

TRANS 2408  
34-0016

TIC 2408  
Ref 34-0016

BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF WATER RESOURCES

|                                        |                     |
|----------------------------------------|---------------------|
| IN THE MATTER OF AMENDED APPLICATION ) | AMENDED             |
| FOR TRANSFER OF RIGHT NO. 34-0016 )    | PROPOSED MEMORANDUM |
| IN THE NAME OF REED ASAY. )            | DECISION AND ORDER  |
| )                                      |                     |

On February 13, 1980, Reed Asay filed with the Department of Water Resources an application to change the point of diversion and place of use of the waters of Pass Creek, evidenced by right No. 34-0016 decreed to Eugene Ahern in the case of Utah Construction Company vs. John F. Abbott et al. The proposed change was advertised in the Challis Messenger on February 21 and 28, 1980. On March 10, 1980, the department received a protest against approval of the application from N. Merle Hone. On April 4, 1980, Reed Asay amended the application for transfer, and it was readvertised in the Arco Advertiser on April 27 and May 1, 1980. Protests were received against approval of the amended application on May 12, 1980 from George Hone, Tom Wallace, Arnold Munson, Leon Williams and Merle Hone.

On May 28, 1980, a conference was held in Arco, Idaho to consider the matter. The applicant was present and represented by attorney Stephen S. Dunn, of Pocatello, Idaho. Protestants, N. Merle and George Hone, were present and represented by attorney, Ray W. Rigby, of Rexburg, Idaho. Protestant, Arnold Munson, was present and represented himself and through power of attorney represented Tom Wallace. Protestant, Leon Williams was present and withdrew his protest.

The conference was used to outline the legal issues related to the proposed transfer. All parties agreed to waive their right to a hearing and allow the department to reach a proposed decision based upon the information submitted at the conference, the department's records, briefs to be submitted by counsel, and if necessary, the findings of a department field examination. On July 18, 1980, the department identified several legal issues and requested the attorneys to provide written arguments on them. These issues are as follows:

1. Because the State made no attempt to divert and beneficially use the waters after March, 1923, could the applicant's father have established ownership of decreed right No. 34-0016 through prescription, adverse use or by an implied transfer of the decreed right?

2. What constitutes proof of ownership of a water right: (a) obtained by prescriptive use, (b) adverse use, or (c) obtained by an implied transfer of a decreed right?

3. Can a decreed water right held by the State be lost through forfeiture? If so, what amount of time is necessary for the forfeiture to occur?

4. Does the existence of a water district preclude the operation of the adverse use?

On September 15, 1980, counsel for the protestants filed a brief and submitted eight exhibits of which he asked the department to take judicial notice.

On October 6, 1980, the department received a reply brief from the applicant's attorney discussing the issues raised by the department, and asking that seven of the eight exhibits submitted by the protestant's counsel be disregarded.

On February 10, 1981, the hearing officer issued a proposed memorandum decision and order. On March 2, 1981, the department received objections to the proposed order from both protestant's attorney and applicant's attorney. On April 30, 1981, the department provided to each of the parties the results of a field examination and water rights review made on April 8, 1981. The information included an analysis of water requirements provided by the applicant to the department on April 15, 1981. On May 19, 1981, the department received comments on the field exam and other data from protestant's attorney.

Because of the substantial changes found necessary because of the field examination and the consideration of information on duty of water the proposed memorandum decision and order are hereby amended and again reissued as a proposed memorandum decision and order. Based upon the information submitted at the conference, the department's records, hereinafter listed, the briefs submitted, and the hearing examiner's understanding of the law, the following findings of fact, conclusion of

law and order are hereby proposed:

REVIEW OF EVIDENCE

Exhibits Submitted at Conference:

1. Applicant's Exhibit #1 - Entitled "Statement of Fact" signed by Reed Z. Asay, Harry Pearson, Devon Jensen, Eugene Gabert, and Max E. Wall, dated May 23, 1980.
2. Protestant's Exhibit #1 - Entitled "Land Sale Certificate," dated August 16, 1976.
3. Protestant's Exhibit #2 - Entitled "Land Sale Certificate and Assignment of State Land Certificate," dated June 23, 1978.
4. Protestant's Exhibit #2 - Entitled "In the District Court of the Sixth Judicial District of the State of Idaho in and for Butte County. State of Idaho vs. Eugene A. Ahern et al. Default," dated March 28, 1923.
5. Protestant's Exhibit #4 - An Agreement with Respect to Phil Davies' Pass Creek Dam Proposal, dated April 4, 1973.

Department Records Considered:

1. Decree in the United States District Court in and for the District of Idaho, Eastern Division. The Utah Construction Company vs. John F. Abbott et al, dated March 15, 1923.
2. Application for Transfer of Water Right No. 34-0016, dated February 12, 1980.
3. Affidavit of Publication of Notice of Proposed Change of Water Right No. 34-0046 (sic), dated March 4, 1980.
4. Amended Application for Transfer of Water Right No. 34-0016, dated April 3, 1980.
5. Affidavit of Publication of Notice of Proposed Amending of Application For Transfer, dated September 8, 1980.
6. Letter Protesting Amended Application For Transfer of Water Right No. 34-0016, dated May 12, 1980.
7. Withdrawal of Protest by Leon L. Williams, dated May 28, 1980.
8. Stipulation and Agreement to Waive Formal Hearing, dated May 28, 1980.
9. Notice of Conference or Hearing, dated May 14, 1980.
10. Protestant's Brief, dated Sept. 12, 1980.

11. Applicant's Reply Brief, dated Oct. 3, 1980.
12. Abstract of Decreed Rights Basin 34.
13. Big Lost River Water District Listing of Rights and Ownership With Cover Letter From Devon Jensen, Watermaster, dated August 20, 1964.
14. Memorandum Decision and Order on Rights 34-0550 and 34-0551, dated March 22, 1973.
15. Claim to a Water Right No. 34-4045.
16. License No. 34-2016.
17. License No. 23-2487.
18. License No. 34-2253.
19. Relinquishment - Ed Denison, dated Jan. 10, 1980.
20. Proposed memorandum decision and order dated February 10, 1981.
21. Applicant's objections to proposed order dated February 23, 1981.
22. Protestant's objections to proposed order dated February 25, 1981.
23. Memorandum of field inspection, water rights review and justification for additional water with cover letter by Ernest Carlsen dated April 30, 1981.
24. Protestant's comments to field exam and other data supplied, dated May 14, 1981.

#### FINDINGS OF FACT

1. The applicant does not claim ownership of the land to which right No. 34-0016 is recorded as being appurtenant, but relies upon a history of use since 1940 or earlier by himself and his father, as his predecessor in interest. The applicant asserts in the application for transfer that the right obtained was by purchase, but written evidence is not available to confirm or refute that purchase.

2. The land to which the right is recorded as appurtenant was obtained by the State of Idaho through default from Eugene A. Ahern and others in a lawsuit in 1923. It remained in state ownership until 1976 when purchased on a contract of sale by Edward R. Denison. The contract of sale was assigned by Edward R. Denison to the U.S. Farmers

Home Administration on June 23, 1978.

3. Edward R. Denison relinquished any interest in right No. 34-0016 on January 10, 1980 acknowledging that he believed that the right was owned by the applicant.

4. The records of the department show the following rights appurtenant to all or part of the land to which right No. 34-0016 is proposed to be moved:

| Number                                                  | Status  | Source                                               | Priority                           | Amt.     | Place of Use                                                                                                                                                                                                                                      |
|---------------------------------------------------------|---------|------------------------------------------------------|------------------------------------|----------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ✓ 34-0727                                               | Decree  | Pass Creek                                           | 6-01-1883                          | 0.8 cfs  | NE $\frac{1}{4}$ , Sec. 28<br>T7N, R25E, B.M.                                                                                                                                                                                                     |
| T.424/<br>✓ 34-0254                                     | Decree  | Pass Creek                                           | 2-03-1903                          | 2.5 cfs  | NW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$<br>Sec. 27, T7N<br>R25E B.M.                                                                                                                                                 |
| <i>Dept. Admin. recognized<br/>34-4045</i><br>* 34-4045 | Claim   | Pass Creek                                           | 6-01-1925                          | 8.6 cfs  | NW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ ,<br>Sec. 27; E $\frac{1}{2}$ NE $\frac{1}{4}$ ,<br>W $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ ,<br>Sec. 28; T7N,<br>R25E, B.M.                    |
| ✓ 34-0947                                               | Decree  | Junction (Jensen) Creek                              | <del>6-1-1902 ?</del><br>1-03-1903 | 0.4 cfs  | W $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ ,<br>Sec. 28, T7N,<br>R25E, B.M.                                                                                                                                              |
| ✓ 34-0948                                               | Decree  | Junction (Jensen) Creek                              | <del>6-1-1902 ?</del><br>6-01-1884 | 0.8 cfs  | W $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ ,<br>Sec. 28, T7N,<br>R25E, B.M.                                                                                                                                              |
| ✓ 34-0949                                               | Decree  | Junction (Jensen) Creek                              | 4-27-1910                          | 3.2 cfs  | NE $\frac{1}{4}$ , Sec. 28,<br>T7N, R25E,<br>B.M.                                                                                                                                                                                                 |
| 34-2016                                                 | License | Cedar Creek                                          | 3-29-1906                          | *5.85cfs | 300 acres in<br>NW $\frac{1}{4}$ NE $\frac{1}{4}$ ,<br>N $\frac{1}{2}$ NW $\frac{1}{4}$ , Sec.<br>27; E $\frac{1}{2}$ NE $\frac{1}{4}$ ,<br>W $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ ,<br>Sec. 28; T7N,<br>R25E, B.M. |
| <i>I didn't use these</i><br>34-0084                    | Decree  | Lower Cedar Creek                                    | 1-01-1913                          | 3.2 cfs) | NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ ,                                                                                                                                                                                             |
| 34-0885                                                 | Decree  | Lower Cedar Creek                                    | 1-01-1914                          | 1.6 cfs) | N $\frac{1}{2}$ SW $\frac{1}{4}$ , Sec. 28,                                                                                                                                                                                                       |
| 34-0886                                                 | Decree  | Lower Cedar Creek                                    | 1-01-1915                          | 1.6 cfs) | T7N, R25E                                                                                                                                                                                                                                         |
| ✓ 34-2253                                               | License | Jensen Springs<br>Crow's Nest Spring<br>Misc. Spring | 1-20-1927                          | 2.4 cfs  | NW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ ,<br>Sec. 27, T7N,<br>R25E                                                                                                                                                   |
| <i>I didn't use this</i><br>34-2487                     | License | Groundwater                                          | 8-16-1966                          | *2.22cfs | 115 acres in<br>NE $\frac{1}{4}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ ,<br>SE $\frac{1}{4}$ NE $\frac{1}{4}$ , Sec.<br>28, T7N, R25E                                                                                               |

\*Prorated share of larger diversion rate

Although Right numbers 34-0044 and 34-0045 were listed in the proposed decision as being appurtenant to part of the land to which right number

34-0016 is proposed to be moved; a further review of department records revealed that both rights had been transferred in April 1980 to lands not included within the legal description proposed for right number 34-0016.

5. The watermaster of Water District 34 is appointed and supervised by the department and the records of the watermaster's office are also considered department records. These records indicate the applicant has controlled right No. 34-0016 since 1964 or earlier.

6. The present and former watermasters of Water District 34 concur that right No. 34-0016 has been used on the lands of the applicant since 1940 or earlier.

7. A field examination made by the department subsequent to issuance of the proposed memorandum decision and order provided information that the applicant and his predecessors have used Pass Creek water to flood irrigate approximately the number of acres listed in the following legally described tracts of land:

| T  | R   | Sec | NE $\frac{1}{4}$ |                  |                  |                  | NW $\frac{1}{4}$ |                  |                  |                  | SW $\frac{1}{4}$ |                  |                  |                  | SE $\frac{1}{4}$ |                  |                  |                  | TOTAL |
|----|-----|-----|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|-------|
|    |     |     | 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 $\frac{1}{4}$ |       |
| 7N | 25E | 27  |                  | 6                |                  |                  | 12               | 21               | 7                |                  |                  |                  |                  |                  |                  |                  |                  |                  | 46    |
| 7N | 25E | 28  | 19               |                  | 2                | 31               |                  |                  |                  |                  | 11               |                  |                  | 11               | 5                | 34               | 40               |                  | 153   |

TOTAL ACRES (rounded) 199

The acreages for each 40 acre subdivision herein listed were obtained by scaling exhibits 1 & 2 of the field examination report to obtain the 199 acres found to be irrigated from Pass Creek by the field examiner.

8. At the request of the hearing officer (reference letter dated March 13, 1981 distributed to counsel for all parties) applicant provided data demonstrating a need for a diversion rate of .04 to .06 cfs per irrigated acre considering the types of soils encountered, the irrigation system used and the crops grown.

9. Information was not presented to demonstrate that other rights would be injured by recording a change in the point of diversion or

10. The applicant states that the application for transfer is to record a change in the point of diversion and place of use which took place over 50 years ago.

11. Those exhibits submitted with the Protestant's Brief which were not records of the department were not admitted into the conference record.

### CONCLUSIONS OF LAW

1. Prior to 1969, a change in point of diversion could be recorded with the department through a transfer application, but the filing of such an application does not appear to have been mandatory.

2. The rate of diversion of water from a single source or any combination of sources cannot exceed 0.02 cfs/acre irrigated unless justification is provided for a higher rate of diversion. The applicant's land and irrigation system require a diversion rate of 0.04 cfs/acres.

3. In the absence of clear evidence to the contrary, the records of the department and actions of those officials responsible for distributing the waters of Pass Creek are sufficient to show the applicant has an ownership interest in right No. 34-0016.

4. The act of recording a change in point of diversion and place of use will not constitute an enlargement or injure any other right, either junior or senior, if it is merely confirming a change which took place 50 years ago.

5. The department may not consider evidence not part of the record.

6. Right No. 34-4045 is a "claimed" right by reason of diversion \* and beneficial use and is not subject to delivery by the watermaster without authorization by a court of competent jurisdiction. Therefore right No. 34-4045 has not been considered in this proposed order.

### ORDER

IT IS HEREBY ORDERED THAT:

1. The exhibits submitted by counsel for the protestant subsequent to the conference be disregarded in entering this decision except Exhibit H and those parts of Exhibit F available in the department records.

2. Application for transfer of right No. 34-0016, bearing a priority date of December 16, 1907, be and is hereby approved subject to the following conditions:

A. The land to which right No. 34-0016 is made appurtenant is limited to that irrigated in previous years within only those legal subdivisions requested by the applicant on the pending appli-

cation for transfer:

| T           | R   | Sec | NE $\frac{1}{4}$ |                  |                  |                  | NW $\frac{1}{4}$ |                  |                  |                  | SW $\frac{1}{4}$ |                  |                  |                  | SE $\frac{1}{4}$ |                  |                  |                  | TOTAL |
|-------------|-----|-----|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|-------|
|             |     |     | 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 $\frac{1}{4}$ |       |
| 7N          | 25E | 27  |                  | 6                |                  |                  | 12               | 21               |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  | 39    |
| 7N          | 25E | 28  | 19               |                  |                  | 31               |                  |                  |                  |                  | 11               |                  |                  |                  |                  |                  | 34               | 40               | 135   |
| TOTAL ACRES |     |     |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  | 174   |

No increase in acreage or change in location from that irrigated in recent years under this right is authorized nor is use of this right authorized except in the above listed legal subdivisions.

B. The rate of diversion of water under right No. 34-0016 when combined with diversion of any and all other rights appurtenant to the same lands shall not exceed 0.04 cfs per acre of land irrigated. The maximum rate of diversion under right No. 34-0016 is hereby reduced to 3.66 cfs. This diversion rate shall be further reduced if water is being diverted from sources other than Pass Creek as herein provided.

C. A measuring device of a type approved by the department shall be installed and maintained at the herein authorized point of diversion.

#### ANALYSIS

The evidence does not show that the applicant has had an ownership interest in the lands to which right 34-0016 was recorded as appurtenant. It does not necessarily follow, however, that the water right is not owned by the applicant.

Water rights are real property appurtenant to the lands upon which they are developed. However, state law does allow a change in point of diversion and place of use of a water right. Prior to 1969 such a change could be recorded with the department through a transfer application but there is some question of whether the recording was mandatory. The records of the department and the statements of the watermaster, as the responsible official charged with delivering the waters of Pass Creek to those having the right to its use, indicate right 34-0016 was controlled by the applicant and his predecessor in interest. These records and actions must be considered to have been based upon evidence of ownership or control no longer available in the records of the department. However, in the absence of evidence to the contrary these actions by the responsible officials are sufficient to ascribe to

PROPOSED MEMORANDUM DECISION & ORDER, Page 8

the applicant an ownership interest in right 34-0016.

The applicant has demonstrated that the duty of water of the lands to which right 34-0016 is to be moved exceeds the normal rate of 0.02 cfs per acre as provided by section 42-220 Idaho Code. As guardian of the public water of Idaho the department must limit the use of water to that reasonably necessary taking into consideration irrigation practices and water requirements of soils common to the area of concern. The maximum rate of diversion allowed under right 34-0016 is calculated as follows:

|                                                                                           |               |
|-------------------------------------------------------------------------------------------|---------------|
| Area to which #34-0016 is made appurtenant                                                | 174 acres     |
| Duty of water herein recognized                                                           | 0.04 cfs/acre |
| Allowable rate if #34-0016 were the only right from Pass Creek appurtenant to these lands | 6.96 cfs      |
| Reduce for prior right #34-0727 appurtenant to NE1/4 Sec. 28, T7N, R25E                   | 0.80          |
|                                                                                           | 6.16          |
| Reduce for prior right T.424/34-0254                                                      | 2.50          |
|                                                                                           | 3.66 cfs      |

The diversion rate actually delivered by the watermaster under right 34-0016 must be further reduced by the amount then being diverted by the applicant from other sources for which the applicant has rights for these same lands. The department recognizes that water rights may be held from various independent sources for the same parcel of land. The maximum rate from each source individually cannot exceed the determined duty of water nor can the rate of diversion at any one time from all combined sources.

Because the approval of this transfer is only to change the records to reflect a change made over 50 years ago, the applicant cannot be given the opportunity to extend the use of right 34-0016 over lands not previously irrigated.

Signed at Boise, Idaho this 23<sup>rd</sup> day of July, 1981.

for L. Glen Saxton  
NORMAN C. YOUNG  
Hearing Examiner