

MEMORANDUM

Date: March 1, 2021
To: Transfer 83418
From: Scott Storms
Re: Updated Review Memo to Reflect Concerns of Full Water Right Validity

Legal Notice Not Required 7/24/2019

Pursuant to Section 42-222, Idaho Code, the Department has discretion to provide public notice as deemed appropriate. The water right changes proposed through this transfer application do not appear to change the effect on the original or hydraulically connected water source or affect other water rights. Therefore, staff review of the transfer application found no cause to require public notice. This application will continue processing without advertisement and be forwarded for approval consideration.

Review & Evaluation of Sufficiency of Information 7/24/2019

Application for transfer No. 83418 was received by the Department of Water Resources (Department) on July 1, 2019. The original application proposed to correct the legal description of one of the points of diversion (POD) to reflect how it was stated on the original claim file and how it truly lays out on the ground. The application states that the POD from the Salmon River was decreed improperly and that the description on the original claim file was the correct one. The POD description as it is currently stated on the water right for the surface water diversion from the Salmon River is Lot 5 (SWSE), Sec. 12, T20N, R21E. The transfer application states the POD location as Lot 1 (SESE) Sec. 12, T20N, R21E. The current GIS shape for the POD is located in Lot 5 (SESE) Sec. 12, T20N, R21E, which does not coincide with any of the other descriptions and will not be considered a reflection of the POD location. Review of the original claim documents and associated maps clearly show the description of the POD located in the SESE of Sec. 12, T20N, R21E. Additionally, maps in the claim file show that water is diverted at the POD into a ditch that leads to the place of use. This ditch is apparent in aerial imagery and shows up in the Department hydrography data. The ditch starts at the POD described in the application, and leads to the place of use for this right. Department data also shows this ditch locally known as the S15 Fife Ditch. The original owner of this right (and who filed claim to the SRBA court) was the Del Monto Fife Family Trust, further alluding to the fact that this is indeed the proper location of the POD.

Upon initial review of the application, it became apparent that there had been updates to the Public Land Survey Systems (PLSS) in this area that had also affected the legal description of the place of use (POU). On July 26, 2019, I contacted the applicant via email to ask if he would like to update the POU description as well, as part of this transfer. The applicant promptly responded that he indeed would like to update the POU to reflect how it should be described according to the most current PLSS descriptions. On July 29, 2019, I emailed an updated transfer application to the applicant, with the changes needed to update the POU description, for his review and signature. The new, signed application was received back on September 3, 2019.

Authority to File:

The application was submitted on behalf of Cole Ranch Properties, LLC. of Butte, Montana, and was signed by Jesse A Cole. A search of Cole Ranch Properties on the Montana Secretary of State business

search shows Jesse A Cole at the only registered agent of the company. No issues of authority to file.

Water Right Validity:

The water right was decreed on November 17, 2008. Examination of aerial imagery clearly shows signs of irrigation within the POU from 2009 to 2017. Upon closer examination, including aerial imagery review and remote sensing data review, it was determined there were only a maximum of 325.3 acres irrigated within the property boundaries of Cole Ranch Properties over the prior 5 year period, rather than the full 471 acres authorized by the water right. This also appeared to be the maximum amount of land that could be irrigated within the property boundaries. The remainder of land was either river bottomlands, covered in trees, driveway and roads, buildings, or hillsides too steep to cultivate and irrigate. A letter was sent to Cole Ranch Properties on December 3, 2019 describing the situation and outlining options moving forward. Enclosed with the letter were also maps outlining what appeared to have been irrigated acres over the prior 5 years, a copy of Idaho Code §42-223 outlining defenses to forfeiture, and a Withdrawal of Application for Transfer form. as well as a petition The options outlined in that letter were as follows:

1. Withdraw the application for transfer. (Application fee will be refunded)
2. Submit information showing irrigation of the full 471 acres within the last 5 years.
3. Submit information demonstrating protection from forfeiture, as provided by Idaho code §42-223.
4. Proceed with the application for transfer with the understanding this right will be reduced.

On August 6, 2020 Jessie Cole of Cole Ranch Properties was again contacted, via email, to confirm receipt of the letter and to inquire how it would like to move forward. Response received later that same day stated Cole Ranch Properties did not wish to move forward with the application for transfer. In response to Cole Ranch Property's I pointed out that a submittal of the Withdrawal of Application for Transfer form would be the easiest way to move forward, and allow for a \$50 refund of the original application fee. After 30 day of no response, it was determined that an order Rejecting Application for Transfer would be written up and the transfer application officially rejected.

Injury to Other Water Rights:

This application only proposes to correct the legal description of the POD to coincide with the proper location that has been used throughout the history of this right, and to update the POU description to coincide with the most current PLSS information. There are no physical changes to any of the elements of this right and therefore no injury to other rights are anticipated.

Enlargement of Use:

No changes in acreage or diversion rate are proposed and there are therefore no enlargement concerns.

Local Public interest:

Review staff has no information to suggest that this application is inconsistent with the local public interest.

Beneficial Use/Conservation of Water Resources:

The transfer appears consistent with the conservation of water resources in Idaho.

Review of the application finds there are inconsistencies with criteria set forth in §42-222(2) Idaho Code, which outlines the potential loss or forfeiture of all or portions of a right due to failure to apply all or portions of the right to its assigned beneficial use, for a term of 5 or more years. Because the applicant did provide any defense to forfeiture as provided by Idaho Code §42-223,

nor did the applicant agree to a reduction to the right or submit official request to withdraw the application, this application has been prevented from moving forward, and an order rejection the application for transfer has been written and submitted.

Grimm, Angie

From: Storms, Scott
Sent: Friday, August 7, 2020 11:58 AM
To: 'Jesse Cole'
Subject: RE: Transfer Review
Attachments: withdrawal-of-application-for-transfer.pdf

Jessie,

There is no requirement for you to move forward with the transfer, as you did not actually move the point of diversion, it was just explained incorrectly on the decree. We try to encourage people to file for these updates in order to keep records properly updated and accurate, but I understand if you would prefer not to at this time. The easiest way to remove the application would be if you could fill out the enclosed Withdrawal of Application for Transfer form. This would also allow me to refund the \$50 fee you originally submitted. The transfer number is 83418.

In regards to the BLM and water rights, the only thing I am aware of has to do with all federally held stockwater rights in Idaho. There was a court case a few years ago, and subsequent legislation put in place, that essentially puts in question the federal government's ability to hold stockwater rights on federal lands, when the government itself does not own the stock, and therefore are not the ones putting the water to beneficial use. It's a bit of a complicated situation that has been ongoing for a few years now, but it will in no way have any impact on yours, or any other privately held water rights.

Scott

Scott Storms
Senior Water Resource Agent
Idaho Department of Water Resources
208-287-4915
Scott.Storms@idwr.idaho.gov

From: Jesse Cole [<mailto:deeprock7@yahoo.com>]
Sent: Thursday, August 6, 2020 2:11 PM
To: Storms, Scott <Scott.Storms@idwr.idaho.gov>
Subject: Re: Transfer Review

Right now I would say let sleeping dogs lie, but is there any good reason I should file for the change?

There are also rumblings going on about BLM and water rights and stuff, which nobody understands. Do you have any info?

Thanks J

On Thursday, August 6, 2020, 09:58:46 AM MDT, Storms, Scott <scott.storms@idwr.idaho.gov> wrote:

Hello Jessie,

It has recently come to my attention that we never came to a conclusion on how you would like to move forward with your transfer application on water right 75-4500. I am attaching the letter I sent to you in December, along with the map that outlines the analysis I conducted. Just a quick recap of what I found (which is more specifically outlined in the letter and the map). In reviewing the described place of use for the water right, I was only able to find evidence of irrigation taking place on 325.3 acres, even though the right authorizes 471 acres. This leaves 145.7 acres subject to forfeiture, should we move forward with the transfer. You do have the opportunity to offer a defense to forfeiture of those acres, the defenses of which are outlined in Idaho code §42-223, found here:

<https://legislature.idaho.gov/statutesrules/idstat/Title42/T42CH2/SECT42-223/>

One thing I would like to point out is, if you look at the map that outlines my analysis, the majority of the 145.7 acres that do not appear irrigated fall within the riparian areas and side channel areas of the Salmon River, and some on the surrounding hillside. As such, if you do choose to move forward, and those acres are forfeited, it does not appear you would lose any acres that could have potentially been irrigated.

Another option, as outlined in the letter, would be to withdraw the transfer application, and the water right would remain as it is currently described.

Please feel free to call me if you have any questions.

Scott

Scott Storms

Senior Water Resource Agent

Idaho Department of Water Resources

208-287-4915

Scott.Storms@idwr.idaho.gov



State of Idaho

DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE
Governor

GARY SPACKMAN
Director

December 3, 2019

JESSE COLE
COLE RANCH PROPERTIES LLC
510 HUMMINGBIRD LN
BUTTE, MT 59701

RE: Application for Transfer of Water Right 75-4500

Jesse,

In reviewing your application it has come to my attention that a portion of water right no. 75-4500 may be at risk of forfeiture. Idaho code §42-222 (2) provides that all rights shall be lost and forfeited if a failure to apply those rights to beneficial use has occurred for a term of 5 years or more. I have conducted an in-depth review of irrigated acres over the past 5 years using aerial imagery, and that review has resulted in a total of 325.3 irrigated acres, 145.7 acres less than the 471 originally authorized by the right. The application for transfer is likely still approvable however, unless you are able to provide further evidence showing the full 471 acres have indeed been irrigated in the past 5 years, or can show proof those acres are protected from forfeiture under the provisions provided in Idaho code §42-223 (copy enclosed), the right would be reduced by those acres lost due to nonuse. In summary, there are four options available moving forward:

1. Withdraw the application for transfer. (Application fee will be refunded)
2. Submit information showing irrigation of the full 471 acres within the last 5 years.
3. Submit information demonstrating protection from forfeiture, as provided by Idaho code §42-223.
4. Proceed with the application for transfer with the understanding this right will be reduced.

I am enclosing a map outlining the most acres I have found to be irrigated within your property boundaries within the last 5 years, along with a copy Idaho code §42-223, Defenses to Forfeiture, and a withdrawal of application for transfer form. Please be aware, although it is encouraged to update point of diversion and place of use descriptions through a reduced fee transfer if the decree did not explain them properly, or if land survey information has been updated, the Department does not require the right holder to do so, and there is no penalty if the transfer were withdrawn. Please let me know how you would like to proceed. Application processing can be suspended to allow additional time to provide a defense against forfeiture. An extension of up to 6 months can be granted upon request. A response or a request for more time must be received within thirty (30) days or the application will be rejected.

If you have any questions, please call me at 208-287-4915, or email me at scott.storms@idwr.idaho.gov.

Sincerely,

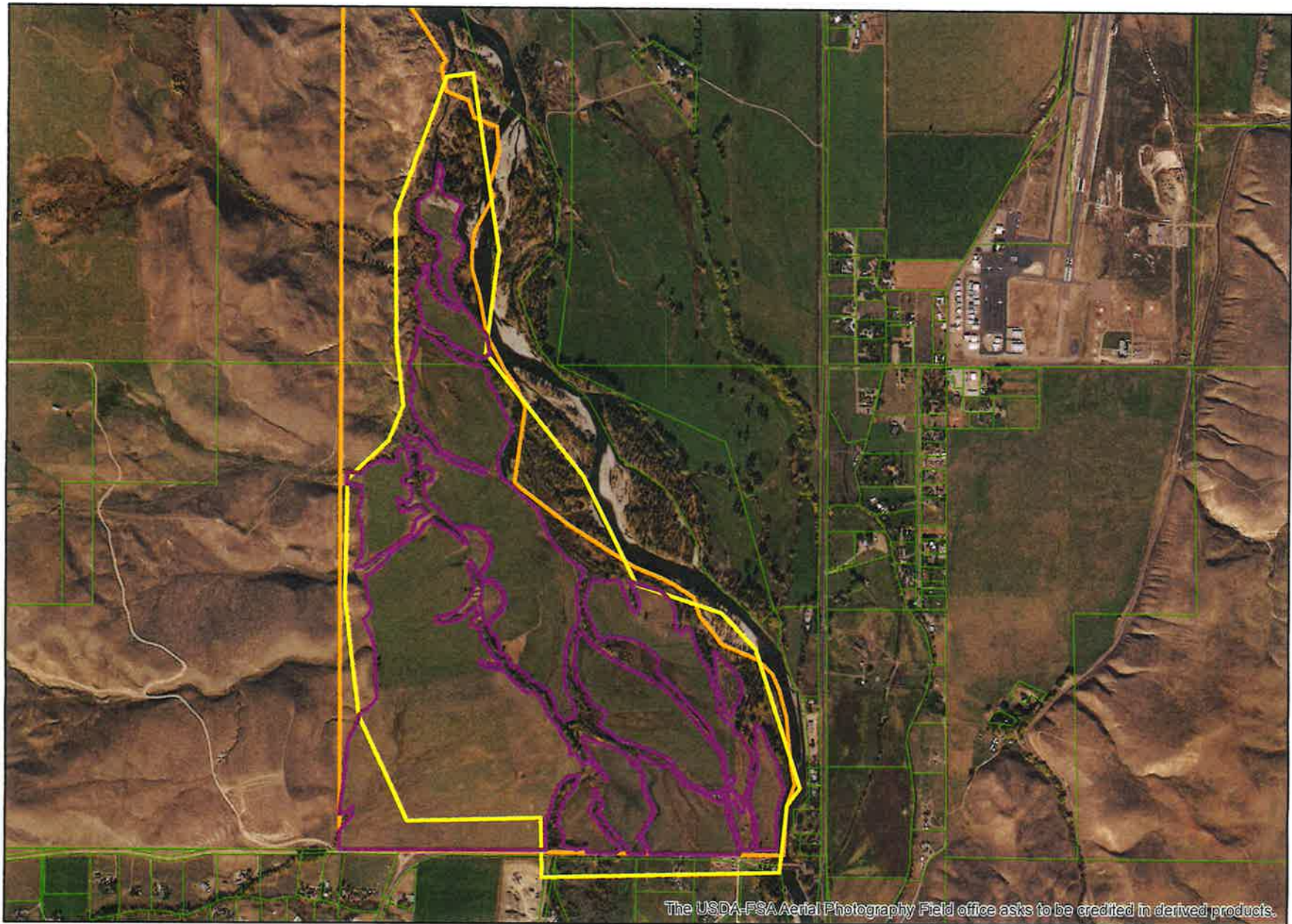
A handwritten signature in blue ink, appearing to read 'Scott Storms', with a long horizontal flourish extending to the right.

Scott Storms
Senior Water Resource Agent

Enclosure: Map of Irrigated Acres

Copy of Idaho code §42-223 – Exceptions or Defenses to Forfeiture
Withdrawal of Application for Transfer form
Receipt for Application for Transfer (please retain for your records)

Cole Ranch Properties Irrigated Acres



-  Irrigated Acres Analysis
-  Existing POU Boundary
-  Property Boundary

0 0.25 0.5 1 Miles





Idaho Statutes

TITLE 42

IRRIGATION AND DRAINAGE – WATER RIGHTS AND RECLAMATION

CHAPTER 2

APPROPRIATION OF WATER – PERMITS, CERTIFICATES, AND LICENSES – SURVEY

42-223. EXCEPTIONS OR DEFENSES TO FORFEITURE. A right to the use of water shall not be lost by forfeiture pursuant to the provisions of section 42-222, Idaho Code, for a failure to apply the water to beneficial use under the conditions specified in any subsection of this section. The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

(1) A water right appurtenant to land contracted in a federal cropland set-aside program shall not be lost or forfeited for nonuse during the contracted period. The running of any five (5) year period of nonuse for forfeiture of a water right shall be tolled during the time that the land remains in the cropland set-aside program.

(2) A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs.

(3) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.

(4) A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the reason for the nonuse of the water is to comply with the provisions of a ground water management plan approved by the director of the department of water resources pursuant to section 42-233a or 42-233b, Idaho Code.

(5) A water right shall not be lost or forfeited by a failure of the owner of the right to divert and apply the water to beneficial use while the water right is placed in the water supply bank or is retained in or rented from the water supply bank pursuant to sections 42-1761 through 42-1765A, Idaho Code, or while the water right is leased pursuant to sections 43-335 through 43-342, Idaho Code, or sections 42-2501 through 42-2509, Idaho Code, or while use of the water is made under any other provision of law authorizing the rental or lease of water rights.

(6) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis.

(7) No portion of a water right held by an irrigation district, a Carey Act operating company, or any other company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

(8) No portion of a water right held by an irrigation district shall be lost, forfeited or subject to forfeiture as a result of the exclusion of land from the district pursuant to chapter 11, title 43, Idaho Code, so long as any five (5) year period of nonuse following the exclusion does not result from circumstances over which the district has control.

(9) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.

(10) No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the director of the department of water resources including as a condition of approval for a new water right appropriation approved pursuant to section 42-203A, Idaho Code, a water right transfer approved pursuant to section 42-222, Idaho Code, a water exchange approved pursuant to section 42-240, Idaho Code, or a mitigation plan approved in accordance with rules promulgated pursuant to section 42-603, Idaho Code.

(11) No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section 47-1205, Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

History:

[42-223, added 2000, ch. 85, sec. 3, p. 185; am. 2002, ch. 343, sec. 1, p. 961; am. 2003, ch. 166, sec. 1, p. 470; am. 2004, ch. 178, sec. 1, p. 560; am. 2008, ch. 239, sec. 1, p. 719.]

How current is this law?

Search the Idaho Statutes and Constitution

WITHDRAWAL
OF
APPLICATION FOR TRANSFER OF WATER RIGHT(S)

I/We, _____ and _____,
(Applicant's Printed Name) (Applicant's Printed Name)

_____ and _____,
(Applicant's Printed Name) (Applicant's Printed Name)

hereby withdraw our Application for Transfer No. _____ of Water Right

No(s). _____.

Signed this _____ day of _____, 20 _____.

(Signature/Title of Applicant)

(Signature/Title of Applicant)

(Signature/Title of Applicant)

(Signature/Title of Applicant)

Hersley, Jean

From: Yenter, Cindy
Sent: Monday, October 07, 2019 3:29 PM
To: Hersley, Jean
Subject: RE: Transfer 83418 comments

I have no objection to the modifications. Correction of the Salmon River POD will be essential for proper administration of the right under a future water district.

*Cindy Yenter
Idaho Dept of Water Resources
Salmon Field Office
102 S Warpath, Salmon ID 83467
cindy.yenter@idwr.idaho.gov
208-742-0655
208-731-0901 cell*

From: Hersley, Jean
Sent: Friday, October 04, 2019 10:25 AM
To: Yenter, Cindy <Cindy.Yenter@idwr.idaho.gov>; Clark, Cynthia Bridge <Cynthia.Clark@idwr.idaho.gov>; Golden, Kala <Kala.Golden@idwr.idaho.gov>; Cassel, Amy <Amy.Cassel@idwr.idaho.gov>; Jeff Richards <jeff.richards@idfg.idaho.gov>
Subject: Transfer 83418 comments

The Department of Water Resources is seeking written comment and/or recommendations from you regarding the above referenced water right transfer.

This office will not be publishing this transfer application as it proposes to correct the point of diversion to properly describe where it truly exists on the ground and since the changes proposed to not appear to change the effect on the original or hydraulically connected water source of affect other water rights. The water rights are not being transferred from the property. Your prompt response to this request is appreciated. If you or your agency has any comments or concerns, please respond by October 21, 2019. If no response is received, we will assume there aren't any concerns and the Department will continue processing this application.

Documents will be scanned by the end of the day. You will find the documents at <https://idwr.idaho.gov/apps/ExtSearch/WRAJSearch/WRADJSearch.aspx>. Please let me know if you have any questions. Thank you.

*Jean Hersley
Idaho Dept Water Resources
Technical Records Specialist II
208-287-4942*