

T5676 NEIBAUR FARM ENTERPRISES

Eastern

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 5676
WATER RIGHT NO(S). 13-02203B/29-02352

RECEIVED

JUL 03 2000

Department of Water Resources
Eastern Region

This is to certify that: **NEIBAUR FARM ENTERPRISES**
C/O CHAD NEIBAUR
1550 CENTRAL RD
BANCROFT ID 83217

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. 13-02203B :			
IRRIGATION	04/15 to 10/15	2.88 CFS	409.5 AF
Priority: 09/09/1959			
Right No. 29-02352 :			
IRRIGATION	04/15 to 10/15	2.50 CFS	672.0 AF
Priority: 07/31/1954			
	TOTAL:	5.23 CFS	1081.5 AF

SOURCE

GROUNDWATER

LOCATION OF POINT(S) OF DIVERSION:

SWSE , Sec. 18, Township 09S, Range 40E
NENW , Sec. 19, Township 09S, Range 40E
CARIBOU 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>
09S	39E	13	Lot 2 (SENW)	30.0	Lot 3 (NESW)	30.0			60.0
	40E	18	NESW	30.0	NWSW	30.0	SWSW	30.0	
			SESW	30.0	NESE	30.0	NWSE	30.0	
			SWSE	30.0	SESE	30.0			240.0
		19	NENW	25.0	Lot 1 (NWNW)	35.5			60.5
					Total number of acres irrigated:				360.5

TRANSFER NO. 5676
WATER RIGHT NO(S). 13-02203B/29-02352

CONDITIONS OF APPROVAL AND REMARKS

Rights 23-02203B and 29-02352 are subject to the conditions of the Preliminary Order dated 05-24-2000 which has become final in the matter of Application For Transfer 5676.

Dated this 23rd day of June, 2000.

J. Glen Saxton
Chief, Water Allocation Bureau

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

RECEIVED
JUN 05 2000

Department of Water Resources
Eastern Region

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5676 IN THE)
NAME OF NEIBAUR FARM)
ENTERPRISES)
_____)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources (the "Department") in the form of a protested application for transfer and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On July 28, 1992, the Sixth Judicial Court of the State of Idaho decreed water right no. **13-02203** to Gem Valley Farms as follows:

Source:	Groundwater
Priority:	September 9, 1959
Rate of diversion:	3.1 cubic feet per second ("cfs")
Volume:	465 Acre Feet per Annum ("AFA")
Point of diversion:	NE1/4NW1/4 Section 19, T9S, R40E, B.M.
Use:	Irrigation
Season of use:	April 15 to October 15
Place of use:	155 acres within parts of Sections 18 and 19, T9S, R40E, B.M.

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

2. On July 28, 1992, the Sixth Judicial Court of the State of Idaho decreed water right no. **29-02352** to Gem Valley Farms as follows:

Source:	Groundwater
Priority:	July 31, 1954
Rate of diversion:	2.5 cfs
Volume:	687 AFA
Point of diversion:	SWSE Section 18, T9S, R40E, B.M.

Use: Irrigation
Season of use: April 15 to October 15
Place of use: 229 acres within parts of Section 18, T9S, R40E, B.M.

3. On March 1, 2000, Gem Valley Farms c/o Chad Neibaur filed Application for Transfer No. **5676** ("application") with the Department proposing to rearrange the irrigated acres in parts of Section 18, and 19, T9S, R40 E, B.M. and in part of Section 13, T9S, R39E, B.M. and to authorize the interconnection of two wells under water right nos. 13-02203 and 29-02352 for the irrigation of 373 acres as follows:

T9S, R39E, B.M.

Section 13 - Lot 2 - 35 acres, Lot 3 - 35 acres

T9S, R40E, B.M.

Section 18 - SW1/4 - 120 acres, SE1/4 - 120 acres

Section 19 - NENW - 26 acres, NWNW - 37 acres

The applicant subsequently changed the name on the application to Neibaur Farm Enterprises ("applicant").

4. A portion of water right no. 13-02203 identified as part 13-02203A has been retained by Paul Christensen, a previous owner of the land for the irrigation of 11 acres in NENW Section 19, T9S, R40E, B.M.

5. The Department published notice of the application which was subsequently protested by Warren Lloyd and Carl Jorgensen who withdrew his protest before the hearing.

6. On April 12, 2000, the Department conducted a hearing in the matter. The applicant was present and was represented by William Forsberg. The protestant was present and was represented by Randall C. Budge.

7. Issues identified by the protestant are as follows:

- a) The proposed changes will constitute an enlargement in use of the water rights.
- b) The proposed changes will injure the water rights of the protestant.
- c) A portion of the waters sought for transfer has been forfeited through non-use for a period of five (5) or more years.

8. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a. Applicant's Exhibit 1 - Schematic of Section 18 - Year 1959
- b. Applicant's Exhibit 2 - Schematic of Section 18 - Year 1969
- c. Applicant's Exhibit 3 - Schematic showing the location of pivots in the vicinity of the place of use
- d. Protestant's Exhibit A - Tabulation of well data in the Bancroft-Lund Water District dated January 1, 2000

9. The applicant acquired the land and water rights involved in the application in 1986. The wells associated with the two water rights had already been connected together by a successor-in-interest of the applicant which interconnection has existed since about 1979.

10. Prior to conversion to pivot irrigation, the land under the decreed rights sought for transfer were irrigated with wheel lines and solid sets. In the late 1980's the applicant changed the water system which diverts water from the well in section 18 to a center pivot. In about 1990, the applicant also changed the water system which diverts water from the well in section 19 to a pivot and wheel lines.

11. The applicant proposes to cease irrigating portions of corners which can not be irrigated well with the pivots and to move the water right associated with those corners to a new place of use. More specifically the land from which the applicant seeks to transfer water includes about 83 acres identified in green on Applicant's Exhibit 3 and is located as follows:

Section 18, T9S, R40E, B.M.

NESE - 10 acres
NWSE - 10
SWSE - 10
SESE - 10
NESW (lot 3) - 10
NWSW - 10
SWSW - 10
SESW (lot 4) - 10

Section 19, T9S, R40E, B.M.

NWNW (lot 1) - 3

12. The protestant lives close to the applicant's land and has observed the irrigation practice on the applicant's land. The protestant is concerned with enlargement in use and believes that some of the land from which the applicant proposes to transfer water has not been irrigated for a period of five or more years.

13. The protestant diverts irrigation water from wells which are located approximately 3/4 of a mile and 1 mile westerly of the applicant's wells.

14. The protestant testified that certain parts of the land from which the applicant proposes to transfer water have not been irrigated for 5 or more years. The land is described as follows:

Section 18, T9S, R40E, B.M.

SWSE - 10	7 ac.
SESE - 10	7 ac
NWSW - 10	7 ac
SESW (lot 4) - 10	7 ac

Section 19, T9S, R40E, B.M.

NWNW (lot 1) - 3	3 ac
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Total	24 acres not irrigated
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15. The applicant testified, however, that the following portion of the decreed place of use from which the applicant intends to transfer water has not been irrigated for 5 or more years. He identified the tracts as follows:

Section 18, T9S, R40E, B.M.

SESE	-	5.0 acres (southeast corner)
SWSW (lot 4)	-	5.0 acres (southwest corner)

Section 19, T9S, R40E, B.M.

NWNW (lot 1)	-	1.0 acre total (northwest and southwest corners)
NWSW	-	1.5 acres of rockpiles

Total	12.5 acres
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The applicant also stated that there are rockpiles and improvements within some of the corners from which the applicant has applied to transfer the water. The improvements include a home, sheds, granaries, scale and potato cellars. The applicant estimated the area of the rockpiles to total 1 to 1.5 acres. The applicant has not measured the land which he presently irrigates or the land from which he intends to transfer the water rights.

16. Neither the applicant nor the protestant has actually measured the land irrigated or not irrigated as described in their testimony.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, 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. "[t]he director of the department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights". Jenkins v. State, Dept. of Water Resources, 103 Idaho 384, 389, 647 P.2d 1256 (1982).

3. 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.

4. 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.

5. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

6. The applicant stated that 12 acres of the land from which the applicant proposes to transfer water have not been irrigated for a period of five or more years. The protestant estimates this amount of land to be about 24 acres.

7. The proposed changes will not constitute an enlargement in use of the original rights if the approval of the application includes a reduction in the irrigated land by 12 acres and by the amount of water associated with those acres.

8. The proposed changes will not injure other water rights if the approval of the application includes a reduction in the irrigated land by 12 acres and by the amount of water associated with those acres.

9. The proposed changes are in the local public interest.

10. The proposed changes are consistent with the conservation of water resources within the state of Idaho.

11. The Department should approve the application with certain conditions to prevent injury and enlargement.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5676 in the name of Neibaur Farm Enterprises is **APPROVED** subject to the following conditions:

1. This approval authorizes a transfer of water to not more than 360.5 acres.
2. Use of water under this approval is not authorized until the right holder identifies for the Department and the watermaster the specific 12.5 acres which is not authorized for irrigation under this transfer. Upon written approval of the Department, the right holder can proceed with the changes authorized by this transfer.
3. The total instantaneous diversion of water from all points of diversion under Transfer 5676 shall not exceed 5.23 cfs nor a total combined annual volume of 1081.5 AF.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.0 AFA at the field headgate for irrigation of the lands above.
5. The period of use for the irrigation described in this approval may be extended to a beginning date of April 1 and an ending date of October 31 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before April 15 and after October 15 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than July 8, 1992.
6. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

7. Prior to diversion and use of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion and annual volume diverted.

8. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

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

Signed this 24th day of May, 2000.


L. GLEN SAXTON
Hearing Officer

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 24th day of May, 2000, 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:

William R. Forsberg
127 E Main St.
Rexburg, ID 83440

Neibaur Farm Enterprises
C/o Chad Neibar
1550 Central Rd.
Bancroft, ID 83217

Randall C. Budge
RACINE OLSON NYE
P.O. Box 1391
Pocatello, ID 83204-1391



Deborah Drew-Ellis, Administrative Assistant
Water Allocation Bureau



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

RECEIVED

MAY 11 2000

Department of Water Resources
Eastern Region

May 8, 2000

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

CHAD NEIBAUR
GEM VALLEY FARMS
1550 CENTRAL RD
BANCROFT ID 83217

RE: OWNERSHIP DOCUMENTATION FOR APPLICATION FOR TRANSFER 5676 - RIGHTS
13-02203 & 29- 02352

Dear Mr. Neibaur:

I have reviewed the information you asked Farm Credit Services to submit on your behalf in connection with the above referenced application for transfer. It does not appear from the faxed document that you also have provided the information to the protestant in the matter. If not, you need to do so and to provide evidence to me that you have so served them.

With regard to the information submitted by Farm Credit Services, there is no information which shows the relationship of the applicant in this matter, i.e. Gem Valley Farms to the Neibaur or Neibaur Farms Enterprises. Please provide this information. In addition, Farm Credit Services, the lienholder, needs to advise the department that it does not object to the changes you have proposed in the application. You have not provided this information which is required in item B.6.a on the application.

Please note that you are required to serve copies of all requested information to the protestant. Failure to make such service and to provide evidence of such service will further delay a decision in the pending matter.

Sincerely,

L. GLEN SAXTON
Hearing Officer

c: ☒ IDWR - E. Region
Norman C. Young
Randy Budge
William Foresberg



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

April 26, 2000

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

CHAD NEIBAUR
GEM VALLEY FARMS
1550 CENTRAL RD
BANCROFT ID 83217

RECEIVED

MAY 01 2000

Department of Water Resources
Eastern Region

**RE: OWNERSHIP DOCUMENTATION FOR APPLICATION FOR TRANSFER 5676 -
RIGHTS 13-02203 & 29- 02352**

Dear Mr. Neibaur:

My review of Application for Transfer 5676 has identified some discrepancies in the ownership documentation that you provided for the above referenced water rights. While the rights were decreed to Gem Valley Farms in 1992, the 1999 tax documents provided with this application do not match that business name. For your reference, I am enclosing copies of the 1999 tax notices that you provided and computer generated profile reports of the water rights identifying the place of use.

The portion of the rights within SESE, Section 18, T09S, R40E identifies Central Scale Inc, c/o Chad Neibaur et. al. as the owner. The remaining land in Section 18 and the N1/2NW, Section 19, T09S, R40E, is covered by notices listing Clyde A. Neibaur et. al. as the owner. There is no documentation to identify Gem Valley Farms as the owner of the 35 acres each in the SENW and NESW, Section 13, T09S, R39E proposed as part of the new place of use.

Please identify all authorized parties, partners or officers for Gem Valley Farms. Also identify and provide documentation of all owners of the property associated with the transferred water rights and the additional land in Section 13, T09S, R39E. If all the parties are related in some way, please provide documentation and notarized authorization from any owners that are not part of Gem Valley Farms.

You also noted on the application that the lands from which you propose to transfer the water rights are subject to liens, deeds of trust, mortgages or contracts. However, you did not provide the required notarized statement from the holder of the lien, deed of trust, mortgage of contract agreeing to the proposed changes as required.

The department can not further consider the application for transfer without clear ownership and authorization from any lienholder(s). I will withhold further review of the application for transfer for 14 days to allow you to collect and submit the requested information.

CHAD NEIBAUR
GEM VALLEY FARMS
April 26, 2000
Page 2

Please note that you are required to serve copies of the requested information to the protestant in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Glen Saxton". The signature is fluid and cursive, with the first name "L." being small and the last name "Saxton" being larger and more prominent.

L. GLEN SAXTON
Hearing Officer

Encl:

c: ✓ IDWR - E. Region
Randy Budge
William Foresberg

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APR 18 2000

Department of Water Resources
Eastern Region

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***ALSO MEMBER IL BAR
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April 13, 2000

Glen L. Saxton
Hearing Officer
Department of Water Resources
1301 No. Orchard
Boise, ID 83706

RE: In the Matter of Applications for Transfer No. 5676
In the Name of Gem Valley Farms

Dear Mr. Saxton:

Enclosed please find the post-hearing brief we are submitting on behalf of the Protestant Warren Lloyd. Thank you for your consideration.

Respectfully,


RANDALL C. BUDGE

RCB:cr

Enclosure

cc: Harold Jones
Wm. Forsberg
Warren Lloyd

TR 5676

Randall C. Budge
ISBN: 1949
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
P. O. Box 1391/Center Plaza
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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS	)	
FOR THE TRANSFER NO. 5676	)	PROTESTANT'S and
IN THE NAME OF	)	POST-HEARING BRIEF
GEM VALLEY FARMS	)	
_____	)	

COMES NOW Protestant, Warren Lloyd, through counsel, and hereby submits this brief to set forth his position on the facts and law following the hearing conducted on April 12, 2000, at 9:30 a.m. at the Pocatello Airport, Pocatello, Idaho before presiding Officer L. Glen Saxton.

STATEMENT OF THE CASE

On March 1, 2000, Applicant Chad B. Neibaur dba Gem Valley Farms (hereinafter "Applicant") filed an application for transfer of water right, Transfer No. 5676. Notice of the proposed change was published in the Caribou County Sun March 16 and 23, 2000. The application and the published notice states that the Applicant's purpose is to "rearrange my acres in the south half of Section 18 and the N 1/2 NW 1/4 of Section 18 to fit pivots and mini-pivots." The Application seeks to transfer the place of use for 2.88 CFS under Right No. 13-02203B and 2.0 CFS

under Right No. 29-02352, total of 5.38 CFS. Water Right No. 29-02352 is commonly known as Applicants "north well" and Right No. 13-02203B is commonly known as Applicant's "south well", and will hereafter be referred to as such.

While there are no changes in the point of diversion or other elements of Applicant's water rights, Applicant proposes to change the place of use on 70 acres, which are the corners around two large and one small center pivot, further to the west.

On March 8, 2000, Warren P. Lloyd (hereinafter "Protestant") timely filed a notice of protest on the Department's prescribed forms on the basis that the proposed transfer would constitute an expansion of the place of use causing injury to his water rights. Protestant's water right No. 13-0213 pertains to a well with a later priority of September 29, 1996, located approximately 1/2 to 3/4 of a mile to the south and west.

Testimony and evidence was presented at the hearing conducted April 12, 2000, at the Pocatello Airport at which the Applicant and the Protestant appeared in person with their attorneys.

STANDARD OF REVIEW

The transfer application was filed and is process under I.C. §42-222. Pursuant to I.C. 42-222(1) the Director of the Department may 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 an enlargement of use of the original right; (3) the change is consistent with the conservation of water resources within the State of Idaho; (4) the change is in the local public interest as defined in §42-203A(5) Idaho Code; and (5) the new use is a beneficial use.

Protestant asserts that the transfer should be denied because the proposed change would constitute an enlargement in use under the original right and that his water rights would be injured thereby.

Protestant also asserts that the Applicant has partially forfeited his water right with respect to the corners of the pivots which have not been watered for an excess of five years. Further, that such non-irrigated acres are not available to transfer and that to allow the transfer would constitute an enlargement of the Applicant's rights. Forfeiture is governed by I.C. § 42-222(2) which provides in pertinent part:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five years to apply it to beneficial use for which it is appropriated and when any right to the use of water shall be lost through non-use or forfeiture such rights to such water shall revert to the state and be again subject to appropriation . . .

Partial forfeiture is provided for by subdivision (2) of this action. State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997).

ISSUES PRESENTED

Protestant submits that the following issues are properly before the Department for determination:

1. Have Applicant's water rights been partially lost and forfeited by a failure for the term of five or more years to apply them to beneficial use for which they were appropriated?
2. Has Applicant met his burden of proof to gain approval of the transfer that no other water rights are injured and that the proposed change will not constitute an enlargement of use of the original right?

3. What conditions should apply to Applicant if the transfer is approved in whole or in part?

ARGUMENT

1. **The Place Of Use Of Applicant's Water Rights Has Been Partially Lost And Forfeited By A Failure For The Term Of Five Or More Years To Apply It To The Beneficial Use For Which It Was Appropriated**

When Applicant's water rights were originally established by license, proof was submitted establishing the place of use in accordance with the Department's records. That land the place of use was entirely irrigated by hand lines and/or wheel lines in accordance with proof submitted to the Department and testimony of Applicant at the hearing. Thereafter, according to the testimony of Applicant the north well place of use was converted to a center pivot in the late 1980's and the south well place of use was converted to a center pivot in about 1990. All irrigation at the place of use has since been provided by center pivot only according to the testimony of Applicant. Chad Neibuar testified that the irrigation was by the center pivots with extension guns and gave no testimony of any hand lines or wheel lines used on the corner areas where forfeiture is asserted.

Applicant's Exhibit "C" identifies the ten corners around the two large and one small pivot, some 70 acres, which Applicant proposes to transfer to a new place of use further to the west. He further testified that the ground water presently used at the new place of use will then be transferred further to the west upon property presently irrigated by surface water from the Last Chance Canal Company system. The surface water from Last Chance will then be moved to other property not currently irrigated. The resulting effect will be to bring new land under irrigation.

On cross-examination concerning the corners around the pivots, Applicant Chad Neibaur, admitted to a total of 12 1/2 acres in the corners which had never been irrigated since the pivots were installed or for the past five or more years continuously, as follows:

East pivot: SE corner = 5 acres

West pivot: SW corner = 5 acres

NW corner = 1 1/2 acres

Mini pivot: NW corner = 1/2 acre

SW corner = 1/2 acre

TOTAL **12 1/2 acres**

Protestant Warren Lloyd testified that he drives the central road which runs through Applicant's property five to six times per week. He testified that since Applicant's property was converted to center pivots, that none of the corners had ever been irrigated that could not be reached by the center pivots or the extension guns. Lloyd estimated a total of 35 acres in the corners that had never been irrigated as follows:

East Pivot: SE corner = 7 acres

NE corner = ?

SW corner = 7 acres

West Pivot: SE corner = 7 acres

NW corner = 11 acres

Mini Pivot: NW corner = 1 1/2 acres

SW corner = 1 1/2 acres

TOTAL **35 acres**

While Applicant's and Protestant's estimates of non-irrigated land in the corners varied, Protestant Lloyd's testimony was more credible. Applicant Neibaur's testimony was substantially eroded on further cross-examination during which he was evasive, uncertain and contradicted his earlier testimony on direct examination. Applicant rather obviously and openly relied extensively upon prompting and coaching from his counsel to answer questions. Further, while Neibaur made no mention in his direct testimony or during initial cross-examination concerning the unirrigated corners about any buildings or improvements, on further examination, he admitted that there were extensive rock piles in the northwest corner which had not been irrigated since the pivots were put in and that there were scales, granaries, houses, potato cellars and other improvements constructed in the corners around the pivots that had never been irrigated.

Accordingly, of the 70 acres Applicant wishes to transfer, one-half or 35 acres of the original right has been lost or forfeited for failure to apply any of the initial appropriated water right pursuant to I.C. §42-222(2).

2. Applicant's Transfer Constitutes An Enlargement Of The Original Right And Will Cause Injury To Protestant And Other Water Right Holders In The Area

Applicant's transfer would result in 35 acres of non-irrigated corners around his existing pivots which have not been irrigated since the late 1980's or 1990 when his pivots were installed to be transferred to the west and come under irrigation. This obviously would constitute an unlawful expansion.

To the extent of the expansion, Applicant's transfer would result in further depletion of the Bancroft/Lund Aquifer to the injury of Protestant Lloyd and other users. The records of the Department concerning the adjudication of the Bancroft Lund Aquifer including USGS and other well measurement records and hydrological studies should be taken notice of. They clearly establish

that shortages occur during the summer months when not all water right owners are able to obtain their full right. Furthermore, the testimony of Protestant established in the mid-summer of an average year, he only receives about half of his entitled right under his well. Thus, expansion of Applicant's right will injure Lloyd and others by causing additional water to be taken from the aquifer.

3. As A Condition Of Any Partial Approval Of The Change, Conditions Should Be Imposed

Applicant has a well documented history established in recent transfer application proceedings before the Department of improperly interconnecting wells under different water rights. By so doing, Applicant has expanded his place of use by using the better more productive wells to pump water onto unauthorized places of use under other water rights served by less productive wells. These unauthorized expansions have been well recognized by the Department, protestants and the applicants in those cases. As a result, the applicant in several cases was required to sever his interconnected wells. The same results should be required here by way of Department imposed condition.

Applicant initially testified that both of his wells which are the subject matter of this transfer will operate simultaneously and continuously together. However, on further cross-examination of Applicant Chad Neibaur following his rebuttal testimony, he was confronted with the well records shown on Protestant's Exhibit "A" and the testimony of Protestant which contradicted his earlier testimony. Based on the testimony of Protestant using the Department's records of electricity consumption, it was established that the north well used 337 kilowatts per acre while the south well used 739.9 kilowatts per acre. This proves the south well was used over double the north well, clearly undermining the credibility of Applicant's testimony the two wells were used the same.

Applicant Neibaur's testimony then changed as he attempted to explain the disparity as crop differences. He admitted then running the south well more to irrigate potatoes after the north well had been shut off of the grain. He further admitted, reluctantly, that he had used the south well on an expanded basis to irrigate lands that were part of the place of use of the north well. This unauthorized and illegal expansion is the same problem encountered in the other transfers. Accordingly, the Department should impose as a condition of any approval that these two wells also be permanently severed and disconnected.

CONCLUSION

Applicant has partially forfeited his water rights on at least 35 acres around the corners of his pivots. These areas have not been irrigated since the center pivots were installed in the late 1980's or 1990 and as a result of rock piles, houses, potato cellars, scales, granaries and other improvements constructed in those areas. At least 35 acres of the proposed transfer should be denied as such would constitute an unlawful expansion of Applicant's water right causing injury to Protestant and others. As a condition of any approved transfer, Applicant should be required to severe and disconnect his wells which have been used in such a manner to expand the place of use.

RESPECTFULLY SUBMITTED.

DATED this 17 day of April, 2000.

RACINE, OLSON, NYE, BUDGE,
& BAILEY, CHARTERED

By Randall C. Budge
RANDALL C. BUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of April, 2000, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

Glen L. Saxton
Hearing Officer
Department of Water Resources
1301 No. Orchard
Boise, ID 83706

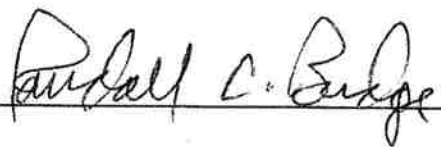
☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Harold Jones
Department of Water Resources
900 No. Skyline Dr.
Idaho Falls, ID 83402

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

William R. Forsberg
127 E. Main Street
Rexburg, ID 83440

☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 5676

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1

Name of Applicant Gem Valley Farms Co Chad Nebauer Phone 208-648-7113
Post Office address 1550 Central Rd Bancroft, ID 83217

A. PURPOSE OF TRANSFER

- ☐ Change point of diversion
 ☐ Add diversion point(s)
 ☒ Change place of use
☐ Change nature of use
 ☐ Change period of use
 ☐ Other _____
- Describe the reason for the proposed changes I want to rearrange my acres in the S 1/2 of sec 18 + N 1/2 NW 1/4 of sec 18 to fit pivots + mini-pivots

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

- | Right Number | Priority | Amount (cfs/ac-ft) | Nature of Use | Period of Use |
|-------------------|------------------|--------------------|-------------------|-----------------------------|
| <u>13-02203 B</u> | <u>9/9/1959</u> | <u>2.88 cfs</u> | <u>Irrigation</u> | <u>4/15</u> to <u>10/15</u> |
| <u>29-02352</u> | <u>7/31/1954</u> | <u>2.50 cfs</u> | <u>" "</u> | <u>"</u> to <u>"</u> |
- Total amount of water being transferred 5.38 cubic feet per second and/or _____ acre-feet per annum.
- Source of water Groundwater tributary to _____
- Point(s) of Diversion: _____

Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		SW	SE	18	9S	40E	Caribou	
		NE	NW	19	"	"	"	

5. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
9S	39E	13								35	35								70
										L-2	L-3								
9S	40E	18									30	30	30	30	30	30	30	30	240
		19					26	37											63

* Rt 13-02203B Limited to 144 acres
* Rt 29-02352 Limited to 229 acres

* Total Acres 373
Permissible P.O.U.
TS676

PART 1

6. General Information:

a. Description of diversion system 2 interconnected wells to pivots

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

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

Witness my hand this _____ day of _____, 20 _____.

For the Director

PART 2

TRANS NO. 5674

A. DESCRIPTION OF RIGHT AS RECORDED:

"Split right"

Claim No. 13-02203

STAGE: LICENSE

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/15 to 10/15	3.10 CFS	465.0 AF

SOURCE

GROUNDWATER

Priority: 09/09/1959

LOCATION OF POINT(S) OF DIVERSION:NENW , Sec. 19, Township 09S, Range 40E
CARIBOU CountyPLACE OF USE:

IRRIGATION

				NE				NW				SW				SE																				
				NENE	NWNE	SWNE	SENE					NENW	NWNW	SWNW	SENW					NESW	NWSW	SWSW	SESW					NESE	NWSE	SWSE	SESE					
T	R	S	:	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	SUM				
09S	40E	18	:																																	
09S	40E	19	:																																	
								37				01-39																								
																																TOTAL ACRES	155.0			

CONDITIONS/REMARKS:

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

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:

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 _____

PART 2

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.)

"B"

1. amount 2.88 for Irrigation purposes from 4/15 to 6/15
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NE	NW	19	9S	40E	Caribou	

3. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
9S	40E	19					26	39											65
								L-1											
		18									40	39							79
											L-3	L-4							

Total Acres 144

C. DESCRIPTION OF UNCHANGED PORTION OF RIGHT (omit if there is no change)

1. amount 0.22 cfs for Irrigation purposes from 4/15 to 10/15
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

"A"

2. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec	Twp	Rge	County	Local name for diversion
		NE	NW	19	9S	40E	Caribou	

3. Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
9S	40E	19					11												11

Total Acres 11

Claim No. 29-02352

STAGE: LICENSE

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/15 to 10/15	2.50 CFS	687.0 AF

SOURCE

GROUNDWATER

Priority: 07/31/1954

LOCATION OF POINT(S) OF DIVERSION:

SWSE , Sec. 18, Township 09S, Range 40E
CARIBOU County

PLACE OF USE:

IRRIGATION

				NE				NW				SW				SE											
				NENE	NWNE	SWNE	SENE	:	NENW	NWNW	SWNW	SENW	:	NESW	NWSW	SWSW	SESW	:	NESE	NWSE	SWSE	SESE	:				
T	R	S	:	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	:	Lt	Ac	Lt	Ac	Lt	Ac	:	Lt	Ac	Lt	Ac	Lt	Ac	:	SUM
09S	40E	18	:									:							:						:		
														40			34			40	40	36	39			229.0	
																							TOTAL ACRES		229.0		

CONDITIONS/REMARKS:

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

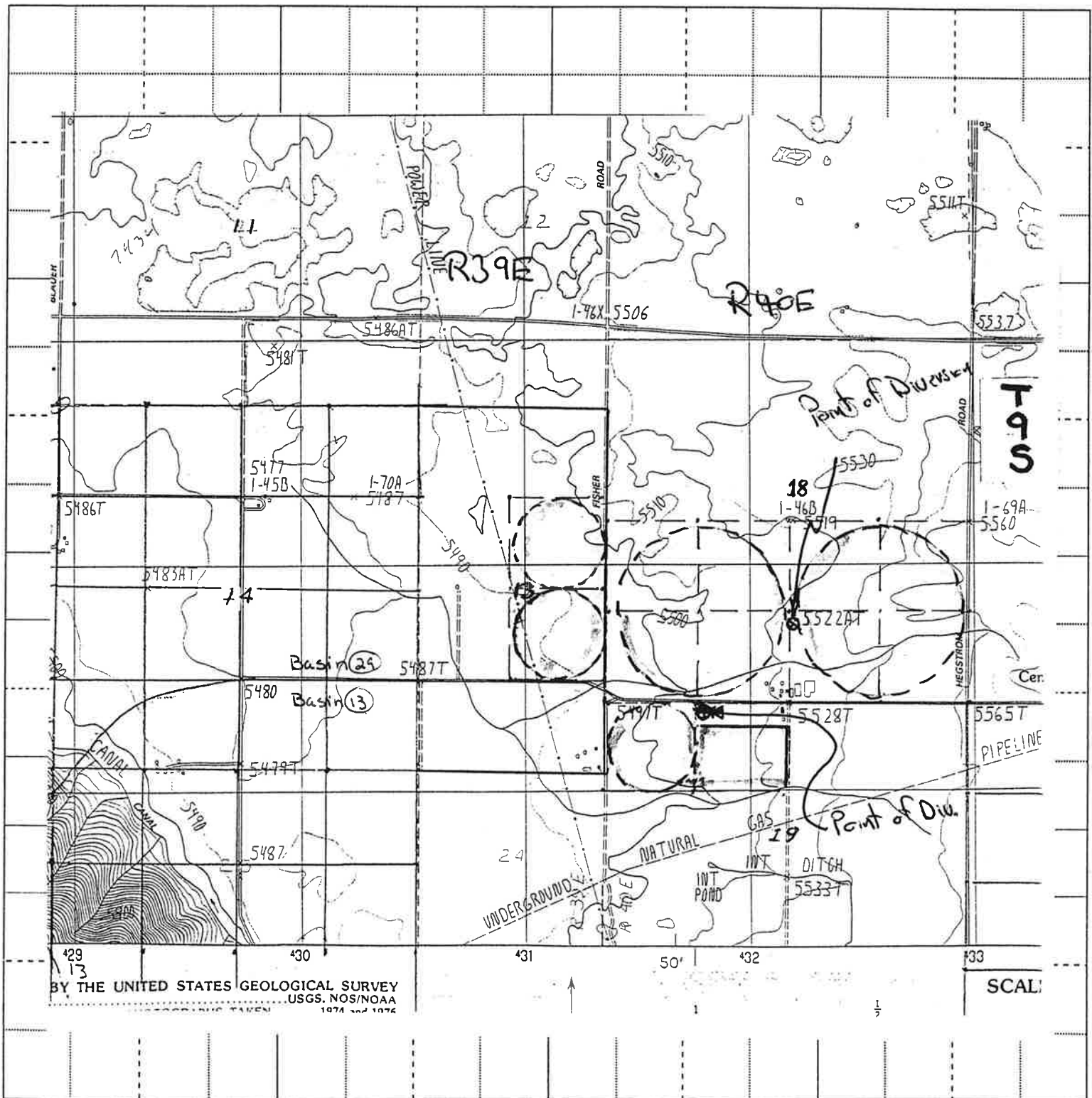
To your knowledge has any portion of this water right undergone a period of five or more consecutive years of non-use? NO If yes, describe:

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 _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESAPPLICATION FOR TRANSFER OF WATER RIGHT
PART 3

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



PART 3

B. CHANGES IN NATURE OF USE

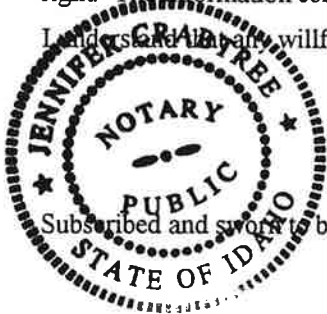
1.

<u>New Nature of Use</u>	<u>Amount(cfs/af-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.



Chat B. McS

(Signature of Applicant)

Subscribed and sworn to before me this 1st day of March, 20 00.

Jennifer Crabtree

(Notary Public)

My commission expires 9/23/03

FOR DEPARTMENT USE ONLY

Transfer contains 7 pages and 4 attachments
 Received by JKC Date 3-1-00 Protest filed by Warren P Lloyd 3/8/2000
 Prelim. Check by _____ Fee _____
 Receipted by JKC Date 3-1-00 E0293A
 Published in Caribou County Sun Copies of protest forwarded by _____
 Pub. Dates 3-15 & 3-22-2000 Hearing held by _____ Date _____
 Watermaster recommendations requested on _____ Recommended for ☐ approval ☐ denial
 _____ received _____ by _____

Copy of transfer sent to lien holder _____

MAKE CHECK PAYABLE TO:
DIANE C. MEADS, TAX COLLECTOR
P.O. BOX 507
SODA SPRINGS, ID 83276
(208) 547-3726

CARIBOU COUNTY 1999 PROPERTY TAX NOTICE
CODE AREA 14

PARCEL NUMBER
RL 34670

MARKET VALUE	HOMESTEAD	NET VALUE
38,300	0	38,300

CENTRAL SCALE INC
% NEIBAUER, CHAD ET AL
1550 CENTRAL RD
BANCROFT, ID 83217

--TAXING DISTRICT--	*--RATE*	*--AMOUNT--
COUNTY	.5714222%	218.8
SCHOOL DIST 148	.5840788%	223.7
CENTRAL CEM	.0355114%	13.6
GRACE LIBRARY	.0533624%	20.4

TR SE1/4SE1/4, SEC. 18, T9S,
R40E

TOTAL TAX/SPECIALS	1.2443748%	476.61
-CIRCUIT BREAKER		
-PREPAYMENT ON		
NET TAX/SPEC DUE		476.61

IMPORTANT
PLEASE READ BOTH FRONT AND BACK

*** MONTHLY PAYMENTS ARE ACCEPTED ***
PAYMENTS RECEIVED WITH A DELINQUENCY WILL BE
APPLIED TO THE OLDEST DELINQUENT YEAR.
TO AVOID LATE CHARGES, PAYMENTS MUST BE
RECEIVED OR POSTMARKED BY THE DUE DATE.
KEEP TOP PORTION FOR YOUR RECORDS.
PERSONAL CHECKS ARE YOUR RECEIPT
SUBJECT TO BANK CLEARANCE.

	1st Half	2nd Half	Full
TAX	238.31	238.30	476.61
LATE			
SUBTOT			
INT			
COST			
TOT			

IF YOU SHOW A DELINQUENCY, CALL US FOR THE PAYOFF
AMOUNT. PRIOR YEARS MUST BE PAID FIRST. THANK YOU.

CARIBOU COUNTY 1999 PROPERTY TAX NOTICE

MAKE CHECK PAYABLE TO:
 DIANE C. MEADS, TAX COLLECTOR
 P.O. BOX 507
 SODA SPRINGS, ID 83276
 (208) 547-3726

CODE AREA 14

PARCEL NUMBER
 RL 3466A

MARKET VALUE	HOMESTEAD	NET VALUE
49,268	0	49,268

NEIBAUR, CLYDE A ETAL
 1300 NEIBAUR MOUNTAIN RD
 BANCROFT, ID 83217

--TAXING DISTRICT--	*-RATE*	*-AMOUNT-
COUNTY	.5714222%	281.5
SCHOOL DIST 148	.5840788%	287.7
CENTRAL CEM	.0355114%	17.5
GRACE LIBRARY	.0533624%	26.2

TR. SW1/4SE1/4SEC 18 T9S-R40E.2
 3AC

TOTAL TAX/SPECIALS	1.2443748%	613.0
-CIRCUIT BREAKER		
-PREPAYMENT ON		
NET TAX/SPEC DUE		613.0

IMPORTANT
 PLEASE READ BOTH FRONT AND BACK

*** MONTHLY PAYMENTS ARE ACCEPTED ***

PAYMENTS RECEIVED WITH A DELINQUENCY WILL BE
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 RECEIVED OR POSTMARKED BY THE DUE DATE.

KEEP TOP PORTION FOR YOUR RECORDS.

PERSONAL CHECKS ARE YOUR RECEIPT
 SUBJECT TO BANK CLEARANCE.

	1st Half	2nd Half	Full
TAX	306.95	306.54	613.09
LATE			
SUBTOT			
INT			
COST			
TOT			

IF YOU SHOW A DELINQUENCY, CALL US FOR THE PAYOFF
 AMOUNT. PRIOR YEARS MUST BE PAID FIRST. THANK YOU.

T 5676
 ATTACHMENT 2 OF 4

Mar. 02 2000 06:05PM P7

PHONE NO. : 208 648 7110

ms

FROM : Chad Neibaur:Gem Valley

Mar. 02 2000 06:05PM P5

PHONE NO. : 208 648 7110

FROM : Chad Neibaur:Gem Valley

MAKE CHECK PAYABLE TO
DIANE C. MEADS, TAX COLLECTOR
P.O. BOX 507
SODA SPRINGS, ID 83216
(208) 547-3726

CARIBOU COUNTY 1999 PROPERTY TAX NOTICE
CODE AREA 14

PARCEL NUMBER
RL 34660

MARKET VALUE	HOMESTEAD	NET VALUE
842,956	0	842,956

NEIBAUER, CLYDE L. - et al
1300 NEIBAUER MTN. RD.
BANCROFT, ID 83217

--TAXING DISTRICT--	*-RATE*	*-AMOUNT-
COUNTY	.5714222%	4816.8
SCHOOL DIST 148	.5840788%	4923.5
CENTRAL CEM	.0355114%	299.3
GRACE LIBRARY	.0533624%	449.8
TV TRANSLATOR		30.0
LANDFILL		65.0

ALL OF SEC, 643.82 AC
LESS 13.9 AC HW
SEC 18, T1S R40E

TOTAL TAX/SPECIALS	1.2443748%	10,584.5
-CIRCUIT BREAKER		
-PREPAYMENT ON		
NET TAX/SPEC DUE		10,584.5

★ ★ ★ IMPORTANT ★ ★ ★
PLEASE READ BOTH FRONT AND BACK

★ ★ ★ MONTHLY PAYMENTS ARE ACCEPTED ★ ★ ★

PAYMENTS RECEIVED WITH DELINQUENCY WILL BE
APPLIED TO THE OLDEST DELINQUENT YEAR.
TO AVOID LATE CHARGES, PAYMENTS MUST BE
RECEIVED OR POSTMARKED BY THE DUE DATE.
KEEP TOP PORTION FOR YOUR RECORDS.
PERSONAL CHECKS ARE YOUR RECEIPT
SUBJECT TO BANK CLEARANCE

	1st Half	2nd Half	Full
TAX	5,292.27	5,292.27	10,584.54
LATE			
SUBTOT			
INT			
COST			
TOT			

IF YOU SHOW A DELINQUENCY, CALL US FOR THE PAYOFF
AMOUNT. PRIOR YEARS MUST BE PAID FIRST. THANK YOU.

T 5676
ATTACHMENT 3 OF 4

Mar. 02 2000 06:04PM P4

PHONE NO. : 208 648 7110

FROM : Chad Neibaur:Gem Valley Farms

CARIBOU COUNTY 1999 PROPERTY TAX NOTICE

MAKE CHECK PAYABLE TO:
DIANE C. MEADS, TAX COLLECTOR
P.O. BOX 507
SODA SPRINGS, ID 83273
(208) 547-3726

CODE AREA 14

PARCEL NUMBER
RL 3471A

MARKET VALUE	HOMESTEAD	NET VALUE
38,774	0	38,774

NEIBAUR, CLYDE A. - et al
1300 NEIBAUR M'N. RD.
BANCROFT, ID 81217

--TAXING DISTRICT--	*--RATE*	*--AMOUNT--*
COUNTY	.5714222%	221.51
SCHOOL DIST 148	.5840788%	226.4
CENTRAL CEM	.0355114%	13.7
GRACE LIBRARY	.0533624%	20.6

LOT 1, TR NE1/4NW1/4 68 AC.
SEC 19, T9S R40E

TOTAL TAX/SPECIALS	1.2443748%	482.5
-CIRCUIT BREAKER		
-PREPAYMENT ON		
NET TAX/SPEC DUE		482.5

★ ★ ★ IMPORTANT ★ ★ ★
PLEASE READ BOTH FRONT AND BACK

★ ★ ★ MONTHLY PAYMENTS ARE ACCEPTED ★ ★ ★

PAYMENTS RECEIVED WITH DELINQUENCY WILL BE
APPLIED TO THE OLDEST DELINQUENT YEAR

TO AVOID LATE CHARGE, PAYMENTS MUST BE
RECEIVED OR POSTMARKED BY THE DUE DATE.

KEEP TOP PORTION FOR YOUR RECORDS.

PERSONAL CHECKS ARE YOUR RECEIPT
SUBJECT TO BANK CLEARANCE.

	1st Half		2nd Half		Full
TAX	241.26	TAX	241.25	TAX	482.51
LATE		LATE		LATE	
SUBTOT		SUBTOT		SUBTOT	
INT		INT		INT	
COST		COST		COST	
TOT		TOT		TOT	

IF YOU SHOW A DELINQUENCY, CALL US FOR THE PAYOFF
AMOUNT PRIOR YEARS MUST BE PAID FIRST. THANK YOU.

T 5674
ATTACHMENT 4 OF 4