

T1842 HOWELL

W.D. #02

Identification No. 21 2012

Transfer No. 1842

RECEIVED

FEB 12 1977

Department of Water Resources
Eastern District Office

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPROVED

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

1. Name of Right Holder Forrest Howell
Post office address Route #1, Ashton, Idaho
2. Right obtained by:
a. Decree to _____ in Case of _____
(Name)
vs. _____, Dated _____ in _____
(Name of Court)
Court. County of _____
- b. License No. 21-2012 issued by the State of Idaho, Department of Reclamation.
3. Source of water Blue Creek tributary to Henry's Fork Snake River
(Name of stream or source)
4. Date of Priority January 25, 1905
5. Amount of water a. 1.90 c.f.s. and/or
b. _____ acre feet/annum
6. Water is used for Irrigation from April 1 to November 1
(Month, Day) (Month, Day)
7. Original location of point of diversion is NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10,
Township 9N, Range 43E, B.M., in Fremont County;
Additional points of diversion, if any _____

8. Lands presently irrigated or place of use:

TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
9N	43E	15						X	X			X	X						160

Total number of acres presently irrigated 160 *

* Acreage not shown on license.

9. If applicant was not the original holder of this right explain how _____ as acquired: _____

10. CHANGE IN POINT OF DIVERSION

- a. Quantity to be diverted at new point: 1.90 c.f.s. and/or _____ acre feet
- b. New point of diversion: NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 15, Township 9N
_____, Range 43E, B.M.
- c. Description of method of diversion and conveyance from new points of diversion: _____
125 horsepower turbine pump

- d. Is water to be conveyed to the lands previously irrigated? Yes X No _____
If not, the place of use should be changed below.
- e. Describe the reasons for applying for a change in the point of diversion:
Gets point of diversion closer to place of use

- f. Do you intend to make the transfer permanent? Yes
- g. Do you intend to abandon completely the old point of diversion? Yes

- h. Indicate on the above plat the new point of diversion and lands to be irrigated.

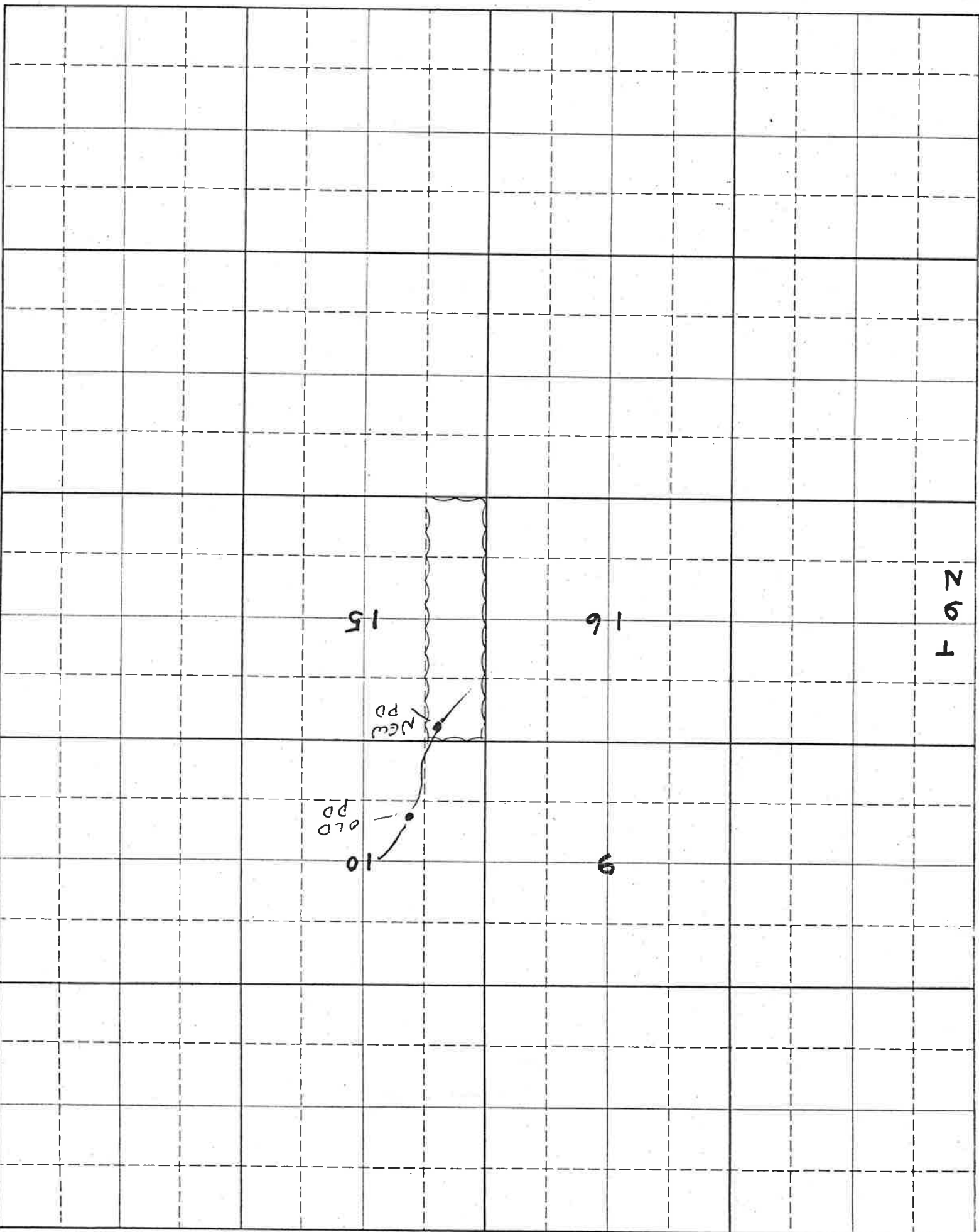
11. CHANGE IN PLACE OF USE NO CHANGE

- a. Describe the new lands on which you wish to use your right.

TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	

Total number of acres to be irrigated _____

SCALE: 2 Inches Equal 1 Mile. Draw Plan in Ink.



N
S
T

R 43E

b. Do you intend to make the transfer permanent?_____

c. Are you completely abandoning the lands previously irrigated by this right? If not, explain your plans:

d. Describe any other water rights that you claim for the new ground upon which you wish to transfer this right:_____

e. Indicate on the above plat the new land to be irrigated and the point of diversion.

I hereby assert that no one will be injured by such transfer and that the change will be made at my own risk. The information contained in this application is true to the best of my knowledge.

Robert Howell
(signature of applicant)

Subscribed and sworn to before me this 31st day of JULY, 19 75

R. D. Carlson
(notary public)

My commission expires 2/19/78

**ACTION OF STATE RECLAMATION ENGINEER
AND CERTIFICATE OF TRANSFER**

This is to certify that I have examined Application for Transfer of Water Rights No. 21-2012,
and said application is hereby APPROVED

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

The use of the water under the approved transfer is subordinate to all
intervening water rights, particularly those of the protestants, and shall have
a priority of June 1, 1973, which is the date when the use of water from Blue Creek
was resumed by the applicant: 2. That a measuring device of a type approved by
the Department be permanently installed and maintained as part of the diverting
works. 3. Be under the control of the watermaster of Water District 01.

Witness my hand this 29 day of January, 19 77

R. Karl [Signature]
XXXXXXXXXXXXXXXXXXXX
DIRECTOR

FOR DEPARTMENT USE ONLY

Received by MB Date 7-31-75

Prelim. check by RDC Date 7/31/75

Fee received by MB Date 7-31-75 Fee \$ 30.00

Approved for publication by EW 8-10-75 # 4352

Published in Des Moines Herald Dates Aug 7+14, 1975

Hearing held _____

Watermaster Recommendation sent Th. D. #01, Art Larson

Protest filed by: _____ Date _____
La Verne D. & Norma Cherry 8-8-75

RECEIVED

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES FEB 2 1977

OF THE
STATE OF IDAHO

Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATION FOR TRANSFER
NO. 21-2012 IN THE NAME OF FORREST HOWELL

MEMORANDUM DECISION
AND ORDER

On July 31, 1975, the Department of Water Resources received an application for transfer on Water Rights No. 21-2012 in the name of Forrest Howell. The transfer proposes to change the point of diversion of 1.90 cubic feet per second of water from Blue Creek, tributary to Henry's Fork of the Snake River with a priority of January 25, 1905. The water was previously diverted within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 10, Twp. 9N, Rge. 43E, B.M., and was used for irrigation purposes. The new point of diversion would be located within the NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 15, Twp. 9N, Rge. 43E, B.M.

The Department received a protest from LaVar A. and Donna P. Cherry on August 8, 1975.

On February 20, 1976, a conference was held in St. Anthony, Idaho, to consider this protest. At that time, the attorneys for the applicant and the protestants agreed to submit to the Department, a stipulation of the facts involved in the matter and to prepare a brief stating each side's position. The Department has reviewed the information presented and issues the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. License No. 1071/21-2012 was originally issued to Emoline Egbert who discontinued diverting water under this license prior to the time the property was sold to Mr. Forrest Howell in 1948.
2. Mr. Howell did not divert water from Blue Creek until the spring of 1973.
3. On September 20, 1949, License No. 21234/21-2102 for 0.20 cubic feet per second from Green Canyon Springs was issued to the protestants and on March 20, 1953, they were granted License No. 23234/21-2104 for 0.60 cubic feet
4. In 1973, the applicant constructed a small dam across Blue Creek, at the new point of diversion described in the transfer application and installed a power line and commenced to pump water and has continued to do so each season since that date.

5. On August 8, 1975, the protestants filed applications for Permit No's. 21-7075 and 21-7076 to appropriate an additional 3.20 cubic feet per second from Green Canyon Springs and an additional 3.20 cubic feet per second from Blue Creek.

6. The protestants now argue that the right evidenced by License No. 21-2012 has been abandoned and the applicant has no right to request a transfer of the license.

7. Since May 20, 1971, the exclusive method of appropriation of surface water in Idaho has been by permit issued by the Department of Water Resources.

CONCLUSIONS OF LAW

The Department has reviewed the arguments concerning forfeiture and in preparing the Conclusions of Law in this matter, must consider the legislative intent of the priority system of water rights. The Department must take the view that the priority system was established as a mechanism for preventing later water users from interfering with water rights that were established prior in time. The theory upon which the priority system is based assumes that as the diversions from any water source increases, available water supplies naturally will diminish and at some point in time all the water will be appropriated. If at that time one or more of the water users decided to discontinue their use of water, then the water that originally would have gone to fill that right is again available for appropriation for new uses or would go to satisfy the requirements of rights with later priority dates. Under present statutes, the only method of establishing a water right is by application and permit from the Department of Water Resources with the date of priority being the date of receipt of the application by the Department of Water Resources. The legislative intent is clear in Section 42-222, which states in part,

"all rights to the use of water acquired under this chapter or otherwise shall be lost or abandoned by a failure for a term of five years to apply it to 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 again be subject to appropriation under this chapter".

The protestants are entitled to the protection of the conditions which existed at the time they established their intervening water rights.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the application for transfer no. 21-2012 be and is APPROVED subject to the following conditions:

1. The use of the water under the approved transfer is subordinate to all intervening water rights, particularly those of the protestants.
2. The transfer shall have a priority of June 1, 1973, which is the date when the use of water from Blue Creek was resumed by the applicant.
3. That a measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works.
4. That use of the water shall be subject to the control of the watermaster of water district no. 01.

Dated this 29 day of January, 1977.


R. KEITH HIGGINSON
Director

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

MAR 8 1977

Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATION FOR TRANSFER
NO. 21-2012 IN THE NAME OF FORREST HOWELL

DENIAL OF PETITION FOR
REHEARING

WHEREAS, on July 31, 1975, the Department received an application for transfer of water right license no. 21-2012 from Forrest Howell; and,

WHEREAS, on August 8, 1975, a protest against the approval of the transfer was received from LaVar and Donna P. Cherry; and,

WHEREAS, on February 20, 1976, a conference was held and in May of 1976, both attorneys submitted arguments in brief form on the points of Law regarding abandonment and forfeiture; and,

WHEREAS, on January 29, 1977, the Director of the Department of Water Resources issued a memorandum decision and order approving the transfer but reducing the priority so as not to interfere with any intervening water rights; and,

WHEREAS, on February 1, 1977, the Department mailed a copy of the decision to all the parties; and,

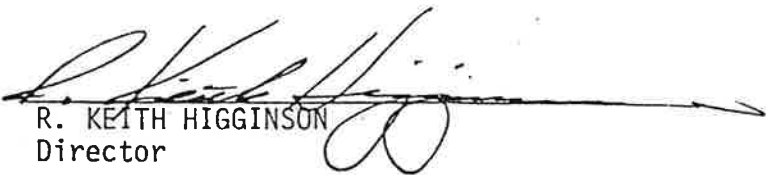
WHEREAS, on February 23, 1977, the Director received, from the protestants through their attorney, Kent W. Foster of Holden, Holden, Kidwell, Hahn and Crapo, a petition for rehearing before the director; and,

WHEREAS, the petition was not received within the time allowed by Rule 11.1 of the Department's Rules of Practice and Procedure; and,

WHEREAS, the Director considered in his decision, the reasons set forth by the protestants in their petition for a rehearing;

IT IS, THEREFORE, HEREBY ORDERED that the petition for rehearing is DENIED.

Dated this 3 day of March, 1977.


R. KEITH HIGGINSON
Director

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MAR 2 1977

BLAIR GROVER
LEE, RIRIE & GROVER
Chartered Professional Association
P. O. BOX 36
RIGBY, IDAHO 83442
(208) 745-6653

Department of Water Resources
Eastern District Office

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

IN THE MATTER OF APPLICATION FOR TRANSFER)
NO. 21-2012 IN THE NAME OF FORREST HOWELL) OPPOSITION TO PETITION
FOR REHEARING

COMES NOW the applicant, FORREST HOWELL, and hereby opposes the Petition for Rehearing submitted by the Protestants, LaVar A. and Donna P. Cherry, for the following reasons:

1. This is not a situation where the Department of Water Resources was totally uninvolved. The applicant had a licensed water right known to both the Department of Water Resources and the protestants. While it was arguably either abandoned and/or forfeited, everyone knew of its existence, and knew that when the applicant resumed use of the water in June of 1973, it was based upon said license.

2. When the applicant resumed use of the water, considerable sums of money were spent in applying it to a beneficial use, not only was protestant aware of the amount of money spent, but actually assisted applicant in construction of the diversion works for a beneficial use. There has never been any indication by either the Department of Water Resources, or the decisions in the courts, that water users can ignore principles of estoppel and fairness. The elements of estoppel certainly prevent protestants from watching and assisting applicant spend substantial sums of money, knowing applicant

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Page 2 - Opposition to Petition for Rehearing

is relying on an existing license, and then ignore the conduct of all parties and seek to nullify the actions and expenses of the applicant.

3. As stated in the protestants' petition, there is ". . . no need for the introduction of further or additional evidence. . .", and thus a rehearing would serve very little benefit except to increase costs and expenses to the parties.

Dated this 28th day of February, 1977.

LEE, RIRIE, GROVER & SIMS

by: _____
Blair Grover

I hereby certify that I mailed a true and correct copy of the foregoing Opposition to Petition for Rehearing, postage prepaid, to Kent W. Foster, Attorney at Law, P. O. Box 129, Idaho Falls, Idaho, 83401, this 1st day of March, 1977.

Blair Grover