

T3675 AIKELE

# 3675  
COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

RECEIVED

OCT 25 1990

Department of Water Resources  
Eastern District Office

In the Matter of Transfer No. 3675 )  
of Water Rights 34-7080A, 34-7136, )  
and 34-7169 in the Names of )  
M. TODD PERKES, JUEL AIKELE, )  
and MICHAEL AIKELE and the )  
Cease and Desist Order issued by the )  
Department on June 22, 1990 )

MEMORANDUM DECISION AND  
ORDER APPROVING APPLICATION  
FOR TRANSFER NO. 3675 AND  
DENYING ATTORNEY'S FEES

On February 14, 1990, M. Todd Perkes, Juel Aikele, and Michael Aikele ("Applicants") filed application for transfer No. 3675 to change the point of diversion and place of use of water right Nos. 34-7080A, 34-7136, and 34-7169. Approval of the application was protested by the Big Lost Irrigation District ("BLID") and by 138 persons signing a petition delivered to the Idaho Department of Water Resources ("Department") by Mr. Lawrence Babcock.

On June 22, 1990, the Department issued an order to Don A. Aikele, Juel Aikele, and Michael Aikele to cease and desist irrigation of land within the S1/2 of the SW1/4 of Section 6, T3N, R26E, BM until a right to do so is obtained or identified. Subsequent correspondence from Mr. Kent Foster, attorney for the Aikeles, indicated that the order would not be complied with and requested approval of application for transfer No. 3675 which, if approved, would authorize irrigation of the land that is the subject of the order to cease and desist. In response, the Department set a combined hearing to consider the application for transfer and the cease and desist order.

The hearing was held on July 26, 1990, in Arco, Idaho. The Applicants and recipients of the order to cease and desist were represented by Mr. Kent Foster. Protestant BLID was represented by Chairman Lewis Rothwell. Mr. Lawrence Babcock acted as spokesman for the protest petition signers. Other petition signers in attendance were given

the opportunity to ask questions and present testimony. At the hearing, Mr. Foster entered a motion seeking a ruling from the Department to require the protestants to pay attorney costs of the Applicants alleging that the issues raised by the protestants were frivolous and without merit. This issue was bifurcated from the other issues allowing a schedule to be entered for briefing the issue of payment of attorney costs, while allowing the record to be closed concerning the other issues of the hearing.

On August 9, 1990, the Department issued a Proposed Memorandum Decision and Order in connection with protested application for transfer No. 3675. On August 28, 1990, the Department received exceptions to the proposed decision from the Applicants.

On September 17, 1990, the Department issued a Proposed Memorandum Decision and Order addressing the motion for attorney's fees. No exceptions were submitted in connection with this proposed decision.

The Director has reviewed the exceptions filed in connection with the proposed decision issued August 9, 1990, and responds to the exception to grant an "extension" that the Director is authorized to specify conditions when granting approvals. The intent, of course, was and is to provide a ready mechanism for the benefit of the Applicants for continued use of the water as proposed in the transfer if authorization to use the water is otherwise obtainable in successive years.

In response to the exceptions, the Director has eliminated condition of approval no. 9) shown in the proposed decision issued August 9, 1990. The matter of payment of a penalty for unauthorized diversion and use of water by the Applicants will be pursued by the Department in a separate action.

#### **FINDINGS OF FACT**

1) The rights proposed to be changed by application for transfer No. 3675 are recorded with the department as follows:

License No. 34-7080A authorizes the diversion of 2.67 cubic feet per second ("cfs") of ground water from wells located in the SW1/4NW1/4, SE1/4NW1/4, Section 5, T3N, R25E for the irrigation of 160 acres located in the NE1/4 of Section 11, T3N, R25E. The priority date is September 23, 1974.

License No. 34-7136 authorizes the diversion of 5.50 cfs of ground water from the same wells listed for right No. 34-7080A for the irrigation of 160 acres in the NW1/4 of Section 11, T3N, R25E. The priority date is March 26, 1976.

License No. 34-7169 authorizes the diversion of 4.48 cfs of ground water from the same wells as the above listed two rights for the irrigation of 160 acres in the SE1/4 of Section 11, T3N, R25E. The priority date is January 6, 1977.

Each of the licenses is conditioned that when combined with the other two rights it "shall not provide more than 12.43 cfs at the points of diversion and shall not exceed 8.49 cfs at the point of re-diversion located within the SE1/4NE1/4, Section 11, T3N, R25E."

Each of the licenses also has the following condition:

This right in no way grants any right-of-way or easement across the land of another.

Licenses 34-7136 and 34-7080A have the following condition:

This right shall not provide more than 0.02 cfs per acre for the lands identified above.

License 34-7169 is conditioned as follows:

This right shall not provide more than 2.68 cfs or 0.017 cfs per acre for the lands identified above.

2) Applicant Perkes testified that the actual location of the point of diversion for each of the licenses is in the SW1/4NW1/4, SE1/4NW1/4, Section 5, T4N, R26E, and that the location has not been changed from that existing prior to issuance of the licenses. Licensing field examinations in the records of the department agree with the testimony.

3) Application for transfer No. 3675 proposes to change the location of the point of diversion of each of the licenses to the SW1/4SW1/4, Section 21, T4N, R26E, a location approximately 3 miles south and 1 mile east of the present actual point of diversion. The application proposes to divert 12.65 cfs for the irrigation of 480 acres in the S1/2N1/2, S1/2, Section 6, T3N, R26E. The new place of use is approximately 1/2 mile north and 1 and 1/2 mile east of the present place of use for the licenses.

4) Notice of application for transfer No. 3675 was advertised in the Arco Advertiser and the Challis Messenger on April 19 and 26, 1990. The protests of BLID and the signed petition were timely received prior to the protest date of May 7, 1990.

5) The following issues were raised concerning application for transfer No. 3675:

- Whether other rights will be injured by the change.

- Whether the change will result in an enlargement in use of the rights.

- Whether the change is in the local public interest.

- Whether the change is consistent with the conservation of water resources in the state of Idaho.

- Whether the rights sought to be changed have been confirmed by license and can be changed under Section 42-222, Idaho Code.

6) The following issues were raised concerning the cease and desist order:

- Has the S1/2SW1/4, Section 6, T3N, R26E been irrigated this season without a valid water right?

- Have the Aikele's continued to irrigate the S1/2SW1/4, Section 6, T3N, R26E after service of the order to cease and desist?

- Should the Department seek enforcement of the order to cease and desist?

- Is the proper forum for considering the order the district court?

7) The hearing officer included in the hearing record a letter submitted by David A. Flesher, Acting County Supervisor of Farmers Home Administration, USDA, indicating FmHA holds a lien on the water rights of transfer No. 3675. Mr. Flesher indicates that transfer of the rights from the mortgaged property would be a violation of the loan and security agreement, and he asks that the processing of the transfer be suspended until concurrence of FmHA is received.

8) Applicant Perkes testified that the water rights proposed to be changed by application for transfer No. 3675 were used until two years ago when the lands were placed in a year-to-year federal set-aside program.

9) Applicant Perkes testified that he owns the water rights to be changed by transfer No. 3675 and the land to which these rights are appurtenant. The Applicants testified that they had entered into an agreement allowing the Aikeles to use the water rights as proposed in transfer No. 3675 on an annual basis with the right to continue on a year-to-year basis.

10) The well to which the rights would be transferred has been used for 8 to 10 years. Juel Aikele testified that less than 12.65 cfs can be diverted from the well as presently constructed.

11) The Big Lost River Basin is in a fourth consecutive season with much below average rain and snowfall. As a result, ground water levels have declined throughout the basin and streamflows have decreased. Information is not currently available to determine the extent to which the operation of specific wells has had an effect upon the streamflow and upon ground water levels.

12) Approval of the application for transfer will not increase the rate or volume of ground water diverted nor increase the acreage irrigated under existing rights.

13) The S1/2SW1/4, Section 6, T3N, R26E, has been irrigated this season without a valid water right and irrigation has continued following service of the order to cease and desist.

14) One or both of the wells from which the water rights are sought to be transferred have been pumped this season for use on land for which the wells are not an authorized point of diversion.

#### **CONCLUSION OF LAW**

1) Section 42-222, Idaho Code, provides, in part, that:

The director of the department of water resources shall examine all 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 use where such change would significantly affect the agricultural base of the local area.

2) Approval of application for transfer No. 3675 with appropriate conditions will not result in injury to other rights.

3) Approval of application for transfer No. 3675 with appropriate conditions will prevent an enlargement of the original rights.

4) Approval of application for transfer No. 3675 is in the local public interest and is consistent with the conservation of water in the state of Idaho.

5) Water has been used on the S1/2SW1/4, Section 6, T3N, R26E, without having a valid water right, and the irrigation of this parcel has continued after receipt of an order issued by the Director pursuant to Section 42-351, Idaho Code, to cease and desist.

6) Section 42-351(1), Idaho Code, provides that:

If the director of the department of water resources finds, on the basis of available information, that a person is diverting water from a natural water course or from a ground water source without having obtained a valid water right to do so or is applying water not in conformance with the conditions of a valid water right, then the director of the department of water resources may file an action seeking injunctive relief or may issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right.

7) Section 42-352(1), Idaho Code provides that:

Any person who willfully violates any cease and desist order issued under chapter 3, title 42, Idaho Code, after the same has been served on that person shall be subject to a civil penalty to be imposed by the director of water resources not to exceed one hundred dollars (\$100) per diversion for each calendar day, or any part of a calendar day, following service of the cease and desist order in which the illegal diversion or use of water occurs. The director of the department of water resources shall have the authority to file an action in the appropriate district court to recover said civil penalties.

8) The issue of whether a transfer of the subject water rights constitutes a violation of the loan and security agreement covering the land from which the rights are being transferred is beyond the authority of the Department to determine. Testimony indicates that the lease of the water rights associated with transfer application No. 3675 is on a year-to-year basis. In the event that the FmHA foreclosed on the mortgage, the Department understands that the water rights, although transferred, would remain part of the property subject to the mortgage.

9) Because of the year-to-year lease of water, the transfer must be conditioned to authorize the change in place of use and point of diversion for a similar period.

### **ORDER**

It is therefore ordered that application for transfer No. 3675 be approved and the same is hereby approved, subject to the following conditions and requirements:

1) Approval is effective until November 1, 1990, unless extended by the director. Upon expiration of this approval or any extension thereof, the place of use and point of diversion for water right Nos. 34-7080A, 34-7136 and 34-7169 shall revert to that existing prior to the approval.

2) During the period of this transfer approval or any extension thereof, the use of water on the lands originally licensed and the diversion of water from the original points of diversion under water right Nos. 34-7080A, 34-7136 and 34-7169 is prohibited.

3) Prior to diverting water under this approval, a measuring device shall be installed and maintained in good working condition as determined by the Department at the point of injection into the canal and another shall be installed and maintained at the point of re-diversion from the canal to the lands to be irrigated. The measuring devices shall be of a type acceptable to the director of the Department.

4) This approval does not constitute an easement or right-of-way across the lands of another; nor does it authorize the use of any canal, ditch, well or pipeline owned by another.

5) The rate of diversion from the well located in the SW1/4SW1/4, Section 21, T4N, R26E shall not exceed 12.43 cfs and the rate of re-diversion from the canal to the lands irrigated under this approval shall not exceed 8.49 cfs.

6) The rate of diversion under this approval shall not provide more than 0.02 cfs per acre at the field headgate for the lands actually being irrigated pursuant to this approval when combined with all other rights used on the same land.

7) This approval does not authorize the construction, reconstruction, or modification of any well.

8) The wells in the SW1/4NW1/4, SE1/4NW1/4, Section 5, T4N, R26E from which the rights to the diversion of water are transferred shall be rendered inoperable. The means used by the applicants to render the wells inoperable shall be a method acceptable to the director of the Department. Thereafter, the wells shall not be made operable again until the director acknowledges in writing that a valid right exists to divert water from the wells.

9) The director retains jurisdiction of this matter to extend the expiration date of this approval upon written notice that the lease has been extended; and upon expiration of the approval to order that the rights revert to the points of diversion and places of use existing prior to the approval of transfer No. 3675.

10) Approval of this transfer does not constitute the approval of the FmHA or other entity holding a lien or mortgage on the water rights involved.

11) Violation of the conditions of this approval shall be cause for the director to void this approval.

It is further hereby ordered that the Proposed Order Denying Motion for Attorney's Fees is adopted and issued as the Final Decision and Order regarding the motion for attorney's fees.

DATED this 15<sup>TH</sup> day of OCTOBER, 1990.

  
R. KEITH HIGGINSON  
Director

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this the 22nd day of October 1990, true and correct copies of the foregoing MEMORANDUM DECISION AND ORDER APPROVING APPLICATION FOR TRANSFER NO. 3675 AND DENYING ATTORNEY'S FEES was mailed, postage prepaid to:

Marshall Todd Perkes  
Route 1, Box 110  
Arco, ID 83213

Gary Slette  
Nelson, Rosholt, Robertson,  
Tolman & Tucker  
Box 1906  
Twin Falls, ID 83303-1906

Lewis Rothwell, Chairman  
Big Lost River Irrigation Dist.  
Box 205  
Mackay, ID 83251

Juel and Michael Aikele  
Route 1  
Moore, ID 83255

Kent Foster  
Holden, Kidwell, Hahn & Crapo  
Box 50130  
Idaho Falls, ID 83405

Lawrence Babcock  
Box 66  
Moore, ID 83255



RITA L. FLECK

Secretary/Records Manager

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

Transfer No. \_\_\_\_\_

APPLICATION FOR TRANSFER OF WATER RIGHT  
PART 1

Name of applicant M. Todd Perkes, Juel Aikele & Michael Aikele Phone (208)523-0620  
Post Office address %Holden, Kidwell, Hahn & Crapo, P.O. Box 50130, Idaho Falls, ID 83405

## 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 Present place of use of Perkes is in a set aside program; pending application for permit of Aikeles for proposed place of use is involved in a hopeless morass of litigation. This would provide a method for legal diversion of the Aikele well.

## 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>34-7080A</u> | <u>09/23/1974</u> | <u>2.67</u>        | <u>Irrigation</u> | <u>April 1</u> | <u>to Nov. 1</u> |
| <u>34-7136</u>  | <u>03/26/1976</u> | <u>5.50</u>        | <u>Irrigation</u> | <u>April 1</u> | <u>to Nov. 1</u> |
| <u>34-7169</u>  | <u>01/06/1977</u> | <u>4.48</u>        | <u>Irrigation</u> | <u>April 1</u> | <u>to Nov. 1</u> |
|                 |                   |                    |                   |                | <u>to</u>        |

2. Total amount of water being transferred 12.65 cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.

3. Source of water Groundwater tributary to \_\_\_\_\_

4. Point(s) of Diversion:

| Lot | ¼ | ¼  | ¼  | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|----|----|------|------|------|--------|--------------------------|
|     |   | SW | SW | 21   | 4N.  | 26E. | Butte  | Aikele Well              |
|     |   |    |    |      |      |      |        |                          |
|     |   |    |    |      |      |      |        |                          |
|     |   |    |    |      |      |      |        |                          |

5. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
| 3N   | 26E  | 6    |      |      | 40   | 40   |      |      | 40   | 40   | 40   | 40   | 40   | 40   | 40   | 40   | 40   | 40   | 480    |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres 480

**PART 1****6. General Information:**

- a. Description of diversion system Well and pump.
- b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? X Yes \_\_\_\_\_ 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:  
This land is presently in a federal set aside program and is not being irrigated  
so there will be no effect for the duration of the lease agreement between Perkes  
and Aikeles.
- d. Remarks:  
SEE ATTACHMENT "A"

**ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES**

This is to certify that I have examined Application for Transfer of Water Rights No. 34-7080A/34-7136/34-7169  
And said application is hereby APPROVED, subject to the following limitations and conditions:

PURSUANT TO MEMORANDUM DECISION AND ORDER APPROVING APPLICATION FOR TRANSFER NO.  
3675 AND DENYING ATTORNEY'S FEES.

Witness my hand this 22nd day of October, 19 90.

L. Glen Saylor  
CHIEF, WATER ALLOCATION BUREAU

**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. \_\_\_\_\_ Decreed to \_\_\_\_\_  
in case of \_\_\_\_\_ vs. \_\_\_\_\_  
dated \_\_\_\_\_ in \_\_\_\_\_ county of \_\_\_\_\_
- b. License No. 34-7080A 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** Groundwater tributary to \_\_\_\_\_

**4. Date or priority** September 23, 1974

**5. Water is used for the following purpose:**

amount 2.67 cfs for Irrigation purposes from April 1 to Nov. 1  
(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** 2.67 cfs cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.  
(But see condition in license.)

**7. Point(s) of Diversion:**

| Lot | ¼ | ¼  | ¼  | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|----|----|------|------|------|--------|--------------------------|
|     |   | SW | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   | SE | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   |    |    |      |      |      |        |                          |

**8. Lands irrigated or place of use:**

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
| 3N   | 25E  | 11   | 40   | 40   | 40   | 40   |      |      |      |      |      |      |      |      |      |      |      |      | 160    |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres 160

**9. Describe any other water rights used for the same purpose as described above** \_\_\_\_\_

**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. \_\_\_\_\_ Decreed to \_\_\_\_\_  
in case of \_\_\_\_\_ vs. \_\_\_\_\_  
dated \_\_\_\_\_ in \_\_\_\_\_ county of \_\_\_\_\_
- b. License No. 34-7136 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** Groundwater tributary to \_\_\_\_\_

**4. Date or priority** March 26, 1976

**5. Water is used for the following purpose:**

amount 5.5 cfs for Irrigation purposes from April 1 to Nov. 1  
(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** 5.5 cfs cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.  
(But see condition in license.)

**7. Point(s) of Diversion:**

| Lot | 1/4 | 1/4 | 1/4 | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|-----|-----|-----|------|------|------|--------|--------------------------|
|     |     | SW  | NW  | 5    | 3N   | 25E  | Butte  |                          |
|     |     | SE  | NW  | 5    | 3N   | 25E  | Butte  |                          |
|     |     |     |     |      |      |      |        |                          |

**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 |        |
| 3N   | 25E  | 11   |        |        |        |        | 40     | 40     | 40     | 40     |        |        |        |        |        |        |        |        | 160    |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |

Total acres 160

**9. Describe any other water rights used for the same purpose as described above** \_\_\_\_\_

**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. \_\_\_\_\_ Decreed to \_\_\_\_\_  
in case of \_\_\_\_\_ vs. \_\_\_\_\_  
dated \_\_\_\_\_ in \_\_\_\_\_ county of \_\_\_\_\_
- b. License No. 34-7169 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 Groundwater tributary to \_\_\_\_\_

4. Date or priority January 6, 1977

5. Water is used for the following purpose:

amount 4.48 cfs for Irrigation purposes from April 1 to Nov. 1  
(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 4.48 cfs cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.  
(But see condition in license.)

7. Point(s) of Diversion:

| Lot | ¼ | ¼  | ¼  | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|----|----|------|------|------|--------|--------------------------|
|     |   | SW | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   | SE | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   |    |    |      |      |      |        |                          |

8. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
| 3N   | 25E  | 11   |      |      |      |      |      |      |      |      |      |      |      |      | 40   | 40   | 40   | 40   | 160    |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres 160

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

**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.**

SEE ATTACHED MAPS FOR CURRENT POINTS  
 OF DIVERSION AND PLACE OF USE AND FOR  
 PROPOSED NEW POINT OF DIVERSION AND  
 PLACE OF USE.

**SCALE: 2 inches equal 1 mile. Draw plan in ink.**

**PART 3****B. CHANGES IN NATURE OF USE**

| 1 | <u>New Nature of Use</u> | <u>Amount</u><br>(cfs/ac-ft) | <u>Hours/days/year</u> | <u>Period of Use</u> |
|---|--------------------------|------------------------------|------------------------|----------------------|
|   |                          |                              |                        | 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.

MT Todd Perkins Paul Arthur Mike Akke  
(Signature of Applicant)

Subscribed and sworn to before me this 14 day of February, 19 80.

Paul D. White  
(Notary Public)

My commission expires 11/10/92

**FOR DEPARTMENT USE ONLY**

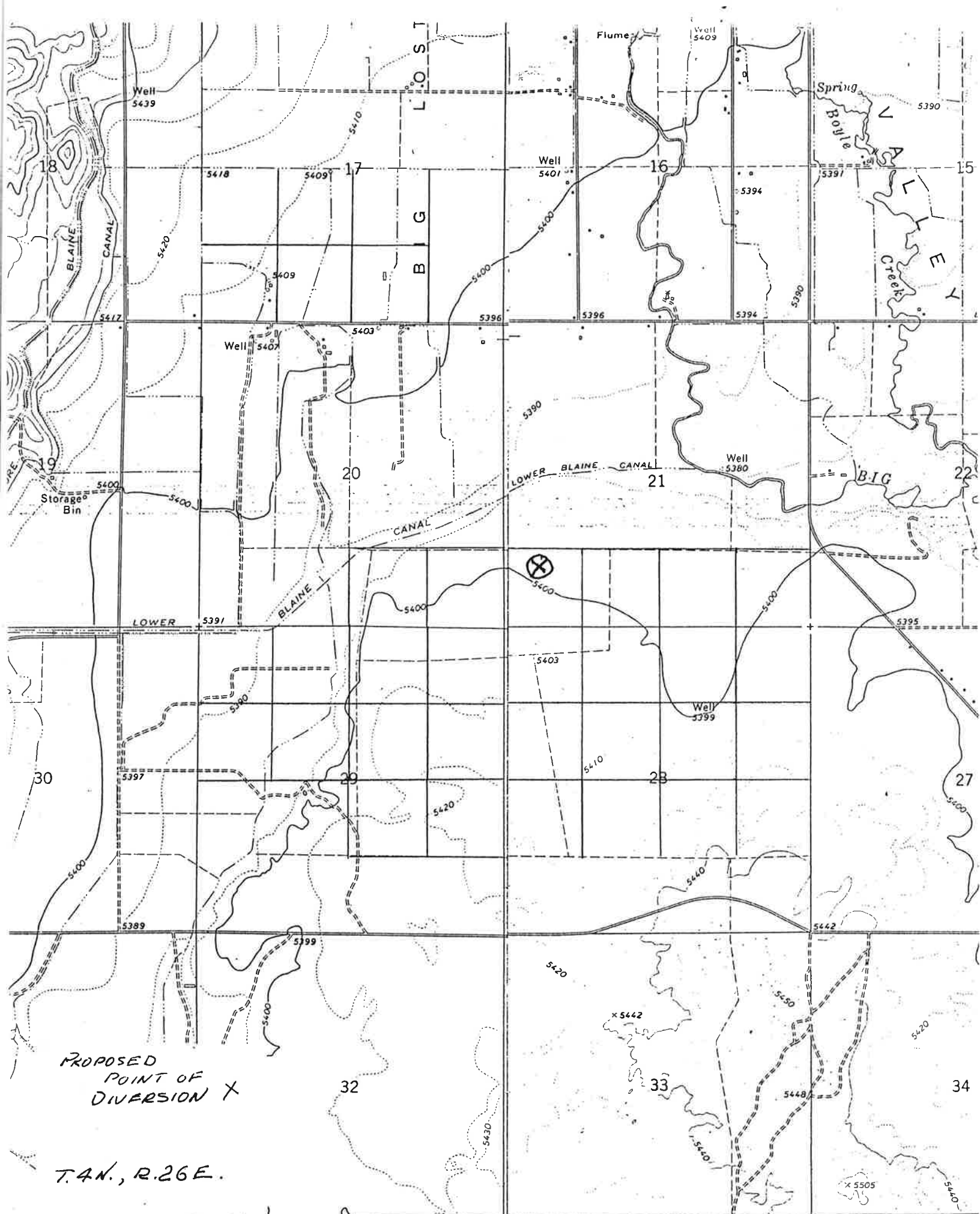
Transfer contains \_\_\_\_\_ pages and \_\_\_\_\_ attachments

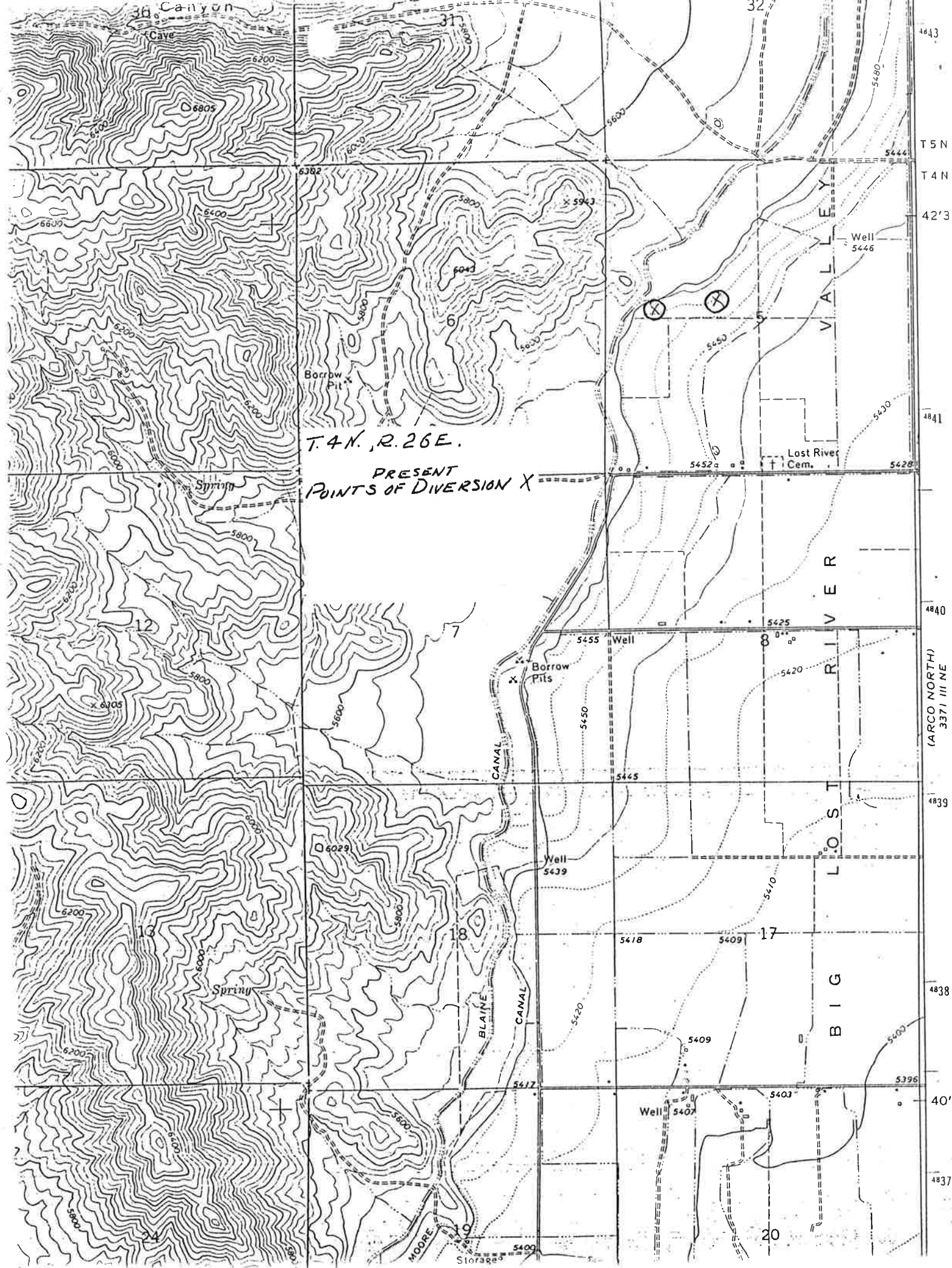
Received by CW Date 2-14-90 Protest filed by Big Lost River Irrig.-Prelim. check by \_\_\_\_\_ Fee \$50.00 # 2012101 PETITIONS-Receipted by HWJ Date 2-20-90Published in Custer Publishing & Arco Advertiser Copies of protest forwarded by \_\_\_\_\_Pub. dates 4-19 & 26-90 Hearing held by \_\_\_\_\_ Date \_\_\_\_\_Watermaster recommendation requested on WD #34 Recommended for ☐ approval ☐ denial\_\_\_\_\_ rec'd. 5-1-90 by \_\_\_\_\_

Copy of transfer sent to lien holder \_\_\_\_\_

**ATTACHMENT "A"**

The three licenses, 34-7080A, 34-7136 and 34-7169, appear to show the two wells or points of diversion for these three rights in T.3N., R.25E., when, in fact, the wells are and always have been in T.4N., R.26E.

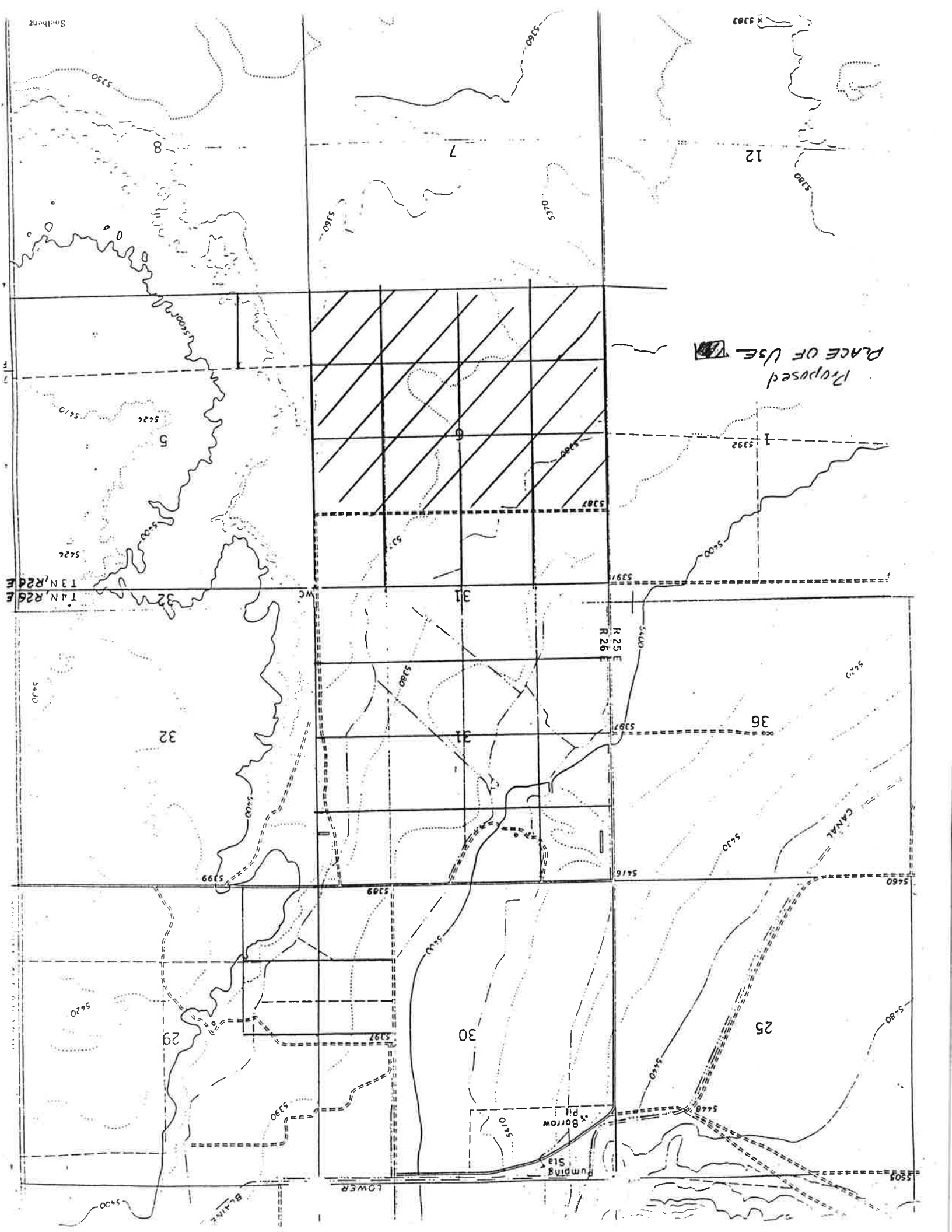




T. 4 N., R. 26 E.

PRESENT  
POINTS OF DIVERSION X

(ARCO NORTH)  
3371 III NE



STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCESTransfer No. 3675APPLICATION FOR TRANSFER OF WATER RIGHT  
PART 1

APPROVED

Name of applicant M. Todd Perkes, Juel Aikele & Michael Aikele Phone (208)523-0620  
 Post Office address %Holden, Kidwell, Hahn & Crapo, P.O. Box 50130, Idaho Falls, ID 83405

## 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 Present place of use of Perkes is in a set aside program; pending application for permit of Aikeles for proposed place of use is involved in a hopeless morass of litigation. This would provide a method for legal diversion of the Aikele well.

## 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>34-7080A</u> | <u>09/23/1974</u> | <u>2.67</u>        | <u>Irrigation</u> | <u>April 1</u> to <u>Nov. 1</u> |
| <u>34-7136</u>  | <u>03/26/1976</u> | <u>5.50</u>        | <u>Irrigation</u> | <u>April 1</u> to <u>Nov. 1</u> |
| <u>34-7169</u>  | <u>01/06/1977</u> | <u>4.48</u>        | <u>Irrigation</u> | <u>April 1</u> to <u>Nov. 1</u> |
|                 |                   |                    |                   | to _____                        |
2. Total amount of water being transferred 12.65 cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.
3. Source of water Groundwater tributary to \_\_\_\_\_
4. Point(s) of Diversion:

| Lot | 1/4 | 1/4 | 1/4 | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|-----|-----|-----|------|------|------|--------|--------------------------|
|     |     | SW  | SW  | 21   | 4N.  | 26E. | Butte  | Aikele Well              |
|     |     |     |     |      |      |      |        |                          |
|     |     |     |     |      |      |      |        |                          |
|     |     |     |     |      |      |      |        |                          |

## 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 |        |
| 3N   | 26E  | 6    |        |        | 40     | 40     |        |        | 40     | 40     | 40     | 40     | 40     | 40     | 40     | 40     | 40     | 40     | 480    |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |
|      |      |      |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |        |

Total acres 480

**PART 1****6. General Information:**a. Description of diversion system Well and pump.b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? X Yes \_\_\_\_\_ 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:

This land is presently in a federal set aside program and is not being irrigated so there will be no effect for the duration of the lease agreement between Perkes and Aikeles.

d. Remarks:

SEE ATTACHMENT "A"**ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES**

This is to certify that I have examined Application for Transfer of Water Rights No. 34-7080A/34-7136/34-7169  
And said application is hereby APPROVED, subject to the following limitations and conditions:

PURSUANT TO MEMORANDUM DECISION AND ORDER APPROVING APPLICATION FOR TRANSFER NO.  
3675 AND DENYING ATTORNEY'S FEES.

Witness my hand this 22nd day of October, 19 90.

L. Glen Saylor  
CHIEF, WATER ALLOCATION BUREAU

**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. \_\_\_\_\_ Decreed to \_\_\_\_\_  
in case of \_\_\_\_\_ vs. \_\_\_\_\_  
dated \_\_\_\_\_ in \_\_\_\_\_ county of \_\_\_\_\_
- b. License No. 34-7169 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 Groundwater tributary to \_\_\_\_\_

4. Date or priority January 6, 1977

5. Water is used for the following purpose:

amount 4.48 cfs for Irrigation purposes from April 1 to Nov. 1  
(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 4.48 cfs cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.  
(But see condition in license.)

7. Point(s) of Diversion:

| Lot | ¼ | ¼  | ¼  | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|----|----|------|------|------|--------|--------------------------|
|     |   | SW | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   | SE | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   |    |    |      |      |      |        |                          |

8. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
| 3N   | 25E  | 11   |      |      |      |      |      |      |      |      |      |      |      |      | 40   | 40   | 40   | 40   | 160    |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres 160

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 | ¼ | ¼ | ¼ | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|---|---|------|------|------|--------|--------------------------|
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |

3. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

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 | ¼ | ¼ | ¼ | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|---|---|------|------|------|--------|--------------------------|
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |

3. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres \_\_\_\_\_

**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. \_\_\_\_\_ Decreed to \_\_\_\_\_  
in case of \_\_\_\_\_ vs. \_\_\_\_\_  
dated \_\_\_\_\_ in \_\_\_\_\_ county of \_\_\_\_\_
- b. License No. 34-7136 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 Groundwater tributary to \_\_\_\_\_

4. Date or priority March 26, 1976

5. Water is used for the following purpose:

amount 5.5 cfs for Irrigation purposes from April 1 to Nov. 1  
(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 5.5 cfs cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.  
(But see condition in license.)

7. Point(s) of Diversion:

| Lot | ¼ | ¼  | ¼  | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|----|----|------|------|------|--------|--------------------------|
|     |   | SW | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   | SE | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   |    |    |      |      |      |        |                          |

8. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
| 3N   | 25E  | 11   |      |      |      |      | 40   | 40   | 40   | 40   |      |      |      |      |      |      |      |      | 160    |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres 160

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 | ¼ | ¼ | ¼ | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|---|---|------|------|------|--------|--------------------------|
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |

3. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

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 | ¼ | ¼ | ¼ | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|---|---|------|------|------|--------|--------------------------|
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |

3. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres \_\_\_\_\_

**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. \_\_\_\_\_ Decreed to \_\_\_\_\_  
in case of \_\_\_\_\_ vs. \_\_\_\_\_  
dated \_\_\_\_\_ in \_\_\_\_\_ county of \_\_\_\_\_
- b. License No. 34-7080A 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 Groundwater tributary to \_\_\_\_\_

4. Date or priority September 23, 1974

5. Water is used for the following purpose:

amount 2.67 cfs for Irrigation purposes from April 1 to Nov. 1  
(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 2.67 cfs cubic feet per second and/or \_\_\_\_\_ acre-feet per annum.  
(But see condition in license.)

7. Point(s) of Diversion:

| Lot | ¼ | ¼  | ¼  | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|----|----|------|------|------|--------|--------------------------|
|     |   | SW | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   | SE | NW | 5    | 3N   | 25E  | Butte  |                          |
|     |   |    |    |      |      |      |        |                          |

8. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
| 3N   | 25E  | 11   | 40   | 40   | 40   | 40   |      |      |      |      |      |      |      |      |      |      |      |      | 160    |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

Total acres 160

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 | ¼ | ¼ | ¼ | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|---|---|------|------|------|--------|--------------------------|
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |

3. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

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 | ¼ | ¼ | ¼ | Sec. | Twp. | Rge. | County | Local name for diversion |
|-----|---|---|---|------|------|------|--------|--------------------------|
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |
|     |   |   |   |      |      |      |        |                          |

3. Lands irrigated or place of use:

| Twp. | Rge. | Sec. | NE ¼ |      |      |      | NW ¼ |      |      |      | SW ¼ |      |      |      | SE ¼ |      |      |      | Totals |
|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|------|--------|
|      |      |      | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ | NE ¼ | NW ¼ | SW ¼ | SE ¼ |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |
|      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |      |        |

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.

SEE ATTACHED MAPS FOR CURRENT POINTS  
OF DIVERSION AND PLACE OF USE AND FOR  
PROPOSED NEW POINT OF DIVERSION AND  
PLACE OF USE.

### PART 3

#### B. CHANGES IN NATURE OF USE

| 1 | New Nature of Use | Amount<br>(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.

M. Todd Perkins (Signature of Applicant)

Subscribed and sworn to before me this 14 day of February, 19 80.

Paul R. Vetter (Notary Public)

My commission expires 11/10/92

#### FOR DEPARTMENT USE ONLY

Transfer contains \_\_\_\_\_ pages and \_\_\_\_\_ attachments

Received by CW Date 2-14-80 Protest filed by Big Lost River Irrig.

Prelim. check by \_\_\_\_\_ Fee \$50.00 # 2012101 PETITIONS-

Receipted by HUJ Date 2-20-90

Published in Custer Publishing & Arco Advertiser Copies of protest forwarded by \_\_\_\_\_

Pub. dates 4-19 & 26-90 Hearing held by \_\_\_\_\_ Date \_\_\_\_\_

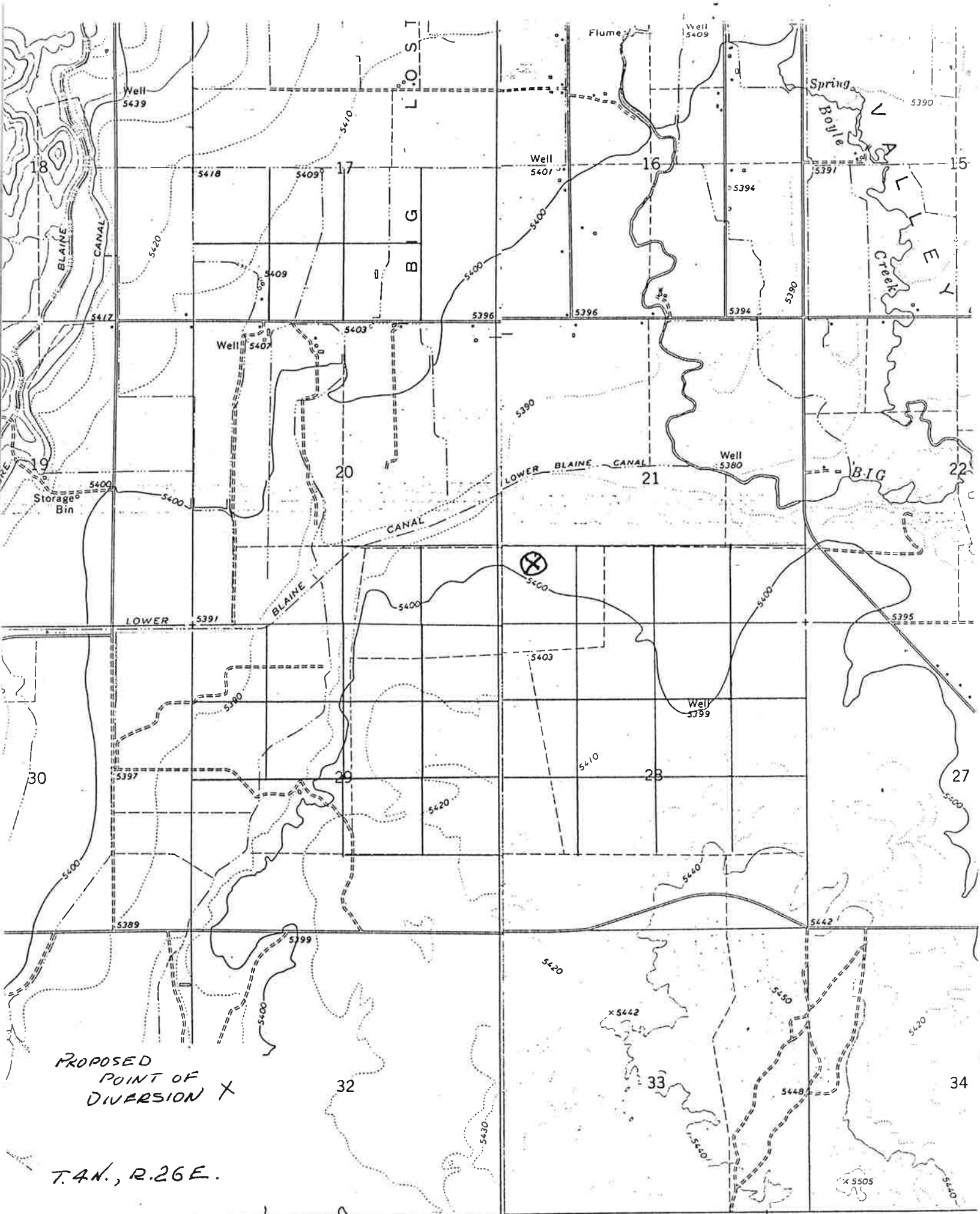
Watermaster recommendation requested on WD #34 Recommended for ☐ approval ☐ denial

\_\_\_\_\_ rec'd. 5-1-90 by \_\_\_\_\_

Copy of transfer sent to lien holder \_\_\_\_\_

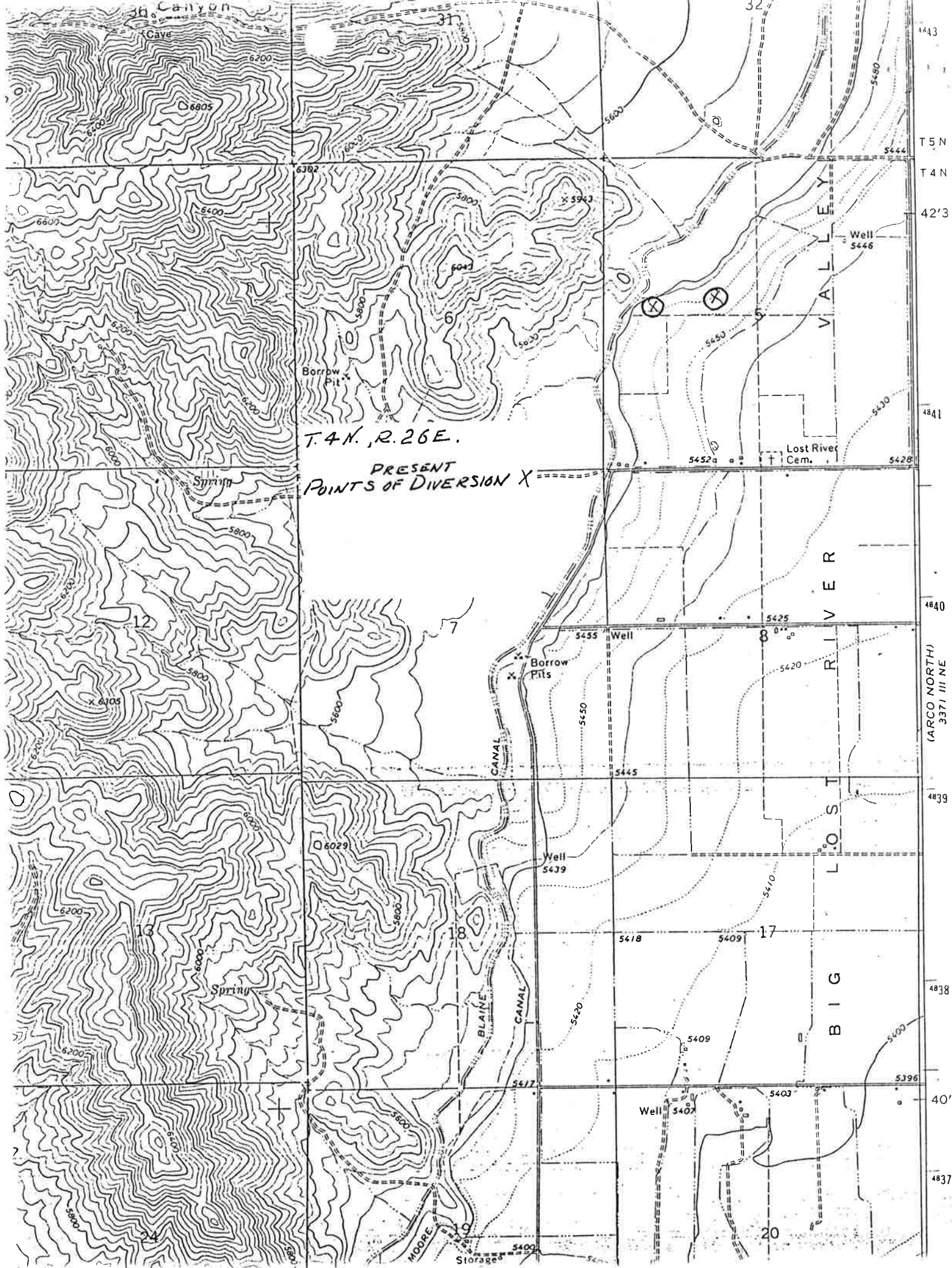
**ATTACHMENT "A"**

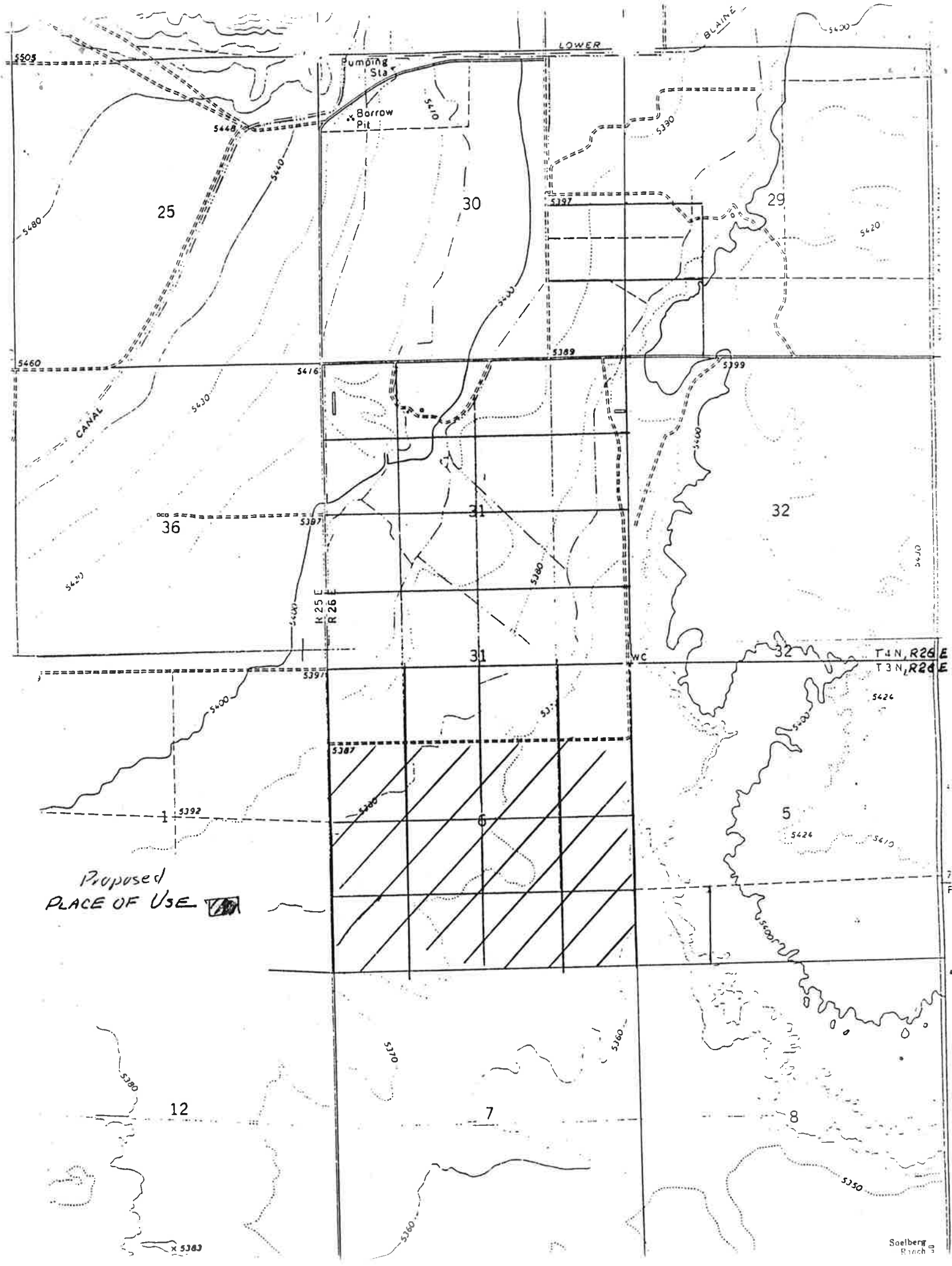
The three licenses, 34-7080A, 34-7136 and 34-7169, appear to show the two wells or points of diversion for these three rights in T.3N., R.25E., when, in fact, the wells are and always have been in T.4N., R.26E.



PROPOSED  
POINT OF  
DIVERSION X

T.4N., R.26E.





BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

RECEIVED

OCT 29 1990

Department of Water Resources  
Eastern District Office

In the Matter of Transfer No. 3675 )  
of Water Rights 34-7080A, 34-7136, )  
and 34-7169 in the Names of )  
M. TODD PERKES, JUEL AIKELE, )  
and MICHAEL AIKELE and the )  
Cease and Desist Order issued by the )  
Department on June 22, 1990 )

MEMORANDUM DECISION AND  
ORDER APPROVING APPLICATION  
FOR TRANSFER NO. 3675 AND  
DENYING ATTORNEY'S FEES

On February 14, 1990, M. Todd Perkes, Juel Aikele, and Michael Aikele ("Applicants") filed application for transfer No. 3675 to change the point of diversion and place of use of water right Nos. 34-7080A, 34-7136, and 34-7169. Approval of the application was protested by the Big Lost Irrigation District ("BLID") and by 138 persons signing a petition delivered to the Idaho Department of Water Resources ("Department") by Mr. Lawrence Babcock.

On June 22, 1990, the Department issued an order to Don A. Aikele, Juel Aikele, and Michael Aikele to cease and desist irrigation of land within the S1/2 of the SW1/4 of Section 6, T3N, R26E, BM until a right to do so is obtained or identified. Subsequent correspondence from Mr. Kent Foster, attorney for the Aikeles, indicated that the order would not be complied with and requested approval of application for transfer No. 3675 which, if approved, would authorize irrigation of the land that is the subject of the order to cease and desist. In response, the Department set a combined hearing to consider the application for transfer and the cease and desist order.

The hearing was held on July 26, 1990, in Arco, Idaho. The Applicants and recipients of the order to cease and desist were represented by Mr. Kent Foster. Protestant BLID was represented by Chairman Lewis Rothwell. Mr. Lawrence Babcock acted as spokesman for the protest petition signers. Other petition signers in attendance were given

the opportunity to ask questions and present testimony. At the hearing, Mr. Foster entered a motion seeking a ruling from the Department to require the protestants to pay attorney costs of the Applicants alleging that the issues raised by the protestants were frivolous and without merit. This issue was bifurcated from the other issues allowing a schedule to be entered for briefing the issue of payment of attorney costs, while allowing the record to be closed concerning the other issues of the hearing.

On August 9, 1990, the Department issued a Proposed Memorandum Decision and Order in connection with protested application for transfer No. 3675. On August 28, 1990, the Department received exceptions to the proposed decision from the Applicants.

On September 17, 1990, the Department issued a Proposed Memorandum Decision and Order addressing the motion for attorney's fees. No exceptions were submitted in connection with this proposed decision.

The Director has reviewed the exceptions filed in connection with the proposed decision issued August 9, 1990, and responds to the exception to grant an "extension" that the Director is authorized to specify conditions when granting approvals. The intent, of course, was and is to provide a ready mechanism for the benefit of the Applicants for continued use of the water as proposed in the transfer if authorization to use the water is otherwise obtainable in successive years.

In response to the exceptions, the Director has eliminated condition of approval no. 9) shown in the proposed decision issued August 9, 1990. The matter of payment of a penalty for unauthorized diversion and use of water by the Applicants will be pursued by the Department in a separate action.

#### **FINDINGS OF FACT**

1) The rights proposed to be changed by application for transfer No. 3675 are recorded with the department as follows:

License No. 34-7080A authorizes the diversion of 2.67 cubic feet per second ("cfs") of ground water from wells located in the SW1/4NW1/4, SE1/4NW1/4, Section 5, T3N, R25E for the irrigation of 160 acres located in the NE1/4 of Section 11, T3N, R25E. The priority date is September 23, 1974.

License No. 34-7136 authorizes the diversion of 5.50 cfs of ground water from the same wells listed for right No. 34-7080A for the irrigation of 160 acres in the NW1/4 of Section 11, T3N, R25E. The priority date is March 26, 1976.

License No. 34-7169 authorizes the diversion of 4.48 cfs of ground water from the same wells as the above listed two rights for the irrigation of 160 acres in the SE1/4 of Section 11, T3N, R25E. The priority date is January 6, 1977.

Each of the licenses is conditioned that when combined with the other two rights it "shall not provide more than 12.43 cfs at the points of diversion and shall not exceed 8.49 cfs at the point of re-diversion located within the SE1/4NE1/4, Section 11, T3N, R25E."

Each of the licenses also has the following condition:

This right in no way grants any right-of-way or easement across the land of another.

Licenses 34-7136 and 34-7080A have the following condition:

This right shall not provide more than 0.02 cfs per acre for the lands identified above.

License 34-7169 is conditioned as follows:

This right shall not provide more than 2.68 cfs or 0.017 cfs per acre for the lands identified above.

2) Applicant Perkes testified that the actual location of the point of diversion for each of the licenses is in the SW1/4NW1/4, SE1/4NW1/4, Section 5, T4N, R26E, and that the location has not been changed from that existing prior to issuance of the licenses. Licensing field examinations in the records of the department agree with the testimony.

3) Application for transfer No. 3675 proposes to change the location of the point of diversion of each of the licenses to the SW1/4SW1/4, Section 21, T4N, R26E, a location approximately 3 miles south and 1 mile east of the present actual point of diversion. The application proposes to divert 12.65 cfs for the irrigation of 480 acres in the S1/2N1/2, S1/2, Section 6, T3N, R26E. The new place of use is approximately 1/2 mile north and 1 and 1/2 mile east of the present place of use for the licenses.

4) Notice of application for transfer No. 3675 was advertised in the Arco Advertiser and the Challis Messenger on April 19 and 26, 1990. The protests of BLID and the signed petition were timely received prior to the protest date of May 7, 1990.

5) The following issues were raised concerning application for transfer No. 3675:

-Whether other rights will be injured by the change.

-Whether the change will result in an enlargement in use of the rights.

-Whether the change is in the local public interest.

-Whether the change is consistent with the conservation of water resources in the state of Idaho.

-Whether the rights sought to be changed have been confirmed by license and can be changed under Section 42-222, Idaho Code.

6) The following issues were raised concerning the cease and desist order:

-Has the S1/2SW1/4, Section 6, T3N, R26E been irrigated this season without a valid water right?

-Have the Aikele's continued to irrigate the S1/2SW1/4, Section 6, T3N, R26E after service of the order to cease and desist?

-Should the Department seek enforcement of the order to cease and desist?

-Is the proper forum for considering the order the district court?

7) The hearing officer included in the hearing record a letter submitted by David A. Flesher, Acting County Supervisor of Farmers Home Administration, USDA, indicating FmHA holds a lien on the water rights of transfer No. 3675. Mr. Flesher indicates that transfer of the rights from the mortgaged property would be a violation of the loan and security agreement, and he asks that the processing of the transfer be suspended until concurrence of FmHA is received.

8) Applicant Perkes testified that the water rights proposed to be changed by application for transfer No. 3675 were used until two years ago when the lands were placed in a year-to-year federal set-aside program.

9) Applicant Perkes testified that he owns the water rights to be changed by transfer No. 3675 and the land to which these rights are appurtenant. The Applicants testified that they had entered into an agreement allowing the Aikeles to use the water rights as proposed in transfer No. 3675 on an annual basis with the right to continue on a year-to-year basis.

10) The well to which the rights would be transferred has been used for 8 to 10 years. Juel Aikele testified that less than 12.65 cfs can be diverted from the well as presently constructed.

11) The Big Lost River Basin is in a fourth consecutive season with much below average rain and snowfall. As a result, ground water levels have declined throughout the basin and streamflows have decreased. Information is not currently available to determine the extent to which the operation of specific wells has had an effect upon the streamflow and upon ground water levels.

12) Approval of the application for transfer will not increase the rate or volume of ground water diverted nor increase the acreage irrigated under existing rights.

13) The S1/2SW1/4, Section 6, T3N, R26E, has been irrigated this season without a valid water right and irrigation has continued following service of the order to cease and desist.

14) One or both of the wells from which the water rights are sought to be transferred have been pumped this season for use on land for which the wells are not an authorized point of diversion.

#### **CONCLUSION OF LAW**

1) Section 42-222, Idaho Code, provides, in part, that:

The director of the department of water resources shall examine all 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 use where such change would significantly affect the agricultural base of the local area.

2) Approval of application for transfer No. 3675 with appropriate conditions will not result in injury to other rights.

3) Approval of application for transfer No. 3675 with appropriate conditions will prevent an enlargement of the original rights.

4) Approval of application for transfer No. 3675 is in the local public interest and is consistent with the conservation of water in the state of Idaho.

5) Water has been used on the S1/2SW1/4, Section 6, T3N, R26E, without having a valid water right, and the irrigation of this parcel has continued after receipt of an order issued by the Director pursuant to Section 42-351, Idaho Code, to cease and desist.

6) Section 42-351(1), Idaho Code, provides that:

If the director of the department of water resources finds, on the basis of available information, that a person is diverting water from a natural water course or from a ground water source without having obtained a valid water right to do so or is applying water not in conformance with the conditions of a valid water right, then the director of the department of water resources may file an action seeking injunctive relief or may issue an order directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or of any existing water right. A cease and desist order may direct compliance with applicable law and with any existing water right or may provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right.

7) Section 42-352(1), Idaho Code provides that:

Any person who willfully violates any cease and desist order issued under chapter 3, title 42, Idaho Code, after the same has been served on that person shall be subject to a civil penalty to be imposed by the director of water resources not to exceed one hundred dollars (\$100) per diversion for each calendar day, or any part of a calendar day, following service of the cease and desist order in which the illegal diversion or use of water occurs. The director of the department of water resources shall have the authority to file an action in the appropriate district court to recover said civil penalties.

8) The issue of whether a transfer of the subject water rights constitutes a violation of the loan and security agreement covering the land from which the rights are being transferred is beyond the authority of the Department to determine. Testimony indicates that the lease of the water rights associated with transfer application No. 3675 is on a year-to-year basis. In the event that the FmHA foreclosed on the mortgage, the Department understands that the water rights, although transferred, would remain part of the property subject to the mortgage.

9) Because of the year-to-year lease of water, the transfer must be conditioned to authorize the change in place of use and point of diversion for a similar period.

### **ORDER**

It is therefore ordered that application for transfer No. 3675 be approved and the same is hereby approved, subject to the following conditions and requirements:

1) Approval is effective until November 1, 1990, unless extended by the director. Upon expiration of this approval or any extension thereof, the place of use and point of diversion for water right Nos. 34-7080A, 34-7136 and 34-7169 shall revert to that existing prior to the approval.

2) During the period of this transfer approval or any extension thereof, the use of water on the lands originally licensed and the diversion of water from the original points of diversion under water right Nos. 34-7080A, 34-7136 and 34-7169 is prohibited.

3) Prior to diverting water under this approval, a measuring device shall be installed and maintained in good working condition as determined by the Department at the point of injection into the canal and another shall be installed and maintained at the point of re-diversion from the canal to the lands to be irrigated. The measuring devices shall be of a type acceptable to the director of the Department.

4) This approval does not constitute an easement or right-of-way across the lands of another; nor does it authorize the use of any canal, ditch, well or pipeline owned by another.

5) The rate of diversion from the well located in the SW1/4SW1/4, Section 21, T4N, R26E shall not exceed 12.43 cfs and the rate of re-diversion from the canal to the lands irrigated under this approval shall not exceed 8.49 cfs.

6) The rate of diversion under this approval shall not provide more than 0.02 cfs per acre at the field headgate for the lands actually being irrigated pursuant to this approval when combined with all other rights used on the same land.

7) This approval does not authorize the construction, reconstruction, or modification of any well.

8) The wells in the SW1/4NW1/4, SE1/4NW1/4, Section 5, T4N, R26E from which the rights to the diversion of water are transferred shall be rendered inoperable. The means used by the applicants to render the wells inoperable shall be a method acceptable to the director of the Department. Thereafter, the wells shall not be made operable again until the director acknowledges in writing that a valid right exists to divert water from the wells.

9) The director retains jurisdiction of this matter to extend the expiration date of this approval upon written notice that the lease has been extended; and upon expiration of the approval to order that the rights revert to the points of diversion and places of use existing prior to the approval of transfer No. 3675.

10) Approval of this transfer does not constitute the approval of the FmHA or other entity holding a lien or mortgage on the water rights involved.

11) Violation of the conditions of this approval shall be cause for the director to void this approval.

It is further hereby ordered that the Proposed Order Denying Motion for Attorney's Fees is adopted and issued as the Final Decision and Order regarding the motion for attorney's fees.

DATED this 15<sup>TH</sup> day of OCTOBER, 1990.

  
R. KEITH HIGGINSON  
Director

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this the 22nd day of October 1990, true and correct copies of the foregoing MEMORANDUM DECISION AND ORDER APPROVING APPLICATION FOR TRANSFER NO. 3675 AND DENYING ATTORNEY'S FEES was mailed, postage prepaid to:

Marshall Todd Perkes  
Route 1, Box 110  
Arco, ID 83213

Gary Slette  
Nelson, Rosholt, Robertson,  
Tolman & Tucker  
Box 1906  
Twin Falls, ID 83303-1906

Lewis Rothwell, Chairman  
Big Lost River Irrigation Dist.  
Box 205  
Mackay, ID 83251

Juel and Michael Aikele  
Route 1  
Moore, ID 83255

Kent Foster  
Holden, Kidwell, Hahn & Crapo  
Box 50130  
Idaho Falls, ID 83405

Lawrence Babcock  
Box 66  
Moore, ID 83255



RITA L. FLECK

Secretary/Records Manager