

T5244

PROTESTED - SEE PROTEST DRAWER



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

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

DIRK KEMPTHORNE
GOVERNOR

December 20, 1999

KARL J. DREHER
DIRECTOR

RE: In the Matter of Application for Transfer No. 5244 in the name of James and/or Paula Whittaker

Dear Interested Parties:

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.

(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

c: IDWR - Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5244 IN THE)
NAME OF JAMES AND/OR)
PAULA WHITTAKER)
_____)

FINAL ORDER

On May 17, 1999, the hearing officer for the Idaho Department of Water Resources (the "Department") issued a Recommended Order in connection with Application for Transfer No. 5244 (the "application") filed in the name of James and/or Paula Whittaker (the "applicant"). On June 7, 1999, the applicant filed "Applicants' Exceptions to Proposed Memorandum Decision and Order" with the Department. On June 29, 1999, Beva Lue Clark (the "protestant") filed a response to the exceptions.

The Director has reviewed the exceptions and response to exceptions and responds as follows:

Finding of Fact No. 9 – This finding is changed to recognize that Big Timber Creek ("Timber Creek") is the primary source of water diverted for irrigation to the homesteads and that water diverted from springs provides only a small portion of the water diverted for irrigation. This finding is also reworded to clarify that consistent with Finding of Fact No. 16, water diverted for irrigation is not the only source of water consumed by crops growing on the homesteads. The fourth sentence in Finding of Fact No. 9 of the Recommended Order (the last sentence of Finding of Fact No. 9 in this Final Order) is accurate, since none of the parties could specifically quantify the acreage supplied with water from the various sources. However, this sentence is reworded for clarification. Regarding the validity of the water rights sought for transfer, there is no intent in the Recommended Order to infer that the rights are "invalid" as alleged in the exceptions filed by the applicant.

The number of springs or the specific acreage supplied with water from the various sources is not at issue in this matter. The central issue that applies to this application for transfer is whether injury to any other water rights would occur if the applicant transfers its water rights for irrigation from the current point of diversion and place of use downstream approximately 4½ miles to another point of diversion and place of use.

When the holder of a senior water right seeks to cease irrigating the original land under the water right and transfer the water right to another place of use, the junior appropriators downstream of the original place of use are entitled to that portion of the water diverted under the senior water right that would ordinarily not be consumed by crops growing at the original place of use but would return back to the stream. If such return flow is not maintained, injury occurs to those junior appropriators who have relied on that return flow. A transfer of a water right that would result in significantly increased consumption of water diverted under the water right from that which historically occurred under the water right would result in a corresponding decrease in return flow to the stream. Since such a transfer would reduce the return flow relied upon by downstream junior appropriators, injury would occur as a result of such increase in consumptive use, unless stream flows are otherwise sufficient at all times to supply the junior water rights.

Finding of Fact No. 10 – This finding is changed to clarify that diversion from the Unnamed Stream would also need to cease, along with ceasing diversions from the two points of diversion from Timber Creek, if the proposed transfer would otherwise be approved.

Finding of Fact No. 11 – This finding is not changed. Although the applicant and the protestant disagree on how much land would be irrigated under the proposed transfer, the testimony described that 105 to 112 acres would be irrigated. The applicant testified that 17 acres of the land that would be irrigated under the proposed transfer is already irrigated and would continue to be irrigated from an existing pivot system. However, the applicant testified that all of the acreage at the proposed place of use is presently planned to be irrigated using water diverted under the proposed transfer.

Finding of Fact No. 16 – This finding is not substantially changed, since the applicant did not show that at least 88 acres would be dried up at the original place of use so that consumptive use of the water diverted under the water rights at the proposed new place of use would not be significantly greater, and return flows significantly less, than what historically occurred under the water rights at the current place of use. Ceasing the diversion of water from Timber Creek, from the Unnamed Stream, and from springs would dry up substantially less than 88 acres at the original place of use because growing vegetation would continue to consume water from subflows originating from Timber Creek and the Unnamed Stream as well as from spring flows.

Finding of Fact No. 17 – While there is contradictory testimony about the number of springs that arise on land comprising the current place of use for the water rights proposed to be transferred, this finding is believed to be accurate and is not changed.

Finding of Fact No. 18 – The finding in the Recommended Order did not state that if the application for transfer is approved, water “lost” as a result of diversions to the proposed new place of use would be “lost to the system.” In Finding of Fact No. 18, the hearing officer concludes that if the application for transfer is approved, the portion of water diverted that would not be consumed by growing crops at the new place of use would return to the system downstream of locations where return flows originating from diversions under the water rights currently return to Timber Creek. As a result, some of the return flows would be “lost” for use by downstream holders of junior water rights. In this Final Order, this finding is revised for clarification.

Finding of Fact No. 19 – Finding of Fact No. 19 is deleted from this Final Order.

Additional Finding of Fact – A new Finding of Fact regarding Water Right No. 74-00042 is not included in this Final Order. With qualifications, the protestant’s expert acknowledged that if Water Right No. 74-00042 from Timber Creek is always filled, approval of the application would not injure the rights of the protestant on Texas Creek. However, the protestant’s expert did not agree that there would be no enlargement in use or that there would be no injury to other water users on Timber Creek if the application is approved.

Conclusion of Law No. 5 – Implicit to this conclusion of law, as set forth in the Recommended Order, is that since the applicant did not establish that use of water at the new pivot would result in the same or smaller consumptive use than when used on the homesteads, the applicant did not establish that return flow relied upon by downstream junior appropriators would be the same or greater under the proposed transfer. However, this conclusion of law is revised in this final order to clarify that the applicant did not show that return flow relied upon by downstream junior appropriators would not be reduced under the transfer since the consumptive use resulting from use of the water rights at the new pivot would be greater than the consumptive use occurring from use of the water rights at the homesteads.

The applicant asserts that the holder of a water right for irrigation can change cropping patterns and the use of water for irrigation in ways that would increase consumptive use provided the acreage irrigated within the authorized place of use is not increased. Therefore, the applicant argues, the only requirement for transferring a water right for irrigation to a new location within the same general area is the amount of acreage irrigated, and so long as the acreage irrigated at the new location is the same or less than the acreage irrigated at the original location, there is no requirement to show that consumptive use at the new location will be the same or less. The applicant is correct in asserting that the holder of a water right for irrigation can make changes that would increase consumptive use provided the acreage irrigated within the authorized place of use is not increased. However, Idaho Code § 42-222(1) specifically requires that “no other water rights are injured” for the transfer of a water right to a new place of use to be approved. Since a reduction in the return flow relied upon by downstream junior appropriators constitutes injury, the transfer of a water right that would reduce the return flow relied upon by downstream junior appropriators can not be approved.

Conclusion of Law No. 7 – This conclusion of law is not changed. The rewording of the conclusion suggested by the applicant concedes that use of water under the transfer “may decrease the amount of return flow to Timber Creek [sic], in certain reaches . . .” The applicant further suggests that because the decrease in return flow would not prevent Water Right No. 74-00042 from being fully satisfied, the protestant would not be injured. However, the requirement set forth by Idaho Code § 42-222(1) that “no other water rights are injured” for the transfer of a water right to be approved is not limited to only water rights held by a protestant.

With qualifications, the protestant’s expert acknowledged that if Water Right No. 74-00042 from Timber Creek is always filled, the proposed transfer would not injure the rights of the protestant on Texas Creek. But he did not agree that there would not be an enlargement in use or that there would not be injury to other water rights on Timber Creek. Since the proposed transfer would reduce the return flow relied upon by other holders of downstream junior water rights, one or more of those water right holders would be injured whether or not they protested the proposed transfer.

Conclusion of Law No. 8 – This conclusion of law is not changed.

Exceptions to Analysis – The analysis section has been revised to more clearly describe that if all diversions to the current place of use on the homesteads from Timber Creek, from the Unnamed Stream, and from springs were

terminated, only 30 to 40 acres of the decreed 99.2 acre place of use would actually be dried up. The applicant did not show that return flow relied upon by holders of downstream junior water rights would be the same or greater under the transfer because the consumptive use under the water rights at the new pivot would be greater than the consumptive use at the current place of use, the homesteads. The amount of land that would be irrigated under the proposed transfer (88 acres as claimed in the applicant's exceptions to Finding of Fact No. 11) is substantially more than the estimated 30 to 40 acres which would be dried up at the homesteads. An increase in the consumptive use from 30 or 40 acres to approximately 88 acres would reduce return flow and would injure other water rights.

The Department is authorized to approve a proposed change in whole or in part under certain circumstances. In this instance, however, the applicant did not propose a partial project. Additionally, the applicant did not show how 30 to 40 acres could be irrigated under the new pivot, which was set up to irrigate 99.2 to 105 acres, without injuring other water rights. Therefore, the Department should not partially approve this application.

Exceptions to Order – Paragraph 2 of the order is not changed.

Based upon his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law, and Final Order:

FINDINGS OF FACT

1. On October 24, 1984, the Department approved Transfer No. 3056 in connection with Water Right No. 74-00056 as follows:

Source:	(a) Unnamed Stream, tributary to Big Timber Creek (b) Big Timber Creek, tributary to Lemhi River
Priority:	May 1, 1910
Rate of diversion:	2.0 cubic feet per second ("cfs")
Point of diversion:	a) SW1/4NE1/4, Section 6, T14N, R26E, B.M. ¹ b) NWSE, Section 7, T14N, R26E, B.M.
Use:	Irrigation

¹ The "1/4" designations will be omitted from subsequent legal descriptions in this order.

Season of use: March 15 to November 15

Place of use: 75 acres² within parts of Sections 5, 6 and 7, T14N, R26E, B.M.

2. Water Right No. 74-01103 was decreed to Floyd J. Whittaker on December 30, 1982 as follows:

Source: Big Timber Creek, tributary to Lemhi River

Priority: November 19, 1922

Rate of diversion: 0.48 cfs

Point of diversion: SWNW, Section 5, T14N, R26E, B.M.
Use: Irrigation

Season of use: April 1 to November 1³

Place of use: 24.2 acres within parts of Section 5, T14N, R26E, B.M. and Section 32, T15N, R26E, B.M.

3. On March 30, 1998, James and/or Paula Whittaker ("applicant") filed Application for Transfer No. 5244 ("application") with the Department seeking to change the point of diversion and place of use of Water Right Nos. 74-00056 and 74-01103. The proposed new point of diversion is located within the SWNW, Section 20, T15N, R26E, B.M., and the proposed new place of use is 99.2 acres within the NE, Section 21, T15N, R26E, B.M.

4. The Department published notice of the application which was subsequently protested by Beva Lue Clark ("protestant").

5. Issues raised by the protestant are as follows:

- a. The proposed changes would injure other water rights;
- b. The proposed changes would constitute an enlargement in use of the original right; and
- c. The proposed changes would not be in the local public interest.

² Transfer No. 3056 inadvertently shows 74 acres instead of 75 acres as decreed in December 30, 1982.

³ The season of use recommended by the Department in the Snake River Basin Adjudication for Basin 74 is March 15 to November 15.

6. On April 7, 1999, the Department conducted a hearing on the application. The applicant was present and was represented by Jerry Rigby. The protestant was present and was represented by Kent Foster.
7. Exhibits accepted at the hearing as a part of the record are as follows:
 - a. Applicant's Exhibit A – Map showing Big Timber Creek, Texas Creek Area
 - b. Applicant's Exhibit B – Map showing the Big Timber Creek, Texas Creek Area, and the location of existing irrigation pivots
 - c. Applicant's Exhibit C – Map showing the location of the present place of use for Water Right Nos. 74-00056 and 74-01103 along Big Timber Creek
 - d. Applicant's Exhibit D – Map showing the location of ditches from Big Timber Creek and irrigation pivots
 - e. Protestant's Exhibit 1 – Large topographical map made up of portions of four U. S. Geological Survey quadrangle maps
 - f. Protestant's Exhibit 2 – Report titled Impacts Assessment of the Proposed Stephenson Water Rights Transfer Application dated February 1, 1995
 - g. Protestant's Exhibit 3 – U. S. Geological Survey Map No. GQ-733 prepared by Edward T. Ruppel in 1968
 - h. Protestant's Exhibit 4 – Photocopy of a map prepared in 1972 by the Department of Water Resources for the Lemhi River Basin Adjudication showing the location of H.E.S. 236 and part of H.E.S. 657 on Big Timber Creek
 - i. Protestant's Exhibit 5 – Orthophotoquad Map, Leadore SW
 - j. Protestant's Exhibit 6 – Five colored photographs of present place of use for Water Right Nos. 74-00056 and 74-01103 along Big Timber Creek
 - k. Protestant's Exhibit 7 – Photograph of weir on diversion from Big Timber Creek to the present place of use for Water Right Nos. 74-00056 and 74-01103

- l. Protestant's Exhibit 8 – Photograph of weir in Whittaker high ditch (the ditch to the pivots)
- m. Protestant's Exhibit 9 – Photograph showing Whittaker high ditch (the ditch to the pivots)
- n. Protestant's Exhibit 10 – Computer printouts of current meter calculations for measurements taken by Dr. Charles Brockway of flows in Whittaker high ditch from diversions out of Big Timber Creek
- o. Protestant's Exhibit 11 – U. S. Department of Agriculture ("USDA") aerial photograph showing location of existing pivots
- p. Protestant's Exhibit 12 – Computer enhanced photograph based on aerial photograph from Agricultural Stabilization and Conservation Service ("ASCS"), now the USDA Farm Service Agency, showing location of existing pivots
- q. Protestant's Exhibit 13 – Orthophotoquad Map of Purcell Springs Area, Leadore SE
- r. Protestant's Exhibit 14 – Computer enhanced copy of ASCS aerial photo showing location of new pivot
- s. Protestant's Exhibit 15 – Two combined USDA aerial photographs showing Purcell Springs Area
- t. Protestant's Exhibit 16 – Two combined aerial photographs showing panoramic view of location for new pivot and area that will cease to be irrigated
- u. Protestant's Exhibit 17 – Photograph of Whittaker property along Big Timber Creek

8. The general location of the irrigation use proposed in the application is in the upper end of the Lemhi River drainage about 4 miles south of Leadore, Idaho. Big Timber Creek ("Timber Creek") and Texas Creek, which are located approximately 3 miles apart, flow in a northerly direction toward Leadore. Texas Creek lies generally east of Timber Creek and joins with Timber Creek near Leadore to form the Lemhi River.

9. The property from which the applicant seeks to transfer water rights consists of parts of two homestead entries (the "homesteads") near the most upstream diversions on Timber Creek. The irrigated land is typical of a high mountain meadow, being rough and rolling in nature with high spots and low areas. Water consumed by crops growing on the homesteads originates from a combination of sources including two diversions for irrigation from Timber

Creek, a diversion for irrigation from an Unnamed Stream, spring flows, subsurface water, and precipitation. Timber Creek is the primary source of water diverted for irrigation on the homesteads. Every year, water is diverted from Timber Creek beginning in the spring and continuing until the diversions are shut off in early July, based on the relatively junior priorities of the decreed water rights. Diversions from the springs on the property provide only a small portion of the water diverted for irrigation. However, a determination of the amounts of water from specific sources consumed by crops growing on the homesteads is difficult, if not impossible, due to the nature of the land and the method of irrigation, which is termed "wild flooding."

10. The applicant proposes to cease using two diversions from Timber Creek and one diversion from the Unnamed Stream to the homesteads and to divert water under the water rights proposed for transfer at a location approximately 4½ miles downstream at another existing diversion on Timber Creek. From the latter existing point of diversion, water would be conveyed easterly approximately 2 miles through an existing ditch and pipeline to a new pivot irrigation system located in the NE of Section 21, T15N, R26E, B.M ("new pivot"). The existing ditch and pipeline delivers water diverted under other rights of the applicant to lands in the vicinity of the new pivot.

11. The location of the new pivot is approximately midway between Timber Creek and Texas Creek, but is closer to Texas Creek. The new pivot is adjacent to an existing pivot of the applicant set up in 1993 that irrigates about 195 acres. The new pivot, as constructed, is about 1,250 feet long and consists of 10 towers and an end gun. The new pivot is capable of irrigating from approximately 105 acres to 112 acres and overlaps irrigation coverage under an existing pivot of the applicant in the amount of 13 to 17 acres. The applicant proposes to irrigate the overlapping land with both pivots.

12. Water Right No. 74-00042 was decreed to James and Maybelle Ellsworth as follows:

Source:	Timber Creek
Priority:	November 1, 1888
Rate of diversion:	4.8 cfs
Place of use:	Same as for Right Nos. 74-00066 and 74-00067

13. Water Right Nos. 74-00066 and 74-00067 ("Ellsworth water rights") with priorities of June 1, 1880, and June 1, 1881, respectively, authorize diversion of water from Texas Creek to Ellsworth lands. These rights are related to Water Right No. 74-00042 diverted from Timber Creek, since Water Right Nos. 74-00066 and 74-00067 are each conditioned with the following language:

The rate of diversion from Texas Creek when added to a portion of right 74-00042 from Timber Creek actually delivered into the channel of Texas Creek by and through the Yearian-Timber Creek ditch shall not exceed 2.74 cfs (3.89 cfs for 74-00067).

14. The protestant's water rights authorize diversion of water from Texas Creek but not Timber Creek. The priorities of the protestant's rights from Texas Creek are 1913 and 1920 and are junior to the Ellsworth water rights described above. The protestant's rights are reduced or shut off when there is insufficient water in Texas Creek to fill prior rights.

15. The protestant generally explained the basis of her protest as follows: Use of water as proposed in the application will enlarge the applicant's use of Timber Creek water. Enlarged use will make less Timber Creek water available for diversion to Texas Creek by Ellsworth under Water Right No. 74-00042. As a result, Ellsworth will need to divert more water from Texas Creek to fill Water Right Nos. 74-00066 and 74-00067 causing the protestant's junior rights on Texas Creek to be diminished or shut off earlier in the irrigation season than otherwise would occur.

16. There was substantial testimony, some of which was conflicting, in connection with the specific land included in the 99.2 acres to be dried up on the homesteads. The protestant provided substantial, credible testimony that if all diversions to the 99.2 acres shown as irrigated on the homesteads were shut off, only about 30 or 40 acres within the authorized place of use would actually be dried up. The remaining land would continue to be sub-irrigated with water from Timber Creek, the Unnamed Stream, and from spring flows.

17. There are approximately 6 or 8 springs that arise on the homesteads.

18. Water lost as a result of diversions to the homesteads returns to Timber Creek and is available for use by other downstream water rights on Timber Creek. If the application is approved, some of the water diverted to the new pivot would be lost in the conveyance ditch. Part of the lost water would return to lower portions of Timber Creek and part would be lost to deep percolation, probably returning to the surface near Leadore, Idaho.

19. The watermaster on Timber Creek and Texas Creek regulates or shuts off some diversions of water in most years due to water shortages.

ANALYSIS

The applicant is entitled to divert and use a water right, as decreed or as changed by an approved transfer, assuming the water right is used (and has been used) in compliance with the decree or transfer and has not been forfeited through non-use. The applicant is entitled to transfer the decreed water rights only to the extent of the historic beneficial use made of the water rights in the past. The applicant is not entitled to increase, through a transfer, the consumptive use of water made under the water rights, even if the applicant could have legally made a larger use of water under the water rights at the original place of use.

Testimony at the hearing shows that if the application is approved, an area of 99 to 105 acres would be irrigated under the new pivot and would consumptively use water diverted under the water rights. If all diversions cease to be made to the present authorized place of use at the

homesteads, only 30 to 40 acres of the decreed 99.2 acre place of use would actually be dried up and cease consumptively using water tributary to Timber Creek. The effect of approving the application would be to allow a larger consumptive use of water than has historically occurred under the water rights, thereby reducing return flows, and other water rights would be injured.

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. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use, and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Idaho Code § 42-222.

5. The applicant has not shown that transferring the water rights for use at the new pivot would not reduce return flows relied upon by downstream junior appropriators since the consumptive use of the water diverted to the new pivot under the water rights would be greater than the consumptive use of the water diverted at the homesteads under the water rights.

6. Allowing a larger volume of water to be consumptively used after the transfer than the historic consumptive use of the water diverted by the applicant under the decreed water rights would constitute an enlargement in use of the original right and would violate Idaho Code § 42-222.

7. The applicant's use of water as proposed in the application will increase consumptive use, will decrease return flows to Timber Creek, and will injure other rights on Timber Creek. The proposed changes in use could also adversely affect the rights of the protestant who diverts water from Texas Creek, depending on the diversion practices of Ellsworth, on management practices of the applicant, and on the nature of return flows of water to Timber and Texas Creeks.

8. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that the motion of the protestant made during the hearing to summarily deny the application for failure to make a prima facie showing is **DENIED**.

IT IS FURTHER hereby ORDERED that Application for Transfer No. 5244 in the name of James and/or Paula Whittaker is **DENIED** for failure of the applicant to show that the original right will not be enlarged and that there will not be injury to other water rights.

Signed this 20th day of December, 1999.



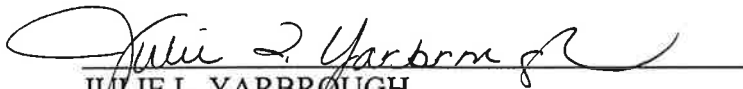
KARL J. DREHER
Director

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on the 20th day of December, 1999, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

JERRY RIGBY
RIGBY THATCHER ANDRUS
RIGBY KAM AND MOELLER
25 N 2ND E
REXBURG ID 83440

KENT FOSTER
HOLDEN KIDWELL HAHN
AND CRAPO
PO BOX 50130
330 SHOUP AVE 3RD FLOOR
IDAHO FALLS ID 83405


JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESTransfer No. 5244

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

Name of applicant JAMES AND/OR PAULA WHITTAKER Phone (208) 768-2491
Post Office address PO Box 240 LEADORE ID 83464

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 transfer WATER TO MORE PRODUCTIVE
ground

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>74-00056</u> | <u>5-1-1910</u> | <u>2.0 cfs</u> | <u>irrigation</u> | <u>3-15</u> to <u>11-15</u> |
| <u>74-01103</u> | <u>11-19-1922</u> | <u>0.48</u> | <u>" "</u> | <u>"</u> to <u>"</u> |
| _____ | _____ | _____ | _____ | _____ to _____ |
| _____ | _____ | _____ | _____ | _____ to _____ |
2. Total amount of water being transferred 2.48 cfs cubic feet per second and/or _____ acre-feet per annum.
3. Source of water Big Timber Creek tributary to Lemhi River
4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		NW	SE	8	15N	26E	Lemhi	
		SW	NW	20	15N	26E	Lemhi	

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	
~~16N~~	~~25E~~	~~25~~													~~25~~	~~25~~	~~25~~		~~75.0~~
15N	26E	21	25	25	24.2	25													99.2

Total acres 75.0
90.2

PART 1**6. General Information:**

a. Description of diversion system Pump + pivot Ditch from Big Timber Creek

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? NA 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:

existing place of use will be taken out of production

d. Remarks:

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____

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

Witness my hand this _____ day of _____, 19 _____

PART 2**A. DESCRIPTION OF RIGHT AS RECORDED:**

Water Right No. 74-01103

STAGE: DECREEED

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
IRRIGATION	03/15 to 11/15	0.48 CFS

<u>SOURCE</u>	<u>TRIBUTARY OF</u>
BIG TIMBER CREEK	LEMHI RIVER

Priority: 11/19/1922

LOCATION OF POINT(S) OF DIVERSION:SWNW , Sec. 5, Township 14N, Range 26E
LEMHI CountyPLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>		<u>ACRES</u>		<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
14N	26E	5	Lot 4 (NWNW)	10	SWNW	8		18
15N	26E	32	SWSW	6				6
Total number of acres irrigated:								24

CONDITIONS/REMARKS:

1. AC. IRR.=24.2.
2. P/U H.E.S. 657.

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. 74-0008 Decreed to FLOYD J. WHITAKER
in case of STATE OF IDAHO vs. FLOYD J. WHITAKER
dated 06-17-1971 in IDAHO county of Lemhi
- 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 _____

3. Source of water Big Timber Creek tributary to Lemhi River

4. Date or priority 5-1-1910

5. Water is used for the following purpose:

amount 2.0 cfs for irrigation purposes from 3-15 to 11-15
(cfs/ac-ft) 04-01 to 11-01
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft) _____ for _____ purposes from _____ to _____
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft) _____ for _____ purposes from _____ to _____

6. Total amount of water under right 2.0 cfs 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
		NW	SE	7	14N	26E	Lemhi	

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	
14N	26E	5									5.3								5.3
		6			1.8										38.9	6.7	18.4		68.7
		7	1.0																1.0

Total acres 75.0

9. Describe any other water rights used for the same purpose as described above None

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	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	

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	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE ¼				NW ¼				SW ¼				SE ¼				Totals
			NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	NE ¼	NW ¼	SW ¼	SE ¼	

Total acres _____

PART 2**A. DESCRIPTION OF RIGHT AS RECORDED:**

Water Right No. 74-00056

STAGE: DECREED

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
IRRIGATION	03/15 to 11/15	2.00 CFS

<u>SOURCE</u>	<u>TRIBUTARY OF</u>
BIG TIMBER CREEK	LEMHI RIVER
UNNAMED STREAM	BIG TIMBER CREEK

Priority: 05/01/1910

LOCATION OF POINT(S) OF DIVERSION:

SWNE , Sec. 6, Township 14N, Range 26E
 NWSE , Sec. 7, Township 14N, Range 26E
 LEMHI County

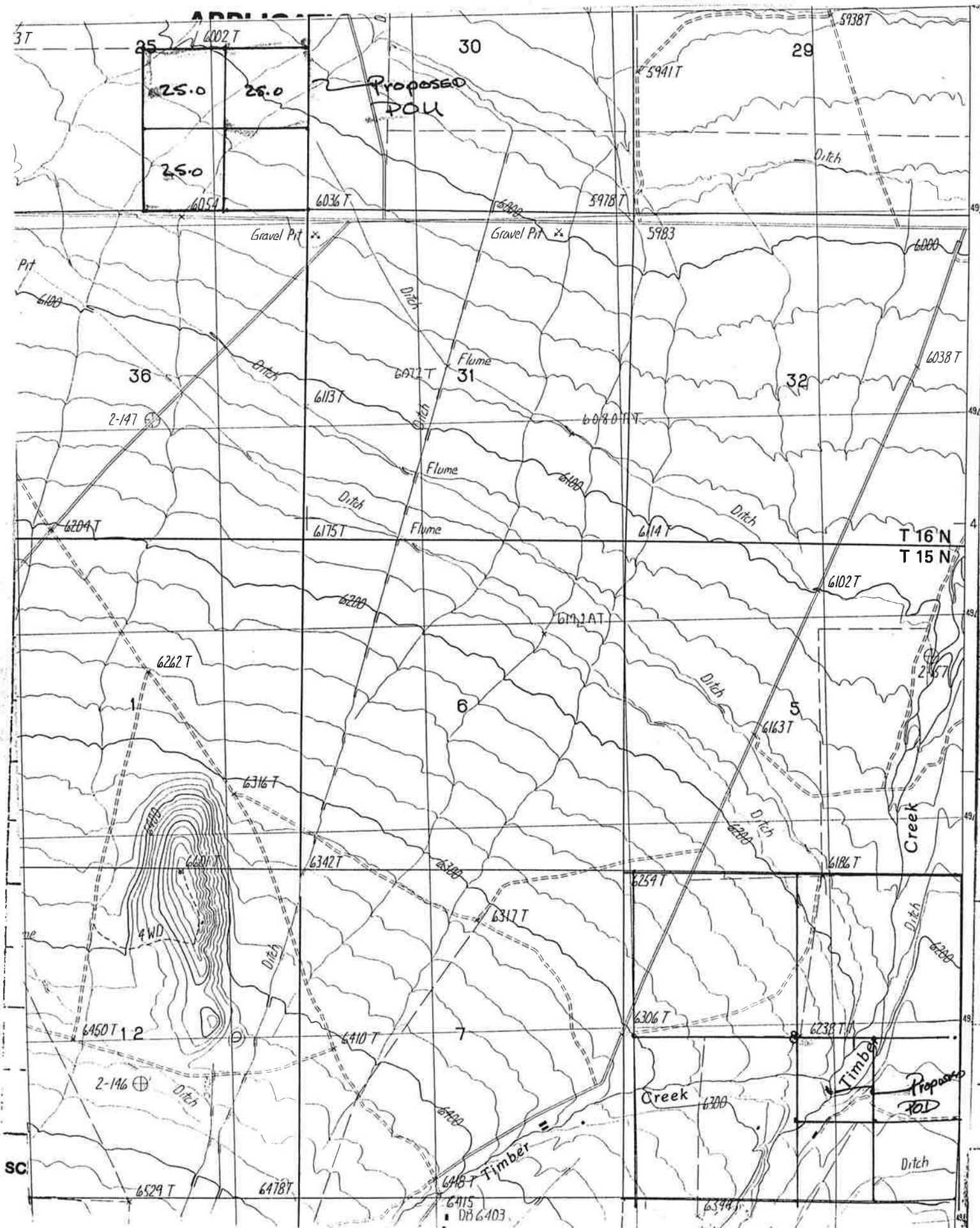
PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
14N	26E	5	NWSW 5			5
		6	SWNE 1	NESE 34	NWSE 9	
			SWSE 7	SESE 18		69
Total number of acres irrigated:						74

CONDITIONS/REMARKS:

1. A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.
2. Use of water under this right is subject to control by the watermaster of State Water District No. .
3. TRANS. 3056. THE COMBINED RATE OF DIV. FROM THE 2 SOURCES
4. IDENTIFIED UNDER THIS TRANS. SHALL NOT EXCEED 2.0 CFS.

STATE OF IDAHO DEPARTMENT OF WATER RESOURCES



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 _____

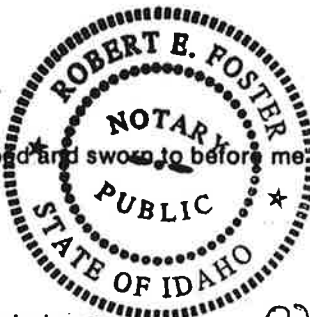
2. Quantity and quality of return flows and location of discharge:

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.

Subscribed and sworn to before me this 27th day of March, 19 98.

 _____
(Signature of Applicant)

_____ Robert E. Foster
(Notary Public)

My commission expires 02-16-2001

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments

Received by SC Date 3-30-98 Protest filed by _____

Prelim. check by _____ Fee #100.00 _____

Received by HWS #E024006 Date 3-30-98 _____

Published in Recorder Herald Copies of protest forwarded by _____

Pub. dates April 16 & 23, 98 Hearing held by _____ Date _____

Watermaster recommendation requested on _____ Recommended for ☐ approval ☐ denial

_____ rec'd. _____ by _____

Copy of transfer sent to lien holder _____

PARCEL NO.

RP 14N26E061201 A

CATEGORY DESCRIPTION

2 IRRGTD PASTURE
5 DRY GRAZING

TAX CODE 3 00

LOTS/ACRES

15.042 AC
139.239 AC
155.280

1997
MARKET VALUE

4,732
5,152
9,884*

OWNER WHITTAKER F JAMES
& WHITTAKER PAULA J
P O BOX 240
LEADORE

ID 83464

LEGAL HES 236
6 14 26
F JAMES 75%
PAULA J 25%

PROPERTY ADDRESS

PARCEL NO. RP 14N26E061201 A

TAX CODE 3 00

PARCEL NO.

RP 16N25E254800 A

CATEGORY DESCRIPTION

5 DRY GRAZING
19 WASTE
32 RURAL IMP ON AG

TAX CODE 3 00

LOTS/ACRES

198.485 AC
1.515 AC

1997
MARKET VALUE

28,979
858
29,837*

200.000

OWNER WHITTAKER FLOYD JAMES
& WHITTAKER PAULA J
P O BOX 240
LEADORE

ID 83464

LEGAL N2SE4 SW4SE4 SE4SW4
NE4SW4
25 16 25
FLOYD JAMES 50%
PAULA J 50%

PROPERTY ADDRESS

PARCEL NO. RP 16N25E254800 A

TAX CODE 3 00

ARLA BOOTS
LEMHI COUNTY ASSESSOR
LEMHI COUNTY COURTHOUSE
206 COURTHOUSE DR.
SALMON, ID 83457

IMPORTANT NOTICE-PLEASE READ

FORWARD & ADDRESS CORRECTION

CATEGORY DESCRIPTION	LOTS/ACRES	TAX CODE	MARKET VALUE
5 DRY GRAZING	91.200 AC	3 00	3,374
	91.200		3,374*

TAX CODE

3 00

LOTS/ACRES

91.200 AC

MARKET VALUE

3,374

91.200

3,374*

1997

TAXPAYER'S
VALUATION

ASSESSMENT NOTICE
TAXES ARE BASED ON THE VALUATION
LISTED ON THIS STATEMENT

IF THERE ARE ANY QUESTIONS
REGARDING THIS STATEMENT
NOTIFY THE ASSESSOR'S OFFICE BEFORE

JUNE 16, 1997

See the reverse side for further references
KEEP THIS COPY FOR YOUR RECORDS

PROPERTY ADDRESS

PARCEL NUMBER RP 14N26E053001 A

Mail To:

HES 657
5 14 26
F JAMES 75%
PAULA J 25%

WHITTAKER F JAMES
& WHITTAKER PAULA J
P O BOX 240
LEADORE

ID 83464

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI**

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5244 IN THE NAME OF)
JAMES AND/OR PAULA WHITTAKER)

Case No. CV-00-009

JAMES AND/OR PAULA WHITTAKER,)
Applicant-Appellant,)

RESPONDENT'S BRIEF

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES and BEVA LUE CLARK,)
Respondents,)

BRIEF OF RESPONDENT IDAHO DEPARTMENT OF WATER RESOURCES

Appeal from the Idaho Department of Water Resources
Karl J. Dreher, Director

Jerry R. Rigby
RIGBY THATCHER ANDRUS
RIGBY KAM & MOELLER, Chartered
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Rexburg, ID 83440
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Idaho Falls, ID 83405-0130
Attorney for Protestant-Respondent

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STATEMENT OF THE CASE

A. Nature of the Case

This case is an appeal from an administrative decision of the Idaho Department of Water Resources ("IDWR" or the "Department") denying an application to transfer two irrigation water rights. The Appellant, James and/or Paula Whittaker ("Whittaker" or "applicant") filed the transfer application with IDWR. The application proposes to change the place of use and point of diversion for two water rights from Big Timber Creek. Big Timber Creek is a tributary to the Lemhi River and flows in a northerly direction toward the town of Leadore, Idaho. The two water rights are appurtenant to 99.2 acres of land located in a high mountain meadow about 4 miles south of Leadore. A local water user, Beva Lue Clark ("Clark" or "protestant") protested the transfer application before the Department. The Department denied the transfer application upon determining that Whittaker failed to show that the original right would not be enlarged and that the transfer would not cause injury to other water rights.

The appeal challenges the Department's denial of the transfer. The appeal raises issues of fact and law. Whittaker argues that the Department wrongly determined that the proposed transfer would increase the historical consumptive use of the original water rights. Whittaker also asserts that the protestant did not prove that the transfer would cause injury. IDWR's position on appeal is that it properly determined the facts in this case and that it correctly applied the applicable law to those facts.

B. Course of the Proceedings

On March 30, 1998, Whittaker filed Application for Transfer No. 5244 with the Department, seeking to change the place of use and point of diversion of water right nos. 74-00056 and 74-01103. R. pp. 1-12. The Department published notice of the application pursuant to . R. p. 14. Beva Lue Clark, protested the transfer application on May 4, 1998. R. p. 15.

The Department conducted two pre-hearing conferences in the matter on June 23, 1998 and March 15, 1999. R. pp. 22, 24 and 26. The Department conducted a hearing on the protested transfer application on April 7, 1999 at the Department's offices in Idaho Falls. R. p. 26. Thereafter, on May 17, 1999 the hearing officer issued a Recommended Order proposing denial of the transfer application. R. pp. 38-45. The hearing officer recommended denial of the application due to the applicant's failure to show that the original rights would not be enlarged and that the transfer would not cause injury to other water rights. R. p. 44.

Whittaker filed "exceptions" to the hearing officer's recommended order accompanied by a supporting brief on June 7, 1999. R. pp. 56-67. The protestant filed a response to the exceptions on June 29, 1999. R. pp. 68-72. Pursuant to I.C. § 67-5246, the director of IDWR reviewed the recommended order, the exceptions and the response to the exceptions and issued a Final Order on December 20, 1999. R. pp. 75-86. The final order denies the transfer application for the reasons stated in the recommended order. R. p. 86. Whittaker filed a notice of appeal to the district court on January 12, 2000.

C. Statement of Facts

Whittaker owns a parcel of land in Lemhi County, Idaho, just south of the town of Leadore, Idaho. Appurtenant to this property are two decreed water rights with points of diversion on the upper reaches of Big Timber Creek. Water right no. 74-00056 for 2.0 cfs is appurtenant to 75 acres of land and has a priority date of May 1, 1910. This right has two authorized points of diversion, one on Big Timber Creek and one from an unnamed tributary to Big Timber Creek. Water right no. 74-01103 for 0.48 cfs is appurtenant to 24.2 acres and has a priority date of November 19, 1922. This second right has a single point of diversion on Big Timber Creek. The total acreage authorized for irrigation under the two water rights is 99.2 acres.

The irrigated land from which Whittaker wants to move the decreed water rights consists of parts of two homestead entries referred to as "the homesteads." The land is typical of high mountain meadow, being rough, rolling in nature with high spots and low areas. The water used to irrigate the land originates from a combination of sources, including the two diversions on Big Timber Creek, the unnamed tributary, flow from 6 to 8 springs, and diffused subsurface water. Tr. pp. 25, 110-111; R. pp. 75, 77, 82-83. A determination of the specific land irrigated from a specific water source would be difficult if not impossible due to the nature of the land and the method of irrigation, which is termed "wild flooding." R. p. 82-83, Finding of Fact No. 9. Under this method of irrigation, water is turned on in the spring and continues to be diverted until shut off in early July every year in order to satisfy more senior priorities on the system.

Under the transfer application filed on March 30, 1998, Whittaker seeks to change the point of diversion and place of use of the two decreed water rights. R. pp. 1-2. The application proposes to close off the two currently authorized diversions from Big Timber Creek and instead divert the water from the stream approximately 4.5 miles downstream (northerly) at another existing diversion on Big Timber Creek. From this point, the water would travel approximately two miles in an easterly direction through an existing ditch and pipeline owned by the applicant to a proposed new pivot located adjacent to other lands currently served by this existing conveyance system. The new pivot, with an attached end gun, covers approximately 1250 feet and is capable of irrigating from 105 to 112 acres including an overlap of 17 acres covered by another existing pivot operated by the applicant. R. p. 76. Whittaker testified that he planned to irrigate the overlapping lands under both systems. Tr. p. 45, L. 6-10; R. p. 76.

The basis of the protest filed by Clark involved water rights held by Clark on Texas Creek, which flows parallel to Big Timber Creek. R. p. 15. Both streams flow in a northerly direction, toward Leadore where they join to form the Lemhi River. Maybelle Ellsworth also holds water rights on Texas Creek, senior to those of Clark. The Ellsworth's water needs are partially filled with water diverted under another right on Big Timber Creek. However, use of the Ellsworth rights are such that, to the extent irrigation needs are not satisfied by water diverted from Big Timber Creek, the diversions from Texas Creek may be increased to fill those needs. R. p. 84 (Finding of Fact No. 15). If there were not enough water in Texas Creek to satisfy both the Ellsworth and the Clark rights, then the Clark rights would be reduced or shut off in order to satisfy the senior rights of Ellsworth. *Id.*

Protestant Clark maintains that use of water under the proposed transfer would enlarge the Whittaker's use of Big Timber Creek water. This enlarged use, according to Clark, would make less water available for diversion to Texas Creek under the Ellsworth rights. As a result, Ellsworth would need to divert more water from Texas Creek to fill her rights, thus causing Clark's junior rights to be diminished or shut off earlier in the irrigation season than otherwise would occur. *Id.* The evidence in the record demonstrates that the hydrologic basis for Clark's concern is valid, however, there is conflicting testimony over the likelihood of such a result ever occurring. Tr. p. 90, L. 18-25, p. 91, L. 1, p. 124, L. 6-13.

The record demonstrates that a significant portion of the lands currently irrigated under the water rights sought to be transferred would not be dried up. Consequently, the consumptive use of water would be increased under the proposed transfer. R. p. 84 (Finding of Fact No. 18). Expert testimony, provided by Dr. Charles E. Brockway, showed that if all the diversions from Big Timber Creek and the unnamed tributary were discontinued, only about 30 or 40 acres of land would actually be dried up due to water provided by the numerous springs flowing on the land. Tr., p. 111, L. 6-12.

Additionally, a portion of water diverted and not consumed by crops at the new place of use would return to the system downstream of locations where return flows resulting from diversions under the water rights currently return to Big Timber Creek. R. p. 84 (Finding of Fact No. 18). Also of significance is the fact that the proposed point of diversion is 4.5 miles downstream and the water must be conveyed two miles further before application, resulting in a considerably more transmission loss that would not reenter either the Big Timber Creek or

Texas Creek surface systems until at or below Leadore. Tr. p. 125, L. 2-7; R. p. 84.

Consequently, if the transfer is approved, substantial return flows would be “lost” for use by downstream holders of junior water rights. R. p. 77.

In addition to the potential injury to the protestant’s rights caused by the enlargement in use of Big Timber Creek water, there is substantial evidence to show that the proposed transfer would injure other appropriators. Such injury would occur because the portion of water diverted and not consumed by crops at the new place of use would return to the system downstream of locations where return flows originating from diversions under the water rights currently return to Big Timber Creek. R. p. 77.

ISSUES PRESENTED ON APPEAL

IDWR suggests that the five issues presented by the Appellant may be encompassed in the following two issues:

1. Did IDWR err in concluding that the proposed transfer would result in an enlargement in use of the original water rights?
2. Did IDWR err in concluding that the proposed transfer would cause injury to other water rights?

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the provisions and standards set forth in the Idaho Administrative Procedure Act (IDAPA), chapter 52, title 67, Idaho Code. I.C. § 42-1701(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277 (1995) *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529; *University of Utah Hosp. v. Board of Comm'rs. of Payette Co.*, 128 Idaho 517, 915 P.2d 1375 (Ct. App. 1996). The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279; *Castaneda v. Brighton Corp.*, 130 Idaho 923, 925-26, 950 P.2d 1262, 1264-65 (1998). The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; not supported by substantial evidence on the record as a whole; or arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279 (3); *Howard v. Canyon County Bd. of Comm'rs.*, 128 Idaho 479, 915 P.2d 709 (1996); *Willig v. State, Dep't of Health & Welfare*, 127 Idaho 259, 899 P.2d 969 (1995). The agency action shall be affirmed unless substantial rights of the appellant have been prejudiced. I.C. § 67-5279(4); *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996). If the agency action is not affirmed, it shall be set side, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs. of Ada Co.*, 128 Idaho 529, 915 P.2d 1387 (Ct. App. 1996).

ARGUMENT

Introduction

The right of an appropriator to change the place of use, purpose of use, or point of diversion of a water right is recognized under Idaho law. See I.C. § 42-108 and 42-222. However, this right is not absolute. See *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 42-43, 147 P. 1073, 1078-79 (1915) Although now codified in all prior appropriation states, the right to transfer has always been a qualified right subject to a number of limitations or conditions. See *2 Waters and Water Rights*, § 16.02 (Robert E. Beck ed., 1991). In Idaho, I.C. § 42-222, sets forth the criteria governing the right of an appropriator to transfer a water right and provides, in pertinent part, as follows:

The director 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 (1) no other water rights are injured thereby (2) the change does not constitute and enlargement in use of the original water right (3) the change is consistent with the conservation of water resources within the state of Idaho and (4) is in the local public interest

I.C. § 42-222 (1)

In addition to making the right to effectuate a transfer conditional, all western states require administrative or judicial approval of a transfer. And, in nearly all of the western states, including Idaho, the burden is on the proponent of the transfer to prove that the conditions imposed by the state have been met. George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 Land & Water L. Rev. 1, 20 (1988). The Idaho transfer statute is consistent with those of the other prior appropriation states. The following argument asserts that IDWR has

properly complied with both the letter and the spirit of Idaho's transfer statute in denying Transfer Application No. 5244.

I. IDWR PROPERLY DETERMINED THAT THE PROPOSED TRANSFER WOULD RESULT IN AN ENLARGEMENT OF THE ORIGINAL WATER RIGHTS.

Whittaker challenges IDWR's conclusion that the proposed transfer will result in an enlargement in use of the original water rights. Pursuant to I.C. § 42-222(1), the director shall approve a transfer provided, *inter alia*, "the change does not constitute an enlargement in use of the original water right." Contrary to Whittaker's assertions, the record contains substantial evidence that enlargement would occur in terms of an increase in the total acreage irrigated, and especially in terms of an increase in the amount of the historical consumptive use under the water rights. Taken together, the evidence of enlargement provides a clear and sufficient legal basis for IDWR to deny the transfer application.

A. The evidence shows that the transfer would result in some increase in irrigated acreage.

A change in use that results in an increase in irrigated acreage under the existing water right constitutes an enlargement in use and is prohibited by I.C. § 42-222. See Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 275 (1990-91) (asserting that I.C. § 42-222 clearly establishes that an expansion of irrigated acreage is an enlargement and that such enlargement is prohibited). In Idaho,

[t]he term enlargement has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. See I.C. § 42-1426(1)(a). An enlargement may include such events

as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

In re SRBA Case No. 39576, Fremont-Madison Irrigation District and Mitigation Group v.

Idaho Ground Water Appropriators Group, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996).

See also Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9, (9th Cir. 1917) (holding that an appropriator could not subsequently apply decreed water to additional lands not diligently prepared for beneficial use, despite a showing that the water was appurtenant to such lands under the original decree).

Though not in the context of a transfer proceeding, an enlargement in irrigated acreage was at issue before the Idaho Supreme Court in *Hall v. Blackman*, 22 Idaho 556, 126 P. 1047 (1912). The plaintiff sought to enjoin the defendant from spreading water decreed and historically applied to a particular parcel of land to approximately ten acres of new land recently acquired by the defendant. Finding that the application of water by the defendant to the new lands deprived the plaintiff of the benefit of seepage, percolation and waste water when used upon lands under the original decree, the Idaho Supreme Court upheld the decision of the trial court perpetually enjoining the defendant from irrigating the recently acquired tract. 22 Idaho at 558, 126 P. at 1048.

In the present case, Whittaker has applied to change the point of diversion and place of use of two water rights. The two rights are appurtenant to 99.2 acres referred to as the "homesteads." The proposed transfer would move the water right to a new location some four (4) miles downstream from the original location. The evidence shows that the irrigation pivot

proposed for use at the new location is capable of irrigating between 105 and 112 acres. Were the transfer approved, the water right decreed and used to irrigate the 99.2 acres at the homesteads would be diverted and applied to a minimum of 105 acres at the new location. By definition this would constitute an enlargement in irrigated acreage and is prohibited by I.C. § 42-222.

B. The evidence shows that the transfer would result in a change in return flows and an increase in consumptive use.

In addition to considering any increase in irrigated acreage, I.C. § 42-222(1) provides that “the director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in the nature of use of an original water right.” Contrary to the assertions of Whittaker, the director properly determined that consumptive use would be increased under the proposed transfer.

Although case law in Idaho does not specifically address the issue of consumptive use as it relates to a section 42-222 transfer proceeding, Idaho courts have addressed consumptive use as it relates to effects on return flows and on the related concept of beneficial use. The well-established rule throughout prior appropriation states is that a junior appropriator is entitled to the maintenance of stream conditions in existence at the time of the junior's appropriation. Wells A. Hutchins, 1 *Water Rights Laws in the Nineteen Western States* 1, 577 (1971). With respect to the law in Idaho, Hutchins states:

However, after recognizing this general rule, the Idaho Supreme Court felt concerned that in some situations this might not afford adequate protection to the junior. ‘So we now declare and determine the rule, generally applicable, to be that junior appropriators have a vested right to a continuance of the conditions

existing on the stream at *and subsequent to* the time they made their appropriations, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.’ [emphasis supplied].

Id. (citing *Crockett v. Jones*, 47 Idaho 497, 503-504, 277 P. 550, 552 (1929)). Thus, in an effort to protect junior appropriators, the focus in a transfer proceeding is on the preservation of flow regimes; and this is particularly true on heavily appropriated streams. *See Gould, supra*, at 22.

To this end, the notion of consumptive use, or “historical consumptive use,” is typically employed as the measure of the right that may be transferred. *See 2 Waters and Water Rights, supra*, § 16.02(b) at 277. An excerpt from a Colorado case is instructive on this issue:

[O]nce an appropriator exercises his or her privilege to change a water right . . . the appropriator runs a real risk of requantification of the water right based on the actual historical consumptive use. In such a change proceeding a junior water right . . . which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historical use of the right.

Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986). The Wyoming courts follow this same principle, limiting the amount of water that may be reallocated under a transfer to the historic beneficial consumptive use. *See e.g., Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557 (Wyo. 1978).

In general, consumptive use may be defined as “diversions less returns.” *2 Waters and Water Rights, supra*, § 16.02(b) at 277. In Idaho, consumptive use is defined as “that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state.” I.C. § 42-202B. Thus, “any act that

increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use.” 2 *Waters and Water Rights, supra*, § 16.02(b) at 277.

Likewise, any act that reduces the return flows historically relied upon, or that in any way alters the flow regimes others have become dependant upon in the exercise of vested water rights, may be considered an increase in consumptive use. The law in Idaho, as it has been both statutorily enacted and judicially applied, operates to preserve such flow regimes when an appropriator seeks to exercise a change in the place of use or point of diversion of an otherwise valid water right.

In *Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co.*, 49 F. 430 (D. Idaho 1892), the defendant had attempted to change the location at which waters appropriated for the operation of a mill returned to the stream. The court found that the defendant for in excess of three years had appropriated the water and allowed it to return to the stream in such a way that the plaintiff had come to rely upon it for his own appropriation. The court perpetually enjoined the defendant from changing the usage of his water right in any way that interfered with the plaintiff’s exercise of his junior water right. 49 F. at 435. Similarly, in *Hall v. Blackman*, discussed *supra*, the plaintiff complained when the defendant began to move water from lands to which the water was originally decreed to other newly acquired lands. 22 Idaho 556, 126 P.1047 (1912). The Idaho Supreme Court in *Hall* upheld the decision of the trial court preventing the change in place of use because it would have deprived the plaintiff from making use of the seepage, percolation and waste water associated with the defendant’s water use upon the lands to which the water right was originally decreed. 22 Idaho at 558, 126 P. at 1049.

In the present case, IDWR's decision to deny the Whittaker transfer is based on the finding that the change in place of use and point of diversion would alter the stream conditions to the detriment of junior appropriators. The reason for the conclusion that stream conditions would be altered is twofold and derives from the following facts.

First, the transfer proposed to move the point of diversion some four and one-half (4.5) miles downstream from the current point of diversion and then to convey the water another two miles via ditch and pipeline before using the water to operate an irrigation pivot at the new place of use. The record contains credible evidence demonstrating that under the proposed transfer water diverted and not consumed at the new location would return to the system downstream of the locations where return flows now occur on Big Timber Creek under the current usage. *See* Tr. p. 124, L. 14-24; R. pp.77 and 84, Finding of Fact No. 18. In addition, the evidence showed that the transfer would result in considerably more transmission loss that would not reenter either the Big Timber Creek or Texas Creek surface systems until at or below Leadore. *See* Tr. p. 125, L. 2-7; R. p. 84. Consequently, if the transfer were approved, substantial return flows would be "lost" for use by downstream holders of junior water rights. *See* R. p. 84, Finding of Fact No. 18.

The second effect on stream flow that would be caused by the proposed transfer stems from the increase in consumptive use that would result from use of water at the new location. The evidence presented shows that the 99.2 acres currently irrigated at the homesteads is partially sub-irrigated by the flow from 6 to 8 springs. Expert testimony provided by Dr. Charles E. Brockway showed that if the transfer were approved and all the diversions from Big

Timber Creek and the unnamed tributary were shut off, only about 30 or 40 acres of land would actually be dried up, due to the continued watering provided by the flowing springs. Tr. p. 111, L. 6-12 ("if you ceased all diversions on here, you probably would not dry up more than 30 or 40 acres"). In other words, 50 to 60 acres of land at the authorized place of use currently receives most of its consumptive water requirements irrespective of the diversions from Big Timber Creek. This fact indicates that the consumptive use of the water rights diverted and applied to the land at the current place of use is significantly less than would be expected were the water diverted and applied at the new location where no such springs exist. This increase in consumptive use is a proper basis on which to deny the transfer.

In sum, the law in Idaho prohibits a transfer where such transfer would result in an enlargement of the original water right. Idaho Code § 42-222(1) authorizes the director to consider consumptive use as a factor in determining whether a proposed change constitutes an enlargement. The record contains sufficient credible evidence of two sources of enlargement that would be occasioned by the proposed transfer. First, the evidence shows that the transfer would result in an increase in the number of acres irrigated. Second, the evidence shows that under the transfer there would be an alteration in flow regimes caused by: (1) a loss of return flows to sections of the stream that have historically benefited from the use of water on the lands to which the water is currently appurtenant; and, (2) an increase in the consumptive use under the water rights due to differences in the natural conditions of the lands existing at the present place of use and the proposed place of use under the transfer application. Based on

these findings of fact demonstrating an enlargement in the use of the water rights, the Department properly denied the Whittaker transfer application.

C. IDWR's determination of enlargement is consistent with the case law and with the principles of the prior appropriation doctrine.

Whittaker asserts that there would be no enlargement under the transfer, or in the alternative, that IDWR has undermined the intent of the legislature by taking into consideration factors irrelevant to the transfer proceeding. Whittaker first contends that no other appropriators, including protestant Clark, has a right to rely on the return flows generated by use of the water on the Whittaker's land. Second, Whittaker contends that IDWR has misapplied the definition of consumptive use in the transfer proceeding.

Whittaker points to two Idaho cases to support the contention that downstream junior appropriators are not entitled to the return flows generated by other appropriators in the use of their rights: *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1002 (1945), and *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). However, both of these cases contain unique circumstances and holdings that make them readily distinguishable from the present case and other Idaho cases holding that a junior appropriator is entitled to the maintenance of stream conditions existing on the stream at and subsequent to the time they made their appropriations.

There are at least three aspects of *Colthorp* and *Boyer* that are distinguishable from other cases more similar to the Whittaker transfer request. First, the rule applied in both cases was that no appropriator may compel any other appropriator to continue the waste of water whereby the former may benefit. See *Colthorp*, 66 Idaho at 182; *Application of Boyer*, 73 Idaho at 162.

This rule, followed in both cases, was not intended to displace or contradict the general rule requiring the maintenance of stream conditions to the benefit of junior appropriators. Instead, it was invoked in the situation where the amount of return flow was so excessive as to impute wastefulness and not beneficial use of the original water right. See Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho Law Rev. 1, 70 (1968). Second, in *Colthorp*, the Court's holding was based on the failure of the plaintiff to allege any injury to a water right as a result of the contested transfer. In fact the Court states that it would have reached an opposite holding "if a change in the point of diversion and place of use of the [defendant's] water actually injured [plaintiff's] use or right to use water decreed to the Ake ranch" 66 Idaho at 181. In *Application of Boyer*, the Court was not only dissatisfied with the claim of injury by plaintiff, but found that the plaintiff had merely relied on the excessive returns, either when the defendant had not used them at all, or when the returns were waste water from use in a particular parcel. 73 Idaho at 161-162. Finally, in both cases the failure of the defendants to fully put their water rights to beneficial use prompted the Court in each instance to undertake an abandonment and forfeiture analysis in order to address the asserted claims. Finding that neither defendants' actions met the requirements of abandonment or forfeiture, the Court felt compelled to allow each defendant to change the place of use in order to fully put the excess water to beneficial use.

Whittaker next contends that IDWR has undermined the intent of the legislature to allow the transfer of water rights by considering factors unnecessary to the determination of consumptive use and in the conclusion that consumptive use would be increased. IDWR's decision, however, is consistent with the relevant case law and the basic tenets of the prior

appropriation doctrine. The rule against enlargement in use of a water right is firmly rooted in the prior appropriation doctrine and can be treated as a corollary to two of its foundational principles: the doctrine of beneficial use and the no injury rule. The no injury rule is discussed, *infra*, under Argument II.

The doctrine of beneficial use, as traditionally stated, provides that beneficial use is “the basis, the measure and the limit of the right to the use of water” under an appropriative right. Hutchins, 1 *Water Rights Laws in the Nineteen Western States*, *supra*, at 9. To this it is usually added that the beneficial use to which the water is applied must be reasonable and economical. *See e.g., Hufford v. Dye*, 121 Pac. 400, 162 Cal. 147, 159 (Cal. 1912). The reasonableness of the use is a question of fact and must take into consideration the purpose for which the water is appropriated and the lands for which it is appurtenant. *See Washington State Sugar Co.*, 27 Idaho at 43, 147 P. at 1079.

In Idaho, the doctrine of beneficial use is constitutionally recognized and permeates the Idaho water code. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). The Idaho Supreme Court articulated the principles discussed above in 1915:

It is held that the test of an appropriator’s right to water for irrigation is the amount of water actually used for a beneficial purpose. [citation omitted]. It is settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of the irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. [citation omitted]. A prior appropriator is only entitled to the water to the extent that he has use for it when it is economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty of the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co., 27 Idaho 43-44, 147 P. at 1079. Thus, the notion that the limit of an appropriator's right is the amount of water actually put to beneficial use, has been, and continues to be, the law in Idaho.

In *Washington State Sugar Co.*, the appropriator proposed both a change in the nature of use and the point of diversion of a water right used in the operation of a mill. The proposed change was to an irrigation use and would have moved the point of diversion upstream above the headgates of junior appropriators. The change was denied on the grounds that it would have expanded the beneficial use of the water right and defeated the rights of junior appropriators. *Id.*

Closer on point to the facts in the present case is the early federal court case of *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th Cir. 1917). There, the proposed change was to irrigate additional lands that, although included in the original decree, had not been previously developed for irrigation. Several junior appropriators complained. Based upon the evidence, the court found: "By reason of the water table being near the surface, and the natural percolation that takes place in the soil, and considering also the overflowing, this method of irrigation results in returning very large quantities of water to the natural streams." *Id.* at 13. Finding that the change would expand the beneficial use of the water right, the court prevented the change in order to protect the rights of junior appropriators to the return flows, and limited the senior to the number of acres irrigated prior to the junior appropriations.

The *Washington State Sugar* and *Vineyard Land* cases illustrate the rule that junior appropriators are entitled to the maintenance of the stream conditions existing at the time of their appropriation. But the cases also illustrate adherence by courts to the principle that the measure of an appropriator's right is that which is actually put to beneficial use. In both cases the courts found that the quantity of water sought to be transferred largely exceeded the quantity of water put to beneficial use and therefore exceeded the quantity of water actually appropriated. 27 Idaho at 43-44, 147 P. at 1079; 245 F. at 12-13, 21. To make this determination the courts looked to the duty of water, the conditions of the land to which the water was applied, and the method of application. *Id.* And in both cases, rather than alter the decrees to reflect the water beneficially used, the court merely restricted the place of use and points of diversion so as to prevent injury.

In the current case, IDWR's decision to deny the transfer was based, in part, on its determination that the proposed transfer would increase the historic consumptive use of the water rights. Similar to the cases discussed above, IDWR made the determination by looking at the purpose for which the appropriation was made on the lands to which it is presently appurtenant. Like the facts in *Vineyard Land and Stock Co.*, the evidence revealed that the method of water application, the location at which it was used, and the purpose of use resulted in a significant portion of the water diverted being returned to the stream. The applicant himself testified to the condition of the land and even stated that it was hard to irrigate efficiently. *See* Tr. p. 19, L. 19-20. Whittaker described a portion of the ground as follows:

This ground is characterized by big rocky gravelly knolls, and it's hard to utilize your water efficiently, and there's also a spring over here at this point right here, maybe runs five inches or something like that that flows in and comes on around the ditch, and then there's another spring that comes down through here that this flows into, and we irrigate out of there sometimes, irrigate this area in here.

Tr. p. 19, L. 18-25.

It was further determined that to allow the transfer would have deprived junior appropriators of the right to the use of the excess water. Although IDWR's decision to deny the transfer was framed in terms of an expansion in consumptive use, this is another way of saying that the proposed transfer would have increased the beneficial use under the water rights. For the foregoing reasons, Whittaker's contention that IDWR has misapplied the law or undermined the intent of the legislature is misplaced.

II. IDWR PROPERLY DETERMINED THAT THE PROPOSED TRANSFER WOULD CAUSE INJURY TO DOWNSTREAM JUNIOR APPROPRIATORS.

Whittaker next challenges IDWR's conclusion that the proposed transfer would result in injury to other water rights. Idaho Code § 42-222(1) states: "the director shall examine all the evidence and available information and shall approve the change in whole or in part . . . provided no other rights are injured thereby." However, as noted previously, the burden is on the proponent of the transfer to prove that no other rights would be injured. *See also Federal Land Bank of Spokane v. Union Central Life Insurance Co.*, 51 Idaho 490, 493-494, 6 P.2d 486 (1961). IDWR has fairly examined all the evidence and available information in this case, and

has determined that the applicant has not met its burden of proving that the change will not cause injury. Therefore, the application for transfer was properly denied.

A. The proposed transfer would cause injury to protestant Clark and other downstream junior water right holders.

IDWR's decision to deny the transfer was based in part on the potential injury to the water rights of protestant Clark that would be caused by the enlarged use of Whittaker's Big Timber Creek water rights. As Whittaker correctly points out, the type of injury protected against under the transfer statute is injury that is "actual and real." *See Colthorp, supra*. In addition, the injury contemplated must be to a water right. *See Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 8, 154 P.2d 507, 509 (1944). Whittaker failed to establish that such injury would not occur.

Whittaker's characterization of the injury to the Clark's water rights as "indirect" is misleading given the nature of the priority system and the general interrelationship among water rights. On any system where there exists multiple appropriators having different priority dates, with different points of diversion, an enlargement in use by one could potentially affect every other appropriator on the system. This is because the impacts of an enlargement in use are transmitted through the system until they manifest as decreased flows at a particular time and place to deprive a junior appropriator of the use of water to which the junior is otherwise entitled. In this sense, every injury to a junior water right in a priority system could be characterized as indirect. Clearly, the statute contemplates such injury; and just as clearly, IDWR is obligated to ensure that such injury does not occur.

As set out in the agency record, protestant Clark's claim of injury is based on the effect of the proposed enlargement on the rights of another water user and the impact on the upper Lemhi system in general. A description of the potential injury to Clark's water right is explained in IDWR's Final Order:

The protestant generally explained the basis of her protest as follows: Use of water as proposed in the application will enlarge the applicant's use of Big Timber Creek water. Enlarged use will make less Big Timber Creek water available for diversion to Texas Creek by Ellsworth under Water Right No. 74-0042. As a result, Ellsworth will need to divert more water from Texas Creek to fill Water Right Nos. 74-00066 and 74-00067 causing the protestant's junior rights on Texas Creek to be diminished or shut off earlier in the irrigation season than otherwise would occur.

R. p. 84, Finding of Fact No. 15. It is apparent from the quoted finding that if Clark's water rights were "diminished or shut off earlier in the irrigation season than otherwise would occur," this would constitute a "real and actual injury" to her water rights.

It is acknowledged that Clark's expert witness admitted, with qualifications, that if water right no. 74-00042 (Ellsworth right) were always filled with water from Big Timber Creek, then the proposed transfer would not injure the rights of Clark on Texas Creek. Tr. p. 131, L. 2-15. However, this admission does not make the potential injury to Clark's water rights any less real. It is also not a basis on which to conclude that approval of the transfer will not injure the protestant's rights.

- B. The concern for potential injury cannot be limited to the water rights of the protestant.

Assuming arguendo that the evidence of potential injury to Clark's water rights is tenuous, that alone would not justify overturning IDWR's decision denying the transfer because of the potential impacts of the proposed transfer upon other water users within the system.

Idaho Code § 42-222 provides that the director shall approve the transfer provided "no other rights are injured thereby." Regardless of the procedures available for other water users to protest a transfer application, the statute cannot be fairly read to imply "provided no other rights 'of protesters' are injured thereby," as Whittaker has suggested. To do so would be to violate a basic rule of statutory construction that in the absence of ambiguity, the clear language of the statute is to be given its plain and ordinary meaning. *See State v. Moore*, 111 Idaho 854, 856, 727 P.2d 1282, 1283 (1986). More importantly, however, the Idaho Supreme Court has already ruled that "[t]he director is statutorily required to examine all evidence of whether the proposed transfer will injure **other** water rights or constitute an enlargement of the original right" *Jenkins v. State, Dept. of Water Resources*, 130 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (emphasis added).

Secondly, the director cannot issue a permit or license that in any manner interferes with the vested rights of other prior appropriators. *See Lockwood v. Freeman*, 15 Idaho 395, 398, 98 Pac. 295 (1908). Consequently, before IDWR may authorize a change in use of a water right under an application for transfer, the director is obligated to scrutinize the application to ensure that what it proposes does not injure other appropriative rights. In the present case, the evidence shows that the rights of junior appropriators would be injured by a decrease of return flows in

reaches of Big Timber Creek, and by an increase in consumptive use at the proposed place of use. Based on this evidence, IDWR properly denied the transfer request.

Whittaker stresses the fact that IDWR has not identified the junior appropriators that would be injured by the transfer. Whittaker then suggests that because these “phantom protestors” have not objected they should be treated as though they do not exist. The applicant further argues that if these appropriators are deemed not to exist there can be no injury and the transfer should be approved. This argument is flawed for several reasons.

Neither the statute nor the case law requires IDWR to separately identify the rights alleged to be injured. On the contrary, there is case law in Idaho and in other states that suggests the opposite. In *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (1944), the Idaho Supreme Court stated:

While it would have been of material assistance had the trial court found the particular facts causing material injury to each of the respondents, and specified definitely the cause, nature and extent of such injury, however, the cause should not be reversed for that reason.

66 Idaho at 10, 154 P.2d at 510. Similarly, in *Farmers' Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954), the Colorado Supreme Court reversed a decision of the trial court that had approved a transfer, despite a showing of increased consumptive use, because the injury could not be shown to effect any junior appropriator specifically. In reaching the holding that the injury to a stream can be a “general injury,” the court reasoned, in effect, that on a fully appropriated stream, the enlargement of a right is bound to affect some appropriator. *Id.* at 633.

Another reason that the applicant's argument is flawed is because the statute does not require the director to find injury in order to deny an application for transfer. The language of the statute is clear that the criteria listed under I.C. § 42-222(1) are separate criteria and that if any one of the four criteria are not met, then the director is obligated to deny the transfer. The Idaho Supreme Court so ruled in, *Jenkins, supra*, where the Court stated:

[t]he statute provides that the director shall approve the transfer provided two conditions are met, i.e., that no other water rights are injured, **and** that the original use is not enlarged. Hence if **either** of the two conditions are not met, there is no authorization to approve the proposed transfer.

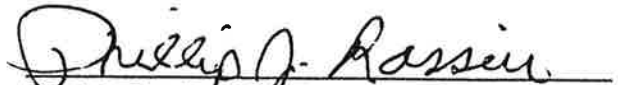
Jenkins, 130 Idaho at 388, 647 P.2d at 1260 (emphasis added). Therefore, IDWR may deny a transfer application based upon a finding of enlargement alone, independent of any finding of injury to a specific water right.

CONCLUSION

For all of the foregoing reasons, IDWR respectfully requests that this Court affirm the decision of IDWR denying Transfer Application No. 5244.

DATED this 8th day of August, 2000.

ALAN G. LANCE
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CERTIFICATE OF SERVICE

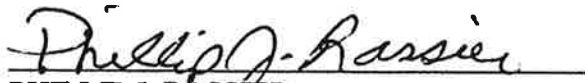
I hereby certify that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described documents on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed on this 8th day of August, 2000.

Documents Served: BRIEF OF RESPONDENT IDAHO DEPARTMENT OF WATER RESOURCES

Persons served: Jerry R. Rigby
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PHILLIP J. RASSIER
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