

RAÚL R. LABRADOR
Attorney General
SCOTT L. CAMPBELL
Deputy Attorney General
Chief, Energy and Natural Resources Division
JOY M. VEGA, ISB #7887
MICHAEL C. ORR, ISB # 6720
Deputy Attorneys General
700 W. State Street, 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Facsimile: 208-854-8072
joy.vega@ag.idaho.gov
michael.orr@ag.idaho.gov

Attorneys for Defendants the State of Idaho, the Idaho Department of Water Resources, and Gary Spackman, in his official capacity as Director of the Idaho Department of Water Resources

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

The STATE OF IDAHO; the IDAHO
DEPARTMENT OF WATER
RESOURCES, an agency of the State of
Idaho; and GARY SPACKMAN, in his
official capacity as the Director of the
Idaho Department of Water Resources,

Defendants,

v.

IDAHO HOUSE OF REPRESENTATIVES;
MIKE MOYLE, in his official capacity as
Majority Leader of the House; IDAHO

Case No. 1:22-cv-00236-DCN

**DECLARATION OF
TIMOTHY J. LUKE**

SENATE; and CHUCK WINDER, in his
official capacity as President Pro Tempore
of the Senate,

Intervenor-Defendants.

I, Timothy J. Luke, declare and state as follows:

1. My name is Timothy J. Luke. I am over eighteen years of age and the following statements are based upon my personal knowledge.

2. I am the Chief of the Water Compliance Bureau in the Idaho Department of Water Resources (“IDWR”). I have held this position since 2011 and I have been an IDWR employee continuously since 1988. I hold a Bachelor of Arts degree in Geography from West Virginia University and a Master of Science degree in Geography and Natural Resource Management from the University of Idaho. My education and training since college has included participation in seminars and courses related to water management such as Ground Water and Surface Water Relationships, Hydraulics, Field Hydrology, Irrigation System Design, and several water law and water management workshops.

3. I worked as a Senior Water Rights Agent from 1988 to 1991. My duties included the review, analysis, recommendation, and processing of water right transfers, and the review and processing of applications to reallocate “trust water” pursuant to the statutes and IDWR rules implementing the 1984 “Swan Falls Agreement.”

4. I was a Hydrologist-in-Training in the Water Permits Section From 1991 to 1992, and a Hydrologist in the Water Permits Section and the Water Distribution

Section from 1992 to 1997. My duties included assisting water districts and watermasters in distributing water according to Idaho water rights and water law, inventorying and measuring water diversions in the field, analyzing water rights, analyzing hydrologic data, preparing reports, and investigating water distribution complaints and water right disputes.

5. I was the Section Manager for the Water Distribution Section from 1997 to 2011. My duties included implementing and managing water measurement programs, enforcing water rights, and providing assistance to water districts and watermasters, training watermasters, and providing watermasters with guidance regarding disputes over water rights and the distribution of water under Idaho water rights and water law. I also oversaw and supervised Water Distribution Section staff in their work.

6. The Water Compliance Bureau consists of the Water Distribution Section, the Ground Water Protection Section, the Stream Channel Protection Unit, and the Floodplain Management Unit. My duties and responsibilities as Water Compliance Bureau Chief include, among others: directing and organizing Bureau programs and operations regarding water distribution, water measurement, ground water protection, stream channel protection, floodplain management, and water right/water use enforcement; reviewing and developing Bureau programs, procedures, guidance, and standards; setting Bureau program objectives and priorities; hiring training, supervising, and evaluating program management staff

and clerical staff; and drafting orders, guidance memoranda, reports, correspondence and other documents related to Bureau program operations.

7. IDWR's duties and responsibilities are defined by Idaho statutes, primarily those in Title 42 of the Idaho Code. My work at IDWR has required me to become familiar with many of these statutes, especially those dealing with the appropriation and distribution of water under Idaho law. Understanding and applying, implementing, or enforcing statutes in Title 42 has been central to every position I have held at IDWR.

8. As a general rule in Idaho, water may not be diverted from a surface source or pumped from a well in the absence of a permitted, licensed, or decreed water right authorizing the diversion (pumping water from a well is a "diversion" of ground water). There are exceptions to this general rule, however. Livestock can be watered directly from a surface water source ("instream stockwatering") without first obtaining a permit, under Idaho Code § 42-113. "Beneficial use"-based stockwater rights can also be perfected in this way. Further, water may be diverted from small "domestic" wells without a permit pursuant to Idaho Code § 42-227, and this water can be used for stockwatering purposes under Idaho Code § 42-111. A "domestic" well does not necessarily have to be used in connection with a home or residence, or be located near a home or residence. Any well that falls within the definition of "domestic" in Idaho Code § 42-111 is a "domestic" well.

9. Idaho water rights are defined by standard elements that are stated in a permit, license, or decree. The elements are: the name of the owner of the water

right; the priority date of the water right; the source from which the water may be diverted; the point (location) of the diversion; the quantity of water that may be diverted; the purpose(s) for which the water may be used; the place(s) where the water may be used; and the time period during the year when the water may be diverted and used (or stored, if storage is authorized). The water right holder's use of water must be consistent with the elements of the water right.

10. Idaho water rights are rights of use. They only authorize the water right holder to divert and use water as authorized in the permit, license, or decree. A water right does not entitle the water right holder to exclusive use of, or control over, the source from which water is diverted. A water right also does not entitle the water right holder to prohibit anyone else from diverting and using water from the same source or at the same location. A water right holder may, however, request that IDWR or the watermaster curtail other water users' diversions from the same source, if those diversions are taking water that the water right holder needs and can use, and are being made under water rights with junior priority dates, or in the absence of a water right.

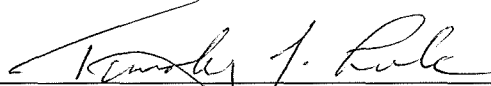
11. A water right also does not authorize trespass or confer a right to access lands that are not owned by the holder of the water right, even when the source, point of diversion, or place of use for a water right is located on those lands. Access must be granted by the landowner or obtained through eminent domain proceedings as authorized in Idaho Code § 42-1106.

12. IDWR is required to distribute water and administer water rights according to the elements and conditions in water right decrees, licenses, and permits, and consistent with the standards, requirements, and limitations of the prior appropriation doctrine as established by Idaho law. Private landowners must comply with Idaho water law and the elements and conditions of their water rights when diverting and using water, but do not have the authority to administer or enforce Idaho water rights or water law. Private landowners do have the right to deny or limit access to water sources located on their lands, but nothing in Idaho water law requires them to do so.

13. To my knowledge, IDWR has never prohibited federal grazing permittees from using water sources on federal public lands to water their livestock, even in the absence of a stockwater right, unless IDWR received a valid delivery call or complaint challenging the use.

Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATE: March 14th, 2023



TIMOTHY J. LUKE