

4104

IDAHO ARROWHEAD WATER DISTRICT

17-

993-0492

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 4104
WATER RIGHT NO(S). 75-00019D/75-00021

This is to certify that: IDAHO ARROWHEAD WATER DISTRICT
1500 FULTON
SALMON ID 83467

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
Right No. 75-00019D : DOMESTIC Priority: 06/01/1868	01/01 to 12/31	0.30 CFS	12.00 AF
Right No. 75-00021 : DOMESTIC Priority: 05/01/1883	01/01 to 12/31	0.10 CFS	42.17 AF
TOTAL:		0.40 CFS	56.17 AF

SOURCE

CHIPPS CREEK

TRIBUTARY OF

POLLARD CREEK

LOCATION OF POINT(S) OF DIVERSION:

SWNW , Sec. 11, Township 21N, Range 21E
LEMHI County

PLACE OF USE: DOMESTIC

TWN RGE SEC

21N 21E	1	NWSW		
	2	NESE	SWSE	SESE

CONDITIONS OF APPROVAL AND REMARKS

Right Nos. 75-00019D and 75-00020 are subject to the conditions of the Final Order in the matter of Application for Transfer No. 4104.

Dated this 20th day of August, 1996.

J. M. Saxton
Chief, Water Alloc. Bureau



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

KARL J. DREHER
DIRECTOR

May 28, 1996

RE: In the matter of Application for Transfer No. 4104 of Water Right Nos. 75-00019D and 75-00021 in the name of Idaho Arrowhead Water District

Dear Interested Party:

The accompanying order is a "recommended order" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the 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 this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, 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 recommended order shall be served on all other parties to these 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 agency 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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,

L. Glen Saxton
L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region



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

August 21, 1996

PHILIP E. BATT
GOVERNOR

KARL J. DREIER
DIRECTOR

RE: In the Matter of Application for Transfer No. 4104 of Water Right Nos. 75-00019D and 75-00021 in the name of Idaho Arrowhead Water District

Dear Interested Party:

The accompanying order is a "final order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

~ Celebrating Our Centennial Year of Service to Idaho 1895-1995 ~

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department 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 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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 a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,



L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 4104 OF WATER)
RIGHT NOS. 75-00019D AND)
75-00021 IN THE NAME OF IDAHO)
ARROWHEAD WATER DISTRICT)
_____)

FINAL ORDER

Protests were filed with the Idaho Department of Water Resources (department) contesting the above described application for transfer. The department conducted a hearing, and the hearing officer issued a recommended order on May 22, 1996.

FINDINGS OF FACT

Water Right History

1. On April 29, 1994, Idaho Arrowhead Water District (Arrowhead) filed amended application for transfer no. 4104 (application) with the department proposing to change the point of diversion, nature of use and period of use of water right nos. 75-00019D and 75-00021.

2. Water right no. 75-00019 was decreed in 1903 to John Wheeler and C.C. Willis as follows:

Rate of flow:	3.6 cfs (180 miner's inches)
Source:	Jesse Creek
Use:	Irrigation
Priority:	1868
Place of use:	Parts of Sections 19, 29, 30, and 31, T22N, R22E, B.M.

3. Water right no. 75-00021 was decreed in 1903 to Sophronia Pollard as follows:

Rate of flow:	0.10 cfs
Source:	Jesse Creek
Use:	Irrigation
Priority:	May 1883

Point of diversion: Not described in decree
Place of use: Not described in decree

4. On October 8, 1907, the state engineer approved a change in the place of use for 0.30 cfs (15 miners inches) of water right no. 75-00019. The place of use was changed to the SE1/4NW1/4, Section 6, T21N, R22E, B.M. The water right transferred was referred to in the department files as the "Ostrander water" or the "Ostrander right."

5. On June 29, 1981, the Department approved application for transfer no. 2356, filed by Dale T. Smedley, for water right no. 75-00021 as follows:

Rate of flow: 0.10 cfs
Source: Chipps Creek
Use: Irrigation
Point of diversion: NE1/4NE1/4, Section 10, T21N, R21E, B.M.
Place of use: 40 acres within the NW1/4SW1/4, Section 1 and the NE1/4SE1/4, Section 2, TS21N, R21E, B.M.

6. On June 30, 1981, the department approved application for transfer no. 2355, filed by Dale T. Smedley, for part of water right no. 75-00019. The water right sought to be transferred was the Ostrander right discussed in paragraph no. 4.

Ident no.: 75-00019D
Rate of flow: 0.30 cfs
Volume: 12 AF
Source: Chipps Creek and Pollard Creek
Use: Irrigation
Point of diversion: Chipps Creek - SE1/4SW1/4, Section 2, T21N, R21E, B.M.
Pollard Creek - NE1/4NE1/4, Section 10, T21N, R21E, B.M.
Place of use: Four acres within the NW1/4SW1/4, Section 1 and the NE1/4SE1/4, Section 2, T21N, R21E, B.M.

The Snake River Basin Adjudication (SRBA) claim filed for this water right no. 75-0019D claims two (2) points of diversion.

7. Because of the identical place of use descriptions and simultaneous filing of application for transfer nos. 2355 and 2356, there is some question whether the place of use described by water right no. 75-00021 should have been limited to the four acres described by water right no. 75-00019D.

8. Application for transfer no. 4104 proposes to change water right no. 75-00019D as follows:

Ident no.: 75-00019D
Rate of flow: 0.30 cfs
Volume: 12 AF
Source: Chipps Creek
Use: Domestic
Priority: 1868
Point of div: SW1/4NW1/4, Section 11, T21N, R21E, B.M.
Place of use: NW1/4SW1/4, Section 1 and the NE1/4SE1/4, S1/2SE1/4, Section 2, T21N, R21E, B.M.

9. Application for transfer no. 4104 proposes to change water right no. 75-00021 as follows:

Ident no.: 75-00021
Rate of flow: 0.10 cfs
Volume: 42.17 AF
Source: Chipps Creek
Use: Domestic
Priority: May 1, 1883
Point of div: SW1/4NW1/4, Section 11, T21N, R21E, BM
Place of use: NW1/4SW1/4, Section 1 and the NE1/4SE1/4, S1/2SE1/4, Section 2, T21N, R21E, B.M.

10. On August 16, 1994, the department conducted a hearing in Salmon, Idaho on the application for transfer no. 4101, the matter now pending. The applicant was present and was represented by Kent Foster. Protestant City of Salmon was represented by Lanny Sloan. Intervenor Isley Investment, Inc., Billy B. Isley and Oliver Ranch Joint Venture (collectively referred to hereafter as "Isley") were represented by Jordan P. Smith. Protestant Dale C. Edwards was present and represented himself and Edgar Edwards. Protestant Robert L. Blackadar did not appear. Jordan Smith moved to continue the hearing due to the complex issues related to the ownership of the rights sought for transfer, and the hearing officer continued the hearing to allow time for the parties to research the questions of title.

11. On March 5, 1996, the Department conducted another hearing for the protests. The applicant was present and was represented by Kent Foster, attorney at law. Protestant City of Salmon was represented by John McKinney, attorney at law. Intervenor Isley Investment, Inc., Billy B. Isley and Oliver Ranch Joint Venture were represented by Billy Isley, a principle in both Isley Investments, Inc. and Oliver Ranch Joint Venture. Dale C. Edwards and Edgar Edwards represented themselves (both referred to hereafter as "Edwards"). Edgar Edwards agreed to be a spokesman for both himself and Dale C. Edwards.

12. At the beginning of the March 5, 1996 hearing, City of Salmon and Isley objected to the hearing on the basis that ownership of the water rights being considered for transfer had not been determined. The hearing officer noted their objection for the record but ruled that he would not continue the matter because the Department of Water Resources had already decided it would determine ownership when considering the application for transfer.

Place of Use and Water Right Chain of Title

13. In June of 1978, Dale T. and Helen B. Smedley (hereafter referred to as "Smedleys") acquired approximately 740 acres of land located on bench land west of Salmon, Idaho, and east of the channels of Pollard Creek and Jesse Creek, known locally as the Oliver Ranch. The land is specifically located within Section 1 and Section 2, T21N, R21E, B.M. The warranty deed conveying the property generally granted all water rights to the Smedleys.

14. In November of 1977, and before acquiring the Oliver Ranch, the Smedleys leased the Oliver Ranch to Van J. Woodward and Margareta J. Woodward for a period of 30 years. The lease merged into the Smedley's ownership of the Oliver Ranch in 1978. The lease did not describe any water rights that were subject to the lease.

15. In March of 1978, approximately three months before Smedleys purchased the Oliver Ranch, John Reddington conveyed "[f]ifteen inches of Jesse Creek . . . known as the Ostrander right . . ." to Smedleys by a deed of water rights. A copy of the deed is in the water right files. Isley exhibit no. C is a canceled check for \$15,000 from Fred R. or Mary Louise Jacobson (owners of the Oliver Ranch prior to Smedley) to John Reddington. Jacobsons paid Reddington on the same day Reddington deeded fifteen miners inches of water to Smedleys. Isley asserted that the check was payment for fifteen miners inches of right no. 75-00019.

16. In 1979, Smedleys filed application for transfer nos. 2355 and 2356, described in finding of fact nos. 5 and 6, respectively. The applications explained they were filed for the purpose of increasing the efficient use of water for irrigation purposes.

17. The applications for transfer did not propose a change in the nature of use and the season of use. There is some indication, however, that Smedleys wanted to change the nature of use and season of use for the water right. A letter issued by Glen Saxton of the department at the time of approval of the applications for transfer contained an unusual warning that approval of the transfers did not authorize a change in nature of use or change in the season of use.

18. In 1980, Smedleys conveyed 75 acres of the Oliver Ranch located in the SW1/4 of Section 1 and the S1/2 of Section 2, T21N, R21E, B.M. to Reed A. Summers and Diane S. Summers (Summers). The deed did not describe any water rights.

19. Smedleys began platting some of the property for development at approximately the same time as the approval of application for transfer nos. 2355 and 2356 in 1981. An intake pipe was buried under or near Chipps Creek which extracted water percolating from the creek. A

domestic pipeline system with four buried 100,000 gallon tanks was also constructed. Smedleys began selling domestic lots in the early 1980's.

20. Evidence at the hearing established that, as homes were built, water was diverted from Chipps Creek from about 1981 to the present time for domestic purposes including sufficient water for irrigation of one-half acre per residential lot.

21. In 1984, Smedleys conveyed four water rights to the Arrowhead Water District, an entity that had been formed to deliver domestic water to the subdivision homeowners. Three of the water rights conveyed were numbered in the department records as 75-00019D, 75-00021, and 75-00022.

22. By the early 1990's, nine homes were built in the Smedley Subdivision and were served with domestic water diverted from Chipps Creek. In addition, a waterline was stubbed to the boundary of one additional residential lot.

23. Isley is a successor in interest to Smedleys, and now owns the 75 acre parcel conveyed to Summers in 1980. Isley is also the successor of the lessee who leased the Oliver Ranch from Smedleys in 1977. Evidence shows that water has been diverted from Jesse Creek and its tributaries for irrigation of the Oliver Ranch when water is available, particularly for irrigation of lands owned by Isley. The phases of development within which the homes are located were released from any encumbrance created by the 1977 lease. Isley stipulated that Arrowhead should receive the water it needs for the existing nine homes and one lot, but was unwilling to concede that Arrowhead owns all of water right nos. 75-00019D and 75-00021.

24. The 0.30 cfs portion of water right no. 75-00019 acquired by Smedleys is not subject to the lease because: (1) it was acquired in 1978, after the lease was executed in 1977, (2) the right was not appurtenant to any of the lands subject to the lease at least until Smedleys transferred the water in 1981, (3) the lessees are not shown to have had any interest in transfer nos. 2355 and 2356 when it was approved by the Department in 1981, (4) water has been used by Arrowhead for domestic purposes, and (5) the homes and one lot were released from the lease.

25. The evidence shows that the intent of the Smedleys was to provide domestic water for the subdivision in the approximate quantities authorized by transfer nos. 2355 and 2356. Evidence also shows that the water approximately equal to the quantities authorized by water right nos. 75-00019D and 75-00021 has been delivered to the Arrowhead subdivision from 1981 through the present time with a better priority than the rights delivered to Isley's property.

26. Furthermore, the conveyance of 75 acres to Isley's predecessors (Summers) was complete prior to approval of transfer nos. 2355 and 2356. Isley's predecessors were not named as the owners of the water rights at the time the transfers were approved. Smedleys did not intend to convey to Summers any portion of water right nos. 75-00019D and 75-00021.

27. The evidence established that Arrowhead owns water right nos. 75-00019D and 75-00021.

Other Water Rights

28. Other water rights are diverted from Chipps Creek, Pollard Creek and Jesse Creek. A water right summary, prepared by the Department, was introduced by Blackadar as Blackadar exhibit no. F at the hearing. While the summary admittedly contains some descriptions that are inaccurate, it correctly shows that the City of Salmon owns water rights authorizing the diversion of 3.80 cfs with an 1867 priority from Jesse Creek and Pollard Creek. These are the earliest water rights authorized for diversion from Jesse Creek and Pollard Creek.

29. The City of Salmon withdrew its protest based on an understanding that its 1867 priority rights were the earliest rights diverted from Jesse Creek and Pollard Creek and Arrowhead understood and agreed that its water rights would be shut off if the City of Salmon's water rights were not being satisfied.

30. Blackadar owns portions of water right no. 75-00019. Arrowhead proposes to transfer a different portion of water right no. 75-00019. As a result, the portion of the right owned by Blackadar bears the same priority of June 1, 1868 as the portion sought to be transferred by Arrowhead.

31. Blackadar correctly pointed out limitations for water right no. 75-00019D, most notably the limitation of 12 acre feet per annum and the requirement that a measuring device be installed.

32. Edwards own land located south of the Oliver property which is irrigated by water diverted pursuant to an April 1, 1894 priority water right diverted from Chipps Creek.

33. Edwards were concerned about the delivery of all the water rights, not just the rights being delivered to the subdivision. Edwards raised concern regarding delivery of water pursuant to water right no. 75-00022 and where the right would be delivered. The parties verbally agreed to a scheme of delivery that is outside the scope of this hearing. Edwards did not withdraw their protest, but the hearing officer finds that their concerns are not relevant to the issues being considered.

34. Arrowhead has installed a measuring device which can be read by the watermaster. The measuring device accumulates total acre feet diverted. When water is not available pursuant to water right no. 75-00021, the watermaster must record the total volume that has accumulated until water right no. 75-00021 is again available. When 12 acre feet has been diverted through the Arrowhead system pursuant to water right no. 75-00019D, diversion must cease until diversion pursuant to water right no. 75-00021 is again possible.

35. Blackadar also pointed out the lack of diligence in delivering these rights in the past. The watermaster should be instructed by this order to carefully deliver the rights pursuant to their order of priority.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 provides in pertinent part as follows:

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 original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. With respect to the issues as set forth in Idaho Code § 42-222, the applicant bears the burden of proof regarding all of the criteria contained therein.

3. Ownership of a water right must be determined by the Department of Water Resources if a transfer is pending before the department.

4. Arrowhead Water District established at the hearing that it had used water in quantities very similar to the quantities described by water right nos. 75-00019D and 75-00021. It also established that it had used these quantities of water within the priorities approximately represented by the water rights. It established that it had received water in priority before deliveries to land owned by Isley or to land leased by Isley. It established a reasonable chain of title to the water rights.

5. This transfer will not injure other water rights.
6. This transfer will not result in an enlargement of use.
7. This transfer is in the local public interest.
8. This transfer is consistent with conservation of the water of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that application for transfer no. 4104 is APPROVED and water right nos. 75-00019D and 75-00021 are subject to the following conditions:

1. Use of water under this right is limited to domestic purposes for ten homes. Not more than one-half acre associated with each completed home may be irrigated.

2. The total annual volume diverted pursuant to water right no. 75-00019D shall not exceed 12 acre feet.

3. A totalizing measuring device and lockable controlling works of a type approved by the department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.

4. Use of water under this water right shall be regulated by the watermaster of State Water District No. 75A.

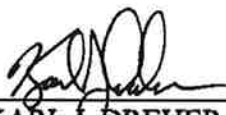
5. The watermaster shall close the controlling works to the Arrowhead Water District diversion whenever prior water rights are not being satisfied. The watermaster shall also close the controlling works to the Arrowhead Water District diversion when Arrowhead Water District has diverted 12 acre feet in one year pursuant to water right no. 75-00019D, unless water pursuant to water right no. 75-00021 is available.

6. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.

7. 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.

8. Approval of this transfer does not preclude the opportunity for review of the validity of the water rights in the ongoing Snake River Basin Adjudication.

Dated this 20th day of August, 1996.



KARL J. DREHER
Director

CERTIFICATE OF MAILING

I do hereby certify that on this 21st day of August, 1996, I mailed a true and correct copy, postage prepaid, of the foregoing **FINAL ORDER** to the following:

Idaho Arrowhead Water Dist
1500 Fulton
Salmon, ID 83467

Robert L. Blackadar
801 Fairmont Street
Salmon, ID 83467

Jordan P. Smith
Attorney at Law
807 Main Street
Salmon, ID 83467

Edgar S. Edwards
Dale C. Edwards
P.O. Box 846
Salmon, ID 83467

Patricia A. Hauff, Mayor
City of Salmon
200 Main Street
Salmon, ID 83467

Kent W. Foster
HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
330 Shoup Ave.
Idaho Falls, ID 83405


JULIE L. YARBROUGH
Senior Secretary

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 4104 OF WATER)
RIGHT NOS. 75-00019D AND)
75-00021 IN THE NAME OF IDAHO)
ARROWHEAD WATER DISTRICT)
_____)

RECOMMENDED ORDER

Protests were filed with the Idaho Department of Water Resources (department) contesting the above described application for transfer. The department conducted a hearing, and the hearing officer recommends the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

Water Right History

1. On April 29, 1994, Idaho Arrowhead Water District (Arrowhead) filed amended application for transfer no. 4104 (application) with the department proposing to change the point of diversion, nature of use and period of use of water right nos. 75-00019D and 75-00021.

2. Water right no. 75-00019 was decreed in 1903 to John Wheeler and C.C. Willis as follows:

Rate of flow:	3.6 cfs (180 miner's inches)
Source:	Jesse Creek
Use:	Irrigation
Priority:	1868
Place of use:	Parts of Sections 19, 29, 30 and 31, T22N, R22E, B.M.

3. Water right no. 75-00021 was decreed in 1903 to Sophronia Pollard as follows:

Rate of flow:	0.10 cfs
Source:	Jesse Creek
Use:	Irrigation
Priority:	May 1883

RECORDED
JAN 13 1995

Point of diversion: Not described in decree
Place of use: Not described in decree

4. On October 8, 1907, the state engineer approved a change in the place of use for 0.30 cfs (15 miners inches) of right no. 75-00019. The place of use was changed to the SE1/4NW1/4, Section 6, T21N, R22E, B.M. The water right transferred was referred to in the department files as the "Ostrander water" or the "Ostrander right."

5. On June 29, 1981, the Department approved application for transfer no. 2356, filed by Dale T. Smedley, for water right no. 75-00021 as follows:

Rate of flow 0.10 cfs
Source Chipps Creek
Use Irrigation
Point of diversion NE1/4NE1/4, Section 10, T21N, R21E, B.M.
Place of use: 40 acres within the NW1/4 SW1/4, Section 1 and the NE1/4SE1/4, Section 2, TS21N, R21E, B.M.

6. On June 30, 1981, the department approved application for transfer no. 2355, filed by Dale T. Smedley, for part of water right no. 75-00019. The water right sought to be transferred was the Ostrander right discussed in the preceding paragraph no. 4.

Ident no.: 75-00019D
Rate of flow: 0.30 cfs
Volume: 12 AF
Source: Chipps Creek and Pollard Creek
Use: Irrigation
Point of div: Chipps Creek - SE1/4SW1/4, Section 2, T21N, R21E, B.M.
Pollard Creek - NE1/4NE1/4, Section 10, T21N, R21E, B.M.
Place of use: Four acres within NW1/4SW1/4, Section 1 and the NE1/4SE1/4 Section 2, T21N, R21E, B.M.

The Snake River Basin Adjudication (SRBA) claim filed for this right claims two (2) points of diversion.

7. Because of the identical place of use descriptions and simultaneous filing of application for transfer nos. 2355 and 2356, there is some question whether the place of use described by water right no. 75-00021 should have been limited to the four acres described by water right no. 75-00019D.

8. Application for transfer no. 4104 proposes to change water right no. 75-00019D as follows:

Ident no.: 75-00019D
Rate of flow: 0.30 cfs
Volume: 12 AF
Source: Chipps Creek
Use: Domestic
Priority: 1868
Point of div: SW1/4NW1/4, Section 11, T21N, R21E, B.M.
Place of use: NW1/4SW1/4, Section 1 and the NE1/4SE1/4, S1/2SE1/4, Section 2, T21N, R21E, B.M.

9. Application for transfer no. 4104 proposes to change water right no. 75-00021 as follows:

Ident no.: 75-00021
Rate of flow: 0.10 cfs
Volume: 42.17 AF
Source: Chipps Creek
Use: Domestic
Priority: May 1, 1883
Point of div: SW1/4NW1/4, Section 11, T21N, R21E, BM
Place of use: NW1/4SW1/4, Section 1 and the NE1/4SE1/4, S1/2SE1/4, Section 2, T21N, R21E, B.M.

10. On August 16, 1994, the department conducted a hearing in Salmon, Idaho on the application for transfer no. 4101, the matter now pending. The applicant was present and was represented by Kent Foster. Protestant City of Salmon was represented by Lanny Sloan. Intervenor Isley Investment, Inc., Billy B. Isley and Oliver Ranch Joint Venture (collectively referred to hereafter as "Isley") were represented by Jordan P. Smith. Protestant Dale C. Edwards was present and represented himself and Edgar Edwards. Protestant Robert L. Blackadar did not appear. Jordan Smith moved to continue the hearing due to the complex issues related to the ownership of the rights sought for transfer, and the hearing officer continued the hearing to allow time for the parties to research the questions of title.

11. On March 5, 1996, the Department conducted another hearing for the protests. The applicant was present and was represented by Kent Foster, attorney at law. Protestant City of Salmon was represented by John McKinney, attorney at law. Intervenor Isley Investment, Inc., Billy B. Isley and Oliver Ranch Joint Venture were represented by Billy Isley, a principle in both Isley Investments, Inc. and Oliver Ranch Joint Venture. Dale C. Edwards and Edgar Edwards represented themselves (both referred to hereafter as "Edwards"). Edgar Edwards agreed to be a spokesman for both himself and Dale C. Edwards.

12. At the beginning of the March 5, 1996 hearing, City of Salmon and Isley objected to the hearing on the basis that ownership of the water rights being considered for transfer had not been determined. The hearing officer noted their objection for the record but ruled that he would not continue the matter because the Department of Water Resources had already decided it would determine ownership when considering the application for transfer.

Place of Use and Water Right Chain of Title

13. In June of 1978, Dale T. and Helen B. Smedley (hereafter referred to as "Smedleys") acquired approximately 740 acres of land located on bench land west of Salmon, Idaho, and east of the channels of Pollard Creek and Jesse Creek, known locally as the Oliver Ranch. The land is specifically located within Section 1 and Section 2, T21N, R21E, B.M. The warranty deed conveying the property generally granted all water rights to the Smedleys.

14. In November of 1977, and before acquiring the Oliver Ranch, the Smedleys leased the Oliver Ranch to Van J. Woodward and Margareta J. Woodward for a period of 30 years. The lease merged into the Smedley's ownership of the Oliver Ranch in 1978. The lease did not describe any water rights that were subject to the lease.

15. In March of 1978, approximately three months before Smedleys purchased the Oliver Ranch, John Reddington conveyed "[f]ifteen inches of Jesse Creek . . . known as the Ostrander right . . ." to Smedleys by a deed of water rights. A copy of the deed is in the water right files. Isley exhibit no. C is a canceled check for \$15,000 from Fred R. or Mary Louise Jacobson (owners of the Oliver Ranch prior to Smedley) to John Reddington, purporting to be payment for fifteen miners inches of right no. 75-00019. Jacobsons paid Reddington on the same day Reddington deeded fifteen miners inches of water to Smedleys.

16. In 1979, Smedleys filed application for transfer nos. 2355 and 2356 described in finding of fact nos. 5 and 6, respectively. The applications explained they were filed for the purpose of increasing the efficient use of water for irrigation purposes.

17. The applications for transfer did not propose a change in the nature of use and the season of use. There is some indication, however, that Smedleys wanted to change the nature of use and season of use for the water right. A letter issued by Glen Saxton of the department at the time of approval of the applications for transfer contained an unusual warning that approval of the transfers did not authorize a change in nature of use or change in the season of use.

18. In 1980, Smedleys conveyed 75 acres of the Oliver Ranch located in the SW1/4 of Section 1 and the S1/2 of Section 2, T21N, R21E, B.M. to Reed A. Summers and Diane S. Summers (Summers). The deed did not describe any water rights.

19. Smedleys began platting some of the property for development simultaneously with the approval of the application for transfer nos. 2355 and 2356 in 1981. An intake pipe was buried under or near Chipps Creek which extracted water percolating from the creek. A domestic

pipeline system with four buried 100,000 gallon tanks was also constructed. Smedleys began selling domestic lots in the early 1980's. As homes were built and service lines from Chipps Creek were connected to the homes.

20. Evidence at the hearing established that water was diverted from Chipps Creek from about 1981 to the present time for domestic purposes as homes were built, including sufficient water for irrigation of one-half acre per residential lot.

21. In 1984, Smedleys conveyed four water rights to the Arrowhead Water District, an entity that had been formed to deliver domestic water to the subdivision homeowners. Three of the water rights conveyed were numbered in the department records as 75-00019D, 75-00021 and 75-00022.

22. By the early 1990's, nine homes were built in the Smedley Subdivision and served with domestic water diverted from Chipps Creek. In addition, a waterline was stubbed to the boundary of one additional residential lot.

23. Isley is a successor in interest to the Smedleys, and now owns the 75 acre parcel conveyed to Summers in 1980. Isley is also the successor of the lessee who leased the Oliver Ranch from Smedleys in 1977. Evidence also shows that water has been diverted from Jesse Creek and its tributaries for irrigation of the Oliver Ranch when water is available, particularly for irrigation of lands owned by Isley. The phases of development within which the homes are located were released from any encumbrance created by the 1977 lease. Isley stipulated that Arrowhead should receive the water it needs for the existing nine homes and one lot, but was unwilling to concede that Arrowhead owns all of water right nos. 75-00019D and 75-00021.

24. The 0.30 cfs of water right no. 75-00019 acquired by Smedleys is not subject to the lease because: (1) it was acquired in 1978, after the lease was executed in 1977, (2) the right was not appurtenant to any of the lands subject to the lease at least until Smedleys transferred the water in 1981, (3) the lessees are not shown to have had any interest in transfer nos. 2355 and 2356 when it was approved by the Department in 1981, (4) water has been used by Arrowhead for domestic purposes, and (5) the homes and one lot were released from the lease.

25. The evidence shows that the intent of the Smedleys was to provide domestic water for the subdivision in the approximate quantities authorized by transfers no. 2355 and 2356. Evidence also shows that the water has been delivered in those approximate quantities to the subdivision from 1981 through the present time with a better priority than the rights delivered to Isley's property.

26. Furthermore, the conveyance of 75 acres to Isley's predecessors (Summers) was complete prior to approval of transfer nos. 2355 and 2356. Isley's predecessors were not named as the owners of the water rights at the time the transfers were approved. Smedleys did not intend to convey to Summers any portion of water right nos. 75-00019D and 75-00021.

27. The evidence established that Arrowhead owns water right nos. 75-00019D and 75-00021.

Other Water Rights

28. Other water rights are diverted from Chipps Creek, Pollard Creek and Jesse Creek. A water right summary, prepared by the Department, was introduced by Blackadar as Blackadar exhibit no. F at the hearing. While the summary admittedly contains some descriptions that are inaccurate, it correctly shows that the City of Salmon owns water rights authorizing the diversion of 3.80 cfs with an 1867 priority from Jesse Creek and Pollard Creek. These are the earliest water rights authorized for diversion from Jesse Creek and Pollard Creek.

29. The City of Salmon withdrew its protest based on an understanding that its 1867 priority rights were the earliest rights diverted from Jesse Creek and Pollard Creek and Arrowhead understood and agreed that its water rights would be shut off if the City of Salmon's water rights were not being satisfied.

30. Blackadar owns portions of water right no. 75-00019, the same right which is proposed to be transferred by Arrowhead. As a result, the portion of the right owned by Blackadar bears the same priority of June 1, 1868 as the portion sought to be transferred by Arrowhead.

31. Blackadar correctly pointed out limitations for water right no. 75-00019D, most notably the limitation of 12 acre feet per annum and the requirement that a measuring device be installed.

32. Edwards own land located south of the Oliver property which is irrigated by water diverted pursuant to an April 1, 1894 priority water right diverted from Chipps Creek.

33. Edwards were concerned about the delivery of all the water rights, not just the rights being delivered to the subdivision. Edwards raised concern regarding delivery of water pursuant to water right no. 75-00022, and where the right would be delivered. The parties verbally agreed to a scheme of delivery that is outside the scope of this hearing. Edwards did not withdraw their protest, but the hearing officer finds that their concerns are not relevant to the issues being considered.

34. Arrowhead has installed a measuring device which can be read by the watermaster. The measuring device accumulates total acre feet diverted. When water is not available pursuant to water right no. 75-00021, the watermaster must record the total volume that has accumulated until water right no. 75-00021 is again available. When 12 acre feet has been diverted through the Arrowhead system pursuant to water right no. 75-00019D, diversion must cease until diversion pursuant to water right no. 75-00021 is again possible.

35. Blackadar also pointed out the lack of diligence in delivering these rights in the past. The watermaster should be instructed by this order to carefully deliver the rights pursuant to their order of priority.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 provides in pertinent part as follows:

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 original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. With respect to the issues as set forth in Idaho Code § 42-222, the applicant bears the burden of proof regarding all of the criteria contained therein.

3. Ownership of a water right must be determined by the Department of Water Resources if a transfer is pending before the department.

4. Arrowhead Water District established at the hearing that it had used water in quantities very similar to the quantities described by water right nos. 75-00019D and 75-00021. It also established that it had used these quantities of water within the priorities approximately represented by the water rights. It established that it had received water in priority before deliveries to land owned by Isley or to land leased by Isley. It established a reasonable chain of title to the water rights.

5. This transfer will not injure other water rights.

6. This transfer will not result in an enlargement of use.

7. This transfer is in the local public interest.

8. This transfer is consistent with conservation of the water of the State of Idaho.

ORDER

IT IS HEREBY ORDERED that application for transfer no. 4104 is APPROVED and water right nos. 75-00019D and 75-00021 are subject to the following conditions:

1. Use of water under this right is limited to domestic purposes for ten homes. Not more than one-half acre associated with each completed home may be irrigated.

2. The total annual volume diverted pursuant to water right no. 75-00019D shall not exceed 12 acre feet.

3. A totalizing measuring device and lockable controlling works of a type approved by the department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.

4. Use of water under this water right shall be regulated by the watermaster of State Water District No. 75A.

5. The watermaster shall close the controlling works to the Arrowhead Water District diversion whenever prior water rights are not being satisfied. The watermaster shall also close the controlling works to the Arrowhead Water District diversion when Arrowhead Water District has diverted 12 acre feet in one year pursuant to water right no. 75-00019D, unless water pursuant to water right no. 75-00021 is available.

6. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.

7. 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.

8. Approval of this transfer does not preclude the opportunity for review of the validity of the water rights in the ongoing Snake River Basin Adjudication.

Dated this 22nd day of May, 1996.


GARY SPACKMAN
Hearing Officer