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AUG 20 2009

DEPARTMENT OF
WATER RESOURCES

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
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*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company and Twin Falls
Canal Company*

**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

)
) Subcase Nos. **Attachment 1**
)
)
) **AFFIDAVIT OF PAUL L.**
) **ARRINGTON**
)
)
)
)
)

STATE OF IDAHO)

) ss.

County of Twin Falls)

I, PAUL L. ARRINGTON, being first duly sworn upon oath, deposes and hereby states
as follows:

1. I am an attorney representing A&B, BID, Milner, NSCC, and TFCC in the above-captioned matter. I am over the age of 18 and state the following based upon my own personal knowledge.

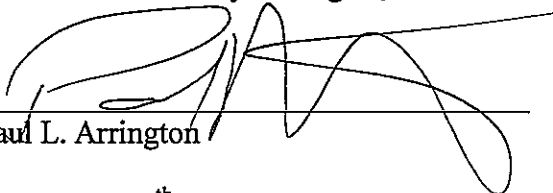
AFFIDAVIT OF PAUL L. ARRINGTON

2. Attached hereto, as Exhibit A, is a true and correct copy of excerpts from the November 14, 2007 *Order Granting in Part & Denying in Part Joint Motion for Summary Judgment and Motion for Partial Summary Judgment*, filed in the Spring Users Delivery Call proceedings. The entire *Order* can be viewed at http://www.idwr.idaho.gov/News/WaterCalls/1000Spring%20Users%20Calls/2007%20Filings/Bue_Clear_Order.pdf.

3. Attached hereto, as Exhibit B, are true and correct copies of licenses and permits obtained from IDWR's website at www.idwr.idaho.gov.

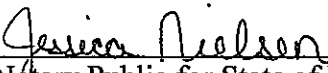
Further you affiant sayeth naught.

DATED this 19th day of August, 2009.


Paul L. Arrington

SUBSCRIBED AND SWORN to before me this 19th day of August, 2009.




Notary Public for State of Idaho
Residing at Twin Falls, Idaho.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2009, I served a true and correct copy of the foregoing *Affidavit of Paul L. Arrington* on the following by the method indicated:

Clerk of the SRBA Court
253 Third Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Natural Resources Division Chief
State of Idaho
Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort St., MSC 033
Boise, Idaho 83724

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

IDWR Repository
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Boise, Idaho 83720-0098

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Idaho Falls, Idaho 83405

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Candice M. McHugh
Racine Olson
101 S. Capitol Blvd, Suite 208
Boise, Idaho 83702

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Denver, CO 80202

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A. Dean Tranmer
City of Pocatello
P.O. Box 4169
Pocatello, Idaho 83201

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William A. Parsons
137 W. 13th St.
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Burley, Idaho 83318

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H. Evan Call
4373 Cold Water Rd.
American Falls, Idaho 83211

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Bret Anderson
Robyn Anderson
322 E. Main
Burley, Idaho 83318

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Travis L. Thompson

Attachment 1

1-4
1-5
1-6
1-7
1-8
1-9
1-10
1-13
1-14
1-16
1-209
1-210
1-211A
1-211B
1-212
1-213
1-214A
1-214B
1-219
1-2050
1-2061
1-10225
1-10034
1-10237
1-10238
1-10239
1-10240
1-10241
1-10482

Exhibit A

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER)	)	ORDER GRANTING IN PART
TO WATER RIGHTS NOS. 36-02356A, 36-07210,)	)	AND DENYING IN PART JOINT
AND 36-07427)	)	MOTION FOR SUMMARY
(Blue Lakes Delivery Call))	)	JUDGMENT AND MOTION
_____)	)	FOR PARTIAL SUMMARY
	)	JUDGMENT

IN THE MATTER OF DISTRIBUTION OF WATER)	)
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,)	)
AND 36-07148 (SNAKE RIVER FARM); AND TO)	)
WATER RIGHTS NOS. 36-07083 AND 36-07568)	)
(CRYSTAL SPRINGS FARMS))	)
(Clear Springs Delivery Call))	)
_____)	)

The Spring Users, consisting of Blue Lakes Trout Farm, Inc. (Blue Lakes) and Clear Springs Foods, Inc. (Clear Springs), filed a joint motion for summary judgment. The Ground Water Users (IGWA) filed a motion for partial summary judgment. The motions were heard November 2, 2007. The motions address issues arising from the Director's 2005 orders on the Spring Users delivery calls and claims presented by IGWA in its petition for reconsideration and the designation of issues in this proceeding concerning the Director's orders. The motions call into question the effect of the partial decrees entered by the SRBA Court determining the Spring Users' water rights.

The Director's orders arose in the course of the Idaho Department of Water Resources' responsibilities in the Snake River Basin Adjudication (SRBA) authorized by the Idaho Legislature, chapter 14, Title 42, Idaho Code, to determine the nature and extent of all water rights within the Snake River Basin and thereby provide the basis for the future administration of those rights in accordance with chapter 6, Title 42, Idaho Code, and other applicable laws, including the State Constitution. As the SRBA has proceeded the legal relationship between

stress on the entire Eastern Snake River Plain a senior user might make a call and secure more water than the senior user has used in times of plenty.

Whether the Director has properly utilized the historical information he has considered is a question of fact that will be resolved at hearing.

VII

THE DIRECTOR'S SEASONAL VARIATION LIMITATION

The Spring Users object to the provisions in their respective orders recognizing seasonal variations in the springs discharge rates and limiting the calls to seasonal conditions that existed at the times the appropriations were initiated. This is a slippery situation, because in this instance it appears that the historical information has been used to modify the partial decrees. Aquaculture differs from the propagation of plants in fields in that it apparently is a pursuit that is or can be operated 365 days of the year. The partial decrees recognize that and do not stipulate any differences season to season in the decreed rights of the Spring Users, unlike the specification of irrigation seasons for field crops. This is not a condition that falls under the umbrella of the general provision in the partial decrees. To the extent that the Director's Orders import a seasonal condition they are in error. It is a fine line because seasonal conditions may limit or expand the availability of water throughout the Eastern Snake Rive Plain. There may be times when there is not enough water to meet the needs of water users whether junior or senior and the Director can consider the conditions, but attaching a seasonal limitation as such is contrary to the adjudicated water rights. The same principles are applicable to the Spring Users calls and any defenses to those calls regardless of the time of the year. If it was not the Director's intent to engraft a seasonal condition on the adjudicated rights, that language must be clarified.

VIII

THE PRIORITIES OF THE SPRING USERS' WATER RIGHTS APPLY TO ALL CONNECTED WATER SOURCES

IGWA maintains that incidental recharge, seepage, or "waste water," as that term is used by IGWA, is not subject to conjunctive management to satisfy senior rights. The rules of conjunctive management incorporated in Idaho Code section 42-226 and CJM Rule 50 dictate otherwise. Water in the aquifer is subject to conjunctive management regardless of its source, so long as hydraulically connected. See CJM Rule 40.01.

It is not directly on point, but the logic of *Shaub v. District Court of the Fifth Judicial District*, 96 Idaho 924, 926, 539 P.2d 277, 279 (1975), is applicable:

It is well settled in Idaho that an adjudication of water rights to a main stream also adjudicates rights to all tributary streams and other sources of supply to the main stream.

This reasoning dates back to *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). See also *Martiny v. Wells*, 91 Idaho 215, 218, 419 P.2d 470, 473 (1966). Facts about the source may be informative as to whether shortages are the result of weather or pumping, but once water enters the aquifer and river channels of the Eastern Snake River Plain from whatever source it is subject to administration by priority. That is the essence of conjunctive management.

IX

THE 10% UNCERTAINTY

The Spring Users Challenge the Director's refusal to subject certain junior ground water right in Water District 130 to administration unless those rights had a depletive effect on the Buhl Gage to Thousand Springs reach of 10% or more of their total diversions. This decision is tied to the 10% uncertainty attributed to the ground water model. The legal underpinnings of this decision are not clear. This is an issue that requires further explanation. Consequently, the issue is reserved for hearing for hearing when a representative of IDWR can explain more thoroughly the legal and factual theories for the decision.

X

THE PHASED IN CURTAILMENT

The Spring Users challenge the phased in curtailment of ground water users over five years as being untimely, inadequate and contrary to law. Spreading the impact of curtailment over the five year period was done to "lessen the economic impact of immediate and complete curtailment." *Clear Springs Order*, p. 34, paragraph 32; *Blue Lakes Order*, p. 27, paragraph 31. On its face the Director's decision seems to run contrary to statutory and case law once material injury to a senior water user is established. E.g., Idaho Code section 42-607, watermaster's duty to "shut or fasten" junior diversions when necessary to supply senior rights. AFRD#2 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call."). Against this thinking is language in AFRD#2 that the Director may consider, among

Exhibit B

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 41-07030

Priority: January 2, 1978

Maximum Diversion Rate: 1.40 CFS
Maximum Diversion Volume: 441.0 AF

This is to certify, that FAROLD J NELSON
PO BOX 177

ROCKLAND ID 83271 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated October 11, 1977; and has submitted Proof of Beneficial Use on October 19, 1983. An examination indicates that the works have a diversion capacity of 1.400 cfs of water from a GROUNDWATER source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	03/15 to 11/15	1.40 CFS	441.0 AF

LOCATION OF POINT(S) OF DIVERSION:

NESE , Sec. 28, Township 10S, Range 31E
POWER County

PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
10S	31E	28	NESW 8	SESW 8	NESE 18	
			NWSE 37	SWSE 37	SESE 18	126

Total number of acres irrigated: 126

CONDITIONS/REMARKS:

1. The maximum diversion volume listed within this right is defined as the maximum allowable volume of water that may be diverted annually from the source identified under this right, or limited to the amount that can actually be beneficially used on the above described place of use. This right is further limited to a maximum diversion of water onto the above described place of use of 0.02 cfs per acre or 3.0 acre feet per acre per year when combined with all other appurtenant water rights.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
5. This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 3.5 afa per acre for the lands above.

RECORDED

DEC 23 1984

WATER RIGHT LICENSE

WATER RIGHT NO. 41-07030

This license is issued pursuant to the provisions of Section 42-219, Idaho Code.
Witness the seal and signature of the Director, affixed at Boise, this 12TH
day of DECEMBER, 1991.

Acting for


R. Keith Higginson, Director

DEC 23 1991

State of Idaho
Department of Water Resources
Permit To Appropriate Water

NO. 29-07770

Proposed Priority: May 21, 1984

Maximum Diversion Rate:

5.72 CFS

This is to certify, that CITY OF POCATELLO

P.O. BOX 4169

POCATELLO, ID 83205

has applied for a permit to appropriate water from: GROUNDWATER
and a permit is APPROVED for development of water as follows:

BENEFICIAL USE

PERIOD OF USE

RATE OF DIVERSION

IRRIGATION

04/01 to 10/15

5.72 CFS

LOCATION OF POINT(S) OF DIVERSION:

SENE

Sec. 12, Township 06S, Range 33E
POWER County

PLACE OF USE: IRRIGATION

TWN RGE SEC

ACRES

ACRES

ACRES

TOTAL

06S 33E 1
12

SWNE 9

NENE 40

SENE 25

NESW 25

SESE 9

NWNE 40

NENW 40

NESE 3

SWNE 40

SESW 40

NWSE 15

18

268

Total number of acres irrigated:

286

CONDITIONS/REMARKS:

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before January 1, 1991.
2. Subject to all prior water rights.
3. Prior to the diversion of water under this permit a flow measurement port or other device as specified by the Department shall be installed to provide for the installation of measuring equipment and the determination of the rate of diversion by the Department.
4. Permit holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
5. The right to the use of water acquired under this permit shall not give rise to any right or claim against the holder of a senior right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.
6. The Director retains jurisdiction of the permit and any license subsequently issued to incorporate the use into a water district, require streamflow augmentation or other action needed to protect prior surface water and groundwater rights.
7. The rate of diversion of water for irrigation under this permit and all other water rights on the same land shall not exceed cubic feet per second for each acre of land.

MICROFILMED

DEC 14 1989

State of Idaho
Department of Water Resources**Permit To Appropriate Water**

NO. 29-07770

CONDITIONS/REMARKS:

8. The maximum rate of diversion for irrigation purposes under this permit shall not exceed 5.72 cfs.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this

7th day of December, 1989.

for R. Keith Higginson, Director

MICROFILMED

DEC 14 1989

Identification No. 29 7222

Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
APPLICATION FOR PERMIT

APPROVED

To appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

1. Name of applicant OWEN K. WARD 1469 W. QUINN Pocatello, ID.
post office address Route 2 Box 309, Pocatello, Idaho 83201 83201

2. Source of water supply ground water which is a tributary of N.A.

3. a. Location of point of diversion is NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 9 Township 6S
Range 34 E B.M. Bannock County; additional points of diversion if any: _____
None RDC 8-22-74

To be located on a line common to the NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 9, T. 6S, R. 34E, B.M.

b. If water is not consumed, it will be discharged into N.A. at a point in _____ $\frac{1}{4}$
of _____ $\frac{1}{4}$ of Section _____ Township _____ Range _____ B.M. _____

4. Water will be used for the following purposes:

Amount 3.2 cfs for irrigation purpose from April 1 to November 1 (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

5. Total quantity to be appropriated:

a. 3.2 cfs cubic feet per second and/or
b. _____ acre feet per annum.

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. Complete irrigation sprinkler outfit consisting of 16 inch well and motor and pump and complete wheel moves sprinkler system to cover entire 102 acre tract

b. Height of storage dam N.A. feet, active reservoir capacity _____ acre feet; total reservoir capacity _____ acre feet, materials used in storage dam: _____

Period of year during which storage will occur _____ to _____ (Mo. Day) Inclusive.

c. Proposed well diameter is 16 inches; proposed depth of well is 160-200 feet.

7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is five years.

b. Estimated construction cost is \$ 40,000.00.

8. Description of proposed uses:

a. If water is not for irrigation: N.A.

(1) Give the place of use of water: _____ $\frac{1}{4}$ of _____ $\frac{1}{4}$ of Section _____ Township _____
Range _____ B.M. _____

(2) Amount of power to be generated: _____ hp under _____ feet of head.

(3) List number of each kind of livestock to be watered _____

(4) Name of municipality to be served _____, or number of families to be supplied with domestic water _____.

(5) If water is to be used for other purposes describe: _____

MICROFILMED

b. If water is for irrigation, indicate acreage in each subdivision in the tabulation below:

TWP.	RANGE	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	
6S	34E	9	NONE				NONE				12.13	0	0	14	0	35.86	40	0	101.99

Total number of acres to be irrigated 101.99

c. Describe any other water rights used for the same purposes as described above.

This land has existing Fort Hall Irrigation Water Rights which will not be used after the well is complete

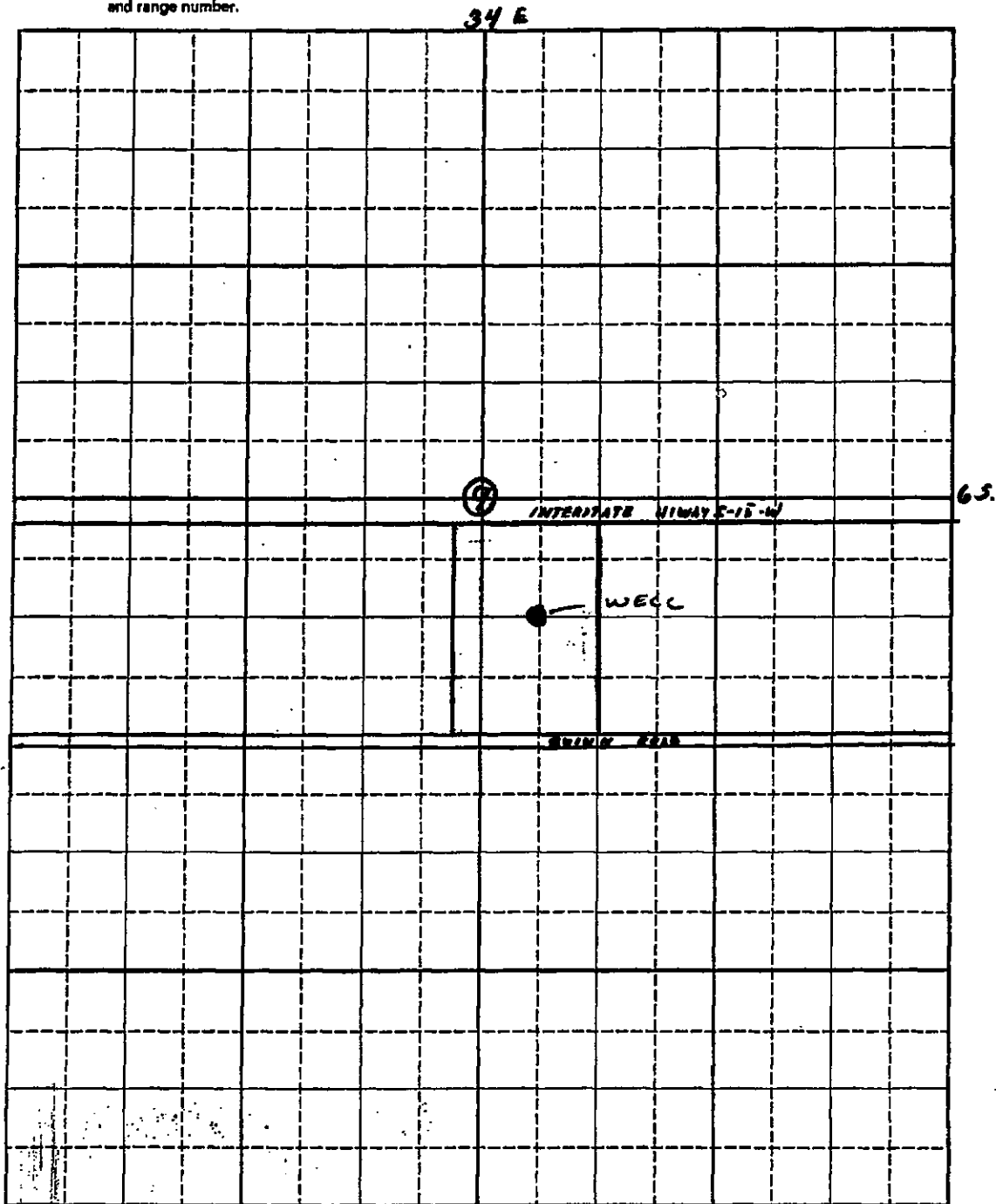
9. a. Who owns the property at the point of diversion Owen K. Ward and Opal M. Ward, husband &

b. Who owns the land to be irrigated or place of use Owen K. Ward and Opal M. Ward wife

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing N.A.

10. Remarks

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: $\frac{1}{2}$ inches equal 1 mile

SEE ATTACHED SURVEY, JOB NO. 6886
PREPARED BY L. H. DALIFF ASSOCIATES.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

James K. Ward
(Applicant)
By *W. H. Daliff*
Attorney

Proposed Priority: 8-22-1974

Received by MB Date 8-22-74 Time 10:50 A
Preliminary check by RDC Fee \$ 55.00
Receipted by MB Date 8-22-74 # 13029
Publication prepared by MB Date 8-23-74
Published in Idaho State Journal
Publication dates Aug 29 + Sept 5, 1974
Publication approved CB Date 9/3/74
Priority reduced to _____ Reason _____

Protests filed by: _____

Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for approval denial by RDC DE

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER ADMINISTRATION

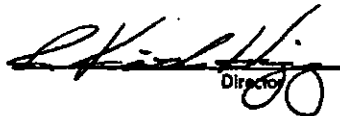
This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 29-7222, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before September 1, 1979.
- c. Other: A measuring device of a type approved by this Department shall be permanently installed and maintained as part of the diverting works.

2. Denial of said application is for the following reasons: _____

Witness my hand this 24 day of September 19 74.


Director