

Objection 5: Water Right 97-7102 (1977 License)

Claimant Information:

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Water Right Number: 97-7102

<p>DISTRICT COURT - CFPRBA Fifth Judicial District County of Twin Falls - State of Idaho</p> <p>MAY 12 2025</p> <p>By _____ Clerk Deputy Clerk</p>
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Objection Details:

I object to the IDWR's recommendation in the Basin 97 Part 1 Director's Report – Active Claims (filed 12/12/24) for claim 97-7102 (1977 license, 0.04 cfs, 2.70 AFY, irrigation/stockwater/storage/recreation, priority date 08/04/1977) on the following grounds:

1. Combining its POD with claim 97-9808 at T58N R04W S20 SWSW, Bonner County, despite distinct diversions.
2. Limiting quantity to a combined 0.04 cfs and 13,000 gpd for domestic/stockwater with 97-9808, 97-9078, and 97-9809.
3. Restricting to a combined 1-acre irrigation POU with 97-9808.
4. Restricting 0.02 cfs stockwater use due to an unpaid \$2 fee.

Reasons and Legal Arguments:

• **Distinct POD:**

1. Claim 97-7102's PODs (on-stream pond NWSWSW, portable 3 hp pump W2E2SWSW) are distinct from 97-9808's 1967 pipe/pump W2E2SWSW, both in T58N R04W S20 SWSW.
2. Adjudication Memorandum #4, Appendix 1, supports multiple diversions, and multiple systems in one diversion.
3. The 1977 license approves the pond and pump mobility, requiring no further approval absent injury (Idaho Code § 42-108, § 42-211, <https://legislature.idaho.gov/statutesrules/idstat/Title42/T42CH1/SECT42-108/>, <https://legislature.idaho.gov/statutesrules/idstat/Title42/T42CH2/SECT42-211/>)

• **Quantity Restrictions:**

1. Idaho Code § 42-111(3) is inapplicable to 97-7102, a statutory right distinct from de minimis domestic claims.
2. Memorandum #4, Example #4, supports separate POUs (pond, 1-acre field).
3. The 0.04 cfs and 13,000 gpd limits with 97-9808 are erroneous, as 97-7102 is irrigation/stockwater/storage/recreation.

• **Irrigation Restriction:**

1. The 1-acre irrigation limit applies to 97-7102 alone, not 97-9808's domestic use.

• **Stockwater Fee:**

1. Adjudication Memorandum #58 validates 0.02 cfs stockwater. The \$2 fee either has been paid or will be paid (or proof submitted), resolving the restriction.

2. The creek supports 0.04 cfs without injury.

Evidence:

1. 1977 License Documents: 0.04 cfs, on-stream pond, portable pump.
2. Proof of claim fees paid, IDWR records.
3. Photos: POU aerial with parcel overlays, showing distinct cabin, pond and POD locations.
4. GPS Coordinates: Pond NWSWSW and pump W2E2SWSW PODs, 1-acre field POU N2SWSWSW all in (T58N R04W S20 SWSW).
5. Field investigation flow measurement of the unnamed stream (0.5 cfs), sinking on the property, is sufficient for 97-7102, 97-9808, 97-9078 & 97-9809 without injury.

Relief Requested:

Decree claim 97-7102 as a separate water right for 0.04 cfs (2.70 AFY) for irrigation, stockwater, storage, and recreation, priority date 08/04/1977, with distinct PODs in T58N R04W S20 SWSW, free of combination with 97-9808, 13,000 gpd limit, 1-acre irrigation restriction with 97-9808, or stockwater fee restriction.

These objections are in a response format to the IDWR NOER letter describing IDWR's final referral recommendations to the directors report.

IDAHO DEPARTMENT OF
WATER RESOURCES

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Governor Brad Little
Director Mathew Weaver

October 18, 2024

JOHN
HAWLEY KAREN HAWLEY RYAN
HAWLEY

6259 CARR ST #3

ARVADA, CO 80004

RE: Notice of Error Replies for CFPRBA Claim Nos. 97-7102, 97-9078, 97-9808, 97-9809, & 97-9810

Dear Claimants,

The Idaho Department of Water Resources has reviewed the Notice of Error Replies for the above referenced water right claims. We are unable to make all the requested revisions to your claim recommendations for the following reasons.

Ok let's at least revise the recommendations as stated. Some of the IDWR recommendations did not make it to the director's report...

97-7102 -This claim was filed based upon a previously issued water right license for the diversion of 0.04 CFS from an unnamed stream for recreation storage, irrigation, and stockwater purposes. Your Notice of Error (NOE) reply requested that the recommended maximum diversion rate be increased from 0.04 CFS to 0.06 CFS. Because this claim is based on a previously established license, IDWR is restricted to only recommending the diversion rate originally authorized. The total diversion rate of 0.04 CFS authorized under license 97-7102, is based upon the maximum diversion capacity of that water system developed and is not a cumulative rate derived from the diversions for individual uses. You also requested that the combined 13,000 gallon per day limit between this right and the other domestic rights be removed from the recommendation. When you filed the claim, the stockwater use was claimed as a *de minimis* use meeting the requirements of Section 42-111, Idaho Code, which includes a 13,000 gallon per day limit because the \$2 variable fee wasn't paid for the stockwater use. If you submitted the \$2 variable fee for the stockwater use, IDWR could remove the condition limiting the stockwater use to 13,000 gallons per day.

97-7102 is a 1977 licensed statutory right that includes 2 diversions and 2 places of use for: irrigation .02CFS & 1.5AFY, stockwater .02CFS & .2AFY, diversion to storage .02CFS, recreation storage 1AFY in a pond.

A) I requested an increased diversion from .04 CFS to .06 CFS because (.02+.02+.02=.06) seemed appropriate. IDWR rejected this because:

1) The right is not cumulative (.02CFS +.02CFS +.02CFS is not .06CFS).

- 2) The recommendation is restricted to the amount authorized in license 97-7102 (.04CFS / 17.95 gpm).
- 3) This diversion rate was determined by the **"maximum diversion capacity of the water system developed."** However, the 97-7102 water system had 2 diversion points, 2 places of use and a pond, which are described as:
 - a) A 8x6 ditch to the pond. With 1" of water, at 1-foot per second, it flows 25 gpm. With 2" of water it flows 50 gpm. With 6" of water it flows 150 gpm.
 - b) A 1977 Sears 3 hp gas pump moved to various points along the stream, capable of producing 80-100 GPM.
 - c) A pond 125'x100'x10' with a 4-hp pump.
 - d) POU pond and 1 acre field.
- 4) IDWR says: **"Because this claim is based on a previously established license, IDWR is restricted to only recommending the diversion rate originally authorized" and "The total diversion rate of 0.04 CFS authorized under license 97-7102, is based upon the maximum diversion capacity of that water system developed."**
 - a) Ok. But the maximum diversion capacity of the water system developed was capable of producing 105 gpm to 250 gpm. According to field inspection, the unnamed stream/spring produces 224 gpm. IDWR field inspection describes the pond as being on-stream and states that the unnamed stream sinks the property.
 - b) If the diversion rate **"is based on the diversion capacity"** that is developed under the permit, why is it .04CFS (17.95 gpm) instead of 180 gpm or 250 gpm?
 - c) Perhaps IDWR put the decimal point in the wrong location? A diversion of 0.4 CFS is 180 gpm. This seems more appropriate for the system that was developed and described in 97-7102 than does .04CFS (17.95gpm).

B) I requested that the 13000 gpd combined limit on 97-7102 be removed.

- 1) IDWR said that this was a small de minimis stockwater claim, therefore the 42-111 domestic 13000 GPD limit applies. I filed the adjudication claim for this online with some errors, so we amended it on a form that was provided by IDWR . I do not recall either of those filings being small de minimis, nor the permit and license for this water right.
- 2) IDWR said the 13000GPD combined limit was imposed on this water right because a \$2 variable stockwater fee was not paid and that this could be corrected if paid.
- 3) We never received a bill for that fee and knew nothing about it. We are willing to pay the fee to remove the restriction.

C) In the NOER, I requested that IDWR remove the combined diversion rate of .04 CFS on 97-7102 and 97-9808. IDWR responded: **"After further review, IDWR can remove 97-7102 and 97-9808 from the combined use condition."** but that change did not make it into the Director's Report. I suspect this restriction was the result of a misunderstanding in the NOER explanatory material section and the point of diversion section?

- 1) In this section, IDWR inserted a comment stating: **"Right number 97-9808 is also diverted through the point of diversion described above."** It should be noted that **"The point of diversion described above"** is: **T58N R04W S20 SWSW**. This is not a singular point on the unnamed stream; it is a 40-acre area. Similar language was added by IDWR to each recommendation. This appears to combine 97-9809 and 97-9078 into one diversion and 97-9808 and 97-7102 into another diversion and all of these into a combined limit of 13000 GPD because of stacking?
- 2) I attempted to correct these errors in my 97-9078 NOER, by explaining that all of the claims have diversions in SWSW, not just 97-9808. More precisely stated: the 5 claims describe 6 distinct diversions located in the SWSW. It did not say that these shared a diversion. This is obvious: Water right 97-7102 describes 2 diversions and 2 places of use in SWSW, and these

2 diversions are in addition to the 4 diversions and 4 distinct places of use described in 97-9078, 97-9808, 97-9809, & 97-9810. All together my claims describe 6 diversions, not one or two. All of them are located in T58N R04W S20 SWSW.

Summary 97-7102:

- 1) The combined restrictions modify an existing license and limit the amount of water decreed.
- 2) IDWR says the 97-7102 adjudication claim was filed as a small de minimis stockwater claim. Perhaps? However, I filed this claim online and then amended it on a form that was provided to us by IDWR. I do not recall either of these being small D&S forms.
- 3) IDWR says the 13000 GPD stockwater restriction can be lifted if a \$2 variable fee is paid. Ok let's do that. We will pay that fee to lift the restriction.
- 4) IDWR says they can remove the 97-7102 and 97-9808 combined use condition. Ok let's do that and also separate the others..
- 5) Our 5 claims describe 6 diversions in T58N R04W S20 SWSW, not 1 or 2.
- 6) Claim 97-7102 (1977 license, 0.04 cfs) is a separate statutory right, unaffected by Idaho Code § 42-111(3), with distinct diversions (on-stream pond, portable 3 hp pump) and places of use (pond, 1-acre field).

Administrator's Memorandum #61: Proof of Priority for Deferrable De Minimis claims page

1. "For deferrable de minimis water uses, IDWR has not routinely required evidence to support the claimed priority date." "Each claim filed in the SRBA is the claimant's affidavit (statement) of the elements of the water right being claimed. Some claimants in the SRBA will be required to submit additional evidence of the priority date of the water right IF:

- 1) The claim is based on beneficial use

AND

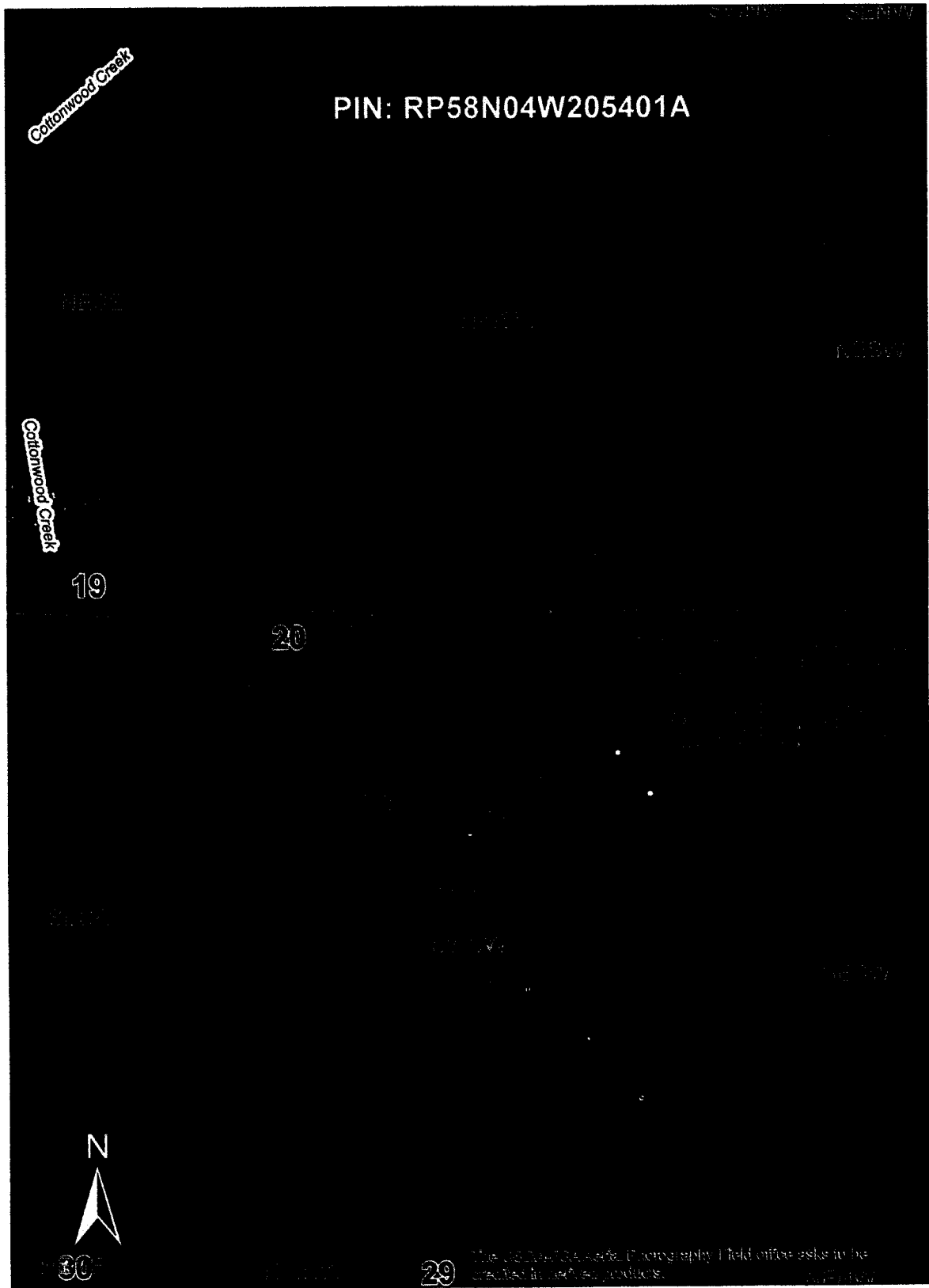
- 2) The claim is NOT a small domestic and stockwater claim."

NOTE: Additional proof of priority for beneficial use claims for small D&S uses will not be required unless specifically requested by IDWR.

Page 3 Guidance 1) If the readily available information does not contradict the priority date, or if no additional priority evidence is encountered in IDWR's regular claim review process, IDWR will recommend the claimed priority claim date.

PARCEL LOCATION FOR CFPRBA CLAIMS

97-9808 & 97-9809 & **97-7102 & 97-9078** & 97-9810



2021 AERIAL PHOTO

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5/1/2025

IDWR Director's Report Recommendation, Objection Evidence and Arguments for:

97-7102 (pond, irrigation, stockwater, storage), 97-9078 (1965 Cabin), 97-9808 (1967 Cabin), 97-9809 (1970 Cabin) and 97-9810 (1975 Cabin).

The following letter was submitted to IDWR on 2-3-24 as required evidence. It was written when we had 2 claims (97-7102 and 97-9078) that attempted to describe 5 water rights. Both claims have since been amended. The text that is most relevant to our objections or that require post amendment clarification are highlighted in red, new clarifying comments are in blue and original text is black.

2-3-24 Revised 5/1/25

Idaho Department of Water Resources

Senior Water Supervisor,

Evan Roda,

Thank you for extending our reply time. Sorry we did not get this to you sooner. As Karen explained, we had some hardships that were unavoidable including a house fire and a car wreck with injuries. Unfortunately the fire destroyed some of our records, but we have been working diligently to gather the information that you requested, regarding adjudication of claims 1426 no. 07-7102 and 1443 no. 97-9087 (typos).

These claims (97-9078 and 97-7102) were amended and are now (97-7102 pond/irrigation/stockwater/storage), (97-9078 1965 Cabin), (97-9808 1967 Cabin), (97-9809 1970 Cabin) and (97-9810 1975 Cabin).

The purpose of this letter is to provide you with that information, and to seek guidance on how best to proceed.

Last we spoke 1/26/24, the plan was to amend 97-7102 to reflect the original elements of the license. That's done. The Amendment Notice of Claim to Water Right Acquired Under State Law is signed and attached below. License 97-7102 is in Dan Zebell's name. We own the property now and acquired his water rights with it. Do we need to submit a change of ownership form 42-1409-6 or is our notice of claim to adjudicate 97-7102 sufficient to update ownership?

We are proceeding with our notice of claim 1443, 97-9078, Beneficial Use Water Rights in 4 cabins. However, your letter states that before you will recommend this water right claim, "sufficient evidence to verify the extent of beneficial use of this water source for domestic purposes within the claimed place of use, beginning on or before the priority date claimed" will be required. We have some questions about that.

I don't recall if we submitted form 42-1409-1, Notice of Claim to a "Water Right Acquired Under State Law," or 42-1409-2, "Notice of Claim to a Water Right Acquired Under State Law for Small Domestic and/or Stockwater purposes where daily use is less than 13,000 GPD." I am presuming that we submitted form 42-1409-1 or that the online application did for us, because IDWR is requesting additional evidence of the priority date, among other things?

IDWR publication "Evidence of Priority" states that "some claimants in the Adjudication will be required to submit additional evidence of the priority date of the water right if: 1) The claim is based on beneficial use AND 2) The claim is NOT a Small Domestic and Stockwater claim." In other words, the claim itself, being an affidavit is sufficient evidence, if it is a Beneficial Use Water Right claim, and it is a Small Domestic Stockwater claim and it is for Domestic Use, and it is less than 13,000 GPD. We have 4 such claims in 1443 97-9078 that are not based on license, decree or permit. We are curious why additional evidence is required? This seems to contradict IDWR policy.

Here I explain that we were attempting to file four Small D&S claims. After more research, it became apparent that we could not file four such claims on one form, which is why we amended 97-9078.

Under the provisions of Section 42-243, Idaho Code, any person using or claiming water rights, established by diversion and application of water to a beneficial use must file a claim (application, permit, license - unless small D&S) with the IDWR. However, it is my understanding that the use of water for Domestic purposes, as defined in 42-111, Idaho Code, is expressly exempted from this requirement. Please clarify.

I was seeking advice. We did not know that we had to file four separate 42-1409-2 forms, to describe the four small D&S claims.

Currently, it appears that IDWR is prepared to recommend that the court decree claim 97-7102 with all the elements of the approved license. Thank you. In addition, your letter states, if no other evidence is submitted, IDWR will recommend the court decree claim 97-9078 for one domestic use. Thank you again. Curious though, if there is sufficient evidence in our Notice of Claim to recommend one Domestic Use Water Right, why is there insufficient evidence to recommend four? Is this due to a limitation on the extent of that Domestic Use per 42-111 or perhaps a limitation of one water right decree per claim form, when filing a Beneficial Use Water Right claim of Domestic use? If this is the case, shouldn't we submit 4 beneficial use water right claims, on four separate claim forms, rather than spending hundreds of hours of histological research to "prove" Use dates, Priority dates, water quantity amounts, and locations of Use, on 4 houses that already have lawfully established "Constitutional Water Rights?" Perhaps, it would be more proper, prudent and efficient, if we just submit 4 claim forms, one for each domestic use? In this way our water rights wouldn't be withheld or diminished, but apparently the burden of proof on the filing requirements would. Please clarify.

We are discovering that filing four claims online, on what appears to be one 42-1409-1 form, was not the proper format. Seeking advice.

Per our last conversation, we have attached the Bonner County Assessor inventory of improvements for our property. This provides evidence of construction dates and thus the inferred Beneficial Use and Priority dates.

The Assessor currently lists 4 improvements on our 65 acres, known as 449 Cat Road in Priest River ID T58-R4W-S20. The assessment also describes plumbing (kitchen sink, bathroom, hot water heat etc). According to Bonner County, these 4 improvements were constructed in 1965, 1970, 1975, and 1985. Three of these improvements (D, 01, 02) are dwellings, the fourth (03) is a barn. There are other buildings that are not listed. One of those is a dwelling that was damaged by a heavy snow load and was subsequently removed from this list.

The current Bonner County assessor's list of improvements are:

- 1) D- Dwelling built in 1965, (Log cabin pictured in the assessment on W2E2SWSW)
- 2) 01- Pole Building built in 1970, (A dwelling adjacent to D-Dwelling on W2E2SWSW)
- 3) 02- Cabin built in 1975, (Guest house on NWSWSW)
- 4) 03- Pole building built in 1985. (This is a garage / pole barn on N2SWSWSW)

IDWR's recommendation to disallow 97-9810 states: "...and Further, a Bonner County property assessment completed in 2016 documented only two standing structures which could be considered homes, (the assessor's pictures shows three standing dwellings and a fourth that is badly damaged) and those have both been recommended under claim nos. 97-9078 (1965 cabin) and 97-9809 (1970 cabin)." The Assessor records correctly describe the 1975 structure as a "cabin."

Based on IDWR codes, the Bonner County assessor's information and our first and second hand knowledge, it appears that we have four dwellings with Beneficial Use Water Rights that should be decreed in adjudication.

These are:

- 1) Improvement D- Dwelling 1965 on W2E2SWSW.
- 2) Improvement 01- Pole building built in 1970. A pole- log cabin/dwelling on W2E2SWSW.
- 3) Improvement 02- Cabin built in 1975, with water appropriation of 10/1/1970 on NWSWSW.
- 4) A dwelling that was removed from the improvement list in 1995 that was likely built in the late 1960's. This was Dan Zebells' primary dwelling located on NWSWSW.

Based on the Assessors' records, two of these dwellings were built before May 20, 1971. **Adjudication Memo 23 states that: "The priority date of a water right established by diversion and application to beneficial use is the date water is put to beneficial use. Incremental development of beneficial use water rights require separate priority dates for each development period. Beneficial use rights do not start with the commencement of development; they start when development is completed and water is put to beneficial use."** We have 4 different developments with 4 beneficial use dates. **The Assessor provides sound evidence of construction completion dates, and therefore the surface water appropriation, diversion, Beneficial Use and Priority dates are 1/1/1965 and 1/1/1970 for these two dwellings. The extent of the use, is the amount prescribed and allotted in 42-111 as Domestic Use.** This and our testimony should be sufficient evidence to recommend the court decree claim 97-9078 for these two Domestic Uses.

Here we describe four small D&S claims. We did not yet know that we had to file each of these on separate forms.

Our other two dwellings have appropriation and priority use dates that are a bit more obscure, because the Assessor's construction dates for these are 1975 and unlisted. **However, sufficient evidence exists, including our first and second hand knowledge of more than 50-**

years, that these dwellings used appropriated water from the unnamed stream before 5/20/1971 and that the water was put to beneficial use in a time and manner that legally established "Constitutional Water Rights." **We also believe that all four of these legally created Beneficial Use Water Rights appurtenant to our four cabins should be recommended for court decree via Adjudication based on the sufficient evidence provided thus far, which includes our testimony to the same.**

We clearly describe the 1975 cabin as a dwelling that had pre-statutory water use and appropriation.

However, you requested more information so we will attempt to provide that.

According to the Assessor valuation summary, Dan Zebell's log cabin was "destroyed" in 1995 and then removed from the improvement list. Though this house was damaged, the Domestic Beneficial Use Water Right use never stopped and continues today. The water is used for Domestic purposes to the extent allowed in 42-111. **This house had all the modern conveniences**, including a functional bathroom. **It was Dan's primary house located on the NWSWSW parcel. Building permits were not required at the time of construction**, so there are no public records in Bonner County that I can find to validate the construction date. However, we believe it to be one of the first cabins constructed on the property in the mid to late 60's. We have documents, aerial and ground photos of this house, at various times, from various sources, and we have first and second hand knowledge that further validates its age and water use. For example: At the end of our driveway, there are historic government issued topo maps from the US Forest Service and USGS that show three structures in the N2SWSWSW / NWSWSW Section 20. These 1967 topos were revised with aerial imagery in 1996 and 2012. The buildings shown in these maps are in the approximate location of Dan's buildings, including this unlisted log cabin. Dan and his girlfriend Dale, lived in it year round. Our plan is to repair or rebuild it.

This cabin (1967) would have been seen/observed by the IDWR field investigators in 1977 and 1981 because it was located in-between the pond and irrigated garden that they were inspecting, and because the pond and garden were domestic recreational uses, likely subordinate to this dwelling. Two Places Of Use (POU) are drawn on page 16 of the 97-7102 report. One appears to be the irrigated 1-acre farm/garden, the other is the pond. There are also two Points Of Diversions (POD) drawn as x and noted as "(2-points) SWSW." Tom King describes the diversion as an 8x6 diversion ditch to the 125x100x10 .96AF pond and a pump that was moved to various points along the stream. **For some reason, he only describes one POU location as T58N-R4W-S20 SW1/4 SW14 for 1/2 acre code x on the location chart. Not sure, but I think code x = Other, not Domestic, Stockwater, M,C,I, Recreation, or H fish propagation etc, which seems odd to me. Why not D or S as licensed? Perhaps the other POU that was not given a location was the preexisting diversion for the dwellings, or perhaps it was for the pump he described which also diverted water to the dwellings, or perhaps it was the irrigated garden or pond? This cabin could not have been missed, yet I don't see that on the report either. The real question is, why isn't his house (1967) listed as a POU on the 97-7102 report? Dan's application requested .04 CFS for Domestic Use and 0.08 CFS total, for all uses but his license was approved with only .04 CFS and Domestic Use was removed.**

In the 1977 inspection and 1981 field report, IDWR describes 2 diversions. One is a 8x6 ditch to the new pond, the other is a portable gas pump that moves along the stream. These are unrelated to the 4 preexisting diversions that were created in 1965, 1967, 1970 and are unrelated to "the preexisting diversion for the dwellings." This describes a pond that existed for a short while (1975-1976/77). See explanations in objections for 98-9078 and 97-7102 and below..

The beneficial use described on the license 97-7102 is Diversion to Storage, Recreation Storage, Stockwater and Irrigation for 1-acre with 2 divisions. **Perhaps Domestic Use was not approved because this water right already existed as a "Beneficial Use Water Right" that was not yet decreed.** In an Aug 15, 1977 interdepartmental memo, Tom King, senior water resource agent reviewing Dan's permit application, describes his 8/17/1977 tour of the property, and the water system development for 97-7102. He noted the new in-stream pond, two other ponds, a swamp, several springs and found that the unnamed stream sinks on the property irrespective of the new pond. He estimated the total flow of the unnamed stream to be 0.5 CFS (228-gpm). **That is a lot of water. Significantly more than it is today, and significantly more than I have seen. It also contradicts Dan's claim that the creek flow was only 0.5-gpm at the pond diversion and 5-gpm 100 feet upstream from it. Perhaps Tom meant .5 GPM?** In any event he did not mention the existing system for the existing cabins, either because he did not see it or because it was unrelated/irrelevant to the inspection that he was conducting.

See attached IDWR's parcel aerial photo with overlays that shows the distinct cabins, pond, POU and POD locations for 97-7102, 97-9078, 97-9808, 97-9809 & 97-9810. The locations of the POD's for the cabins would not have been seen because they are not in the same area that IDWR was investigating. It is highly unlikely that IDWR would have seen or noted the four cabin POD's during site inspections because they typically were naturally occurring pools or ponds along the stream that did not have permanent distribution systems. See explanations below.

It appears that Tom King conducted a second field examination Sep 14 1981 to verify completion of the new diversion system development of Beneficial Use. Dan's application for permit was for Diversion to Storage, Domestic Use, Storage for Recreation,

Stockwater, 1/2 acre Irrigation and Aquatic Fish Culture, totaling 0.08 CFS. IDWR approved Diversion to Storage, Storage for Reaction, Stockwater and Irrigation for 1 acre at .04 CFS and 2.7 AFA. That seems odd to me. Before Dan applied for this permit, water was diverted from a small dam on the same unnamed creek and beneficially used domestically in 4 dwellings. (this describes a transient shared source, not a permanent shared diversion) These "small domestic uses" (four distinct cabin systems) were exempt from the 1978 statutory reporting requirement. **That legislation was being considered when Dan applied, and it passed during his licence approval process. The 1978 law requiring the reporting of existing Beneficial Use Water Rights expressly excluded a requirement for reporting small 42-111 domestic use rights, like Dan's. This might explain why Domestic use was indicated on his application but did not end up on his license?** Dan had lawfully established Domestic Beneficial Use Water Rights when he submitted "application for permit" in 1977. The legal purpose for the "application for permit" form that he was told to use by IDWR, is exclusively used for the establishment of new water rights. (by application permit and license) It cannot adjudicate and decree pre-existing water rights. **To do that, Dan needed to submit a "notice of claim."** But he did not know that. **Unfortunately, Dan's "application for permit" could not have been licensed with, nor decreed rights for, his existing Constitutional Water Rights, though it appears he tried. I see no other rational explanation as to why Dan applied for and IDWR denied his request for Domestic Use, which he already had. Water use in Idaho is a constitutional right that is not withheld without good reason, like the right already exists.**

Above, I describe the small natural dam (beaver pond / pool) that came into existence in 1975 and was a shared source for the 4 cabins from 1975 to 1976 or 1977. These 4 cabins, typically at different times, each individually used their own pump and pipe (system) in this pond. This configuration did not exist in 1965, 1967 or 1970 when the water rights were each appropriated, developed and perfected individually. Idaho Code § 42-108 broadly allows diversion changes for all water rights including pre-statutory, if no injury occurs. Later diversion modifications do not negate or combine the water rights and are not relevant to the initial appropriation. See objection arguments 97-9078 and 97-7102.

Before 5/20/71 a water right was created by simply diverting surface water to a beneficial use. The Priority date is the date the water is put to Beneficial Use. **Dan was not opposed to the permit process. He submitted an application for permit (97-7102) and invited Tom to tour the property in 1977. Domestic uses were exempt from the reporting requirements in the statute passed in 1978. Perhaps Dan knew that his preexisting system provided legally established Domestic Beneficial Use Water Rights and as such they were exempt from new permit and reporting requirements and that there was no reason to acquire new rights for this purpose? What other reason would he have for not including all four cabins in his 97-7102 application for permit?** This would have been the perfect time to get water rights if he did not already have them. The only rational conclusion is that these cabins already had lawfully appropriated "Constitutional Water Rights" and there was no need for a "new water right" to serve the 4 cabins. **That means, even if Dan tried to include one or all of the existing Beneficial Use Water Rights to be adjudicated by court decree in his 97-7102 Application/Permit/License process, that would have been rejected because this process and form was exclusively for new water rights. It appears, despite this, Dan attempted to include his primary dwelling's water rights in his new permit to obtain a court decree or license for the same and was denied because this was not the correct venue for it. It would also appear that those investigating this matter, understood that Dan had pre-existing Beneficial Use Water Rights for the dwellings which was the reason for the denial of new domestic water rights. As such this further provides evidence that this cabin and its water rights existed before 5/20/1971. All of this speaks to the age and existence of these cabins and their water rights. Furthermore, even if this Domestic Use was added after 5/20/71, which is very unlikely and opposed to the evidence otherwise, it appears that 42-1426 allows for the lawful enlargement of the existing Use and referral to the court for decree via adjudication. Each cabin already had a unique Constitutional Water Right before license 97-7102 was issued in 1977.**

The extent of the use for this dwelling is the amount prescribed and allotted in 42-111 Domestic Use (.04 CFS up to 13,000 GPD). We don't know the exact date of construction or beneficial use. Based on all the evidence that we found thus far and our recollection of the facts, we believe this cabin was built before the 5/20/1971 restrictions went into effect and that it was likely built in the late 60's. Therefore, a reasonable Diversion, Beneficial Use and Priority date is 1/1/1967.

Improvement 02- cabin 1975 is Dan's guest house. It is located on the NWSWSW parcel near his primary dwelling. Evidence suggests that construction of this cabin likely began before 5/20/1971. The Earles' and Dan's father Dick Zebell were friends. They visited the property regularly and utilized this dwelling among others. Construction in these remote places often takes years to complete due to the harsh weather, limited supplies, limited manpower, limited finances, access, adverse wildlife, and short building seasons. It is reasonable to conclude that water appropriation began before construction started, because water access plays a key role in determining if a house can be built and then determining where it will be built. Water development is typically the first task of development. **Before May 20, 1971 permits were not required for surface water appropriation, which is the most likely explanation why permits were not sought.** The process of creating a water right was to divert water and use it for a beneficial purpose. When this water appropriation precedes 5/20/71, Adjudication Memorandum #23 allows 5 years due diligence to put the appropriation to beneficial use. "Priority date of such a right is the date the appropriation was completed." "There may be claims based on beneficial use with priority dates after the effective

date of the permit requirement." That means a claim of beneficial use water right can be referred and decreed with a priority date of 5/20/1976, and in some cases later than that. According to the Assessor information, this cabin was constructed 1/1/75. That means the Beneficial Use date is 1/1/1975. And because construction can take 4-5 years to complete, it is reasonable to conclude that appropriation and diversion began 10/1/1970. In this scenario, the appropriation date is before 5/20/71. The priority date is the beneficial use date of 1/1/1975. This is a more plausible and rational explanation, that is consistent with the facts, laws and our recollection, than the theory that appropriation happened after 5/20/71 without a water permit. That makes no sense whatsoever. Why wait until after 5/20/71 and then have to pay a fee and subject yourself unnecessarily to the tedious permit process? The water was readily available and free for the taking. Three other domestic diversions were already in use. Connecting a fourth (to the unnamed stream) before construction and before the proposed change in law would have been easy and free and the logical rational thing to do. Furthermore, even if this Domestic Use was added in 1975, which is less likely, it appears that 42-1426 allows for the enlargement of the existing Use. To the best of our knowledge this is a lawfully appropriated Beneficial Use Water Right that has existed as long as we can recall and it continues today. As such it should be referred to the court for decree. The extent of the use for this dwelling is the amount prescribed and allotted in 42-111 Domestic Use (.04 CFS up to 13,000 GPD) with a Priority date of 1/1/75.

Here I describe three independent diversions that were in use in 1965, 1967, 1970, and a 4th that was added 10/1/1970 for the 1975 Cabin at the beginning of its construction. These were all separate dynamic pre-statutory systems that changed as the creek changed.

Wendell and Lorraine Earle were friends with the Zebells and acquaintances with the Heidekkers. They began vacationing at the property in 1972. Subsequently they purchased a new 1973 Chevy Suburban to travel there. We currently own it. Jani, Karen's older sister, remembers their first trip to the property in 1972. At that time, the unnamed stream provided water to the dwellings. Wendell bragged about the spring water and the fact that they would drink it from the creek. After Wendell purchased the property, he and Dan had an ongoing business friendship. That arrangement allowed Dan to continue to occupy "his cabins" and in exchange he became a caretaker of Wendell's property. That arrangement continued until Dan died in 2010. We got to know Dan well. He told us about all the various aspects of this property, including water rights and usage.

After Wendell purchased the property, Dan would set up the water systems for Wendell and Lorraine each summer. These systems were separate and functioned independently. Before this, Dan and Larry each owned 2 cabins on separate 10 acre parcels. They did not share a common diversion system. They did share a common water source (the unnamed stream / spring and its system of tributaries).

Dan and Larry were friends, neighbors and business partners. They shared water and other resources. Each had two dwellings located on separate parcels. Unfortunately, Dan and Larry have passed away, so we can't get an affidavit from them. Likewise, Wendell and Lorraine are both deceased, so we can't get a statement from them either. Robert Brody, another previous owner, who was also a developer, is deceased. I believe Pack River Properties was dissolved. Most of the people with first hand knowledge of this property, before 1972, are gone. However, my wife, her sister, and I have more than 50 years of first and second hand knowledge. In addition, we have access to Wendell's property records, which are plentiful.

Our 65 acres consists of 25 acres on 3-parcels in SWSW and 40 acres on 1-parcel in NWSW. The 25 acres are divided into 1(5-acre parcel) and 2(10-acre parcels). Wendell and Lorraine Earle purchased all of this property in multiple installments at different times from various people, including Dan Zebell, Lawrence Heidekker, Stephen Wagner and Robert Brody.. Dan and Larry owned 1/2 interests in the property. Their cabins and water usages were on separate parcels. This is relevant because it is my understanding that water rights attach to parcels and uses. In this case we have 4 beneficial use water rights on 2 parcels attached to 4 houses. I believe Dan acquired the entire 65 acres from Pack River Properties. The assessment record shows that Pack River acquired it from the US Government, Dec 31, 1899. Pack River Properties was a timber company. They likely appropriated significant amounts of water on this property, for the beneficial use of Forest Practices, dating back to 12/31/1899. Based on this perhaps our Forest Practice Use should have a Priority of 1899?

The two cabins owned by Dan were on a 10 acre parcel NWSWSW. The 2 cabins owned by Larry were on a different 10 acre parcel W2E2SWSW. The irrigated 1 acre farm is on a third 5 acre parcel N2SWSWSW. All of these are on RP58N04W205401A 65 acres.

This land is currently known as RP58N04W205401. It is owned by my wife Karen Hawley. Her parents, Wendell and Lorraine Earle, used the property for Forest Practice, livestock, poultry, agricultural and Domestic Purposes, including recreation, as did the previous owners. Wendell and Lorraine placed the property in trust in 2007 (deed 743063). Karen took possession of it in 2021 (deed 984879).

The water on this property has long been used for forest practice and timber management (permit 92813E), farming, agricultural irrigation, stock water and domestic uses for dwellings including garden/yard irrigation and recreation. Abundant evidence of this remains on the property. For example, tree stumps from logging and timber management, remnants of barbed wire fencing for livestock management are embedded deep into the trees throughout the forest. Remains of old logging equipment, irrigation, agricultural, and

farming equipment exist on the property as well. And of course, multiple dwellings and outbuildings are a witness to their long established domestic uses. All these testify to the historic and beneficial uses for appropriated waters on this property. The historic tax classification has been timber management, while concurrently being used for residential and recreational purposes. The owners that I know of, were all engaged in Timber Practices, among other things. Current tax class is 534 residential improvement on cat 12 rural residential tract. This is not a subdivision, no are there

The unnamed creek/spring originates in the national forest and sinks on the property as described in 97-7102 field investigation. I would estimate the maximum flow of this creek in summer to be 60 GPM, not 0.5 CFS (224 GPM) as Tom King estimated. Most of this water has been appropriated and put to beneficial use on this property. What isn't used sinks on the land. The creek freezes or dries up in the winter, therefore it does not support aquatic life but our pond does, including native trout, turtles and frogs etc. In addition, we have multiple sources of private and diffused waters, including other ponds, one being about 2 acres in size, springs, pools, artesian wells and wetlands. All of these waters sink on our property and all of these waters, except the unnamed creek, originate on our property. These abundant private waters have long been used for forest practice, wildlife habitats, aesthetics, aquatic life and recreational purposes. The "unnamed" stream system is not just one channel, but rather multiple small tributaries, channels, springs, pools, artesian wells and wetlands all of which sink on the property. Most of it is private and diffused. See attached parcel use location drawing.

It is my understanding that we don't need a permit to use the private and diffused waters on our lands and that these private waters cannot be appropriated by others, per 14-212 and IDWR memorandum #11. However, if a permit for these will help prevent our private waters from being taken from us, or if we risk losing our priority date, then we want to acquire a permit for our private waters by adjudication or otherwise. That said, this letter and our current applications are focused on the adjudication of appropriated water from the unnamed stream and put to beneficial use in our dwellings, and the continuation of 97-7102 as licensed. This describes our intent to claim the four beneficial use appropriations as small D&S water rights for the four cabins.

Our notice of claim (97-9078) was intended to adjudicate our Beneficial Use Water Right claim of 0.1 CFS (44.83 GPM) for Domestic Use in the 4 dwellings, which is the recommended allotment by IDWR for 4 dwellings. Perhaps the recommended amount of 0.04 CFS each x 4 = 0.16 CFS would be more appropriate? Each dwelling has a tap which provides about 11-gpm (11x4=44 gpm) via gravity flow. This amount roughly doubles when pumped. I have no idea how that translated into .02 CFS on our application. It was not our intention to underclaim the diversion rate for 97-7102 or 98-9078. I do not know how that happened. Our apologies, we are new to this process. This describes 4 separate domestic use systems, each having its own tap (diversion) on the un-named stream which we incorrectly attempted to claim on one claim form. This is not a shared system.

To that end, it appears that the Beneficial Uses Water Rights for our dwellings qualify for adjudication and decree. Perhaps all of these should be adjudicated collectively under claim 97-9078 as summited or perhaps they should be adjudicated separately on different claim forms, if there is a limitation of one right per form?

We are realizing that our combined claim 97-9078 was the wrong format to perfect the 4 distinct beneficial use water rights via adjudication. Shortly after this letter we amended that claim to split it into 4 claims.

You expressed concern that existing diversions (4 distinct cabin diversions 97-9078) for the Domestic Beneficial Use Water Rights (plural) were not noted in field report 97-7102. I am not sure why this is a concern, but it is easily explained. The 65 acre parcel has very thick vegetation. In mid September it would have been difficult to see the tiny creek and the small diversion dam (beaver pond 1975-1977) because the forest and foliage is exceptionally dense. The grass, foliage and shrubbery grows 6 to 7 feet, making it difficult to walk through and hard to see anything. It has always been a challenge for me to find the diversion, (for the cabin we used) and I know where to look. If Dan did not show it to the inspector, it is unlikely that he would have seen it. Dan had no obligation or reason to do so. The new diversions and Uses proposed in 97-7102 were unrelated to the existing diversions (4 distinct pipes and pumps) and beneficial uses (4-cabins) that were already legally established for the houses (4-cabins). On the other hand, if the preexisting diversion (beaver pond) was observed, it would have appeared to be a natural pool in the stream. The field inspector was looking for a POD for the pond and possibly a POD for the 1-acre garden. He was not looking for a pre-existing POD or POU relating to already established Constitutional Water Rights (plural) and Uses (plural) in the cabins (plural). Tom King walked the property in 1977 and 1981. He, or another official reviewing this claim, appears to have drawn 2 PODs and 2 POUs. The 2-PODs appear to be a new ditch to the pond (yes) and the other was the pre-existing diversion for the cabins (not likely) or perhaps the mobile pump diversion he describes (yes)? Dan identifies the new diversion system on his application for 97-7102 as the pond and a 4-hp pump. Tom describes the second diversion in Dan's new system as a 3-hp gas "portable pump moved to various points along the stream." (97-7102 has 2 POD's) It should be noted that a 3-hp gas pump produces 80-100 GPM and a 4-hp gas pump produces 145-160 GPM. However, Tom describes this pump as delivering only 9-GPM to the irrigation system? A 1/2 hp pump could have easily done that. Where

was the other 70-90 GPM going, that this pump was producing? (The following speculates about where the other 90% capacity of the portable pump diversion went) Perhaps that capacity was for the 4 preexisting Domestic Uses (the field report says the pump supplied 97-7102's 1-acre garden). The 2 POU's drawn, appear to be Dan's pond and his 1-acre farm/garden. Perhaps the field investigator observed both (sets of) diversions (97-7102 and 97-9078) and thought nothing of it, because one of them was a pre-existing exempt system (97-9078) that already had legally established "Historic" "Constitutional Water Rights," (plural) which were unrelated to 97-7102's new diversion and Use?(not likely) Or perhaps he thought the domestic diversion (beaver pond or pool) was only for the irrigated land and pump? Or perhaps, he simply did not see it (yes-most likely)? Or perhaps having full knowledge of it, Tom excluded it from the 97-7102 report, because this current application for permit and license process was for new use water rights only, and this report was not the correct venue to note or refer existing use claims for adjudication decree (not likely). Or perhaps some other combination of reasons (perhaps)? We can only speculate as to why it was not mentioned in the field report. What we do know, is that the preexisting diversion and use was in existence long before Tom's unrelated field report and investigation.

This protracted speculation ponders why the field investigator did not describe the 4 pre-existing diversions, how it would have been impossible for him to stumble upon them and where the pump's water was being used. I attempt to describe the changing diversion configuration for the 4 cabins as they likely existed at the time of the field investigations in 1977 and 1981. In 1976 or 1977 there was a shared pond, in 1981 there wasn't. I describe the "existing diversions" "for the houses" as "4 preexisting domestic uses" and that if they were observed "it would have appeared to be a natural pool in the stream." These were dynamic systems that changed as the stream changed. In 1977, IDWR field inspector described 2 beaver ponds on the unnamed creek. One of the pools/ponds described as a diversion was likely a 3rd beaver pond upstream from those? The pond was a short lived "diversion" shared by the cabins at different times with different diversion pipes that functioned independently. This describes separate systems using the same source, at a specific point in time. It is not describing a one system with a common diversion.

It should be noted that the water distribution pipes and or pumps for the existing system (4 distinct cabins and diversions) were not always connected. These were typically removed when the property was not in use, because they could be stolen or damaged by flooding or freezing, and oddly enough, bears like chewing on the pipes which creates a maintenance nightmare. Leaving them out meant extensive repairs next season. It is quite possible that the diversion system was not connected at the time of field inspection and could not have been observed or noted. Finally, grizzly bears, black bears, mountain lions, moose and wolves are all abundant on the property. It is a beautiful place with lots of wildlife, but it is not the kind of place that most people feel safe walking around in, for an extended length of time, looking for diversions.

The diversions typically consisted of a pipe in a pool of water (natural dam or spring) and a pump depending on the location. These were set up and removed annually. This is not something the field investigator would have seen unless, the cabins were in use and the water systems were set up and the inspector was then escorted to the various remote POD locations. See attached parcel location map. The Earle's kept detailed records of their trips to Idaho. They were not there when IDWR did their field inspections on 9/14/81 and 8/15/1977. Therefore, their water systems were not set up during those inspections and could not have been observed. To provide some context; the Assessor that took photos of the property in 2016 could not find the cabins without a guided tour. The IDWR inspector also required a guided tour.

The assessor's documentation establishes reasonable and sufficient proof of the dates that the dwellings were constructed and thus establishes subsequent beneficial use and priority dates for the domestic uses that were appropriated for these dwellings. Assessment dates are assumed to be complete years for tax purposes. We can reasonably assume that appropriation and beneficial use of water began no later than the date of completion of construction, and more likely, it began at the onset of construction. Accordingly, reasonable appropriation dates, priority dates and beneficial use dates for these dwellings are 1/1/1965 for the D-dwelling, 1/1/1967 Dan's unlisted home that collapsed, 1/1/1970 for the 01-pole building-cabin, and 1/1/1975 priority for the 1975 02- cabin- based on appropriation being 10/01/70 and beneficial use being 1/1/75.

The 1975 cabin appropriation was 10/01/1970 with priority date of 1/1/1975 which is a pre-statutory claim.

The beneficial use for the dwellings are "domestic purposes" per 42-111. The extent of the beneficial use for each dwelling is the allotment that is prescribed in Sec 42-111.1.A & B, which is A) 1/2 acre irrigation up to 13,000 GPD or B) other uses at .04 CFS not exceeding diversion volume of 2,500 GPD or as otherwise prescribed in IDWR publication "Water Use Information" "Domestic Use Diversion Rates" for "typical in house domestic use", A) 0.04 CFS for 1-dwelling or B) 0.10 CFS for 4-dwellings. Which domestic use limitations and rights are further clarified on page 7 of Administers memorandum 67 including in-house domestic, 1/2 acre lawn and garden and pond storage. We attempted to claim 0.1 CFS (44.883 gpm) for the 4 dwellings under claim 97-9078 while leaving license 97-7102 unchanged at .04 CFS (14.9532gpm). Perhaps 0.04 CFS x 4 = 0.16 CFS (78.21 GPM) for the 4 dwellings would be more appropriate? The six POU's on three parcels, include the pond and 1-acre irrigation on 97-7102 and the 4 cabins. License 97-7201 is approved for 0.04 CFS (19.55 GPM) which supplies water to the pond and 1-acre irrigation. The preexisting diversion system provides

about 11 GPM to each house from the unnamed stream by gravity. When augmented with a 3-hp gas pump, this amount increases to about 19.5 gpm each.

The 4 cabin claims are 42-111 domestic claims. I describe 6 POU's and 6 diversions: (two diversion for 97-7102 (.04 cfs) and four diversions (.04 cfs X 4) for the four cabins. The "preexisting diversion system (currently) provides about 11 GPM to each house from the unnamed stream by gravity" and when pumped increases to about 19.5 gpm (describing one diversion for one cabin). This pre-amended version of 97-9078 attempts to claim and describe 4 water rights on one claim, which we soon discovered was not the correct format so we amended it into four separate claims.

As you suggested, we have amended 97-7102 to match the elements of the existing license. It was not our intention to underclaim the diversion rate. Our records show that we applied for 0.1CFS (44.883 GPM) in our 97-9078 claim and it was our intention to leave 97-7102 unchanged at 0.04 CFS (14.9532 GPM).

The claims have been amended.

If this information does not provide clear and convincing evidence of beneficial use, sufficient to approve our claims, **then we can provide more evidence, but that will take more time.** We are in Colorado. Unfortunately, Bonner County records before July 1986, are available only through in person search at the Clerk and Recorder's office which is located in Sand Point, Idaho. Wendell kept detailed records, so there are lots of pictures and documents that we can look through including his tax records that might show the construction date of Dan's primary cabin, or other pertinent information? Unfortunately, Wendell's records are in California, in Jani's house, and they are not well organized.

We believe this claim to be consistent with all applicable laws including Idaho's Constitution Article XV Sec 3: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied."

I apologize for the length, redundancy and any errors, we were a bit rushed to put this together. Please let us know what is the best way to proceed and what additional documentation, if any, is needed to process our claims.

Thanks for your help, and Go Broncos!

John and Karen Hawley