

MEMORANDUM

Date: April 29, 2022
To: Transfer 86072
From: James Cefalo
Re: Review & Evaluation of Sufficiency of Information

This application proposes to change the place of use for water rights 34-7149, 34-7181, 34-7225, 34-10680, 34-12421 and 34-13414. The current place of use covers land owned by the applicant, Larry Quist, and land owned by Sunset Farm & Ranch LLC (Sunset). The proposed place of use will also cover some land owned by Larry Quist and some land owned by Sunset.

In February 2021, the Department approved Transfer 83745, which created a permissible place of use for water rights held by Sunset. Based on the acres authorized by the Sunset rights, the size of the permissible place of use and the configuration of the Applicant's water rights, there would be an overlap of at least 135 irrigated acres between the rights. Because the Applicant had no control over the change to Sunset's water rights, the Applicant was given one year (until May 1, 2022) to rearrange his water rights to avoid the overlap with the Sunset rights. This application was filed in response to the conditions in Transfer 83745. Although the Applicant's water rights will still partially overlap the Sunset permissible place of use, the rights will not be stacked with Sunset's rights based on the current configuration of the Sunset irrigated acres.

This application proposes to move water rights 34-10680 and 34-13414 entirely onto property owned by the Applicant. The combined limit conditions for all of the water rights included in the transfer application will be updated to fully segregate the rate and volume for water rights 34-10680 and 34-13414 from the other rights, except for the combined acre limit.

Authority to File: The Applicant, Larry Quist, is the current owner of record for the water rights. He is the owner of record for part of the existing place of use for the rights. The remaining acres are owned by Sunset. Larry owns the water rights separate from the land pursuant to a court order settling the estate of Larry's parents. The Applicant has the authority to file the application.

Prior to approving this application, I received an email from Rob Harris, attorney for Sunset, stating that Sunset does not consent to Larry Quist including any of the Sunset property in the proposed place of use. Section 42-222, which sets forth the criteria used to evaluate transfer applications, does not include "speculation" or "legal access to the proposed point of diversion or place of use" as elements of review. Transfer Processing Memo No. 24 states that an applicant must provide documentation of access to the proposed place of use if the applicant does not own the place of use. The memo, however, does not include any citation to a statute or court decision holding that legal access to the proposed place of use is required for approval of an application for transfer. An oft-cited case regarding water rights and trespass, *Lemmon v. Hardy*, is focused on the speculation element of review for applications for permit (42-203A(5)). The water rights in this application are not new appropriations, were developed on and are already appurtenant to the Sunset property.

A water user who changes the point of diversion or place of use for his water rights to another person's property does so at their own risk. In this case, Larry Quist assumes the risk that (1) Sunset might move other irrigation water rights to the same acreage, thereby stacking the irrigation rights and making it difficult or impossible for the Quist rights to ever be transferred off of the Sunset property and (2) that the acres might be idled by Sunset, making the Quist rights subject to forfeiture through non-use.

Water Right Validity: Water rights 34-7149 and 34-7225 are very junior water rights from the Big Lost River and are rarely available. Water rights 34-7181 and 34-12421 are diverted from the Quist exchange well, but are only allowed to receive water after the other rights in the Quist exchange well are satisfied. Water right 34-13414 is diverted from the Ferris Slough, which is dry. The only reliable water right in the group is water right 34-10680 from the Big Lost River, which bears a priority date of 1885 and authorizes 160 acres of irrigation. At least 160 acres have been consistently irrigated with the Quist water rights. The remaining rights are diverted for irrigation when available. Forfeiture is not an issue.

Injury to Other Water Rights: No issues identified. Points of diversion will not change. The watermaster for Water District 34 was notified of the application and did not provide comment.

Enlargement of Use: Combined rate and volume limits for water rights 34-10680 and 34-13414 have been separated from the other water rights. Combined rate and volume limits have been updated to prevent enlargement of the water rights.

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

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