

Shelley M. Davis, ISB # 6788
BARKER ROSHOLT & SIMPSON LLP
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RECEIVED
FEB 28 2006
DEPARTMENT OF
WATER RESOURCES

Attorneys for Earl Warthen, Objector

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	)	Subcase Nos. 45-10480, 45-10481, 45-10502
	)	and 45-12906
	)	
	)	AFFIDAVIT OF SHELLEY M.
Case No. 39576	)	DAVIS IN SUPPORT OF EARL
	)	WARTHEN'S MOTION FOR
	)	SUMMARY JUDGMENT ON ALL
	)	CLAIMS AND WITHDRAWING
	)	OBJECTION TO SUB-CASE NO.
	)	45-10502
	)	
STATE OF IDAHO	)	
	) ss.	
County of Ada	)	

SHELLEY M. DAVIS, being first duly sworn upon oath, deposes and states as follows:

1. I am the attorney representing Earl Warthen in the above-entitled subcases, and make the following affidavit upon my personal knowledge of the facts and circumstances set forth herein below.

2. Attached hereto as Exhibit A is a true and correct copy of a November 13, 1990 letter to Loren Holmes from Norman Smyer retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

3. Attached hereto as Exhibit B is a true and correct copy of a January 10, 1986 letter to Norman Smyer from Jim Johnson retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

4. Attached hereto as Exhibit C is a true and correct copy of a May 24, 1989 letter to Loren Holmes from Rick Bollar retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

5. Attached hereto as Exhibit D is a true and correct copy of a May 23, 1989 letter to Kevin Smyer from Loren Holmes retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

6. Attached hereto as Exhibit E is a true and correct copy of an Application for Transfer of Water Right filed by Kevin Smyer May 26, 1989 retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

7. Attached hereto as Exhibit F is a true and correct copy of the *Wood v. Stokes* decree entered into evidence in the 1991 transfer proceedings, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

8. Attached hereto as Exhibit G is a true and correct copy of a June 16, 1989 letter to Loren Holmes from Mark Ingram, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

9. Attached hereto as Exhibit H are true and correct copies of additional miscellaneous documents prepared or submitted in connection with the Kevin Smyer's

Application for Transfer retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

10. Attached hereto as Exhibit I is a true and correct copy of a December 8, 1989 memorandum from Lauren Holmes to file number 45-292 regarding the outcome of the pre-hearing conference held November 15, 1989, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

11. Attached hereto as Exhibit J is a true and correct copy of a January 8, 1990 letter to Loren Holmes from Rick Bollar, a notice of hearing on the Application for Transfer setting the hearing for February 15, 1990 and a list of attendees at the February 15, 1990 hearing, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

12. Attached hereto as Exhibit K is a true and correct copy of an undated substituted Application for Transfer of Water Right submitted by Kevin Smyer, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

13. Attached hereto as Exhibit L is a true and correct copy of a Protest filed by Earl Warthen on June 1, 1990, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

14. Attached hereto as Exhibit M is a true and correct copy of a May 25, 1990 memorandum from Gary Spackman to Loren Holmes regarding the new Kevin Smyer Transfer, Numbered 3693 containing handwritten notes, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

15. Attached hereto as Exhibit N is a true and correct copy of the list of attendees at the November 13, 1990 hearing on the Kevin Smyer's Application for

Transfer of Water Right 45-292, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

16. Attached hereto as Exhibit O is a true and correct copy of the Department of Water Resources Proposed Memorandum Decision and Order dated January 14, 1991, authored by Gary Spackman, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

17. Attached hereto as Exhibit P is a true and correct copy the Department of Water Resources Order Adopting Proposed Memorandum Decision and Order, dated March 1, 1991 and signed by R. Keith Higginson, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

18. Attached hereto as Exhibit Q is a true and correct copy of a Notice of Claim filed by Kevin Smyer May 9, 1989 and assigned claim number 45-10480, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

19. Attached hereto as Exhibit R is a true and correct copy of the Amended Claim filed by Kevin Smyer August 28, 2003, for claim number 45-10480, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

20. Attached hereto as Exhibit S is a true and correct copy of Idaho Department of Water Resources recommendation for claim number 45-10480 submitted August 24, 2004, retrieved from the on-line files of the Idaho Department of Water Resources.

21. Attached hereto as Exhibit T is a true and correct copy of a Notice of Claim filed by Kevin Smyer May 9, 1989 and assigned claim number 45-10481, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

22. Attached hereto as Exhibit U is a true and correct copy of the Amended Claim filed by Kevin Smyer August 28, 2003 for claim number 45-10481, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

23. Attached hereto as Exhibit V is a true and correct copy of Idaho Department of Water Resources' recommendation for claim number 45-10481 submitted August 24, 2004, retrieved from the on-line files of the Department of Water Resources.

24. Attached hereto as Exhibit W is a true and correct copy of a Notice of Claim filed by Norman and Delores Smyer on August 17, 1999, and assigned claim number 45-12906, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

25. Attached hereto as Exhibit X is a true and correct copy of the Amended Claim filed by Norman and Delores Smyer August 7, 2003 for claim number 45-12906, retrieved from the files of the Idaho Department of Water Resources office in Twin Falls.

26. Attached hereto as Exhibit Y is a true and correct copy of the Supplemental Director's Repoert Regarding Subcase nos. 45-10480, 45-10481, 45-10502, 45-12906, and 45-13669 submitted by the Idaho Department of Water Resources February 8, 2006.

27. Attached hereto as Exhibit Z is a true and correct copy of Idaho Department of Water Resources' Recommendation for claim no. 45-12906, submitted August 24, 2004, retrieved from the on-line files of the Department of Water Resources.

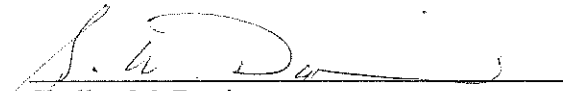
28. Attached hereto as Exhibit AA is a true and correct copy of the Affidavit of Albert B. Warthen prepared and signed July 11, 2005.

29. Attached hereto as Exhibit BB is a true and correct copy of the warranty deed transferring the Norman and Delores Smyers' property to them from Joy Solosabal and Dolores Kilmartin dated August 15, 1994.

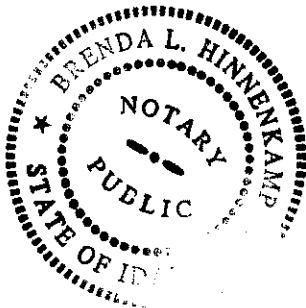
30. Attached hereto as Exhibit CC is a true and correct copy of a warranty deed transferring the Anderson property to the Solosabals and Kilmartins, dated July 25, 1979.

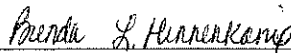
Dated this 24th day of February 2006.

BARKER ROSHOLT & SIMPSON LLP


Shelley M. Davis
Counsel for Earl Warthen

SUBSCRIBED AND SWORN to before me this 24th day of February 2006.




Notary Public for Idaho
Residing at: Borac' rd
Commission Expires: 9/2008

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 2006, I served a true and correct copy of the foregoing *Affidavit of Shelley M. Davis in Support of Earl Warthen's Motion for Summary Judgment on All Claims and Withdrawing Objection to Sub-Case No. 45-10502* on the following by U.S. Mail, postage prepaid or Facsimile:

Original hand delivered to:

Clerk
Fifth Judicial District Court
Snake River Basin Adjudication
253 3rd Ave. N.
P.O. Box 2707
Twin Falls, ID 83303-2707

Counsel for the Objector/Claimants:

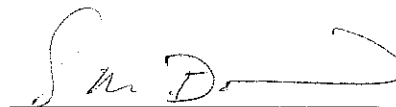
Michael Tribe
Ling, Robinson & Walker
P.O. Box 396
Rupert, ID 83350

Copies to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment and Nat'l Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449



Shelley M. Davis

Exhibit A

EXHIBIT 3

Nov. 13, 1990

Mr. Loren O. Holmes, P.E.
Southern Region Manager
222 Shoshone Street East
Twin Falls, Idaho 83301

Re: Application for change of water right No. 45-0292.

Dear Mr. Holmes,

We, the applicants purchased the property described as N.E. 1/4 Section 16, Township 12, Range 25 from the estate of the late Kate Bridger on August 20, 1985. At the time we purchased the property, water was coming onto our property through two natural channels and existing irrigation ditches. The water was spread out on high ground for several days providing irrigation on pasture land, [Howell Creek water to beneficial use].

On January 4, 1986, I, Norman Smyer, wrote a letter to the State Office of the Department of Water Resources, making an inquiry whether the property we had purchased did have a valid water right.

See copy of response dated January 6, 1986 from Mr. Jim Johnson, Water Rights Supervisor, stating that it did. That was nearly 3 and one-half years before Mr. Warthen's protest.

March 14, 1986 I met with Mr. Jim Stanton and discussed water right No. 45-0292. At that time I acquired a copy of pages

eleven and twelve of the court case, Wood vs. Stokes. Mr. Stanton instructed us to get with the watermaster and make him aware that when water was available we were interested in receiving our decree.

In April 1986, Kevin Smyer met with watermater, Jake Smith. reviewing the two pages of the court record, a copy of which was given to Mr. Smith at that time. Mr. Smith said it looked good to him and when sufficient water comes down we could irrigate with it.

June and early July 1986, sufficient quantities of water came onto our property through two natural channels and existing ditches to fill the the Right and were used to irrigate 25 to 30 acres of pasture [Howell Creek water to beneficial use.]

In 1987 a good amount of water came down early, but ran low in early June. In October 1987, Kevin contacted Mr. Smith after noting that the Creek was running a large amount of water. Mr. Smith instructed him to divert the water, which he did, through a headgate and measuring device located south of Mr. Warthen's property on property owned by Dick Anderson, down a ditch along Mr. Warthen's fence line into a natural channel, then onto our property. At that time the water was used for two or three days before the water flow decreased and then stopped.

1988 - a small amount of water came down the old channels during winter months. There was not a sufficient amount coming out during the irrigation season to make a call for water.

In April 1989 Kevin met with Donald Danner in an effort to clarify the issue of the water right. Mr. Danner was making a concerted effort to match decrees to legal descriptions and maps. Kevin gave Donald a copy of our decree. Review of the records by Mr. Danner, indicated that our decree had been included with Mahoney's decree and subsequently billed that way. Kevin asked what we needed to do to receive the water when it was available. Mr. Danner said there is the question of a means of delivery and suggested we get with Mr. Warthen and try to work something out. After review of existing ditches and old creek channels it is our belief that the point of diversion and ditch currently being used by Mr. Warthen is the diversion and ditches used by Kate Bridger to irrigate not only the twenty acres purchased by Mr. Warthen, but also to put water into the old Howell Creek channel where it co-mingled with waste water from the Anderson ranch for a distance of approximately 1330 feet, where it was diverted and used to irrigate the property we purchased from the Kate Bridger estate. Kevin spoke with Mr. Warthen concerning the possibility of sharing his point of diversion, which he refused. Mr. Warthen did suggest that if Kevin would repair a ditch on the Anderson

property, which Mr. Warthen had cut to fill a pond on his own property, we could get some water down the old channel. Kevin made the suggested repair and received some water for a few days. When water stopped inspection of the Anderson ditch revealed Mr. Warthen had cut the ditch and diverted the water into his pond, This same scenario was repeated three or four times.

Still not having settled the issue of a permanent point of diversion Kevin went to Water Resources in Twin Falls, on May 9, 1989, first to satisfy adjudication requirements, second to learn what was necessary to establish a point of diversion. During the course of establishing recorded detail with Mrs. White and subsequent conversation with Mr. Holmes about requirements needed for point of diversion change, either a misunderstanding of the question, or a misunderstanding of the answer received, Kevin came away from that meeting believing he had fulfilled necessary legal requirements to proceed with diversion and ditch. Kevin proceeded to contact Mr. Dick Anderson, to get permission to cut a ditch across his property, which he consented to. Kevin talked with J.J. McClaws of the Soil Conservation Service on May 12, 1989 to obtain specifications needed for diversion headgate and measuring device. He told Kevin to work it out with the water-master. Kevin met with Mr. Danner and discussed what would be acceptable for a headgate on May 15th. After the headgate was constructed we proceeded to install it on Howell Creek. After it

was installed we cut a ditch across Mr. Anderson's field, turned in enough water to flush out the ditch and to determine if it was a workable system, which it was. This was accomplished in one day, May 21, 1989.

On May 25, 1989, we received a letter from Mr. Rick Bollan indicating displeasure with our diversion and ditch. Again we went back to the Department of Water Resources and found we did need a formal application to relocate a point of diversion. This was applied for on May 30, 1989.

June 19, 1989, Department of Water Resources received the first protest from Mr. Warthen, stating that a diversion from Howell Creek and ditch across Mr. Anderson's property constituted a barrier to him receiving waste waters exiting the Anderson property, which would be item #1 of the list of four issues used by the Department of Water Resources to resolve protests. Mr. Warthen's protest went on to include that applicant did not have a right to the waters of Howell Creek by reason of nonuse and that said right has been forfeited or abandoned by virtue of nonuse for eighteen years.

The resolution to the protest that came out of a hearing conducted by the Dept. of Water Resources on February 15, 1990 was that applicant could use the diversion and ditch for the

irrigation season 1990 if any water was available for that decree, that applicant re-apply for another point of diversion below the property of Mr. Warthen on property owned by applicant.

The matter of abandonment and forfeiture was deferred to a later date.

Kevin reapplied March 15, 1990 to establish a point of diversion below Mr. Warthen's property on property owned by applicant.

On June 1, 1990 the Dept. of Water Resources received another protest from Mr. Warthen, this time with focus on the issue that the water right had been forfeited or abandoned by applicant by reason of nonuse, that water had not been called for, and that a method of delivery had not been established through a headgate and measuring device.

In applying the four issues used by the Dept. of Water Resources I cannot find a basis for Mr. Warthen's protest, as the water would be diverted below his property and has a later priority date than his, so it would have no effect on his ability to receive his decreed water.

In reference to the property not having been irrigated for eighteen years, previous information included in this letter

along with a notarized statement from Bennie Smyer would refute that claim, further if you will replay the testimony of the hearing of February 15, 1990, you will hear Mr. Warthen's statement that our property had been irrigated by waters from Howell Creek.

If we have failed to any degree to acquire the water that we are entitled to, it has not been from lack of trying, instead we believe records have been mishandled between watermaster, i.e. Jake Smith, and the Dept. of Water Resources, that watermasters past and present, have not always received as much information as they need to perform their task. We do not feel we should be held accountable for mistakes made by others.

Having reviewed some court cases that seem pertinent to this situation we find the following quotes. Most have reference to Idaho Code 42-222 and were found in court case Jenkins vs State Department of Water Resources.

1. Intent to abandon a water right must be proved by clear and convincing evidence of unequivocal acts; mere nonuse of water right standing alone is not sufficient for per se abandonment.
2. Where record showed only nonuse of water right, disclosing no intent to abandon, holder did not loose his water right by common

law abandonment.

3. If use of water right is resumed after the five year period, but before any third parties make a claim in the water, then the courts will decline to declare a forfeiture.

4. Forfeitures are not favored, and clear and convincing proof is required to support a forfeiture.

In closing we know that Howell Creek water has been applied to this property since 1985. We know that Kate Bridger and Reed Shaw, her hired man, kept water that came onto this property through natural channels diverted and spread out causing land to be irrigated most of the years she had the property. We don't know if Mrs. Bridger knew she had a decreed water right, or when the decree was misplaced, it may go back to the court document of Wood vs Stokes, but that is through no fault of ours. We believe a window of opportunity should exist for us, to re-establish without harassment of Mr. Warthen, the decree appurtenant to the property. We are willing to install on our property a diversion that meets all of the specifications required and will cooperate fully with the watermaster. cooperate fully with the watermaster.

With Sincere regards,

Norman Smyer
Kevin Smyer

Exhibit B



State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

~~Application~~
EK 1

January 10, 1986

Norman Smyer
Rt. 1, Box 2
Declo, ID 83323

Dear Mr. Smyer:

Pursuant to your letter received January 6, 1986, the Department records shows that decreed water right No. 45-0292 is appurtenant to the property. The source of water identified under this right is from Howell Creek.

Enclosed is an Application for Permit form with instructions. You should fill it out and submit it to our office located at 1041 Blue Lakes Blvd. N., Twin Falls, 83301. There is additional information you should be aware of before filing the application. We recommend that you contact the Twin Falls office prior to filing.

Lastly, groundwater is water located below the surface of the ground. The water which seeps to the surface is considered surfact water.

If you have any further questions, please let us know.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:sc

Enclosures

Exhibit C

LING, NIELSEN & ROBINSON

ROGER D. LING
ROBERT M. NIELSEN
BRENT T. ROBINSON
DAVID W. HALEY
MARK A. INGRAM
RICK BOLLAR

ATTORNEYS AT LAW
616 "H" STREET
P. O. BOX 396
RUPERT, IDAHO 83350

AREA CODE 208
TELEPHONE 436-4717
FAX 436-6804

May 24, 1989

RECEIVED

MAY 25 1989

Department of Water Resources
Southern Region Office

Loren Holmes
Department of Water Resources
2148 4th Avenue East
Twin Falls, Idaho 83301

RE: Kevin Smyers - Water Diversion

Dear Mr. Holmes:

This will confirm our conversation of May 22nd regarding the diversion by Kevin Smyers of certain waste water on the property of Dick Anderson South of Albion, in Cassia County. As I indicated in our conversation, my client, Earl Warthen, is concerned that the Department be apprised of this change in a point of diversion. Mr. Smyers accomplished the diversion by taking certain equipment to the property of Dick Anderson on May 21st, installing a head gate and appropriating water through an old ditch. As I indicated, this diversion was accomplished with no measuring device, without the supervision of the watermaster, and, on information and belief, with no application to the Department for a change in the point of diversion.

As also indicated, it is the contention of Mr. Warthen that the water right on the Smyers property has been abandoned for an adequate period of time to preclude the assertion of the prior water right by the current land owner.

The forfeiture and/or abandonment of the water right are issues which Mr. Warthen is prepared to litigate in the event that Kevin Smyers or Norman Smyers continue to assert their entitlement to said water right.

I appreciate your assurance that the Department will review the conduct of Mr. Smyers in appropriation of the aforementioned water through Donald Danner, Watermaster in the Albion area. This will serve as notice of Mr. Wathern's intentions in this regard. Provide notice of

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APR 18 1990

Loren Holmes
May 24, 1989
Page 2

Mr. Warthen's representation by this firm. This will also formalize the Department's notice of the illegal diversion by Mr. Smyers of certain water from a point of diversion located on the property of Dick Anderson.

Thank you for your attention in this matter.

Yours very truly,

A handwritten signature in dark ink, appearing to read "R. Bollar", with a horizontal line extending to the right.

Rick Bollar

RB:pc

cc: Earl Warthen

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APR 18 1990

Exhibit D



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 2148 4th Ave. East, Twin Falls, Idaho 83301 (208) 734-3578

CECIL D. ANDRUS
Governor

R. KEITH HIGGINSON
Director

23-May-1989

Kevin Smyer
P.O. Box 482
Albion, ID 83311

Dear Mr. Smyer:

Enclosed is an application for transfer I have drafted based on available information and our conversation.

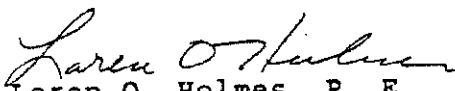
The application, when signed and filed with this office with the statutory filing fee of \$50.00, will start the process of legally establishing the point of diversion at your recently installed headgate on Howell Creek.

Please be advised that the watermaster cannot deliver water under the right until a determination has been made on the transfer.

There are a couple of items on the transfer form that need your completion prior to filing. These are marked and flagged.

If you have any questions regarding the application or need any further assistance, please let me know.

Very Truly yours,


Loren O. Holmes, P. E.
Southern Region Manager

CC: Watermaster

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APR 18 1990

Exhibit E

Page 1 of 6STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. _____

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1Name of applicant Kevin Smyet Phone 654-2310
Post Office address P.O. Box 482 Albion, ID 83311

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 To establish diversion point & place of use as described in SRPA claim A46-00292 to obtain unmastered delivery of the right.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF AFTER THE REQUESTED CHANGE

1. Right Number 46-0292 Priority 3/31/1881 Amount (cfs/ac-ft) .24 Nature of Use irrigation Period of Use 3/15 to 11/15
2. Total amount of water being transferred .24 cubic feet per second and/or _____ acre-feet per annum.
3. Source of water Howell Creek tributary to Marion Creek
4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
	NW	SE	SW	16	12S	25E	Cassia	

5. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
12S	25E	16		10	20														30

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APR 18 1990

Total acres 30

PART 1

6. General Information:

a. Description of diversion system Headgate & Ditch

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ Yes X 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; This place of use is the irrigable land within the old Mahoney property described in the water right.

d. Remarks:

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____

And said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, 19 _____.

RECORDED

APR 18 1990

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

1. Right evidenced by:

- a. Decree No. 45-0292 Decreed to B. F. Mahoney
in case of R. L. Wood et al vs. William Stokes et al
dated 2/21/1892 in 4th Judicial Dist. county of Cassia
- 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 a 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 Howell Creek tributary to Marsh Creek

4. Date or priority 3/31/1881

5. Water is used for the following purpose:

amount 0.24 cfs for Irrigation purposes from 3/15 to 11/15
(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 0.24 cubic feet per second and/or _____ acre-feet per annum.

7. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
					12S	25E	Cassia	Not Specified in Decree

8. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
12S	25E	16	X	X	X	X													

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APR 18 1990

Total acres _____

9. Describe any other water rights used for the same purpose as described above _____

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?

* no 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	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

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	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

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APR 18 1990

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 rights described in part 1. Clearly depict the land by section, township and range number.



PART 3

B. CHANGES IN NATURE OF USE

1	New Nature of Use	Amount (cfs/ac-ft)	Hours/days/year	Period of Use
				to
				to

2. Quantity and quality of return flows and location of discharge:

3. Describe effects on other water uses resulting from the proposed change:

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.

Kevin Smyer

(Signature of Applicant)

Subscribed and sworn to before me this

26th

day of

May, 19 89Linda M. Leach

(Notary Public)

Notary Public, residing at Adrian, Michigan

My commission expires

My Commission Expires September 18, 1990

FOR DEPARTMENT USE ONLY

Transfer contains 6 pages and 2 attachmentsReceived by IC

Date

5/30/89Protest filed by Earl Warthen

Prelim. check by

Fee

5/25/89Received by LRP

Date

5-30-89# 5007384Published in So. ID. Press

Copies of protest forwarded by

Pub. dates

9/7 & 9/14/89

Hearing held by

Date

Watermaster recommendation requested on

8/25/89

Recommended for

☐

approval

☐

denial

rec'd.

9/6/89

by

Copy of transfer sent to lien holder

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APR 18 1990

Exhibit F

IN THE DISTRICT COURT

45-G

OF THE FOURTH JUDICIAL DISTRICT OF ILLINOIS, IN AND FOR

CASSIA COUNTY.

RECEIVED
MAR 28 1960

Department of Information

R.L. Wood,
T.M. Gray,
John Bridger,
W.A. Harroun,
S.E. Gwin,
J.W. Lamoreaux,
Geo. H. Weldon,
Josiah Bridger,
T. A. Starrh,
W. Haller,
Minnie Gwin,
W. Sears,
Chas. Cobb,
Plaintiffs.

-VS-

William Stokes,	Jas. Mahoney,	F.P. Williams,
J. W. Nelson,	E. Mc'Coy,	Joseph Holbrook,
Geo. Gordon,	E. A. Nutt,	L. Germer,
S. J. Nutt,	C. L. Hawkins,	F. Lavitt,
Wm. Morris,	John Chatburn,	J. W. Snodgrass,
Jonas Chatburn,	D. I. Stark,	E. C. Miller,
W. E. Holmes,	M. G. Gibson,	J. S. Lewis,
Martha Snodgrass,	S. P. Featherman,	W. B. Tanner,
S. E. Miller,	Joseph Brim,	E. Harper,
C. M. Gray,	E. T. Harper,	A. H. Williams,
John Clark,	L. Loveland,	Dora Quin,
R. Harper,	E. J. Starks,	E. S. Robbins,
D. Camp,	E. T. Robbins,	A. L. Brim,
Wm. Quin,	J. H. Phippen,	H. S. Hampton,
H. C. Potter,	E. K. Rice,	Mahala Wright,
Geo. Brim,	C. T. Rathbone,	T. C. Dalton,
Mattie Hampton,	E. F. Mahoney,	Geo. Cook,
R. B. Wright,	Ira C. Parke,	J. A. Lewis,
Geo. Gyles,	Thos. Horcely,	Alva Lewis,
C. L. Albertson,	Abbie Houck,	David Walker,
Geo. Houck,	E. W. Lewis,	Wm. Dalton,
John Bennett,	Henry Lish,	F. Cobb,
Hy Lish,	Mary E. Horton,	Dora Parke,
A. D. Norton,	Andrew H. Parke,	Ethel Parke,
Eliza Parke,	Stephen Parke,	
John Parke,	C. L. Stokes,	
J. B. Stokes,		

Defendants.

FINDINGS OF FACT

AND

CONCLUSIONS OF LAW.

FEB 10 1962

Department of Information
Cassia County, Idaho

XXVI.

45-0269 That the defendant, A. B. Williams, on June 30th, A.D. 1881, appropriated 40 inches of the waters of Land Creek, a tributary of Marsh Creek, for the purpose of irrigating the following lands, to-wit, the S.1/2 of the N.W.1/4 and the N.1/2 of the S.W.1/4 of Sec. 23, Tp.12, S.R.24 E., and since that time has continuously and each year used said waters upon said lands for the purpose of irrigation and for domestic purposes except when interrupted by the wrongful acts of others.-

XXVII.

45-0270 That the defendant B. F. Mahoney, on May 31st, A.D. 1881, appropriated 40 inches of the waters of Howell Creek, a tributary of Marsh Creek, for the purpose of irrigating the following lands, to-wit; the S.1/2 of the S.W.1/4 and the S.W.1/4 of the S.E.1/4 of Sec. 9, Tp.12, S.R.25 E. and since that time has continuously and each year used said waters upon said lands for the purpose of irrigation and for domestic purposes except when interrupted by the wrongful acts of other parties.

XXVIII.

45-0271 That the defendant, Margaret A. Mahoney, on May 1st, 1881, appropriated 25 inches of the waters of Howell Creek, a tributary of Marsh Creek, for the purpose of irrigating the following lands, to-wit, the N.1/2 of the S.W.1/4 of Sec. 9, Tp.12, S.R.25 E. and since that time has continuously and each year used said water upon said lands for the purpose of irrigation and for domestic purposes except when interrupted by the wrongful acts of others.

XXIX.

45-0272 That the defendant B.F. Mahoney, on March 31st, 1881, appropriated 12 inches of the waters of Howell Creek, a tributary of Marsh Creek, (if any) for the purpose of irrigating the following lands,

EX'hibit #4

16

to wit, the N.E.1/4 of Sec. 12, Tp. 12, S. R. 25 E. and since that time and each year has used said waters upon said lands for the purpose of irrigation and for domestic purposes, except when interrupted by the wrongful acts of others.

XXX.

45-0213 That the defendant, Dora A. Quinn, on the 31st of March, A. D. 1882, appropriated 25 inches of the waters of Hotell Creek, a tributary of Marsh Creek, for the purpose of irrigating the following lands, to-wit, the W.1/2 of the N.W.1/4 and the W.1/2 of the S.W.1/4 of Sec. 15, Tp. 12, S. R. 25 E. and since that time continuously and each year has used said waters upon said land for the purpose of irrigation and for domestic purposes except when interrupted by the wrongful acts of others.

XXXI.

45-0214 That defendant George Giles, and defendant Andrew Parke as Administrator of the Estate of John Parke, deceased, since the 31st day of March A. D. 1888, by means of a reservoir constructed at Lake Cleveland, and a ditch from said lake to Marsh Creek, have during the irrigating season of each year, turned into and added to the waters of said creek 240 inches of water under a four inch pressure, and have during said time as aforesaid diverted from said stream and used said waters for irrigating the lands herein found to belong to said parties respectively, in the proportion of 75 inches under a four inch pressure diverted by said Giles to irrigate the W.1/2 of the S.E.1/4 and the E.1/2 of the S.W.1/4 of Sec. 1, Tp. 12, S. R. 24 E., and 150 inches under a four inch pressure diverted by said Andrew Parke as Administrator of the Estate of John Parke, deceased, to irrigate the E.1/2 of the N.E.1/4 of

Exhibit G

LING, NIELSEN & ROBINSON

ROGER D. LING
ROBERT M. NIELSEN
BRENT T. ROBINSON
DAVID W. HALEY
MARK A. INGRAM
RICK BOLLAR

ATTORNEYS AT LAW
615 "H" STREET
P. O. BOX 396
RUPERT, IDAHO 83350

AREA CODE 208
TELEPHONE 436-4717
FAX 436-6804

June 16, 1989

RECEIVED

JUN 19 1989

Department of Water Resources
Southern Region Office

Loren O. Holmes
Department of Water Resources
2148 4th Avenue East
Twin Falls, Idaho 83301

RE: In the Matter of the Application of Kevin Smyers
for Change in Point of Diversion
Adjudication Claim No. 45-00292

Dear Loren:

I have enclosed herein a Protest to the above referred to
Application on behalf of Earl Warthen.

Very truly yours,


Mark A. Ingram

nk
Enclosure

MICROFILMED

APR 18 1990

MARK A. INGRAM
LING, NIELSEN AND ROBINSON
Attorneys at Law
P.O. Box 396
Rupert, Idaho 83350
Telephone: 436-4717
Attorneys for Protestant

RECEIVED

JUN 19 1989

Department of Water Resources
Southern Region Office

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

In the Matter of the	)	Adjudication
Application of Kevin Smyers	)	Claim No. 45-00292
for Change in Point of	)	
Diversion	)	<u>PROTEST</u>

COMES NOW Earl Warthen, by and through his counsel Mark A. Ingram of the firm Ling, Nielsen and Robinson, and protests that certain Application for Change of Point of Diversion with respect to Adjudication Claim No. 45-00292 for the following reasons:

1. The applicant's proposed changed point of diversion requires that a ditch be opened across lands belonging to Mr. Dick Anderson. These lands generally are an elevation above the lands of the protestant. Protestant has claims to waste waters arising on the above described land owned by Dick Anderson pursuant to Claim No. A45-10502 and Permit No. 45-7538. The above described ditch has the effect of intercepting the waste waters rightfully claimed by protestant.

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APR 18 1990

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2. The applicant bases his change of diversion Application upon Water Right No. 45-0292, a decreed right pursuant to the case of Wood v. Stokes. Such water right has been forfeited and abandoned by the applicant for reasons of nonuse. To protestant's knowledge, waters claimed pursuant to this right have not been applied to beneficial use for at least eighteen years, and probably prior to that.

DATED this 16th day of June, 1989.

LING, NIELSEN AND ROBINSON

By

Mark A. Ingram
Mark A. Ingram

Attorney for Protestant

MICROFILMED

APR 18 1990

Exhibit H

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

NO.45-0292

Notice is hereby given that Kevin Smyer of Albion, ID has applied to the Department of Water Resources to change the following described water right(s) pursuant to Section 42-222 of the IDAHO CODE.

Water right No. 45-0292

Basis of right: Decreed to B. F. Mahoney in case of R. L. Wood et al vs. William Stokes et al dated 2/21/1892 in Fourth Judicial District Court, Cassia County.

Source: Howell Creek tributary to Marsh Creek

Priority Date: 3/31/1881

Amount of water: .24 cfs

Water use: Irrigation

Point(s) of diversion: Not specified in decree.

Place of use: Unspecified acres within NE1/4, S16, T12S, R25E.

TO BE CHANGED AS FOLLOWS

Water right No.: 45-0292

Amount: .24 cfs

Total amount being transferred: .24 cfs

Source: Howell Creek tributary to Marsh Creek

Point of diversion: NW1/4SE1/4SW1/4, S16, T12S, R25E, Cassia County.

Place of use: 30 acres within W1/2NE1/4, S16, T12S, R25E.

Any protest against approval of the application for transfer must be filed with the Department of Water Resources, 2148 4th Ave East, Twin Falls, ID 83301 on or before September 25, 1989.

R. Keith Higginson, Director

Published in South Idaho Press on 9/7 & 9/14/89.

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APR 18 1990

RECEIVED

SEP 6 1989

APPLICATION FOR TRANSFER OF WATER RIGHT

NO. 45-0292

Department of Water Resources
Southern Region Office

RECOMMENDATION OF WATERMASTER

I, DONALD B. DANNER, watermaster of ALBION,
of Water District No. 45-F, County of CASSIA, State of Idaho,
whose address is Box 116
have read the attached copy of the application for transfer of water right for _____
KEVIN SMYER, and to the best of my knowledge believe the
(name)
application to be true.

A. I hereby endorse the above numbered Application for Transfer and recommend
that the Director of the Department of Water Resources approve the transfer subject to
the following conditions: That an approved measuring
device be installed in conjunction with
the existing headgate. (over)

OR

B. I do not endorse approval of the above numbered Application for Transfer as re-
quested for the following reasons: _____

Dated at Albion, Idaho, this 5 day of Sept 19 89.

Donald B. Danner
(signature)

MICROFILMED

APR 18 1990

my recommendation to approve this application is based upon what I see as an established water right (45-0292) on the subject described land. To my knowledge no court action has been taken that would transfer or delete this right. Based upon the above, I believe that Mr. Smyer is entitled to the subject 12" of water from Howell creek, and the establishment of an approved diversion point.

I must point out in this statement, however, that I have no direct knowledge of the five or more consecutive years of non-use, asked in Part 2, item 10, page 4 of 6. It would appear that during those years when water was available, it was brought on to the subject property through delivery ditches other than those that now exist. I have noted however, that this was not an uncommon practice, on these older rights.

MICROFILMED

APR 18 1990

RECEIVED

SEP 25 1989

September 25, 1989

Department of Water Resources
Southern Region Office

Department of Water Resources
2148 4th Avenue East
Twin Falls, Idaho 83301

RE: Notice of Proposed Change of Water Right No. 45-0292

Dear Director:

Please consider this formal notice of protest in the aforementioned Application for change in the point of diversion on Howell Creek by Kevin Smyer. As your file will indicate, it is my intention that the underlying water right claimed by Mr. Smyer has been abandoned or subject to forfeiture pursuant to Section 42-222(2), Idaho Code for nonuse. That forfeiture or abandonment is assertable against Mr. Smyer and his predecessors in interest. Having occupied the property on the Howell Creek drainage for approximately seventeen years, I have personally observed failure to apply the aforementioned water to the beneficial use for which it was appropriated for a period of time far in excess of the requisite of five years required by the statute.

The aforementioned concerns regarding abandonment and forfeiture have been set forth to the Department since May 24, 1989, at which time the law firm Ling, Nielsen and Robinson was retained to express that protest to the unauthorized diversion of Howell Creek, which diversion made it impossible for me to continue to capture water for my appropriated beneficial use. My concerns at that time were expressed to both Mr. Smyer, the Department and the local watermaster.

I have since that time, and through my attorney, attempted to ascertain from the Department the nature and frequency of any beneficial use by Mr. Smyer. Currently, those inquiries have remained unanswered. I continue to maintain that the underlying water right is not available for a transfer in the point of diversion and, therefore, the current Application to the Department by Mr. Smyer is improper.

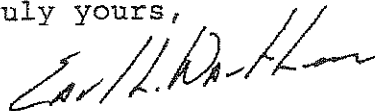
MICROFILMED

APR 18 1990

Department of Water Resources
September 25, 1989
Page 2

Notwithstanding the above basis for protest, the proposed point of diversion would encroach upon my established water right.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Earl H. Warthen", written in a cursive style.

Earl Warthen

MICROFILMED

APR 18 1990



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301 (208) 734-3578

CECIL D. ANDRUS
Governor

R. KEITH HIGGINSON
Director

October 19, 1990

Kevin Smyer
P.O. Box 482
Albion, ID 83311

Re: Application for transfer of water right No. 45-0292

Dear Mr. Smyer:

Enclosed is a copy of a protest filed against the granting of a transfer pursuant to your above referenced application. Since this matter has been the subject of a previous application involving the same parties, and a pre-hearing conference has been held, I am planning to proceed directly to scheduling a hearing with no further conference except for some preliminary time allowed on the date of the hearing unless one is requested.

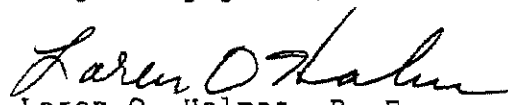
In the protest, the issue of possible forfeiture or abandonment of the water right has been raised. Although this issue is not specified in statute as bearing on an application for transfer, the courts have ruled that the Director has the authority and the duty to investigate and to rule on the issue in the case of a protested transfer.

The attachment to this letter describes the issues which the department must consider in taking action on an application for transfer. It also gives a brief description of the conference and hearing procedure followed by the department in resolving protested applications.

This office is tentatively scheduling the matter of protests for a hearing for November 13, 1990. Notices formally setting the hearing time and place will be mailed about October 30, 1990.

If you have any questions regarding this matter, please feel free to contact this office.

Very Truly yours,


Loren O. Holmes, P. E.
Southern Region Manager

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER OF WATER RIGHT
NO. 45-0292

NOTICE OF
PRE-HEARING CONFERENCE

Kevin Smyer

SOURCE: Howell Creek

Applicant

COUNTY: Cassia

Earl Warthen

Protestant

On May 30, 1989, Kevin Smyer, applicant, filed with the Department of Water Resources an application to change the point of diversion of the above captioned water right. On September 25, 1989, the Department received a protest against the approval of said application from Earl Warthen.

The Department has set the matter of protest for conference for Tuesday, November 15, 1989, at 10:00 AM, at the Albion City Hall, Albion.

The purpose of the conference is to formulate and simplify the issues, obtain admissions of fact and of documents which will avoid unnecessary proof, arrange for the exchange of proposed exhibits or prepared expert testimony prior to the hearing, limit the number of witnesses, consolidate the examination of witnesses, and advise the parties of the procedure which will be followed at any subsequent hearing.

The conference will be held in accordance with chapter 2, Title 42 of the Idaho Code and the adopted Rules of Practice and Procedure of the Department of Water Resources. Opportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved.

MICROFILMED Dated this 30 day of October, 1989.

APR 18 1990

Loren O. Holmes
Loren O. Holmes
Southern Region Manager

Exhibit I

MEMORANDUM

DATE: 08-Dec-1989

FROM: Loren Holmes *LA*

TO: File 45-0292, Kevin Smyer

SUBJECT: Outcome of pre-hearing conference on Nov. 15, 1989

This transfer application was filed at my direction to establish a point of diversion. The applicant had installed a headgate on Howell creek and requested delivery of the right by the watermaster. I instructed the watermaster not to deliver the right until a transfer had been processed because there was no evidence of past delivery of the right.

The issues raised by the protestant are:

- 1) Injury to the protestant's rights by interception of water. Applicant has constructed a ditch which is above the protestant's ditch which intercepts water running off irrigated lands.
- 2) Forfeiture through non-use. Protestant maintains that there has been no diversion of water to fill this right from the creek. Protestant maintains that even though there has been no headgate, water has flowed in natural channels to the place of use.

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APR 18 1990

Exhibit J

CREASON AND CREASON
ATTORNEYS AT LAW
614 7TH STREET
RUPERT, IDAHO 83350

H.V. CREASON 1894-1988
CHARLES H. CREASON
CHARLES H. CREASON, JR.
Rick Bollar

January 8, 1990

P.O. BOX 335
(208) 436-4704

RECEIVED

JAN 8 1990

Department of Water Resources
Southern Region Office

Loren Holmes
The Department of Water Resources
2148-4th Ave. E.
Twin Falls, ID 83301

Re: Water Right 45-0292

Dear Loren:

Pursuant to our conversation of January 5, 1990, I would ask that the hearing on the Application For Transfer of Water Right 45-0292 in the name of Kevin Smyer scheduled for January 24, 1990, be postponed. As I indicated in our conversation, this continuance is requested to allow Earl Warthen time to elect certain records which have been requested of the Department of Water Resources. These records specifically include minutes of the Water Users of District No. 45-F.

When these records are assembled and Mr. Warthen can properly go forward with his objection to the aforementioned Application, I will again request that this matter be set for hearing.

Thank you for your consideration in this regard.

Very truly yours,

CREASON, CREASON & BOLLAR


Rick Bollar

RB/tj

MAILED

JAN 18 1990

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER OF WATER RIGHT
NO. 45-0292

NOTICE OF HEARING

Kevin Smyer

SOURCE: Howell Creek

Applicant

COUNTY: Cassia

Earl Warthen

Protestant

On May 30, 1989, Kevin Smyer, applicant, filed with the Department of Water Resources an application to change the point of diversion of the above captioned water right. On September 25, 1989, the Department received a protest against the approval of said application from Earl Warthen.

A pre-hearing conference in the matter was held on November 15, 1989.

The Department has set the matter for hearing for Thursday, February 15, 1990 at 10:00 AM, at the Albion City Hall, Albion.

The hearing will be held in accordance with chapter 2, Title 42 of the Idaho Code and the adopted Rules of Practice and Procedure of the Department of Water Resources. Opportunity shall be afforded to all parties to respond and present evidence and argument on all issues involved.

Dated this 1 day of February, 1990.


Loren O. Holmes
Southern Region Manager

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APR 18 1990

APR 18 1990

Exhibit K

Page 1 of 6STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. _____

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

Name of applicant Kevin Smyer Phone 654-2310
Post Office address P.O. Box 482, Albion, ID 83311

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 Reduce P/U within original land
2. Describe the reason for the proposed changes Establish point of diversion to settle conflict with neighbor.

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
<u>45-00292</u>	<u>2-21-1881</u>	<u>0.24 cfs</u>	<u>Irrig.</u>	<u>3-15</u> to <u>11-15</u>
_____	_____	_____	_____	_____ to _____
_____	_____	_____	_____	_____ to _____
_____	_____	_____	_____	_____ to _____

2. Total amount of water being transferred 0.24 cubic feet per second and/or _____ acre-feet per annum.
3. Source of water Howell Creek tributary to Marsh Creek
4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
	NW	SW	NE	16	12S	25E	Cassia	

5. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
12S	25E	16	8	23	2														33

Total acres 33

PART 1

6. General Information:

a. Description of diversion system Headgate & ditch, gravity irrigation.

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ Yes X 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:

Land will continue to be irrigated with waste water.

d. Remarks:

This transfer replaces the previous pending transfer filed on this right.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____

And said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, 19 _____.

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

1. Right evidenced by:

- a. Decree No. 45-00292 Decreed to B. F. Mahoney
in case of R. L. Wood, ET. AL. vs. William Stokes, ET. AL.
dated 2-21-1892 in 4th District county of Cassia
- 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 a 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 Howell Creek tributary to Marsh Creek
4. Date or priority 3-31-1881

5. Water is used for the following purpose:

amount 0.24 cfs for Irrigation 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 0.24 cubic feet per second and/or _____ acre-feet per annum.

7. Point(s) of Diversion: Unknown - Not in decree

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

8. Lands irrigated or place of use: Historical P/U

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
<u>12S</u>	<u>25E</u>	<u>16</u>	<u>8</u>	<u>26</u>	<u>27</u>														<u>61</u>

Total acres 61

9. Describe any other water rights used for the same purpose as described above _____

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?

No

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	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

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	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

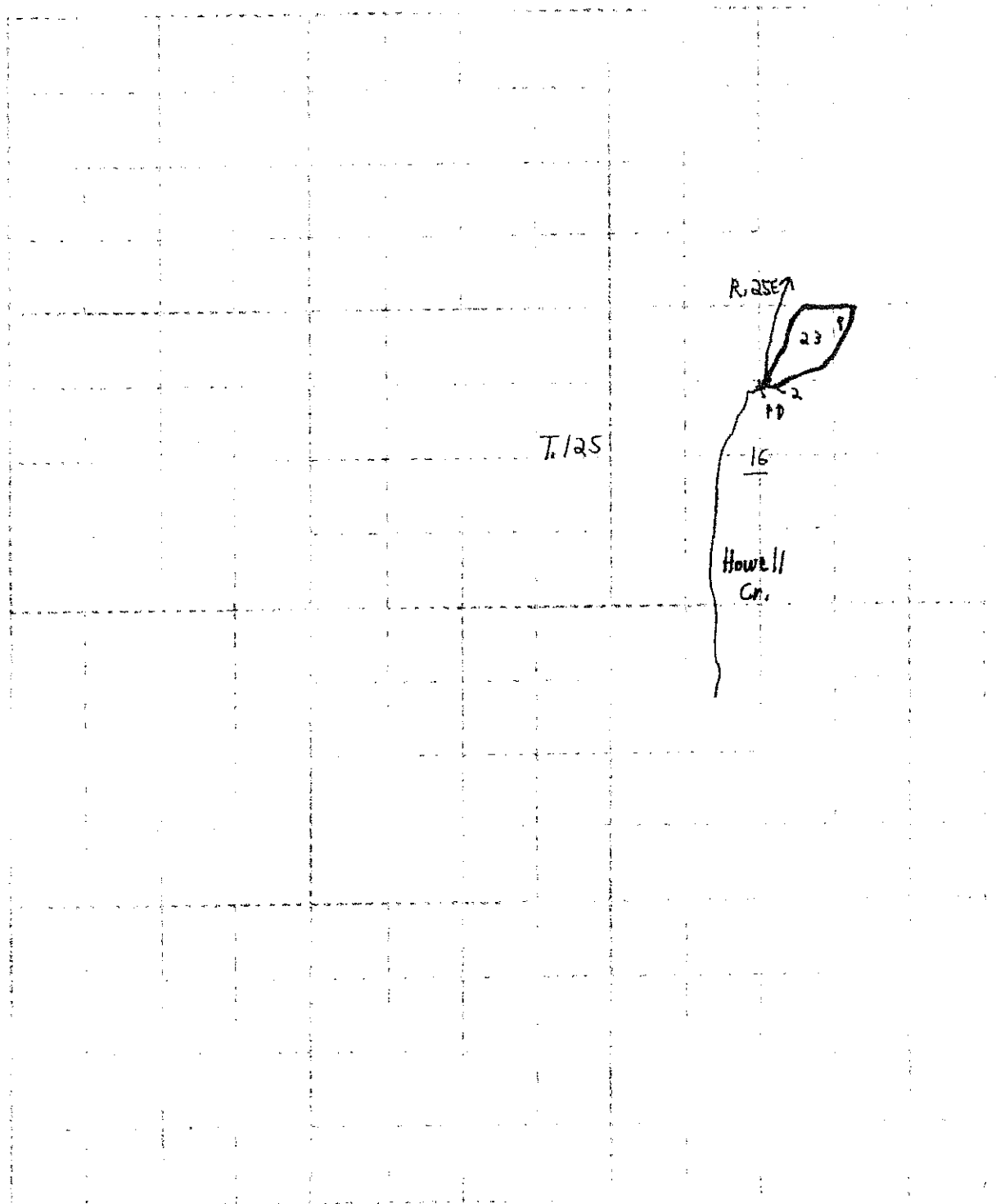
3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

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 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.

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?
No 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	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total acres _____

C. DESCRIPTION OF UNCHANGED PORTION OF RIGHT (omit if there is no change)

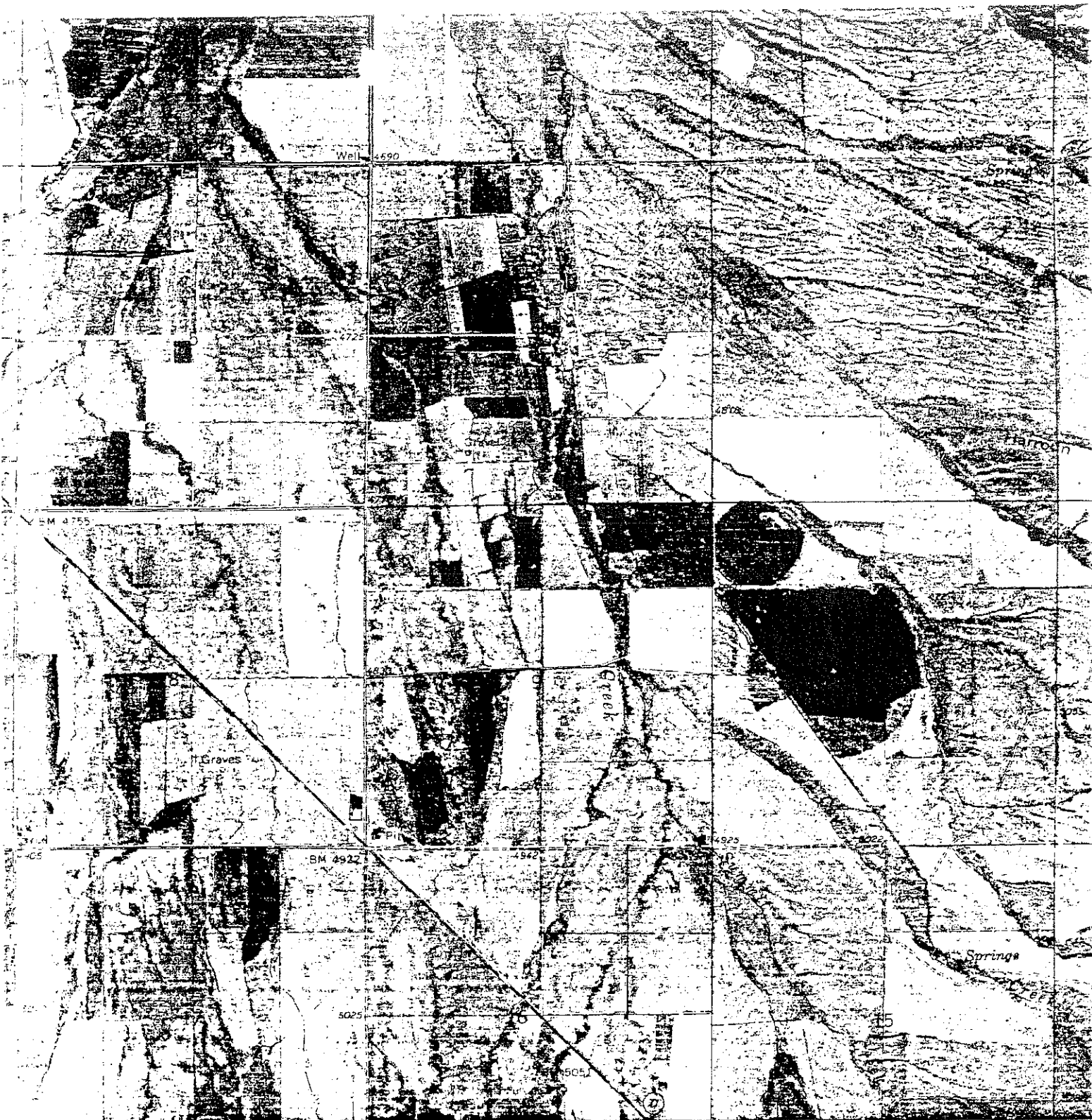
1. amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
2. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

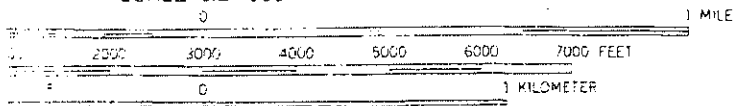
3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total acres _____



SCALE 1:24000

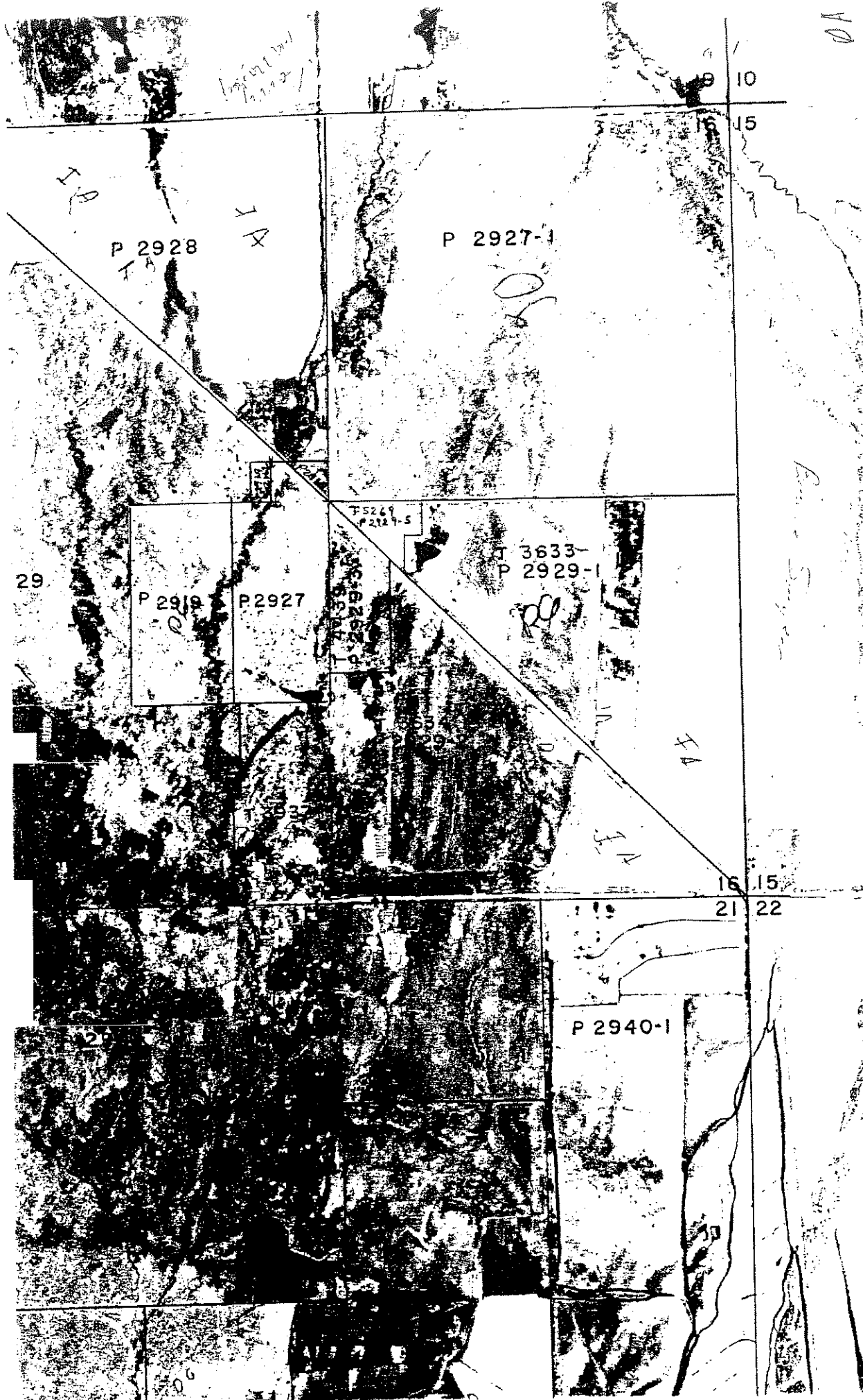


These Maps Can Be Obtained
in Blue Print, Boise Idaho

COMPLIES WITH NATIONAL MAP ACCURACY STANDARDS
U.S. GEOLOGICAL SURVEY, MENLO PARK, CALIF. 94025



AL
N4



RECEIVED

MAR 15 1990

Department of Water Resources
Southern Region Office

RECEIVED

MAR 16 1990

Department of Water Resources

R E L I N Q U I S H M E N T

TO WHOM IT MAY CONCERN:

I hereby relinquish to the State of Idaho,
Application for ~~Transfer~~ Transfer of
all my right, title and interest in and to ~~Permit / Kb / Appropriate~~
the Public Waters of the State of Idaho, No. 45-00292.

Signed at Twin Falls, ID this 15th day
of March, 19 90.

Kevin Smiley
Permit Holder

ATTEST:

J. E. Stanton

MICROFILMED

APR 18 1990

Exhibit L

CREASON, CREASON & BOLLAR
Attorneys at Law
P. O. Box 335
Rupert, Idaho 83350

Telephone: 436-4704

Attorneys for Protestant

RECEIVED

JUN 1 - 1990

Department of Water Resources
Southern Region Office

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

In the Matter of the	)	Adjudication
Application of Kevin Smyers	)	Claim No. 45-00292
for Change in Point of	)	
Diversion	)	<u>PROTEST</u>
	)	

COMES NOW Earl Warthen, by and through his counsel Rick Bollar of the firm, Creason, Creason & Bollar, and protests that certain Application for Change of Point of Diversion with respect to Adjudication Claim No. 45-00292 for the following reasons:

1. That the Applicant basis his change of diversion application upon Water Right No. 45-00292, a decreed right pursuant to the holding of Wood vs. Stokes. Such water right has been forfeited and/or abandoned by the Applicant by reason of non-use. To Protestants knowledge, waters claimed pursuant to this right have not been called for, nor has a method of delivery been established for diversion of said water through a headgate and measuring device.

PROTEST

2. That upon information believed, Applicant does not have a bona fide claim to said water by reason of failure to transfer said water rights to the property of Applicant herein.

DATED this 31st day of ~~June~~^{May} 1990.

CREASON, CREASON & BOLLAR

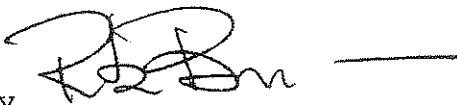
By 
Rick Bollar
Attorney for Protestant

Exhibit M

RECEIVED

JUN 4 - 1990

Department of Water Resources
Southern Region Office

MEMORANDUM

TO: Southern Region, Loren Holmes
FROM: Gary Spackman *Gary*
DATE: May 25, 1990

RE: The New Kevin Smyer Transfer, Numbered 3693

We have received a copy of Kevin Smyer's new transfer which proposes location of his point of diversion below the place where it will impact Earl Warthen's use of water.

I believe that there are still some serious questions about forfeiture of this water right. Please require submittal from Smyer of information, including watermaster records, affidavits and perhaps aerial photographs, which may prove that the water has been delivered from Howell Creek within the last five years.

To: File 45-0292, T# 3693
From: Douglas Jones
Date: 6/5/90

This day I spoke with Gary Spackman about additional information he is requesting above. He indicated that Earl Warthen has filed a protest in Boise raising these issues. Gary suggested that we let Warthen provide the impetus for the investigation via the protest process. I have elected to defer writing Smyer requesting the information. A copy for original of protest is pending from SO.
Douglas Jones

Exhibit N

Assisted by: LOREN HOLMES

ROSTER OF ATTENDANCE

[illegible]

Exhibit O

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER	)	
	)	
OF WATER RIGHT NO. 45-00292 IN THE NAME	)	PROPOSED
	)	MEMORANDUM
OF KEVIN SMYER	)	DECISION AND
	)	ORDER

On March 15, 1990, the applicant, Kevin Smyer filed with the Idaho Department of Water Resources (Department) an application for transfer to establish a point of diversion for water right no. 45-00292. The application was filed in accordance with the provisions of Chapter 2, Title 42, Idaho Code.

The application was properly advertised, and was protested by Earl Warthen. The protest was heard on November 13, 1990, at the Albion City Hall. A hearing having been held, and evidence submitted to the Department, the hearing officer, as a representative of the Director, proposes the following findings, conclusions, and order:

FINDINGS OF FACT

1. Water right no. 45-00292 was decreed by the District Court of Idaho in the case of Wood v. Stokes. The court decreed 12 inches of water (.24 cfs) of Howell Creek, a tributary of Marsh Creek, to B.F. Mahoney, for the purpose of irrigating land located in the NE1/4 of an unidentified section, T12S, R25E, B.M. The Wood decree and related findings of fact and conclusions of

law contained in the files of the Department of Water Resources do not identify the location of the place of use.

2. The decree also does not locate the point of diversion for water right no. 45-00292. The purpose of the application for transfer is to locate a point of diversion.

3. Earl Warthen protested the application for transfer, alleging that the right had been forfeited.

4. Historic watermaster annual reports and daily records do not record a water right delivered to B.F. Mahoney. Water was delivered to B. Mahoney and Bert Mahoney for irrigation of land located in Section 16, T12S, R25E, but there is no correlation between the amount of water delivered and the flow rate decreed to B. F. Mahoney.

5. The legal description of the place of use irrigated by B. Mahoney and Bert Mahoney is not consistent. Protestant's exhibit C lists both the NW1/4 and the NE1/4 of Section 16, although the record for 1917, the earliest of the watermaster reports, locates the place of use in the NW1/4 of Section 16.

6. A copy of the findings and conclusions of the Wood decree, submitted by the applicant as exhibit no. 4, contain a handwritten "16" inserted after the word "Section." No evidence was submitted as proof that the decreeing court had authorized the addition. Furthermore, no evidence was submitted to establish facts supporting the addition. The handwritten section "16" is given insignificant weight and will be used only for the purpose of corroborating other evidence.

7. The protestant stated that the last date of recorded delivery of the right was 1925. After reviewing the watermaster records, I cannot conclude that water right no. 45-00292 was delivered at anytime before or after 1925. What I can conclude is that there is no record of delivery of water irrigating the NE1/4 of Section 16, T12S, R25E, B.M. after 1932.

8. The current watermaster testified that it would be unusual for a right that was delivered and administered not to be recorded in the watermaster records.

9. The applicant testified that water has been delivered to a place of use located in NE1/4 of Section 16, T12S, R25E, by means of old natural channels of Howell Creek, and that water has not been diverted directly from Howell Creek. The applicant alleged that diversion from Howell Creek has been unnecessary during high run-off years, or when waste water is being discharged into the natural channels.

10. The channels labeled as "old Howell Creek channels" on Applicant's Exhibit no. 5 may have been prehistoric Howell Creek channels. They are presently intermittent channels that capture waste run-off water, with the exception of the Spring Creek channel, which contains some spring flows that are diverted by another water user.

11. The applicant has filed adjudication claim no. A45-00292 in the Snake River adjudication.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 states the criteria by which the Department must review an application for transfer:

The director of the department of water resources shall examine all of 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, and 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 42-203A(5), Idaho Code; except the director shall not approve a change in the nature of use from agricultural where such change would significantly affect the agricultural base of the local area.

2. The burden of proof in a water right hearing is normally upon the applicant. The issue of forfeiture relates to the injury and enlargement questions. Forfeiture must be established by clear and convincing evidence. The burden of establishing forfeiture originally rests with the protestant.

3. The absence of delivery records or any evidence of delivery, and the non-existence of a diversion structure is sufficient clear and convincing evidence of non-use that the burden shifted to the applicants to show that water right no. 45-0292 had not been forfeited.

4. The applicant showed that water had been diverted out of intermittent channels rather than Howell Creek. No evidence was submitted to show that the water right has been diverted from Howell Creek in recent history, or that the NE1/4 of Section 16, T12S, R25E, has been irrigated from Howell Creek since 1932. In fact, the applicant admitted that water has not been diverted from Howell Creek.

5. At best, the predecessors of the applicant began diverting water from the natural channels rather than Howell Creek, completing an unrecorded transfer to the natural channels.

6. There was no evidence, however, that this unrecorded transfer was intentionally made. The records of the watermaster should have reflected the change.

7. I conclude that use of water from the natural channels (old Howell Creek channels) is only authorized by a beneficial use right that was perfected when the water was first diverted and beneficially used from the natural channels, and has no relationship to the water right attempted to be transferred by this application.

8. Idaho Code § 42-222 establishes when non-use will result in a forfeiture of the right:

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 of forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter.

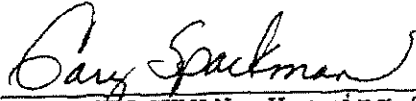
9. The right to divert water pursuant to right no. 45-00292 has been lost through years of nonuse.

ORDER

IT IS HEREBY ORDERED that the application to transfer water right no. 45-0292 by establishing a point of diversion in Howell Creek is DENIED.

IT IS FURTHER ORDERED that water right no. 45-00292 is FORFEITED.

Dated this 14th day of January, 1991.


GARY SPACKMAN, Hearing Officer
Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of January, 1991, I mailed a true and correct copy of the Memorandum Decision and Order, postage prepaid, to the following individuals:

Kevin Smyer
P.O. Box 482
Albion, ID 83311

Don Danner
Watermaster
Albion, ID 83311

Rick Bollar
Box 335
Rupert, ID 83350

Earl Warthen
Box 145
Albion, ID 83311

Norman Smyer
Rt. 1, Box 2
Declo, ID 83323

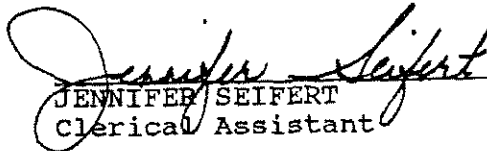

JENNIFER SEIFERT
Clerical Assistant

Exhibit P

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	
	)	ORDER ADOPTING
TRANSFER OF WATER RIGHT NO.	)	PROPOSED MEMORANDUM
	)	DECISION AND ORDER
45-00292 IN THE NAME OF KEVIN SMYER	)	
	)	

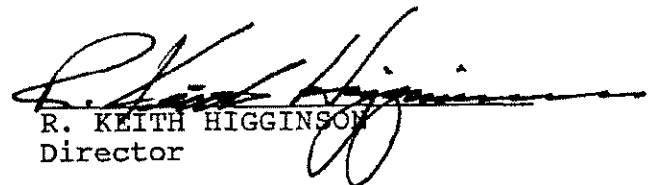
A Proposed Memorandum Decision and Order in the above-captioned matter has been issued and a copy served on the parties;

WHEREAS, more than fifteen days have passed since the service of the Proposed Memorandum Decision and Order; and,

WHEREAS, no exception to that Proposed Memorandum Decision and Order has been received;

IT IS, THEREFORE, HEREBY ORDERED that said Proposed Memorandum Decision and Order be adopted and issued as the Final Decision and Order.

Dated this 1ST day of March, 1991.


R. KEITH HIGGINSON
Director

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March, 1991, I mailed a true and correct copy of the Order Adopting Proposed Memorandum Decision and Order, postage prepaid, to the following individuals:

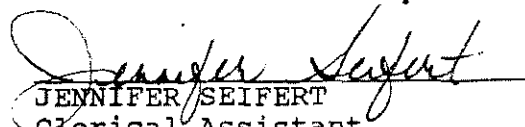
Kevin Smyer
P.O. Box 482
Albion, ID 83311

Earl Warthen
Box 145
Albion, ID 83311

Don Danner
Watermaster
Albion, ID 83311

Norman Smyer
Rt. 1, Box 2
Declo, ID 83323

Rick Bollar
Box 335
Rupert, ID 83350


JENNIFER SEIFERT
Clerical Assistant

BEFORE THE DIRECTOR OF THE DEPARTMENT
OF WATER RESOURCES OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER OF WATER RIGHT NO. 45-00292
IN THE NAME OF KEVIN SMYER

ORDER ISSUING
PROPOSED MEMORANDUM
DECISION

R. Keith Higginson, Director of the Department of Water Resources, having reviewed the attached proposed decision prepared by this appointee, GARY SPACKMAN, who conducted the hearing or who has read the record in this case, hereby approves the same as a proposed decision pursuant to Idaho Code, Sec. 67-5211.

Each party to these proceedings who appeared at the hearing is given the opportunity, pursuant to Idaho Code, Sec. 42-1701A and 67-5211, to file exceptions to the proposed decision and to present briefs and oral arguments. If no timely and proper exceptions are received, an order by the Director will be entered adopting the proposed decision as his final decision.

I.
EXCEPTIONS

A. To be considered by the Director, exceptions must:

1. be received by the Director on or before the 15th day following the day of service of this Order and the proposed decision,

2. specifically identify the portions of the proposed decision to which exceptions are made and specifically state the grounds for those exceptions, and

3. be sent to each of the parties who appeared or their attorneys.

II.
BRIEFS

A. Any briefs in support of exceptions to the proposed decision shall be filed with the Director at the same time that party's exceptions are filed with the Director.

B. All response briefs to the exceptions must be filed with the Director within 15 days after the exceptions were served upon the responding party.

III.

A. No oral arguments before the Director on the proposed decision will be held unless specifically requested by a party filing exceptions to the proposed decision and unless that request is filed with the Director concurrently with the filing of that party's exception.

B. If oral arguments have been properly requested by a party filing exceptions, any other party, upon reasonable notice to the Director, shall have the right to present oral argument in response to the exceptions filed.

C. Oral arguments before the Director on exceptions to the proposed decision shall be heard at the discretion of the Director, pursuant to Idaho Code, Sec. 42-1701A. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour the oral arguments will take place and of the period of time allocated for the arguments of this case. Unless the Director orders otherwise, all oral arguments shall be heard in Boise, Idaho.

IV.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and other matters filed with the Director in connection with the proposed decision shall be served on all other parties to these proceedings in accordance with Rule 7.2.

V.

FINAL DECISION

Following the submission of all exceptions, briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

Dated this 15TH day of JANUARY, 19 91.


R. KEITH HIGGINSON
Director

Exhibit Q

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: A45-10480
Date Received: 5/09/1989
Receipt No: S007062
Received By: lw

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: KEVIN SMYER
Address: P.O. BOX 482
ALBION, ID

208-654-2310

83311

2. Date of Priority: MAR 31, 1881.

3. Source: UNNAMED SPRING

Trib. to: SINKS

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
12S	25E	16	SE	SW			CASSIA

5. Description of diverting works:
DITCH

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION	04/01	11/01	0.300		

7. Total Quantity Appropriated is:
0.300 C.F.S. (and/or)

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
12S	25E	16	NW	NE		IRR	10.0
			SW	NE		IRR	20.0
Section Acres							30.0

A45-10480

Page

1

Date: 05/09/89

MICROFILMED

MAR 10 1993

Total Acres	30.0
-------------	------

12. Do you own the property listed above as place of use? YES

14. Remarks:

16. Signature(s)

Number of attachments: _____

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Kevin Smoyer Date: 5/9/89
Date: _____

State of Idaho)
County of FF) ss.

County of St
Subscribed and sworn (or affirmed) before me this 9th day
of May 19 89
Lon White
Notary Public

Residing at TL
My Commission Expires 5/94

MAR 10 1993

Exhibit R

COPY

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 45-10480
Date Received: 5/9/1989
Receipt No: S007062
Received By: 5026090(Add)
(Variable Fee)

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

KEVIN SMYER Phone: (208)654-2310
PO BOX 482
ALBION ID USA 83311

AMENDED

2. Date of Priority: 03/18/1910

3. Source: SPRING CR Trib. to: HOWELL CR
UNNAMED STREAM Trib. to: SUMMIT CR

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4 Lot	County	Type
12S	25E	16	SW	SW	NE	CASSIA	
12S	25E	16	NE	SW	NE	CASSIA	
12S	25E	16	SE	SW	NE	CASSIA	
12S	25E	16	NW	SE	NE	CASSIA	

5. Description of diverting works:

DITCHES

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	4/01	10/31	1.05	

7. Total Quantity Appropriated is:
1.05 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of	1/4 Lot	Use	Acres
12S	25E	16	NE	NE	IRRIGATION	22
			SW	NE	IRRIGATION	16
			SW	NE	IRRIGATION	16
					Section Acres	54
					Total Acres	54

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks: The claim is being amended to increase the place of use, the associated diversion rate, the points of diversion and the sources associated with the points of diversion, and the priority date, based upon a field visit and discussions with Kelly Christensen (IDWR water resource agent) on 7-29-03. The priority date represents a beneficial use right with a priority date one day after the Bridger vs Tremayne decree.

15. Basis of Claim: Beneficial Use

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 X do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

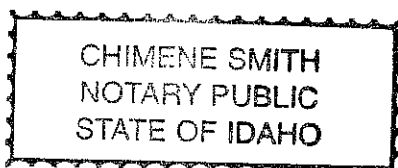
I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Kevin Smyer Date: 8-28-03

Date: _____

State of Idaho)
County of Cassia) SS.

Subscribed and sworn (or affirmed) before me this 28th day of August 2003
Chimene Smith



Notary Public
Residing at Mundaka
My commission Expires 1/30/07

Exhibit S

08/24/2004

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 45-10480
NAME AND ADDRESS: KEVIN SMYER
PO BOX 482
ALBION ID 83311

SOURCE: SPRING CREEK
UNNAMED STREAM
TRIBUTARY: HOWELL CREEK
TRIBUTARY: SUMMIT CREEK

QUANTITY: 1.050 CFS

PRIORITY DATE: 03/18/1910

POINT OF
DIVERSION: T12S R25E S16 NESWNE Within CASSIA County
T12S R25E S16 SWSWNE Within CASSIA County
T12S R25E S16 SESWNE Within CASSIA County
T12S R25E S16 NWSENE Within CASSIA County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	04/01 10/31	1.050 CFS

The use of water for irrigation under this right may begin as early as March 15 provided other elements of the right are not exceeded. The use of water before April 1 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE: IRRIGATION Within CASSIA County

T12S R25E S16	NENE	22.0	T12S R25E S16	NWNE	16.0
T12S R25E S16	SWNE	16.0			

54 ACRES TOTAL

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.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

Abandoned, p.o.d. interferes
2/ Earl.

Exhibit T

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: A45-10481
Date Received: 5/09/1989
Receipt No: S007062
Received By: tw

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

208-654-2310

1. Name: KEVIN SMYER
Address: P.O. BOX 482
ALBION, ID

83311

2. Date of Priority: MAR 31, 1881

3. Source: SEEP WATER

Trib. to: SINKS

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4 of	Lot	County
12S	25E	16	NE	SW	NE		CASSIA

5. Description of diverting works:
DITCH

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
IRRIGATION	04/01	11/01	0.100		

7. Total Quantity Appropriated is:
0.100 C.F.S. (and/or)

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 of	Lot	Use	Acres
12S	25E	16	NW	NE		IRR	10.0
			SW	NE		IRR	20.0

Section Acres 30.0

10. Place of Use: Continued

Total Acres 30.0

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A45-10480, 00292

14. Remarks:

15. Basis of Claim: BENEFICIAL USE

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/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Kevin Smyer Date: 5/9/89
Date:

State of Idaho)
County of FF) SS.

Subscribed and sworn (or affirmed) before me this 9 day th
of May 19 89 Tom White
Notary Public

Seal

Residing at FF
My Commission Expires 5/94

Exhibit U

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 45-10481
Date Received: 5/9/1989
Receipt No: S007062
Received By:

RECEIVED

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

SEP 02 2003

Department of Water Resources
Southern Region

1. Name of Claimant(s)

KEVIN SMYER Phone: (208)654-2310
PO BOX 482
ALBION ID USA 83311

AMENDED

2. Date of Priority: 03/18/1910

3. Source: SPRING Trib. to: SINKS

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
12S	25E	16	SW NW NE	CASSIA	

5. Description of diverting works:

SPRING DUG OUT TO DITCH

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	4/01	10/31	0.14	

7. Total Quantity Appropriated is:
0.14 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of 1/4 Lot	Use	Acres
12S	25E	16	NW NE	IRRIGATION	6.8
Section Acres					6.8
Total Acres					6.8

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks: This claim is being amended to identify a single source and the related place of use. The rate, acres, and priority date based upon a field visit and discussions with Kelly Christensen (IDWR water resource agent) on 7-29-03. The priority date represents a beneficial use right with a priority date one day after the Bridger vs Tremayne decree.

15. Basis of Claim: Beneficial Use

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:

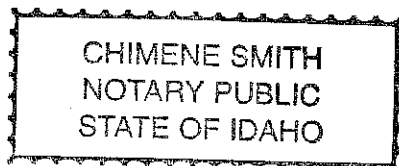
I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Kevin Smyer Date: 8-28-03

Date: _____

State of Idaho)
County of Cassia) SS.

Subscribed and sworn (or affirmed) before me this 28th day of August 2003
Chimene Smith



Notary Public
Residing at Mundaka
My commission Expires 1/30/07

Exhibit V

08/24/2004

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 45-10481
NAME AND ADDRESS: KEVIN SMYER
PO BOX 482
ALBION ID 83311

SOURCE: SPRING TRIBUTARY: SINKS

QUANTITY: 0.140 CFS

PRIORITY DATE: 03/18/1910

POINT OF
DIVERSION: T12S R25E S16 SWNWNE Within CASSIA County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	04/01 10/31	0.140 CFS
The use of water for irrigation under this right may begin as early as March 15 provided other elements of the right are not exceeded. The use of water before April 1 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.		

PLACE OF USE: IRRIGATION Within CASSIA County
T12S R25E S16 NWNE 6.8

6.8 ACRES TOTAL

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.

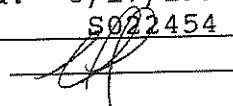
EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

Exhibit W

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: A45-12906
Date Received: 8/17/1999
Receipt No: S022454
Received By: 

COPY FOR
YOUR FILES

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

COPY FOR
YOUR FILES

1. Name: NORMAN L SMYER
Address: 76 SOUTH HWY 77
DECLO ID

83323

208-654-2310

OR

Name: DELORES J SMYER
Address: 76 SOUTH HWY 77
DECLO ID

83323

208-654-2310

2. Date of Priority: APR 30, 1885

3. Source: WASTEWATER

Trib. to: SUMMIT CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
12S	25E	16	NW	SE			CASSIA

5. Description of diverting works:
DITCHES

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
IRRIGATION	03/15	11/15	0.150		

7. Total Quantity Appropriated is:
0.150 C.F.S. (and/or)

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
12S	25E	16	NW	SE		IRR	7.5

10. Place of Use: Continued

Section Acres 7.5

Total Acres 7.5

11. Place of use in counties: CASSIA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
A45-12907

14. Remarks:
WASTEWATER FROM STOKES RANCH IN SEC 21 T12S R25E
CLAIM IS A PORTION OF 45-00523A DECREED AS 45-00523 TO LOUIS CAMP
IN WOOD VS STOKES.

15. Basis of Claim: DECREED

Case Number:

Court :

Decree date: / /

WOOD
Decree Plaintiff

STOKES
vs Decree Defendant

Exhibit X

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 45-12906
Date Received: 8/17/1999
Receipt No: S022454
Received By:

COPY

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

NORMAN L SMYER Phone: (208)654-2310
DELORES J SMYER
76 SOUTH HWY 77
DECLO ID USA 83323

AMENDED

2. Date of Priority: 03/18/1910

3. Source: SPRING CREEK Trib. to: HOWELL CREEK
UNNAMED STREAM SUMMIT CREEK

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
12S	25E	16	SE SE SW	CASSIA	
12S	25E	16	SW NW SE	CASSIA	

5. Description of diverting works:

DITCHES

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	4/1	10/31	0.14	

7. Total Quantity Appropriated is:
0.14 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of 1/4 Lot	Use	Acres
12S	25E	16	NW SE	IRRIGATION	4.6
				Section Acres	4.6
				Total Acres	4.6

11. Place of use in counties: CASSIA
12. Do you own the property listed above as place of use? Yes
13. Other Water Rights Used:
14. Remarks:

WASTEWATER FROM STOKES RANCH IN SEC 21 T12S R25E CLAIM IS A PORTION OF 45-00523A DECREED AS 45-00523 TO LOUIS CAMP IN WOOD VS STOKES.

The claim is being amended to identify two sources and their respective diversion locations, the found irrigated acres and the associated diversion rate, and the current irrigation season for this area. The data is based upon a field visit and discussions with Kelly Christensen (IDWR water resource agent) on 7-29-03. The priority date represents a beneficial use right with a priority date one day after the Bridger vs Tremayne decree.

15. Basis of Claim: Beneficial use

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/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Norman Dwyer Date: 8-7-03

Date: _____

State of Idaho)
County of Twin Falls) SS.

Subscribed and sworn (or affirmed) before me this 7th day of Aug 2003

Kelly Christensen

Notary Public

Residing at Twin Falls

My commission Expires 3-11-04

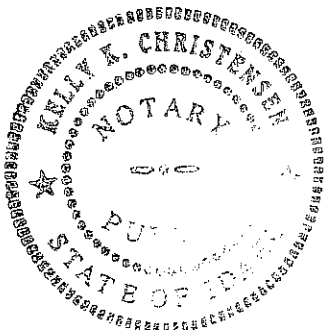


Exhibit Y

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NOS. 45-10480, 45-10481, 45-10502,
45-12906, AND 45-13669**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
Donald V. Shaff, Adjudication Bureau Chief

February 8, 2006

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I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Dolan's January 3, 2006 *Order Requesting Preparation of Rule 706 Report*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase numbers 45-10480, 45-10481, 45-10502, 45-12906, and 45-13669; setting forth the bases for the Department's recommendations for those water rights. The Report was prepared under the supervision of Karl J. Dreher, Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employee has knowledge of the information contained in the Report: Kelly K. Christensen, Senior Water Resource Agent, Southern Region Office in Twin Falls ("Agent Christensen").

II. SUMMARY OF THE ISSUES

At issue are the Department's recommendations for five beneficial use surface water rights in Basin 45 that were ordered consolidated into one subcase by Special Master Dolan. In its Basin 45 Director's Report for Irrigation and Other Uses, the Department recommended the following water rights: 45-10480 and 45-10481 in the name of Kevin Smyer ("Smyer"); 45-10502 in the name of Earl Warthen ("Warthen"); and 45-12906 in the names of Norman and Delores Smyer ("the Smyers"). The Department recommended as disallowed water right no. 45-13669 in the name of Warthen. Warthen objects to each of the Department's recommendations.

The Department will first address its recommendations for Kevin Smyer's claims; next, its recommendation for Norman and Delores Smyer's claim; and, finally, its recommendations for Earl Warthen's claims.

III. BACKGROUND

The recommendations at issue in this Report are located in the Albion Valley and divert surface water from unnamed streams, springs, and Spring Creek for irrigation. Attached hereto as Attachment A are two images depicting the area at issue. The sources are tributary to sinks, Howell Creek, and Summit Creek, all of which are part of the Marsh Creek drainage. While the water rights at issue in this Report were claimed as beneficial use rights, it is important to note that rights to Marsh Creek, including its tributaries Spring Creek, Howell Creek, and Summit Creek, were decreed in four previous adjudications: *Chatburn v. Brim* (Idaho Territory, Cassia County, April 19, 1884); *Vaughn v. Harroun* (Idaho Territory, Cassia County, December 1, 1885); *Wood v. Stokes* (State of Idaho, Cassia County, March 11, 1892); and *Bridger v. Tremayne* (State of Idaho, Cassia County, March 17, 1910). Therefore, the earliest priority date the Department recommend for the beneficial use water rights at issue in this Report was March 18, 1910, one day after the *Bridger v. Tremayne* decree.

A subsidiary issue that has arisen is the identification of Spring Creek and its historic channel.

IV. DISCUSSION

A. Kevin Smyer

1. Water Right No. 45-10480

On May 9, 1989, Kevin Smyer filed a notice of claim to a beneficial use surface water right for irrigation in the Snake River Basin Adjudication (“SRBA”), which was amended on August 28, 2003, and later recommended as claimed by the Department. The pertinent elements

of Kevin Smyer's claim and the Department's recommendation are depicted as follows:

	Claim	Recommendation
Priority	March 18, 1910	March 18, 1910
Source	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.
Quantity	1.05 cfs	1.05 cfs
Point of Diversion	T.12S., R.25E., Sec. 16 SWSWNE T.12S., R.25E., Sec. 16 NESWNE T.12S., R.25E., Sec. 16 SESWNE T.12S., R.25E., Sec. 16 NWSENE	T.12S., R.25E., Sec. 16 SWSWNE T.12S., R.25E., Sec. 16 NESWNE T.12S., R.25E., Sec. 16 SESWNE T.12S., R.25E., Sec. 16 NWSENE
Place of Use	T.12S., R.25E., Sec. 16 NENE (22 acres), SWNE (16), SWNE (16): 54 acres	T.12S., R.25E., Sec. 16 NENE (22 acres), SWNE (16), SWNE (16): 54 acres

On January 3, 2005, Warthen objected to the Department's recommendation for water right no. 45-10480, stating that the "water right should not exist" because there was never a "lawful appropriation."

Water right no. 45-10480 was recommended as claimed for the following reasons. First, the claimed priority date is based on historic beneficial use. Because water from the claimed points of diversion is not always available, both sources were recommended. Historic diversions for water right no. 45-10480 have existed and been available for use since their development in the early 1900s. It is likely that the diversion system was historically part of the original diversion system for water right no. 45-292. Attached hereto as Attachment B is a true and correct copy of a page from *Wood v. Stokes* decreeing water right no. 45-292. As water for water right no. 45-10480 would have been incidental to the original decreed right, and naturally captured by the Howell Creek system, the Department recommended water right no. 45-10480 with a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree.

Second, the Department recommended the sources for water right no. 45-10480 as claimed. Through the course of these proceedings, however, the Department's recommendation of which channel constitutes Spring Creek has been drawn into question. Typically, the Department recommends sources as they are identified by the United States Geological Survey ("USGS"). According to the USGS, there are no channels in the area that are identified as Spring Creek. The USGS' finding is contrary to the finding of the District Court in *Wood v. Stokes*, which decreed water rights to Spring Creek. Attached hereto as Attachment C is a true and correct copy of a page from *Wood v. Stokes* decreeing water right no. 45-517 to Spring Creek. Attached hereto as Attachment D is a true and correct copy of water right no. 45-517D, which was partially decreed by the SRBA District Court for irrigation from Spring Creek, and represents a split of the original right decreed by *Wood v. Stokes*. Therefore, for purposes of consistency in the SRBA, the Department recommended the first source for water right no. 45-10480 as Spring Creek tributary to Howell Creek.

The historic channel of what is locally known as Spring Creek has also been drawn into question. During the Department's field investigation with Richard Anderson for water right no. 45-517D, Anderson identified three points of diversion from the Spring Creek channel. See *Attachment A*. At Anderson's southern point of diversion, the historic Spring Creek channel is clearly visible and can be followed north onto the Anderson farmstead where it enters a pond just north of the farmstead road. *Id.* At this point, the direction of the channel becomes unclear. *Id.* A channel just to the west of the pond leads to the Warthen property and enters a pond on that ground, which is the point of diversion Warthen claimed for Spring Creek in water right no. 45-10502. *Id.* The eastern channel leads to a pond just south of Kevin Smyer's property and is claimed by Norman and Delores Smyer through water right no. 45-12906. *Id.* Based on the

Department's review of the area in question, it was determined that the western channel is the historic Spring Creek channel, which is tributary to Howell Creek; the eastern channel is an unnamed stream, which is tributary to Summit Creek.¹ *Id.* Therefore, the western channel is Spring Creek, while the eastern channel is unnamed stream.

The western channel that the Department recognized in its recommendation for water right no. 45-10480 is the same channel recommended to Warthen for water right no. 45-10502 and Norman and Delores Smyer for water right no. 45-12906. That channel flows north from Warthen's pond, goes under Highway 77, and enters Kevin Smyer's property in the southwest corner. At that point, the channel flows into a ditch from which water can be spread onto the ground around Smyer's current place of use and to the north. Portions of the ditch are visible in 1962 and 1968 aerial photography.

The second source recommended for water right no. 45-10480, the eastern channel, is an unnamed stream that was also recommended by the Department for water right no. 45-12906, claimed by Norman and Delores Smyer. *Id.* The unnamed stream flows from a small reservoir in the SWNESE of Section 16, goes under Highway 77, through a pond on the Redman property, and onto Kevin Smyer's property where the first diversion from that channel can be found. The diversion ditch then flows west to an old orchard and can irrigate ground on the south end of Smyer's property. Two additional points of diversion from that channel were found approximately 1,250 feet north of the first point of diversion. Those diversions allow water to reach the northern portion of the place of use. The ditches from this system are visible in 1962 and 1968 aerial photography.

¹ Summit Creek is not visible in Attachment A.

At no time was the Department able to find that water right no. 45-10480 had been abandoned or forfeited. Therefore, based on the above information, the Department recommended water right no. 45-10480 as claimed by Kevin Smyer.

2. Water Right No. 45-10481

On May 9, 1989, Kevin Smyer filed a notice of claim to a beneficial use surface water right for irrigation in the SRBA, which was amended on August 28, 2003, and later recommended as claimed by the Department. The pertinent elements of Kevin Smyer's claim and the Department's recommendation are depicted as follows:

	Claim	Recommendation
Priority	March 18, 1910	March 18, 1910
Source	Spring trib. to Sinks	Spring trib. to Sinks
Quantity	0.14 cfs	0.14 cfs
Point of Diversion	T.12S., R.25E., Sec. 16 SWNWNE	T.12S., R.25E., Sec. 16 SWNWNE
Place of Use	T.12S., R.25E., Sec. 16 NWNE (6.8 acres): 6.8 acres	T.12S., R.25E., Sec. 16 NWNE (6.8 acres): 6.8 acres

On January 3, 2005, Warthen objected to the Department's recommendation for water right no. 45-10481, stating that the "water right should not exist" because there was never a "lawful appropriation."

Water right no. 45-10481 was recommended as claimed for the following reasons. The source, Spring tributary to Sinks, is located in the middle of the place of use recognized for water right no. 45-10480. *See Attachment A.* During the Department's field investigation, Agent Christensen found a small pond at the spring location and a ditch coming off the pond that ran north. The pond is visible in 1962 aerial photography of the area. Based on the location of the ditch and ground contour, it was determined that 6.8 acres could be irrigated from the system.

The spring water would have commingled with Howell Creek water when water right no. 45-292 was being used in 1881 and later. Because water right no. 45-10481 was not decreed in the previous decrees in the Albion Valley, the Department recommended water right no. 45-10481 with a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree.

At no time was the Department able to find that water right no. 45-10481 had been abandoned or forfeited. Therefore, based on the above information, the Department recommended water right no. 45-10481 as claimed by Kevin Smyer.

B. Norman and Delores Smyer

1. Water Right No. 45-12906

On August 17, 1999, Norman and Delores Smyer filed a notice of claim to a beneficial use surface water right for irrigation in the SRBA, which was amended on August 7, 2003, and later recommended by the Department. The pertinent elements of Norman and Delores Smyer's amended claim and Department's recommendation are as follows:

	Claim	Recommendation
Priority	March 18, 1910	March 18, 1910
Source	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.
Quantity	0.14 cfs	0.14 cfs
Point of Diversion	T.12S., R.25E., Sec. 16 SESESW	T.12S., R.25E., Sec. 16 SESESW
Place of Use	T.12S., R.25E., Sec. 16 NWSE (4.6 acres): 4.6 acres	T.12S., R.25E., Sec. 16 NWSE (4.6 acres): 4.6 acres

On January 3, 2005, Warthen objected to the Department's recommendation for water right no. 45-12906, stating that the "water right should not exist" because there was never a "lawful appropriation."

Water right no. 45-12906 was recommended as claimed for the following reasons.

First, the claimed priority date is based on historic beneficial use. Historic diversions for water right no. 45-12906 have existed and been available for use since their development in the early 1900s when the Smyers' property was irrigated as part of what was originally the Anderson farmstead. The water that has been appropriated by the Smyers is water that is available in excess of irrigation flows from Anderson's irrigation practices. Since the Smyers claimed beneficial use of any water that would have been available after Anderson's irrigation practices were met, the Department recommend a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree.

Second, the place of use and points of diversion for water right no. 45-12960 could be recommended based on historic use. As previously stated, the place of use for water right no. 45-12906 was originally part of the Anderson farmstead. *See Attachment A*. A small reservoir is located on the unnamed stream just south of the Smyers' property. This channel has also been identified as the eastern channel. *Id.* Overflow from the reservoir makes its way into a ditch on the east side of the Smyers' property and loops to the west for the irrigation of a majority of the 4.6 acres.

The second point of diversion is from the western channel that is locally known as Spring Creek, located approximately 175 feet upstream from Warthen's point of diversion for water right no. 45-10502. *Id.* Agent Christensen was informed by the Smyers that, when they purchased the property, the ditches existed, but were in sufficient disrepair that they had to be refurbished. The Smyers' claim was recommended based on the understanding that the place of use was historically part of the Anderson property and constituted an extension of the Anderson irrigation system to the south. At an unknown date the small reservoir was constructed on the

unnamed stream and an overflow ditch was constructed to specifically apply water to the ground now owned by the Smyers. The historical development of the ditch from the Spring Creek source is not known.

At no time was the Department able to find that water right no. 45-12906 had been abandoned or forfeited. Therefore, based on the above information, the Department recommended water right no. 45-12906 as claimed by Norman and Delores Smyer.

C. Earl Warthen

1. Water Right No. 45-10502

On May 11, 1989, Warthen filed a notice of claim to a beneficial use surface water right for irrigation and ground water recharge in the SRBA, which was amended on November 19, 1998. The pertinent elements of Warthen's amended claim and Department's recommendation are as follows:

	Claim	Recommendation
Priority	August 31, 1874	May 26, 1964
Source	Spring Cr. trib. to Sinks	Spring Cr. trib. to Howell Cr.
Quantity	0.40 cfs for irrigation 0.20 cfs for ground water recharge	0.40 cfs for irrigation
Point of Diversion	T.12S., R.25E., Sec. 16 SENESW	T.12S., R.25E., Sec. 16 SENESW
Place of Use	T.12S., R.25E., Sec. 16 NENW (40 acres), NWNW (20), SENW (19), NESW (20 irrig./20 gw. rchrg.): 99 acres	T.12S., R.25E., Sec. 16 NENW (37 acres), NWNW (15), SENW (16), NESW (18): 86 acres

On January 3, 2005, Warthen filed an objection to the Department's recommendation, asserting that his claimed priority of August 31, 1874 was correct. Warthen further noted in Part E of his objection that "Water from Spring Creek and co-mingled wastewater from adjacent property has always been diverted in connection with adjacent property's water rights."

Warthen's claimed priority, August 31, 1874, for water right no. 45-10502, a beneficial use water right, may be based on water right no. 45-517, a right decreed by the District Court in *Wood v. Stokes*. See Attachment C. On August 4, 1951, transfer no. 775 moved 0.20 cfs of water right no. 45-517 onto Warthen's property in the NW quarter of Section 16. A true and correct copy of transfer no. 775 is attached hereto as Attachment E. Transfer no. 775 did not, however, include the twenty acres in the NESW of Section 16. On May 25, 1964, transfer no. 1029 moved the water off Warthen's property and back onto property owned by Richard Anderson. A true and correct copy of transfer no. 1029 is attached hereto as Attachment F. Water right no. 45-517 was never appurtenant to the twenty acres owned by Warthen in the NESW of Section 16.

Because Warthen claimed a beneficial use water right from Spring Creek, a previously decreed source, the Department could not recommend a priority date that was earlier in time than the last of the four decrees in the Albion Valley, *Bridger v. Tremayne* (March 17, 1910). Therefore, Warthen's claimed priority date of August 31, 1874 could not be recommended.

Because Warthen claimed the ground east of Highway 77, located in the NE quarter and the eastern half of the NESW of Section 16 in one claim, the Department could not recommend a priority date that was earlier in time than the last day the portion of water right no. 45-517 was on Warthen's property, May 25, 1964. Therefore, the earliest date the Department could recommend for water right no. 45-10502 was the first day after transfer no. 1029 moved the water off Warthen's property, May 26, 1964.² The recommendation for water right no. 45-

² If Warthen were to file a separate claim listing the place of use as the NESW of Section 16, the Department could recommend the claim with a March 18, 1910 priority. The Department would then remove the NESW of Section 16 as a place of use for water right no. 45-10502.

10502 is also based on the assumption that water from Spring Creek is still used on the property when there is water in the channel in excess of all other valid rights with an earlier priority date.

Warthen's objection to the Department's recommendation for water right no. 45-10502 also addresses whether the water that is delivered to the property is from Spring Creek, or is Spring Creek water that is commingled with waste water. As stated above in the discussion regarding water right no. 45-10480, and as also depicted in *Attachment A*, Warthen diverts water from the western channel, which is the historic Spring Creek channel. Any waste water that enters the western channel prior to Warthen's property is considered water of that channel. Because the western channel is Spring Creek, the Department recommended Spring Creek water, not waste water.

2. Water Right No. 45-13669

On March 2, 2004, Warthen filed a notice of claim to a beneficial use surface water right for irrigation, irrigation storage, and root zone storage in the SRBA. In remarks, Warthen stated that the waste water being claimed is from water right nos. 45-284B, 45-285, 45-327D, and 45-517D, currently owned by Richard Anderson.³ Warthen stated that the diversion system consisted of a pond, open ditches, and tile drains. Remarks further described the distribution system as water stored in a pond and distributed via ditches, tile drains, and a pressurized irrigation system.

Warthen's claim for water right no. 45-13669 was recommended disallowed by the Department for failure to show a lawful appropriation. The pertinent elements of Warthen's

³ These water rights, respectively, represent splits of water rights decreed by the District Court in *Wood v. Stokes* as follows: 134 inches (2.68 cfs) from Howell Creek, priority April 1, 1875; 15 inches (0.30 cfs) from Howell Creek, priority April 1, 1878; 150 inches (3.00 cfs) from Howell Creek, priority March 1, 1881; and 20 inches (0.40 cfs) from Spring Creek, priority August 31, 1874.

claim and Department's recommendation are as follows:

	Claim	Recommendation
Priority	August 13, 1874	Disallowed
Source	Waste water trib. to Howell Cr.	Disallowed
Quantity	0.40 cfs for irrigation/irrigation from storage/root zone storage	Disallowed
Point of Diversion	T.12S., R.25E., Sec. 16 SENESW	Disallowed
Place of Use	T.12S., R.25E., Sec. 16 NENW (40 acres), NWNW (20), SENW (19) NESW (20): 99 acres	Disallowed

On January 20, 2006, Warthen filed a Standard Form 4 to amend his claim to water right no. 45-13669. As of the date of the filing of this Report, the Court has not ruled on Warthen's motion to amend. Therefore, for purposes of this Report, the Department will only address its original recommendation and Warthen's objection thereto.

Warthen's claim was recommended disallowed for several reasons. First, the claimed priority date could not be recognized because Warthen could not prove that the claimed delivery system historically existed. The claimed delivery system was previously identified during the licensing examinations for water right nos. 45-7366 and/or 45-7538 (45-7538 is not a part of the adjudication process). The licensing examination for water right no. 45-7538 described the source as a buried perforated pipeline running east to the pond and eventually to a pipeline going to the ground north and east of Highway 77. A true and correct copy of the pertinent page from the licensing examination for water right no. 45-7538 is attached hereto as Attachment G.

Second, the Department could not recognize the claimed source. Although much of the claimed water likely originates from one or more sources related to Richard Anderson's irrigation practices, Warthen's claim incorrectly identified the source as waste water. The source

should instead be identified as Spring Creek, as it is the same channel that delivers water to points of diversion for water right nos. 45-10480, 45-10481, and 45-12906.

Third, the claimed purposes could not be recommended because Warthen could not prove historic use. Warthen's claim for irrigation from storage is apparently in reference to a pond that is located on his property. However, the pond does not appear in 1968 aerial photography; thus, irrigation from storage was not recommended. The claimed use for root zone storage during the winter months was not recommended because Warthen could not prove historic practice. While the irrigation component of the claim is a valid use, the claimed source, priority date, and the point of diversion could not be recommended; therefore, the entire claim was recommended disallowed.

V. CONCLUSION

The Department's recommendations for water right nos. 45-10480, 45-10481, 45-10502, 45-12906, and 45-13669 are based on historical evidence of beneficial use and reasonable conclusions. Therefore, the Department respectfully requests that these water rights, as described in the Director's Report, be recommended to the Snake River Basin Adjudication District Court for partial decree.

Submitted this 8th day of February, 2006


Kelly K. Christensen
Senior Water Resources Agent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 8th day of February 2006.

Document Served: Supplemental Director's Report Regarding Subcase Nos.
45-10480, 45-10481, 45-10502, 45-12906, and 45-13669

Persons Served: Shelley M. Davis
877 W. Main St., Ste. 1000
P.O. Box 1617
Boise, Idaho 83701-1617

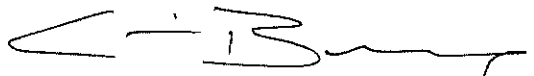
Michael P. Tribe
615 H St.
P.O. Box 396
Rupert, Idaho 83350

Kevin Smyer
P.O. Box 482
Albion, Idaho 83311

Norman and Delores Smyer
76 S. Hwy. 77
Declo, Idaho 83323

Earl Warthen
P.O. Box 145
Albion, Idaho 83311

David L. Negri
United States Department of Justice
Environmental and Natural Resources Division
Natural Resources Section
550 West Fort Street, MSC 033
Boise, Idaho 83724



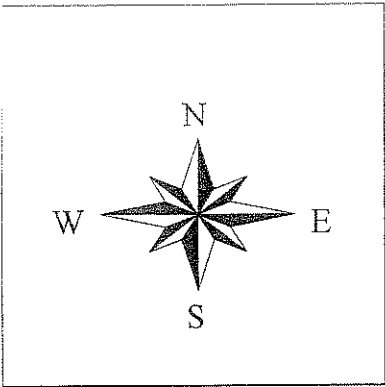
Idaho Department of Water Resources

Attachment A

Map Depicting Warthen/Smyer Places of Use and Points of Diversion

T.12S. R.25E. Sec.16

1968 aerial photo



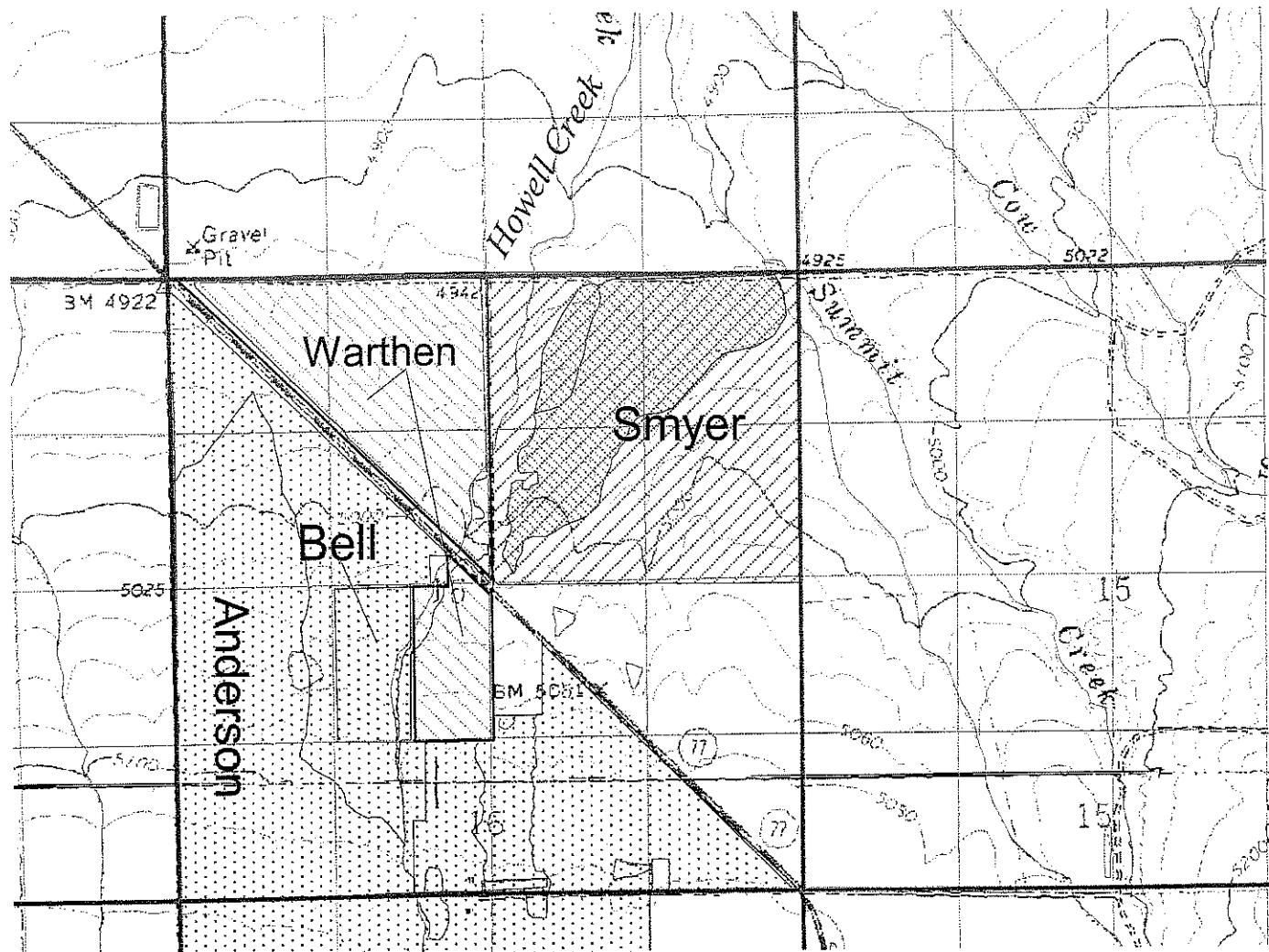
- Kevin Smyer
45-10480
45-10481
- Earl Warthen
45-10502
45-13669
- Norman Smyer
45-12906

- Howell Creek
- Unnamed Stream
- Spring Creek

- Pond North of Anderson Farmstead
- Anderson Farmstead
- Anderson/Hawker Spring Creek Recommended P/D

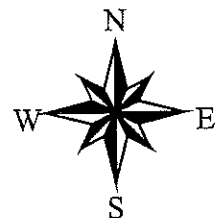


Depiction of Area of Concern Subcase No. 45-10480 et al.



0.4 0 0.4 0.8 Miles

- Sections
- Quarter-Quarter
- Streams
- Smyer Parcel
- Smyer POU
- Warthen Parcel
- Warthen POU
- Bell Parcel
- Bell pous.shp
- Anderson Parcels
- Anderson POU



IDWR
USGS Quadrangles
Drawn by: D. Shaff
Date: Jan 7, 2006

Attachment B

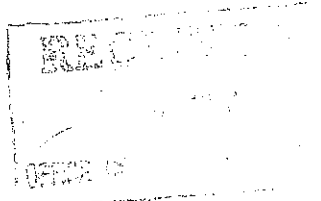
① *it is mine*
In the District Court of the Fourth
Judicial District in and for the
County of Cassia, State of Idaho 45-G

R. L. Wood, et al
Plaintiffs

vs

Wm. Stokes, et al
Defendants,

Transfers Noted



This cause having been heretofore tried by the Court without a jury and the Court having made its findings and conclusions of law,

It is now ordered adjudged and decreed that the following persons parties to this action are entitled to divert from Marsh Creek and its tributary streams situate in Cassia County, Idaho, the amount of water hereinafter indicated, the amount of each party to date from the time hereinafter stated and set apposite his or their name, to-wit:

1 45 0258 Hardy Sears one hundred (100) inches from Land Creek tributary to Marsh Creek March 1st. 1875.

45 0259 Hardy Sears, Thirty inches from Rose Creek tributary to Marsh Creek March 1st. 1875.

2 45 0260 M. A. Harroun Seventy inches (70) from Howell Creek Tributary to Marsh Creek, March 31st. 1876.

3 45 0261 Josiah Bridger Fifty inches (50) from Marsh Creek March 31st. 1882.

4 45 0262 John Bridger Sixty inches from Marsh Creek November 30, 1879.

5 45 0263 J. W. Lamoreaux Sixty inches from Marsh Creek April 16th 1881.

5 45 0264 J. W. Lamoreaux, Sixty (60) inches from Marsh Creek July 21st 1884.

5 45 0265 J. W. Lamoreaux Four hundred and eighty (480) inches from Marsh Creek from January 1st. to July of each year when not in use by prior appropriators.

6 45 0266 T. A. Starrh, Sixty inches from Land Creek Tributary to Marsh Creek June 15, 1875. *Transfer #85 30"*

7 45 0267 S. R. Guin Fifty inches from Marsh Creek June 5th, 1875. *Trans 678*

7 45 0268 S. R. Guin one hundred and thirty three and 1/3 inches from Marsh Creek May 30, 1879.

SCANNED

DEC 16 2002

27.

45 0290 B. F. Mahoney, Forty inches (40) of the waters of Howell Creek, a tributary of Marsh Creek, from the 31st. day of May 1881.

28.

45 0291 Margaret A. Mahoney Twenty five (25) inches of the Waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of May 1884.

29.

45 0292 B. F. Mahoney twelve (12) inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 31st. day of March, 1881.

30.

45 0293 Dora A. Quinn, twenty five (25) inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of March 1882.

31.

45 0294 George Giles, and Andrew Park, as Administrator of the estate of John Park, deceased, (240) Two hundred Forty inches from Cleveland Lake, from the 31st. day of March 1888. and George Giles to have ~~Seventy Five~~ (75) inches of said water and the said Andrew Park, as the Administrator of the Estate of the John Park, deceased, to have ~~one hundred and fifty~~ inches, (150) thereof at the point of diversion from Marsh Creek, when said Giles shall have turned in Eighty (80) inches into said Creek from said Lake, and said Park shall have turned in one hundred Sixty (160) inches into said Creek from said Lake; said two hundred and forty (240) inches of water to be measured at the point where it enters said Marsh Creek, under a ~~four~~ inch pressure, and at the head of said ditches when taken upon said described land as the same are described in the findings herein.

32.

33

45 0295 Thomas Walton twenty (20) inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 31st. day of March 1883.

34.

45 0296 Thomas E. Harper, Fifty inches of the waters of Land Creek a tributary of Marsh Creek, from the 31st. day of March 1877.

35.

SCANNED

DEC 16 2002

Attachment C

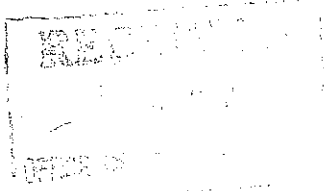
① *not to be used* In the District Court of the Fourth
Judicial District in and for the
County of Cassia, State of Idaho 45-G

R. L. Wood, et al
Plaintiffs

vs

Wm. Stokes, et al
Defendants,

Transfers Noted



This cause having been heretofore tried by the Court with-
out a jury and the Court having made its findings and conclusions
of law,

It is now ordered adjudged and decreed that the following
persons parties to this action are entitled to divert from March
Creek and its tributary streams situate in Cassia County, Idaho, the
amount of water hereinafter indicated, the amount of each party to
date from the time hereinafter stated and set apposite his or their
name, to-wit:

1 45 0258 Hardy Sears one hundred (100) inches from Land Creek tribu-
tary to Marsh Creek March 1st. 1875.

45 0259 Hardy Sears, Thirty inches from Rose Creek tributary to
Marsh Creek March 1st. 1875.

2 45 0260 M. A. Harroun Seventy inches (70) from Howell Creek Tribu-
tary to Marsh Creek, March 31st. 1876.

3 45 0261 Josiah Bridger Fifty inches (50) from Marsh Creek March
31st. 1882.

4 45 0262 John Bridger Sixty inches from Marsh Creek November 30, 1879.

5 45 0263 J. W. Lamoreaux Sixty inches from Marsh Creek April 16th
1881.

5 45 0264 J. W. Lamoreaux, Sixty (60) inches from Marsh Creek July 21st
1884.

5 45 0265 J. W. Lamoreaux Four hundred and eighty (480) inches from
Marsh Creek from January 1st. to July of each year when not in use by
prior appropriators.

6 45 0266 T. A. Starrh, Sixty inches from Land Creek Tributary to
Marsh Creek June 15, 1875. *Transfer # 36 30"*

7 45 0267 S. R. Guin Fifty inches from Marsh Creek June 5th, 1875. *Trans 678*

7 45 0268 S. R. Guin one hundred and thirty three and 1/3 inches from
Marsh Creek May 30, 1879.

SCANNED

DEC 16 2002

JUN 05 1996

Marsh Creek from the 31st. day of March, 1878.

19.

45 0282 Mary R. Norton one hundred (100) inches of the waters of Marsh Creek from the 30th day of April 1874. Trans #678

20.

45 0283 D. I. Stark one hundred (100) inches of the waters of Land Creek, a tributary of Marsh Creek, from the 1st. day of March 1875, and thirty (30) inches of the waters of Rose Creek, a tributary of Marsh Creek, from 1st. day of March 1875, and 30 inches of the waters of Marsh Creek from the 1st. day of April 1876.

21.

45 0284 William Stokes 134 inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of April 1875, and twenty (20) inches of the waters of Spring Creek (a tributary of Marsh creek, from the 31st. day of August 1874, and ninety five (95)

inches of the waters of Rose Creek, a tributary of Marsh Creek, from the 1st. day of April 1876, and 2 inches of water from Springs, tributary of Marsh Creek, from the 1st. day of April 1875.

22.

45 0285 William Stokes for the heirs of George Stokes, Fifteen inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of April 1878.

23.

45 0286 E. J. Stokes, Eighty (80) inches of the waters of Howell Creek tributary of Marsh Creek, from the 1st. day of September 1880.

24.

45 0287 Wm. Stokes, Potter claims, Seventy inches of the waters of Rose Creek, tributary of Marsh Creek, from the 5th day of June 1875.

25.

45 0288 C. M. Gray one hundred and twenty five (125) inches of the waters of Land Creek a tributary of Marsh Creek, from the 3d. day of November 1875.

26

45 0289 B. Williams Forty inches of the waters of Land Creek, a tributary of Marsh Creek, from June 30th 1881.

SCANNED

DEC 13 2002

JUN 05 1996

Attachment D

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 45-00517D

NAME AND ADDRESS: HELEN ANDERSON
RICHARD S ANDERSON
BOX 114
1100 S 50 W
ALBION, ID 83311

SOURCE: SPRING CREEK TRIBUTARY: HOWELL CREEK

QUANTITY: 0.20 CFS

PRIORITY DATE: 08/31/1874

POINT OF DIVERSION: T12S R25E S16 SESESW Within Cassia County
S21 NESENW
SWSENW
NESENW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 10-31	0.20 CFS

The use of water for irrigation under this right may begin as early as March 15 provided other elements of the right are not exceeded. The use of water before April 1 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE:	Irrigation	Within Cassia County
T12S R25E S16	NWNW 1.7	SWNW 28.0
	NWSW 33.0	SWSW 39.0
	SESW 28.0	NWSE 8.3
	SWSE 29.0	SESE 18.0
S21	NWNE 40.0	NENW 39.0
	NWNW 41.0	SWNW 36.0
	SENW 37.0	
	378.0 Acres Total	

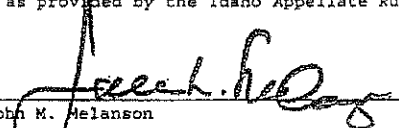
USE OF THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 378 ACRES IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS. 45-275, 45-284B, 45-285, 45-327D, 45-517D, 45-523A, AND 45-13589
THIS RIGHT IS LIMITED TO THE IRRIGATION OF 120 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

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.


John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

Attachment E

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

Certificate of Water Right
Transferred Right No. 775

THIS IS TO CERTIFY That RICHARD STORKEY ANDERSON of Albion, Idaho,
is the owner of and using the following water rights in Howell and Spring
Creeks:

.50 cubic foot per second
with priority of March 1, 1881.

1.5 cubic feet per second
with priority of April 1, 1875. *Howell Cr.*

.20 cubic foot per second with
priority of August 31, 1874. *Spring Cr.*

said water being decreed to William Stokes, et al, by Judge C. C. Stockslager
of the Fourth Judicial District of the State of Idaho, in and for the County
of Cassia, in the case of

R. L. WOOD, et al.,
Plaintiff,

vs.

WILLIAM STOKES, et al.,
Defendants.

said decree bearing date of March 21, 1892.

738 That by said decree and by Certificates of Transfer Nos. 870 and
285, these waters were made appurtenant to the following described lands,
to-wit:

.50 cubic foot per second, March 1,
1881, appurtenant to NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$,
NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16;

.50 cubic foot per second, April 1,
1875, appurtenant to NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 21;

.50 cubic foot per second, April 1, 1875
and .20 cubic foot per second, August 31,
1874, appurtenant to E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 21.

.50 cubic foot per second, April 1, 1875,
appurtenant to W $\frac{1}{2}$ NW $\frac{1}{4}$ Section 21;

All in Township 12 South, Range 25 East,
B.M.

That said decree has been entered in the records of the Department
of Reclamation of the State of Idaho, in Volume 1 of Decrees, beginning at
Page 377 and said Transfer Certificates in Volume 2 of Transfers, on Pages
870 and 285, respectively.

That said Richard Storey Anderson of Albion, Idaho, has become the owner of said water rights through purchase.

And that now upon the application of Richard Storey Anderson of Albion, Idaho, for the transfer of two and twenty-hundredths (2.20) cubic feet per second of the waters of Howell Creek and Spring Creek, made before the State Reclamation Engineer of the State of Idaho, and said application having been granted, the right to the use of two and twenty hundredths (2.20) cubic feet per second of the waters of Howell Creek and Spring Creek upon the above described lands is hereby abandoned and the place of use of said water under such right hereby confirmed shall by this Certificate become appurtenant for irrigation and domestic purposes is described as follows, to-wit:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section
16; NW $\frac{1}{4}$, NW $\frac{1}{4}$, NE $\frac{1}{4}$ Section 21, Township
12 South, Range 25 East, B.M.

That said water is to be limited at any given time to an amount actually needed and beneficially used for such purposes, and shall not exceed the following amount, to-wit:

.50 cubic foot per second
with priority of March 1, 1881.

1.5 cubic feet per second
with priority of April 1, 1875.

.20 cubic foot per second with
priority of August 31, 1874.

That the right to the use of the water aforesaid, hereby confirmed, is restricted to the lands or place of use last above described, as provided by the laws of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho to be hereunto affixed at Boise, Idaho, this 4th day of August, 1931.

MARK R. KILP
State Reclamation Engineer

Attachment F

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

CERTIFICATE OF DECREED WATER RIGHT
TRANSFERRED RIGHT NO. 1029

THIS IS TO CERTIFY, That Richard Storey Anderson of Box 126, Albion, Idaho, is the owner of and using a certain water right of 1.7 cubic feet per second, bearing date of priority as follows: August 31, 1874 for 0.2 cubic feet per second of the waters of Spring Creek; April 1, 1875, for 1.5 cubic feet per second of the waters of Howell Creek, County of Cassia, State of Idaho, decreed to William Stokes by decree of Judge C. O. Stockslager of the 4th Judicial District of the State of Idaho, in and for the County of Cassia, in the case of

R. L. WOOD, et al

Plaintiffs

vs.

WILLIAM STOKES, et al

Defendants

said decree bearing date of March 21, 1892, and being appurtenant to the following described lands, to-wit:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$,
Section 16; NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$,
Section 21, Township 12 South,
Range 25 E.B.M., (by Transfer
No. 775)

That said decree has been entered in the records of the Department of Reclamation of the State of Idaho in Volume 1 of Decrees at Page 607 thereof;

That said Richard Storey Anderson has become the owner of said water right by purchase;

And that now, upon the application of Richard Storey Anderson, for the transfer of 1.7 cubic feet per second of the waters of Howell and Spring Creeks, made before the State Reclamation Engineer of the State of Idaho, and said application having been granted, the right to the use of 1.7 cubic feet per second of the waters of Howell and Spring Creeks upon the above described land is hereby abandoned, and the land under such right and to which the water right HEREBY CONFIRMED, shall become appurtenant by this Certificate for irrigation purposes, is described as follows, to-wit:

SW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$,
Section 16;
NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 21, Town-
ship 12 South, Range 25 E.B.M.,

That the said water is to be limited at any given time to an amount actually needed and beneficially used for such purpose, and shall not exceed the following amount, to-wit:

0.2 cubic feet per second
of the waters of Spring Creek,
with priority of August 31, 1874;

1.5 cubic feet per second of the
waters of Howell Creek, with
priority of April 1, 1875;

That the water right hereby transferred has heretofore been conducted from said streams to the first above described lands through private ditch with points of diversion in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 16; NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 21, Township 12 South, Range 25 E.B.M.,

That the water right hereby transferred will hereafter be conducted to the last above described lands through private ditch with points of diversion in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 16; NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, of Section 21, all in Township 12 South, Range 25 E. B. M.,

That the right to the use of the waters aforesaid, hereby confirmed, is restricted to the lands last above described, as provided by the laws of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho to be hereunto affixed at Boise, Idaho, this 25th day of May, 1964,

(SEAL)

s/ CARL E. TAPPAN

CARL E. TAPPAN
State Reclamation Engineer

RECEIVED
MAY 27 1964
STATE RECLAMATION ENGINEER
BOISE, IDAHO

Attachment G

From Licensing Examination for Water
Right No. 45-7366

E. NARRATIVE/REMARKS/COMMENTS

The water for this farm comes from four different sources. The first source is a well (P/D for permit 45-07366) located in the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. The second source is groundwater collected by an underground perforated pipeline (P/D for permit 45-07538) which runs parallel to southern border of the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. The third source is a waste water right (adjudication claim A45-10502) that catches water from a drainage ditch that is diverted at the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. The final source of water comes from Howell Creek (adjudication claim A45-00327E) from two points of diversion. The first Howell Creek point of diversion is located in the NW 1/4 - SE 1/4 - SW 1/4 of section 16 - township 12S - range 25E and the second Howell Creek point of diversion is located in the SE 1/4 - SE 1/4 - NW 1/4 - of section 16 - township 12S - range 25E.

Drainage Ditch
aka Spring
Creek
RE perforated
pipe

The water from all of these sources are used in a common 8 inch mainline system the mainline begins at the main pond located in the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. From the pond the mainline travels due north approximately 3/8 of a mile and then turns west 1/8 of a mile and then travels due north 3/8 of a mile where it ends. Approximately 3/16 of a mile from the end the mainline has a spur that travels west for 1/8 of a mile and then turns north 1/8 of a mile where it ends. There are four lines of handlines which have an average of 20 heads per line. The pressure for this mainline operates solely on the head differential from the top of the system to the lower portion. The system is not pressurized by any pump or other external means.

The water from the well (permit # 45-07366) is pumped out of the well by a 25 Hp pump and is discharged into a 4 inch pipeline that travels northeast approximately 200 feet where it intersects with the 8 inch mainline. The groundwater from the perforated pipe (permit # 45-07358) is collected in the pipe and then the perforated pipe travels through the pond and collects enough water from the pond to fill the mainline system. The waste water (adjudication claim A45-10502) enters the pond from a drainage ditch located to the south of the pond. The Howell Creek water (adjudication claim A45-00327E) is diverted from Howell Creek and travel northeast where it enters a small collection pond and then travels due east through the perforated pipe to the pond and through the mainline. The Howell Creek water can also be diverted through a second point of diversion after it crosses State Highway 77 and flows through an open ditch to flood irrigate the pastures or fields. The water in the pond is used to irrigate the 20 acre pasture in the southwest 1/4 of section 16.

FILMED

000 0 6 1998

Exhibit Z

08/24/2004

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 45-12906

NAME AND ADDRESS: NORMAN L SMYER
76 S HWY 77
DECILO ID 83323

DELORES J SMYER
76 S HWY 77
DECILO ID 83323

SOURCE: SPRING CREEK
UNNAMED STREAM

TRIBUTARY: HOWELL CREEK
TRIBUTARY: SUMMIT CREEK

QUANTITY: 0.140 CFS

PRIORITY DATE: 03/18/1910

POINT OF
DIVERSION: T12S R25E S16 NESESW Within CASSIA County
T12S R25E S16 SWNWSE Within CASSIA County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	04/01 10/31	0.140 CFS
The use of water for irrigation under this right may begin as early as March 15 provided other elements of the right are not exceeded. The use of water before April 1 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.		

PLACE OF USE: IRRIGATION Within CASSIA County

T12S R25E S16 NWSE 4.6

4.6 ACRES TOTAL

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.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

Exhibit AA

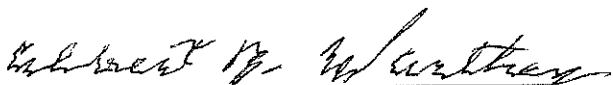
AFFIDAVIT

STATE OF IDAHO)
) ss.
County of Minidoka.)

ALBERT B. WARTHEN, being first duly sworn, on oath,
deposes and says:

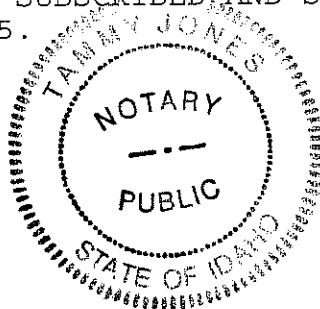
That he makes this Affidavit based upon his personal
knowledge or all facts set forth herein and that he observed the
work and labor performed in connection with water from Howell
Creek in Cassia County, Idaho, as follows:

1. That during the water years of 1973 and 1974 Read
Shaw, Kate Bridger and Earl Warthen, constructed a channel from
excess flood waters coming into the Southwest Corner of what is
at this date real property owned by Kevin Smyer in the NE¼ of
Section 16, Township 12 South, Range 25 East, Boise Meridian,
Cassia County, Idaho.
2. That during said water years referred to above, the
above named parties used such water for irrigation purposes which
was diverted in the channel constructed and maintained by them.
3. That after the two (2) years referred to in
paragraph 1 above there was not sufficient water to use the
channel so constructed.


Albert B. Warthen

SUBSCRIBED AND SWORN to before me this 11th day of
July, 2005.

SEAL



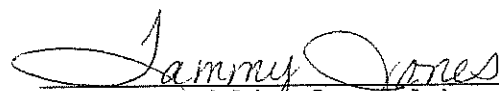

Notary Public for Idaho
Residing at Rupert, Idaho
My Commission Expires: 11-4-2005

Exhibit BB

13580

THIS BLANK FURNISHED BY CASSIA COUNTY ABSTRACT COMPANY

232521

WARRANTY DEED

For Value Received JOY R. SOLOSABAL aka JOY SOLOSABAL, A SINGLE WOMAN
AND DOLORES KILMARTIN, A SINGLE WOMAN, EACH AS TO A ONE-HALF UNDIVIDED
INTEREST

the grantor s. do hereby grant, bargain, sell and convey unto
NORMAN L. SMYER AND DELORES J. SMYER, HUSBAND AND WIFE
Rt 1, Box 2 - Declo, Idaho 83323

the grantees, the following described premises, to-wit:

TOWNSHIP 12 SOUTH, RANGE 25 EAST, BOISE MERIDIAN
Section 16: Part of the NW 1/4, described as follows:

Beginning at the mid-section corner of said Section 16;
Thence South 0° 21' 30" East 88.9 feet to a point on the
South right-of-way of Highway 77, which shall be the
True Point of Beginning:

Thence along said right-of-way South 45° 51' 30" East
556.2 feet to a point;
Thence South 0° 51' 30" East 593.1 feet to a point;
Thence South 85° 38' 56" West 402.79 feet to a point;
Thence North 0° 21' 30" West 1010.9 feet along the
North-South mid-section line to the True Point
of Beginning.

ALL IN CASSIA COUNTY, STATE OF IDAHO.

SUBJECT TO: General taxes for the year 1994 and subsequent years.
Electric Line Right-of-way Easement, recorded February 6, 1989 as
Instrument No. 200173 on Film No. 204, records of Cassia County, Idaho

TOGETHER WITH ALL AND ANY WATER RIGHTS

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees,
their heirs and assigns forever. And the said Grantors do hereby covenant to
and with the said Grantees that they are the owner in fee simple of said premises; that
said premises are free from all incumbrances except as above described; and that they will
warrant and defend the same from all lawful claims whatsoever.

Dated:

Joy R. Solosabal
Joy R. Solosabal
Dolores Kilmartin
Dolores Kilmartin

STATE OF IDAHO, COUNTY OF CASSIA
On this 15th day of August, 1994, before me, a
notary public in and for said State, personally appeared

Joy R. Solosabal, aka Joy Solosabal
and Dolores Kilmartin.

known to me to be the persons whose names are subscribed to the
within instrument, and acknowledged to me that they executed the same.

David C. Bill
Residing at Burley, Idaho, Comm. Expires 8/2/00

CASSIA COUNTY ABSTRACT

FILED 2005/08/15

RECORDED

15 AUG 16 2 11 PM '98

RECORDED AT THE REQUEST OF
CASSIA COUNTY ABSTRACT
232521

232521

Exhibit CC

Mail Box Notice to Box 792, Burley, Idaho 83318

9845

THIS BLANK FURNISHED BY CASSIA COUNTY ABSTRACT COMPANY

118761

WARRANTY DEED

For Value Received OLIVER GEORGE ANDERSON and JANICE A. ANDERSON,
husband and wife

the grantors do hereby grant, bargain, sell and convey unto
PAUL SOLOSABAL and JOY SOLOSABAL, husband and wife; and,
FERGUS KILMARTIN and DELORES KILMARTIN, husband and wife
1819 Conant Avenue Burley, Idaho 83318 and 1600 Bennett Avenue
the grantees, the following described premises, to-wit: Burley, Idaho 83318

TOWNSHIP 12 SOUTH, RANGE 25 EAST, BOISE MERIDIAN

Section 16: Part of the NW $\frac{1}{4}$ SE $\frac{1}{4}$, described as follows:

Beginning at the mid-section corner of said Section 16;
Thence South 0°21'30" East 88.9 feet to a point on the
South right-of-way of Highway 77, which shall be the
True Point of Beginning:

Thence along said right-of-way South 45°51'30" East
556.2 feet to a point;
Thence South 0°51'30" East 593.1 feet to a point;
Thence South 85°38'56" West 402.79 feet to a point;
Thence North 0°21'30" West 1010.9 feet along the
North-South mid-section line to the True Point
of Beginning.

ALL IN CASSIA COUNTY, STATE OF IDAHO.

TOGETHER WITH all water rights.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees,
their heirs and assigns forever. And the said Grantors do hereby covenant to
and with the said Grantees, that they are the owners in fee simple of said premises; that
said premises are free from all incumbrances except as above described, and that they will
warrant and defend the same from all lawful claims whatsoever.

Dated: July 17, 1979

Oliver George Anderson *Janice A. Anderson*
OLIVER GEORGE ANDERSON JANICE A. ANDERSON

STATE OF IDAHO, COUNTY OF CASSIA:

On this 25 day of JULY, 1979 before me, a
notary public in and for said State, personally appeared

OLIVER GEORGE ANDERSON and JANICE A.
ANDERSON, husband and wife,

known to me to be the persons whose names are subscribed to the
within instrument, and acknowledged to me that they executed the same.

L. H. Korman
Residing at Burley, Idaho. Comm. Expires 11-11-82

FOR RECORDING ONLY:

118761

RECORDED AT THE REQUEST OF
CASSIA COUNTY ABSTRACT

FILE 128

JUL 30 9 09 AM '79

CASSIA COUNTY, IDAHO
FRANK B. KEARNS
RECORDER

FEE 2.00 DEPUTY AP

13580

THIS BLANK FURNISHED BY CASSIA COUNTY ABSTRACT COMPANY

232520

WARRANTY DEED

For Value Received DOLORES KILMARTIN, PERSONAL REPRESENTATIVE OF THE
ESTATE OF FERGUS KILMARTIN DECEASED

the grantor do ES hereby grant, bargain, sell and convey unto
DOLORES KILMARTIN, A SINGLE WOMAN
1600 Bennett Ave., Burley, ID 83518

the grantee the following described premises to-wit:

TOWNSHIP 12 SOUTH, RANGE 25 EAST, BOISE MERIDIAN

Section 16: Part of the NW $\frac{1}{4}$ SE $\frac{1}{4}$, described as follows:

Beginning at the mid-section corner of said Section 16;
Thence South 0°21'30" East 88.9 feet to a point on the
South right-of-way of Highway 77, which shall be the
True Point of Beginning;

Thence along said right-of-way South 45°51'30" East
556.2 feet to a point;

Thence South 0°51'30" East 593.1 feet to a point;

Thence South 85°38'56" West 402.79 feet to a point;

Thence North 0°21'30" West 1010.9 feet along the
North-South mid-section line to the True Point
of Beginning.

ALL IN CASSIA COUNTY, STATE OF IDAHO.

This Deed executed pursuant to Letters Testamentary recorded June 1, 1994
as Instrument No. 251178 on Film No. 256, records of Cassia County, ID

RECORDED AT THE REQUEST OF

CASSIA COUNTY ABSTRACT

258

1994 AUG 16 A 11:57

232520

CASSIA COUNTY, IDAHO

MARRELL M. ROSEKELLEY

RECORDER

FEE 3.00 DEPUTY *MA*

CASSIA COUNTY ABSTRACT

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantee,
her heirs and assigns forever. And the said Grantor does hereby covenant to
and with the said Grantee that she is the owner in fee simple of said premises; that
said premises are free from all incumbrances except as above described; and that she will
warrant and defend the same from all lawful claims whatsoever.

Dated: August 16, 1994

Dolores Kilmartin Personal Representative
Dolores Kilmartin, Personal Representative

STATE OF IDAHO)
COUNTY OF CASSIA)

ss.

On this 15th day of August, 1994, before me, the undersigned, a Notary Public in and
for said State, personally appeared Dolores Kilmartin, known to me to be the person
whose name is subscribed to the within instrument as Personal Representative of the
Estate of Fergus Kilmartin, deceased, and acknowledged to me that she executed the same
as such Personal Representative.

Harold C. Bell
Notary Public for Idaho

Residing at: Burley, Idaho

Commission Expires: 8/2/00