

T3705 HILLCREEK PROPERTIES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of Rights)
to the Use of Water from the Snake River)
Basin Water System.)

Case No. 39756

The State of Idaho, ex rel. R. Keith
Higginson in his official capacity as
director of the Idaho Department of
Water Resources,

Petitioner,

vs.

BRIEF IN SUPPORT
OF PETITION FOR
PRELIMINARY INJUNCTION

DICKCON, a California corporation,
TIMJON, a California corporation, dba
HILLCREEK PROPERTIES, and
RICHARD A. TUTHILL, dba P. U.
RANCH, LTD.,

Defendants.

DESCRIPTIVE SUMMARY

This document is petitioner IDWR's brief in support of its Petition for Preliminary Injunction. The petition seeks to restrain the defendants Dickcon, Timjon, dba Hillcreek

Properties, and Richard Tuthill, dba P. U. Ranch, Ltd., from making certain diversions of ground water within the Big Lost River basin pending the issuance of a decree adjudicating rights to water within the basin.

INTRODUCTION

The petitioner, R. Keith Higginson, Director, Idaho Department of Water Resources (IDWR), on January 31, 1991, filed with the court a Petition for Preliminary Injunction seeking to enjoin the defendants, Dickcon, Timjon, dba Hillcreek Properties, and Richard Tuthill, dba P. U. Ranch, Ltd. (hereinafter "Tuthill" or "defendants"), from making certain diversions of ground water within the Big Lost River basin pending the issuance of a decree adjudicating rights to water within the basin. An Appendix accompanying IDWR's petition contains Exhibits A through I and affidavits of three department employees. IDWR also filed a memorandum in support of its petition for preliminary injunction on January 31, 1991, relying upon the provisions of Sections 42-231, 42-351 and 42-1805(9), Idaho Code, as authority for the director to seek injunctive relief in this case.

Tuthill filed a Motion to Dismiss or, in the Alternative, for Change of Venue on February 26, 1991. On March 14, 1991, Tuthill filed a Brief in Support of Motion to Dismiss with an affidavit of Richard A. Tuthill and copies of two letters and a memorandum from IDWR relating to the Big Lost River basin attached. IDWR filed a Brief in Opposition to Defendants' Motion to Dismiss on April 1, 1991. The court heard the motion by telephone conference on April 3, 1991, and denied both the motion to dismiss and the alternative motion for change of venue at the conclusion of the hearing. The court entered a written order denying the motions on April 9, 1991.

On April 17, 1991, the parties filed with the court a Stipulation of Facts on

Petition for Preliminary Injunction (hereinafter "Stipulation" or "SOF") to be used by the court in acting upon IDWR's petition for preliminary injunctive relief against Tuthill.

The purpose of this brief is to present further argument in support of IDWR's petition to enjoin Tuthill from diverting ground water in excess of the amount represented by existing approved water rights of record with IDWR. In particular, this brief responds to representations by Tuthill that defendants rely, in part, upon the provisions of Sections 42-1416 and 42-1416A, Idaho Code, as authority for the use of water in excess of the amounts represented by their water rights of record with IDWR. Because the parties are filing simultaneous briefs, IDWR must anticipate Tuthill's arguments in opposition to the petition for injunctive relief. In submitting this brief, IDWR relies upon the facts, exhibits and affidavits set forth or incorporated by reference in the parties' Stipulation of Facts. For the convenience of the court, the facts most pertinent to IDWR's argument are set out below.

STATEMENT OF FACTS

Defendants "Tuthill" include an individual and various corporate and non-corporate entities owning property in Butte County, Idaho, upon which farming operations are conducted. Richard A. Tuthill is the major principal of the various corporate and partnership entities named as defendants. SOF 4, ¶5.

Included in the Butte County property owned by Tuthill is a tract of 264 acres of previously undeveloped sagebrush land acquired by Tuthill in 1983 and located in "Era Flats," an area west of the City of Arco. SOF 4, ¶6. After acquiring this land, Tuthill proceeded to clear the sagebrush and otherwise prepare the land for cultivation. *Id.* Because of the arid nature of the land and the unavailability of water for irrigation in

the immediate area, Tuthill found it necessary to purchase some distant water rights for use on the land. *Id.* Tuthill entered into certain water transport agreements and acquired necessary easements for the conveyance of the water to the land for the operation of two pivot sprinkler irrigation systems. *Id.* Today, Tuthill claims a total investment in excess of \$300,000 in the 264 acres of Era Flats land. *Id.*

Tuthill first acquired two decreed surface water rights (34-0170 and 34-0556) from the Big Lost River for irrigation of the Era Flats land. SOF 11, ¶23. The use of these decreed rights is not at issue in this action for injunctive relief. When the decreed rights proved inadequate for irrigation of the land, Tuthill in 1985 purchased the so-called "Moss well" and eleven acres of land surrounding the well. SOF 5, ¶16. The Moss well is located in the NW¼NW¼, Section 21, Township 5N, Range 25E, approximately 8 miles northeast of the Era Flats land. Tuthill acquired licensed water right Nos. 34-2332 and 34-7079 with the purchase of the Moss well. The amount of water Tuthill is authorized to divert under these two licensed water rights is what is at issue under IDWR's petition for injunctive relief.

Licensed right No. 34-2332 was issued by IDWR to one Etsel Moss in 1959 with a priority date of May 6, 1955. SOF 7, ¶11 (Appendix to Petition for Preliminary Injunction, hereinafter "Appendix," Exhibit C). The license authorized a water diversion rate of 2.9 cfs for use on 145 acres located in Section 21, Township 5N, Range 26E, B.M., Butte County. The application for permit upon which license No. 34-2332 is based shows that the new ground water right was obtained to supplement decreed surface water rights from the Big Lost River having priority dates of 1884 and 1896. *Id.*

Licensed right No. 34-7079 was issued by IDWR to Etsel Moss in 1975 with a

priority date of September 17, 1974. SOF 7, ¶12 (Appendix, Exhibit D). The license authorized a water diversion rate of 2.76 cfs for supplemental use on the same 145 acres covered by right No. 34-2332. IDWR issued license 34-7079 upon the condition that the combined diversion rate under the two rights shall not exceed that required to efficiently irrigate the land, and that the maximum volume diverted per year under the two rights shall not exceed 435 acre feet, or 3.0 acre feet per acre. *Id.*, ¶12. Prior to the issuance of the underlying permit for license No. 34-7079, IDWR required Moss to make a showing, based upon soil type, percolation rates and length of field run, that the additional rate of flow represented by the second water right was necessary in order to efficiently irrigate the 145 acres of land. SOF 8, ¶13.

On August 21, 1985, Tuthill filed transfer application No. 3214 with IDWR seeking to change the place of use for water rights 34-2332 and 34-7079 from the Moss land to 145 acres of defendants' Era Flats land situated in the SW¼ of Section 2, Township 3N, Range 25E, B.M., Butte County. SOF 8, ¶15 (Appendix, Exhibit E). IDWR approved transfer No. 3214 on December 4, 1985 upon the following conditions:

- 1) The rate of diversion and annual volume of rights 34-7079 and 34-2332 when combined shall not exceed 2.90 cfs or 435 acre feet per annum.
- 2) No more than 2.90 cfs or 435 acre feet per annum shall be injected into the Moore Canal.
- 3) The rate of re-diversion from Timberdome Canal may be subject to a conveyance loss assessment.
- 4) Approval of this transfer does not constitute a right to use privately owned conveyance facilities.

SOF 8, ¶16. Tuthill did not contest or appeal from the conditions placed upon the approval of the transfer by IDWR. *Id.*

Commencing with the winter of 1986-1987, the Big Lost River basin began experiencing a serious drought which has continued every year since to the present. SOF 9, ¶19. In 1989, Tuthill experienced a serious reduction in the output of the Moss well. SOF 10, ¶20. In response, Tuthill applied to IDWR in October of 1989 for a drilling permit to deepen the Moss well. IDWR issued the permit on October 18, 1991. *Id.*, ¶21. (Appendix, Exhibit F). IDWR subsequently authorized Tuthill to use the drilling permit to drill a new well provided that the old well must be abandoned, or alternatively if both wells were necessary to provide the authorized rate of flow then a transfer application must be filed to add the second point of diversion. SOF 10, ¶22 (Appendix, Exhibit G).

On March 16, 1990, Tuthill filed adjudication claim Nos. A34-07079 and A34-02332 in the SRBA, reflecting the defendants' claimed right to the use of water from the Moss well on 145 acres of the Era Flats land at an annual consumptive use of 362.5 acre feet per annum or 2.5 acre feet per acre. SOF 11, ¶25 (Appendix, Exhibits A and B). On June 8, 1990, Tuthill filed amended adjudication claim Nos. A34-07079 and A34-02332. SOF 12, ¶28 (Appendix, Exhibits A and B). The amended claims increase the acreage claimed to be irrigated from the Moss well to 264 acres and increase the annual consumptive use claimed under the two rights to 924 acre feet per annum or 3.5 acre feet per acre. The amended claims were filed as accomplished transfers under Section 42-1416A, Idaho Code. *See* Remarks section of Amended Claims, Appendix, Exhibits A and B.

In addition to the amended claims, Tuthill also filed on June 8, 1990, pursuant to the provisions of Section 42-1416(2), Idaho Code, a new adjudication claim No. A34-

10904 for 2.34 cfs reflecting a claimed expansion, with an April 1, 1980 priority date, of the amount of water authorized to be diverted from the Moss well under licensed right Nos. 34-2332 and 34-7079. SOF 12, ¶29 (Exhibit J, attached to IDWR's Brief in Opposition to Defendants' Motion to Dismiss). Tuthill's present position is that the 2.34 cfs claimed under Claim No. A34-10904 is in error and that the correct amount should be the difference between the approximately 6 cfs historically produced by the Moss well and the 5.66 cfs covered by claim Nos. A34-02332 and A34-07079. *Id.* Tuthill has not filed an amendment to claim No. A34-10904 in the SRBA reducing the amount claimed.

On July 2, 1990, Tuthill informed IDWR of defendants' intention to divert a total of 8.0 cfs from the two wells. SOF 12, ¶30 (Appendix, Exhibit H). On July 11, 1990, IDWR personnel observed water being diverted from both the new well and old well, with a combined rate of diversion of 8.0 cfs. SOF 13, ¶32 (Appendix, Affidavit of Keith Wilson). On July 13, 1990, IDWR issued a cease and desist order requiring the Defendants to discontinue diversion of water from the two wells in excess of the 2.9 cfs authorized by Transfer No. 3214. SOF 13, ¶34 (Appendix, Exhibit I). However, Tuthill continued to divert water from both wells in violation of the cease and desist order. SOF 13, ¶35. On July 19 and 25, 1990, IDWR personnel measured the combined diversions from the two wells at 8.0 cfs. *Id.* (Appendix, Affidavits of Paul Meyer and Scott King). Because Tuthill chose not to comply with the cease and desist order, IDWR filed its petition for preliminary injunction with this court on January 30, 1991.

ARGUMENT

Authority to Seek Injunctive Relief

The general powers and duties of IDWR are set forth in Sections 42-1701 and 42-

1805, Idaho Code. IDWR has specific powers and duties to supervise and control the appropriation of ground water under the provisions of Idaho's Ground Water Act, I.C. §§ 42-226 to 42-237h. Section 42-226, Idaho Code, provides that, "All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use."

Section 42-231, Idaho Code, imposes upon IDWR a specific duty and responsibility to administer the state's ground water resources in accordance with the laws of the state:

42-231. Duties of the director of the department of water resources. -- It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

The Idaho Ground Water Act empowers IDWR to take certain actions to enforce specific provisions of the Act to effectuate the public policy of conservation of the state's ground water resource. In this regard I.C. § 42-237(a) provides:

42-237a. Powers of the director of the department of water resources. -- In the administration and enforcement of this act and in the effectuation of the policy of this state to conserve its ground water resources, the director of the department of water resources is empowered:

. . . .

f. To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears to the director of the department of water resources that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in this act.

The Idaho Supreme Court frequently has approved of the granting of injunctive

relief in water right cases. See *Olson v. Bedke*, 97 Idaho 825, 555 P.2d 156 (1976); *Stevenson v. Steele*, 93 Idaho 4, 453 P.2d 819 (1969). The Court has approved the granting of injunctive relief to restrain the illegal pumping of ground water in violation of the Idaho Ground Water Act. *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973); *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

In *Tappan*, the predecessor to the director of IDWR, the state reclamation engineer, brought an action to enjoin landowners from pumping ground water from a new well constructed without state approval. 92 Idaho at 453. The landowners originally had filed an application to appropriate ground water from a well located within an area designated as a Critical Ground Water Area. The state reclamation engineer refused to approve the application and subsequently issued cease and desist orders prohibiting the landowners from making any further withdrawals from the unauthorized well. *Id.* at 452, 453. When the landowners failed to comply with the administrative cease and desist orders, the trial court issued an injunction enjoining the landowners from any further withdrawals from the well. *Id.* On appeal, the Supreme Court held that the trial court had properly enjoined the landowners from further pumping and that it was acceptable to require the landowners to comply with the administrative cease and desist orders. *Id.* at 458.

The Legislature has provided IDWR with additional authority to control illegal diversions of water under the provisions of I.C. § 42-351 which provides in part:

42-351. Illegal diversion or use of water -- Injunctive relief -
- Cease and desist orders. -- (1) 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 watercourse 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.

In the present action, IDWR issued an Order to Cease and Desist on July 13, 1990, because the defendants were diverting and applying water in a manner not in conformance with the conditions of water right Transfer No. 3214 which limits the total diversion under the applicable water rights to 2.9 cfs.

I.C. § 42-351(5) sets out the terms under which the director of IDWR is entitled to injunctive relief:

(5) If the person who is the subject of the cease and desist order fails to comply with the order within the time limit set in the order the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the department proceeding. In such action, brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction or permanent injunction not be issued, or that the remedy at law is inadequate, and the preliminary injunction, or permanent injunction shall issue without such allegations and without such proof.

I.C. § 42-1805 provides additional authority regarding the right of the petitioner to seek and obtain injunctive relief against the defendants:

42-1805. Additional duties. -- In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

. . . .

(9) To seek a preliminary or permanent injunction, or both, or a temporary restraining order restraining any person from violating or attempting to violate (a) those provisions of law relating to all aspects of the appropriation of water, distribution of water, headgates and measuring devices; or (b) the administrative or judicial orders entered in accordance with the provisions of law.

The foregoing facts and statutory authority demonstrate that IDWR is entitled to the injunctive relief requested in its petition for preliminary injunction. Tuthill has not yet formally responded to the merits of IDWR's petition for injunctive relief. Based upon discussion between counsel and statements made in Tuthill's Brief in Support of Motion to Dismiss and in Tuthill's SRBA claims, IDWR anticipates three arguments that Tuthill may make in opposition to the petition for injunctive relief: 1) the 2.9 cfs transfer limitation placed upon the amount of water that Tuthill may divert under licensed rights 34-2332 and 34-7079 is invalid or unenforceable; 2) IDWR's decision to seek injunctive relief against Tuthill is contrary to the previously announced policy of IDWR for the management of water in the Big Lost River Basin pending a determination of rights in the SRBA; and 3) Tuthill has filed valid claims in the SRBA to the expanded use of water under the provisions of two adjudication statutes, I.C. §§ 42-1416(2) and 42-1416A. IDWR will respond to each of these anticipated arguments. If additional or different arguments are submitted by Tuthill in opposition to the petition for injunctive relief, IDWR requests the opportunity to respond.

Transfer No. 3214

As described in the statement of facts above, Tuthill in 1985 filed application for transfer No. 3214 to change the place of use for water rights 34-2332 and 34-7079 from the Moss land to 145 acres of defendants' Era Flats land. SOF 8, ¶15 (Appendix,

Exhibit E). In describing the proposed use of the two water rights after the requested change, the application states, "The rate of diversion under License 34-2332 & 34-7079 shall not exceed that required to efficiently irrigate the land. The maximum volume per year shall not exceed 435 acre feet or 3 acre feet per acre."

This proposed limitation on the use of the two rights after the transfer was consistent with the limitation that IDWR had placed upon license 34-7079 when issued in 1975. SOF 7, ¶12 (Appendix, Exhibit D). IDWR issued license 34-7079 upon the condition that the combined diversion rate under rights 34-2332 and 34-7079 shall not exceed that required to efficiently irrigate the 145 acres of land, and that the maximum volume diverted per year under the two rights shall not exceed 435 acre feet, or 3.0 acre feet per acre. *Id.*

IDWR in approving transfer No. 3214 conditioned the approval so that, "The rate of diversion and annual volume of rights 34-7079 and 34-2332 when combined shall not exceed 2.90 cfs or 435 acre feet per annum." This condition was required by the provisions of I.C. § 42-222 which provides that the director of IDWR may approve a change in a water right provided that, among other factors, "the change does not constitute an enlargement in use of the original right."

IDWR also conditioned the transfer to make it clear that the amount of water authorized to be diverted shall be measured near the well at the point where the water is injected into the Moore Canal for conveyance to the new place of use. This requirement is consistent with the standard principle that a water right is measured at the point of diversion and not at the place of use. *See* I.C. § 42-110; *Bennett v. Nourse*, 22 Idaho 249, 254, 125 Pac. 1038 (1912); *Basinger v. Taylor*, 30 Idaho 289, 300, 164 Pac.

IDWR further noted in the conditions to the transfer approval that the rate of re-diversion from the Timberdome Canal may be subject to a conveyance loss assessment. IDWR did not, however, provide for any increase in the amount of water authorized to be diverted under the rights to compensate for the expected conveyance losses over a distance of approximately 8 miles. IDWR apparently determined that the addition of such a conveyance loss factor would constitute an enlargement of the original rights which is prohibited by the provisions of I.C. § 42-222.

Tuthill acknowledges receiving a copy of the approved transfer in a timely manner. SOF 11, ¶24. Tuthill did not request a hearing pursuant to I.C. § 42-1701A(3) to contest the transfer conditions; nor did Tuthill seek judicial review of the transfer conditions pursuant to I.C. § 42-1701A(4). The IDWR decision on Transfer 3214 thus became a final agency determination which defines and limits Tuthill's right to divert water under rights 34-2332 and 34-7079 to a diversion rate of 2.9 cfs and an annual volume of 435 acre feet.

IDWR Policy for the Big Lost River Basin

Tuthill argued in defendants' Brief in Support of Motion to Dismiss that IDWR's seeking of preliminary injunctive relief in this case is contrary to the announced policy of IDWR for the management of water in the Big Lost River basin pending determination of rights in the SRBA. The parties Stipulation at page 11, ¶26 incorporates by reference two letters from IDWR dated February 21, 1990 and April 27, 1990, and a memorandum from the director of IDWR dated May 7, 1990, which discuss the policy of IDWR. These documents are included in the court file as attachments to

Defendants' Brief in Support of Motion to Dismiss. IDWR does not read the policy positions outlined in the two referenced letters and the memorandum as being inconsistent with seeking injunctive relief against Tuthill in this case. The May 7, 1990 memorandum from the director of IDWR was widely circulated among the water users of the Big Lost River basin and is entitled "Department Policy concerning enjoining of use of water where the only right is an adjudication claim." The memorandum at page 1 states:

Various uses of water without a valid recorded right have been brought to my attention during the past year. IDWR's response has been to issue administrative orders to "cease and desist" use of water if either no water right is of record with the department or if the only record is an unapproved application. This continues to be IDWR's policy where no valid right to use water is evident, and IDWR will seek injunctions and civil fines as necessary to enforce the administrative orders.

The director recognizes in the memorandum that claims have been filed in the SRBA asserting that valid rights exist to irrigate some of the lands in question because of either expansions authorized to be claimed by Section 42-1416, Idaho Code, or changes in point of diversion or place of use authorized to be claimed by Section 42-1416A, Idaho Code. The director further acknowledges in the memorandum that IDWR is confronted with the question of whether to seek to enjoin use of the water because the validity of these claims has not been confirmed by the court or to allow continued use pending action of the court. IDWR Memorandum at 2. The director announces the following policy determination in the memorandum at pages 2-3:

Therefore, IDWR will not seek to prevent use of ground water where the right to use the water is based upon a claim unless:

- (1) The claim is obviously without merit because the use clearly did not commence prior to the required dates or the use was obviously expanded after the statutory deadline.

(2) The rate of diversion exceeds the rate of the right which is claimed as expanded or transferred.

(3) Documented evidence exists that the claimed use by itself or in conjunction with the use of other claimed uses is directly and significantly injuring another valid right or rights.

Tuthill asserts that none of the three conditions apply to the defendants' claimed rights to the use of ground water in the SRBA, and therefore IDWR should not seek to enjoin Tuthill's diversion and use of water in excess of 2.9 cfs under the rights acquired with the purchase of the Moss well. IDWR's intent in announcing the policy, however, is that Tuthill's diversion of water under the Moss well rights in excess of 2.9 cfs comes within the second exception of the policy. That is, Tuthill's rate of diversion (whether 8 cfs, 6 cfs or 5.66 cfs) exceeds the existing approved rate of the right (2.9 cfs) which is claimed as expanded or transferred from 145 acres to 264 acres. Tuthill's diversion of water in excess of the approved 2.9 cfs rate of diversion under the defendants' rights is exactly the type of use against which IDWR in its policy memorandum reserved the right to seek injunctive relief.

Adjudication Statutes

Tuthill has represented through the filing of its adjudication claims in the SRBA that the defendants rely, at least in part, upon the provisions of I.C. § 42-1416, the so-called "presumption statute," and I.C. § 42-1416A, the "accomplished transfer statute," for their claimed right to divert water under rights 34-2332 and 34-7079 in excess of the 2.9 cfs authorized by IDWR under transfer No. 3214 approved by IDWR on December 4, 1985.

Presumption Under I.C. § 42-1416(2)

Section 42-1416, Idaho Code, approved by the Legislature in 1985, provides as follows:

42-1416. Presumptions in basin-wide adjudication.-- In any basin-wide adjudication, the following shall apply:

(1) The holders of previously adjudicated water rights shall be presumed to have validly applied all water to beneficial use on the lands being irrigated at the time of basin-wide adjudication with no change in the priority dates of the original rights.

(2) Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

(3) A prior decree adjudicating a tributary stream or subbasin within the basin shall be presumed correct, if:

(a) It is or can be made substantially correct as to current water rights; and

(b) Contains all the elements necessary to adequately describe the water rights included in the decree.

(4) The presumptions established in this section are rebuttable.

(5) The presumptions established in this section shall not apply in any area designated by the department as a critical groundwater area for expansion of use that occurred after the date of designation.

Section 42-1416 has not been subjected to previous judicial construction, nor has IDWR construed the statute through the promulgation of administrative rules and regulations. IDWR and the SRBA proceeding would benefit from an early judicial construction of the statute because of the numerous claims that have been filed pursuant to the provisions of the statute. Tuthill relies in part upon such a claim in this proceeding for the defendant's claimed right to divert water in excess of that represented by its unadjudicated water rights of record. Accordingly, IDWR shall present to the court in this brief its interpretation of the meaning of subsection 2 of Section 42-1416, Idaho Code.

Section 42-1416 establishes certain **rebuttable presumptions** that apply in basin-wide adjudications. The SRBA is a basin-wide adjudication. A rebuttable presumption

is a rule of evidence whereby a particular inference may be drawn from certain facts unless other facts contrary to the inference are shown. Rule 301 of the Idaho Rules of Evidence provides:

Rule 301. Presumptions in general in civil actions and proceedings.-- In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

In the present case, because rights 34-2332 and 34-7079 are licensed water rights that have not been adjudicated, Tuthill's claim to an expanded use of the rights must be based upon the second presumption contained in section 42-1416(2). Subsection 2 provides:

(2) Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

Tuthill relies in part upon the language of this provision to justify the filing of SRBA claims for a diversion rate under rights 34-2332 and 34-7079 in excess of the 2.9 cfs authorized by transfer No. 3214. In order to concur in Tuthill's reliance upon the provisions of § 42-1416(2), it is necessary to interpret the words "expansion of the use . . . of a valid unadjudicated water right" to include an increase in the rate and amount of water authorized to be diverted under the right. IDWR's position is that Tuthill's reading of the statute is contrary to the plain meaning of the language. It is an established rule of statutory construction that where the language of a statute is clear and unambiguous the expressed intent of the Legislature must be given effect. *Credit*

Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat. Bank, 117 Idaho 29, 784 P.2d 885 (1989); *State, Dept. of Law Enforcement v. One 1955 Willys Jeep*, 100 Idaho 150, 595 P.2d 299 (1979).

Relying upon the plain meaning of the statutory language, IDWR reads § 42-1416(2) to authorize the filing of an SRBA claim based upon the expansion (or enlargement) of use of the amount of water originally appropriated under the claimant's valid unadjudicated water right. IDWR interprets the statutory language to authorize a claimant to claim an expansion in irrigated acreage or additional purposes of use, but not an increase in the amount of water diverted, which have occurred prior to entry by this court of the SRBA Commencement Order on November 19, 1987. IDWR urges the court to adopt this plain meaning construction of the statute. If the Legislature had intended to authorize a claim to be filed for an "increased amount of water" rather than just for an "expansion of the use" of an existing right, it must be assumed that the Legislature would have used language in the statute referring to an increase in the "amount" of water being diverted.

IDWR also interprets the provisions of § 42-1416(2) to mean that if a person initiated a new diversion of water in violation of the mandatory permit system, but did not do so in conjunction with an existing water right, then the presumption does not apply. This meaning clearly is required by the language of the statute which presumes the existence of "a valid unadjudicated water right."

This reading also is consistent with IDWR's interpretation that an existing right holder is not authorized by the statute to claim an increase in the amount of water diverted. To construe the statute otherwise with respect to the holders of valid existing

rights would appear to create a serious question as to the constitutionality of the statute under equal protection grounds. To comply with the equal protection provisions of Idaho Constitution, Art. I, Sections 2 and 13, there must be some reasonable ground or basis for the distinction between classes of persons imposed by a particular statutory scheme. *Everett v. Trunnell*, 105 Idaho 787, 673 P.2d 387 (1983). The equal protection clauses of the state and federal constitutions embrace the principle that all persons in like circumstances should receive the same benefits and burdens of the law. *State v. Breed*, 111 Idaho 498, 725 P.2d 202 (Ct. App. 1986).

It is not clear that a rational basis exists for allowing an existing water right holder to claim an increase in the amount of water diverted in violation of the mandatory permit statutes, while a person not holding an existing right is prohibited from claiming the establishment of a new right in violation of the mandatory permit statutes. In each instance it would appear that the impact on the state's water allocation scheme and on other water users would be the same.

Accomplished Transfers Under I.C. § 42-1416A

On June 8, 1990, Tuthill filed amended adjudication claim Nos. A34-07079 and A34-02332 that change the place of use under the two rights from 145 acres to 264 acres. The amended claims were filed pursuant to the provisions of I.C. § 42-1416A, the accomplished transfer statute, and I.C. § 42-1416 the presumption statute. SOF 12, ¶128 (Appendix, Exhibits A and B). Section 42-1416A, Idaho Code, added by the Legislature in 1989 provides as follows:

42-1416A. Prior change in point of diversion, place of use, period of use, or nature of use of water rights claimed in a general adjudication.-- (1) If any person entitled to the use of water has made a change in point of diversion, place of use, period of use or nature of use of all or a part of

the water, including a change as part of an exchange as defined by section 42-105, Idaho Code, prior to entry of an order commencing a general adjudication pursuant to section 42-1408, Idaho Code, and the person entitled to the use of water has not complied with the requirements of sections 42-108 and 42-222, Idaho Code, regarding such changes, the following shall apply:

(a) the water right may be claimed in the general adjudication as changed and an application for change of the water right is not required to be filed pursuant to section 42-222, Idaho Code; and

(b) the water right may be determined by the director in the director's report pursuant to section 42-1411, Idaho Code, and decreed by the district court pursuant to section 42-1412, Idaho Code, as changed, if the change meets the substantive criteria of section 42-222, Idaho Code, for approval of such changes, provided that the change may be approved subject to conditions necessary to satisfy the substantive criteria of section 42-222, Idaho Code, for approval of such changes.

(2) To the extent that the provisions of this section and section 42-1416, Idaho Code, are both applicable to the same water right, the two sections shall be applied conjunctively, if possible, but this section shall not be construed to limit the provisions of section 42-1416, Idaho Code.

The effect of an approval of Tuthill's claimed accomplished transfer of rights 34-2332 and 34-7079 in conjunction with the claimed expansion under claim No. 34-10904 will be to increase the annual volume of consumptive use under rights 34-2332 and 34-7079 from 362.5 acre feet (2.5 x 145 acres) to 660 acre feet (2.5 x 264 acres). Neither the claimed accomplished transfer nor the claimed expansion will, however, result in an increase in the combined annual diversion volume of 435 acre feet under the three rights.

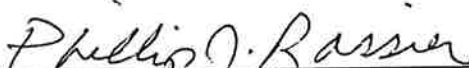
CONCLUSION

Idaho's Ground Water Act, I.C. §§ 42-226 to 42-237h, I.C. § 42-351 and I.C. § 42-1805(9) authorize IDWR to seek injunctive relief for violations of Idaho water law. Defendants continued to illegally divert ground water at a rate much in excess of their existing water rights. Defendants chose to ignore the Order to Cease and Desist issued by IDWR and continued to divert water in excess of their valid existing water rights.

IDWR's only recourse is to petition this court for injunctive relief to prevent further illegal diversions pending the issuance of the court's decree adjudicating the water rights in the Big Lost River basin. IDWR therefore requests that the court provide it with the relief prayed for in IDWR's Petition for Preliminary Injunction.

DATED this 24th day of April, 1991.

LARRY ECHOHAWK
Attorney General



PHILLIP J. RASSIER
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I certify that on the 24th day of April, 1991, I served a true and correct copy of the Petitioner Idaho Department of Water Resources' BRIEF IN SUPPORT OF PETITION FOR PRELIMINARY INJUNCTION by placing a true and correct copy thereof in the United States mail, postage prepaid and addressed as follows; or by hand delivery:

1. One copy to:
Larry EchoHawk, Attorney General
Statehouse, Room 210
Boise, Idaho 83720

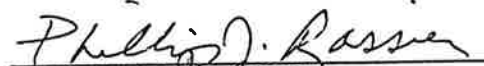
Peter Monson, Trial Attorney
U. S. Department of Justice
Land and Natural Resources Division
P.O. Box 44378
Washington, D.C. 20026-4378

2. Six Copies to:

David Shaw, Chief (Hand delivery)
Adjudications Bureau
Department of Water Resources
1301 North Orchard
Boise, Idaho 83706

3. One copy to each of the following parties identified in the pleading from whom relief is sought:

Kent W. Foster, Esquire
HOLDEN, KIDWELL, HAHN & CRAPO
P.O. Box 50130
Idaho Falls, Idaho 83405



PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

Page _____ of _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 3705

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

Name of applicant Hillcrest Properties. Phone 527-3123
Post Office address % Richard Tuttle Rt. 1 Box 447 Ave. 10 83213.

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 The production of the existing well has declined because of the drop in water table.

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>34-01077</u> | <u>Sept. 17, 1974</u> | <u>2.76</u> | <u>Irrigation</u> | <u>April 1</u> to <u>Nov. 1</u> |
| <u>34-02332</u> | <u>May 6, 1955</u> | <u>2.90</u> | <u>Irrigation</u> | <u>April 1</u> to <u>Nov. 1</u> |
| _____ | _____ | _____ | _____ | _____ to _____ |
| _____ | _____ | _____ | _____ | _____ to _____ |
2. Total amount of water being transferred 2.90 cubic feet per second and/or _____ acre-feet per annum.
3. Source of water B Groundwater tributary to _____
4. Point(s) of Diversion: _____

[illegible]

5. Lands irrigated or place of use:

[illegible]

Total acres 145.

PART 1**6. General Information:**

- a. Description of diversion system Water from 2 wells will be discharged directly into the Moore Canal, where it will be rediverted into the Old U.E. Canal. After leaving the Big Lost River irrigation district the water will be (see remarks)
- b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ 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:
- _____
- _____
- _____
- _____
- d. Remarks:

carried to the place of use through the Timber Pore Canal. The point of rediversion from the Timber Pore Canal is in the SE 1/4 NE 1/4 Section 35 Twp 4N, R. 25E.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 34-02332/07079

And said application is hereby APPROVED, subject to the following limitations and conditions:
SEE ATTACHED SHEET FOR CONDITIONS OF APPROVAL.

Witness my hand this

14th

day of

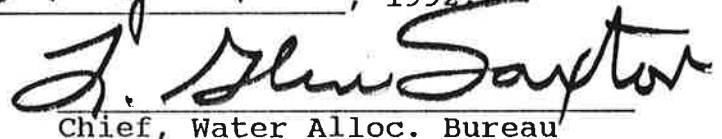
August, 19 92.

J. Glen Saylor
CHIEF, WATER ALLOC. BUREAU

CONDITIONS OF APPROVAL
Transfer of Water Rights
No. 34-02332/07079

1. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.
2. Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.
3. Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 34.
5. These rights when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre for the lands above.
6. Prior to diversion of water under this transfer, measuring devices and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained on each of the wells in a manner that will provide the watermaster suitable control of the diversion.
7. The combined rate of diversion from these wells shall not exceed 2.90 cfs.

Dated this 14th day of August, 1992.


Chief, Water Alloc. 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. _____ issued by the Idaho Department of Water Resources.
- c. Claim No. _____ on file with the Idaho Department of Water Resources.
- d. Transfer No. 3214 / 34-7079 & 34-2332 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 (34-7079) Sept. 17, 1974, (34-2332) May 6, 1955.

5. Water is used for the following purpose:

34-01079 amount 2.76 for Irrigation purposes from 401 to 401
(cfs/ac-ft) 34-02332 amount 2.98 for _____ purposes from 401 to 401
(cfs/ac-ft) _____ amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft)

6. Total amount of water under right 2.98 cubic feet per second and/or _____ acre-feet per annum.

7. Point(s) of Diversion:

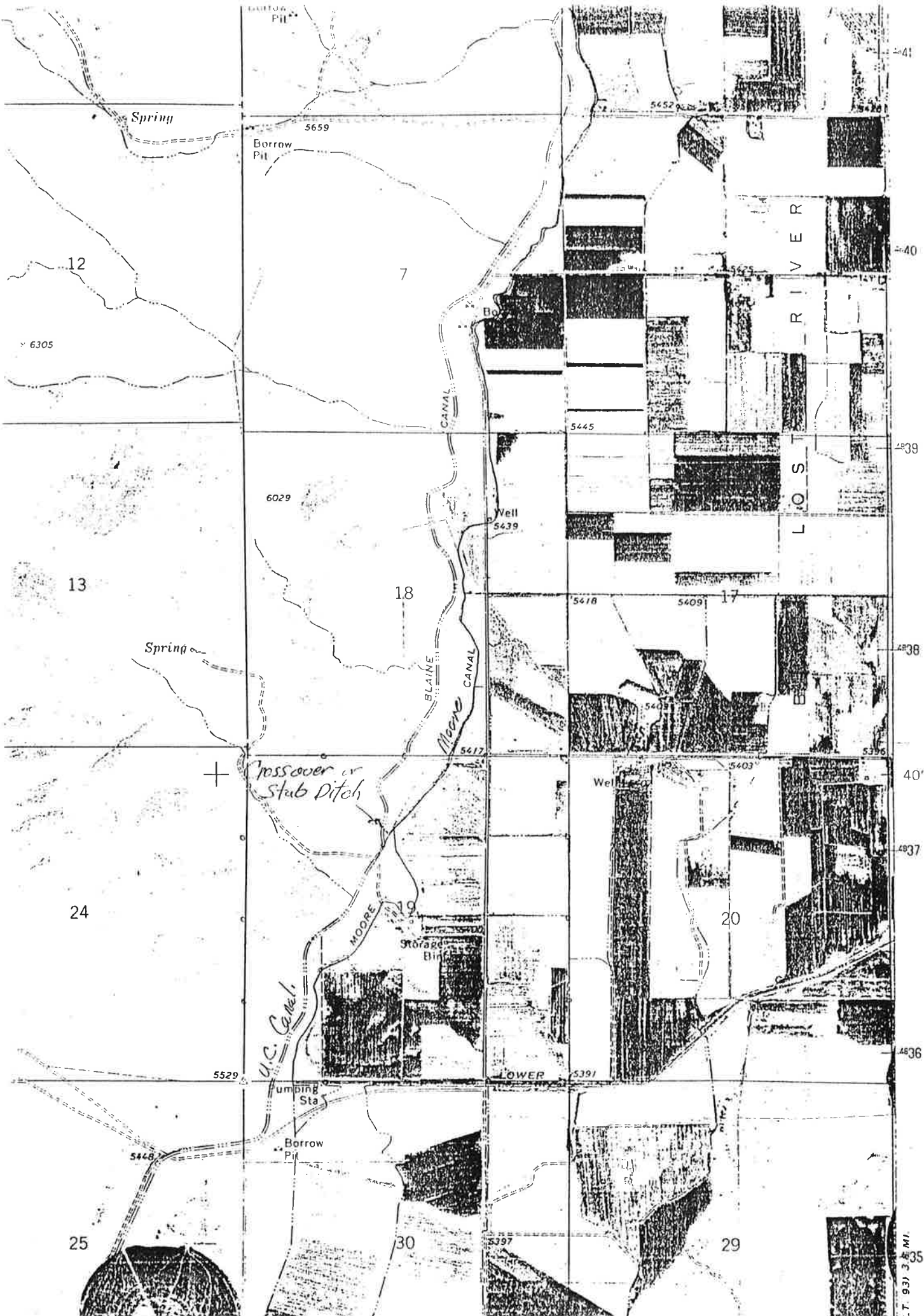
Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		NW	NW	21	5N	26E	Butte	

8. Lands irrigated or place of use:

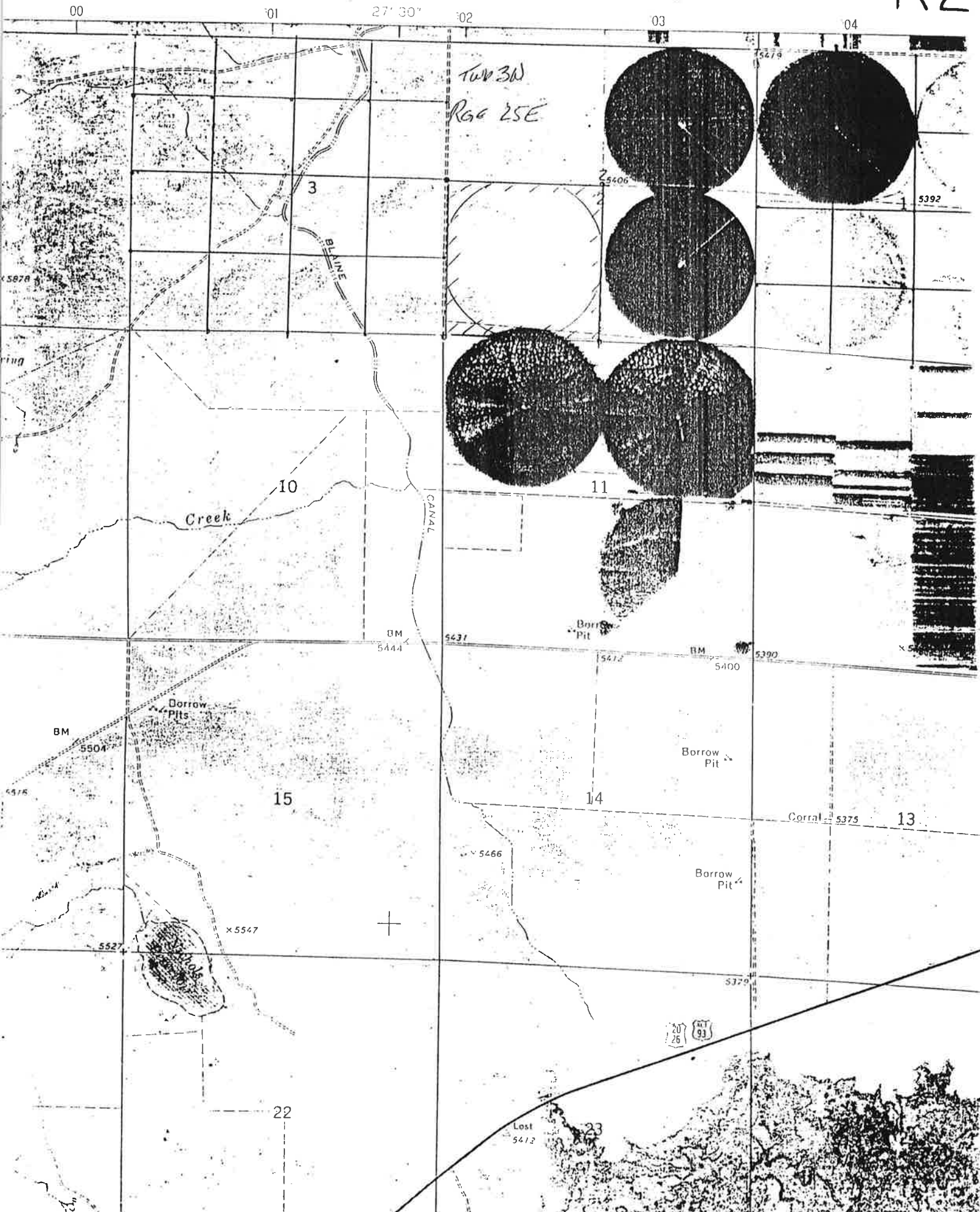
Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
3N	25E	2									36	36	36	37					145

Total acres 1459. Describe any other water rights used for the same purpose as described above None

[illegible]



441
440
439
438
40'
437
436
435
T. 93N 3E MI.



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

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

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

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

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

I understand that any willful misrepresentations made in this application may result in voiding its approval.

Subscribed and sworn to before me this _____

day of _____

, 19 90.

My commission expires _____

Manager

(Signature of Applicant)

Ernest Carlson

(Notary Public)

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments

Received by EMC Date May 22, 1990

Protest filed by _____

Prelim. check by _____ Fee \$50.00 E014652Received by EMC Date May 22, 1990Published in Arco Advertiser / Custer Publishing

Copies of protest forwarded by _____

Pub. dates 6-7 & 14-90

Hearing held by _____ Date _____

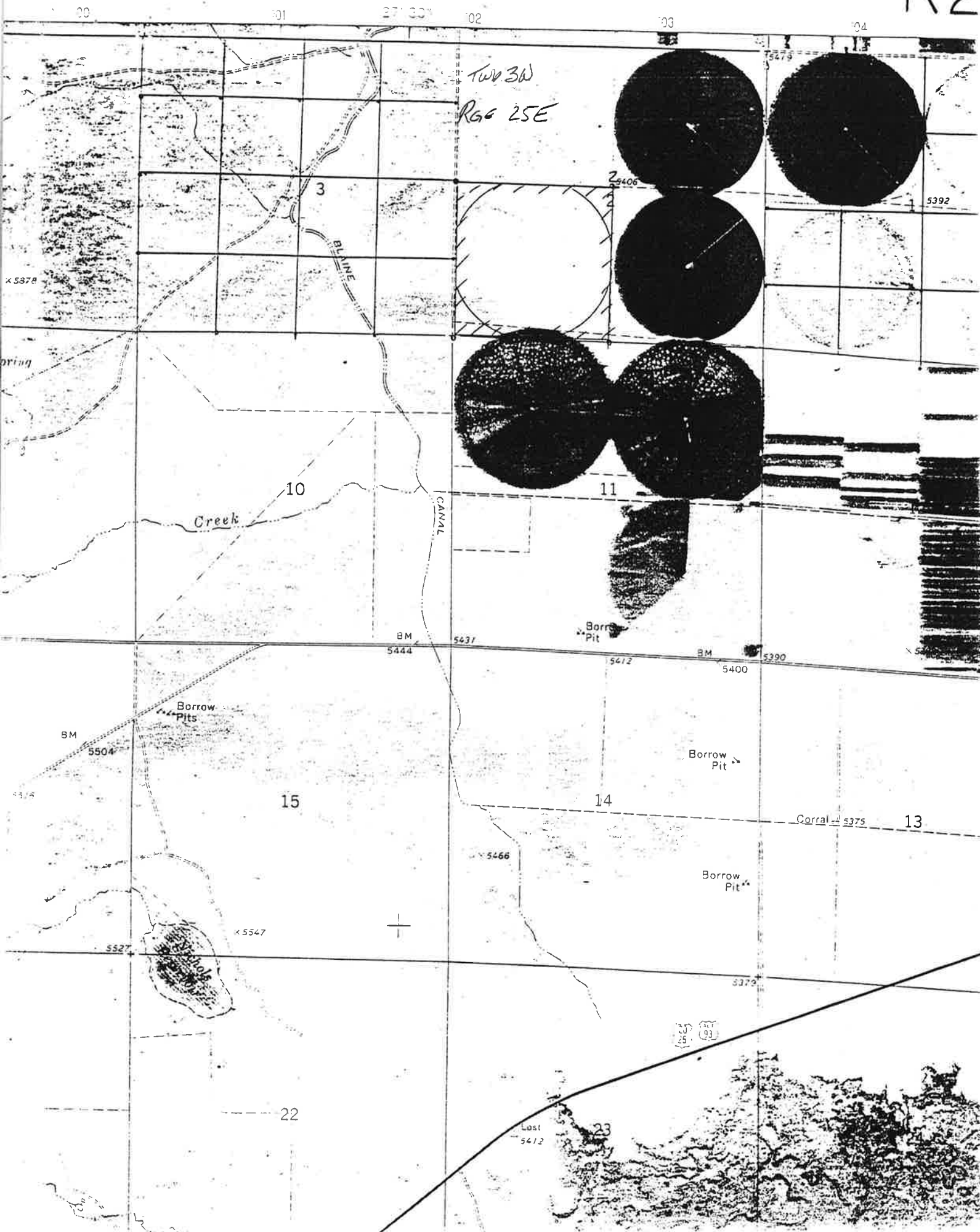
Watermaster recommendation requested on _____

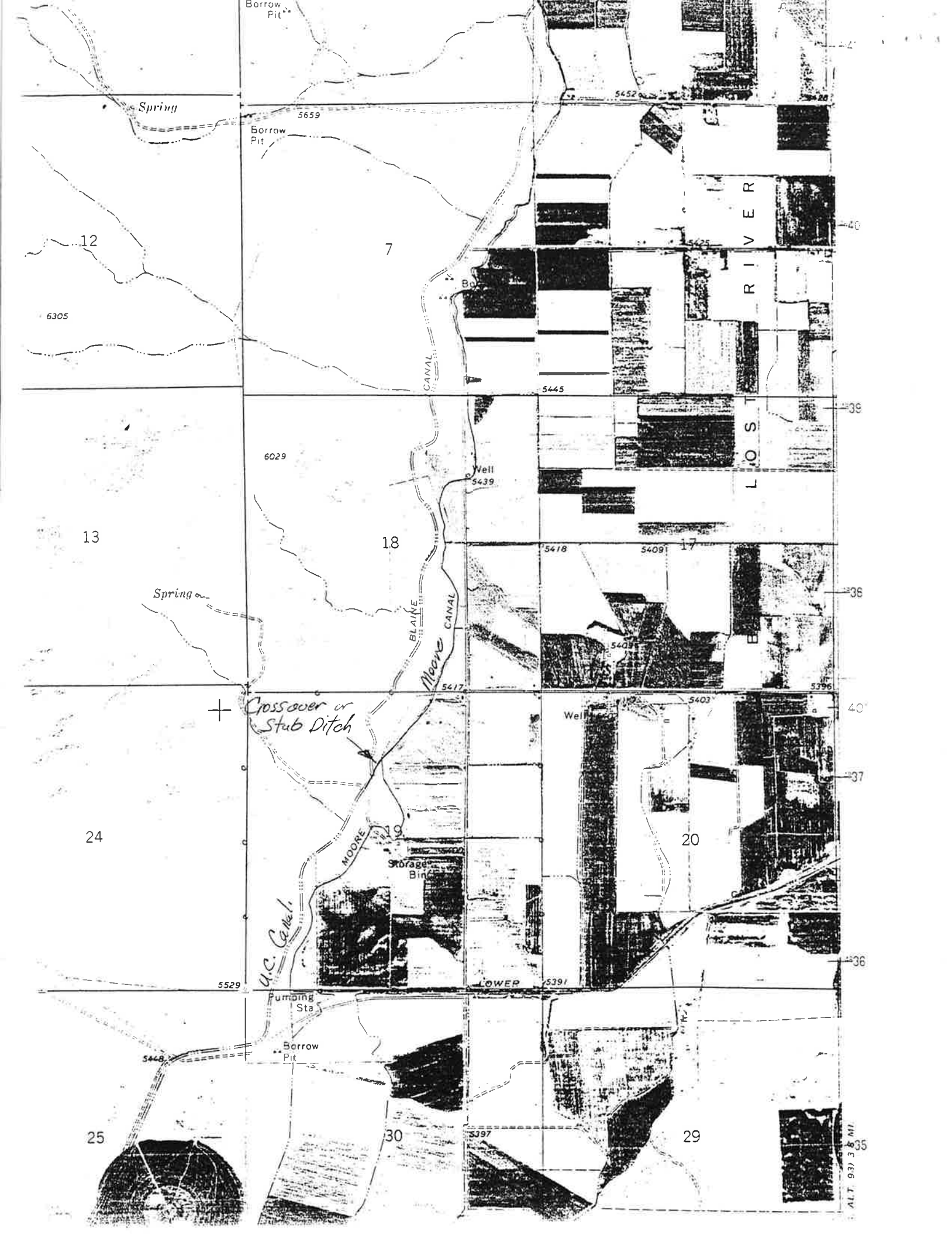
Recommended for ☐ approval ☐ denial

_____ rec'd. _____

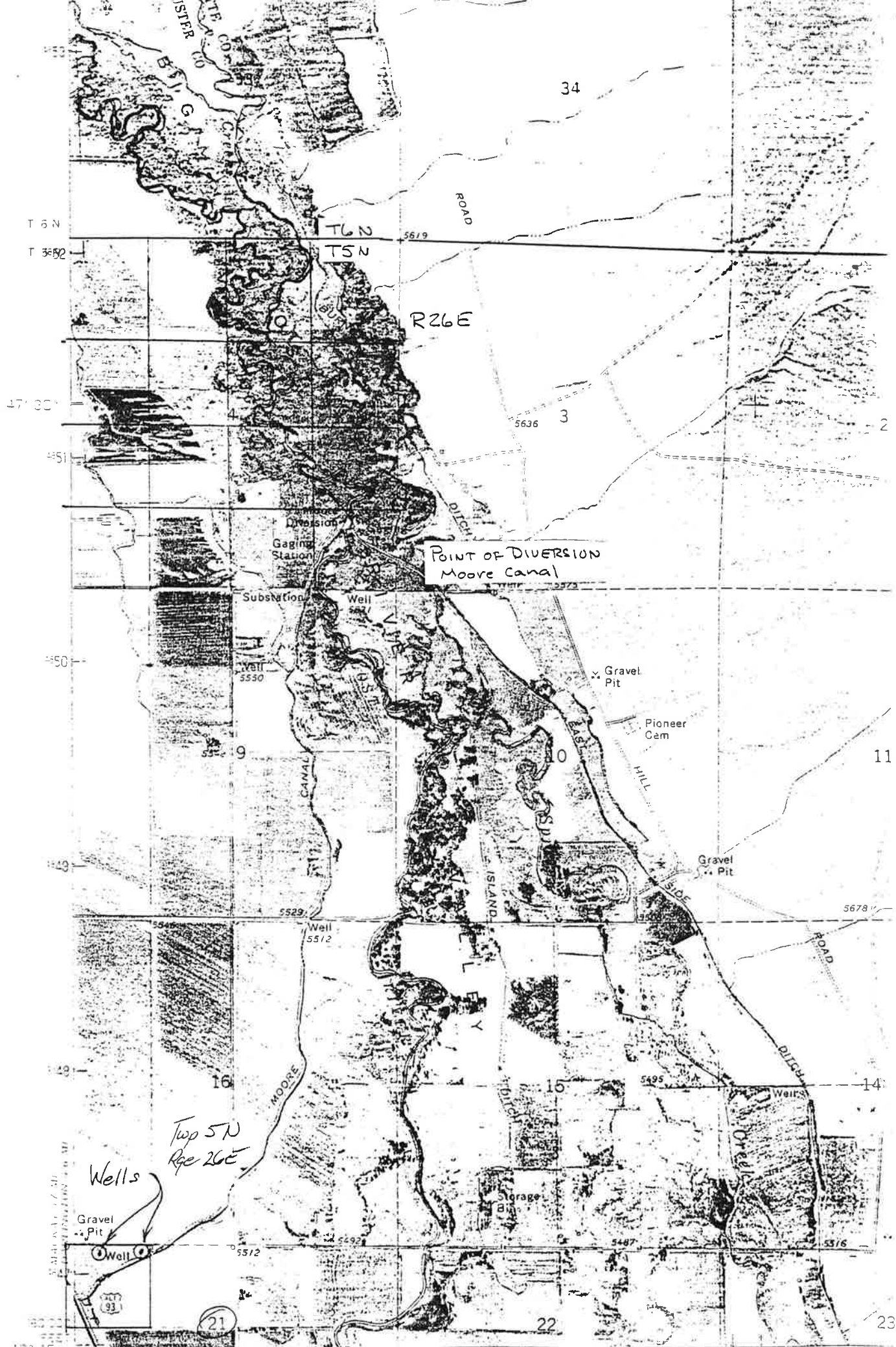
by _____

Copy of transfer sent to lien holder _____





6N
5N



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

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

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

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

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

I understand that any willful misrepresentations made in this application may result in voiding its approval.

Subscribed and sworn to before me this _____

day of _____, 19 90.

Manager

(Signature of Applicant)

Ernest Carlson

(Notary Public)

My commission expires _____

May 22, 1990.

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments

Received by EMC Date May 22, 1990.

Protest filed by _____

Prelim. check by _____ Fee \$50.00 EO14652Received by EMC Date May 22, 1990.Published in Arco Advertiser / Custer Publishing

Copies of protest forwarded by _____

Pub. dates 6-7 & 14-90

Hearing held by _____ Date _____

Watermaster recommendation requested on _____

Recommended for ☐ approval ☐ denial

_____ rec'd. _____

by _____

Copy of transfer sent to lien holder _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1

Name of applicant Hillcrest Properties Phone 527-3133
Post Office address % Richard Tuttle Rt. 1 Box 447 Arco, ID 83213

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 The production of the existing well has declined because of the drop in a water table.

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>34-01079</u>	<u>Sept. 17, 1974</u>	<u>2.76</u>	<u>Irrigation</u>	<u>April 1</u> to <u>Nov. 1</u>
<u>34-02332</u>	<u>May 6, 1955</u>	<u>2.90</u>	<u>Irrigation</u>	<u>April 1</u> to <u>Nov. 1</u>
_____	_____	_____	_____	_____ to _____
_____	_____	_____	_____	_____ to _____

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

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		<u>NW</u>	<u>NW</u>	<u>21</u>	<u>5N</u>	<u>26E</u>	<u>Butte</u>	<u>2 points.?</u>

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	
<u>3N</u>	<u>25E</u>	<u>2</u>									<u>36</u>	<u>36</u>	<u>36</u>	<u>37</u>					<u>145</u>

PART 1**6. General Information:**

- a. Description of diversion system Water from 2 wells will be discharged directly into the
Lower Canal, where it will be reddiverted into the Old U.C. Canal. After
leaving the Big Lost River irrigation district the water will be (see remarks)
- b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ 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:

d. Remarks:

carried to the place of use through the Timber Pore Canal. The point
of rediversion from the Timber Pore Canal is in the SE 1/4 NE 1/4
Section 35 Twp 41N, R. 25E.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

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

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

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

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT

PART 2

(Attach one copy for each right)

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree No. _____ Decreed to _____
in case of _____ vs. _____
dated _____ in _____ county of _____
- b. License No. _____ issued by the Idaho Department of Water Resources.
- c. Claim No. _____ on file with the Idaho Department of Water Resources.
- d. Transfer No. 3214 / 34-7079 & 34-2332 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 (34-7079) Sept. 17, 1974, (34-2332) May 6, 1955.

5. Water is used for the following purpose:

34-01079 amount 2.76 for Irrigation purposes from 4/1 to 4/1
(cfs/ac-ft) 34-02332
amount 2.98 for _____ purposes from 4/1 to 4/1
(cfs/ac-ft)
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft)

6. Total amount of water under right 2.98 cubic feet per second and/or _____ acre-feet per annum.

7. Point(s) of Diversion:

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

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	
<u>3.0</u>	<u>25E</u>	<u>2</u>									<u>36</u>	<u>36</u>	<u>36</u>	<u>37</u>					<u>145</u>

Total acres 145

9. Describe any other water rights used for the same purpose as described above None

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

No. If yes, describe _____

B. DESCRIPTION OF PORTION OF RIGHT BEING TRANSFERRED

(If the entire right is to be changed by the applicant, omit part B and C.)

1. amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion:

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

3. Lands irrigated or place of use:

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

Total acres _____

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

1. amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion:

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

3. Lands irrigated or place of use:

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

Total acres _____

9/89

Drilling Permit No. 34-89-E-0815Water Right Permit No. 34-7079, 34-2332/T3214

Injection Permit No. _____

State of Idaho
Department of Water Resources

D R I L L I N G P E R M I T

1. Applicant PU Ranch
2. Mailing Address Rt. 1, Box 447
Arco, ID 83213 Telephone 527-3133
- (X) Well Owner () Well Operator () Other, specify _____
3. Proposed well location NW 1/4 NW 1/4, or Gov't lot No. _____,
Sec. 21, Twp. 5N, Rge. 26E, County Butte,
Street Address of Well Site _____,
Lot, block and subdivision _____
4. Proposed use of well:
- () Single family or stockwater use (less than 13,000 gallons per day)
- (X) Irrigation (more than 1/2 acre)
- () Monitoring - A well bore schematic and map is required for each well.
No. of proposed wells: _____
- () Other (describe fully) _____
5. Well construction information:
- A. () New well (X) Deepen () Replace - See Condition 9.
- B. Proposed surface diameter 16 Maximum depth 120
- C. Anticipated bottom hole temperature:
(X) 85°F or less (Cold water well)
() 85°F to 212°F (Low temp. geothermal well)
() 212°F or more (Geothermal well)
6. Construction Start Date 5-21-1990 (KCLW)
7. Anticipated Well Driller FINDLEY (KCLW)
NOTE: The actual well driller must be identified prior to drilling.
8. Applicant's signature PU Ranch by Tony Bailey Date _____
Title Manager (Owner, Firm Representative, Other)

ACTION OF DEPARTMENT OF WATER RESOURCES

This Permit is approved. Date 10-18-89.

If approved, this permit authorizes the construction of a well subject to the following conditions. READ CAREFULLY!

GENERAL CONDITIONS:

1. The well must be constructed in compliance with the applicable statutes, specific conditions of approval shown on the water right permit, injection well permit, transfer or amendment and the rules and regulations of the Department for water appropriation, injection wells and well construction standards.
2. This drilling permit is valid for two (2) months from the above approval date for the start of construction and is valid for one (1) year from the approval date for completion of the well unless an extension has been granted.
3. This permit does not constitute the approval of the District Health Department or the Idaho Department of Health and Welfare which may be required before construction of this well.
4. The well shall be constructed by a driller currently licensed in the State of Idaho who must maintain a copy of the drilling permit at the drilling site.
5. Approval of this drilling permit does not authorize trespass on the land of another party.
6. This permit does not constitute other local, county, state or federal approvals which may be required for construction of a well.
7. This drilling permit does not represent a right to divert and use the water of the State of Idaho.
8. If a bottom hole temperature of 85°F or greater is encountered, well construction shall cease and the well driller and the well owner shall contact the Department immediately.
9. If this permit is for a replacement well, the well being replaced must be abandoned in accordance with Department Rules and Regulations.

SPECIFIC CONDITIONS:



Signature of Authorized Department Representative

Eastern Regional Manager

Title

Receipt No. E011031 Received by RB Fee \$100 Date 10-18-89

EXTENSION OF DRILLING PERMIT

Extension approved by _____ Approval Date _____

This extension is good for 60 days beyond the above extension approval date.

TO: FILE DRILLING PERMIT 34-89-E-085

SUBJECT: USING DRILLING PERMIT TO DRILL A NEW WELL

NOTE: DRILLING PERMIT 34-89-E-085 WAS FILLED TO DEEPEN AN EXISTING WELL.

IN CONVERSATION WITH TONY BAILEY I WAS INFORMED THAT HE WISHED TO DRILL A NEW WELL AND IF THE TOTAL AMOUNT OF THEIR RIGHT WAS OBTAINED FROM THE NEW WELL THEN THE ORIGINAL WELL WOULD BE ABANDONED. HOWEVER, IF THE NEW WELL DID NOT PRODUCE THE AMOUNT OF WATER UNDER THEIR RIGHTS HE WANTED TO BE ABLE TO USE THE OLD WELL. MR. BAILEY INDICATED THAT THE WELL DRILLER HAD STARTED WORK LAST YEAR, BUT BECAUSE OF ALL THE PROTESTS WITHIN THE BASIN THEY HAD PULLED THE WELL DRILLER OFF OF THE PROJECT.

I TALKED WITH RON CARLSON AND RELAYED THE FOLLOWING INFORMATION TO TONY BAILEY:

1. IF THE NEW WELL WAS TO REPLACE THE OLD WELL THEN THIS OFFICE WOULD ALLOW THE DRILLING PERMIT TO BE USED FOR THE NEW WELL PROVIDED THAT THE OLD WELL BE ABANDONED ACCORDING TO RULE 3,12,1 COMPLETION OF THE NEW WELL.
2. IF THE NEW WELL DOES NOT PRODUCE THE QUANTITY OF WATER NECESSARY TO DELIVER THEIR RIGHTS (REQUIRING THAT THE OLD WELL BE USED), THEN AN APPLICATION FOR TRANSFER MUST BE FILLED WITH THE DEPARTMENT.

NOTE: THE NEW WELL CAN NOT BE USED UNTIL THE TRANSFER IS APPROVED, AND IF THE TRANSFER IS NOT APPROVED THE WELL WOULD HAVE TO BE ABANDONED ACCORDING TO RULE 3,12,1

3. SINCE THE NEW WELL IS TO BE DRILLED CLOSER TO THE CANAL, IF WATER IS ENCOUNTERED APPROXIMATE TO THE CANAL, THE WELL MUST BE CASED AS NOT TO INTERCEPT ANY WATER FROM THE CANAL.

(MR. BAILEY INFORMED ME THAT THE NEW WELL WOULD BE CASED UNPERFORATED DOWN TO AT LEAST 80 FEET.)


KEITH C. WILSON