

T3530 FARMERS HOME ADMINISTRATION



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

February 3, 1995

RE: In the matter of Application for Transfer of Water Right No.
34-00737B in the name of Farmers Home Administration
34-00721B Tr. 3530

Dear Interested Party:

The accompanying order is a "preliminary order" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the department unless a party petitions for reconsideration within fourteen (14) days after issuance as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of this order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal. Written briefs in support of or taking exceptions

to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,



L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER OF WATER RIGHT NO.)
34-00727B IN THE NAME OF FARMERS)
HOME ADMINISTRATION)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources (department), as a result of the review of a Snake River Basin Adjudication claim filed on water right no. 34-00727B, the department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On July 2, 1991, the department issued a Proposed Memorandum Decision and Order in connection with Application for Transfer No. 34-00727B (application) filed in the name of Farmers Home Administration.

2. On July 31, 1991, Bret Zollinger (intervenor) filed exceptions to the proposed decision.

3. On August 14, 1991, the Director of the department issued a Final Memorandum Decision and Order in the matter changing the water measurement condition of approval objected to by the intervenor.

4. On September 4, 1991, the intervenor requested a rehearing in the matter with respect to the measuring device requirements described in the Final Order. The water right file does not show that the department responded to the request.

CONCLUSIONS OF LAW

1. The request for rehearing by the intervenor was timely filed with the department and must be addressed to complete the administrative decision process.

2. The department should respond to the request in compliance with IDAPA 37.01.01730 (Procedure Rule 730).

3. The department should not make additional changes to the Final Order of the department issued on August 14, 1991, and should deny the request for rehearing.

ORDER

IT IS THEREFORE, HEREBY ORDERED that the request for rehearing filed by intervenor Bret Zollinger is **DENIED**.

Dated this 1st day of February, 1995.

A handwritten signature in dark ink, appearing to read "L. Glen Saxton", is written over a horizontal line.

L. GLEN SAXTON, Chief
Water Allocation Bureau

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of February, 1995,
I mailed a true and correct copy, postage prepaid, of the foregoing
PRELIMINARY ORDER to the following:

Farmers Home Administration
P.O. Box 656
Arco, ID 83213

Bret Zollinger
c/o Ray Rigby
RIGBY THATCHER ANDRUS RIGBY
& KAM
25 N. 2nd E.
Rexburg, ID 83440


JULIE L. YARBROUGH
Senior Secretary

RECEIVED

STATE OF IDAHO MAR 3 0 1992

DEPARTMENT OF WATER RESOURCES

Transfer No. 3530Page 1 of 1

DEC 23 1988

Department of Water Resources
Eastern District Office

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

Name of applicant FARMERS HOME ADMINISTRATION Phone 527-3486
Post Office address P.O. Box 656, Arco, Idaho 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 To provide a better surface water to the property owned by the FmHA in Section 6 and 7 of T6N, R26E.

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>34-0727 B</u>	<u>6-1-1883</u>	<u>.8</u>	<u>Irrigation</u>	<u>April 1</u> to <u>November 1</u>
_____	_____	_____	_____	_____ to _____
_____	_____	_____	_____	_____ to _____
_____	_____	_____	_____	_____ to _____

2. Total amount of water being transferred .8 cubic feet per second and/or _____ acre-feet per annum.
3. Source of water Pass Creek tributary to The Big Lost River
4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		SW	NE	23	7N	25E	Butte	

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	
6N	26E	6											5	5					10
6N	26E	7		10			10	10											30

AUG 21 1991

Total acres 40

PART 1

6. General Information:

- a. Description of diversion system Divert by a check and headgate on Pass Creek. Travels through a lateral ditch and enters the Burnett Ditch. Then is diverted by means of headgate from the Burnett Ditch and pressurized by pump and motor and applied by sprinklers.
- b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ Yes X _____ 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:
Will be irrigated by ground water under License #34-2393

d. Remarks:

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCESThis is to certify that I have examined Application for Transfer of Water Rights No. 34-0727B

APPROVED

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

Pursuant to the Final Memorandum Decision and Order datedAugust 14, 1991.Witness my hand this 14th day of AugustAUG 21 1991, 19 91/s R. Keith Higginson, Director

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. 466 Decreed to 34-0727 B / Tr. 557
 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. _____ 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 Sheriff's Deed Title Insurance

3. Source of water Pass Creek tributary to Big Lost River

4. Date or priority 6-1-1883

5. Water is used for the following purpose:

amount .8cfs for Irrigation purposes from April to November 1
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

6. Total amount of water under right .8 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
		SW	NE	23	7N	25E	Butte	

8. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
6N	25E	12				40													40

Total acres 40

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

Water License #34-2393 TON RABE
for Sections 1 & 12 34-02403

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 _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT
PART 3

- A. Draw a map or attach a USGS map indicating the new point(s) of diversion and/or the new place of use for rights described in part 1. Clearly depict the land by section, township and range number.**

R26 EBM

T
6
N

SW
 SW 37 SE 14
 1 6
 12 7 39 40 30
 NW NE NW
 NW NE

licence 39-02403

RECORDED
AUG 21 1991

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

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

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

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

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

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

John L. Johnson County Supervisor Fall 1988
(Signature of Applicant)

Subscribed and sworn to before me this _____ day of November, 19 88.

John L. Johnson
(Notary Public)

My commission expires 8-26-93

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments

Received by RB Date 12-23-88

Protest filed by _____

Prelim. check by DMS Fee 500 ECOS345

Received by HLJ Date 12-23-88

Published in Area Advertiser

Copies of protest forwarded by _____

Pub. dates 3-16-89

Hearing held by _____ Date _____

Watermaster recommendation requested on 3-16-89

Recommended for ☐ approval ☐ denial

WD 34 rec'd. _____

by _____

Copy of transfer sent to lien holder _____

RECORDED

AUG 21 1991

3530

RECEIVED

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

AUG 19 1991

STATE OF IDAHO

Department of Water Resources
Eastern District Office

IN THE MATTER OF APPLICATION FOR TRANSFER)
)
OF WATER RIGHT NO. 34-0727B IN THE NAME)
)
OF FARMERS HOME ADMINISTRATION)
)

FINAL MEMORANDUM
DECISION AND ORDER

Exceptions having been filed by Reed Z. Asay, and the Director having reviewed the exceptions, issues the following Final Memorandum Decision and Order:

ANALYSIS

Asay raises the following issues:

1. Asay alleges that water right no. 34-0727B has been forfeited, or has been obtained by Pehrson and Asay by adverse possession. In addition, Asay alleges that both Asay and Pehrson own later in time water rights that will be injured by the approval of this application for transfer.

2. Asay alleges that Zollinger does not have a right of way in the ditch for delivery of the water.

Asay also asks for a rehearing or oral argument. The petition for rehearing or oral argument is denied.

FORFEITURE

There was conflicting testimony in the record regarding the issue of forfeiture. Forfeiture must be established by clear and convincing evidence. The burden of proof rested with the protestant to prove the water right had been forfeited. Sufficient proof of forfeiture was not offered at the hearing.

DITCH RIGHT OF WAY

A review of the record indicates that the ditch through which the water right is proposed to be delivered was not clearly identified. Asay argues that Zollinger will attempt to divert his water through a private ditch. The watermaster should not be instructed to deliver water through a point of diversion where no right of way exists. Zollinger should present some evidence to the watermaster prior to delivery of his water, showing some indicia of a right of way. Watermaster knowledge of past

delivery of the water right through a particular ditch should be sufficient. If a right of way question persists, the parties may have to resolve the dispute in another forum.

In addition to the issues identified above by Asay, the proposed decision needs some additional clarification. Paragraph 20 of the decision improperly sets forth the scheme of rotation. It should state:

20. The Department records show four water rights with an identical priority date of June 1, 1883.

<u>Number</u>	<u>Amount</u>	<u>Current Owner</u>
34-0731	0.50 cfs	Pehrson
34-0726	0.50 cfs	Pehrson
34-0727A	0.80 cfs	Asay
34-0727B	0.80 cfs	(an issue in this matter)

At one time, the owners of these water rights rotated on a thirteen-day rotation. Pehrson, or his predecessor, diverted for five days under his two rights, 34-0731 and 34-0726, Asay for four days, and the water right holder of right no. 34-0727B for four days.

Finding of fact number 21 will also be changed to state:

21. Monson used his Pass Creek water right sporadically. Pehrson, Asay and possibly other right holders with later dates of priority used the water at times when Monson was not diverting under his priority. After FmHA foreclosed on the Monson place and the Zollinger Place, there was no indication that Monson or FmHA attempted to use water right no. 34-0727B. Water which would normally be diverted to fill the right was available for diversion by other appropriators, including Pehrson and Asay.

Conclusion of Law number 6 will also be changed to state:

6. Asay and Pehrson both own water rights which are later in time than 1883. Resumption of diversion of right no. 34-0727B by Zollinger will reduce the amount of water available to junior appropriators. Reduction of flow cannot be viewed as a legal injury to these parties, however, unless the right sought to be transferred is found to be non-existent. Resumption of use of a valid water right is not an injury to junior water right holders.

An additional paragraph will be added as Conclusion of Law number 7, and all subsequent paragraphs numbered consecutively therefrom:

7. Asay and Pehrson cannot claim adverse possession because it is prohibited by Idaho Code § 42-607. Section 42-607 states that a person cannot obtain a water right by adverse possession when the water right is administered by a watermaster in a water district.

Finally, Zollinger challenges Conclusion of Law number 11 and conditions 5 and 6 of the order because they require measuring of total volume withdrawn pursuant to this right. Because the right will be diverted through a surface headgate, and may be commingled with other rights, the measurement of the total volume of water diverted pursuant to this right may not be possible.

Conclusion of Law number 11 appears to be adequate. Condition no. 5 of the order, however, will be changed as follows:

A totalizing measuring device at a separate point of diversion must be installed and permanently maintained as part of the diverting works prior to diversion of water under this transfer. As an alternative, total volume may be accumulated from the first day Pass Creek water is diverted at the full flow rate of 0.8 cfs, and the volume will continuously accumulate at full flow rate until the entire 120 acre-feet has been diverted, at which time the Pass Creek water will no longer be delivered.

With the foregoing corrections to the Proposed Memorandum Decision and Order, the Director of the Department of Water Resources finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The records of the Department of Water Resources show that water right no. 34-0727B authorizes the diversion of 0.8 cubic feet per second (cfs) from Pass Creek, a tributary to the Big Lost River. The water right records locate the point of diversion in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 23, T7N, R25E. The Department records identify 40 irrigated acres within the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 12, T6N, R25E, B.M., known locally as the Fullmer place, as the place of use.

MEMORANDUM DECISION AND ORDER

Page - 3

2. The testimony from all parties established that the place of use identified by the Department records (Fullmer place) has never been irrigated by water right no. 34-0727B.

3. FmHA established that it owns the place of use described by the water right records (Fullmer place), even though the water has not been used on that land.

4. Terry Monson (Monson) established that he once owned land located in the $W\frac{1}{2}NE\frac{1}{4}$, Section 12, T6N, R25E, B.M. (hereafter referred to as the Monson place). He established that water right no. 34-0727B had been used on the $W\frac{1}{2}NE\frac{1}{4}$ of Section 12 when he owned the property.

5. The evidence also established that Monson owned the 40 acres in Sections 6 and 7, T6N, R26E, B.M., to which FmHA proposes to transfer the water (hereafter referred to as the Zollinger place).

6. During the mid to late 1980's, FmHA foreclosed on land owned by Monson (the Monson place and the Zollinger place) and FmHA ultimately gained ownership of both properties.

7. During FmHA's ownership of the Monson place and the Zollinger place, as well as the place of use described for water right no. 34-0727B in the Department records (Fullmer place), FmHA evaluated the properties and determined that the best way to maximize the sale of all of the properties was to transfer water right no. 34-0727B to the land proposed as a place of use by this transfer, the Zollinger place. The water rights were included in an appraisal completed by the FmHA in 1988.

8. Penciled into the margin of a tabular summary of water rights on page eight of the appraisal are alpha characters (E, C, and W) designating which parcel should be the place of use for each of the rights. The parcels are identified on page five as either "east," "central," or "west." The alpha characters on page eight refer to the east, central or west parcels described on page five.

9. The Monson place is listed as a place of use for water right no. 34-0727B. The Fullmer place, which the Department records list as the place of use, is not one of the designated parcels appraised. The appraisal identifies the Zollinger place as the "east parcel." FmHA did not list the Zollinger place as the place of use for right no. 34-0727B.

10. Prior to marketing any of the property owned by FmHA, FmHA offered Mr. Monson first right to lease or acquire the property which had been repossessed.

11. Monson determined that the lease price was excessive and appealed administratively to FmHA. At the hearing, Monson stated that he did not want to lease the Zollinger place, but desired to lease two other parcels, one of which is the Monson place. FmHA found that the lease price was appropriate, but that "if the appellant decides to lease the property at the amount offered, the appellant should also be offered the surface water rights appurtenant to that portion of the land he wishes to lease."

12. In correspondence, the FmHA hearing officer wrote to Monson:

If you decide to lease back the property at the amounts offered to you by FmHA, you may be entitled to surface water rights appurtenant to the 120 acre plot in question at an additional, reasonable cost.

Therefore, if you exercise the option to lease the 120 acres, the December 19, 1988, decision of FmHA is modified in part. FmHA should then determine what surface water rights are appurtenant to the 120 acre plot, make an evaluation of the same, and offer you those water rights at a fair market value. The value of the water rights would, of course, be in addition to the \$4200.00 per year lease value already placed on the 120 acres.

13. The record is unclear whether right no. 34-0727B was ever offered to Monson when he leased the Monson place.

14. Monson declined to lease the property located in Sections 6 and 7, (Zollinger place) because the price was too high, but opted to lease the W $\frac{1}{2}$ NE $\frac{1}{4}$, Section 12, T6N, R25E, (Monson place) which appears to be the location of the 120 acres discussed in the hearing officer's letter.

15. Zollinger filed an adjudication claim for water right no. A34-0727B. Two days following the hearing, Monson filed adjudication claim A34-0727C for the same water.

16. George R. Hone testified that water diverted pursuant to water right no. 34-0727B not only irrigated the Monson place but also irrigated the Zollinger place, located in Sections 6 and 7, T6N, R26E, when these lands were owned by Monson.

17. FmHA determined that water right no. 34-0727B should be conveyed with the Zollinger place, and sold the water with the land to Zollinger.

18. Conflicting testimony was presented about the period of time expired since water had been diverted and beneficially used as authorized by right no. 34-0727B. Pehrson testified that the water right had not been used for ten years. George Hone testified, however, that the water right had been used through 1985 or 1986.

19. This application for transfer was filed in 1988, but the Department delayed action on the transfer because of water right disputes in the Big Lost River Basin.

20. The Department records show four water rights with an identical priority date of June 1, 1883.

<u>Number</u>	<u>Amount</u>	<u>Current Owner</u>
34-0731	0.50 cfs	Pehrson
34-0726	0.50 cfs	Pehrson
34-0727A	0.80 cfs	Asay
34-0727B	0.80 cfs	(an issue in this matter)

At one time, the owners of these water rights rotated on a thirteen-day rotation. Pehrson and his predecessor diverted for five days, Asay for four days, and the water right holder of right no. 34-0727B for four days.

21. Monson used his Pass Creek water right sporadically. Pehrson, Asay and possibly other right holders with later dates of priority used the water at times when Monson was not diverting under his priority. After FmHA foreclosed on the Monson place and the Zollinger Place, there was no indication that Monson or FmHA attempted to use water right no. 34-0727B. Water which would normally be diverted to fill the right was available for diversion by other appropriators, including Pehrson and Asay.

22. No deeds or other documents were produced by Monson to show that he received water right no. 34-0727B when he leased the property from FmHA. No evidence was submitted to show that he retained the water when FmHA foreclosed.

23. The hearing officer finds that, regardless of which parcel the water right was appurtenant to, FmHA owned both the place of use described in the Department records, and also the place of use where the water was beneficially used at the time the transfer was filed.

MEMORANDUM DECISION AND ORDER

Page - 6

24. Zollinger testified that he owns approximately 200 acres of land (Zollinger place) within which the fragmented 40 acres which he proposes as the place of use are located. He intends to sprinkle irrigate 120 acres of the 200 acres with water diverted pursuant to the right. The estimate of 120 irrigated acres conflicts with a claim of 190 acres represented to be irrigated in the adjudication claim.

25. Several water rights are appurtenant to the 200 acres owned by Zollinger:

<u>Right No.</u>	<u>Priority</u>	<u>Source</u>	<u>Flow Rate</u>	<u>Delivery Rating by FmHA</u>
34-0878B	04/22/1884	Big Lost River	0.50 cfs	Excellent
34-0484	06/01/1889	Big Lost River	2.00 cfs	Poor
34-2403	03/31/1961	Groundwater	3.20 cfs	N/A

26. Another water right for 0.40 cfs and an 1898 priority is also listed in the FmHA appraisal which does not appear in the Department records. There may also be some Big Lost River Irrigation District storage water appurtenant to Zollinger's land.

27. Water right no. 34-0878B and water right no. 34-0727B are early priority rights. These early rights might provide sufficient water for sprinkler irrigation of 120 acres during times of low flow in the Big Lost River and Pass Creek.

28. Water rights diverted from Pass Creek are administered by the watermaster of Water District No. 34, Big Lost River.

29. By means of climatic, evapotranspiration and seepage loss data, the Department has determined that the maximum annual diversion volume necessary to grow crops in the Big Lost River area is 3.0 acre-feet per acre.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, sets forth the criteria that the Department can consider in determining whether an application for transfer should be approved:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the

MEMORANDUM DECISION AND ORDER

Page - 7

original right, and the change is in the local public interest as defined in Section 42-203A, Idaho Code; . . .

2. The applicant carries the burden of coming forward with evidence that his proposed transfer will not result in an enlargement in use and will not injure other water rights.

3. All parties carry the burden of coming forward with the evidence regarding matters of local public interest, but the applicant bears the burden to show that his proposal is in the local public interest, or that public interests which favor the proposal are of greater worth than the public interests with which it conflicts.

4. Forfeiture must be established by clear and convincing evidence.

5. The question of forfeiture was clouded by testimony that the water had been used as recently as 1985 or 1986. The conflict in testimony regarding the last date of use coupled with the Department's delay of processing the application for transfer dictate a conclusion that right no. 34-0727B has not been forfeited.

6. Asay and Pehrson both own water rights which are later in time than 1883. Resumption of diversion of right no. 34-0727B by Zollinger will reduce the amount of water available to junior appropriators. Reduction of flow cannot be viewed as a legal injury to these parties, however, unless the right sought to be transferred is found to be non-existent. Resumption of use of a valid water right is not an injury to junior water right holders.

7. Asay and Pehrson cannot claim adverse possession because it is prohibited by Idaho Code § 42-607. Section 42-607 states that a person cannot obtain a water right by adverse possession when the water right is administered by a watermaster in a water district.

8. Use of Pass Creek water for irrigation purposes to the extent of valid existing water rights is in the local public interest.

9. FmHA owned all the places of use to which the water right could be appurtenant before the sale of land to Zollinger. Without a greater showing of ownership by Monson, the Department will allow FmHA to transfer this right, and Monson must pursue his grievance in another forum.

MEMORANDUM DECISION AND ORDER

Page - 8

10. Unless Zollinger cannot efficiently deliver the water to his property, or will incur unreasonable application losses, the transfer of the place of use is consistent with conservation of water of the State of Idaho.

11. This transfer could result in an enlargement, because irrigation of more acres is proposed than authorized by right no. 34-0727B. Therefore, this right should be conditioned to limit the total volume of water annually withdrawn from Pass Creek to an annual volume equal to the annual volume allowable for irrigation of 40 acres, or a total of 120 acre-feet.

ORDER

IT IS HEREBY ORDERED that transfer no. 3530, proposing to change the place of use for water right 34-0727B is APPROVED subject to the following conditions:

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 right shall be controlled by the watermaster of Water District #34, Big Lost River.
5. A totalizing measuring device of a type approved by this Department, at a separate point of diversion, must be installed and permanently maintained as a part of the diverting works prior to diversion of water under this transfer. As an alternative, total volume assumed to be diverted may be accumulated from the first day Pass Creek water is diverted at the specified flow rate of 0.8 cfs, and the volume will continuously accumulate at full flow rate until the entire 120 acre-feet has been diverted, at which time the Pass Creek water will no longer be delivered.
6. The allowable annual diversion volume is limited to 3.0 acre-feet per acre. Total annual volume shall not exceed the annual volume that would have been granted for irrigation of 40 acres. No more than 120 acre-feet can be diverted annually from Pass Creek pursuant to this right.

7. This water right only authorizes irrigation of 40 acres with Pass Creek water. If this water right or a portion of it is ever sold, the conveyance document must identify which of the 40 acres described as the place of use will no longer be irrigated. The place of use must be reduced by one acre for every 0.02 cfs conveyed.

8. If the 40 acre tracts within which this water right is appurtenant are ever subdivided, the deeds must expressly state whether any portion of this right is being conveyed. When 40 acres have been identified by the deeds as having water right 34-0727B appurtenant to them, subsequent conveyances of right 34-0727B will not be recognized.

9. Failure to comply with the conditions of approval of this transfer is cause for the Director to void the approval.

Dated this 14TH day of August, 1991.



R. KEITH HIGGINSON, Director
Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of August, 1991, I mailed a true and correct copy of the Final Memorandum Decision and Order, postage prepaid, to the following individuals:

Farmers Home Administration
P.O. Box 656
Arco, ID 83213
ATTN: Allan Banta

Bret Zollinger
Star Rt.
Mackay, ID 83251

Terry Monson
Route 1 Box 30
Darlington, ID 83231

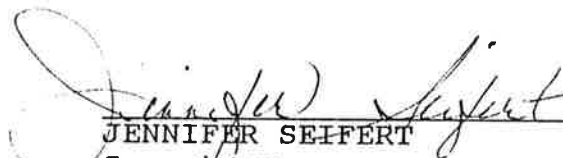
Terrell C. Hone
1582 West 600 South
Pingree, ID 83262

Reed Asay
Box 415
Mackay, ID 83251

Randy Pehrson
P.O. Box 239
Mackay, ID 83251

George Hone
Darlington, ID 83231

Betty Sowards
Rt. 1 Box 80
Moore, ID 83255


JENNIFER SEIFERT
Secretary