

TRANSE 1987

Transfer No. 1987

Application No. 32-0014/32-0016/32-2049/32-2071/32-2079

Increased rights
Denied Transf.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT
To Change the Point of Diversion and/or the Place of Use

APPROVAL

Name of applicant WHA00 & BHA, INC. Phone 356-3178
Post office address Sugar Rt. #1

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree to A. G. Edie
(Name)
in case of Thomas A. Robson et al vs James Colson et al
dated Sept. 15, 1953 in Ninth Judicial Court county of Clark
32-2049, (Name of court)
b. License No. 32-2071, 32-2079 issued by the Idaho Department of Water Resources
c. Claim No. on file with the Idaho Department of Water Resources

2. If applicant is not the original holder of this right, explain how it was acquired and attach a copy of the deed or other evidence of ownership of the land to which the right is appurtenant
Through purchase of land.

3. Source of water Indian Creek tributary to Medicine Lodge Creek
4. Date of priority (32-0014) - 6-14-83 32-0015 5-01-84
32-0016 - 32-2049 1-10-14 32-2079 10-04-30
5. Water is used for the following purposes: 32-2071 7-26-17
amount 16.92 for Irrigation purposes from Apr. 1 to Nov. 1
amount for purposes from to
amount for purposes from to
(month/day - both dates inclusive)

6. Total amount of water under right: a. 16.92 cubic feet per second
&/or
b. acre feet per annum
7. Location of original point of diversion is SE 1/4 of SW 1/4 of Section 1
Township 11N Range 34E, B.M., in Clark County
Additional points of diversion, if any SE 1/4 SW 1/4, Sec. 36, T. 12N, R. 34E; NE 1/4 NW 1/4, Sec. 1, T. 11N, R. 34E, SE 1/4 NW 1/4, Sec. 36, T. 12N, R. 34E, B.M.

8. Lands irrigated or place of use:

TWP.	RANGE	SEC.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
DECREE																			
11N	34E	12	40	40	40	40									40	40	40	40	320
11N	34E	12	37.5	40	40	40	30			40	40			20	35.5	40	40	21	424

** SEE REMARKS

Total number of acres to be irrigated 450

MICROFILMED

B. DESCRIPTION OF PORTION OF RIGHT FOR WHICH THE CHANGE IS REQUESTED (If the entire right is requested changed, omit part B)

1. Amount of water: a. _____ cubic feet per second
&/or
b. _____ acre feet per annum
2. Point of diversion _____ ¼ _____ ¼, Section _____ Township _____
Range _____, B.M., _____ County _____
Additional points _____

3. Place of use:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

C. DESCRIPTION OF RIGHT OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Change in point of diversion

- a. Amount of water to be diverted 16.92 c.f.s. &/or _____ acre feet
- b. Point(s) of diversion NE ¼ SW ¼, Section 36 Township 12N
Range 34E, B.M., Clark County _____
Additional points _____

c. Description of diverting works 18" to 6" steel pipeline for gravity sprinkler system

d. Describe the reasons for applying for a change in the point(s) of diversion more efficient use of water

2. Change in place of use NO CHANGE

- a. Describe the lands or place of use to which the right will be transferred:

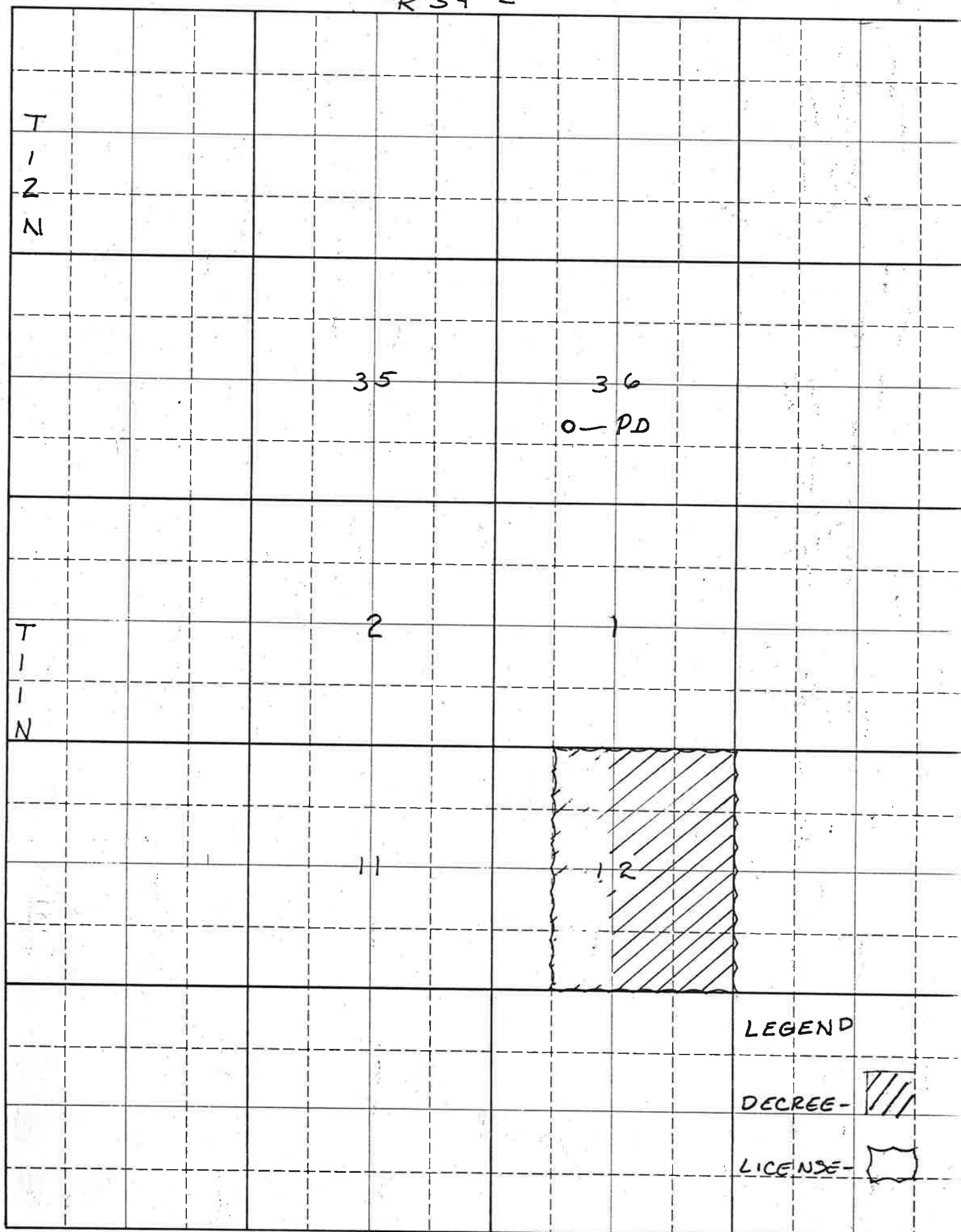
TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

** SEE REMARKS

Total number of acres to be irrigated _____

- b. Draw a map indicating the new point(s) of diversion and/or the new land to be irrigated. Show clearly the land involved by section, township and range number.

R 34 E



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

W $\frac{1}{2}$ E $\frac{1}{2}$ SEC 12

10.1

20.9

19.1

19.7

15.6

23.8

6.0

1.6

3. Remarks The licensed rights are classified as high water rights due to their late priority and are not available most years.

I hereby assert that no one will be injured by such change and 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.

Grant Sherrell Pres. Wash.
(Signature of applicant) RAAO

Subscribed and sworn to before me this 10th day of MAY, 19 76

Ronald J. Parker
(Notary public)

My commission expires 2/19/78

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 _____

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

PURSUANT TO MEMORANDUM DECISION AND ORDER

DATED THIS DAY. (Rights No. 32-0014, 32-0015 and 32-0016-APPRO)

2. Denial of said application is for the following reasons: PURSUANT TO MEMORANDUM DECISION
(32-2049, 32-2071, 32-2079-DENIED) AND ORDER DATED THIS DAY.

Witness my hand this 9 day of FEBRUARY, 19 77

R. Keith Higginson
R. KEITH HIGGINSON

FOR DEPARTMENT USE ONLY

Received by CW Date 5-10-76

Prelim. check by RC Fee 30⁰⁰

Receipted by CW Date 5-10-76

Published in Enterprise Citizen # 15799

Pub. dates May 20 & 27, 1976

Watermaster recommendation requested on 5-13-76

DON SHENTON rec'd. 5-26-76

32-C

Wapahiter, Anne Cook
Protest filed by Lynn Hagan, Allene May
Wayne Stelzer, Thomas Stelzer, Ned
Arnesting, Delana Small, George
Whitlaffer, Mr & Mrs Maple Shenton,
Alman T. Woodfield, Dean Shenton,
Helmer Bros, Bernice Doyle, Ben Doyle.
Copies of protest forwarded by CW 6-11-76

Hearing held by _____ Date _____

Recommended for _____ approval _____ denial
by _____

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO.
32-0014/32-0015/32-0016/32-2049/32-2071/32-2079
IN THE NAME OF WHA00 & BHA, INC.

MEMORANDUM DECISION
AND ORDER

On May 10, 1976, Whaoo & BHA, Inc. applied to the Department of Water Resources to change the point of diversion of three rights (Nos. 32-0014/32-0015/32-0016) decreed to A. G. Edie in the case of Thomas A. Robson, et al -vs- James Colson, et al, as modified by the stipulated agreement dated September 15, 1953, and three licensed rights (Nos. 32-2049/32-2071/32-2079). The water rights more specifically described as:

No.	Amount	Priority	Point of Diversion
32-0014	0.50 cfs	6/15/1883	none listed in decree
32-0015	1.32 cfs	5/01/1884	none listed in decree
32-0016	3.00 cfs	none listed	none listed in decree
32-2049	3.50 cfs	1/10/1914	SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, 11N, 34E SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 36, 12N, 34E
32-2071	6.60 cfs	7/26/1917	NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 1, 11N, 34E
32-2079	2.00 cfs	10/04/1930	SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 36, 12N, 34E

The applicant proposes to change the location of the point of diversion so that 16.92 cubic feet of water per second is diverted from Indian Creek at a point in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 36, Twp. 12N, Rge. 34E, B.M.

Notice of this proposed change in the point of diversion was published in the Enterprise-Citizen at Rexburg, Idaho, on May 20 and May 27, 1976, and subsequently was protested by fifteen waterusers of Water District 32C.

A conference was held to hear the objections to the granting of the proposed change was held in Dubois, Idaho, on August 12, 1976. The applicant was present and represented by Grant Ashcraft, President of WHA00 & BHA, Inc., and G. Rich Andrus, Attorney-at-Law of the firm Rigby, Thatcher & Andrus. The protestants were present and represented themselves. The primary issues raised concerned the current status of the licensed rights the applicant is seeking to transfer and a claimed expansion of the area of irrigation under the decreed rights. Testimony on behalf of the applicant and protestants was presented.

After having reviewed all the evidence presented at the conference and the pertinent information in the Department's official files and based upon the Director's understanding of the law, the Director of the Department of the Department of Water Resources makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1) The applicant is the owner of decreed rights 32-0014, 32-0015, and 32-0016 which were originally decreed to A. G. Edie for the irrigation of the E $\frac{1}{2}$, Sec. 12, Twp. 11N, Rge. 34E, B.M., in the case entitled Thomas A. Robson, et al -vs- James Colson, et al, as modified by the stipulated agreement dated September 15, 1953.

2) The 3.00 cfs identified as right No. 32-0016 is available for use contingent upon the maintenance and use of a concrete flume constructed as a water saving works.

3) The watermaster's records indicate that the decreed rights have been delivered during each irrigation season with the exception of right no. 32-0016 which has not been delivered during the past two years due to the failure of the owner to maintain the water saving works.

4) A field inspection and an examination of the aerial photographs of the place of use show that aforementioned decreed rights have been used for the irrigation of 124 acres of land located within the E $\frac{1}{2}$, Sec. 12, Twp. 11N, Range 34E, B.M.

5) There is evidence that water under licensed rights 32-2049, 32-2071 and 32-2079 has not been used by the previous land owner or the applicant since 1955.

6) Section 42-222 of the Idaho Code states that "... all rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through non-use or forfeiture such rights to such water shall revert to the State and be again subject to appropriation under this chapter."

7) The stipulated agreement of September 15, 1953, setting forth the recognized water rights is further evidence that the water under the licensed rights was not being used since they were not included in the agreement.

8) The applicant has requested no change in the place of use by said application.

CONCLUSIONS OF LAW

1) The applicant is the successor in interest to the rights originally decreed to A. G. Edie and is entitled to change the point of diversion of these rights.

2) The applicant is entitled to irrigate the 124 acres of land within the E½ of Sec. 12, Twp. 11N, Rge. 34E, B.M. historically irrigated with his present rights.

3) The water rights evidenced by licenses 32-2049, 32-2071 and 32-2079 have been forfeited through non-use.

ORDER

IT IS, THEREFORE, HEREBY ORDERED and that portion of Application for Transfer involving rights No. 32-0014, 32-0015 and 32-0016 is hereby APPROVED subject to the following conditions:

- 1) That a measuring device of a type approved by the Director shall be permanently installed and maintained as part of the diverting works.
- 2) That the delivery of said rights shall remain under the control of the watermaster of Water District 32C.

IT IS, FURTHER ORDERED and that portion of Application for Transfer involving rights No. 32-2049, 32-2071 and 32-2079 is hereby DENIED pursuant to Section 42-222, Idaho Code.

Dated this 9 day of February, 1977.


R. KEITH HIGGINSON
Director

BEFORE THE DIRECTOR OF THE DEPARTMENT
OF WATER RESOURCES OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 32-0014/0015/)
0016/2049/2071/2079 IN THE)
NAME OF WHA00 & BHA, INC.)
_____)

ORDER ISSUING
PROPOSAL FOR DECISION
I.C. SECTION 67-5211

C. Stephen Allred, Director of the Department of Water Resources, having reviewed the attached proposed decision prepared by his appointee, Bobby D. Fleenor, who conducted the hearing or who has read the record in this case, hereby approves the same as a proposal for decision pursuant to Idaho Code, Section 67-5211 and orders that said proposed decision and a copy of this order be served upon each of the parties to these proceedings who appeared at the hearing on February 9, 1979, of this matter or upon their attorneys in accordance with Rule 7.3 of the Rules of Practice and Procedure of this Department.

Each party to these proceedings who appeared at the hearing is hereby afforded the opportunity, pursuant to Idaho Code Section 67-5211, to file exceptions to the attached proposed decision and to present briefs and oral arguments in accordance with the provisions of this order. Exceptions may not be filed and briefs and oral arguments may not be presented by parties who did not appear at the hearing of this case. If no timely and proper exceptions are received, an order by the Director will be entered adopting and issuing the proposed decision as his final decision.

I.

EXCEPTIONS

- A. To be considered by the Director, exceptions must:
1. be received by the Director on or before the 15th day following the day of service of this Order and the proposed decision, and

2. specifically identify the portions of the proposed decision to which exceptions are made and specifically state the grounds for those exceptions.

B. Exceptions not in compliance with the above stated requirements will not be considered and will be deemed an acceptance of the proposed decision.

II.

BRIEFS

A. Any briefs in support of exceptions to the proposed decision shall be filed with the Director at the same time that party's exceptions are filed with the Director.

B. Any party desiring to file a brief in response to any exceptions filed by any other party may do so by filing such brief with the Director on or before the 15th day following the last day any exceptions by any other party were served upon that party desiring to respond.

III.

ORAL ARGUMENTS

A. No oral arguments before the Director on the proposed decision will be held unless specifically requested by a party filing exceptions to the proposed decision and unless that request is filed with the Director concurrently with the filing of that party's exceptions.

B. If oral arguments have been properly requested by a party filing exceptions, any other party shall have the right to present oral arguments in response to the exceptions filed, provided that party files a request with the Director on or before the 15th day following the day the last exceptions by any other party were served upon that party.

C. After all exceptions, briefs and requests for oral arguments have been received by the Director and if oral arguments have been properly requested, the Director will, within a reasonable time, set the case for oral arguments and notify each party of the place,

date and hour the oral arguments will take place and of the period of time allocated for the arguments of this case. Unless the Director orders otherwise, all oral arguments shall be heard in Boise, Idaho.

IV.

CERTIFICATION OF SERVICE

A. All exceptions, briefs, requests for oral arguments and other matters filed with the Director in connection with the proposed decision shall be served on all other parties to these proceedings in accordance with Rule 7.2.

V.

FINAL DECISION

A. Following the submission of all exceptions and briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

DATED this 16 day of May, 1980



CC STEPHEN ALLRED
Director

Department of Water Resources

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 32-0014/0015/	)	
0016/2049/2071/2079 IN THE NAME OF)	)	PROPOSED
WHAOO & BHA, INC.	)	MEMORANDUM DECISION AND
	)	ORDER ISSUED ON REHEARING

The application to transfer water right Licenses No. 32-2049, 32-2071, and 32-2079 first came before the Department of Water Resources on May 10, 1976, when Grant Ashcraft, President of WHAOO & BHA, INC., applied to the Department to consolidate the points of diversion for six different rights to a new point of diversion located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 36, Twp. 12N, Rge. 34E B.M., Clark County.

As a result of the requisite advertising in the Enterprise Citizen several protests to the granting of this application were received from water users in Water District No. 32-C. A conference and/or hearing in the matter was set for August 12, 1976. Based upon the information presented at the conference and upon the records and field inspection of the Department, the parties agreed to allow the Department to reach a decision in the matter. By its Memorandum Decision and Order issued February 9, 1977, the Department approved a change in the point of diversion of the decreed rights 32-0014, 32-0015 and 32-0016 but denied the transfer of the three licensed rights.

The applicant petitioned for rehearing of the Department's decision and requested opportunity to submit evidence. On February 8, 1979, the matter came before the Department for rehearing.

Department Jurisdiction

The applicant argues that, "the Department was without jurisdiction to refuse to grant the application for the change in point of diversion and went beyond its jurisdiction in making a

conclusion of law to the effect that a water right had been forfeited through nonuse." The applicant further asserts that, "the law is clear that the Department simply does not have jurisdiction to adjudicate the existence, the forfeiture or abandonment of water rights"

The arguments which the applicant raises must be analyzed in view of Section 42-222 of the Idaho Code which provides the legal mechanism for transferring water rights. This section requires the following of the applicant, the director, and those wishing to protest an application for transfer:

1) Any person "who shall desire to change the point of diversion or place of use . . . shall first make application to the department of water resources for approval of such change."

2) "It shall be the duty of the director of the department of water resources to examine same . . . and cause notice of proposed change to be published. . . ."

3) "Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department. . . ."

4) "It shall be the duty of the director of the department of water resources to investigate the same and conduct a hearing thereon."

5) "He (the director) shall also advise the watermaster of the district in which such water is used of the proposed change . . . and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof" (emphasis added)

6) "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 and the change does not constitute an enlargement in use of the original

rights." (emphasis added)

7) "All rights to the use of water . . . shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated. . . ."

8) "Upon proper showing before the director of the department of water resources of good and sufficient reason for non-application to beneficial use of such water for such term of five (5) years the director of the department of water resources is hereby authorized to grant an extension of time for forfeiture of title . . . for a period not to exceed five (5) additional years."

It is clear from the above referenced provisions of Section 42-222, Idaho Code, the Director has a number of specific responsibilities to fulfill before he grants any change in the point of diversion or place of use of a water right. However, the primary responsibility placed upon the Director by this section of the code is that emphasized in No. 6 above, i.e., the protection of other water rights.

The question that must be asked is, "How can a water right be injured?" To answer this, one must first remember that the watermaster is elected and called to deliver water rights according to the existing decrees and licenses; and therefore, it is apparent that when the watermaster is called, the water supply is insufficient to meet the demand.

Thus, any factor which would tend to reduce normal water supplies will tend to injure other water rights. These factors can include increased percolation, evaporation and conveyance losses. This also includes diverting more water from the source than has normally been diverted. This may result from irrigating more land with a given water right or commencing the use of a water right that has not been used for many years. This is clearly the reason that the forfeiture provisions are included in 42-222.

Thus, if the Director finds that the right described on an application for transfer has not been exercised for a time period exceeding five years, and that a resumption of the use of such right would result in injury to established water rights, he cannot approve the application for transfer. If the Director fails in his responsibility at this point, the injured parties may be left with no recourse except a costly court action to protect their rights against the resumption of a forfeited right. A recent decision of the District Court of Idaho, Harshbarger v. Idaho Department of Water Resources, Fremont Co. No. 7264 (Dist. Ct. 7th Jud. Dist, Sept. 4, 1979), has held that the prior loss or relinquishment of a water right sought to be transferred is an issue which the Director may consider in order "to avoid a multiplicity of law suits."

The Department thus continues the position that it may properly consider whether a water right sought to be transferred has been lost and forfeited by a failure for the term of five years to apply it to the beneficial use for which it was appropriated.

Applicant's other argument is that the Department lacks jurisdiction to adjudicate water rights in its administrative proceedings. The order portion of the Department's February 9, 1977 Memorandum Decision and Order in this matter does not purport to be an adjudication of the rights described therein. What the order does is approve certain rights for transfer and deny certain other rights based upon criteria set out in Section 42-222, Idaho Code. The partial denial is based upon evidence that certain of the rights to be transferred have not been used since 1955 and thus have been forfeited through nonuse pursuant to Section 42-222(2), Idaho Code. Consideration of the issue of forfeiture by the Department was proper. See, Harshbarger, supra. The decision and order denies an application to transfer the rights in question based upon evidence showing that such rights have in fact been statutorily forfeited.

It is the determination of the Director that the evidence submitted by the applicant at the February 8, 1979 rehearing was not substantially different from the information presented at the August 12, 1976 conference.

The applicant weakly asserts that water was diverted under licensed rights 32-2049, 32-2071 and 32-2079 by its predecessor in interest, Mr. A. G. Eddie. However, the evidence is unrefuted that only 124 acres have ever been irrigated under the combination of six rights shown on the application for transfer. The three decreed rights authorized to be transferred by the Department represents a total diversion rate of 4.82 cubic feet per second. Utilized on 124 acres, this represents a diversion rate of 0.038 cfs per acre or nearly twice the normal rate of 0.02 cfs per acre. It has not been shown that an even greater diversion rate is needed to irrigate these lands.

Further, no new evidence or testimony was produced at the rehearing to show that the lands listed under the three licensed rights have been irrigated since 1955, or that water has been diverted at the licensed points of diversion. The findings of fact and the conclusions of law made in the original order are incorporated in this decision as though fully set forth herein.

NOW THEREFORE, IT IS HEREBY ORDERED that the Memorandum Decision and Order of the Director entered herein on February 9, 1977 is hereby reaffirmed in all respects.

DATED this 6 day of May, 1980.


BOBBY D. FLEENOR
Hearing Officer

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER OF WATER RIGHT NO'S. 32-)
0014/0015/0016/2049/2071/2079 IN)
THE NAME OF WHA00 & BHA, INC.)

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on the 16th day of May, 1980, true and correct
copies of the foregoing ORDER ISSUING PROPOSAL FOR DECISION and PROPOSED MEMORANDUM
DECISION AND ORDER, were mailed, postage prepaid to:

Gene Cook
Dubois, ID 83423

Hugh Webster
Dubois, ID 83423

Ben Fayle
Dubois, ID 83423

Holmes Brothers
Dubois, ID 83423

Dean Shenton
Dubois, ID 83423

Bennie D. Fayle
Dubois, ID 83423

Elman T. Woodfield
Dubois, ID 83423

Mr. and Mrs. Hollis Shenton
Dubois, ID 83423

George Whittaker
Dubois, ID 83423

Leland Small
Dubois, ID 83423

Ned Gneiting
Dubois, ID 83423

Thomas Steltzer
Dubois, ID 83423

Dave Stelzer
Dubois, ID 83423

Allyn K. May
Dubois, ID 83423

Lynn Hoggan
Dubois, ID 83423

Grant Ashcraft
Route 1
Sugar City, ID 83448

G. Rich Andrus
RIGBY, THATCHER & ANDRUS
25 N. 2nd E.
Rexburg, ID

Jack and Pat McGary
Dubois, ID 83423


RITA I. FLECK