 C.F.R. § 122.3(e) (EPA NPDES regulations); 40 C.F.R. § 232.3(c)(1)(i) (EPA dredge and fill regulations).

[1254] 40 C.F.R. § 122.3(e).

[1255] *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526 (9th Cir. 2001).

[1256] The exemption provision does not mention CAFOs, CWA § 404(f)(1)(A), 33 U.S.C. § 1344(f)(1)(A). However, the definition of point source expressly includes CAFOs, CWA § 502, 33 U.S.C. § 1362(14), and EPA has interpreted the agricultural exemption to apply only to nonpoint sources, 40 C.F.R. § 122.3(e).

[1257] CWA § 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B). The Corps' implementing regulation for this exemption further provides: "Maintenance does not include any modification that changes the character, scope, or size of the original fill design." 33 C.F.R. § 323.4(a)(2). *See, United States v. Sargent Cnty. Water Resource Dist.*, 876 F. Supp. 1081 (D. N.D. 1992) (the activity is not "maintenance" if "improvements" were made).

[1258] CWA § 404(f)(1)(C), 33 U.S.C. § 1344(f)(1)(C).

[1259] CWA § 404(f)(1)(D), 33 U.S.C. § 1344(f)(1)(D).

[1260] CWA § 404(f)(1)(D), 33 U.S.C. § 1344(f)(1)(D).

Note, however, that each of these exemptions is subject to a "recapture" provision.[1261] If the purpose of the activity is "bringing an area of the navigable waters into a use to which it was not previously subject …" the exemption is not applicable.

(c) Incidental fallback

Dredged material is defined in the Corps' regulations as "material that is excavated or dredged from waters of the United States." 33 CFR § 323.2(c). However, a discharge of dredged material does not include what is known as "incidental fallback." "Discharge of dredged material" is defined as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 CFR § 323.2(d)(1).

"Incidental fallback" is defined as "the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed." 33 C.F.R. § 323.2(d)(2)(ii) (emphasis in original). The Corps has implemented the incidental fallback exemption cautiously. The regulations state that a discharge of dredged material does not include "[a]ctivities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposited excavated soil material" 33 CFR § 323.2(d)(2)(ii). Thus, the incidental fallback exemption does not apply, for example, to the side spill from a bulldozer blade excavating in waters of the United States.

(d) *Rapanos v. United States*

On June 19, 2006, the U.S. Supreme Court handed down its decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The discussion in the sections that follow this one have not yet been re-written in light of *Rapanos* and should be read with this new case in mind.

The first step in reading *Rapanos* is trying to figure out which opinion controls. There is no clear answer. The Court was split four to four, with Justice Kennedy casting the deciding vote. He sided with the Justices Scalia, Roberts, Thomas, and Alito on the outcome, but did not join their plurality decision. Instead, he wrote a separate opinion concurring in the judgment but rejecting the fundamental rationale of Justice Scalia's plurality opinion.[1262]

As Chief Justice Roberts said in his own concurring opinion, "It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758. The Chief Justice cites two cases dealing with how to interpret

[1261] CWA § 404(f)(2), 33 U.S.C. § 1344(f)(2); 33 C.F.R. § 323.4(c).

[1262] In fact, there were five opinions: a four-justice plurality, two individual concurrences, and two dissents.

splintered decisions. In *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation omitted), the Court laid down a simple rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." This rule suggests that the narrower Kennedy opinion now constituted the "holding of the Court." However, Chief Justice Roberts also cited *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003), which observed that "[t]his test is more easily stated than applied."

Thus, the Chief Justice seems to be warning the agencies and lower courts not to assume that the Kennedy Opinion controls. However, there is every reason to believe that the Kennedy opinion is indeed the controlling one.[1263]

In any event, the direction of the Court is unmistakable. The days of an expansive reading of the Act are over. It is just a question of whether the decision reflects a minor or major retrenchment. Given the uncertainty, however, we discuss both the plurality opinion and Justice Kennedy's concurrence.

If it is the controlling precedent from the case, the plurality opinion would substantially shrink the Corps' authority under section 404 of the Clean Water Act in two respects. First, it says that wetlands are not subject to section 404 jurisdiction unless they are physically touching a water of the United States. Second, it would reverse thirty years of court and agency interpretation of waters of the United States, substantially narrowing the definition.

The plurality agreed that the Act's definition of "navigable waters" as "waters of the United States," is broader than the traditional "navigability in-fact" test first articulated in *The Daniel Ball*, 77 U.S. 557 (1870), but not by much. The Court offered this summary:

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and]

[1263] "The standards set forth in Justice Kennedy's concurrence and the plurality should both be used in the lower courts to find that the Corps has jurisdiction over wetlands, but Justice Kennedy's opinion is broader than the plurality's, so it will usually suffice on its own. Under the analysis laid out by the Supreme Court in *Marks v. United States*, where there was no majority opinion, the narrowest holding that can gain the support of a majority of Justices is binding on lower courts. Because Justice Kennedy's opinion is the only holding that could be supported by at least five Justices-- Justice Kennedy and the four Justices who dissented--the Kennedy concurrence is binding. The dissent by Justice Stevens, joined by three other Justices, would have upheld broad deference to the Corps' judgment on what constitutes "waters of the United States" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* as applied by Riverside Bayview, but it also explicitly states that it would prefer Justice Kennedy's standard to the plurality's narrower bright-line rule." Samuel P. Bickett, *The Illusion of Substance: Why Rapanos v. United States and its Resulting Regulatory Guidance Do Not Significantly Limit Federal Regulation of Wetlands*, 86 N.C. Law Rev. 1032, 1037-38 (2008) (footnotes omitted).

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> lakes." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Rapanos, 547 U.S. at 739.

Rapanos (actually two consolidated cases) involved the filling of wetlands adjacent to drains, drainage ditches, and tributaries which, in turn, led to lakes and rivers. No irrigated farmland was involved, so the Court did not discuss irrigation ditches, canals, or drains.

Next, the plurality addressed whether the subject wetlands might nevertheless be subject to Corps jurisdiction on the basis that they were close enough to other legitimate waters of the United States. Here, the plurality answered with a definitive "no." It clarified its earlier pronouncements, rejecting the earlier reference to "reasonable proximity" in *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Engineers ("SWANCC")*, 531 U.S. 159 (2001). In the plurality's opinion, the only wetlands reached by the Clean Water Act are those physically touching navigable waters:

> Therefore, *only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to "waters of the United States" do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a "significant nexus" in SWANCC. 531 U.S., at 167. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.

Rapanos, 126 U.S. at 742.

The practical effect of this is enormous, if the plurality controls. It would mean that wetlands connected to waters of the United States only through waterways that are not "relatively permanent" are not within the Act. This approach would substantially reduce the Corps' jurisdiction, particularly in the western United States.

The plurality was careful to point out that its decision under section 404 of the Act does not restrict EPA's authority to regulate the discharge of pollutants to navigable waters under section 402 of the Act. Section 402 will continue to prohibit the discharge of pollutants not just directly into navigable waters, but to conduits (such as drains) that eventually reach navigable waters. Indeed, the

plurality points out that these conduits, although not themselves navigable waters, are point sources when they reach navigable waters.

This, in turn, raises questions about the liability of canal companies and irrigation districts for discharges from their water delivery and collection systems into navigable waters. Could they be liable for pollutants in their canals deriving from municipal POTWs, street drains, and housing developments? Will the agricultural exemption (which EPA has interpreted to apply only to nonpoint sources, 40 C.F.R. § 122.3(e)), protect them when the canal point source reaches a navigable river? These are open questions.

The Kennedy concurrence is far more modest in limiting the CWA's reach. Kennedy rejects the plurality's conclusion that an intermittent stream or ditch can never be a water of the United States and that only wetlands with a direct physical connection can be regulated.

Justice Kennedy essentially says that *Riverside Bayview* and *SWANCC* form a sound foundation for reading the Clean Water Act and no dramatic departure from the Corps' current case-by-case approach is required. He concludes that the operative premise of these cases is not to mandate any hard and fast rules (as the plurality does), but to allow regulation of tributaries, ditches, and wetlands where it can be shown, as a matter of ecological science, that "a water or wetland [possesses] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759. Justice Kennedy explains what he means by "nexus" this way:

> Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."

Rapanos, 547 U.S. at 780.

Thus, under the Kennedy approach, the Corps would continue to have considerable leeway in evaluating the extent of their jurisdiction.

(e) Post-*Rapanos* circuit court decisions addressing CWA jurisdiction: Justice Kennedy's approach predominates

Given the Supreme Court's starkly divided and inexact declarations in *Rapanos*, the law could be seen as unsettled in the area of CWA jurisdiction, at least when the situation presents complicated or ambiguous facts. However, the following sampling of post-*Rapanos* opinions from the circuit courts of appeal indicates that the Kennedy approach is seen as the operative holding from the case.

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(i) *United States v. Gerke Excavating, Inc.*[1264]

In *Gerke* the court concluded that Justice Kennedy's approach in *Rapanos* is the one to be applied because it is the only one which "will command the support of five justices" and "is the least common denominator."[1265]

(ii) *United States v. Charles Johnson*[1266]

In *Johnson* the circuit court remanded a lower court decision that was decided while *Rapanos* was pending. The appeal court ruled that the lower court may find CWA jurisdiction in the matter if the facts meet "either Justice Kennedy's legal standard or that of the plurality."

(iii) *San Francisco Baykeeper v. Cargill Salt Division*[1267]

The court in this case ruled there was no CWA jurisdiction over a "non-navigable, intrastate pond . . . not determined to be a wetland"—a pond that was the company's own man-made water body—even though it was adjacent to a slough that is waters of the United States. The court concluded that "mere adjacency provides a basis for CWA coverage only when the relevant waterbody is a 'wetland'. . . ." *Id*. However, the court confirmed that if the pond were to leak pollutants into the slough, discharges into the pond would be subject to section 404. *Id.* at 708 n. 7.

(iv) *United States v. Moses*[1268]

The Ninth Circuit upheld a criminal conviction for illegal fills in the "often dry portion of Teton Creek." The court observed that all nine justices in the *Rapanos* ruling agreed that "intermittent streams (at least those that are seasonal) can be waters of the United States." *Id.* at 991. The creek into which Mr. Moses deposited fill is tributary to Idaho's Teton River, which is tributary to the Snake River.

[1264] 464 F.3d 723, 725 (7th Cir. Sept. 22, 2006), petition for rehearing and rehearing en banc denied Dec. 1, 2006, petition for certiorari denied Oct. 1,2007.

[1265] Actually, the Circuit Court could have described the math in terms of the Kennedy position being the "greatest common numerator." The denominator remains 9; Kennedy's concurrence combines with 4 to make 5/9ths.

[1266] 467 F.3d 56, 60 (1st Cir. Oct. 31, 2006), petition for rehearing and rehearing en banc denied Feb. 21, 2007, petition for certiorari denied Oct. 9, 2007.

[1267] 481 F.3d 700, 702 (9th Cir. Mar. 8, 2007).

[1268] 496 F.3d 984, 989 (9th Cir. Aug. 3, 2007), petition for rehearing en banc denied September 24, 2007, petition for certiorari denied June 23, 2008.

(v) *Northern California River Watch v. City of Healdsburg*[1269]

In *Healdsburg* an abandoned quarry pit that had filled with ground water was subject to CWA jurisdiction, even though it usually had no surface connection to the nearby Russian River, because 1) the pond has "an underground hydraulic connection" with the river; 2) the pond "significantly affects the physical, biological, and chemical integrity" of the Russian River (i.e., it meets one of the tests in the Kennedy concurrence); and 3) the pond is "part of a larger wetland that is 'adjacent' to the River within the meaning of *Riverside Bayview Homes*."

Healdsburg is one of several post-*SWANCC* cases that have found water bodies to be waters of the United States even though they are man-made. In *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526, 533 (9th Cir. 2001), the appeals court ruled that irrigation canals are waters of the United States because they "receive water from natural streams and lakes, and divert water to streams and creeks," and therefore "are connected as tributaries to" jurisdictional waters. Likewise, even in *SWANCC* the fact that the abandoned gravel pit was man-made did not appear relevant to the Court's decision, which instead rested on the "significant nexus" concept. *See also* above discussion about the footnote in the *Cargill* opinion.

(vi) United States v. Robison[1270]

In Robison the court adopted the Justice Kennedy "significant nexus" test as the controlling standard from *Rapanos* and remanded the case for consideration consistent with that test.

(vii) *United States v. Robert J. Lucas, Jr.*[1271]

The circuit court found the record showed that a wetland was connected to navigable waters through three drainage areas, and therefore found all the tests listed in Justice Kennedy's *Rapanos* concurrence to be satisfied. Therefore, the wetland was subject to CWA jurisdiction.

(viii) *United States v. George Rudy Cundiff*[1272]

In this case defendant had constructed a ditch through a wetland, sidecasting the dirt into the wetland. The court agreed that the wetland was subject to CWA jurisdiction under either the plurality or concurring (i.e., Justice Kennedy) opinion in *Rapanos* because the wetland was connected to a creek which in turn reached a navigable river, and because the wetland performed important ecological functions that protected these waterways.

[1269] 496 F.3d 993, 1000-01 (9th Cir. Aug. 6, 2007), petition for certiorari denied Feb. 19, 2008

[1270] 505 F.3d 1208 (11th Cir. Oct. 24, 2007), petition for rehearing en banc denied, 521 F.3d 1319 (Mar. 27, 2008), petition for certiorari denied Dec. 1, 2008.

[1271] 516 F.3d 316 (5th Cir. Feb. 1, 2008), petition for certiorari denied Oct. 15, 2008.

[1272] 555 F.3d 200 (6th Cir. Feb. 4, 2009), petition for certiorari denied October 5, 2009.

(ix) *United States v. Gary Bailey*[1273]

The court in *Bailey* found a wetland subject to CWA because it was "adjacent to navigable-in-fact waters."

(f) EPA's 2011 Draft Guidance interpreting *Rapanos*

In April 2011 EPA and the Corps issued a draft guidance on *Rapanos* to update their 2008 memorandum[1274] on this subject ("2011 Guidance"). In the draft guidance, the agencies state that they "continue to believe, as expressed in previous guidance, that it is most consistent with the *Rapanos* decision to assert jurisdiction over waters that satisfy either the plurality or the Justice Kennedy standard, since a majority of justices would support jurisdiction under either standard."[1275]

(6) General permits (section 402 and 404)

The Corps and EPA can expedite the permitting process by issuing what are called "general permits" for minor-impact activities. The Act provides that general permits for section 404 discharges may be issued on a state, regional, or nationwide basis "for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."[1276]

Interestingly, the Act contains no similar provision for general permits for section 402 discharges. EPA has issued them nonetheless, based on general principles of administrative law, following the suggestion of federal courts beginning in the 1970s.[1277]

[1273] 571 F.3d 791, 802 (8th Cir. July 9, 2009).

[1274] Before *Rapanos*, the agencies issued a Joint Memorandum in 2003 on the definition of waters of the United States, 68 Fed. Reg. 1991, 1995. In 2008, they issued their paper entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States"* (December 2, 2008).

[1275] 2011 Guidance at 2.

[1276] CWA § 404(e), 33 U.S.C. § 1344(e) (authorizing general permits for section 404).

[1277] "Courts . . . specifically suggested the use of area-wide and general permits as a mechanism for addressing the Agency's need to issue a substantial number of permits. See *NRDC v. Train*, 396 F. Supp. 1393, 1402 (D. D.C. 1975); *NRDC v. Costle*, 568 F.2d 1369, 1381 (D.C. Cir. 1977). Adopting the courts' suggestion, EPA has made increasing use of general permits in its CWA regulatory program, particularly for storm water discharges." 63 Fed. Reg. 52430, 52462 (Sept. 30, 1998). Courts continue to look to general permits in the section 402 context as a practical solution: "Congress intentionally passed a 'tough law.' [*Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1375 (D.C.Cir.1977).] But Congress did not intend that the law impose an unreasonable or impossible burden. Congress has carefully exempted certain categories of point source discharges from the statutory definition. For those discharges that continue to be covered by the definition, the

> NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication process. *See* 40 C.F.R. §§ 122.21, 124.1-124.21, 124.51-124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. *See id*. §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id*. § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. *Id*. § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. *Id*. § 122.28(b)(2)(iv).

Natural Resources Defense Council v. EPA, 279 F.3d 1180, 1183 (9th Cir. 2002).

A person may engage in an activity covered by a general permit without obtaining an individual permit so long as he or she meets all the conditions spelled out in the permit.[1278] In some cases, an activity covered by a general permit may simply be undertaken without paperwork or notification. In other cases, the permit requires notice to the agency (called a "Notice of Intent" or NOI).

The Corps has published implementing regulations for its general permits.[1279] However, neither Corps nor EPA general permits themselves are codified in the Code of Federal Regulations, because they are not rules.[1280] Rather, they appear as notices in the Federal Register.[1281]

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permitting process is not necessarily onerous, either for EPA or for an entity seeking a permit. For example, in appropriate circumstances a discharge may be allowed under a 'general permit' requiring only that the discharger submit a 'notice of intent' to make the discharge." *Northwest Envtl. Defense Ctr. v. Brown*, 617 F.3d 1176, 1197 (9th Cir. 2010).

[1278] 33 C.F.R. §§ 330.1(c), 330.2(c).

[1279] 33 C.F.R. § 323.2(h) (Corps' definition of general permit); 33 C.F.R. § 325.2(e)(2) (regional 404 permits generally); 33 C.F.R. part 330 (nationwide 404 permits generally).

[1280] "On the basis of its review, EPA has concluded that NPDES general permits are permits under the APA [Administrative Procedures Act] and thus not subject to APA rulemaking requirements . . . ." 63 Fed. Reg. 52430, 52462 (Sept 30, 1998).

[1281] 67 Fed. Reg. 2020 (Jan. 15, 2002) (Corps' section 404 nationwide permits); 67 Fed. Reg. 6692 (Feb. 13, 2002) (minor corrections to Corps permits). EPA's general permits are not collected into a single Federal Register notice.

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A summary of the Corps' 43 nationwide permits, and their conditions, appears in Appendix R. Of particular note are NWP No. 3 (maintenance activities), NWP No. 13 (bank stabilization), NWP No. 18 (minor discharges—up to 1/10 acre fill), NWP No. 19 (minor dredging), NWP No. 29 (single family home). Note that former NWP No. 26 (isolated wetlands) expired in 2000.

Like individual permits, general permits are issued for a fixed period of time, not to exceed five years. Note that this period runs from the date the agency issued the permit, not the date that the individual sought coverage under the permit. Ordinarily the issuing agency will provide continuing coverage to holders of expired general permits, if the agency fails to issue a replacement general permit in a timely fashion.

Even if a general permit is available, the applicant must still obtain a section 401 certification from the state. In some instances, the state will certify the general permit itself, so that no further action is required of the application. In other cases, the state has declined to certify the general permit, in which case the applicant must seek certification from the state on an individual basis.

(7) Section 401 certification

Section 401 of the CWA requires that any applicant for a federal license or permit (including a section 402 or 404 permit) authorizing a discharge into the navigable waters must first obtain a certification from the state in which the discharge will occur. CWA § 401(a)(1), 33 U.S.C. § 1342(a)(1). The state certification must provide that the discharge will comply with all applicable water quality provisions of the CWA and all applicable state laws (unless the state waives the 401 certification). EPA or the Corps typically provide a draft permit for state review. The state may then grant or deny certification, or it may grant certification conditionally based on the inclusion of more stringent provisions.

In *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370 (2006), the operator of a group of small hydroelectric facilities licensed by the Federal Energy Regulatory Commission ("FERC") sought a section 401 certification from the State of Maine under protest. The operator contended that the renewal of a FERC license was not a section 401 event because the project involved no discharge of a pollutant to waters of the United States. Maine nonetheless issued certifications with conditions requiring minimum streamflows in the stream segments that would otherwise have been dewatered by the projects. (The projects removed water from the stream, generated power, and returned the water downstream.)

The decision turned on parsing the language in section 401. The Supreme Court noted that section 401 speaks only of a "discharge into the navigable waters" in contrast with section 402, which keys into the defined term "discharge of a pollutant." *S.D. Warren*, 547 U.S. at 380-81. Section 401 is broader, said the Court. While the term "discharge of a pollutant" is a defined term under the Act (CWA § 502(12), 33 U.S.C. § 1362(12)), the term "discharge" is not. Moreover, the Court concluded that the reference to "discharge" as something that "includes a discharge of a pollutant (CWA § 502(16), 33 U.S.C. § 1362(16)) was not intended to equate "discharge" with "discharge of a pollutant." Instead, the Court gave the word "discharge" its "common and ordinary meaning". *S.D.*

Warren, 547 U.S. at 387. Accordingly, the discharge of the same water back to the stream is a "discharge" requiring section 401 certification, even if it does not require a section 402 permit.

The case of *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143 (9th Cir. 2011), also addressed the scope of section 401, finding that it was limited to point source discharges. In this case, environmental groups challenged the approval by the BLM and the Forest Service of the expansion of the J.R. Simplot Smoky Canyon Mine in eastern Idaho. Plaintiffs raised a number of issues including the failure to secure a section 401 certification. The Ninth Circuit ruled no 401 certification was required because there was no point source discharge. "The district court correctly concluded that Simplot did not fail to acquire a § 401 certification as required under the CWA. The § 401 certification requirement applies only to discharges from point sources. *See Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095–97 (9th Cir. 1998). Simplot was not required to obtain a § 401 certification because the mining pits protected by the cover do not qualify as a point source." *Greater Yellowstone*, 628 F.3d at 1152. In reaching this conclusion, the Ninth Circuit parsed the statute as follows:

> Pursuant to § 401 of the CWA, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). The CWA defines "discharge" as including "any addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12)(A). A point source is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id*. § 1362(14).

Greater Yellowstone, 628 F.3d at 1152. Curiously, neither the parties nor the district court nor the appellate court explored whether *Greater Yellowstone* is consistent with *S.D. Warren*. *Greater Yellowstone* was cited and followed in *Ecological Rights Foundation v. Pacific Gas and Electric Co.*, 2011 WL 1302229 at *5 (N.D. Cal. 2011).

In an unreported decision, a federal district court in Oregon held that the approval of plans of operation ("PoO") for mining was a section 401 event. *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554 (D. Or. 2006). In this case, two environmental groups challenged a decision by the Forest Service to approve a group of 49 new PoOs and amended PoOs for gold mining in the Wallowa-Whitman National Forest in eastern Oregon. The Forest Service prepared a single EIS and ROD for all the mining operations. The action did not actually approve the individual PoOs. However, subsequent PoO approvals would follow as a matter of course based on the ROD. By the time of the decision, 29 PoOs had been approved in accordance with the ROD, and none of them entailed section 401 certification. Plaintiffs in *Hells Canyon* contended that the Forest Service violated the CWA when it issued the ROD without first requiring the applicants to obtain section 401 certification.

The district court then concluded that the ROD and/or the subsequent PoO approvals constitute a "license or permit that would trigger § 401." *Hells Canyon* at *4. "The agency's responsibility under the CWA is clear and, as here, the Forest Service has not complied with the § 401 requirement of

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certification prior to permitting miners to begin mining operations. . . . Thus, mining activities that may result in discharges of pollutants into navigable waters will commence without § 401 certification, a violation of the CWA." *Hells Canyon* at *4.

In *Hells Canyon*, the parties and the court simply assumed that the federal action would result in discharges to navigable waters. "The Forest Service does not dispute that mining activities may result in discharges into navigable waters." *Hells Canyon* at *4.[1282] It would seem that this factual premise could be a basis for distinguishing *Hells Canyon* in other contexts. Notably, a particular PoO (or other federal action) might include express conditions prohibiting any discharge that is not covered by a then-existing or to-be-obtained section 402 or 404 permit. In that case, the PoO approval would not be a permit or license "which may result in any discharge into the navigable waters." CWA § 401(a)(1), 33 U.S.C. § 1342(a)(1).

(8) Section 313 (sovereign immunity waiver; subjects federal facilities to CWA permit requirements)

The CWA applies to all "persons." However, that term is defined to exclude the United States (section 502(5), 33 U.S.C. § 1362(5)).

The CWA was amended in 1977 to add a waiver of sovereign immunity similar to that found in other pieces of environmental legislation. Specifically, section 313(a) of the CWA, 33 U.S.C. § 1322(a), requires federal agencies to comply with all federal and state requirements respecting the control and abatement of water pollution, including permit requirements. Note that section 404(r) of the CWA, 33 U.S.C. § 1344(r), sets out a special exemption from section 402 and 404 for the construction of congressionally authorized projects. It does not apply, however, to the operation of such federal projects.

Thus, when the federal government engages in actions that cause discharges, it too must obtain appropriate permits. "The Clean Water Act requires that a government agency obtain a NPDES permit before discharging any pollutant from any point source into navigable waters of the United States. 33 U.S.C. § 1323(a)." *Fairhurst v. Hagener*, 422 F.3d 1146, 1148 (9th Cir. 2005). For example, when the Forest Service itself applies pesticides to waters of the United States, is bound to comply with the CWA. *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir 2002). In 2017, the Center for Environmental Law and Policy successfully sued U.S. Fish

[1282] Rather than arguing that the PoOs did not authorize any discharge, the Forest Service argued that the ROD did not itself approve any PoOs, and the PoO approvals would happened subsequently based on their own merits. The district court rejected this argument, noting that the PoO approvals were largely pro forma so long as they PoO was consistent with the terms of the ROD. Thus, the Court never discussed how it was that the PoOs actually "authorized" any discharges. It is also curious that no issue was raised in the case about the lack of a section 402 or 404 permit. If there is a problem with section 401, would not section 402 and 404 permits also have been required? In any event, the premise of the decision seems to be that the PoO itself (not a 402 or 404 permit) is a "Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters." *Hells Canyon* at *3-4 (quoting CWA § 401(a)(1), 33 U.S.C. § 1342(a)(1)).

& Wildlife for discharging without an NPDES permit (or more precisely, discharging with an NPDES permit that expired about 35 years earlier). *Center for Envtl. Law & Policy v. U.S. Fish & Wildlife*, No. 2:15-CV-00264-SMJ, 2017 WL 80254 (E.D. Wash. Jan. 9, 2017). See discussion in Peter McKenna, *Constitutional Law—Sovereign Immunity—States May Not Impose Civil Penalties on the United States Government for Violations of State Statutes Promulgated under the Authority of the Clean Water Act and the Resource Conservation and Recovery Act—United States Dep't of Energy v. Ohio, 112 S. Ct. 1627 (1992)*, 23 Seaton Hall L. Rev. 762 (1993).

A few cases have applied this provision in situations where the federal government does nothing more than approve a private action on federal land. These cases fail to analyze this section, and their conclusion appears to be incorrect.[1283]

In a separate part of its decision in *Hells Canyon Preservation Council v. Haines*, 2006 WL 2252554 (D. Or. 2006), the court found that the Forest Service's approval of the PoOs violated section 313(a), 33 U.S.C. § 1323(a). This is a little-discussed provision that requires all branches of the federal government to comply with the CWA "to the same extent as any nongovernmental entity." This provision is a waiver of sovereign immunity similar to those found in other environmental statutes. Without explanation, the *Hells Canyon* Court assumed that it imposed an obligation on the Forest Service to comply with state anti-degradation requirements every time it issues a PoO.

A similar, and similarly confusing, passing reference to section 313 appears in *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1149 (9th Cir. 2011) ("The CWA requires federal agencies to determine that approved actions do not result in pollution in violation of state water quality standards. 33 U.S.C. § 1323(a)."). See also *Center for Native Ecosystems v. Cables*, 509 F.3d 1310 (10th Cir. 2007), finding section 313 triggered by the issuance of grazing authorizations to private parties.

Other decisions which have grappled with the issue, rather than merely reciting section 313, reach the seemingly obvious conclusion that the waiver of sovereign immunity applies only where the federal government is itself the polluter:

> On its face, Section 313 acts to waive sovereign immunity only where an arm of the federal government is an alleged polluter. *See also Colorado*

[1283] "Plaintiffs point to *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1153 (9th Cir.1998), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981 (9th Cir.2008), and *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842 (9th Cir.1987) (*ONRC*), two cases in which the Ninth Circuit reviewed the Forest Service's sale of timber on federal land to a third party. Although these cases were brought for alleged violations of § 1323, neither decision directly addresses the CWA's waiver of sovereign immunity with regard to the permitted activities of a private third party on federal land." *Center for Biological Diversity v. Wagner*, 2009 WL 2176049 at *15 (D. Oregon 2009), *R & R approved*, 2009 WL 2208023 (D. Oregon 2009). The *Idaho Sporting Congress* decision was sharply criticized in Robin Kundis Craig, *Idaho Sporting Congress v. Thomas and Sovereign Immunity: Federal Facility Nonpoint Sources, the APA, and the Meaning of "In the Same Manner and to the Same Extent as any Nongovernmental Entity*, 30 Envtl. L. 527 (2000), an article cited with approval in *Center for Biological Diversity*, 209 WL 2176049 at *16.

> *Wild, Inc. v. United States Forest Service*, 122 F. Supp. 2d 1190 (D. Colo. 2000) (no waiver of sovereign immunity under Section 313 where plaintiffs did not allege that Forest Service was engaged in polluting at a federal facility). In those instances, Congress indicated its intent to require governmental entities to comply with pollution requirements to the same extent as nongovernmental polluters. *See United States Dep't of Energy v. Ohio*, 503 U.S. 607, 112 S. Ct. 1627, 118 L.Ed.2d 255 (1992) ("The federal-facilities sections of the CWA and RCRA govern the extent to which federally operated facilities, such as DOE's Fernald facility are subject to . . . statutes . . . and regulation and enforcement programs."). There is no indication in the statute that Congress intended to waive sovereign immunity with respect to agency enforcement decisions over third parties, such as those at issue in this case.

City of Olmsted Falls v. U.S. EPA, 233 F. Supp. 2d 890, 897 (N.D. Ohio 2002) (challenge to issuance of section 404 permit for an airport on municipal land).

In the *Colorado Wild* case (cited by the court in *Olmstead Falls*), the court rejected an argument that section 313 applied where the Forest Service approved a master plan for a ski area located on federal land:

> First, the language of Section 313 appears to be limited to requiring a federal facility to comply with pollution control measures in the same fashion as a nongovernmental entity. Cases interpreting this section have addressed the issue of whether sovereign immunity was waived in cases involving the operation of federal facilities. *See United States Dep't of Energy v. Ohio*, 503 U.S. at 612, 112 S. Ct. 1627 (alleging violations of CWA arising from the operation of a uranium processing plant); *Lujan*, 972 F.2d at 316 (alleging violations of CWA arising from operation of a mine drainage tunnel); *Metro. Sanitary Dist. v. United States Dep't of Navy*, 722 F. Supp. 1565, 1567 (N.D. Ill. 1989) (alleging the United States Department of the Navy failed to comply with the terms of its sewage discharge permit). In fact, Section 313 is entitled "Federal facilities pollution control." 33 U.S.C. § 1323. . . . Here, there is neither a federal facility, nor a federal activity resulting in the discharge of pollutants which invokes Section 313. Therefore, the Court feels that waiving sovereign immunity in this case where the only alleged action involves the approval of a Master Development Plan would improperly enlarge the waiver of sovereign immunity beyond what Section 313 requires.

Colorado Wild, Inc. v. U.S. Forest Service, 122 F. Supp. 2d 1190, 1194-95 (D. Colo. 2000).

Olmstead Falls and *Colorado Wild* are thoughtfully discussed in *Center for Biological Diversity v. Wagner*, 2009 WL 2176049 at *15 (D. Oregon 2009), *R & R approved*, 2009 WL 2208023 (D. Oregon 2009). Ultimately, however, that court found it unnecessary to reach the issue.

(9) Indirect discharge regulation (aka pretreatment regulation)

Industrial users[1284] who do not discharge directly to waters of the United States are not required to obtain an NPDES permit. However, municipal operators of publicly owned treatment works ("POTW") are obligated under the Act to regulate "significant industrial users" who increase the load to their POTW by discharging to the municipal sewage system. These are called "indirect dischargers." They are required to obtain an "indirect discharge permit" from the city.[1285] These are sometimes referred to under the rubric of pretreatment regulation, based on the idea that the industrial user may be required to pretreat its discharge to some extent before discharge to the POTW. However, this is a bit of a misnomer, because the thrust of the program is demand that the industrial user meet a variety of often complex limitations on what can be discharged. This may or may not require pretreatment to achieve. It may be, for instance, that the industrial user can comply simply by modifying its production process or limiting its volume.

Although industrial users that discharge to a POTW need not obtain an NPDES permit, they may still have liability under the Clean Water Act for their discharges under two circumstances.

First, industrial users are prohibited from discharging pollutants to a POTW if the discharge results in a violation of the POTW's own NPDES permit because of "interference"[1286] or "pass through."[1287]

[1284] A note on terminology: "Industrial User" is defined at 40 C.F.R. § 403.3(h) as the source of an Indirect Discharge to a POTW. Practitioners often refer to industrial users by the acronym "IU." "Indirect Discharge" is defined at 40 C.F.R. § 403.3(g) as a discharge to a POTW from a non-domestic source. There is no such thing as an Indirect Discharger; the correct term is Industrial User. Nevertheless, one frequently encounters the phrase Indirect Discharger, e.g., *Clean Water Act Handbook* at 83 (ABA 2001). Indeed, EPA uses the term indirect discharger in its own guidance. Note also that there is a different definition of "industrial user" in the CWA, which does not appear to relate to persons discharging to a POTW. CWA § 502(18), 33 U.S.C. § 1362(18).

[1285] Note that the permit discussed here is distinct from an industrial wastewater discharge agreement, which may also be required. The industrial wastewater discharge agreement (which is sometimes folded into the permit as a single document) is a contract between the city and the industrial user of the POTW and established discharge fees based on the volume of wastewater discharged and other factors.

[1286] 40 C.F.R. § 403.3(j) (definition of "interference" – essentially a discharge that inhibits or disrupts the operation of the POTW).

[1287] 40 C.F.R. § 403.3(n) (definition of pass through – essentially a discharge that the POTW is unable to treat).

Second, if the POTW has adopted what are known as "local limits"[1288] and imposed them on the industrial user by ordinance or through an industrial waste water discharge permit, these limits are directly enforceable by EPA and by citizens.

Both of these prohibitions are regulatory creations under EPA's pretreatment regulations. The first (prohibition of pass through and interference) was plainly authorized by the Act.[1289] The second (federal enforceability of local limits) arguably was not. The Clean Water Act does not even mention local limits.[1290] Rather, the Act expressly authorizes EPA to promulgate national "pretreatment standards" to prevent pass through and interference.[1291] These pretreatment standards are made federally enforceable.[1292] Thus, there is no doubt that federally promulgated pretreatment standards (such as EPA's categorical pretreatment standards[1293]) are enforceable by EPA and citizens.

[1288] Local limits are intended to take into account local conditions and concerns. "[C]ategorical standards [promulgated by EPA] are developed to achieve a nationally-uniform degree of water pollution control for selected industries and pollutants. Local limits [imposed by the POTW] are intended to prevent site-specific plant and environmental problems resulting from any nondomestic user." *Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program* (Dec. 1987) at 1-11.

[1289] The Act instructs EPA to promulgate regulations to prevent interference and pass through. CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1). The agency has done so in its "general prohibition" section of its pretreatment regulations, which states: "A User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. § 403.5(a)(1). Such discharges are also prohibited under the "specific prohibitions" section. 40 C.F.R. § 403.5(b)(4).

[1290] The terms "specific limits" and "local limits" do not appear in the CWA. Although they are employed in the regulations, they are not formally defined. The closest thing to a definition of "local limits" is section 403.5(c) where the words "local limits" appear only in the heading. EPA's guidance employs the term "local limits" to describe the specific limits discussed in section 403.5(c). Accordingly, this Handbook employs the term "local limits."

[1291] The Clean Water Act did not establish any pretreatment standards itself. Rather, it instructed EPA to promulgate "regulations establishing pretreatment standards." CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1). The CWA contains no formal definition of "pretreatment standards." However, the Act refers in numerous places to "pretreatment standards under section 1317" or, in some cases, "under section 1317(b)" or "1317(b)(1)." E.g., CWA § 402(m), 33 U.S.C. § 1342(m). Thus, it is clear that under the Act "pretreatment standards" means any standards adopted under section 307. That is as close as the Act gets to defining pretreatment standards.

[1292] The CWA provides that citizen suits may be brought against any person for violations of "an effluent standard or limitation under this chapter." CWA § 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A). The citizen suit section of the Act defines "effluent standard or limitation under this chapter" as any "prohibition, effluent standard or pretreatment standards under section 1317 of this title." CWA § 505(f)(4), 33 U.S.C. § 1365(f)(4) (emphasis added). Thus, citizen suits may be brought to enforce "pretreatment standards." (The Act contains a separate and more limited definition of "effluent limitation" in its main definition section, CWA § 502(11), 33 U.S.C. § 1362(11), but the more broader definition of "Effluent standard or limitation under this chapter" contained in the citizen suit provision controls here.)

The Act says nothing about federal enforcement of local limits imposed by municipal POTW operators.[1294] The Act does not authorize EPA to delegate its authority to adopt pretreatment regulations to individual municipalities. Nor does the Act contain any definition or other language suggesting that limits adopted by operators of a POTW fall within the meaning of "pretreatment standards" under section 307. Nevertheless, EPA has promulgated regulations making local limits enforceable under the Act by EPA and private citizens. Thus, whether intended by Congress or not, the fact is that EPA's implementing regulations have federalized local limits.

The regulations do this in two ways. The first is by expanding the definition of pretreatment standard.[1295] The second is through a separate provision expressly dealing with the enforcement of local limits.[1296]

EPA may also directly enforce violations of pretreatment standards in federal court. CWA § 309(f), 33 U.S.C. § 1319(f); *Clean Water Act Handbook* at 96 (AGA 2001).

[1293] "Categorical standards" are technology-based standards adopted by EPA on an industry-by-industry basis. They are described generally in section 403.6. 40 C.F.R. § 403.6. Specific standards are set out for various subcategories of industrial users. 40 C.F.R. §§ 405 to 471.

[1294] The conclusion that the pretreatment standards contemplated by Congress were to be issued by EPA is reinforced by the language in subsection 307(d), which declares that it is unlawful for any owner or operator to operate a source in violation of a "pretreatment standard promulgated under this section." CWA § 307(d), 33 U.S.C. § 1317(d) (emphasis added). The promulgated standards referred to in section 307(d) are presumably the very pretreatment regulations EPA was instructed to promulgate in section 307(b)(1) ("the Administrator shall promulgate such pretreatment standards"). The federal regulatory nature of pretreatment standards is further reinforced by the Act's proviso that the pretreatment regulations should be tailored to industry groups, not to individual users. "When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standards shall apply." CWA § 307(b)(3), 33 U.S.C. § 1317(b)(3). EPA has implemented this requirement through the adoption of categorical pretreatment standards.

[1295] EPA's regulations define "National Pretreatment Standard" and "Pretreatment Standard" as interchangeable terms meaning (1) any regulation adopted by EPA imposing limits on industrial users pursuant to section 307 of the Act or (2) "prohibitive discharge limits established pursuant to § 403.5" 40 C.F.R. § 403.3(j). It is the second part of that definition (referring to section 403.5) that picks up local limits. The terms "prohibitive discharge limits" and "prohibited discharges" are not found in the CWA and appear only in the regulations. (The only other similar reference is the term "prohibitive discharge standards," which appears in 40 C.F.R. § 403.13(c)(2)(ii). (Both "prohibitive discharge limits" in section 403.3(j) and "prohibitive discharge standards" in section 403.13(c)(2)(ii) refer back to section 403.5. Presumably, then, they are the same thing.) Although the reference to "prohibitive discharge limits" in section 403.3(j) refers to section 403.5, section 403.5 does not employ the term "prohibitive discharge limits." However, it does contain the words "*prohibited* discharges" in its heading. Thus, apparently, the terms are interchangeable and encompass anything within section 403.5.

Section 403.5 sets out two types of "prohibitive discharges": "general prohibitions," 40 C.F.R. § 403.5(a), and "specific prohibitions," 40 C.F.R. §§ 403.5(b), (c) and (d). These are referred to collectively as "general pretreatment requirements." *Clean Water Act Handbook* at 85 (ABA 2002).

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By federalizing local limits in the absence of statutory authority, it appears that EPA's regulations may exceed the agency's authority under the CWA. This may even constitute an unconstitutional delegation of administrative authority to non-federal entities. However, the regulations have been in place since the 1980s and have never been challenged.

In any event, not every effluent limit contained in a locally-issued industrial waste water discharge permit is a local limit. To be a local limit under EPA's regulations, the standard must have been crafted by the local entity specifically to prevent "interference" and "pass through."[1297] Making this calculation is not a trivial exercise.[1298] EPA has provided hundreds of pages of detailed technical

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The term "general prohibitions" actually consists of a single, catch-all prohibition: "A User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. § 403.5(a)(1). The "specific prohibitions" are set out in the regulations as a list of eight additional prohibitions. These include a prohibition against "[a]ny pollutant, including oxygen demanding pollutants (BOD, etc.) released in a Discharge at a flow rate and/or pollutant concentration which will cause Interference with the POTW." 40 C.F.R. § 403.5(b)(4). By the way, it is odd that this provision only mentions "Interference" and not "Pass Through."

The next subsection (40 C.F.R. § 403.5(c)) requires POTWs, under certain conditions, to implement "specific limits" to supplement and/or implement the general discharge requirements described above. Although referred to in section 403.5(c) as "*specific* limits," they are referred to in section 403.5(d) as "*local* limits." They mean the same thing.

The requirement to develop local limits applies in two circumstances. First, every POTW with a design flow of over 5 mgd is required to adopt local limits. 40 C.F.R. § 403.5(c)(1). Second, other POTWs (i.e., those below 5 mgd, such as the Jerome POTW) are required to adopt local limits if there has been a recurring pattern of interference or pass through. 40 C.F.R. § 403.5(d)(2).

[1296] As shown above, the regulation's definition of "pretreatment standards" includes "prohibitive discharges" encompassing everything spelled out in section 403.5 This alone should be sufficient to federalize locally-implemented limits under section 403.5(c). However, the regulations contain another provision expressly stating that these are enforceable under the Act:

> *Local limits*. Where specific prohibitions or limits on pollutants or pollutant parameters are developed by a POTW in accordance with paragraph (c) above, such limits shall be deemed Pretreatment Standards for the purposes of section 307(d) of the Act.

40 C.F.R. § 403.5(d) (italics original). Section 307(d) is the prohibition against violating any pretreatment standard. CWA § 307(d), 33 U.S.C. § 1317(d). As discussed above, the citizen suit provision allows enforcement of violations of pretreatment standards under section 307. CWA §§ 505(a) and (f)(4), 33 U.S.C. §§ 1365(a) and (f)(4).

Thus, the regulations adopt a belt-and-suspenders approach to making these locally-imposed standards part of the federally enforceable pretreatment standards.

[1297] The CWA clearly provides that pretreatment standards are to be aimed specifically at addressing interference and pass through. CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1); CWA § 307(b)(1), 33 U.S.C. § 1317(b)(1). EPA's regulations are consistent with the scope of section 307 in that they limit pretreatment standards to effluent limits aimed at preventing interference or pass through.

[1298] One commentator offers this summary:

guidance on how these local limits are to be developed. *Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program* (Dec. 1987). Moreover, local limits must be adopted in accordance with certain notice requirements.[1299]

(10) Oil and hazardous substance spills

The sections of the Clean Water Act discussed above—notably section 402—deal with anticipated, ongoing, routine releases to navigable waters, typically in the context of industrial, commercial, or agricultural operations. The Act also contains a section dealing with accidental releases and spills—section 311.[1300] Note that section 311 interacts with the Oil Pollution Act of 1990.[1301]

Section 311(b)(3) prohibits the discharge of "oil or hazardous substances" into waters of the United States.[1302] (This section does not apply to discharges pursuant to an NPDES permit (section 402), which are exempted from section 311.[1303])

> POTWs establish local limits through a process that first requires the POTW to use site-specific data to identify pollutants of concern that might reasonably be expected to be discharged in quantities sufficient to cause plant or environmental problems. These pollutants of concern may be identified by characterizing industrial discharges, monitoring POTW influent, effluent and sludge, and reviewing pollutant effects on plant operations and environmental protection criteria. Once the pollutants of concern and the sources discharging them have been identified, the POTW will choose the most effective technical approach for limit development.

Clean Water Handbook at 116-17 (Gov't Institutes 2003).

[1299] Subsection, 403.5(c)(3), mandates: "Specific effluent limits shall not be developed and enforced without individual notice to persons or groups who have requested such notice and an opportunity to respond." 40 C.F.R. § 403.5(c)(3). Thus, affected parties have a right to be engaged in the process of developing these limits. EPA's guidance states that all "affected persons" are entitled to notice, not just those requesting such notice. "Federal regulations require POTWs to provide individual notice and an opportunity to respond to affected persons and groups before final promulgation of a local limit." *Guidance Manual on the Development and Implementation of Local Discharge Limitations Under the Pretreatment Program* (Dec. 1987) at 1-19 (citing 40 C.F.R. § 403.5(c)(3)).

[1300] CWA § 311, 33 U.S.C. § 1321.

[1301] The Oil Pollution Act of 1990 ("OPA"), Pub. L. No. 101-380 (Aug. 18, 1990), was adopted by a remarkable unanimous vote of the House and Senate in response to the Exxon Valdez oil spill in Alaska. It is codified primarily at 33 U.S.C. §§ 2701 to 2761). However, it also amended section 311 of the CWA. The interaction between the two statues can be confusing. For instance, section 311 contains limitations on liability that have been overridden by section 2002 of the OPA.

[1302] CWA § 311(b)(3), 33 U.S.C. § 1321(b)(3).

[1303] CWA § 311(a)(2), 33 U.S.C. § 1321(a)(2).

When a release of hazardous substances to waters of the United States occurs, violators will be subject both to section 311 of the CWA and to CERCLA. Note, however, that the definition of hazardous substances is not the same under the two acts. Thus, as a practical matter, Section 311 is employed primarily to address oil spills.

The Act requires the person in charge to immediately notify the National Response Center of any spill in violation of section 311.[1304]

Violators of section 311 are liable for penalties,[1305] response costs,[1306] and natural resource damages.[1307] Operators are strictly liable for cleanup costs, except for a few exceptions.[1308] Criminal sanctions for violations of section 311 are also provided.[1309] Enforcement of section 311 is the dual responsibility of the EPA and the U.S. Coast Guard.

(11) Federal enforcement of the Clean Water Act

The holder of a section 404 or NPDES permit is subject to enforcement action by EPA for failure to comply with conditions spelled out in the permit. The government's enforcement tools include administrative, civil, and criminal sanctions.[1310] Penalties may be as high as $32,500 per day.[1311]

In determining the amount of any civil penalty, the court will take into account six factors set out in the statute: "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable

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[1304] CWA § 311(b)(5), 33 U.S.C. § 1311(b)(5).

[1305] CWA § 311(b)(6) and (7), 33 U.S.C. § 1311(b)(6) and (7).

[1306] CWA § 311(f), 33 U.S.C. § 1311(f).

[1307] CWA § 311(f)(4), 33 U.S.C. § 1311(f)(4).

[1308] For example, CWA § 311(f)(2)(D), 33 U.S.C. § 1311(f)(2)(D), exempts owners or operators of onshore facilities (which is defined to include vehicles) from responsibility for federal cleanup of spills caused solely "by an act or omission of a third party" (even where the third party was not negligent). Similar exemptions apply to spills from vessels and offshore facilities. However, this "third party defense" has been construed narrowly by the courts. E.g., *Kyoei Kaiun Kaisha, Ltd. v. M/V Bering Trader*, 795 F. Supp. 1054, 1056 (W.D. Wash. 1991) ("any conduct, however slight, on the part of the owner or operator contributing to a spill negates relief, even though such conduct might have operated in concert with greater third-party conduct to produce the spill").

[1309] CWA § 309(c), 33 U.S.C. § 1319(c); Oil Pollution Act § 4301(c).

[1310] CWA § 309, 33 U.S.C. § 1319.

[1311] CWA § 309(d), 33 U.S.C. § 1319(d); 69 Fed. Reg. 7121 (Feb. 13, 2004).

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requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."[1312]

Many enforcement actions are settled with agreements employing "Supplemental Environmental Projects" (SEPs).[1313] These are employed in settlement of both government enforcement actions and now, increasingly, private citizen suits. In a typical SEP, the defendant funds an environmentally beneficial project in lieu of (or as an offset to) civil penalties. SEPs are usually related in some way to the alleged violation or to the resource alleged to be adversely affected.[1314]

Enforcement actions may be brought by both the EPA and the State, where the program has been delegated.[1315] Idaho, however, is one of a few states that has not been delegated authority under the Clean Water Act. Consequently, all enforcement is federal.

The defendant is entitled to a trial by jury for determination of liability under the Clean Water Act, but not as to the determination of the specific amount of any penalty.[1316] That determination falls within the discretion of the trial judge, subject to the statutory guidelines discussed above.

One final point, unlike CERCLA and other federal environmental statutes, the Clean Water Act focuses on the actor who engaged in the unlawful discharge, not the owner of the property. (Section 311, discussed in section 17.A(10), is an exception.) Thus, a party who acquires a property on which an illegal fill occurred may not be responsible for the violation (assuming there was no collusion between buyer and seller).[1317] However, there is case law to suggest that the beneficiary of an estate may be responsible for the violations of the deceased.[1318] Conceivably the same principle might apply

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[1312] CWA § 309(d), 33 U.S.C. § 1319(d). Various judicial approaches to the assessment of penalties are explored in Erin Belk & Sarah Kern, *Assessing Civil Penalties in Clean Water Act Citizen Suit Cases*, 10 Hastings West-Northwest Journal of Envtl. L & Policy 71 (2003).

[1313] See *Final EPA Supplemental Environmental Projects Policy*, 63 Fed. Reg. 24796, 24797-98 (May 5, 1998).

[1314] SEPs are discussed in Edward Lloyd, *Supplemental Environmental Projects Have Been Effectively Used in Citizen Suits To Deter Future Violations as Well as to Achieve Significant Additional Environmental Benefits*, 10 Widener L. Rev. 413 (2004).

[1315] CWA §§ 309, 33 U.S.C. §§ 1319, 1342(b)(7).

[1316] *Tull v. United States*, 481 U.S. 412 (1987).

[1317] *In re Carsten*, 211 B.R. 719, 730 (D. MT. 1997) (owners were not liable for construction of pond by prior owner: "Thus, where a party has no decision making authority, does not participate in the planning of a project, and whose will has no impact on a [sic] whether and to what extent dredge materials are discharged into waters of the United States, that party cannot suffer liability under [sic] CWA.").

[1318] *United States v. Norris*, 937 F.2d 286, 288 (6th Cir. 1991) (bank is unaware of violation and obtains title through mortgage foreclosure, but is ordered to allow access for restoration); *United States v. Lambert*, 915 F. Supp. 797, 801, 805 (S.D.W. Va. 1996) (court orders estate of deceased violator to remove all fill and riprap

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to a successor corporation. Unfortunately, there is little case law on the subject of successor liability, and these principles are not well established.

(12) Criminal sanctions

The Act provides for criminal as well as civil penalties. CWA § 309(c), 33 U.S.C. § 1319(c). Criminal penalties may be based on a "negligent violation" in which a violation of a wastewater discharge permit condition causes the POTW to violate its own NPDES requirements. In other words, intent to violate the Act need not be shown. Penalties include fines and imprisonment for up to three years, per violation.

(13) Citizen suits under the Clean Water Act

Congress envisioned the EPA and the states as the primary enforcement entities for the Clean Water Act. However, Congress also authorized private enforcement of the Act through citizen suits.[1319] Such citizen suits may be directed to the state or federal agencies for failing to perform their duties. Or, as is more often the case, such suits may be directly against the polluting entity.[1320]

As a prerequisite to such suits, the would-be plaintiff must give 60 days advance notice to the would-be defendant as well as specified governmental bodies.[1321] "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into compliance with the Act and thus . . . render unnecessary a citizen suit."[1322] Note that if a third person (such as the permit holder) intervenes as a defendant, the intervenor may not complain that he or she did not also receive 60-day notice. *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1295 n.26 (1st Cir. 1996). Likewise, an intervenor-plaintiff need not provide 60-day notice to the existing plaintiffs. *Dubois*, 102 F.3d at 1296, n.27. The *Dubois* case also suggests, in dictum, even if the 60-day notice requirement had not been satisfied, the CWA claim could be addressed in the context of the NEPA claim. "This is because, as noted *supra*, NEPA requires the Forest Service to identify in its EIS all federal permits that the project needed in order to comply with applicable federal law." *Dubois*, 102 F.3d at 1296.

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beyond what is necessary for bank stabilization); *United States v. Edwards*, 667 F. Supp. 1204, 1215 (W.D. Tenn. 1987) (court orders estate of deceased violator to totally restore wetland, including filling in ditches).

[1319] CWA § 505, 33 U.S.C. § 1365.

[1320] A citizen suit may be brought to enforce any violation of an NPDES permit. CWA § 505(f)(6), U.S.C. § 1365(f)(6).

[1321] CWA § 505(b), 33 U.S.C. § 1365(b). Narrow exceptions to the 60-day notice rule are set out in the statute.

[1322] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987).

Citizen plaintiffs may obtain injunctive relief against the defendant and/or the imposition of civil penalties payable to the United States Treasury.[1323]

Although the Clean Water Act establishes a private right of action for such suits, citizens must nevertheless establish that they have standing to litigate.[1324] The law of standing derives from the U.S. Constitution's "case or controversy" limitation on judicial authority as well as court-recognized prudential concerns, the full exposition of which is beyond the scope of this Handbook. The basic principles, however, were summarized by the U.S. Supreme Court in *Friends of the Earth v. Laidlaw*:[1325]

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

In *Laidlaw*, plaintiffs demonstrated standing by submitting affidavits that they lived near the facility in question and that they would make recreational use of a river into which the facility discharged but for their concerns about the discharge of pollutants. *Laidlaw* also noted that plaintiffs must establish standing separately for each form of relief sought.[1326] Nevertheless, the Court found that the deterrent effect of fines that might be assessed against the defendant could provide a basis for standing, even when those fines would not be paid to plaintiffs.[1327]

Apart from Article III standing, citizen plaintiffs must demonstrate that their lawsuit falls within the bounds of the private cause of action established by the Congress. In a pivotal case decided in 1987, the U.S. Supreme Court ruled that citizen suits under the Act do not lie to address wholly past violations of the permit.[1328] Thus, if the defendant had stopped violating the permit by the time the suit

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[1323] CWA §§ 309(d), 505(a), 33 U.S.C. §§ 1319(d), 1365(a).

[1324] On the other hand, there is no private right of action under the Clean Water Act outside of the citizen provisions, and the Act preempts the common law of nuisance. *Middlesex Cnty. Sewerage Authority v. Nat'l Sea Clammers Assn.*, 453 U.S. 1 (1981). See discussion of private rights of action in the *Idaho Land Use Handbook*.

[1325] *Friends of the Earth, Inc. v. Laidlaw Envtl. Services* (TOC), Inc., 528 U.S. 167, 180-81 (2000).

[1326] *Laidlaw* at 185 (2000).

[1327] *Laidlaw* at 185 (2000).

[1328] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

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was filed, and is not likely to resume, the plaintiff has no cause of action under the citizen suit provision. To establish a cause of action, plaintiffs must "make a good-faith allegation of continuous or intermittent violation."[1329] The Court emphasized that the Act is intended to encourage violators to come into compliance.[1330] Moreover, the Act contemplates giving agency prosecutors the discretion to enter into compliance orders with past violators in which past violations are forgiven.[1331]

Next, there is the question of mootness. May a defendant moot a citizen suit and obtain its dismissal by ending the offensive behavior? The *Gwaltney* Court said that this could happen, where "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[1332] The availability of the mootness strategy was reconfirmed by the Court in 2000. In that case, however, the Court noted that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."[1333] The Court emphasized that the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."[1334] In 2001, the Ninth Circuit recognized *Gwaltney*, but concluded that it provides no protection to a defendant engaged in a continuing violation of the Act, even where the defendant had taken steps to ensure that a pesticide introduced into a canal system would no longer kill fish. It is not enough to mitigate the harm; the defendant must stop violating the Act period.[1335]

While providing for private enforcement, the Act preserves "the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution.[1336] Thus, Congress bars citizen suits where the EPA or the State has commenced and is diligently prosecuting a civil or criminal action in a court[1337] or administratively[1338] (so long as the administrative enforcement action was initiated prior to

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[1329] *Gwaltney* at 64.

[1330] "It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney* at 60.

[1331] "If citizens could file suit, months or years later, to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney* at 61.

[1332] *Gwaltney* at 66.

[1333] *Laidlaw* at 174.

[1334] *Laidlaw* at 189 (internal quotations omitted).

[1335] *Headwaters, Inc. v. Talent Irr. Dist.*, 243 F.3d 526, 529 (9th Cir. 2001).

[1336] CWA § 101(b), 33 U.S.C. § 1251(b).

[1337] CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

[1338] CWA §§ 309(g)(6)(A), 505(a), 33 U.S.C. §§ 1319(g)(6)(A), 1365(a). This provision was added in 1987; prior to that time, only judicial enforcement actions barred citizen suits.

the citizen suit notice).[1339] In one case, a federal court ruled that EPA's issuance of a compliance schedule satisfied the requirements of diligent prosecution and barred a citizen suit (despite the fact that the compliance schedule expressly stated that it did not bar citizen suits).[1340]

(14) Attorney fee recovery

In citizen suits brought under the CWA the court is authorized to award litigation costs, including attorney and expert witness fees, to "any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."[1341] Thus, a defendant who unsuccessfully defends a citizen suit may be subject not only to penalties and injunctive relief, but also may be obligated to pay the plaintiff's attorney fees.[1342] On the other hand, a citizen who brings a losing citizen suit may be required to shoulder the defendant's litigation costs.

The amount of fees awarded is based on what is called a "loadstar" calculation, equal to the number of hours of attorney time reasonably expended on the matter multiplied by a reasonable hourly rate. The U.S. Supreme Court ruled that a prevailing plaintiff is not entitled to the award of an "enhanced" fee beyond the loadstar amount where the plaintiff's counsel undertook the representation on a contingent basis.[1343] Where public interest attorneys charge a reduced fee to their clients, the loadstar calculation may be based on a higher prevailing rate in the community.

In *Gwaltney*, the Supreme Court warned that the "suddenly repentant defendant" who succeeded in mooting a citizen suit might nonetheless be obligated to pay plaintiff's attorney fees.[1344] This has come to be known as the "catalyst" theory of attorney fees.[1345] In 2001, however, the Supreme Court expressly ruled that attorney fees may not be awarded pursuant to the a "catalyst" theory under two civil rights statutes that, like the CWA, are based on a "prevailing party" standard.[1346] Thus, it appears,

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[1339] CWA § 309(g)(6)(B), 33 U.S.C. § 1319(g)(6)(B).

[1340] *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 682 F. Supp. 1186 (N.D. Ala. 1988).

[1341] CWA § 505(d), 33 U.S.C. § 1365(d).

[1342] Attorney fee awards can be substantial. In *National Wildlife Fed'n v. Hanson*, 18 Envtl. L. Rep. 20008 (E.D. N.C. 1987), *aff'd*, 859 F.2d 313 (4th Cir. 1988), the court awarded $398,006 to lawyers for the environmental group. In *City of Burlington v. Dague*, 505 U.S. 557 (2001), the Supreme Court allowed $198,027 (the plaintiff had sought more).

[1343] *City of Burlington v. Dague*, 505 U.S. 557 (1992).

[1344] *Gwaltney* at 67 n.6.

[1345] In *Laidlaw*, the Supreme Court again discussed, but declined to rule on, the "catalyst" theory of attorney fees, in which the plaintiff in a mooted lawsuit is deemed a "prevailing party" because he or she was the catalyst that triggered the favorable outcome. *Laidlaw* at 194-95. Attorney fees were awarded under this theory in *Armstrong v. Asarco, Inc.*, 138 F.3d 382 (8th Cir. 1998) and in a number of other federal cases.

[1346] *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001).

that awards of attorney fees should be disallowed where the defendant succeeds in mooting the litigation by taking sufficient corrective steps.

Some courts have suggested that there may be a double standard, in which it is more difficult for a successful defendant to recover fees against the plaintiff than it is for a successful plaintiff to recover fees against the defendant.[1347]

In addition to section 505(d) of the CWA, parties may be able to obtain recovery of attorney fees against the government under the Equal Access to Justice Act.[1348]

(15) EPA audit policy

EPA has adopted a policy of limited protection for industries and persons who undertake "environmental audits" and then promptly report regulatory violations to the agency. The guidance requires disclosure within 21 days. *Incentives for Self-Policing; Discovery, Disclosure, Correction and Prevention of Violations*, 65 Fed. Reg. 19,618 (Apr. 11, 2000). This policy applies to section 402 violations.

B. The Endangered Species Act

The discretion accorded government agencies under the Clean Water Act disappears when it comes to the Endangered Species Act, 16 U.S.C. §§ 1531-1543.[1349] No federal environmental statute is as absolute as the Endangered Species Act.[1350] It requires without exception that federal agencies not permit activities which are likely to jeopardize the survival of endangered or threatened species or will destroy or adversely modify their critical habitat. It is not a matter of balancing; the government may not consider whether the advantages of a particular project outweigh the potential loss of a species.[1351]

[1347] *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995) (prevailing defendant must show plaintiff's action was frivolous, unreasonable, or without foundation); *Marbled Murrelet v. Babbitt*, 182 F.3d 1091, 1094 (9th Cir. 1999) (In Razore, "[w]e adopted . . . for the CWA the Christiansburg civil rights standard for frivolousness.").

[1348] *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132 (4th Cir 1993); *United States v. Moseley*, 761 F. Supp. 90 (E.D. Mo. 1993); *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 391 (2nd Cir. 1985).

[1349] The key provision of the Endangered Species Act is section 7(a)(2), 16 U.S.C. § 1536(a)(2).

[1350] "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . ." *TVA v. Hill*, 437 U.S. 153, 173 (1978) (citation omitted, emphasis supplied by Court).

[1351] Following the celebrated snail darter case, *TVA v. Hill*, 437 U.S. 153 (1978), which blocked construction of the Tellico Dam in Tennessee, the Congress amended the Act in 1978 to allow an "Endangered Species Committee" of top federal officials to approve projects despite jeopardy to endangered species. 16 U.S.C. § 1536(e); 50 C.F.R. Parts 450-453 (1988). Despite this authority, the committee (often referred to as

Consequently, when endangered or threatened species are involved, the Endangered Species Act can combine with section 404 or other federal environmental statutes to frustrate or prohibit water development activities.

A case in point occurred in Colorado in the 1980s when the Riverside Irrigation District proposed to build Wildcat Dam on a tributary of the South Platte River. The Corps refused to issue the district a section 404 permit because of the potential adverse impact of the dam on downstream whooping crane habitat.[1352] The district sued, claiming that the "Wallop Amendment" to the Clean Water Act[1353] prohibited the Corps from interfering with anyone's water rights, and that denying a section 404 permit because the water was needed for some other purpose (e.g., protection of endangered species) was illegal. The court rejected the argument, declaring that the Wallop Amendment was merely a policy statement that does not override the Clean Water Act's clear and explicit mandate that the Corps regulate the disposal of material in water to maintain the ecological integrity of rivers. The case appears to have put to rest the argument that Western water rights are simply exempt from federal regulation.

C. Hydropower project licensing by FERC

Non-federal hydroelectric projects—that is, those owned by state and local governments and private parties—are regulated under the terms of the Federal Power Act ("FPA").[1354] The act is administered by the Federal Energy Regulatory Commission ("FERC").

Developers of hydropower projects must comply with an elaborate permit and licensing process which examines all aspects of a project's impacts, including fish and wildlife, and which may involve formal evidentiary hearings. Some small-scale hydropower projects may be exempted from licensing, although they still are subjected to a "consultation" process.[1355] In all cases, the hydropower projects must comply with applicable federal laws including the National Environmental Policy Act's environmental impact statement requirements, the Wild and Scenic Rivers Act, and the Clean Water Act.

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the "God Squad" because of its power over the life or death of entire species), has never exempted a project. Most political analysts doubt the committee ever will.

[1352] *Riverside Irr. Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985).

[1353] The Wallop Amendment to the Clean Water Act provides, in pertinent part: "It is the policy of Congress that the authority of each State to allocate water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." CWA § 101(g), 33 U.S.C. § 1251(g) (enacted in 1977).

[1354] 16 U.S.C. §§ 791a - 825r.

[1355] 16 U.S.C. §§ 2705 - 2708.

Under the Electric Consumers Protection Act of 1986 ("ECPA"), FERC is required to take into consideration "comprehensive state plans" for the development and protection of its rivers and streams. Moreover, in considering projects for licensing (or relicensing), ECPA requires FERC to evaluate environmental matters much more thoroughly than was previously required.

There has been a long history of struggle between FERC (and its predecessor, the Federal Power Commission) and the states regarding the states' authority over hydropower development. The FPA includes language similar to that found in the Reclamation Act recognizing the primacy of state water laws. However, the United States Supreme Court has interpreted the two provisions differently.[1356] Apparently the only state laws that continue to bind FERC are laws relating to proprietary water rights.[1357] Thus, for example, it may be that FERC could impose instream flow requirements in contravention of state water law.

Although it appears that states may not override FERC-imposed flow requirements, states may impose their own additional minimum flow requirements on FERC-licensed projects pursuant to section 401(d) of the Clean Water Act "insofar as necessary to enforce a designated use contained in a state water quality standard."[1358]

Moreover, section 10(a) of the FPA requires FERC to consider comprehensive waterway plans when making its licensing decisions. The comprehensive state water plan adopted by the Idaho Water Resource Board pursuant to Idaho Code § 42-1734A is such a plan.

As a final note, hydropower projects in navigable rivers also must obtain State Land Board permission to utilize the State's lands underlying navigable waters.

FERC licenses have terms that extend from thirty to fifty years. Between 1997 and 2010, 20 large hydropower projects in Idaho are due for relicensing by FERC. The total annual energy produced at these projects is equivalent to more than half of the energy consumed by all customers in Idaho. The relicensing process involves a comprehensive review of each hydropower project and requires FERC to balance the competing uses of a waterway. These relicensing decisions in Idaho will represent the first time may Idaho projects have been reviewed under the new environmental laws and standards. Relicensing is a rigorous process that can affect both project operations and economics.

[1356] *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n,* 328 U.S. 152 (1946).

[1357] *California v. FERC*, 495 U.S. 490 (1990).

[1358] *PUD No. 1 of Jefferson Cnty. v. Washington Department of Ecology*, 511 U.S. 700, 723 (1994). In this case, the Supreme Court upheld Washington's imposition of minimum flow requirements on a proposed FERC-licensed hydropower project pursuant to section 401 of the Clean Water Act. The power company argued, among other things, "that the Clean Water Act is only concerned with water 'quality' and does not allow regulation of water 'quantity.'" 511 U.S. at 719. The Court rejected this argument. "This is an artificial distinction. In many cases, water quantity is closely related to water quality …." *Id*. The Court sidestepped the question of what would happen if the state-imposed minimum flow conflicted with FERC-imposed requirements, saying that it would not address this "hypothetical" question.

18. IDAHO STREAM CHANNEL PROTECTION ACT (STREAM ALTERATION PERMIT)

The Idaho Stream Channel Protection Act, Idaho Code §§ 42-3801 to 42-3813, requires that the stream channels of the state and their environment be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. To comply with the act, one must obtain a Stream Channel Alteration Permit from IDWR in advance any work being done within the beds and banks of a continuously flowing stream. The Stream Channel Protection Act applies to any type of alteration work, including recreational dredge mining, done inside the ordinary high water marks of a continuously flowing stream.

Applicants must demonstrate that their project will be installed and maintained in accordance with applicable regulations of the Idaho Stream Channel Protection Act and Idaho Forest Practices Act.

Implementing regulations are found at IDAPA 37.03.07.

The Army Corps of Engineers, IDWR, and Idaho Department of Lands (IDL) have established a joint process for activities impacting jurisdictional waterways that require review and/or approval of both the Corps and the State of Idaho. The Stream Application Alteration Permit is the same application as the Walla Walla District Corps of Engineers 404 Joint Application. The joint permit application process covers

- Army Corp permits required by Section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act
- Stream alteration permits required under the Idaho Stream Protection Act, §§ 42-3801 to 42-3813
- Encroachment permits for navigable lakes required under the Idaho Lake Protection Act, Idaho Code §§ 58-1301 to 58-1312

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19. FEDERAL WATER RIGHT ACQUISITIONS FOR SALMON FLOW ENHANCEMENT

A. Current BOR water acquisition program

Since 1991, the Bureau of Reclamation ("Bureau," "BOR," or "USBR") has been authorized to rent up to 427,000 acre-feet per annum of water via the water bank for salmon-related flow augmentation "[n]otwithstanding the legislative approval required in section 42-108." This authority derives from a state statute, Idaho Code § 42-1763B, which is set to sunset in 2005. Under this program, water may be acquired from anywhere on the Snake River system. The Bureau has acquired flows in the Upper Snake, the Payette River, the Boise River and the Malheur River in Oregon.

The governing Idaho statute limits the Bureau to acquisition of storage rights, that is, water held in reservoirs. Since 1996, however, the Bureau has acquired natural flow rights on the Malheur River in Oregon. Beginning in 2002, the Bureau has also acquired natural flow rights on the Snake River in Idaho.

To avoid circumventing the statute's limitation to storage rights, the Bureau has acquired the Snake River natural flow rights with the assistance of Idaho Power. Idaho Power signs the paperwork (as renter) to acquire water from the water bank controlled by the Idaho Water Resource Board. This is done pursuant to a special statute (Idaho Code § 42-108A) authorizing rentals for hydropower purposes. The Bureau then cuts the check to compensate the farmers who lease the water to the water bank. All this has been done with the knowledge and blessing of the Governor and the Legislature. The water then runs through Idaho Power's dams all the way through Hells Canyon. From there, it continues on down the Lower Snake where it benefits the salmon.

The tables attached as Appendix Q tally the flows acquired in each year since 1991.

Due to drought conditions and other factors, no storage water on the Upper Snake was available to the Bureau during the years 2002 to 2004. This is the reason the Bureau has been driven to acquire natural flow rights via Idaho Power.

The Bureau purchases no ground water rights.

B. Changes to BOR program under the Nez Perce settlement

The authority to acquire 427,000 acre-feet per year originally set to sunset in 2005 was extended for another thirty years.

For the first time, the Bureau will be authorized to rent in its own name up to 60,000 acre-feet per year of consumptive natural flow water rights from below-Milner diverters. Agreement § III.C.6. This is in addition to the 427,000 acre-feet per year. Thus, the total amount the Bureau can control and use for flow augmentation in any one year is increased from 427,000 acre-feet per year to 487,000.

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In addition to renting the 60,000 acre-feet per year in its own name, the Bureau will continue its current practice of acquiring instream uses via Idaho Power (as part of the original 427,000 acre-feet per year).

The Agreement provides that the Bureau is authorized to secure a stable, permanent supply for the 60,000 acre-feet per year, but must still run it through the water bank on an annual basis. Thus, for the first time, the Bureau may purchase water rights from farmers outright. However, it is still required to go through motions of running the water through the water bank.

C. Bureau prices

The Bureau pays varying amounts for its one-year storage rentals. Rates paid for storage water are rather low. They are not set by the marketplace, but by the "rental pools" under the water bank. Payette River storage: $8.50/per acre-foot per year; Boise River storage: $6.93/ per acre-foot per year ; Water District 1 (i.e., above-Milner Snake River): $14.55/ per acre-foot per year (all figures include water bank or rental pool administrative charges).

The Bureau currently offers up to $50 per acre-foot per year for rentals of natural flow water rights from high lift pumpers in Idaho and Oregon.

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20. INTERSTATE ALLOCATION

A. Overview

State and federal water law is designed, by and large, to allocate and administer water rights within state boundaries. A separate body of law governs the allocation of water between states.

If you imagine a water resource common to two states as a pie, interstate allocation divides that pie into two pieces. Each state, in turn, allocates its portion of the pie to individual water users within the state. In other words, interstate allocation of water, by and large, operates at the macro level. With some exceptions discussed below, it addresses disputes between states, not disputes between individual water users located in different states.

The effect of an interstate allocation of water is to require one state (typically the upstream or up-gradient state) to deliver water on an aggregate basis to the neighboring state. In order to meet this obligation, the upstream state may have to curtail uses of that water within that state. Which individual users are curtailed in order to meet the upstream state's obligation to the downstream state is a matter of state law (mostly) within the upstream state. Once the water arrives in the downstream state, the water is allocated according to the rules of allocation within the downstream state. As a result, it is entirely possible that a senior water right in an upstream state could be curtailed, while a junior water right in the downstream state receives its full share.

Interstate allocation can take various forms, outlined below.

Before going further, however, note that some of these measures are subject to restrictions under the dormant commerce clause as articulated in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.) (see discussion in section 20.B(5) at page 701), while others are not. In a nutshell, actions by Congress and the Supreme Court are not subject to the dormant commerce clause. Thus, equitable apportionment, compacts, and congressional allocations are immune from challenge under *Sporhase*. This does no more, however, than protect the provisions set out in the compact. Thus, even when two states are governed by a compact or other allocation, a state water export statute would still need to comply with *Sporhase* if it spelled out further criteria or other requirements not contained in the compact other allocation.

Macro-level approaches (applicable to states and only indirectly to individual water users)

- (1) *Equitable apportionment.* If two or more states cannot agree on the allocation of a shared water resource, one state may initiate litigation directly in the U.S. Supreme Court. This brute force approach to interstate allocation serves as the underlying threat motivating most of the other approaches discussed below. These cases are tried first by a special master and ultimately decreed by the U.S. Supreme Court under the doctrine of "equitable apportionment."

- (2) *Compacts.* If states are able to reach an agreement regarding the allocation of a common water resource, they may enter into a "compact." Compacts must be approved

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Printed 6/23/2023 9:09 AM

by the U.S. Congress. Once approved, they are legally enforceable agreements. Typically, they are fairly rigid, mathematical allocations of water without a mechanism for consideration of new information or changed conditions. But they could contain more flexible terms.

- (3) *Congressional allocation.* The third approach is for Congress to unilaterally allocate the water resource among the states through legislation. These are very rare (having occurred only twice).

- (4) *Less formal agreements among the states.* More recently, states have begun to explore a less formal approach to water allocation based on memorandums of understanding and other mechanisms not entailing congressional approval. The advantage of this approach is that it is simpler, more flexible, more cooperative, more efficient, more incremental, and more adaptive. On the other hand, by and large, they are not enforceable. The goal of this approach may be the development of a better information base that will facilitate the cooperative development of creative management strategies in both states aimed at maximizing the efficient utilization of the resource while protecting other values. Because this approach often does not entail an explicit allocation of the water between the affected states, this is sometimes referred to as the "less is more" approach.[1359]

Micro-level approaches (directly applicable to individual water users)

- (5) *Export restrictions.* States sometimes attempt unilaterally to restrict the diversion of water in that state where it will be transported out-of-state to serve uses elsewhere. These restrictions may apply both to new appropriations and to transfers of exiting rights for use outside of the state. Such restrictions may expressly target out-of-state uses, or they may come in the form of restrictions on out-of-basin use. Across-the-board, unilateral bans on out-of-state uses are unconstitutional under the "dormant commerce clause" of the U.S. Constitution. Some limited restrictions on export in the context of conservation efforts, however, are permissible. Export restrictions that would otherwise violate the Commerce Clause may be allowed by a compact or equitable apportionment. There may also be questions about whether a compact or equitable apportionment implicitly prohibits transfers across state lines.

- (6) *Interstate water markets and the administration of water rights transferred across state lines.* As a practical matter, it is rare for a water right acquired in one state to be transferred to a use in another state. With tightening supplies and an emerging interstate water market, however, this is likely to occur more frequently in the future. Of course, any such transfer would be subject to any applicable export restrictions imposed by the

[1359] James H. Davenport, *Less is More: A Limited Approach to Multi-State Management of Interstate Groundwater Basins*, ABA Water Law Conference (Feb. 21, 2008). Mr. Davenport is special counsel for the Colorado River Commission of Nevada.

exporting state or by compact. Transfer of the place of use across a state line is fairly straightforward. In contrast, transfer of the point of diversion across a state line is problematical.

- (7) *Private enforcement of priority across state lines.* Interstate allocation litigation ordinarily involves actions by state governments. However, individual parties have been known to bring litigation to establish priority relationships across state lines. For example, a senior user in one state may sue to enjoin diversions by a junior in another state, as in *Bean v. Morris*, 221 U.S. 485 (1911). This approach has seldom been employed. Presumably, it would be available only in the absence of any other applicable interstate allocation. For instance, if a decree, compact, or congressional allocation were in place, individual water users would probably not be allowed to enforce priorities across state lines because doing so would upset the established allocation.

Each of these approaches is discussed below.

B. The law of interstate allocation

(1) Equitable apportionment

In the past, state-versus-state conflicts have focused on water supply for agricultural and other private consumptive water needs. In coming years, however, we may expect to see more and more interstate battles fought over water needed to meet new urban demands, to meet water quality and other instream needs, and to avoid jeopardy to endangered species.

For over a hundred years, the axiom "first in time is first in right" has reigned as the central governing principle of Western water law. One might think, then, that this principle would govern disputes between states as well as between people. It does not. One of the more curious incongruities in Western water law is that the rule of first in time does not govern the allocation of water between western states. Priority of use between the states is a factor to be considered, but only one. As Justice Douglas noted, "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible." *Nebraska v. Wyoming*, 325 U.S. 589, 599, 618 (1945).

The law of interstate allocation did not arise until the 20th century. In the 1800s, water resources were not sufficiently developed to generate significant cross-border conflicts. Beginning in the early 1900s, however, depletions in some interstate streams became so severe that states took each other to court. Curiously, some of the early interstate water conflicts developed not in the parched West, but on the East Coast as major cities tapped the rivers in neighboring states to satisfy their growing

populations.[1360] Indeed, disputes over water in the Eastern United States are becoming increasingly common today.[1361]

The U.S. Supreme Court has the power to entertain and decide disputes on any subject (not just water) between two or more states pursuant to the Constitution's grant of original jurisdiction. U.S. Const. art. III, § 2, cl. 2. Such litigation is most unusual in that it is initiated directly in the U.S. Supreme Court, bypassing the lower federal district and appellate courts. As a practical matter, the Supreme Court is not equipped to conduct a trial of such matters. Consequently, it appoints a special master to conduct the trial. Trials before the special master are lengthy, complicated, and expensive—often lasting over a decade. The special master hears evidence, rules on motions, and proposes a recommended decree. The Court pays significant deference to the special master's recommendation, but reserves the right to render the final judgment.[1362]

The Supreme Court will not automatically take jurisdiction over any dispute between states. Rather, it has construed the Constitution and 28 U.S.C. § 1251(a)(1) as making original jurisdiction actions discretionary with the Court. The Court has said that the party initiating the suit must demonstrate "real or substantial injury or damage." *Colorado v. New Mexico*, 459 U.S. 176, 188 n.13 (1982), *appeal after remand*, 467 U.S. 310 (1984).

In theory, the dispute must be serious enough that it could cause the states to enter into war with each other, if they were sovereigns. *Missouri v. Illinois*, 200 U.S. 496, 519-21 (1906).

> When the Court exercises its original jurisdiction over a controversy between two States, it serves "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372–373, 44 S.Ct. 138, 68 L.Ed. 342 (1923). That role significantly "differ[s] from" the one the Court

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[1360] E.g., *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (This case contains Justice Holmes famous statement: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

[1361] In *South Carolina v. North Carolina*, 552 U.S. 804 (2007) (per curium), the Court granted South Carolina leave to file an original action challenging an interbasin diversion of water by North Carolina from the Catawba River into the Yadkin-Pee Dee Basin. In an unusual move, the Court allowed Duke Energy and another water user to intervene. *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Alito, J.). Ultimately, the case was settled. *South Carolina v. North Carolina*, 562 U.S. 1126 (2010) (per curium).

In *Virginia v. Maryland*, 540 U.S. 56 (2003) (Rehnquist, C.J.), the Court ruled that Maryland may not prohibit a Virginia county from diverting water from the Potomac River. This was not, strictly speaking, an equitable apportionment case in that it did not allocate all the water in the river. Rather, it was a challenge to a particular water diversion. However, the Court invoked its authority to ensure that "water is equitably apportioned between the States." *Virginia v. Maryland*, 540 U.S. at 609.

[1362] William D. Olcott, Comment, *Equitable Apportionment: A Judicial Bridge Over Troubled Waters*, 66 Neb. L. Rev. 734, 736 (1987).

> undertakes "in suits between private parties." *Id*., at 372, 44 S.Ct. 138; see Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 705 (1925) (When a "controversy concerns two States we are at once in a world wholly different from that of a law-suit between John Doe and Richard Roe over the metes and bounds of Blackacre"). In this singular sphere, "the court may regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice." *Kentucky v. Dennison*, 24 How. 66, 98, 16 L. Ed. 717 (1861).

Kansas v. Nebraska, 135 S. Ct. 1042, 1051-52 (2015) (Kagan, J.).[1363]

The Court's jurisdiction is equitable in nature. *Kansas v. Nebraska*, 135 S. Ct. at 1051. The Constitution provides no guidance on how to resolve these matters, so the Court has written on a blank slate in creating the body of federal common law of water allocation known as equitable apportionment.[1364] Presumably, Congress has the power to shape the rules of equitable apportionment through legislation. (See footnote 1371 at page 699 discussing Congress' power to unilaterally allocate interstate water.) In any event, it has never legislated on the subject.

The Court has made clear that whether the headwaters of a river arise in one state or another is "essentially irrelevant." *Colorado v. New Mexico*, 467 U.S. 310, 467 (1984). As a practical matter, equitable apportionment litigation is typically initiated by a downstream state seeking to curtail water diversions by an upstream state. In theory, however, an upstream state could initiate an equitable apportionment proceeding in order to resolve interstate rights in a predictable way before a downstream state sought to upset existing or planned uses in the upstream state.

Although all cases to date have originated in the context of disputes over rivers, the principles of equitable apportionment apply equally to the allocation of an interstate aquifer. For instance, in a 2001 decision, the Supreme Court awarded damages to Kansas because Colorado allowed ground water pumping that depleted surface flows in the Arkansas River to which Kansas was entitled under a 1949 compact. *Kansas v. Colorado*, 533 U.S. 1 (2001). Although this was a compact case, not an equitable

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[1363] *Kansas v. Nebraska* was a compact enforcement case, not an equitable apportionment case. The Court recognized, however, the connection between the two. "This Court's authority to apportion interstate streams encourages States to enter into compacts with each other. . . . But in doing so, we remain aware that the States bargained for those rights in the shadow of our equitable apportionment power—that is, our capacity to prevent one State from taking advantage of another. Each State's 'right to invoke the original jurisdiction of this Court [is] an important part of the context' in which any compact is made." *Kansas v. Nebraska*, 135 S. Ct. at 1052 (quoting *Texas v. New Mexico*, 462 U.S. 554, 569 (1983)).

[1364] Of course, the principles of equitable apportionment assume that there has been no congressional apportionment of the waters through legislation (discussed below at section 20.B(3) at page 699). "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *Arizona v. California*, 373 U.S. 546, 546 (1963) (Black, J.).

apportionment case, it built on a long history of equitable apportionment of that river.[1365] Likewise, the case of *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015) (Kagan, J.) involved the Republic River Compact in which ground water counted toward the water consumption allowed under the compact.

The first interstate equitable apportionment case was *Kansas v. Colorado*, 206 U.S. 46 (1907). Kansas sued Colorado charging that extensive irrigation in Colorado was drying up the Arkansas River and restricting the ability of Kansas farmers to launch new irrigation projects. Each state argued from the perspective of the water rights system with which it was familiar. Kansas, a largely riparian rights state, argued that Colorado's use of water was unreasonable. Colorado, a prior appropriation state, argued that, by its Constitution, it owned all the water and could allocate it on the basis of first in time.

In deciding the case, the Supreme Court had no precedent to go on; a case like this had never arisen before. The Court noted that the Constitution granted it the authority to resolve disputes between the states, and set out to write a new body of interstate allocation law now known as "equitable apportionment."

Had the case arisen today, it is likely that the parties would have documented the environmental consequences of a dried-up Arkansas River. But there was no mention of dead fish or the environment in this 1907 decision. Instead, the Court focused its attention on the benefits of irrigated farming. The Court determined that it would be inequitable to cut off the water already being used by Coloradans simply to provide more water to Kansas. But the Court did not rule in Colorado's favor simply because its uses were "senior" to uses in Kansas. Rather, the Court engaged in a balancing act to determine what allocation of water was "fair" to each of the disputants and concluded that the status quo was "fair." Thus, the Court allowed Colorado to continue its diversions for the time being, with the proviso that Kansas could institute a new suit if Colorado increased its depletions.

In the first case to arise between two prior appropriation states, *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court found it appropriate to apply the rule of priority in time to allocate water between the two states. However, in subsequent litigation between prior appropriation states (*Nebraska v. Wyoming* in 1945 and *Colorado v. New Mexico* in 1982[1366]) the Court has declared that the rule of priority is only one factor to be considered.

Over the years, the Supreme Court has heard just over a dozen cases in which decrees were sought allocating water on interstate streams.[1367] No hard and fast rules have emerged from this history

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[1365] *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943), *and*, *Kansas v. Colorado*, 514 U.S. 673 (1995).

[1366] *Nebraska v. Wyoming*, 325 U.S. 589, 599, 617-18 (1945); *Colorado v. New Mexico*, 459 U.S. 17613 (1982), *appeal after remand*, 467 U.S. 310 (1984).

[1367] Arkansas River *Kansas v. Colorado*, 206 U.S. 46 (1907), *prior history*, 185 U.S. 125 (1902), *subsequent history*, *Colorado v. Kansas*, 320 U.S. 383 (1943), *and*, *Kansas v. Colorado*, 514 U.S. 673 (1995), 1949 *compact enforced in*, *Kansas v. Colorado*, 533 U.S. 1 (2001).
Bois de Sioux *North Dakota v. Minnesota*, 263 U.S. 365 (1923).

of litigation. To the contrary, the Supreme Court has ruled on an *ad hoc* basis, considering whatever evidence on the issue of equity it found appropriate at the time.

Justice Douglas, writing for the Court in *Nebraska v. Wyoming*, summed up the law this way:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (Douglas, J.).[1368]

Catawba River *South Carolina v. North Carolina*, 558 U.S. 256 (2010) (Alito, J.) (allowing intervention); *Carolina v. North Carolina*, 562 U.S. 1126 (2010) (per curium) (dismissal following settlement).

Chicago River *Missouri v. Illinois*, 200 U.S. 496 (1906).

Colorado River *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.), *decree entered*, 439 U.S. 419 (1979), *decree modified*, 460 U.S. 605 (1983).

Columbia & Snake Rivers *Idaho v. Oregon*, 462 U.S. 1017 (1983) (dealing with anadromous fish).

Connecticut River *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

Delaware River *New Jersey v. New York*, 283 U.S. 336 (1931), *decree amended*, 347 U.S. 995 (1954).

Laramie River *Wyoming v. Colorado*, 259 U.S. 419 (1922), *decree modified*, 260 U.S. 1 (1922), *new decree entered*, 353 U.S. 953 (1957).

North Platte River *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), *settlement entered*, *Nebraska v. Wyoming and Colorado*, 534 U.S. 40 (2001).

Potomac River *Virginia v. Maryland*, 540 U.S. 56 (2003) (Rehnquist, C.J.). This was not, strictly speaking, an equitable apportionment case. Rather, it was a challenge to a particular water diversion.

Vermejo River *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984).

Walla Walla River *Washington v. Oregon*, 297 U.S. 517 (1936).

[1368] *Nebraska v. Wyoming* concerned a dispute between Nebraska, Wyoming, Colorado and the United States regarding the waters of the North Platte River. The United States claimed it owned all of the unappropriated water in the river, and that its entitlement was derived not from appropriation but from its underlying ownership of the lands and waters—all acquired by cessions from foreign governments—which entitled it to an apportionment free from state control. The Court rejected the federal assertion, noting that the water rights in the North Platte Project all had been obtained in compliance with state law. *Nebraska v. Wyoming*, 325 U.S. at 614.

More recently, however, considerations of water conservation and efficiency have moved to the forefront. In the most recent case, Colorado sued New Mexico, charging that New Mexico was wasting water taken from the Vermejo River. *Colorado v. New Mexico*, 459 U.S. 176 (1982), *appeal after remand*, 467 U.S. 310 (1984). Although the water uses in New Mexico were longstanding and therefore "senior" to Colorado's potential uses of the river in the future, Colorado asked the Supreme Court to consider the inefficiency of New Mexico's irrigation system. The Special Master appointed by the Court to hear the facts found that "the heart of New Mexico's water problem is the Vermejo Conservancy District" which he considered a failed reclamation project that "quite possibly should never have been built." The Court nevertheless determined that Colorado should not be able to force New Mexico to improve the efficiency of the project to free up water for Colorado's use, because Colorado had not demonstrated any stronger water conservation program of its own.

This important case demonstrates the possibility that, in the future, water may be allocated between states based on each state's level of commitment to promoting water conservation and efficiency. The case should serve as a warning to all Western states to countenance wasteful water use practices at their peril.

(2) Compacts

An interstate compact is an agreement by two or more states that has been approved by Congress for the purpose of allocating the rights to the use of a natural resource such as water among the compacting states. The federal Constitution tacitly authorizes such agreements between states: "No State, shall without the Consent of Congress, . . . compact with another State, or with a foreign Power . . . ." U.S. Const. art. I, § 10, cl. 3.

Typically, Congress invites the states to initiate negotiations, with the expectation that whatever accommodation is achieved will receive subsequent congressional approval. Upon approval by Congress a compact becomes a law of the United States. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (White, J.). Thereafter, the compacting states act to incorporate the terms of the compact into their respective state laws. This dual codification aids in the enforcement of the compact's terms. The federal codification ensures that states cannot back out, and eliminates any potential for a dormant commerce clause attack on the allocation. State codification ensures that every affected individual water user will be subject to the benefits and burdens of the compact.

Compacts are typically implemented though the creation of administrative compact commissions. These compact commissions "create political institutions that help break down barriers that have prevented more effective water management" and have been described as "the greatest contribution to interstate water resource management."[1369]

Violations of compact provisions carry heavy consequences. In 2001 the Supreme Court awarded monetary damages and pre-judgment interest to Kansas, based on Colorado's violation of its

[1369] Karl Erhardt, *The Battle Over "The Hooch": The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 Stan. Envtl. L. J. 200, 216 (1992).

compact with the state. *Kansas v. Colorado*, 533 U.S. 1 (2001). The Court noted that "it is the State's prerogative either to deposit the proceeds of any judgment in the 'general coffers of the State' or to use them to 'benefit those who were hurt.'" *Kansas v. Colorado* at 10. See also, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (White, J.) (Court not limited to prospective relief, may also award money damages for past breach of Compact). In *Kansas v. Nebraska*, 135 S. Ct. 1042, 1056 (2015) (Kagan, J.), the Court found that "Nebraska showed reckless indifference as to compliance" with the compact and ordered Nebraska to partially disgorge benefits it derived by failing to deliver sufficient water. It ordered payment of $1.8 million, saying that this "relatively small disgorgement award suffices here," because Nebraska had taken action to correct the problem after the 2006 breach. *Kansas v. Nebraska*, 135 S. Ct. at 1058.

The first interstate compact allocating water in the West was the Colorado River Compact of 1922. Since then, interstate compacts have been frequently employed by states sharing common water resources.

To date, about two dozen interstate compacts have been authorized to allocate the waters of interstate streams among the states. The allocations typically are based either on an agreement to share the waters of the interstate stream on a percentage basis, or upon the agreement of one or more upper basin states to deliver a fixed amount of water to one or more lower states.[1370]

Compacts are thought to be permanent and inflexible allocations of water. One commentator, however, has offered an interesting argument suggesting that under some circumstances a state might succeed in revoking its ratification of a compact where it finds itself "shackled" by outdated assumptions. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105 (2003).

(3) Congressional apportionment (aka congressional allocation)

On rare occasions, two to be exact, the U.S. Congress has unilaterally allocated water among states. Unlike congressional approval of interstate compacts, this action may occur over the objection of affected states. Congress has the power to do so under its commerce power,[1371] and its actions override those of the states under the supremacy clause, which renders "congressional action the supreme law of the land, bind[ing] even unwilling states to the terms of congressional acts." Joseph L. Sax, *et al.*, *Legal Control of Water Resources* 731, 737 (2nd ed. 1991).

[1370] Two useful sources on the law of compacts are Frankfurter and Landix, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685 (l925); and Zimmerman and Wendell, *The Interstate Compact Since 1925* (Council of State Governments, 1951).

[1371] It had long been thought that Congress lacked the power to allocate water among states. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. Colo. L. Rev. 105, 173-74 (2003). In 1963, however, a sharply divided Supreme Court held that Congress has this power and exercised it in the Boulder Canyon Project Act. *Arizona v. California*, 373 U.S. 546, 565-66 (1963) (Black, J.).

The most notable congressional apportionment (also known as congressional allocation) came in the form of the Boulder Canyon Project Act enacted by Congress in 1928.[1372] The Act established a comprehensive scheme for apportioning the waters of the Colorado River among Arizona, California, and Nevada. Although the Act did not contain an express allocation of water, the U.S. Supreme Court ruled in 1963 that the intent of Congress was to make such an allocation. *Arizona v. California*, 373 U.S. 546 (1963) (Black, J.).

The only other congressional apportionment to date involved a division of the waters of the Truckee and Carson Rivers and Lake Tahoe between Nevada and California. Although technically enacted as a congressional apportionment, Congress acted on an agreement worked out between the states which had originally taken the form of a compact.

(4) Informal agreements

As an alternative to formal interstate compacts, states may elect to enter into less formal, cooperative agreements or understandings. Just as with an interstate compact, these agreements could take all manner of approaches to allocation of the resource. They could allocate water according to a formula. The formula might or might not include variables that change over time. More likely, however, there might be mere targets or no allocation at all. Instead, the agreement might establish procedural mechanisms aimed at promoting cooperation and/or dispute resolution. Or it might simply approach the subject incrementally, for instance, requiring some steps by each side (such as data gathering, the adjudication of water rights, the promotion of conservation, and the development of cooperative solutions like aquifer recharge). The agreements might even provide for changes in state law governing water rights, for instance, to promote greater efficiency and conservation. They could also address issues outside of water law, such as zoning and land use policy.

The key difference between this approach and an interstate compact is that it is easier and more flexible. Notably, this informal approach does not require congressional ratification or any special form of approval by the states. Thus, depending on what it sought to accomplish, it might take the form of something as informal as a memorandum of understating between state agencies (or even a handshake of the governors). It also has the flexibility to incorporate other entities, such as local governments, tribes, water users, environmental groups, and other non-governmental organizations.

The downsides to this approach include the following:

- It lacks the strong enforcement mechanisms that come automatically with an interstate compact. This approach relies in large part on each state's commitment to making the process work. Of course, states may build in whatever enforcement mechanisms they wish in the form of a contract. But questions remain about their enforceability. The ability of states to wiggle out of such informal agreements is both a strength and a

[1372] Boulder Canyon Project Act of 1928, ch. 42, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617(a)-717(t)). The Act became effective after further state and federal actions in 1929, and is sometimes referred to as the Boulder Canyon Project Act of 1929.

weakness. It gives states a chance to take their cooperation a step at a time, without making an ironclad commitment. And the fact that either state might walk away (and, perhaps seek an equitable apportionment instead) gives all parties an incentive to stay engaged.

- These agreements could be subject to challenge as a violation of the compact clause of the Constitution, which prohibits states from compacting without the approval of Congress. The more formal and substantive the agreement, the greater the risk of such a challenge.

- These agreements could also be challenged as a violation of the so-called dormant commerce clause, which precludes states from restricting interstate commerce. However, if the agreement was crafted in terms of promoting water conservation, it would probably survive the test established in *Sporhase v. Nebraska*. (See discussion below in section 20.B(5) at page 701).

(5) Unilateral restrictions on export: the dormant commerce clause

From time to time, states have sought to bar water rights that serve out-of-state water uses. Federal constitutional constraints severely constrain such "water hoarding."

The so-called dormant commerce clause of the U.S. Constitution has been interpreted to restrict the ability of states to regulate commerce. The leading case is *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.).[1373] The U.S. Supreme Court held that water was an article of interstate commerce, and that a state therefore may not unreasonably restrict its interstate use.[1374] The Court then struck down parts of Nebraska's water export statute which violated the "dormant commerce clause" of the U.S. Constitution. U.S. Const. art. I, § 8, cl. 3. Specifically, the Court voided Nebraska's absolute ban on water exports to "non-reciprocating" states, but upheld those provisions reasonably relating to the "conservation" of water. Thus, so long as restraints on exportation are expressed in terms of legitimate state concerns (which the Court found to include conservation), a limited preference for in-state use may not constitute an unconstitutional burden on commerce. In Nebraska's case, the Court commended the state's objective "to conserve and preserve diminishing sources of groundwater," ruling that "[t]he purpose is unquestionably legitimate and highly important" and that this purpose was "advanced" by the conservation requirements imposed on exporters of water.

[1373] *See also, City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983); *City of El Paso v. Reynolds*, 597 F. Supp. 694 (D.N.M. 1984); and *Linsey v. McClure*, 136 F.2d 65 (1943); s*ee also, American Trucking Ass'ns v. Michigan Public Service Comm'n*, 545 U.S. 429 (2005).

[1374] For a fuller discussion see, Christopher H. Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, 1 The Environmental Forum 28, Environmental Law Institute (1983); Steven E. Clyde, *State Prohibitions on the Interstate Exportation of Scare Water Resources*, 53 U. Colo. L. Rev. 529 (1982); Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. Colo. L. Rev. 347 (1985).

458 U.S. at 954-55. Accordingly, for Idaho to make the restrictions on export stick, it was necessary to add the water conservation test to the requirements for all new and transferred water rights.

See discussion of Idaho's export restrictions in section 16 at page 259 and section 20.C(2) at page 705.

(6) Transfer of water rights across state lines

In theory, water may be moved across state lines either by appropriation of new rights in one state for use in another or by transfer of existing rights to a place of use in another state. Both are rare. They will be more common in the future, however, as supplies tighten and water markets become more sophisticated. If used properly, they could contribute to greater efficiency of use in the management of a common resource. There is not much track record and considerable uncertainty as to how such appropriations or transfers would be accomplished and administered.

Given the limited availability of unappropriated water and the benefit of a senior priority date, most interstate transfers will probably entail transfers of existing rights. Most interstate transfers involve retaining the point of diversion in the original state and moving the water (via pipeline or other delivery system) to a place of use in a new state.

Suppose, for example, that an Idaho municipality sought to expand its service area into another state. Recently, for example, the City of Moscow explored delivering water pumped from its wells in Idaho to customers immediately across the state line in Washington. Presumably, as a matter of Idaho water law, the city would not need to seek a transfer of its municipal water rights to do this, assuming that the new service territory falls within the predictably expanding municipal service area. (See discussion of expanding service areas in section 23.D(5) at page 346.)[1375]

If, however, a transfer application were required for a new place of use outside of Idaho, the water right holder would need to address the factors set out in Idaho's water export statute (see discussion in section 20.C(2)(a) at page 705.) and, if applicable, Idaho's out-of-basin rules (see discussion in section 20.C(3) at page 709). That, presumably, would be the end of the matter. Unlike transfers involving a transfer of the point of diversion to outside of the state, relatively few administration issues would be presented. So long as the diversion remains in Idaho, IDWR would retain ample authority to monitor and administer the right. One issue that might arise would be ensuring that the use was not improperly enlarged or used for unauthorized purposes in the new out-of-state location. Presumably, IDWR could condition the right to require reporting of use in the neighboring state.

It is far more complex and problematical to move both the point of diversion and place of use from one state to another. Suppose, for example, that the developer of a new subdivision or

[1375] On the other hand, there is a separate question as to whether Idaho cities have the authority—as a matter of municipal law—to serve customers outside of the state. A bill to clarify that they do have this authority was considered by the Legislature in 2009, but was not enacted. S.B. 1002 (2009).

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Printed 6/23/2023 9:09 AM

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commercial/industrial facility in Idaho purchased existing water rights used in Washington and sought to transfer those rights across the state line. If the water flowed from a stream in Washington into a river in or bordering Idaho (or if the water could be diverted from an aquifer common to both states), the developer might seek a new point of diversion in Idaho. Thus, the transfer might then seek to change the point of diversion to the other side of the Snake or to a well in Idaho.

Assuming the transfer survived any applicable water export rules in Washington and was approved by that state, how would such a right be administered in Idaho? This has never been attempted in these states. The authors are advised that IDWR is skeptical that such a transfer (involving moving an out-of-state point of diversion to a location in Idaho) would be recognized in Idaho.[1376] One can only ponder how such a transfer might work. The discussion that follows illustrates the difficulties of administration.

Presumably, the holder of the transferred right could call upon Washington water authorities to curtail junior users in that state if those uses injured the right now diverted in Idaho. This, however, might trigger factually complex defenses from the Washington users in which they contend that the injury is caused not by them but others in Idaho.

Putting aside those evidentiary issues, it may be that the holder of the transferred right will have no motivation to seek such administration. Suppose, for example, the water was originally diverted from a tributary of the Snake River in Washington and is now diverted from the Idaho side of the Snake. Juniors in Washington might then begin to divert from the tributary in a manner that would have interfered with the water right where it was before the transfer. But the current user may not care, because there is plenty of water physically available in the Snake River. Essentially, the Washington juniors would be stealing water from downstream Snake River water users (including Idaho water rights for hydropower and instream flow). What remedies would the downstream Idaho water right holders have? Could they curtail the junior Washington pumpers? Should the right be conditioned to clarify how administration in Washington would occur?

Suppose that the holder of the transferred right diverts more water in Idaho than is allowed under the Washington right. If the point of diversion has moved to Idaho, Washington would have no jurisdiction to curtail the unlawful diversion. Plainly, Idaho could curtail the unlawful diversion, if it wished to. But suppose for some reason it did not. Could the State of Washington (or individual Washington or Idaho water users) initiate administrative or judicial proceedings in Idaho to curtail the illegal use? Presumably the answer is yes, but there is no precedent for this.

What if other water users in Idaho began to interfere with the new water right? For example, suppose the Washington right was transferred to a well on the Idaho side. Suppose further that the holder of the Washington right then complained to IDWR that other Idaho pumpers were interfering with their new well in Idaho. How would IDWR respond to such a call? Assuming that IDWR determined it had authority to protect the Washington right against Idaho juniors, would IDWR simply

[1376] Telephone conference between Phillip J. Rassier, then Chief Counsel, IDWR and Christopher H. Meyer (Aug. 25, 2009).

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integrate the Washington priority date into the administration of priorities in Idaho? What if this "slotting in" resulted in Idaho rights now being curtailed? Should the right be subordinated to all Idaho rights existing at the time of the transfer into Idaho? Should the Washington right be allowed to limit further development of water rights in Idaho? This example illustrates the inherent difficulty in allowing one state to approve an out-of-state transfer of the point of diversion without administrative involvement by the other state.

These questions are offered simply to identify some of the issues that might be raised in such a point-of-diversion transfer. These examples also shed some light on why IDWR may be reluctant to allow this "can of worms" to be opened.

(7) Private curtailment of water rights in other states

In a handful of cases brought by private parties, federal courts have enforced priorities of water rights across state lines. The most notable is the decision by Justice Holmes in *Bean v. Morris*, 221 U.S. 485 (1911). In this case, the holder of a water right in Wyoming sued an upstream diverter with a more junior priority in Montana. The Court enforced the senior priority of the Wyoming water right holder, enjoining the Montana diverter from interfering with the senior diverter. In reaching its decision, the Court relied on the fact that both states applied the same prior appropriation doctrine and that neither state has adopted legislation suggesting that they would not honor priorities of neighboring states.

This decision is consistent with the result in *Wyoming v. Colorado*, 259 U.S. 419 (1922), in which the Court allocated water between two prior appropriation states on the basis of first in time. But it is inconsistent with the result in *Nebraska v. Wyoming*, 325 U.S. 589, 599, 617-18 (1945) and every equitable apportionment case since, all of which have recognized that priority of use is but one factor to consider, e.g., *Colorado v. New Mexico*, 459 U.S. 17613 (1982), *appeal after remand*, 467 U.S. 310 (1984).

It bears emphasis that this was not an equitable apportionment case brought by one sovereign against another. Rather, it was initiated by private parties. Had there been any sort of allocation in place (whether by compact, decree, or congressional allocation), that would have overridden the result here.

C. Interstate and inter-basin allocation in Idaho

(1) Idaho compacts

Idaho is a party to an interstate compact with the states of Utah and Wyoming on the Bear River located in the southeast corner of the state. The Amended Bear River Compact was ratified by the three states in 1979 and approved by Congress on February 8, 1980. Pub. L. 96-189, 94 Stat. 4; Idaho Code § 42-3402. The compact is actively administered by the Bear River Commission made up of representatives appointed by the governors of the three states and a Federal representative.

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Idaho also is a party to the Snake River Compact with the State of Wyoming which allocates 96 percent of the waters of the Snake River for use by Idaho and 4 percent for use by Wyoming upon satisfying certain storage replacement provisions. Act of March 21, 1950, 64 Stat. 29; Idaho Code § 42-3401.

In 1963, Idaho ratified the Columbia River Interstate Compact among the states of Idaho, Montana, Oregon and Washington. 1963 Idaho Sess. Laws, ch. 818. Not all of the states ratified the compact. Idaho repealed its ratification of the compact in 1975. 1975 Idaho Sess. Laws, ch. 29. Some discussions have occurred in recent years concerning the prospects for renewing the interstate compact initiative as a way of addressing the numerous fish and water resource issues among the Columbia River states.

(2) Idaho's statutory water export restrictions

(a) Idaho Water Export Act

(i) Enactment in 1915 and amendments in 1951, 1990, 1992, and 2014

Idaho's Water Export Act may be traced to legislation enacted in 1915 that was directed solely to water exports to Oregon. 1915 Idaho Sess. Laws, ch. 111 (now codified at Idaho Code §§ 42-401 to 42-408).

Minor amendments were made in 1951. 1951 Idaho Sess. Laws, ch. 80.

In 1990, the Idaho Legislature enacted legislation that replaced all of the key substantive provisions of the Water Export Act. 1990 Idaho Sess. Laws, ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)). The 1990 amendment made the act applicable to all new appropriations or transfers of existing rights involving the use of Idaho water in any other state.

In 1992, out-of-state water bank rentals were made subject to the six factors set out in Idaho Code § 42-401(3). 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

The Act was amended again in 2014 to remove the requirement of "transportation" of water across a state line in order make it applicable to recharge of an interstate aquifer in North Idaho.[1377] 2014 Idaho Sess. Laws, ch. 245.

[1377] Prior to the 2014 amendment, the Act was made applicable to the "transportation and use" of water out of state. At the time of the 1990 amendment, the Legislature was concerned that pipelines carrying Idaho water to Las Vegas or elsewhere might be constructed—hence the reference to "transportation" of water. The 2014 amendment removed these references, making the legislation applicable to any out-of-state use, even if no transportation of water was involved. The bill's Statement of Purpose explained that the amendment was intended to ensure that the act would apply to ground water recharge projects in the Rathdrum Prairie aquifer in North Idaho that would benefit out-of-state water users. In other words, the amendment clarified that it is not necessary to physically "transport" the water to out-of-state uses for the act to apply.

(ii) Structure of Act

The 1990 amendment to the Water Export Act included two primary components: (1) water conservation requirements applicable to all water right applications and (2) six special requirements (or "factors") to be considered with respect to out-of-state water uses.

The 1990 amendment added a requirement applicable to all water right appropriation and transfer applications (not just those for out-of-state uses): The applicant must show that the proposed use is consistent with (or not contrary to) "the conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f), 42-222(1).

This water conservation requirement (and all other criteria set out in Idaho Code 42-203A(5)) were also made applicable to all out-of-state water use applications. Idaho Code § 42-401(3). Note that this has the effect of making both the 42-203(5) criteria (which are ordinarily applicable only to permit applications) applicable to out-of-state transfers as well.

The 1990 amendment to the Water Export Act repealed the 1915 measures aimed at water use in Oregon,[1378] replacing them with a set of rules applicable to all appropriations and transfers[1379] for use of water out-of-state.

Under the amended Act, applicants for out-of-state uses are required to follow special procedures and to satisfy six additional tests (or "factors"). 1990 Idaho Sess. Laws, ch. 141, § 3 (codified at Idaho Code § 42-401(3)).

This structure was designed to bring the State into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the federal commerce clause for the circumstances under which states

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[1378] The 1990 amendment to the Water Export Act repealed former Idaho Code §§ 42-401, 42-408, 42-409, 42-410, and 42-411. 1990 Idaho Sess. Laws, ch. 145, § 2. These 1915-vintage requirements included a reciprocity requirement similar to the one struck down in *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), discussed below, 1915 Idaho Sess. Laws, ch. 111, § 8 (later codified, before being repealed, at Idaho Code § 42-408).

[1379] The Water Export Act includes an oddly worded provision stating: "Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho for use outside the state or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for a permit to do so, subject to the requirements of chapter 2, title 42, Idaho Code." Idaho Code § 42-401(2) (as amended) (emphasis added). The requirement to file an application for a "permit" makes sense for a new appropriation, but not for a transfer. Read literally, the language seems to require that a water user seeking a change in place or purpose of use should file an appropriation application rather than a transfer application. That would make no sense and is probably a drafting error. In any event, the Department has processed and approved transfer applications pursuant to the Water Export Act. See, e.g., James Cefalo, Memorandum at 1, *In the Matter of Transfer Application No. 81750* (Apr. 19, 2019).

may restrict water exports to other states. The basic idea is that restrictions on out-of-state exports are constitutional only if undertaken in the context of even-handed water conservation policies. This explains the addition to water conservation requirements for all new appropriations and transfers.[1380]

(iii) Six additional factors applicable to water exports

In addition, the Water Export Act sets out six additional "factors" for the IDWR Director to consider in the context of any water export application (permit or transfer). See the table set out in section 20.C(2)(a)(iv) at page 707.

These factors are aimed generally at evaluating the relative availability of water in the sending and receiving states—something that is inherently nebulous and subjective. It is unclear how they would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director broad discretion. For the applicant, their nebulous nature translates to an increase uncertainty and transaction costs.

(iv) Summary of applicable criteria and factors

As noted above, the Water Export Act makes the "permit" criteria under section 42-203A(5) applicable to all out-of-state water exports, including transfers.

In addition, out-of-state exports are subject to the criteria set out in Idaho Code § 42-202(1) applicable to all transfers.[1381] These two sets of criteria overlap to a large extent, as summarized in the table below.

[1380] Compliance with *Sporhase* is also reflected in the Act's inclusion of a policy statement to the effect that Idaho is "dedicated to the conservation of its public waters" and "recognizes that under appropriate conditions the out-of-state use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters." Idaho Code § 42-401(1).

[1381] This assumes it is correct to file a transfer application to change an existing right's place or purpose of use from a place in Idaho to a place outside the state. See footnote 1379 at page 706.

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Application for appropriation criteria (Idaho Code § 42-203A(5))	Transfer application criteria (Idaho Code § 42-222(1))
(a) that it will reduce the quantity of water under existing water rights, or	[a] no other water rights are injured thereby, [b] the change does not constitute an enlargement in use of the original right,
(b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or	
(c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or	
(d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or	
(e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or	[c] the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code,
(g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates;	[d] the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and
	[e] the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

In addition to satisfying the criteria above, all applications for out-of-state uses are subject to the Director's consideration of the following six factors:

Out-of-state use factors (Idaho Code § 42-401(3))
(a) The supply of water available to the state of Idaho;
(b) The current and reasonably anticipated water demands of the state of Idaho;
(c) Whether there are current or reasonably anticipated water shortages within the state of Idaho;
(d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
(e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
(f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

(3) Basin-of-origin protection (avoiding harm to local economy)

The Idaho Water Code contains two provisions providing basin-of-origin protection.

The first was enacted in 1980 and cosmetically amended in 1987. 1980 Idaho Sess. Laws, ch. 186; 1986 Idaho Sess. Laws, ch. 347 (S.B. 1353) (codified at Idaho Code § 42-226). It applies only to new, large appropriations of ground water for use outside the "immediate ground water basin as defined by the director." It applies only to applications seeking water for irrigation of 5,000 acres or more or for a total volume of 10,000 acre-feet per year. Such a permit application requires special approval by both IDWR and the Idaho Legislature, based on "due consideration to the local economic and ecological impact of the project or development."

The second basin-of-origin protection was added in 2003 as part of the "local public interest" legislation. H.B. 284, 2003 Idaho Sess. Laws, ch. 298. It is codified in multiple places: Idaho Code §§ 42-203A(5)(g) (appropriations), 42-222(1) (transfers), 42-240(5) (exchanges), 42-1763 (water bank). This protection, it appears, was aimed at protecting local areas from "Owens Valley" type water transfers that deprive a local community of its economic base.[1382] Thus, unlike the local public interest test, it does not call for a weighing and balancing of various harms and benefits. It focuses on one thing only: the avoidance of harm to the economy of the area in which the water is diverted.

In the case of an application for appropriation, the statute provides that when water is moved "outside of the watershed or local area where the source of water originates," the Director will consider whether it will adversely affect the local economy of the originating watershed or local area. If the Director finds such an effect, the Director may approve, deny, approve in part, or condition the permit. Idaho Code § 42-203A(5)(g).

In the case of a transfer, the language is phrased differently, stating that the Director "shall approve" the change so long as the Director finds "the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates." Idaho Code § 42-222(1).

Arguably, the language in the appropriation section is permissive while the language in the transfer section is mandatory. However, it is unlikely that the different structure of the two mandates was intended to distinguish the Director's responsibility or change the standard to be met. Rather, it

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[1382] Owens Valley was a once thriving agricultural area that was largely dewatered by the Los Angeles Canal completed in 1913. The plot of the movie *Chinatown* centers on this water grab.

"In 1963 the Los Angeles Department of Water and Power suggested that 2.4 million acre feet of water should be diverted every year from the Snake River near Twin Falls to the Colorado River system to increase the supply of water to southern California and Arizona. Idaho responded quickly, amending Article XV in 1964 for the purpose of creating an Idaho water plan. The goal was to put all of Idaho's water to work for Idaho so that none would be left for Los Angeles." Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Advocate 20, 20 (Dec. 2010) (footnote omitted).

appears that the different wording was simply a function of how the provision was grafted onto the existing language of the two sections.

(4) Interstate allocation in the Spokane – Coeur d'Alene area

(a) The Spokane River and the SVRP Aquifer

The Spokane Valley Rathdrum Prairie Aquifer underlies the Spokane River and areas north of Coeur d'Alene Lake in Washington and Idaho. The aquifer is known as the Spokane Valley Aquifer in Washington and the Rathdrum Prairie Aquifer in Idaho. It is referred to collectively as the Spokane Valley Rathdrum Prairie Aquifer or SVRP Aquifer.

In 1978, the SVRP Aquifer was designated as a "sole source aquifer" providing drinking water for over 400,000 people in this region, including the cities of Spokane, Spokane Valley, Liberty Lake, Post Falls, and Coeur d'Alene. The aquifer also feeds the Spokane River in Washington, which is experiencing difficulties in meeting minimum flow requirements during the summer months. These instream flows are needed to protect water quality, fisheries, and recreation.

A peculiar geologic feature of the aquifer is that the Spokane River is perched above the aquifer in Idaho, but not in Washington. Thus, ground water diversions from the SVRP Aquifer in Idaho have no impact on river flows within Idaho. But they are believed to reduce river flows where the aquifer is hydraulically connected to the river downstream in Washington.

(b) Allocation between Washington and Idaho

Unlike other interstate water conflicts, the tensions over water allocation on the Spokane River are not driven by unmet consumptive water rights in the downstream state. By and large, surface water rights on the Spokane River in Washington are being met. Rather, the conflict is driven by water quality and instream flow needs in Washington. This includes, notably, concerns over meeting the TMDL (total maximum daily load) requirements imposed under the Clean Water Act. It also includes concerns about maintaining fisheries and white water recreational opportunities.

There are four possible forums for resolving these disputes:

- Either Washington or Idaho could initiate an original jurisdiction lawsuit before the U.S. Supreme Court seeking an equitable apportionment of water. Such a lawsuit would be tried before a Special Master appointed by the Supreme Court. The U.S. Supreme Court, however, would have the last say. This is considered the most "brute force" approach. It typically results in a fairly arbitrary division of water between the states. Since there is little clear precedent (other than general equitable principles), outcomes are hard to predict and therefore dangerous from both sides' perspectives

- The two states could resolve their differences by entering into a formal interstate compact, pursuant to the U.S. Constitution. This would require the approval of the U.S. Congress. It appears that Idaho and Washington are not interested in pursuing this

approach, because of a concern that Congress might widen the scope of the discussion to address issues beyond those contemplated by the states (such as endangered species). To date, state leaders have insisted that they prefer to resolve these water allocation issues without federal involvement (other than funding of studies).

- The states could seek a congressional allocation of water between the two states via federal legislation. However, this approach would entail the same federal involvement that appears to be problematical in the context of interstate compacts.

- The two states could enter into a less formal agreement (something short of a congressionally-approved compact). Such an agreement might take any form, from a contract to a memorandum of agreement. It would not necessarily set out a fixed formula for allocation. Instead, it might establish procedural mechanisms, set out broad criteria and goals, provide for additional fact-finding, and the like. To date, the two states have expressed a strong preference for this approach. This is reflected in the cooperative effort in the SVRP Study. Of course, were this approach to fail, either state could always fall back to the first option (equitable apportionment litigation). Thus, the first option remains a hammer driving the parties to make the cooperative approach work.

(c) The bi-state aquifer study

In the mid-1990s, the State of Washington imposed a de facto moratorium on new ground water appropriations in the Spokane Valley Aquifer.

In 2001, two applications were filed seeking huge ground water appropriations from the Rathdrum Prairie Aquifer in Idaho for proposed energy facilities.[1383] In 2002 IDWR denied the applications as being inconsistent with the "conservation of water" test. Idaho Code §§ 42 203A(5)(f), 42-222(1). Nevertheless, concern was aroused by these cases over the extent of water available.

In 2003, IDWR declined a request to impose a moratorium on new water appropriations in Idaho.

In the same year, the U.S. Geological Survey, IDWR, the Washington Department of Ecology, the University of Idaho, and Washington State University launched the Bi-State Aquifer Study to evaluate the SVRP Aquifer. The $3.5 million study resulted in the creation of a ground water model showing the hydrological connection between the SVRP Aquifer and the Spokane River. Thus, for the first time, questions about how the river and aquifer interact may be answered with a high degree of scientific certainty.

On May 8-9, 2007, the USGS and the other participants released reports on the Bi-State Aquifer Study in two days of meetings in Spokane Valley. One report (Scientific Investigation Report 2007-

[1383] Application for Water Right No. 95-09086 by Kootenai Generation LLC; Application for Water Right No. 95-09069 by Cogentrix Energy, Inc.

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5044) described the ground water model. The other (Scientific Investigation Report 2007-5041) described the hydrogeologic conditions and water budget.

At the risk of oversimplification, the studies concluded that the SVRP Aquifer is very productive and is in hydrologic balance. In other words, withdrawals from the aquifer are in overall balance with natural inputs. In other words, ground water declines that are experienced from time to time are driven by short-term climatic conditions (e.g., drought), rather than ground water mining.

On the other hand, the study confirms that ground water pumping in both states reduces Spokane River flows in Washington. At this point, however, there appears to be reason for cautious optimism that the parties can build on the model and on cooperative efforts to date to find solutions to those problems. It is Idaho's position that there is not an overall water shortage in the basin. Rather, there are timing issues, notably in July and August, when the Spokane River drops below instream flow targets. This suggests that practical, on-the-ground solutions merit exploration.

Examples of possible strategies for improving instream flows in Washington might include the following:

- The City of Spokane could move its production wells further from the river. Today, they are located so close to the river that they are literally pumping river water and contributing to summer instream flow violations. Moving the diversion points, say, six or seven miles away might spread out the impact of diversion over time lessening the impact of peak diversion during this critical time.

- Additional water could be released from Lake Coeur d'Alene during the summer. This is a simple solution from a Spokane-oriented perspective. But it would have very significant downside impacts on interests around Lake Coeur d'Alene. There are also constraints related to lake level agreements and requirements and the interests of Avista in connection with its Post Falls Dam operation. Perhaps more significantly, the high summer temperature of the lake water can be a problem. Some research suggests that releases of high temperature water from the lake may do more harm than good to downstream fisheries.

- It may be that the SVRP Aquifer could be artificially recharged with river water during periods when flows exceed minimum flow levels. This could entail either direct diversion from the river or, conceivably, pumping from the City of Spokane's production wells (which, as a practical matter) pump river water. Thus, the SVRP Aquifer could be used as an underground reservoir, recharge of which would increase base flows into the river during the critical summer months.

At this point, ideas like these are only ideas. It is premature to suggest that they will work. And there are other reasons that they would be unacceptable. They are listed here solely to give a sense of the sort of things that might be explored. In any event, much work lies ahead to better understand

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which strategies could be practical and effective. Then there is the question of how to fund them, and how to mitigate adverse impacts and tradeoffs that may be entailed.

(d) Complicating factors

(i) Northern Idaho Adjudication

As a practical matter, this adjudication process is likely to force a number of skeletons out of the closet. Indeed, that is its purpose. Water rights that people have held (or claimed) for years may be disallowed. Others will be substantially cut back. At the end of the process, the State will have, for the first time, a comprehensive database of virtually all water uses in the region. This in turn should assist cooperative efforts to manage the water resource system.

Although having more data on the table can cut both ways, on balance it will probably strengthen Idaho's hand vis-à-vis Washington in the context of interstate disputes. One of the things that the Supreme Court looks at in equitable apportionment decrees is the extent to which states have undertaken efforts to conserve and control water, and to prevent waste. The adjudication will count for something on that score. On the other hand, it will put data into the hands of everyone, and some of it could be used to support arguments by Washington against Idaho users.

A key question facing Idaho and Washington is how the pending adjudication of water rights in north Idaho (and the possible future adjudication of rights in Washington) could factor into equitable apportionment litigation between the states. Plainly, if interstate litigation were to be initiated, the Court would not simply tote up how much water Idaho has adjudicated to its users and award that to Idaho. On the other hand, the adjudication of rights would increase the state's ability to document its need for water. It could also be used to bolster the argument that the state is committed to weeding out paper water rights, enforcing limitations, conditions and mitigation requirements, and generally promoting water conservation. It would appear that these considerations are not lost on Washington, which, as of this writing, is gearing up toward an adjudication of rights on its side of the border. At this point it is in the "pre-adjudication" phase involving computer modeling, data collection, etc.

(ii) Avista

Avista Corp. is a private utility serving North Idaho. It holds senior water rights in connection with its Post Falls Dam hydropower plant. Its most senior rights on this project are two beneficial use claims with January 1, 1907 priority dates. Water Right No. 95-4518 is a hydropower right for 4,250 cfs. Water Right No. 95-9115 is storage right for 164,440 acre-feet per annum. These rights work in conjunction. The Company also holds two smaller rights for the project with less senior priority dates (Nos. 95-9119 and 95-8003).

These water rights will be adjudicated in the upcoming Northern Idaho Adjudication. Moreover, Avista's Post Falls Dam project is now being relicensed by the Federal Energy Regulatory Commission ("FERC") which has the power to impose conditions affecting water releases.

These conditions (Avista's water rights and subsequent FERC-imposed license conditions) are a sleeping dog that could substantially complicate the water picture. The Post Falls Dam power facility frequently operates substantially below capacity, yet the company has never placed a "call" on upstream junior water rights and has never expressed any inclination to do so. Such a call could significantly disrupt existing and anticipated future development throughout the Coeur d'Alene area. It could also have significant effects on lake levels in Lake Coeur d'Alene—a highly sensitive subject.

On the other hand, Idaho Power Company was in the same position in the 1970s, holding senior water rights without making a call on juniors. The entire Snake River Basin Adjudication in the lower part of Idaho was driven by a lawsuit in the 1970s which forced Idaho Power Company to assert its hydropower water rights. That litigation was brought by ratepayers who opposed Idaho Power Company's plan to build a new coal fired power plant. They complained that the company should fully exercise its existing hydropower rights before constructing new facilities. That litigation was ultimately resolved in the so-called Swan Falls settlement, which subordinated a portion of the company's water rights and mandated the initiating of the Snake River Basin Adjudication to adjudicate all water rights in the basin.

Could such a thing happen with Avista? In theory, it could. However, there are several reasons to think it will not.

- First, Avista has shown no interest in such an assertion. Indeed, doing so would create a public relations nightmare for the company. (Then again, Idaho Power was also forced into asserting its water rights.)

- Second, unlike Idaho Power's situation, the Post Falls hydropower project is a relatively small component of Avista's power production system. Thus, not as much is in play.

- Third, Avista's operations are constrained by long-established rules, policies, and statutes governing lake levels in Lake Coeur d'Alene.

- Fourth, and perhaps most importantly, Avista's senior rights are not licensed rights, but mere "beneficial use" claims. In other words, there is no piece of paper evidencing a determination of this water right; they are simply assertions by the company that they have always used these rights in this manner. It is entirely possible that when these rights are adjudicated in the Northern Idaho Adjudication, they will be deemed to have been subordinated to other water uses. If such a subordination occurred, however, presumably it would be a subordination to existing Idaho users, not to future Idaho development or to make new water available to solve problems in Washington.

(iii) Coeur d'Alene Tribe

The U.S. Supreme Court ruled in 2001 that the Coeur d'Alene Tribe owns the bed of the southern third of Lake Coeur d'Alene. *Idaho v. United States*, 533 U.S. 262 (2001).

The Tribe's claims were based on a complicated history of treaties and other agreements as well as unilateral reservations and other actions by the United States:

- On June 14, 1867, President Andrew Jackson issued an Executive Order establishing a reservation for the Coeur d'Alene Tribe in an area known as Hangman Valley to the south of Lake Coeur d'Alene. The boundaries are disputed, but it included, at most, a tiny sliver of Lake Coeur d'Alene. The Tribe never accepted this reservation.

- In 1873, following further negotiations, the United States reached an agreement with the Tribe on a new reservation of 598,000. This included most of Lake Coeur d'Alene, the Coeur d'Alene River and the St. Joe River. The agreement also provided compensation to the Tribe. This agreement was reflected in a letter dated November 4, 1873 from the Commissioner of Indian Affairs to the Secretary of the Interior.

- In 1886, the Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation."

- In 1887 the Tribe and the United States reached an agreement in which the Tribes ceded all claims outside the proposed reservation in the 1873 agreement. This was not binding on either party, however, until ratified by Congress.

- The Congress thereafter authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."

- In 1889 the parties reached an agreement whereby the Tribe ceded the northern third of the 1873 reservation to the United States. This included roughly the northern two-thirds of the Lake. The agreement was not binding on either party until ratified by Congress.

- On March 3, 1891, Congress ratified the 1887 and 1889 agreements.

- In 1894, the Tribe agreed to cede to the United States a one-mile wide strip of the reservation running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession").

- In 1908, Congress authorized the conveyance to Idaho of land surrounding three small lakes adjacent to southern extreme of the Lake Coeur d'Alene. This later became Heyburn State Park.

The Supreme Court did not address water rights in the 2001 decision. However, the United States has now made federal reserved rights claims on behalf of the Tribe in the pending Coeur d'Alene Spokane River Basin Adjudication ("CSRBA"), presumably based on their ownership of the lake and other treaty rights.

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The Nez Perce and other tribes have made similar federal reserved water right claims in Idaho, all of which have been settled. Speaking practically, one would reasonably expect the same to occur here, after a period of saber rattling by both sides. At the end of the day, the Tribe's interest in maintaining the status quo of lake operations in Lake Coeur d'Alene are not that different from other developers and property owners. While the Tribe's wild card will remain in play for some time, the end game, one might hope, may not result in substantial reallocation of rights or otherwise impair ongoing cooperative efforts between the two states to allocate water and manage the SVRP Aquifer cooperatively within existing legal structures.

(iv) Municipal water rights

In 2003 the State of Washington enacted H.B. 1338 validating what are known in Washington as "inchoate" water rights for municipalities. These rights allow municipalities to grow into larger uses over time. These rights are now being challenged in Washington courts. Thus, there is potential for significant new municipal demand in Washington, despite the de facto moratorium on new water rights.

Meanwhile, Idaho has long recognized the right of cities to hold water rights for reasonably anticipated future needs. See discussion in chapter 23 beginning on page 327.

21. NAVIGABILITY, TITLE, AND PUBLIC ACCESS TO STREAMS

Ownership of the bed and banks of rivers depends on whether the stream is navigable. If navigable, they are owned by the state; if not, the riparian landowner owns to the thread of the stream. This determination is made based on circumstances existing at the time of statehood.

> Upon the admission of a state to the Union, title to lands underlying navigable waters within the state passes from the United States to the state as incident to the transfer to the state of local sovereignty. Therefore, title to the submerged and submersible lands within the state vests in the state subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.

Oregon v. Riverfront Protective Ass'n, 672 F.2d 792, 794 (9th Cir. 1982).

The definition of navigability has changed over time. Under English common law, the Crown owned the bed and banks of all navigable waters affected by the ebb and flow of the tide. *Martin v. Waddell*, 41 U.S. 367 (1842). While that rule was followed briefly in the United States, it was soon recognized that the ebb and flow test was better suited to the English island than to the vast United States. Accordingly, the U.S. Supreme Court declared that "rivers must be regarded as public navigable rivers in which are navigable in fact" even if "many hundreds of miles" from the sea. *The Daniel Ball*, 77 U.S. 557, 563 (1870).[1384]

Over the years, different navigability tests have emerged for different purposes.

> The term "navigability" has many legally distinct applications. (1) It may determine title to river and lake beds. (2) It has been the touchstone of Congressional jurisdiction over waters via the Commerce Clause. (3) It embodies the navigation servitude, a modern declaration of the common law right of public access to the surface of waters. In addition, (4) admiralty jurisdiction in federal courts flows from the general concept of navigability. The use of the term "navigability" for these four purposes, however, does not necessarily mean that each is co-extensive with the other. Therefore any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of "navigability" was invoked in a particular case.

United States v. Kaiser Aetna, 408 F. Supp. 42, 48-49 (1976), *aff'd*, 444 U.S. 164, 170-71 (1979) (the Supreme Court spoke approvingly of this passage) (footnotes and citations omitted). Thus, a river might be navigable for one purpose and not navigable for another.

[1384] "*The Daniel Ball* sounded in admiralty, but the Supreme Court has adopted the same definition in 'navigability for title' cases." *Oregon v. Riverfront Protective Ass'n*, 672 F.2d 792, 794 (9th Cir. 1982).

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Over time, tests for navigability have tended to become broader, particularly the test for commerce clause purposes.[1385] It has been observed, tongue in cheek, that "a navigable river is any river with enough water in it to float a Supreme Court opinion."[1386]

In contrast, the test of navigability for title purposes has remained relatively stable since adoption of the "navigable in fact" test. After a false start, Idaho's Supreme Court recognized that the state holds title to the bed and banks of navigable streams. *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (reversing *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908)).[1387] The Idaho Supreme Court has construed the "navigability in fact" test for title purposes to mean that streams are deemed navigable if they are "used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to market." *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908) (other aspects of this case have been overruled, but this point remains good law).

This test is now codified.[1388] The Legislature has also defined the term "navigable lake."[1389]

In addition to establishing title in the State, navigability carries with it the right of public access. This right of access is based on both federal law and state law.

While the State of Idaho owns the bed and banks of navigable rivers, it may dispose of them as it sees fit—but only subject to the right of the public to "the use navigable lakes, rivers, or streams as public highways over which every citizen has a natural right to carry commerce, whether by ships, boats, or the floating of lumber, having due consideration and reasonable care for the rights of individuals, as well as the public, in the common use of such public highways." *Callahan v. Price*, 26 Idaho 745, 146 P. 732, 735 (1915).

[1385] E.g., *United States v. Appalachian Power Co*., 311 U.S. 377 (1940) (expanding the navigability test beyond the "navigable in fact" test). See also discussion of the broad definition of navigable waters under the Clean Water Act in section 17.A(2) at page 647.

[1386] Charles Meyers & Daniel Tarlock, *Water Resource Management* 240 (1971).

[1387] The Idaho Supreme Court declared this as a matter of state law. *Callahan*, 26 Idaho at ___, 146 P. at 734-35. This appears to be inconsistent with the U.S. Supreme Court's declaration that this is a question of federal law. *United States v. Oregon*, 295 U.S. 1, 14 (1935) ("Since the effect upon title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the state under which the lands lie are navigable, is a federal, not a local one.") *Callahan* notwithstanding, it is universally recognized that navigability for title is a federal test. "Determining whether waterways are 'navigable' for title under this test is a matter of federal rather than state law." Jas. Jeffrey Adams & Cody Winterton, Navigability in Oregon: Between a River Rock and a Hard Place, 41 Willamette L. Rev. 615, 623 (2005).

[1388] Idaho Code § 36-1601(a).

[1389] Idaho Code § 58-1302(a). This was amended in 2006 by H.B. 639 to clarify that privately owned, man-made reservoirs are not considered navigable lakes. 2006 Idaho Sess. Laws, ch. 111 (2006).

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This right of public access was historically viewed in a commercial sense. However, the right of the public to access navigable streams for recreational purposes was confirmed in *Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974). The result was codified in 1976:[1390]

> (b) Recreational Use Authorized. Navigable rivers, sloughs or streams within the meander lines or, when not meandered, between the flow lines of ordinary high water thereof, and all rivers, sloughs and streams flowing through any public lands of the state shall be open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation – boating, swimming, fishing, hunting and all recreational purposes.
>
> (c) Access Limited to Navigable Stream. Nothing herein contained shall authorize the entering on or crossing over private land at any point other than within the high water lines of navigable stream except that where irrigation dams and other obstructions interfere with the navigability of a stream, members of the public may remove themselves and their boats, floats, canoes or other floating crafts from the stream immediately below such obstruction at the nearest point where it is safe to do so.

There is also a federal basis for the right of public access.[1391] This federal right is inherent in the "navigation servitude" which derives from the Commerce Clause of the federal Constitution. The "navigation servitude" exempts the federal government from the obligation to pay compensation for federal actions which would otherwise constitute compensable takings when the federal action is taken pursuant to the navigation power. *Arizona v. California*, 283 U.S. 423 (1931). However, the navigation servitude is more than a federal defense to a takings claim; it also carries with it an inherent public right of access to navigable waters.

In 1979, however, the U.S. Supreme Court made clear that the public right of access is not coextensive with the reach of the commerce power. *Kaiser Aetna* posed the question whether the owner of a formerly non-navigable lagoon must provide public access when the owner converted the lagoon into a marina by deepening it and opening it to a navigable bay.[1392] Here the Court concluded that the marina was navigable for commerce clause purposes (and thus within the reach of federal regulation), but not navigable for navigation servitude purposes (thus requiring the government to compensate the owner for the obligation to provide public access). Thus, the Court determined that the federal government had the power to provide public access, but would have to compensate the owner of the marina if it chose to exercise that power:

[1390] Idaho Code §§ 36-1601(b) and (c).

[1391] E.g., *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 645 (1970) (holding navigable waterways "shall be and remain public highways . . . for the public purposes of commerce, navigation and fishery.")

[1392] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

> In light of its extensive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question.[1393]

Here the Court examined a variety of factors and determined that a taking had occurred. In reaching this conclusion, the Court emphasized that prior to its dredging, the lagoon had been only two feet deep and was always deemed private property under Hawaiian law. The Court also noted that the owner had invested millions of dollars in the improvements and that public access would substantially devalue its investment.

In sum, the Court in *Kaiser Aetna* restricted the application of the navigation servitude (and the right of free public access) to water bodies that were navigable prior to private investment. In a companion case, the Court determined that privately constructed canals in Louisiana are not subject to the navigation servitude, unless they replaced previously existing navigable waterways.[1394] Several cases have followed *Kaiser Aetna* and *Vaughn*.[1395]

Despite important exception carved out by *Kaiser Aetna*, the navigation servitude remains a vital tool for public access in the case of traditionally navigable streams.[1396]

[1393] *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)

[1394] *Vaughn v. Vermillion Corp*., 444 U.S. 206 (1979).

[1395] *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991) (navigation servitude does not reach man-made lagoon in Hawaii); *Loving v. Alexander*, 548 F. Supp. 1079 (W. D. Va. 1982) (navigation servitude does reach the Jackson River in Virginia, despite the fact that it is privately owned under state law, because it was capable of being used for commerce without private investment); *Dardar v. LaFourche Realty Co*., 55 F.3d 1082 (5th Cir. 1995) (navigation servitude does not apply to a series of canals in Louisiana that were capable of supporting commerce only after dredging).

[1396] E.g.*, Atlanta Sch. Of Kayaking, Inc. v. Douglasville-Douglas Cnty. Water & Sewer Auth.*, 981 F. Supp. 1469 (N.D. Ga. 1997) (authorizing preliminary injunction to allow public access to a reservoir on the basis of the federal navigation servitude).

22. IRRIGATION RIGHTS-OF-WAY AND EASEMENTS

A. Types of interest that may be held and who may hold them

At the outset, it is important to understand the types of legal interests involved here and the entities that may hold them.

Types of legal interest:

- A license is permission granted by the owner of real property (e.g., owner of a fee, leasehold, or right-of-way interest) given to a licensee allowing that person to use the land or the right-of-way for a specific purpose. A license may be oral or written. Licenses are generally revocable or for a stated period of time. A license is a contractual right, not a property interest.

- A right-of-way is a particular type of easement. There are other kinds of easements, too, such as easements for light. For purposes of this discussion, the terms "easement" and right-of-way" are interchangeable.

- Unlike a license, a right-of-way is a real property interest. Specifically, it is a type of easement that creates a non-possessory right to cross another person's land. Rights-of-way may be used for such things as roads and streets or for irrigation conduits. A right-of-way may be created by deed, dedication (e.g., on a plat), condemnation, prescription (adverse use over time). A right-of-way could also be created by operation of law if such a statute existed, but (as discussed below) none does. If one were enacted, it would give rise to a takings claim.[1397]

- A fee interest refers to full legal ownership of the real property (subject to any easements, leases, or other limitations imposed on the land).

Ada County is unique in that it is the only Idaho county with a county-wide highway department. ACHD has regulatory jurisdiction over all public streets in Ada County. ACHD typically holds a right-of-way (a type of easement), not fee title. Idaho Code § 50-1312 says that a public dedication in a plat "is equivalent to a deed in fee simple."[1398] Most people (including most title companies) assume this language means what it says (that the dedication conveys a fee interest).

[1397] Rights-of-way created by prescription do not give rise to takings claims, because they do not create rights-of-way by fiat. Instead, they operate by way of a statute of limitation, which has never been known to give rise to a takings claim.

[1398] It is commonly believed that this language dates only to 1967, and that prior to 1967 only an easement was conveyed. This is because that is the extent of the history shown in the current codification dates to 1967. In fact, this "equivalent to a deed in fee simple" language has been on the books since 1893. 1893 Idaho Sess. Laws sec. 93, as discussed in *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 400 (1910) (Sullivan, C.J.).

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Curiously, the Idaho Supreme Court has consistently held that only an easement is created.[1399] However, the easement created by the dedication is an exclusive right-of-way. This conclusion follows from the Court's explanation that the main difference between a full fee and the "equivalent" of a fee is that the public entity may not convey away its interest for profit. This presumably means that ACHD would retain all other aspects of fee title including the right to exclusive use—i.e., the right to allow or not allow others to use the right-of-way. This puts ACHD largely in control with respect to what other easements can be placed within its easement—subject to the caveats set out in the footnote.[1400]

[1399] The first case to address the nature of the interest conveyed by a public dedication under the 1893 statute (which is functionally the same as the version in effect today) was *Shaw v. Johnston*, 17 Idaho 676, 682, 107 P. 399, 399-400 (1910) (Sullivan, C.J.). The *Shaw* Court did not actually apply the statute because it was enacted nearly two months after the subject plat was filed. Nevertheless, the Court addressed the 1893 statute and ruled on its meaning (arguably in dictum). *Shaw* held that the same result would occur under the 1893 statute and the common law. Either way, only an easement is conveyed. In reference to the statute, the Court observed:

> While the acknowledgment and recording is equivalent to a deed in fee simple, it is not a deed in fee simple, and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple. We do not think it would be contended that, if a private owner dedicates a street or a block in a city to public use, the public could convey it to a private party and have the property placed to some other use or purpose than that for which it was originally dedicated.

Shaw, 107 P. at 400-01.

See also *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 539 (1930) (recording of plat vested only determinable fee for public use to surface of street in city); *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935) (owners of property abutting on street which predecessor in title had dedicated to city or state for use as such, owned fee of land to center of street, while city or state had complete right to use of such land for street purposes).

Neider v. Shaw, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003) (Kidwell, J.) involved a statutory dedication (not a common law dedication) in which the plat depicted roads dedicated to the public. Relying on *Shaw*, the *Neider* Court reiterated that the statute providing that a recorded plat dedication is the equivalent of a deed in fee simple (Idaho Code § 50-1312) actually conveys only an easement.

In *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.* ("*Ponderosa II*"), 143 Idaho 407, 410, 146 P.3d 673, 677 (2006) (Burdick, J.), a case involving a common law dedication, the Court again reiterated that "under Idaho law, a dedication, whether express or common law, creates an easement." The Court cited *Neider* in a footnote. *Ponderosa II*, 143 Idaho 410 n.3, 146 P. 676 n.3. Arguably, this too was dictum because the *Ponderosa II* case dealt with common law dedication not statutory dedication. Nevertheless, the Court has consistently adhered to its conclusion that section 50-1312 (and its 1893 predecessor) conveys an easement, not the full fee.

[1400] Caveats: (1) Some state and federal statutes provide that certain types of easements must be allowed within the road right-of-way, but none of these include irrigation easements. (2) ACHD's exclusive easement operates prospectively. It does not mean that another easement might have been granted prior to the dedication of the street.

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B. The law of irrigation rights-of-way

(1) Prescription

Rights-of-way may be created by use of another person's land. See *Weaver v. Stafford*, 134 Idaho 691, 698, 8 P.3d 1234, 1241 (2000) (discussing the law of prescriptive rights in the context of an irrigation ditch).

This is called "adverse possession" in the case of land and "prescriptive use" in the case of rights-of-way and other easements. Adverse possession and prescriptive use are based on Idaho's statute of limitation on actions to recover realty. Idaho Code § 5-203. In short, if the original property owner suffers the use of the property by others without challenge for more than the statutory period, then the statute of limitation bars the original owner from litigating the matter thereafter. Although the statutory foundation is the statute of limitations, the courts have interpreted this as more than a restriction on that person's right to sue; the passage of time under the proper circumstances actually shifts title (for a right-of-way) to the new owner.

In 2006, the Idaho Legislature changed the prescriptive period from five to 20 years. 2006 Idaho Sess. Laws, ch. 158 (codified at Idaho Code § 5-203). However, the change does not apply retroactively.[1401] Thus, any right-of-way that already had vested by satisfying the five-year test as of 2006 would be unaffected by the amendment to the statute.

Thus, as a practical matter, irrigation conduits constructed after 2002 have not yet satisfied the prescriptive use period (though the clock is running).

(2) Title 42 irrigation rights-of-way statutes

(a) Idaho Code § 42-1101 (repealed in 2021)

Prior to its repeal, section 42-1101 stated:

> All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed.

Idaho Code § 42-1101 (repealed by H.B. 307, 2021 Idaho Sess. Laws, ch. 250).

[1401] *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 420 n.2, 283 P.3d 728, 737 n.2 (2012) ("However, the twenty year time period does not apply to an easement by prescription acquired prior to the amendment.") (quoted in *Machado v. Ryan*, 153 Idaho 212, 222, 280 P.3d 715, 725 (2012).

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This statute was repealed in 2021. According to the bill's Statement of Purpose, it was repealed because it "appears to recognize riparian doctrine in Idaho." The repealed statute had been on the books (and essentially ignored) since 1887. 1887 Idaho Revised Stat. § 3180.[1402]

The reason this repealed provision is important is that it sheds light on the scope and meaning of the provisions that follow, most notably section 42-1102. Specifically, the repealed provision confirms that the other right-of-way statutes codified together in the 1887 Revised Statutes are limited to irrigation rights-of-way for riparian or adjacent lands.

(b) Idaho Code § 42-1102

(i) Subsection (1)

Subjection 42-1102(1) states:

> When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for a ditch, canal, or conduit to convey water to the place of use for the purposes of irrigation.

Idaho Code § 42-1102(1) (emphasis added).

At the outset, it is important to recognize that even if subsection 42-1102(1) were applicable here, it does not do much. It says that landowners are "entitled to a right-of-way," but this subsection does not create the right-of-way.

This conclusion is evident not only from the words of subsection 42-1102(1) (which lacks language creating a right-of-way), but also from its legislative history. What is now section 42-1102 was enacted in 1881 (1881 Idaho Terr. Sess. Laws, p. 269) and was codified in 1887 (1887 Idaho Revised Statutes § 3181) along with other statutes relating to irrigation rights-of-way.

The two sections that followed in the 1887 codification (sections 3182 and 3183) authorized the irrigator to condemn of a right-of-way across the lands of another in the event the other landowner refused to allow passage of the irrigation works. Thus, it is evident that section 1102 has never created irrigation rights-of-way; it only authorizes their creation through condemnation (including payment of compensation to the underlying landowner).

[1402] The only reference to the statute is the dissent in *Drake v. Earhart*, 2 Idaho 750, 23 P. 541, 546 (1890) (Berry, J., dissenting). The dissent noted that the statute recognized "what are the equivalent to common-law water-rights [i.e., riparian rights]." *Id.* (referring to an 1881 statute, "Section 3180, Rev. St.").

Moreover, there is a strong argument that subsection 42-1102(2) is not applicable to most irrigation systems operated by Idaho irrigation entities:

First, the statute applies to "owners or claimants of land." In other words, it applies to farmers. Its language does not include irrigation districts that do not actually own the irrigated land.

Second, the statute applies only to the ditches, canals, and conduits used to irrigate riparian land—specifically, land that is physically adjacent to a stream or in the vicinity of a stream. This is evident in the following ways:

- The first part of the statute applies only to the situation where the owner of the ditch, canal, or other conduit must cross another person's property because there is insufficient "frontage on a stream to afford the requisite fall." This is aimed at the situation where, in order to gain sufficient elevation to move the water by gravity, the canal must cross other land further upstream. Plainly, this does not apply to any pressurized irrigation pipe. Nor, for that matter, would it apply to most urban ditches and canals, which are created for delivering water to remote locations, not for overcoming insufficient frontage along a stream.

- The remaining portion is also unavailing. It recognizes rights-of-way where the irrigated land is "back from the banks of such stream" and cannot be conveniently irrigated without crossing other land. The term "back from the banks" implies that the land is near to the banks but not touching the banks. It cannot reasonably be read to authorize rights-of-way for canals and other conduits going great distances to remote locations.

- The conclusion that the applicability of the statute is geographically limited to riparian lands is confirmed by the previous section, Idaho Code § 42-1101 (repealed in 2021). See discussion in section 22.B(2)(a) on page 723. Section 42-1102(1) (quoted above) links back to repealed section 42-1101. Section 42-1102(1) begins with the words "When any such owners or claimant." The repeal of section 42-1101 did not change the meaning or scope of section 42-1102(1).

- This conclusion is also reinforced by the separate provision in section 42-1103 (section 3185 in the 1887 codification), which addresses irrigation works serving "any distant place." Thus, section 42-1102 addresses riparian lands, while section 42-1103 addresses water delivery facilities serving non-riparian lands.

(ii) Subsection (4)

Subsections (2) and (3) are not pertinent here. I turn now to subsection (4), which states:

> The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

Idaho Code § 42-1102(4) (emphasis added).

First, subsection (4) applies only to visible irrigation conduits. Buried pressurized irrigation pipe is not visible.

Second, this subsection applies only to notice of existing rights-of-way. It does not create any new right-of-way. This conclusion follows from the final words in the statute ("has the right-of-way and incidental rights confirmed or granted by this section").

(iii) Subsection (5)

The text of subsection (5) is set out below. To facilitate the sentence-by-sentence analysis of this subsection, I have added numbers in brackets marking each sentence.

> {1} Rights-of-way provided by this section are essential for the operations of the ditches, canals and conduits. {2} No person or entity shall cause or permit any encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects, without the written permission of the owner or operator of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way. {3} Encroachments of any kind placed in such right-of-way without express written permission of the owner or operator of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachment, upon the request of the owner or operator of the right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way. {4} Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

Idaho Code § 42-1102(5) (emphasis and numbering of sentences added).

First, the first sentence in the subsection limits its scope to "rights-of-way provided by this section." As discussed above, section 42-1102 is limited to rights-of-way serving riparian land. The second and third sentences use the phrase "the right-of-way" or "such right-of-way" making clear all of subsection (5) is so limited.

Second, even if subsection (5) were applicable here, an irrigation entity may not deny permission or place conditions on its permission that are not necessary to prevent harm to its irrigation facilities. The basis for this conclusion is explored below.

The second and third sentences operate (somewhat redundantly) to require a person to obtain the permission of the irrigation right-of-way owner before encroaching thereon. Even if this subsection

were applicable to non-riparian rights-of-way, it expressly provides that the permission is aimed at avoiding unreasonable or material interference with the irrigation works. Thus, an irrigation entity would have no right to deny permission if the encroachment did not cause such interference.

This conclusion is underscored by the legislative history. Subsection (5) was not added until 2004. In that year, the Legislature added both subsection 42-1102(5) and section 42-1209. H.B. 634a, 2004 Idaho Sess. Laws, ch. 179. Section 42-1209, discussed below, contains language that is nearly identical to section 42-1102(5). When first introduced, H.B. 634 contained only the permission requirement. In order to gain Senate approval (which it did only on a tie vote), the bill was amended to add language to both subsections making clear that the permission requirement is targeted at preventing injury to the irrigation right-of-way. In other words, it does not give the irrigation entities carte blanche or veto power over any encroachment to the right-of-way.

Interestingly, even before subsection 5 was enacted in 2004, the Idaho Supreme Court recognized the limited authority of irrigation entities to use their rights-of-way against others. Section 42-1102 was interpreted in *NMID v. Washington Federal Savings* ("*Washington Federal*"), 135 Idaho 518, 20 P.3d 702 (2001) (Walters, J.). NMID sought to enjoin the bank from constructing a sidewalk and fence next to NMID's lateral. NMID held a written easement for the lateral, which it had obtained from the prior owner. But NMID did not like the narrow scope of the written easement, so it argued that Idaho Code § 42-1102(2) should be used instead to define (and broaden) the scope of the easement.

The Court said it didn't matter. It found that the scope of easements described in section 42-1102 is no greater than that found in the written easement. Either way, "[t]he owner of the servient estate is entitled to make uses of the property that do not unreasonably interfere with the dominant estate owner's enjoyment of the easement." *Washington Federal*, 135 Idaho at 522, 20 P.3d at 706. Thus, *Washington Federal* shows that even before the explicit limitation added in subsection (5) other uses of an irrigation right-of-way may be barred only if they actually impair use of the irrigation conduit.

(iv) Subsection (6)

Subsection (6) states:

> This section shall apply to ditches, canals, conduits, and embankments existing on the effective date of this act, as well as to ditches, canals, conduits, and embankments constructed or existing after such effective date.

Idaho Code § 42-1102(6).

Subsection (6) simply provides that section 42-1102 applies both retroactively (to facilities existing on the date of enactment—which date is ambiguous given the various amendments to this section) and prospectively (to facilities constructed after enactment). Subsection (6) itself has no substantive effect. It creates no rights-of-way.

By the way, this subsection was amended in 2021. H.B. 307, 2021 Idaho Sess. Laws, ch. 250. The amendment added the words "or existing" apparently (and according to the Statement of Purpose) to reinforce that subsection (6) also applies prospectively. Either before or after its amendment, subsection (6) is of no consequence here because all of section 42-1102 is of no consequence.

(c) Idaho Code § 42-1103

Section 42-1103 states:

> Where the owners of any spring, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for the purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use, and to accomplish such object it is necessary to cross with ditches, flumes or other conduit, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner above provided.

Idaho Code § 42-1103.

While section 42-1102 (discussed above) is limited to facilities serving riparian lands, section 42-1103 reaches lands in "any distant place."

Although the sweep of section 42-1103 is broad, it does not create any rights-of-way. As with section 42-1102, it only creates a right of condemnation.

The reason is the last clause: "may be acquired in the manner above provided." When enacted in 1881 (1881 Idaho Terr. Sess., p. 271) and codified in 1887 (1887 Idaho Revised Statutes §§ 3180 to 3190), the condemnation provisions were located "above" what is now section 42-1103.[1403]

Thus, section 42-1103 does no more than create a right to condemn and pay for an irrigation easement. There is no language requiring other persons to seek the permission of the right-of-way owner before encroaching upon right-of-way. The requirement to seek permission set out in section 42-1102(5) does not apply to rights-of-way addressed by section 42-1103. As discussed above, section 42-1102(5) applies only to rights-of-way described in section 42-1102.

[1403] What is now Idaho Code § 42-1103 was codified at 1887 Idaho Rev. Stat. § 3185, while the associated condemnation provisions were codified immediately above that section in sections 3182 and 3183. In 1899 the condemnation provisions were replaced by what now appears in Idaho Code § 42-1106 (discussed below). Thus, the condemnation provision is now "below" section 42-1103, not "above." But the statute was never cleaned up to reflect that reorganization. Curiously, the reference to condemnation in Idaho Code § 42-1105 (which is not relevant here) was fixed, but the corresponding need to correct section 42-1103 was overlooked.

(d) Idaho Code § 42-1106

Section 42-1106 states:

> In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain.

Idaho Code § 42-1106 (emphasis added).

This section, which authorizes condemnation of irrigation rights-of-way, is critical to understanding how Title 11 of Section 42 operates. Adopted in 1889 (Idaho General Laws, p. 380, § 14), it replaced the more antiquated condemnation provisions in the 1887 codification (sections 3182 and 3183). Its existence demonstrates that the other sections of Title 11 (notably sections 42-1102 and 42-1103) do not actually create rights-of-way. Rather, they describe the right to obtain irrigation rights-of-way through condemnation and scope and operation of such rights-of-way, once they are created.

This conclusion is confirmed by the following statement in a 1975 Idaho Supreme Court decision:

> Chapter 11 of Title 42, Idaho Code, deals with ditch rights of way for the irrigation of land. I.C. § 42-1102 gives to landowners a right to an easement or right of way across the lands of others to supply irrigation water. If the landowner of an adjacent parcel refuses to allow such access for irrigation water, the owner of land may condemn a right-of-way under the law of eminent domain. I.C. § 42-1106. The law of eminent domain is governed by I.C. § 7-701 et seq.

White v. Marty, 97 Idaho 85, 86, 540 P.2d 270, 271 (1975) (McQuade, C.J.).

(e) Idaho Code § 42-1209

Section 42-1209 states:

> Easements or rights-of-way operated, maintained, controlled or owned by irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures, landscaping, trees, vegetation, or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit

> irrigation entity, lateral ditch association, or drainage district owning, operating, maintaining, or controlling the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission, shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the persons operating, maintaining, or controlling the easement or right-of-way or the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code.

Idaho Code § 42-1209 (emphasis added).

As noted above (see section 22.B(2)(b)(iii) on page 726), this provision was enacted in 2004 along with subsection 42-1102(5). H.B. 634a, 2004 Idaho Sess. Laws, ch. 179.

As discussed above, it appears that the permission requirement in subsection 42-1102(5) is limited to rights-of-way serving riparian lands. Perhaps that is the reason that the Legislature saw fit to enact the seemingly redundant section 42-1209, which is not so limited.

Section 42-1209 does not include any of the baggage that limits section 42-1102 to riparian lands. Nor is it limited to the owners of irrigated land. Thus, section 42-1209 is clearly applicable to most irrigation entities—to the extent they have rights-of-way from some other source. Just as with subsection 42-1102(5), section 42-1209 does not create rights-of-way.

The operative language of section 42-1209 is identical to that of subsection 42-1102(5). Accordingly, to the extent it creates a permission requirement for an encroachment, an irrigation entity may exercise that discretion only to the extent necessary to prevent unreasonable or material injury to its right-of-way. See discussion in section 22.B(2)(b)(iii) on page 726.

23. WATER RIGHTS AND LAND USE PLANNING

A. Overview

In Idaho and all western states, the law of water rights and land use planning developed along entirely different paths, which have intersected only recently.

The quick (and somewhat over-simplified) distinction is that IDWR has control over the appropriation, transfer, and administration of water rights in Idaho, while cities and counties (together, referred to as municipalities) have control over land use (including planning, zoning, and subdivision). A third entity, the Idaho Department of Environmental Quality ("IDEQ"), has jurisdiction over water quality. Finally, the Idaho Public Utilities Commission ("IPUC") regulates public utilities including municipal providers of water, with particular attention to the rates they charge and the expenses they incur.[1404]

This discussion focuses primarily on the intersection of the authority of IDWR and municipalities. In particular, it explores the extent to which IDWR's exclusive authority over water rights administration limits the authority of municipalities to address or regulate water supply in the context of land use regulation.

IDWR traces its authority over water rights back to its predecessor, the Office of State Engineer, created in 1895 (five years after statehood). (See footnote 306 on page 166 for history of IDWR.) This authority is grounded in the State Constitution and buttressed by statutes dating to territorial times.[1405]

Land use control and, in particular, the authority to zone, resides in Idaho cities and counties. Idaho is a Dillon's rule state (as opposed to a home rule state), meaning that cities and counties have no inherent authority to legislate.[1406] Rather, their law-making power derives from grants of authority found in or necessarily implied by the Idaho Constitution or statute.[1407]

[1404] The IPUC is nearly as old as IDWR. The IPUC was created by the Legislature in 1913. 1913 Sess. Laws, chap. 61.

[1405] Idaho Const. art. XV, approved in 1890, governs water rights. See, Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Idaho Advocate, 20 (Dec. 2010). The first Idaho statute addressing water rights was enacted by the Territorial Legislature in 1881. 1881 Idaho Sess. Laws 273-75. The earliest parts of what is now Idaho's water code (Title 42) date to 1899. 1889 Idaho Sess. Laws, pp. 380-87; 1901 Idaho Sess. Laws, pp. 191-201, in particular § 9b at p. 200-01 (codified to Idaho Code § 42-101).

[1406] Dillon's Rule is named after the Iowa Supreme Court Justice who authored the rule in 1868. *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868) (Dillon, C.J.). He also authored 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th Ed. 1911).

[1407] *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (Morgan, J.) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

Despite being a Dillon's rule state, no statutory authorization is necessary for zoning, because the authority to zone derives directly from a self-executing grant under the State Constitution.[1408] Specifically, the police power granted to municipalities (Idaho Const. art. XII, § 2) includes the power to zone.[1409] Thus, cities have lawfully engaged in zoning even before the first comprehensive land use planning statute was enacted in 1975 (the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538). Today, local authority over land use is controlled and constrained by the comprehensive regime set out in LLUPA. (See *Idaho Land Use Handbook* for a comprehensive discussion of LLUPA.)

These authorities over water and land use are largely distinct, but come into connection (and potential jurisdictional conflict) where IDWR seeks to guide land development through water rights administration or where municipalities seek to shape water policy. The discussion below explores a variety of statutory provisions that bear on these jurisdictional quandaries.

IDWR's exclusive control over water rights administration derives from two sources: (1) implied preemption analysis based on Idaho statutes assigning authority over water rights to IDWR, and (2) a 2006 statute expressly recognizing IDWR's exclusive authority over water rights (Idaho Code § 42-201(7)). The former is addressed in an Idaho Supreme Court decision, *Ralph Naylor Farms v. Latah Cnty.* ("*Naylor Farms*"), 144 Idaho 806, 810, 172 P.3d 1081, 1085 (2007) (Trout, J. Pro. Tem.). The latter is addressed in an unappealed district court decision, *Eagle Creek Partners, LLC v. Blaine Cnty.,* Case No. CR-2007-670, Idaho Dist. Ct., Fifth Judicial Dist. (May 6, 2008) (Robert J. Elgee, J.). Both concluded that IDWR's jurisdiction is exclusive.

A handful of statutes grant municipalities limited authority to address water supply and related issues in specific contexts. These statutes are addressed in section 23.C on page 734. Some but not all of them were addressed by *Naylor Farms* and *Eagle Creek*. Due to their limited scope, none of them provides a basis for municipalities to act in ways that infringe on IDWR's exclusive authority to regulate the use of the public water supply.

The bottom line is that, although there is some uncertainty about the extent and preemptive effect of IDWR's exclusive authority, it appears that the Department's responsibility over water rights substantially limits or precludes efforts by municipal governments to employ their land use authority to manage Idaho's water supply.

[1408] In sharp contrast, the state constitutional taxing authority, Idaho Const. art. VII, § 6, is non-self-executing. Accordingly, impact fees, capitalization fees, service fees, and other "land use fees" all require statutory authority (except for those described as regulatory fees, which fall under the police power). This has given rise to a mountain of litigation in Idaho.

[1409] "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). *See*, Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

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B. The law governing municipal and IDWR authority over water supply

(1) Idaho is a "Dillon's rule" state.

In "home rule" states, cities have broad authority to govern and need not rely on specific authorization. Idaho is not a home rule state. It is what is known as a "Dillon's rule" state.[1410] In Dillon's rule states, municipalities have only such authority as has been granted to them expressly or by necessary implication by the Idaho Constitution or statute.[1411]

(2) The municipal "police power" includes the power to zone but is constrained by the requirement that local regulation not be in conflict with other statutes.

Idaho's Constitution expressly requires legislative authorization for local taxation.[1412] Idaho Const. art. VII, § 6. In contrast, it grants the police power directly to cities and counties (without need for implementing legislation).

> Local police regulations authorized. — Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

Idaho Const. art. XII, § 2 (emphasis added).

[1410] Dillon's Rule is named after the Iowa Supreme Court Justice who authored it. Justice Dillon stated:

> In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.

Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868) (Dillon, C.J.). In *Merriam*, the court invalidated the sale of a home for nonpayment of a special tax, noting that the Legislature authorized the tax, but did not expressly authorize the sale of property for nonpayment of the tax. The quoted passage is restated in nearly the same words in 1 J. Dillon, *Commentaries on the Law of Municipal Corporations* § 237 (5th Ed. 1911).

[1411] *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 32, 177 P. 388, 389 (1918) (Morgan, J.) (quoting 1 *Dillon on Municipal Corporations* § 237 (5th ed.)); *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (Donaldson, C.J.).

[1412] As a result, impact fees, connection or capitalization fees, service fees, and other land use fees all require statutory authority (except for those described as regulatory fees, which fall under the police power). This has given rise to a mountain of litigation in Idaho all of which underscores the limited scope of regulatory authority held by Idaho cities.

The police power includes the power to zone.[1413] Thus, cities lawfully engaged in zoning even before the first comprehensive land use planning statute was enacted in 1975 (the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538).[1414] Today, however, local authority over land use is controlled and constrained by the comprehensive regime set out in LLUPA—as well as other statutes.

The key words in the constitutional grant of police power state (quoted above) that local regulations adopted pursuant to the police power not be "in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2.

Thus, the specific contours of LLUPA now constrain the authority of municipalities to engage in planning and zoning. And LLUPA is not the only constraint. In addition, and of particular note here, cities are constrained by other laws granting authority to other regulatory agencies, notably the Idaho Department of Water Resources ("IDWR"). Where the Legislature has seen fit to grant implicitly or explicitly exclusive authority over water rights and water supply to the IDWR, municipalities may not rely on their police power to justify their own regulation of water supply. Doing so runs afoul of the Constitution's requirement that local regulations not be "in conflict with . . . with the general laws." Idaho Const. art. XII, § 2. More simply put, the authority of municipalities over water supply is preempted by the delegation of authority to IDWR. This preemptive effect is discussed in section 23.D on page 743.

Hypothetically, any delegation of exclusive authority to IDWR could be overridden by clear legislative authority granted to municipalities over water rights and water supply. Accordingly, this memorandum evaluates all statutory provisions authorizing municipal involvement in matters relating to water. These authorities are discussed in section 23.C below. That evaluation demonstrates that these authorities are sharply limited. None would justify a departure from the conclusion that IDWR has exclusive authority over water rights and water supply. Indeed, the expressly narrow range of municipal responsibilities described in these statutes reinforces the conclusion that municipal authority over water matters is not supported by an unbounded police power but is limited to those authorities set out in these statutes.

C. Specific authority granted to municipalities with respect to water quantity and supply

Before turning to IDWR's authority, we begin by identifying statutes that contain provisions dealing with the authority of municipalities to address water quality and/or water supply.

[1413] "The power of counties and municipalities to zone is a police power authorized by Art. 12, § 2 of the Idaho Constitution." *Gumprecht v. City of Coeur d'Alene*, 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983), *overruled on other grounds by City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006). *See*, Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 154 (1977).

[1414] For example, Boise's first zoning code was adopted in 1966, before the enactment of LLUPA in 1975.

(1) LLUPA

(a) Idaho Code § 67-6502(b): One of LLUPA's goals is to facilitate the provision of adequate public facilities and services.

The introductory section of LLUPA lists its goals. One is "To ensure that adequate public facilities and services are provided to the people at reasonable cost." Idaho Code § 67 6502(b). This objective is implemented through any number of requirements in LLUPA—from comprehensive planning to the establishment of areas of city impact—all of which are intended to foster the efficient provision of public services. It is an aspirational goal, not an extension of additional regulatory authority. Moreover, the goal emphasizes reasonable cost, which weighs against the imposition of unnecessary new burdens on those who provide municipal water.

(b) Idaho Code § 67-6508(h): Planning and zoning commissions are required to consider water supply in their comprehensive planning process.

Idaho Code § 67 6508(h) instructs planning and zoning commissions to conduct a comprehensive planning process that considers a long list of components, including "water supply." The statute does not provide any regulatory authority with respect to water supply in the comprehensive planning process.

(c) Idaho Code §§ 67-6511(2)(a), 67-6512(a), 67-6512(d)(6) and 67-6512(d)(8): Municipalities may consider services provided by political subdivisions.

Three provisions of LLUPA authorize municipalities to address impacts of development on public facilities or services provided by political subdivisions.

The rezone provision of LLUPA states:

> Particular consideration shall be given to the effects of any proposed zone change upon the delivery of services by any political subdivision providing public services, including school districts, within the planning jurisdiction.

Idaho Code § 67-6511(2)(a) (emphasis added).

The section of LLUPA dealing with conditional use permits authorizes municipalities to take into account the public services that will be required by the development.

> A special use permit may be granted to an applicant if the proposed use is conditionally permitted by the terms of the ordinance . . ., subject to the ability of political subdivisions, including school districts, to provide services for the proposed use . . . .

Idaho Code § 67-6512(a) (emphasis added). This section then sets out a non-exclusive list of conditions that may be imposed on a CUP. The first allows conditions "[r]equiring the provision for on-site or off-site public facilities or services." Idaho Code § 67-6512(d)(6). The second authorizes conditions "[r]equiring mitigation of effects of the proposed development upon service delivery by any political subdivision, including school districts, providing services within the planning jurisdiction." Idaho Code § 67-6512(d)(8).

These sections are limited to addressing impacts on services provided by "political subdivisions."[1415] Thus, it appears that municipalities have authority to consider and to impose

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[1415] LLUPA contains no definition of political subdivision. The term is defined in various contexts elsewhere in the Idaho Code. *E.g.*, Idaho Code §§ 6-902(2), 7-1303(6), 12-117(6)(b), 42-3207, 44-2013(2)(a), 42-3218C, 46-1002(4), 50-3002(12), 56-1402(5), 58-1102(c), 59-802(5); 63-3622O(2)(j), and 67-2809(2)(b)(i).

All the statutory definitions, and common usage, recognize that political subdivisions are limited to governmental entities with the power to tax. Some definitions are narrow. For example, the Idaho Video Service Act limits the term to cities and counties. Idaho Code § 50-3002(12). At the other end of the spectrum is the Idaho Sales Tax Act which includes this broad definition:

> "Political subdivision" means:
> (i) A governmental organization that:
> 1. Embraces a certain territory,
> 2. Is organized for public advantage and not in the interest of private individuals or classes,
> 3. Has been delegated functions of government, and
> 4. Has the statutory power to levy taxes; or
> (ii) A public health district created by section 39-408, Idaho Code; or
> (iii) A soil conservation district as defined in section 22-2717, Idaho Code; or
> (iv) A drainage district created pursuant to chapter 29, title 42, Idaho Code; or
> (v) An irrigation district created pursuant to title 43, Idaho Code; or
> (vi) A state grazing board created by section 57-1204, Idaho Code; or
> (vii) A water measurement district created pursuant to section 42-705 or 42-706, Idaho Code; or
> (viii) A ground water management district created pursuant to chapter 51, title 42, Idaho Code.

Idaho Code § 63-3622O(2)(j).

There is no doubt that water and sewer districts are political subdivisions of the state. "The judges of election shall certify the returns of the election to the district court having jurisdiction. If a majority of the votes cast at said election are in favor of the organization, the district court shall declare the [water or sewer] district organized and give it a corporate name by which, in all proceedings, it shall thereafter be known, and designated the first board of directors elected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation." Idaho Code § 42-3207 (providing for the creation of water and sewer districts) (emphasis provided). See also, Idaho Code § 42-3218C ("Each water or sewer subdistrict created and established as provided in sections 42-3218A through 42-3218D, Idaho Code, shall be a political subdivision of the state of Idaho.").

The same is true for irrigation districts. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, 329, 297 P.3d 1134, 1146 (2013) (holding that an irrigation district is a political subdivision within the meaning of section 12-117).

requirements aimed at mitigating the impacts of a rezone or conditional use permit on the ability of a water and sewer district (for example) to provide services to a proposed development. But this statutory authority is limited to political subdivisions and does not address the ability of non-governmental entities (such as municipal water providers) to provide water service.

(d) Idaho Code § 67-6537(1): LLUPA requires that surface water be used for irrigation when available.

In 2005, the Idaho Legislature enacted legislation requiring land developers to provide for surface water for lawn irrigation systems if possible. 2005 Idaho Sess. Laws, ch. 338) (H.B. 281a) (codified at Idaho Code § 67-6537) (sponsored by Rep. Mike Moyle).[1416] "All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." Idaho Code § 67-6537(1). This mandate is driven by the assumption that ground water (which typically does not require treatment to be used as drinking water) is more precious than surface water.

The legislation is not directed to IDWR. Instead, it amended LLUPA, which governs planning and zoning actions by cities and counties.

The 2005 act applies to any applicant "proposing to make land use changes." That is very broad, presumably including zoning changes, special use permits, planned unit developments, annexations, or any other application for a new land use.

Thus, if a developer of agricultural land served by surface water seeks a land use entitlement, he or she is arguably obligated to install a separate lawn irrigation system to utilize that water (rather than relying on municipal water that uses ground water). The unintended effect of this requirement is the proliferation of separate, unmetered lawn irrigation systems. Without the price signal of metering, effective water conservation is difficult to achieve. The City of Denver learned this the hard way, when it was forced to retrofit the entire city which was originally unmetered.

The requirement applies where surface water is "reasonably available." The act defines this as where surface water is appurtenant to the property, or reasonably could be made appurtenant, or where it could be obtained from an irrigation district or other entity. Idaho Code § 67-6537(1)(a). In other

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It is equally clear that public utilities, which have no governmental or taxing authority, are not political subdivisions.

[1416] Idaho Code § 67-6537 was first enacted as a part of the Ground Water Quality Protection Act of 1989, 1989 Idaho Sess. Laws, ch. 421. At that time, it contained only what is now codified, as amended, as Idaho Code § 67-6537(4). In 1989, it simply required local governments to "consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the quality of ground water in the area." It was not until 2005 that section 67-6537 was substantially amended to add the mandate in section 67-6537(1) that developers use surface water when available. 2005 Idaho Sess. Laws, ch. 338. The 2005 amendment recodified the original section 67-6337 to 67-6537(4) and amended it to include consideration of the source and quantity (as well as quality) of ground water in the area.

words, even if the land does not have surface water available today, the owner might be obligated to acquire surface water rights.

The requirement to use surface water where available raises a number of questions:

1. Does the act prohibit a municipal water provider (relying at least in part on ground water supplies) from serving homes that use the municipal water for lawn irrigation? Answer: No. The act applies to developers appearing before zoning bodies, not to municipal providers whose water rights are administered by IDWR. Thus, it has no effect on what a municipal provider (or anyone else) does with its water rights. This is reinforced by subsection 3 of the act which states that nothing in the statute is intended to override or amend the Water Code. Idaho Code § 67-6537(3). Thus, the statute has no impact on IDWR's review of a water right application or any other administration of water rights.

2. Would the act require the developer of a shopping mall to install a separate surface-based irrigation system to irrigate the trees and shrubs in the parking lot? Answer: Arguably yes, if surface water is reasonably available. On the other hand, the mandate, though written in absolute terms, should be read in context, allowing the municipality to exercise some discretion. The first sentence of the act says that its purpose is to "encourage the use of surface water," not to mandate it. Moreover, the requirement is placed in a planning statute, LLUPA, which is built on the exercise of discretion. Thus, in determining whether surface water is reasonably available, one would think that the zoning board should be entitled to consider such things as the economic feasibility and efficiency.

3. Does this provision prohibit a municipal provider or subdivision developer from land applying treated municipal effluent from derived from ground water to parks, open space, golf courses, and common areas? Answer: No. IDWR takes the position that it does not, so long as the ground water was first used for in-house culinary purposes (as opposed to lawn irrigation). This also would seem logical from a physical standpoint: Once the water emerges from the treatment plant, it should be viewed as surface water.

4. If a proposed development is within an irrigation district that has surface water available for irrigation, can the municipality require that the development's irrigation be served instead by reuse water provided by the city?[1417] Answer: Probably yes. Assuming that the reuse is seen as surface water, the statute raises no impediment to

[1417] For "Class A wastewater," which has been treated essentially to drinking water standards, the IDEQ guidance does not require any buffer zones between use areas and, for example, private dwellings. *Guidance for Reclamation and Reuse of Municipal and Industrial Wastewater*, Idaho Department of Environmental Quality at 6-17 (September 2007).

such a city requirement.[1418] However, assuming the subdivision remains within the irrigation district, its landowners would be subject to irrigation district assessments whether they get water from the district or not.

5. Can a new development use ground water to irrigate lawns and landscaping during the "shoulder season" (when surface water is not available in the spring and fall)? Answer: Yes. The statute requires only that surface water serve as the primary source of water, and it must be reasonably available.

6. Can an applicant install an efficient irrigation system that uses a portion of the former surface right, and sell the balance to another user?[1419] Answer: Yes. The act does not limit the ability of a landowner to sell off the unused portion of surface rights associated with a developed parcel. In other words, the act says that if there is surface water on the property, it must be used.

7. Rather than directly applying the surface water, can the surface water be put to use indirectly as mitigation for a ground water right that serves the new development? Answer: Arguably yes. The statute requires the developer to "use the surface water . . . as the primary water source for irrigation." Arguably, use of the water in a mitigation plan would satisfy this requirement, but there has been no ruling or Departmental guidance on this point.

H.B. 281 also raises constitutional questions under the Fifth Amendment (takings).

The measure probably does not qualify as a physical invasion, and thus is not a *per se* taking under that line of cases. *Loretto v. Teleprompter Manhattan CATV Corp.*, 444 U.S. 164 (1979). On the other hand, if rigidly applied, it may constitute a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and its progeny. Most notably, the provision would appear to falter under the cases dealing with "exactions." In *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), the Supreme Court held an exaction is a taking if it does not substantially advance the same governmental interest that would justify denial of the zoning application. In other words, there must be an "essential nexus" between the restriction on the use of the surface water and the goals of the planning and zoning act. One could argue that there is no such

[1418] The "irrigate with surface water" statute, Idaho Code § 67-6537, raises no impediment, but it is possible an opponent of the city's plan might assert that Idaho Code § 42-201(7), discussed below, would block the city from requiring that the reuse water be employed for subdivision irrigation. However, that provision addresses agency "authority over the appropriation of the public surface water and ground waters of the state." To the extent supplying reuse water for irrigation is not mandating an appropriation, it would appear this statute would not come into play.

[1419] Splitting a water right and selling a portion is relatively easy if the land is served by its own water right(s). It is far more difficult if the land is served by an irrigation district, whose consent (and possibly the consent of the federal water provider) will be required.

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connection, an argument reinforced by the Legislature's decision to address this question in LLUPA, rather than the Water Code.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court elaborated further on the subject, declaring that there must be "rough proportionality" between the required dedication and the impact of the proposed development. H.B. 281 appears quite vulnerable on this point. Indeed, the problem with H.B. 281 is that it is a blanket prohibition that takes no account of the individual circumstances, and thus no account of the actual impacts of a particular development on the ground and surface water supply.

(e) Idaho Code § 67-6537(4): Municipalities are required to consider the effect of their comprehensive plans on the source, quantity, and quality of ground water.

In 1989, as part of larger legislation expanding IDEQ's role in ground water protection, the Idaho Legislature enacted a law requiring municipalities to address ground water impacts when updating their comprehensive plans. 1989 Idaho Sess. Laws, ch. 421 (now codified at Idaho Code § 67-6537(4)) (see footnote 1416 on page 737). The provision, as amended in 2005, reads:

> When considering amending, repealing or adopting a comprehensive plan, the local governing board shall consider the effect the proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area.

Subsection 67-6537(4).

A comprehensive plan, as its name implies, articulates goals and objectives that will shape future growth within the geographic boundaries of the city or county. Idaho Code § 67-6508. These are broad, conceptual planning documents, not descriptions of what is allowed under current zoning. "This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions." *Urrutia v. Blaine Cnty.,* 134 Idaho 353, 357-58, 2 P.3d 738, 742-43 (2000) (Trout, C.J.)

In *Naylor Farms* (discussed in section 23.D(1) on page 743), the Court agreed with the district court's finding that the mandate to "consider" ground water impacts in the context of a comprehensive plan does not overcome IDWR's exclusive authority and does not authorize municipalities "to manage water in Idaho." *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085.

(2) EPHA

(a) Idaho Code § 39-126: The EPHA requires local governments to take ground water quality into account in their permitting decisions.

The Idaho Environmental Protection and Health Act ("EPHA"), Idaho Code § 39-101 to 39-130, established the Idaho Department of Environmental Quality ("IDEQ").[1420] A provision of this statute instructs local governments to take ground water effects into account in their permitting decisions. Idaho Code § 39-126(2). However, the next subsection cautions local governments not to second guess the decisions of other state agencies that already have addressed the ground water quality issue. Idaho Code § 39-126(3).

The regulatory authority granted by this statute is limited in several ways. First, it is limited to "a permit or license that deals with the environment." Arguably, that does not include permits and other entitlements issued under LLUPA or the subdivision statute. Second, the statute is limited to ground water quality; it does not extend to ground water supply or quantity issues. Third, as noted, subsection (3) prohibits local governments from acting where state agencies already have addressed the water quality issue. Fourth, subsection (4) expressly addresses preemption: "Nothing contained in this section shall be deemed to permit cities, counties or other political subdivisions of the state to regulate ground water quality with respect to any activity for which another statute or other statutes may have expressly or impliedly preempted such local ground water quality regulation."

Perhaps these limitations are the reason section 39-126 was given short shrift in *Naylor Farms* (see discussion in section 23.D(1) on page 743).

(3) County and city laws

(a) Idaho Code § 31-3805: Municipalities are required to assess the suitability of certain irrigation delivery systems to serve proposed developments.

Idaho Code § 31-3805 sets out requirements for the subdivision of property within the boundaries of irrigation districts, canal companies, and the like.[1421] For cities, "the irrigation system must be approved by the city zoning authority or city council, as provided by ordinance, with the advice of the irrigation entity charged with delivery of water to said lands." Idaho Code § 31-3805(1)(b)(i). Similar provisions address subdivisions within the area of city impact (section 31-3805(1)(b)(ii)) and other unincorporated areas of the county (section 31-3805(1)(b)(iii)).

[1420] Section 39-126 was enacted by 1989 Idaho Sess. Laws, ch. 421, with non-substantive amendments in S.B. 1426, 2000 Idaho Sess. Laws, ch. 132.

[1421] Note that sections 31-3805 and 67-6537 are crossed referenced by LLUPA in Idaho Code § 67-6519(4).

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The functionally identical subsection applying to unincorporated areas (section 31-3805(1)(b)(iii)) was addressed in *Eagle Creek Partners* (see discussion in section 23.D(2)(b)on page 746). The district court ruled that this provision did not overcome the exclusive authority granted to IDWR under Idaho Code § 42-201(7) (then codified at section 42-201(4)). The court said that section 31-3805 is essentially "a consumer protection statute, designed to insure a buyer of land in an irrigation district (under a proposed subdivision) either gets the water he is entitled to from the water provider, or receives notice that he is still liable for assessments for that water." *Eagle Creek Partners* at 9. The court continued: "The statute does not go on to provide the County the authority to approve or deny the subdivision on that basis, or to require modifications acceptable to the County . . . ." *Eagle Creek Partners* at 10.

In short, section 31-3805 calls for evaluation and notice to the purchaser of land regarding the adequacy of irrigation delivery systems operated by irrigation entities, but the statute includes no regulatory authority over those delivery systems.

(b) Idaho Code §§ 50-1326 through 50-1329 and 50-1334: Certifications are required on subdivision plats respecting water supply.

Sections 50-1326 through 50-1329 of the Municipal Code provide that all subdivision plats (except for agricultural land) are subject to a "sanitary restriction." The sanitary restriction may be satisfied by providing a certificate of approval issued by IDEQ with respect to water and sewer facilities.

Similarly, section 50-1334 requires persons filing subdivision plats to certify that the lots will be served by either (1) individual wells, (2) an existing water system, or (3) a new water system.[1422]

These provisions are directed to the county clerk and recorder and to IDEQ. They extend no authority to municipalities.

[1422] More specifically, the act requires certification that at least one of the following is the case:

> (1) The individual lots described in the plat will not be served by any water system common to one (1) or more of the lots, but will be served by individual wells.
>
> (2) All of the lots in the plat will be eligible to receive water service from an existing water system, be the water system municipal, a water district, a public utility subject to the regulation of the Idaho public utilities commission, or a mutual or nonprofit water company, and the existing water distribution system has agreed in writing to serve all of the lots in the subdivision.
>
> (3) If a new water system will come into being to serve the subdivision, that it has or will have sufficient contributed capital to allow the water system's wells, springboxes, reservoirs and mains to be constructed to provide service without further connection charges or fees to the landowners of the lots, except for connection of laterals, meters or other plant exclusively for the lot owner's own use.

Idaho Code § 50-1334.

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(c) Municipalities have authority to operate their own utilities providing water, sewer, and solid waste facilities, and flood control.

In addition to the specific authorities addressed above, municipalities have broad authority to construct and operate their own sewer systems, to require landowners to connect to them, to issue bonds and to impose ad valorem taxes, user fees, and hook-up or capitalization fees to pay for the systems, and/or to require developers to construct their own centralized sewer systems.

Other statutes authorize cities to establish and operate their own domestic water systems and solid waste facilities and to impose user fees, etc. to finance these systems.

In addition, Idaho cities have express authority to engage in activities relating to drainage and flood prevention and to impose the cost thereof on property owners.

The voluminous body of law on this subject is addressed in the *Idaho Land Use Handbook*.

None of these constitute authority to regulate the public water supply.

D. IDWR's has exclusive authority over water rights administration.

IDWR's exclusive control over water rights and the management of water supply finds support in both (1) a traditional implied preemption analysis based on the implicit effect of laws delegating regulatory authority over water use to IDWR, and (2) explicit preemption in the form of a 2006 statute, Idaho Code § 42-201(7). These are discussed in turn below.

(1) Implied preemption analysis (*Naylor Farms*)

IDWR traces its authority over water rights back to its predecessor, the Office of State Engineer, created in 1895 (five years after statehood). The Department's authority is grounded in the State Constitution and buttressed by statutes dating to territorial times.[1423]

Since 1900, Idaho's water code has assigned to the State the authority to control the distribution and use of water. Idaho Code § 42-101.[1424] "I.C. § 42-101 provides that control over the appropriation

[1423] Idaho Const. art. XV, approved in 1890, governs water rights. See, Dennis C. Colson, *Water Rights in the Idaho Constitution*, 53 Idaho Advocate, 20 (Dec. 2010). The first Idaho statute addressing water rights was enacted by the Territorial Legislature in 1881. 1881 Idaho Sess. Laws 273-75. The earliest parts of what is now Idaho's water code (Title 42) date to 1899. 1889 Idaho Sess. Laws, pp. 380-87; 1901 Idaho Sess. Laws, pp. 191-201, in particular § 9b at p. 200-01 (codified to Idaho Code § 42-101).

[1424] The very first section of Idaho's water code, codified in 1900 and unchanged since then, assigns to the State control over Idaho's water:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its

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of water is vested in the State . . . ." *Ralph Naylor Farms v. Latah Cnty.* ("*Naylor Farms*"), 144 Idaho 806, 810, 172 P.3d 1081, 1085 (2007) (Trout, J. Pro. Tem.).

On the other hand, as discussed in section 23.C on page 734, other statutes assign at least some responsibility for consideration of water quality and supply issues to other governmental entities.

In *Naylor Farms*, the Court weighed the interaction among three of these statutes (Idaho Code §§ 42-101, 67-6537(4), and 39-126) and the county's Groundwater Management Overlay Zone. *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085.[1425] The Court agreed with the district court's determination that the county's ordinance was preempted by section 42-101 and was not saved by the other three statutes.

The case involved an ordinance adopted by Latah County creating the "Moscow Sub-basin Groundwater Management Overlay Zone." The ordinance prohibited the county from accepting applications for specified new land uses that were found to consume large quantities of water (mineral extraction and processing, large CAFOs, and golf courses). *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086. The ordinance was enacted as a direct response to the county's failed protest of Naylor Farms' application to IDWR for a ground water right for mineral extraction.

The district court applied the common law "implied preemption analysis" articulated in *Envirosafe Services of Idaho, Inc. v. Cnty. of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987) (Huntley, J.). *Naylor Farms*, 144 Idaho at 810, n.1, 172 P.3d at 1085, n.1. It concluded that the assignment of control over water allocation to IDWR occupied the field and preempted Latah County's ordinance. "The district court concluded that the effect of the Ordinance was to control access to water within the Groundwater Management Overlay Zone by controlling certain uses within that zone and therefore, there was an implicit conflict between the Ordinance and the general laws of the State." *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. Thus, "the County's actions were preempted by State law." *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086.

As for section 67-6537(4), "the [district] court concluded that the Ordinance went beyond considering the effects on water and, in effect, was an attempt to manage water in Idaho." *Naylor Farms*, 144 Idaho at 810, 172 P.3d at 1085. In other words, the mandate to "consider" ground water in comprehensive planning is not authority to regulate or restrict the diversion of ground water. See discussion of this statute in section 23.C(1)(e) on page 740.

> use, shall equally guard all the various interests involved. All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose . . . .

Idaho Code § 42-101 (emphasis added).

[1425] The *Naylor Farms* decision did not address Idaho Code § 42-201(7) (then 42-201(4)), which was on the books at the time of the appeal but was not in effect during the relevant time.

The Court also gave short shrift to section 39-126, which instructs local governments to "take into account" the effect of a permitted activity on ground water quality. See discussion in section 23.C(2)(a) on page 741.

The county did not appeal, but Naylor Farms appealed the district court's denial of its attorney fee request. Although the appeal was limited to the issue of attorney fees, the Idaho Supreme Court found it necessary to address the merits of the preemption issue in order to determine whether the county acted unreasonably. In so doing, the Idaho Supreme Court essentially upheld the district court's preemption analysis. "[W]e respect the district court's analysis of the Ordinance and preemption by State law . . . ." *Naylor Farms*, 144 Idaho at 811, 172 P.3d at 1086. The Idaho Supreme Court not only agreed with (or at least "respected") the district court's preemption analysis, it also upheld the district court's decision not to award attorney fees against the county because the preemption question was not well settled prior to *Naylor Farms*.

(2) Idaho Code § 42-201(7)

(a) The 2006 statute

In 2006, the Idaho Legislature enacted a statute intended to further shore up IDWR's authority over water rights. 2006 Idaho Sess. Laws, ch. 256 (S.B. 1353) (now codified at Idaho Code § 42-201(7), originally codified as section 42-201(4)).

In a sense, Idaho Code § 42-201(7) may be seen as codifying the common law preemption analysis articulated a year later in *Naylor Farms* (that the statutory delegation of water right authority to IDWR occupies the field). In other words, any doubt about the strength of the *Naylor Farms* precedent is now resolved. The 2006 statute expressly delegates to IDWR "exclusive authority over the appropriation of the public surface water and ground waters of the state" and prohibits any other governmental entity from taking any "action to prohibit, restrict or regulate the appropriation" of water. It reads in full:

> This title [Title 42] delegates to the department of water resources exclusive authority over the appropriation of the public surface and ground waters of the state. No other agency, department, county, city, municipal corporation or other instrumentality or political subdivision of the state shall enact any rule or ordinance or take any other action to prohibit, restrict or regulate the appropriation of the public surface or ground waters of the state, and any such action shall be null and void.

2006 Idaho Sess. Laws, ch. 256 (S.B. 1353) (now codified at Idaho Code § 42-201(7), originally codified to Idaho Code § 42-201(4)) (emphasis added).

The legislation was a direct response to a draft ordinance contemplated by the City of Parma that would have required the City's approval of any new ground water well. The bill's sponsors viewed this as an attempt by the City to usurp IDWR's authority over water appropriation. Accordingly, the

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bill clarifies that local governments may not set up regulatory processes that mimic the responsibilities of IDWR regarding the appropriation of water.

The Statement of Purpose for the 2006 statute describes its goal as keeping IDWR and municipalities in their own lanes. While municipalities are forbidden from usurping IDWR's authority over water rights, the statute is not intended to deprive municipalities of their power to zone. "It will have no impact on the zoning authority or other powers inherent in political subdivisions."[1426]

(b) *Eagle Creek Partners*

As of this writing, no appellate case has addressed Idaho Code § 42-201(7). The only district court decision of which the authors are aware is *Eagle Creek Partners, LLC v. Blaine Cnty.,* Case No. CR-2007-670, Idaho Dist. Ct., Fifth Judicial Dist. (May 6, 2008) (Robert J. Elgee, J.). In that case, the court invalidated a subdivision approval condition based on the 2006 statute.

Eagle Creek Partners sought to subdivide 37-plus acres of farm land in the Ketchum area into four large residential lots. The land was served by an irrigation company, which approved the development plan including the construction of five irrigation ponds intended to "gain a higher discharge for sprinkler irrigation systems." *Eagle Creek Partners* at 2. In the subdivision hearing, IDFG and others raised concerns about possible adverse effects of the ponds on fish and wildlife. The county approved the subdivision, subject to a condition requiring the developer fill in the ponds (which it had already built after receiving approval from the irrigation company) and devise a more efficient water distribution system.

The district court found this condition violated recently enacted Idaho Code § 42-201(4) (now 42-201(7)):

> Thus, the first question is whether the County's action, in requiring Condition 1, constitutes a restriction or regulation on Eagle Creek's appropriation. The Court concludes that it does. . . . . Making a determination that Eagle Creek could come up with a more efficient system

[1426] The Statement of Purpose reads in full:

> Title 42 of the Idaho Code delegates comprehensive authority to the Idaho Department of Water Resources over the appropriation of the waters of the State. This delegation of authority preempts other agencies and political subdivisions from regulating the appropriation of the public waters of the State. This legislation further clarifies these principles to ensure that no other agency or political subdivision takes any action which impinges upon the Department of Water Resource's exclusive jurisdiction over the appropriation of the waters of the state. The legislation will not affect the right of an agency or political subdivision to file a protest in a water right proceeding. It will have no impact on the zoning authority or other powers inherent in political subdivisions. There would also be no impact on private contracts, covenants, or restrictions.

Statement of Purpose, R.S. 15889 (which became S.B. 1353, now codified at Idaho Code § 42-201(7)).

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> is no different than telling Eagle Creek it has too much water, or does not need the water it has, or there are other beneficial uses that the water should be applied to. . . .
>
> The Court also concludes the County cannot measure or regulate efficiency of water use; . . . Regulating or managing efficiency is measuring or restricting or regulating beneficial use and the process of applying water to its beneficial use—a uniquely state function.

Eagle Creek Partners at 7-8 (emphasis original).

Blaine County pointed to Idaho Code § 31-3805(1)(b)(iii) as a way around the 2006 statute. (See discussion in section 23.C(3)(a) on page 741.) The county contended section 31-3805(1)(b)(iii) provides a specific grant of authority to evaluate and approve an applicant's water delivery system. The district court disagreed, holding that this statute only requires municipalities to evaluate the suitability of the delivery system to deliver water so that the buyer of property may be informed thereof. It does not authorize the county to require the developer to design and construct what the county perceives to be a better delivery system.

The district court did not address Idaho Code § 67-6537(4) (the statute requiring municipalities to "consider" the impact of its comprehensive plan on ground water, see discussion in section 23.C(1)(e) on page 740)[1427] or to Idaho Code § 39-126 (requiring local governments to take ground water quality into account, see discussion in section 23.C(2)(a) on page 741). Presumably, that was because the proposed development used surface water. Nor did the court mention the recently-decided case of *Naylor Farms*.

E. In sum, what authority do municipalities retain over water supply?

As discussed above, the Legislature has given municipalities express authority over water quality and supply in the following areas. However, these statutory authorities are specific and limited in scope to the following:

- Municipalities are obligated to "consider" the source, quantity, and quality of ground water in developing their comprehensive plans. Idaho Code § 67-6537(4) (see section 23.C(1)(e) on page 740).
- Similarly, they must include a discussion of "water supply" when updating their comprehensive plans. Idaho Code § 67-6508(h) (see 23.C(1)(b) on page 735).
- Municipalities must take ground water quality into account in certain permitting decisions. Idaho Code § 39-126 (see section 23.C(2)(a)on page 741).

[1427] The district court made a passing references to section 67-6537, but was in the context of the "surface water only" requirement in section 67-6537(1). *Eagle Creek Partners* at 6.

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- Municipalities must ensure that new developments seeking land use entitlements employ surface water when it is available. Idaho Code § 67-6537(1) (see section 23.C(1)(d) on page 737).
- At the time of subdivision, municipalities must assess the suitability of water delivery systems operated by certain irrigation entities. Idaho Code § 31-3805 (see section 23.C(3)(a) on page 741).
- LLUPA's rezone and conditional use permit provisions authorized municipalities to address impacts of development on public facilities or services that are provided by political subdivisions (*e.g.*, schools and water and sewer districts). Idaho Code §§ 67-6511(2)(a), 67-6512(d)(6), 67-6512(a), and 67-6512(d)(8) (see section 23.C(1)(c) on page 735).

- LLUPA's statement of goals, Idaho Code § 67-6502(b) (see discussion in section 23.C(1)(a) on page 735) speaks of facilitating the availability of adequate public facilities and services at reasonable cost. This is a goal, not a grant of regulatory authority.

- Sections 50-1326 through 50-1329 of the Municipal Code make subdivision plats subject to a "sanitary restriction" requiring the land owner to secure a certificate from IDEQ showing that private or public water and sewer have been provided. Similarly, section 50-1334 requires certification by persons filing plats that the new lots will be served by a private or public water supply. (See section 23.C(3)(b) on page 742.)

- Municipalities have broad authority to operate their own utilities providing water, sewer, solid waste, and flood control service to city residents. (See section 23.C(3)(c) on page 743).

Beyond that, municipal ordinances or actions that impair, override, second-guess, or otherwise implicate IDWR's water right administration or which limit the ability of water right holders to exercise their water rights are likely to be deemed "null and void" under Idaho Code § 42-201(7) and other statutes assigning water right authority to IDWR.

If the teaching of *Naylor Farms* and *Eagle Creek Partners* is followed, municipalities will find themselves on thin ice if their regulation of municipal water supply or delivery systems steps beyond the express authorities discussed above.

On the other hand, IDWR is not in the business of managing sewer systems or water quality in general. Accordingly, it would seem that Idaho Code § 42-201(7) should not be read to limit the authority of local governments to address water quality concerns via requirements for sewer connections or the construction of a central sewer system. Indeed, local governments routinely impose such requirements, often supported by bonds and fees to cover the cost of sewer services. See discussion in section 23.C(3)(c)on page 743.

Whether municipalities have the authority to impose a requirement to construct or connect to a central water delivery system is perhaps a closer call. If such a requirement is framed as matter of

water quality protection (to avoid aquifer contamination from multiple individual wells) it would seem to be justified for the same reasons as requiring a central sewer system.[1428] The argument that cities retain their long-standing authority to impose such requirements is strengthened by Idaho Code § 42-201(7)'s Statement of Purpose, which says that the 2006 bill is intended to "have no impact on the zoning authority or other powers inherent in political subdivisions." See footnote 1426 on page 743.

That said, it is reported that "some local governments do not require developers to install community wells because of concerns that they are prohibited from doing so under section 42-201(7) of the Idaho Code." Nathan Bracken, *Exempt Well Issues in the West*, 40 Envtl. L. 141, 216 (2010) (citing a 2009 email communication from Jeff Peppersack of IDWR).

The decision in *Eagle Creek Partners* (overturning Blaine County's requirement that a developer remove its irrigation ponds and design something more efficient) might be read to prohibit municipalities from requiring developers to employ efficient lawn and open space irrigation systems. The authors suggest that is going too far. *Eagle Creek Partners* should be limited to the circumstances of that case—namely, municipal regulation imposed directly on the holder of water rights or entitlements. (The developer, Eagle Creek Partners, was the beneficial owner of the water rights at issue.) Where water is supplied to a development by a third party (*e.g.*, a municipal provider), the concern raised by the court in *Eagle Creek Partners* does not arise. Thus, requiring a developer to install efficient irrigation equipment is no different than requiring the installation of low-flow toilets or xeriscaping. These reduce water demand without interfering with or second-guessing IDWR's determination of whether someone's water rights are rightly sized (as was the case in *Eagle Creek Partners*).

Some municipal jurisdictions require an applicant for development to provide a "will serve" letter from the water supplier. For example, Ada County requires such letters at the time of preliminary plat for planned communities. Ada County Code § 8-6-3(L)(3)(f). Curiously, the current Boise City Code contains no similar provision. Although there is no statute specifically authorizing municipalities to require "will serve" letters (confirming that water can and will be provided by a municipal water provider or other source), such authority may be found within the statutes discussed in section 23.C(1)(c)on page 735 to the extent the water service is provided by a political subdivision. Even in the absence of specific authorizing legislation, a requirement for a "will serve" letter probably falls within the municipal police power, which is not preempted because it entails no exercise of regulatory power by the municipality over the water supply.

[1428] A requirement for central water and sewer was upheld in a case that pre-dated Idaho Code § 42-201(7). In *Sanders Orchard v. Gem Cnty.,* 137 Idaho 695, 702, 52 P.2d 840, 847 (2002), the Court vacated the county's denial of a subdivision plat on the basis of the developer's failure to provide for a central water and sewer system. The Court found that there was no evidence in the record to support the county's factual conclusion that sewer would soon be extended to the area. However, the Court made clear that the county had the authority to consider the feasibility of installing central water and sewer. Indeed, the Court strongly implied that the county could have simply mandated such a requirement without need for individual factual determinations. *Sanders*, 137 Idaho at 702-03, n.6, 52 P.3d at 847-48, n.6.

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Similarly, a municipality may require an applicant that is not served by a municipal provider (but is instead relying on wells or a private water system for the development) to provide documentation that it has secured or will secure water rights to support the use.

The law establishing that IDWR has exclusive authority to regulate use of the public water supply does not mean that local governments are obligated to grant every planning and zoning request simply because the applicant has obtained a water right for its project. But just where the line is between legitimate local regulation (*e.g.*, requirements for water service connections and "will serve" letters) and improper intrusions into IDWR's and the IPUC's authority remains to be worked out. In any event, it is evident that the Legislature and the courts have moved in the direction of limiting municipal authority over water supply to actions that are expressly authorized by statute or exercises of the police power (*e.g.*, water quality protection) that do not infringe on IDWR's authority over the public's use of state's water resources.

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24. OTHER TOPICS POTENTIALLY BEARING ON LAND USE OR MUNICIPAL WATER SUPPLY.

A. The "preference" for domestic use is really a right to condemn.

Like the constitutions of several western states, Idaho's Constitution ranks certain beneficial uses in terms of "preferences." Idaho's Constitution ranks domestic uses first, agricultural uses second, and manufacturing purposes third, except that in an "organized mining district" (an historical anachronism) mining uses have preference over all but domestic uses.[1429]

These preferences mean much less than might appear. They provide neither "super-priority" status in the priority system nor authority for IDWR to "prefer" certain water uses over others in the approval or administration of rights. Rather, this constitutional preference simply confers on the preferred water user the right to condemn the water rights of a less preferred user.[1430] Indeed, this is made explicit by the last sentence of section 3: "But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution."[1431]

Thus, for instance, a farmer may condemn the water rights of a manufacturing operation, but would be required to reimburse the manufacturer for the fair market value of the water right taken. That, of course, is not likely to pencil out. Likewise, a municipal provider (whose municipal water needs are deemed "domestic" for this purpose) could, in theory, condemn any other use. The authors are unaware of an instance in Idaho where this constitutional condemnation power has been exercised.

B. IDWR's scaled back authority to evaluate the local public interest test.

Prior to 1978, applications for water right appropriations and transfers were evaluated by IDWR solely on the basis of the traditional issues, such as injury, enlargement, beneficial use, and speculation.

[1429] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution." Idaho Const. art. XV, § 3.

[1430] *Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911).

[1431] This language was noted, in support of this proposition, in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 880-81, 154 P.3d 433, 451-52 (2007).

The environmental or land use impacts of water development were not a relevant consideration.[1432] Indeed, in the early days of mining development, water uses often had horrific consequences on the local environment. At the time, that was considered the cost of progress.

In Idaho, this changed dramatically in 1978 when the Idaho Legislature added a "local public interest" review requirement to the criteria for approval of appropriations of new water rights.[1433] 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-202B(3), 42-203A(5)(e)).[1434]

As originally enacted, the public interest provision granted IDWR broad authority to consider anything bearing on "the affairs of the people in the area directly affected by the proposed use." 1978 Idaho Sess. Laws, ch. 306, § 1. This sweeping language opened the door for the Department to consider environmental and land use impacts associated with the project or development for which the water was needed.

The statute was hardly noticed for two decades. Then, in the late 1990s, it began to generate a substantial number of contested administrative cases. Opponents of unwelcome developments opposed water rights needed for the development. This tactic of challenging the water right, rather than the project itself, reflects the perceived inadequacy of other forums for citizen input. This coincided with the growth of the large-scale dairy industry in Idaho (whose economic power now exceeds that of Idaho's "Famous Potatoes"). Local public interest litigation, however, was not limited to dairy conflicts. Public interest battles also were waged by those opposing such things as a ski development, power plants, fish production facilities, residential subdivisions, and competing municipal water supplies.

These contests set off a firestorm of debate over the proper scope of the local public interest test. The resulting hue and cry resulted in an amendment to the local public interest language in 2003, over the objection of environmental groups and IDWR itself.

[1432] *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981) (in which the Idaho Department of Water Resources had ruled that water quality concerns were an "inappropriate consideration" prior to the adoption of the local public interest test).

[1433] There is a pre-1978 ancestor of sorts to the public interest test. An oblique reference to the "public interest" in the context of certain water right applications requiring approval by the Idaho Water Resource Board was made a part of the water code in 1967. 1967 Idaho Sess. Laws, ch. 374, § 2. It was repealed two years later. 1969 Idaho Sess. Laws, ch. 468, § 1. However, this short-lived provision did not provide a basis for a broad public interest review.

[1434] This test was soon applied in other settings. In 1979, when the water supply bank was created, the local public interest test was made applicable to water bank rentals. 1979 Idaho Sess. Laws, ch. 193, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-1763). In 1981 the Legislature made the test applicable to changes (also known as transfers) of existing water rights. 1981 Idaho Sess. Laws, ch. 147, § 3 (codified as amended at Idaho Code §§ 42-202B(3), 42-222(1)).

In 2003, the Legislature redefined "local public interest," limiting its scope to "the effects of such use on the public water resource." 2003 Idaho Sess. Laws, ch. 298 (codified at Idaho Code § 42-202B(3)).

Under this new test, a protestant could still complain, for instance, that a water right would dewater a trout stream. Presumably, the new definition also embraces water quality impacts. For instance, if a diversion from a stream would reduce the quantity of water remaining, and, thereby, the assimilative capacity of the stream, this impact would appear to be a proper matter for the Department to evaluate.

But evidence about dairy odors, noise, traffic, and other adverse effects of the project (unrelated to the water resource) was off limits in IDWR's consideration of the water right application. These are land use matters that must be taken up with municipal and other regulatory authorities with proper jurisdiction.

The examples above involve impacts caused by the diversion of water. What about adverse impacts resulting from the use of the diverted water? For instance, suppose an applicant sought a water right for use in a facility that would contaminate the water with pollutants, and the resulting waste water would eventually reach a nearby aquifer raising the level of contaminants in it. The current language speaks in terms of impacts of "a proposed water use" (and not just the diversion). This suggests that the Department is authorized to consider impacts including contaminated return flow, seepage, or waste water.

C. IDWR's basin-of-origin protection

See discussion in section 20.C(3) (Basin-of-origin protection (avoiding harm to local economy)) at page 709.

D. IDWR's authority to evaluate out-of-state water transfers

In 1990, the Idaho Legislature enacted detailed legislation specifically dealing with out-of-state uses of water (by either appropriation or transfer of existing rights). 1990 Idaho Sess. Laws, ch. 141 (codified primarily at Idaho Code § 42-401, but also §§ 42-203A(5)(f) and 42-222(1)) ("Water Export Act").

The Water Export Act was intended to bring the state into compliance with *Sporhase v. Nebraska ex rel. Douglas*, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (Stevens, J.), which set constitutional standards under the dormant commerce clause for when states may restrict water exports to other states. The Water Export Act included two primary elements.

First, it added a conservation requirement applicable to all water right applications (not just those out-of-state). See discussion in section 24.E at page 754. (This conservation requirement was added because states may not restrict the export of water unless they are conserving the resource within the state.)

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Second, the Water Export Act repealed earlier measures aimed particularly at water use in Oregon, and replaced them with a set of rules applicable to all appropriations and transfers for use of water out-of-state. Such out-of-state uses were required to follow special procedures, and IDWR was required to address six additional "factors" addressing the availability of water in the sending and receiving states. Idaho Code § 42-401(3). The factors are:

> (1) The supply of water available to the state of Idaho;
> (2) The current and reasonably anticipated water demands of the state of Idaho;
> (c) Whether there are current or reasonably available anticipated water shortages within the state of Idaho;
> (d) Whether the water that is the subject of the application could feasibly be used to alleviate current or reasonably anticipated water shortages within the state of Idaho;
> (e) The supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
> (f) The demands placed on the applicant's supply in the state where the applicant intends to use the water.

Idaho Code § 42-401(3).

It is unclear how these factors would be applied or what sort of evidence the applicant would be expected to provide. They appear to be intended to give the Director very broad discretion. For the applicant, the result is to significantly increase uncertainty and transaction costs. Not surprisingly, out-of-state transfers are a rarity.

Out-of-state water bank rentals were made subject to the same five tests in 1992. 1992 Idaho Sess. Laws, ch. 101, § 1 (codified at Idaho Code § 42-1763).

E. IDWR's authority to evaluate water conservation

As noted above, the Water Export Act included a conservation requirement applicable to <u>all</u> water right applications. The applicant for any new water right appropriation or transfer must show that the proposed use is consistent with (or not contrary to) "the conservation of water resources within the state of Idaho." Idaho Code §§ 42-203A(5)(f) (appropriations), 42-222(1) (transfers) 42-401(3) (out-of-state water exports).

This provision was used in 2002 to deny two water right applications filed in connection with two proposed gas-fired power projects near Rathdrum, Idaho. *In the Matter of Application for Permit No. 95-09069 in the Name of North Idaho Power LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002); *In the Matter of Application for Permit No. 95-09086 in the Name of Kootenai Generation LLC*, Before the Idaho Dep't of Water Resources (Preliminary Order, July 18, 2002). Both applications were denied because the proposed natural gas-fired power projects proposed to employ water-based cooling technologies where other technologies were available. The Department

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concluded that the inefficient use of water threatened the Rathdrum Prairie Aquifer. This decision was based on the "conservation of water" test (Idaho Code §§ 42-203A(5)(f), 42-222(1), not the local public interest test. There is no appellate case law interpreting this provision.

It would seem that this provision could be used by IDWR, if it chose, to widen its role in the evaluation of the efficiency of all manner of water uses—from agricultural irrigation to housing developments. To date, however, IDWR has been guarded in its use of this conservation provision.

F. IDWR's responsibility to consider comprehensive planning in the context of RAFN rights

The courts of Idaho and other Western states have long recognized the unique obligations of municipalities to establish a long term water supply sufficient to meet all comers. Most water users are required to put water to use promptly in order to obtain and retain a water right. Idaho was the first state to recognize the need for special treatment for municipal providers, allowing them to secure water rights for future needs. *City of Pocatello v. Murray*, 206 F. 72 (D. Idaho 1913), *aff'd, Murray v. City of Pocatello*, 214 F. 214 (9th Cir. 1914); *Beus v. City of Soda Springs*, 62 Idaho 1, 107 P.2d 151 (1940) (Holden, J.); *Village of Peck v. Denison*, 92 Idaho 747, 450 P.2d 310 (1969) (McQuade, J.). Colorado was quick to follow, and the doctrine has been most thoroughly discussed by the courts of that state. The seminal exposition comes from the Colorado Supreme Court, writing in 1939. *City & Cnty. of Denver v. Sheriff*, 96 P.2d 836, 841 (Colo. 1939).

What is known in Colorado as the "great and growing cities doctrine," is known in Idaho and elsewhere as the "growing communities doctrine"—underscoring that it applies to all municipalities.

In 1996, the Idaho Legislature codified the growing communities doctrine and established specific procedures and limitations governing a municipality's ability to acquire water rights (by appropriation or transfer) for "reasonably anticipated future needs ("RAFN").[1435]

In the 1996 Act, the Legislature affirmed the growing community doctrine's role in Idaho water law, while placing clear sideboards on how it is applied. By requiring careful planning and full disclosure by municipal providers who seek future needs water rights, the statute establishes a cautious approach that is both sensitive to speculation and consistent with the Idaho's longstanding doctrine mandating the maximum use of this public resource.

The 1996 Act may be boiled down to one sentence (with defined terms underlined): "Municipal providers" may secure water rights for "municipal purposes" of sufficient quantity to serve all

[1435] Municipal Water Rights Act of 1996 ("1996 Act"), 1996 Idaho Sess. Laws, ch. 297 (codified as amended at Idaho Code §§ 42-202(2), 42-202(11), 42-202B, 42-217, 42-219(1), 42-219(2), 42-222(1), 42-223(2)). This list of codified sections excludes some minor "clean up" to other sections of the Water Code that were included in the 1996 Act. References to municipal providers are also found in Idaho Code §§ 43-335 and 43-338, dealing with the right of irrigation districts to lease water to municipal providers. These references were not part of the 1996 Act, but came a year later.

"reasonably anticipated future needs" (aka "RAFN") within an expanding future "service area" during a specified "planning horizon."

On occasion, growing cities in other western states have engaged in costly races to lock up huge stockpiles of water rights. Each city's goal is to ensure that it, rather than its neighbor, will be able to grow. The primary authors of the 1996 Act were acutely aware of this phenomenon—particularly on the Front Range of Colorado—and took steps to limit the possibility that the special treatment accorded municipal providers would trigger similar "water wars" in Idaho.

In order to avoid these problems, the 1996 Act imposes three anti-speculation requirements. First, the Act requires that the claimed future needs must not be "inconsistent with comprehensive land use plans approved by each municipality." Second, the quantification of RAFN may not include "uses of water within areas overlapped by conflicting comprehensive land use plans." Idaho Code § 42-202B(8) (definition of "reasonably anticipated future needs"). Third, RAFN rights may not be sold. Idaho Code §§ 42-219(1), 42-222(1).

The first two of these speak directly to land use planning, and will be discussed further below. In a nutshell, the 1996 Act draws a clear jurisdictional boundary. It recognizes that municipalities have the duty to engage in comprehensive planning. IDWR is obligated to respect those planning documents, not to second guess them.

The first requirement—that projected future needs be consistent with comprehensive plans—is straightforward and not overly rigorous. Comprehensive plans are broad, conceptual planning documents, not specific descriptions of what is permitted where.[1436] Comprehensive plans do not ordinarily contain detailed population or economic projections. Thus, not too much should be read into this consistency requirement. On the other hand, the consistency requirement means something. It requires that future needs projections take into account the local government's vision of the future, at least on a macro scale. For example, if the comprehensive plan (or its associated future land use map) described an area as dedicated open space or preserved agricultural use, that, presumably, would be inconsistent with a quantification of RAFN based on high density development in the area.

The second requirement is a potentially draconian measure designed to provide an incentive to adjacent municipalities to cooperate in planning efforts. To the extent two or more municipalities assert planning authority over the same area and develop conflicting planning scenarios, future needs within that area may not be included in the quantification of any RAFN right. In other words, such areas must be excluded from what is informally known as the "planning area" for RAFN quantification.

As a practical matter, however, such conflicts are rare in Idaho. LLUPA does a good job of resolving disputes between cities over the direction of future growth. Each city is required to establish

[1436] Virtually all state zoning laws require local governments to adopt comprehensive plans. Idaho's requirement is found in the Local Land Use Planning Act ("LLUPA"), Idaho Code § 67-6508. *See Idaho Land Use Handbook* for a detailed discussion of this subject.

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an "area of city impact" that defines the area beyond its current city limits where a city anticipates growing and, more specifically, extending city services and annexing. LLUPA provides a mechanism for cities and counties to resolve disputes over the boundaries of areas of city impact (to ensure that they do not overlap) and to determine whether the city's or the county's comprehensive plan and zoning ordinances will apply within the area of city impact. Idaho Code § 67-6526. The Act provides mechanisms for negotiation and, if necessary, judicial or political resolution. Even so, LLUPA has not eliminated all such conflicts.

The 1996 Act's prohibition against serving "conflicting plans" areas applies equally to municipalities and to private utilities providing municipal water. Thus, a water utility cannot base its RAFN quantification on service to lands where two municipalities have an unresolved area of city impact dispute.

It bears emphasis that the "conflicting plans" areas probation applies only to water rights (or the portion thereof) held for RAFN. Municipal providers may acquire and hold water rights to serve existing or short-term needs within such "conflicted" areas.

G. Cities' and developers' rights to cross, use, or discharge into irrigation canals and drains

Many Idaho cities contain within their boundaries substantial networks of irrigation canals, ditches, laterals, and drains, and the associated easements along these waterways necessary for their management and repair. The easements for these irrigation facilities, usually acquired by prescription (and recognized by statute[1437]) typically are owned by the irrigation district, canal company, lateral water users association, or individual that owns or claims the ditch or drain. As cities have grown, more and more public and private facilities need to cross over, under, or along these irrigation conduits or their associated easement areas. These facilities include such things as water and sewer pipelines, electrical utility lines, sidewalks, bridges, public pathways, landscaping, and storm water conveyance systems. Similarly, municipal water providers sometimes need to discharge water from wells as part of the well completion or maintenance process; canals or drains are a logical place to do so. Storm water historically has been discharged to irrigation canals or drains in many cases, and new land uses change flow patterns and lead to additional, or changed, stormwater discharges.

Idaho Code §§ 42-1209, 42-1102, and 42-1108 are the principal statutes addressing the question of how, or whether, entities may place such facilities—"encroachments" as they are termed in section 42-1209—within irrigation entity easements.

[1437] Idaho Code § 42-1102 ("The existence of a visible ditch, canal or conduit shall constitute notice to the owner . . . of the underlying servient estate, that the owner of the ditch . . . has the right-of-way and incidental rights confirmed or granted by this section.") and Idaho Code § 42-1204 (ditch or canal owners "have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, repairing and maintaining" the ditch "and to occupy such width of the land along the banks of the ditch . . . as is necessary to properly do the work").

Idaho Code § 42-1204 expressly obligates the operators of ditches and canals to maintain their systems so as to avoid injury to others.

Section 42-1108 seemingly is an expression of legislative recognition that canals and drains should not be used to block land use changes or the construction of needed infrastructure, provided, of course, that it can be done without damage to the canal. This provision prohibits the owner of a ditch, flume or conduit from denying another the "right to cross their right of way with another ditch, flume or conduit," provided that "the same can be done in a convenient and safe manner" and the person building the crossing facility remains liable for any damages to the existing ditch. This language appears to provide a city or other entity an entitlement to place an encroachment—or at least a "ditch, flume or conduit"—in an irrigation easement, while remaining obligated to protect the irrigation entity from damage. However, this section probably would be read together with the more specific sections 42-1102 and 42-1209 so as to give effect to each. There is no case law discussing the interplay between these statutes.

Idaho Code sections 42-1102 and 42-1209 each require those seeking to build an encroachment to obtain the "written permission of the owner of the right-of-way in order to ensure that any such encroachments will not unreasonably or materially interfere with the use or enjoyment of the right-of-way."[1438] They also confirm the common law rule that the person making the encroachment will remain liable to the irrigation entity for damages caused by any encroachment, and expressly preserve the right of eminent domain under Idaho Code § 7-701.

In *Pioneer Irr. Dist. v. City of Caldwell,* 153 Idaho 593, 288 P.3d 810 (2012) (Horton, J.), the Idaho Supreme Court considered whether a city could discharge stormwater into an irrigation district's canals and maintain urban stormwater discharge conduits within the district's canal easement. The irrigation district, claiming the conduits and discharges are trespasses on an exclusive canal easement, sought an injunction requiring their removal at the city's expense.

[1438] Idaho Code § 42-1209 provides in full: "Easements or rights-of-way of irrigation districts, Carey act operating companies, nonprofit irrigation entities, lateral ditch associations, and drainage districts are essential for the operations of such irrigation and drainage entities. Accordingly, no person or entity shall cause or permit any encroachments onto the easements or rights-of-way, including any public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects, without the written permission of the irrigation district, Carey act operating company, nonprofit irrigation entity, lateral ditch association, or drainage district owning the easement or right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Encroachments of any kind placed in such easement or right-of-way, without such express written permission shall be removed at the expense of the person or entity causing or permitting such encroachments, upon the request of the owner of the easement or right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the easement or right-of-way. Nothing in this section shall in any way affect the exercise of the right of eminent domain for the public purposes set forth in section 7-701, Idaho Code."

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The Idaho Supreme Court considered the matter in light of Idaho Code § 42-1209. The Court held that "the ditch owner is vested with the discretion to determine whether an encroachment would result in unreasonable or material interference with the easement or right-of-way." *Pioneer*, 153 Idaho at 598, 288 P.3d at 815. But that determination is subject to limited judicial review. The Court then remanded the matter to the district court "to determine whether a reasonable decision-making process was employed, and whether the decision was arbitrary and capricious or based upon clearly erroneous findings." *Pioneer*, 153 Idaho at 601, 288 P.3d at 818.[1439]

As to the question about removing the encroachment, the Court found that the irrigation entity could engage in "self-help" and remove the encroachment itself at the encroacher's expense if four conditions are met: (1) the encroachment was built after 2004 (when section 42-1209 was enacted); (2) the encroachment was constructed without permission; (3) "the encroachment must unreasonably or materially interfere with the use and enjoyment of the easement"; and (4) the irrigation entity first must request that the party responsible for the encroachment remove it.

The Court disagreed with the irrigation district that its easements are exclusive. The Court noted that, under the common law, irrigation canal easements are not exclusive, citing, *inter alia, Pioneer Irr. Dist. v. Mussell,* 138 Idaho 28, 33, 72 P.3d 868, 873 (2003) and *Nampa & Meridian Irr. Dist. v. Washington Federal Savings,* 135 Idaho 518, 20 P.3d 702 (2001). It found no indication that, in enacting section 42-1209, the Legislature sought to abrogate the common law. *Pioneer*, 153 Idaho at 601, 288 P.3d at 818. On this point all five justices agreed.

H. Responsibility for maintaining canals, ditches, laterals, and buried water conduits

It is the duty of the owner of a canal, ditch, or other water conduit to maintain it:

> The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others.

[1439] Such a review standard is familiar in the context of actions by state agencies or municipalities that engage in a meaningful fact-finding and hearing procedure, produce a record, and issue a final order that then will be subject to judicial review under Idaho's Administrative Procedure Act ("IAPA"), Idaho Code §§ 67-5201 *et seq.* The IAPA contains essentially the same deferential "arbitrary and capricious" standard the *Caldwell* Court concluded should be applied to an irrigation entity's decision regarding permission for an encroachment. While irrigation districts do not ordinarily hold hearings, employ procedures that ensure due process, or develop a record of decision, the Court concluded that section 42-1209 requires courts to extend "judicial deference" to the irrigation entity's decision to grant or withhold permission.

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Idaho Code § 42-1204.

Similarly (or redundantly), the owner of any ditch, canal, or conduit is responsible to "carefully keep and maintain the embankments thereof in good repair." Idaho Code § 42-1203.

Another statute says the same thing in the context of laterals: "The improvement, repair and maintenance of any such lateral or distributing ditch shall be under the direction of the directors of the association." Idaho Code § 42-1303.[1440]

While the irrigation entity has the maintenance duty, the extent of liability for breach of that duty was limited by the Legislature in 2012:

> The duties referenced in this section, whether statutory or common law, require reasonable care only, and shall not be construed to impose strict liability or to otherwise enlarge the liability of the owner or owners of any irrigating ditch, canal or conduit. The owners or constructors of such ditches, canals, works or other aqueducts, while responsible for their own acts or omissions, shall not be liable for damage or injury caused by: (1) The diversion or discharge of water into a ditch, canal or conduit by a third party without the permission of the owner or owners of the ditch, canal or conduit; (2) Any other act or omission of a third party, other than an employee or agent of the owner or owners of the ditch, canal or conduit; or (3) An act of God, including fire, earthquake, storm or similar natural phenomenon.

Idaho Code § 42-1203. Functionally identical language was added in 2012 to Idaho Code § 42-1204.

A landowner whose land is crossed by a ditch, canal, lateral or drain or buried irrigation conduit has a right to change the location of the conveyance to another place on his or her land or within a neighbor's easement, or to bury the conveyance, if this may be done without impairing the water flow. When the landowner decides to bury the water conveyance, the owner of the conveyance remains responsible for its maintenance. But there is a catch: "The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner, his heirs, executors, administrators, successors and assigns, shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner." Idaho Code § 42-1207.

[1440] "Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three (3) days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the watermaster in his own name." Idaho Code § 42-1206.

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There is even a criminal statute on the subject. "The right and responsibility for operation and maintenance shall remain with the owner of the ditch, canal, lateral or drain, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner." Idaho Code § 18-4308.

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PRELIMINARY ORDER: GRANTING AND DENYING IN PART MOTION TO STRIKE; AND DISMISSING PETITION FOR DECLARATORY RULING WITHOUT PREJUDICE**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively, "Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* ("*Petition*"), "pursuant to IDAPA 37.01.01.300.02.d" with the Idaho Department of Water Resources ("Department"). *Petition*, at 1. The Pehrsons seek two forms of relief:

1. Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right now. 34-18 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.

2. Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Id. at 2.

On February 23, 2024, Moss Farms, Inc. ("Moss") filed an *Objection to Petition for Declaratory Ruling for Watermaster Instructions* with the Department. Additionally, the Big Lost River Irrigation District ("BLRID"), Moore Canal Users ("Moore"),[1] and Big Lost River

[1] "Moore Canal Users" collectively refers to Moore Canal Water Users' Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline.

Ground Water District petitioned for intervention in this contested case. Hearing Officer Burdick granted intervention to BLRID and Moore and denied Big Lost River Ground Water District.

On October 17, 2024, the Hearing Officer issued a scheduling order setting the deadline to file dispositive motions for January 24, 2025. *Order Auth. Discovery & Email Service; Scheduling Order; Not. of Hr'g*, at 3.

On January 13, 2025, pursuant to Idaho Rules of Civil Procedure 12(b)(6), Moore filed a motion to dismiss the *Petition* for failure to "comply with statutory or regulatory requirements" and "improperly assert[ing] a right to a futile call." *Moore Mot. to Dismiss*, at 8. On January 24, 2025, BLRID filed a joinder in Moore's motion to dismiss, "reserv[ing] the right to reply to any response filed in opposition to said motion or to participate in any oral argument on the motion." *BLRID's Joinder in Supp. Moore's Mot. to Dismiss*, at 1. On January 27, 2025, the Pehrsons filed a response in opposition to Moore's motion to dismiss concurrently with a motion to strike BLRID's joinder. On January 31, 2025, the Hearing Officer issued an order denying the Pehrsons' motion to strike, allowing BLRID to join Moore's motion, however, "restricted exclusively to the augments raised in Moore's motion to dismiss." *Order Grant. Mot. to Shorten Time & Den. Mot. to Strike*, at 2. On February 3, 2025, Moore filed a reply to its motion to dismiss.

On January 24, 2025, Moss filed a motion for summary judgment with a supporting memorandum and declaration. On February 3, 2025, BLRID filed a response in support of Moss's motion. On February 7, 2025, the Pehrsons filed a response against the motion for summary judgment along with several supporting declarations. On February 14, 2025, Moss filed a reply to its motion for summary judgment with a declaration in support.

Additionally, on February 14, 2025, Moss filed a motion to strike certain paragraphs from the declarations filed by the Pehrsons on February 7, 2025.

The Hearing Officer noticed a dispositive motion hearing in this matter for February 21, 2025. The hearing was held, and all parties appeared represented by their respective counsel of record. Having fully reviewed the record, during the hearing the Hearing Officer (1) granted and denied in part the pending motion to strike, (2) granted the motion to dismiss, dismissing the *Petition* without prejudice, in its entirety, after allowing all parties to present oral argument, (3) declined to hear oral argument or rule on the motion for summary judgment, and (4) informed the parties that a written order would follow. The purpose of this order is to memorialize and expound upon the oral rulings made by the Hearing Officer on February 21, 2025, in accordance with IDAPA 37.01.01.412.01.f.

MOTION TO STRIKE

Following introductions, Hearing Officer Burdick began the February 21 hearing by orally ruling on Moss's pending motion to strike without allowing oral argument. Referencing Rule 600 of the Department's Rules of Procedure ("Rules"), IDAPA 37.01.01, during the hearing, he stated that the main criterion for admission is: "All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." IDAPA

37.01.01.600. The Hearing Officer finds Moss's arguments, concerning inadmissible hearsay and statements that are improperly conclusory or lacking foundation, compelling only as they concern paragraphs 15 and 19 of the *Declaration of Byron Pehrson* and paragraph 24 of the *Declaration of Lucas Yockey*, both filed by the Pehrsons on February 7, 2025. *See Mot. to Strike*, at 6, 7, 9. Exercising his discretion, during the hearing he orally ruled in favor of striking only those specific paragraphs and denied all other requests to strike. When offered an opportunity to object, counsel for Moss expressly recognized the decision as one of discretion and declined to make an objection on the record. The Hearing Officer's oral ruling on Moss's *Motion to Strike* is memorialized in the order section below.

MOTION TO DISMISS

I. Legal Standard

The Department's Rules permit any party to file a motion with the Department to take an action in a contested case. IDAPA 37.01.01.220.01. This includes the opportunity for a party to file a motion to dismiss an action for a "failure to state a claim upon which relief can be granted." I.R.C.P. 12(b)(6). On a motion to dismiss for failure to state a claim, "the non-moving party is entitled to have all inferences from the record viewed in his favor." *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "After drawing all inferences in the non-moving party's favor," the issue becomes whether "a claim for relief has been stated." *Id.* The Hearing Officer would "look[] only at the pleadings to determine whether a claim for relief has been stated." *Shelton v. Shelton*, 148 Idaho 560, 565, 225 P.3d 693, 698 (2009). The Hearing Officer must determine "whether the party is entitled to offer evidence to support the claims." *Young*, 137 Idaho at 104, 44 P.3d at 1159. In other words, the Hearing Officer must examine whether the Pehrsons have sufficiently alleged the required declaratory ruling elements in their petition to survive a motion to dismiss for failure to state a claim. *See id.*

II. Analysis

The Pehrsons filed the *Petition* asking the Department to issue watermaster instructions "regarding the delivery of certain water rights from the Big Lost River in Water District No. 34 and releases of storage water from Mackay Reservoir as carriage water to satisfy natural flow rights from the Big Lost River." *Petition*, at 1. The Pehrsons filed the *Petition* pursuant to Rule 300.02.d. *Petition*, at 1. However, Rule 300.02 merely sets forth specific content requirements:

> **02. Content of Pleadings and Written Motions.** A pleading or written motion shall fully state:
>
> a. The facts upon which it is based;
>
> b. The provision of statute, rule, order, or other controlling law upon which it is based; and
>
> c. The relief sought, including any proposed limitation (or the denial) of any right, license, or permit sought in an application.
>
> d. Petitions for declaratory orders shall state the declaratory ruling that the petitioner seeks.

IDAPA 37.01.01.300.02. The Pehrsons claim the *Petition* "asks for a declaratory ruling as to the Director's duty and authority to deliver water in priority as required by Idaho law and his statutory duty in light of facts that would make such delivery a futile call." *Pehrson's Resp. to Moore's Mot. to Dismiss*, at 3.

Any agency proceeding that "may result in the issuance of an order" is subject to the provisions of the Idaho Administrative Procedures Act ("APA"). I.C. § 67-5240. The APA authorizes state agencies to determine contested cases. *Id.* An "agency" includes a "state board, commission, department or officer authorized by law to make rules or to determine contested cases." I.C. § 67-5201(3). The Legislature established the Department as an "executive department of the state government." I.C. § 42-1701. The Department is authorized in specified circumstances to promulgate rules and determine contested cases. *E.g.*, I.C. §§ 42-1805(8), 42-1701A. The Department has promulgated rules governing its procedures for contested case proceedings. IDAPA 37.01.01.001; *see* I.C. § 67-5206(2). Therefore, the Department is a state agency authorized to determine contested cases pursuant to the APA.

Agencies are "limited to the power and authority granted them by the Legislature." *Henderson v. Eclipse Traffic Control & Flagging, Inc.,* 147 Idaho 628, 632, 213 P.3d 718, 722 (2009) (quoting *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996)). Consequently, the Department proceedings in this matter are controlled and limited by the statutory provisions of the APA. *See* I.C. § 67-5240. In accordance with the APA, an agency may initiate a contested case when a person petitions for a declaratory ruling. *Idaho Retired Firefighters Ass'n v. Pub. Emp. Ret. Bd.*, 165 Idaho 193, 196, 443 P.3d 207, 210 (2019) (citing I.C. § 67-5232(2)); *see also* I.C. § 67-5255(2). The agency may then issue an order addressing the petition for a declaratory ruling. *See id*. However, the APA only permits a person to file a petition for declaratory ruling before an agency in certain circumstances, which are provided in Idaho Code §§ 67-5232 and 67-5255. As stated below, the Pehrsons did not base the *Petition* on any statute, rule, or order for the Hearing Officer to consider in issuing a declaratory ruling.

A. The Pehrsons did not cite a statute or Department rule in the *Petition* that would allow the Hearing Officer to issue a declaratory ruling pursuant to Idaho Code § 67-5232.

Idaho Code § 67-5232 provides a person with a limited opportunity to properly petition an agency for a declaratory ruling. It states: "Any person may petition an agency for a declaratory ruling as to *the applicability of any statutory provision or of any rule administered by the agency*. I.C. § 67-5232(1) (emphasis added). For a person to initiate a declaratory ruling under § 67-5232, their petition must make an inquiry concerning the applicability of an expressly stated statute or rule administered by the Department. If their petition fails to satisfy this statutory requirement, then the agency cannot make a declaratory ruling pursuant to § 67-5232.

Here, § 67-5232 does not apply because the Pehrsons fail to request a determination concerning the applicability of a specific statute or rule administered by the Department. A failure that continued throughout their response to the motion to dismiss and oral argument. In a footnote in their response opposing dismissal, the Pehrsons generally reference for the first time

Title 42, Chapter 6 of Idaho Code to support their assertion that the Director is authorized to make the declaratory ruling requested in their *Petition*. *Pehrson's Resp. to Moore's Mot. to Dismiss*, at 3 n.1. It cannot be disputed that the Director has the authority and a legal duty to administer water within Idaho water districts in accordance with the prior appropriation doctrine. I.C. § 42-602. However, a footnote reference to the general authority that Title 42, Chapter 6 of Idaho Code may grant the Director to deliver water in priority does not satisfy the requirements outlined in § 67-5232(1). As § 67-5232(1) indicates, there must first be an identified statute or administrative rule for an agency to consider before it is able to issue a declaratory ruling addressing any factual or legal issues presented. Without citing a relevant statute or rule, the Hearing Officer is unable to address the applicability of such law within a declaratory ruling. Therefore, because the Pehrsons failed to raise a statute or administrative rule in the *Petition* for the Department to consider, the Department cannot issue a declaratory ruling pursuant to Idaho Code § 67-5232.

B. The Pehrsons did not cite an order of the Department in the *Petition* that would allow the Hearing Officer to issue a declaratory ruling pursuant to Idaho Code § 67-5255.

Idaho Code § 67-5255 also provides a person with a limited opportunity to properly petition an agency for a declaratory ruling. It states: "Any person may petition an agency for a declaratory ruling as to *the applicability of any order issued by the agency*." I.C. § 67-5255(1) (emphasis added). For a person to initiate a declaratory ruling under § 67-5255, their petition must make an inquiry concerning the applicability of an order issued by the Department. If their petition fails to satisfy this statutory requirement, then the agency cannot make a declaratory ruling pursuant to § 67-5255.

During the dispositive motion hearing, the Hearing Officer asked counsel for the Pehrsons, "But what has the department done that you wish to have an explanation from a court about?" Hr'g, at 00:29:59–00:24:09. In response, counsel ultimately directed the Hearing Officer to the exhibits from his February 7 declaration, asserting for the first time that a series of email exchanges between Department staff and the Water District 34 watermasters, that occurred in 2021 and 2022, are the orders forming the basis of the *Petition* because they were "decisions made by the Department" that interfered with the Pehrsons' water rights. Hr'g, at 00:24:33–00:28:28, 00:36:56–00:37:31; *see Bromley Dec.* Exs. (Feb. 7, 2025).

The APA defines an "order" issued by an agency as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." I.C. § 67-5201(15). The Idaho Supreme Court implemented a two-step analysis to determine whether an order exists: (1) "the Legislature must have empowered the agency to determine the particular issue"; and (2) "the decision must determine 'the legal rights, duties, privileges, immunities, or other legal interests' of one or more persons." *Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 871, 243 P.3d 1055, 1059 (2010) (quoting I.C. § 67-5201(15)). The first element must be met prior to the second element because if an agency does not have authority over a particular issue, then the agency cannot issue an order determining a person's legal rights. *Westway Const., Inc. v. Idaho Transp. Dep't*, 139 Idaho 107, 112, 73 P.3d 721, 726 (2003).

In *Laughy*, a group appealed the Idaho Transportation Department's ("ITD") decision to grant an overlegal special permit to an entity to transport coke drums that exceeded the statutory maximum size and height of vehicles to travel on state highways. *Laughy*, 149 Idaho at 868–69, 243 P.3d at 1056–57. The Court concluded the first element of an order was satisfied because the Legislature authorized the ITD to issue an overlegal special permit pursuant to its statutory authority and associated promulgated rules governing the permit process to issue overlegal special permits. *Id.* at 871, 243 P.3d at 1059 (citing I.C. § 49-1004(1); IDAPA 39.03.09).

Here, the first element is satisfied. Despite the Pehrsons' reference in a footnote to the Director's statutory authority to administer water in priority pursuant to Title 42, Chapter 6 of Idaho Code, it cannot be disputed that the Director has the authority and a legal duty to administer water within Idaho water districts in accordance with the prior appropriation doctrine. I.C. § 42-602. In addition, this matter is within Water District 34 which has its own promulgated rules pertaining to the distribution of storage water from the Mackay Reservoir. *See* IDAPA 37.03.12. However, the Pehrsons do not specifically cite or reference those rules at all in their pleading, responsive brief, or at the hearing.

As to the second element in *Laughy*, the Court concluded it was satisfied because ITD's decision to issue an overlegal permit would specifically impact the applicant's legal right to transport cargo on the state highway. *Id.* at 871, 243 P.3d at 1059. The Court reasoned that although the permit was issued as a result of informal proceedings by the ITD, the permit still constituted an order because the ITD still had to follow its procedural guidelines set forth in statute and agency rules to issue the special overlegal permit. *Id.*

Here, the second element is not satisfied. As detailed above, the Pehrsons waited until the hearing to verbalize an ill-defined claim that the Department orders at issue in the *Petition* are the email exchanges between Department staff and Water District 34 watermasters reversing a futile call decision. The *Petition* itself did not cite or reference these email exchanges as an order issued by the Department for the Hearing Officer to consider in a declaratory ruling. It is likely that a futile call decision would impact the Pehrsons' legal rights in receiving their water rights. Although informal proceedings may be the source of a declaratory action, there still needs to be some process followed to be considered an order. For instance, unlike *Laughy*, the email exchanges between Department staff were not the result of the Department following statutory or rule-based procedures to grant or deny an application for a statutory permit. Further, as Moore indicated at the hearing, if email exchanges between Department staff were broadly construed as an "order," then every action of every employee of state agencies would open an avenue for declaratory rulings. Hr'g, at 00:40:17–00:40:56. Thus, the email exchanges do not rise to the level of an order needed to support a declaratory ruling. Therefore, the Department does not have authority to issue a declaratory ruling pursuant to Idaho Code § 67-5255 because the Pehrsons did not cite a Department order to support a declaratory action.

Moreover, in its response to the motion to dismiss, the Pehrsons claim that Idaho Code §§ 67-5232 and 67-5255 grant the Department the authority to choose to issue a declaratory ruling simply by initiating a contested case. *Pehrson's Resp. to Moore's Mot. to Dismiss*, at 4. The Pehrsons indicate that when §§ 67-5232 and 67-5255 are read in conjunction with Rules 51 and 300.02.d, the Department can liberally construe its administrative rules to "accept the *Petition* to

then initiate a contested case that will result in the issuance of an order." *Id*. (citing IDAPA 37.01.01.051, 37.01.01.300.02.d). However, Rule 51 does not allow the Department to ignore statutory requirements. *See* IDAPA 37.01.01.051. The APA requires a petitioner to cite a statute, rule, or order for the Department to consider when issuing a declaratory ruling. I.C. §§ 67-5232, 67-5255. The Pehrsons failed to cite a statute, rule, or order on the face of the *Petition*. Such failure justifies dismissing the matter for failing to sufficiently allege the required declaratory ruling elements in the *Petition*. Therefore, the *Petition* is dismissed without prejudice.

III. Conclusion

The Pehrsons failed to support the *Petition* with any statute, rule, or order which allows the Hearing Officer to consider issuing a declaratory ruling. The Hearing Officer's oral ruling on *Moore Canal Users' Motion to Dismiss* is memorialized in the order section below.

MOTION FOR SUMMARY JUDGMENT

A matter "becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Goodson v. Nez Perce Cnty. Bd. of Cnty. Comm'rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). An issue is moot if there is "no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Id.* Because the *Petition* is dismissed, the issues presented in Moss Farms' *Memorandum in Support of Motion for Summary Judgment* are no longer live. There is no question that Moss Farms may have presented a justiciable controversy in its motion. However, because the *Petition* failed to state a claim for relief, the issues brought forth in the motion for summary judgment cannot be considered. Therefore, the motion for summary judgment is moot.

ORDER

IT IS HEREBY ORDERED that Moss Farms, Inc.'s *Motion to Strike* is GRANTED IN PART as it concerns paragraphs 15 and 19 of the *Declaration of Byron Pehrson* and paragraph 24 of the *Declaration of Lucas Yockey*, both filed February 7, 2025, and DENIED IN PART as it concerns all other requests.

IT IS FURTHER ORDERED that *Moore Canal Users Motion to Dismiss* is GRANTED, and the *Petition for Declaratory Ruling for Watermaster Instructions*, filed by Byron Pehrson, Loy Pehrson, and Randy Pehrson on February 14, 2024, is DISMISSED, in its entirety, WITHOUT PREJUDICE.

DATED this 28th day of February 2025.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of February 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Courtesy copy via email:

Moss Farms Inc.
mx222moss@aol.com

Sara Ajeti
Deputy Attorney General

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

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RECEIVED
Mar 05, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**MOTION TO AMEND PETITION FOR DECLARATORY RULING; PETITION FOR RECONSIDERATION AND/OR PETITION FOR EXCEPTIONS; MOTION TO EXPEDITE**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons"), by and through their counsel of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.303, hereby respectfully move to amend their *Petition for Declaratory Ruling* ("Petition") filed with the Idaho Department of Water Resources ("IDWR" or "Department") on February 14, 2024; petition the Hearing Officer to reconsider his *Preliminary Order: Granting and Denying In Part Motion to Strike; and Dismissing Petition for Declaratory Ruling without Prejudice* (Feb. 28, 2025) ("Order"), pursuant to IDAPA 37.01.01.730.02.b, and/or petition the Hearing Officer for exceptions, pursuant to IDAPA 37.01.01.730.02.c; and move the Hearing Officer to expedite the

decision in this matter, pursuant to IDAPA 37.01.01.220.02.f. Filed contemporaneously is an *Amended Petition for Declaratory Ruling*.

I. INTRODUCTION

February 28, 2025, Hearing Officer Roger Burdick issued his *Order*. According to the *Order*, the Hearing Officer determined that the *Petition* did not sufficiently cite Idaho Code, the Department's Rules of Procedure, or orders of IDWR; thus, the Hearing Officer dismissed the *Petition*, without prejudice. First, pursuant to IDAPA 37.01.01.303, Pehrsons hereby move the Hearing Officer grant the instant *Motion*, which will allow the *Amended Petition for Declaratory Ruling* to be heard. Through this *Motion*, Pehrsons will cite the Hearing Officer to the statutes, rules, and orders of IDWR that support the *Amended Petition for Declaratory Ruling*, with argument to support the same.

Second, pursuant IDAPA 37.01.01.730.02.b and IDAPA 37.01.01.730.02.c, and to the extent the *Motion* and the *Amended Petition for Declaratory Ruling* do not resolve the issues raised in the *Order*, Pehrsons petition the Hearing Officer to reconsider the *Order* and/or take exceptions with the *Order*.

Third, pursuant to IDAPA 37.01.01.220.02.f, and for good cause shown, Pehrsons move the Hearing Officer to expedite decisions in the above-captioned matter. As will be explained, good cause exists to hear this case and have a schedule in place with a decision issued before July 1, 2025.

II. ARGUMENT CONCERNING THE *ORDER* AND AMENDMENT OF THE PETITION FOR DECLARATORY RULING

IDAPA 37.01.01.303 states: "The agency may allow amendments to pleadings during informal proceedings. The presiding officer may allow amendments to pleadings during formal proceedings. Pleadings will be liberally construed, and defects that do not affect substantial

rights of the parties will be disregarded." According to IDAPA 37.01.01.050: "The rules in this chapter will be liberally construed to ensure just, speeding and economical determination of all issues presented to the agency." *See also* I.R.C.P. 1(b) ("These rules should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding."). When an order dismisses claims, without prejudice, as occurred here, it is appropriate to grant leave to amend the petition. *John Doe v. Idaho State Bar*, 161 Idaho 139, 140, 384 P.3d 386, 387 (2016) ("Plaintiffs were granted leave to amend their complaint as to certain claims dismissed without prejudice by Judge Lodge.").

According to the *Order*, and consistent with I.C. §§ 67-5232(1) and 67-5255(1), Pehrsons are required to cite statutes, rules, or orders that are at issue:

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of <u>any statutory provision or of any rule administered by the agency</u>.

I.C. § 67-5232 (emphasis added).

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of <u>any order issued by the agency</u>.

I.C. § 67-5255 (emphasis added).

A. Statutes and Rules Administered by the Department that Apply to the *Amended Petition for Declaratory Ruling*

The statutes that govern the Department are found in Title 42, Idaho Code, with the Department's rules of procedure contained in the Idaho Administrative Code. According to the Idaho Supreme Court:

> Under the other provisions of Idaho Code Title 42, chapter 6, the Director is granted broad authority to direct and control water, and to administer it according to the prior appropriation doctrine. The legislature has mandated that IDWR manage water resources in Idaho, and has provided IDWR with the water district as its principal tool in carrying out this mandate.

Thompson Creek Mining Co. v. Idaho Dept. of Water Res., 148 Idaho 200, 211-12, 220 P.3d 318, 329-30 (2009).

Consistent with the foregoing, the Director's powers to create water districts, appoint watermasters, instruct watermasters, interpret and administer water rights for delivery within water districts is supported by I.C. §§ 42-602, 42-603, 42-604, 42-607, as well as interpretation of Chapter 6, Title 42, Idaho Code by IDWR, the district court, and the Idaho Supreme Court. These sections of Idaho Code apply because they explain the powers of the Director and watermasters to administer water within water districts, including WD34.

Article XV of Idaho's Constitution generally discusses the use of the State's water resources, with the following sections applying to this matter: 1, 3, and 5, as well as interpretation of those sections by IDWR, the district court, and the Idaho Supreme Court. These sections of Idaho's Constitution apply because they are the foundational pieces of Idaho's prior appropriation doctrine, which Pehrsons allege has been violated through incorrect application of the water rights that are at issue and determinations of futile call.

Chapter 1, Title 42, Idaho Code generally discusses how water is appropriated in the State of Idaho and contains statutes that apply to this matter, including but not limited to: I.C. §§ 42-101, 42-103, 42-104, 42-105, 42-106, 42-107, 42-108, and 42-110, as well as interpretation of Chapter 2, Title 42, Idaho Code by IDWR, the district court, and the Idaho Supreme Court. These sections of Idaho Code apply because they build on the provisions in Idaho's Constitution and further explain the rights of appropriators that are at issue herein.

Chapter 2, Title 42, Idaho Code generally discusses how water is appropriated in the State of Idaho and contains statutes that apply to this matter, including but not limited to: I.C. §§ 42-201, 42-202, 42-219, 42-220, and 42-222, as well as interpretation of Chapter 2, Title 42, Idaho Code by IDWR, the district court, and the Idaho Supreme Court. These sections of Idaho

Code apply because they also build on the provisions in Idaho's Constitution and further explain the rights of appropriators and the requirements for transfer of water rights that are at issue herein.

Chapter 14, Title 42, Idaho Code generally discusses how water is adjudicated in the State of Idaho and contains statutes that apply to this matter, including but not limited to: I.C. §§ 42-1409, 42-1411, 42-1412, 42-1413, and 42-1420, as well as interpretation of Chapter 14, Title 42, Idaho Code by IDWR, the district court, and the Idaho Supreme Court. These sections of Idaho Code apply because they define how water rights were adjudicated in the Snake River Basin Adjudication ("SRBA"), the finality of the partial decrees that were issued by the SRBA district court, and the import of the SRBA's *Final Unified Decree* to the water rights at issue herein.

The water rights that are at issue here are located in Water District No. 34 ("WD34"). Distribution of water within WD34 is governed by the Idaho Constitution, the above-listed statutes, the water rights that were issued by the SRBA, the transfers that were approved by the Department, as well as IDAPA 37.03.12, *Idaho Department of Water Resources Water Distribution Rules – Water District 34* ("WD34 Rules"). The WD34 Rules that apply to this proceeding include but are not limited to: 010.01 – 2-B Gage; 010.09 – Holder of a Water Right; 010.13 – Storage Water; 010.14 – Watermaster; 025 – River Reaches; 030.02 – Alternate Point of Diversion; 040 – Allocation of Natural Flow, as well as interpretation of the WD34 Rules by IDWR, the district court, and the Idaho Supreme Court. The WD34 Rules further define the rights of the parties herein.

Lastly, general principles apply in this case, that are described by the Supreme Court, with bases in the above-cited codified laws: "A water right is tantamount to a real property right,

and is legally protected as such." *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1997). "It is the policy of the law of this state to prevent the wasting of water." *Colthorp v. Mountain Home Irrigation District*, 66 Idaho 173, 178, 157 P.2d 1005, 1007 (1945). "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of direction by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007).

B. Orders Issued by the Department that Apply to the *Amended Petition for Declaratory Ruling*

Included as exhibits to the *Declaration of Chris M. Bromley* (Feb. 7, 2025) ("Bromley Dec.") and the *Declaration of Preston Marcroft* (Feb. 4, 2025) ("Marcroft Dec.") are letters and emails from the Department to the WD34 Watermaster, in which IDWR declared futile call on the Big Lost River above and below the Darlington Sinks. These documents show that the way in which IDWR determined futile call differed from its past determinations and was not consistent in 2021 and 2022. As will be explained, the letters and emails are agency actions that constitute orders that apply to the *Amended Petition for Declaratory Ruling*.

1. The 2021 futile call determination

On July 26, 2021, Rob Whitney, Manager, Water Distribution Section, sent a letter ("July 2021 Letter") to Watermaster Lucas Yockey, in which futile call was determined:

> It is evident that that curtailment of junior surface water rights upstream of the Moore Diversion to satisfy surface water rights at the Moore Diversion constitutes a futile call. Therefore, you are instructed to distribute surface water flows of the Big Lost River in the reach from Mackey Dam to the Beck Diversion as a separate source for the remainder of the 2021 irrigation season . . . .

Bromley Dec., Ex. 1 at 2 (emphasis added).

Attached to the *Amended Petition for Declaratory Ruling* as Exhibit 3 is an *Order* issued by former Director Karl Dreher, on July 30, 2004, establishing futile call on the Big Lost River, instructing the watermaster "to distribute surface flows of the Big Lost River in the reach from Mackey Dam to the Beck Diversion as a separate source for the remainder of the 2004 irrigation season . . . ." As evidenced therein, the July 2021 Letter uses the same language as the former Director concerning the reach in question and treating it as a separate source for the remainder of the irrigation season.

2. The 2022 futile call determination

On August 15, 2022, Tim Luke, Water Compliance Bureau Chief, sent an email ("August 2022 Email") to Watermaster Preston Marcroft, in which futile call was determined:

> Based on the information you provided, data available to us, and the support by advisory committee members, the Department concludes that a futile call on the river is currently justified. . . . . This guidance is consistent with last year's futile call approval . . . .

Bromley Dec., Ex. 2 at 1 (emphasis added).

On August 19, 2022, Mr. Luke responded to email correspondence with Jason Anderson. *See generally Bromley Dec., Ex. 3*. Upon information and belief, Mr. Anderson is a Moore Canal water user. Through email communication, Mr. Anderson communicated with Mr. Luke regarding the transfer that was approved by IDWR in 2015 that added the River Diversion to the natural flow water rights of Moss Farms, Inc. ("Moss") that are listed in the caption of this contested case ("Moss Water Rights"). *Id*.

Sometime between August 19, 2022 and September 2, 2022, the Department's determination of futile call was rescinded, as evidenced in email communication from David Hoekema, Hydrologist, to Mr. Luke and other IDWR employees, including Director Weaver, dated September 2, 2022, sent at 9:41 a.m.:

> I had a phone conversation with Randy Pehrson this morning. He is very upset that Dennis Moss is able to call for storage water and receive decree (1883 natural flow) at the same time. After the futile call in mid-August it was determine[d] that decree water in the river was inadequate to carry water to Moss.

Bromley Dec., Ex. 4 at 1.

As explained by Mr. Hoekema in the above-referenced email, futile call was rescinded because of the introduction of storage water as carriage water for the Moss Water Rights, through the Darlington Sinks and to the River Diversion:

> I would like to hear your thoughts on a futile call. While I understand the concept of a futile call, I'm not familiar with the procedures. But it seems to me that if we are able to deliver 20-25 cfs of natural flow to users from Beck upstream and deliver Moss's 1883 priority it would be awful hard to make a futile call. When Moss runs out of storage, though I think a futile call is very appropriate, unless inflow has increased to the reservoir and demand is down.

Id. at 2.

Upon information and belief, the storage water that was used as carriage water to the River Diversion is owned by Big Lost River Irrigation District ("BLRID"). Based on the plain language of the BLRID storage water rights, as they were partially decreed in the SRBA, the River Diversion is not an authorized point of diversion and/or rediversion. *Declaration of David R. Tuthill, Jr.* at 5 (Feb. 7, 2025). Based on the plain language of the 2015 transfer that added the River Diversion as an alternate point of diversion to the Moss Water Rights, the storage water rights of BLRID were not altered, nor was a transfer filed to alter the storage water rights of BLRID. *Id*. at 5, 7. Upon information and belief, Moss was out of storage water at the time of Mr. Hoekema's email. Upon information and belief, the storage water that was used as carriage water belonged to users in the Moore Canal.

On September 2, 2022, at 10:00 a.m., Mr. Luke responded to Mr. Hoekema, stating:

> I agree with your explanation and perspective. We should probably meet today to discuss this given the pending long weekend. Rob was planning to call Preston to

> get an update. I (and maybe Rob) have a meeting at 10 and [Director] Mat W[eaver] is over at Gov's office from 10 to 11 approx.
>
> For reference, attached is a letter we've sent to water districts in the past giving some general guidance on futile call determination. Note that there is a reference to futile call in WD34 Rules, but that particular rule and reference was deleted about two years ago following the Governor's red-tape reduction act.

Id. at 1.

That the Director was copied in the communication regarding the determination and then rescission of futile call is consistent with the WD34 Rule that was referenced by Mr. Luke to Mr. Hoekema in the above email.[1] As stated in the WD34 Rules, it is the Director who determines futile call. IDAPA 37.03.12.020.04; *see also* *Final Order for Petition for Removal of Water District 34 Watermaster | July 17, 2013 | idwr.idaho.gov* at 8, ¶ 6 ("Under the above cited rule [IDAPA 37.03.12.020.04], a futile call is determined by the director, not the watermaster. The watermaster may measure water to support a futile call and may request that the director determine whether there is a futile call, but the authority for determining a futile call is vested in the Director of IDWR.") (emphasis added) (visited 3/3/2025).[2] *See also* IDAPA 37.03.11.010.08 ("A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by

[1] The definition of "futile call" in IDAPA 37.03.12.020.04 was promulgated on October 26, 1994, defined as follows: "When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile." The reference to "futile call" in the WD34 Rules last appeared in 2019. *See* https://adminrules.idaho.gov/rules/2019%20Archive%20C1/37/370312.pdf (visited 3/3/2025). According to Mr. Luke in email communication to various IDWR employees and Watermaster Yockey, the rule was removed "because it is a restatement of existing law. The Director's authority to determine futile call rests in the common law holdings of Idaho courts not in these rules." The email from Mr. Luke is included as Exhibit 1 to the *Amended Petition for Declaratory Ruling*, filed contemporaneously herewith. The cited portion of the email is located on page 2 of the document.

[2] When the 2015 transfer was approved that added the River Diversion to the Moss Water Rights, the definition of futile call in IDAPA 37.03.12.020.04 applied.

immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.").

On September 2, 2022, at 4:56 p.m., Mr. Whitney sent an email ("September 2022 Email") to Watermaster Marcroft, copied to Director Weaver, confirming that futile call was rescinded, due to the introduction of storage water as carriage water:

> Randy Pehrson contacted David Hoekema with concerns about futile calls and delivery of both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. . . . . Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified.

Marcroft Dec., Ex. 1 (italics in original) (emphasis added).

On Sunday, September 4, 2022, the Director, who is the ultimate decision maker for futile call, confirmed his approval of through email communication with Department staff:[3]

[3] The cited email was obtained from the Department as part of the public records request and is included as Exhibit 1 to the *Amended Petition for Declaratory Ruling*, filed contemporaneously herewith.

From: Weaver, Mathew
To: Whitney, Rob; Luke, Tim; Hoekema, David; Ferguson, Kara
Subject: RE: Big Lost Futile Call
Date: Sunday, September 4, 2022 9:25:23 AM

Thank you, everyone, for responding to this issue at the last minute. Administering water, especially during drought conditions at the end of the irrigation season, is a stressful job. Likely Randy and other water users are unhappy with our direction to the watermaster, but it's the right direction.

Good work. I hope you enjoy your Labor (free) day.

Cheers,

Mathew Weaver, PE | deputy director
Idaho Department of Water Resources
www.idwr.idaho.gov | 208.287.4800

As evidenced in the 2021 and 2022 written communications between IDWR and the Watermaster, and even though IDAPA 37.03.12.020.04 was no longer part of the WD34 Rules, the WD34 Advisory Board and the BLRID were consulted in the futile call determinations, prior to the decision of the Director. *Bromley Dec., Ex. 1* at 2 (2021 letter from Mr. Whitney to Watermaster Yockey: "You stated by email that Advisory Committee Chair, VerNon Roche polled the other committee members on Friday July 23rd regarding their support (or not) of the futile call determination. Shawn Anderson and Jason Anderson were not in support at that time. After you contacted them today, Shawn Anderson agreed to support the determination and Jason Anderson did not."); *Bromley Dec., Ex. 2* at 2 (2022 email from Watermaster Marcroft to Mr. Luke and Mr. Whitney requesting a determination of futile call: "I have been in contact with Vernon Roche Chairman of the advisory board and 5 of the 9 members support this. I also talked to the chairman of the Big Lost River Irrigation District[t] and they approved WD34 request.").

As evidenced in the July 2021 Letter, the August 2022 Email, and the September 2022 Email – all of which post-date the 2015 transfer that added the River Diversion as an alternate point of diversion to the Moss Water Rights – futile call was declared and implemented

differently. As explained in the declarations of Watermaster Lucas Yockey and Watermaster Preston Marcroft that were filed with the Hearing Officer on February 7, 2025, the change in administration resulted in unprecedented curtailments. As explained in the declarations of Byron Pehrson, Loy Pehrson, and Randy Pehrson that were filed with the Hearing Officer on February 7, 2025, the change in administration adversely affected the Pehrsons' use of their water rights above the Darlington Sinks.

C. The July 2021 Letter, the August 2022 Email, and the September 2022 Email Are Agency Actions That Are Orders

According to IDAPA 37.01.01.002.11, an "Order" is defined as: "An agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specified persons." Emphasis added. *See also* I.C. § 67-5201(15) ("'Order' means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.") (emphasis added). "Agency action" is defined as: "(a) The whole or part of a rule or order; (b) The failure to issue a rule or order; or (c) An agency's performance or, or failure to perform, any duty placed on it by law." I.C. § 67-5201(4) (emphasis added).

According to the Hearing Officer, the Idaho Supreme Court implemented a two-step analysis to determine whether an order exists:

> (1) the Legislature must have empowered the agency to determine the particular issue; and (2) the decision must determine the legal rights, duties, privileges, immunities, or other legal interests of one or more persons.

Order at 5 (citing *Laughy v. Idaho Dept. of Trans.*, 149 Idaho 867, 871, 243 P.3d 1055, 1059 (2010)).

According to the Hearing Officer, the first step is satisfied: "[I]t cannot be disputed that the Director has the authority and legal duty to administer water within Idaho water districts in

accordance with the prior appropriation doctrine." *Order* at 6. According to the Hearing Officer, the second step was not satisfied, as Pehrsons waited "until the hearing" to cite him to the IDWR letters and emails, and the "*Petition* itself did not cite or reference these email exchanges as an order issued by the Department for the Hearing Officer to consider in a declaratory ruling." *Id*.[4] That being said, the Hearing Officer stated he did not view the email exchanges as "ris[ing] to the level of an order needed to support a declaratory ruling pursuant to Idaho Code § 67-5255 because the Pehrsons did not cite a Department order to support a declaratory action."

The Pehrsons largely agree with the Hearing Officer that not *every* letter and email from the Department rises to the level of an order, as some of the written communication provides context to how the ultimate decision of futile call was made; however, the July 2021 Letter, the August 2022 Email, and the September 2022 Email most certainly do rise the level of orders because they determined the Pehrsons' legal rights.[5]

In support of their position, the Pehrsons direct the Hearing Officer's attention to two decisions from the Idaho Supreme Court that post-date *Laughy*, both of which conclude, through citation to I.C. § 67-5201(4),[6] that writings sent by an agency that determine a person's legal

[4] As stated in the *Declaration of Chris M. Bromley* (Feb. 7, 2025), the letters and emails were obtained through a public records request to IDWR and were not received until February 5, 2024.

[5] The *Order* references a statement made at the February 21, 2025 hearing by counsel for Moore Canal for the proposition that "if email exchanges between Department staff were broadly construed as an 'order,' then every action of every employee of state agencies would open an avenue for declaratory rulings." *Id*. at 6 (emphasis added). The July 2021 Letter, the August 2022 Email, and the September 2022 Email were not sent by entry-level IDWR staff; quite to the contrary, they were sent by high-level, long-tenured employees, like Mr. Luke who was the Water Compliance Bureau Chief, and Mr. Whitney who was the Manager of the Water Distribution Section, who are supervised by the Director.

[6] The "Agency Action" definition that is cited in *Fuchs* and *Podsaid* is the same as the definition found today in I.C. § 67-5201(4). In 2023, I.C. § 67-5201 was amended, with subsection (3) renumbered as subsection (4). *Idaho Sess. Law, 2023, ch. 314, sec. 1, p. 956*. For consistency with the argument herein, the citation above is to subsection (4) since that is where "Agency Action" is currently defined.

rights is an agency action: *Fuchs v. Dept. of Idaho State Police*, 152 Idaho 626, 630, 272 P.2d 1257, 1261 (2012) ("The July 24, 2009 letter is an agency action under this definition."); and *Podsaid v. State of Idaho Outfitters and Guides Licensing Board*, 159 Idaho 70, 74, 356 P.3d 363, 367 (2015) ("The Board acted according to a duty placed on it by law when it denied Podsaid's license application and it informed him of that denial by letter, so the letter was an agency action.").

As stated above, under the definition of "futile call" in the WD34 Rules and the common law, as confirmed by Mr. Luke, *supra footnote 1*, it is the Director who determines if a call is futile. Thus, if the futile call declarations in 2021 and 2022 had any legal meaning, then it was the Director who sanctioned the decision. If the July 2021 Letter, the August 2022 Email, and the September 2022 Email do not rise to the level of an "agency action," then the Pehrsons' rights will continue to be frustrated and those who deprived them of their rights will forever be insulated from review. Based on *Fuchs* and *Podsaid*, there can be no question that July 2021 Letter, the August 2022 Email, and the September 2022 Email, which determined the Pehrsons' legal rights to water, are agency actions. *See Order* at 6 ("It is likely that a futile call decision would impact the Pehrsons' legal rights in receiving their water rights.").

D. It Is Not Speculative For The Hearing Officer To Address The Relief Sought By Pehrsons Through This Proceeding

Pehrson's request for a declaratory ruling on how the Department intends to administer the Moss Water Rights at the River Diversion when the Big Lost River is broken at the Darlington Sinks and to whether BLRID Storage Rights may be used as carriage water is the appropriate process in order to alleviate the harm that Pehrsons have suffered in the past from the wrong instructions to the Watermaster. This request is not speculative, with the Supreme Court already holding that a declaratory action of this nature, seeking to determine rights before harm

occurs, is proper. *Elgee v. Retirement Bd. of the Public Employee Ret. System of Idaho*, 169 Idaho 34, 490 P.3d 1142 (2021). There, Elgee argued that he should be entitled to bring a declaratory action for a "tax loss" claim that might arise: "While Elgee acknowledged that he did not know whether he would suffer a tax loss or its amount, he sought a determination that PERSI would be liable for tax loss damages *if* he were ultimately to suffer them." 169 Idaho at 46, 490 P.3d at 1154 (italics in original). On judicial review, the district court dismissed Elgee's tax loss claim, without prejudice. On appeal, the Supreme Court reversed on this point:

> Elgee was not seeking to prove a present claim, but to have the PERSI Board construe the statutes and rules it administers to determine his rights should a claim arise. This is expressly permissible under IDAPA. *See* I.C. § 67-5232(1) ("Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency").

Id. at 47, 490 P.3d at 1155 (emphasis added).

Here, as evidenced in the July 2021 Letter, the August 2022 Email, and the September 2022 Email, and the statutes and rules that govern the Department, the Pehrsons have been subjected to differing interpretations of futile call, both with and without the introduction of BLRID storage water as carriage water to the River Diversion, with their legal rights adversely affected. As evidenced in the July 2021 Letter, and without the introduction of BLRID storage water as carriage water, the Department concluded that curtailment of water rights above the Darlington Sinks was futile. In 2022, no findings were made by IDWR as to how much storage water was released from Mackey Reservoir to carry the Moss Water Rights and the curtailed water rights through the Darlington Sinks, but it can be inferred that a quantity of storage water was used purely as carriage water: "Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified." *September 2022 Email*. Upon information and belief, these facts will be developed for the hearing. If BLRID

Storage Water was not delivered to Moss for irrigation, but was instead used as carriage for the Moss Water Rights, there are legitimate questions to probe at the hearing concerning whether water that is stored for irrigation and not used for that purpose constitutes a beneficial use. *Colthorp* at 178, 157 P.2d at 1007 ("It is the policy of the law of this state to prevent the wasting of water."). In addition, there are legitimate questions to probe at the hearing concerning whether water that is stored under junior priority dates can be used to defeat futile call. And, lastly, there are legitimate questions to probe at the hearing concerning whether it is permissible to deliver BLRID storage water to a point of diversion and/or rediversion that is not included on the BLRID Storage Rights. Thus, a declaratory ruling to determine proper Watermaster instructions is appropriate.

III. PETITION FOR RECONSIDERATION AND/OR PETITION FOR EXCEPTIONS

The *Order* is styled as "Preliminary" with an insert describing the same. A preliminary order is an order "issued by a person other than the agency head that will become a final order of the agency unless reviewed by the agency head or designee pursuant to Section 67-5245, Idaho Code." A party may "file a petition for reconsideration of th[e] preliminary order with the agency within fourteen (14) days of the service date of the order." IDAPA 37.01.01.730.02.b. A party may "in writing file exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding . . . ." IDAPA 37.01.01.730.02.c.

Because the *Order* was issued, without prejudice, it appears that it is proper to file an *Amended Petition for Declaratory Ruling*; therefore, it is unclear whether it is also appropriate to petition the Hearing Officer for reconsideration and/or for exceptions. If the Hearing Officer grants the instant *Motion*, the relief sought through reconsideration and/or exceptions may be moot.

One point, however, in an abundance of caution, that appears to potentially justify asking for reconsideration and/or exceptions, is whether the July 2021 Letter, the August 2022 Email, and the September 2022 Email are or are not agency actions that are orders. As stated by the Hearing Officer: "Further, as Moore [Canal] indicated at the hearing, if email exchanges between Department staff were broadly construed as an 'order,' then every action of every employee of state agencies would be an open avenue for declaratory rulings. Thus, the email exchanges do not rise to the level of an order needed to support a declaratory ruling. Therefore, the Department does not have authority to issue a declaratory ruling pursuant to Idaho Code § 67-5255 because the Pehrsons did not cite a Department order to support a declaratory action." *Order* at 6 (internal citation omitted) (emphasis added).

If the amendments to the *Petition*, together with argument, as discussed above in Section II.B., are insufficient to preserve the issue that the July 2021 Letter, the August 2022 Email, and the September 2022 Email are not agency actions that are orders, Pehrsons respectfully request that the Hearing Officer reconsider and/or consider exceptions on the issue. As recognized by the Hearing Officer: "It is likely that a futile call decision would impact the Pehrsons' legal rights in receiving their water rights." *Order* at 6. As evidenced above, futile call determinations were made: (1) on July 26, 2021 through the July 2021 Letter; (2) on August 15, 2022 through the August 2022 Email; and (3) then the August 15, 2022 futile call determination was rescinded some days or weeks later, as confirmed on September 2, 2022 through the September 2022 Email. Pehrsons hereby incorporate by reference their arguments in Section II.B. concerning the Supreme Court's view that agencies who affect the rights of persons through a writing constitutes an agency action, as confirmed in *Fuchs* and *Podsaid*.

IV. MOTION TO EXPEDITE DECISION

According to IDAPA 37.01.01.220.02.f, the Hearing Officer is authorized to modify "the time limits in this rule . . . for good cause shown." As evidenced at the hearing and through the pleadings filed herein, the issues are understood, revolving around determinations of futile call on the Big Lost River below the 2B Gage at the Darlington Sinks, with differing outcomes in 2021 and 2022, and whether BLRID storage water may be used as carriage water for diversion of the Moss Water Rights at the River Diversion. Summary judgment was filed by Moss on these issues, claiming that IDWR's approval of the 2015 transfer prevents the Pehrsons from pursuing this declaratory action on the basis of collateral attack and *res judicata*, with Pehrsons disagreeing, arguing that use of BLRID storage water was never at issue in the 2015 transfer, along with the fact that the BLRID storage water rights do not list the River Diversion as an authorized point of diversion and/or rediversion.

The case appears well positioned for a decision on summary judgment and to then proceed to hearing on issues that are unresolved, with the ability for the parties to have clarity in time for the hot and dry weeks and months of the 2025 irrigation season. For good cause shown, the Pehrsons respectfully request that the Hearing Officer expedite his decision on the issues raised herein, and to have a schedule put in place that will result in the issuance of a decision before July 2025.

V. CONCLUSION

Based on the foregoing, and consistent with IDAPA 37.01.01.303, the Hearing Officer should: (1) grant the instant *Motion*, which will allow the *Amended Petition for Declaratory Ruling* to be heard; (2) should determine whether reconsideration and/or exceptions are

appropriate in light of the *Petition* being dismissed, without prejudice; and (3) should expedite his decision on the issues raised herein.

DATED this 5th day of March, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Chris M. Bromley
Chris M. Bromley

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**ORDER SHORTENING TIME TO RESPOND TO MOTION TO AMEND AND NOTICE OF MOTION HEARING**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively, "Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* ("*Petition*") with the Idaho Department of Water Resources ("Department"). *Petition*, at 1. On February 23, 2024, Moss Farms, Inc. ("Moss") filed an objection to the *Petition*. In addition, the Hearing Officer allowed Big Lost River Irrigation District ("BLRID") and Moore Canal Users ("Moore")[1] to intervene in the case.

On January 13, 2025, Moore filed a motion to dismiss the *Petition*, which was joined by BLRID. On February 21, 2025, a dispositive motion hearing was held. The Hearing Officer made oral rulings on the record that were later memorialized and expounded upon in a *Preliminary Order: Granting and Denying in Part Motion to Strike; and Dismissing Petition for Declaratory Ruling Without Prejudice* ("*Preliminary Order*"), issued February 28, 2025. The Hearing Officer granted Moore's motion to dismiss, dismissing the *Petition* without prejudice. *Preliminary Order*, at 7.

On March 5, 2025, the Pehrsons filed a *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite* ("*Motion to Amend*") pursuant to the Department's Rules of Procedure ("Rules"), IDAPA 37.01.01, Rules 303, 730.02, and 220.02. *Motion to Amend*, at 1. The Pehrsons request the Hearing Officer grant their *Motion to Amend* and allow their simultaneously filed *Amended Petition for Declaratory Ruling* to be heard. *Id.* at 2.

ANALYSIS

The Department's Rules allow parties to amend pleadings during informal or formal proceedings and petition the presiding officer for reconsideration of a preliminary order. IDAPA 37.01.01.303, 37.01.01.730.02.b. The Rules further allow parties in a contested case to file a written motion and supporting briefs with the hearing officer. IDAPA 37.01.01.220.02.a. Any briefs responding to the motion must be submitted to the hearing officer and served on the parties

[1] "Moore Canal Users" collectively refers to Moore Canal Water Users' Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline.

within fourteen days of the filing of the motion. IDAPA 37.01.01.220.02.b. The moving party may file a reply brief within seven days of the response briefs. IDAPA 37.01.01.220.02.c. However, the hearing officer may modify the prescribed time limits prescribed if the parties establish that good cause exists. IDAPA 37.01.01.220.02.f.

The Pehrsons request the Hearing Officer expedite consideration of their *Motion to Amend* because the issues are understood by the parties and the case is already well positioned for a summary judgment hearing for the Hearing Officer to render a decision before the hot and dry months of the 2025 irrigation season. *Motion to Amend*, at 18. The Hearing Officer agrees with the Pehrsons that this matter has been extensively briefed by the parties. He finds that good cause exists to expedite this matter by shortening the time for the parties to file responsive pleadings to the *Motion to Amend* and scheduling a hearing on the motion.

In addition, in their *Motion to Amend* the Pehrsons petitioned the Hearing Officer for exceptions. *Id*. at 1, 18–19. The Department's Rules state: "Any party may in writing file exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the *agency head* . . . ." IDAPA 37.01.01.730.02.c. The Department's Rules expressly require exceptions to a preliminary order to be filed with the Director. *Id.* The Hearing Officer is not the Director. Therefore, the Hearing Officer will not consider the petition for exceptions or any further argument concerning exceptions.

CONCLUSION

In an exercise of his discretion, the Hearing Officer concludes that the Pehrsons have shown that good cause exists to expedite this matter and that the time required for the parties to respond to the *Motion to Amend* should be shortened.

ORDER

IT IS HEREBY ORDERED that the deadline for Moss Farms, Inc., Moore Canal Users, and Big Lost River Irrigation District to file a response to the Pehrsons' *Motion to Amend* is **March 14, 2025**.

IT IS FURTHER ORDERED that the deadline for the Pehrsons to file a reply to their *Motion to Amend* is **March 19, 2025**.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that Hearing Officer Burdick will hold a hearing in this matter on the *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite* on **March 21, 2025 at 9:00 a.m. (MT)**. All parties who wish to participate in the hearing must be represented by virtual conference.

To join the hearing via computer or smartphone, please click the following Webex link and follow the prompts: https://idahogov.webex.com/idahogov/j.php?MTID=mda024f6d68a279e152d02c40141684cc.

To join the hearing via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: **2861 617 7654**.

The hearing will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at https://adminrules.idaho.gov/rules/current/37/370101.pdf.

If you require reasonable accommodation to attend, participate in, or understand the hearing, please advise the Department no later than two (2) days before the hearing. Inquiries for reasonable accommodations or technical assistance should be directed to Sarah Tschohl, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho 83720-0098, telephone (208) 287-4815, or email sarah.tschohl@idwr.idaho.gov.

DATED this 6th day of March 2025.



ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

Chris M. Bromley Candice McHugh McHugh Bromley, PLLC cbromley@mchughbromley.com cmchugh@mchughbromley.com	☒ Email
Skyler C. Johns OLSEN TAGGART PLLC sjohns@olsentaggert.com	☒ Email
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Attorneys for Big Lost River Irrigation District

RECEIVED
Mar 14, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	BIG LOST RIVER IRRIGATION DISTRICT'S OPPOSITION TO MOTION TO AMEND PETITION FOR DECLARATORY RULING; PETITION FOR RECONSIDERATION AND/OR PETITION FOR EXCEPTIONS

Big Lost River Irrigation District (the "District" or "BLRID"), by and through its counsel of record, Parsons Behle & Latimer, hereby submits this Opposition to Byron Pehrson, Loy Pehrson, and Randy Pehrson's (collectively "Pehrsons") Motion to Amend Petition for Declaratory Ruling and Petition for Reconsideration and/or Petition for Exceptions ("Motion to Amend"). BLRID also hereby joins in any responses filed in opposition to the Motion to Amend by Moss Farms and Moore Canal Users and BLRID reserves the right to fully participate in any oral argument on the Motion to Amend.

I. LEGAL STANDARD

The Idaho standard for deciding a motion to amend under I.R.C.P. 15(a) is well settled. Concerning this standard, the Idaho Supreme Court has held:

> A district court's denial of a plaintiff's motion to amend their complaint is governed by an abuse of discretion standard of review. *Elliott v. Murdock*, 161 Idaho 281, 286, 385 P.3d 459, 464 (2016) (citation omitted). "Under Idaho law, motions for leave to amend pleadings are to be liberally granted...." However, "[i]n determining whether an amended complaint should be allowed, where leave of court is required under Rule 15(a), the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim." *Id.* (quoting *Black Canyon Racquetball Club, Inc. v. Idaho First Nat. Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991)).

Dickinson Frozen Foods, Inc. v. J.R. Simplot Co., 164 Idaho 669, 683, 434 P.3d 1275, 1289 (2019) (emphasis added).

Where there is "no genuine issue of material fact" demonstrating that a claim has merit, a administrative body does not err by refusing to grant leave to amend. *Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 209, 254 P.3d 497, 510 (2011). Denial of a motion to amend is also appropriate where the moving party is, as a matter of law, "not entitled" to the relief the amendment seeks. *Id.* A district court further acts within its discretion in denying a motion for leave to amend "on the grounds of futility." *Taylor v. McNichols*, 149 Idaho 826, 847, 243 P.3d, 642, 663 (2010). Here, the proposed Petition, as amended, still does not state a valid claim and is futile.

II. ARGUMENT

A. The Amended Petition is meritless and futile because it relies on facts contradicted by hearing officer's findings in the matter and does not identify a statutory or rule-based procedure by which the IDWR issued any "order."

Hearing Officer Burdick's Order Dismissing Petition without Prejudice contains an analysis of the issues of whether the emails cited to the Pehrsons constitute an "order" under I.C. § 67-5255(1). The Order states:

> Although informal proceedings may be the source of a declaratory action, there still needs to be ***some process followed to be considered an order***. For instance, unlike *Laughy*, ***the email exchanges between Department staff were not the result of the Department following statutory or rule-based procedures*** to grant or deny an application for a statutory permit. Further, as Moore indicated at the hearing, if email exchanges between Department staff were broadly construed as an "order," then every action of every employee of state agencies would open an avenue for declaratory rulings. Hr'g, at 00:40:17–00:40:56. Thus, the email exchanges do not rise to the level of an order needed to support a declaratory ruling. Therefore, the Department does not have authority to issue a declaratory ruling pursuant to Idaho Code § 67-5255 because the Pehrsons did not cite a Department order to support a declaratory action.

Order Dismissing Petition without Prejudice, at 6 (emphasis added). The emails between the IDWR and Water District 34 cannot therefore constitute an "order" unless there is a "statutory or rule-based procedure" the IDWR followed to make a decision regarding the futile call.

The Amended Petition is improper because it assumes and relies on assertion that emails are an order—contradictory to specific findings already made in this proceeding. Furthermore, the Petition still fails because it does not identify a statutory or rule-based procedure that was used by the Department to issue any order. The legal authority presented by the Pehrsons are a regurgitation of the same legal authority presented at the prior Motion to Dismiss hearing. Any additional authority presented does not contain a statutory or rule-based procedure. The fact remains that there is no new procedure that the Pehrsons have identified that constitutes a statutory or rule-based procedure.

B. The Amended Petition is Meritless and Futile because it provides no legal authority which allows modification of watermaster instructions by declaratory judgment, or which would allow a declaratory judgment to override Water District 34's rules regarding delivery of storage water.

When a party requests a declaratory ruling from a State Agency under the Administrative Procedures Act regarding order from a state agency, the relief they can obtain typically would only include a ruling on whether and how the specific order applies to the party's situation. *See* I.C. § 67-5255 (stating that a person "may petition an agency for a declaratory ruling as to the ***applicability*** of any order issued by the agency") (emphasis added). Essentially, the hearing officer is limited to determining whether the agency order is "valid or applicable" to the Petitioner. *See also, e.g.* I.C. § 67-5278 (providing context that "the validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner."). In contrast, a petition for a declaratory ruling is not an opportunity for the party to re-write administrative rules or ask for additional rule-making. The scope of relief available in a declaratory action is very narrow because they are meant to address actual and existing facts and controversies, not hypothetical or abstract disputes.

The proposed Amended Petition requests two forms of relief. First, it seeks declaratory ruling that the Department issue Watermaster instructions[1] as follows:

[1] Ironically, the relief sought by the Pehrsons under their third proposed Watermaster instruction would not allow delivery of BLRID's storage water rights to the Pehrson's to the Pehrson Ditch where they presently divert their storage allocation. BLRID's storage rights include as its point of diversion the Big Lost River, starting directly below Mackay Reservoir, and as points of rediversion, numerous ditches and laterals coming off the Big Lost River. The Pehrsons incorrectly argue that the Moss Farms' pump in the Big Lost River is not a proper place for BLRID to deliver storage water even though the pump sits within BLRID's main conveyance structure, the river itself. Under their own reasoning and proposed instruction, the Pehrson Ditch is not identified in any part of BLRID's storage water rights as a point of diversion or rediversion and therefore, BLRID cannot deliver water to the same.

The *Amended Petition* seeks a declaratory ruling from the Idaho Department of Water Resources ("IDWR" or "Department") as follows:

> (1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.
>
> (2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.
>
> (3) Instruct the Water District No. 34 Watermaster that storage water held by the Big Lost River Irrigation District, pursuant to water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, shall not be delivered to a point(s) of diversion on the Big Lost River that is not also described as a point(s) of diversion and/or rediversion on the storage water rights of the Big Lost River Irrigation District.

Amended Petition, at 2. Second, the Amended Petition requests rulemaking wherein the "the Department declare how it will determine futile call and whether it is permissible for storage water to defeat futile call, pursuant to its duties to administer, supervise, and distribute water rights." *Id.* However, neither Watermaster instructions or a request for rule-making on a futile call (to the extent the request for Watermaster instructions is not in of itself a request for rule-making) is relief available to a party seeking a declaratory ruling.

So, even if there is an "order" in this case for which the Pehrsons can seek a declaratory ruling, they have not provided any legal authority to connect a declaratory ruling regarding the simple applicability of said order to any right to relief for additional rulemaking or Watermaster instructions. There are other procedural mechanisms to request discretionary rulemaking, and the Pehrsons do not get to bypass those by petitioning for declaratory relief. *See* I.C. § 67-5230. The

Pehrsons have also failed to show any legal authority that would allow their claim for declaratory relief to override Water District 34's water delivery rules[2] which allow delivery of storage water as carriage water for natural flow rights. *See* Idaho Admin. Code r. 37.03.12.040 ("The Watermaster ***may use storage water to assist the delivery of natural flow water rights at the beginning of the irrigation season when requested to do so by the storage holder***.") (emphasis added).

Therefore, the Amended Petition is futile because it does not request relief it can even receive in a declaratory action—overriding or attempting to make new administrative rules for Water District 34.

C. <u>The Amended Petition is meritless and futile because the Pehrson's lack standing or a legal interest to obtain a declaratory judgment as to the use of BLRID's storage rights—or, in the alternative, this matter would require notice to every single BLRID patron who utilizes BLRID storage water rights.</u>

The Pehrsons now attempt to frame the issue of an "order" on a futile call as having an effect on their legal rights. However, the relief that the Pehrsons actually seek—as described above in Section B—is the ability to ignore the existence of the releases of BLRID's storage from Mackay Reservoir when determining a futile call, and control of how, when, and where BLRID's storage water rights[3] are released. Because the requested relief is regarding BLRID's storage water rights and the Pehrsons have no storage rights[4], in Mackay reservoir, they do not have standing[5] to ask for any relief that would affect the administration of BLRID's storage

[2] Water District 34, which covers the Big Lost River Basin, is unique in that it has its rules incorporated within the IDWR's rules in the Idaho Administrative Code.

[3] Water Right Nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935.

[4] Though BLRID allocates a pro-rate share of storage water to the Pehrsons as patrons of the District, all the storage rights are held by the District itself.

[5] To have standing in a case, a party must demonstrate three key elements: (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *See Coalition for Agriculture's Future v. Canyon County*, 160 Idaho 142 (2016); *Reclaim Idaho v. Denney*, 169 Idaho 406 (2021). The party must show a

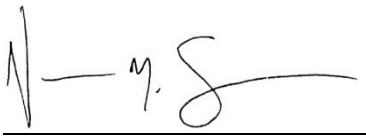
water rights. However, if it is the Pehrson's position that they do have a legal interest sufficient to pursue the claimed relief, then every other BLRID patron who utilizes BLRID storage water would also have an interest in this administrative proceeding. It would then be improper to proceed further without proper notice of this proceeding by the IDWR to all interested parties—particularly other BLRID water users who use BLRID storage water with the water user's natural flow water during the irrigation season.

III. CONCLUSION

For the reasons argued herein, BLRID respectfully requests that the Pehrson's Motion to Amend be denied.

DATED this 14th day of March, 2025.

PARSONS BEHLE & LATIMER



Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura
Attorneys for Big Lost River Irrigation District

"concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical." *Id.* There must also be a fairly traceable causal connection between the claimed injury and the challenged conduct. *Id.* Simply put, the right of BLRID to independently determine how and when to deliver its storage water as it is lawfully authorized to do cannot rise to the level of an injury that would give standing to the Pehrsons.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of March, 2025, a true and correct copy of the foregoing document was filed by email to file@idwr.idaho.gov, and I served a true and correct copy of the foregoing by delivering the same to each of the following individuals by the method indicated below, addressed as follows:

Original to:	
IDAHO DEPARTMENT OF WATER RESOURCES P. O. Box 83729 Boise, ID 83720	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: file@idwr.idaho.gov; Garrick.baxter@idwr.idaho.gov
Copies To:	
Chris M. Bromley Candice McHugh MCHUGH BROMLEY, PLLC P. O. Box 107 Boise, ID 83701 *Attorneys for Bryon Pehrson, Loy Pehrson & Randy Pehrson*	☐ U.S. Mail ☐ Facsimile: 208/287-0864 ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: cbromley@mchughbromley.com; cmchugh@mchughbromley.com
Roger S. Burdick	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: roburd47@gmail.com

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Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW 25 North 2nd East Rexburg, ID 83440	☐ U.S. Mail ☐ Facsimile: ☐ Hand Delivery ☐ Overnight Delivery ☒ Email: herickson@rex-law.com; mmortimer@rex-law.com
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RECEIVED
Mar 14, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	)	**MOORE CANAL USERS OPPOSITION TO PEHRSONS' MOTION TO AMEND PETITION FOR DECLARATORY RULING; PETITION FOR RECONSIDERATION AND/OR PETITION FOR EXCEPTIONS**

COMES NOW, Moore Canal Users, by and through their attorney of record, Rigby, Andrus & Rigby Law, *PLLC*, and, pursuant to IDAPA 37.01.01.220.02.a oppose Pehrsons' Motion to Amend Petition for Declaratory Ruling and their Petition for Reconsideration and/or Petition for Exceptions. In addition, to the arguments herein, Moore Canal Users join in the responses filed by Moss Farms, Inc. and BLRID in opposition to Pehrsons' motions.

BACKGROUND

On March 5, 2025, Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrsons") submitted a Motion to Amend and an Amended Petition for Declaratory Ruling ("Amended Petition"). In their Amended Petition, Pehrsons assert that the IDWR must take three specific actions:

(1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.

(2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

(3) Instruct the Water District No. 34 Watermaster that storage water held by the Big Lost River Irrigation District, pursuant to water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, shall not be delivered to a point(s) of diversion on the Big Lost River that is not also described as a point(s) of diversion and/or rediversion on the storage water rights of the Big Lost River Irrigation District.

Id. at 2.

On March 6, 2025, the Hearing Officer submitted an *Order Shortening Time to Respond to Motion to Amend and Notice of Motion Hearing*.

ARGUMENT

1. **The Pehrsons' Amended Petition Does Not Meet the Requirements of a Petition for a Declaratory Ruling as set out in I.C. § 67-5232.**

Pehrsons' Amended Petition cites to both I.C. § 67-5232 and I.C. § 67-5255. *Amended Pet.* at 16-23. However, a review of the petition makes clear that they are relying entirely on I.C. § 67-5255. Pehrsons identify a plethora of statutes and rules related to water rights and the IDWR in their brief. *Amended Pet.* at 16-21.

Pehrsons list Article XV Sections 1, 3, and 5 of Idaho's Constitution; Idaho Code §§ 42-101 through 108, 110, 42-602 through 604, 42-607, 42-201, 42-202, 42-219, 42-220, 42-222, 42-

1409, 42-1411 through 1413, 42-1420; and IDAPA 37.03.12 as the legal basis for the requested declaratory rulings. *Mot. to Amend* at 3-5. However, despite citing numerous statutes and rules, it is not consistent with I.C. § 67-5232(1) which reads as follows:

> (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.

No one disputes that the Department has the authority and the duty to regulate the delivery of water. Pehrsons' petition does not ask the hearing officer to apply a specific statute or rule to the facts of the case at hand as required in the statute. The Amended Petition does not seek an interpretation or clarification of a specific statute or rule and is not an appropriate request for a declaratory ruling regarding any of the cited statutes or rules.

2. **The Amended Petition is improper pursuant to I.C. § 67-5255 because the July 2021 letter, the August 2022 Email, and the September 2022 email to WD34 Watermaster regarding futile call are not orders. The decision regarding futile call is of general applicable rather than having "particular applicability" to "specific persons."**

The Amended Petition asserts that "the July 2021 letter, the August 2022 Email, and the September 2022 Email, in which IDWR declared futile call on the Big Lost River above and below the Darlington Sinks" constitute agency orders that thus allow them to petition the Department for a declaratory ruling in accordance with I.C. §67-5255. *Amended Pet.* at 22-25.

Idaho Code § 67-5201(15) and IDAPA 37.01.01.002.11 define "order" as follows:

> "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.

The Director's decision to regarding futile call in WD34 is not an agency action of "particular applicability" that impacts "specific persons." Rather, it is an agency action of general applicability. The decision applies to all persons with water rights in WD34.

When identifying an "order" as opposed to a "rule" the Idaho Supreme Court has focused on the applicability of the agency action. When analyzing whether an IDOT decision of whether or not issue a specific permit was an "order" the Court provided the following analysis:

> The distinction between an order and a rule "turns primarily on applicability: orders-- like judicial decrees--affect identified parties; rules--like statutes--affect classes of persons." *Michael S. Gilmore & Dale D. Goble, The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 284 (1993) (emphasis omitted). Unlike a generally applicable rule, the permits particularly affect only ConocoPhillips's right to move a load down a state highway. . . . Again, however, the permits at issue in this case affect ConocoPhillips's particular rights, privileges, and duties. They are therefore an order[.]

Laughy v. Idaho DOT, 149 Idaho 867, 871, 243 P.3d 1055, 1059 (2010). The Supreme Court cited to a 1993 Idaho Law Review article on administrative law. A more recent Idaho Law Review article is also directly on point.

> [W]hen an agency makes rules, it is making prescriptions of general applicability--i.e., prescriptions that apply to entire categories of people, not to particular individuals. The general applicability of rules characterizes the rules of both state and federal agencies; it characterizes rules whether they regulate air pollution or define eligibility for government benefits. Similarly, when an agency adjudicates a case, it decides the legal rights or duties of particular individuals or businesses. The particularized applicability of adjudications characterizes adjudications by state as well as federal agencies; it characterizes the adjudication of applications for permits and applications for government benefits. In short, all agency rulemakings have certain things in common, as do all agency adjudications. These common features make it possible and valuable to study rulemaking and adjudication somewhat generically. That is why law school textbooks on administrative law typically devote separate, entire chapters to agency rulemaking and agency adjudication.

Richard Henry Seamon, Idaho Administrative Law: A Primer for Students and Practitioners, 51 Idaho L. Rev. 421, 433 (Includes footnotes citing to the definitions of "rule" and "order" found in I.C. § 67-5201).

While the Director's determination regarding futile call is an agency action, it is not an order. It does not adjudicate or otherwise implicate the rights of any particular person. It is a

generalized decision based on a factual determination by the Director that applies to everyone, not any specific person.

The 2021 futile call determination contained in a letter Watermaster Yockey is a factual determination. It is not an agency action of particular applicability that determines the legal rights of "one or more specified persons." There are no legal rights determined for specified persons in the 2021 letter. The August 2022 email is not an order for the same reason. There are no specified persons to whom the decision is particularly applicable and it does not determine legal rights. The same is true of the September 2022 email that rescinded the futile call determination. It is a factual determination that the amount of water is again sufficient to supply senior appropriators with water because it can physically make it to the point of diversion. All of the alleged orders are Department staff members making factual determinations based on the supply of water – they are not making legal determinations applicable to specific persons.

3. Pehrsons Do Not Have a Legal Right To A Futile Call Determination.

Pehrsons' Petition cites to *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 245, 443 P.3d 252, 259 (2019) as support for their request that "[t]he Department should issue watermaster instructions defining when futile call exists for natural flow water rights but for storage water releases from Mackay Reservoir." (*Amended Pet.* at 20-21). However, this situation is distinguishable from the situation in Sylte. In Sylte, releasing storage water from Twin Lakes was expressly barred by the Final Decree. *Id*. Here, Mackay Reservoir is a storage reservoir with the purpose of storing water for irrigation. There is no general bar on releases of storage water from Mackay Reservoir as there was in Sylte.

Futile call is not meant to be used as a sword by junior appropriators against senior appropriators. Futile call is a last resort applied only when water will not make it to a senior's

point of diversion and will be wasted if the senior continues to call for its water. No water user has a right to a futile call, it is merely the recognition of a practical reality. The watermaster instructions requested in the Petition will not only affect Moss, but will affect all senior and junior downstream users. If the first requested watermaster instruction is allowed, the trigger at the 2B Gage will effectively shut off the delivery of water for all downstream users, not just Moss.

Idaho Courts have long held that futile call is only to be used in situations where water is short and there is no other option for the senior user to receive its water. The Idaho Supreme Court in *Gilbert v. Smith*, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976) held as follows,

> As a rule, the law of water rights in this state embodies a policy against the waste of irrigation water. Such policy is not to be construed, however, so as to permit an upstream junior appropriator to interfere with the water right of a downstream senior appropriator so long as the water flowing in its natural channels would reach the point of downstream diversion. We agree that if due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Internal citations omitted. The Court identifies the reasons that a futile call may exist as "seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators[.]" In other words, geological and hydrological realities. This is consistent with the definition of futile call used in the Conjunctive Management rules.

> 08. Futile Call. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.

IDAPA 37.03.11.010.08. A call becomes futile when it cannot be delivered "for physical or hydrological reasons." Futile call is based on a hydrological and physical reality – it is not a legal

right held by any water user. In fact, futile call is generally treated as an affirmative defense used by junior water right holders as a shield to explain their failure to respond to a senior's call for water. *See Montana v. Wyoming*, No. 137, 2014 U.S. LEXIS 8446, at *292-94 (Dec. 29, 2014) (*citing to A&B Irrigation v. Spackman*, 155 Idaho 640, 315 P.3d 828, 835 (Idaho 2013) and *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71, 98 (Idaho 2011) as examples of futile call as an affirmative defense.).

The Pehrsons' petition misapprehends the nature of futile call. Rather than a recognition of a physical reality, they seek to turn futile call into a right by asserting that, although water can be delivered to senior water right holders, it should not be. This is a novel argument and unsupported in Idaho law.

Under IDAPA 37.03.12.040, the rules governing water delivery in Water District 34, the delivery of storage water is under the control of the appropriators. If an appropriator has storage water, they can call for it to be delivered whenever they want. If storage water is available and it can be used, there is no reason it cannot be used to help deliver the natural flow right of the same appropriator if it is in priority.

Pehrsons misapply the water right transfer injury analysis to argue that because their rights were appropriated before the construction of Mackay Reservoir, they are entitled to delivery determinations as if the reservoir did not exist. However, the construction of Mackay Reservoir changed the delivery of water to the entire basin downstream. The allocation and accounting of water in the basin changed to account for the storage of water in Mackay Reservoir. It would be impossible to do the water right accounting as if Mackay Reservoir did not exist purely to inform futile call decisions that benefit Pehrsons.

Pehrsons' two watermaster instructions would negatively affect delivery of water to all users downstream of the 2B Gage and Moss's point of diversion on the Big Lost River. The Petition should be dismissed in its entirety.

Pehrsons are requesting the Department issue the three proposed watermaster instructions so they won't be harmed in the future. However, Pehrsons are not requesting the Department tell them how they will implement futile call with the *Amended Petition*, Pehrsons are endeavoring to tell the Department how to declare and implement futile call to benefit them, which they do not have the right to do.

Pehrsons request that the Watermaster of District 34 apply futile call to the detriment of a senior appropriator, even if it were only for delivery of water to Moss's River Diversion, is unsupported in Idaho law. Futile call is a last resort mechanism available to junior appropriators that want to receive water in the event that geological and hydrologic conditions are present that are beyond the control of the senior appropriator that make delivery of water to the senior appropriator impossible. It is not a preemptive tool that can be used to shut off a senior or decide that a senior cannot receive water that is, in reality, deliverable. If futile call is administered in the manner being presented, even if it arguably only applies to Moss, it will still have the effect of shutting off downstream users by reducing the amount of water flowing downstream.

Pehrsons assert that they are entitled to the same conditions that were present when they perfected their water right but provide no authority for this proposition. Pehrsons assertion that junior water right holders are entitled to have the Big Lost River operated consistent with the conditions that existed at the time their water right was perfected is not only unsupported by any authority, but if applied generally in Idaho, would be highly disruptive.

Imagine Water District 01's water master managing the Snake River, not simply by priority, but attempting to ensure that every water right was managed as it would have been before the creation of reservoirs or other alterations to the system that postdate that specific right's priority date. As a brief example only including four reservoirs on the Snake and its tributaries – a 1904 water right would have to be managed as if no reservoirs existed; a 1906 right could be impacted by Milner Dam, but not American Falls, Palisades, or Ririe; a 1960 right by Milner and Palisades, but not American Falls or Ririe; and a 1979 right could be impacted by all four. This is not workable.

Since the Pehrson's water right was perfected, the Mackay Dam was constructed, creating the Mackay Reservoir, and Water District 34 was created. It would be impossible to administer water in Mackay Reservoir as if the reservoir did not exist at all, ignore the IDAPA rules governing Water District 34, and ask the watermaster to apply futile call based on a certain trigger even though in reality, water can still be delivered to a senior appropriator.

Pehrsons' requested watermaster instructions attempt to incorrectly apply futile call. If granted, the requested relief would negatively affect delivery of water to all users downstream of Moss' River Diversion. The Petition should be dismissed in its entirety.

CONCLUSION

Pehrsons' Motion to Amend should be denied as the Amended Petition fails to identify the proper basis for a declaratory ruling.

DATED this 14th day of March, 2025.

Michelle Mortimer
Hyrum Erickson

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 14th day of March, 2025.

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RECEIVED
Mar 14, 2025
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001** **RESPONSE TO PEHRSONS' MOTION TO AMEND PETITION FOR DECLARATORY RULING; PETITION FOR RECONSIDERATION AND/OR PETITION FOR EXCEPTIONS**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc., by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, responds to the *Motion to Amend Petition for Declaratory Ruling*; Petition for Reconsideration and/or Petition for Exception (hereafter "Amended Petition") filed by the Petitioners. This Response is supported by the record in this matter.

I.
STANDARD OF REVIEW

The Idaho Department of Water Resources (hereafter "IDWR") rules provide for amendment of pleadings:

> The presiding officer may allow amendments to pleadings during formal proceedings. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded.

IDAP A 37.01.01.303. A court has wide discretion in permitting amendment to a pleading. *Obray v. Mitchell*, 98 Idaho 533, 537, 567 P.2d 1284, 1288 (1977). In the interest of justice, courts should favor liberal grants of leave to amend. *Wickstrom v. North Idaho College*, 111 Idaho 450,453, 725 P.2d 155, 158 (1986). However, "if the amended pleading does not set out a valid claim, or if the opposing party would be prejudiced by the delay in adding the new claim, or if the opposing party has an available defense such as a statute of limitations, it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint." *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank*, 119 Idaho 171,175,804 P.2d 900,904 (1990).

II.
ARGUMENT

A. The Amended Petition does not seek to add valid claims.

The Motion to Amend should be denied because the Amended Petition does not set out a valid claim for declaratory ruling. *Black Canyon Racquetball Club, Inc.*, 119 Idaho at 175, 804 P.2d at 904. ("If the amended pleading does not set out a valid claim ... it is not an abuse of discretion for the trial court to deny the motion to file the amended complaint.").

1. Section 67-5232 does not authorize the amendment or modification of existing IDWR Rules.

The Idaho Administrative Procedure Act (hereafter "IDAPA") provides for the administrative issuance of declaratory rulings. Idaho Code § 67-5232(1) provides that "[a]ny person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency." (Emphasis added). Sections 67-5232 and 67-

5255 limit the agency's inquiry to the "applicability of" a particular statutory provision, rule, or order.

Case law elucidating on the nature of declaratory rulings by administrative agencies is limited. However, Idaho courts have an analogous power to issue declaratory judgments which can provide persuasive evidence of the purposes and limitations of actions for declaratory rulings. Courts may issue declaratory judgments to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed." I.C. § 10-1201. The purpose of a declaratory judgment is to provide an additional procedural remedy for the determination of existing rights or titles without proof of a wrong committed by one party against the other. 20 *Charles Alan Wright, Arthur R. Miller & Edward He Cooper, Federal Practice and Procedure* § 106. (2017). This enables parties between whom an actual controversy exists, or is inevitable, to have issues speedily determined when doing so would prevent unnecessary injury caused by delay or ordinary judicial proceedings. *Id.*

In other words, the purpose of declaratory rulings is to clarify how a specific rule or statute applies to a particular situation, not to change the rule or the statute itself. In fact, requests for amendments or modifications to existing rules of IDWR fall under Idaho Code § 67-5230. This section provides that "[a]ny person may petition an agency requesting the adoption, amendment, or repeal of a rule." *Id.* at (1). If IDWR grants the request, the negotiated rulemaking process is triggered. *Id*. Thus, the Pehersons cannot seek changes, modifications, or new rules through section 67-5232.

The Amended Petition does not request a ruling as to how IDWR will interpret and apply existing rules, statutes, or orders when a particular set of facts arise. Instead, the Pehrsons are asking IDWR for new instructions, or new rules, for the watermaster. The requests are as follows:

> (1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.
>
> (2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.
>
> (3) Instruct the Water District No. 34 Watermaster that storage water held by the Big Lost River Irrigation District, pursuant to water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, shall not be delivered to a point(s) of diversion on the Big Lost River that is not also described as a point(s) of diversion and/or rediversion on the storage water rights of the Big Lost River Irrigation District.

Amended Petition, p. 2, *See* also III., p. 27. None of the foregoing requests cite to, or even reference, existing statutes or rules. These instructions were created by the Pehrsons and are requests for new instructions that benefit their water rights. In other words, these are requests for IDWR to modify, amend, or otherwise deviate from its existing rules. However, IDWR cannot make modification to its rules under the authority granted to it in section 67-5232. As such, requests 1 through 3 on p. 2 of the Amended Petition are invalid claims.

2. Emails from IDWR personnel are not orders reviewable under section 67-5255.

Section 67-5255 limits the declaratory judgment inquiries to "the applicability of any order issued by the agency." An "Order" is "[a]n agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." IDAPA 37.01.01.002.11. Emails from IDWR do not fit within this definition.

A declaratory judgment should be refused where the questions presented "should be the subject of judicial investigation in a regular action" and "may be maintained only for the purpose of determining and declaring fixed legal rights where it will accomplish some useful purpose." *Ennis v. Casey*, 72 Idaho 181, 185-186, 238 P.2d 435,438 (1951). Actions for declaratory judgment also are not intended "as a substitute for statutory procedures and administrative remedies must be exhausted." *Regan v. Kootenai Cty.*, 140 Idaho 721, 725, 100 P.3d 615,619 (2004). Actions for declaratory relief "may not be used to avoid the consequences of failing to comply with statutory procedural requirements." *Ag Air, Inc. v. Idaho State Tax Comm'n*, 132 Idaho 345,348,972 P.2d 313,316 (1999).

At a minimum, the emails could be considered actions by the Department that were reviewable at the time the emails were sent. Idaho Code § 42-1701A(3) generally permits:

> any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, 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.

The Pehrsons were well-aware of the emails back in 2021 and 2022, and they had a statutory remedy offering them the ability to request a hearing to address IDWR's actions 15 days after receiving notice of the emails. They failed to act and lost their right to a hearing. They cannot misuse a petition for declaratory ruling as a mechanism to initiate evidentiary hearings on actions taken by an agency years ago.

3. The requested declaratory ruling related to futile calls does not cite specific legal provisions for the Department to interpret in a meaningful way.

The Amended Petition's only requested ruling that cites to a rule or statue was the request **"**that the Department declare how it will determine futile call and whether it is permissible for storage water to defeat futile call, pursuant to its duties to administer, supervise, and distribute water rights." *Id.*, at p. 2. However, this request does not reference or identify any particular provision or language that discusses futile call determinations in relation to the Moss Farms Water Rights and the BLRID Water Rights. It cites 26 legal citations that generally deal with powers of and authority of the Department on page 2, and then cites rules on page 5 that do not reference either futile call or carriage water in the context argued for in the Amended Petition. *Id*.

The Pehrsons failure to identify the specific language in rules or statutes is problematic. IDWR requires specific information in petitions seeking declaratory rulings. "Petitions" are considered "pleading[s]" under IDAPA 37.01.01.002.14. As such, a petition "must fully state a) [t]he facts upon which it is based; b) [t]he provision of statute, rule, order, or other controlling law upon which it is based; and c) [t]he relief sought, including any proposed limitation (or the denial) of any right, license, or permit sought in the application." IDAPA 37.01.01.300.02.a-c. Another requirement exists for petitions for declaratory rulings, which must "state the declaratory ruling that the petitioner seeks." *Id.* at 02.c. At a minimum, a petitioner must cite to specific provisions or language that relates to its requested declaratory ruling. By reading the face of the petition, it is impossible to know exactly what provisions of the cited law the Pehrsons want IDWR to interpret.

In addition, issuing the declaratory rulings stating that the legal provisions cited on page 2 of the Amended Petition apply to Moss Farm's Water Rights and to BLRID's Water Rights would not accomplish any "useful purpose." *Ennis*, 72 Idaho at 185-186, 238 P.2d at 438. Even if the parties stipulated that all citations to the Idaho Constitution, Idaho Code, and the Idaho Department of Water Resources Water Distribution Rules – Water District 34 apply, it would not clarify fixed

legal rights of the Pehrsons, clarify the legal relations between the parties, or provide a determination of whether a particular rule or statute was applicable in the instant proceeding. *See Ennis v. Casey*, 72 Idaho 181, 185-186, 238 P.2d 435,438 (1951). The legal provisions cited by the Pehrsons would be generally applicable to any water user in Basin 34. Furthermore, the Amended Petition does not provide a reference to any rule or statute that discusses storage water being used as carriage water. The only reference is a Supreme Court Case, *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 443 P.3d 252 (2019), not a rule, statute, or order, which falls outside the scope of inquiry under sections 67-5232 and 67-5255.

Furthermore, interpretations of any rules by IDWR and legal precedents are not rules for purposes of section 67-5232. Idaho Code § 67-5201(24) defines a rule as:

> all or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, enforces, or prescribes:
>
> (a) Law; or
>
> (b) The procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, **but does not include:**
>
> (i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
>
> (ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code;[1] or
>
> (iii) Intra-agency memoranda; or
>
> (iv) Any written statements given by an agency that pertain to an interpretation of a rule or to the documentation of compliance with a rule.

Id. (emphasis added). The Pehrsons requests that seek review of interpretations of the WD34 Rules by IDWR, the District Court, and the Idaho Supreme Court do not fit the bill. IDWR simply does not have authority under section 67-5232 to issue declaratory rulings on those items.

[1] It is worth noting that the definition of "Rule" for chapter 52, title 67, demonstrates that a declaratory ruling cannot establish, modify, or amend rules as requested by the Pehrsons because declaratory rulings issued pursuant to section 67-5232 are not even considered rules.

4. The Amended Petition seeks rulings on factual matters, which should have been brought in other proceedings.

As set forth previously, a declaratory judgment should be refused where the questions presented "should be the subject of judicial investigation in a regular action" and "may be maintained only for the purpose of determining and declaring fixed legal rights where it will accomplish some useful purpose." *Ennis*, 72 Idaho at 85-186, 238 P.2d at 438. Actions for declaratory judgment are not intended "as a substitute for a statutory procedure and such administrative remedies must be exhausted." *Regan*, 140 Idaho at 725, 100 P.3d at 619. Actions for declaratory relief "may not be used to avoid the consequences of failing to comply with statutory procedural requirements." *Ag Air, Inc.,* 132 Idaho at 348, 972 P.2d at 316.

The declaratory rulings sought by the Pehrsons do not seek to determine the rights, status, or other legal relations between parties to this case. They involve factual determinations that were the subject of other proceedings when the subject water rights were decreed, adjudicated, and transferred. As discussed below, these factual determinations have already been decided and are no longer reviewable.

Even though no specific violation of Idaho Codes or IDWR Rules is expressly identified in the Petition, the Pehrsons are essentially arguing that retrospective determinations by IDWR were incorrect. Specifically, they reference the Snake River Basin Adjudication and the Moss Farms Application for Transfer of Water Rights. But those issues could have been addressed through the normal statutory procedures set forth in Idaho Code. *Ennis*, 72 Idaho at 185,238 P.2d at 438 (action for declaratory ruling inappropriate when the issues could be determined in a regular suit.). The Petitioners failed to bring these factual issues before IDWR within the timeframes set forth by statute and cannot now use an action for a declaratory ruling to readdress what has already been finally decided. Thus, the declaratory rulings sought by the Petitioners do not fall within the

limited scope of what may be brought in an action for declaratory ruling. Because the declaratory rulings sought by the Petitioners are not proper for an action for declaratory ruling, they do not present a valid claim and the Motion to Amend should be denied.

B. The Pehrsons are collaterally attacking the Transfer Application.

"[T]he proper method of contesting an agency or judicial decision is by appeal" and "an order or judgment may not later be collaterally attacked by means of" an action for declaratory relief. *Carter v. State, Dep't of Health & Welfare*, 103 Idaho 701, 702, 652 P.2d 649,650 (1982). In the Amended Petition, the Pehrsons' repeatedly attack Moss Farms' transfer of its Water Rights that occurred over nine years ago. As set forth previously in these proceedings, the Pehrsons were already given the opportunity to protest the administration of Moss Farms' Water rights clear back in 2015, but they failed to act. There is no dispute that no person or entity, including the Pehrsons, objected to the Application filed by Moss Farms in 2015 despite notice of the Application being given by the Department pursuant to Idaho Code Idaho Code § 42-222. The preliminary order approving the Application was issued pursuant to Idaho Code § 67-5243.This order became a final order because no motions to reconsider were filed within the 14-day time limit. *See id.* Because no motions to reconsider, nor appeals were filed, the preliminary order became a final order. *See* Idaho Code §§ 67-5245, 67-5270, & 67-5272.

The Pehrsons were given notice and an opportunity to participate in proceedings and to protest the water right transfer. They did not. They also did not move to reconsider or otherwise seek declaratory relief consistent with the deadlines prescribed in Idaho Code §§ 42-222 or 42-5246. As such, the order on the Moss Farms' transfers have been final for nearly nine (9) years, and there are simply no legal grounds to undue it now.

With regard to the BLRID Right, the Pehrsons had notice and opportunity to participate in

proceedings determining the administration of these rights. Any conditions the Pehrsons wished to have placed on Moss Farms Water Rights or BLRID's Water Right had to be raised in other proceedings. They cannot use sections 67-5232 and 67-5255 to replace their failure to advocate for conditions on other people's water rights. Allowing them to do so would be against public policy because any person could advocate for new conditions to be placed on another's water rights simply by filing a petition for declaratory ruling. This was not the intent of the legislature, and IDWR should not adopt the Pehrsons' interpretation of section 67-5232 nor 67-5255.

C. The Petition to Reconsider merely asks the Hearing Officer to second guess himself.

It is true, that a party may "file a petition for reconsideration of th[e] preliminary order with the agency within fourteen (14) days of the service date of the order." IDAPA 37.01.01.730.02.b. However, such requests for reconsideration is appropriate "in the light of new evidence or additional authority." *Midtown Ventures, LLC v. Capone as Tr. to Thomas & Teresa Capone Living Tr.*, 173 Idaho 172, 539 P.3d 992, 1002 (2023) (citing *BrunoBuilt, Inc. v. Erstad Architects*, PA, 172 Idaho 1, 528 P.3d 531, 542 (2023)). Motions to reconsider are "not a vehicle to undermine the trial court's decision on appeal by allowing newly asserted arguments and evidence—placed into the record at the eleventh hour—to provide a basis for an appellate court to second guess the trial court's initial decision." *Id.*

Here, the Pehrsons have filed an Amended Petition with no new law, or at least relevant law, and no new evidence. They have presented no new compelling reason for the Hearing Officer to modify his prior Order. For that reason, and the reasons set forth in the Response, the Petitioner for Reconsideration and/or Exceptions should be denied.

III.
CONCLUSION

Based on the foregoing, Moss Farms respectfully requests the Hearing Officer deny the Pehrsons' Motion to Amend, and their Petitioner to Reconsider and/or Request for Exceptions.

DATED: March 14, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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RECEIVED
Mar 18, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**REPLY TO RESPONSES IN OPPOSITION TO MOTION TO AMENDED PETITION FOR DECLARATORY RULING**

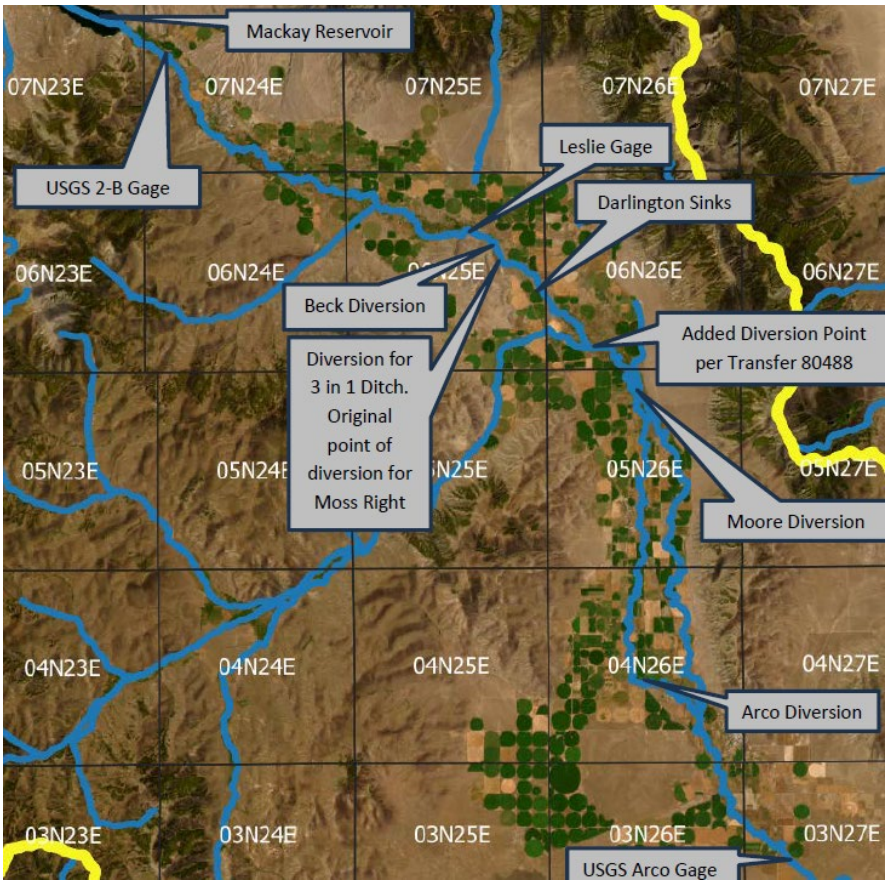
COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, pursuant to IDAPA 37.01.01.220.02.c and the Hearing Officer's *Order Shortening Time to Respond to Motion to Amend and Notice of Motion Hearing* (March 6, 2025), and hereby reply to the oppositions filed by Big Lost River Irrigation District ("BLRID"), Moore Canal Users ("Moore Canal"), and Moss Farms, Inc. ("Moss") (collectively referred to as the "Respondents").

I. INTRODUCTION

The Pehrsons will address the arguments of Respondents, and will group the replies to avoid repetition. At the outset, the Respondents have not rebutted the legal authority cited by Pehrsons in both their *Motion to Amend Petition for Declaratory Ruling* and the *Amended Petition for Declaratory Ruling* that the Director of the Idaho Department of Water Resources ("IDWR" or "Department") possesses the authority to administer, interpret, and instruct watermasters when it comes to the delivery of water rights. The general argument from Respondents is the relief the Pehrsons seek is not sufficiently pled, and that even if it has been, it has vague, abstract, or hypothetical ramifications for all water users across the State. To be clear, the water rights that are at issue in this proceeding are located in Water District No. 34 ("WD34"), belong to the Pehrsons, Moss, and BLRID, with questions involving the interaction of those specified rights, in a discrete reach of the Big Lost River that is between the 2B Gage and the Moss River Diversion,[1] with the Darlington Sinks in between. This reach of the River is shown in the map prepared by Pehrson's expert witness, Dr. David R. Tuthill, Jr., and is shown below:[2]

[1] The Moss River Diversion is identified on the map as "Added Diversion Point per Transfer 80488."

[2] The Moore Canal, which the map identifies as the "Moore Diversion," is located downstream from the Moss River Diversion.



Tuthill Dec. at 2.

As previously discussed, the crux of the issue, which has been sufficiently pled and articulated, is whether, when the Big Lost River breaks at the Darlington Sinks, is it lawful for Moss or other water users to defeat futile call by then calling for BLRID storage water to carry Moss' natural flow water rights to the River Diversion, contrary to past administrative practice, the WD34 rules, and the BLRID water rights? It is Pehrsons' contention that this practice is not permitted because the BLRID storage rights do not describe the River Diversion as a point of diversion and/or rediversion. It is Moss' contention that this practice is allowed because a 2015 transfer that added the River Diversion to his water rights – one of which is senior to Pehrsons (water right no. 34-182), the other of which is junior (water right no. 34-381A), and two of which are supplemental ground water rights (water right nos. 34-2379F and 34-14525) – also

altered the decreed elements of BLRID's storage rights, without any notice, thus allowing storage to be diverted at the River Diversion.[3]

In summary, this case is understood and is ripe for decision-making. It is important that this case be heard before the summer turns hot and dry so that the parties will understand their rights and responsibilities in this coming irrigation season, with the law allowing decisions of this nature before harm occurs.

II. ARGUMENT

A. Granting Relief To Pehrsons Does Not Implicate Rulemaking

Ignoring the cases and statutes cited by Pehrsons in support of their *Motion to Amend Petition for Declaratory Ruling* and the *Amended Petition for Declaratory Ruling*, the Respondents argue that if this matter proceeds to hearing and a decision is issued, it will trigger rulemaking. *See BLRID Opp.* at 5-6 ("the Amended Petition requests rulemaking . . . . There are other procedural mechanisms to request discretionary rulemaking, and the Pehrsons have also failed to show any legal authority that would allow their claim for declaratory relief to override Water District 34's water deliver rules"); *Moore Canal Opp.* at 3-4 ("The Director's decision to [sic] regarding futile call in WD34 is not an agency action of 'particular applicability' that impacts 'specific persons.' Rather, it is an agency action of general applicability. The decision applies to all persons with water rights in WD34. When identifying an 'order' as opposed to a 'rule' the Idaho Supreme Court has focused on the applicability of the agency action."); *Moss*

[3] The Department approved two transfers for Moss in 2015, with issues of fact concerning which 2015 transfer governs these proceedings. Transfer No. 79972 was issued by IDWR on June 30, 2015, and did not address Moss' supplemental ground water rights. Transfer No. 80488 was issued on December 14, 2015, addressing Moss' natural flow rights and supplemental ground water rights. Neither transfer addressed the storage rights of BLRID. In Moss' *Response to Pehrsons' Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions*, it is argued that Pehrsons, through this proceeding, are collaterally attacking one or both of the 2015 transfers. This matter has been fully briefed on summary judgment and Pehrsons hereby incorporate their responses. *See Pehrsons' Response to Moss Motion for Summary Judgment* at 16-24 (Feb. 7, 2025).

Opp. at 3 ("If IDWR grants the request, the negotiated rulemaking process is triggered."). As will be discussed, the Respondents misapply the law concerning rulemaking.

The word "rule" means "all or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, enforces, or prescribes . . . [l]aw; or . . . [t]he procedure or practice requirements of an agency." I.C. § 67-5201(24) (emphasis added). As specifically acknowledged by the Legislature, the word "rule" "does not include . . . . [d]eclaratory rulings . . . ." *Id*. (emphasis added).

The Supreme Court has directed that the phrase "general applicability" is "the most salient characteristic distinguishing quasi-legislative rulemaking from a purely executive or quasi-judicial agency action." *Pizzuto v. Idaho Dept. of Correction*, 170 Idaho 94, 96-97, 508 P.3d 293, 295-96 (2022) (emphasis added). In the context of administrative rules, the phrase general applicability has two meanings. *Id*. at 97, 508 P.3d at 296. First, "it means that rules apply uniformly *to the public*." *Id*. (italics in original). According to the Court: "This distinguishes rulemaking from quasi-judicial agency actions because quasi-judicial actions determine only the rights and duties of individuals." *Id*. Second, rules "must be applied uniformly *by the agency*." *Id*. (italics in original). This means an agency "does not have discretion to depart from its rules while they are in effect." *Id*.

The arguments made by Respondents, that rulemaking is triggered in this instance, are contrary to *Pizzuto* and to Judge Wildman's recent decision in *City of Pocatello v. Idaho Water Res. Board*, Case No. CV42-23-1668 (Jan. 10, 2024).[4] There, Judge Wildman heard cross-motions for summary judgment concerning a procedure involving the use of storage water in

[4] *City of Pocatello v. Idaho Water Res. Board* is located here: http://srba.state.id.us/Images/AdminApp/CV42-23-1668/01-10-24%20Amended%20Order.pdf (last visited March 18, 2025).

Water District 01 known as "last to fill." Water District 01 governs the Snake River above Milner Dam. In essence, last to fill means that if storage water is "rented for purposes below Milner [dam], 'the space evacuated to provide the rental became '*last-to-fill*' in the reservoir for the following season, and for each season thereafter until the space refilled.'" *Pocatello* at 6 (italics in original). The City of Pocatello, who holds storage water interests in the Upper Snake reservoir system, argued that rulemaking was required to codify the last to fill procedure. The Water Resources Board, the Department, the Director, the Water District 01 Watermaster, and other storage water spaceholders (collectively referred to herein as the "State") took the opposite position, arguing rulemaking was not required because the last to fill procedure was not generally applicable.[5]

In ruling for the State, Judge Wildman analyzed the Supreme Court's decision in *Pizzuto* and applied it to the facts at hand, holding that the last to fill procedure did not require rulemaking because it was not generally applicable, to wit:

- "Rental pool procedures are, by their nature, not procedures of general applicability. They are narrowly tailored by local communities to fit unique local conditions." *Id*. at 11.

- "[T]here is a recognition that a state-wide, one-size-fits-all, rental pool procedure may not be feasible with respect to stored water." *Id*.

- "Those Procedures are not generally applicable to the public or even to all water users. They are narrowly tailored to facilitate the rental of stored water only in Water District 01. Even within the confines of Water District 01, the Rental Pool Procedures do not apply to all water users or to all rentals of water." *Id*.

- "Procedure 1.2 [] provides: 'These procedures shall not be interpreted to limit the authority of the Idaho Department Water Resources, the Idaho Water

[5] Ironically, in *City of Pocatello v. Idaho Water Res. Board*, Case No. CV42-23-1668, counsel for Moore Canal, then representing the Fremont Madison Irrigation District and the Idaho Irrigation Counsel, joined in the arguments made by the State that the last to fill procedure was not generally applicable and therefore not a rule: http://srba.state.id.us/Images/AdminApp/CV42-23-1668/11-08-23%20Notice%20of%20Joinder.pdf (last visited March 18, 2025).

> Resources Board, or the Watermaster of Water District 01 in discharging their duties as prescribed by statute or rule.'" *Id*. at 12.[6]

Here, the relief sought by the Pehrsons is narrowly tailored to their water rights, the water rights of Moss, and the storage water rights of BLRID; thus, the relief the Pehrsons' seek is not generally applicable, because:

- Not all citizens of the State are water users;
- Not all water users in the State have had their rights decreed in a general adjudication;
- Not all water users in the State who have had their rights decreed in a general adjudication are located within the boundaries of the SRBA;
- Not all water users in the State who have had their rights decreed in the SRBA are located in water districts;
- Not all water users in the State who have had their rights decreed in the SRBA are located in WD34;
- Not all water users in WD34 rely solely on surface water;
- Not all water users in WD34 rely solely on ground water;
- Not all water users in WD34 have storage water interests in BLRID;
- Not all water users in WD34 are located in the discrete reach of the Big Lost River that is at issue herein.

Clearly, the relief Pehrsons are seeking falls squarely within Judge Wildman's decision in *Pocatello* and does not trigger rulemaking, consistent with *Pizzuto*.

[6] Procedure 1.2 is fully consistent with WD34 Rule 001, which states: "This rule governs the distribution of surface water and ground water within Water District 34, the Big Lost River Basin, by the duly appointed watermaster pursuant to the provisions in Chapter 6, Title 42, Idaho Code, and applicable court decrees. This chapter does not limit the authority of the Director of the Idaho Department of Water Resources in exercising the duties and responsibilities in other provisions of Idaho law." IDAPA 37.03.12.001 (emphasis added). Thus, no matter what the WD34 Rules say, they cannot contradict the SRBA partial decrees or limit the Director's authority to administer water rights consistent with his duties in Title 42, Idaho Code. *See Motion to Amend Petition for Declaratory Ruling* at 4-6 (discussing the provisions of law that control this case).

B. I.C. §§ 67-5232 and 67-5255, Together with the Law Cited By Pehrsons, Support The Motion To Amend, With This Matter Not A Hypothetical Exercise

Idaho Code § 67-5232(1) allows Pehrsons to petition IDWR "for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency." In their *Motion to Amend Petition for Declaratory Ruling* and the *Amended Petition for Declaratory Ruling*, Pehrsons cited "a plethora of statutes and rules related to water rights and IDWR," *Moore Canal Opp.* at 2, to support their position that this matter is properly framed as a declaratory action pursuant to I.C. § 67-5232. Respondents fail to rebut the law concerning the Department's authority to administer water rights because they know they cannot. *See Thompson Creek Mining Co. v. Idaho Dept. of Water Res.*, 148 Idaho 200, 211-12, 220 P.3d 318, 329-30 (2009) ("the Director is granted broad authority to direct and control water, and to administer it according to the prior appropriation doctrine. The legislature . . . has provided IDWR with the water district as its principle tool to carrying out this mandate.").[7] Moreover, Respondents fail to address the decision in *Elgee v. Retirement Bd. of the Public Employee Ret. System of Idaho*, 169 Idaho 34, 490 P.3d 1142 (2021), wherein the Court held that a declaratory action involving rules and statutes may be brought before harm occurs.

Idaho Code § 67-5255(1) allows Pehrsons to petition IDWR "for a declaratory ruling as to the applicability of any order issued by the agency." Respondents fail to address the definitions of "agency action" and "order" that are discussed by Pehrsons in the *Motion to Amend Petition for Declaratory Ruling* at 12, and in the *Amended Petition for Declaratory Ruling* at 22.[8] Respondents also fail to address the caselaw cited in support of the argument that

[7] The Court's decision in *Thompson Creek* is cited by Pehrsons in the *Motion to Amend Petition for Declaratory Ruling* at 3-4, and in the *Amended Petition for Declaratory Ruling* at 16-17.

[8] There is a typographical error in the section heading on page 22 of the *Amended Petition for Declaratory Ruling*. The section heading cites I.C. § 67-52**32(1)** as the law involving orders. The correct citation for this type of declaratory action is I.C. § 67-52**55(1)**.

the July 2021 Letter, the August 2022 Email, and the September 2022 Email are agency actions, which constitute orders of the Department, that are subject to a declaratory action. *Podsaid v. State of Idaho Outfitters and Guides Licensing Board*, 159 Idaho 70, 74, 356 P.3d 363, 367 (2015) ("The Board acted according to a duty placed on it by law when it denied Podsaid's license application and it informed him of that denial by letter, so the letter was an agency action."); *Fuchs v. Dept. of Idaho State Police*, 152 Idaho 626, 630, 272 P.2d 1257, 1261 (2012) ("The July 24, 2009 letter is an agency action under this definition."). Respondents do not dispute that the *Order* issued by former Director Dreher on July 30, 2004 is the type of document that is subject to a declaratory action. The prior orders of the Department show that the Director's decision to declare futile call, and the workarounds the seniors used in 2022 to overturn the decision through the introduction of storage water as carriage water, have been analyzed differently since the Moss transfer was approved and are a departure from past decisions.

BLRID contends: "The scope of relief available in a declaratory action is very narrow because they are meant to address actual and existing facts and controversies, not hypothetical or abstract disputes." *BLRID Opp*. at 4. Pehrsons could not agree more. As evidenced in the pleadings herein, this dispute is anything but hypothetical. In 2004 and in 2021, futile call was declared by the Director, and downstream senior users either could not or did not seek to use BLRID storage water as carriage water to overturn the decision. All of that changed in 2022, when the Director first declared futile call, yet then accepted the seniors' defense that BLRID storage water should be allowed as carriage water to the River Diversion, with the declarations of the Watermasters establishing that the curtailment was unprecedented.

Even Moss agrees with Pehrsons that seeking a declaratory ruling now, before the parties are harmed when the 2025 irrigation season turns hot and dry, is well within the scope of a declaratory action. *Moss Opp.* at 3 ("Courts may issue declaratory judgments to 'declare rights, status, and other legal relations whether or not further relief is or could be claimed.' I.C. § 10-1201. The purpose of a declaratory judgment is to provide an additional procedural remedy for the determination of existing rights or titles without proof of a wrong committed by one party against the other. 20 *Charles Alan Wright, Arthur R. Miller He Cooper, Federal Practice and Procedure* § 106 (2017). This enables parties between whom an actual controversy exists, or is inevitable, to have issues speedily determined when doing so would prevent unnecessary injury caused by delay or ordinary judicial proceedings. *Id*.").

C. The Court's Decision in *Sylte*, the WD34 Rules, and I.C. § 42-222(1) Support the Proposition that BLRID Storage Water Cannot be Used as Carriage Water to the River Diversion

Moore Canal argues that the Supreme Court's decision in *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 443 P.3d 252 (2019) does not prevent the use of BLRID storage water as carriage water to the River Diversion: "[T]his situation is distinguishable from the situation in *Sylte*. In *Sylte*, releasing storage water from Twin Lakes was expressly barred by the Final Decree. *Id*. Here, Mackey Reservoir is a storage reservoir with the purpose of storing water for irrigation. There is no general bar on releases of storage water from Mackey Reservoir as there was in *Sylte*." *Moore Canal Opp.* at 5. BLRID builds on this idea by wrongly claiming that the WD34 Rules allow the release of storage water as carriage water: "Pehrsons have also failed to show any legal authority that would allow their claim for declaratory relief to override Water District 34's water delivery rules[] which allow delivery of storage water as carriage water for natural flow rights. *See* Idaho Admin. Code r. 37.03.12.040[.02.d.iii] ('The Watermaster ***may***

use storage water to assist the delivery of natural flow water rights at the beginning of the irrigation season when requested to do so by the storage holder.')). *BLRID Opp.* at 6 (emphasis in original).

Turning first to BLRID's argument, the incomplete citation to IDAPA 37.03.12.040.02.d.iii is entirely misleading because, in addition to only applying at "the beginning of the irrigation season,"[9] Rule 40.02 only applies to "Rotation Credit." The phrase "Rotation Credit" is a term of art and is defined as: "Water impounded in Mackey Reservoir pursuant to a water right whose source of water is the Big Lost River and which does not include storage as a purpose of use. The impoundment of water as rotation credit is described in Rule Subsection 040.02." IDAPA 37.03.010.11 (emphasis added). *See State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998) (discussing "rotation for credit" in WD34 and the SRBA). Thus, if Moss wishes to rotate his natural flow water rights for credit that are impounded in Mackey Reservoir at the beginning of the irrigation for carriage water to the River Diversion, his water rights, as explained in the WD34 Rules, allow him to do so – but not to the detriment of senior water rights. This case does not, however, concern the use of rotation credit; rather, this case involves the ability for Moss or others to demand the release of BLRID storage water rights, which have a storage purpose of use, to defeat futile call and thus effectively curtail upstream senior water rights. *Compare* IDAPA 37.03.12.010.13, (defining "Storage Water" as "Water impounded in a storage facility, including Mackey Reservoir, pursuant to a water right which includes storage as a purpose of use") (emphasis added) *with* IDAPA 37.03.010.11 (defining "Rotation Credit" as

[9] This is to be contrasted with the issue in this case which is when natural flow water rights from the Big Lost River are being administered, in priority, and the River has broken at the Darlington Sinks when the summer has turned hot and dry. Even if IDAPA 37.03.12.040.02.d.iii applied, the factual circumstances in this case do not take place at the "beginning of the irrigation season."

impoundment of water in Mackey reservoir "pursuant to a water right . . . which does not include storage as purpose of use") (emphasis added).[10]

Turning next to *Sylte*, Moore Canal expands states: "There is no general bar on releases of storage water from Mackey Reservoir as there was in *Sylte*." *Moore Canal Opp.* at 5. However, the point Moore Canal makes is incorrect because BLRID's water rights, as they were partially decreed in the SRBA, only allow storage water to be diverted and/or rediverted at certain named canals and ditches that are identified both by name and by legal description. Thus, if a point of diversion and/or rediversion is not listed on the face of BLRID's storage rights, like the River Diversion, storage water cannot be lawfully used at that location. The Supreme Court agrees, having established a bright line rule that if a point of diversion is not decreed, then water may not be delivered and diverted at that location. *Whittaker v. Idaho Dept. of Water Res.*, 551 P.3d 729, 742 (Idaho 2024) ("West Springs Ditch is an unauthorized diversion of the waters of Stroud Creek because it is not identified as a point of diversion in Whittaker's water right 74-157.") (emphasis added); *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) ("Because the Bridge Diversion lies outside the specified point of diversion in its partial decrees, the water rights at issue here do not entitle Rangen to divert water via the Bridge Diversion.") (emphasis added). Therefore, the inability to use storage water at the River Diversion is consistent with *Sylte*, *Rangen*, and *Whittaker*.

Lastly, BLRID correctly states that the Pehrsons have sometimes taken delivery of storage water at what is known as "the Pehrson Ditch." *BLRID Opp.* at 4, fn. 1. The Pehrson Ditch is located above the Darlington Sinks, and, like the River Diversion, "is not identified in any part of BLRID's storage water rights as a point of diversion or rediversion . . . ." *Id.*

[10] Pehrsons cited and discussed IDAPA 37.03.12.010.13 in the *Amended Petition for Declaratory Ruling* at 19.

Therefore, BLRID argues that if the Pehrsons succeed, the District "cannot deliver water to the" Pehrson Ditch. *Id.* The Pehrsons agree with BLRID, and previously identified this issue to the Hearing Officer as evidence of BLRID's understanding that if a point of diversion and/or rediversion is not identified on its water rights, then BLRID cannot deliver storage water to that location.

As explained in *Pehrsons' Response to Moss Motion for Summary Judgment* (Feb. 7, 2025), in 2008, during the pendency of the SRBA, BLRID filed *Application for Transfer No. 74790* with the Department to add the Pehrson Ditch as a point of diversion and/or rediversion. *Pehrsons' Response to Moss Motion for Summary Judgment* at 19; *Tuthill Dec., Ex. 10* (Transfer No. 74790). The purpose of *Application for Transfer No. 74790* was to "Update the diversions used by Applicant [BLRID]" by adding both the "Lower Burnett" and "Pehrson Ditch." *Tuthill Dec.; Ex. 10* at 2, lns. 2 and 4. On December 16, 2008, BLRID withdrew *Application for Transfer No. 74790*: "Please send back BLRID's application for transfer of Point of Diversion of storage water as it pertains to the Lower Burnett and Pehrson Ditch. The directors do not want it to go before Pehrson's is approved." *Id*. at 1.

Thus, BLRID acknowledges that the Pehrson Ditch, like the River Diversion, is not an authorized point of diversion and/or rediversion for storage water. This illustrates the simplicity of the solution for Respondents – file an *Application for Transfer* with IDWR, pursuant to I.C. § 42-222(1), to add the River Diversion to BLRID's storage water rights. *See Tuthill Dec.* at 6, ¶ 29 ("Because the River Diversion is not listed as a point of diversion and/or rediversion for the BLRID storage rights referenced in paragraph 13, the correct way to allow Moss to use storage water as carriage water would be for BLRID to file a transfer with IDWR to add the River Diversion as a point of diversion and/or rediversion on the BLRID water rights."). The ability to

file an *Application for Transfer* is a clear legal remedy that could allow the lawful delivery of storage water to the River Diversion. I.C. § 42-222(1) ("Any person . . . who shall desire to change the point of diversion . . . shall first make application to the department of water resources for approval of such change.") (emphasis added).

Consistent with I.C. § 42-222(1), the Supreme Court has previously held that if an element is not listed on a water right that was partially decreed in the SRBA – as the BLRID storage rights were – then the sole remedy is to file an *Application for Transfer*:

> There is no question that an application for transfer is required to change [a water right. I.C. § 42-222(1). . . . . Furthermore, it is equally clear from the plain language of the [SRBA] decree that recharge is not listed as an authorized use . . . . Claiming, at this stage, that recharge is an authorized use . . . is nothing more than an impermissible collateral attack on the partial decree. Allowing the City to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process. As we recently said in *Rangen, Inc.*, any interpretation of [the] partial decree [] that is inconsistent with the plain language would necessarily impact the certainty and finality of the SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself.

City of Blackfoot v. Spackman, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) (internal quotations and citations omitted) (emphasis added).

D. BLRID's Argument that the Pehrsons do not have Standing Ignores their Beneficial Interest

Citing *Reclaim Idaho v. Denney*, 169 Idaho 406, 497 P.3d 160 (2021), BLRID argues the Pehrsons do not have standing to bring this action. According to *Reclaim Idaho*:

> To establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. To satisfy the first element—an injury in fact—one must 'allege or demonstrate' an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical. To satisfy the first element—an injury in fact—one must allege or demonstrate an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical. The common phrase "allege or demonstrate" used by this Court is an incomplete statement of the requirements for standing. This Court clarified in Young that the standing phrase "allege or demonstrate" actually requires a showing

> of a distinct palpable injury and fairly traceable causal connection between the claimed injury and the challenged conduct. "Palpable injury" has been defined by this Court as an injury that is easily perceptible, manifest, or readily visible.

169 Idaho at 419, 497 P.3d at 173 (cleaned up).

The pleadings in this matter, together with the law, establishes Pehrsons' standing. As to the first two factors, there is both injury in fact and a causal connection. Sometime between August 2022 and September 2022, the Director's determination of futile call was rescinded due to the introduction of BLRID storage water as carriage water to the River Diversion, with the Respondents not disputing this occurrence. The result of this decision upended prior futile call determinations, as evidenced in 2004 and 2021. The decision in 2022 to allow this practice to occur resulted in unprecedented curtailments, as stated in the declarations of the Watermasters. If the Pehrsons prevail, BLRID storage water cannot be used as carriage water to defeat futile call, meeting the redressability factor.

Unsupported by law, BLRID asserts: "Because the requested relief is regarding BLRID's storage water rights and the Pehrsons have no storage rights, in Mackey reservoir, they do not have standing to ask for any relief that would affect the administration of BLRID's storage water rights." *BLRID Opp.* at 6-7. This statement completely ignores the Supreme Court's decision in *United States v. Pioneer Irr. Dist*., 144 Idaho 106, 157 P.3d 600 (2007), wherein it was held "as a matter of Idaho constitutional and statutory law title to the use of water is held by the consumers or users of the water." 144 Idaho at 115, 157 P.3d at 609 (emphasis added). It is undisputed that Pehrsons have interests in BLRID's storage water rights. It is further undisputed that BLRID holds nominal, legal title in its storage rights, but it is the Pehrsons, along with all other BLRID's other patrons, who put stored water to beneficial use. *Id*.; *see also* I.C. § 43-316 (irrigation districts hold property in trust). Thus, without the Pehrsons, BLRID would not have a

water right. *Pioneer* at 110, 157 P.3d at 604 ("In Idaho it is 'a well settled rule of public policy that the right to the use of the public water of the state can only be claimed where it is applied to a beneficial use in the manner required by law.' *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P. 418, 422 (1924)."); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 19, 156 P.3d 502, 520 ("'In the absence of a beneficial use, actual or at least potential, a water right can have no existence.'" *Strong v. Twin Falls Canal Co.*, 44 Idaho 427, 434, 258 P. 173, 175 (1927).").

Lastly, BLRID argues it possesses the right "to independently determine how and when to deliver its storage water as it is lawfully authorized to do [sic] cannot rise to the level of an injury that would give standing to the Pehrsons." *BLRID Opp.* at 6, fn. 5. Again, as discussed throughout this proceeding, if the elements of BLRID's storage water rights, as they were decreed in the SRBA, do not authorize delivery to the River Diversion, then the simple fact that BLRID says the practice is allowed does not make it lawful, and is contrary to the outcomes of the SRBA. *First Sec. Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 741, 451 P.3d 446, 454 (2009) (the SRBA "partial decrees were incorporated into the SRBA's Final Unified Decree, which 'is binding against all persons'") (emphasis added); *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018) ("Finality in water rights is essential. Finality is for good reason, especially in water law; otherwise the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures." (cleaned up); *Whittaker*, 551 P.3d at 742 ("This Court has consistently rejected arguments to revisit water rights adjudicated in the SRBA . . . it is the finality of the SRBA that guides our decision today.").

III. CONCLUSION

Based on the foregoing, the Pehrsons respectfully request that the Hearing Officer grant the *Motion to Amended Petition for Declaratory Ruling*, which will allow the *Amended Petition for Declaratory Ruling* to be heard before the summer turns hot and dry.

DATED this 18th day of March, 2025.

/s/ Chris M. Bromley
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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RECEIVED
Mar 20, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. **P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF SERVICE OF PEHRSON SUPPELEMENTAL ANSWERS TO REQUESTS FOR PRODUCTION**

PLEASE TAKE NOTICE that Byron Pehrson, Loy Pehrson, and Randy Pehrson, by and through their attorneys of record have served Supplemental Answers To Moss Farms, Inc., First Set Of Requests For Production. The first set of supplemental documents was served on January 28, 2025, Pehrson Bates Numbers 40-84; counsel recently learned that she failed to provide a notice of service of said documents. The second set of supplemental documents was served March 20, 2025, Perhson Bates Numbers 84-104.

Submitted this 20th day of March, 2025

MCHUGH BROMLEY, PLLC

/s/Candice McHugh
Chris Bromley
Candice McHugh
Attorneys for Pehrsons

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**ORDER GRANTING MOTION TO AMEND AND WITHDRAWING PRELIMINARY ORDER DISMISSING PETITION** **ORDER VACATING HEARING AND AMENDING SCHEDULE**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively, "Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* ("*Petition*") with the Idaho Department of Water Resources ("Department"). *Petition*, at 1. The Pehrsons sought a declaratory ruling from the Department in the form of an order that would:

> (1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right now. 34-18 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.
>
> (2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

Id. at 2.

On February 23, 2024, Moss Farms, Inc. ("Moss") filed an objection to the *Petition*. In addition, the Hearing Officer allowed the Big Lost River Irrigation District ("BLRID") and Moore Canal Users ("Moore")[1] to intervene in the case.

[1] "Moore Canal Users" collectively refers to Moore Canal Water Users' Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline.

On January 13, 2025, Moore filed a motion to dismiss the *Petition*, which was joined by BLRID. On February 21, 2025, a dispositive motion hearing was held. The Hearing Officer made oral rulings on the record that were later memorialized and expounded upon in a *Preliminary Order: Granting and Denying in Part Motion to Strike; and Dismissing Petition for Declaratory Ruling Without Prejudice* ("*Preliminary Order*"), issued February 28, 2025. Upon concluding that "[t]he Pehrsons failed to support the Petition with any statute, rule, or order which allows the Hearing Officer to consider issuing a declaratory ruling," the Hearing Officer granted Moore's motion to dismiss, dismissing the *Petition* without prejudice. *Preliminary Order*, at 7.

On March 5, 2025, the Pehrsons filed a *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite* ("*Motion*") along with an *Amended Petition for Declaratory Ruling* ("*Amended Petition*"). In lieu of dismissal, the Pehrsons request that their *Motion* be granted, and this case be allowed to move forward based on the issues raised in the *Amended Petition*. *Motion*, at 2. In addition to the two instructions requested in the *Petition*, the *Amended Petition* "requests that the Department declare how it will determine futile call and whether it is permissible for storage water to defeat futile call" and seeks the issuance of a third instruction:

> (3) Instruct the Water District No. 34 Watermaster that storage water held by the Big Lost River Irrigation District, pursuant to water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, shall not be delivered to a point(s) of diversion on the Big Lost River that is not also described as a point(s) of diversion and/or rediversion on the storage water rights of the Big Lost River Irrigation District.

Amended Petition, at 2.

Moss, BLRID, and Moore filed responses in opposition to the *Motion* on March 14, 2025, and the Pehrsons filed a reply on March 18, 2025. The *Motion*, as it concerns the request to amend the *Petition* and reconsider the *Preliminary Order*, came before Hearing Officer Burdick for hearing on March 21, 2025. All parties were represented by counsel and the matter was taken under advisement.

ANALYSIS

The Department's Rules of Procedure ("Rules") allow the Department to grant parties leave to amend pleadings during informal or formal proceedings. IDAPA 37.01.01.303. The amended "[p]leadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded." *Id.*

The Pehrsons ask the Hearing Officer to consider "the statutes, rules, and orders of [the Department]" cited in the *Motion* as support when deciding whether to allow the various issues raised in the *Amended Petition* to be heard. *Motion*, at 2. Throughout their *Motion*, the Pehrsons cite a myriad of statutes, rules, and agency actions and raise multiple issues for the Hearing Officer to consider in the *Amended Petition*, however, the Hearing Officer finds that two primary

issues are raised for declaratory relief in this matter. Given the Director's authority to administer water in priority, issue watermaster instructions, and make futile call determinations, the Pehrsons ask the Department:

1. To issue watermaster instructions authorizing the watermaster to make futile call determinations under specific conditions; and
2. To determine whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law.

See Amended Petition, at 17, 20–26; *see also Motion*, at 16.

For reasons explained below, much like the Darlington Sinks breaking the river, the Hearing Officer will break the futile call issue from the authorized diversion issue and only grant the *Motion* in part.

I. The Hearing Officer declines to consider the futile call issue because the Pehrsons failed to timely exhaust their administrative remedies.

The Pehrsons' first request for declaratory relief asks the Department to issue Water District 34 watermaster instructions that require a watermaster to make futile call determinations under certain conditions. *Amended Petition*, at 2. The Pehrsons claim that a 2021 letter[2] and two 2022 emails[3] sent by Department staff to the Water District 34 watermasters are agency actions that constitute orders because they evidence futile call determinations that "resulted in unprecedented curtailments" and "adversely affected the Pehrsons' use of their water rights above the Darlington Sinks." *Motion*, at 11–13. The Pehrsons claim the agency actions are indicative that futile call determinations have not been consistent and may cause harm in the future, and therefore, declaratory relief is appropriate to determine legal rights before harm occurs again. *Id.* at 14–15.

The Administrative Procedures Act allows any person to petition an agency for a declaratory ruling as to the applicability of a statute, rule, or order administered by the agency. I.C. §§ 67-5232(1), 67-5255(1). The Department's Rules require a petition for declaratory ruling to "state the declaratory ruling that the petitioner seeks" and "[t]he provision of statute, rule, order, or other controlling law upon which it is based," among other requirements. IDAPA 37.01.01.300.02. However, actions for declaratory relief "may not be used to avoid the consequences of failing to comply with statutory procedural requirements." *Ag Air, Inc. v. Idaho State Tax Comm'n*, 132 Idaho 345, 348, 972 P.2d 313, 316 (1999). Actions for declaratory relief "are not intended as a substitute for a statutory procedure and such administrative remedies must be exhausted." *Id.* (quoting *V-1 Oil Co. v. Bannock Cnty.*, 97 Idaho 807,810,554 P.2d 1304, 1307 (1976)). "[T]he proper method of contesting an agency or judicial decision is by appeal, and [] an

[2] *See Bromley Dec.* Ex. 1, at 2 (Feb. 7, 2025) (Letter from Rob Whitney, Department Water Distribution Section Manager, to Lucas Yockey, Water District 34 Watermaster sent July 26, 2021).

[3] *See Bromley Dec.* Ex. 2, at 1 (Feb. 7, 2025) (Email from Tim Luke, Department Water Compliance Bureau Chief, to Preston Marcroft, Water District 34 Watermaster sent August 15, 2022); *Amended Petition* Ex. 3 (Email from Rob Whitney, Department Water Distribution Section Manager, to Preston Marcroft, Water District 34 Watermaster sent September 2, 2022).

order or judgment may not later be collaterally attacked by means of a declaratory judgment action." *Id.* (quoting *Carter v. Dep't of Health & Welfare*, 103 Idaho 701, 702, 652 P.2d 649,650 (1982)).

Idaho Code § 42-1701A(3) provides a catch-all statutory procedure for contesting Department actions. It states, in pertinent part:

> [A]ny person aggrieved by any action of the director, including any decision, determination, order or other action, . . . 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.

I.C. § 42-1701A(3).

There can be no doubt that futile call determinations are agency actions when Department staff rely on the authority of the Director to make and rescind such determinations. However, the appropriate method for challenging such actions, written or otherwise, is to request a hearing pursuant to Idaho Code § 42-1701A(3), not file a petition for declaratory ruling. Accordingly, the Pehrsons had fifteen days after receiving notice of each futile call determination to request a hearing by filing "a written petition stating the grounds for contesting" the agency action. I.C. § 42-1701A(3). The Pehrsons never requested such hearing, even though it was confirmed at the hearing on the *Motion* that the Pehrsons received "actual notice" from the Department regarding the futile call determinations during the 2022 irrigation season. *See Motion* Hr'g 10:21–10:49. Without timely requesting a hearing in accordance with Idaho Code § 42-1701A(3), the Pehrsons did not exhaust their administrative remedies and cannot litigate in 2025 a futile call determination made in 2021 or 2022. The Pehrsons' current attempt to challenge past futile call determinations through a petition for declaratory ruling constitutes an impermissible collateral attack on those agency actions. *See Ag Air, Inc.*, 132 Idaho at 348, 972 P.2d at 316. Moreover, even if the 2021 letter or 2022 emails constituted orders, it is not clear how the Hearing Officer could interpret the applicability of those in-season agency actions to issue a declaratory ruling requiring the Water District 34 watermaster to make futile call determinations when water conditions and agricultural needs change constantly. The changing conditions and needs are subject to a myriad set of influences singularly, or in combination, and therefore do not lend themselves to a declaratory action. Therefore, the Hearing Officer declines to issue declaratory relief because the Pehrsons failed to timely exhaust their available administrative remedies by not requesting a hearing on the futile call rescission, and as a result no Department order was forthcoming that lends itself to a declaratory ruling.

II. The Hearing Officer will consider the authorized diversion issue raised in the *Amended Petition*.

The Pehrsons second request for declaratory relief is for the Hearing Officer to determine "whether it is permissible to deliver BLRID storage water to a point of diversion and/or rediversion that is not included on the BLRID Storage Rights." *Motion*, at 16. The Pehrsons claim that pursuant to the finality of decreed water rights, Idaho statutes and administrative rules, and relevant caselaw, water users must divert water according to the elements listed on the water rights. *Id.* at 4–5, 8, 15.

The Director has the statutory authority and a legal duty to administer water within Idaho water districts in accordance with the prior appropriation doctrine. I.C. § 42-602. The Director also has a "clear legal duty to distribute water according to decreed water rights." *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017) (quoting *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). As indicated by the *Amended Petition*, these duties are reflected in many statutory provisions and rules administered by the Department. *Amended Petition*, at 2. Of particular concern to the authorized diversion issue, such duties may include but are not limited to: (a) Idaho Code § 42-201(2), which requires water users to obtain a valid water right to divert water; (b) Idaho Code § 42-1411(2)(e), which states the elements of a water right include the point of diversion; and (c) Idaho Code § 42-222(1), which requires filing a transfer application to change a point of diversion on a valid water right.

Considering the relevant statutes, rules, and caselaw, the Department may consider petitions for declaratory ruling under limited circumstances, including when the requested relief will clarify how the statutes or rules administered by the Department apply to a person's rights in the event of a potential claim. *See Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys. of Idaho*, 169 Idaho 34, 47, 490 P.3d 1142, 1155 (2021) (citing I.C. § 67-5232(1)); *see also* IDAPA 37.01.01.300.02.d. In *Elgee*, the petitioner challenged the PERSI Board's tax loss calculations and eligibility determinations under the Board's governing tax loss statutes and rules it administers. *Elgee*, 169 Idaho at 39, 46–47, 490 P.3d at 1147, 1154–55. The Court reasoned that:

> [I]t is apparent that Elgee was seeking a declaratory ruling from PERSI on remand, though he did not use the term. Elgee was not seeking to prove a present claim, but to have the PERSI Board construe the statutes and rules it administers to determine his rights should a claim arise. This is expressly permissible under IDAPA.

Id. at 47, 490 P.3d at 1155 (citing I.C. § 67-5232(1)).

Under *Elgee*, it is undeniable that a declaratory action before the Department is appropriate when it seeks a determination that "construe[s] the statutes and rules it administers to determine" rights where there is a high likelihood of repetition on a usual set of facts should that specified agency action occur. That is what the Pehrsons are now requesting because BLRID could, in the future, deliver storage water rights at the River Diversion. Therefore, the Hearing Officer will consider the authorized diversion issue raised in the *Amended Petition*.

CONCLUSION

Consistent with the foregoing, the Hearing Officer will use his discretion to grant the Pehrsons' request to amend their *Petition*, pursuant to Rule 303. Consequently, the *Amended Petition* shall be accepted into the record of this matter and the *Preliminary Order* is withdrawn. As the sole Respondent in this matter, the Hearing Officer will also exercise his discretion to grant Moss leave to file a response to the *Amended Petition*.

Although the Hearing Officer will accept the *Amended Petition* into the record, the Hearing Officer will only consider the authorized diversion issue raised in the *Amended Petition*—whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law. Due to the change in the central issue as outlined in this order, the Hearing Officer will not consider or hear argument on Moss's *Motion for Summary Judgment* filed January 24, 2025. The Hearing Officer ruled Moss's *Motion for Summary Judgement* to be moot based upon his original dismissal dated February 28, 2025. That original dismissal having been rescinded and modified does not preclude Moss from refiling their *Motion for Summary Judgment* and presenting oral arguments during the hearing on dispositive motions to be set on May 19, 2025. The scheduling order will be amended to reopen the period for filing and hearing dispositive motions. The parties are encouraged to rely upon declarations previously filed in this matter, so as not to unnecessarily expand the record, and will be used by the Hearing Officer if needed.

The Hearing Officer's ruling on Moss's motion to strike issued February 28, 2025, is in full force and effect if the parties rely on any of the previously filed declarations. Hearing Officer Burdick began the February 21 dispositive motion hearing by orally ruling on Moss's pending motion to strike without allowing oral argument. Referencing Rule 600 during the hearing, he stated that the main criterion for admission is: "All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." IDAPA 37.01.01.600. The Hearing Officer finds Moss's arguments, concerning inadmissible hearsay and statements that are improperly conclusory or lacking foundation, compelling only as they concern paragraphs 15 and 19 of the *Declaration of Byron Pehrson* and paragraph 24 of the *Declaration of Lucas Yockey*, both filed by the Pehrsons on February 7, 2025. *See Mot. to Strike*, at 6, 7, 9. Exercising his discretion, during the hearing he orally ruled in favor of striking only those specific paragraphs and denied all other requests to strike. When offered an opportunity to object, counsel for Moss expressly recognized the decision as one of discretion and declined to make an objection on the record. The Hearing Officer's oral ruling on Moss's *Motion to Strike* is memorialized in the order section below.

ORDER

Therefore, based on the foregoing, the following are hereby ORDERED:

1. The *Preliminary Order: Granting and Denying in Part Motion to Strike; and Dismissing Petition for Declaratory Ruling Without Prejudice* issued February 28, 2025, is hereby WITHDRAWN and is of no force or effect.

2. The Pehrsons' motion to amend their *Petition for Declaratory Ruling for Watermaster Instructions* is hereby GRANTED. The *Amended Petition for Declaratory Ruling*, submitted to the Department in this matter and served upon the parties on March 5, 2025, is accepted into the record and shall be marked received by the Department as of the date of this order.

3. Moss Farms, Inc. is granted leave to file on or before **April 7, 2025**, a response to the *Amended Petition for Declaratory Ruling*. The Big Lost River Irrigation District and Moore Canal Users are still intervenors in this matter.

4. The hearing in this matter scheduled for April 8–11, 2025, and all future deadlines set forth in the October 17, 2024 scheduling order are hereby VACATED.

5. Concerning dispositive motions, the schedule is AMENDED as follows:

April 23, 2025	Deadline for the parties to file dispositive motions, including motions for summary judgment. Any supporting documents or opening briefs must be filed concurrently with the dispositive motion. Any responses or replies must be filed in accordance with the timelines prescribed in IDAPA 37.01.01.220.
May 19, 2025	Date reserved to hear oral argument on dispositive motions. If a dispositive motion is timely filed, a notice of hearing for the motion will be issued by the presiding officer without the need for a request.

6. Moss Farms, Inc.'s *Motion to Strike* is GRANTED IN PART as it concerns paragraphs 15 and 19 of the *Declaration of Byron Pehrson* and paragraph 24 of the *Declaration of Lucas Yockey*, both filed February 7, 2025, and DENIED IN PART as it concerns all other requests.

DATED this 28th day of March 2025.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**AMENDED PETITION FOR DECLARATORY RULING**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.300.02.d, IDAPA 37.01.01.002.14, and I.C. §§ 67-5232 and 67-5255, hereby file this *Amended Petition for Declaratory Ruling* ("Amended Petition"). The *Amended Petition* is supported by the contemporaneously filed *Motion to Amended Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite*, and the previously filed pleadings in this matter, including but not limited to the declarations filed on February 7, 2025: *Declaration of Lucas Yockey* ("Yockey Dec."); *Declaration of Preston*

Marcroft ("Marcroft Dec."); *Declaration of Byron Pehrson* ("B. Pehrson Dec."); *Declaration of Loy Pehrson* ("L. Pehrson Dec."); *Declaration of Randy Pehrson* ("R. Pehrson Dec."); *Declaration of David R. Tuthill, Jr., Ph.D., P.E*. ("Tuthill Dec."); and *Declaration of Chris M. Bromley* ("Bromley Dec.").

The *Amended Petition* seeks a declaratory ruling from the Idaho Department of Water Resources ("IDWR" or "Department") as follows:

(1) Instruct the Water District No. 34 Watermaster that when the natural flow in the Big Lost River at USGS Gage #13127000 ("2B Gage") located at T07N, R24E, S18, SWNE, B.M. is 187 cfs or less for three (3) consecutive days, water right nos. 34-182 and 34-381A, held by Moss Farms, Inc., shall only be entitled to divert from the 3 in 1 Ditch, located at T06N, R25E, S14, SENWSE, and shall not be entitled to also divert from the Big Lost River at T06N, R26E, S32, SENW, unless and until the natural flow in the Big Lost River exceeds 500 cfs at the 2B Gage for three (3) consecutive days.

(2) Instruct the Water District No. 34 Watermaster to make futile calls on the river as if storage water is not available as carriage water for natural flow water rights. If storage water is added to natural flow, futile call determinations can change to the detriment of natural flow water users. Natural flow water users are entitled to delivery determinations being made in the same manner as when their appropriations were made, prior to the creation of storage.

(3) Instruct the Water District No. 34 Watermaster that storage water held by the Big Lost River Irrigation District, pursuant to water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, shall not be delivered to a point(s) of diversion on the Big Lost River that is not also described as a point(s) of diversion and/or rediversion on the storage water rights of the Big Lost River Irrigation District.

This *Amended Petition* requests that the Department declare how it will determine futile call and whether it is permissible for storage water to defeat futile call, pursuant to its duties to administer, supervise, and distribute water rights. Idaho Const. Art. XV §§ 1, 3, 5; I.C. §§ 42-101, 42-103, 42-104, 42-105, 42-106, 42-107, 42-108, 42-110, 42-201, 42-202, 42-219, 42-220, 42-222, 42-602, 42-603, 42-604, 42-607, 42-1409, 42-1411, 42-1412, 42-1413, 42-1420; IDAPA 37.03.12, *Idaho Department of Water Resources Water*

Distribution Rules – Water District 34. Because water rights are real property rights, the Pehrsons' interests are legally protected, with the Pehrsons entitled to due process to protect their rights. *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1997) ("A water right is tantamount to a real property right, and is legally protected as such.").

I. STATEMENT OF FACTS

The water rights that are at issue in this proceeding are owned by Moss Farms, Inc. ("Moss"), the Pehrsons, and the Big Lost River Irrigation District ("BLRID"), with the water rights subject to the differing interpretations of futile call, which will be discussed below.

A. Moss Water Rights

1. The natural flow water rights that appear in the caption of this case, that are owned today by Moss, were decreed in the Snake River Basin Adjudication ("SRBA") to Catherine M. and Lee J. Watson ("Watson"), for irrigation, with a single point of diversion on the Big Lost River at a location known as the 3 in 1 Ditch, summarized as follows:

	Water Right No. 34-182	**Water Right No. 34-381A**
Quantity:	1.60 cfs	2.40 cfs
Priority Date:	6/1/1883	9/26/1894
Acres:	80 acres within 212 acres	120 acres within 212 acres

Tuthill Dec. at 2-3, Exs. 2-3.

2. On November 16, 2012, IDWR changed ownership of the above-referenced water rights from Watson to Moss. *Id*. at 3, Ex. 5.

3. The above-referenced water rights share a 200-acre place of use and a combined diversion rate of 5.2 cfs with water right no. 34-2379F, *Declaration of Skyler Johns in Support of*

Motion for Summary Judgment, Ex. H at 2 (Condition of Approval No. 2) (Jan. 24, 2025) ("Johns Dec.").

4. Water right no. 34-2378F is a ground water right with a priority date of August 8, 1960. *Tuthill Dec.* at 3, Ex. 4.

B. Pehrson Water Rights

5. The water rights of Byron Pehrson and Loy Pehrson are summarized as follows:

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-28G	8/31/1884	0.80	40 acres	3 in 1
34-638A[1]	10/12/1884	0.15	7.5 acres	3 in 1
34-14189	6/1/1885	1.54	77 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	96.1 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	154 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	115.5 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

B. Pehrson Dec. at 2; *L. Pehrson Dec.* at 2.

6. The water rights of Randy Pehrson are summarized as follows:

Water Right No.	Priority Date	Quantity (cfs)	Irrigated Acres	Canal/Ditch Name
34-733	7/21/1886	1.44	72.4 acres	Burnett
34-10236	5/30/1885	2.00	100 acres	Darlington
34-10933	4/22/1884	1.63	81.40 acres	Darlington
34-10950	5/31/1884	0.72	36 acres	Darlington
34-13874	7/21/1886	1.00	50 acres	Burnett
34-14389	4/22/1884	0.55	27.30 acres	Darlington

[1] Pehrsons recently bought a portion of this water right with the records of IDWR not yet showing the updated ownership.

R. Pehrson Dec. at 2.

7. The water rights of Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively the "Pehrson Water Rights") are junior to Moss water right no. 34-182 and senior to Moss water right nos. 34-381A and 34-2379F.

8. The Pehrson Water Rights divert water from the Big Lost River at the ditches and canals that are shown in the tables above, all of which are upstream of the Darlington Sinks. *B. Pehrson Dec.* at 2-3; *L. Pehrson Dec.* at 2-3; *R. Pehrson Dec.* at 2.

C. BLRID Storage Water Rights

9. The BLRID storage water rights were decreed in the SRBA on October 15, 2001, authorize water to be stored in Mackey Reservoir for irrigation storage and irrigation from storage, and consist of the following water right nos.: 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935 (collectively the "BLRID Storage Rights"). *Tuthill Dec.* at 3, Ex. 6.

10. The point of diversion element for the BLRID Storage Rights, shown below, decreed that water is diverted at and stored behind Mackey Dam, in T07N, R23RE, S12, SENW, and is then diverted and/or rediverted, downstream at twenty-two named ditches and canals, such as the 3 in 1 Ditch and Moore Canal:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id., Ex. 6.

11. In the SRBA, BLRID claimed the above-referenced canals and ditches as points of diversion and/or rediversion. *Id*. at 4, Ex. 7.

12. In the SRBA, IDWR recommended the above-referenced canals and ditches as points of diversion and/or rediversion. *Id*. at 4, Ex. 8.

D. The 2015 Moss Transfers

13. On April 6, 2015, Moss filed the *Application* with IDWR. *Johns Dec., Ex. C*, at 1. In the *Application*, Moss did not seek to remove or eliminate the 3 in 1 Ditch as a point of diversion, instead he sought to add the River Diversion as a second point of diversion. *Johns Dec., Ex. C* at 2, ln. A.2; *Tuthill Dec.* at 5; *Yockey Dec.* at 3.

14. The River Diversion would "allow [Moss] to pump directly from the river," *Johns Dec., Ex. C*, at 1, meaning it is not on a canal or ditch that is referenced as a point of diversion and/or rediversion on the BLRID Storage Rights.

15. After Moss filed the *Application*, then-Watermaster Yockey was asked by IDWR to comment as to the *Application*, *Johns Dec., Ex. E*, with then-Watermaster Yockey checking the box that he did not oppose approval. *Yockey Dec.* at 3.

16. When IDWR addressed the *Application* with Watermaster Yockey, BLRID storage water was not discussed as it related to the Moss Water Rights. *Yockey Dec.* at 3.

17. The River Diversion, which is a second point of diversion for the Moss Water Rights, is what is known by IDWR as an "alternate point of diversion." *Tuthill Dec.* at 5.

18. Neither the *Application* nor the *Transfer* addressed the storage water rights of BLRID. *Johns Dec., Exs. C & H*; *Tuthill Dec.* at 6; *Yockey Dec.* at 3-4.

19. A condition on the face of the *Transfer* states: "This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources." *Johns Dec., Ex. H* at 1.

20. On December 14, 2015, the Moss Water Rights were subject to a second IDWR transfer. *Tuthill Dec.* at 4, Ex. 9 ("2015 Transfer").

21. The *2015 Transfer* adds a condition to the Moss Water Rights that was not included in the *Transfer*, explaining the use of water right no. 34-2379F, a ground water right with a priority date of 8/8/1960, when it is used in conjunction with the Moss Water Rights. *Tuthill Dec.* at 4.

22. The BLRID Storage Rights have not been amended through an IDWR transfer to add the River Diversion as an authorized point of diversion and/or rediversion. *Id*. at 6.

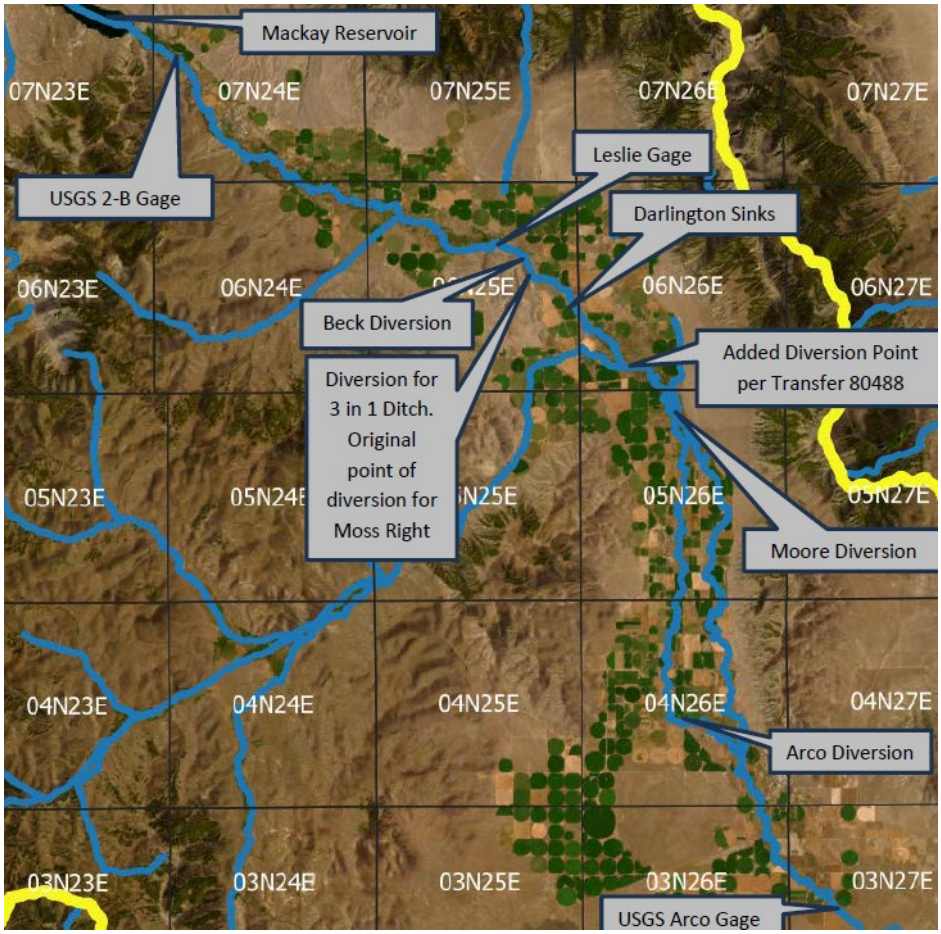
E. Physical Relationship Between Pehrsons, Moss, BLRID, And Moore Canal

23. The River Diversion is located approximately 5.9 miles downstream on the Big Lost River from the 3 in 1 Ditch. *Tuthill Dec.* at 5.

24. Between the 3 in 1 Ditch and the River Diversion is what is known as the Darlington Sinks, which, when flows are low, is a losing reach of the Big Lost River. *Johns Dec.*, *Ex. G* ("the proposed new point of diversion is located downstream from the current point of diversion on a losing river reach"); *Yockey Dec.* at 3; *Marcroft Dec.* at 2.

25. The Moore Canal, also known as the Moore Diversion, is located downstream of the River Diversion.[2]

26. The features mentioned above are shown on the following map:



Tuthill Dec. at 2.

[2] It is only germane to discuss the Moore Canal because the Moore Canal Users are party to this case as intervenors.

27. The Pehrson Water Rights, summarized above, divert from the canals and ditches described in the BLRID Storage Rights, with the Pehrsons holding storage water interests in BLRID. *B. Pehrson Dec.* at 2; *L Pehrson Dec.* at 2; *R. Pehrson Dec.* at 2.

28. Moss holds interests in the BLRID Storage Water Rights that are diverted and/or rediverted at the 3 in 1 Ditch and the Moore Canal. *B. Pehrson Dec*. at 3, Ex. 1.

F. IDWR's 2021 Futile Call Determination

29. On July 22, 2021, Watermaster Yockey contacted IDWR to "express a concern that a futile call determination request was imminent due to the rapidly diminishing water supply in the Big Lost River . . . ." *Bromley Dec., Ex. 1* at 1.

30. On July 23, 2021, Watermaster Yockey reported to IDWR that "delivery calls for decreed [natural flow] water (appx. 12 cfs) at the Moore Diversion were satisfied at the head of the ditch, but were not making it to the first user in a beneficially usable amount." *Id*.

31. On July 24, 2021, Watermaster Yockey "notified the Department that the priority delivery date had changed from 1884 to 1883, and that [he] would attempt to continue to deliver the senior rights to the Moore Diversion for the remainder of the weekend."

32. On July 26, 2021, Watermaster Yockey sent an email to Tim Luke, IDWR's Water Compliance Bureau Chief, requesting a determination of futile call:

> Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 7-24-2021 and no water is reaching the Diversion. There is no storage water being delivered to any canal. This makes the river shrink 100%. If the futile call is determined the last point of delivery of water on the Big Lost River would be moved up to the Beck Canal Heading which would allow beneficial use again. As watermaster I have the general consent of the [Water District No. 34] advisory board and The Big Lost River Irrigation District approves WD34's request.

Bromley Dec., Ex. 1 at 7.

33. Through July 26, 2021 email communication between IDWR and BLRID, it was established that, while a majority of the WD34 advisory board supported a determination of futile call, two of the advisory board members, Shawn Anderson and Jason Anderson, did not. *Id*. at 6.

34. On July 26, 2021, the BLRID General Manager responded via email to Mr. Luke, stating: "I spoke with Shawn [Anderson] just now and he agreed to support the futile [call] . . . . When I spoke with Jason [Anderson] he was against making the [f]utile call." *Id*.; *see also id.* at 2 ("Shawn Anderson agreed to support the determination and Jason Anderson did not").

35. Jason Anderson is a water user on the Moore Canal. *B. Pehrson Dec.* at 4.

36. In support of the futile call determination, David Hoekema, Hydrologist with IDWR, prepared a series of graphs and tables showing the flow of the Big Lost River during the month of July, including at the 2B Gage. *Bromley Dec., Ex. 1* at 3-5.

37. According to Figure 3, prepared by Mr. Hoekema, between July 22 and July 26, the flow at the 2B Gage was approximately between 200 to 150 cfs, as shown below:

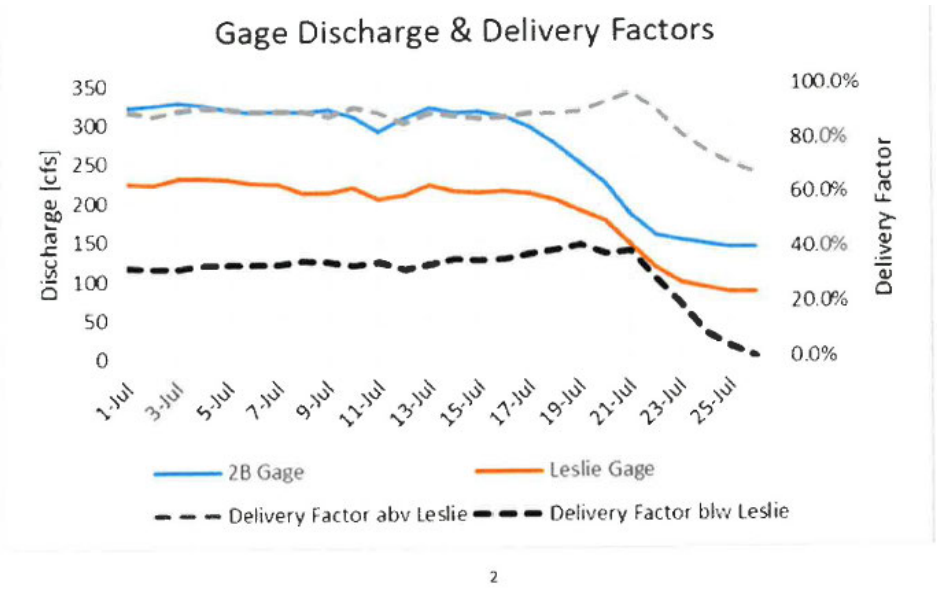


Figure 3 Flow past the 2B Gage is shown by the blue line, flow past the Leslie Gage is shown by the orange line, the delivery factor above the Leslie Gage is shown by the dashed, grey line, and the delivery factor blw Leslie is shown by the dashed, black line.

Id. at 3-4.[3]

38. On July 26, 2021, internal email communication from Mr. Hoekema to fellow IDWR employees, Mr. Luke and Rob Whitney, Manager, Water Distribution Section, established: "As the reservoir has been flat-lined, so as to only pass inflows (natural flow), it appears that the natural flow in the river is not adequate to carry water to the Moore Diversion." *Id*. at 3.

39. On July 26, 2021, Mr. Whitney sent a letter to Watermaster Yockey informing him that the Department made a finding of futile call:

> It is evident that curtailment of junior surface water rights upstream of the Moore Diversion to satisfy senior surface water rights at the Moore Diversion constitutes

[3] In the *Petition for Declaratory Ruling for Watermaster Instructions* (Feb. 14, 2024), Watermaster Yockey and Watermaster Marcroft opined that futile call should be determined in this reach when flow at the 2B Gage "is 187 cfs or less for three (3) consecutive days . . ." resulting in curtailment of the Moss Water Rights at the River Diversion and Moss able to divert his Water Rights at the 3 in 1 Ditch. *Petition* at 2. The opinion of the Watermasters is consistent with Figure 3.

> a futile call. Therefore, you are instructed to distribute surface water flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate source for the remainder of the 2021 irrigation season, unless it is subsequently determined that delivery of the senior water rights at the Moore Diversion is no longer futile.

Id. at 2 (emphasis added).

G. IDWR's 2022 Futile Call Determination And Rescission Of The Same Due To Introduction Of Moore Canal Storage Water To The River Diversion

40. On August 15, 2022, Watermaster Marcroft sent an email to IDWR employees Mr. Luke and Mr. Whitney, wherein he requested that IDWR make a finding of futile call:

> I would like to request that IDWR, please make a futile call for the delivery of water to the Moore Diversion based on the lack of beneficial use of the decreed water. Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 8-12-2022. I called Dave Hokeman and told him that there was no water making it to the Moore Diversion. so we agreed to curtail all of the 1884 decrees in attempt to dilver the 8-10-1883 decree to the Moore Diverson. All of the 1884 decrees where turned off by 11:30 that day.There is no storage waterbeing delivered to any canal. as of this mourning there is no water making it to the Moore Diversion.This makes the river shrink 100%. if the futile call is determined the last point of delivery of water on the Big Lost River would be be moved up to the Beck Canal Heading which would allow beneficial use again. I have been in contact with Vernon Roche Chairman of advisory borad and 5 of the 9 members support this. I also talked to the chairman of Big Lost River Irrigation Distric and they approve WD"34 request.

Bromley Dec., Ex. 2 at 3.

41. On August 15, 2022, the Department found futile call, as evidenced through email communication from Mr. Luke, who instructed Watermaster Marcroft to "deliver water to more junior priority rights on the river between Mackey Reservoir and the Beck Ditch." *Id*. at 1. Director Mathew Weaver was copied to the email. *Id*.

42. Mr. Luke further stated: "Please note that this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season. . . . . This guidance is consistent with last year's futile call approval . . . ." *Id*. (emphasis added).

43. On August 18-19, 2022, and inconsistent with the prior year, Jason Anderson, Moore Canal water user, communicated with Mr. Luke regarding the determination of futile call,

and particularly the Moss Water Rights and delivery of water to the River Diversion. *Id., Ex. 3* at 1-6.

44. Sometime on or before September 2, 2022, IDWR reversed its finding of futile call, as explained through an email from David Hoekema, IDWR Hydrologist, to Mr. Luke and Mr. Whitney, with copies to IDWR employees Matthew Anders and the Director:

> I had a phone conversation with Randy Pehrson this morning. He is very upset that Dennis Moss is able to call for storage water and receive decree (1883 natural flow) at the same time. After the futile call in mid-August, it was determine[d] that decree water in the river was inadequate to carry water to Moss. . . . . His argument is that without storage water deliveries to Moss, it would be impossible to deliver the decree [natural flow] water to Moss.

Id., Ex. 4 at 1 (emphasis added).

45. According to Mr. Hoekema: "When Moss runs out of storage, though I think a futile call is very appropriate . . . ." *Id*. at 2 (emphasis added).

46. On September 2, 2022, Mr. Luke responded to Mr. Hoekema, stating: "I agree with your explanation and perspective. We should probably meet today to discuss this . . . . Rob [Whitney] was going to call Preston [Marcroft] to get an update. I (and maybe Rob) have a meeting at 10 and Mat W[eaver] is over at Gov's office from 10 to 11 approx." *Id*. at 1.

47. Late in the day on September 2, 2022, Mr. Whitney sent an email to Watermaster Marcroft informing him that the August 15, 2022 futile call decision of Mr. Luke had been rescinded, due to Mr. Whitney's belief that Moss had sufficient storage water to carry the Moss Water Rights to the River Diversion:

> Randy Pehrson contacted David Hoekema with concerns about the futile call, and delivering both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley*

ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season." After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. You have reported this afternoon that about 600 inches (12cfs) of water is passing the Moss diversion but there are no calls for delivery below Moss. Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified. It appears appropriate to deliver additional water upstream of Moss by adjusting the decree to deliver more 1884 rights, while maintaining delivery to Moss. Your suggestion to adjust the decree date to 8-31-1884 may be a reasonable place to start, but IDWR will defer to your local knowledge of what the demand might be if a certain decree date is set. As we discussed, please stay in contact with Dennis Moss as you deliver additional decrees. If the demand under a new decree date results in a shortage of water to satisfy Moss, the date should be adjusted accordingly. Please reach out if you have any questions.

Marcroft Dec., Ex. 1 at 1-2 (italics in original) (emphasis added).

48. On Sunday, September 4, 2022, the Director confirmed the rescission of futile call through email communication with Department staff:

From: Weaver, Mathew
To: Whitney, Rob; Luke, Tim; Hoekema, David; Ferguson, Kara
Subject: RE: Big Lost Futile Call
Date: Sunday, September 4, 2022 9:25:23 AM

Thank you, everyone, for responding to this issue at the last minute. Administering water, especially during drought conditions at the end of the irrigation season, is a stressful job. Likely Randy and other water users are unhappy with our direction to the watermaster, but it's the right direction.

Good work. I hope you enjoy your Labor (free) day.

Cheers,

Mathew Weaver, PE | deputy director
Idaho Department of Water Resources
www.idwr.idaho.gov | 208.287.4800

49. The introduction of storage water in 2022 to carry the Moss Water Rights to the River Diversion resulted in curtailment of the Pehrson Water Rights differently and prior to their historical cutoff dates. *Yockey Dec.* at 4-5; *Marcroft Dec.* at 3-4.

H. The BLRID Storage Rights And BLRID's Internal Records Do Not Support Of Storage Water At The River Diversion, Nor Did BLRID File A Transfer Of Its Own To Add The River Diversion As A Point Of Diversion And/Or Rediversion

50. The BLRID Storage Rights do not list the River Diversion as a point of diversion and/or rediversion. *Tuthill Dec.* at 6.

51. The records of BLRID establish that Moss is allowed to use storage water at the 3 in 1 Ditch and the Moore Canal but not at the River Diversion, consistent with the BLRID Storage Rights. *B. Pehrson Dec.* at 3.

52. BLRID has not filed a transfer with IDWR to add the River Diversion as a point of diversion and/or rediversion to the BLRID Storage Rights. *Tuthill Dec.* at 6.

I. It Is Appropriate To Issue Watermaster Instructions Explaining: (1) Whether The River Diversion May Be Exercised When The Big Lost River Is Broken At The Darlington Sinks And: (2) Whether BLRID Storage Water May Be Used At The River Diversion To Defeat Futile Call

53. The River Diversion is what is known as an "alternate point of diversion," with the *Transfer* adding the River Diversion as a second, alternate point of diversion, as well as keeping the 3 in 1 Ditch as the original point of diversion for the Moss Water Rights. *Tuthill Dec.* at 5.

54. It is not uncommon for IDWR to issue watermaster instructions to explain when an alternate point of diversion may be exercised. *Id*.

55. It is not uncommon for IDWR to instruct the watermaster as to when futile call is established or when a river breaks. *Id*.

56. According to the Watermaster, when the Big Lost River is connected between the 3 in 1 Ditch and the Moore Canal, the River Diversion may be used by Moss; therefore, when the River is broken at the Darlington Sinks, use of the River Diversion must cease. *Yockey Dec.* at 4-5; *Marcroft Dec.* at 3-4.

57. It is the opinion of the Watermasters and has been their practice, as evidenced in 2021 and 2022, that the Big Lost River is connected between the 3 in 1 Ditch and the Moore Diversion when flow at the 2B Gage is 500 cfs for three consecutive days, with the River broken at the Darlington Sinks when flow at the 2B Gage is 187 cfs or less for three consecutive days. *Petition for Declaratory Ruling for Watermaster Instructions* at 2 (Feb. 14, 2024); *see also Bromley Dec., Ex. 1* at 3-4, Fig. 3 (July 2021 flow at the 2B Gage as presented by David Hoekema).

58. When the Big Lost River is broken at the Darlington Sinks, and because the River Diversion is not listed as a point of diversion and/or rediversion for the BLRID Storage Rights, it is appropriate to instruct the Watermaster to not allow the introduction of BLRID storage water to defeat futile call at an unauthorized point of diversion and/or rediversion, as was the case in 2021, but not in 2022.

II. POINTS AND AUTHORITIES

Pursuant to IDAPA 37.01.01.300.02.d, IDAPA 37.01.01.002.14, and I.C. §§ 67-5232 and 67-5255, Pehrsons must set forth the statutes, rules, and orders upon which they rely. The following points and authorities, and discussion thereof, support the declaratory relief requested herein.

A. Statutes And Rules That Support The Petition For Declaratory Ruling, I.C. § 67-5232(1)

1. *The Director is authorized to issue watermaster instructions concerning the administration and distribution of water rights in Water District 34*

The Director is authorized by Chapter 6, Title 42, Idaho Code, to administer water within water districts:

> Under the other provisions of Idaho Code Title 42, chapter 6, the Director is granted broad authority to direct and control water, and to administer it according to the

> prior appropriation doctrine. The legislature has mandated that IDWR manage water resources in Idaho, and has provided IDWR with the water district as its principal tool in carrying out this mandate.

Thompson Creek Mining Co. v. Idaho Dept. of Water Res., 148 Idaho 200, 211-12, 220 P.3d 318, 329-30 (2009); *see also* I.C. §§ 42-602, 42-603, 42-604, 42-607.

The Director is responsible for the administration and distribution of the waters of the State, which are a public resource, and governed by the prior appropriation doctrine, as established by Idaho law. Idaho Const., Art. XV §§ 1, 3, 5. The water rights that are at issue herein are located in Water District No. 34 ("WD34"). WD34 exists consistent with I.C. § 42-604. Pursuant to I.C. § 42-603, the Director is authorized to adopt rules and regulations for distribution of water in WD34, which he did, through promulgation of IDAPA 37.03.12, *Idaho Department of Water Resources Water Distribution Rules – Water District 34* ("WD34 Rules"). Pursuant to I.C. § 42-605, the Director is responsible for the appointment of the WD34 Watermaster, who at this time is Preston Marcroft. IDAPA 37.03.12.010 (defining "Watermaster" as "[t]he duly elected and appointed state watermaster of Water District 34"). The Supreme Court has recognized the Director's authority to instruct watermasters when it comes to the administration and distribution of water rights. *See e.g. Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 443 P.3d 252 (2019); *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1997); *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 18 P.3d 219 (2001); and *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981). The Director is responsible for the supervision of distribution of water within all water districts. I.C. § 42-602.

2. *The water rights at issue herein were partially decreed in the SRBA, with the Moss water rights subsequently changed through an approved transfer, whereas the BLRID storage rights have not been*

The water rights at issue herein, as described above, were partially decreed in the SRBA, consistent with Chapter 14, Title 42, Idaho Code. *See* I.C. §§ 42-1409, 42-1411, 42-1412, 42-

1413, and 42-1420. The BLRID Storage Water Rights, which authorize the storage of water in Mackey Reservoir, were partially decreed by the SRBA district court on October 15, 2001, with an *Amended Partial Decree Nunc Pro Tunc* for water right no. 34-10935 issued on May 21, 2014. *Tuthill Dec.* at 3. As explained above, the BLRID Storage Water Rights list multiple points of diversion and/or rediversion, both by legal description and local nomenclature, none of which include the River Diversion. According to the WD34 Rules, "Storage Water" is defined as: "Water impounded in a storage facility, including Mackey Reservoir, pursuant to a water right which includes storage as a purpose of use." IDAPA 37.03.12.010.13 (emphasis added). Thus, storage water must be used consistently with the water rights that allow its use, with the WD34 Rules not circumventing that legal requirement.

On April 6, 2015, and after issuance of the SRBA partial decrees for BLRID and the Pehrsons, Moss filed the *Application* that sought to add the River Diversion as a second, alternate point of diversion for the Moss Water Rights, while keeping the original point of diversion at the 3 in 1 Ditch. The *Application* was filed consistent with I.C. § 42-222(1) and addressed only the Moss Water Rights. On June 30, 2015, IDWR approved the *Transfer*. *3G AG LLC v. Idaho Dept. of Water Res.*, 509 P.3d 1180, 1185 (2022) ("Idaho Code section 42-222(1) sets forth the criteria used by IDWR to evaluate applications to transfer water rights whenever a right holder desires to change a water right's 'point of diversion, place of use, period of use or nature of use.'"). The *Transfer* states: "This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources." *Johns Dec., Ex. H* at 1.

The condition in the *Transfer* is consistent with the prior appropriation doctrine and past precedent of the Idaho Supreme Court, wherein it was held that storage water cannot be used as carriage water for natural flow water rights when a decree does not support its use:

> The stored waters are already appropriated, making them unavailable for redistribution to satisfy Sylte's natural flow water right. *See Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 943, 945 (1935) ("After the water was diverted from the natural stream and stored in the reservoir, it was no longer 'public water' subject to diversion and appropriation under the provisions of the Constitution."); *see also Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007) ("when water is stored, it becomes 'the property of the appropriators . . . impressed with the public trust to apply it to a beneficial use.'") (quoting *Talboy*, 55 Idaho at 389, 43 P.2d at 945).
>
> The Instructions are in harmony with the Final Decree. The Instructions generally prohibit the watermaster from releasing water to satisfy Rathdrum Creek water rights when seepage and evaporation losses exceed the natural tributary inflow, while still upholding the exception carved out for Sylte and giving it priority over junior rights.

Sylte at 245, 443 P.3d at 259.

Here, there is no decree (final, partial, or otherwise) or legal basis that allows storage water to be used as carriage water to the River Diversion. The *Transfer* does not allow Moss to use "storage water" because it only addressed the Moos Water Rights, which are natural flow rights. *See* IDAPA 37.03.12.010.13 (defining "Storage Water" as "Water impounded in a storage facility, including Mackey Reservoir, pursuant to a water right which includes storage as a purpose of use.") (emphasis added). The BLRID Storage Rights, which were decreed in the SRBA, do not list the River Diversion as a point of diversion and/or rediversion; therefore, storage water cannot be used at the River Diversion. *Whittaker v. Idaho Dept. of Water Res.*, 551 P.3d 729, 742 (Idaho 2024) ("West Springs Ditch is an unauthorized diversion of the waters of Stroud Creek because it is not identified as a point of diversion in Whittaker's water right 74-157.") (emphasis added); *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 807, 367

P.3d 193, 202 (2016) ("Because the Bridge Diversion lies outside the specified point of diversion in its partial decrees, the water rights at issue here do not entitle Rangen to divert water via the Bridge Diversion.") (emphasis added).

For these reasons, and absent a transfer that adds the River Diversion to the BLRID Storage Rights, the plain language of the water rights control. *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) ("this Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words."). It is axiomatic in Idaho that the use of water without a valid water right that authorizes its use is unlawful. Idaho Const., Art. XV §§ 1, 3, 5; I.C. §§ 42-101, 42-103, 42-104, 42-105, 42-106, 42-107, 42-108, 42-110, 42-201, 42-202, 42-219, and 42-220.

3. *The futile call doctrine embodies a policy against the waste of irrigation water*

Idaho law embodies an emphasis on the diversion and application of water to a beneficial use. *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 154, 408 P.3d 899, 909 (2018); *see also Colthorp v. Mountain Home Irrigation District*, 66 Idaho 173, 178, 157 P.2d 1005, 1007 (1945) ("It is the policy of the law of this state to prevent the wasting of water."). According to the doctrine of futile call, in certain conditions and in certain times of year, a downstream senior appropriator's right to water may be denied if curtailment of upstream junior-priority water rights will not provide a sufficient quantity of water for beneficial use:

> The futile call doctrine in Idaho "embodies a policy against the waste of irrigation water." Generally, this doctrine provides
>
> > if ... seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.

Sylte at 245, 4443 P.3d at 259 (internal citations omitted).

Futile call is currently defined in the Department's *Rules for Conjunctive Management of Surface and Ground Water Resources* as: "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource." IDAPA 37.03.11.010.08. From 1994 and until 2019 – including when IDWR evaluated approval of the *Transfer* – futile call was defined in the WD34 Rules as:

> When the curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile.

IDAPA 37.03.12.020.04.[4]

In addition to *Sylte*, the Supreme Court has recognized application of the futile call doctrine. *See e.g. Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976); *Hill v. Green*, 47 Idaho 157, 274 P. 110 (1928). "Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of direction by the Director." *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007).

[4] The definition of "futile call" in IDAPA 37.03.12.020.04 was promulgated on October 26, 1994. The reference to "futile call" in the WD34 Rules last appeared in 2019. *See* https://adminrules.idaho.gov/rules/2019%20Archive%20C1/37/370312.pdf (visited 3/3/2025). According to Mr. Luke in email communication to various IDWR employees and Watermaster Yockey, the rule was removed "because it is a restatement of existing law. The Director's authority to determine futile call rests in the common law holdings of Idaho courts not in these rules." The email from Mr. Luke was obtained by counsel through a public records request of IDWR and is attached hereto as Exhibit 1. The cited portion of the email is located on page 2 of the attachment.

B. Orders That Support The Petition For Declaratory Ruling, I.C. § 67-5232(1)

Historically, and consistent with IDAPA 37.03.12.020.04, it is the responsibility of the Director to issue orders establishing futile call in WD34. *See* *Final Order for Petition for Removal of Water District 34 Watermaster | July 17, 2013 | idwr.idaho.gov* at 8, ¶ 6 ("Under the above cited rule [IDAPA 37.03.12.020.04], a futile call is determined by the director, not the watermaster. The watermaster may measure water to support a futile call and may request that the director determine whether there is a futile call, but the authority for determining a futile call is vested in the Director of IDWR.") (emphasis added) (visited 3/3/2025).

That the Director determines futile call is consistent with his responsibility to supervise the distribution of water in water districts. I.C. § 42-602. Attached hereto, as Exhibit 2, is an *Order* issued by former Director Karl Dreher, on July 30, 2004, establishing futile call on the Big Lost River, and instructing the watermaster "to distribute surface flows of the Big Lost River in the reach from Mackey Dam to the Beck Diversion as a separate source for the remainder of the 2004 irrigation season . . . ." The reach between Mackey Dam and the Beck Diversion is pertinent to the matters herein.

As evidenced in 2021 and 2022, the Department issued letters and emails that have determined and rescinded futile call. While not captioned "Order," these writings constitute agency actions that rise to the level of orders, I.C. § 67-5201(4) (defining "agency action" as an "order"), 67-5201(15) (defining "order" as an "agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specified persons"), 67-5255(1) ("[a]ny person may petition an agency for a declaratory ruling as to the applicability of any order issued by the agency"), IDAPA 37.01.01.002.11 (same), because they have adversely affected the Pehrsons' legal rights, while also

countenancing the impermissible use of BLRID storage water as carriage water for the Moss Water Rights at the River Diversion.

As explained by the Supreme Court, written statements from agencies that affect the legal rights of persons are agency actions. *Podsaid v. State of Idaho Outfitters and Guides Licensing Board*, 159 Idaho 70, 74, 356 P.3d 363, 367 (2015) ("The Board acted according to a duty placed on it by law when it denied Podsaid's license application and it informed him of that denial by letter, so the letter was an agency action.");[5] *Fuchs v. Dept. of Idaho State Police*, 152 Idaho 626, 630, 272 P.2d 1257, 1261 (2012) ("The July 24, 2009 letter is an agency action under this definition."). Thus, the fact that the Department was less formal in its use of captioning in 2021 and 2022 than in 2004, does make the decisions any less meaningful, and does not prevent the Pehrsons from seeking relief.

1. *The 2021 futile call determination*

On July 26, 2021, Rob Whitney, Manager, Water Distribution Section, sent a letter ("July 2021 Letter") to Watermaster Lucas Yockey, in which futile call was determined:

> It is evident that that curtailment of junior surface water rights upstream of the Moore Diversion to satisfy surface water rights at the Moore Diversion constitutes a futile call. Therefore, you are instructed to distribute surface water flows of the Big Lost River in the reach from Mackey Dam to the Beck Diversion as a separate source for the remainder of the 2021 irrigation season . . . .

Bromley Dec., Ex. 1 at 2 (emphasis added).

As evidenced therein, the July 2021 Letter uses the same language as the former Director concerning the reach in question and treating it as a separate source for the remainder of the irrigation season. The July 2021 Letter, was issued under the supervision of the Director, it affected the Pehrsons' rights, and is therefore an agency action that is an order.

[5] In *Podsaid*, the Board argued contrary, that "the letter is not [an] agency action." 159 Idaho at 74, 356 P.3d at 367.

2. The 2022 futile call determination

On August 15, 2022, Tim Luke, Water Compliance Bureau Chief, sent an email ("August 2022 Email") to Watermaster Preston Marcroft, in which futile call was determined:

> Based on the information you provided, data available to us, and the support by advisory committee members, the Department concludes that a futile call on the river is currently justified. . . . . This guidance is consistent with last year's futile call approval . . . .

Bromley Dec., Ex. 2 at 1 (emphasis added).

Sometime between August 15, 2022 and September 2, 2022, the Department reversed its futile call determination. This is confirmed through an email sent by Mr. Whitney to Watermaster Marcroft, dated September 2, 2022, stating that futile call was rescinded due to the introduction of BLRID storage water as carriage water for the Moss Water Rights at the River Diversion:

> Randy Pehrson contacted David Hoekema with concerns about futile calls and delivery of both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. . . . . Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified.

Marcroft Dec., Ex. 1.

On Sunday, September 4, 2022, the Director, who is the ultimate decision maker of futile call, confirmed his approval of through email communication with Department staff:[6]

From: Weaver, Mathew
To: Whitney, Rob; Luke, Tim; Hoekema, David; Ferguson, Kara
Subject: RE: Big Lost Futile Call
Date: Sunday, September 4, 2022 9:25:23 AM

Thank you, everyone, for responding to this issue at the last minute. Administering water, especially during drought conditions at the end of the irrigation season, is a stressful job. Likely Randy and other water users are unhappy with our direction to the watermaster, but it's the right direction.

Good work. I hope you enjoy your Labor (free) day.

Cheers,

Mathew Weaver, PE | deputy director
Idaho Department of Water Resources
www.idwr.idaho.gov | 208.287.4800

The September 2022 Email that rescinded futile call is directly contrary to the July 2021 Letter and adversely affected the legal rights of the Pehrsons, as they were physically curtailed, with the Watermasters agreeing that the scope of the curtailment was unprecedented. The August 2022 Email and the September 2022 Email were issued under the supervision of the Director, they affected the Pehrsons' rights, and are therefore agency actions that are orders.

C. This Action For A Declaratory Ruling Is Not Premature

The 2025 irrigation season will shortly commence; therefore, whether futile call will be determined is unknown. Because futile call has been declared and implemented differently in prior years, with the Pehrsons' rights adversely affected, it is appropriate to bring this action now, before they are harmed. *Elgee v. Retirement Bd. of the Public Employee Ret. System of Idaho*, 169 Idaho 34, 490 P.3d 1142 (2021). There, Elgee argued that he should be entitled to bring a declaratory action for a "tax loss" claim that might arise: "While Elgee acknowledged

[6] The cited email was obtained from the Department as part of the public records request; the full email, as sent to counsel by the Department, is attached hereto as Exhibit 3.

that he did not know whether he would suffer a tax loss or its amount, he sought a determination that PERSI would be liable for tax loss damages *if* he were ultimately to suffer them." 169 Idaho at 46, 490 P.3d at 1154 (italics in original). On judicial review, the district court dismissed Elgee's tax loss claim, without prejudice. On appeal, the Supreme Court reversed on this point:

> Elgee was not seeking to prove a present claim, but to have the PERSI Board construe the statutes and rules it administers to determine his rights should a claim arise. This is expressly permissible under IDAPA. *See* I.C. § 67-5232(1) ("Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency").

Id. at 47, 490 P.3d at 1155 (emphasis added).

Here, as evidenced in the July 2021 Letter, the August 2022 Email, and the September 2022 Email, and the statutes and rules that govern the Department, the Pehrsons have been subjected to differing interpretations of futile call, both with and without the introduction of BLRID storage water as carriage water to the River Diversion, with their legal rights adversely affected. As evidenced in the July 2021 Letter, and without the introduction of BLRID storage water as carriage water, the Department concluded that curtailment of water rights above the Darlington Sinks was futile. In 2022, no findings were made by IDWR as to how much storage water was released from Mackey Reservoir to carry the Moss Water Rights and the curtailed water rights through the Darlington Sinks, but it can be inferred that a quantity of storage water was used purely as carriage water: "Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified." *September 2022 Email*. Upon information and belief, these facts will be developed for the hearing. If BLRID Storage Water was not delivered to Moss for irrigation, but was instead used as carriage for the Moss Water Rights, there are legitimate questions to probe at the hearing concerning whether water that is stored for irrigation and not used for that purpose constitutes a beneficial use.

Colthorp at 178, 157 P.2d at 1007 ("It is the policy of the law of this state to prevent the wasting of water."). In addition, there are legitimate questions to probe at the hearing concerning whether water that is stored under junior priority dates can be used to defeat futile call. And, lastly, there are legitimate questions to probe at the hearing concerning whether it is permissible to deliver BLRID storage water to a point of diversion and/or rediversion that is not included on the BLRID Storage Rights. Thus, a declaratory ruling to determine proper Watermaster instructions is appropriate.

III. CONCLUSION

Based on the foregoing, Pehrsons request the Department issue an order, consistent with the instructions described above on page 2 of this *Amended Petition for Declaratory Ruling*.

DATED this 5th day of March, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

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Roburd47@gmail.com

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sjohns@olsentaggert.com

Norman Semanko
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800 W. Main St., Ste. 1300
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Hyrum Erickson
Michelle Mortimer
RIGBY, ANDRUS & RIGBY LAW
25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

EXHIBIT 1

From:	Luke, Tim
To:	Whitney, Rob
Subject:	FW: Futile Call
Attachments:	082107 LTR to WMs RE Futile Call Delivery Guidance.pdf

Rob,

Here is the email I sent to Randy Nelson in June and copied to you and Lucas.

From: Luke, Tim
Sent: Wednesday, June 9, 2021 1:27 PM
To: 'nelsonrandy@gmail.com' <nelsonrandy@gmail.com>
Cc: Lucas Yockey WD34 WM <watermaster34@atcnet.net>; Whitney, Rob <Rob.Whitney@idwr.idaho.gov>; Visosky, Steven <Steven.Visosky@idwr.idaho.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>
Subject: Futile Call

Randy,

Attached to this letter for your information is a 2007 IDWR letter to state watermasters giving some guidance about futile call determinations. This guidance is still applicable except for a reference to a Water District 34 rule that describe futile calls which was removed in 2019. Listed below are two orders and some past correspondence from IDWR or WD34 regarding futile calls in WD34.

https://idwr.idaho.gov/apps/ExtSearch/DocsImages/9q0t01_.pdf
https://idwr.idaho.gov/apps/ExtSearch/DocsImages/9pl601_.pdf
https://idwr.idaho.gov/apps/ExtSearch/DocsImages/9pl501_.pdf
https://idwr.idaho.gov/apps/ExtSearch/DocsImages/9q0s01_.pdf

Also, I forgot to mention earlier in our call that Futile Call is described in our Conjunctive Management Rules as follows:
IDWR Conjunctive Management Rules (IDAPA 37.03.11)
010.08 Futile Call. A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource. (10-7-94

Also, Futile Call was referenced in the WD34 Rules but removed in 2019. The former rule is given below along with IDWR justification for removal in 2019.
WD34 Rule 20.04 (removed in 2019)
04. Futile Call for the Delivery of Surface Water. When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights

would be futile.

IDWR justification for removal of rule:
Futile Call: This rule is unnecessary because it is a restatement of existing Law. The Director's authority to determine futile delivery calls rests in the common law holdings of Idaho courts not in these rules. Likewise, the Director has the authority to consult with water district advisory boards and water users and does not need the rules to establish this authority. This rule is redundant to existing law, and to the extent it is not redundant, it is contrary to the Director's existing authorities

Hope this information is helpful towards your understanding of futile calls. With respect to WD34, I strongly recommend that you or other users discuss potential of a futile call with the watermaster first. The watermaster should discuss this request with the advisory committee and if the committee is supportive of a futile call determination, then the watermaster should contact IDWR for further guidance or approval from IDWR. I recommend this approach since futile call determination in the district has been a sensitive issue over the years.

Let me know if you have any issues with opening the links I listed above.

Regards,

Tim Luke
Idaho Department of Water Resources
Water Compliance Bureau Chief
tim.luke@idwr.idaho.gov | 208-287-4959

EXHIBIT 2

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DETERMINING A FUTILE CALL FOR THE DELIVERY OF SURFACE WATER IN WATER DISTRICT NO. 34, BIG LOST RIVER

ORDER

The Director of the Department of Water Resources ("Director" or "Department"), being charged with the duty of protecting vested water rights, enforcing certain statutes of the State of Idaho, and the rules of the Department, has consulted with the watermaster for Water District No. 34 regarding the determination of a futile call and delivery of surface water on the Big Lost River.

Based on the Department's investigation and his understanding of the law, the Director makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The watermaster of Water District No. 34 has contacted the Director and provided measurements of the flow and diversions in the various reaches of the Big Lost River for those reaches defined in the Distribution Rules. The following pertinent data were provided by the watermaster:

a) Flows at the Leslie gaging station and downstream diversions. The Beck Ditch is the only diversion between the Leslie gaging station at the Leslie Bridge and the Moore/Eastside Diversion. The Beck Ditch is located nearly one mile below the Leslie Bridge and the Moore/Eastside Diversion is located over 7 miles below the Leslie Bridge.

	Discharge (cfs)			
Date	Big Lost River at Leslie Bridge	Beck Ditch	Moore Ditch	Eastside Ditch
7/24/2004	202	12	42	0
7/25/2004	166	12	30	0
7/26/2004	149	12	24	0
7/27/2004	133	11	13	0
7/28/2004	133	13	3	0

b) The watermaster reported on July 26, 2004, that he had curtailed distribution of water on the Big Lost River below Mackay Dam to water rights having priority dates later than April 22, 1884. The watermaster distributed about 13.5 cfs of natural flow to the Moore Ditch, including 0.14 cfs to the one water right on the Moore Ditch having a priority date of April 22, 1884, and about 13.4 cfs to water rights bearing priority dates between June 1, 1883 and August 10, 1883. About 10.5 cfs of storage water was also delivered to the Moore Ditch on this date. The watermaster further reported that of the 13.5 cfs of natural flow delivered to the Moore Ditch, only 3.4 cfs was deliverable to and used at the field headgates of the senior priority water right holders. This constitutes a loss of about 75 percent of the decreed natural flow between the ditch heading and the senior priority right field headgates.

c) Also on July 26, 2004, the total loss of water in the river between the Beck Ditch and the Moore Ditch was about 113 cfs, or 82.5 percent.

d) The Eastside Ditch was shut off on July 24, 2004, when water rights having priority dates later than May 20, 1884, were curtailed. There are only three decreed natural flow rights on the Eastside Ditch with priority dates of May 20, 1884, or earlier, totaling 1.65 cfs, and water to these senior rights could not be delivered to the field headgates on the Eastside Ditch. On July 29, 2004, the manager of the Big Lost River Irrigation District ("BLRID") reported to the Department that all active storage water on the Eastside Ditch had been used by July 24, 2004.

e) On July 28, 2004, flow in the river at the Leslie Bridge was 133 cfs, and the amount of water distributed to the Moore Ditch declined to 3 cfs. The watermaster reported that the 3 cfs could not be delivered to the field headgates of the most senior priority water right holders. The total loss of water in the river between the Beck Ditch and the Moore Ditch was about 120 cfs, or 90.2 percent. The manager of the BLRID reported to the Department that all water allocated to the Moore Ditch from active storage had been used by July 29, 2004, and/or there were no further calls for delivery of stored water to the Moore Ditch.

2. On July 28, 2004, the watermaster for Water District No. 34 reported that water was being delivered to just four diversions above the Leslie Bridge, including the Sharp, Swauger, Burnett, and Darlington Ditches. The watermaster reported that only storage water was delivered to three of these four ditches, while about 5.9 cfs of natural flow rotation credit was delivered to the heading of the Sharp Ditch. The watermaster reported that a total of 82.5 cfs of storage water was delivered to the remaining three ditches plus the Beck Ditch, and that all water rights having a priority date of April 22, 1884, on the remaining three ditches and the Beck Ditch had been curtailed on July 28, 2004. Water rights having the priority of April 22, 1884, are the most senior rights on the Sharp, Swauger, Burnett, Darlington, and Beck diversions, and have a total diversion rate of about 33.6 cfs.

3. On July 28, 2004, the watermaster reported that the available storage remaining in Mackay Reservoir was 1,922 acre-feet. The Department's determination of storage water released from Mackay Reservoir, based on the data provided by the watermaster, was 62 cfs on

July 28, 2004. Assuming no loss in the conveyance of storage water between Mackay Dam and the Beck Ditch, the data indicate that approximately 20.5 cfs of natural flow may have been delivered as storage water to the Swauger, Burnett, Darlington, and Beck Ditches. The manager of the BLRID reported to the Department on July 30, 2004, that the reservoir control gates at Mackay Dam were raised on July 28, 2004, to release additional storage water as the April 22, 1884, priority rights were curtailed, but that flow in the river did not correspondingly increase. While delivery of the 20.5 cfs as storage water may be in error, the accounting as storage water resulted from on-going daily adjustments to release of water from Mackay Reservoir and is within the range of what can be practically administered. Curtailment of this water will not allow any additional distribution of water to senior priority water rights at the Moore Diversion.

4. On July 28, 2004, the watermaster submitted a written request to the Director for consideration of a futile call determination pursuant to Rule 20.04 of the Water District 34 Water Distribution Rules. The watermaster made this request based on the data reported to the Department showing extremely high losses in both the river channel between Leslie and the Moore Ditch, as well as high losses in the Moore Ditch and the inability to distribute water to the most senior priority water rights on the Moore Ditch.

5. Based on the information supplied by the watermaster for Water District No. 34 and analysis of that information by the Department, the call for the delivery of surface water in the Big Lost River by senior right holders located from Leslie downstream to and including the Moore Diversion would be futile.

CONCLUSIONS OF LAW

1. Rule 20.04 (IDAPA 37.03.12.20.04) of the Rules Governing Water Distribution in Water District No. 34 (Distribution Rules), provides:

> **Rule 37.03.12.020.04. Futile Call for the Delivery of Surface Water**
> When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the Director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights. The Director may consult the Water District 34 advisory board, the Big Lost River Irrigation District and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile.

2. Rule 30 (IDAPA 37.03.12.30.01 - .02) of the Distribution Rules, provides:

> **Rule 37.03.12.030. Natural Flows**
> Natural flow shall be delivered through the natural river channel to the point of diversion of record except as provided in these rules.

3. Rule 30.01 and 30.02 (IDAPA 37.03.12.30.01 - .02) of the Distribution Rules provide only two exceptions to Rule 30 above. The watermaster is allowed to deliver the natural

flow of the river channel only through the Eastside Canal and the Munsey Ditch to downstream diversions under certain conditions.

4. Curtailment of junior surface water rights upstream of the Moore Diversion for delivery and use of senior rights at the Moore Diversion constitutes a futile call by the senior water right holders at the Moore Diversion for the remainder of the 2004 irrigation season, except as provided in the order below.

ORDER

IT IS THEREFORE HEREBY ORDERED as follows:

1. The watermaster for Water District No. 34 is hereby instructed to distribute surface flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate source for the remainder of the 2004 irrigation season, except as provided below.

2. The watermaster for Water District No. 34, with the approval of the Director, may discontinue the futile call determination anytime during the 2004 irrigation season if it is subsequently determined that delivery is no longer futile.

Dated this 30th day of July, 2004.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 30th day of July, 2004, the attached ORDER was served upon the following individual by placing a copy of the same in the United States Mail, postage prepaid, and properly addressed as follows:

BOB DUKE
WATERMASTER
WATER DISTRICT 34
PO BOX 53
MACKAY ID 83251

BOB SHAFFER
GENERAL MANAGER
BIG LOST RIVER IRRIG DIST
P.O. BOX 205
MACKAY ID 83251

ANN S ANDERSEN
LARMAN D ANDERSEN
RT 1 BOX 52
MOORE ID 83255

MARY ANN BURT
FRED N BURT
PO BOX 628
MOORE ID 83255

PHYLLIS J. JONES
RT 1 BOX 91BB
MOORE ID 83255

PENNY R HAWKINS
RT 1 BOX 91A
MOORE ID 83255

VAUGHN L JENSEN
THEOLA E JENSEN
RT 1 BOX 93
MOORE ID 83255

HERMAN AIKELE
RT 1 BOX 61
MOORE ID 83255

DON A AIKELE
RT 1 BOX 60
MOORE ID 83255

JACK A JENSEN
DIANA JENSEN
RT 1 BOX 32
MOORE ID 83255

RAYMOND W NOBLE
ARABELL M NOBLE
1425 MOUNTAIN VIEW LN
IDAHO FALLS ID 83402-1813

LLOYD A BINGHAM
RT 1 BOX 21
MOORE ID 83255

JAY F PEARSON
SUSAN PEARSON
RT 1 BOX 47
MOORE ID 83255

WILLIAM HUGH RUSSELL
JACKIE LEE RUSSELL
RT 1 BOX 70
MOORE ID 83255

DE ANN N JENSEN
JAY V JENSEN
RT 1 BOX 112A
MOORE ID 83255

RON CARLSON - MANAGER
IDWR EASTERN REGION
900 N SKYLINE DR STE A
IDAHO FALLS ID 83402-6105

Crystal Calais
Administrative Assistant
Water Distribution Section

EXHIBIT 3

From:	Weaver, Mathew
To:	Whitney, Rob; Luke, Tim; Hoekema, David; Ferguson, Kara
Subject:	RE: Big Lost Futile Call
Date:	Sunday, September 4, 2022 9:25:23 AM

Thank you, everyone, for responding to this issue at the last minute. Administering water, especially during drought conditions at the end of the irrigation season, is a stressful job. Likely Randy and other water users are unhappy with our direction to the watermaster, but it's the right direction.

Good work. I hope you enjoy your Labor (free) day.

Cheers,

Mathew Weaver, PE | deputy director

Idaho Department of Water Resources

www.idwr.idaho.gov | 208.287.4800

From: Whitney, Rob <Rob.Whitney@idwr.idaho.gov>
Sent: Friday, September 2, 2022 4:56 PM
To: Preston Marcroft <presmarc@mackayschools.org>
Cc: Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Luke, Tim <Tim.Luke@idwr.idaho.gov>; Hoekema, David <David.Hoekema@idwr.idaho.gov>; Ferguson, Kara <Kara.Ferguson@idwr.idaho.gov>
Subject: Big Lost Futile Call

Preston,

Randy Pehrson contacted David Hoekema with concerns about futile calls and delivery of both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"… this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. You have reported that about 600 inches (12cfs) of water is currently passing the Moss diversion but there are no calls for delivery below Moss. Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified. It appears appropriate to deliver additional water upstream of Moss by adjusting the decree to deliver more 1884 rights, while maintaining delivery to Moss. Your suggestion to adjust the decree date to 8-31-1884 may be a reasonable place to start, but IDWR will defer to your local knowledge of what the demand might be if a certain decree date is set. As we

discussed, please stay in contact with Dennis Moss as you deliver additional decrees. If the demand under a new decree date results in a shortage of water to satisfy Moss, the date should be adjusted accordingly. Please reach out if you have any questions.

Thanks, RW

RECEIVED
Apr 07, 2025
DEPARTMENT OF
WATER RESOURCES

Skyler C. Johns, ISB No. 11033
OLSEN TAGGART PLLC
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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHTS NOS. 34-182 and 34-381A (MOSS FARMS, INC.)	**OBJECTION TO AMENDED PETITION FOR DECLARATORY RULING**
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, hereby objects to the *Amended Petition for Declaratory Ruling for Water Master Instructions* (hereafter "Amended Petition") filed by Byron Pehrson and Loy Pehrson (hereafter "Petitioners"). Moss Farms respectfully requests the Director of the Idaho Department of Water Resources (hereafter "Director") reject the Amended Petition and not consider it for the following reasons:

A. Idaho Code §§ 67-5232 and 67-5255 do not authorize the Director to grant the declaratory relief requested by Petitioners;

B. The Petitioners' time to challenge the Moss Farms' Water Rights has expired pursuant to Idaho Code §§ 42-222 & 42-5246;

C. The action is barred by the doctrine of laches;

D. The action is barred by the doctrine of quasi-estoppel; and

E. Even if the BLRID Water Rights are capable of being reviewed, no transfer is required for Moss Farms to take storage water rights from the Big Lost River.

I.
BACKGROUND OF THE DISPUTE

The Amended Petition again seeks to limit Moss Farms, Inc. (hereafter "Moss Farms") from delivering its senior water rights to its river diversion (hereafter "River Diversion"). The Pehrsons were unsuccessful in using their former petition for declaratory ruling to order new watermaster instructions to limit Moss Farms' use of its water rights at the River Diversions. The Pehrsons have now modified their argument to attack the Big Lost River Irrigation District (hereafter "BLRID") storage water rights (hereafter "BLRID Rights") themselves.

This new attack on Moss Farms' use of its water rights is still improper under Idaho Code §§ 67-5232 and 67-5255 because the BLRID Rights are neither rules, statutes, or orders capable of being reviewed by the Director for the purpose of making a declaratory ruling; the Petition is collaterally attacking the prior transfer application and the time has passed for such challenges; the doctrine of laches prevents the Pehrsons from raising the issue of BLRID Storage Water Rights being diverted from the river because they have known about this issue for decades and never raised an issue; and the Pehrsons are barred from bring this action under the doctrine of quasi-estoppel because Byron Pehrson approved the use of BLRID Rights at the River Diversion and other locations even though no new points of re-diversion were added and the Pehrsons themselves diverted BLRID Storage Rights for years into an alternative delivery ditch off the Big Lost River without first obtaining a new point of re-diversion. As will be set forth in detail below, Idaho law and public policy do not permit the declaratory relief sought by the Petitioners.

II.
ARGUMENT

A. Idaho Code §§ 67-5232 and 67-5255(1) do not authorize the Director to grant the declaratory relief requested by Petitioners.

The declaratory ruling sought in the Amended Petition seeks relief unauthorized under Idaho Code §§ 67-5232 and 67-5255 because it is requesting a ruling interpreting a water right, which is neither a statute, rule, or order. IDWR is an agency within the meaning Idaho Administrative Procedure Act. *See* Idaho Code § 67-5201(3). Therefore, Idaho Code § 67-5255(1) applies to IDWR. This section only permits a person to petition IDWR "for a declaratory ruling as to the applicability of any order issued by the agency." *Id.* at (1).

Although the Amended Petition here lists a plethora of statutes to be reviewed, the relief it seeks is fundamentally a declaratory ruling regarding a water right, which amounts to nothing more than a collateral attack on adjudicated water rights. The relief being sought here, which is what really matters, is to obtain a declaratory ruling stating that the BLRID Storage Rights of Moss Farms cannot be diverted from the Big Lost River unless a new point of diversion is added by Moss Farms. The other statutory provisions relate to the statutory authority of the Director, which no one disputes applies to the water rights in issue. The issue here is whether the Department has the authority to grant the relief requested in the Amended Petition. It does not.

A water right, is a real property right once adjudicated. *See* Idaho Code § 55-101. Courts of the State of Idaho have more general authority to review these rights. Whereas Idaho Code §§ 67-5232 and 67-5255 are limited to declaring the applicability of rules, statutes, or orders, Idaho Code § 10-1201 permits "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." The application and interpretation of a water rights falls outside the authority granted to

the Department. Because the relief sought by the Amended Petition necessarily and primarily involves a declaration as to the applicability of a water right, not a statute, rule, or order, the Director lacks authority to grant the requested declaratory relief under Idaho Code § 67-5255(1). For these reasons, the Amended Petition should be dismissed.

B. The Petitioners are still collaterally attacking the River Diversion transfer and the time to challenge the Moss Farms' Water Rights has long expired.

The Amended Petition seeks to attack the Moss Farms River Diversion yet again, only under a different theory. The Pehrsons knew that Moss Farms and other in Water District 34, including the Pehrsons, diverted BLRID Rights at locations that were not specifically listed on the BLRID Rights as points of re-diversion.

At the time Moss Farms filed for a transfer of it natural flow water rights to the River Diversion, the Pehrsons were on notice and had an opportunity to protest Moss Farms from taking its water rights, including his BLRID Rights from the River Diversion. The Transfer Application contained statements and information that plainly put the Pehrsons, who do not dispute that they read the Transfer Application, on notice that Moss Farms would no longer take any of its water rights, including the BLRID Rights from the Three-in-One Ditch. The Pehrsons chose not to protest and are now trying every legal mechanism they can to undo what they should have protested back in 2015/2016.

The Orders approving Moss Farms' transfers are final orders that Petitioners lack any legal grounds to now modify or undue. The orders on the Moss Farms' transfers have been final for almost ten (10) years now, and the Pehrsons cannot undo the same through merely declaratory judgment proceedings. For these reasons, the Amended Petition should be dismissed.

C. The relief sought under the Amended Petition should be barred under the doctrine of laches.

Pehrsons have known for decades that the BLRID Rights are diverted from the Big Lost River without first adding a new point of re-diversions and they stood by silently for years. This raises issues related to whether it is just for the Pehrsons to seek this relief at this point in time. In Idaho

> [t]he defense of laches is a creation of equity and is a specie of equitable estoppel. Laches is an affirmative defense and the party asserting the defense has the burden of proof." This Court considers four elements when considering whether the defense of laches applies:
>
> > (1) defendant's invasion of plaintiff's rights, (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit, (3) lack of knowledge by defendant that plaintiff would assert his rights, and (4) injury or prejudice to defendant in the event relief is accorded to plaintiff or the suit is not held to be barred.

Access Behav. Health v. Dep't of Health & Welfare, 170 Idaho 874, 886–87, 517 P.3d 803, 815–16 (2022) (internal quotations and citations omitted).

Here, the Pehrsons allege that Moss Farms, and others, taking their BLRID Rights from the Big Lost River is not permitted unless a transfer is filed creating a new point of re-diversion from the Big Lost River. The fact is, many folks in Water Basin 34, including the Pehrsons, take their water from different locations along the Big Lost River without first filing applications for transfer to create new or alternative points of re-diversion. This has been the practice in Water District 34 for decades.

The Pehrsons knew that Moss Farms was taking its BLRID Rights from the River Diversion back in 2016/2017. In fact, while on the BLRID Board, Byron Pehrson signed off on Moss Farms taking BLRID Storage Water at the River Diversion. They watched Moss Farms expend hundreds of thousands of dollars in infrastructure improvements to create the River

Diversion. Yet, they delayed taking legal action to bar Moss Farms from diverting its BLRID Rights from the River Diversion until late 2024. Moss Farms was permitted to continue its irrigation practices from the River Diversion.

Irreparable injury will occur to Moss Farms if this action is permitted to continue. If a decision is rendered, as requested, Moss Farms will lose the ability to divert its BLRID Rights. Despite hundreds of thousands of dollars in infrastructure for irrigation from the River Diversion, Moss Farms will be prohibited from taking all its water rights from that River Diversion. Moss Farms also currently has a tenant planning to grow potatoes on the land irrigated by the River Diversion. Given the timing of this Amended Petition, a decision will likely be rendered after the tenant plants his crops, leaving him no time to adjust his planting if the water rights available at the River Diversion are changed. Granting the requested relief at this time will be unjust and unfair to Moss Farms, and it will likely cause significant injury to its operations. For these reasons, the Amended Petition should be dismissed.

D. The relief sought under the Amended Petition should be barred under the doctrine of quasi-estoppel.

The Pehrsons previously supported, approved, and benefitted from their former position that BLRID Rights could be taken at different locations on the Big Lost River without adding new points of re-diversion. In Idaho,

> Quasi-estoppel prevents a party from changing its legal position and, as a result, gaining an unconscionable advantage or imposing an unconscionable disadvantage Unlike equitable estoppel, quasi-estoppel does not require an undiscoverable falsehood, and it requires neither misrepresentation by one party nor reliance by the other. Id. Instead, quasi-estoppel applies where:
>
> > (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party

> to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Hollingsworth v. Thompson, 168 Idaho 13, 22–23, 478 P.3d 312, 321–22 (2020) (citations omitted).

Here, Byron Pehrson approved numerous transfers of BLRID Rights during his time on the BLRID Board. Among Byron Pehrson's many approvals were Moss Farms taking BLRID Rights from its River Diversion. Also, the Pehrsons requested, and the BLRID Board approved, the delivery of their BLRID Storage Rights to the so-called Pehrson Ditch, even though the Pehrsons never sought a transfer to create a point of re-diversion for the Pehrson Ditch. The Pehrsons materially benefited from their prior position that there is no need for a transfer to create new points of diversion on the Big Lost River. Under these circumstances, it would be unconscionable to permit the Pehrsons to change their position to the detriment of Moss Farms. For these reasons, the Amended Petition should be dismissed.

E. Even if the Director could grant the relief requested in the Amended Petition, the BLRID Rights can legally be diverted from the natural waterway – the Big Lost River – without adding a new or alternative point of re-diversion.

If the Department is inclined to review this matter and broadly accept evidence in this matter, notwithstanding the foregoing argument, the law and the evidence supports that there is no requirement for a transfer of a new point of re-diversion from the Big Lost River to divert the BLRID Rights.

1. BLRID Rights can be diverted from the Big Lost River without a transfer adding a new point of re-diversion because it is natural waterway.

The Pehrsons argue that the BLRID Rights do not allow Moss Farms to divert its BLRID Rights from the River Diversion. This is contrary to the law and the plain language of the BLRID Rights. Idaho Code title 42 chapter 1. Section 105(1) provides "[t]he water that a person is entitled

to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed…" Idaho Code § 42-110 provides that "[w]ater diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator."

It is undisputed that the BLRID Rights are delivered from Mackay Reservoir down the Big Lost River to Moss Farms, the owner and appropriator. The Big Lost River is a natural waterway. The Big Lost River is a point of diversion. Therefore, Moss Farms can divert BLRID Rights from the River Diversion on the Big Lost River.

2. The language regarding "point[s] of re-diversion" plainly does not imply a requirement for a transfer adding a point of re-diversion from the Big Lost River is required in this matter.

Pehrsons claim that the language regarding "points of re-diversion" on the BLRID Rights limits Moss Farms from diverting from the River Diversion. This is not so. Although Idaho Code does not define "re-diversion" multiple persuasive authorities support Moss Farm's interpretation that the points of re-diversion are from the primary point of diversion – the Big Lost River.

The Idaho Department of Water Resources October 2018 *Idaho Statutes Pertaining to Canals and Laterals* manual defines re-diversion as:

> a general term used to describe the location of any secondary point of diversion under a water right. For example: consider a storage reservoir on Creek A where storage water is released to Creek A and diverted downstream at Canal #1. The primary point of diversion for a water right with a storage reservoir on Creek A is the impounding dam across Creek A, while the point of re-diversion is Canal #1.

Idaho legal commentators have also opined that:

> Many Idaho water rights authorize water to be diverted from one stream, "injected" into another stream, and then "rediverted" to a storage facility or other use.49 An example of this is a storage and direct flow right (no. 63-19893) for the Mountain Home Reservoir operated by Mountain Home Irrigation District. Under the "points of diversion" heading, the right lists the original point of diversion from Little

> Camas Creek, a point of injection into East Fork Long Tom Creek (a tributary of Canyon Creek), and a point of rediversion from Canyon Creek. Thus, where water is injected back into a natural stream (and thus is outside the control of the appropriator) and subsequently rediverted from that natural stream, the injection and rediversion are considered additional points of diversion. (referring to *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 201, 157 P.2d 76, 77 (1945) (Givens, J.); *American Falls Reservoir District No. 2 v. IDWR ("AFRD")*, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.).

The Idaho Department of Water Resources stated the following in a survey of its employees:

> A special case is where water is diverted from one natural stream into a man-made structure that carries the water to another natural stream. The point of re-diversion if defined as the spot where water flows from the first natural stream into the man-made channel, and the point of re-injection is where the water flows from the man-made structure into the second natural stream.

Applying these sources into a combined definition supports Moss Farms' position that the points of re-diversion listed on the BLRID Rights are secondary points of diversion from the primary point of diversion – the Big Lost River. Thus, the plain language of the BLRID Rights does not prohibit Moss Farms from taking its BLRID Rights from the River Diversion, which is located on the natural water waterway – the Big Lost River. So long as Moss Farms applies the BLRID Rights to its authorized places of use, which it does, the BLRID Rights may continue to be diverted from the River Diversion.

2. BLRID is authorized to permit the use of storage water at the River Diversion.

The language of the BLRID storage rights is not the only source of authority showing that Moss Farms use of its various water rights is proper. BLRID is also authorized by the Idaho State Legislature to manage the delivery of storage rights among its members. Idaho Code § 43-304 empowers the board of an irrigation district to:

> manage and conduct the business and affairs of the district, make and execute all necessary contracts, employ and appoint such agents, officers and employees as

> may be required and prescribe their duties, to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same…

Id.

Simply put, BLRID is statutorily empowered to determine how it will distribute the BLRID Rights among its patrons. Given there are no conditions in the BLRID rights limiting diversions from the Big Lost River, the Pehrsons carry the burden to show that Moss Farms, and BLRID for that matter, failed to follow its Bylaws and Polices. The Pehrsons did not provide the Hearing Officer the very document that governs delivery of the BLRID Rights. They only cited inadmissible statements from the Pehrsons as to what they recall was done or not done by the BLRID and what they recall BLRID required to be done. There is no admissible evidence before the Hearing Officer that supports the Pehrsons' argument that Moss Farms cannot take his BLRID Rights from the River Diversion. At best, the Pehrsons have only presented a mere scintilla of evidence that BLRID is not authorized to permit Moss Farms to divert storage rights from the River Diversion.

Per Idaho Code § 43-304, the BLRID Bylaws and Policies actually control the procedures for delivering storage water rights to its patrons, not the Pehrsons recollections of what those procedures are. The Pehrsons have not provided sufficient evidence that show that delivery of storage water to the River Diversion is "illegal." Of note, is the fact that the Pehrsons do not dispute that BLRID Rights were delivered to Moss Farms at the River Diversions.

3. A transfer of the point of diversion is not necessary because the Big Lost is a natural waterway, and the Moss Farms BLRID storage rights were delivered to an authorized place of use.

The Pehrsons argue that Moss Farms was required to create a new point of diversion to take his BLRID Rights at the River Diversion. As set forth in section A(4) above, no transfer was required because the Big Lost River is already an authorized point of diversion for the BLRID Rights. Also, a transfer is not required based on the language in Idaho Code title 42 chapter 1.

Section 105(1) provides "[t]he water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed…" In fact, there is no statutory requirement to add a point of re-diversion in Idaho Code.

As set forth in section A(4) above, the face of the BLRID Rights shows that the Big Lost River is the primary point of diversion. It is undisputed that the BLRID Rights are delivered from the Big Lost River, which is a natural watercourse. All the ditches and canals referenced by the Pehrsons are "points of rediversion" and are, therefore, alternative points of diversion from the primary point of diversion. Pehrsons cannot produce any compelling evidence or law showing that delivery of BLRID Rights from the Big Lost River through the River Diversion is expressly prohibited. This is because the Big Lost River is already a point of diversion. For these reasons, the Amended Petition should be dismissed.

III.
CONCLUSION

The law simply does not authorize the Director to grant the relief requested, nor does the law permit the Director to relitigate the issues already resolved in the prior transfer proceeding.

The Pehrsons delay in bring this action, despite their knowledge of the actions of Moss Farms, themselves, and others, should bar them from now litigating this particular issue.

What's more, the Pehrsons previously supported and benefitted from the delivery of BLRID Rights to locations that were not listed as points of re-diversion on the BLRID Rights.

Finally, even if the law did permit review of the BLRID Rights and the requested relief was permission, the water rights themselves demonstrate that BLRID Rights can be diverted from the Big Lost River without adding points of re-diversion through transfer proceedings.

For these reasons, and others not yet identified, Moss Farms respectfully request the Director dismiss this Petition with prejudice.

DATED: April 7, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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RECEIVED
Apr 10, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**REPLY TO MOSS RESPONSE TO AMENDED PETITION FOR DECLARATORY RULING**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.220.02.c, hereby file this reply to Moss Farms, Inc. ("Moss") *Objection to Amended Petition for Declaratory Ruling* (April 7, 2025) ("Response").[1]

[1] While styled as an "Objection" the pleading that was authorized by the Hearing Officer was a "response" and will be referred to herein as the same. *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* at 7 (March 28, 2025).

I. INTRODUCTION

On March 28, 2025, the Hearing Officer issued his *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* (March 28, 2025) ("Order"), in which he ruled that the Pehrsons' *Amended Petition for Declaratory Ruling* ("Amended Petition") would proceed forward, inviting the filing of dispositive motions on the issue of whether the decreed storage water rights of the Big Lost River Irrigation District ("BLRID") are authorized to be diverted by Moss at the River Diversion, with the Hearing Officer further granting Moss leave to file a response to the *Amended Petition*. *Order* at 7.

The *Response* raises both old issues and new, with the new issues unsupported by facts in the record and the old issues previously addressed. As will be explained, the relief pled in the *Response* should be denied and this matter should proceed forward, as directed by the Hearing Officer, for dispositive motions on the "authorized diversion issue raised in the *Amended Petition* – whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law." *Id*. at 6.

II. ARGUMENT

A. The Hearing Officer Correctly Ruled That I.C. § 67-5232(1) Allows The *Amended Petition* To Move Forward For Dispositive Briefing

Moss responds to the *Order* by claiming the Hearing Officer erred in allowing the case to proceed on the basis of I.C. § 67-5255(1): "[T[he Director lacks authority to grant the requested declaratory relief under Idaho Code § 67-5255(1)." *Response* at 4. As evidenced in the *Order*, the Hearing Officer did not allow the case to proceed on the basis of I.C. § 67-5255(1) ("Pehrsons' current attempt to challenge past futile call determinations through a petition for

declaratory ruling constitutes an impermissible collateral attack on those agency actions"); rather, he stated that the matter would move forward pursuant to § 67-5232(1).

Regarding I.C. § 67-5232(1) – addressing declaratory actions concerning legal authorities contained in statutes and rules – Moss argues, without citation, that the "application and interpretation of a water right falls outside the authority granted to the Department." *Response* at 3-4. This novel argument, that IDWR somehow does not have authority to examine water rights, was previously rejected by the Hearing Officer:

> The Director has the statutory authority and a legal duty to administer water within Idaho water districts in accordance with the prior appropriation doctrine. I.C. § 42-602. The Director also has a "clear legal duty to distribute water according to decreed water rights." *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017) (quoting *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014). As indicated by the *Amended Petition*, these duties are reflected in many statutory provisions and rules administered by the Department. *Amended Petition*, at 2. Of particular concern to the authorized diversion issue, such duties may include but are not limited to: (a) Idaho Code § 42-201(2), which requires water users to obtain a valid water right to divert water; (b) Idaho Code § 42-1411(2)(e), which states the elements of a water right include the point of diversion; and (c) Idaho Code § 42-222(1), which requires filing a transfer application to change a point of diversion on a valid water right.

Order at 5 (emphasis added).

Because the law clearly gives the Director the authority to analyze and interpret water rights for purposes of administration and their lawful diversion and delivery, Moss' response on this issue should be denied.

B. At Issue Are The BLRID Storage Rights, Not The Moss Transfer

As argued throughout this case, Moss attempts to paint the issue as one involving the Department's prior approvals of transfers that added the River Diversion as an alternate point of diversion to his natural flow water rights. This case is not about undoing the 2015 transfers, which added the River Diversion to the existing diversion at the 3 in 1 Ditch. This case is

instead about whether the BLRID Storage Rights, which do not list the River Diversion in the point of diversion element, may be taken by Moss at the River Diversion when the 2015 transfers never addressed the use of storage water. *Declaration of David R. Tuthill, Jr.* at 6 (Feb. 7, 2025). The formulation of the issue was explained by the Hearing Officer when he discussed the "authorized diversion issue":

> Under *Elgee*, it is undeniable that a declaratory action before the Department is appropriate when it seeks a determination that "construe[s] the statutes and rules it administers to determine" rights where there is a high likelihood of repetition on a usual set of facts should that specified agency action occur. That is what the Pehrsons are now requesting because BLRID could, in the future, deliver storage water rights at the River Diversion. Therefore, the Hearing Officer will consider the authorized diversion issue raised in the *Amended Petition*.

Order at 5.

Because the matter to be addressed in summary judgment is the meaning of the decreed elements of the BLRID Storage Rights, Moss' *Response* should be denied since it misses the mark.

C. The Equitable Defenses Of Laches And Quasi-Estoppel Cannot Be Invoked To Prevent Review Of The Water Rights

For the first time, Moss raises the affirmative defenses of laches and equitable estoppel. Those doctrines require Moss to bear the burden of proof. *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 359, 48 P.3d 1241, 1248 (2022). To support his claim, Moss presents "facts" without citation to any evidence in the record, to wit:

- "The fact is, many folks in Water Basin 34, including the Pehrsons, take their water from different locations along the Big Lost River without first filing applications for transfer to create new or alternative points of re-diversion. This has been the practice in Water District 34 for decades." *Response* at 5.

- "Byron Pehrson signed off on Moss Farms taking BLRID Storage Water at the River Diversion." *Id*. at 5; *see also id.* at 7 ("Byron Pehrson approved numerous transfers of BLRID Rights during his time on the BLRID Board.").

- "[Pehrsons] watched Moss Farms expend hundreds of thousands of dollars in infrastructure improvements to create the River Diversion. Yet they delayed taking legal action to bar Moss Farms from diverting its BLRID Rights from the River Diversion until late 2024." *Id*. at 5-6.

- "Moss Farms also currently has a tenant planning to grow potatoes on the land irrigated by the River Diversion. Given the timing of the Amended Petition, a decision will likely be rendered after the tenant plants his crops, leaving him no time to adjust his planting if the water rights available at the River Diversion have changed. Granting the requested relief at this time will be unjust and unfair to Moss Farms, and it will likely cause significant injury to its operations." *Id*. at 6.[2]

Without factual underpinnings, Moss cannot carry his burden and the Hearing Officer should deny the requested relief.

Even if Moss could present facts in support of his laches and equitable estoppel argument, he still cannot carry his burden because the BLRID Storage Rights were previously decreed in the Snake River Basin Adjudication ("SRBA") and past practices that were not brought into the SRBA do not sanction today's inconsistent use. As explained by the Supreme Court, the equitable claims of laches and estoppel were required to be brought in the SRBA and memorialized through water right elements, otherwise those defenses were foreclosed due to lack of subject matter jurisdiction. *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994) ("The second issue requiring resolution is whether Devil Creek Ranch's 1915 right, whatever it is, must be reduced, barred, or otherwise limited by Cedar Mesa's affirmative defenses of estoppel and/or laches. . . . . Because this controversy concerns an adjudication of a right to the use of water in the Snake River Basin, for

[2] Moss conveniently forgets that *Transfer No. 80488*, as approved on December 14, 2015, authorizes the use of ground water, pursuant to water right no. 34-2379F on the same acres that are irrigated with natural flow that is diverted from the Big Lost River at the River Diversion. *Declaration of David R. Tuthill, Jr., Ex. 9* (Feb. 7, 2025). Moreover, the 3 in 1 Ditch remains an authorized point of diversion for BLRID storage water. It is disingenuous to argue that Moss' tenant will be irreparably harmed when ground water can be pumped and natural flow and storage water can be diverted at the 3 in 1 Ditch.

which a general adjudication has commenced, only the SRBA district court has the subject matter jurisdiction to adjudicate the water rights asserted in this case.").

Moss was party to the SRBA and is bound by its outcomes. *First Sec. Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 741, 451 P.3d 446, 454 (2019).[3] To take Moss up on his argument regarding the application of equitable defenses – all in order to countenance use of water that is inconsistent with the BLRID Storage Rights – will lead to the unraveling of all SRBA partial decrees and cannot be allowed. *See Whittaker v. Idaho Dept. of Water Res.*, 173 Idaho 913, 926, 551 P.3d 729, 742 (2024) ("This Court has consistently rejected arguments to revisit water rights adjudicated in the SRBA for equitable concerns and we do so again here") (emphasis added); *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) ("allowing a party to contest a partial decree outside of the SRBA would undermine any certainty or finality of the partial decree") (emphasis added).

D. The Provisions Of I.C. §§ 42-105 And 42-110 Do Not Allow The Use Of Storage Water At The River Diversion Without Examination Of Injury And The Supervision And Control Of The Director And Watermaster

Perhaps admitting for the first time that the River Diversion is not authorized to take BLRID storage water, Moss asserts, as an alternative argument, that a transfer is not required because the Big Lost River can be used as a natural conduit. Moss makes this argument with incomplete citations to I.C. §§ 42-105 and 42-110, stating:

[3] Just like Moss, Moore Canal, and BLRID, the Pehrsons are also bound by the SRBA. Moss attempts to create an issue by pointing out that the Pehrsons have diverted and/or rediverted BLRID storage water at "the Pehrson Ditch." *Response* at 7. BLRID previously attempted to create an issue on this point. *BLRID Opposition to Motion to Amend* (March 14, 2025). To be clear, Pehrsons raised the issue before BLRID filed its *Opposition to Motion to Amend* and again on pages 12-13 of their *Reply to Responses in Opposition to Motion to Amend Petition for Declaratory Ruling* (March 18, 2025). The Pehrson Ditch is an authorized point of diversion for Byron Pehrson and Loy Pehrson's natural flow water rights, as partially decreed in the SRBA, and is not listed as a point of diversion and/or rediversion in the BLRID Storage Rights. *Amended Petition for Declaratory Ruling* at 4-5 (March 5, 2025). Pehrsons have never argued that the BLRID Storage Rights should be used inconsistently with the partial decrees, so as to allow them to benefit any differently than others. It must also be noted that the Pehrsons have never used the Pehrson Ditch in a way that injures other water users.

> [Idaho Code] Section 105(1) provides "[t]he water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed…" Idaho Code § 42-110 provides that "[w]ater diverted from its source pursuant to a water right is the property of the appropriator while it is lawfully diverted, captured, conveyed, used, or otherwise physically controlled by the appropriator."

Response at 7-8.

Left unsaid by Moss is if either subsection is asserted, then the Director has to authorize its use and such use cannot result in injury to other water users.

At the outset, I.C. § 42-105 applies when there is either a "commingling" or an "exchange" of water:

> One commentator defines the practice of commingling as follows: "[W]ater appropriated out of one stream may be turned into the channel of another stream, mingled with the water already flowing there, and then reclaimed . . . ." 1 W. Hutchins, Water Rights Laws in the Nineteen Western States 603 (1971). Hutchins points out that an exchange differs from commingling, although the two concepts are closely related and may in some circumstances overlap. Essentially, commingling occurs when waters are mixed and later separated. An exchange takes place when different waters are traded without being mixed.
>
> I.C. § 42-105 permits commingling of water. It also permits an exchange or substitution of water provided the parties to such exchange agree and obtain the approval of the Department of Water Resources.

Canyon View Irr. Co. v. Twin Falls Canal Co., 101 Idaho 604, 611, 619 P.2d 122, 129 (1980) (internal citations omitted).

Here, Moss has not stated if he is asserting a commingling or an exchange. If Moss is asserting an exchange, then an "application" for exchange must be filed, with the requirements of published "notice," solicitation of "recommendations [from] the watermaster," the ability to "protest," and after an "examin[ation] of all the evidence and available information . . . provided no other water rights are injured thereby . . ." the exchange may be approved. I.C. § 42-240[4]

[4] It is notable that when the Legislature codified I.C. § 42-240 in 1998, amendments were also made to I.C. § 42-105, evidencing the Legislature's understanding that investigation of injury is required when water is either commingled or exchanged. Idaho Sess. Laws, ch. 424, sec. 1, p. 1339 (1998) (last visited April 14, 2025).

If Moss is asserting commingling, the portion of the statute that Moss has omitted states: "The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision of and control of the director of the department of water resources and shall be subject to the regulation and control of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting." I.C. § 42-105(1) (emphasis added). Thus, the use of the Big Lost River as a natural conduit does not give a free pass to injuring water rights.

Second, I.C. § 42-110 states its use is "subject, however, to all prior rights." The idea that the use of water is under the supervision of the Director and cannot result in injury to other water rights is further consistent with I.C. § 42-602 and overall principles associated with the prior appropriation doctrine, as established by Idaho law, I.C. § 42-101.

Accordingly, I.C. §§ 42-105 and 42-110 do not allow those who oppose the Pehrsons the ability to somehow alter the decreed elements of the BLRID Storage Rights without process. *City of Blackfoot v. Spackman*, 162 Idaho 302, 308, 396 P.3d 1184, 1190 (2017) (explaining the mandatory requirement to file a transfer to change the element of a decreed water right). And even if Moss' alternative argument carried weight, invocation of I.C. §§ 42-105 and 42-110 must still be sanctioned by the Director and cannot result in injury the Pehrsons.

E. The Point Of Diversion Element Associated With The BLRID Storage Rights Must Be Given Its Plain Meaning, With The River Diversion Not Listed

Similar to his argument concerning the use of the Big Lost River as a conduit for storage water, Moss again attempts to read the point of diversion element out of the BLRID Storage Rights, this time by cobbling together a definition for the word "re-diversion." *Response* at 9. According to Moss' definition, "the points of re-diversion listed on the BLRID Rights are secondary points of diversion from the primary point of diversion – the Big Lost River." *Id*.

(emphasis added). Thus, Moss acknowledges that the points of re-diversion are, in fact, diversions.

Water rights are "defined by elements." *City of Blackfoot v. Spackman*, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017). The "point of diversion" element is defined by I.C. § 42-1411(2)(e) as: "The legal description of the point(s) of diversion . . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) (describing "point of diversion" as an element of a water right). Elements in a water right may be further defined through "conditions" and "remarks" that the Director deems necessary for "clarification of any element of a right, or for administration of the right . . . ." I.C. §§ 42-1411(2)(i) and 42-1411(2)(j).

Moss incredibly states: "There is no admissible evidence before the Hearing Officer that supports Pehrsons' argument that Moss Farms cannot take his BLRID Rights from the River Diversion." *Response* at 10 (emphasis added). This could not be further from the truth as the BLRID Storage Rights were put into the record by Pehrsons through the *Declaration of David R. Tuthill, Jr*. (Feb. 7, 2025).

Here, the point of diversion element for the BLRID Storage Rights is defined both by legal description and through specific reference to Mackey Dam – where water is diverted – and to certain locations on the Big Lost River – where water is re-diverted:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Tuthill Dec., Ex. 6.

Whether "primary" or "secondary," *Response* at 9, the point of diversion element must be given its plain meaning: "[T]his Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words." *City of Blackfoot* at 306, 396 P.3d at 1188. "Like a contract, this Court will read the decree as a whole and will give meaning to all of its terms to the extent possible." *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019). Thus, because the River Diversion is not listed in the point of diversion element, storage water cannot be rediverted at that location. *Whittaker* at 251, 551 P.3d at 742 ("Whittaker's use of West Springs Ditch as a point of diversion from Stroud Creek was disallowed under the Final Unified Decree because none of his water rights list it as an authorized point of diversion"); *Rangen* at 807, 367 P.3d at 202 ("Because the Bridge Diversion lies outside the specified point of diversion in its partial decrees, the water rights at issue here do not entitle Rangen to divert water via the Bridge Diversion").

It should not be lost that Moss can continue to receive storage water at the 3 in 1 Ditch, which is expressly listed in the point of diversion element for the BLRID Storage Rights, or see

to it that a transfer is filed to add the River Diversion as a point of diversion to the BLRID Storage Rights.

F. The Irrigation District Statutes Do Not Allow Moss Or BLRID To Circumvent The Decreed Elements Associated With The BLRID Storage Rights

While not representing BLRID, Moss attempts to stand in its shoes by arguing that irrigation districts are entitled to make use of their water however they see fit: "Simply put, BLRID is statutorily empowered to determine how it will distribute the BLRID Rights among its patrons." *Response* 10.

Unsaid is irrigation districts hold water rights in "trust" and act as a "fiduciary . . . to its own water users." I.C. § 43-316; *Bliss v. Minidoka Irr. Dist.*, 167 Idaho 141, 151, 468 P.3d 271, 281 (2020). This means BLRID cannot put Moss' interests ahead of any other patron. Furthermore, for Moss to argue that BLRID is empowered to ignore the decreed elements of its water rights, and operate however it pleases, ignores the binding nature of the SRBA and the Court's decisions stating that the elements in an irrigation district's water rights are held to the same standards as all other SRBA partial decrees. *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 408 P.3d 899 (2018); *United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 408 P.3d 52 (2017). Notably, BLRID is not bringing this argument as it understands its responsibilities better than Moss.

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III. CONCLUSION

Based on the foregoing, Pehrsons request that the Hearing Officer deny the *Response* and allow the matter to proceed to dispositive briefing on the "authorized diversion issue raised in the *Amended Petition* – whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law." *Order* at 6.

DATED this 10th day of April, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson,
and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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RECEIVED
Apr 23, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSONS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.220.03 and the Hearing Officer's *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* (March 28, 2025), hereby file their *Motion for Summary Judgment*, supported by their contemporaneously filed *Memorandum in Support* and the record herein.

DATED this 23rd day of April, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

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BEFORE THE DEPARTMENT OF WATER RESOURCES

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IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**MEMORANDUM IN SUPPORT OF PEHRSONS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and pursuant to IDAPA 37.01.01.220.03 and the Hearing Officer's *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* (March 28, 2025) ("Order"), hereby file this *Memorandum in Support of Pehrsons' Motion for Summary Judgment*, supported by the record herein with citation thereto.

I. INTRODUCTION

According to the *Order*, the parties are instructed to present summary judgment for the Hearing Officer's consideration on the "authorized diversion issue," framed as follows:

> The Hearing Officer will only consider the authorized diversion issue raised in the *Amended Petition* – whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law.
>
> . . . .
>
> Of particular concern to the authorized diversion issue, such duties may include but are not limited to: (a) Idaho Code § 42-201(2), which requires water users to obtain a valid water right to divert water; (b) Idaho Code § 42-1411(2)(e), which states the elements of a water right include the point of diversion; and (c) Idaho Code § 42-222(1), which requires filing a transfer application to change a point of diversion on a valid water right.

Order at 6.

As will be explained, it is Pehrsons' position that, consistent with the partial decrees from the Snake River Basin Adjudication ("SRBA"), the patrons of the Big Lost River Irrigation District ("BLRID") are entitled to receive storage water at the specific locations that are described in the point of diversion element for BLRID's storage rights. Consequently, because the River Diversion is not listed in the point of diversion element, Moss Farms, Inc. ("Moss") cannot receive storage water at the River Diversion. This outcome does not prevent Moss from continuing to receive storage water at the 3 in 1 Ditch or, consistent with I.C. § 42-222(1), to add the River Diversion to the BLRID storage rights through the filing of a transfer with the Idaho Department of Water Resources ("IDWR" or "Department").

II. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law." *Marchand v. Jem Sportswear,*

Inc., 143 Idaho 458, 458, 147 P.3d 90, 90 (2006). The Hearing Officer is to "construe[] the record in the light most favorable to the non-moving party, and draw[] all reasonable inferences in favor of that party. If reasonable minds might come to different conclusions, summary judgment is inappropriate." *Id*. "If the record contains conflicting inferences or reasonable minds might reach a different conclusion, a summary judgment must be denied." *G&M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). "All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom, and if reasonable people might reach different conclusions." *Id*.

III. STATEMENT OF UNDISPUTED FACTS

A. BLRID Storage Water Rights

1. On February 19, 1991, BLRID filed a claim in the SRBA for water from the Big Lost River that was historically stored in Mackey Reservoir. *Declaration of David R. Tuthill, Jr.* (Feb. 7, 2025), *Ex. 7*.

2. The claim was later broken out into various priority dates and volumes, with the claim for water right no. 34-12 emblematic of the other claims for the "Point of Diversion" element, Line 4, shown as follows, listing seventeen separate legal descriptions:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4			Lot		County
03N	26E	1	NE	NE	SW		R	BUTTE
		12	NE	NW	SE		R	BUTTE
04N	26E	26	NW	NW	NW		R	BUTTE
05N	26E	4	NW	SE	SE		R	BUTTE
06N	24E	1	NE	NE	SW		R	CUSTER
	25E	6	SW	NE	SE		R	CUSTER
		10	NE	NE	SW		R	CUSTER
		11	SW	SE	SW		R	CUSTER
		14	SE	NW	SE		R	CUSTER
		24	NW	NW	NE		R	CUSTER
	26E	32	NW	SE	NW		R	CUSTER
07N	23E	12		SE	NW			CUSTER
			NW	NW	SE		R	CUSTER
	24E	18	SE	SW	NE		R	CUSTER
		20	SW	NE	SW		R	CUSTER
		33	NW	SW	NE		R	CUSTER
		34	SE	NW	NW		R	CUSTER

Id.

3. In Line 14, the legal descriptions for the "Points of Rediversion" that are shown in Line 4 were specifically described by BLRID with the following canal and ditch names:

> WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC GOWN, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS.
> POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id.

4. In Line 15, the basis for BLRID's claims was asserted as a prior decree, known as *Utah Construction Co. v. Abbott*. *Id*.; *see State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943, 944 (1997) ("This area was subject to an earlier decree in the case of *Utah Construction Co. v. Abbott,* Equity No. 222 (D.E. 1923) (U.C. Decree).").

5. On May 27, 1992, the Director issued his recommendation for BLRID's storage rights to the SRBA district court, with the Point of Diversion element shown as follows:

POINT OF DIVERSION:

T07N R23E	S12	SENW	
T03N R26E	S01	NENESW	(R)
	S12	NENWSE	(R)
T04N R26E	S26	NWNWNW	(R)
T05N R26E	S04	NWSESE	(R)
T06N R24E	S01	NENESW	(R)
R25E	S06 Pvt	SWNESE	(R)
	S10 Pvt	NENESW	(R)
	S11 Pvt	SWSESW	(R)
	S14	SENWSE Pwb	(R)
	S24	NWNWNE	(R)
R26E	S32	NWSENW	(R)
T07N R23E	S12	NWNWSE	(R)
R24E	S18	SESWNE	(R)
	S20	SWNESW	(R)
	S33	NWSWNE	(R)
	S34	SENWNW	(R)

Id., Ex. 8.

6. In "Remarks," and consistent with the claim, the Director described the canals and ditches as the locations where "water is delivered," along with a statement that when water is rediverted from the Big Lost River it cannot result in "injury":

> POINT OF DIVERSION IN SENW SEC 12, TWP 7N, RGE 23E IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.
>
> THE AMOUNT OF WATER REDIVERTED FROM THE BIG LOST RIVER SHALL BE REDUCED WHEN NECESSARY TO PREVENT INJURY TO APPROPIATORS OF WATER DOWNSTREAM FROM THE POINT OF REDIVERSION.

Id.

7. On October 15, 2001, and pursuant to IRCP 54(b), the Honorable Roger Burdick, the Presiding Judge of the SRBA, issued partial decrees for the BLRID storage rights. *Id., Ex. 6*. As to the Point of Diversion element, the storage rights recited as follows, consistent with the claims and recommendation:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id.

8. The partial decrees for the BLRID storage water rights were individually numbered as follows: 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935 (collectively the "BLRID Storage Rights"). *Id.* at 3.

9. Attached hereto as Exhibit 1 is a map, which was generated on April 22, 2025, from IDWR's website, showing the points of diversion and place of use for the BLRID Storage Rights, of which the Hearing Officer may take judicial notice.

B. Moss Water Rights

10. The natural flow water rights that appear in the caption of this case, that are owned today by Moss, were decreed in the SRBA to Catherine M. and Lee J. Watson ("Watson"), for irrigation, with a single point of diversion on the Big Lost River at a location known as the 3 in 1 Ditch, summarized as follows:

	Water Right No. 34-182	**Water Right No. 34-381A**
Quantity:	1.60 cfs	2.40 cfs

Priority Date:	6/1/1883	9/26/1894

Tuthill Dec. at 2-3, Exs. 2-3.

11. As shown on the partial decrees for the BLRID Storage Rights, the 3 in 1 Ditch is listed as a location where storage water may be delivered.

12. On November 16, 2012, and during the pendency of the SRBA, IDWR changed ownership of the above-referenced water rights from Watson to Moss. *Id*. at 3, Ex. 5.

13. The above-referenced water rights share a 200-acre place of use and a combined diversion rate of 5.2 cfs with water right no. 34-2379F, *Declaration of Skyler Johns in Support of Motion for Summary Judgment, Ex. H* at 2 (Condition of Approval No. 2) ("Johns Dec.").

14. Water right no. 34-2378F is a ground water right with a priority date of August 8, 1960. *Tuthill Dec.* at 3, Ex. 4.

C. Pehrson Water Rights

15. The water rights of Byron Pehrson and Loy Pehrson are summarized as follows:

Water Right No.	**Priority Date**	**Quantity (cfs)**	**Irrigated Acres**	**Canal/Ditch Name**
34-28G	8/31/1884	0.80	40 acres	3 in 1
34-638A[1]	10/12/1884	0.15	7.5 acres	3 in 1
34-14189	6/1/1885	1.54	77 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	96.1 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	154 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	115.5 acres	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

[1] I recently bought a portion of this water right with the records of IDWR not yet showing the updated ownership.

B. Pehrson Dec. at 2; *L. Pehrson Dec.* at 2.

16. The water rights of Randy Pehrson are summarized as follows:

Water Right No.	**Priority Date**	**Quantity (cfs)**	**Irrigated Acres**	**Canal/Ditch Name**
34-733	7/21/1886	1.44	72.4 acres	Burnett
34-10236	5/30/1885	2.00	100 acres	Darlington
34-10933	4/22/1884	1.63	81.40 acres	Darlington
34-10950	5/31/1884	0.72	36 acres	Darlington
34-13874	7/21/1886	1.00	50 acres	Burnett
34-14389	4/22/1884	0.55	27.30 acres	Darlington

R. Pehrson Dec. at 2.

17. The water rights of Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively the "Pehrson Water Rights") are junior to Moss water right no. 34-182 and senior to Moss water right nos. 34-381A and 34-2379F.

18. The Pehrson Water Rights divert water from the Big Lost River at the ditches and canals that are shown in the tables above, all of which are upstream of the Darlington Sinks. *B. Pehrson Dec.* at 2-3; *L. Pehrson Dec.* at 2-3; *R. Pehrson Dec.* at 2.

19. As shown on the partial decrees for the BLRID Storage Rights, the canals and ditches that are associated with the Pehrson Water Rights are listed as locations where storage water may be received.

D. The 2015 Moss Transfers

20. On August 26, 2014, the SRBA was concluded with issuance of the *Final Unified Decree*. *Eden v. State*, 164 Idaho 241, 245, 429 P.3d 129, 133 (2018).

21. On April 6, 2015, nearly one-year after entry of the *Final Unified Decree*, Moss filed an *Application for Transfer* ("Application") with IDWR. *Declaration of Sklyer Johns in*

Support of Motion for Summary Judgment (Feb. 14, 2025), *Ex. C*, at 1. In the *Application*, Moss did not seek to remove or eliminate the 3 in 1 Ditch as a point of diversion, instead he sought to add the River Diversion as a second point of diversion for the Moss Water Rights. *Johns Dec., Ex. C* at 2, ln. A.2; *Tuthill Dec.* at 5.

22. The River Diversion, which was a new point of diversion, would "allow [Moss] to pump directly from the river." *Johns Dec., Ex. C*, at 2.

23. The River Diversion, which is a second point of diversion for the Moss Water Rights, is what is known as an "alternate point of diversion." *Tuthill Dec.* at 5.

24. Because the *Application* only addressed the Moss Water Rights, neither it nor the subsequently approved *Transfer* could have altered or addressed the storage water rights of BLRID. *Johns Dec., Exs. C & H*; *Tuthill Dec.* at 6; *Yockey Dec.* at 3-4.

25. A condition on the face of the *Transfer* states: "This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources." *Johns Dec., Ex. H* at 1.

26. On December 14, 2015, the Moss Water Rights were subject to a second IDWR transfer. *Tuthill Dec.* at 4, Ex. 9 ("2015 Transfer").

27. The *2015 Transfer* adds a condition to the Moss Water Rights that was not included in the *Transfer*, explaining the use of water right no. 34-2379F, a ground water right with a priority date of 8/8/1960, when it is used in conjunction with the Moss Water Rights. *Tuthill Dec.* at 4.

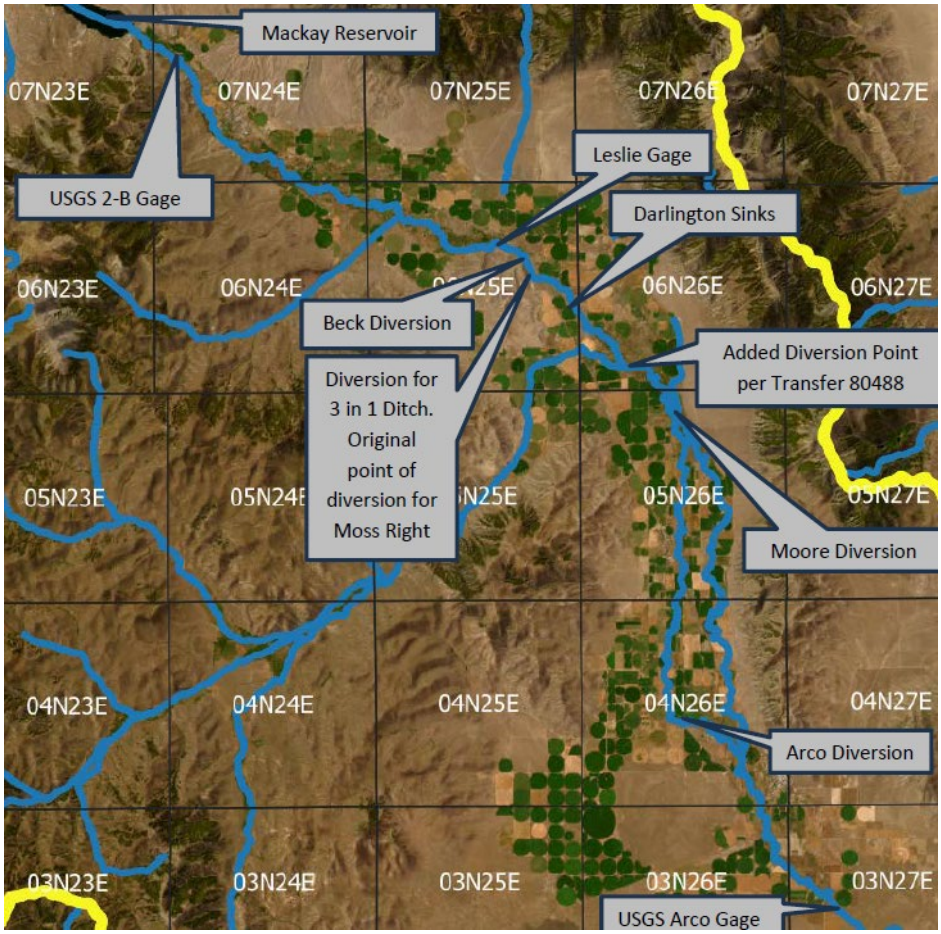
E. Physical Relationship Between Pehrsons, Moss, BLRID, And Moore Canal

28. The River Diversion is located approximately 5.9 miles downstream on the Big Lost River from the 3 in 1 Ditch. *Tuthill Dec.* at 5.

29. Between the 3 in 1 Ditch and the River Diversion is what is known as the Darlington Sinks, which, when flows are low, is a losing reach of the Big Lost River. *Johns Dec.*, *Ex. G* ("the proposed new point of diversion is located downstream from the current point of diversion on a losing river reach"); *Yockey Dec.* at 3; *Marcroft Dec.* at 2.

30. The Moore Canal, also known as the Moore Diversion, is located downstream of the River Diversion.[2]

31. The features mentioned above are shown on the following map:



Tuthill Dec. at 2.

[2] It is germane to discuss the Moore Canal because the Moore Canal Users are intervenors to this case.

32. The Pehrson Water Rights, summarized above, divert from the canals and ditches described in the BLRID Storage Rights, with the Pehrsons holding storage water interests in BLRID. *B. Pehrson Dec.* at 2; *L Pehrson Dec.* at 2; *R. Pehrson Dec.* at 2.

33. Moss holds interests in the BLRID Storage Water Rights that are diverted and/or rediverted at the 3 in 1 Ditch and the Moore Canal. *B. Pehrson Dec*. at 3, Ex. 1.

34. Based on the pleadings in this case, users in the Moore Canal hold storage water interests in BLRID. *Moore Canal Users' Petition to Intervene* (Aug. 22, 2024).

35. While the 3 in 1 Ditch and Moore Canal are listed on the face of the BLRID Storage Rights in the point of diversion element, the River Diversion is not. *Tuthill Dec.* at 6.

F. IDWR's 2021 Futile Call Determination And Curtailment Of Rights Below The Darlington Sinks

36. On July 22, 2021, Watermaster Yockey contacted IDWR to "express a concern that a futile call determination request was imminent due to the rapidly diminishing water supply in the Big Lost River . . . ." *Declaration of Chris M. Bromley* (Feb. 7, 2025), *Ex. 1* at 1.

37. On July 23, 2021, Watermaster Yockey reported to IDWR that "delivery calls for decreed [natural flow] water (appx. 12 cfs) at the Moore Diversion were satisfied at the head of the ditch, but were not making it to the first user in a beneficially usable amount." *Id*.

38. On July 24, 2021, Watermaster Yockey "notified the Department that the priority delivery date had changed from 1884 to 1883, and that [he] would attempt to continue to deliver the senior rights to the Moore Diversion for the remainder of the weekend."

39. On July 26, 2021, Watermaster Yockey sent an email to Tim Luke, former IDWR employee, requesting a determination of futile call:

> Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 7-24-2021 and no water is reaching the Diversion. There is no storage water being delivered to any canal. This makes the river shrink 100%. If the futile

> call is determined the last point of delivery of water on the Big Lost River would be moved up to the Beck Canal Heading which would allow beneficial use again. As watermaster I have the general consent of the [Water District No. 34] advisory board and The Big Lost River Irrigation District approves WD34's request.

Bromley Dec., Ex. 1 at 7.

40. Through July 26, 2021 email communication between IDWR and BLRID, it was established that, while a majority of the WD34 advisory board supported a determination of futile call, two of the advisory board members, Shawn Anderson and Jason Anderson, did not. *Id*. at 6.

41. On July 26, 2021, the BLRID General Manager responded via email to Mr. Luke, stating: "I spoke with Shawn [Anderson] just now and he agreed to support the futile [call] . . . . When I spoke with Jason [Anderson] he was against making the [f]utile call." *Id*.; *see also id.* at 2 ("Shawn Anderson agreed to support the determination and Jason Anderson did not").

42. Jason Anderson is a water user on the Moore Canal. *B. Pehrson Dec.* at 4.

43. In support of the futile call determination, IDWR employee David Hoekema prepared a series of graphs and tables showing the flow of the Big Lost River during the month of July, including at the 2B Gage. *Bromley Dec., Ex. 1* at 3-5.

44. According to Figure 3, prepared by Mr. Hoekema, between July 22 and July 26, the flow at the 2B Gage was approximately between 200 to 150 cfs, as shown below:

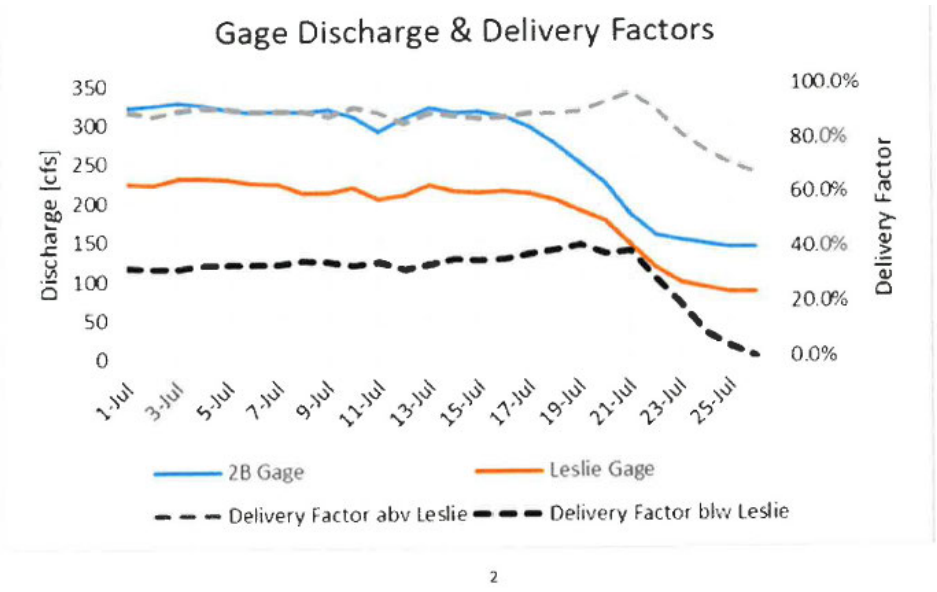


Figure 3 Flow past the 2B Gage is shown by the blue line, flow past the Leslie Gage is shown by the orange line, the delivery factor above the Leslie Gage is shown by the dashed, grey line, and the delivery factor blw Leslie is shown by the dashed, black line.

Id. at 3-4.

45. On July 26, 2021, internal email communication from Mr. Hoekema to fellow IDWR employees, Mr. Luke and Rob Whitney, established: "As the reservoir has been flat-lined, so as to only pass inflows (natural flow), it appears that the natural flow in the river is not adequate to carry water to the Moore Diversion." *Id*. at 3.

46. On July 26, 2021, Mr. Whitney sent a letter to Watermaster Yockey informing him that IDWR supported the determination of futile call:

> It is evident that curtailment of junior surface water rights upstream of the Moore Diversion to satisfy senior surface water rights at the Moore Diversion constitutes a futile call. Therefore, you are instructed to distribute surface water flows of the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate source for the remainder of the 2021 irrigation season, unless it is subsequently determined that delivery of the senior water rights at the Moore Diversion is no longer futile.

Id. at 2 (emphasis added).

G. IDWR's 2022 Futile Call Determination, Curtailment Of Rights Below The Darlington Sinks, And Rescission Of The Same Due To Introduction Of Storage Water To The River Diversion

47. On August 15, 2022, Watermaster Marcroft sent an email to IDWR employees Tim Luke and Rob Whitney, wherein he requested that IDWR make a finding of futile call:

> I would like to request that IDWR, please make a futile call for the delivery of water to the Moore Diversion based on the lack of beneficial use of the decreed water. Currently WD34 is attempting to deliver the 8-10-1883's to the Moore Canal starting on 8-12-2022. I called Dave Hokeman and told him that there was no water making it to the Moore Diversion. so we agreed to curtail all of the 1884 decrees in attempt to dilver the 8-10-1883 decree to the Moore Diverson. All of the 1884 decrees where turned off by 11:30 that day.There is no storage waterbeing delivered to any canal. as of this mourning there is no water making it to the Moore Diversion.This makes the river shrink 100%. if the futile call is determined the last point of delivery of water on the Big Lost River would be be moved up to the Beck Canal Heading which would allow beneficial use again. I have been in contact with Vernon Roche Chairman of advisory borad and 5 of the 9 members support this. I also talked to the chairman of Big Lost River Irrigation Distric and they approve WD"34 request.

Bromley Dec., Ex. 2 at 3.

48. On August 15, 2022, Mr. Luke agreed with a determination of futile call and instructed Watermaster Marcroft to "deliver water to more junior priority rights on the river between Mackey Reservoir and the Beck Ditch." *Id*. at 1.

49. Mr. Luke further stated: "Please note that this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season. . . . . <u>This guidance is consistent with last year's futile call approval</u> . . . ." *Id*. (emphasis added).

50. On August 18-19, 2022, and inconsistent with the prior year, Jason Anderson, Moore Canal water user, communicated with Mr. Luke regarding the determination of futile call, and particularly the Moss Water Rights and delivery of water to the River Diversion. *Id., Ex. 3* at 1-6.

51. Sometime on or before September 2, 2022, IDWR reversed its finding of futile call, as explained through an email from David Hoekema to Mr. Luke and Rob Whitney, with copies to IDWR employees Matthew Anders and Director Mathew Weaver:

> I had a phone conversation with Randy Pehrson this morning. He is very upset that Dennis Moss is able to call for storage water and receive decree (1883 natural flow) at the same time. After the futile call in mid-August, it was determine[d] that decree water in the river was inadequate to carry water to Moss. . . . . His argument is that without storage water deliveries to Moss, it would be impossible to deliver the decree [natural flow] water to Moss.

Id., Ex. 4 at 1 (emphasis added).

52. According to Mr. Hoekema: "When Moss runs out of storage, though I think a futile call is very appropriate . . . ." *Id*. at 2 (emphasis added).

53. On September 2, 2022, Mr. Luke responded to Mr. Hoekema, stating: "I agree with your explanation and perspective. We should probably meet today to discuss this . . . . Rob [Whitney] was going to call Preston [Marcroft] to get an update. I (and maybe Rob) have a meeting at 10 and Mat W[eaver] is over at Gov's office from 10 to 11 approx." *Id*. at 1.

54. Late in the day on September 2, 2022, Mr. Whitney sent an email to Watermaster Marcroft informing him that the August 15, 2022 futile call decision of Mr. Luke had been rescinded, due to Mr. Whitney's belief that Moss had sufficient storage water to carry the Moss Water Rights to the River Diversion:

> Randy Pehrson contacted David Hoekema with concerns about the futile call, and delivering both storage and decreed water to Dennis Moss. Tim and I met with David to discuss Randy's concerns and current water supply conditions on the Big Lost River. On August 15, 2022, IDWR conditionally supported a futile call determination on the Big Lost River at your request. This determination recognized a break in the river immediately below the Beck diversion but noted that *"... this determination does not prevent users on the Moore Canal or other lower valley ditches to call for and receive delivery of storage and decreed rights during the remainder of this irrigation season."* After the August 15, 2022 determination, IDWR was notified that delivery of water right 34-184 (Moss river pump) was affected by breaking the river at the Beck. Because the Moss water right has a 6-1-1883 priority date and an authorized point of diversion below the Beck, you were instructed resume delivery to fill the Moss water right. Currently, delivery to Moss is not futile because he has sufficient storage water to help carry the decreed right. You have reported this afternoon that about 600 inches (12cfs) of water is passing the Moss diversion but there are no calls for delivery below Moss. Without sufficient storage to carry decrees to the Moore diversion, the futile call

> determination below Moss continues to be justified. It appears appropriate to deliver additional water upstream of Moss by adjusting the decree to deliver more 1884 rights, while maintaining delivery to Moss. Your suggestion to adjust the decree date to 8-31-1884 may be a reasonable place to start, but IDWR will defer to your local knowledge of what the demand might be if a certain decree date is set. As we discussed, please stay in contact with Dennis Moss as you deliver additional decrees. If the demand under a new decree date results in a shortage of water to satisfy Moss, the date should be adjusted accordingly. Please reach out if you have any questions.

Marcroft Dec., Ex. 1 at 1-2 (italics in original) (emphasis added).

55. Watermaster Marcroft disagreed with the decision of IDWR to allow storage water to be used "as carriage water to push upstream, curtailed natural flow water rights through the Darlington Sinks when the Big Lost River is broken at that location . . . . This practice results in upstream, natural flow water rights being curtailed when they have not been historically curtailed." *Marcroft Dec.* at 3.

56. The storage water that was used to carry the Moss Water Rights to the River Diversion was made up of BLRID interests held by Moss and Moore Canal. *B. Pehrson Dec.* at 4.

57. Because the River Diversion is not listed in the point of diversion element for the BLRID Storage Rights, a transfer must be filed with IDWR, consistent with I.C. § 42-222(1), to add the River Diversion. *Tuthill Dec.* at 6.

IV. ARGUMENT

Storage Water Cannot Be Diverted Or Rediverted At The Moss River Diversion Because The BLRID Storage Rights Do Not Authorized Its Use In The Point Of Diversion Element

In Idaho, water can only be diverted with a valid water right. I.C. § 42-201(2). The BLRID Storage Rights were partially decreed in the SRBA, consistent with Chapter 14, Title 42, Idaho Code, and have not been subsequently modified. "A decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated

system. I.C. § 42-1420(1)." *A&B Irr. Dist. v. Spackman*, 153 Idaho 500, 515, 284 P.3d 225, 240 (2012).

Here, the BLRID Storage Rights authorize water to be stored for subsequent use by its patrons for irrigation. "Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs." *A&B Irr. Dist. v. State*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014). "A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam." *Id*. "Water diverted and stored pursuant to a storage water right need not be put to the end use immediately, but may be stored for a period of time prior to the end use . . . ." *Id*. The "end use" for a storge right is defined by the purpose of use element. *Id*. In the case of BLRID, the end use for its Storage Rights is "irrigation from storage." *Tuthill Dec., Ex. 6*.

The Court has specifically held that storage water may only be used pursuant to a water right decree. *Sylte* at 245, 443 P.3d at 259. Water rights are "defined by elements." *City of Blackfoot v. Spackman*, 162 Idaho 302, 306-07, 396 P.3d 1184, 1188-89 (2017). All elements of a storage right must be given meaning and are construed against the holder of the right, including the omission of an element, such as a remark authorizing refill. *A&B* at 390, 336 P.3d at 797; *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 147-48, 408 P.3d 899, 902-03 (2018); *United States v. Black Canyon Irr. Dist*., 163 Idaho 54, 55-56, 408 P.3d 52, 57-58 (2017).

As explained by the Hearing Officer, it is the "point of diversion" element that is at issue herein. The "point of diversion" element is defined by I.C. § 42-1411(2)(e) as: "The legal description of the point(s) of diversion . . . ." *City of Pocatello v. Idaho*, 152 Idaho 830, 839, 275 P.3d 845, 854 (2012) (describing "point of diversion" as an element of a water right). Elements in a water right may be further defined through "conditions" and "remarks" that the Director

deems necessary for "clarification of any element of a right, or for administration of the right . . . ." I.C. §§ 42-1411(2)(i) and 42-1411(2)(j). Here, the point of diversion element for the BLRID Storage Rights is defined both by legal description and through specific reference to Mackey Dam – where water is diverted – and to certain locations on the Big Lost River – where water is rediverted:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Tuthill Dec., Ex. 6.[3]

As explained above, it is undisputed that BLRID intentionally claimed its Storage Rights by legal description and canal/ditch name, which were then recommended by the Department to the SRBA for partial decree, with the point of diversion element expressly limiting where water may be diverted (Mackey Dam) and then rediverted (certain canals and ditches). *Tuthill Dec., Exs. 7 & 8*. This was not by accident, as BLRID's claims in the SRBA were based on the prior

[3] The point of diversion element for the BLRID Storage Rights should be contrasted with the storage rights of the United States in the Upper Snake, Boise, and Payette river systems. For example, the United States' storage water rights in Palisades (water right no. 1-2068), American Falls (water right no. 1-2064), Lucky Peak (water right no. 63-3618), and Cascade (water right no. 65-2927A) reservoirs list the dam as the point of diversion and then do not list points of rediversion, thereby allowing storage water in those federal projects to be used anywhere within the place of use element. For purposes of convenience, the water rights for the above-cited federal reservoirs are attached hereto as Exhibits 2, 3, 4, and 5, respectively. The Hearing Officer may take judicial notice of these storage rights.

decree in *Utah Construction Co. v. Abbott* (1923). *Tuthill Dec. Ex. 7*; *see also Nelson* at 13, 951 P.2d at 944 ("This area was subject to an earlier decree in the case of *Utah Construction Co. v. Abbott,* Equity No. 222 (D.E. 1923) (U.C. Decree).").[4] Consistent with the history of how the irrigation system in the Big Lost River Basin was constructed, the Director's recommendation to the SRBA district court expressly stated that if storage water was used inconsistently with the recommendation, it would result in "injury to appropriators of water downstream from the point of rediversion." *Tuthill Dec., Ex. 8*. The Director's recommendation was in-line with the Court's prior decisions concerning losses in the Big Lost River, *Nelson* at 158, 219 P.3d at 805 (discussing loss of storage water in the Big Lost River due to "gravel deposits and porous soils through which the river flows"), *Boyer* at 161-62, 248 P.2d at 545-46 (discussing loss in the Big Lost River in the region of the Darlington Sinks and injury to water right holders as a result of the unauthorized transfer of water), and overall consequences associated with changes in return flow when the diversion and use of water is unauthorized, *Colthorp v. Mountain Home Irr. Dist*., 66 Idaho 173, 176-77, 157 P.2d 1005, 1006 (1945).

Due to these facts, there is no ambiguity associated with the point of diversion element in the BLRID Storage Rights and the plain language controls: "[T]his Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words." *City of*

[4] Unlike the federal dams on the Upper Snake and Boise rivers, which were built pursuant to the Reclamation Act, with spaceholders whose rights are defined by federal contract and law, *United States v. State*, 135 Idaho 655, 662-63, 23 P.3d 117, 124-25 (2001), *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 109-10, 157 P.3d 600, 603-04 (2007), *A&B Irr. Dist. v. State*, 157 Idaho 385, 388, 336 P.3d 792, 795 (2014), Mackey Dam and Reservoir were built by the Utah Construction Company pursuant to the Carey Act, *In re: Application of Boyer*, 73 Idaho 152, 160, 248 P.2d 540, 544-45 (1952). In 1936, BLRID was organized to purchase the assets of the Utah Construction Company. *Boyer* at 160, 248 P.2d at 545. As explained by the Court, the legal basis upon which irrigation projects were built has meaning: "[T]he origin and purpose of Carey Act companies . . . have been generally recognized by the statutes and by the courts as forming a distinct class of water corporations. . . . . Once the irrigation system was completed and the construction company had sold all (or most) of the stock in the operating company, the construction company would convey all its interest in the irrigation system and water rights to the operating company." *Eagle Creek Irr. Co. v. A.C. & C.E. Invs., Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (internal citations omitted) (emphasis added).

Blackfoot v. Spackman, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (emphasis added). "Like a contract, this Court will read the decree as a whole and will give meaning to all of its terms to the extent possible." *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019) (emphasis added). Thus, because the River Diversion is not listed in the point of diversion element, storage water cannot be rediverted at that location.

This outcome is consistent with the post-*Final Unified Decree* brightline rule that has been established by the Supreme Court, wherein it has been consistently held that if a water right does not plainly authorize the use of water at a particular location, such diversion is unlawful. The Court first addressed this issue in *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 367 P.3d 193 (2016). There, Rangen argued it was entitled to divert water from what was known as the "Bridge Diversion." The Bridge Diversion was located downstream from what was known as the "Martin-Curren Tunnell," with the Martin-Curren Tunnell described in the point of diversion element in Rangen's SRBA partial decrees by legal description. According to the Court: "Because the Bridge Diversion lies outside the specified point of diversion in its partial decrees, the water rights at issue here do not entitle Rangen to divert water via the Bridge Diversion." *Id*. at 807, 367 P.3d at 202.[5]

The Court recently reaffirmed its brightline rule in *Whittaker v. Idaho Dept. of Water Res.*, 173 Idaho 913, 551 P.3d 729 (2024). There, Whittaker had separate SRBA partial decrees

[5] The Court recognized that because Rangen was not legally authorized to divert water at the Bridge Diversion, Rangen's overall water supply was reduced by 37 percent. *Rangen* at 810, 367 P.3d at 205. Even though the outcome in Rangen was harsh, the Court had previously recognized that the "prior appropriation doctrine . . . [can] . . . become even more difficult, and harsh, in [its] application in times of drought." *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). This case is not, as BLRID has argued, about early season use of storage, when the watermaster is authorized to "use storage water to assist the delivery of natural flow water rights at the beginning of the irrigation season" pursuant to rotation credit. IDAPA 37.03.12.040.02.d.iii. Rather, the factual underpinnings of this case occur during the hot and dry summer months, when water is scarce, making the outcomes particularly acute to the Pehrsons.

that authorized him to divert water from Stroud Creek at a creek-wide diversion and a downstream source known as West Springs, pursuant to water right no. 74-157. The record established that Whittaker was diverting Stroud Creek water downstream from the creek-wide diversion on Stroud Creek at a location known as "West Springs Ditch." According to the Court: "Whittaker concedes that water right 74-157 does not list the West Springs Ditch as a diversion point for Stroud Creek and only authorizes a diversion of the West Springs." *Id*. at 250, 551 P.3d at 741. Accordingly, the Court held that even though Whittaker had an upstream point of diversion, his subsequent, downstream diversion of Stroud Creek at West Springs Ditch was unlawful: "Thus, Whittaker's use of the West Springs Ditch as a point of diversion from Stroud Creek was disallowed under the Final Unified Decree because none of his water rights list it as an authorized point of diversion." *Id*. at 251, 551 P.3d at 742.[6]

Based on the above, the only lawful way for storage water to be taken at the River Diversion is by altering the BLRID Storage Rights through a transfer, consistent with I.C. § 42-222(1), as articulated by the Court in *City of Blackfoot*:

> There is no question that an application for transfer is required to change the purpose or nature of use of a water right. I.C. § 42-222(1) ("Any person ... who shall desire to change the ... nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change."); *see also City of Pocatello*, 152 Idaho at 839, 275 P.3d at 854. Furthermore, it is equally clear from the plain language of the decree that recharge is not listed as an authorized use under the purpose of use element of 181C. Claiming, at this stage, that recharge is an authorized use of 181C, is nothing more than an impermissible collateral attack on the partial decree. Allowing the City "to collaterally attack this determination would severely undermine the purpose of the SRBA and create uncertainty in water rights adjudicated in that process." *Idaho Ground Water Assoc. v. Idaho Dep't of Water Res.*, 160 Idaho 119, 128, 369 P.3d

[6] Similar to *Rangen*, the Court in *Whittaker* recognized there could be perceived unfairness in the outcome to a particular party, however, its decision was guided by the finality of the SRBA: "Our decision today does nothing more than enforce the finality provision of the SRBA Final Unified Decree and apply existing water law concerning the definition of a diversion . . . . We have simply decided the issues presented in this appeal and there is nothing untoward or unfair about doing so." *Whittaker* at 743. "While a decision in the McConnells' favor may seem inequitable to Whittaker, and vice versa, it is the finality of the SRBA that guides our decision today." *Id*. at 742.

> 897, 906 (2016). As we recently stated in *Rangen, Inc*., "[a]ny interpretation of [the] partial decree [ ] that is inconsistent with the [ ] plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself." 159 Idaho at 806, 367 P.3d at 201. Here, no such request was made.

City of Blackfoot at 308, 396 P.3d at 1190 (emphasis added); *see also United States v. Black Canyon Irr. Dist*., 163 Idaho 54, 64, 408 P.3d 52, 62 (2017) ("Finality is for good reason, especially in water law; otherwise, the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures. See Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 Idaho L. Rev. 53, 56 (2016).").[7]

If storage water is allowed to be taken at the River Diversion, without securing a transfer, it will:

> (1) circumvent the notice requirements to third parties of the proposed change and the opportunity for protest;
>
> (2) obviate the recommendation of the watermaster as to his opinions; and
>
> (3) eliminate the Director's responsibility to determine injury and enlargement, among other mandatory factors.

Barron v. Idaho Dept. of Water Res., 135 Idaho 414, 417, 18 P.3d 219, 222 (2001) (discussing I.C. § 42-222(1) factors).

As evidenced in the 2021 and 2022 orders and correspondence from IDWR to the Watermaster that are described above, *Order* at 4 ("There can be no doubt that futile call

[7] Like Mackey Dam and Reservoir, Magic Dam and Reservoir, owned by the Big Wood Canal Company ("BWCC") in Basin 37, were also constructed pursuant to the Carey Act. *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 392, 288 P. 522, __ (1929). The Point of Diversion element for BWCC's storage rights in Magic Reservoir are similar to that of BLRID, with points of diversion and rediversion. *Compare* Water Right No. 34-12 (BLRID) *with* Water Right No. 37-867 (BWCC). For purposes of convenience, water right no. 37-867 is attached hereto as Exhibit 6. The Hearing Officer may take judicial notice of BWCC's storage rights and the fact that, after issuance of its SRBA partial decrees, BWCC filed for and was granted a transfer by IDWR to add a point of rediversion to the point of diversion element in its storage rights for a pump on the Little Wood River for one of its patrons. *Transfer No. 78703*. After issuance of its SRBA partial decrees, but before issuance of the *Final Unified Decree*, BLRID similarly filed an application for transfer to add two points of rediversion to its Storage Rights, yet later withdrew the application because those points of rediversion were being addressed in the adjudication. *Tuthill Dec., Ex. 10*. Thus, because the Moss River Diversion post-dates the SRBA's *Final Unified Decree*, and consistent with *City of Blackfoot*, the only avenue to add the River Diversion to the BLRID Storage Rights is through a transfer.

determinations are agency actions when Department staff rely on the authority of the Director to make and rescind such determinations."), it is not an academic exercise for the Pehrsons to ask for the requirements of I.C. § 42-222(1) to be followed. Nor is it improper for Pehrsons to seek a ruling, today, before they are harmed again. *Elgee v. Retirement Bd. of the Public Employee Ret. System of Idaho*, 169 Idaho 34, 47, 490 P.3d 1142, 1155 (2021) ("Elgee was not seeking to prove a present claim, but to have the PERSI Board construe the statutes and rules it administers to determine his rights should a claim arise. This is expressly permissible under IDAPA.") (emphasis added). Indeed, without securing a transfer, storage water was used by Moss at the River Diversion in 2022 to defeat futile call when the Big Lost River was broken at the Darlington Sinks, thereby resulting in the collateral attack of the BLRID Storage Rights and injuring the Pehrson Water Rights through curtailment. *See South Valley Ground Water Dist. v. Idaho Dept. of Water Res*., 548 P.3d 734, 766 (Idaho 2024) (discussing due process requirements before water rights are curtailed). As described in the declarations of the watermasters and the Pehrsons that were filed with the Hearing Officer on February 7, 2025, the curtailment was unprecedented, warranting the protections of due process through the filing of a transfer. *B. Pehrson Dec.* at 5; *L. Pehrson Dec.* at 4; *R. Pehrson Dec.* at 4; *L. Yockey Dec.* at 5; *P. Marcroft Dec.* at 4.

/ / /

/ / /

V. CONCLUSION

Based on the foregoing, Pehrsons request the Hearing Officer grant their *Motion for Summary Judgment* by holding that the BLRID Storage Rights, as they are presently constituted and absent an approved transfer, cannot be diverted by Moss at the River Diversion.

DATED this 23rd day of April, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, ID 83720
file@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov

Roger S. Burdick
Roburd47@gmail.com

Skyler C. Johns
OLSEN TAGGART PLLC
PO Box 3005
Idaho Falls, ID 83403
sjohns@olsentaggert.com

Norman Semanko
Garrett Kitamura
PARSONS BEHLE & LATIMER
800 W. Main St., Ste. 1300
Boise, ID 83702
nsemanko@parsonsbehle.com
gkitamura@parsonsbehle.com

Hyrum Erickson
Michelle Mortimer
RIGBY, ANDRUS & RIGBY LAW
25 N. 2nd E.
Rexburg, ID 83440
herickson@rex-law.com
mmortimer@rex-law.com

/s/ Chris M. Bromley
Chris M. Bromley

Exhibit 1

(BLRID Map)

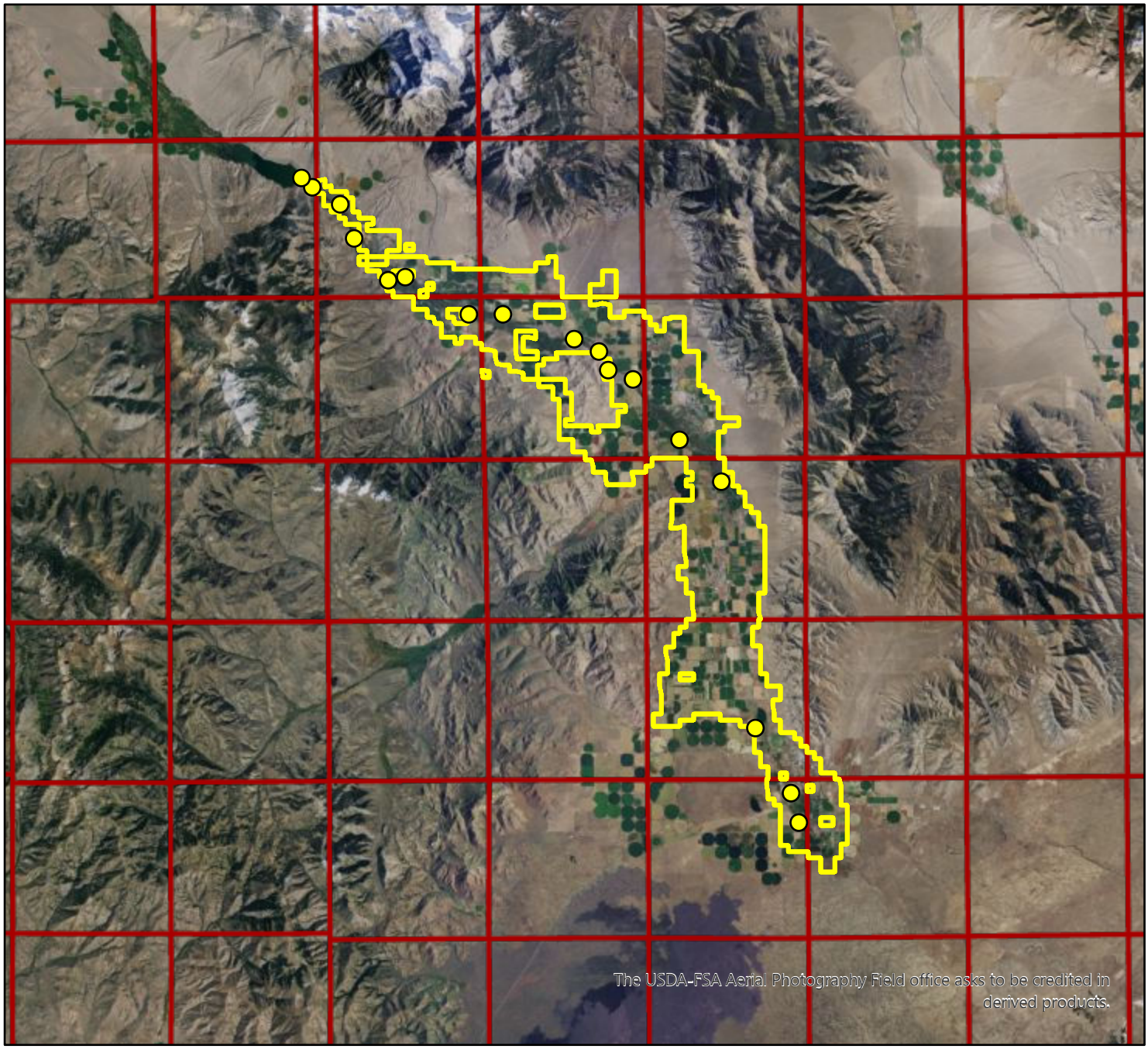
State of Idaho
Department of Water Resources

Water Right

34-12

IRRIGATION FROM STORAGE

The map depicts the place of use for the water use listed above and point(s) of diversion of this right as currently derived from interpretations of the paper records and is used solely for illustrative purposes. Discrepancies between the computer representation and the permanent document file will be resolved in favor of the actual water right documents in the water right file.





0 2 4 8 12 16
Miles

Legend
Townships
Place of Use Boundary
Point of Diversion

N

Date created: 4/22/2025

Exhibit 2

Water Right No. 1-2068
(Palisades Reservoir)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2ND **AMENDED**

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 01-02068

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
FEB 2 8 2020
By _____ Clerk
Deputy Clerk

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY: 940400.00 AFY

Total reservoir active capacity is 1,200,000 acre feet when filled to elevation 5620 and measured at the upstream face of the dam.
Water right nos. 01-2068, 01-10043, 01-10621A and 01-10621B are limited to the total combined annual diversion volume necessary to allocate a total of 1,200,000 acre-feet of irrigation storage water per year to the consumers or users of the irrigation storage water.

RECEIVED
MAR 0 2 2020
DEPARTMENT OF
WATER RESOURCES

PRIORITY DATE: 07/28/1939

The United States, after consultation with the Watermaster and the Water District 1 Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades Dam powerplant and may store such water in American Falls Reservoir. The release of such water will be confined, however, when it appears to the Secretary that American Falls, Palisades, and Jackson Lake reservoirs will fail to fill, to not more than 1,000 cfs for minimum firm power production and that amount which can be stored in American Falls Reservoir; and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto. "Upper valley entities" shall mean those reservoir spaceholders diverting from the Snake River and its tributaries above American Falls Dam.

POINT OF DIVERSION: T01S R45E S17 SENE Within Bonneville County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	940400.00 AFY
Irrigation from Storage	03-15 TO 11-15	940400.00 AFY
Power Storage	01-01 TO 12-31	940400.00 AFY
Power from Storage	01-01 TO 12-31	940400.00 AFY

PLACE OF USE:

Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jefferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton, and Elmore.
Place of use for storage is Palisades Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources), the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will

PLACE OF USE (continued)

maximize the storage of water upstream of Milner Dam.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address section of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.
2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in the reservoir system shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors. The Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute the stored water in accordance with allocation instructions from the United States Bureau of Reclamation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott, which store water for distribution pursuant to water right nos. 1-219, 1-2064, 1-2068, 1-4055, 1-10042, 1-10043, 1-10044, 1-10045, 1-10620, 1-10621A, 1-10621B, 1-10622, 1-10623, 21-2156, 21-4155, 21-10560, 21-13161, 21-13194, 25-7004, 25-14413A and 25-14413B.
3. This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
4. The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District #2.
5. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended, including but not limited to the contractual storage exchanges, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties.
6. September 15th shall begin the annual period for water right accounting in the Upper Snake River Basin upstream of Milner Dam. The September 15th beginning date for this annual period is known as the "reset date" for reservoir volumes. The "reset date" allows previously satisfied reservoir water right volumes to begin filling again for the next annual storage volume period. The annual storage volume period will extend from September 15th to the following September 14th. Consistent with Section 8.3 of the 1990 Fort Hall Indian Water Rights Agreement, nothing in this provision is intended to impact the rights described and administered pursuant to that Section.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS

OTHER PROVISIONS (continued)

NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Exhibit 3

Water Right No. 1-2064 (American Falls Reservoir)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2ND AMENDED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 01-02064

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
FEB 2 8 2020
By _____ Clerk
Deputy Clerk

RECEIVED
MAR 0 2 2020
DEPARTMENT OF WATER RESOURCES

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY: 1540600.00 AFY

The American Falls Reservoir was originally licensed for a total quantity of 1,700,000 acre-feet. For purposes of administration, however, water right nos. 1-2064 and 1-10042 shall be limited to a total combined quantity equal to the active capacity of the water volume storable in American Falls Reservoir when filled to elevation 4354.5 and measured at the upstream face of the dam. Water right nos. 01-2064, 01-10042 and 01-10620 are limited to the total combined annual diversion volume necessary to allocate a total of 1,655,000 acre-feet of irrigation storage water per year to the consumers or users of the irrigation storage water.

PRIORITY DATE: 03/30/1921

POINT OF DIVERSION: T07S R31E S30 SWSE Within Power County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	1495600.00 AFY
Irrigation from Storage	03-15 TO 11-15	1495600.00 AFY
Power Storage	01-01 TO 12-31	45000.00 AFY
Power from Storage	01-01 TO 12-31	45000.00 AFY

PLACE OF USE:

Place of use for storage is American Falls Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources), the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.
Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jeffferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton and Elmore.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address section of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for

OTHER PROVISIONS (continued)

the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations. The Idaho Power Company uses the water decreed for power purposes herein to generate hydropower.

2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in the reservoir system shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors. The Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute the stored water in accordance with allocation instructions from the United States Bureau of Reclamation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott, which store water for distribution pursuant to water right nos. 1-219, 1-2064, 1-2068, 1-4055, 1-10042, 1-10043, 1-10044, 1-10045, 1-10620, 1-10621A, 1-10621B, 1-10622, 1-10623, 21-2156, 21-4155, 21-10560, 21-13161, 21-13194, 25-7004, 25-14413A and 25-14413B.

3. This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

4. The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District #2.

5. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended, including but not limited to the contractual storage exchanges, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties.

6. September 15th shall begin the annual period for water right accounting in the Upper Snake River Basin upstream of Milner Dam. The September 15th beginning date for this annual period is known as the "reset date" for reservoir volumes. The "reset date" allows previously satisfied reservoir water right volumes to begin filling again for the next annual storage volume period. The annual storage volume period will extend from September 15th to the following September 14th. Consistent with Section 8.3 of the 1990 Fort Hall Indian Water Rights Agreement, nothing in this provision is intended to impact the rights described and administered pursuant to that Section.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Exhibit 4

Water Right No. 63-3618 (Lucky Peak Reservoir)

RECEIVED
JUL 22 2019
DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 63-03618

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JUL 19 2019
By _____ Clerk
_____ Deputy Clerk

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE: BOISE RIVER TRIBUTARY: SNAKE RIVER

QUANTITY: 293050.00 AFY

Maximum Volume Annually Diverted to Storage and Release from Storage: 293,050.0 AF.
The reservoir storage capacity is 293,050 acre feet when filled to elevation 3055.0 and measured at the upstream face of the dam.
Lucky Peak Reservoir has 13,950 acre feet of capacity for flood control purposes in addition to the volume of water authorized for storage under this right.
Water right nos. 63-303, 63-3613, 63-3614, 63-3618, 63-33734A, and 63-33734B are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

PRIORITY DATE: 04/12/1963

POINT OF DIVERSION: T02N R03E S11 LOT 7 (SENE) Within Ada County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	111950.00 AFY
Irrigation from Storage	03-01 TO 11-15	111950.00 AFY
Recreation Storage	01-01 TO 12-31	28800.00 AFY
Streamflow Maintenance Storage	01-01 TO 12-31	152300.00 AFY
Steamflow Maintenance from Sto	01-01 TO 12-31	152300.00 AFY

PLACE OF USE:

Irrigation from Storage

T02N R03E S11 LOT 4 (NENE)
S12 NWNW
R04E S04 SWSW
S05 LOT 8 (SWNE)
NESE
SWSE
S06 SWNE
LOT 8 (SWSW)
LOT 6 (NESE)
LOT 11 (SESE)
S07 NWNE
LOT 1 (NENW)
NESW
NWSE

T03N R04E S05 SENE
S11 SENE
S12 SWNW
S22 LOT 3 (NENW)
SENW

Within Ada County
NESE
SWSW
LOT 6 (SWNW)
NWSE
SESE
NESW
LOT 9 (SESW)
NWSE
SWNE
SENW
LOT 4 (NWSW)

Within Boise County
LOT 1 (NESE)
LOT 1 (NWSW)

Within Elmore County
SWNW

PLACE OF USE (continued)

Within Ada County
S32 LOT 1 (NWNE) SWNE
LOT 5 (NWSE) LOT 10 (SWSE)

Recreation Storage — Within Ada County
Same as Irrigation Storage

Streamflow Maintenance Storage — Within Ada County
Same as Irrigation Storage

Irrigation Storage — Within Ada County
Lucky Peak Reservoir

Streamflow Maintenance from Storate — Within Ada County
Wtinin the Channel of the Boise River from Lucky Peak Dam downstream to the confluence with the Snake River.

The place of use is within the Boise Federal Reclamation Project within Ada, Canyon, Payette, and Gem Counties, Idahp; Malheur County, Oregon; and the above-listed tracks in Ada, Boise, and Elmore Counties, Idaho.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Recreation Storage (inactive storage) shall not be released from storage for a beneficial use.

The name of the United States of America Acting Through the Bureau of Reclamation appears in the Name and Address Section of this Partial Decree. However, as a matter of Idaho constitutional and statutory law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

The storage rights in Lucky Peak Reservoir are subject to the flood evacuation provisions which supplement irrigation storage contracts held in Anderson Ranch and Arrowrock Reservoirs as defined by supplemental contracts with the Bureau of Reclamation. This acknowledgement relieves the right holder from seeking a temporary change in purpose of use to meet these obligations. The Bureau of Reclamation and Idaho Department of Fish and Game shall provide joint written instructions to the Department, for conveyance to the watermaster, regarding release of the Lucky Peak streamflow maintenance storage water.

The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided, however, the annual time period will begin (1) after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on November 1, whichever is earlier.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE

OTHER PROVISIONS (continued)

ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Exhibit 5

Water Right No. 65-2927A (Cascade Reservoir)

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2003 MAR 31 PM 4 28

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 65-02927A

NAME AND ADDRESS:
REGIONAL DIRECTOR, PN REGION
REGIONAL DIRECTOR, PN REGION
BUREAU OF RECLAMATION
1150 N CURTIS RD
BOISE, ID 83706-1234

A BENEFICIAL USE OF A PORTION OF THE WATER REPRESENTED HEREBY IS MADE BY THE LANDOWNERS WITHIN BLACK CANYON IRRIGATION DISTRICT, EMMETT IRRIGAITON DISTRICT, NOBLE DITCH COMPANY, FARMERS COOPERATIVE IRRIGATION COMPANY, THE LOWER PAYETTE DITCH COMPANY, AND BY INDIVIDUALS WHO HAVE ENTERED INTO CONTRACT WITH THE UNITED STATES FOR IRRIGATION WATER FROM THIS STORAGE RESERVOIR. SUCH BENEFICIAL USE IS SUBJECT TO AND PURSUANT TO CONTRACT WITH THE UNITED STATES (AS MAY HEREAFTER BE SUPPLEMENTED OR AMENDED) FOR IRRIGATION AND OTHER PERMITTED PURPOSES AS AUTHORIZED BY LAW AND CONTRACTS.

SOURCE: PAYETTE RIVER, NORTH FORK TRIBUTARY: PAYETTE RIVER

QUANTITY: 697500.00 AFY

TOTAL RESERVOIR CAPACITY IS 700,000 ACRE FEET WHEN FILLED TO ELEVATION 4828 FEET AND MEASURED AT THE UPSTREAM FACE OF THE DAM. THIS TOTAL CAPACITY IS EQUAL TO THE COMBINED QUANTITIES OF WATER RIGHTS 65-02927A AND 65-2927B.

PRIORITY DATE: 12/24/1937

POINT OF DIVERSION: T14N R03E S26 LOT 5 (NENE) Within Valley County
LOT 1 (NENE)

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	697500.00 AFY
Irrigation from Storage	01-01 TO 12-31	697500.00 AFY
Power Storage	01-01 TO 12-31	697500.00 AFY
Power from Storage	01-01 TO 12-31	697500.00 AFY

PLACE OF USE:

PLACE OF USE IS WITHIN VALLEY, BOISE, GEM, PAYETTE, WASHINGTON, CANYON AND ADA COUNTIES.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication

Exhibit 6

Water Right No. 37-867
(Magic Reservoir)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 37-00867

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV 29 2012
By _____ Clerk
_____ Deputy Clerk

NAME AND ADDRESS: BIG WOOD CANAL COMPANY
C/O LYNN HARMON, MANAGER
409 N APPLE ST
SHOSHONE, ID 83352

SOURCE: BIG WOOD RIVER TRIBUTARY: MALAD RIVER

QUANTITY: 3000.00 CFS
172000.00 AFY

Rights 37-867 and 37-870 are limited to the combined storage of 172,000 acre feet in Magic Reservoir.
Right numbers 37-867, 73-870, 37-20733 and 37-895 are limited to a total storage of 191,500 acre feet.

PRIORITY DATE: 11/16/1905

POINT OF DIVERSION:

T02S R18E S18	NENE	Within Blaine County	
S30	SWSENE		
T03S R18E S09	SENESE	Within Lincoln County	
T04S R18E S15	SWNWSE		
R19E S25	SENWSE	(Injection)	
	NESWSE	(Rediversion)	
T05S R14E S33	NWNESE	(Injection)	Within Gooding County
S35	NESENE	(Rediversion)	
R15E S12	NESESW	Within Lincoln County	
R16E S29	SWSESW	(Rediversion)	
R19E S05	SWNWSE	(Rediversion)	
T06S R14E S30	SENESW	(Rediversion)	Within Gooding County
	NESESW	(Rediversion)	

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	172000.00 AFY
Irrigation from Storage	04-01 TO 10-31	172000.00 AFY
Irrigation	04-01 TO 10-31	3000.00 CFS

PLACE OF USE:

101903 ACRES TOTAL

Place of Use is within Blaine County, Gooding County and Lincoln County, and is on land irrigated by shareholders of the Big Wood Canal Company.
Right Nos. 37-867, 37-870, 37-13116, 37-20733 and 37-895 are limited to the irrigation of 74000 acres within the place of use described herein in a single irrigation season.
The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
Place of use does not include federal public lands unless authorized in writing by the managing federal agency.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Norman M. Semanko, ISB #4761
Garrett M. Kitamura, ISB #11502
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Attorneys for Big Lost River Irrigation District

RECEIVED
Apr 23, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

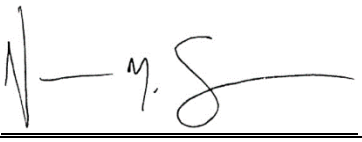
IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	MOTION FOR SUMMARY JUDGMENT

Big Lost River Irrigation District, by and through counsel of record, Parsons Behle & Latimer, hereby moves this Court for summary judgment pursuant to IDAPA 37.01.01.220.03 and Idaho Rules of Civil Procedure 56 against Byron Pehrson, Loy Pehrson, and Randy Pehrson's Amended Petition for Declaratory Ruling for Water Master Instructions.

This Motion is supported by the accompanying Memorandum in Support of Motion for Summary Judgment, Declaration of Richard Harry, Declaration of Bryce Contor, and Declaration of Payton Hampton filed contemporaneously herewith.

DATED April 23, 2025

PARSONS BEHLE & LATIMER

/s/ 

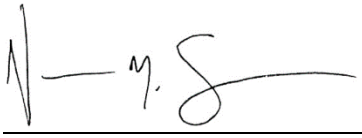
Norman Semanko
Garrett Kitamura
Payton G. Hampton
s for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

Idaho Department of Water Resources PO Box 83729 Boise, ID 83720	[x] Email file@idwr.idaho.gov garrick.baxter@idwr.idaho.gov
Chris M. Bromley Candice McHugh MCHUGH BROMLEY, PLLC PO Box 107 Boise, ID 83701 *Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson*	[x] Email cbromley@mchughbromley.com cmchugh@mchughbromley.com
Skyler C. Johns OLSEN TAGGART PLLC PO Box 3005 Idaho Falls, ID 83403	[x] Email sjohns@olsentaggart.com
Hyrum Erickson Michelle Mortimer RIGBY, ANDRUS & RIGBY LAW, PLLC	[x] Email herickson@rex-law.com mmortimer@rex-law.com
Robert L. Harris HOLDEN KIDWELL HAHN & CRAPO LLC PO Box 50130 Idaho Falls, ID 83405	[x] Email rharris@holdenlegal.com
Roger S. Burdick *Hearing Officer*	[x] Email roburd47@gmail.com

DATED April 23, 2025



Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura

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Attorneys for Big Lost River Irrigation District

RECEIVED
Apr 23, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Big Lost River Irrigation District ("BLRID" and the "District"), by and through counsel of record, Parsons Behle & Latimer, submits the following Memorandum in Support of Motion for Summary Judgment pursuant to IDAPA 37.01.01.220.03 and Idaho Rules of Civil Procedure 56 against Byron Pehrson, Loy Pehrson, and Randy Pehrson's (collectively the "Pehrsons") Amended Petition for Declaratory Ruling for Water Master Instructions ("Amended Petition").

INTRODUCTION

This case turns on a straightforward principle: storage water can be appropriated from a storage source and reclaimed along the natural channel down which it flows, without any requirement of a point of rediversion listed on a water right. Idaho Code §§ 42-105(1) and 42-

801 confirm that the District, as a storage water right holder and delivery entity, has full authority to release storage water from Mackay Reservoir and convey it to its patrons in compliance with the statutory provisions to account for shrink and measure the conveyed storage water. The Pehrsons' Amended Petition ignores this basic statutory framework and seeks to invent a new element of a storage water right in a way that would seriously upend BLRID's and other major decreed storage water rights across the State. Their claims have no legal support and should be dismissed.

STATEMENT OF UNDISPUTED FACTS

BLRID's Storage Water Rights Appropriated from Mackay Reservoir

1. BLRID delivers both storage and natural flow water to patrons through an integrated system of the Big Lost River and various canals, ditches, and other diversions leaving the River. *Harry Decl., ¶4.*
2. The District's storage rights are held in Mackay Reservoir and include Water Rights 34-12, 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, and 34-10935. *Harry Decl., ¶5.*
3. The Point of Diversion ("POD") for these storage rights is located at the base of Mackay Reservoir Dam, with the Big Lost River serving as a natural conveyance channel. *Harry Decl., ¶6.*
4. The legal description of the POD and points of rediversion common to BLRID's storage water rights is below:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Contor Decl., Ex. B.

5. The conditions of BLRID's storage water rights that do mention ditches, canals, or river pumps as rediversion points do not restrict delivery only to those locations. *Contor Decl., ¶34.*

BLRID's Administration and Delivery of its Storage Water to District Patrons

6. Storage water is conveyed through the River to various points as requested by District patrons, including canals and pumps. *Harry Decl., ¶6.*
7. BLRID has never been required by IDWR to file a transfer application to add or change a point of rediversion for its storage rights. *Harry Decl., ¶9.* This is simply not a practice of the IDWR. *Contor Decl., ¶27.*
8. Storage water is allocated pro-rata to the District's patrons, typically in May, with potential adjustments based on water conditions. *Harry Decl., ¶10.*
9. Storage water incurs "shrink" as it travels through the river, calculated based on real-time gage data and applied uniformly to all users. *Harry Decl., ¶¶13–15.*

10. The average shrink rate historically has been around 50%, though in 2024 the average delivery efficiency was higher, at about 60%. The shrink rate is calculated with real time data from the gages on the River showing actual carrying loss of water and varies at different times of the year. *Harry Decl., ¶16.*
11. In addition to river shrink, storage water diverted into canals also experiences lateral-specific shrink losses. *Harry Decl., ¶19.*
12. Patrons receiving water through a canal may be subject to both river and lateral shrink, which are added together for a total delivery shrink. *Harry Decl., ¶20.*
13. The District has always applied a uniform shrink policy, and its operations have never been designed to benefit one geographic area over another. *Harry Decl., ¶¶15, 21.*
14. BLRID does not treat rediversion points as part of the legal definition of its storage water rights; they are administrative tools for delivery. *Harry Decl., ¶7.*
15. BLRID has delivered storage water to multiple canals and ditches not listed as points of rediversion, including the Eastside and Island Canals. *Harry Decl., ¶27.*
16. Storage deliveries have occurred to the Eastside and Island Canals for approximately 90 years. *Harry Decl., ¶29.*
17. There are over 69,000 storage inches allocated to the Eastside Canal, over 57,000 to the Island Canal, and over 6,900 that can be delivered to either. *Harry Decl., ¶28.*
18. There are also multiple pumps and headgates used for storage delivery in or below the Darlington Sinks area in addition to the Moss Farms' River Diversion in the Amended Petition. *Harry Decl., ¶24.*

Critical Distinction Between a Storage Water Right and Natural Flow Right

19. A storage water right differs from a natural flow water right in its source and operation: the source of storage water is the reservoir and is released and conveyed through a river system, while natural flow rights divert directly from a river or spring or other natural waterway. *Contor Decl., ¶¶12–13.*

20. The POD for a natural flow right is the location where water is directly taken from a public water source, such as a river or spring, and typically corresponds to the headgate of a ditch or lateral. *Contor Decl., ¶13.*

21. The POD for a storage right, in contrast, is typically the outlet at the storage source reservoir, such as at Mackay Reservoir for BLRID's rights, because the source of the water is the storage source. Once the water leaves the damn, it has been appropriated by the District. *Contor Decl., ¶15; Harry Decl., ¶6.*

22. After release from the reservoir, storage water is often conveyed through public watercourses, such as the Big Lost River, to locations far downstream, where it may then be rediverted. This is authorized under Idaho Code § 42-105(1). *Contor Decl., ¶17.*

23. Natural flow water does not incur transport-related shrinkage because it is diverted at the location it is used, whereas storage water incurs river shrink due to losses in conveyance over distance. *Harry Decl., ¶17.*

24. The District applies a consistent shrink policy to storage water because it is charged for losses during transport—an issue that does not apply to natural flow water rights. *Harry Decl., ¶¶14–15.*

25. These differences are recognized in both IDWR policy and statute and underscore that storage water is not administered in the same way as natural flow water. *Contor Decl., ¶¶11–18.*

Points of Rediversion are not a Legal Element of a Storage Water Right, and to Treat Them as Such Would Lead to an Absurd Result

26. Idaho Code § 42-1411 identifies PODs as a statutory element of a water right but makes no mention of points of rediversion. *Contor Decl., ¶16.*

27. IDWR does not generally require identification of rediversion points for the delivery of storage water. *Contor Decl., ¶19.*

28. Water, once appropriated, may lawfully be conveyed in natural watercourses and reclaimed at a later point, as recognized by Idaho Code § 42-105(1) and § 42-801. *Contor Decl., ¶17.*

29. IDWR has not required transfer applications when clients deliver storage water to different points of rediversion. *Contor Decl., ¶27.*

30. An IDWR GIS dataset analysis shows that of 4,307 rights for "use from storage," only 237 also list rediversion points—demonstrating that most storage rights in Idaho do not specify rediversion points. *Contor Decl., ¶31.*

31. A requirement to list all rediversion points for BLRID storage rights would contradict longstanding IDWR practice and the historical use of over 4,000 "from storage" rights in Idaho. *Contor Decl., ¶¶36, 42.*

25. If such a restriction were adopted, it would render thousands of existing, decreed storage rights practically unusable and undermine the Snake River Basin Adjudication. *Contor Decl., ¶¶41–44.*

26. In one significant example, the United States Bureau of Reclamation holds Water Right 1-2064, one of the largest storage rights in the State of Idaho, authorizing up to 1,495,600 acre-feet of water stored in American Falls Reservoir for "Irrigation From Storage." *Contor Decl., ¶38.*

27. Water Right 1-2064 does not list any points of rediversion on its face or in its conditions, despite the fact that the right is used to deliver water to numerous locations far downstream from American Falls Reservoir. *Contor Decl., ¶39.*
28. The authorized places of use for Water Right 1-2064 include regions that cannot be served directly from the reservoir and instead rely on rediverting water conveyed through the Snake River. *Contor Decl., ¶39.*
29. Storage water from Water Right 1-2064 is delivered to multiple canals that are spaceholders under the right, and many of these canals are within the defined place of use. *Contor Decl., ¶40.*
30. Despite these widespread deliveries to points far down the River, there is no requirement for specific identification of the rediversion locations in the right, further confirming that Idaho law does not require points of rediversion to be specified for lawful conveyance and delivery of storage water in a public watercourse. *Contor Decl., ¶¶39–40.*

LEGAL AUTHORITY

The Idaho Rules of Civil Procedure provide that "summary judgment shall be rendered when "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. If the evidence reveals no disputed issues of material fact, what remains is a question of law, over which this Court exercises free review." *Krinitt v. Idaho Dept of Fish & Game*, 162 Idaho 425, 428–29, 398 P.3d 158, 161–62 (2017) (internal citations omitted).When an action will be tried before the court without a jury, the trial court, as the trier of fact, is entitled to arrive at the most probable inferences based upon the undisputed evidence

properly before it and grant summary judgment despite the possibility of conflicting inferences. *Bauchman-Kingston P'ship, LP v. Haroldsen*, 149 Idaho 87, 233 P.3d 18 (2008).

ARGUMENT

The Amended Petition's sole remaining claim "for declaratory relief is for the Hearing Officer to determine 'whether it is permissible to deliver BLRID storage water to a point of diversion and/or rediversion that is not included on the BLRID Storage Rights.'" The answer to this is a simple and resounding "yes." Below, first, the BLRID's storage water rights are not restricted to the listed points of rediversion because a point of rediversion is not a statutorily required element of a water right. Second, Idaho Code § 42-105(1) and § 42-801 specifically authorize the use of natural waterways to carry and deliver BLRID's storage water, independent of any conditions placed on BLRID's water rights.

I. A point of rediversion is not a legal element of a water right.

There can be no question that BLRID appropriates and takes control of water at the base of Mackay Dam, at the POD listed in its storage water rights. *Harry Decl., ¶6.* The claim then by the Pehrsons is that each and every place where the storage water is delivered from the Big Lost River must be identified as a point of rediversion in the water right. However, this cannot be the case, because nowhere in the applicable statutes are "points of rediversion" a required element of a water right, let alone a storage water right.

The Pehrsons correctly identify I.C. §§ 42-1409, 42-1411, 42-1412, 42-1413, and 42-1420 as applicable to BLRID's storage water rights as they went through the adjudication "because they define how water rights were adjudicated in the Snake River Basin Adjudication ("SRBA"), the finality of the partial decrees that were issued by the SRBA district court, and the import of the SRBA's Final Unified Decree to the water rights at issue herein." Motion to

Amend Petition, at 5. However, notable lacking from these statutes is any mention of "points of rediversion."

Idaho Code § 42-1411 governs the scope of elements that the Director of the Idaho Department of Water Resources (IDWR) must or may determine in the course of adjudicating water rights. Subsection (2) of the statute specifically enumerates the elements necessary "to define and administer the water rights acquired under state law." These elements include: the name of the claimant, the water source, quantity, priority date, legal description of the point(s) of diversion, purpose of use, season of use, place of use, any conditions, and necessary clarifying remarks. *See* Idaho Code § 42-1411(2)(a)–(j). Critically, ***nowhere in this statutory list is there any mention of "point of rediversion."*** The statute is explicit in requiring the "point(s) of diversion" in subsection (e), but it does not extend that requirement to administrative points at which water may be rediverted after lawful appropriation from the source at a point of diversion.

This statutory omission is dispositive. When interpreting a statute, the Court begins with an examination of the literal words of the statute. *Grand Canyon Dories v. Idaho State Tax Comm'n,* 124 Idaho 1, 5, 855 P.2d 462, 466 (1993); *State ex rel. Lisby v. Lisby,* 126 Idaho 776, 779, 890 P.2d 727, 730 (1995). The language of the statute is to be given its plain, obvious and rational meaning. *Lisby,* 126 Idaho at 779, 890 P.2d at 730. A statute is to be construed as a whole without separating one provision from another. Because § 42-1411(2) clearly defines what constitutes the legal elements of a water right and does not include rediversion points, no such element may be read into the law, and the statute should only be given its plain and ordinary meeting—a water right need only have a point of diversion to be valid and usable, not any points of rediversion.

A rediversion requirement as proposed in the Amended Petition would also create an absurd and unworkable burden on the IDWR and storage water users statewide. Of the more than 4,300 water rights in Idaho that authorize "use from storage," only 237 list any points of rediversion. Contor Decl., ¶31.This shows that the overwhelming majority of such rights do not include, and are not required to include, rediversion points. If the relief requested in the Amended Petition were granted, it would invalidate or jeopardize thousands of lawful storage rights, creating chaos and undermining decades of adjudication and water certainty in the state. Contor Decl., ¶¶36, 41–43. Indeed, one of the clearest examples is the U.S. Bureau of Reclamation's Water Right 1-2064—one of the largest in Idaho. That right authorizes more than 1.4 million acre-feet of storage water in American Falls Reservoir and delivers it to users far downstream through the Snake River. Contor Decl., ¶38. Despite this, the right does not list rediversion points on its face or in its conditions. Contor Decl., ¶39.The only logical conclusion is clear: the law does not require it. This is not an oversight by the SRBA court, but rather an inherent feature of how Idaho manages and administers its storage water rights.

The River Diversion is not the only place BLRID delivers storage water to spaceholders. There are existing major canals in BLRID that existed well before adjudication that would lose access to their storage deliveries if the Pehrsons are allowed to legislate a new element of a storage water right into existence. BLRID has made storage deliveries to the Eastside and Island Canals for approximately 90 years. Harry Decl., ¶29. There are over 69,000 storage inches allocated to the Eastside Canal, over 57,000 to the Island Canal, and over 6,900 that can be delivered to either. Harry Decl., ¶28. The Amended Petition is nothing more than an impermissible attempt to readjudicate BLRID's decreed storage water rights. This is not permissible. *See Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018)

("Finality in water rights is essential. Finality is for good reason, especially in water law; otherwise the approximate $94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures.") (cleaned up); *Whittaker v. Idaho Dep't of Water Res., 174 Idaho 60, 551 P.3d 729, 741 (2024)* ("This Court has consistently rejected arguments to revisit water rights adjudicated in the SRBA . . . it is the finality of the SRBA that guides our decision today.").

II. **Idaho law, Idaho Code § 42-105(1) and § 42-801, specifically allows BLRID's use of natural channels to convey already-appropriated storage water.**

Idaho law expressly authorizes how BLRID has lawfully delivered its storage water for decades. Under Idaho Code § 42-105(1), a water user "***may turn [water] into the channel of a natural waterway and mingle it with its water, and then reclaim***" it, so long as transport losses are accounted for and proper measurements taken. (emphasis added). The statute imposes no requirement that the reclamation point—which is not referred to as a "point of rediversion"—be listed in the water right. BLRID's delivery of storage water complies fully with § 42-105(1). The District measures river shrink in real time using gages and uniformly applies shrink adjustments to all patrons.[1] *Harry Decl., ¶¶13–16.* Water is allocated pro-rata and delivered at patron request using the Big Lost River as a conveyance system. *Harry Decl., ¶¶6, 10, 14.* This reflects the very system the statute envisions: flexible, measured, and equitable water delivery using natural watercourses.

[1]This policy of universal shrink was affirmed by the Idaho Supreme Court in 2009, and reflects the fair, system-wide approach BLRID must take when delivering its storage water. *See Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 165, 219 P.3d 804, 812 (2009) ("Apportioning conveyance loss by river reach would result in some water users paying a higher proportion of that cost than others. The district court did not err in ordering that the conveyance loss be apportioned under the universal shrink method so that all water users receiving the storage water bear their proportionate share of the conveyance loss.").

Similarly, Idaho Code § 42-801 confirms that stored water specifically may be conveyed through natural streams, subject to notice and watermaster supervision. The statute does not require points of rediversion to be specified in the right—only that delivery be supervised and that entitled users receive their volume. BLRID adheres to these requirements through its transparent shrink accounting and coordination with IDWR. *Harry Decl., ¶¶13–21; Contor Decl., ¶27.*

It is a fundamental principle of statutory interpretation that regulatory and adjudicatory practices must yield to statutory authority. A water right cannot be construed in a way that deprives its holder of a right expressly granted by statute. Here, Idaho Code §§ 42-105(1) and 42-801 grant water users the right to commingle and reclaim water in natural watercourses and impose no requirement to list rediversion points in the water right itself. As such, BLRID's use of the river and its numerous downstream delivery points is legally authorized by statute and cannot be limited by claims that such locations must be specified in the right. To hold otherwise would create an absurd result—requiring water users like BLRID to file repeated transfer applications every time a delivery point is changed or added, despite the fact that both statute and IDWR practice allow for administrative flexibility. *Contor Decl., ¶¶27, 31, 36.*

The IDWR has already made its position on BLRID's use of the River to convey and reclaim storage water clear. In a prior case involving storage water delivery issues, *Nelson v. Big Lost River Irrigation Dist.*, and involving then-Plaintiff Byron Pehrson (whose current counsel authored the IDWR's brief referenced below), the State of Idaho, through the Idaho Department of Water Resources ("IDWR"), clearly articulated its position regarding the District's authority to administer its storage water deliveries under I.C. § 42-801 in a brief titled IDWR Response to

Motion for Reconsideration ("IDWR Response"). *See* Hampton Decl., Ex. A. First, the IDWR explicitly acknowledges BLRID's authority to utilize Idaho Code § 42-801 to convey storage water. The IDWR Response states, "Idaho Code 42-801 authorizes the natural river channel to be used by the irrigation district for conveying water downstream to its patrons." It also states "Unlike natural flow water rights that have a specific diversion rate to be delivered under a certain priority, the storage water flowing in the river has ***already been diverted*** and is now simply being conveyed pursuant to direction of the owner of the storage water, the BLRID." (emphasis added). Second, in that brief, the IDWR also agreed with the lower court's "rationale that '[w]hen 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." This demonstrates the IDWR's recognition of BLRID's autonomy in administration of its storage water deliveries through the River channel. Further, the IDWR Response notes, "Although the watermaster informs the BLRID how much water flowing in the river is storage water, the BLRID tells the watermaster how much of that storage water should be delivered to its patrons' points of diversion."

On appeal, the Idaho Supreme Court affirmed the lower court's decision (and the IDWR's position), recognizing the broad authority the District possesses to administer its water and convey storage under Idaho Code § 42-801. *See Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 165, 219 P.3d 804, 812 (2009) (stating "Idaho Code § 43–304 grants the directors of an irrigation district the power 'to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same'").

CONCLUSION

BLRID's delivery of storage water to rediversion points not identified in its water rights is consistent with Idaho Code §§ 42-105(1) and 42-801, longstanding practice, and the SRBA decrees. The law does not require storage rights to specify rediversion points, nor has IDWR historically imposed such a requirement. The Pehrsons' Amended Petition fails as a matter of law and should be dismissed. For each of the reasons above, the Hearing Officer should grant the motion for summary judgment on the matters set forth above.

DATED April 23, 2025

PARSONS BEHLE & LATIMER

/s/ _____

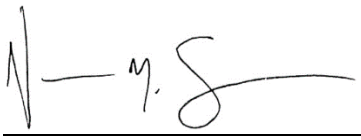
Norman Semanko
Garrett Kitamura
Payton G. Hampton
Attorneys for Big Lost River Irrigation District

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

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DATED April 23, 2025



Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura

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Attorneys for Big Lost River Irrigation District

RECEIVED
Apr 23, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	DECLARATION OF BRYCE CONTOR

I, Bryce Contor, being first duly sworn, depose, state and declare as follows:

1. I am competent to testify, over the age of eighteen, and I make this Declaration from my own personal knowledge.

QUALIFICATIONS

2. I reside in Iona, Idaho. I have worked on water right related issues as a hydrologist since 1996.

3. My employment includes time with the Idaho Department of Water Resources ("IDWR").

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4. From 1997 to 2001 I worked as a senior water resource agent for the IDWR, where one of my duties was to review and examine water right claims and make recommendations in the Snake River Basin Adjudication ("SRBA").
5. From 2001 to 2011 I worked as a research hydrologist for the Idaho Water Resources Research Institute.
6. From 2010 to 2023 I worked as a Senior Hydrologist and later, the Principal Hydrologist for Rocky Mountain Environmental Associates, where my work included, among other things, assisting clients with making water right claims in river basin adjudications and assisting clients with transfer applications of existing water rights.
7. From 2023 to the present I have been the Principal Hydrologist at Contor Water LLC.
8. I have an associate degree in farm crops management from Ricks College, a B.S. in agricultural economics from Brigham Young University, and an M.S. in hydrology from the University of Idaho.
9. My work has been published in the Journal of the American Water Resources Association, in Irrigation and Drainage and in the American Journal of Agricultural Economics.

ANALYSIS

10. To my understanding, the relief sought in the Pehrsons' Amended Petition centers on a proposed watermaster instruction restricting diversion of Big Lost River Irrigation District's ("BLRID") water rights at what the Amended Petition calls "points of rediversion."
11. A Point of Diversion ("POD") is the location where water is appropriated from a public water source for beneficial use.

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12. Natural flow and storage water rights are consistently different when it comes to the location of their respective POD.
13. For a natural-flow surface-water right, the POD typically is the headgate or turnout from the stream channel or spring that is deemed the public source.
14. For a groundwater right, the POD is the well.
15. For an in-stream storage right, the POD is from the storage source, the dam.
16. Idaho Code 42-1411(2) shows the statutory legal elements of a water right, and includes the POD as one of those elements. I did not find any reference to a point of rediversion listed amongst the legal elements of a water right in 42-1411, nor could I find reference to them by name in other statutes. When I worked as a Senior Water Resource Agent in the Adjudication Bureau of IDWR I was trained to identify, map and recommend all necessary statutory elements for all water rights.
17. As authorized by Idaho Code 42-105 (1), water once appropriated "may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed."
18. In addition to mapping PODs, for SRBA recommendations I also was trained to identify, map and list the location(s) where water was "turned into the channel" as point(s) of injection and the location(s) where it was "reclaimed" as point(s) of rediversion. Importantly, I was trained to identify both points of injection and points of rediversion. However, to my knowledge this *was not* a required part of a storage water right.
19. In private practice making claims and applying for transfer applications since my work in the Snake River Basin Adjudication, I have further learned that the Allocations Bureau of IDWR does not generally view points of re-diversion as a required element of a water right.

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20. An example consistent with the Allocations Bureau's viewpoint is Water Right 21-13151, authorizing diversion of groundwater for irrigation. Water diverted from groundwater under this right is delivered to the Henrys Fork River or the Independent Canal, then withdrawn from these channels at other locations to be delivered to beneficial use. A condition of the right acknowledges the injection and rediversion of water. However, the right does not specify points of injection or rediversion, and within the conditions it does not even give general locations of where the injection or rediversion occurs.
21. However, it is important to further distinguish between natural flow and storage water rights.
22. The above example of Water Right 21-13151 is for natural-flow rights, but the Amended Petition specifically addresses storage water rights.
23. A true and correct copy of the decree for Water Right 21-13151 is attached as Exhibit A.
24. The implicit assertion in the requested Watermaster Instruction is that BLRID storage can only be delivered through points of rediversion.
25. I see nothing in the plain language of any part of the Idaho Code, including Idaho Code 42-1411 and Idaho Code 42-105 that would require points of rediversion to be identified in a water right in order for storage rights to be deliverable.
26. The only other related statute with applicability that I could find or have been made aware of is Idaho Code 42-801, which provides notice requirements for the conveyance of stored water in "a stream, or a natural water course," implying that water would later be withdrawn from the channel. I find nothing in the plain language of the statute requiring that the point where water is reclaimed from the channel be identified on the

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face of the water right or in its conditions. The statute uses neither the term injection nor rediversion.

27. In working with clients to provide notice of changes of locations where storage is to be withdrawn from the Snake River, the IDWR has never requested or required us to file transfer applications to change or add points of rediversion to the water rights. This is consistent with the plain-language reading.

28. Further, the Amended Petition could make impossible this statute's requirement that watermasters and assistants "...adjust the head gates of all ditches not entitled to the stored water, and in such manner that those having the right to the use of such water shall secure the volume to which they are entitled."

29. If the Amended Petition's assertion regarding proposed Instruction 3 were correct, listing of points of rediversion for storage rights would be commonplace throughout Idaho.

30. To test the notion, I extracted all PODs from the IDWR Geographic Information Systems (GIS) "Water-Right POD" data set that had "from storage" as part of the descriptor(s) of authorized use(s),and made another selection of all PODs flagged as points of rediversion. I then compared the two lists.

31. IDWR regularly edits the GIS data to reflect transfers and new licenses, so my results are an exact representation of only a single snapshot in time. However, the results are generally representative and suitable for testing the assertion. As of the creation date of the version of the water-right PODs that I used, 4,307 Idaho water rights included "from storage" as part of the authorized-use descriptors, and 2,822 unique water rights included the IDWR database flag for a "point of rediversion." It is easy to see that the number of water rights authorizing use of water from storage far exceeds the number of rights that

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specify points of rediversion. Comparing the lists right-by-right yields only 237 rights that appear on both lists, indicating that it is rare for from-storage rights to include points of rediversion.

32. The storage rights of the Big Lost River Irrigation District are among these few, including Water Rights 34-12, 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, 34-10935.

33. A true and correct copy of the decrees for 34-12, 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, 34-10935 are attached as Exhibit B.

34. The conditions of these BLRID rights include a listing of ditches through which water is delivered, and indicate that the named ditches are points of rediversion. Importantly, none of the conditions on these rights limit delivery only to the named ditches.

35. The Basin 34 Administrative Rules provide no requirement that storage water only be delivered to points of rediversion.

36. Statewide, the fact that only 237 rights include both "from storage" language and "points of rediversion" means that over 4,000 rights authorize "from storage" uses without specifying "points of rediversion." Analysis of each and every one of those 4,000 rights +/- of course is beyond the scope of this declaration, but the first sample I reviewed is Water Right 1-2064.

37. A true and correct copy of the decree for Water Right 1-2064 is attached as Exhibit C.

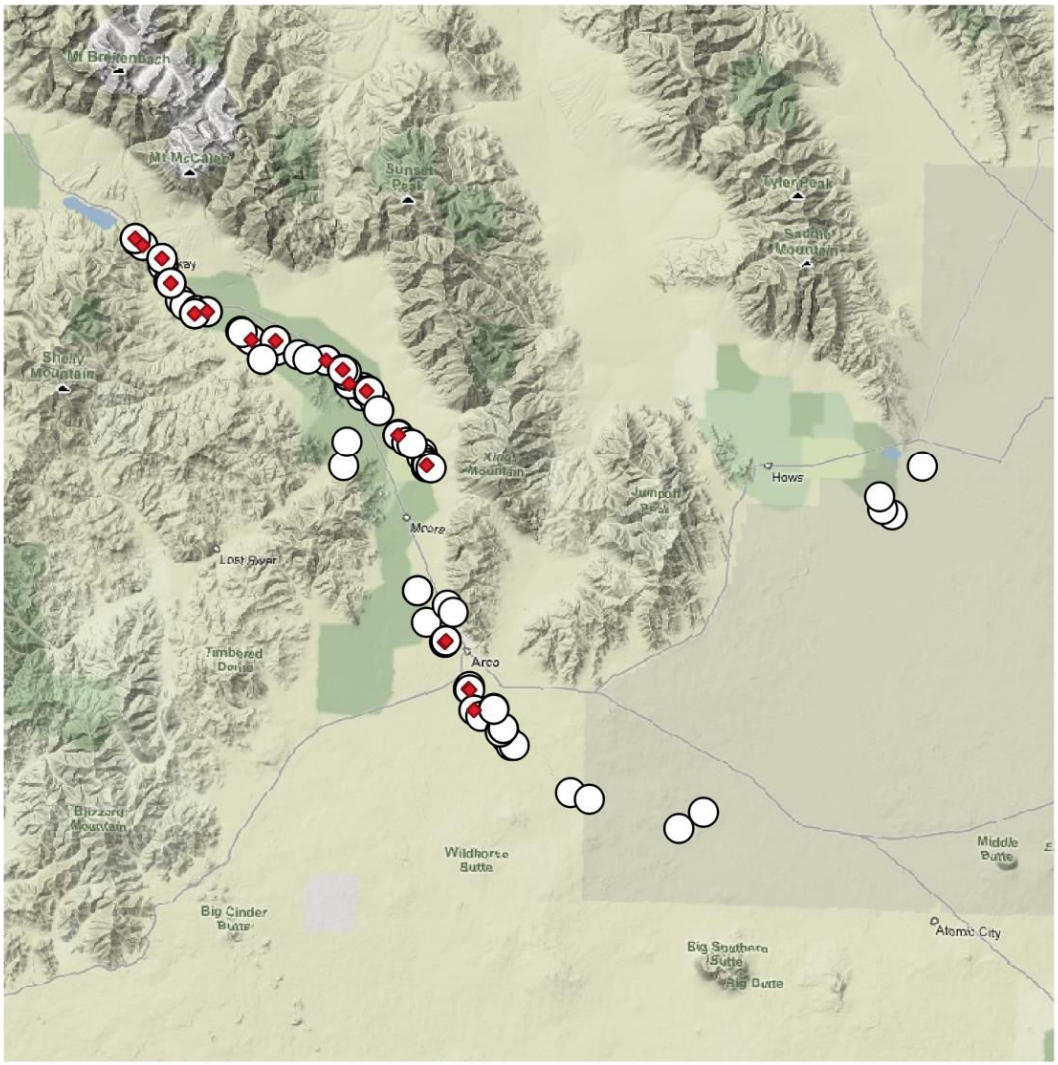
38. Water Right 1-2064 is one of the largest storage water rights in the State of Idaho held by the United Stated Bureau of Reclamation, and authorizes 1,495,600 acre feet of water stored in American Falls Reservoir to be used for "Irrigation From Storage" just like the BLRID storage rights.

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39. No points of rediversion are specified on the face of Water Right 1-2064 or in the conditions. The conditions do not talk about rediversion even in general terms. However, many of the authorized Places of Use on Water Right 1-2064 are so distant from American Falls Reservoir that the right could not be (and in fact are not) used without the water being conveyed down and extracted from the Snake River rather than from the reservoir itself.
40. In fact, Water Right 1-2064 is delivered to the heads of numerous canals which are spaceholders within that water right and that are also within the authorized Places of Use for Water Right 1-2064.
41. Logically there are only two possibilities that arise from the discrepancy between the specification of these 4,000 +/- water rights, including Water Right 1-2064 and the Amended Petition's assertion:
    1) In the SRBA, the Court and/or IDWR have made grave blunders, resulting in thousands of storage rights that cannot be used because there is no provision for rediversion, or;
    2) The assertion is incorrect, and in fact it is not necessary for storage rights to list points of rediversion.
42. From the examples given it appears that the second possibility is by far the most likely.
43. If granted, the precedent set in the Amended Petition would make all the storage water in those 4,000 +/- water rights undeliverable.
44. Figure 1, below, shows Big Lost River natural-flow PODs overlain with the BLRID points of rediversion.

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Figure 1. Map of PODs and Points of Rediversion



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45. Though an exhaustive search is beyond the scope of this declaration, among the many natural-flow PODs not coincident with a BLRID point of rediversion are the following:

    -Notch Butte/Lezamiz POD, rights 24-374B, 34-459, 34-490, 34-12365, 34-14804, 34-14805, 34-14806, 34-14807;

    -Pehrson Ditch, rights 34-14189 through 34-14210;

    -Island/East Side Ditches (too many rights to list).

46. It is my understanding that at least one user on the Pehrson Ditch is a storage holder.

47. Per BLRID, there are 69,241 storage inches in the Eastside Ditch, 57,206 in the Island Ditch, and 6,910 deliverable in either ditch. The two ditches divert from the Big Lost River on the east side of the Moore Canal diversion.

48. I state the examples above in Paragraphs 45-47 to illustrate that BLRID does indeed deliver a significant volume of storage water via the Big Lost River to many water users, including to the Pehrsons, that are not listed as a point of rediversion on BLRID's storage water rights.

CONCLUSION

49. In summary, my expert opinions, based on my education, skills, and experience, are as follows:

    a. Points of Diversion are statutory elements of a water right.

    b. Diverted natural-flow water may be inserted into public water courses and extracted at other locations.

    c. Stored water may be conveyed in public water courses.

    d. Implicitly, stored water conveyed in public water courses also may be extracted from these water courses.

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e. Watermasters must deliver stored water to those entitled to it.

f. Though not so named in statute, the locations of extraction can be called points of rediversion.

g. Points of rediversion were applied to some storage water rights in the Snake River Basin Adjudication, but not to all rights that utilize rediversion.

h. Approximately 2,800 Idaho water rights explicitly list points of rediversion.

i. About 4,300 water rights include provision for uses *"from storage."*

j. The overlap between these data sets is fewer than 300 rights.

k. More than 4,000 *"from storage"* rights do not list points of rediversion.

l. The storage rights of the Big Lost River Irrigation District list points of rediversion.

m. The conditions of the Big Lost River Irrigation District storage rights do not preclude delivery of storage to other locations.

n. The Basin 34 General Provisions do not limit delivery of storage only to points of rediversion.

o. A ruling that storage water only may be extracted at formally-identified points of rediversion would:

    i. Prevent watermasters from complying with 42-801 and Idaho Code 42-105;

    ii. Precipitate wholesale and unnecessary applications for transfer to add points of rediversion, at great cost to water users and to IDWR;

    iii. Deprive users of decreed enjoyment whenever transfers were unsuccessful;

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iv. Undo the certainty that is the crowning achievement of the Snake River Basin Adjudication.

I declare under penalty of perjury, pursuant to the laws of the State of Idaho, that the foregoing is true and correct to the best of my knowledge and understanding.

DATED April 23, 2025

Signed by:
Bryce Contor
A69F012ACDC04DF...

BRYCE CONTOR

Docusign Envelope ID: 5796568A-B7F7-43FC-942B-0F1E70157288

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

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DATED April 23, 2025

Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura

EXHIBIT A

RECEIVED
JAN 09 2013
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN - 8 2013
By
Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**ORDER OF PARTIAL DECREES FOR IRRIGATION DELIVERY ENTITY USING DIGITAL BOUNDARY DESCRIPTION; I.C. §§ 42-202B(2), 42-219(2), 42-1411(2)(h)**
Case No. 39576	**Subcases: 21-13151 & 22-14057 (Fremont Madison Irrigation District)**

I.
FINDINGS AND CONCLUSIONS

1. On November 7, 2012, a ***Special Master's Report and Recommendation*** was filed for the above water rights. No Challenges were filed to the ***Special Master's Report and Recommendation*** and the time for filing Challenges has now expired.

2. The above-captioned water rights are for an irrigation purpose of use and satisfy one of the following statutory criteria: (1) used in conjunction with an irrigation project where the canals constructed cover an area of twenty-five thousand (25,000) acres or more; (2) the place of use for the water rights is located within an irrigation district organized pursuant to the laws of the state of Idaho; or (3) the water rights are for an irrigation project developed by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area less than twenty-five thousand (25,000) acres.

3. Effective July 1, 2002, the Idaho Legislature approved the use of a Geographic Information System (GIS) for describing the place of use (digital boundary) for water rights meeting the above-stated criteria. *See* I.C. §§ 42-219(2)(2003) and 42-1411(2)(h)(2003). The

GIS mapping technology allows the geographic area encompassing the place of use for a water right to be particularly identified and visually displayed in a map overlay format through the aid of computer technology. In incorporating a digital boundary into a partial decree, the electronic or digital data is what is actually decreed as opposed to the visually displayed map ultimately generated from the data. The data is stored on a CD-ROM. The Court finds that the GIS mapping technology maintained by IDWR complies with the standards for spatial accuracy set forth in I.C. § 42-202B (2)(2003). *See Notice of Filing Affidavit of Michael Ciscell Re: Digital Boundary, filed October 17, 2003.*

II.
ORDER

1. Therefore, IT IS ORDERED that the above-captioned water rights are hereby **decreed** as set forth in the attached ***Partial Decrees Pursuant to I.R.C.P. 54(b)***.

2. IT IS FURTHER HEREBY ORDERED that the data comprising the digital boundary shall be stored on a CD-ROM medium, which shall be issued in duplicate original. The SRBA District Court will retain one original together with the original ***Partial Decrees***, and IDWR will retain the other original. The map depicting the place of use attached to the ***Partial Decrees*** is intended for illustrative purposes only.

3. IT IS FURTHER HEREBY ORDERED that upon request, the claimant can obtain a copy of the CD-ROM from IDWR at no cost, although GIS software will still be required to access the data. Subsequent administrative changes to the place of use shall also be stored in a digital format and kept on file and maintained by IDWR. IDWR shall maintain all computer software and/or hardware necessary for reducing the data to a usable format that is accessible to the general public, including access through the IDWR Internet website (www.idwr.state.id.us) or its successor Uniform Resource Locator (URL).

DATED January 8, 2013.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 21-13151

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN - 8 2013
By _____ Clerk
Deputy Clerk

NAME AND ADDRESS: FREMONT MADISON IRRIGATION
DISTRICT
DALE SWENSEN SEC-TREAS
PO BOX 15
ST ANTHONY, ID 83445

SOURCE: GROUND WATER

QUANTITY: 76.75 CFS
32578.00 AFY

Use of water from these wells for supplemental irrigation, when combined with other direct flow or storage water rights, shall provide no more than 0.02 cfs per acre nor more than 5.0 acre-feet of water per acre per irrigation season.
Rights 21-13151, 22-14057 and 22-13506 when combined shall not exceed a total annual maximum diversion volume of 220,000 acre-feet.

PRIORITY DATE: 04/23/1969

POINT OF DIVERSION:

T06N R38E S25	SWNE	Within Madison County
T07N R39E S16	NWSE	Within Fremont County
S34 LOT 17	(SWSW)	Within Madison County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	04-01 TO 10-31	76.75 CFS 32578.00 AFY

PLACE OF USE:

Place of use is within the boundary of Fremont-Madison Irrigation District pursuant to Section 43-323, Idaho Code.
The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
Place of use does not include federal public lands unless authorized in writing by the United States Bureau of Reclamation.
Rights 21-13151, 22-14057 and 22-13506 when combined shall not exceed the irrigation of 152,562 acres, comprised of 111,210 acres for which these rights shall be supplemental to other water rights for irrigation purposes and 41,352 acres for which these rights may be the sole supply of irrigation water.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Rights 21-13151 and 22-14057 are limited to the total number of acres irrigated under those rights prior to July 18, 2012, the date proof of beneficial use was filed for those rights. Additional irrigated acres can no longer be developed under rights 21-13151 and 22-14057.
THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS

OTHER PROVISIONS (continued)

NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 22-14057

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN - 8 2013
By _____ Clerk
Deputy Clerk

NAME AND ADDRESS: FREMONT MADISON IRRIGATION
DISTRICT
DALE SWENSEN SEC-TREAS
PO BOX 15
ST ANTHONY, ID 83445

SOURCE: GROUND WATER

QUANTITY: 31.05 CFS
13180.00 AFY

Use of water from these wells for supplemental irrigation, when combined with other direct flow or storage water rights, shall provide no more than 0.02 cfs per acre nor more than 5.0 acre-feet of water per acre per irrigation season.
Rights 21-13151, 22-14057 and 22-13506 when combined shall not exceed a total annual maximum diversion volume of 220,000 acre-feet.

PRIORITY DATE: 04/23/1969

POINT OF DIVERSION:

T06N R39E S23	NENE	Within Madison County
T07N R40E S19	SENE	Within Fremont County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	04-01 TO 10-31	31.05 CFS 13180.00 AFY

PLACE OF USE:

Place of use is within the boundary of Fremont-Madison Irrigation District pursuant to Section 43-323, Idaho Code.
The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. Section 42-202B(2) and authorized pursuant to I.C. Section 42-1411(2)(h). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.
Place of use does not include federal public lands unless authorized in writing by the United States Bureau of Reclamation.
Rights 21-13151, 22-14057 and 22-13506 when combined shall not exceed the irrigation of 152,562 acres, comprised of 111,210 acres for which these rights shall be supplemental to other water rights for irrigation purposes and 41,352 acres for which these rights may be the sole supply of irrigation water.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Rights 21-13151 and 22-14057 are limited to the total number of acres irrigated under those rights prior to July 18, 2012, the date proof of beneficial use was filed for those rights. Additional irrigated acres can no longer be developed under rights 21-13151 and 22-14057.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT

OTHER PROVISIONS (continued)

ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

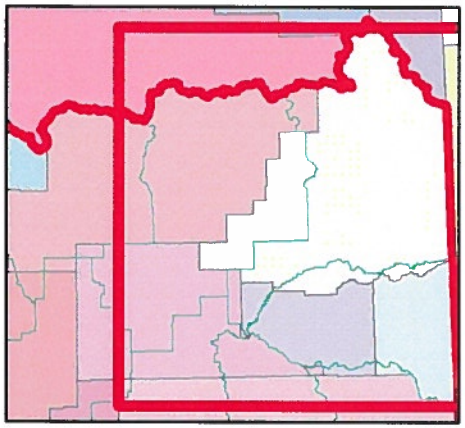
Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

Fremont Madison Irrigation District

Adjudication Recommendations: 21-120A, 21-121A, 21-122A, 21-123A, 21-124A, 21-125A, 21-126A, 21-2156, 21-4155, 21-10560, 21-13151, 22-14057

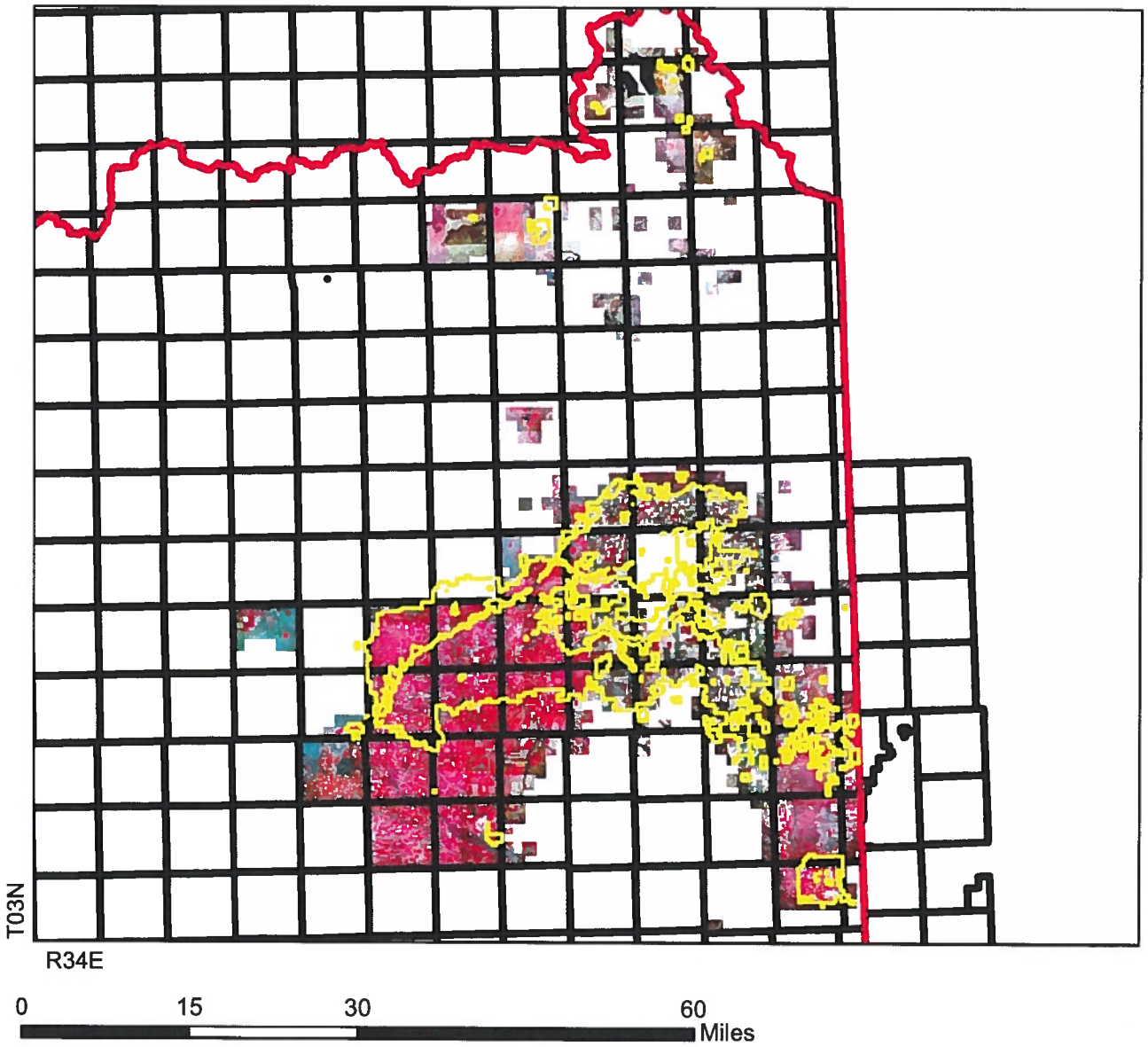
Irrigation Service Area Boundary
GIS Place of Use Illustration





Clark, Fremont, Jefferson, Madison, Teton Counties





Prepared by Favreau, Danielle
November 1, 2012
1987/88 Aerial Photography

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV - 6 2012
By _____ Clerk
Deputy Clerk

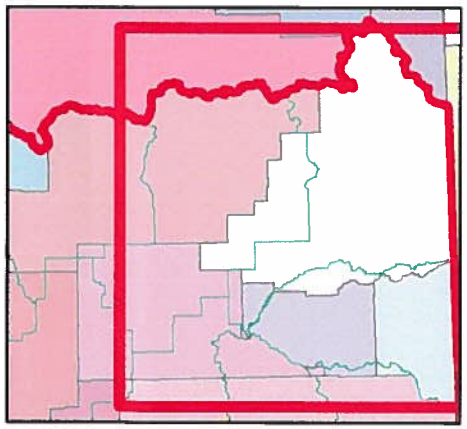
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Fremont Madison Irrigation District

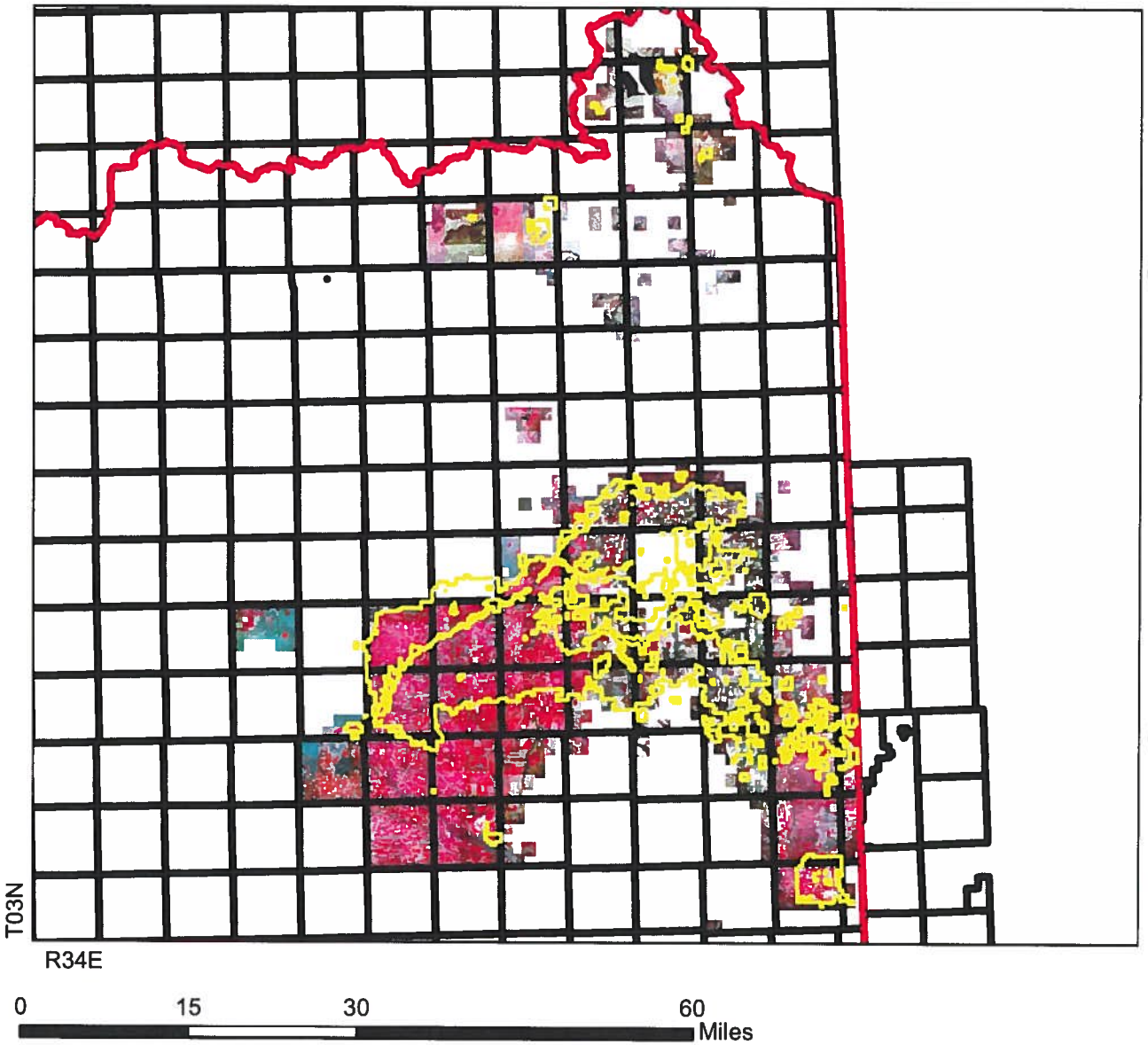
Adjudication Recommendations: 21-120A, 21-121A, 21-122A, 21-123A, 21-124A, 21-125A, 21-126A, 21-2156, 21-4155, 21-10560, 21-13151, 22-14057

Irrigation Service Area Boundary
GIS Place of Use Illustration

Service Area
State Outline
Townships



Clark, Fremont, Jefferson, Madison, Teton Counties



Prepared by Favreau, Danielle
November 1, 2012
1987/88 Aerial Photography

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
NOV - 6 2012
By _____ Clerk
Deputy Clerk

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER OF PARTIAL DECREES FOR IRRIGATION DELIVERY ENTITY USING DIGITAL BOUNDARY DESCRIPTION was mailed on January 08, 2013, with sufficient first-class postage to the following:

FREMONT MADISON IRRIGATION
Represented by:
JERRY R RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

EXHIBIT B

RECEIVED
OCT 10 2 1
Document Number 39576

2001 OCT 15 PM 4:34
DISTRICT COURT-SRBA
TWIN FALLS COUNTY IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-00012**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. Additional proceedings followed, which ultimately culminated in a ***Memorandum Decision and Order on Motions for Reconsideration*** issued by Judge Wood on December 16, 1999.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right.

No objections were filed to the *Supplemental Director's Report* with respect to the above-captioned water right. On May 9, 2001, this Court issued an ***Order of Partial Decree for General Provisions in Administrative Basin 34***.

Therefore, IT IS ORDERED that water right 34-00012 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED October 15, 2001.

R Burdick

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 SEP 15 PM 4:34

DISTRICT COURT-SRBA
TWIN FALLS COUNTY, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00012

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 17205.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 02/07/1916

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	17205.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	17205.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N	R26E	S02			NESE			NWSE		SESE
		S12			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S13			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NESE		NWSE	
	R27E	S05	Lot 4	(NWNW)				SWNW		NWSW	SWSW
		S06	Lot 1	(NENE)		Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)		Lot 4	(NWNW)			SENW	NESW
			Lot 6	(NWSW)		Lot 7	(SWSW)			SESW	NESE
					NWSE			SWSE		SESE	
		S07			NENE			NWNE		SWNE	SENE
					NENW	Lot 1	(NWNW)		Lot 2	(SWNW)	SENW
					NESW			NWSW		SWSW	SESW
					SWSE			SESE			
		S08			NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
		S17			NENW			NWNW		SWNW	SENW
					NWSW			SWSW			
		S18			NENE			NWNE		SWNE	SENE
					NENW	Lot 1	(NWNW)		Lot 2	(SWNW)	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S19			NENE			NWNE		SWNE	SENE
T04N	R26E	S02	Lot 2	(NWNW)							
		S03	Lot 1	(NENE)		Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)		Lot 4	(NWNW)			SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S04	Lot 1	(NENE)		Lot 2	(NWNE)			SWNE	SENE
			Lot 3	(NENW)		Lot 4	(NWNW)			SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S05	Lot 1	(NENE)		Lot 2	(NWNE)			SWNE	SENE
					SENW			NESW		NWSW	SWSW
					SESW			NESE		NWSE	SWSE
					SESE						
		S07			NENE			SENE		NESE	SESE
		S08			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S09			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S10			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S11			NWNW			SWNW		NWSW	SWSW
		S14			NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S15			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S16			NENE			NWNE		SWNE	SENE
					NENW			NWNW		SWNW	SENW
					NESW			NWSW		SWSW	SESW
					NESE			NWSE		SWSE	SESE
		S17			NENE			SWNE		SENE	NWNW
					SWNW			SENW		NESW	NWSW
					SWSW			SESW		NESE	NWSE
					SWSE			SESE			
		S18			NENE			NWNE		SWNE	SENE
					NESE			NWSE		SWSE	SESE
		S19			NENE			NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T04N R26E S19	NESW	SESW	NESE	NWSE	
	SWSE	SESE			
S20	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	NWSE	
S21	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE				
S22	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	NESE	NWSE	
	SWSE	SESE			
S23	NWNE	SWNE	NENW	NWNW	
	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S25	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S26	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE	
	NENW	SENW	NESE	NWSE	
	SWSE	SESE			
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SESW	NESE	
	NWSE	SWSE	SESE		
R27E S31	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	SWSE	
	SESE				
T05N R25E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
R26E S03	NWSW	SWSW			
S04	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	NESE	SWSE	SESE		
S06	NWNW				
S08	NENE	SENE	NESW	NWSW	
	SWSW	SESW	NESE	NWSE	
	SWSE	SESE			
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	SWNE	NENW	NWNW	SWNW	
	SENW	NESW	NWSW	SWSW	
	SESW	NWSE	SWSE	SESE	
S14	NWNW	SWNW	NESW	NWSW	
	SWSW	SESW			
S15	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S16	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
S20	NENE	NWNE	SWNE	SENE	

PLACE OF USE: (CONT)

T05N R26E	S20	NESE	NWSE	SWSE	SESE		
	S21	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S22	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S23	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		

PLACE OF USE: (CONT)

T06N R25E S08	NENE	NWNE	NENW	NWNW	
	SWNW	NWSW	SWSW	NESE	
	NWSE	SWSE	SESE		
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S11	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S12	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S13	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S14	NENE	NWNE	SENE	NESE	
	SWSE	SESE			
S16	NWNE	NENW	NWNW	SWNW	
S17	SWNE	SENE	NWNW	SWNW	
	SENW	NESW	NWSW	NESE	
	NWSE	SWSE	SESE		
S18	NENE	NWNE	SWNE	SENE	
	SWSW				
S21	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	NESE	NWSE	
	SESE				
S22	NWSW	SWSW			
S23	NENE	SENE	NESE	SESE	
S24	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S25	NENE	NWNE	SWNE	SENE	
	NENW	SWNW	SENW	NESW	
	NWSW	SWSW	SESW	NESE	
	NWSE	SWSE	SESE		
S26	SESW	SWSE	SESE		
S27	NWNW	SWNW	SWSW	SESW	
	SWSE	Lot 4 (SESE)			
S28	NENE	SENE	NESE	SESE	
S33	NENE				
S34	Lot 1 (NENE)	NWNE	SWNE	Lot 2 (SENE)	
	NENW	NWNW	SENW	NESW	
	Lot 3 (NESE)	NWSE	Lot 4 (SESE)		
S35	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
R26E S05	Lot 4 (SWSW)	Lot 5 (SESW)			
S06	SWSW	SESE			
S07	NENE	SWNE	SENE	Lot 1 (NENW)	
	NWNW	SWNW	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	NESE	
	NWSE	SWSE	SESE		
S08	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	

PLACE OF USE: (CONT)

T06N R26E	S17		NESE			NWSE		SWSE	SESE
	S18		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE			NWSE		SWSE	SESE
	S19		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S20		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S21		SWNW			NESW		NWSW	SWSW
			SESW			SWSE			
	S27		NESW			NWSW			
	S28		NWNE			SWNE		NENW	NWNW
			SWNW			SENW		NESW	NWSW
			SWSW			SESW		NESE	NWSE
			SWSE			SESE			
	S29		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S30		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE			NWSE		SWSE	SESE
	S31		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE			NWSE		SWSE	SESE
	S32		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S33		NWNE			SWNE		NENW	NWNW
			SWNW			SENW		NESW	NWSW
			SWSW			SESW		NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)		Lot 4	(SWSW)		SESW	
	S17		SWNW			NWSW		SWSW	SESW
	S18		NENE			NWNE		SWNE	SENE
			NENW			SENW		NESE	NWSE
			SESE						
	S20		NENE			NWNE		SWNE	NENW
			NWNW			NESE		NWSE	SWSE
			SESE						
	S21		NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S26		SWSW			SESW		SWSE	SESE
	S27		NENW			NESW		NWSW	SWSW
			SESW			NESE		NWSE	SWSE
			SESE						
	S28		NENE			NWNE		NENW	NWNW
			SWNW			SENW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S29		NENE			NWNE		SENE	NWSE
			SESE						
	S33		NWNE			SWNE		SENE	NENW
			NESE			NWSE		SESE	
	S34		NENE			NWNE		SWNE	SENE
			SWNW			SENW		NESW	NWSW
			SWSW			SESW		NESE	NWSE
			SWSE						
	S35		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			SWSW		SESW	NESE
			NWSE			SWSE		SESE	
	S36		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T07N R24E S36	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

YOUNG HARVEY WALKER
Represented by:
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201 E CENTER, STE A2
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PAYETTE RIVER WATER USERS ASSN
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BIG LOST RIVER WATER USERS
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RT 1 BOX 112A
MOORE, ID 83255

Lettie Messick

LETTIE MESSICK
Chief Deputy Clerk

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MOORE, ID 83255

Lettie Messick

LETTIE MESSICK
Chief Deputy Clerk

CERTIFICATE OF MAILING

RECEIVED
OCT 17 2001
of Water Resources

2001 OCT 15 PM 4:55
FILED
TWIN FALLS, IDAHO

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-00810**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. No Challenges were filed to the ***Special Master's Report and Recommendation*** and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and ***SRBA Administrative Order 1***, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right. No objections to this Supplemental Report were filed and the time period for filing objections has now expired.

Therefore, IT IS ORDERED that water right 34-00810 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED October 15, 2001

R. Burdick

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

2001 OCT 15 PM 4:55

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-00810

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 3.2 CFS
556.5 AFY

PRIORITY DATE: 06/01/1888

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	556.5 AFY
IRRIGATION FROM STORAGE	Irrigation Season	556.5 AFY
DIVERSION TO STORAGE	05-01 10-15	3.2 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE:

IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		NESE		NWSE	SESE	
S12		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S13		NENE		NWNE	SWNE	SENE
		NENW		NWNW	SWNW	SENW
		NESW		NESE	NWSE	
R27E S05	Lot 4	(NWNW)		SWNW	NWSW	SWSW
S06	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENW		NWNW		SWNW		SENW
			NWSW		SWSW				
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			SENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S07		NENE		SENE		NESE		SESE
	S08		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S09		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S10		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S11		NWNW		SWNW		NWSW		SWSW
	S14		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S15		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S16		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S17		NENE		SWNE		SENE		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NESW		SESW		NESE		NWSE
			SWSE		SESE				
	S20		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		NWSE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESE						
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T04N R26E S22	NESW	NWSW	NESE	NWSE	
	SWSE	SESE			
S23	NWNE	SWNE	NENW	NWNW	
	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S25	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S26	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE	
	NENW	SENW	NESE	NWSE	
	SWSE	SESE			
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SESW	NESE	
	NWSE	SWSE	SESE		
R27E S31	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	SWSE	
	SESE				
T05N R25E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
R26E S03	NWSW	SWSW			
S04	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	NESE	SWSE	SESE		
S06	NWNW				
S08	NENE	SENE	NESW	NWSW	
	SWSW	SESW	NESE	NWSE	
	SWSE	SESE			
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	SWNE	NENW	NWNW	SWNW	
	SENW	NESW	NWSW	SWSW	
	SESW	NWSE	SWSE	SESE	
S14	NWNW	SWNW	NESW	NWSW	
	SWSW	SESW			
S15	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S16	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
S20	NENE	NWNE	SWNE	SENE	
	NESE	NWSE	SWSE	SESE	
S21	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S22	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S23	NENW	NWNW	SWNW	SENW	

PLACE OF USE: (CONT)

T05N R26E S23	NESW	NWSW	SWSW	SESW	
S26	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S27	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S28	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S29	NENE	NWNE	SWNE	SENE	
	NENW	SENW	NESE	NWSE	
	SWSE	SESE			
S32	NENE	SENE	NESE	SESE	
S33	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S34	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)	
	NESE	NWSE	SWSE	SESE	
S35	NWNW	SWNW	NWSW	SWSW	
T06N R24E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NESE	NWSE	SWSE	
	SESE				
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SESW	NWSE	
	SWSE	SESE			
S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
S11	NENE	NWNE	SWNE	SENE	
S12	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NWSW	NESE			
R25E S01	NESW	SWSW	SESW	NESE	
	NWSE	SWSE	SESE		
S02	SWNE	SWNW	SENW	NESW	
	NWSW	SWSW	SESW	NWSE	
	SWSE	SESE			
S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)	
	SWSW	SESW	SWSE	SESE	
S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW	
	NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW	
	NESE	NWSE	SWSE	SESE	
S07	NENE	NWNE	SWNE	SENE	
	NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	
	NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	
	NESE	NWSE	SWSE	SESE	
S08	NENE	NWNE	NENW	NWNW	
	SWNW	NWSW	SWSW	NESE	
	NWSE	SWSE	SESE		
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE		SESE
	S11		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S12		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S13		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S14		NENE		NWNE		SENE		NESE
			SWSE		SESE				
	S16		NWNE		NENW		NWNW		SWNW
	S17		SWNE		SENE		NWNW		SWNW
			SENW		NESW		NWSW		NESE
			NWSE		SWSE		SESE		
	S18		NENE		NWNE		SWNE		SENE
			SWSW						
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE		NWSE
			SESE						
	S22		NWSW		SWSW				
	S23		NENE		SENE		NESE		SESE
	S24		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S25		NENE		NWNE		SWNE		SENE
			NENW		SWNW		SENW		NESW
			NWSW		SWSW		SESW		NESE
			NWSE		SWSE		SESE		
	S26		SESW		SWSE		SESE		
	S27		NWNW		SWNW		SWSW		SESW
			SWSE	Lot 4	(SESE)				
	S28		NENE		SENE		NESE		SESE
	S33		NENE						
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2	(SENE)
			NENW		NWNW		SENW		NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)		
	S35		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S36		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)				
	S06		SWSW		SESE				
	S07		NENE		SWNE		SENE	Lot 1	(NENW)
			NWNW		SWNW		SENW		NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S20		NENE		NWNE		SWNE		SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S21		SWNW		NESW		NWSW		SWSW		
			SESW		SWSE						
	S27		NESW		NWSW						
	S28		NWNE		SWNE		NENW		NWNW		
			SWNW		SENW		NESW		NWSW		
			SWSW		SESW		NESE		NWSE		
			SWSE		SESE						
	S29		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S30		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S31		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S32		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S33		NWNE		SWNE		NENW		NWNW		
			SWNW		SENW		NESW		NWSW		
			SWSW		SESW		NWSE		SWSE		
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW				
	S17		SWNW		NWSW		SWSW		SESW		
	S18		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SESE								
	S20		NENE		NWNE		SWNE		NENW		
			NWNW		NESE		NWSE		SWSE		
			SESE								
	S21		NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S26		SWSW		SESW		SWSE		SESE		
	S27		NENW		NESW		NWSW		SWSW		
			SESW		NESE		NWSE		SWSE		
			SESE								
	S28		NENE		NWNE		NENW		NWNW		
			SWNW		SENW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SENE		NWSE		
			SESE								
	S33		NWNE		SWNE		SENE		NENW		
			NESE		NWSE		SESE				
	S34		NENE		NWNE		SWNE		SENE		
			SWNW		SENW		NESW		NWSW		
			SWSW		SESW		NESE		NWSE		
			SWSE								
	S35		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S36		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
R25E	S28		SWSW		SESW		NWSE		SWSE		
	S31		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S32		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00811, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24		
S04	NWSW	37	SWSW	36	SESW	37.5
	SWSE	37.5	SESE	37.5		
S08	NENE	21	NWNE	38	SENE	35
	NESE	39	NWSE	27		
S09	NENE	32	SENE	39	NWNW	33
	SWNW	31	NESW	30	NWSW	38
	SWSW	25				

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39
	SWSE	40				
S24	NENW	39	NWNW	38	SWNW	39

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE was mailed on October 15, 2001, with sufficient first-class postage to the following:

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

2001 OCT 15 PM 4:31
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-00811**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. No Challenges were filed to the ***Special Master's Report and Recommendation*** and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and ***SRBA Administrative Order 1***, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right. No objections to this Supplemental Report were filed and the time period for filing objections has now expired.

Therefore, IT IS ORDERED that water right 34-00811 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED October 15, 2001.

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:31

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR
	)	
Case No. 39576	)	Water Right 34-00811
	)	

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 1.7 CFS
294.0 AFY

PRIORITY DATE: 06/30/1881

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	294.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	294.0 AFY
DIVERSION TO STORAGE	05-01 10-15	1.5 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW		SENW
	NESW	NWSW	SWSW		SESW
	NESE	NWSE	SWSE		SESE
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
	NESE	NWSE	SESE		
S12	NENE	NWNE	SWNE		SENE
	NENW	NWNW	SWNW		SENW
	NESW	NWSW	SWSW		SESW
	NESE	NWSE	SWSE		SESE
S13	NENE	NWNE	SWNE		SENE
	NENW	NWNW	SWNW		SENW
	NESW	NESE	NWSE		
R27E S05	Lot 4 (NWNW)	SWNW	NWSW		SWSW
S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENW		NWNW		SWNW		SENW
			NWSW		SWSW				
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			SENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S07		NENE		SENE		NESE		SESE
	S08		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S09		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S10		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S11		NWNW		SWNW		NWSW		SWSW
	S14		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S15		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S16		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S17		NENE		SWNE		SENE		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NESW		SESW		NESE		NWSE
			SWSE		SESE				
	S20		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		NWSE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESE						
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T04N R26E S22	NESW	NWSW	NESE	NWSE	
	SWSE	SESE			
S23	NWNE	SWNE	NENW	NWNW	
	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S25	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S26	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE	
	NENW	SENW	NESE	NWSE	
	SWSE	SESE			
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SESW	NESE	
	NWSE	SWSE	SESE		
R27E S31	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	SWSE	
	SESE				
T05N R25E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
R26E S03	NWSW	SWSW			
S04	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	NESE	SWSE	SESE		
S06	NWNW				
S08	NENE	SENE	NESW	NWSW	
	SWSW	SESW	NESE	NWSE	
	SWSE	SESE			
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	SWNE	NENW	NWNW	SWNW	
	SENW	NESW	NWSW	SWSW	
	SESW	NWSE	SWSE	SESE	
S14	NWNW	SWNW	NESW	NWSW	
	SWSW	SESW			
S15	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S16	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
S20	NENE	NWNE	SWNE	SENE	
	NESE	NWSE	SWSE	SESE	
S21	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S22	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S23	NENW	NWNW	SWNW	SENW	

PLACE OF USE: (CONT)

T05N R26E	S23	NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S08	NENE	NWNE	NENW	NWNW		
		SWNW	NWSW	SWSW	NESE		
		NWSE	SWSE	SESE			
	S09	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S10	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		

PLACE OF USE: (CONT)

T06N R25E S10	NESE	NWSE	SWSE	SESE	
S11	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S12	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S13	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S14	NENE	NWNE	SENE	NESE	
	SWSE	SESE			
S16	NWNE	NENW	NWNW	SWNW	
S17	SWNE	SENE	NWNW	SWNW	
	SENW	NESW	NWSW	NESE	
	NWSE	SWSE	SESE		
S18	NENE	NWNE	SWNE	SENE	
	SWSW				
S21	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	NESE	NWSE	
	SESE				
S22	NWSW	SWSW			
S23	NENE	SENE	NESE	SESE	
S24	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S25	NENE	NWNE	SWNE	SENE	
	NENW	SWNW	SENW	NESW	
	NWSW	SWSW	SESW	NESE	
	NWSE	SWSE	SESE		
S26	SESW	SWSE	SESE		
S27	NWNW	SWNW	SWSW	SESW	
	SWSE	Lot 4 (SESE)			
S28	NENE	SENE	NESE	SESE	
S33	NENE				
S34	Lot 1 (NENE)	NWNE	SWNE	Lot 2 (SENE)	
	NENW	NWNW	SENW	NESW	
	Lot 3 (NESE)	NWSE	Lot 4 (SESE)		
S35	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
R26E S05	Lot 4 (SWSW)	Lot 5 (SESW)			
S06	SWSW	SESE			
S07	NENE	SWNE	SENE	Lot 1 (NENW)	
	NWNW	SWNW	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	NESE	
	NWSE	SWSE	SESE		
S08	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S18	NENE	NWNE	SWNE	SENE	
	NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	
	NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	
	NESE	NWSE	SWSE	SESE	
S19	NENE	NWNE	SWNE	SENE	
	NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S20	NENE	NWNE	SWNE	SENE	

PLACE OF USE: (CONT)

T06N R26E S20		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S21	SWNW		NESW		NWSW	SWSW
		SESW		SWSE			
	S27	NESW		NWSW			
	S28	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE		SESE			
	S29	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S30	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S31	NENE		NWNE		SWNE	SENE
		NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S33	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NWSE	SWSE
T07N R24E S07		Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	
	S17	SWNW		NWSW		SWSW	SESW
	S18	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SESE					
	S20	NENE		NWNE		SWNE	NENW
		NWNW		NESE		NWSE	SWSE
		SESE					
	S21	NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S26	SWSW		SESW		SWSE	SESE
	S27	NENW		NESW		NWSW	SWSW
		SESW		NESE		NWSE	SWSE
		SESE					
	S28	NENE		NWNE		NENW	NWNW
		SWNW		SENW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SENE	NWSE
		SESE					
	S33	NWNE		SWNE		SENE	NENW
		NESE		NWSE		SESE	
	S34	NENE		NWNE		SWNE	SENE
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE					
	S35	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S36	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
R25E S28		SWSW		SESW		NWSE	SWSE
	S31	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00817B, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39
	SWSE	40				
S24	NENW	39	NWNW	38	SWNW	39

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R. Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 OCT 15 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	CERTIFICATE OF MAILING
Case No. 39576	Water Right(s): 34-00811

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) for WATER RIGHT 34-00811 was mailed on October 15, 2001, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

Lettie Messick

LETTIE MESSICK
Chief Deputy Clerk

2001 OCT 15 PM 4:27

DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-00817B**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. No Challenges were filed to the ***Special Master's Report and Recommendation*** and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and ***SRBA Administrative Order 1***, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right. No objections to this Supplemental Report were filed and the time period for filing objections has now expired.

Therefore, IT IS ORDERED that water right 34-00817B is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED October 15, 2001.

R Burdick

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-00817B

2001 OCT 15 PM 4:27

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 0.8 CFS
140.0 AFY

PRIORITY DATE: 03/01/1902

POINT OF DIVERSION:

T03N R26E	S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
T04N R26E	S26	NWNWNW	(REDIVERSION)	
T05N R26E	S04	NWSESE	(REDIVERSION)	
T07N R23E	S12	SENW		Within CUSTER County
T06N R24E	S01	NENESW	(REDIVERSION)	
R25E	S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
R26E	S32	NWSENW	(REDIVERSION)	
T07N R23E	S12	NWNWSE	(REDIVERSION)	
R24E	S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANCUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	05-01 10-15	140.0 AFY
IRRIGATION FROM STORAGE	Irrigation Season	140.0 AFY
DIVERSION TO STORAGE	05-01 10-15	0.8 CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		NESE	NWSE	SESE		
	S12	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S13	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NESE	NWSE		
R27E	S05	Lot 4 (NWNW)	SWNW	NWSW		SWSW
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE
			NWSE		SWSE		SESE		
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			SWSE		SESE				
	S08		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S17		NENW		NWNW		SWNW		SENW
			NWSW		SWSW				
	S18		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)						
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE
			SENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S07		NENE		SENE		NESE		SESE
	S08		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S09		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S10		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S11		NWNW		SWNW		NWSW		SWSW
	S14		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S15		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S16		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S17		NENE		SWNE		SENE		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S18		NENE		NWNE		SWNE		SENE
			NESE		NWSE		SWSE		SESE
	S19		NENE		NWNE		SWNE		SENE
			NESW		SESW		NESE		NWSE
			SWSE		SESE				
	S20		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		NWSE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESE						
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW

PLACE OF USE: (CONT)

T04N R26E S22	NESW	NWSW	NESE	NWSE	
	SWSE	SESE			
S23	NWNE	SWNE	NENW	NWNW	
	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S25	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S26	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE	
	NENW	SENW	NESE	NWSE	
	SWSE	SESE			
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SESW	NESE	
	NWSE	SWSE	SESE		
R27E S31	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	SWSE	
	SESE				
T05N R25E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
R26E S03	NWSW	SWSW			
S04	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	NESE	SWSE	SESE		
S06	NWNW				
S08	NENE	SENE	NESW	NWSW	
	SWSW	SESW	NESE	NWSE	
	SWSE	SESE			
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	SWNE	NENW	NWNW	SWNW	
	SENW	NESW	NWSW	SWSW	
	SESW	NWSE	SWSE	SESE	
S14	NWNW	SWNW	NESW	NWSW	
	SWSW	SESW			
S15	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S16	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
S20	NENE	NWNE	SWNE	SENE	
	NESE	NWSE	SWSE	SESE	
S21	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S22	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S23	NENW	NWNW	SWNW	SENW	

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW	SESW
	S26		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S27		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S28		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SWSE		SESE			
	S32		NENE		SENE		NESE	SESE
	S33		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S34		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW	Lot 4 (SWSW)	Lot 5 (SESW)	
			NESE		NWSE		SWSE	SESE
	S35		NWNW		SWNW		NWSW	SWSW
T06N R24E	S01	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NESE		NWSE	SWSE
			SESE					
	S02	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SESW	NWSE
			SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
	S11		NENE		NWNE		SWNE	SENE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NWSW		NESE			
R25E	S01		NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S02		SWNE		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NWSE
			SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)		Lot 3 (NENW)	Lot 4 (NWNW)	
			SWSW		SESW		SWSE	SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		Lot 5 (SWNW)		SENW
			NESW	Lot 6 (NWSW)		Lot 7 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S08		NENE		NWNE		NENW	NWNW
			SWNW		NWSW		SWSW	NESE
			NWSE		SWSE		SESE	
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)			
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)	
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)			
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S21		SWNW		NESW		NWSW		SWSW
			SESW		SWSE				
	S27		NESW		NWSW				
	S28		NWNE		SWNE		NENW		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE		SESE				
	S29		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S30		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S31		NENE		NWNE		SWNE		SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW
			NESE		NWSE		SWSE		SESE
	S32		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S33		NWNE		SWNE		NENW		NWNW
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NWSE		SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
	S17		SWNW		NWSW		SWSW		SESW
	S18		NENE		NWNE		SWNE		SENE
			NENW		SENW		NESE		NWSE
			SESE						
	S20		NENE		NWNE		SWNE		NENW
			NWNW		NESE		NWSE		SWSE
			SESE						
	S21		NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S26		SWSW		SESW		SWSE		SESE
	S27		NENW		NESW		NWSW		SWSW
			SESW		NESE		NWSE		SWSE
			SESE						
	S28		NENE		NWNE		NENW		NWNW
			SWNW		SENW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S29		NENE		NWNE		SENE		NWSE
			SESE						
	S33		NWNE		SWNE		SENE		NENW
			NESE		NWSE		SESE		
	S34		NENE		NWNE		SWNE		SENE
			SWNW		SENW		NESW		NWSW
			SWSW		SESW		NESE		NWSE
			SWSE						
	S35		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		SWSW		SESW		NESE
			NWSE		SWSE		SESE		
	S36		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
R25E	S28		SWSW		SESW		NWSE		SWSE
	S31		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S32		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00818, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24			
S04	NWSW	37	SWSW	36	SESW	37.5	
	SWSE	37.5	SESE	37.5			
S08	NENE	21	NWNE	38	SENE	35	
	NESE	39	NWSE	27			
S09	NENE	32	SENE	39	NWNW	33	
	SWNW	31	NESW	30	NWSW	38	
	SWSW	25					

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39	
	SWSE	40					
S24	NENW	39	NWNW	38	SWNW	39	

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

R Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 OCT 15 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)	CERTIFICATE OF MAILING
)	
Case No. 39576)	
)	Water Right(s): 34-00817B

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) for WATER RIGHT 34-00817B was mailed on October 15, 2001, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

LETTIE MESSICK
Chief Deputy Clerk

RECEIVED

SEP 27 2001

Department of Water Resources

2001 SEP 26 AM 11:

FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-00818**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. No Challenges were filed to the ***Special Master's Report and Recommendation*** and the time for filing Challenges has now expired.

Pursuant to I.R.C.P. 53(e)(2) and ***SRBA Administrative Order 1***, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report*** and wholly adopts them as its own.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right. No objections to this Supplemental Report were filed and the time period for filing objections has now expired.

Therefore, IT IS ORDERED that water right 34-00818 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED September 26, 2000.

Roger Burdick

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-00818

2001 SEP 26 AM 11:16

FILED

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 3.2 CFS
556.5 AFY

PRIORITY DATE: 06/30/1880

POINT OF DIVERSION:

T03N R26E	S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
T04N R26E	S26	NWNWNW	(REDIVERSION)	
T05N R26E	S04	NWSESE	(REDIVERSION)	
T07N R23E	S12	SENW		Within CUSTER County
T06N R24E	S01	NENESW	(REDIVERSION)	
R25E	S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
R26E	S32	NWSENW	(REDIVERSION)	
T07N R23E	S12	NWNWSE	(REDIVERSION)	
R24E	S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE		QUANTITY	
IRRIGATION STORAGE	05-01	10-15	556.5	AFY
IRRIGATION FROM STORAGE	05-01	10-15	556.5	AFY
DIVERSION TO STORAGE	05-01	10-15	3.2	CFS

THE PERIOD OF USE FOR EACH PURPOSE OF USE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		NESE	NWSE	SESE		
	S12	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S13	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NESE	NWSE		
R27E	S05	Lot 4 (NWNW)	SWNW	NWSW		SWSW
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)			SENW		NESW	
		Lot 6	(NWSW)	Lot 7	(SWSW)			SESW		NESE	
			NWSE			SWSE			SESE		
	S07		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW			NWSW			SWSW		SESW
			SWSE			SESE					
	S08		NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
	S17		NENW			NWNW			SWNW		SENW
			NWSW			SWSW					
	S18		NENE			NWNE			SWNE		SENE
			NENW	Lot 1	(NWNW)		Lot 2	(SWNW)			SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S19		NENE			NWNE			SWNE		SENE
T04N R26E	S02	Lot 2	(NWNW)								
	S03	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)			SWNW		SENW	
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE		SENE	
		Lot 3	(NENW)	Lot 4	(NWNW)			SWNW		SENW	
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE		SENE	
			SENW			NESW			NWSW		SWSW
			SESW			NESE			NWSE		SWSE
			SESE								
	S07		NENE			SENE			NESE		SESE
	S08		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S09		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S10		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S11		NWNW			SWNW			NWSW		SWSW
	S14		NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S15		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S16		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		SESW
			NESE			NWSE			SWSE		SESE
	S17		NENE			SWNE			SENE		NWNW
			SWNW			SENW			NESW		NWSW
			SWSW			SESW			NESE		NWSE
			SWSE			SESE					
	S18		NENE			NWNE			SWNE		SENE
			NESE			NWSE			SWSE		SESE
	S19		NENE			NWNE			SWNE		SENE
			NESW			SESW			NESE		NWSE
			SWSE			SESE					
	S20		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESW			NWSW			SWSW		NWSE
	S21		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW
			NESE								
	S22		NENE			NWNE			SWNE		SENE
			NENW			NWNW			SWNW		SENW

PLACE OF USE: (CONT)

T04N	R26E	S22		NESW		NWSW	NESE	NWSE
				SWSE		SESE		
		S23		NWNE		SWNE	NENW	NWNW
				SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S25		SWNW		SENW	NESW	NWSW
				SWSW		SESW	NWSE	SWSE
				SESE				
		S26		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SWSW	SESW
				NESE		NWSE	SWSE	SESE
		S35		NENE		NWNE	SWNE	SENE
				NENW		SENW	NESE	NWSE
				SWSE		SESE		
		S36		NENE		NWNE	SWNE	SENE
				NENW		NWNW	SWNW	SENW
				NESW		NWSW	SESW	NESE
				NWSE		SWSE	SESE	
	R27E	S31	Lot 1 (NWNW)		Lot 2 (SWNW)		SENW	NESW
			Lot 3 (NWSW)		Lot 4 (SWSW)		SESW	SWSE
			SESE					
T05N	R25E	S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
			Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
		S02	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
			Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
			NESE		NWSE		SWSE	SESE
	R26E	S03	NWSW		SWSW			
		S04	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
			Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
		S05	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
			NESE		SWSE		SESE	
		S06	NWNW					
		S08	NENE		SENE		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
		S09	NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
		S10	SWNE		NENW		NWNW	SWNW
			SENW		NESW		NWSW	SWSW
			SESW		NWSE		SWSE	SESE
		S14	NWNW		SWNW		NESW	NWSW
			SWSW		SESW			
		S15	NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
		S16	NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
		S17	NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE		NWSE		SWSE	SESE
		S20	NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
		S21	NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
		S22	NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
		S23	NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23	NESW	NWSW	SWSW	SESW		
	S26	NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
	S27	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S28	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S29	NENE	NWNE	SWNE	SENE		
		NENW	SENW	NESE	NWSE		
		SWSE	SESE				
	S32	NENE	SENE	NESE	SESE		
	S33	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S34	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	Lot 4 (SWSW)	Lot 5 (SESW)		
		NESE	NWSE	SWSE	SESE		
	S35	NWNW	SWNW	NWSW	SWSW		
T06N R24E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NESE	NWSE	SWSE		
		SESE					
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
	S11	NENE	NWNE	SWNE	SENE		
	S12	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NWSW	NESE				
R25E	S01	NESW	SWSW	SESW	NESE		
		NWSE	SWSE	SESE			
	S02	SWNE	SWNW	SENW	NESW		
		NWSW	SWSW	SESW	NWSE		
		SWSE	SESE				
	S03	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S04	Lot 1 (NENE)	Lot 2 (NWNE)	Lot 3 (NENW)	Lot 4 (NWNW)		
		SWSW	SESW	SWSE	SESE		
	S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE		
		Lot 3 (NENW)	Lot 4 (NWNW)	Lot 5 (SWNW)	SENW		
		NESW	Lot 6 (NWSW)	Lot 7 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S07	NENE	NWNE	SWNE	SENE		
		NENW	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW		
		NESW	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW		
		NESE	NWSE	SWSE	SESE		
	S08	NENE	NWNE	NENW	NWNW		
		SWNW	NWSW	SWSW	NESE		
		NWSE	SWSE	SESE			
	S09	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		
		NESE	NWSE	SWSE	SESE		
	S10	NENE	NWNE	SWNE	SENE		
		NENW	NWNW	SWNW	SENW		
		NESW	NWSW	SWSW	SESW		

PLACE OF USE: (CONT)

T06N R25E	S10		NESE		NWSE		SWSE	SESE
	S11		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S12		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S13		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S14		NENE		NWNE		SENE	NESE
			SWSE		SESE			
	S16		NWNE		NENW		NWNW	SWNW
	S17		SWNE		SENE		NWNW	SWNW
			SENW		NESW		NWSW	NESE
			NWSE		SWSE		SESE	
	S18		NENE		NWNE		SWNE	SENE
			SWSW					
	S21	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		NESE	NWSE
			SESE					
	S22		NWSW		SWSW			
	S23		NENE		SENE		NESE	SESE
	S24		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S25		NENE		NWNE		SWNE	SENE
			NENW		SWNW		SENW	NESW
			NWSW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S26		SESW		SWSE		SESE	
	S27		NWNW		SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)			
	S28		NENE		SENE		NESE	SESE
	S33		NENE					
	S34	Lot 1	(NENE)		NWNE		SWNE	Lot 2 (SENE)
			NENW		NWNW		SENW	NESW
		Lot 3	(NESE)		NWSE	Lot 4	(SESE)	
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
R26E	S05	Lot 4	(SWSW)	Lot 5	(SESW)			
	S06		SWSW		SESE			
	S07		NENE		SWNE		SENE	Lot 1 (NENW)
			NWNW		SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T06N R26E	S20		NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S21		SWNW		NESW		NWSW		SWSW		
			SESW		SWSE						
	S27		NESW		NWSW						
	S28		NWNE		SWNE		NENW		NWNW		
			SWNW		SENW		NESW		NWSW		
			SWSW		SESW		NESE		NWSE		
			SWSE		SESE						
	S29		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S30		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S31		NENE		NWNE		SWNE		SENE		
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW		
			NESW	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW		
			NESE		NWSE		SWSE		SESE		
	S32		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S33		NWNE		SWNE		NENW		NWNW		
			SWNW		SENW		NESW		NWSW		
			SWSW		SESW		NWSE		SWSE		
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW				
	S17		SWNW		NWSW		SWSW		SESW		
	S18		NENE		NWNE		SWNE		SENE		
			NENW		SENW		NESE		NWSE		
			SESE								
	S20		NENE		NWNE		SWNE		NENW		
			NWNW		NESE		NWSE		SWSE		
			SESE								
	S21		NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S26		SWSW		SESW		SWSE		SESE		
	S27		NENW		NESW		NWSW		SWSW		
			SESW		NESE		NWSE		SWSE		
			SESE								
	S28		NENE		NWNE		NENW		NWNW		
			SWNW		SENW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S29		NENE		NWNE		SENE		NWSE		
			SESE								
	S33		NWNE		SWNE		SENE		NENW		
			NESE		NWSE		SESE				
	S34		NENE		NWNE		SWNE		SENE		
			SWNW		SENW		NESW		NWSW		
			SWSW		SESW		NESE		NWSE		
			SWSE								
	S35		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		SWSW		SESW		NESE		
			NWSE		SWSE		SESE				
	S36		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
R25E	S28		SWSW		SESW		NWSE		SWSE		
	S31		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		
	S32		NENE		NWNE		SWNE		SENE		
			NENW		NWNW		SWNW		SENW		
			NESW		NWSW		SWSW		SESW		
			NESE		NWSE		SWSE		SESE		

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-02507, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Roger Burdick

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 SEP 26 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)	CERTIFICATE OF MAILING
)	
Case No. 39576)	
)	Water Right(s): 34-00818

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) for WATER RIGHT 34-00818 was mailed on September 26, 2001, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

DIANA DELANEY
Chief Deputy Clerk

2001 OCT 15 PM 4:50

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-02507**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. Additional proceedings followed, which ultimately culminated in a ***Memorandum Decision and Order on Motions for Reconsideration*** issued by Judge Wood on December 16, 1999.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right.

No objections were filed to the *Supplemental Director's Report* with respect to the above-captioned water right. On May 9, 2001, this Court issued an ***Order of Partial Decree for General Provisions in Administrative Basin 34***.

Therefore, IT IS ORDERED that water right 34-02507 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED October 15, 2001.

R Burdick

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:50
DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

In Re SRBA	)	PARTIAL DECREE PURSUANT TO
	)	I.R.C.P. 54(b) FOR
Case No. 39576	)	
	)	Water Right 34-02507

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6000.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 09/02/1959

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE		QUANTITY	
IRRIGATION STORAGE	01-01	12-31	6000.0	AFY
IRRIGATION FROM STORAGE	05-01	10-15	6000.0	AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
	Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
		NESW		NWSW	SWSW	SESW
		NESE		NWSE	SWSE	SESE
S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE

PLACE OF USE: (CONT)

T03N R26E	S02			NESE			NWSE		SESE	
	S12			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S13			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NESE		NWSE	
R27E	S05	Lot 4	(NWNW)				SWNW		NWSW	SWSW
	S06	Lot 1	(NENE)	Lot 2	(NWNE)				SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)				SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)				SESW	NESE
				NWSE			SWSE		SESE	
	S07			NENE			NWNE		SWNE	SENE
				NENW	Lot 1	(NWNW)		Lot 2	(SWNW)	SENW
				NESW			NWSW		SWSW	SESW
				SWSE			SESE			
	S08			NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
	S17			NENW			NWNW		SWNW	SENW
				NWSW			SWSW			
	S18			NENE			NWNE		SWNE	SENE
				NENW	Lot 1	(NWNW)		Lot 2	(SWNW)	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S19			NENE			NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)							
	S03	Lot 1	(NENE)	Lot 2	(NWNE)				SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)				SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)				SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)				SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)				SWNE	SENE
				SENW			NESW		NWSW	SWSW
				SESW			NESE		NWSE	SWSE
				SESE						
	S07			NENE			SENE		NESE	SESE
	S08			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S09			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S10			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S11			NWNW			SWNW		NWSW	SWSW
	S14			NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S15			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S16			NENE			NWNE		SWNE	SENE
				NENW			NWNW		SWNW	SENW
				NESW			NWSW		SWSW	SESW
				NESE			NWSE		SWSE	SESE
	S17			NENE			SWNE		SENE	NWNW
				SWNW			SENW		NESW	NWSW
				SWSW			SESW		NESE	NWSE
				SWSE			SESE			
	S18			NENE			NWNE		SWNE	SENE
				NESE			NWSE		SWSE	SESE
	S19			NENE			NWNE		SWNE	SENE

PLACE OF USE: (CONT)

T04N R26E S19	NESW	SESW	NESE	NWSE	
	SWSE	SESE			
S20	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	NWSE	
S21	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE				
S22	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	NESE	NWSE	
	SWSE	SESE			
S23	NWNE	SWNE	NENW	NWNW	
	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S25	SWNW	SENW	NESW	NWSW	
	SWSW	SESW	NWSE	SWSE	
	SESE				
S26	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE	
	NENW	SENW	NESE	NWSE	
	SWSE	SESE			
S36	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SESW	NESE	
	NWSE	SWSE	SESE		
R27E S31	Lot 1 (NWNW)	Lot 2 (SWNW)	SENW	NESW	
	Lot 3 (NWSW)	Lot 4 (SWSW)	SESW	SWSE	
	SESE				
T05N R25E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
R26E S03	NWSW	SWSW			
S04	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S05	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE	
	NESE	SWSE	SESE		
S06	NWNW				
S08	NENE	SENE	NESW	NWSW	
	SWSW	SESW	NESE	NWSE	
	SWSE	SESE			
S09	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S10	SWNE	NENW	NWNW	SWNW	
	SENW	NESW	NWSW	SWSW	
	SESW	NWSE	SWSE	SESE	
S14	NWNW	SWNW	NESW	NWSW	
	SWSW	SESW			
S15	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S16	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESW	NWSW	SWSW	SESW	
	NESE	NWSE	SWSE	SESE	
S17	NENE	NWNE	SWNE	SENE	
	NENW	NWNW	SWNW	SENW	
	NESE	NWSE	SWSE	SESE	
S20	NENE	NWNE	SWNE	SENE	

PLACE OF USE: (CONT)

T05N R26E	S20		NESE		NWSE		SWSE		SESE
	S21		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S22		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S23		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S26		NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
	S27		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S28		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S29		NENE		NWNE		SWNE		SENE
			NENW		SENW		NESE		NWSE
			SWSE		SESE				
	S32		NENE		SENE		NESE		SESE
	S33		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S34		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NESW		NWSW	Lot 4 (SWSW)		Lot 5 (SESW)	
			NESE		NWSE		SWSE		SESE
	S35		NWNW		SWNW		NWSW		SWSW
T06N R24E	S01	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW		SENW
			NESW		NESE		NWSE		SWSE
			SESE						
	S02	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW		SENW
			NESW		NWSW		SESW		NWSE
			SWSE		SESE				
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE		SENE
	S11		NENE		NWNE		SWNE		SENE
	S12		NENE		NWNE		SWNE		SENE
			NENW		NWNW		SWNW		SENW
			NWSW		NESE				
R25E	S01		NESW		SWSW		SESW		NESE
			NWSE		SWSE		SESE		
	S02		SWNE		SWNW		SENW		NESW
			NWSW		SWSW		SESW		NWSE
			SWSE		SESE				
	S03	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)		Lot 3 (NENW)		Lot 4 (NWNW)	
			SWSW		SESW		SWSE		SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)			SWNW		SENW
			NESW		NWSW		SWSW		SESW
			NESE		NWSE		SWSE		SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)			SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		Lot 5 (SWNW)			SENW
			NESW	Lot 6 (NWSW)		Lot 7 (SWSW)			SESW
			NESE		NWSE		SWSE		SESE
	S07		NENE		NWNE		SWNE		SENE
			NENW	Lot 1 (NWNW)		Lot 2 (SWNW)			SENW
			NESW	Lot 3 (NWSW)		Lot 4 (SWSW)			SESW
			NESE		NWSE		SWSE		SESE

PLACE OF USE: (CONT)

T06N R25E S08			NENE			NWNE		NENW	NWNW
			SWNW			NWSW		SWSW	NESE
			NWSE			SWSE		SESE	
	S09		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S10		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S11		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S12		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S13		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S14		NENE			NWNE		SENE	NESE
			SWSE			SESE			
	S16		NWNE			NENW		NWNW	SWNW
	S17		SWNE			SENE		NWNW	SWNW
			SENW			NESW		NWSW	NESE
			NWSE			SWSE		SESE	
	S18		NENE			NWNE		SWNE	SENE
			SWSW						
	S21	Lot 1	(NENE)	Lot 2	(NWNE)			SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)			NESE	NWSE
			SESE						
	S22		NWSW			SWSW			
	S23		NENE			SENE		NESE	SESE
	S24		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S25		NENE			NWNE		SWNE	SENE
			NENW			SWNW		SENW	NESW
			NWSW			SWSW		SESW	NESE
			NWSE			SWSE		SESE	
	S26		SESW			SWSE		SESE	
	S27		NWNW			SWNW		SWSW	SESW
			SWSE	Lot 4	(SESE)				
	S28		NENE			SENE		NESE	SESE
	S33		NENE						
	S34	Lot 1	(NENE)			NWNE		SWNE	Lot 2 (SENE)
			NENW			NWNW		SENW	NESW
		Lot 3	(NESE)			NWSE	Lot 4	(SESE)	
	S35		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S36		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
R26E S05		Lot 4	(SWSW)	Lot 5	(SESW)				
	S06		SWSW			SESE			
	S07		NENE			SWNE		SENE	Lot 1 (NENW)
			NWNW			SWNW		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)			SESW	NESE
			NWSE			SWSE		SESE	
	S08		NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
	S17		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T06N R26E	S17		NESE		NWSE		SWSE	SESE
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)		SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S21		SWNW		NESW		NWSW	SWSW
			SESW		SWSE			
	S27		NESW		NWSW			
	S28		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S29		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S30		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S31		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2 (SWNW)		SENW
			NESW	Lot 3	(NWSW)	Lot 4 (SWSW)		SESW
			NESE		NWSE		SWSE	SESE
	S32		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S33		NWNE		SWNE		NENW	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
	S17		SWNW		NWSW		SWSW	SESW
	S18		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SESE					
	S20		NENE		NWNE		SWNE	NENW
			NWNW		NESE		NWSE	SWSE
			SESE					
	S21		NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S26		SWSW		SESW		SWSE	SESE
	S27		NENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S28		NENE		NWNE		NENW	NWNW
			SWNW		SENW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SENE	NWSE
			SESE					
	S33		NWNE		SWNE		SENE	NENW
			NESE		NWSE		SESE	
	S34		NENE		NWNE		SWNE	SENE
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE					
	S35		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		SWSW		SESW	NESE
			NWSE		SWSE		SESE	
	S36		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW

PLACE OF USE: (CONT)

T07N R24E S36	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE OESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-10873 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 OCT 15 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)	CERTIFICATE OF MAILING
)	
Case No. 39576)	
)	Water Right(s): 34-02507

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) for WATER RIGHT 34-02507 was mailed on October 15, 2001, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

YOUNG HARVEY WALKER
Represented by:
RANDALL C BUDGE
PO BOX 1391
201 E CENTER, STE A2
POCATELLO, ID 83204-1391
Phone: 208-232-6101

ARTHUR W. QUIST
Represented by:
RAY W. RIGBY
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

LITTLE SALMON RIVER WATER USER
PAYETTE RIVER WATER USERS ASSN
Represented by:
SCOTT L. CAMPBELL
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83702-0829
Phone: 208-345-2000

BIG LOST RIVER WATER USERS
Represented by:
WILLIAM R HOLLIFIELD
249 THIRD AVENUE EAST (83301)
PO BOX 66
TWIN FALLS, ID 83303-0066
Phone: 208-734-5610

JAY V JENSEN
RT 1 BOX 112A
MOORE, ID 83255

LETTIE MESSICK
Chief Deputy Clerk

2001 OCT 15 PM 4:54

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	
	)	**ORDER OF PARTIAL DECREE**
Case No. 39576	)	
	)	**For Water Right 34-10873**

On March 25, 1998, a ***Special Master's Report and Recommendation*** was filed for the above water right. Additional proceedings followed, which ultimately culminated in a ***Memorandum Decision and Order on Motions for Reconsideration*** issued by Judge Wood on December 16, 1999.

On June 24, 1999, in response to the Idaho Supreme Court decision in *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), IDWR filed a *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of Period of Use (For Irrigation Water Uses) and Conjunctive Management General Provisions* which included a recommendation for the irrigation season of use for this water right.

No objections were filed to the *Supplemental Director's Report* with respect to the above-captioned water right. On May 9, 2001, this Court issued an ***Order of Partial Decree for General Provisions in Administrative Basin 34***.

Therefore, IT IS ORDERED that water right 34-10873 is hereby **decreed** as set forth in the attached ***Partial Decree Pursuant to I.R.C.P. 54(b)***.

DATED October 15, 2001.

R Burdick

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2001 OCT 15 PM 4:54

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-10873

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 20646.0 AFY

A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVIOR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.

PRIORITY DATE: 10/02/1905

POINT OF DIVERSION:

T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
S12	NENWSE	(REDIVERSION)	
T04N R26E S26	NWNWNW	(REDIVERSION)	
T05N R26E S04	NWSESE	(REDIVERSION)	
T07N R23E S12	SENW		Within CUSTER County
T06N R24E S01	NENESW	(REDIVERSION)	
R25E S06	SWNESE	(REDIVERSION)	
S10	NENESW	(REDIVERSION)	
S11	SWSESW	(REDIVERSION)	
S14	SENWSE	(REDIVERSION)	
S24	NWNWNE	(REDIVERSION)	
R26E S32	NWSENW	(REDIVERSION)	
T07N R23E S12	NWNWSE	(REDIVERSION)	
R24E S18	SESWNE	(REDIVERSION)	
S20	SWNESW	(REDIVERSION)	
S33	NWSWNE	(REDIVERSION)	
S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION STORAGE	01-01 12-31	20646.0 AFY
IRRIGATION FROM STORAGE	05-01 10-15	20646.0 AFY

THE PERIOD OF USE FOR IRRIGATION FROM STORAGE DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE	SENE
	Lot 3 (NENW)	Lot 4 (NWNW)	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

PLACE OF USE: (CONT)

T03N	R26E	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
				NESE		NWSE		SESE			
		S12		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S13		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NESE		NWSE			
	R27E	S05	Lot 4	(NWNW)		SWNW		NWSW		SWSW	
		S06	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SENW		NESW	
			Lot 6	(NWSW)	Lot 7	(SWSW)		SESW		NESE	
				NWSE		SWSE		SESE			
		S07		NENE		NWNE		SWNE		SENE	
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	
				NESW		NWSW		SWSW		SESW	
				SWSE		SESE					
		S08		NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
		S17		NENW		NWNW		SWNW		SENW	
				NWSW		SWSW					
		S18		NENE		NWNE		SWNE		SENE	
				NENW	Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S19		NENE		NWNE		SWNE		SENE	
T04N	R26E	S02	Lot 2	(NWNW)							
		S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
			Lot 3	(NENW)	Lot 4	(NWNW)		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE		SENE	
				SENW		NESW		NWSW		SWSW	
				SESW		NESE		NWSE		SWSE	
				SESE							
		S07		NENE		SENE		NESE		SESE	
		S08		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S09		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S10		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S11		NWNW		SWNW		NWSW		SWSW	
		S14		NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S15		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S16		NENE		NWNE		SWNE		SENE	
				NENW		NWNW		SWNW		SENW	
				NESW		NWSW		SWSW		SESW	
				NESE		NWSE		SWSE		SESE	
		S17		NENE		SWNE		SENE		NWNW	
				SWNW		SENW		NESW		NWSW	
				SWSW		SESW		NESE		NWSE	
				SWSE		SESE					
		S18		NENE		NWNE		SWNE		SENE	
				NESE		NWSE		SWSE		SESE	

PLACE OF USE: (CONT)

T04N R26E S19			NENE			NWNE	SWNE	SENE
			NESW			SESW	NESE	NWSE
			SWSE			SESE		
	S20		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	NWSE
	S21		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESE					
	S22		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	NESE	NWSE
			SWSE			SESE		
	S23		NWNE			SWNE	NENW	NWNW
			SWNW			SENW	NESW	NWSW
			SWSW			SESW	NWSE	SWSE
			SESE					
	S25		SWNW			SENW	NESW	NWSW
			SWSW			SESW	NWSE	SWSE
			SESE					
	S26		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S35		NENE			NWNE	SWNE	SENE
			NENW			SENW	NESE	NWSE
			SWSE			SESE		
	S36		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SESW	NESE
			NWSE			SWSE	SESE	
R27E S31		Lot 1	(NWNW)	Lot 2	(SWNW)		SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	SWSE
			SESE					
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW			NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESE			NWSE	SWSE	SESE
R26E S03			NWSW			SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			NESE			SWSE	SESE	
	S06		NWNW					
	S08		NENE			SENE	NESW	NWSW
			SWSW			SESW	NESE	NWSE
			SWSE			SESE		
	S09		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S10		SWNE			NENW	NWNW	SWNW
			SENW			NESW	NWSW	SWSW
			SESW			NWSE	SWSE	SESE
	S14		NWNW			SWNW	NESW	NWSW
			SWSW			SESW		
	S15		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S16		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESW			NWSW	SWSW	SESW
			NESE			NWSE	SWSE	SESE
	S17		NENE			NWNE	SWNE	SENE
			NENW			NWNW	SWNW	SENW
			NESE			NWSE	SWSE	SESE

PLACE OF USE: (CONT)

T05N R26E	S20	NENE		NWNE		SWNE	SENE
		NESE		NWSE		SWSE	SESE
	S21	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S22	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S23	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
	S26	NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
	S27	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S28	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SWSE		SESE			
	S32	NENE		SENE		NESE	SESE
	S33	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S34	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW	Lot 4 (SWSW)		Lot 5 (SESW)
		NESE		NWSE		SWSE	SESE
	S35	NWNW		SWNW		NWSW	SWSW
T06N R24E	S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NESE		NWSE	SWSE
		SESE					
	S02	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW		SESW	NWSE
		SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
	S11	NENE		NWNE		SWNE	SENE
	S12	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NWSW		NESE			
	R25E S01	NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S02	SWNE		SWNW		SENW	NESW
		NWSW		SWSW		SESW	NWSE
		SWSE		SESE			
	S03	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)	Lot 3 (NENW)		Lot 4 (NWNW)
		SWSW		SESW		SWSE	SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE	SENE
		Lot 3 (NENW)		Lot 4 (NWNW)	Lot 5 (SWNW)		SENW
		NESW		Lot 6 (NWSW)	Lot 7 (SWSW)		SESW
		NESE		NWSE		SWSE	SESE
	S07	NENE		NWNE		SWNE	SENE
		NENW		Lot 1 (NWNW)	Lot 2 (SWNW)		SENW
		NESW		Lot 3 (NWSW)	Lot 4 (SWSW)		SESW

PLACE OF USE: (CONT)

T06N R25E	S07			NESE			NWSE			SWSE			SESE
	S08			NENE			NWNE			NENW			NWNW
				SWNW			NWSW			SWSW			NESE
				NWSE			SWSE			SESE			
	S09			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S10			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S11			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S12			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S13			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S14			NENE			NWNE			SENE			NESE
				SWSE			SESE						
	S16			NWNE			NENW			NWNW			SWNW
	S17			SWNE			SENE			NWNW			SWNW
				SENW			NESW			NWSW			NESE
				NWSE			SWSE			SESE			
	S18			NENE			NWNE			SWNE			SENE
				SWSW									
	S21	Lot 1	(NENE)		Lot 2	(NWNE)				SWNE			SENE
		Lot 3	(NENW)		Lot 4	(NWNW)				NESE			NWSE
				SESE									
	S22			NWSW			SWSW						
	S23			NENE			SENE			NESE			SESE
	S24			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S25			NENE			NWNE			SWNE			SENE
				NENW			SWNW			SENW			NESW
				NWSW			SWSW			SESW			NESE
				NWSE			SWSE			SESE			
	S26			SESW			SWSE			SESE			
	S27			NWNW			SWNW			SWSW			SESW
				SWSE		Lot 4	(SESE)						
	S28			NENE			SENE			NESE			SESE
	S33			NENE									
	S34	Lot 1	(NENE)				NWNE			SWNE		Lot 2	(SENE)
				NENW			NWNW			SENW			NESW
		Lot 3	(NESE)				NWSE		Lot 4	(SESE)			
	S35			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
	S36			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
				NESE			NWSE			SWSE			SESE
R26E	S05	Lot 4	(SWSW)		Lot 5	(SESW)							
	S06			SWSW			SESE						
	S07			NENE			SWNE			SENE		Lot 1	(NENW)
				NWNW			SWNW			SENW			NESW
		Lot 3	(NWSW)		Lot 4	(SWSW)				SESW			NESE
				NWSE			SWSE			SESE			
	S08			NENW			NWNW			SWNW			SENW
				NESW			NWSW			SWSW			SESW
	S17			NENE			NWNE			SWNE			SENE
				NENW			NWNW			SWNW			SENW

PLACE OF USE: (CONT)

T06N R26E	S17		NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S18		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE			NWSE		SWSE	SESE
	S19		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S20		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S21		SWNW			NESW		NWSW	SWSW
			SESW			SWSE			
	S27		NESW			NWSW			
	S28		NWNE			SWNE		NENW	NWNW
			SWNW			SENW		NESW	NWSW
			SWSW			SESW		NESE	NWSE
			SWSE			SESE			
	S29		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S30		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE			NWSE		SWSE	SESE
	S31		NENE			NWNE		SWNE	SENE
			NENW		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
			NESE			NWSE		SWSE	SESE
	S32		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S33		NWNE			SWNE		NENW	NWNW
			SWNW			SENW		NESW	NWSW
			SWSW			SESW		NWSE	SWSE
T07N R24E	S07	Lot 3	(NWSW)		Lot 4	(SWSW)		SESW	
	S17		SWNW			NWSW		SWSW	SESW
	S18		NENE			NWNE		SWNE	SENE
			NENW			SENW		NESE	NWSE
			SESE						
	S20		NENE			NWNE		SWNE	NENW
			NWNW			NESE		NWSE	SWSE
			SESE						
	S21		NESW			NWSW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S26		SWSW			SESW		SWSE	SESE
	S27		NENW			NESW		NWSW	SWSW
			SESW			NESE		NWSE	SWSE
			SESE						
	S28		NENE			NWNE		NENW	NWNW
			SWNW			SENW		SWSW	SESW
			NESE			NWSE		SWSE	SESE
	S29		NENE			NWNE		SENE	NWSE
			SESE						
	S33		NWNE			SWNE		SENE	NENW
			NESE			NWSE		SESE	
	S34		NENE			NWNE		SWNE	SENE
			SWNW			SENW		NESW	NWSW
			SWSW			SESW		NESE	NWSE
			SWSE						
	S35		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW
			NESW			SWSW		SESW	NESE
			NWSE			SWSE		SESE	
	S36		NENE			NWNE		SWNE	SENE
			NENW			NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T07N R24E S36	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
R25E S28	SWSW	SESW	NWSE	SWSE
S31	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S32	NENE	NWNE	SWNE	SENE
	NENW	NWNW	SWNW	SENW
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE
S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS. 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10935.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER BURDICK
Presiding Judge of the
Snake River Basin Adjudication

2001 OCT 15 PM 02:00
DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)	CERTIFICATE OF MAILING
)	
Case No. 39576)	
)	Water Right(s): 34-10873

CERTIFICATE OF MAILING

I certify that a true and correct copy of the PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) for WATER RIGHT 34-10873 was mailed on October 15, 2001, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

YOUNG HARVEY WALKER
Represented by:
RANDALL C BUDGE
PO BOX 1391
201 E CENTER, STE A2
POCATELLO, ID 83204-1391
Phone: 208-232-6101

ARTHUR W. QUIST
Represented by:
RAY W. RIGBY
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

LITTLE SALMON RIVER WATER USER
PAYETTE RIVER WATER USERS ASSN
Represented by:
SCOTT L. CAMPBELL
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83702-0829
Phone: 208-345-2000

BIG LOST RIVER WATER USERS
Represented by:
WILLIAM R HOLLIFIELD
249 THIRD AVENUE EAST (83301)
PO BOX 66
TWIN FALLS, ID 83303-0066
Phone: 208-734-5610

JAY V JENSEN
RT 1 BOX 112A
MOORE, ID 83255

LETTIE MESSICK
Chief Deputy Clerk

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY 21 2014
By _____ Clerk
Deputy Clerk

RECEIVED
MAY 22 2014
DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	**Water Right No.: 34-10935**
Case No. 39576	**ORDER OF AMENDED PARTIAL DECREE, *NUNC PRO TUNC* TO OCTOBER 15, 2001**

On June 24, 1999, the Director of the Idaho Department of Water Resources filed his *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34* ("*Supplemental Director's Report*"), which included a recommendation for the above-captioned water right claim. No objections were filed to the recommendation in the *Supplemental Director's Report* and the time period for filing such objections has expired. On October 15, 2001, a *Partial Decree* was entered for the above-captioned water right claim. Although the recommendation for the claim provided for a period of use of "05-01 10-15," for the Irrigation From Storage purpose of use, the *Partial Decree* erroneously identified the period of use as "Irrigation Season." The Court finds the erroneously identified period of use to be the result of clerical error.

Therefore, IT IS ORDERED pursuant to Idaho Rule of Civil Procedure 60(a) that the ***Partial Decree*** for the above-captioned water right is hereby amended *nunc pro tunc* to October 15, 2001, to correct the clerical error as set forth in the attached ***Amended Partial Decree Pursuant to I.R.C.P. 54(b).***

Dated _____

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER OF AMENDED PARTIAL DECREE NUNC PRO TUNC TO OCTOBER 15, 2001 was mailed on May 21, 2014, with sufficient first-class postage to the following:

STATE OF IDAHO
Represented by:
CLIVE STRONG
NATURAL RESOURCES
DEP AG OFFICE OF ATTY GEN
STATEHOUSE MAIL
BOISE, ID 83720-0010
Phone: 208-334-2400

BIG LOST RIVER IRRGTN DIST
Represented by:
KENT W FOSTER
1000 RIVERWALK DR, STE 200
PO BOX 50130
IDAHO FALLS, ID 83405-0130
Phone: 208-523-0620

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Julie Murphy
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

AMENDED

NUNC PRO TUNC

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 34-10935

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
OCT 15 2001
By _____ Clerk
_____ Deputy Clerk

RECEIVED
Within BUTTE County
MAY 22 2014
DEPARTMENT OF WATER RESOURCES
Within CUSTER County

NAME & ADDRESS: BIG LOST RIVER IRRIGATION DISTRICT
PO BOX 205
MACKAY ID 83251

SOURCE: BIG LOST RIVER TRIBUTARY: SINKS

QUANTITY: 6.4 CFS
1113.0 AFY

PRIORITY DATE: 06/01/1896

POINT OF DIVERSION:

T03N R26E	S01	NENESW	(REDIVERSION)
	S12	NENWSE	(REDIVERSION)
T04N R26E	S26	NWNWNW	(REDIVERSION)
T05N R26E	S04	NWSESE	(REDIVERSION)
T07N R23E	S12	SENW	
T06N R24E	S01	NENESW	(REDIVERSION)
R25E	S06	SWNESE	(REDIVERSION)
	S10	NENESW	(REDIVERSION)
	S11	SWSESW	(REDIVERSION)
	S14	SENWSE	(REDIVERSION)
	S24	NWNWNE	(REDIVERSION)
R26E	S32	NWSENW	(REDIVERSION)
T07N R23E	S12	NWNWSE	(REDIVERSION)
R24E	S18	SESWNE	(REDIVERSION)
	S20	SWNESW	(REDIVERSION)
	S33	NWSWNE	(REDIVERSION)
	S34	SENWNW	(REDIVERSION)

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE		QUANTITY	
IRRIGATION STORAGE	05-01	10-15	1113.0	AFY
IRRIGATION FROM STORAGE	05-01	10-15	1113.0	AFY
DIVERSION TO STORAGE	05-01	10-15	6.4	CFS

The period of use for each purpose of use described above may be extended in seasons of unusual characteristics to a beginning date of 4-20 and an ending date of 10-31 at the discretion of the Director.

PLACE OF USE: IRRIGATION FROM STORAGE Within BUTTE and CUSTER Counties

T03N R26E	S01	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		Lot 3 (NENW)	Lot 4 (NWNW)	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S02	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE
		NESE	NWSE	SESE		
	S12	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NWSW	SWSW		SESW
		NESE	NWSE	SWSE		SESE
	S13	NENE	NWNE	SWNE		SENE
		NENW	NWNW	SWNW		SENW
		NESW	NESE	NWSE		
R27E	S05	Lot 4 (NWNW)	SWNW	NWSW		SWSW
	S06	Lot 1 (NENE)	Lot 2 (NWNE)	SWNE		SENE

PLACE OF USE: (CONT)

T03N R27E	S06	Lot 3	(NENW)	Lot 4	(NWNW)		SENW	NESW
		Lot 6	(NWSW)	Lot 7	(SWSW)		SESW	NESE
			NWSE		SWSE		SESE	
	S07		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			SWSE		SESE			
	S08		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S17		NENW		NWNW		SWNW	SENW
			NWSW		SWSW			
	S18		NENE		NWNE		SWNE	SENE
			NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
T04N R26E	S02	Lot 2	(NWNW)					
	S03	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S04	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)		SWNE	SENE
			SENW		NESW		NWSW	SWSW
			SESW		NESE		NWSE	SWSE
			SESE					
	S07		NENE		SENE		NESE	SESE
	S08		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S09		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S10		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S11		NWNW		SWNW		NWSW	SWSW
	S14		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S15		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S16		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S17		NENE		SWNE		SENE	NWNW
			SWNW		SENW		NESW	NWSW
			SWSW		SESW		NESE	NWSE
			SWSE		SESE			
	S18		NENE		NWNE		SWNE	SENE
			NESE		NWSE		SWSE	SESE
	S19		NENE		NWNE		SWNE	SENE
			NESW		SESW		NESE	NWSE
			SWSE		SESE			
	S20		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	NWSE
	S21		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESE					
	S22		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW

PLACE OF USE: (CONT)

T04N R26E S22			NESW		NWSW	NESE	NWSE
			SWSE		SESE		
	S23		NWNE		SWNE	NENW	NWNW
			SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S25		SWNW		SENW	NESW	NWSW
			SWSW		SESW	NWSE	SWSE
			SESE				
	S26		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S35		NENE		NWNE	SWNE	SENE
			NENW		SENW	NESE	NWSE
			SWSE		SESE		
	S36		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SESW	NESE
			NWSE		SWSE	SESE	
R27E S31		Lot 1	(NWNW)	Lot 2	(SWNW)	SENW	NESW
		Lot 3	(NWSW)	Lot 4	(SWSW)	SESW	SWSE
			SESE				
T05N R25E S01		Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
	S02	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESE		NWSE	SWSE	SESE
R26E S03			NWSW		SWSW		
	S04	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
		Lot 3	(NENW)	Lot 4	(NWNW)	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S05	Lot 1	(NENE)	Lot 2	(NWNE)	SWNE	SENE
			NESE		SWSE	SESE	
	S06		NWNW				
	S08		NENE		SENE	NESW	NWSW
			SWSW		SESW	NESE	NWSE
			SWSE		SESE		
	S09		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S10		SWNE		NENW	NWNW	SWNW
			SENW		NESW	NWSW	SWSW
			SESW		NWSE	SWSE	SESE
	S14		NWNW		SWNW	NESW	NWSW
			SWSW		SESW		
	S15		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S16		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S17		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESE		NWSE	SWSE	SESE
	S20		NENE		NWNE	SWNE	SENE
			NESE		NWSE	SWSE	SESE
	S21		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S22		NENE		NWNE	SWNE	SENE
			NENW		NWNW	SWNW	SENW
			NESW		NWSW	SWSW	SESW
			NESE		NWSE	SWSE	SESE
	S23		NENW		NWNW	SWNW	SENW

PLACE OF USE: (CONT)

T05N R26E	S23		NESW		NWSW		SWSW	SESW
	S26		NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
	S27		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S28		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S29		NENE		NWNE		SWNE	SENE
			NENW		SENW		NESE	NWSE
			SWSE		SESE			
	S32		NENE		SENE		NESE	SESE
	S33		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW		SWSW	SESW
			NESE		NWSE		SWSE	SESE
	S34		NENE		NWNE		SWNE	SENE
			NENW		NWNW		SWNW	SENW
			NESW		NWSW	Lot 4 (SWSW)	Lot 5 (SESW)	
			NESE		NWSE	SWSE		SESE
	S35		NWNW		SWNW	NWSW		SWSW
T06N R24E	S01	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW		SENW
		NESW		NESE		NWSE		SWSE
		SESE						
	S02	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW		SENW
		NESW		NWSW		SESW		NWSE
		SWSE		SESE				
	S03	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
	S11	NENE		NWNE		SWNE		SENE
	S12	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NWSW		NESE				
R25E	S01	NESW		SWSW		SESW		NESE
		NWSE		SWSE		SESE		
	S02	SWNE		SWNW		SENW		NESW
		NWSW		SWSW		SESW		NWSE
		SWSE		SESE				
	S03	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S04	Lot 1 (NENE)		Lot 2 (NWNE)		Lot 3 (NENW)	Lot 4 (NWNW)	
		SWSW		SESW		SWSE		SESE
	S05	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S06	Lot 1 (NENE)		Lot 2 (NWNE)		SWNE		SENE
		Lot 3 (NENW)		Lot 4 (NWNW)		Lot 5 (SWNW)		SENW
		NESW		Lot 6 (NWSW)		Lot 7 (SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S07	NENE		NWNE		SWNE		SENE
		NENW		Lot 1 (NWNW)		Lot 2 (SWNW)		SENW
		NESW		Lot 3 (NWSW)		Lot 4 (SWSW)		SESW
		NESE		NWSE		SWSE		SESE
	S08	NENE		NWNE		NENW		NWNW
		SWNW		NWSW		SWSW		NESE
		NWSE		SWSE		SESE		
	S09	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW
		NESE		NWSE		SWSE		SESE
	S10	NENE		NWNE		SWNE		SENE
		NENW		NWNW		SWNW		SENW
		NESW		NWSW		SWSW		SESW

PLACE OF USE: (CONT)

T06N R26E S20		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S21	SWNW		NESW		NWSW	SWSW
		SESW		SWSE			
	S27	NESW		NWSW			
	S28	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE		SESE			
	S29	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S30	NENE		NWNE		SWNE	SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
		NESE		NWSE		SWSE	SESE
	S31	NENE		NWNE		SWNE	SENE
		NENW	Lot 1	(NWNW)	Lot 2	(SWNW)	SENW
		NESW	Lot 3	(NWSW)	Lot 4	(SWSW)	SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S33	NWNE		SWNE		NENW	NWNW
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NWSE	SWSE
T07N R24E S07	Lot 3	(NWSW)	Lot 4	(SWSW)		SESW	
	S17	SWNW		NWSW		SWSW	SESW
	S18	NENE		NWNE		SWNE	SENE
		NENW		SENW		NESE	NWSE
		SESE					
	S20	NENE		NWNE		SWNE	NENW
		NWNW		NESE		NWSE	SWSE
		SESE					
	S21	NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S26	SWSW		SESW		SWSE	SESE
	S27	NENW		NESW		NWSW	SWSW
		SESW		NESE		NWSE	SWSE
		SESE					
	S28	NENE		NWNE		NENW	NWNW
		SWNW		SENW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S29	NENE		NWNE		SENE	NWSE
		SESE					
	S33	NWNE		SWNE		SENE	NENW
		NESE		NWSE		SESE	
	S34	NENE		NWNE		SWNE	SENE
		SWNW		SENW		NESW	NWSW
		SWSW		SESW		NESE	NWSE
		SWSE					
	S35	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		SWSW		SESW	NESE
		NWSE		SWSE		SESE	
	S36	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
R25E S28		SWSW		SESW		NWSE	SWSE
	S31	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE
	S32	NENE		NWNE		SWNE	SENE
		NENW		NWNW		SWNW	SENW
		NESW		NWSW		SWSW	SESW
		NESE		NWSE		SWSE	SESE

PLACE OF USE: (CONT)

T07N R25E S33	NWNE	SWNE	SENE	NENW
	NWNW	SWNW	SENW	NESW
	NWSW	SWSW	SESW	NESE
	NWSE	SWSE	SESE	
S35	NENE	NWNE	SWNE	SENE
	NESW	NWSW	SWSW	SESW
	NESE	NWSE	SWSE	SESE

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF 32,000 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00012, 34-00013, 34-00810, 34-00811, 34-00817B, 34-00818, 34-02507 AND 34-10873.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS:

T03N R27E S03	SWSW	37	SESW	24		
S04	NWSW	37	SWSW	36	SESW	37.5
	SWSE	37.5	SESE	37.5		
S08	NENE	21	NWNE	38	SENE	35
	NESE	39	NWSE	27		
S09	NENE	32	SENE	39	NWNW	33
	SWNW	31	NESW	30	NWSW	38
	SWSW	25				

634.5 ACRES TOTAL

ALSO, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO 120 ACRES WITHIN THE LANDS DESCRIBED BELOW IN A SINGLE IRRIGATION SEASON.

T03N R26E S13	NWSW	39	SWSW	33	SESW	39
	SWSE	40				
S24	NENW	39	NWNW	38	SWNW	39

267 ACRES TOTAL

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J Wildman
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT C

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

2ND AMENDED

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 01-02064

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
FEB 2 8 2020
By _____ Clerk
Deputy Clerk

RECEIVED
MAR 0 2 2020
DEPARTMENT OF WATER RESOURCES

NAME AND ADDRESS: UNITED STATES OF AMERICA
BUREAU OF RECLAMATION
REGIONAL DIRECTOR PN CODE-3100
1150 N CURTIS RD STE 100
BOISE, ID 83706-1234

SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY: 1540600.00 AFY

The American Falls Reservoir was originally licensed for a total quantity of 1,700,000 acre-feet. For purposes of administration, however, water right nos. 1-2064 and 1-10042 shall be limited to a total combined quantity equal to the active capacity of the water volume storable in American Falls Reservoir when filled to elevation 4354.5 and measured at the upstream face of the dam. Water right nos. 01-2064, 01-10042 and 01-10620 are limited to the total combined annual diversion volume necessary to allocate a total of 1,655,000 acre-feet of irrigation storage water per year to the consumers or users of the irrigation storage water.

PRIORITY DATE: 03/30/1921

POINT OF DIVERSION: T07S R31E S30 SWSE Within Power County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation Storage	01-01 TO 12-31	1495600.00 AFY
Irrigation from Storage	03-15 TO 11-15	1495600.00 AFY
Power Storage	01-01 TO 12-31	45000.00 AFY
Power from Storage	01-01 TO 12-31	45000.00 AFY

PLACE OF USE:

Place of use for storage is American Falls Reservoir, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources), the Water District 01 advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.
Place of use for irrigation from storage is within the following counties: Fremont, Madison, Jeffferson, Bonneville, Bingham, Bannock, Power, Minidoka, Cassia, Lincoln, Jerome, Twin Falls, Gooding, Teton and Elmore.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address section of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for

OTHER PROVISIONS (continued)

the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations. The Idaho Power Company uses the water decreed for power purposes herein to generate hydropower.

2. The allocation of storage to federal contractors and the location of that storage, including carryover storage, in the reservoir system shall be determined by the United States Bureau of Reclamation pursuant to federal reclamation law and contracts entered into between the United States and federal contractors. The Water District 01 Watermaster (as supervised by the Director of the Department of Water Resources) shall distribute the stored water in accordance with allocation instructions from the United States Bureau of Reclamation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott, which store water for distribution pursuant to water right nos. 1-219, 1-2064, 1-2068, 1-4055, 1-10042, 1-10043, 1-10044, 1-10045, 1-10620, 1-10621A, 1-10621B, 1-10622, 1-10623, 21-2156, 21-4155, 21-10560, 21-13161, 21-13194, 25-7004, 25-14413A and 25-14413B.

3. This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

4. The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District #2.

5. This decree does not alter, amend, or modify the contracts entered into between the various federal contractors and the United States Bureau of Reclamation, as amended, including but not limited to the contractual storage exchanges, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties.

6. September 15th shall begin the annual period for water right accounting in the Upper Snake River Basin upstream of Milner Dam. The September 15th beginning date for this annual period is known as the "reset date" for reservoir volumes. The "reset date" allows previously satisfied reservoir water right volumes to begin filling again for the next annual storage volume period. The annual storage volume period will extend from September 15th to the following September 14th. Consistent with Section 8.3 of the 1990 Fort Hall Indian Water Rights Agreement, nothing in this provision is intended to impact the rights described and administered pursuant to that Section.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

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Attorneys for Big Lost River Irrigation District

RECEIVED
Apr 23, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	DECLARATION OF PAYTON HAMPTON

I, Payton Hampton, being first duly sworn, depose and state as follows:

1. I am competent to testify, over the age of eighteen, and I make this Declaration from my own personal knowledge.
2. I am an attorney of record for Big Lost River Irrigation District ("BLRID").
3. Attached as Exhibit A to my Declaration is a true and correct copy of a brief filed by the Idaho Department of Water Resources through their counsel in December of 2006 into *Nelson v. Big Lost River Irrigation District*, CV-05-91, titled "IDWR Response to Motion for Reconsideration."

I declare under penalty of perjury, pursuant to the laws of the State of Idaho, that the foregoing is true and correct to the best of my knowledge and understanding.

DATED April 23, 2025



Payton Hampton

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

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Roger S. Burdick *Hearing Officer*	[x] Email roburd47@gmail.com

DATED April 23, 2025

Norman M. Semanko; Payton G. Hampton;
Garrett M. Kitamura

EXHIBIT A

WD34

DISTRICT COURT
CUSTER COUNTY
IDAHO

2006 DEC 15 AM 10: 38

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DEPARTMENT OF
WATER RESOURCE

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Attorneys for Defendants

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,

vs.

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

Defendants.

BIG LOST RIVER IRRIGATION DISTRICT,

Counter Claimant,

vs.

DAVID NELSON and LOY PEHRSON, et al.,

Counter Defendants.

Case No. CV-05-91

IDWR RESPONSE TO MOTION FOR RECONSIDERATION

COME NOW DEFENDANTS, the Idaho Department of Water Resources and Karl J. Dreher, its Director, ("IDWR" or "Department"), and submit this Response to Motion for Reconsideration in response to the Plaintiffs' pending Motion for Reconsideration filed pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B).

I. PROCEDURAL HISTORY AND BACKGROUND

Oral argument occurred on Plaintiffs' Cross Motion for Summary Judgment on October 30, 2006. The Department incorporates herein the procedural history and background set forth in its Response to Plaintiffs' Cross Motion for Summary Judgment dated October 13, 2006.

II. ARGUMENT

After due consideration of the briefs and oral argument in this case, the Court issued its *Opinion, Decision and Order on Defendant Big Lost River Irrigation District's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment* ("Order"). The Court determined that "Rule 40.03.b applies to the distribution of water by the IDWR to appropriators within Water District 34." Order at 12. The Court further held that the "BLRID Board is not mandated to distribute storage water within the BLRID according to watermaster's calculation in Rule 40.03.b." Id. These conclusions are absolutely correct.

The Court's determinations are fully supported by the Court's rationale that "[w]hen 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." Order at 11. The Court was also correct when it found that 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." Id. There is no statutory authority in either Title 42, governing water rights administration, or Title 43, governing irrigation

districts, for the Department to enact a rule that would bind the internal operations of the BLRID Board. Thus, the Department does not have the authority to meddle in an irrigation district board's decision on how to assess its patrons for use of its storage water.

A. Rule 40.03.b Does Not Apply to the BLRID

Plaintiffs are in error when they argue that Rule 40.03.b applies to the Board's assessment of storage water released from Mackay Reservoir into the Big Lost River channel. A plain reading of the rule demonstrates that Rule 40, entitled Allocation of Natural Flow, addresses administration of natural flow surface water rights. Rule 40.03.b provides specific direction to the Department and the watermaster for the Water District when calculating conveyance loss for the delivery of impounded water and states:

> **03. Assessment of Evaporation and Conveyance Losses to Impounded Water.**
>
> **a.** Evaporation losses from Mackay Reservoir shall be estimated daily by the watermaster by applying correlated evapotranspiration data from the Aberdeen hydromet station to the Mackay Reservoir and shall be assessed to all impounded water. (10-26-94)
>
> **b.** 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 river reach 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. (10-26-94)

IDAPA 37.03.12.040.03.b. (emphasis added). The rule stops short of requiring the next step that Plaintiffs insist on, applying the proportioned amount of conveyance loss attributed to impounded water to BLRID patrons on a river reach basis.

B. The Watermaster Conveys Storage Water Through the Big Lost River Channel That Has Been Already Appropriated by BLRID for Use By BLRID Patrons

Any storage water held by the BLRID was first diverted and stored under certain water rights prior to being released for use by the patrons of the irrigation district. The BLRID's water delivery method includes the release of its storage water into the Big Lost River channel to be conveyed downstream by the watermaster for distribution to its patrons. Idaho Code 42-801 authorizes the natural river channel to be used by the irrigation district for conveying water downstream to its patrons.

The watermaster for Water District 34, under the direction of the Department, has the authority under I.C. 42-801 to convey the irrigation district's storage water. The watermaster's duty "shall be to adjust the headgates of all ditches not entitled to the stored water, and in such a manner that those having the right to the use of such water shall secure the volume to which they are entitled." I.C. 42-801. As part of his duty to determine how much storage water BLRID has available to deliver to its patrons, the watermaster follows Rule 40.03.b to determine the amount of conveyance loss to be assessed to the natural flow water flowing in the Big Lost River channel and how much conveyance loss must be assessed to the storage water being conveyed through the Big Lost River channel. Although the watermaster is controlling all of the water within the Big Lost River channel, his actions in delivering the two types of water are different. When the watermaster distributes water to the natural flow water rights, he is determining which water rights can be filled in priority to satisfy the needs of the owners of those water rights. For the storage water rights, however, the watermaster at the request of the BLRID delivers a specific volume of water to the points of diversion of the BLRID's patrons. Although the watermaster informs the BLRID how much water flowing in the river is storage water, the BLRID tells the

watermaster how much of that storage water should be delivered to its patrons' points of diversion.

Unlike natural flow water rights that have a specific diversion rate to be delivered under a certain priority, the storage water flowing in the river has already been diverted and is now simply being conveyed pursuant to direction of the owner of the storage water, the BLRID.

IV. CONCLUSION

The Court's conclusion that Rule 40.03.b is unambiguous and does not preclude the BLRID from applying a universal shrink assessment to its patrons is correct and should not be altered. The Court should decline to reconsider its prior Order.

DATED this 15th day of December 2006.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

PHILLIP J. RASSIER
Deputy Attorney General
Section Chief, Water Resources

Candice M. McHugh
Deputy Attorney General, IDWR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho, and residing in Boise, Idaho; and that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto and by facsimile to the numbers listed below on this 15th day of December 2006.

Document Served: IDWR RESPONSE TO MOTION FOR RECONSIDERATION

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Attorneys for Big Lost River Irrigation District

RECEIVED
Apr 23, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.),	Docket No. P-DR-2024-001
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	DECLARATION OF RICHARD HARRY

I, Richard Harry, being first duly sworn, depose and state as follows:

1. I am competent to testify, over the age of eighteen, and I make this Declaration from my own personal knowledge.
2. I am the general manager of Big Lost River Irrigation District ("BLRID" or the "District").
3. I have knowledge of the administration and delivery of storage water within the District. I make this declaration based on personal knowledge and experience acquired through my role in the district and from reviewing historical records and knowledge of local practices.

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4. BLRID delivers both storage and natural flow water to its patrons through an integrated river and canal system. This declaration focuses specifically on the administration and delivery of storage water by BLRID.
5. A storage right is distinct from a natural flow right. BLRID owns the storage water rights in Mackay Reservoir, including Water Rights 34-12, 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, 34-10935.
6. The point of diversion for these storage rights, where the District appropriates the water for delivery to its patrons, is at the base of the dam at Mackay Reservoir. After release, the Big Lost River serves as a conveyance system to deliver water to various administrative rediversion points, including canals, laterals, and pumps.
7. The points of rediversion have never been treated by the District as a part of the legal definition of the storage water right. Instead, the District views and uses them as administrative locations used to facilitate delivery across the District.
8. In our practice, delivery points of storage water sometimes change as new delivery locations arise when a patron who has a storage allocation requests it through the District. The District can deliver this water when it is within the existing Place of Use listed on the District's storage water rights.
9. We have never been required to file a transfer application by the IDWR to add or change points of rediversion on the District's storage rights.

ALLOCATION AND DELIVERY PRACTICES OF STORAGE WATER

10. The District typically allocates storage to its patrons in pro-rata shares in early May, with a potential reallocation in June depending on runoff and reservoir conditions.

11. The allocation is made uniformly to all qualifying water users in the District, regardless of location, and storage water is considered equally owned by all members.
12. Storage water is released from the reservoir and conveyed through the river to various delivery points. The District delivers water according to District patron requests and not based on a goal to carry natural flow water.
13. Once storage water is appropriated by the District at the Point of Diversion, it is charged with river shrink, which reflects the natural losses incurred during transport.
14. Storage water incurs shrink in the Big Lost River, which is calculated based on real-time measurements at the gages on the River and varies depending on seasonal and operational conditions.
15. Based on my skills, experience, and the prior practices of the District, I know the District applies a universal shrink policy for all storage deliveries made through BLRID's storage rights, meaning that all users are charged the same river shrink regardless of where they divert their water.
16. While the shrink rate changes throughout the course of an irrigation season, it has historically averaged around 50%, with better delivery efficiency in wetter years. In 2024, for example, average delivery efficiency was approximately 60%, with only 40% river shrink.
17. Natural flow (decree) water does not incur shrink in the River because the POD on these rights is where the water is diverted from the River. This is because the source of natural flow water is the River itself, versus the reservoir being the source of water for BLRID's storage rights.

18. This distinction is important in understanding how the District administers different types of rights.
19. If the storage water is diverted into a canal or lateral, it is subject to another shrink calculation. The amount of shrink is specific to each lateral. Long canals like Burnett and Darlington experience the highest losses (often over 50%), while other canals closer to the reservoir (e.g., Sharp and Swagger) experience minimal or no shrink.
20. So, in sum, if storage water is being delivered to a patron with a headgate on any lateral, it is going to be subject to two (2) reductions, added together and subtracted from deliverable water available to the patron at their respective headgate—the River shrink percentage and the shrink percentage on the lateral or ditch
21. Based on the District's storage water deliver practices, including universal shrink, it is clear that the District's storage water was intended to benefit the entire district equitably. All users pay the same assessments and became patrons to the District at equal cost. There was never an intent for one geographic area to receive more favorable treatment than another.
22. The District's historical and equitable administration of storage water should be preserved, and IDWR should continue to treat rediversion points as administrative, not legal, components of the right.
23. The District has the right to maintain discretion and control to deliver its storage water throughout the service area without requiring legal modifications or facing legal challenges every time a new delivery point is used for its storage, as it is within the District's own internal control and discretion to make those delivery determinations.

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24. There are multiple pumps/headgates where BLRID's storage water has been diverted in or below the Darlington Sinks.
25. Dennis Moss' river pump, referred to in the Amended Petition as the "River Diversion" has a river diversion directly on the river.
26. But also, Robert Moss, Harry Crawford, and Michael Webb of Pioneer Farms and King Mountain Ranch have river diversions directly on the River.
27. There are also multiple large canals or ditches that are not listed as a "point of rediversion" on BLRID's water rights. This includes the Pehrson Ditch/Pipeline, the Eastside Canal, and the Island Canal.
28. There are 69,241 storage inches allocated to District patrons in the Eastside, 57,206 in the Island and 6,910 deliverable in either canal, which is a significant amount of water.
29. BLRID's storage water has been delivered to the Eastside and Island Canals for approximately 90 years.

I declare under penalty of perjury, pursuant to the laws of the State of Idaho, that the foregoing is true and correct to the best of my knowledge and understanding.

DATED April 23, 2025

Signed by:
Richard Harry
29D5A29355AC4B5...
RICHARD HARRY

Docusign Envelope ID: D1E1F210-3A73-4DB3-84CE-551BF3938615

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

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DATED April 23, 2025

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Apr 23, 2025
DEPARTMENT OF
WATER RESOURCES

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHTS NOS. 34-182 and 34-381A (MOSS FARMS, INC.)	**MOSS FARMS' MOTION TO DISMISS** Docket No. P-DR-2024-001
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, moves the Hearing Officer to dismiss the *Amended Petition for Declaratory Ruling for Water Master Instructions* (hereafter "Amended Petition") filed in this matter. This Motion is supported by the record and previous filings in this matter, including the *Declaration of Bryce Contor* (hereafter "Dec. of Contor") filed in support of the Big Lost Irrigation District's Motion for Summary Judgment.

I.
SUMMARY

The Amended Petition now seeks to prevent Moss Farms, Inc. (hereafter "Moss Farms") from diverting BLRID storage water rights (hereafter "BLRID Rights") from its pump on the Big

Lost River (hereafter "River Diversion"). This new attack on Moss Farms' use of its BLRID Rights is still not authorized under Idaho Code §§ 67-5232 or 67-5255 because the BLRID Rights are neither rules, statutes, or orders capable of being reviewed by the Director for the purpose of making a declaratory ruling. Declaratory rulings regarding rights, including water rights, are authorized in the district courts of the State of Idaho pursuant to Idaho Code § 10-1201. Finally, because the requested declaratory judgment will impact the interpretation and use of storage rights in the Snake River Basis Adjudication ("SRBA"), these actions must be brought before the SRBA district court. Alternatively, the Hearing Officer should issue an order directing the Department to provide notice to all SRBA storage right holders and afford them an opportunity to participate in this matter.

II.
STANDARD OF REVIEW

"[T]he issue of whether a district court has subject matter jurisdiction is a question of law, over which we exercise free review." *Slavens v. Slavens*, 161 Idaho 198, 201, 384 P.3d 962, 965 (2016) (quoting *Chapple v. Madison Cnty. Officials*, 132 Idaho 76, 78, 967 P.2d 278, 280 (1998)).

When reviewing motions to dismiss, the court must determine "whether the non-movant has alleged sufficient facts to support [their] claim, which, if true, would entitle [them] to relief. In doing so, [the court] draw[s] all reasonable inferences in favor of the non-moving party." *Evans v. Wright*, 554 P.3d 591, 596 (Idaho 2024) (internal quotations and citations omitted).

"The district court's determination of whether a party is required is discretionary 'so long as the determination rests on factual grounds.'" *Monitor Fin., L.C. v. Wildlife Ridge Ests., LLC*, 164 Idaho 555, 563, 433 P.3d 183, 191 (2019) (citing *Ulrich v. Bach*, 155 Idaho 249, 252–53, 308 P.3d 1232, 1235–36 (2013)). "Likewise, the district court's determination of whether a party is indispensable is also discretionary." *Id.*

III.
ARGUMENT

A. Idaho Code §§ 67-5232 and 67-5255 do not authorize the Director to make a declaratory ruling that interprets a person's water right and their right to use that water right.

In his Order, the Hearing Officer described the issue at hand as determining "whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law." Order p. 6. Answering this question requires the Hearing Officer to review, interpret, and make a declaration regarding the language of Moss Farms Rights. However, Idaho Code §§ 67-5232 and 67-5255 only authorize the Director to make declaratory rulings "as to the applicability of" rules, statutes, or orders of the Department. (Emphasis added). Water rights are considered real property rights in Idaho once they are adjudicated – they are not statutes, rules, or orders. *See* Idaho Code § 55-101. As such, there is no statutory basis to grant the relief requested.

The issue presented in the Amended Petition is not limited to review of the applicability of specific rules, statues, or orders to the BLRID Rights. The Pehrsons assert that the interpretation and use of the BLRID Rights is appropriate in part because, under Idaho Code §§ 42-602, 42-201, 42-1411(2)(e), 42-222(1) and *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017) (quoting *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014), the Director has "clear legal duty to distribute water according to decreed water rights." Reply, p. 3. Order at p. 5. But there is no dispute here that the Director has the statutory authority and legal duty to "administer" water. The issue is the requested declaratory ruling seeks to interpret language of an adjudicated water right and establish a precedent as to the meaning of that language, which will effectively create an instruction for the Director as to how that right is to be administered/used. This is far outside the scope of section 67-5232 and 67-5255.

The Legislature did not intend to permit persons to petition agencies to make declaratory

rulings interpreting language in a person's water right and their right to use that right. If so, it could have inserted the word "rights" along with "statute," "rule," and "order." *Id.* It did not. Instead, the legislature authorized district courts to review the rights of persons, not administrative bodies. Specifically, Idaho Code § 10-1201 provides that

> [c]ourts of record within their respective jurisdictions shall have power to **declare rights, status, and other legal relations**, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Id. The Idaho Supreme Court "has long held that 'the question[ed] 'right' or 'status' may invoke either remedial or preventive relief; it may relate to a right that has either been breached or is only yet in dispute or a status undisturbed but threatened or endangered ...'" *Paslay v. A&B Irrigation Dist.*, 162 Idaho 866, 869, 406 P.3d 878, 881 (2017) (citing *State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 217, 52 P.2d 141, 144 (1935)).

There is no dispute that water rights are considered real property rights in Idaho once they are adjudicated, *see* Idaho Code § 55-101, and that under Idaho Code § 10-1201, district courts in the state of Idaho have authority to review these rights. Because the relief sought by the Amended Petition seeks a declaratory ruling interpreting the language in a water right and seeks to limit the use of a water right, not a statute, rule, or order, the Hearing Officer lacks authority to grant the Pehrsons the requested declaratory relief under Idaho Code § 67-5232 and 67-5255.

Even further, the Idaho Legislature intended that the type of declaratory relief sought by the Pehrsons be determined by the Snake River Basin Adjudication ("hereafter "SRBA") District Court. In *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994), the Idaho Supreme Court explained the purpose of the SRBA district court as follows:

> The Idaho legislature intended to prevent private adjudications of claimed water rights to water systems for which a general adjudication has been commenced or completed. Because this controversy concerns an adjudication of a right to the use of water in the Snake River Basin, for which a general adjudication has commenced, only the SRBA district court has the subject matter jurisdiction to adjudicate the water rights asserted in this case. Therefore, the district court properly dismissed the remaining issues in this case for lack of subject matter jurisdiction.

(Emphasis Added).

The BLRID Rights/Moss Farms Rights were adjudicated in the SRBA. *See* Dec. of Contor, Exhibits A-C. As set forth by Bryce Contor, over 4,000 water rights in the State of Idaho "authorize 'from storage' uses without specifying 'points of rediversion,'" many of which were adjudicated in the SRBA. *Id.* at ¶¶ 41-43, 49, Exhibits A-C. The Pehrsons requested declaratory ruling will directly implicate the interpretation of language in storage water rights adjudicated in the SRBA and the declaration sought will most certainly impact the manner in which these rights are used. Therefore, "[b]ecause this controversy concerns an adjudication of a right to the use of water in the Snake River Basin" the SRBA district court has jurisdiction over the matter. For these reasons, Moss Farms respectfully requests an order dismissing the Amended Petition.

B. Alternatively, Moss Farms requests an order directing the Department to notify and provide an opportunity for all interested parties to participate in this proceeding.

If the Hearing Officer declines to dismiss the Amended Petition based on the reasons set forth above, Moss Farms alternatively requests an order directing the Department to publish notice to all storage right owners in the SRBA and providing them an opportunity to participate in this proceeding. IDAPA Rule 37.01.01.301 provides that "[t]he agency may provide notice of a petition for declaratory ruling in a manner designed to call its attention to persons likely to be interested in the subject matter of the petition." Although I.R.C.P. 19(a) does not strictly apply to contested

proceedings, *see* IDAPA 37.01.01.051, it provides guidance on how to determine whether additional parties should be notified and given an opportunity to participate in this matter:

> (1) Required Party. A person who is subject to service of process must be joined as a party in the action if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the persons ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(Emphasis added).

Although the declaratory ruling sought in this case facially appears to be narrowly tailored only to the BLRID Rights, its effect will have far reaching effects. It will set a precedent in the SRBA as to how certain language in storage water rights adjudicated in the SRBA will be interpreted by the Director, how those rights may be diverted, and where. The declaratory ruling sought here will essentially act as an instruction to the Director as to how he should administer storage water rights in the SRBA.

There are many other storage rights adjudicated in the State, particularly the SRBA (potentially more than 4,000 rights), that have similar language to those at issue in this case. These storage right holders are unable to represent or protect their interests in this matter through the current parties to the action. Furthermore, their absence in this action raises a substantial risk of them incurring inconsistent obligations if a different administrative hearing officer or court review the language of their water rights, similar to what is proposed in the Amended Petition.

IV.
CONCLUSION

For these reasons, Moss Farms respectfully request the Director dismiss the Amended Petition with prejudice. Alternatively, Moss Farms requests an order directing the Department to publish notice of this matter and provide an opportunity for storage rights holders with rights adjudicated in the SRBA to participate in this matter.

DATED: April 23, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 23, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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RECEIVED
May 07, 2025
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.), IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001 OPPOSITION TO PEHRSON'S MOTION FOR SUMMARY JUDGMENT

Big Lost River Irrigation District (the "District" or "BLRID"), by and through counsel of record, Parsons Behle & Latimer, hereby submits this Opposition to Pehrson's Motion for Summary Judgment (the "Pehrson Motion"). BLRID hereby fully incorporates all facts and arguments made in its Motion for Summary Judgment and supporting pleadings in this Opposition as they pertain to the same single issue, and BLRID also responds as follows.

I. INTRODUCTION

The Pehrson Motion is built on a fundamental mischaracterization of BLRID's storage water rights and Idaho law. BLRID diverts its storage water at one place and one place only: Mackay Dam—the sole decreed point of diversion. Once appropriated and stored, that water is

lawfully conveyed through the Big Lost River and reclaimed downstream without requiring a transfer. Idaho Code §§ 42-105 and 42-801 expressly authorize this method of delivery, and IDWR has consistently recognized it in both practice and policy. The Pehrsons' attempt to recast lawful reclamation points of conveyed storage water as unauthorized diversions not only misapplies legal precedent—drawn entirely from natural flow cases—but also threatens to undermine the validity of thousands of similar storage rights across the state. Their proposed watermaster instruction is not about lawful administration; it is a calculated effort to restrict lawful deliveries and manipulate conveyance loss calculations to their own advantage. The law does not support their position, and equity and fairness in water administration cannot tolerate it.

II. STATEMENT OF DISPUTED FACTS

BLRID hereby fully incorporates all facts and arguments made in its Motion for Summary Judgment and supporting pleadings and declaration as undisputed facts in this matter. Further, pursuant to Idaho Rule of Civil Procedure 56(c), facts asserted in the Pehrson Motion and disputed by BLRID are restated here.[1]

6. "In "Remarks," and consistent with the claim, the Director described the canals and ditches as the locations where "water is delivered," along with a statement that when water is rediverted from the Big Lost River it cannot result in "injury":"

POINT OF DIVERSION IN SENW SEC 12, TWP 7N, RGE 23E IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

THE AMOUNT OF WATER REDIVERTED FROM THE BIG LOST RIVER SHALL BE REDUCED WHEN NECESSARY TO PREVENT INJURY TO APPROPIATORS OF WATER DOWNSTREAM FROM THE POINT OF REDIVERSION.

RESPONSE: Disputed in Part. This is a fundamental misstatement of the Director's report. What is actually states is "[t]he amount of water rediverted from the Big Lost River shall be reduced when necessary to prevent injury to appropriators of water *downstream* from the point of rediversion." *Id.* The Pehrsons are not downstream from the Moss Farms River Diversion.

7. "On October 15, 2001, and pursuant to IRCP 54(b), the Honorable Roger Burdick, the Presiding Judge of the SRBA, issued partial decrees for the BLRID storage rights. *Id., Ex. 6*. As to the Point of Diversion element, the storage rights recited as follows, consistent with the claims and recommendation:"

POINT OF DIVERSION:	T03N R26E S01		NENESW	(REDIVERSION)	Within BUTTE County
		S12	NENWSE	(REDIVERSION)	
	T04N R26E S26		NWNWNW	(REDIVERSION)	
	T05N R26E S04		NWSESE	(REDIVERSION)	
	T07N R23E S12		SENW		Within CUSTER County
	T06N R24E S01		NENESW	(REDIVERSION)	
		R25E S06	SWNESE	(REDIVERSION)	
		S10	NENESW	(REDIVERSION)	
		S11	SWSESW	(REDIVERSION)	
		S14	SENWSE	(REDIVERSION)	
		S24	NWNWNE	(REDIVERSION)	
		R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12		NWNWSE	(REDIVERSION)	
		R24E S18	SESWNE	(REDIVERSION)	
		S20	SWNESW	(REDIVERSION)	
		S33	NWSWNE	(REDIVERSION)	
		S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

RESPONSE: Disputed in Part. While the Pehrson Motion attempts to treat all of the listed "points of rediversion" as "points of diversion" in its legal analysis under the various cases cited, it fails to fully recognize that there is but ***one single point of diversion*** listed above "[the] point

[1] BLRID does not waive the right to later dispute other facts presented in the Pehrson Motion in this proceeding, at trial, or in other legal proceedings.

of diversion in T07N R23E S12 SENW is Mackay Dam." The terms "point of diversion" and "point of rediversion" are different and must be distinguished.

35. "While the 3 in 1 Ditch and Moore Canal are listed on the face of the BLRID Storage Rights in the point of diversion element, the River Diversion is not. Tuthill Dec. at 6."

RESPONSE: Disputed in Part. Once again, there is only a single point of diversion. None of the listed points of rediversion are a "point of diversion."

36 through 54. [Series of facts regarding futile call, omitted for brevity]

RESPONSE: Objected to on the grounds of relevance. These facts relate to futile call history and IDWR administrative issues that are not material to the dispositive single legal question. These facts pertain to other claims the Hearing Officer has already declined to address in this proceeding and therefore should not and cannot be considered.

55. "Watermaster Marcroft disagreed with the decision of IDWR to allow storage water to be used "as carriage water to push upstream, curtailed natural flow water rights through the Darlington Sinks when the Big Lost River is broken at that location . . . . This practice results in upstream, natural flow water rights being curtailed when they have not been historically curtailed." *Marcroft Dec.* at 3."

RESPONSE: Disputed. Junior water rights were curtailed, not senior rights. It is not the practice of BLRID or Basin 34 to deliver water in contravention of water right priority. (Harry Dec. ¶¶ 13–17.) Petitioners' assertion is contrary to IDWR's lawful administration of water by priority and their own representation that at least some of the Pehrson's water rights are junior to the Moss Farm water right. *See* Pehrson Motion at 8 ("The water rights of Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively the "Pehrson Water Rights") are junior to Moss water right no. 34-182 and senior to Moss water right nos. 34-381A and 34-2379F."). Under basic

Idaho law, Moss water right no. 34-182 must be delivered before more junior rights held by the Pehrsons.

57. "Because the River Diversion is not listed in the point of diversion element for the BLRID Storage Rights, a transfer must be filed with IDWR, consistent with I.C. § 42-222(1), to add the River Diversion. *Tuthill Dec.* at 6."

RESPONSE: Disputed. The District's actions are consistent with IDWR's practice of not requiring points where water is reclaimed from a natural channel as a legal element of a water write. Idaho Code § 42-222(1) applies only when a statutory element of a water right is changed, such as the point of diversion. As Bryce Contor explains, "to my knowledge this [point of rediversion] was not a required part of a storage water right," and IDWR does not generally require transfers to add rediversion points. Contor Dec. ¶¶ 18–19, 25–27.

III. ARGUMENT

Below, the Pehrsons' argument fails as a matter of law and fact. (A) BLRID's storage water is appropriated only at Mackay Dam—the sole decreed point of diversion—and that downstream deliveries are not new diversions but lawful reclamations authorized by statute and longstanding IDWR practice. (B) Idaho law, including §§ 42-105 and 42-801, expressly permits the release and reclamation of stored water without requiring a transfer. (C) The Pehrsons' cited cases involve unauthorized natural flow diversions, not storage deliveries. (D) No legal element of BLRID's water right has changed, and no transfer under § 42-222 is required. (E) The Pehrsons' theory would destabilize thousands of valid storage rights across Idaho. (F) The Pehrsons' proposed watermaster instruction regarding "points of rediversion" is a thinly veiled attempt to manipulate distribution in their favor by disrupting universal delivery calculations throughout the District.

A. BLRID appropriates water at the only point of diversion on its decreed storage rights—the Mackay Reservoir outlet

The Pehrsons begin their substantive analysis of BLRID's storage right by making a carefully chosen, but wrongful presupposition regarding the elements of BLRID's water right. Pehrson Motion at 18 ("Here, the point of diversion element for the BLRID Storage Rights is defined both by legal description and through specific reference to Mackey Dam – where water is diverted – and to certain locations on the Big Lost River – where water is rediverted") The difficulty the Pehrson's theory of this case faces is the fact that there is only a single point of diversion at issue:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

See Contor Decl., Ex. B. While the Pehrson Motion attempts to treat all of the listed "points of rediversion" as "points of diversion" in its legal analysis under the various cases cited, it fails to fully recognize that there is but ***one single point of diversion*** listed above "[the] point of diversion in T07N R23E S12 SENW is Mackay Dam." The terms "point of diversion" and "point of rediversion" are different and must be treated differently.

As explained in BLRID's Memorandum in Support of Motion for Summary Judgment (at 5–6), all of the District's storage rights list the point of diversion at the Mackay Dam outlet. Those rights were decreed through the SRBA and include Water Rights 34-12, 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, and 34-10935. See Contor Decl., Ex. B. Further, as Contor testifies, "for storage water rights, the point of diversion is typically the outlet at the storage source reservoir, such as at Mackay Reservoir for BLRID's rights." Contor Decl. ¶15. No new diversion occurs when that water is later rediverted in the river channel—it has already been appropriated.

Further, this is the position the Department (and the Pehrson's current counsel) has already taken in the prior *Nelson* case— the Big Lost River Irrigation District ("BLRID") appropriates its storage water at the Mackay Dam outlet—the sole decreed point of diversion for BLRID's storage rights. As explained in the Department's brief, "any storage water held by the BLRID was first diverted and stored under certain water rights prior to being released for use by the patrons of the irrigation district." *IDWR Response to Motion for Reconsideration*, at 4, Hampton Decl., Ex. A. After appropriation and storage at the dam, "the BLRID's water delivery method includes the release of its storage water into the Big Lost River channel to be conveyed downstream by the watermaster for distribution to its patrons." *Id.*.

The Department further clarifies that this delivery process is not a second diversion. Rather, it is a matter of regulated conveyance. As the Department states: "Unlike natural flow water rights that have a specific diversion rate to be delivered under a certain priority, the storage water flowing in the river has already been diverted and is now simply being conveyed pursuant to direction of the owner of the storage water, the BLRID." *IDWR Response to Motion for Reconsideration*, at 5, Hampton Decl., Ex. A. Accordingly, the act of delivering previously stored water to canals and laterals does not constitute a new point of diversion.

Finally, the Department grounds its position in Idaho Code § 42-801, noting that it "authorizes the natural river channel to be used by the irrigation district for conveying water downstream to its patrons." *IDWR Response to Motion for Reconsideration*, at 4, Hampton Decl., Ex. A. This statutory framework, coupled with the Department's acknowledgment of Mackay Dam as the location of appropriation, decisively refutes the Pehrsons' contention that downstream deliveries must be listed as points of diversion or rediversion in the decree.

BLRID's delivery of storage water through the Big Lost River is both legally authorized and administratively supervised through I.C. § 42-105(1) and § 42-801.

Another piece notably unrecognized by the Pehrson Motion is the critical element of any decreed water right, the "place of use."[2] The place of use is described with particularity, taking up nearly 6 pages, and covers 32,000 acres. *See* Contor Decl., Ex. B. Understanding that the BLRID has a single point of diversion and an expansive place of use that encompasses the entire District is critical to interpretation of the District's broad storage right.

B. Idaho statutes authorize injection and reclamation of already-appropriated water from a natural channel with a valid water right.

The Pehrson Motion's claim that the River Diversion constitutes an unauthorized "point of diversion" reflects a misunderstanding of Idaho's legal framework governing storage rights. As discussed in BLRID's Motion for Summary Judgment, Idaho Code § 42-1411 requires listing the "point(s) of diversion" as an element of a water right, but does not require the listing of rediversion points. Idaho Code §§ 42-105(1) and 42-801 provide specific statutory authority for the release and delivery of already-appropriated stored water and do not require the points where water is reclaimed to be listed on a water right.

Idaho Code § 42-105(1) provides:

> The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and

[2] The Pehrson Motion also references a remark made in the Director's report on the BLRID right, asserting that when "water is rediverted from the Big Lost River it cannot result in injury." Pehrson Motion at 5. This is a fundamental misstatement of the Director's report. What is actually states is "[t]he amount of water rediverted from the Big Lost River shall be reduced when necessary to prevent injury to appropriators of water ***downstream*** from the point of rediversion." *Id.* The Pehrsons are not downstream from the Moss Farms River Diversion. In fact, this language seems to track and be a recognition of the statutory allowance for BLRID to exercise its right to inject and reclaim its storage water rights under I.C. § 42-105(1). ("The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, ***but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished. . . .***") (emphasis added).

> then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage.

Similarly, Idaho Code § 42-801 authorizes the use of natural channels to carry stored water under IDWR supervision:

> Whenever the owner of a reservoir shall desire to use the bed of a stream, or a natural water course, for the purpose of carrying stored water, he shall in writing notify the department of water resources... [and] the appointed watermaster and his assistants may be instructed to make the delivery of the stored water... so that those having the right to the use of such water shall secure the volume to which they are entitled.

These statutes do not require the listing of rediversion points in the water right. They instead grant a statutory right to convey stored water and reclaim it downstream—subject only to protection of senior rights and measurement of conveyance loss. See Contor Decl. ¶¶27, 34. BLRID adheres to both requirements, applying real-time gage data to determine conveyance loss and making uniform adjustments. See Harry Decl. ¶¶13–15. The purpose of these statutes is to enable efficient delivery of previously appropriated water—not to create a procedural bottleneck requiring a § 42-222 transfer each time a new headgate is used.

C. The cases cited by the Pehrson Motion involved unpermitted diversions of natural flow water, and are therefore inapplicable to the delivery of already-appropriated storage water.

The Pehrsons argue that BLRID has unlawfully diverted water at the River Diversion headgate because that location is not expressly listed on the District's decreed storage rights. Relying on *Rangen Inc. v. IDWR*, 159 Idaho 798 (2016), and *Whittaker v. IDWR*, 174 Idaho 60 (2024), they contend that such delivery constitutes a change in the point of diversion that must be approved through a formal transfer under Idaho Code § 42-222. But this argument is fundamentally flawed, both legally and factually. The comparison fails for a simple reason: both *Rangen* and *Whittaker* involved **natural flow rights**, which operate differently than storage

rights. Neither case controls the analysis of an irrigation district's delivery of **already-appropriated storage water** under a valid storage right.

In *Rangen*, the right holder held a decreed natural flow right to divert water from Martin Spring to support a fish hatchery. Without obtaining a transfer, Rangen began diverting water from a different source—Curren Tunnel—which was not identified in its partial decree. The Idaho Supreme Court held that the use of Curren Tunnel violated Idaho Code § 42-222, explaining:

> Because the Curren Tunnel was not identified in the partial decree as a source of water, Rangen could not rely on that source without first obtaining a transfer.

159 Idaho at 807. The Court emphasized that Rangen had never lawfully appropriated water from Curren Tunnel and that its natural flow right did not extend to that source. The case stands for the uncontroversial proposition that a natural flow right is limited to the specific source and location decreed, and diversion from a different source constitutes a change in the water right requiring transfer.

Similarly, in *Whittaker*, the user held a natural flow right with a decreed point of diversion at the Weaver Ditch. The user unilaterally began diverting water from the Whittaker Lateral instead, arguing that this change did not require a formal transfer. The Idaho Supreme Court again rejected the argument, holding that:

> A water right holder cannot begin diverting water from a new point without approval of a transfer application.

174 Idaho at 65. The Court's holding in *Whittaker* reaffirms the principle that a natural flow right must be exercised at the decreed point of diversion. Because the water had not yet been appropriated at the new location, the user could not lawfully divert it without first modifying the decree through a statutory transfer. So, again, the *Whittaker* case stands for the uncontroversial proposition that one cannot just move the point of diversion—just as BLRID could not

unilaterally try to use its right to store and divert water from a different reservoir than Mackay Dam.

Both *Rangen* and *Whittaker* involve circumstances where the **appropriation itself had never occurred** at the claimed new location. The rights in question were natural flow rights, and the users sought to divert water from unauthorized sources or points, bypassing the essential requirement of appropriation. And notably, there was no attempt by the water users in either of those cases to convey water under I.C. § 42-105(1) and § 42-801 after it had been diverted from the existing point of diversion on the water right. These decisions also do not speak to the delivery of **stored water**, which has already been diverted, impounded, and appropriated at the reservoir—here, at Mackay Dam. BLRID is only using the same point of diversion it always has, and doing so does not require a transfer application.

Further, the Idaho Supreme Court has repeatedly emphasized the unique structure of storage rights. In *Washington Cnty. Irr. Dist. v. Talboy*, it held that a storage water right entitles the appropriator to divert water from a natural watercourse by means of a diversion structure such as a dam, and once stored, the water becomes "the property of the appropriators ... impressed with the public trust to apply it to a beneficial use." 55 Idaho 382, 385, 43 P.2d 943, 945 (1935). And in *Rayl v. Salmon River Canal Co.*, the Court explained, "There is a fundamental difference with regard to the diversion and use of water from a flowing stream and a reservoir.…" 66 Idaho 199, 208, 157 P.2d 76, 80 (1945).

The Pehrsons' error is treating delivery locations as if they are new points of diversion requiring a transfer. But the storage water has already been diverted—at the Mackay Dam. It is lawfully conveyed through the Big Lost River and rediverted under statutes that expressly permit

that process. No second appropriation is occurring at the River Diversion. It is simply a reclamation point of injected water.

D. BLRID cannot and is not required to file a transfer application to divert water that has already been appropriated.

The legal elements of a water right are limited to those listed in § 42-1411(2)—including source, quantity, point of diversion, place of use, and purpose of use—but do not include downstream rediversion points unless expressly included as an element. There is no such thing as a legal element for a "point of rediversion."

Accordingly, even if some water rights contain remarks referencing canals, they do not prohibit delivery to other lawful rediversion points authorized under §§ 42-105 and 42-801. Contor Decl. ¶¶27, 34. (stating "In working with clients to provide notice of changes of locations where storage is to be withdrawn from the Snake River, the IDWR has never requested or required us to file transfer applications to change or add points of rediversion to the water rights" and "The conditions of these BLRID rights include a listing of ditches through which water is delivered, and indicate that the named ditches are points of rediversion. Importantly, none of the conditions on these rights limit delivery only to the named ditches").

The Pehrsons cite Idaho Code § 42-222, which governs applications to change the point of diversion, place of use, or nature of use. But BLRID has not changed any of those elements. It continues to store and divert water at Mackay Dam (the decreed point of diversion) and deliver it for irrigation (the decreed purpose of use), within the decreed place of use. There is no expansion, no new use, and no injury.

The Pehrsons argue that BLRID must file a transfer under Idaho Code § 42-222, citing the Idaho Supreme Court's decision in City of Blackfoot v. Spackman. In *City of Blackfoot v. Spackman*, 162 Idaho 302, 396 P.3d 1184 (2017), the Court required a transfer where a city

attempted to use a right for aquifer recharge—a new purpose not listed in the decree. The transfer statute applies when a water user seeks to change the purpose, nature, point of diversion, or place of use of a water right. BLRID is not doing any of those things. The purpose of use—"irrigation from storage"—remains unchanged.

Here, the District is not changing the use or location of its storage water; it is simply delivering previously stored water through the Big Lost River to a location within the authorized place of use. That activity is explicitly authorized by Idaho Code §§ 42-105(1) and 42-801, which allow an appropriator to release water into a natural stream and reclaim it downstream, provided losses are accounted for and senior rights protected. The Court in *City of Blackfoot* did not address those statutes, nor was it dealing with stored water already appropriated and released from a reservoir.

The Pehrsons' argument is thus premised on an incorrect legal framework. Section 42-222 governs actual changes to a water right. It does not apply to the movement of water already stored and appropriated under a valid right, especially where such movement is authorized under longstanding Idaho statutes and IDWR practice. Section 42-222 would apply if the District was, for example, attempting to store and divert water under its storage right from another reservoir.

The Pehrson Motion also cites *City of Blackfoot v. Spackman*, *Sylte*, and *Black Canyon* to argue that the water right is defined by its elements. *See* Pehrson Motion at 17. BLRID agrees with that principle. But those decisions also confirm that **legal elements**, and limited by conditions, not administrative remarks meant to aid a watermaster with general operational administration. As the Court stated in *City of Blackfoot*, "Water rights are defined by elements." 162 Idaho 302, 306–07, 396 P.3d 1184, 1188–89 (2017). Points of rediversion are not an element anywhere under § 42-1411. Neither are the points of rediversion included as a condition of use

on the water rights. And even if they were considered a legal element, there is nothing in Idaho law that would eliminate BLRID's statutory right to use Idaho Code §§ 42-105(1) and 42-801 to convey already-appropriated water.

E. Thousands of storage rights across Idaho would be rendered legally defective under the Pehrsons' interpretation.

As detailed in the Contor Declaration, of the 4,307 decreed "use from storage" rights analyzed in IDWR's GIS dataset, only 237 list any rediversion point—just 5.5%. Contor Decl. ¶31. The remaining 94.5% of Idaho storage rights do not specify any rediversion point. Under the Pehrsons' logic, these rights would be subject to curtailment or forced transfer to deliver it—despite decades of lawful delivery under IDWR supervision.

One prominent example is Water Right 1-2064, held by the United States Bureau of Reclamation. That right authorizes the storage of up to 1,495,600 acre-feet in American Falls Reservoir for irrigation. Contor Decl. ¶38. It does not list any points of rediversion, even though it supplies water to dozens of canals and laterals far downstream. The authorized place of use spans hundreds of square miles, much of which is geographically inaccessible from the reservoir itself. Yet this right has been administered for generations without question, because the law does not require rediversion points to be specified. Were the Pehrsons' interpretation adopted, even the Bureau's system would be in legal jeopardy. The result would be a cascading disruption across Idaho water systems as other already-adjudicated storage rights are challenged.

Idaho courts avoid interpretations of statutes against the plain meaning that would lead to absurd or unworkable consequences. See *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007) (citing to *Gillihan v. Gump*, 140 Idaho 264, 266, 92 P.3d 514, 516 (2004), abrogated on other issues by *Gonzalez v. Thacker*, 148 Idaho 879, 231 P.3d 524 (2009)). The Pehrsons' interpretation of Idaho Code §§ 42-105(1), 42-801, and 42-222 would produce exactly that

absurd result. It would require BLRID—and every other storage water user in Idaho—to file a transfer application every time water is delivered to a different headgate, pump, or canal. That is unworkable and unsupported by any Idaho law. For example, in Water District 1, the Committee of Nine regularly approves the rental of storage water throughout the Eastern Snake Plain—which is then conveyed by the Water District 1 Watermaster pursuant to Idaho Code §§ 42-105(1) and 42-801, accounting for an measuring for conveyance loss at the new delivery point.

The Pehrson's theory would also require IDWR to review and act on thousands of needless transfer applications for changes that do not affect water use or injury—clogging an already resource-limited process with red tape. Worse still, it would invite legal attacks on thousands of valid, decreed rights simply because they do not include every possible operational delivery point. This is not what the SRBA envisioned. It is not how Idaho Code § 42-105 and § 42-801 were meant to operate. And it is not how IDWR or any major water user in the state has interpreted those provisions.

F. The Pehrsons' Proposed Instruction Seeks to Undermine BLRID's Equitable Delivery System and Manipulate Conveyance Loss Calculations to Their Own Advantage

The Pehrsons' objective in this litigation is not the protection of their own rights but the suppression of others'. As part of their requested relief, the Pehrsons seek the following directive:

> (3) Instruct the Water District No. 34 Watermaster that storage water held by the Big Lost River Irrigation District, pursuant to water right nos. 34-12, 34-810, 34-811, 34-817B, 34-818, 34-2507, 34-10873, and 34-10935, shall not be delivered to a point(s) of diversion on the Big Lost River that is not also described as a point(s) of diversion and/or rediversion on the storage water rights of the Big Lost River Irrigation District.

Pehrsons' Motion for Summary Judgment at 2.

This proposed watermaster instruction is not supported by any showing that deliveries to others occur out of priority, are unlawful, or fail to account for conveyance losses. Instead, it is a

strategic effort to interfere with lawful, longstanding operations of BLRID's delivery system and to advantage upper-river users—specifically, the Pehrsons themselves—at the expense of users in the lower part of the basin. If adopted, the instruction would prohibit delivery of storage water to locations such as the River Diversion and other rediversion points that BLRID has used for decades to serve patrons in and below the Darlington Sinks. These deliveries are made in full compliance with Idaho Code §§ 42-105 and 42-801 and are based on real-time river gage data and measured conveyance losses. See Harry Decl. ¶¶13–16, 24–29.

These deliveries are not only lawful—they are equitable. They ensure that BLRID patrons throughout the District receive their fair share of water, regardless of their geographic position. That equity is precisely what the Pehrsons oppose. This is not the first time the Pehrsons have attempted to gain an administrative advantage over their neighbors through litigation. In *Nelson v. Big Lost River Irrigation District*, 148 Idaho 157 (2009), plaintiffs—among them some of the current litigants—challenged BLRID's policy of applying uniform conveyance loss charges to all patrons. This was another attempt by the litigants to have BLRID's storage water "administered as if they were the appropriators of the natural flow from the river rather than landowners within an irrigation district." 148 Idaho at 158. The Idaho Supreme Court rejected the effort, affirming the District's use of a basin wide uniform loss model:

> The Directors have the power 'to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land [within the District], as may be necessary and just to secure the just and proper distribution of the same.

Nelson, 148 Idaho at 168, 219 P.3d at 1286.

What the Pehrsons could not achieve through litigation in *Nelson*, they now attempt to secure through regulatory reinterpretation. The proposed instruction would achieve the same

inequitable outcome: an avenue for curtailing downstream deliveries to reduce measured conveyance loss and increase effective deliveries to the upper river.As Mr. Harry explains, conveyance loss in BLRID's system is calculated using gage data and applied uniformly to all patrons. See Harry Decl. ¶¶13–21. This system functions only when water is delivered throughout the length of the river. If deliveries are administratively barred from reaching the lower basin—particularly below Darlington Sinks—the conveyance loss calculation becomes artificially favorable to upstream users.

This is because conveyance losses vary geographically. The reach from Mackay to Beck, where the Pehrsons hold land, has historically low loss. Below and in the Sinks, losses increase. If no water is delivered to the lower reach, those losses are no longer measured, and total conveyance loss appears lower—not because the system has improved, but because the District has been barred from serving part of its service area. The result is a manipulated allocation model. Effective deliveries to upper river users increase. Downstream users receive less. And the equitable balance preserved by *Nelson* and Idaho Code is upended in favor of a few strategically positioned users. That is not lawful water administration. It is regulatory gamesmanship. Idaho's water law favors the beneficial use and fair and equitable distribution of water—not selective interference with established water rights that shifts benefits to one class of users at the expense of others.

IV. CONCLUSION

For the reasons argued herein, BLRID respectfully requests that Pehrson's Motion for Summary Judgment be denied.

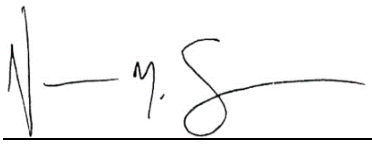
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DATED May 7, 2025.

PARSONS BEHLE & LATIMER



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CERTIFICATE OF SERVICE

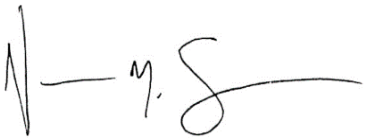
The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

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RECEIVED
May 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSON RESPONSE TO MOSS MOTION TO DISMISS**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and hereby respond to *Moss Farms' Motion to Dismiss* ("Motion").

I. INTRODUCTION

The instant *Motion* is a rehash of repeated attempts by Moss Farms, Inc. ("Moss"), the Moore Canal Users, and the Big Lost Irrigation District ("BLRID") to prevent this action from proceeding. As was previously explained by the Hearing Officer, this matter is properly framed and the relief Pehrsons seek is redressable. *Order Granting Motion to Amend and Withdrawing*

Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule (March 28, 2025) ("Order"). Here, the only new argument that Moss makes concerning dismissal is his claim that the Snake River Basin Adjudication ("SRBA") district court is the singular forum in which this matter may be heard. Second, and despite acknowledging that the relief requested is narrowly tailored to BLRID, Moss argues that statewide notice of this proceeding must be given because any ruling in this case will affect the interests of water users in other basins. Both arguments are without merit and should be denied. Third, the *Declaration of Bryce Contor*, referenced in support of the statewide service argument, should be given little if any weight due to the fact that it attempts to sew ambiguity into the BLRID Storage Rights when none exists, reminiscent of prior arguments made by Rangen, Inc. ("Rangen"). *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 367 P.3d 193 (2016).

II. ARGUMENT

A. The SRBA's *Final Unified Decree* And The Supreme Court Confirm That The Department Is Authorized To Examine And Interpret Water Rights In Administrative Proceedings

The only new argument that Moss makes concerning dismissal is an assertion, without discussion of or citation to the SRBA *Final Unified Decree*, that the SRBA district court is the singular forum in which water rights may be interpreted, with the Director foreclosed from doing the same:

> Because the relief sought by the Amended Petition seeks a declaratory ruling interpreting the language in a water right and seeks to limit the use of a water right, not a statute, rule, or order, the Hearing Officer lacks authority to grant the Pehrsons the requested declaratory relief under Idaho Code § 67-5232 and 67-5255.
>
> . . . .
>
> Even further, the Idaho Legislature intended that the type of declaratory relief sought by the Pehrsons be determining by the Snake River Basin Adjudication [] District Court.

Motion at 4.

There can be no question that the Department is authorized to entertain declaratory actions regarding rules and statutes that are administered by the agency, as well as to orders issued by the agency. I.C. §§ 67-5232 and 67-5255. As expressed by the Hearing Officer, the instant action is brought pursuant to I.C. § 67-5232, with the Pehrsons' entitled to have the matter heard before they are again harmed:

> The Director has the statutory authority and a legal duty to administer water within Idaho water districts in accordance with the prior appropriation doctrine. I.C. § 42-602. . . . . Of particular concern to the authorized diversion issue, such duties may include but are not limited to: (a) Idaho Code § 42-201(2), which requires water users to obtain a valid water right to divert water; (b) Idaho Code § 42-1411(2)(e), which states the elements of a water right include the point of diversion; and (c) Idaho Code § 42-222(1), which requires filing a transfer application to change a point of diversion on a valid water right.
>
> Considering the relevant statutes, rules, and caselaw, the Department may consider petitions for declaratory ruling under limited circumstances, including when the requested relief will clarify how the statutes or rules administered by the Department apply to a person's rights in the event of a potential claim. *See Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys. of Idaho*, 169 Idaho 34, 47, 490 P.3d 1142, 1155 (2021) (citing I.C. § 67-5232(1)); *see also* IDAPA 37.01.01.300.02.d.

Order at 5.

The explanation of the Hearing Officer is fully consistent with the *Final Unified Decree*, wherein the SRBA district court held:

> 15. The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state and tribal law . . . .
>
> 16. Nothing in this Final Unified Decree shall be interpreted or construed as exempting the holder of a decreed water right based on state law from exercising or changing such right in compliance with applicable Idaho law.
>
> 17. This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho

> Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources . . . .

Final Unified Decree at 13 (emphasis added).[1]

With foresight as to the arguments that disgruntled water right holders like Moss might make, the SRBA district court included paragraphs 15, 16, and 17 in the *Final Unified Decree* to ensure that it is read in conjunction with applicable Idaho law, such that the authorities of the Department are not restrained. Indeed, if Moss' argument, concerning the Director's lack of authority to interpret the meaning of water right elements in an administrative proceeding carried any weight, the Supreme Court would have ruled against IDWR in both *Rangen* and *Whittaker*; yet, that did not happen. *Whittaker v. Idaho Dept. of Water Res.*, 173 Idaho 913, 926, 551 P.3d 729, 742 (2024) ("Thus, Whittaker's use of the West Springs Ditch as a point of diversion from Stroud Creek was disallowed under the Final Unified Decree because none of his water rights list it as an authorized point of diversion."); *Rangen* at 807, 367 P.3d at 202 ("Because the Bridge Diversion lies outside the specified point of diversion in its partial decrees, the water rights at issue here do not entitle Rangen to divert water via the Bridge Diversion.").

B. Only The Storage Rights Of BLRID Are At Issue In This Proceeding

Moss wrongly attempts to conflate this matter into a question concerning statewide interpretation of storage water rights:

> Although the declaratory ruling sought in this case facially appears to be narrowly tailored to only the BLRID Rights, its effect will have far reach effects. It will set a precedent in the SRBA as to how certain language in storage rights adjudicated in the SRBA will be interpreted by the Director, how those rights may be diverted,

[1] The *Final Unified Decree* is housed on the SRBA's website: 0039576XX09020.pdf (last visited May 6, 2025). The *Final Unified Decree* is "binding" against the parties here today. *Final Unified Decree* at 11, ¶ 8; *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 741, 451 P.3d 446, 454 (2019). Moss' citation to *Devil Creek Ranch, Inc. v. Cedar Mesa Res. & Canal. Co.*, 126 Idaho 202, 879 P.2d 1135 (1994) has no bearing in this matter. There, the water rights of the parties had yet to be decreed in the SRBA, with the *Final Unified Decree* not issuing until 2014. Here, it is undisputed that the water rights of the parties were partially decreed in the SRBA, with questions concerning interpretation and administration of BLRID's Storage Rights.

> and where. The declaratory ruling sought here will essentially act as an instruction to the Director as to how he should administer storage rights in the SRBA.

Motion at 6.

As recognized by Moss, the relief at issue herein is interpretation of the point of diversion element associated with BLRID's Storage Rights, nothing more. Because this proceeding only concerns the BLRID Storage Rights, additional notice would accomplish nothing and would only serve as a delay tactic to foreclose relief before the summer becomes hot and dry. Lastly, additional notice will accomplish nothing when it comes to the proper understanding of BLRID's Storage Rights, with the Supreme Court consistently holding that each SRBA partial decree is judged based on its own language. *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) ("[T]his Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words.") (emphasis added).

C. The Declaration Of Bryce Contor Should Be Given Little If Any Weight

In support of his argument for statewide notice, Moss cites to the *Declaration of Bryce Contor* (April 23, 2025), filed in support of BLRID's *Motion for Summary Judgment* (April 23, 2025). Mr. Contor's declaration should be given little if any weight. *Reclaim Idaho v. Denney*, 169 Idaho 406, 417, 497 P.3d 160, 171 (2021) ("This Court is competent to determine the weight we should afford those opinions"). This is because the majority of Mr. Contor's discussion seeks to read language out of the BRLID Storage Rights, and, if accepted, will result in the collateral attack of the BRLID partial decrees, similar if not identical to arguments made before by Rangen; arguments that Rangen lost: "[I]f Rangen disagreed with how its water rights were recommended . . . it had an opportunity and responsibility to voice its concerns in the appropriate forum – the SRBA." *Rangen* at 806, 367 P.3d at 201.

According to Mr. Contor, there are "4,307 Idaho water rights" with a "from storage" purpose of use. *Contor Dec.* at 5. Of that group, "only 237 rights" also include a "point of rediversion" description. *Id*. In order to derive those figures, Mr. Contor states that he performed a "statewide" "GIS" analysis of Idaho water rights using IDWR's "Water-Right POD data set." *Id*. at 5-6.[2] In performing his statewide, computer-based analysis, Mr. Contor admits he did not limit his review to the boundaries of the SRBA. In addition, by only examining the IDWR dataset, Mr. Contor admits he did not review the SRBA partial decrees themselves. That Mr. Contor never squared his computer analysis with the actual SRBA partial decrees is further evidenced by his statement that neither "the Eastside Ditch" nor "the Island Ditch" can deliver storage. *Id*. at 9.[3] The plain language of the BLRID Storage Rights, as partially decreed by the SRBA district court, contradicts Mr. Contor's computer analysis (yellow highlighting added):

> POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Tuthill Dec., Ex. 6 (SRBA partial decree).

Lastly, it is irrelevant how many water rights Mr. Contor examined when he readily acknowledges that the BLRID Storage Rights, which are at issue herein, have rediversion

[2] Mr. Contor's analysis is further confused by the fact that he discusses a supplemental ground water right, no. 21-13151, held by the Fremont Madison Irrigation District, with a combined use limitation associated with natural flow and storage water. *Contor Dec.* at 4. Discussion of a supplemental ground water right has no bearing on the issue framed for summary judgment by the Hearing Officer.

[3] An identical assertion was made in the *Declaration of Richard Harry*. Mr. Harry is the BLRID general manager who has been on the job for one-year. Issues with Mr. Harry's declaration are addressed in *Pehrsons' Response to BLRID's Memorandum in Support of Summary Judgment*, filed contemporaneously herewith, with those arguments incorporated herein.

descriptions in the point of diversion element. *Contor Dec.* at 10 ("The storage rights of the Big Lost River Irrigation District list points of rediversion.").

Through Mr. Contor, Moss is attempting to argue that not all of the language in the point of diversion element for the BLRID Storage Rights has meaning, or worse yet, that it is permissible to collaterally attack the partial decrees by ignoring language – as attempted with the Eastside and Island ditches – or by adding extrinsic evidence to the record in order to create ambiguity, all in an effort to look behind the decrees. This last statement is evidenced when Mr. Contor asserts that he recently discussed, with unnamed IDWR staff, the meaning of a "point[] of re-diversion as a required element of a water right. . . . . I see nothing in the plain language of any part of Idaho Code . . . that would require points of rediversion to be identified in a water right in order for storage rights to be deliverable." *Contor Dec.* at 3-4 (emphasis added).

Mr. Contor concludes his declaration by ironically claiming that if the BLRID Storage Rights are given their plain meaning, it will somehow "[u]ndo the certainty that is the crowning achievement of the Snake River Basin Adjudication." *Id*. at 11. In this case, the points of rediversion were intentionally claimed, reviewed, recommended, and decreed; thus, they are meaningful and binding on BLRID and all other water users. *Rangen, Inc. v. Idaho Dept. of Water Res.*, 160 Idaho 119, 127, 369 P.3d 897, 905 (2016) ("decree[s] entered in a general adjudication shall be conclusive as to the *nature* and extent of all water rights in the adjudicated system") (emphasis in original). To ignore and write the points of rediversion out of the BLRID Storage Rights undermines the settled expectations of everyone, including the Pehrsons, who relied on the outcomes of the SRBA.

To this point, and for more than ten years, the Supreme Court has developed the well-articulated standards by which partial decrees are reviewed. According to the Supreme Court:

"We apply the same rules of interpretation to a decree that we apply to contracts." *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). "Like a contract, this Court will read the decree as a whole and will give meaning to all of its terms . . . ." *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019) (emphasis added). "[T]his Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words." *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017). "Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review." *Rangen* at 807, 367 P.3d at 202. According to the SRBA district court, whose decisions are binding on the parties: "[T]he Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree . . . . To the extent the [] director's recommendation and *Partial Decree* were alleged to be in error, those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum." *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration*, Subcase No. 92-00021 at 8 (Nov. 17, 2005) (emphasis added).[4] "We have previously barred collateral attacks because of their ability to create uncertainty and to undermine water adjudications. After all, finality in water rights is essential." *McInturff v. Shippy*, 165 Idaho 489, 495, 447 P.3d 937, 943 (2019) (emphasis added).

Here, the record conclusively establishes there is no ambiguity associated with the point of diversion element for BLRID's Storage Rights. *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* at 4-12 (May 7, 2025); *Memorandum*

[4] The *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* is located on the SRBA's website: http://164.165.134.61/S0092021XX.HTM (last visited May 6, 2025).

in Support of Pehrsons' Motion for Summary Judgment at 3-6 (April 23, 2025). This is due to the fact that BLRID affirmatively and intentionally claimed the named canals and ditches in the point of diversion element, based on a prior decree known as *Utah Construction Co. v. Abbott*. *Id*. at 4; *see also State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943, 944 (1997) ("This area was subject to an earlier decree in the case of *Utah Construction Co. v. Abbott,* Equity No. 222 (D.E. 1923) (U.C. Decree)."). IDWR examined the claims and recommended the point of diversion element, as claimed, with a remark explaining that the named canals and ditches are the locations where "water is delivered," along with a statement that when water is rediverted from the Big Lost River, it cannot result in "injury." *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* at 8; *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 3-4. After reviewing the claims and recommendations, the SRBA district court, issued partial decrees for the BLRID Storage Rights, describing the point of diversion element consistent with the claims and recommendations. *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* at 10-11; *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 5-6.[5]

By failing to acknowledge there is any meaning in the partial decrees for the BLRID Storage Rights, the *Declaration of Bryce Contor* wrongly attempts to read words out of the point of diversion element, attempting to create ambiguity where none exists, to collaterally attack the

[5] Today, BLRID argues against how it filed its claims, how IDWR recommended the same, and how the SRBA district court issued the partial decrees for its storage rights. According to BLRID's current general manager, Richard Harry, whose background and tenure with the District is unstated in his declaration: "The points of rediversion have never been treated by the District as a part of the legal definition of the storage water right. Instead, the District views and uses them as administrative locations used to facilitate delivery across the District." *Declaration of Richard Harry* at 2 (April 23, 2025). The above-cited record belies this statement. Moreover, in the SRBA, the District evidenced its understanding that points of rediversion were necessary for the use of its Storage Rights when it filed a transfer with IDWR to add both the "Lower Burnett" and "Pehrson Ditch" to its water rights. *Declaration of David R. Tuthill, Jr., Ex. 10* at 2, lns. 2 and 4. The Lower Burnett appears on the face of the BLRID Storage Rights, *Tuthill Dec., Ex. 6*, with the Pehrson Ditch added to Byron and Loy Pehrsons' natural flow water rights through the SRBA.

decrees. The statements made by Mr. Contor, which are formulated into argument by Moss, echo arguments made previously by Rangen, wherein Rangen claimed it was entitled to divert water from locations that were not listed in the point of diversion element. Because of this, it is worth quoting extensively from *Rangen*:

> By statute, "decree[s] entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42–1420(1). In 1997, Rangen's water rights numbers 36–02551 and 36–07694 were adjudicated and partial decrees were entered in the SRBA. When Rangen applied to have its water rights entered in the SRBA, it requested identifying the source of each right as "Curran Tunnel" and describing the point of diversion of each right as a particular forty-acre tract. Rather than recommending that Rangen's water rights be decreed precisely as Rangen had requested, the IDWR Director at the time instead recommended identifying the source as "Martin–Curren Tunnel" and describing the point of diversion as the ten-acre tract in which the tunnel sits. Rangen did not file an objection to the Director's recommendations. The presiding judge of the SRBA entered partial decrees consistent with the Director's recommendations. Rangen neither appealed nor moved to set aside either partial decree in the SRBA.

Rangen at 805, 367 P.3d at 200 (emphasis added).

> In the agency action on review here, the Director determined that
>
> > Rangen's SRBA decrees do not identify Billingsley Creek as a source of water and do not include a point of diversion in the SWSWNW Sec. 32, T7S, R14E . . . . Administration must comport with the unambiguous terms of the SRBA decrees. Because the SRBA decrees identify the source of the water as the Curren Tunnel, Rangen is limited to only that water discharging from the Curren Tunnel. Because the SRBA decrees list the point of diversion as SESWNW Sec. 32, T7S, R14E, Rangen is restricted to diverting water that emits from the Curren Tunnel in that 10–acre tract.
>
> On review, the district court concluded that if Rangen disagreed with how its water rights were recommended and ultimately decreed, it had an opportunity and responsibility to voice its concerns in the appropriate forum – the SRBA. The district court reasoned that this was necessary because the SRBA is a forum where all parties to the adjudication would have been afforded appropriate notice of Rangen's arguments and been given the opportunity to respond.
>
> . . . .

> Rangen argues that it is disputing the Director's interpretation of the partial decrees rather than the partial decrees themselves. But this is a distinction without a difference. Any interpretation of Rangen's partial decrees that is inconsistent with their plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself.
>
> The district court found that Rangen's argument was based on the idea that the decrees do not accurately reflect its historical beneficial use. The court held that this argument was an impermissible collateral attack on the decrees. This Court agrees and affirms the district court's holding that Rangen's partial decrees entitle it to divert only that water emanating from the Martin–Curren Tunnel and only within the decreed ten-acre tract. If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA.

Id. at 806, 367 P.3d at 201 (emphasis added).

Accordingly, there is no ambiguity in the BLRID Storage Rights. Because Mr. Contor fails to offer any explanation concerning the actual language in the BLRID Storage Rights, his declaration should be given little if any weight.

III. CONCLUSION

Based on the foregoing, Moss' *Motion to Dismiss* should be denied and the *Declaration of Bryce Contor* should be given little if any weight.

DATED this 7th day of May, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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RECEIVED
May 07, 2025
DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSONS' RESPONSE TO BLRID'S MEMORAMDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and hereby respond to the Big Lost River Irrigation District's ("BLRID") *Memorandum in Support of Motion for Summary Judgment* (April 23, 2025) ("Opening Brief").

I. INTRODUCTION

The overall theme posited by BLRID is the canals and ditches that are listed as points of rediversion both by legal description and by name in the Point of Diversion element of its

Storage Rights[1] – affirmatively claimed by BLRID, recommended by the Director, and partially decreed by the Snake River Basin Adjudication ("SRBA") district court – are meaningless. BLRID asks the Hearing Officer to instead look at I.C. §§ 42-105 and 42-801 as the way in which to read the decreed elements out of the rights. As will be explained, the argument made by BLRID has been rejected repeatedly by the Supreme Court as a collateral attack against SRBA partial decrees, with the Court holding over and over again that if such collateral attacks are permitted, it will upend the finality of the SRBA. Fortunately, BLRID is not without a remedy to address the use of storage water at the Moss River Diversion, with the Court holding that the elements of SRBA partial decrees may be amended through the filing of a transfer with the Idaho Department of Water Resources ("IDWR" or "Department"), pursuant to I.C. § 42-222.

II. STATEMENT OF UNDISPUTED FACTS

In its *Opening Brief*, BLRID presents a number of statements that it asserts are "undisputed facts." *Opening Brief* at 2. While there are some facts the Pehrsons agree are undisputed and material (e.g. BLRID delivers storage water pursuant to its storage rights and the point of diversion element), nearly all of the purported facts are either disputed (e.g. which locations below Mackey Dam are entitled to receive storage), immaterial or irrelevant (e.g. discussion of "shrink"),[2] wrong (e.g. Eastside and Island canals not authorized to receive storage water), and legal opinions masquerading as facts (e.g. points of rediversion are not elements of

[1] The partial decrees for the BLRID Storage Rights are attached as Exhibit 6 to the *Declaration of David R. Tuthill, Jr.* (Feb. 7, 2025).

[2] The lengthy discussion concerning how BLRID allocates "shrink" (i.e. conveyance loss) has no bearing on the meaning of the Point of Diversion element, as partially decreed by the SRBA district court, and the listing of points of diversion and rediversion both by legal description and by name. How BLRID allocates conveyance loss amongst its patrons does not allow it to add or subtract elements from its Storage Rights.

the BLRID Storage Rights). Pehrsons instead reference the Hearing Officer to their Statement of Undisputed Facts, contained on pages 3-16 of their *Memorandum in Support of Motion for Summary Judgment* (April 23, 2025).

III. STANDARD OF REVIEW FOR SRBA PARTIAL DECREES

In the *Opening Brief*, BLRID argues that the Pehrsons are attempting to "readjudicate BLRID's decreed storage water rights." *Opening Brief* at 10. In making this statement, BLRID never addresses the language of its SRBA partial decrees, nor the legal standards by which SRBA partial decrees are analyzed. Instead, BLRID argues for a novel way of determining its water rights, one that ignores the partial decrees themselves, instead relying on purported grants given by statute: "[A]djudicatory practices must yield to statutory authority. A water right cannot be construed in a way that deprives its holder of a right expressly granted by statute." *Opening Brief* at 12 (emphasis added). The way in which the Court reviews SRBA partial decrees is critical to answering the question framed by the Hearing Officer: "[W]hether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law." *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* at 6 (March 28, 2025).

For more than a decade, the Supreme Court has developed the well-articulated standards by which partial decrees are reviewed. According to the Court: "We apply the same rules of interpretation to a decree that we apply to contracts." *A&B Irr. Dist. v. Idaho Dept. of Water Res.*, 153 Idaho 500, 523, 284 P.3d 225, 248 (2012). "Like a contract, this Court will read the decree as a whole and will give meaning to all of its terms . . . ." *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019) (emphasis added). "[T]his Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its

words." *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017). "Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review." *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016). According to the SRBA district court, whose decisions are binding on the parties: "[T]he Director cannot re-examine the basis for the water right as a condition of administration by looking behind the partial decree . . . . To the extent the [] director's recommendation and *Partial Decree* were alleged to be in error, those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum." *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration*, Subcase No. 92-00021 at 8 (Nov. 17, 2005) (emphasis added).[3] "We have previously barred collateral attacks because of their ability to create uncertainty and to undermine water adjudications. After all, finality in water rights is essential." *McInturff v. Shippy*, 165 Idaho 489, 495, 447 P.3d 937, 943 (2019) (emphasis added).

IV. ARGUMENT

A. The Language In BLRID's Storage Rights Must Be Given Meaning And Cannot Be Read Away

Acknowledging that the named canals and ditches, together with their legal descriptions, are part of its Storage Rights, BLRID nonetheless asks the Hearing Officer to simply ignore the language in its water rights, arguing that I.C. § 42-1411(2) did not require points of rediversion to be claimed: "Critically, *nowhere . . . is there any mention of 'point of rediversion.'* The statute is explicit in requiring the 'point(s) of diversion' in subsection (e), but it does not extend that requirement to administrative points at which water may be rediverted after lawful appropriation

[3] The *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration* is located on the SRBA's website: http://164.165.134.61/S0092021XX.HTM (last visited May 6, 2025).

from the source at a point of diversion. This statutory omission is dispositive." *Opening Brief* at 9 (emphasis in original).

As stated above in Section III, BLRID's argument is novel and directly at odds with more than a decade of Supreme Court precedent, holding that partial decrees are examined like contracts, with all language given its plain and ordinary meaning.

1. BLRID affirmatively claimed the canals and ditches as points of diversion and rediversion

Here, BLRID ignores that on February 19, 1991, it affirmatively claimed the canals and ditches as points of rediversion in the SRBA, expressed in Line 4 ("Point of Diversion") of its SRBA claim:

4. Point of Diversion:

Township	Range	Section	1/4	of 1/4	of 1/4	Lot		County
03N	26E	1	NE	NE	SW		R	BUTTE
		12	NE	NW	SE		R	BUTTE
04N	26E	26	NW	NW	NW		R	BUTTE
05N	26E	4	NW	SE	SE		R	BUTTE
06N	24E	1	NE	NE	SW		R	CUSTER
	25E	6	SW	NE	SE		R	CUSTER
		10	NE	NE	SW		R	CUSTER
		11	SW	SE	SW		R	CUSTER
		14	SE	NW	SE		R	CUSTER
		24	NW	NW	NE		R	CUSTER
	26E	32	NW	SE	NW		R	CUSTER
07N	23E	12		SE	NW			CUSTER
			NW	NW	SE		R	CUSTER
	24E	18	SE	SW	NE		R	CUSTER
		20	SW	NE	SW		R	CUSTER
		33	NW	SW	NE		R	CUSTER
		34	SE	NW	NW		R	CUSTER

Memorandum in Support of Pehrsons' Motion for Summary Judgment at 4; *Declaration of David R. Tuthill, Jr., Ex. 7*.

In Line 14 ("Remarks"), the legal descriptions for the "Points of Rediversion" that are shown in Line 4 were specifically described by BLRID with the following canal and ditch names:

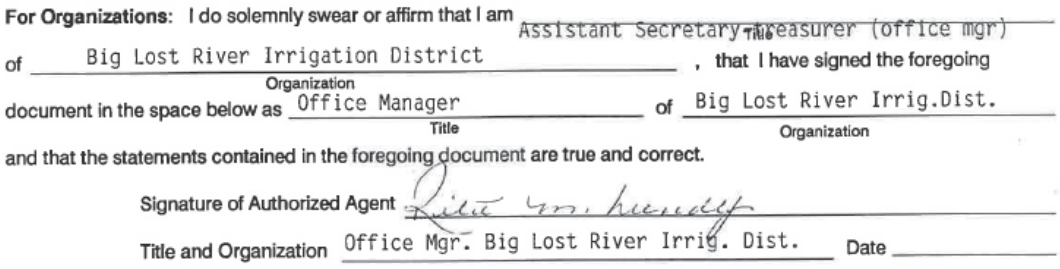
WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC GOWN, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS.
POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id.

In Line 15 ("Basis of Claim"), BLRID stated its claims were premised on a prior decree, known as *Utah Construction Co. v. Abbott*. *Id*.; *see State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943, 944 (1997) ("This area was subject to an earlier decree in the case of *Utah Construction Co. v. Abbott,* Equity No. 222 (D.E. 1923) (U.C. Decree)."); *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 79, 856 P.2d 868, 869(1993) ("In 1936, BLRID acquired water rights by purchasing the assets of the Utah Construction Company. Among Utah Construction Company's assets were the Mackey Dam and Reservoir and a decreed right to store a specified amount of the Big Lost River's natural flow in the Mackey Reservoir."). The significance of a claim being based on a prior decree is it settled expectations for delivery and use of water among the parties and privies to the decision. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1996). The named canals and ditches, like the "Eastside" and "Island," have been in place "for approximately 90 years," meaning they were subject to the *U.C. Decree*. *Declaration of Richard Harry* at 5 (April 23, 2025).

Thus, whether points of rediversion were or were not required to be claimed, it is undisputed that BLRID affirmatively completed its SRBA claim form by listing the elements of the right, I.C. § 42-1409(a) – (h), together with conditions and remarks on the exercise of the use of water, I.C. § 42-1409(j) and (k). In support of its *Motion for Summary Judgment*, BLRID filed the *Declaration of Richard Harry*, current general manager of the District. Mr. Harry,

whose experience and tenure with BLRID is never stated,[4] asserts: "The points of rediversion have never been treated by the District as a part of the legal definition of the storage water right." *Harry Dec.* at 2 (emphasis added). Mr. Harry's modern day interpretation should be given no weight, *Reclaim Idaho v. Denney*, 169 Idaho 406, 417, 497 P.3d 160, 171 (2021) ("This Court is competent to determine the weight we should afford those opinions"), as it is directly at odds with the claim itself, which was signed and averred by BLRID as "true and correct":



For Organizations: I do solemnly swear or affirm that I am Assistant Secretary-Treasurer (office mgr) (Title) of Big Lost River Irrigation District (Organization), that I have signed the foregoing document in the space below as Office Manager (Title) of Big Lost River Irrig.Dist. (Organization) and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent [signature]

Title and Organization Office Mgr. Big Lost River Irrig. Dist. Date

Tuthill Dec., Ex. 7 at 13, Line 16; *see also* I.C. § 42-1409(3) ("Each claimant, through submission of a claim, shall solemnly swear or affirm under penalty of perjury that the statements contained in the notice of claim . . . are true and correct.").

BLRID has offered no evidence why its claims were erroneous or any explanation as to why the Court's precedent should not be followed here, with the contents of BLRID's claim evidencing the District's intent: "When Rangen applied to have its water rights entered in the SRBA, it requested identifying the source of each right as 'Curran Tunnel' and describing the point of diversion of each right as a particular forty-acre tract." *Rangen* at 805, 367 P.3d at 200 (emphasis added).

[4] According to the April 2, 2024 *Meeting Minutes* of BLRID, which are posted online, Mr. Harry was sworn in as general manager during the April 2, 2024 meeting. https://acrobat.adobe.com/id/urn:aaid:sc:US:aadf8429-9422-47f5-bce8-a49bab45b087 (last visited May 6, 2025). Thus, Mr. Harry has been on the job for one-year and it is further unknown if Mr. Harry has any additional experience with water in Basin 34 or other areas of the State.

2. The Director examined BLRID's claims and recommended the canals and ditches as points of diversion and rediversion, with the blackletter requirement that when water is rediverted from the Big Lost River it cannot result in injury

BLRID also ignores that, on May 27, 1992, the Director issued his recommendation for BLRID's storage rights to the SRBA district court, consistent with the claim. In the Point of Diversion element, I.C. § 42-1411(2)(e), the Director recommended multiple points of diversion and rediversion, shown as follows:

POINT OF DIVERSION:

T07N	R23E	S12	SENW
T03N	R26E	S01	NENESW (R)
		S12	NENWSE (R)
T04N	R26E	S26	NWNWNW (R)
T05N	R26E	S04	NWSESE (R)
T06N	R24E	S01	NENESW (R)
	R25E	S06 Pvt	SWNESE (R)
		S10 Pvt	NENESW (R)
		S11 Pvt	SWSESW (R)
		S14	SENWSE Pub (R)
		S24	NWNWNE (R)
	R26E	S32	NWSENW (R)
T07N	R23E	S12	NWNWSE (R)
	R24E	S18	SESWNE (R)
		S20	SWNESW (R)
		S33	NWSWNE (R)
		S34	SENWNW (R)

Memorandum in Support of Pehrsons' Motion for Summary Judgment at 4; *Declaration of David R. Tuthill, Jr., Ex. 8*.

In the "Remarks" line of the recommendation, I.C. § 42-1411(2)(i) and (j), and consistent with the claim, the Director described the canals and ditches as the locations where "water is delivered," along with a condition that, when water is rediverted from the Big Lost River, it cannot result in "injury to appropriators of water":

POINT OF DIVERSION IN SENW SEC 12, TWP 7N, RGE 23E IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

THE AMOUNT OF WATER REDIVERTED FROM THE BIG LOST RIVER SHALL BE REDUCED WHEN NECESSARY TO PREVENT INJURY TO APPROPIATORS OF WATER DOWNSTREAM FROM THE POINT OF REDIVERSION.

Id.

As explained by the Supreme Court: "To be sure, subsections 42-1411(2)(i) and (j) . . . should be included together with the water right elements listed in subsections (2)(a) though (h) . . . such 'conditions' typically relate to those elements already expressed on the license or decree." *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 263, 509 P.3d 1180, 1192 (2022) (emphasis added). Here, the Point of Diversion and Remarks elements relate directly to one another, with the points of diversion and rediversion expressed both by legal description, by the names of the canals and ditches, along with the blackletter legal requirement that exercise of the right cannot result in injury. *See e.g.* I.C. § 42-101 ("Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending on its just appointment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all of the various interests involved.").

When the Director's recommendation was filed with the SRBA district court, it constituted "prima facie evidence of the nature and extent of the water rights acquired under state law." I.C. § 42-1411(4); *City of Pocatello v. State*, 152 Idaho 830, 840, 275 P.3d 845, 855 (2012) ("the report 'shall constitute prima facie evidence'"). As the claimant, BLRID bore "the ultimate burden of persuasion for each element" of its claims, with "the burden of going forward with the evidence to establish any element of a water right that is in addition to or inconsistent with the description in [the] director's report." I.C. § 42-1411(5) (emphasis added); *Pocatello* at 840, 275 P.3d at 855 ("claimant . . . has the ultimate burden of persuasion for each element of a water right").

Here, the Director's recommendation was consistent with the claim; thus, if BLRID thought the recommendation was incorrect or inconsistent, it was the District that bore the burden to disprove the Director's recommendation. BLRID has offered no reason why the recommendation was incorrect and why the Court's precedent in *Rangen* should not be followed: "[I]f Rangen disagreed with how its water rights were recommended . . . it had an opportunity and responsibility to voice its concerns in the appropriate forum – the SRBA." *Rangen* at 806, 367 P.3d at 201.

3. Consistent with the claims and recommendations, the SRBA district court issued partial decrees describing the points of diversion and rediversion

On October 15, 2001, and pursuant to IRCP 54(b), the Honorable Roger Burdick, presiding judge of the SRBA, issued partial decrees for the BLRID storage rights. *Id., Ex. 6.* As to the Point of Diversion element, the storage rights recited as follows, consistent with the claims and recommendations:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id.

As certified judgments, BLRID had an obligation to contest inclusion of the points of diversion and rediversion through the applicable Idaho Rules of Civil Procedure and/or the Idaho Appellate Rules, yet it did not. Since BLRID did not contest its partial decrees, it is the partial decrees that govern its use of water.

Nevertheless, Mr. Harry asserts BLRID's Storage Rights do not control, rather it is past practices that should be followed: "The District's historical and equitable administration of storage water should be preserved, and IDWR should continue to treat rediversion points as administrative, not legal, components of the right." *Harry Dec.* at 4. Mr. Harry's statement is both contrary to the facts and the law. First, as a matter of fact, futile call has historically been declared by the Director on the Big Lost River at the Darlington Sinks, both before and after the 2015 transfer that authorized the Moss River Diversion as an alternate point of diversion for Moss' natural flow water rights. *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 11 (discussing 2021 futile call); *Amended Petition for Declaratory Ruling* at 22 (March 4, 2025) (discussing 2004 futile call). In the late summer of 2022, past practice changed, with storage water allowed to be used as carriage water to the Moss River Diversion, thereby defeating futile call. *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 13-16. As explained through the declarations of the watermasters and the Pehrsons, the curtailments that resulted from this change in practice were unprecedented. *Id*. at 23.

Second, by arguing that BLRID's practice should carry the day, Mr. Harry's statement is contrary to law, and eerily reminiscent of arguments made previously by Rangen and rejected by the Supreme Court:

> Rangen argues that it is disputing the Director's interpretation of the partial decrees rather than the partial decrees themselves. <u>But this is a distinction without a difference</u>. Any interpretation of Rangen's partial decrees that is <u>inconsistent with their plain language</u> would necessarily impact the certainty and finality of SRBA

> judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself.
>
> The district court found that Rangen's argument was based on the idea that the decrees do not accurately reflect its historical beneficial use. The court held that this argument was an impermissible collateral attack on the decrees. This Court agrees and affirms the district court's holding that Rangen's partial decrees entitle it to divert only that water emanating from the Martin–Curren Tunnel and only within the decreed ten-acre tract. If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA.

Rangen at 806, 367 P.3d at 201 (emphasis added); *see also* Ann Y. Vonde, Christopher M. Bromley, Meghan M. Carter & Andrea L. Courtney, et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO LAW REV. 52, 127 (2019) (discussing the requirement to document "historic practices" as elements of water rights in SRBA partial decrees) (hereinafter "Understanding the SRBA").[5]

Regardless of BLRID's past practices – which unquestionably differ before and after 2022, thereby post-dating the SRBA – there is simply no language in Idaho Code or the decisions of the Court explaining if elements of a water right are affirmatively claimed, recommended, and partially decreed, that the decreed elements can be ignored. Even assuming, *arguendo*, that points of rediversion were not required to be claimed, the record conclusively establishes that the Storage Rights were: (a) claimed with points of rediversion; (b) examined and reported by Director with points of rediversion; (c) published on the SRBA's docket sheet for objections and responses with points of rediversion, *Lu Ranching v. United States*, 138 Idaho 606, 610, 67 P.3d 85, 89 (explaining the constitutionality of docket sheet procedure); and (d) partially decreed by the SRBA district court with points of rediversion as adjudicated elements that are legally significant and meaningful.

[5] *Understanding the SRBA* has been cited as authority by the Court on a number of occasions. *See e.g. Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018); *Eden v. State*, 164 Idaho 241, 245, 429 P.3d 129, 133 (2018); *United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 64, 408 P.3d 52, 62 (2017).

Importantly, and contrary to BLRID's arguments, the requirement to add post-SRBA points of rediversion, like the River Diversion, does not deprive BLRID of anything, as it is entitled to file a transfer, pursuant to I.C. § 42-222, to change the Storage Rights. *City of Blackfoot* at 308, 396 P.3d at 1190 ("There is no question that an application for transfer is required to change the [elements] of a [decreed] water right.") (emphasis added).

B. This Contested Case Is Limited To The BLRID Storage Rights And Does Not Have Statewide Implications, With Points Of Rediversion Not Imputed To Other Rights

Attempting to create a mountain out of a molehill, BLRID asserts that if the Hearing Officer rules in favor of the Pehrsons, it will somehow have statewide implications:

> A rediversion requirement . . . would also create an absurd and unworkable burden on the IDWR and storage water users statewide. Of the more than 4,300 water rights in Idaho that authorize 'use from storage,' only 237 list any points of rediversion. Contor Decl., ¶ 31. This shows that the overwhelming majority of such rights do not include, and are not required to include, rediversion points. If the relief request in the Amended Petition were granted, it would invalidate and jeopardize thousands of lawful storage rights, creating chaos and undermining decades of adjudication and water certainty in the state. Contor Decl., ¶¶ 36, 41-43.

Opening Brief at 10.[6]

First, it is immaterial how many storage water rights exist in the State, whether described by beneficial use, license, or partial decree, and how many of those rights are described with points of rediversion. Inescapable, and unaddressed by BLRID, is its Storage Rights, which it affirmatively claimed in the SRBA, which the Director recommended, and which the district court partially decreed, most certainly describe points of rediversion, both by legal description and by name. Consistent with the pleadings in this case and the framing of the issue by the

[6] Specific issues with the *Declaration of Bryce Contor* are addressed by Pehrsons in their *Response to Moss Motion to Dismiss*, filed contemporaneously herewith, with those arguments incorporated herein.

Hearing Officer, the outcome is limited to BLRID's Storage Rights and whether storage may be received at locations that are not described in the water rights.

Second, through BLRID's efforts in the SRBA, it received benefits and burdens, some of which may be unique. One benefit is the listing of canals and ditches as points of rediversion, both by legal description and by name. The benefit of this adjudicated element is to users within the named canals and ditches who know that status quo will be maintained, consistent with the principle to prevent "injury to appropriators of water," as articulated in the Director's recommendation. *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 4; *Declaration of David R. Tuthill, Jr., Ex. 8.* The burden is then on water users who wish to add post-SRBA points rediversion, like the River Diversion, to comply with the transfer requirement contained in I.C. § 42-222. *City of Blackfoot* at 308, 396 P.3d at 1190 ("There is no question that an application for transfer is required to change the [elements] of a [decreed] water right.") (emphasis added). The Pehrsons are entitled to rely on the BLRID Storage Rights as conclusive and binding. *Whittaker v. Idaho Dept. of Water Res.*, 173 Idaho 913, 924-25, 551 P.3d 729, 740-41 (2024) ("The SRBA Final Unified Decree is 'conclusive as the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987' and is 'binding against all persons.'").

Another benefit that is enjoyed by BLRID is inclusion of a "refill" remark in the Quantity element:

QUANTITY:	17205.0	AFY
	A VOLUME OF WATER IN ADDITION TO THE VOLUME DESCRIBED ABOVE FOR STORAGE PURPOSES MAY BE STORED IN A SINGLE YEAR IF: A) THE ADDITIONAL VOLUME IS STORED USING THE STORAGE CAPACITY OF MACKAY RESERVOIR, AND B) ALL WATER RIGHTS EXISTING AT THE TIME OF STORAGE (INCLUDING WATER RIGHTS WITH JUNIOR PRIORITY AND OTHER RIGHTS FOR STORAGE PURPOSES) THAT ARE WITHIN THEIR PERIOD OF USE ARE SATISFIED.	

Tuthill Dec., Ex. 6.

As the Hearing Officer is aware, the issue of reservoir refill in the Upper Snake, Boise, and Payette basins was heavily litigated in Basin-Wide Issue No. 17 ("BWI 17"). *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 408 P.3d 899 (2018); *United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 408 P.3d 52 (2017); *A&B Irr. Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014); *see generally Understanding the SRBA* at 136-46. The refill remark in the BLRID Storage Rights, which predated BWI 17, allowed BLRID to escape the refill controversy. BLRID's argument that the outcome in this case will prejudice other storage water rights in the State is contradicted by the fact that the BLDIR refill remark was not imputed to the rights at issue in BWI 17. Thus, a burden that is associated with the BLRID refill condition is if there is any refill of Mackey Reservoir, the refill is subordinate to existing water rights; meaning, none of the refill can be used by Moss as carriage water to the River Diversion to defeat futile call.

Putting the United States' storage water right in American Falls Reservoir at issue, BLRID argues that the right, no. 1-2064, which was part of BWI 17, will be jeopardized by the outcome in this case because "the right does not list rediversion points on its face or in its conditions." *Opening Brief* at 10. BLRID is correct that water right no. 1-2064 does not list points of rediversion. Yet, the argument that the American Falls right will be jeopardized carries no weight because the United States ***chose*** to claim the right without points of rediversion, meaning there is no element to construe against the United States. Why the United States decided not to claim points of rediversion is irrelevant, but it could have to do with the fact that the United States' storage rights were developed pursuant to the Reclamation Act,[7] with the

[7] While the federal dams in the Upper Snake River basin were built pursuant to the Reclamation Act, with spaceholders whose rights are defined by federal contract and law, *United States v. State*, 135 Idaho 655, 662-63, 23 P.3d 117, 124-25 (2001), Mackey Dam and Reservoir were built by the Utah Construction Company pursuant to the

United States operating an integrated reservoir system, known as the "Minidoka Project," that stretches from Jackson Lake in Wyoming to Milner Dam. *United States v. State*, 135 Idaho 655, 662-63, 23 P.3d 117, 124-25 (2001). *See also Memorandum in Support of Pehrsons' Motion for Summary Judgment, Ex. 3 (Water Right No. 1-2064, American Falls Reservoir)* (Place of Use Element: discussing that water held in American Falls Reservoir may be stored in any of the reservoirs upstream of Milner dam).[8] Clearly, BLRID's "the sky is falling" argument is simply wrong.

C. As Plainly Expressed In The BLRID Storage Rights, And Contrary To The *Declaration Of Richard Harry*, Both The Eastside And Island Canals Are Entitled To Receive Storage Water

BLRID makes the inexplicable argument through citation to the *Declaration of Richard Harry* that neither the Eastside nor the Island canals are entitled to receive storage water:

> There are existing major canals in BLRID that existed well before adjudication that would lose access to their storage deliveries if the Pehrsons are allowed to legislate a new element of a storage water right into existence. BLRID has made storage deliveries to the Eastside and Island Canals for approximately 90 years. Harry

---

Carey Act, *In re: Application of Boyer*, 73 Idaho 152, 160, 248 P.2d 540, 544-45 (1952). In 1936, BLRID was organized to purchase the assets of the Utah Construction Company. *Boyer* at 160, 248 P.2d at 545. As explained by the Court, the legal basis upon which irrigation projects were built has meaning: "[T]he origin and purpose of Carey Act companies . . . have been generally recognized by the statutes and by the courts as forming a distinct class of water corporations. . . . . Once the irrigation system was completed and the construction company had sold all (or most) of the stock in the operating company, the construction company would convey all its interest in the irrigation system and water rights to the operating company." *Eagle Creek Irr. Co. v. A.C. & C.E. Invs., Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923 (2019) (internal citations omitted) (emphasis added). The federal spaceholder contracts and the Carey Act contracts are at issue in this case, nor would it be relevant to examine said contracts as the BLRID Storage Rights have been partially decreed.

[8] An additional reason for the difference could be that the use of water in the Upper Snake was subject to prior decrees known as the "*Eagle Decrees*." *Understanding the SRBA* at 127. The *Eagle Decrees* governed use of water in the Upper Snake, whereas the use of water in the Big Lost was governed by the *U.C. Decree*. The use of water in the prior decrees was claimed in the SRBA, reviewed and recommended by the Director, with partial decrees then issuing. Again, it is irrelevant for purposes of today's discussions why the partial decrees differ, other than to simply recognize that all water rights are different and were based on their own unique facts and circumstances, explaining why the Court reviews the plain language of each SRBA partial decree on its own merits. This is why the SRBA district court has previously held, as cited above, that no one can "look[] behind the partial decree . . . . To the extent the [] director's recommendation and *Partial Decree* were alleged to be in error, those issues should have been timely raised in the SRBA Court. Collateral attack of the elements of a partial decree cannot be made in an administrative forum." *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration*, Subcase No. 92-00021 at 8 (Nov. 17, 2005) (emphasis added).

> Decl., ¶ 29. There are over 69,000 storage inches allocated to the Eastside Canal, over 57,000 to the Island Canal, and over 6,900 that can be delivered to either. Harry Decl., ¶ 28. The Amended Petition is nothing more than an impermissible attempt to readjudicate BLRID's decreed storage water rights. This is not permissible.

Opening Brief at 10.

As discussed above in Section IV.A, BLRID filed claims, received recommendations, and ultimately partial decrees for its Storage Rights. At each stage of the SRBA, and directly contrary to Mr. Harry's declaration, the Eastside and Island canals are listed as points of rediversion, to wit (yellow highlighting added):

WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC GOWN, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS.

Tuthill Dec., Ex. 7 (BLRID Claim)

POINT OF DIVERSION IN SENW SEC 12, TWP 7N, RGE 23E IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LOUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Tuthill Dec., Ex. 8 (Director's Recommendation).

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Tuthill Dec., Ex. 6 (SRBA district court partial decree).

Thus, if Mr. Harry had actually "review[ed] [the] historical records" as he claimed he did, he would have seen that the Eastside and Island canals are expressly listed as points of rediversion where storage water may be received. Accordingly, based on Mr. Harry's inexperience and apparent failure to review the BLRID Storage Rights, the Hearing Officer

should give little if any weight to Mr. Harry's declaration. *Reclaim Idaho* at 417, 497 P.3d at 171 ("This Court is competent to determine the weight we should afford those opinions").

D. Idaho Code §§ 42-105 and 42-801 Do Not Allow BLRID To Evade The Elements Of Its Storage Rights And Injure The Pehrsons

According to BLRID, I.C. §§ 42-105 and 42-801 somehow allow it to evade the elements of its Storage Rights: "A water right cannot be construed in a way that deprives its holder of a right expressly granted by statute. Here, Idaho Code §§ 42-105 and 42-801 grant water users the right to commingle and reclaim water in natural watercourses and impose no requirement to list rediversion points in the water right itself." *Opening Brief* at 12. As has been explained above, BLRID intentionally claimed, the Director recommended, and the SRBA district court partially decreed points of rediversion, within the Point of Diversion element, as a limitation on the Storage Rights. As will be explained below, neither section of Idaho Code allows BLRID to read decreed elements out of its Storage Rights.

1. I.C. § 42-105

The concept that a stream channel may be used as a means of conveyance is simply a practical recognition that it would be costly and unnecessary to require the construction of separate canals alongside natural streams. According to the Supreme Court, I.C. § 42-105 applies in one of two circumstances, when there is either a "commingling" or an "exchange" of water:

> One commentator defines the practice of commingling as follows: "[W]ater appropriated out of one stream may be turned into the channel of another stream, mingled with the water already flowing there, and then reclaimed . . . ." 1 W. Hutchins, Water Rights Laws in the Nineteen Western States 603 (1971). Hutchins points out that an exchange differs from commingling, although the two concepts are closely related and may in some circumstances overlap. Essentially, commingling occurs when waters are mixed and later separated. An exchange takes place when different waters are traded without being mixed.

> I.C. § 42-105 permits commingling of water. It also permits an exchange or substitution of water provided the parties to such exchange agree and obtain the approval of the Department of Water Resources.

Canyon View Irr. Co. v. Twin Falls Canal Co., 101 Idaho 604, 611, 619 P.2d 122, 129 (1980) (internal citations omitted).

Here, the Pehrsons are not disputing the use of the Big Lost River as a natural waterway. While BLRID claims there is only a commingling, when the BLRID Storage Rights are used as carriage water for the Moss natural flow rights to the River Diversion, an exchange occurs, due to the fact that two sources of water are involved (natural flow and storage). Thus, what is at issue is whether either I.C. §§ 42-105(1) or 42-105(2) allows BLRID to override the partially decreed elements of its Storage Rights to the injury of existing users and without notice. Based on the statute, and consistent with overarching prior appropriation principles, injury is expressly prohibited.

2. I.C. § 42-801

Idaho Code § 42-801 simply states that natural waterways may be used for conveyance of storage water, provided that the "owner of any reservoir proceeding under the provisions of this section shall pay . . . a sum based upon the cost of delivering a unit of water . . . as approved by the director of the department of water resources . . . ." I.C. § 42-801; *see also Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 159, 219 P.3d 804, 806 (2009) ("Because the Irrigation District uses the river to convey its storage water to its water users, it must permit the watermaster of the Water District to distribute the water from the river into the Irrigation District's waterworks, and it must compensate the watermaster for those services. I.C. § 42-

801.") (emphasis added). Unequivocally, there is no language in I.C. § 42-801 that allows use of the statute to override the partially decreed elements of the BLRID Storage Rights.[9]

E. The Requirement To File A Transfer Is Consistent With The Decisions Of The Supreme Court, Upholding The Integrity Of The SRBA

Lastly, BLRID makes various assertions that if the Pehrsons prevail, the District will be forced to file transfers with IDWR, thereby undermining the integrity of the SRBA:

> A requirement to list all rediversion points for BLRID storage rights would contradict longstanding IDWR practice and the historical use of over 4,000 "from storage" rights in Idaho. *Contor Decl., ¶¶36, 42.*
>
> If such a restriction were adopted, it would render thousands of existing, decreed storage rights practically unusable and undermine the Snake River Basin Adjudication. *Contor Decl., ¶¶41–44.*
>
> . . . .
>
> To hold otherwise would create an absurd result – requiring water users like BLRID to file repeated transfer applications every time a delivery point is changed or added, despite the fact that both statute and IDWR practice allow for administrative flexibility. *Contor Decl., ¶¶27, 31, 36.*

*Opening Br*ief at 6, 12 (emphasis added).

The arguments of BLRID are contrary to both fact and law. First, the facts establish that the BLRID Storage Rights were partially decreed by the SRBA district court on October 15, 2001. *Tuthill Dec., Ex. 6.* In the twenty-four (24) intervening years since, it is stated through the *Declaration of Richard Harry* that, in addition to Moss, there have been two other river pumps installed on the Big Lost River, one by Harry Crawford and one by Michael Webb. *Harry Dec.*

[9] Attached as Exhibit A to the *Declaration of Payton Hampton* is a brief filed by IDWR in litigation involving BLRID, with some supposed importance concerning I.C. § 42-801. The brief certainly cites the statute, but only for the simple proposition that "The watermaster for Water District 34, under the supervision of the Department, has the authority . . . to convey the irrigation district's storage water." *IDWR Response to Motion for Reconsideration* at 4 (Dec. 15, 2006). Through citation to said brief, BLRID makes the further argument of "IDWR's recognition of BLRID's autonomy in administration of its storage water deliveries through the River channel." *Opening Brief* at 13. At no point in IDWR's briefing, or anywhere in Idaho law can it be argued that an irrigation district is allowed to override its water rights at the expense and injury to water users.

at 5, ¶ 25-26. Thus, taking Mr. Harry at his word, the factual claim by BLRID that it would somehow be burdened by having to file serial transfers is incredibly overstated. While unknown, it can be reasonably speculated that the lack of change in the BLRID system is due to the fact that the basin was subject to a prior decree, with BLRID filing its claims pursuant to the prior decree in order to preserve settled expectations within the basin. *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 4; *Tuthill Dec., Ex. 7*.

Second, despite BLRID's argument to the contrary, there is nothing "absurd" about following the law. *Citibank (South Dakota) N.A. v. Carroll*, 148 Idaho 254, 260, 220 P.3d 1073, 1079 (2009) ("we are a State and Nation of laws, not individuals who can disregard duly enacted laws as they see fit"). The Supreme Court has conclusively held that the only way to alter the decreed elements of an SRBA water right is by filing a transfer, consistent with I.C. § 42-222: "There is no question that an application for transfer is required to change [an element] of a water right." *City of Blackfoot* at 308, 396 P.3d at 1190 (emphasis added).[10] Since the River Diversion is a post-SRBA rediversion of storage water, it is axiomatic that the BLRID Storage Rights do not describe it; thus, the law establishes BLRID must file a transfer. Nor can it be legitimately argued by BLRID that the requirement to file a transfer somehow undermines the finality of the SRBA, when the Court has conclusively held against this argument: "Any

[10] Indeed, BLRID recognized this simple fact when it filed an *Application for Transfer* with IDWR on May 8, 2008, to "Update the diversions used by the Applicant." *Tuthill Dec., Ex. 10* at 2, ln. 2. The update was necessary to add the "Pehrson ditch and Lower Burnett (new) . . . [t]otal diversions shall not exceed 800 af per year." *Id*. at 3, ln. 6.d. Because the SRBA was still an active adjudication, BLRID withdrew the *Application for Transfer*, explaining to IDWR that the additions were being addressed in the SRBA: "Please send back BLRID's application for the transfer of Point of Diversion of storage water as it pertains to Lower Burnett and Pehrson Ditch. The directors do not want it to go before Pehrson's is approved." *Id*. at 1. The Lower Burnett appears on the face of the BLRID Storage Rights, *Tuthill Dec., Ex. 6*, with the Pehrson Ditch added to Byron and Loy Pehrsons' natural flow water rights through the SRBA. The fact that BLRID pursued a transfer contradicts Mr. Harry's statement that "points of rediversion have never been treated by the District as a part of the legal definition of the storage water right." *Harry Dec.* at 2 (emphasis added). Clearly, when Mr. Harry stated that his "personal knowledge" is based on "reviewing historical records," *id* at 1, he must not have seen the *Application for Transfer*.

interpretation of the partial decree that is inconsistent with the plain language would necessarily impact the certainty and finality of SRBA judgments and, therefore, requests for such interpretations needed to be made in the SRBA itself. Here, no such request was made." *Id*. (cleaned up).

V. CONCLUSION

Based on the foregoing, Pehrsons respectfully request that the Hearing Officer deny BLRID's *Motion for Summary Judgment*.

DATED this 7th day of May, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of May, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHTS NOS. 34-182 and 34-381A (MOSS FARMS, INC.)	**RESPONSE AND JOINDER IN SUPPORT OF BLRID'S MOTION FOR SUMMARY JUDGMENT; OPPOSITION TO PEHRSONS' MOTION FOR SUMMARY JUDGMENT; RULE 56(d) MOTION; AND MOTION FOR ORDER AUTHORIZING LIMITED DISCOVERY**
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns of Olsen Taggart PLLC, hereby joins in support of the *Motion for Summary Judgment* filed by the Big Lost River Irrigation District (hereafter "BLRID MSJ") on April 23, 2025.

Moss Farms hereby opposes the *Motion for Summary Judgment* filed by the Pehrsons (hereafter "Pehrsons' MSJ") on April 23, 2025. Moss Farms joins in support of the arguments raised in BLRID's MSJ with its accompanying declarations and supporting memoranda and

incorporates them into Moss Farms' instant *Opposition to Pehrsons' MSJ* (hereafter the "Moss Opposition").

Moss Farms further joins in support of the arguments raised in the *Opposition to Pehrsons' Motion for Summary Judgment* (hereafter "BLRID's Opposition") filed on May 7, 2023, and incorporates them into the Moss Opposition.

Moss Farms further incorporates the arguments from section III.A.3-5 of it *Reply in Support of Motion for Summary Judgment* and the accompanying *Declaration of Skyler C. Johns* filed by Moss Farms in this matter on February 14, 2025, into the Moss Opposition. The Moss Opposition is further supported by the record in this matter.

Moss Farms further moves the Hearing Officer pursuant to IDAPA 32.01.01.220.03, I.R.C.P. 56(d), 32.01.01.520.01.a., to defer final consideration of BLRID's MSJ and the Pehrsons' MSJ to permit Moss Farms to take deposition testimony from James Cefalo, East Region Manager for the Idaho Department of Water Resources (hereafter "IDWR"), and to permit Moss Farms to submit Mr. Cefalo's deposition transcript to be part of the record for the Hearing Officer to considerer in these proceedings. Moss Farms further moves the Hearing Officer pursuant to Idaho Rules of Evidence 201(b) to take judicial notice of the fact that the East Region Office for IDWR administers transfer applications in East Idaho, including transfer applications filed in Basin 34. *See* https://idwr.idaho.gov/water-rights/administrative-basins/, https://idwr.idaho.gov/water-rights/transfers/.

Good cause exists in this matter to take Mr. Cefalos' deposition testimony to discover information related to the manner in which transfer application requirements related to storage water rights have been interpreted and administered by the East Region Office of IDWR in the Snake River Basin, including Basin 34. Mr. Cefalo's testimony will aid the Hearing Officer in

determining that Moss Farms may continue diverting BLRID storage rights at the River Diversion without obtaining a new point of diversion. Furthermore, including Mr. Cefalo's testimony as part of the record for the Hearing Officer to consider before ruling on the merits of this case is in the interest of judicial economy.

In the event the Hearing Officer does not permit the deposition testimony of James Cefalo to be taken and included in the record, Moss Farms argues that the record still shows that Moss Farms may continue to divert BLRID storage water rights from the River Diversion, and there is no requirement in Idaho law or practice that Moss Farms obtain a new point of diversion to divert these water rights from the River Diversion. Therefore, Moss Farms respectfully requests the Hearing Officer grant summary judgment in favor of BLRID and Moss Farms and deny Person's MSJ.

DATED: May 7, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 7, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.), IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001 RESPONSE IN SUPPORT OF MOSS FARMS' MOTION TO DISMISS

Big Lost River Irrigation District (the "District" or "BLRID"), by and through counsel of record, Parsons Behle & Latimer, hereby submits this Response in Support of Moss Farms, Inc.'s' Motion to Dismiss, filed April 23, 2025. BLRID is in support of Moss Farms, Inc.'s Motion for Summary Judgment and respectfully requests that the Idaho Department of Water Resources grant the relief requested therein.

DATED May 7, 2025.

PARSONS BEHLE & LATIMER

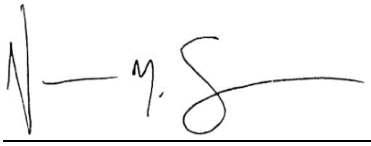
Norman M. Semanko; Payton G. Hampton; Garret M. Kitamura - *Attorneys for Big Lost River Irrigation District*

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PEHRSON RESPONSE TO MOSS MOTION FOR DISCOVERY, RESPONSE TO MOSS IRCP 56(d) MOTION, AND RESPONSE TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and hereby respond to Moss, Farms, Inc.'s *Opposition to Pehrsons' Motion for Summary Judgment; Rule 56(d) Motion; and Motion for Order Authorizing Limited Discovery* ("Motion"). All forms of relief in the *Motion* should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 14, 2024, Pehrsons filed their *Petition for Declaratory Ruling for Watermaster Instructions* ("Petition"), which was opposed by Moss on February 23, 2024. On August 8, 2024, the Director of the Idaho Department of Water Resources ("IDWR") issued a *Notice of Prehearing Conference; Order Appointing Hearing Officer*, setting a prehearing conference to take place on August 29, 2024, and appointing former Idaho Supreme Court Chief Justice Roger S. Burdick to serve as the hearing officer in this matter.

On August 29, 2024, the prehearing conference took place, and was extended by order of the Hearing Officer to October 10, 2024. *Notice of Continued Prehearing Conference; Order Granting Intervention: BLRID* (Sept. 10, 2024). The Hearing Officer granted intervention to the Big Lost River Irrigation District ("BLRID") and the Moore Canal Water Users ("Moore").

On October 10, 2024, the continued prehearing conference took place, with the Hearing Officer, through consultation of the parties, issuing a scheduling order, establishing various deadlines and opening discovery. *Order Authorizing Discovery and Email Service; Scheduling Order; Notice of Hearing* (Oct. 17, 2024).

Consistent with the *Scheduling Order*, the parties named expert witnesses and filed expert witness reports.

On January 13, 2025, Moore filed a *Motion to Dismiss* the *Petition*, which was joined by BLRID. On January 24, 2025, Moss filed a *Motion for Summary Judgment*, together with a memorandum in support and declaration of counsel. The motions were timely opposed by Pehrsons. On February 14, 2025, Moss filed *Reply in Support of Motion for Summary Judgment* ("Moss MSJ Reply").

On February 28, 2025, the Hearing Officer issued his *Preliminary Order: Granting and Denying Motion to Strike; and Dismissing Petition for Declaratory Ruling without Prejudice*.

On March 5, 2025, Pehrsons filed their *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite*, together with an *Amended Petition for Declaratory Ruling*. The motions were opposed by Moss, Moore, and BLRID.

On March 28, 2025, the Hearing Officer issued his *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* ("Scheduling Order"). Pertinent to the issues raised by Moss in the current *Motion*, the Hearing Officer disposed of Moss' *Motion for Summary Judgment* as moot, and established a schedule for the case moving forward:

> Due to the change in the central issue as outlined in this order, the Hearing Officer will not consider or hear argument on Moss' *Motion for Summary Judgment* filed January 24, 2025. The Hearing Officer ruled Moss' *Motion for Summary Judgment* to be moot based upon his original dismissal dated February 28, 2025. That original dismissal having been rescinded and modified does not preclude Moss from refiling their *Motion for Summary Judgment* and presenting oral arguments during the hearing on dispositive motions to be set on May 19, 2025. The scheduling order will be amended to reopen the period for filing and hearing dispositive motions. The parties are encouraged to rely upon declarations previously filed in this matter, so as not to unnecessarily expand the record, and will be used by the Hearing Officer if needed.
>
> . . . .
>
> Concerning dispositive motions, the schedule is AMENDED as follows:
>
> **April 23, 2025** — Deadline for the parties to file dispositive motions, including motions for summary judgment. Any supporting documents or opening briefs must be filed concurrently with the dispositive motion. Any responses or replies must be filed in accordance with the timelines prescribed in IDAPA 37.01.01.220.

May 19, 2025	Date reserved to hear oral argument on dispositive motions. If a dispositive motion is timely filed, a notice of hearing for the motion will be issued by the presiding officer without the need for a request.

Scheduling Order at 6-7 (emphasis added).

On April 23, 2025, and consistent with the *Scheduling Order*, motions for summary judgment were filed by Pehrsons and BLRID. On April 23, 2025, Moss filed a *Motion to Dismiss*.

On May 7, 2025, and consistent with the timelines in IDAPA 37.01.01.220 that were referenced by the Hearing Officer in the *Scheduling Order*, responses to the motions for summary judgment were filed by Pehrsons and BLRID, with Pehrsons also filing a response to Moss' *Motion to Dismiss*.

II. ARGUMENT

Through the *Motion*, Moss argues for three forms of relief: (1) deny Pehrsons' *Motion for Summary Judgment* by incorporating various sections of the February 14, 2025 *Moss MSJ Reply*; (2) pursuant to IRCP 56(d) "defer final consideration of BLRID's MSJ and the Pehrsons' MSJ to permit Moss Farms to take deposition testimony from James Cefalo, East Region Manager for the Idaho Department of Water Resources . . . and to permit Moss Farms to submit Mr. Cefalo's deposition transcript to be part of the record for the Hearing Officer to consider in these proceedings . . ." *Motion* at 2; and (3) issue a ruling "that Moss Farms may continue to divert BLRID storage water rights from the River Diversion, and there is no requirement in Idaho law or practice that Moss Farms obtain a new point of diversion to divert these water rights from the River Diversion." *Id*. at 3.

The relief should be denied as failing to comply with the *Scheduling Order*, IRCP 56(d), and as prejudicial to the Pehrsons and the overall process established by the Hearing Officer.

A. Moss' Attempt To Incorporate The *MSJ Reply* Is Untimely

The *Scheduling Order* is exceedingly clear – the Moss summary judgment filings were deemed "moot . . . [this] does not preclude Moss from refiling their *Motion for Summary Judgment* and presenting oral arguments during the hearing on dispositive motions to be set on May 19, 2025." *Scheduling Order* at 6 (emphasis added). The *Scheduling Order* established a clear deadline for filing dispositive motions: April 23, 2025. Motions for summary judgment were filed by Pehrsons and BLIRD, with Moss filing a *Motion to Dismiss*, all of which were timely. Moss failed to move for summary judgment and cannot now incorporate any of his previously filed documents in order to contest the Pehrsons, or in support of BLRID.

B. Because Moss Did Not File An Affidavit Or Declaration In Support Of His IRCP 56(d) Motion, The Motion To Depose James Cefalo Should Be Denied

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. *Nipper v. Wootton*, 542 P.3d 1279, 1284 (Idaho 2024). The time in which to move for summary judgment, to respond, and reply is established by IRCP, the Department's Rules of Procedure, and the Hearing Officer's *Scheduling Order*. "Rule 56(d) provides for additional relief when the nonmoving party establishes it 'cannot present facts essential' to its opposition of the motion." *Id*. (emphasis added). Here, Moss failed to move for summary judgment on April 23, 2025, making him a nonmoving party.[1] In order to invoke the relief provided by IRCP 56(d), Moss

[1] Moss argues out of both sides of his mouth by asking to incorporate his *MJS Reply*, which would make him a moving party, and seeking to depose Mr. Cefalo as a nonmoving party. Moss cannot have it both ways, and, in fact, cannot have it either way as he failed to comply with the *Scheduling Order* and has not met the requirements of IRCP 56(d).

must "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition . . . ." IRCP 56(d) (emphasis added); *Nipper* at 1284. By failing to file either an "affidavit or declaration" explaining why the Rule 56(d) motion should be granted, Moss violated the express requirement of the rule; thus, the Hearing Officer should deny the relief.

Even if Moss had filed an affidavit or declaration, the motion should still be denied. "Under Idaho Rule of Civil Procedure 56(d), a motion for an extension of time to file additional affidavits, depositions, and interrogatories in opposition to a motion for summary judgment lies within the discretion of the district court." *Nipper* at 1284. Here, Mr. Cefalo is an IDWR who has been available to Moss since February 14, 2024, when Pehrsons filed their *Petition*. In fact, and pursuant to the Hearing Officer's *Order Authorizing Discovery and Email Service; Scheduling Order; Notice of Hearing* (Oct. 17, 2024), the Pehrsons identified Mr. Cefalo as an expert witness, explaining that he would offer testimony concerning the approval of transfers: "Mr. Cefalo is expected to testify as to the process by which IDWR permits, licenses, and approves transfers for water rights, as well as administration of water rights, and his opinions hereto." *Pehrson Expert Witness Disclosure* (Nov. 1, 2024).

Moss now asserts that he should be allowed to depose Mr. Cefalo "to discover information related to the manner in which transfer application requirements . . . have been interpreted and administered . . . ." *Motion* at 2.[2] Therefore, even if Moss had filed an affidavit or declaration in support of the IRCP 56(d) motion, he has failed to satisfy the "specified reasons

[2] Moss provides nothing new in this statement. Opinions from David R. Tuthill, Jr. and Bryce Contor, both of whom were previously employed by IDWR, are in the record. Mr. Tuthill opines that a transfer is required to add the Moss River Diversion to the BLRID Storage Rights, whereas Mr. Contor does not.

requirement in Rule 56(d)." *Nipper* at 1285 (explaining reasons that include "inability to proffer the affidavit within normal summary judgment time-frames"). Accordingly, Mr. Cefalo has been available to Moss for deposition for 15 months and the Hearing Officer should not allow this proceeding to be held open while Moss engages in a fishing expedition that will only serve to delay the outcome.

Lastly, the Hearing Officer was clear in his opinion that enough information is in the record to rule on summary judgment; thus, there is no reason to depose Mr. Cefalo and to add his deposition transcript to the record: "The parties are encouraged to rely upon declarations previously filed in this matter, so as not to unnecessarily expand the record, and will be used by the Hearing Officer if needed." *Scheduling Order* at 6 (emphasis added). Moss consented to the *Scheduling Order* by not challenging it and has provided no justification as to why it should be amended now.

C. The Hearing Officer Should Not Issue A Separate Ruling That Moss Is Entitled To Divert Storage Water At The River Diversion

According to the Hearing Officer, at issue in summary judgment is "whether diverting BLRID storage water at a point of diversion or rediversion not listed on [BLRID's] decreed water rights violates Idaho law." *Scheduling Order* at 6. As stated above, motions for summary judgment have been filed, with briefs in support of, and responses thereto. Here, Moss makes a conclusory statement, without citation to any authority, that the Hearing Officer should issue a separate ruling, expressing "that Moss Farms may continue to divert BLRID storage water rights from the River Diversion, and there is no requirement in Idaho law or practice that Moss Farms obtain a new point of diversion to divert these water rights from the River Diversion." *Motion* at 3. The requested relief is what is directly at issue in summary judgment; thus, the Hearing

Officer should deny the *Motion* because his order on summary judgment will dispose of the question, one way or the other.

III. CONCLUSION

Based on the foregoing, all forms of relief requested by Moss in the *Motion* should be denied.

DATED this 9th day of May, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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/s/ Chris M. Bromley
Chris M. Bromley

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**NOTICE OF MOTION HEARING**

NOTICE IS HEREBY GIVEN that on **May 19, 2025, at 9:00 a.m. (MT)**, Hearing Officer Burdick will hear oral argument in this matter on (1) Moss Farms, Inc.'s May 7, 2025 Rule 56(d) motion and motion for limited discovery, followed by the dispositive motions filed April 23, 2025—(2) *Pehrsons' Motion for Summary Judgment*, (3) Big Lost River Irrigation District's *Motion for Summary Judgment*, and (4) *Moss Farms' Motion to Dismiss*.[1] The hearing will be held at the Department's State Office, located at 322 E. Front Street, 6th Floor, Conference Rooms 602B–D, Boise, Idaho. All parties who wish to participate in the hearing shall be present in person.

The hearing will be available for observation only via Webex. To join the conference via computer or smartphone, please click the following Webex link and follow the prompts: https://idahogov.webex.com/idahogov/j.php?MTID=mb7cd06d5fca4cd23db4a5fefde805b30.

To join the conference via telephone, please dial 1(415) 655-0001 (US Toll) and enter the following meeting access code when prompted: 2865 596 8091.

The hearing will be held in accordance with the provisions of Chapter 17, Title 42, and Chapter 52, Title 67, Idaho Code, and the Department's Rules of Procedure, IDAPA 37.01.01. A copy of the Rules of Procedure may be obtained from the Department upon request or at https://adminrules.idaho.gov/rules/current/37/370101.pdf.

The hearing will be conducted in a facility that meets the accessibility requirements of the Americans with Disabilities Act. If you require reasonable accommodation to attend, participate in, or understand the hearing, please advise the Department no later than Thursday, May 15, 2025. Inquiries for reasonable accommodations should be directed to Sarah Tschohl, Idaho Department of Water Resources, PO Box 83720, Boise, Idaho 83720-0098, telephone (208) 287-4815, or email sarah.tschohl@idwr.idaho.gov.

DATED this 9th day of May 2025.

ROGER S. BURDICK
Hearing Officer

[1] On May 7, 2025, Moss Farms filed a *Response and Joinder in Support of BLRID's Motion for Summary Judgment; Opposition to Pehrsons' Motion for Summary Judgment; Rule 56(D) Motion; and Motion for Order Authorizing Limited Discovery*. Given the deadline to file dispositive motions passed April 23, 2025, Moss Farms' May 7, 2025 joinder for summary judgment is untimely and will not be considered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of May 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.), IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001 REPLY IN SUPPORT OF BIG LOST RIVER IRRIGATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT

Big Lost River Irrigation District (the "District" or "BLRID"), by and through counsel of record, Parsons Behle & Latimer, and pursuant to IDAPA 31.01.01.220.03 and Idaho Rule of Civil Procedure 56, hereby submits this Reply in Support of its *Motion for Summary Judgment.*

I. INTRODUCTION

The Pehrsons' legal theory rests on two fundamental departures from Idaho law. First, it asks the hearing officer to limit the application of Idaho Code § 42-105—a statute that, by its terms and consistent case law, applies broadly to the conveyance and reclamation of validly diverted water through natural waterways. Neither the statute nor any Idaho appellate decision supports the narrow reading the Pehrsons propose.

Second, their theory requires the hearing officer to override the plain language of Idaho Code §§ 42-108, 42-222, and 42-1411 by applying legal rules governing points of diversion to points of rediversion—a term that does not appear in statute, is not an adjudicated element, and has never been subject to transfer requirements. The Pehrsons ask the hearing officer to create new legal limitations that the Legislature has never enacted, that the SRBA never imposed, and to read restrictions into the partial decree that simply do not exist.

II. OBJECTION TO STATEMENT OF FACTS

The Pehrsons' blanket dismissal of nearly all of BLRID's asserted facts—claiming they are "disputed," "immaterial," "wrong," or "legal opinions masquerading as facts" (Pehrsons' Response at 3)—does not meet the standard required by Idaho Rule of Civil Procedure 56(c)(1). That rule requires a party disputing a fact to support its position by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

I.R.C.P. 56(c)(1).The Pehrsons' response satisfies neither prong.

First, the Pehrsons cite ***no particular parts of the record*** to dispute BLRID's facts as required under Rule 56(c)(1)(A). For example, rather than cite any factual record material, the Pehrson Response simply labels certain points as a "legal opinion" without analysis or rebuttal evidence. Second, the Pehrsons do not meet their burden under Rule 56(c)(1)(B) to show that BLRID's cited materials fail to support the facts asserted. They simply disagree with BLRID's facts, which is not a valid basis to disregard the assertion.

Because the Pehrsons do not point to admissible evidence contradicting BLRID's asserted facts or show that BLRID's citations fail to establish those facts, their denials do not create a genuine dispute of material fact under Rule 56. The hearing officer should treat BLRID's properly supported facts as undisputed for purposes of summary judgment.

III. ARGUMENT

A. Idaho Code Sections 42-105 and 42-801 are dispositive of the Pehrson's claim.

In Section III(D) of the *Pehrsons' Response to BLRID's Memorandum* in Support of Motion for Summary Judgment ("Pehrson Response"), they incorrectly contend that BLRID's use of § 42-105 to justify downstream reclamation improperly overrides the terms of its decreed storage rights, and that § 42-105 cannot be used to expand or alter adjudicated elements of a water right. In effect, they portray § 42-105 not as a permissive delivery statute, but as legally subordinate to—and limited by—the wording of the decree. However, the structure of Idaho Code § 42-105(1) confirms that it is not a component of any specific water right but a **standalone statutory right** that is **additive** to any valid water right. The statute expressly applies only after a valid water right has been exercised by means of diversion:

> "The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed…"

I.C. § 42-105(1). This language establishes a clear temporal sequence: the right to divert must exist first. Only after the water has been lawfully diverted does § 42-105 authorize it to be mingled in a natural stream and reclaimed. The statute does not describe the elements of a water right—such as source, point of diversion, or place of use—and it does not require any such elements to be amended or supplemented to make use of the statute. Instead, it presumes the validity of the underlying right and grants a general statutory entitlement to convey water through a natural waterway under the condition that losses due to seepage and evaporation must be accounted for.

This confirms that § 42-105(1) is not part of the adjudicated content of a water right but instead operates independently as a delivery statute. It supplements a water right by providing a lawful means of transport through natural channels. Any attempt to treat it as a limitation on a right—as the Pehrsons argue—is contrary to its structure and plain text. A statutory delivery mechanism cannot "override" or "contradict" a water right because it exists outside of and in addition to the elements adjudicated in that right.

This statutory framework is central to BLRID's operations. The District stores water at Mackay Reservoir and releases it through the only decreed point of diversion—Mackay Dam. Once released, the water is delivered through the Big Lost River and later reclaimed at various established distribution points throughout the District. Because the appropriation occurs at the dam, and BLRID properly accounts for conveyance loss, its downstream reclamation complies fully with the statute.

This legal framework is supported by the Idaho Supreme Court in *Canyon View Irr. Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 611, 619 P.2d 122, 129 (1980), which explained the difference between commingling and exchange. The Court describes exactly what § 42-105(1) authorizes: the original appropriator introduces their already-appropriated water into a stream, allows it to mix with other flows, and later reclaims it—subject to measurement and accounting for loss. BLRID's use of the Big Lost River falls squarely within this framework. The District diverts water at the dam from its source, releases it into the river, and later reclaims it at pumps and headgates used for decades to serve its patrons.

By contrast, Idaho Code § 42-105(2) addresses water exchanges, which require agreement among interested parties and approval by the Director of IDWR. These apply when one user substitutes their water for another's in a delivery system. That is not what occurs here, as the Pehrson Response alleges. There is no substituted supply and no agreement between BLRID and

Moss Farms or any other party. The water delivered and reclaimed by BLRID is its own, lawfully appropriated, conveyed under § 42-105(1), and reclaimed within its place of use.

The Idaho Supreme Court has directly endorsed this practice in a nearly identical factual scenario. In *Keller v. Magic Water Co.*, 92 Idaho 276, 441 P.2d 725 (1968), the Court upheld a water right where the appropriator diverted at a dam, conveyed some of the water to a pump at the dam, and released the rest into the natural channel of Salmon Falls Creek for later reclamation at a downstream pump not listed in the permit. The appellants objected that this downstream reclamation point constituted a second, unauthorized diversion. The Court rejected that argument, holding:

> Magic Water Company diverts the entire stream of Salmon Falls Creek at the dam, and part of the water is conveyed to Pumping Unit A… Other water flows over the spillway back into the natural channel of Salmon Falls Creek. Respondent utilizes the natural channel as part of its transportation system to its lower pumps, Pumping Unit B, where it pumps the water up the side of the canyon.

Id. at 284, 441 P.2d at 733.

The appellant contended that this was indicative of two different points of diversion, attempting to treat Pump Unit B as an unpermitted point of diversion. But, crucially, the Court concluded, in reliance on § 42-105 :

> The trial court did not err in its finding of fact that Magic Water Company had only one diversion, nor did it err in its conclusion of law based on such finding. Respondent was entitled to use the natural channel of the creek to transport the water which it diverts further downstream to the point where its pumps can most advantageously discharge the water.

Id. at 285, 441 P.2d at 734.

The Court treated the dam as the sole point of diversion and held that use of the stream to convey water downstream for later reclamation—under circumstances materially identical to BLRID's—was authorized by law and did not require that Pump B be listed in the permit. Even in

the permitting and perfection context, where strict compliance is required, the Court recognized that § 42-105 permitted use of the stream as a conveyance system for validly diverted water.

The lesson from *Keller* is clear: Section 42-105(1) is not integrated into a water right. It is an independent statutory right that may be used by any valid water right holder to convey and reclaim properly appropriated water through a natural stream**.** BLRID's reclamation of storage water is a direct exercise of this statutory entitlement. It neither alters nor conflicts with the decreed elements of BLRID's storage rights. Rather, it is additive to them.

B. The Pehrsons' Argument Depends on Two Legal Mischaracterizations: (1) Conflating Points of Diversion with Points of Rediversion, and (2) Treating Statutes Governing Defined Elements as if They Apply to Non-Elements

The Pehrsons' legal theory rests on two foundational errors. First, they repeatedly conflate **points of diversion**—a recognized and regulated element of a water right—with **points of rediversion**, which are not defined anywhere in Idaho law and have never been treated as adjudicated elements. Second, they improperly apply Idaho Code §§ 42-108 and 42-222—statutes that govern changes to clearly enumerated elements of a water right—to operational delivery practices that fall outside the scope of those statutes. These mischaracterizations appear throughout their briefing and should be rejected.

Idaho Code § 42-108 and § 42-222 form the statutory framework governing changes to water rights. These statutes ensure that material changes to a water right—such as diverting from a new source or applying water to a new use—go through a formal, transparent process to protect the rights of other users and maintain orderly administration. But the statutes do not apply to operational decisions like where to reclaim water already diverted under an existing right.

The Idaho Legislature has expressly defined which aspects of a water right require a formal change application. Idaho Code §§ 42-108 and 42-222 require a transfer only for changes to one of the following four elements:

- Point of diversion
- Place of use
- Period of use
- Nature of use

> No person shall be authorized to change the period of use or nature of use, point of diversion or place of use of water unless he has first applied for and received approval of the department…

I.C. § 42-108.

> Any person… who shall desire to change the point of diversion, place of use, period of use or nature of use… shall first make application…

I.C. § 42-222(1). These are the only elements that require administrative approval to modify. "Point of rediversion" is not on that list. It is not mentioned in either statute. It is not defined anywhere in Title 42. It is not listed in the SRBA decree framework set out in § 42-1411. It is simply not a legal element of a water right.

This statutory omission is reflected in agency practice. BLRID has never been required to file a transfer application to change or add a point of rediversion for its storage rights, and Harry Decl., ¶9; Contor Decl., ¶27. IDWR has never requested or required such filings for delivery points downstream of a valid diversion from a storage reservoir Contor Decl., ¶27. This reflects a long-standing administrative interpretation consistent with the plain language of Idaho Code Contor Decl., ¶¶16, 27, 31.

In Section II(A) of their Response, the Pehrsons assert that BLRID's canals and ditches are "listed as points of rediversion… in the Point of Diversion element" of its partial decrees, and argue that reclaiming water at any unlisted location is unauthorized. But this claim depends on a fundamental mischaracterization: that a point of rediversion is legally equivalent to a point of diversion**.** It is not. The Pehrsons ignore the reality of how storage water is diverted and delivered. BLRID's storage rights are appropriated at a single point: the base of Mackay Dam Harry Decl., ¶6;

Contor Decl., ¶15. This point of diversion is the only one listed in the partial decrees and the only one required to be listed under Idaho Code § 42-1411. From there, water is released into the Big Lost River and conveyed downstream to various delivery points.

The Pehrsons attempt to manufacture legal consequence from informational entries in BLRID's SRBA filings. But the fact that canal or ditch names were included in supporting materials does not transform them into decree elements. BLRID has always treated such references as operational, not legal. As Rich Harry explains, BLRID "has never treated rediversion points as part of the legal definition of its storage water rights; they are administrative tools for delivery" Harry Decl., ¶7. Bryce Contor confirms that this is also IDWR's consistent interpretation across thousands of water rights statewide Contor Decl., ¶27.

Nevertheless, the Pehrsons continue to press their claim in Section III(E), arguing that BLRID must file a transfer to add "post-SRBA points of rediversion." But again, the statutes they rely on—§§ 42-108 and 42-222—do not govern rediversion points. They govern only changes to actual water right elements. The Pehrsons seek to use these statutes to impose transfer requirements on something the law does not recognize, thereby judicially creating a fifth element of a water right without legislative authority.

They also invoke decisions like *City of Blackfoot v. Spackman* and *McInturff v. Shinn Irrigation Co.*, which involve changes to defined elements like the point of diversion or place of use. But those cases are inapplicable here. BLRID has not changed its point of diversion. It continues to appropriate storage water solely at Mackay Dam. Harry Decl., ¶6; Contor Decl., ¶15. No reappropriation occurs when that water is later rediverted in the river—it has already been diverted and is merely being conveyed for use within the authorized place of use. Contor Decl., ¶17.

The hearing officer should reject both tactics. Idaho law is clear: the elements of a water right are defined by statute, and only those elements are subject to transfer. "Point of rediversion" is

not one of them. BLRID is not seeking to change any element of its decreed rights. It is simply reclaiming stored water released at Mackay Dam—its adjudicated point of diversion—at existing delivery points, using Idaho Code § 42-105(1), as spaceholder entities, canal companies and irrigation districts across the state routinely do Contor Decl., ¶31.[1]

If accepted, the Pehrsons' theory would require a transfer application for every headgate, turnout, or pump location not listed in a partial decree, even when the water was validly diverted at the decreed point. That is not, and has never been, the law. The hearing officer should reject the Pehrsons' attempt to rewrite Idaho's water law framework through mischaracterization and overreach.

C. The Pehrsons Misread the Conditions of BLRID's Water Rights and Invent Delivery Limitations That Do Not Exist.

The Pehrsons argue that BLRID's partial decrees broadly restrict[2] rediversion to specific ditches and impose a unique duty to avoid injury in delivery of water to all other Big Lost River water users. They are wrong on both points.

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[1] The Pehrsons dismiss *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 219 P.3d 804 (2009), and the doctrine of universal shrink as irrelevant. It is not. The Idaho Supreme Court in *Nelson* upheld universal shrink as a lawful and equitable method for allocating conveyance loss from impounded water delivered through a natural watercourse. *Id.* at 164, 219 P.3d at 811. That framework is directly relevant here because Idaho Code § 42-105 requires water conveyed in a natural waterway to be measured and adjusted for loss—something that already happens under the universal shrink approach in Water District 34. When BLRID delivers storage water through the Big Lost River, the District's obligation to account for loss is already met through this system. Thus, no legal injury occurs when water is rediverted under § 42-105 at a different location, so long as loss is accounted for.

If, as the Pehrsons argue, the decree must be narrowly interpreted to authorize reclamation only at listed rediversion points, then Moss Farms could lawfully demand delivery of its water at points much further downstream—so long as those points were listed. That would significantly increase the real-time shrink applied, as Rich Harry explains (Harry Decl., ¶9), yet under the Pehrsons' theory, it would be perfectly valid. In contrast, rediverting the same water sooner, at the River Diversion, allegedly violates the decree—even though it imposes **less** loss on the system. That result is internally inconsistent and underscores why their interpretation makes neither legal nor practical sense.

[2] The Pehrsons argue that BLRID's partial decrees should be narrowly construed based on the canals and ditches identified during the SRBA. But their position asks the hearing officer to punish BLRID for being transparent. Idaho Code § 42-1411 required claimants to identify specific elements of a water right—such as source, point of diversion, quantity, and place of use—but it also allowed claimants to include supporting information to aid in defining the right. BLRID, like many others, provided additional background in its

First, nothing in the BLRID decrees limits delivery to the ditches or laterals listed in the descriptive language.[3] Those entries identify common delivery locations but do not impose exclusive delivery constraints. As Bryce Contor explains:

> The conditions of these BLRID rights include a listing of ditches through which water is delivered, and indicate that the named ditches are points of rediversion. Importantly, none of the conditions on these rights limit delivery only to the named ditches.

Contor Decl., ¶34.[4]

Rich Harry confirms that BLRID has never treated those references as exclusive (Harry Decl., ¶7), and IDWR has never required a transfer to redivert water to other points (Contor Decl.,

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claim forms, including the names of canals historically used to redivert storage water. That supporting information does not transform into a limiting condition, nor does it restrict BLRID from rediverting at other lawful points. The decree contains no such limitation. Yet the Pehrsons seek to elevate those disclosures into enforceable boundaries. That flips the SRBA process on its head. The law encourages transparency in adjudication—it does not weaponize it.

[3] The Pehrsons suggest that BLRID improperly relies on IDWR's 2006 brief in *Nelson* for its argument about § 42-801, asserting that the Department merely stated that the watermaster "has the authority… to convey the irrigation district's storage water." But that severely understates the Department's position. IDWR's brief explicitly acknowledges that BLRID, as a Title 43 irrigation district, has full statutory authority to direct storage deliveries within its system. "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." (*IDWR Resp. to Mot. for Recons.*, Dec. 15, 2006, at 2, attached as Ex. A to Hampton Decl.). The Department further stated that "there is no statutory authority… for the Department to enact a rule that would bind the internal operations of the BLRID Board," and confirmed that storage water "has already been diverted and is now simply being conveyed pursuant to direction of the owner of the storage water, the BLRID." *Id.* at 2–4. The Pehrsons now ask the hearing officer to do exactly what the Department warned against: override BLRID's lawful delivery discretion by reading into the decree an exclusive list of rediversion points that does not exist.

[4] BLRID agrees with the Pehrsons' recitation of the applicable legal standard: a water right decree, like any other judicial decree or contract, must be interpreted according to its plain language and the four corners of the document**.** See *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 634, 226 P.3d 1277, 1281 (2010) (cited in Pehrsons' Response at 10) ("The interpretation of a contract begins with the plain meaning of its words, and the document must be construed as a whole, without consideration of extrinsic evidence unless the document is ambiguous."). But it is the Pehrsons who misapply that principle. Rather than limit their analysis to the plain terms of BLRID's partial decrees, they attempt to import intent and limitations from extrinsic sources—including prior transfer applications, SRBA forms, and claim documents—to argue that the decree implicitly prohibits rediversion at locations not specifically listed. The Idaho Supreme Court has rejected such reasoning: "[a] partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source." *3G AG LLC v. IDWR*, 170 Idaho 251, 263, 509 P.3d 1180, 1192 (2022). As Contor explains, "none of the conditions on these rights limit delivery only to the named ditches" (Contor Decl., ¶34). The Pehrsons' theory depends on

¶27; Harry Decl., ¶9). The Pehrsons try to elevate historical delivery references into legal restrictions. The decrees do not support that interpretation.

The Pehrsons also cite a clause that states:

> The amount of water rediverted from the Big Lost River shall be reduced when necessary to prevent injury to appropriators of water downstream from the point of rediversion.

This does not limit rediversion—it authorizes it, subject to a requirement that rediversion not injure ***downstream*** users. The language tracks Idaho Code § 42-105(1), which allows water to be conveyed and reclaimed in a natural watercourse so long as the user (1) measures injection and reclamation, and (2) accounts for conveyance loss, to avoid injury to downstream rights. BLRID satisfies these. Contor Decl., ¶¶17, 26–27; Harry Decl., ¶6. The Pehrsons are not downstream from the Moss Farms River Diversion and are not within the class protected by this clause.

The Pehrsons also misread *3G AG LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022). That case holds that conditions or administrative limits are not adjudicated "elements" of a water right. The Court made clear:

> Adjudicating a water right determines, among other things, the water source, quantity, priority date, point of diversion, place, and period and purpose of use.

3G AG, 170 Idaho at 263, 509 P.3d at 1192 (citing I.C. § 42-1411(2)(a)–(j)).

> A partial decree 'need not contain information on how each water right on a source physically interacts or affects other rights on that same source.'

Id. (quoting *Am. Falls Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 876–77, 154 P.3d 433, 447–48).

The Court rejected the idea that a "single combined beneficial use" limit imposed during transfer review redefined the water right, holding:

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reading in limitations that appear nowhere in the decree's language—precisely what the four corners rule prohibits.

> [W]hen IDWR reads in a 'single combined beneficial use' limit… that is not a re-adjudication of the water right's elements. Such a limit is not an 'element' of a water right as enumerated under Idaho Code section 42-1411(2)(a)–(j).

As to conditions and remarks under § 42-1411(2)(i) and (j), the Court explained:

> Such 'conditions' typically relate to those elements already expressed on the license or decree.

The Pehrsons conflate a clause meant to protect downstream users with a limitation on rediversion locations. That clause is not an element. It is not a basis to invalidate lawful rediversions elsewhere. And *3G AG* confirms that Idaho law does not treat such language as redefining a water right's scope. The hearing officer should reject the Pehrsons' reading. The BLRID decrees authorize rediversion of storage water, do not limit it to specific ditches, and impose no duty to protect upstream or lateral users. The Pehrsons' interpretation adds language or hiddent intent that isn't there and ignores the plain limits of Idaho water law.

D. Recognizing "Point of Rediversion" as a New Water Right Element Would Destabilize Storage Rights Statewide

The Pehrsons argue that this case has no broader implications because it involves only BLRID's decrees. That is wrong. The danger lies in the legal precedent they ask the hearing officer to adopt: that point of rediversion is a required element of a water right, and that using a new reclamation point under Idaho Code § 42-105 is unlawful unless it is explicitly listed in the right itself.

This theory would expose every storage water right holder in Idaho to litigation whenever they begin using a new reclamation point—even if their water right says nothing at all about rediversion. Under the Pehrsons' view, each operational shift could be challenged unless a transfer is first obtained to add the new point. That is not how Idaho water law works today, but it is what the Pehrsons are asking this hearing officer to impose.

As Bryce Contor explains, this is not an abstract risk. Most Idaho storage rights don't list rediversion points at all. Of the more than 4,300 rights that authorize "use from storage," only 237 list any point of rediversion Contor Decl., ¶31. For these 4,000+ storage water rights, storage water is routinely delivered to varied rediversion points without transfer or litigation. That flexibility is essential to how storage projects function across the state.

Contor's analysis of the Bureau of Reclamation's[5] American Falls storage right (Water Right No. 1-2064) highlights the issue. The American Falls right authorizes over 1.4 million acre-feet of storage water but does not list a single point of rediversion—yet it is used to deliver water to dozens of downstream contractors across hundreds of miles of river. Contor Decl., ¶¶38–39. These deliveries occur through natural channels, consistent with § 42-105. If the Pehrsons' theory were adopted, each one could be deemed an unlawful diversion unless the reclamation point had been formally adjudicated.

That, as Contor notes, would upend not only private rights like BLRID's, but foundational systems like the Minidoka Project. It would "throw into doubt the legal basis for virtually all of Reclamation's spaceholder deliveries below American Falls Reservoir" and trigger a wave of unnecessary transfer filings and legal challenges based on the Pehrson theory. Contor Decl., ¶40.

This case is not about whether BLRID claimed its rights properly. It's about whether Idaho will recognize a new water right element that has never been required. Point of rediversion is not

[5] The Pehrsons suggest that BLRID's historical origins under the Carey Act somehow limit its current authority or distinguish it from entities like the Bureau of Reclamation. That argument is legally incorrect. As the Idaho Department of Water Resources explained in its briefing in *Nelson v. Big Lost River Irrigation Dist.*, BLRID is "a water distribution organization established by landowners pursuant to the provisions of Title 43 of the Idaho Code" and governed by an elected board under Idaho Code §§ 43-301 to -343. As such, BLRID is a subdivision of the State of Idaho with broad statutory authority over the distribution of storage water within its boundaries. In fact, the IDWR recognized that "the Board has the 'power to manage and conduct the business and affairs of the district ... [and] establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land, as may be necessary and just to secure the just and proper distribution of the same.'" *Id.* (citing I.C. § 43-304). Thus, the suggestion that BLRID is somehow subject to a different legal standard or less entitled to rely on Idaho Code § 42-105 or general SRBA decree principles is simply incorrect.

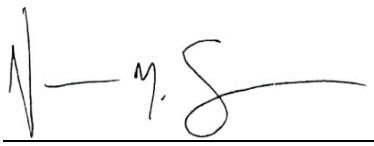
among the statutory elements under Idaho Code § 42-1411. The SRBA never required it. IDWR practice does not treat it as controlling. And creating it now would destabilize how water is delivered across the state. The hearing officer should reject the Pehrsons' invitation to invent a new legal requirement and impose it retroactively on all storage users. Idaho Code § 42-105 governs how water is conveyed and reclaimed. It does not require rediversion points in the water right to be utilized.

IV. CONCLUSION

For each of the reasons above, the Hearing Officer should grant BLRID's *Motion for Summary Judgment* on the matters set forth therein.

DATED May 14, 2025.

PARSONS BEHLE & LATIMER



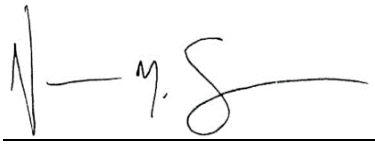
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CERTIFICATE OF SERVICE

The undersigned certifies that, on the date given below, s/he caused to be served a copy of the foregoing document upon the following persons by the method of service indicated below:

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DATED May 14, 2025.



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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No.: P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**REPLY TO BLRID OPPOSITION TO PEHRSONS' MOTION FOR SUMMARY JUDGMENT**

COMES NOW Byron Pehrson, Loy Pehrson, and Randy Pehrson ("Pehrson" or "Pehrsons"), by and through their attorneys of record, McHugh Bromley, PLLC, and hereby reply to Big Lost River Irrigation District's *Opposition to Pehrsons' Motion for Summary Judgment* (May 7, 2025) ("BLRID Opp.").

I. INTRODUCTION

Rather than address the meaning of the Point of Diversion element, BLRID continues to ask the Hearing Officer to read it out of the Storage Rights, wrongly claiming that it can ignore the twenty-plus points of rediversion and deliver storage water at any location on the Big Lost

River. The result of BLRID's argument is an enlargement of its Storage Rights, to the detriment of the Pehrsons (and other upstream users), and without any notice and due process protections that are afforded by Idaho's transfer statute, I.C. § 42-222. The arguments of BLRID will be addressed below.

II. ARGUMENT

A. The Point Of Diversion Element Was Intentionally Claimed, Recommended, And Partially Decreed To Include Points Of Diversion And Rediversion

The issue for summary judgment was framed by the Hearing Officer as follows: "[W]hether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law." *Order Granting Motion to Amend and Withdrawing Preliminary Order Dismissing Petition; Order Vacating Hearing and Amending Schedule* at 6 (March 28, 2025) (emphasis added). The reason for framing the issue as such is the Point of Diversion element for the BLRID Storage Rights, as partially decreed in the Snake River Basin Adjudication ("SRBA"), contains both points of diversion and rediversion, stating in full:

POINT OF DIVERSION:	T03N R26E S01	NENESW	(REDIVERSION)	Within BUTTE County
	S12	NENWSE	(REDIVERSION)	
	T04N R26E S26	NWNWNW	(REDIVERSION)	
	T05N R26E S04	NWSESE	(REDIVERSION)	
	T07N R23E S12	SENW		Within CUSTER County
	T06N R24E S01	NENESW	(REDIVERSION)	
	R25E S06	SWNESE	(REDIVERSION)	
	S10	NENESW	(REDIVERSION)	
	S11	SWSESW	(REDIVERSION)	
	S14	SENWSE	(REDIVERSION)	
	S24	NWNWNE	(REDIVERSION)	
	R26E S32	NWSENW	(REDIVERSION)	
	T07N R23E S12	NWNWSE	(REDIVERSION)	
	R24E S18	SESWNE	(REDIVERSION)	
	S20	SWNESW	(REDIVERSION)	
	S33	NWSWNE	(REDIVERSION)	
	S34	SENWNW	(REDIVERSION)	

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Declaration of David R. Tuthill, Jr., Ex. 6.

Despite the clearly stated issue for summary judgment, BLRID continues to try and cast this case as only addressing the diversion of water at Mackay Dam, refusing to ever address the twenty-plus points of rediversion that are described both by legal description and by name, with the River Diversion unquestionably omitted. As explained throughout this proceeding, the uncontested facts establish the points of diversion and rediversion were: (1) intentionally claimed by BLRID based on the 1923 decree in *Utah Construction Co. v. Abbott*, consistent with I.C. § 42-1409; (2) examined and reported by the Director as necessary and proper to avoid injury, consistent with I.C. § 42-1411; (3) published on the docket sheet for objections and responses, *Lu Ranching v. United States*, 138 Idaho 606, 610, 67 P.3d 85, 89 (explaining the constitutionality of docket sheet procedure); and (4) partially decreed by the SRBA district court as adjudicated elements that are legally significant and meaningful, consistent with I.C. § 42-1412(6) (issuance of partial decrees) and I.C. § 42-1413 (issuance of the *Final Unified Decree*).

BLRID further refuses to address the decade of precedent, explaining that when language is contained in a partial decree, it must be given meaning. *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* at 3-4 (May 7, 2025) (discussing the standards by which partial decrees are reviewed). Because it cannot, BLRID has offered no explanation as to why the points of rediversion were incorrectly claimed or otherwise ambiguous; therefore, the plain language of the partial decrees must govern. *See e.g. Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 807, 367 P.3d 193, 202 (2016) ("Whether an ambiguity exists in a legal instrument is a question of law, over which this Court exercises free review."); *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) ("[T]his Court will determine the meaning and legal effect of a decree from the plain and ordinary meaning of its words."); *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 244, 443

P.3d 252, 258 (2019) ("Like a contract, this Court will read the decree as a whole and will give meaning to all of its terms . . . .").

Thus, BLRID's request to read the points of rediversion out of the Point of Diversion element is unavailing and should be given no credence. *Whittaker v. Idaho Dept. of Water Res.*, 173 Idaho 913, 924-25, 551 P.3d 729, 740-41 (2024) ("The SRBA Final Unified Decree is 'conclusive as the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987' and is 'binding against all persons.'"); *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016) ("If Rangen wanted its water rights to be interpreted differently, it should have timely asserted that in the SRBA.").

B. A Transfer Is Required To Add The Moss River Diversion To The Point Of Diversion Element In The BLRID Storage Rights

BLRID contends a transfer is not required to alter the Point of Diversion element, citing the *Declaration of Bryce Contor*: "As Bryce Contor explains, 'to my knowledge this [point of rediversion] was not a required part of a storage water right,' and IDWR does not generally require transfer to add rediversion points. Contor Dec., ¶¶ 18-19, 25-27." *BLRID Opp.* at 5. Mr. Contor's opinion is disputed by David R. Tuthill, Jr.: "the correct way to allow Moss to use storage water as carriage water would be for BLRID to file a transfer with IDWR to add the River Diversion as a point of diversion and/or rediversion on the BLRID water rights." *Tuthill Dec.*, at 6, ¶ 29.

Consistent with the opinion of Mr. Tuthill, the facts establish that BLRID filed an *Application for Transfer* with IDWR to alter the Point of Diversion element, in order to add the Lower Burnett and Pehrson ditches as locations in which storage may be received. *Tuthill Dec.* at 5, ¶ 21, Ex. 10; *Pehrsons' Response to BLRID's Memorandum in Support of Motion for*

Summary Judgment at 21, fn. 10. BLRID later withdrew the *Application for Transfer* because the points of rediversion were being addressed in the SRBA. As plainly seen in the Storage Rights, the Lower Burnett is an authorized location at which storage water may be rediverted. *Tuthill Dec., Ex. 6*.

Further consistent and as discussed in the *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 22, fn. 7 (April 23, 2025), the Big Wood Canal Company ("BWCC") filed an *Application for Transfer* to alter the Point of Diversion element for its storage water rights. BWCC, like BLRID, was formed pursuant to the Carey Act, and has multiple points of rediversion described in the Point of Diversion element of its SRBA partial decrees. *Id.* The SRBA partial decrees for BWCC were issued on November 29, 2012. *Id., Ex. 6*.

On August 20, 2013, BWCC filed an *Application for Transfer* with the Department to add a "new additional point of rediversion" to its storage rights:

> The application proposes adding a new point of diversion on the Little Wood River. This location will be identified on the Little Wood River rights as a new additional point of diversion and will be identified on the Big Wood River rights as a new additional point of rediversion. The application also proposes modifying the canal company's service area boundary to include approximately 200 additional acres that were missed in the SRBA. No net increase in actual irrigated acres will occur as a result of the service area change.

Application for Transfer No. 78703 at 3, ln. 2 (highlighting added).[1]

On July 9, 2013, the *Application for Transfer* was approved by the Department, thereby altering the Point of Diversion element associated with BWCC's partially decreed storage rights. *City of Blackfoot* at 308, 396 P.3d at 1190 ("There is no question that an application for transfer is required to change the [elements] of a [decreed] water right."). Thus, an application for

[1] In the *Memorandum in Support of Pehrsons' Motion for Summary Judgment*, it was requested that the Hearing Officer take judicial notice of Transfer No. *78703*. The *Application for Transfer* is located here: https://research.idwr.idaho.gov/apps/Shared/LfRelatedDocs/Home/DownloadDoc?eid=2001661 (last visited May 13, 2025).

transfer must be filed to add the River Diversion as a point of rediversion to the BLRID Storage Rights.

C. The Hearing Officer Should Ignore BLRID's Discussion Of The Supreme Court's Decisions In *Rangen* And *Whittaker* Because The Briefing Is Repeatedly Inconsistent With the Decisions Themselves

The Hearing Officer should simply ignore BLRID's arguments regarding the Supreme Court's decisions in *Rangen* and *Whittaker* because the briefing is repeatedly inconsistent with the decisions themselves and it appears that this entire section may be confused with some other cases or is a fabrication of what these cases actually stand for. Concerning *Rangen*, at no point in the Court's decision was the source, "Martin Spring," discussed. *BLRID Opp.* at 11. Second, "Idaho Code § 42-222" was neither cited to, discussed, nor was Rangen found to be in violation of failing to file a "transfer." *Id*. Third, at no point was Rangen found to have unlawfully diverted water from "the Curren Tunnel," *id*.; rather, Rangen was illegally diverting water from the "Bridge Diversion," *Rangen* at 804, 367 P.3d at 199. Fourth, the block quote that BLRID attributes to the Court's decision does not exist:

> Because the Curren Tunnel was not identified in the partial decree as a source of water, Rangen could not rely on that source without first obtaining a transfer.
>
> 159 Idaho at 807.

BLRID Opp. at 11.

As to *Whittaker*, there is no structure referred to as the "Weaver Ditch." *BLRID Opp.* at 11. Second, there is no feature in the Court's decision involving the "Whittaker Lateral." *Id*. Third, at no point in the decision was an argument made that a change in point of diversion "did not require a formal transfer," *id*; rather, at its foundational core, the decision involved approval of a transfer, filed by the McConnells, protested by Whittaker as injurious, and ultimately held to

be correctly approved, without subordination. Fourth, while certainly supportive of the argument made herein by Pehrsons, the block quote that BLRID attributes to the Court's decision does not exist:

> A water right holder cannot begin diverting water from a new point without approval of a transfer application.
>
> 174 Idaho at 65.

BLRID Opp. at 11.[2]

Turning to BLRID's more generalized argument, it asserts that *Rangen* and *Whittaker* do not apply because the water involved in this matter is storage water, whereas those decisions involve natural flow. The cases absolutely apply because they unequivocally hold that if the Point of Diversion element of an SRBA partial decree is different from actual use, then water cannot be used at the inconsistent location. Pehrsons agree that BLRID's citations to *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 385, 43 P.2d 943, 945 (1935) and *Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 208, 157 P.2d 76, 80 (1945) are accurate and correct. However, once a storage water right is partially decreed, the use of storage water must be consistent with the decree. *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 245, 443 P.3d 252, 259 (2019); *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 408 P.3d 899 (2018); *United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 408 P.3d 52 (2017); *A&B Irr. Dist. v. State*, 157 Idaho 385, 336 P.3d 792 (2014). Here, when BLRID intentionally claimed points of rediversion by legal description and name, with the Director recommending them, as partially decreed in the

[2] It must also be pointed out that the Court's decision in *Whittaker* is not reported in the 174th volume of the Idaho Reports, nor is there a pin cite to page 65. The full cite to the Court's decision is *Whittaker v. Idaho Dept. of Water Res.*, 173 Idaho 913, 551 P.3d 729 (2024) (emphasis added). Thus, BLRID's citation to *Whittaker* is not a simple transposition of numbers or other typographical type of error. It is therefore unknown what case BLRID is actually citing to.

SRBA, the Storage Right became impressed with a binding element that all water users are entitled to rely on, absent a transfer.

D. Idaho Code §§ 42-105 And 42-801 Cannot Be Used To Read Away Or Otherwise Enlarge The Partially Decreed Elements Of The BLRID Storage Rights

Attempting to read the points of rediversion out of the Storage Rights and expand the use of water, BLRID points to I.C. §§ 42-105 and 42-801 as authorizing enlargement of the partially decreed elements. Pehrsons incorporate their responses to this argument, by reference, from *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* at 18-20 (May 7, 2025). In summary, the statutes do not allow BLRID to change the elements of its SRBA partial decrees to the detriment of other water users.

E. Arguing That Storage Water Rights By The Thousands Will Be Adversely Affected By The Outcome In This Case Is A Red Herring

In its *Opposition Brief*, BLRID makes the same argument as it did in its *Opening Brief*, that thousands of storage water rights across the State of Idaho will be adversely affected if the Pehrsons prevail, pointing with particularity to the United States Bureau of Reclamation's storage water right in American Falls Reservoir, no. 1-2064. Pehrsons hereby incorporate, by reference, their responses to the previously made argument. *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* at 15-16, 20-22. In a nutshell, BLRID's Storage Rights were partially decreed with points of rediversion in the Point of Diversion element, whereas the storage water rights of the United States were not; thus, the outcome in this matter is limited to BLRID's Storage Rights and will have no impact on the water rights of the United States or others. Moreover, in the twenty-four (24) years since the BLRID Storage Rights were partially decreed, and in addition to Moss, BLRID was only able to identify two other pumps that were placed in the Big Lost River; thus, the argument that BLRID

would somehow be burdened by having to file serial transfers is beyond overstated. While unknown, it can be reasonably speculated that there has been very little change in the BLRID system because the basin was subject to a prior decree, with BLRID intentionally filing its claims based on the prior decree in order to preserve settled expectations.

F. The Place Of Use Element Is Not At Issue In This Proceeding

BLRID attempts to create an issue out of nothing, stating: "Another piece notably unrecognized by the Pehrson Motion is the critical element of any decreed water right, the 'place of use.' The place of use is described with particularity, taking up nearly 6 pages and covers 32,000 acres. Understanding that the BLRID has . . . an expansive place of use that encompasses the entire District is critical to interpretation of the District's broad storage right." *BLRID Opp.* at 9.[3] At no point in these proceedings has the Place of Use element ever been at issue and it has no bearing on the legal meaning of the Point of Diversion element.

G. The Discussion Of Universal Shrink Has No Bearing On The Outcome, With Pehrsons Seeking To Protect Their Water Rights From New And Novel Theories Of Interpretation And Administration

This case is about BLRID's Storage Rights and how the Point of Diversion element is interpreted. Attempting to create yet another issue out of thin air, BLRID claims that if the Pehrsons prevail, it will upset the District's "policy of applying uniform conveyance loss charges to all patrons . . . . What the Pehrsons could not achieve through litigation in *Nelson [v. Big Lost*

[3] Another benefit of pursuing a transfer is BLRID could update its Place of Use element to take advantage of the "digital boundary" statute. I.C. § 42-202B(2). Earlier on in the SRBA, when BLRID's claims were at issue, the Place of Use element was claimed, recommended, and partially decreed by quarter-quarter legal description. Ann Y. Vonde, Christopher M. Bromley, Meghan M. Carter & Andrea L. Courtney, et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO LAW REV. 52, 79 (2019). As the SRBA wore on, the Legislature streamlined the adjudication statutes to allow large irrigation places of use to be described by "digital boundary." *Id*. The change in statute allowed the Place of Use element to be more generally described. *Compare Tuthill Dec., Ex. 6* (BLRID Storage Rights) *with Pehrson Motion for Summary Judgment Opening Brief, Exs. 6* (BWCC Water Right No. 37-867). A benefit of the digital boundary statute is fewer Place of Use legal description errors that invariably occur over time.

River Irr. Dist., 148 Idaho 157 (2009)], they are now attempting to secure through regulatory reinterpretation." *BLRID Opp*. at 17. Discussion of shrink (i.e. conveyance loss) has no bearing on the meaning of the Point of Diversion element, as partially decreed by the SRBA district court, and its listing of points of diversion and rediversion both by legal description and by name. How BLRID allocates conveyance loss amongst its patrons does not allow it to add or subtract elements from its Storage Rights.

BLRID makes the further, baseless assertion that "Pehrsons' objective in this litigation is not the protection of their own rights but the suppression of others'." *BLRID Opp.* at 16. According to BLRID, if the Pehrsons prevail the "reach from Mackay to Beck" will prevail over the reach "[b]elow and in the [Darlington] Sinks . . . ." *BLRID Opp*. at 18. The District will then be "barred from serving part of its service area. The result is a manipulated allocation model. Effective deliveries to upper river users increase. Downstream users receive less." *Id*. This will result in the "upend[ing of] . . . the equitable balance preserved by *Nelson* and Idaho Code . . . in favor of a few strategically positioned users." *Id.* "That is not lawful water administration. It is regulatory gamesmanship. Idaho's water law favors the beneficial use and fair and equitable distribution of water—not selective interference with established water rights that shifts benefits to one class of users at the expense of others." *Id*.

These claims could not be further from the truth, and as the Hearing Officer knows, geography is always an important factor in water rights administration. *See e.g. S. Valley Ground Water Dist. v. Idaho Dept. of Water Res.*, 548 P.3d 734, 743 (Idaho 2024) (discussing curtailment differences north and south of the "Bellevue Triangle"); *Rangen. Inc. v. Idaho Dept. of Water Res.*, 160 Idaho 119, 121-22, 369 P.3d 897, 899-900 (2016) (discussing curtailment differences east and west of the "Great Rift"). As explained throughout this litigation, the

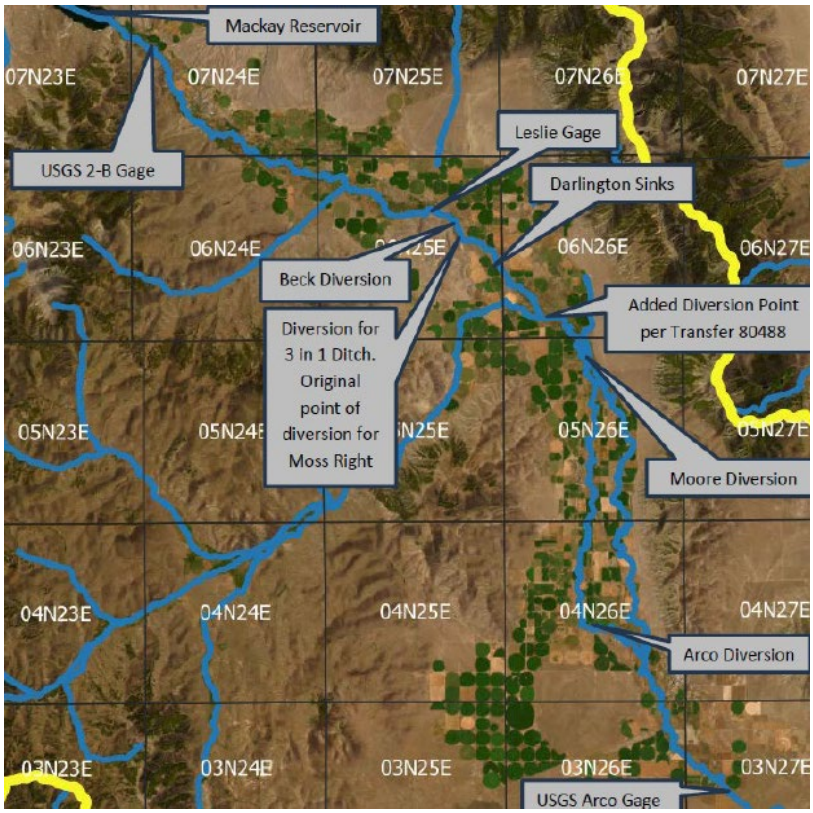
Pehrsons have relied on their water rights, the water rights of others, and the BLRID Storage Rights, as partially decreed in the SRBA, to be consistently used, interpreted, and administered. The BLRID Storage Rights were partially decreed in 2001. *Tuthill Dec., Ex. 6*. In 2004, futile call was ordered by former Director Karl Dreher, instructing the watermaster "to distribute surface flows in the Big Lost River in the reach from Mackay Dam to the Beck Diversion as a separate source for the remainder of the 2004 irrigation season . . . ." *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite* at 7 (March 5, 2025) ("Motion to Amend Petition for Declaratory Ruling").[4] Thus, more or less contemporaneously with issuance of the SRBA partial decrees, the Director was administering natural flow water rights above and below the Darlington Sinks differently from one another, and without a finding that would have authorized the use of storage as carriage water to defeat futile call.

Five years later, in 2009, the Court issued its decision in *Nelson*, which BLRID claims struck an "equitable balance" between users above and below the Darlington Sinks. Whatever the balance was, the Pehrsons continued to rely on the SRBA partial decrees in the basin as they did in 2004. Indeed, even after the Moss River Diversion was added in 2015, there were no changes in administration. This is evidenced by the fact that in 2021, when futile call was again declared, the outcome was consistent with 2004. *Motion to Amend Petition for Declaratory Ruling* at 6-7; *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 11-13.

It was only in 2022 – twenty-one (21) years after issuance of BLRID's partial decrees, thirteen (13) years after *Nelson*, and seven (7) years after the transfer approving the Moss River Diversion – that administration changed. The change came about through active lobbying by

[4] The 2004 *Order* is attached as Exhibit 3 to the Pehrsons' *Amended Petition for Declaratory Ruling* (March 5, 2025).

some water users associated with the Moore Canal, who were claiming that the addition of the Moss River Diversion could be used in an unprecedented way to manipulate historic water administration. *Motion to Amend Petition for Declaratory Ruling* at 7-12; *Memorandum in Support of Pehrsons' Motion for Summary Judgment* at 14-16. As shown in the *Memorandum in Support of Pehrsons' Motion for Summary Judgment*, the Moss River Diversion (identified on the map as the "Added Diversion Point per Transfer 80488") is below the Darlington Sinks and about halfway between the Beck Diversion and the Moore Canal (identified on the map as the "Moore Diversion"):



Memorandum in Support of Pehrsons' Motion for Summary Judgment at 10.

In 2022, the Department found there was insufficient storage water to overcome the losses from the Beck Diversion to the Moore Canal: "Without sufficient storage to carry decrees to the Moore diversion, the futile call determination below Moss continues to be justified."

Memorandum in Support of Pehrsons' Motion for Summary Judgment at 15-16. However, because the River Diversion is further upstream from the Moore Canal, there was enough storage to carry Moss' senior natural flow water right, no. 34-182, to his 120-acre place of use. The consequence was curtailment of natural flow users upstream of the Beck Diversion, with the record showing that the curtailment was unprecedented. *B. Pehrson Dec.* at 5; *L. Pehrson Dec.* at 4; *R. Pehrson Dec.* at 4; *L. Yockey Dec.* at 5; *P. Marcroft Dec.* at 4.

Accordingly, the "regulatory gamesmanship" that BLRID speaks of is not being wielded by the Pehrsons; rather, it is the users below the Darlington Sinks who are using water rights in a new and novel way, all without due process protections that are afforded through a transfer proceeding. *Barron v. Idaho Dept. of Water Res.*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001) (discussing factors associated with a transfer, including notice). Thus, the Pehrsons are simply asking that the BLRID Storage Rights be interpreted the way in which they were partially decreed, nothing more.

III. CONCLUSION

Based on the foregoing, Pehrsons request the Hearing Officer grant their *Motion for Summary Judgment* by holding that the BLRID Storage Rights, as they are presently constituted and absent an approved transfer, cannot be diverted by Moss at the River Diversion.

DATED this 14th day of May, 2025.

/s/ Chris M. Bromley
Chris M. Bromley
McHugh Bromley, PLLC
Attorneys for Byron Pehrson, Loy Pehrson, and Randy Pehrson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2025, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by electronic service:

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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHTS NOS. 34-182 and 34-381A (MOSS FARMS, INC.)	**MOSS FARMS REPLY TO PEHRSONS' RESPONSE TO MOTION TO DISMISS; REPLY TO PERHRSON RESPONSE TO RULE 56(d) MOTION; REPLY TO PEHRSON RESPONSE TO MOTION FOR LIMITED DISCOVERY; AND SUR-REPLY TO PEHRSON RESPONSE TO MOSS FARMS OPPOSITION TO PEHRSON MOTION FOR SUMMARY JUDGMENT**
IN THE MATTER OF THE USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	Docket No. P-DR-2024-001

Moss Farms, Inc. (hereafter "Moss Farms"), by and through its attorney of record, Skyler C. Johns, of Olsen Taggart PLLC, are replies to the Pehrson's Response to the Motion to Dismiss as follows:

I.
REPLY TO PEHRSON RESPONSE TO MOTION TO DISMISS

In Idaho, "[s]ubject-matter jurisdiction can be raised at any time." *Ackerschott v. Mountain View Hosp., LLC*, 166 Idaho 223, 237, 457 P.3d 875, 889 (2020) (citing *Idaho State Ins. Fund By & Through Forney v. Turner*, 130 Idaho 190, 191, 938 P.2d 1228, 1229 (1997). As set forth in detail below, the jurisdiction over the subject matter of this case lies with the District Court, particularly, the Snake River Basin Adjudication District Court (hereafter "SRBA"):

A. Legal authority shows that the District Court, particularly the SRBA District Court, is where jurisdiction lies for this case.

Pehrsons allege that no authority was presented showing that the SRBA District Court has jurisdiction over this matter. However, section III(A) of Moss Farm's Motion to Dismiss presented authority supporting this very point.

B. Elgee, the SRBA Unified Decree, *Whittaker*, and *Rangen*, do not support nor authorize declaratory rulings related to water rights in proceedings initiated under Idaho Code §§ 67-5232 and 67-5255[1].

Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys. of Idaho, 169 Idaho 34, 47, 490 P.3d 1142, 1155 (2021), is distinguishable from the present case. In *Elgee*, the "rights" at issue were statutory rights created pursuant to the Public Employee Retirement System (hereafter "PERSI"). *See* Idaho Code §§ 59-1301 et seq. The "rights" referred to in PERSI are for a person to receive certain government benefits once such benefits are vested. *See* Idaho Code § 59-1302(36) ("Vested member" means an active or inactive member who has at least five (5) years of credited service, except that a

[1] It is important to note recent modifications to Idaho Code § 67-5232 by the Idaho Legislature. The Legislature recently clarified and narrowed the scope of inquiry Idaho Code § 67-5232 (1) as follows: "Any person may petition an agency for a declaratory ruling that interprets or applies legislative a statute or rule administered by the agency or state whether or in what manner an order issued by the agency applies to the Petitioner." ID LEGIS 151 (2025), 2025 Idaho Laws Ch. 151 (H.B. 9). The stated purpose for the change was due in part to "Modern practice, and related developments in administrative law, warrant an update to several provisions of the Idaho Administrative Procedure Act." *Id.*, Statement of Purpose. The Legislature also added a provisions" "(4) (4) An agency shall index all currently effective declaratory orders in accordance with the provisions of section 67–5250, Idaho Code." *Id*. This modification suggest an intent to clarify that declaratory ruling in administrative agencies are not to be used for broader rulings with broad implications as sought by the Pehrsons.

member who at the time of his separation from service." Such rights are not constitutionally guaranteed in Idaho.[2]

Water Rights, on the other hand, are constitutional rights specifically created and protected by the Idaho Constitution: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho Const., Art. XV., Sec. 3. Water rights are also considered property rights, and are therefore, an inalienable right. They are not rights created by statute.

In *Elgee*, the agency was simply making a declaratory ruling as to the "applicability of… statutory provision[s] or… rule[s] administered by the agency…," which involved the statutory "rights" created by the Legislature. Such inquiry is authorized under Idaho Code § 67-5232. However, the rights in issue in this case are constitutional rights, not created by statute, but instead recognized and protected under higher law, the Idaho Constitution. The language creating the "rights" in this case is contained in a separate document, and is not contained in the statutes that created the right as was the case in *Elgee*. To reach a declaratory ruling here, the Hearing Officer must read a separate constitutional right (i.e., the water right) and compare it to separate stattues that do not create, establish, or protect that water right. The rights at issue in *Elgee* are simply not

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[2] "Much of the misapprehension which apparently still exists in the minds of conscientious administrators of pension funds is possibly due to the fact that there still lingers a remnant of the ancient idea that a pension is a manifestation of sovereign generosity. The concept of pensions has come down through the centuries wearing a cloak of monarchical dispensation. Kings conferred pensions on court favorites, artists and military heroes with a flourish which proclaimed that the royal treasury was as inexhaustible as the crown's power was unlimited. However, despite ceremony and pronunciamento, the pensioner obtained no vested right to the proclaimed pension. In fact, he could not be any more assured of a continuation of the pension than he could be assured that his head would remain on his shoulders if he should displease his absolutist benefactor. But the pension of today is not a grant of the Republic nor in this case is it a gift of the City Fathers. It is the product of mutual promises between the pensioning authority and the pensioner; it is the result of contributions into a fund which exists for the single purpose of pensions." *Hanson v. City of Idaho Falls*, 92 Idaho 512, 515, 446 P.2d 634, 637 (1968)

the same as the rights at issue in this case. As such, jurisdiction and authorization to issue a declaratory ruling interpreting the meaning of water rights lies with the District Court, not the Department.

The Phersons' other legal authorities are not applicable to the question before the Hearing Officer in Moss Farm's Motion to Dismiss. That is because the proceedings in the cited cases, *Whittaker v. Idaho Dep't of Water Res.*, 174 Idaho 60, 551 P.3d 729, 742 (2024), and *Rangen, Inc. v. Idaho Dept. of Water Res.*, 159 Idaho 798, 367 P.3d 193 (2016), were not even initiated under Idaho Code §§ 67-5232 nor 67-5255. These cases were both initiated under different Idaho Code provisions that provide broader authorization for the Director to make determinations relative to water rights.

In *Whittaker*, the proceedings involved a water transfer by Bruce and Glenda McConnell. Proceedings were initiated and conducted pursuant to Idaho Code § 42-222. *Whittaker*, 174 Idaho 60, 551 P.3d 729, 735. Whittaker objected to the transfer and formal proceedings ensued. *Id.* The proceedings that occurred in Whittaker are distinguishable from proceedings initiated under Idaho Code §§ 42-5232 and 42-5255 because the Director has broader statutory duties under Idaho Code § 42-222 authorizing him, among other things, to:

> examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(1) (emphasis added). These provisions plainly authorize the Department to expand its inquiry to include a review and interpretation of water rights during proceedings initiated under Idaho Code § 42-222. They are unrelated to proceedings under Idaho Code §§ 67-5232 and 67-5255.

Rangen is similarly unrelated to this case. Rangen, Inc., initiated a water delivery call pursuant to Idaho Code title 42, chapter 6. An order was issued by then Director, Karl Dreher, after which numerous petitions protesting the order and/or requesting intervention and requesting a hearing to challenge the order were filed. *See* e.g., the Idaho Dairymen's Association *Petition Requesting an Idaho Code Section 42-1701A Hearing, Request for Stay of Delivery Call Order, and Petition to Intervene* filed *In the Matter of Distribution Water Rights Nos. 36-15501,36-02551, and 36-07694*;see also City of Burley *Petition Contesting Amended Order and Requesting a Hearing* filed *In the Matter of Distribution Water Rights Nos. 36-15501,36-02551, and 36-07694*; The basis for these motions in *Rangen* was Idaho Code 42-1701A, which provides:

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, 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.

Id. Again, proceedings initiated under this provision provide different broader authorization for the Department to act in such proceedings than the authorization granted under Idaho Code §§ 67-5232 and 67-5255.

What's more, the SRBA District Court has jurisdiction over this matter because the Pehrson's requested declaratory relates to "the right to the use of water." *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78 (1993), 856 P.2d 868.

The citied provisions by the Pehrsons to the SRBA Unified Decree, specifically section 17, support Moss Farm's Motion to Dismiss. This provision states that the SRBA District Court "retains jurisdiction" to "resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources…" As set forth above, the Pehrsons are not entitled to a declaratory ruling that interprets the meaning of the BLRID Water Rights. Thus, this provision avails nothing for the Pehrsons because the Final Unified Decree is not reviewable in proceedings requested under Idaho Code §§ 67-5232 and 67-5255 by a Hearing Officer.

The issue framed by the Hearing Officer requires him to review and interpret the meaning of the BLRID Water Rights, which are constitutional rights, not statutory rights. This type of inquiry and review is reserved for the SRBA District Court. Therefore, jurisdiction is properly before the SRBA District Court.

C. The requested ruling will set a precedent from which the Department will be required to interpret the meaning water rights beyond the BLRID Water Rights that have similar language.

The Pehrsons argue that notice to additional parties is not necessary here because the ruling is specific to BLRID. However, as set forth in the Dec. of Contor, there are thousands of water rights that will be impacted by a declaratory ruling interpreting the meaning of language in water rights with similar language. Recent changes to Idaho Code § 67-5232(4) support that the requested ruling in this case must be catalogued by the Department, thereby making it available to

be relied upon as precedent by others looking to attack the thousands of water rights with language similar to BLRID's Water Rights.

The testimony by Mr. Contor is highly relevant the Hearing Officer's inquiry because it shows that there are broad potential consequences for making a declaratory ruling that interprets the meaning of the BLRID Water Rights because many other rights with similar language will be negatively affected. Without these other water right owners being part of this proceeding, they are unable to defend their interests and there is a risk of inconsistent and competing ruling being issued without all necessary parties being present.

II.
REPLY TO PEHRSON RESPONSE TO ALTERNATIVE MOTION

The Pehrson's arguments related to the weight of Mr. Contor's testimony do not contradict or disprove Moss Farm's allegations that other parties are affected by these proceedings. Mr. Contor's testimony was offered solely to establish that not all necessary parties have been joined in this action, and the basis for the same. The Pehrsons attack Contor's analysis and conclusions regarding the interpretation of the BLRID Water Rights, but they do not challenge the fact that there are thousands of other similarly worded water rights in Idaho that can and will be impacted by the requested declaratory ruling.

Moss Farms has presented good cause for additional notice to be provided to the owners of the water rights identified by Mr. Contor so that they too may protect their interests and avoid the risk of incurring double, multiple, or otherwise inconsistent obligations being imposed on them in separate proceedings.

III.
REPLY TO PEHRSON RESPONSE TO RULE 56(d) MOTION

In light of the Hearing Officer's Order issued on Friday, May 9, 225, Moss Farms voluntarily withdraws it Rule 56(d) Motion. However, it maintains its request made in its *Motion for the Order Authorizing Limited Discovery* filed on May 7, 2025, for the same reasons as set forth in Moss Farm's original motion for the reasons set forth below.

IV.
REPLY TO PEHRSON RESPONSE TO MOTION FOR ORDER AUTHORIZING LIMITED DISCOVERY

Notwithstanding the withdrawal of its Rule 56(d) Motion, Moss Farms maintains that its request for an order for limited discovery to depose James Cefalo is appropriate under the circumstances, particularly if this matter is not resolved at summary judgment or pursuant to Moss Farm's Motion to Dismiss filed on May 7, 2025.

The issue now before the Hearing Officer comes after dismissal of the prior Petition on February 28, 2025, followed by an amended petition being filed on March 5, 2025, and an Order granting the petition to amend on March 28, 2025, where the sole issue in this case was identified by the Hearing Officer.

The new issue was not part of the previous petition's request for a declaratory ruling. Since the amendment, there has been no order reauthorizing discovery in this matter. If the proceedings are not resolved by the pending dispositive motions, Moss Farms requests that the Hearing Officer authorize Moss Farms to take Mr. Cefalo's deposition.

IV.
SUR-REPLY TO PEHRSON RESPONSE TO MOSS FARMS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

The Pehrson's argue that Moss Farms should not be allowed to rely upon arguments in previous filings in this matter. The March 28, 2025, Order by the Hearing Officer stated that "[t]he parties are encouraged to rely upon declarations previously filed in this matter, so as not to unnecessarily expand the record…" (emphasis added). Permitting Moss Farms to incorporate several sections from its previous arguments made in filing in the same case is consistent with this portion of the order. Furthermore, it is in the interest of judicial economy because relying on past filings limits additional briefing from the parties. This case has been lengthy and there are many filings requiring which require time and resources to address. Limiting the length of the record reduces the time and resources needed to address new filings. For that reason, Moss Farm's request is also in the best interests of the parties.

Finally, there is no prejudice to the parties because all parties have already previously read Moss Farm's past arguments and there is no unfair surprise in play. For that same reason, there is no need for extensive additional briefing of the same arguments. For this reason, Moss Farms should be permitted to rely upon its past arguments in its opposition to Pehrson's Motion for Summary Judgment.

V.
CONCLUSION

For these reasons, Moss Farms respectfully request the Director dismiss the Amended Petition with prejudice.

Alternatively, Moss Farms requests an order directing the Department to publish notice of this matter and provide an opportunity for storage rights holders with rights adjudicated in the SRBA to participate in this matter.

Moss Farms further requests an order authorizing it to take James Cefelo's deposition.

Moss Farms further requests an order denying Pehrson's Motion for Summary Judgment.

DATED: May 14, 2025

OLSEN TAGGART PLLC

/s/ Skyler C. Johns
SKYLER C. JOHNS, Esq.
Attorney for Moss Farms, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 14, 2025, I emailed a true and complete copy of the foregoing document in the manner indicated below, to the following:

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/s/Skyler C. Johns

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.)	**Docket No. P-DR-2024-001**
IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	**PRELIMINARY ORDER ON DISPOSITIVE MOTIONS**

BACKGROUND

On February 14, 2024, Byron Pehrson, Loy Pehrson, and Randy Pehrson (collectively, "Pehrsons") submitted a *Petition for Declaratory Ruling for Watermaster Instructions* ("*Petition*") with the Idaho Department of Water Resources ("Department"). *Petition*, at 1. The Pehrsons sought a declaratory ruling from the Department to issue two watermaster instructions requiring the Water District No. 34 Watermaster (1) to curtail diversions from a specific alternative point of diversion when the natural flow was at a certain level and (2) to issue futile call determinations as though storage water is unavailable to be added to natural flow. *Id.* at 2.

On February 23, 2024, Moss Farms, Inc. ("Moss") filed an objection to the *Petition*. In addition, the Hearing Officer allowed the Big Lost River Irrigation District ("BLRID") and Moore Canal Users[1] ("Moore") to intervene in the case.

On January 13, 2025, Moore filed a motion to dismiss the *Petition*, which was joined by BLRID. On February 21, 2025, a dispositive motion hearing was held. The Hearing Officer made oral rulings on the record that were later memorialized and expounded upon in a *Preliminary Order: Granting and Denying in Part Motion to Strike; and Dismissing Petition for Declaratory Ruling Without Prejudice* ("*Preliminary Order*"), issued February 28, 2025. Upon concluding that "[t]he Pehrsons failed to support the Petition with any statute, rule, or order which allows the Hearing Officer to consider issuing a declaratory ruling," the Hearing Officer granted Moore's motion to dismiss, dismissing the *Petition* without prejudice. *Preliminary Order*, at 7.

On March 5, 2025, the Pehrsons filed a *Motion to Amend Petition for Declaratory Ruling; Petition for Reconsideration and/or Petition for Exceptions; Motion to Expedite* ("*Motion*") along with an *Amended Petition for Declaratory Ruling* ("*Amended Petition*"). In lieu of dismissal, the Pehrsons requested that their *Motion* be granted, and this case be allowed to move forward based on the issues raised in the *Amended Petition*. *Motion*, at 2. The *Amended Petition* requested the Department declare how futile call is determined and whether storage water can defeat futile call. *Amended Petition*, at 2. Also, in addition to the two instructions requested in the *Petition*, the *Amended Petition* sought issuance of a third watermaster instruction

[1] "Moore Canal Users" collectively refers to Moore Canal Water Users' Association, Inc., the Timberdome Canal Company, and the Lost River Pipeline.

preventing the watermaster from delivering storage water to a point of rediversion not listed on the BLRID's storage water rights. *Id.*

On March 14, 2025, Moss, BLRID, and Moore filed responses in opposition to the *Motion*, and the Pehrsons filed a reply on March 18, 2025. The *Motion*, as it concerns the request to amend the *Petition* and reconsider the *Preliminary Order*, came before Hearing Officer Burdick for hearing on March 21, 2025.

On March 28, 2025, Hearing Officer Burdick issued an order granting the *Motion* only in part. *Order Granting Mot. to Am. & Withdr'g Prelim. Order Dismissing Pet.; Order Vacating Hr'g & Am. Schedule*, at 3 (hereinafter "*Order Granting Motion to Amend*"). The *Order Granting Motion to Amend* identified two primary issues presented in the *Motion* regarding (1) futile call determinations and (2) an authorized diversion issue. *Id*. The Hearing Officer declined to consider the futile call issue and concluded that the sole issue to be determined in this matter is "whether diverting BLRID storage water at a point of diversion or rediversion not listed on its decreed water rights violates Idaho law." *Id.* at 3, 6. Accordingly, the Hearing Officer accepted the *Amended Petition* into the record and withdrew the *Preliminary Order* dismissing the matter. *Id*. at 6–7.

On April 7, 2025, in response, Moss filed an objection requesting the Hearing Officer dismiss the *Amended Petition* with prejudice and asserted that the Director does not have the authority to grant the Pehrsons' requested relief. *Obj. to Am. Pet. for Decl'y Ruling*, at 11. The Pehrsons filed a reply on April 10, 2025, requesting that the matter be allowed to proceed to determine the issue identified in the *Order Granting Motion to Amend*. *Reply to Moss Resp. to Am. Pet. for Decl'y Ruling*, at 12.

On April 23, 2025, the Department received three dispositive motions: (1) *Moss Farms' Motion to Dismiss*; (2) *Pehrsons' Motion for Summary Judgment*; and (3) a *Motion for Summary Judgment* filed by BLRID. Moss seeks dismissal of the *Amended Petition* with prejudice because the issue identified for hearing by the Hearing Officer would involve interpreting the language of BLRID's storage water rights, which are neither statutes, rules, nor orders that the Director is authorized to determine the applicability of when making a declaratory ruling under Idaho Code §§ 67-5232 or 67-5255. *Moss Mot. to Dismiss*, at 3, 7. In the alternative, Moss asks that the Department be ordered to publish notice of this matter and provide storage water right owners throughout the Snake River Basin the opportunity to participate in this proceeding. *Id.* at 7.

The Pehrsons request the Hearing Officer hold that BLRID's storage water rights cannot be diverted by Moss at the River Diversion (i.e., T06N, R26E, S32, SENW), because that point of rediversion is not listed on BLRID's storage water rights. *Mem. in Supp. of Pehrsons' Mot. for Summ. J.*, at 16, 20, 24 [hereinafter "*Pehrsons' Memorandum*"]; *see also Amended Petition*, at 2, 8 (identifying the location of the "River Diversion").

BLRID requests the Hearing Officer dismiss the *Amended Petition* and hold that Idaho law does not require storage water rights to specify points of rediversion, claiming that storage water can be commingled with a natural channel and reclaimed along the natural channel. *Mem. in Supp. of Mot. for Summ. J.*, at 9, 11–12 [hereinafter "*BLRID's Memorandum*"]

The Department received the following responses and replies filed in relation to the three dispositive motions described above:

(1) *Response in Support of Moss Farms' Motion to Dismiss* filed by BLRID on May 7, 2025;

(2) *Opposition to Pehrson's Motion for Summary Judgment* ("*BLRID's Opposition to Pehrsons' Motion*") filed by BLRID on May 7, 2025;

(3) *Response and Joinder in Support of BLRID's Motion for Summary Judgment;*[2] *Opposition to Pehrsons' Motion for Summary Judgment; Rule 56(d) Motion; and Motion for Order Authorizing Limited Discovery* ("*Moss's Opposition to Pehrsons' Motion*") filed by Moss on May 7, 2025;

(4) *Pehrson Response to Moss Motion to Dismiss* filed on May 7, 2025;

(5) *Pehrsons' Response to BLRID's Memorandum in Support of Motion for Summary Judgment* ("*Pehrsons' Response to BLRID's Motion*") filed on May 7, 2025;

(6) *Pehrson Response to Moss Motion for Discovery, Response to Moss IRCP 56(d) Motion, and Response to Opposition to Motion for Summary Judgment* ("*Pehrsons' Reply to Moss's Opposition*") filed on May 9, 2025;

(7) *Reply in Support of Big Lost River Irrigation District's Motion for Summary Judgment* ("*BLRID's Reply*") filed by BLRID on May 14, 2025;

(8) *Moss Farms Reply to Pehrsons' Response to Motion to Dismiss; Reply to Pehrson Response to Rule 56(d) Motion; Reply to Pehrson Response to Motion for Limited Discovery; and Sur-Reply to Pehrson Response to Moss Farms Opposition to Pehrson Motion for Summary Judgment* ("*Moss's Reply*") filed on May 14, 2025; and

(9) *Reply to BLRID Opposition to Pehrsons' Motion for Summary Judgment* ("*Pehrsons Reply to BLRID's Opposition*") filed by the Pehrsons on May 14, 2025.

On May 19, 2025, a hearing in this matter was held and all parties were represented by counsel. During the hearing Moss withdrew its Idaho Rules of Civil Procedure Rule 56(d) motion and modified its motion for limited discovery to a standing discovery motion requesting an opportunity to depose James Cefalo, the Department's Eastern Region Manager, only if the *Amended Petition* is not dismissed and the issue identified for hearing is not fully resolved on summary judgment. After hearing oral argument on Moss's modified discovery motion and all three dispositive motions, the Hearing Officer took the matter under advisement.

[2] In the May 9, 2025 *Notice of Motion Hearing* the Hearing Officer noted that the deadline to file dispositive motions passed on April 23, 2025, therefore, the joinder was untimely and would not be considered. *Notice of Mot. Hr'g*, at 1 n.1.

FINDINGS OF FACT

A. BLRID Storage Water Rights

1. On October 15, 2001, the Snake River Basin Adjudication ("SRBA") District Court issued partial decrees for storage water rights held in Mackay Reservoir for water right numbers 34-12,[3] 34-810, 34-811, 34-817, 34-818, 34-2507, 34-10873, and 34-10935 (collectively the "BLRID Storage Rights"). *Tuthill Decl.* Ex. 6.

2. The BLRID Storage Rights list one point of diversion, sixteen points of rediversion, and a remark describing the point of diversion and various points of rediversion under the point of diversion element:

POINT OF DIVERSION:	T03N	R26E	S01	NENESW	(REDIVERSION) Within BUTTE County
			S12	NENWSE	(REDIVERSION)
	T04N	R26E	S26	NWNWNW	(REDIVERSION)
	T05N	R26E	S04	NWSESE	(REDIVERSION)
	T07N	R23E	S12	SENW	Within CUSTER County
	T06N	R24E	S01	NENESW	(REDIVERSION)
		R25E	S06	SWNESE	(REDIVERSION)
			S10	NENESW	(REDIVERSION)
			S11	SWSESW	(REDIVERSION)
			S14	SENWSE	(REDIVERSION)
			S24	NWNWNE	(REDIVERSION)
		R26E	S32	NWSENW	(REDIVERSION)
	T07N	R23E	S12	NWNWSE	(REDIVERSION)
		R24E	S18	SESWNE	(REDIVERSION)
			S20	SWNESW	(REDIVERSION)
			S33	NWSWNE	(REDIVERSION)
			S34	SENWNW	(REDIVERSION)

POINT OF DIVERSION IN T07N, R23E, S12, SENW IS MACKAY DAM. WATER IS DELIVERED THROUGH THE ANGELO, ARCO, B & J, BECK/MC GOWAN, BURNETT, DARLINGTON, EASTSIDE, HARRIS-VAUGHT, ISLAND, LOWER BURNETT, MC LAUGHLIN, MIDDLE, MILLER, MOORE, MUNSEY, SHARP, STREETER, SUTTER, SWAUGER, VANOUS, WESTSIDE AND 3 IN 1 DITCHES OR CANALS; ALL ARE POINTS OF REDIVERSION FROM THE BIG LOST RIVER.

Id.

3. BLRID's point of diversion is the Mackay Dam. *Id.*

4. BLRID's By-Laws and Policies' Statement of Objectives states its purpose is "to store and deliver irrigation water as required by the landowners within the Irrigation District." *Johns Decl. in Supp. of Mot. to Strike* Ex. A., at 2.

5. BLRID's general manager "shall have general charge of the distribution of water furnished by the District to consumers . . . ." *Id.* at 11.

[3] Water right no. 34-12 is emblematic of the other water rights.

B. Moss Water Rights

1. Moss's natural flow surface water rights[4] include Water Right Nos. 34-182 and 34-381A (collectively "Moss Water Rights"). *Tuthill Decl.* Ex. 2.

Water Right No.	Priority Date	Quantity (cfs)	Point of Diversion
34-182	6/1/1883	1.60	3 in 1 Ditch, River Diversion
34-381A	9/26/1894	2.4	3 in 1 Ditch, River Diversion

2. The location of the Moss Water Rights point of diversion as decreed was the 3 in 1 Ditch.[5] *Id.*

3. On April 6, 2015, Moss filed an Application for Transfer No. 80488 with the Department, seeking to add the River Diversion as an alternate point of diversion for the Moss Water Rights. *Johns Decl. in Supp. of Mot. for Summ. J.* Ex. C.

4. On June 30, 2015, the Department approved Moss's Application For Transfer No. 80488 and added the River Diversion as an alternate point of diversion for the Moss Water Rights. *Id.* Ex. I.

C. Pehrson Water Rights

1. Byron and Loy Pehrsons' water rights include:

Water Right No.	Priority Date	Quantity (cfs)	Point of Diversion
34-28G	8/31/1884	0.80	3 in 1
34-638A[6]	10/12/1884	0.15	3 in 1
34-14189	6/1/1885	1.54	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14191	4/22/1884	1.92	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14207	6/30/1885	3.08	Burnett, Beck-McGowan, 3 in 1, Lower Burnett
34-14209	9/14/1886	2.31	Burnett, Beck-McGowan, 3 in 1, Lower Burnett

B. Pehrson Decl., at 2; *L. Pehrson Decl.*, at 2.

[4] Moss also has water right no. 34-2378F which is a ground water right that is not at issue in this matter. *Tuthill Decl.*, at 3.

[5] Moss's Water Rights were originally decreed to Catherine and Lee Watson; Moss filed a change of ownership request with the Department for those water rights on November 13, 2012. *Tuthill Decl.* Ex. 2, 5.

[6] Byron and Loy recently purchased a portion of this water right, and the Department has not yet updated its records regarding ownership of this water right. *B. Pehrson Decl.*, at 2; *L. Pehrson Decl.*, at 2.

2. Randy Pehrson's water rights include:

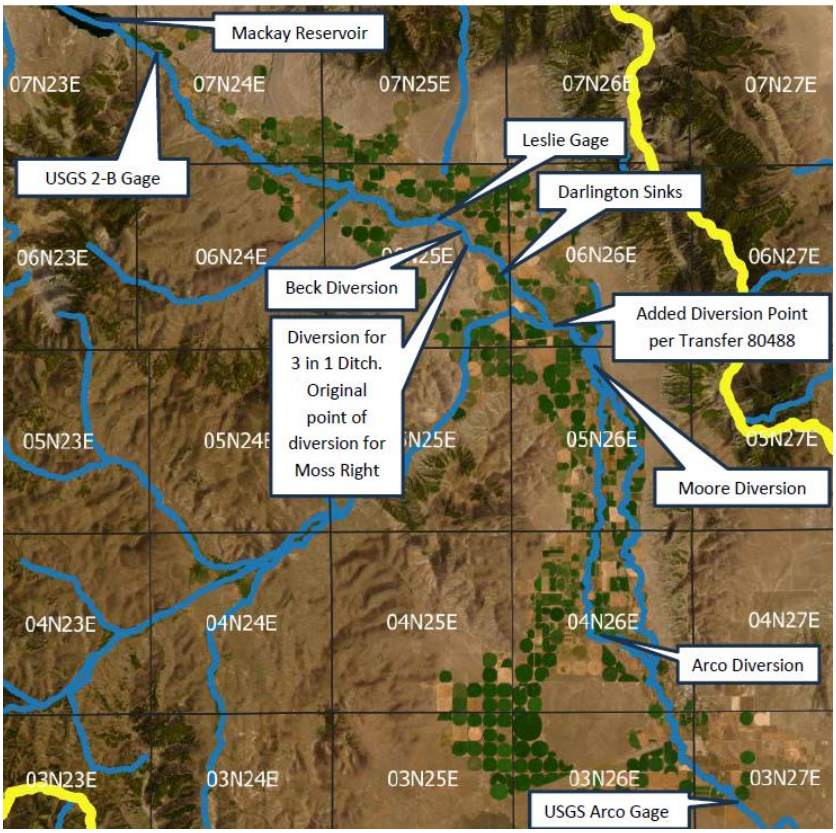
Water Right No.	Priority Date	Quantity (cfs)	Point of Diversion
34-733	7/21/1886	1.44	Burnett
34-10236	5/30/1885	2.00	Darlington
34-10933	4/22/1884	1.63	Darlington
34-10950	5/31/1884	0.72	Darlington
34-13874	7/21/1886	1.00	Burnett
34-14389	4/22/1884	0.55	Darlington

R. Pehrson Decl., at 2.

3. Byron, Loy, and Randy Pehrsons' water rights listed above (collectively the "Pehrson Water Rights") are junior to Moss's water right no. 34-182 and senior to Moss's water right nos. 34-381A and 34-2379F. *B. Pehrson Decl.*, at 3; *L. Pehrson Decl.*, at 3; *R. Pehrson Decl.*, at 2.

D. The physical relationship between the Pehrson Water Rights, Moss Water Rights, BLRID Storage Rights, and Moore Canal

1. The following map identifies relevant areas used in analyzing the parties' motions.



Tuthill Decl., at 2.

2. The River Diversion is located approximately 5.9 miles downstream from the 3 in 1 Ditch on the Big Lost River. *Tuthill Decl.*, at 5.

3. The Darlington Sinks is a losing reach within the Big Lost River and exists between the 3 in 1 Ditch and the River Diversion. *Tuthill Decl.*, at 2; *Yockey Decl.*, at 4; *Marcroft Decl.*, at 2–3.

4. The points of diversion for the Pehrson Water Rights are upstream of the Darlington Sinks. *B. Pehrson Decl.*, at 2; *L. Pehrson Decl.*, at 2; *R. Pehrson Decl.*, at 2.

5. The Moore Canal is downstream from the River Diversion. *Tuthill Decl.*, at 2.

6. The Pehrsons and Moss hold storage water interests in the BLRID. B. *Pehrson Decl.*, at 3; *L. Pehrson Decl.*, at 3; *R. Pehrson Decl.*, at 3; *Marcroft Decl.*, at 2; *Yockey Decl.*, at 2.

MOTION TO DISMISS

Moss argues that the Administrative Procedures Act ("APA") does not grant the Department authority to issue declaratory rulings interpreting water rights because water rights are property rights, and not statutes, rules, or orders for the Department to consider when resolving this matter. *Moss Mot. to Dismiss*, at 3. Moss also argues that the Department does not have jurisdiction to interpret water rights because only the SRBA District Court has the authority to do so. *Id.* at 5. In the alternative, Moss requests the Hearing Officer issue an order directing the Department to provide notice and an opportunity for all interested parties to participate in this matter. *Id.*

I. The Director has authority and jurisdiction to issue declaratory rulings interpreting and administering water rights.

First, Moss argues that Pehrsons' *Amended Petition* should be dismissed because the Department lacks authority under Idaho Code §§ 67-5232 and 67-5255 to issue a declaratory ruling interpreting a water right. *Moss Mot. to Dismiss*, at 3. Moss claims that water rights are property rights under Idaho Code § 55-101, and not statutes, rules, or orders that the Department can determine the applicability of under its declaratory ruling authority. *Id.* To further support this claim, Moss asserts that resolving whether BLRID's storage water may be diverted at a point of rediversion not listed on the storage right collaterally attacks Moss's decreed rights by interpreting them, and "will effectively create an instruction for the Director as to how [BLRID's] right is to be administered/used." *Id.*

It is undisputed that water rights are real property rights. *Nettleton v. Higginson*, 98 Idaho 87, 90, 558 P.2d 1048, 1051 (1977). However, water itself remains the property of the State. *Id.* (citing I.C. § 42-101). The Idaho Constitution granted the Legislature the "authority to regulate and restrict the use of public waters in this state." *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 80, 856 P.2d 868, 870 (1993) (citing Idaho Const. art. XV, § 1). To this end, the Legislature enacted Title 42, Idaho Code, which grants the Department "exclusive authority over the appropriation of the public surface and ground waters of the state." I.C. § 42-201(7). The

Department must act "within the scope of the authority conferred upon it" by the Legislature. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 872, 154 P.3d 433, 443 (2007). Such authority delegated to the Director includes distributing water in priority within water districts and promulgating rules to effectuate that duty. I.C. §§ 42-602, 42-603.

Accordingly, the APA permits any person to file a petition for declaratory ruling with an agency regarding the applicability of a statute, rule, or order administered by the agency. I.C. §§ 67-5232(1), 67-5255(1). An agency may then issue a declaratory ruling clarifying how the applicable laws apply under specific factual circumstances, especially in the event those circumstances are likely to reoccur. *See Elgee v. Ret. Bd. of Pub. Emp. Ret. Sys. of Idaho*, 169 Idaho 34, 47, 490 P.3d 1142, 1155 (2021).

Here, it is undeniable that a declaratory action is appropriate when the Department must interpret the applicability of the statutes and rules it administers when determining whether a person's rights are interfered with when there is a high likelihood that specific actions are likely to reoccur. Despite Moss's assertion that resolving this issue is a collateral attack of its approved transfer in 2015, the request for declaratory relief does not ask the Hearing Officer to deny Moss its decreed natural flow rights at the River Diversion. Instead, the Pehrsons request for declaratory relief asks the Hearing Officer to consider the statutes and rules the Department administers to determine whether a storage right holder is diverting water according to the elements listed on their decreed water rights, given the likelihood that BLRID will likely deliver storage water at the River Diversion again in the future. *Amended Petition*, at 27.

Moreover, Moss's assertion that the Director does not have authority to interpret water rights in accordance with his authority to administer water in priority would denude the Department from any enforcement of its administrative authority. To end up in district court any time a question over the interpretation of water rights comes up would be unduly burdensome on the judicial system. Moss's assertion further undermines the need for the statutory framework under the APA and Title 42, both of which govern the Department's authority to administer and conduct administrative hearings. Simply claiming water rights are property rights does not strip away the Department's authority to interpret and determine the effects Idaho law has on water rights.

Second, Moss argues that only the SRBA District Court has jurisdiction to interpret water rights because this issue "concerns an adjudication of a right to the use of water in the Snake River Basin." *Moss Mot. to Dismiss*, at 5 (quoting *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994)). To support this jurisdictional claim, Moss asserts that interpreting BLRID's Storage Rights is outside the Department's declaratory ruling authority because water rights are constitutional rights and not statutory rights. *Moss's Reply*, at 3–4. This argument misconstrues the Department's declaratory ruling authority and its jurisdiction under Idaho law.

The *Final Unified Decree* culminated the finality of the SRBA and issued thousands of "judicially decreed property right[s]" into one final order. *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). The *Final Unified Decree* is "conclusive as to the nature and extent of all water rights in the adjudicated water system" and "is binding against all

persons." *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 741, 451 P.3d 446, 454 (2019) (citations omitted). The *Final Unified Decree* even recognized the Department's jurisdiction to review issues covered by the APA and the Department's rules. *Final Unified Decree* ¶ 17, at 13, *In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Aug. 26, 2014). The *Final Unified Decree* also acknowledges the Department's authority to administer water in accordance with the prior appropriation doctrine. *Id.* ¶ 15. Such authority includes the Director's "'clear legal duty to distribute water' according to decreed water rights." *City of Blackfoot*, 162 Idaho at 309, 396 P.3d at 1191.

Moreover, *Devil Creek Ranch* does not support Moss's claim because it involved a private water right dispute that should have been resolved in the general adjudication since the SRBA had already commenced. *Devil Creek Ranch*, 126 Idaho at 206, 879 P.2d at 1139. Accordingly, the SRBA District Court adjudicates water rights, not the Department. Given the Department's authority to regulate the State's water resources and administer water in priority, the Department is authorized to issue a declaratory ruling interpreting the statutes or rules it administers to determine whether a water user is diverting water in accordance with a valid water right. Therefore, the Hearing Officer concludes the Department has authority and jurisdiction to issue a declaratory ruling interpreting whether the statutes and rules it administers permit a water user to deliver storage water at a point of rediversion not listed on a decreed water right. The Hearing Officer denies *Moss Farms' Motion to Dismiss*.

II. In the alternative, the Department does not need to notify or provide an opportunity for all interested parties to participate in this proceeding.

In the alternative, Moss asks the Hearing Officer to issue "an order directing the Department to publish notice to all storage right owners in the SRBA and providing them an opportunity to participate in this proceeding" in the event the Hearing Officer does not dismiss the *Amended Petition*.[7] *Moss Mot. to Dismiss*, at 5.

Rule 301 of the Department's Rules of Procedure states: "The agency *may* provide notice of a petition for declaratory ruling in a manner designated to call its attention to persons likely to be interested in the subject matter of the petition." IDAPA 37.01.01.301 (emphasis added). This is permissive language, not mandatory. The Department is not required to publish notice. Moreover, both BLRID and Moore are intervenors in this matter. Their involvement represents a broad range of interests for water users in Water District 34. Other interested water users had the opportunity to seek intervention when the petition was originally filed. Therefore, the Hearing Officer declines to issue an order directing the Department to publish notice of the *Amended Petition* and denies Moss's alternative request.

[7] The Hearing Officer declines to consider Moss's argument regarding adding required parties to an action under Rule 19(a) of the Idaho Rules of Civil Procedure because those rules do not apply to contested cases before the Department. IDAPA 37.01.01.051.

MOTIONS FOR SUMMARY JUDGMENT

I. Preliminary Matters

A. Moss's Incorporation of Prior Arguments and Support Into Its Opposition to *Pehrsons' Motion for Summary Judgment*

In the *Order Granting Motion to Amend*, the Hearing Officer declined to consider Moss's January 24, 2025 summary judgment motion, given the central issue in the matter changed with the acceptance of the *Amended Petition*. *Order Granting Motion to Amend*, at 6. However, Moss was informed that the prior determination that its summary judgment motion was moot, made within the now withdrawn *Preliminary Order*, did "not preclude Moss from *refiling* their *Motion for Summary Judgment*." *Id.* (emphasis added).

In *Moss's Opposition to Pehrsons' Motion*, Moss did not ask the Hearing Officer to refile its summary judgment motion. Instead, Moss asked to incorporate into its opposition to *Pehrsons' Motion for Summary Judgment*, the arguments it made in Section III.A.3-5 of its *Reply in Support of Motion for Summary Judgment* and the entirety of its accompanying *Declaration of Skyler C. Johns*, both filed on February 14, 2025. *Moss's Opposition to Pehrsons' Motion*, at 2. The Pehrsons opposed Moss's incorporation of prior arguments as untimely. *Pehrsons' Reply to Moss's Opposition*, at 5.

Pursuant to Rule 220 of the Department's Rules of Procedure, Moss had 14 days to file its opposition to *Pehrsons' Motion for Summary Judgment*. IDAPA 37.01.01.220. Moss timely filed its opposition requesting to incorporate its prior arguments and supporting declaration. Therefore, in issuing this order, the Hearing Officer took into consideration Moss's arguments from Section III.A.3-5 of its February 14, 2025 reply and its supporting declaration.

B. Pehrsons' Request for the Hearing Officer to Take Official Notice of an Exhibit

During the dispositive motion hearing, the Pehrsons introduced an exhibit and requested the Hearing Officer to take official notice of the exhibit. Hr'g Audio 51:11–52:14, 52:39–55:56. BLRID and Moss objected to the introduction of the exhibit, claiming the documents are irrelevant and there is no time to review them. *Id*. at 52:14–52:38. The Hearing Officer did not review the proposed exhibit at the hearing and informed the parties that he would determine whether he will take judicial notice of that exhibit later. *Id*. at 51:48–54, 55:23–43.

Rule 602 of the Department's Rules of Procedure states: "The presiding officer may take official notice of any facts that could be judicially noticed in the courts of Idaho, of generally recognized technical or scientific data or facts within the agency's specialized knowledge and records of the agency." IDAPA 37.01.01.602. The Hearing Officer reviewed the exhibit and does not find it particularly helpful in resolving this matter. Therefore, the Hearing Officer declines to consider the exhibit, and it is not added to the record.

II. Legal Standard

The Department's Rules of Procedure, IDAPA 37.01.01, govern the pending motion in this case. Rule of Procedure 220.03 authorizes motions for summary judgment and states that "Rule 56(a), (c), (d), (e), and (f) of the Idaho Rules of Procedure, apply to such motions before the agency." IDAPA 37.01.01.220.03.

Summary judgment is appropriate "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." *Lee v. Litster*, 161 Idaho 546, 549, 388 P.3d 61, 64 (2017) (quoting I.R.C.P. 56(c)). The moving party bears the burden of establishing the absence of a genuine issue of material fact belongs to the moving party. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996).

If the movant meets its burden, the movant is entitled to summary judgment unless the nonmovant presents "specific facts that demonstrate the existence of a genuine issue for trial"—a "mere scintilla of evidence" or "slightest doubt as to the facts" will not do. *Haight v. Idaho Dep't of Transp.*, 163 Idaho 383, 387, 414 P.3d 205, 209 (2018). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Major v. Sec. Equip. Corp.*, 155 Idaho 199, 202, 307 P.3d 1225, 1228 (2013). "If the evidence reveals no disputed issues of material fact, then only a question of law remains . . . ." *Lee*, 161 Idaho at 549, 388 P.3d at 64 (quoting *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002)).

III. Analysis

The central issue in this matter is whether diverting BLRID storage water at a point of rediversion not listed on its decreed rights violates Idaho law. The Pehrsons argue that BLRID cannot deliver its storage water at the River Diversion because that point of rediversion is not listed on its Storage Rights. *Pehrsons' Memorandum*, at 16. On the contrary, BLRID argues that points of rediversion are not legal elements of water rights, and Idaho Code §§ 42-105(1) and 42-801 authorize BLRID to commingle its storage water with the natural flow of the Big Lost River to convey its already appropriated storage water to landowners within the district. *BLRID's Memorandum*, at 9, 11–12.

A. Storage water right decrees are different from a natural flow water right because storage water becomes the property of the appropriator and may be delivered to individual storage water users not listed on the decree itself.

The Pehrsons argue that BLRID cannot deliver its storage water at the River Diversion because that point of rediversion is not listed on its Storage Rights. *Pehrsons' Memorandum*, at 16. The Pehrsons claim that storage water being delivered at the River Diversion is an unauthorized diversion because the plain language of the BLRID Storage Rights do not list the River Diversion as a point of rediversion. *Id.* at 19–21. Accordingly, the Pehrsons assert that BLRID needs to file a transfer application pursuant to Idaho Code § 42-222(1) to add the River Diversion as a point of rediversion on its storage water rights. *Id.* at 23.

On the contrary, BLRID argues that because points of rediversion are not a legal element of a water right, BLRID is not limited to delivering storage water at the listed points of rediversion on its decreed rights. *BLRID's Memorandum*, at 9.

i. Storage water rights become the property of the appropriator.

In Idaho, a water right is needed to divert water and apply it to beneficial use. I.C. § 42-201(2). The SRBA was implemented to identify and decree water rights within the Snake River Basin "to allow for fair and efficient administration of the limited water supply." I.C. § 42-1427(1)(a)–(b). As part of the adjudication process, the State standardized the elements of water rights to include the claimant's name, water source, quantity, point of diversion, purpose of use, period of use, and place of use. I.C. § 42-1411(a)–(h). Remarks and conditions were also added to the water rights to further define the listed elements. *3G AG LLC v. Idaho Dept. of Water Res.*, 170 Idaho 251, 263, 509 P.3d 1180, 1192 (2022) (citing I.C. § 42-1411(2)(i)-(j)).

On August 25, 2014, the presiding judge of the SRBA District Court executed the *Final Unified Decree* which culminated in the finality of the SRBA and issued thousands of judicially decreed property rights into one final order. *Final Unified Decree*, *In re SRBA Case No. 39576* (Twin Falls Cnty. Dist. Ct. Idaho Aug. 26, 2014); *City of Blackfoot v. Spackman*, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017). The *Final Unified Decree* is "conclusive as to the nature and extent of all water rights in the adjudicated water system," Idaho Code § 42-1420(1), and "is binding against all persons," *Black Canyon Irrigation District v. State*, 163 Idaho 144, 150, 408 P.3d 899, 905 (2017).

These judicially decreed property rights include storage water rights. I.C. § 42-1427(1)(a); *see*, *e.g.*, *Tuthill Decl.* Ex. 6. "Storage water is water held in a reservoir and intended to assist the holders of the water right in meeting their decreed needs." *A & B Irr. Dist. v. State*, 157 Idaho 385, 389, 336 P.3d 792, 796 (2014). "A storage water right entitles the appropriator to divert, impound, and control water from a natural watercourse by means of a diversion structure such as a dam." *Id.* Storage water is "already diverted and appropriated and are no longer 'public waters.'" *Washington Cnty. Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943, 946 (1935) (quoting *Rabido v. Furey*, 33 Idaho, 56, 190 P. 73 (1920)). Storage water rights are entitled to the same protections as other property rights and are "still subject to other requirements of the prior appropriation doctrine." *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 879, 154 P.3d 433, 450 (2007).

Here, BLRID Storage Rights are diverted at the Mackay Dam which is the listed point of diversion on its decreed rights. *Tuthill Decl.* Ex. 6. Accordingly, the appropriated storage water becomes BLRID's property.

ii. Interpreting decrees for storage water is different than interpreting decrees for natural flow water.

First, the Pehrsons argue that *Rangen, Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016), established a brightline rule "that if a water right does not plainly authorize the use of water at a particular location, such diversion is unlawful." *Pehrsons'*

Memorandum, at 20. In *Rangen*, when the Department curtailed junior ground water rights in response to a delivery call in the ESPA, it also found that the source of water and point of diversion elements of Rangen's water rights were smaller in scope than it historically used. *Rangen*, 159 Idaho at 801, 367 P.3d at 196. The Court reviewed the plain language of Rangen's water right decrees and affirmed the Director's order that Rangen was only entitled to divert its natural flow water right from the source emanating from the Martin-Curren Tunnel, as opposed to the entire springs complex, and that Rangen could only divert from the ten-acre tract depicted on the decree itself, not the Bridge Diversion that lies outside the decreed ten-acre tract. *Id.* at 806, 367 P.3d at 201. The Court reasoned that the appropriate forum for Rangen to contest its decreed elements was during the SRBA after the Director recommended the elements of its water rights to the SRBA District Court. *Id.*

Second, the Pehrsons argue that the Court in *Whittaker v. Idaho Department of Water Resources*, 551 P.3d 729 (2024), affirmed the brightline rule established in *Rangen*. *Pehrsons' Memorandum*, at 20. In *Whittaker*, the Court resolved an issue regarding whether the Director was correct in using the historical confluence as opposed to the modern confluence in approving an alternate point of diversion on a transfer application of a natural flow water right. *Whittaker*, 551 P.3d at 736. In interpreting whether the historical or modern confluence was appropriate for the transfer analysis, the Court found that a neighboring water right holder that diverted the natural flowing creek that contributed to the historic confluence at the West Springs Ditch was an unauthorized diversion. *Id.* at 740–41. The Court reasoned that the West Springs Ditch was an unauthorized diversion because it was not listed on their natural flow decreed water right since they failed to claim it during the SRBA. *Id.*

Both the *Rangen* and *Whittaker* cases addressed natural flow rights, not storage rights. In contrast, BLRID's Storage Rights are fully diverted at the Mackay Dam—the authorized point of diversion on its decreed water rights. *Tuthill Decl.* Ex. 6.

iii. Decrees for storage water do not require the exact specificity of the identity and quantity of storage water that users are entitled to receive.

Decrees for storage water rights are not required to specify which irrigation districts are authorized to distribute the storage water or the exact amounts they are entitled to receive. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 116, 157 P.3d 600, 610 (2007). There, the Court affirmed the irrigation districts' legal interests in receiving storage water from the Bureau of Reclamation ("BOR") who owns the federally managed reservoir and storage facilities. *Id.* at 111, 114–15, 157 P.3d at 604, 608–09. The irrigation districts' legal interests include receiving the storage water in trust for the landowners to apply the storage water to beneficial use for irrigation purposes. *Id.* at 114, 157 P.3d at 608. This legal relationship is affirmed in the following remark that was added to the BOR decrees, which states, in pertinent part:

> [A]s a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. *The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the*

> *landowners entitled to receive distribution of this water from the respective irrigation organizations.* The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Id. at 115, 157 P.3d at 609 (emphasis added). The remark acknowledges the irrigation districts' legal interests in receiving the storage water and clarifies that the quantity of storage water each irrigation district is entitled to receive is based on the contracts between the BOR and the districts. *Id.* at 116, 157 P.3d at 610. The Court reasoned that storage "water rights have been administered successfully" without specifying the identity of the irrigation districts and the quantity of storage water each is entitled to receive within the decree itself. *Id.* In other words, irrigation districts act on behalf of the landowners in trust to administer the storage water according to the amounts identified in the contracts between the BOR and the irrigation districts on behalf of the individual landowners applying the storage water to beneficial use.

Here, BLRID represents the interests of the individual landowners within the district that receives storage water. Although BLRID has no contract with BOR or another entity, the concept is the same; the storage water is already appropriated and becomes the property of BLRID. This concept is one of ownership at the point of diversion. As the property of BLRID, storage water can be administered without naming the individual users of storage water or their entitled amount to the storage water on the decree itself.

B. Idaho Code §§ 42-105(1) and 42-801 provide supplemental statutory authority governing the distribution of storage water.

BLRID argues that Idaho Code §§ 42-105(1) and 42-801 authorize BLRID to use the natural flow of the Big Lost River to convey its already appropriated storage water. *BLRID's Memorandum*, at 11–12. BLRID claims these statutes "grant water users the right to commingle and reclaim water in natural watercourses and impose no requirement to list rediversion points in the water right itself." *Id.* at 12. On the contrary, the Pehrsons argue that nothing in Idaho Code §§ 42-105(1) or 42-801 authorize storage water right holders to ignore the decreed elements of a water right. *Pehrsons' Response to BLRID's Motion*, at 18–19.

The Director has a "clear legal duty to distribute water according to decreed water rights" under the prior appropriation doctrine. *City of Blackfoot*, 162 Idaho at 309, 396 P.3d at 1191 (internal quotations omitted) (quoting *A & B Irr. Dist.*, 157 Idaho at 393, 336 P.3d at 800). This includes the authority to "direct[] and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom." I.C. § 42-602.

The Director must also administer water in accordance with Title 42 of the Idaho Code. *Sylte v. Idaho Dep't of Water Res.*, 165 Idaho 238, 244, 443 P.3d 252, 258 (2019) (quoting I.C. § 42-1413(2)). Title 42 includes supplemental authority to the general distribution requirement that directly affects the rights and duties of storage water right holders. *See* I.C. §§ 42-105(1), 42-801.

i. Storage water may be commingled with natural flow water and reclaimed downstream pursuant to Idaho Code § 42-105(1).

Idaho Code § 42-105(1) states:

> The water that a person is entitled to divert by reason of a valid water right may be turned into the channel of a natural waterway and mingled with its water, and then reclaimed, but in reclaiming the water so mingled, the amount of water to which prior appropriators may be entitled shall not be diminished, and due allowance shall be made for loss by evaporation and seepage. The use of natural waterways to commingle and reclaim water shall be subject at all times to the supervision and control of the director of the department of water resources and shall be subject to the regulation of the watermaster within an established water district. The amounts of water turned into or diverted from all natural waterways are subject to the requirement of measurement and reporting.

A water user may commingle its already diverted water with natural flow water and reclaim its diverted water downstream at a more efficient location. *Keller v. Magic Water Co.*, 92 Idaho 276, 285, 441 P.2d 725, 734 (1968). There, Magic Water diverted its natural flow water right from the natural flowing creek at a dam which was the listed point of diversion on the water right. *Id.* at 279, 441 P.2d at 728. After being diverted at the dam, the water was conveyed to Pump Unit A where the water either (a) discharged into a pond to be distributed to water users via canal, or (b) overflowed into a spillway which returned to the natural flowing creek channel and was reclaimed downstream at a second Pump Unit B. *Id.* The Court held that the dam was the single point of diversion, and the two pumping units were not two separate points of diversion. *Id.* at 285, 441 P.2d at 734. The Court reasoned that Idaho Code § 42-105(1) entitled Magic "to use the natural channel of the creek to transport the water which it diverts further downstream to the point where its pumps can most advantageously discharge the water." *Id.* In other words, a water user may commingle its already diverted water with the natural flowing water and reclaim it further downstream at a more efficient and practical location to receive the water.

Here, BLRID's storage water is impounded in the Mackay Reservoir and diverted at the Mackay Dam, which is the identified point of diversion on the BLRID Storage Rights. *Tuthill Decl.* Ex. 6. Once the storage water is diverted at Mackay Dam, the storage water may commingle with the natural flow in the Big Lost River to be reclaimed downstream at different points of delivery. However, pursuant to Idaho Code § 42-105(1), BLRID must inform the watermaster the amount of storage water that is added to the Big Lost River.

i. A storage right holder must notify the Department when it will use a natural watercourse to convey storage water to its users under Idaho Code § 42-801.

Idaho Code § 42-801 states, in pertinent part:

> Whenever the owner of a reservoir shall desire to use the bed of a stream, or a natural water course, for the purpose of carrying stored water, he shall in writing notify the [Department], giving the date when it is proposed to discharge the water, its volume in acre feet, and in cubic feet per second at the point of discharge, *and the persons and ditches entitled to its use.* The . . . appointed watermaster and his assistants may be instructed to make the delivery of the stored water without further appointment, whose duty it shall be to adjust the headgates of all ditches not entitled to the stored water, and in such manner that those having the right to the use of such water shall secure the volume to which they are entitled.

Idaho Code § 42-801 authorizes an irrigation district that holds storage water rights to use natural flow to carry storage water. Use of the natural flow allows the irrigation district to deliver the storage water, held in trust for landowners within the district, at various diversion points along the river. *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho 157, 158 n.1, 159, 219 P.3d 804, 805 n.1, 806 (2009). However, the irrigation district must account for any conveyance loss when reclaiming the storage water to ensure that the natural flow available to natural flow users is not diminished. *Id.* The Court held that the conveyance loss for storage water should be "apportioned under the universal shrink method so that all water users receiving the storage water bear their proportionate share of the conveyance loss." *Id.* at 165, 219 P.3d at 812. In coming to that conclusion, the Court reviewed a decree from 1936 and the Department's Water District 34 Rules.

First, the Court reviewed a 1936 decree concerning BLRID's issuing and selling of bonds to obtain supplemental rights and irrigation works after acquiring the Mackay Reservoir and Dam to determine whether that decree addressed the appropriate conveyance loss calculation method. *Id.* at 160–61, 219 P.3d at 807–08; *see also State v. Nelson*, 131 Idaho 12, 13, 951 P.2d 943, at 944 (1998). Although the decree did not address the appropriate conveyance loss calculation method, the Court found that the decree recognized the legal authority of the BLRID Board of Directors to apportion the benefits of storage water among landowners within the district. *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho at 161, 219 P.3d at 808. This authority acknowledges the irrigation district's role in managing the delivery of storage water based on "the amounts of apportionment, the factors considered in making the apportionment, and the basic rules and regulations governing the use and distribution of water upon the lands in the District . . . ." *Id.*

Second, the Court considered the Department's Water District 34 Rules to determine the proper calculation of conveyance loss. *Id.* at 163, 219 P.3d at 810. Rule 40.03.b outlines how the watermaster allocates conveyance loss for natural flow water along the Big Lost River. *Id.* It further directs the watermaster to measure the amounts of both natural flow and storage water at various diversion points along the river to ensure that storage water users do not receive natural flow water, and vice versa. *Id.*; see IDAPA 37.03.12.040.03.b.

For the watermaster to calculate conveyance loss of the natural flow water, the watermaster must know the amount of storage water being delivered. When the storage right holder requests the watermaster to release its storage water, the volume of storage water must first be measured at the reservoir. *Nelson v. Big Lost River Irr. Dist.*, 148 Idaho at 161, 219 P.3d

at 808. The downstream conveyance loss is then deducted from that original volume. *Id.* In addition, because storage water users do not receive equal or simultaneous deliveries, individual allotments are calculated and measured at the reservoir based on the amounts provided by the irrigation district. *Id.* at 162, 219 P.3d at 809. Moreover, irrigation districts deliver appropriated storage water pursuant to its authority "to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of such land [within the District], as may be necessary and just to secure the just and proper distribution of the same." *Id.* at 163, 219 P.3d at 810 (alteration in original) (quoting I.C. § 43–304). In other words, the irrigation district may establish bylaws outlining rules for distributing storage water to the landowners within the irrigation district. However, the irrigation district must also notify the Department when it will release storage water, where the storage water will be delivered, how much storage water will be delivered, and the persons entitled to receive the storage water pursuant to the supplemental distribution authority under Idaho Code §§ 42-105(1) and 42-801.

Here, BLRID is an irrigation district governed by an elected Board of Directors under Title 43 of the Idaho Code. *See* I.C. §§ 43-301 to -343. BLRID has the authority to establish bylaws that inform how storage water is to be distributed to water users within the district. Accordingly, BLRID's adopted bylaws are instructive as to the district's authority to deliver storage water. *See Johns Decl. in Supp. of Mot. to Strike* Ex. A., at 2. Within the bylaws, the statement of objectives state BLRID's authority "to deliver storage water of the Irrigation District to landowners within the district in the amounts to which said storage water has been apportioned to the lands within the district, all in the most efficient manner and consistent with good management practices." *Id.* The bylaws also govern the General Manager's authority to distribute storage water. *Id.* at 11. It states:

> The Mackay Dam and Reservoir, and the control and diversion gates at said Mackay Dam and Reservoir, and all main canals and laterals and all diversion and distribution of water, and all storage and natural flow rights owned by Big Lost River Irrigation District, shall be under the direction and supervision of the General Manager, whose duty it shall be to distribute water to the consumer thereof according to their rights under these By-Laws and the laws of the State of Idaho, and under such special rules as may be from time to time made by the Board of Directors in any emergency.

Id.

Although BLRID can establish bylaws governing the distribution of storage water under Idaho Code § 43-304, it must still abide by the notification and measurement requirements of Idaho Code §§ 42-105(1) and 42-801. BLRID must notify the Department and watermaster when it desires to release the storage water, who will receive the storage water, where the storage water will be delivered, and the quantity of storage water to be delivered. The purpose of this notification requirement ensures that the watermaster can distribute the natural flow water in priority be measuring the difference between the commingled natural flow and storage water and calculating the conveyance loss of the natural flow water.

Once the storage water has been appropriated and commingled with the natural flow, BLRID delivers the storage water to the landowners within the district based on its bylaws so long as BLRID notifies the Department and watermaster when the storage water is to be released, who will receive the storage water, the quantity of storage water to be delivered, and where the storage water will be delivered. This ensures the watermaster will be able to calculate the conveyance loss of the natural flow water and to distribute the natural flow water in priority in accordance with the Director's authority. Therefore, so long as BLRID informs the watermaster where the storage water is being delivered for the watermaster's accounting practices, BLRID is authorized to deliver storage water at the River Diversion.

MOSS'S DISCOVERY AND EVIDENCE MOTIONS

I. Moss's Standing Discovery Motion

At the dispositive motion hearing, Moss orally made a standing motion for a limited order authorizing discovery to depose Mr. Cefalo in the event the Hearing Officer does not fully resolve the issue identified in this matter via his ruling on the subject dispositive motions. Hr'g Audio 1:48–2:14, 2:29–3:41.

A matter "becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Goodson v. Nez Perce Cnty. Bd. of Cnty. Comm'rs*, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000). Consistent with the above analysis concerning the motions for summary judgment and the order below granting BLRID's *Motion for Summary Judgment*, the only issue identified for hearing in this matter is no longer live and ruling on Moss's standing motion would have no practical effect on the decision in this matter. Therefore, Moss's standing motion is moot.

Moreover, this matter always involved an issue of whether storage water could be delivered at the River Diversion. The Hearing Officer imposed a February 28, 2025 deadline for the parties to complete depositions. *Order and Notice of Hearing*, at 3. Accordingly, Moss could have deposed Mr. Cefalo prior to that deposition deadline if it believed Mr. Cefalo's testimony would have assisted the Hearing Officer in determining whether BLRID's Storage Rights could be delivered at the River Diversion. However, Moss failed to do so. Instead, Moss waited to request an order authorizing limited discovery well after the deposition deadline, which would only be used to cause further administrative delay in this matter. Therefore, even if Moss's standing motion had not been rendered moot, the Hearing Officer would have denied Moss's request for a limited order authorizing discovery as untimely.

II. Moss's Motion for the Hearing Officer to take Judicial Notice Pursuant to the Idaho Rules of Evidence

To the extent that Moss's motion to take "judicial notice of the fact that the East Region Office for IDWR administers transfer applications in East Idaho" was made independent from its withdrawn Rule 56(d) motion, it is denied. *Moss's Opposition to Pehrsons' Motion*, at 2. Moss made its judicial notice motion pursuant to Rule 201(b) of the Idaho Rules of Evidence. *Id*. The Hearing Officer is not bound by the Idaho Rules of Evidence and may decline to consider

evidence that is irrelevant. IDAPA 37.01.01.600; *see also* IDAPA 37.01.01.602. Moss's transfer application is not at issue in this matter, and Moss did not choose to clarify its motion for judicial notice when given the opportunity to offer oral argument on its preliminary motions. *See* Hr'g Audio at 1:40–7:00. Therefore, the Hearing Officer declines to take judicial notice as requested by Moss.

CONCLUSION

Consistent with the foregoing, the Hearing Officer concludes that BLRID is authorized to deliver storage water at the Moss River Diversion pursuant to Idaho Code §§ 42-105(1) and 42-801, which authorize the use of natural flow water to carry already appropriated storage water for delivery to landowners within the irrigation district. This authority is subject to the measuring and reporting requirements outlined in those statutes and requires BLRID to inform the watermaster: (1) when storage water will be released, (2) which users are entitled to receive the storage water, (3) the quantity of storage water being delivered to each user, and (4) where the storage water will be delivered.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that:

1. *Moss Farms' Motion to Dismiss* is DENIED.
2. The Big Lost River Irrigation District's *Motion for Summary Judgment* is GRANTED.
3. The *Pehrsons' Motion for Summary Judgment* is DENIED.

DATED this 23rd day of June 2025.

ROGER S. BURDICK
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June 2025, the above and foregoing, was served by the method indicated below, and addressed to the following:

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Courtesy copy via email:
Moss Farms Inc.
mx222moss@aol.com

Sara Ajeti
Deputy Attorney General

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 53 and 202.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

> Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
>
> (a) The petition for reconsideration is disposed of; or
> (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5246(3), and 67-5270 through 67-5279, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

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ATTORNEY GENERAL

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BYRON PEHRSON, LOY PEHRSON, AND RANDY PEHRSON, Petitioners, vs. THE IDAHO DEPARTMENT OF WATER RESOURCES, and MATHEW WEAVER in his capacity as the Director of the Idaho Department of Water Resources, Respondents.	Case No. CV01-25-13914 **NOTICE OF LODGING THE AGENCY RECORD WITH THE AGENCY**
IN THE MATTER OF WATER RIGHT NOS. 34-182 AND 34-381A (MOSS FARMS, INC.) IN THE MATTER OF USE OF NATURAL FLOW FROM THE BIG LOST RIVER AND STORAGE RELEASES FROM MACKAY RESERVOIR	

TO: THE DISTRICT COURT AND THE PARTIES OF RECORD

In accordance with I.R.C.P. 84(j), YOU ARE HEREBY NOTIFIED that the agency record, having been prepared pursuant to I.R.C.P. 84(f), is lodged with the Idaho Department of Water Resources for the purpose of settlement.

A copy of the agency record filed with the Department has been uploaded to the Department's website. The parties may visit https://idwr.idaho.gov/legal-actions/district-court-actions/pehrson-v-idwr/ and follow their browser's document download procedure to obtain a copy of the agency record after expanding the accordion labeled "Agency Record" and clicking on the PDF titled "Agency Record on Appeal."

The parties have fourteen (14) days from the date of this notice to file any objections to the record. The agency's decision on any objection timely filed along with all evidence, exhibits, and written presentations on the objection shall be determined by the agency within fourteen (14) days and included in the record. If no objections are filed within that time, the record shall be deemed settled. Subsequently, the agency will lodge the settled record with the District Court pursuant to I.R.C.P. 84(k) and the Court's August 12, 2025 *Order Granting Extension*.

DATED this 22nd day of August 2025.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

MEGHAN M. CARTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August 2025, I caused to be served a true and correct copy of the foregoing *Notice of Lodging the Agency Record With the Agency*, via iCourt E-File and Serve, upon the following:

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