

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 81936**

This is to certify that: **WILLIAM R WILKERSON SR**
2520 S POWERLINE RD
NAMPA, ID 83686

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
2-2318A	WR/DECREED	6/5/1964	0.270 cfs	N/A	N/A	13.3	SNAKE RIVER

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
2-2318A	NO	NO	NO	YES	NO	NO

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
2-2318A	2-2318A	0.270 cfs	N/A	N/A	13.3	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		0.270 cfs	N/A	N/A	13.3		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 24th day of JULY, 2018.



Chief, Water Allocation Bureau

WATER RIGHT NO. 2-2318A

As Modified by Transfer No. 81936

In accordance with the approval of Transfer No. 81936, Water Right No. 2-2318A is now described as follows:

Right Holder: WILLIAM R WILKERSON SR AND/OR
IMOGENE E WILKERSON
2520 S POWERLINE RD
NAMPA, ID 83686

Priority Date: 6/5/1964

Source: SNAKE RIVER
Source: JUMP CREEK

Tributary: COLUMBIA RIVER
Tributary: SNAKE RIVER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>
IRRIGATION	3/15	to 11/15	0.270 cfs 0.270 cfs

LOCATION OF POINT(S) OF DIVERSION

SNAKE RIVER	L6 (NWNW)	Sec 14 Twp 03N Rge 05W OWYHEE County
JUMP CREEK	L5 (SENW)	Sec 14 Twp 03N Rge 05W OWYHEE County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
03N	05W	14							4.3	9.0									13.3
									L 6	L 5									

POU Total Acres: 13.3

CONDITIONS OF APPROVAL

1. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the place of use.
2. The period of use for the irrigation described in this approval may be extended to a beginning date of 3/1 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 3/15 is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than 10/31/2011.
3. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.
4. Diversion of Jump Creek is limited to those times water is available for diversion under this right and priority from the Snake River at the original point of diversion.

Transfer No. 81936

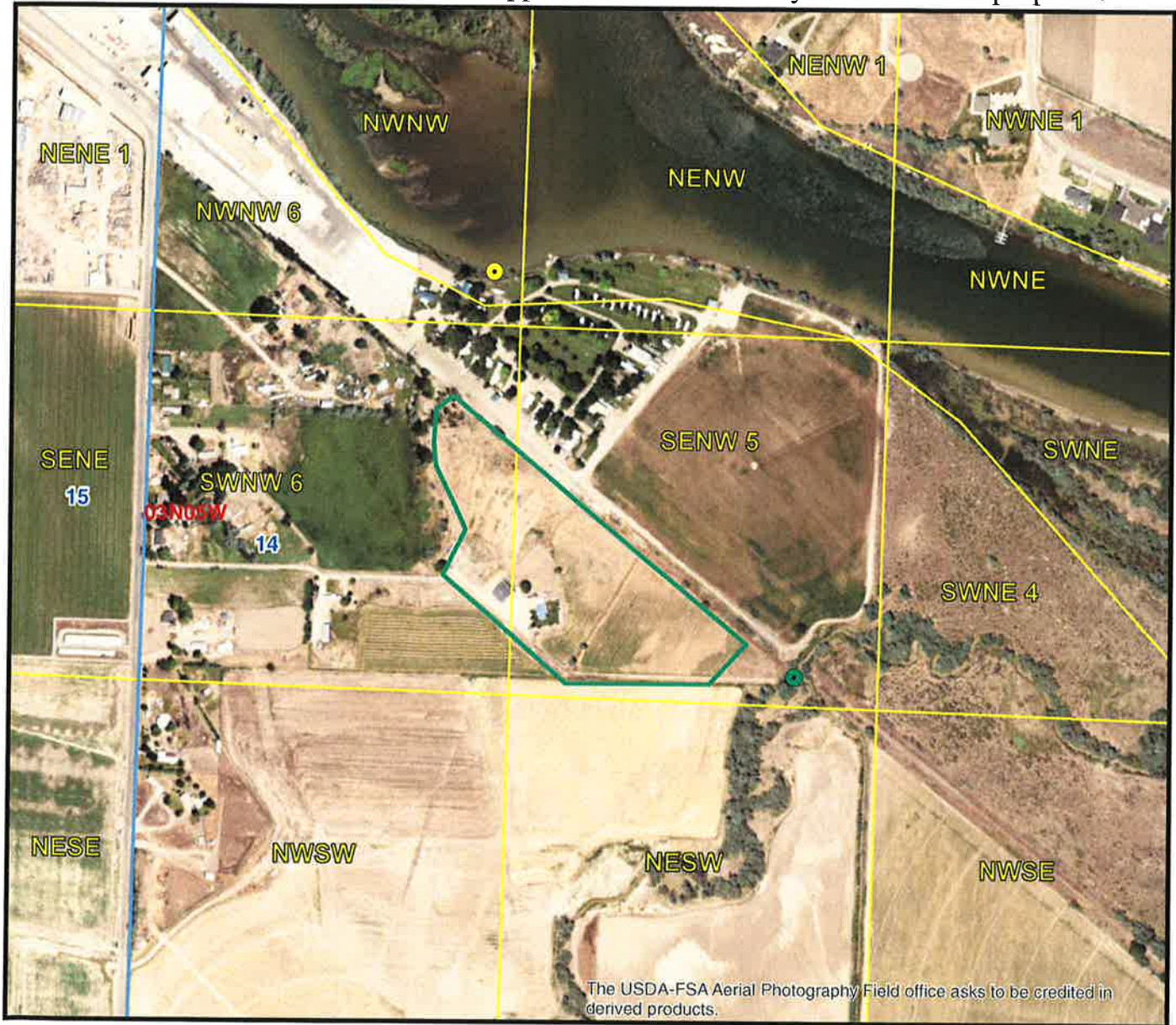
WATER RIGHT NO. 2-2318A
As Modified by Transfer No. 81936

CONDITIONS OF APPROVAL

5. Upstream water rights on Jump Creek existing at the time of this transfer approval (Transfer 81936) shall not be curtailed to deliver water to this right for diversion at the Jump Creek point of diversion. Provided this right is otherwise in priority and other conditions of the transfer approval are met, this condition is not intended to limit the ability to use water at the Jump Creek point of diversion made available when junior, upstream Jump Creek rights are curtailed to deliver rights on the Snake River.
6. This right does not grant any right-of-way or easement across the land of another.
7. This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to the final judgement entered in that proceeding.
8. The right holder shall accomplish the change authorized by this transfer within one 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.
10. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

State of Idaho
Department of Water Resources
Attachment to Transfer No. 81936
Water Right: 2-2318A

This map depicts the IRRIGATION place of use boundary for the water right at the time of this approval and is attached to the approval document solely for illustrative purposes.



- Township/Range
- Sections
- QQ
- Place of Use Boundary
- Proposed Point of Diversion
- Original Point of Diversion



0 0.15 0.3 Miles



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region • 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

July 24, 2018

WILLIAM R WILKERSON SR
2520 S POWERLINE RD
NAMPA ID 83686

Re: Transfer No: 81936
Water Right No(s): 2-2318A

Transfer Approval Notice

Dear Water Right Holder and other Interested Persons:

The Department of Water Resources has issued the enclosed approved Transfer of Water Right(s). Please be sure to thoroughly review the conditions of approval and remarks listed on the approval document.

The Transfer of Water Right(s) is a PRELIMINARY ORDER issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action by the Department unless the APPLICANT petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

ANY PERSON aggrieved by any decision, determination, order or action of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Department and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

If the transfer approval includes a condition requiring measuring and recording devices, such devices shall comply with specifications established by the Department. Detailed specifications are available on the Department's home page on the Internet, or you can request a copy by contacting any office of the Department. Please be sure to thoroughly review the specifications to avoid unnecessary costs for reinstallation or modification due to non-conforming or improperly installed devices.

Please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

If you have any questions, please contact me at (208) 334-2190.

Sincerely,

A handwritten signature in black ink, appearing to read "Nick Miller". The signature is stylized with a large, looped initial "N" and a cursive "Miller".

Nick Miller
Regional Manager

Enclosure

CC:

IMOGENE E WILKERSON
2520 S POWERLINE RD
NAMPA ID 83686

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2018 I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER (Approved Transfer) to the person(s) listed below:

**Re: Transfer No.: 81936
Water Right No(s): 2-2318A**

**WILLIAM R WILKERSON SR
2520 S POWERLINE RD
NAMPA ID 83686**

**IMOGENE E WILKERSON
2520 S POWERLINE RD
NAMPA ID 83686**



**Rachel Neely
Administrative Assistant**

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

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

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

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

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

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

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

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

MEMORANDUM

TO: Transfer No. 81936 File
FROM: Cody Parker
RE: Evaluation of Sufficiency of Information
DATE: January 5, 2018

The purpose of this transfer is to add a point of diversion to water right no. 2-2318A. The original POD diverts water from the Snake River, and the new POD to be added diverts water from Jump Creek, an upstream tributary of the Snake River. Water will continue to be used at the current place of use southeast of the intersection of River Resort Dr and N Jump Creek Rd, approximately two miles southeast of Homedale, Idaho.

Summary of Information Submitted

Authority to File: The owners of record for right no. 2-2318A are Imogene and William Wilkerson. The place of use is owned by the same, indicating that they are the current owners of the right. The transfer application is signed by William R Wilkerson, confirmed owner of the right. According to the tax parcel spatial data, the eastern property boundary borders Jump Creek, so the applicant owns the land at the proposed new point of diversion. The applicant has authority to file the transfer and to seek the proposed change to the water right.

Water Right Validity: The water right to be changed has been leased to the Water Supply Bank since 2014. The right is currently in the Bank and the lease will terminate on December 31, 2017 per a Request to Release a Water Right from the Bank form submitted on September 29, 2017. Any approval of the changes proposed in this transfer will need to be issued *after* the right is released from the Bank. Water rights leased to the Bank are protected from forfeiture according to §42-223(5), Idaho Code. Thus, the right is presumed valid.

Injury to Other Water Rights: The application does not propose a change that would be an immediate cause for reduction in the quantity available to other water rights. The transfer application proposes an additional source through the addition of a new point of diversion. The new POD is upstream of the original and is located on a tributary of the original source.

Gem Irrigation District has used certain reaches of Jump Creek to convey District water. There has been previous concern from irrigation companies that authorizing natural flow diversions from conveyance channels could lead to right owners using District water without owning shares. However, such a concern is probably irrelevant in this case because the proposed POD is at the edge of the District and in the furthest downstream reach of Jump Creek, below all points of delivery.

The original POD is shared by right no 2-2318B. The two have the exact same priority date. By adding a POD upstream, the applicant may have better access to water than 2-2318B. However, there are no real water supply issues in this lower reach of the Snake River, so it is unlikely that the move upstream would ever cause injury to 2-2318B.

Although the transfer is adding a source, the new point of diversion is upstream and tributary to the original source, so it is not really a new source. Yet, the supply of water may be better or worse at the new point of diversion, resulting in enlargement and injury concerns. To limit the potential for enlargement when the supply at Jump Creek is better than at the Snake River POD, the right should be conditioned so it can only be diverted when water is available and in priority at the original point of diversion. To limit the potential to injure existing users on Jump Creek, particularly during times when water may be available at the Snake River POD, but not in Jump Creek, the right should be conditioned to prevent the user from calling on existing upstream junior users, beyond what is necessary to make the right available at the original point of diversion.

Enlargement of Use: None anticipated. There is no proposed change to the diversion rate, diversion volume, or number of acres irrigated. The annual volume limit was not expressly defined on the decreed right. But, any approval of this right will ensure that all rights when combined do not provide more than 4.5 afa/acre to irrigate the POU.

In one sense, the use of water is being enlarged above the historical use because the owners have never (since 2-2318A was split from parent right 2-2318) had legal access to the original point of diversion. However, the right has been leased to the water supply bank so it seems that they have protected themselves against the accounting of historical use.

Local Public Interest: There is no anticipated conflict with the local public interest. The application will be advertised to ensure that public concerns are addressed. The Department will also solicit comment from IDFG and the local watermaster.

Beneficial Use/Conservation of Water Resources: The application proposes beneficial use consistent with conservation of water resources in Idaho.

The application is consistent with criteria of I.C. § 42-222 and should be processed.

Discussion

According to WRA Aaron Skinner, who helped fill out the transfer application, the owners of this right do not have access to the original point of diversion, which lies on someone else's property. A condition on the right discusses this issue further stating that the right of access issue was decided in some district court decision. Despite the lack of access Aaron says that the applicants' intent is to add a new point of diversion rather than replace the original. The original POD will be left on the right, but it should remain clear that this right does not grant any right-of-way or access onto anyone else's land.

There is an error in the application with the description of the original POD. The application lists it in Lot 6 (SWNW) while the description on the right and the POD shapefile show it in Lot 6 (NWNW). The applicant correctly identified the government lot number and indicated which

description was meant to be the original POD. Therefore, I have assumed that they meant to put the original POD description as listed on the right and have not required an amendment.

A phone conversation with the applicant on December 6, 2017 confirmed that the applicants are not removing the Snake River point of diversion from the water right through this transfer despite their not having access to it. The reason given was that subsequent owners may provide them access to that point in the future. Condition 004 has been added to the right to make clear that approval of the transfer does not grant access to that property. The existing condition which references the court decision regarding the matter has been retained on the right.

RECEIVED

JAN 05 2018

WATER RESOURCES
WESTERN REGION

2013 FEB -4 A 10:21

FILED

A.M. 9:44 P.M.

JAN 31 2013

Charlotte Sherburn, Clerk
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

WILLIAM WILKERSON,

Plaintiff/Counter-defendant,

vs.

SNAKE RIVER R.V. RESORT, LLC,
RAYMOND C. BARKER, JR., CHARLES
KRITZ, AND DIANE KRITZ,

Defendants/Counter-claimants.

Supreme Court No. 40547

CASE NO CV 2006-5541-M

RULE 54(a), 58(a) FINAL JUDGMENT

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. Plaintiff's Verified Complaint and each claim therein, is hereby dismissed with prejudice;
and
2. Defendants' counterclaim for trespass is hereby dismissed with prejudice; and
3. Defendants' counterclaim for intentional interference with prospective economic advantage
is dismissed without prejudice.

DATED: 1/31/13

Thomas J. Ryan

Thomas J. Ryan
District Judge

RULE 54(a), 58(a) FINAL JUDGMENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Rule 54(a), 58(a) Judgment was served upon the following persons on this 31st day of January, 2013.

Josephine P. Beeman
Jane Newby
BEEMAN & ASSOCIATES, P.C.
409 W. Jefferson Street
Boise, ID 83702

Dana L. Hofstetter
HOFSTETTER LAW OFFICE, LLC
608 West Franklin Street
Boise, Idaho 83702

Debra K. Ellers
ATTORNEY AT LAW
P.O. Box 1030
McCall, Idaho 83638

Stephen W. Kenyon
Idaho Supreme Court Clerk
P.O. Box 83720
Boise, ID 83720-0101

Owyhee County Clerk of the Court

By: *Shirley Ann*
Deputy Clerk



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region • 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

November 20, 2017

WILLIAM WILKERSON And
IMOGENE WILKERSON
2520 S POWERLINE RD
NAMPA ID 83686

RE: Application for Transfer of Water Right No. 2-2318A

Dear Wilkersons,

I am writing you today in regard to the transfer application referenced above. The completed transfer was submitted by you on October 2, 2017. At this time, an initial review of your application is complete. The changes you propose in your application were advertised in the local paper to provide an opportunity for public protest. The protest deadline passed on November 6, 2017 and no protests were received.

My purpose for writing you today is to clarify your intention for the existing point of diversion (from the Snake River) listed on your water right. Conditions of your water right indicate that you may not have access to the Snake River diversion as was determined in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV 2006-05541-M). A review of the conclusions from that case confirms that you are not able to access the Snake River diversion.

Your application as it is, proposes to add a new point of diversion from Jump Creek. The application does not show that you want to remove the Snake River diversion. Is this correct? In general, the water right transfer process is meant to update a water right license to either: 1) more accurately describe the existing use or 2) describe the water right as it will be used following the approval of the transfer. If you do not mean to gain access to the Snake River diversion I would recommend removing it from the license through this transfer process.

In light of the information above the Department is inclined to remove the Snake River diversion from your water right license to reflect the actual use of water according to your water right. However, such a change is not explicitly required by statute or rule. If you intend to keep the Snake River diversion on your license, a condition will be added stating "[t]his right does not grant any right-of-way or easement across the land of another." The current condition identifying the court case referenced above will be updated to reflect the decision reached by the court.

Please contact me if you want to keep the Snake River diversion on your water right license following an approval of this transfer. You may submit written reply to the address listed in the letterhead above, or you may call me at 208-334-2190 or email me at cody.parker.idwr.idaho.gov. **I look forward to your reply within thirty (30) days of the date of this letter.** If I do not hear from you within that time, I will assume that you have no further interest in describing the Snake River diversion as part of your water right, and I will go ahead and remove it. Please let me know if you have any questions regarding the content of this letter. Thank you for your attention to these matters.

Respectfully,

Cody Parker
Water Resource Agent
IDWR Western Region



ATTORNEYS AND COUNSELORS

Hawley Troxell Ennis & Hawley LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617
208.344.6000
www.hawleytroxell.com

DANA L. HOFSTETTER
MAIL: DHOFSTETTER@HAWLEYTROXELL.COM
DIRECT DIAL: 208-388-4867
DIRECT FAX: 208-954-4867

November 16, 2017

VIA U.S. MAIL AND E-MAIL (ANGIE.GRIMM@IDWR.IDAHO.GOV)

Angela Grimm
Idaho Department of Water Resources
2735 Airport Way
Boise, Idaho 83705-5082

Re: *Transfer No. 81936 – Water Right No. 2-2318A*

Dear Ms. Grimm:

On behalf of Snake River R.V. Resort, LLC and its principals, Diane and Charles J. Kritz, Jr. and Raymond C. Barker, Jr. (hereinafter collectively “the Kritzes”), I hereby submit the following comments on Transfer Application No. 81936 regarding Water Right No. 2-2318A. The Kritzes are the owners of Water Right No. 2-2318B and the associated place of use.

In 2006, the Applicant for Transfer No. 81936, William R. Wilkerson, Sr., filed a lawsuit in Owyhee County District Court claiming an easement across the Kritzes’ property for access to the Snake River to divert Water Right No. 2-2318A. That easement case remained pending in 2011, when the SRBA Court issued the Partial Decree for Water Right No. 2-2318A. As a result, the final October 31, 2011, SRBA Partial Decree for Water Right No. 2-2318A (copy enclosed) included the following provision:

This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. Al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding.

RECEIVED
NOV 20 2017
WATER RESOURCES
WESTERN REGION

Transfer No. 81936 – Water Right No. 2-2318A

November 16, 2017

Page 2

The subsequent April 10, 2012, decision in the Owyhee County easement case (copy enclosed), ultimately found that Wilkerson had no easement across the Kritzes' property to access the Snake River. Accordingly, the Kritzes have no opposition to Transfer No. 81936 being approved with a single point of diversion from Jump Creek, as long as Wilkerson's point of diversion on Jump Creek, including associated equipment and utility service and access thereto, is located solely on Wilkerson's property. However, as the Owyhee County case determined, the Applicant has no easement to access the Snake River for diversion of 2-2318A and, accordingly, any Transfer Approval should not include a Snake River point of diversion.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me if you have any questions or need further information about these comments.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP



Dana L. Hofstetter

Enclosures

DH:tas

FILED

A.M. 1:50 P.M.

APR 10 2012

Charlotte Sherburn, Clerk
Dana (mar)
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

WILLIAM WILKERSON, an individual,	)	
	)	
Plaintiff,	)	CASE NO. CV 2006-05541-M
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
SNAKE RIVER R.V. RESORT, LLC,	)	
RAYMOND C. BARKER, JR.,	)	
CHARLES KRITZ, AND	)	
DIANE B. KRITZ	)	
	)	
	)	
Defendants.	)	
	)	

The trial of this matter was heard by the Court without a jury on February 1 through February 3, 2012, and then continued on to February 8, 2012. Appearing on behalf of the Plaintiff, William Wilkerson, was Josephine P. Beeman and Jane M. Newby of Beeman & Associates, P.C. Appearing on behalf of the Defendants, Snake River R.V. Resort, LLC, et al., was Dana L. Hofstetter and Debra K. Ellers, attorneys at law. Subsequent to the Court Trial, counsel filed their written closing arguments and proposed findings of facts and conclusions of law and the matter was finally submitted to this Court on March 6, 2012. The Court has considered the evidence produced at trial, together with the applicable law, and hereby finds as follows:

FINDINGS OF FACT

1. From the early 1960's until 1991, the real property of the Plaintiff and the real property of Defendants was contiguously owned by James and Peggy Jackson as one 50 acre parcel of land.
2. This property had a railroad right of way that ran through it, with 13 acres located to the south and 37 acres to the north. Ultimately, it was split and the Defendants now own the northernmost 37 acres and the Plaintiff owns the southernmost 13 acres.
3. In the late 1960s or early 1970s, the Jacksons ran an irrigation conduit from the Snake River under the old railroad right of way to the 13 acre parcel of land. James Jackson continued to irrigate the 13 acre parcel until approximately 1982. From 1982 to 1991, the water delivery system to the 13 acre parcel was not used. It apparently was used between 1991 and 1996 and has been continuously dormant since that time.
4. In 1972, the Idaho Department of Water Resources issued the Jacksons water right 02-2318 for the 50 acres. Water right 02-2318 has been apportioned into 02-2318A and 02-2318B, with the A portion for the 13 acre parcel and the B portion for the 37 acre parcel. The final decree from the SRBA was just issued on October 31, 2011, Case No. 39576.
5. The Jacksons ultimately developed an RV park on the 37 acres which they continued to irrigate.
6. In 1991, the Jacksons sold the 13 acre parcel to the Wittrocks. In the sale agreement, the Wittrocks could use the irrigation conduit for a three year period after which time the use was to terminate. Mrs. Jackson stated at trial that it was specifically her husband's intention not to grant an easement for the conduit to the 13 acre parcel as he felt it would devalue the 37 acre parcel that they retained at the time.
7. In 1992, the Jacksons sold the 37 acre parcel to the Harlans.
8. Both parcels have subsequently been transferred multiple times.
9. Lonnie Mashburn owned the 13 acre parcel from approximately 1994 to 1996. During that time he irrigated the parcel using the Snake River point of diversion. Mashburn simply installed his own pump on the pumping platform on the Snake River, hooked up to

the electricity¹ of Defendants' predecessor in interest (Bromley) and proceeded to irrigate the 13 acre parcel over the next several years until the pump stand fell into the river sometime in 1995. Thereafter, Bromley refused access to Mashburn. Mashburn never took any action to gain access. Ultimately, he quitclaimed his legal interest in the property to his ex-wife.

10. Defendants own and manage the 37 acre parcel of land as a mobile home and recreational vehicle park.
11. Defendants' property is bordered by the Snake River along its north boundary.
12. Plaintiff William Wilkerson bought the 13 acre parcel of land in 1998. At the time of his purchase he did not make a personal visit or inspection of the property. It was not until after he purchased the property that he learned of the existence of the underground conduit from a prior owner.
13. Plaintiff's property (the 13 acre parcel) has no frontage on the Snake River.
14. There is a missing survey stake at the southeast corner of Wilkerson's property which is the closest proximity to Jump Creek. By making measurements based upon the existing survey stakes, Engineer Terry Scanlin concluded that there was a distance of approximately 2.8 feet from Jump Creek to the boundary of Wilkerson's property. No evidence was produced by the Plaintiff to indicate who might own those 2.8 feet between Jump Creek and the Wilkerson property.
15. The only evidence produced regarding ownership of the 2.8 foot strip came from Defendant Diane Krist. She stated that she had always assumed that Wilkerson's property did border upon Jump Creek.² Her testimony to this Court concluded that if there was such a gap between Wilkerson's property and Jump Creek than it was the Defendants' property that bordered on Jump Creek at that point and that the Defendants would stipulate to granting an easement to Wilkerson at the Jump Creek location.
16. In early 2006, Wilkerson brought in a tanker truck of water to run water through the conduit to his ditches to see if it would work, which it did. No other evidence was introduced to support a claim that the conduit is in good repair and capable of being used today.

¹ Mashburn testified that he had an agreement with Bromley to reimburse for one-half of the monthly electric bill.

² Indeed, throughout the arguments in the motions for cross summary judgment filed in 2007, Wilkerson took the position that his property did border upon Jump Creek.

17. In 2007, Wilkerson hired Agri-Lines to determine what type of pump he needed to pump enough water from the Snake River to irrigate his 13 acre parcel. Agri-Lines recommended a specific pump which Wilkerson purchased and had them begin installing it at the Snake River diversion; however, the Defendants refused Wilkerson entry upon the property to complete the project.
18. Beginning in 1999, Wilkerson, after learning of the existence of the water delivery from a previous owner, claims to have gone to the Snake River RV office each spring to declare his right to irrigate water from the point of diversion on the Snake River platform, only to be turned away by the then owner.
19. Gem Irrigation is the entity that controls the water in Jump Creek. Ron Kiester is the Manager of Gem Irrigation District. He testified that the quantity and quality of water in Jump Creek is inconsistent. He also confirmed that during the middle to late summer, Jump Creek can become 80 – 90 % contaminated with silt and that its supply of water to those who hold water rights is sometimes “trimmed back” in the later months of summer so they can make it through the irrigation season.
20. Steve Nash irrigates a 30 acre parcel about a quarter mile upstream from Wilkerson’s 13 acre parcel. He rents the property from Ron Cammack who possesses a water right out of Jump Creek. Nash uses a double pump system whereby one pump filters the water and pumps to the second pump which puts water and pressure to the pivot line for watering this 30 acre parcel. Agri-Lines originally designed the system.
21. Nash testified that he has no unusual silt problems and finds the water to be satisfactory for the full range of crops he grows thereon. He asserts he has made a profit from his crops every year. Finally, he says he has never encountered a shortage of water quantity. His season of water use runs from April to October. He has grown alfalfa hay on this parcel in the past and estimates a yield of 5 – 6 tons per acre per season.
22. The Defendants retained an expert to review possible alternatives for Wilkerson. That expert is Norman C. Young of ERO Resources in Boise, Idaho. Young has a Bachelor of Science degree in Agricultural Engineering and over 40 years of experience in water resource management. He spent 33 years with the Department of Water Resources, State of Idaho. Among his expertise are water right applications, transfers and exchanges. He conducted

several visits to the property and ultimately concluded that there are four alternatives that could be implemented to provide Plaintiff Wilkerson with the irrigation water he seeks.

23. Exhibit 49 of the Defendants illustrates the location of each of those alternatives. They include:

- A. Water from the original point of diversion on the Snake River, the "Snake River Pump Station."
- B. Water from a point of diversion on the Snake River at the junction of the Defendants' property and the Filler King property (or the Boise Cascade property), the "Beam Plant Alt."
- C. Water from a point of diversion from Jump Creek where it flows nearest to the Wilkerson property, the "Jump Creek Pump Station."
- D. Water from a proposed well to be drilled upon Wilkerson's property, the "Proposed Well."

24. For each of these options, Mr. Young assumed in each instance that water would be conveyed from the respective source to the head of the 13 Acre Parcel's concrete ditch which was marked by Mr. Young on Exhibit 49.

25. Plaintiff's proposed easement from the Snake River across the Riverfront Parcel to the head of the concrete ditch on the 13 Acre Parcel entails utilization of the Plaintiff's new pump with pipelines extending from the vicinity of the Snake River R.V. platform on the Snake River, then underground to the inverted siphons at the old railroad right of way.

26. While the precise location of any existing buried pipeline is not known, a logical path for the buried pipeline across the Riverfront Parcel extends from the vicinity of the pumping platform to the inverted siphons.

27. A 30 foot wide easement would be necessary for access and maintenance of the underground pipeline to allow operation of equipment, such as a backhoe.

28. This information about easement size and location was the same information that was provided to the appraiser, Brad Janoush, and used in his appraisal report.

29. As both Mr. Young and Mr. Lester testified, the Plaintiff's proposed approach across the Riverfront Parcel would require an Idaho Department of Water Resources transfer approval for installation of a second point of diversion at the Snake River.

30. Mr. Brad Janoush, a licensed real estate appraiser in Idaho, conducted an appraisal of Plaintiff's proposed easement from the Snake River across the Riverfront Parcel. Utilizing the standard sales comparison and income capitalization approaches, with greater weight to the income capitalization approach, and determining that two mobile home spaces and three R.V. spaces on the Riverfront Parcel would be affected and that the remainder of the Park would be affected 5% overall, he calculated that the value of the easement sought by Plaintiff would be \$25,220.³
31. In addition to costs incurred for the easement and permits associated with Plaintiff's preferred approach, electrical station improvements, pumping station costs for a separate fixed concrete base for Plaintiff's pump and for the intake line with a check valve would also be incurred. The condition of the existing conduit is unknown. In the event it needs to be replaced, there would be additional costs to install approximately 530 linear feet of PVC pipe from the pumping station to the 13 Acre Parcel along with associated fittings and valves.
32. One alternative point of diversion considered was on the Snake River downstream on the Filler King industrial property.
33. There is an open area along the property boundary between the Riverfront Parcel and the Filler King property through which a pipeline could be installed at the Snake River on the Filler King property.
34. Costs for this approach would include a State easement for a pumping station in the Snake River along with an IDWR transfer application to add a second point of diversion and a survey to locate and document the easement.
35. There would also be costs associated with the Filler King easement and an easement across the Snake River R.V. access road to the 13 Acres Parcel for a buried pipeline and while these easement costs are unknown, they likely would be significantly less than the easement across the Riverfront Parcel because of limited impacts to the Filler King and Snake River R.V. properties.

³ This Court previously ruled that the issue of costs associated with an easement would be bifurcated in this trial. Specifically, the Court ruled that if an easement was found to exist, then the Court would consider evidence of the cost of such an easement related to Defendants' right to condemnation. In this opinion, any reference to costs associated with an easement merely serves illustrative purpose. This Court does not consider the costs of an easement in reaching its determination.

36. Additional costs include electrical supply and electrical station improvements, a pumping station, consisting of a fenced concrete pad, intake line and self-cleaning intake screen, and the cost of installing approximately 600 linear feet of buried PVC pipeline from the pump to the 13 Acre Parcel along with fittings and valves.
37. The Jump Creek alternative evaluated involves placement of a pump on the northeast corner of the 13 Acre Parcel with a "snorkel" extending a few feet across the Riverfront Parcel property boundary into Jump Creek. A diversion system similar to that utilized successfully by Mr. Nash could be installed for the 13 Acre Parcel. At trial, Defendants stipulated and agreed that they would grant any easement necessary to access Jump Creek, at no cost to Plaintiff.
38. The water would be piped from Jump Creek via buried pipeline located entirely on the 13 Acre Parcel to the head of the concrete ditch.
39. Costs in developing the Jump Creek alternative would include either an IDWR transfer or exchange approval pursuant to Idaho Code §§ 42-222 or 42-240.
40. Additional costs include the electrical supply and electrical station, installation of a pumping station, similar to the one utilized by Mr. Nash with a bubbler filter and a snorkel hose extending to Jump Creek, and installation of approximately 1,700 linear feet of buried PVC pipeline from Jump Creek to the head of the concrete ditch on the 13 Acre Parcel with necessary fittings and valves.
41. Utilizing Agri-Line's Jump Creek estimate and adjusting it to account for a smaller pipeline for diversion of Plaintiff's Water Right No. 2-2318A which amounts to 0.27 cubic feet per second ("cfs") or about 120 gallons per minute ("gpm"), implementation of the Jump Creek alternative would be about \$23,245. There would be no cost incurred for an easement using this alternative.

PROCEDURAL BACKGROUND

Originally, the Plaintiff brought this lawsuit seeking quiet title to what he claimed is an easement right over the property of the Defendants. The easement he sought was to be able to use a water delivery system from a point of diversion from the Snake River through a conduit buried on the Defendants' property to a concrete ditch that existed upon his property. Wilkerson did not have an express easement in his deed. He claimed the right of easement upon three legal theories:

- do not
decide
- (1) Implied easement by prior use;
 - (2) Easement by prescription; and
 - (3) Easement by statute (I.C. § 42-1102).

Previously, this Court addressed the issues of implied easement by prior use and easement by prescription. As to those theories, the Court granted summary judgment in favor of the Defendants in its Memorandum Decision filed in October, 2007 followed up by its decision upon Plaintiff's motion for reconsideration filed in December, 2007. Thereafter, this case remained inactive while the parties litigated the issue of a water right determination before the Snake River Adjudication in the District Court of the Fifth Judicial District, State of Idaho.

In its Amended Memorandum Decision and Order on Challenge and Order of Partial Decree filed October 31, 2011, the SRBA court declared that Wilkerson possessed a valid water right at the point of diversion in the Snake River which is at the heart of the dispute in this case. In so doing, the SRBA court found that the "following remark is necessary for future efficient administration of the right:"

This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et al*, Third Judicial District, Owyhee County (Case No. CV 06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding.

Despite this finding, Wilkerson has continued to assert that the declaration of the water right to him is dispositive of this case. This Court disagreed and this matter came on for trial upon the sole issue of whether the Plaintiff has a statutory right of easement pursuant to I.C. § 42-1102.

CONCLUSIONS OF LAW

I.C. § 42-1102. Owners of land – Right to right-of-way. -

When any such owners or claimants to land have **not sufficient length of frontage on a stream to afford the requisite fall** for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, **or** where the **land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had**, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation. The right-of-way shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. Provided, that in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interests of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and are liable to the owners or claimants of the lands crossed by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted in this section.

This section shall apply to ditches, canal or other conduits existing on the effective date [March 12, 1996] of this act, as well as to ditches, canals or other conduits constructed after such effective date. **Emphasis added.**

Thus, at the Court Trial the Plaintiff had the burden to prove by a preponderance of evidence:

1. that he does not have sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit;

OR,

2. that the land that he proposes to irrigate is back from the banks of such stream, and convenient facilities otherwise for the watering of said land cannot be had.

FINALLY,

3. The existence of a visible ditch, canal or other conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has a right-of-way.

ANALYSIS

Notice of Right-of-Way

Idaho Code § 42-1102, was enacted in 1881 and has remained fundamentally unchanged over 130 years later. Idaho Code § 42-1102 historically has provided a way to obtain an easement or a right of way across the lands of others to obtain irrigation water.

Amendments in 1996 to I.C. § 42-1102 included adding clarification about the scope of a I.C. § 42-1102 right-of-way and adding two final paragraphs concerning constructive notice of the existence of such right-of-ways, but did not change the essence of the statute. The pertinent "notice" language is as follows:

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

Available legislative history for these 1996 amendments establishes that irrigation delivery entities sought these amendments because many historic valid easements that remain in use today and require on-going maintenance are undocumented and that with urbanization and people moving in from outside, the newcomers do not understand that canal and ditch companies need access to their canals, ditches and conduits to maintain their waterways. *1996, Idaho Legislative Statement of Purpose, RS 06033 (S.B. 1476); Minutes, Idaho House Resources and Conservation Committee, February 29, 1996, Re: Senate Bill 1476, at p. 2; Minutes, Idaho*

Senate Resources and Environment Committee, February 16, 1996, Re: Senate Bill 1476, at p. 1. Thus, these 1996 amendments did not alter the way that Idaho Code § 42-1102 easements are established in the first place. A visible ditch, conduit, or canal is not sufficient alone to create a I.C. § 42-1102 easement where the evidence proves that no easement was previously established pursuant to I.C. § 42-1102 or otherwise. This language expressly concerns only “notice” of the possibility of such an easement; the language of I.C. § 42-1102 does not create an easement where none previously was established.

No easement existed prior to 1991, because the Property was owned by a single owner, the Jacksons. Mrs. Jackson testified that they did not grant an easement when the property was split in 1991, because they were developing on the Riverfront Parcel, and they thought that an easement would devalue the 37 acre parcel. Thus, there was no I.C. § 42-1102 easement created in 1991 and the notice language added in 1996 does not create an easement pursuant to this statute where one previously did not exist.

The Court finds that even if the notice provisions of I.C. § 42-1102 were construed not just to provide notice of a possible easement, but also to establish an easement, under the facts of this case, no such easement would have been established. The operative notice involves a “visible ditch, canal or conduit.” Plaintiff alleges that at various times during the 1990s and earlier, there were 2 pumps on the Snake River platform. However, the statute does not reference a pump as creating notice, only a “visible ditch, canal or conduit.” Also, at the time Defendants’ purchased the Riverfront Parcel in 2003, the evidence establishes there was only one pump on the platform and Plaintiff did not install his new pump on the platform until 2006 or later. In any event, the only conduit which could evidence the easement was buried and therefore not “visible” as required by the statute. It is important to note that Wilkerson admitted that he was unaware of the existence of the conduit at the time he purchased the 13 acre parcel and only learned of its existence subsequently through conversations with a prior owner.

Sufficient Length of Frontage on a Stream

It has been argued throughout this case by the Defendants that Wilkerson has sufficient length of frontage on a stream which negates his ability to utilize I.C. § 42-1102 as an argument for an easement to the Snake River. Specifically, that the Wilkerson 13 acre parcel borders Jump Creek (a tributary to the Snake River) and that the stream could be utilized for irrigation. Indeed, Doug

Larzlier, a son of the Jacksons, testified that his brother irrigated a hay crop on the 13 acre parcel in the late 1980's using a generator and pump to get water from Jump Creek.

Wilkerson has maintained throughout this lawsuit that utilizing Jump Creek was not convenient. Specifically, that the installation of a pumping station on Jump Creek was too expensive, that the water quality was unsatisfactory because of mud and silt, and that water quantity cannot always be guaranteed.

Furthermore, Wilkerson did not dispute that his property bordered Jump Creek until the trial. Through witnesses Terry Scanlin and Steve Wellington, Wilkerson provided evidence that his property may not actually border on Jump Creek. According to Scanlin's measurements, Jump Creek comes within 2.8 feet of the Wilkerson property at its closest point.⁴ Nevertheless, Defendants pointed out that if Scanlin's conclusions are true, then it is the Defendants' property that borders Jump Creek and they are willing to grant an easement to Wilkerson to accommodate irrigation facilities thereon.

Therefore, it is this Court's conclusion that the Wilkerson property does have sufficient frontage on a stream as that language is used in I.C. § 42-1102.

Is the acreage to be irrigated so far back from the Jump Creek frontage that convenient facilities cannot be had?

Plaintiff has consistently taken the position that it is not convenient to pump water from Jump Creek because its flow is inconsistent, it becomes muddy and full of silt in the late summer, and pumping from Jump Creek would require pumping the water a distance of approximately 1700 feet as opposed to the relatively easy 300 to 400 feet (from the Snake River). Furthermore, the pump stand and electrical power are already in place at the Snake River point of diversion.

Norm Young is an expert witness who testified on behalf of the Defendants. He has over 40 years of experience in water resource management, including 33 years with the Idaho Department of Water Resources. He conducted several visits to the property and ultimately concluded that there are four alternatives that could be implemented to provide Wilkerson with adequate irrigation water for his 13 acre parcel. Young analyzed the costs estimated to be associated with each one of these proposals and found much of costs were common to each alternative such as electrical hookup and

⁴ It should be remembered that Plaintiff's counsel did not retain these expert witnesses until after the discovery cutoff and the time for naming experts. Despite Defendants' objection and request to exclude their testimony, the Court did allow their testimony at trial but is mindful that the Defendants never had a reasonable opportunity to develop rebuttal to this evidence.

supply, pipeline, and pumping costs. Only one proposal, pumping water from Jump Creek did not entail cost for an easement. The Court briefly summarizes three of the alternatives as follows:

The Snake River Pump Station

Young testified that because of the vertical distance from the Snake River to Plaintiff's property the 13 acre parcel could not be irrigated by gravity; a pump would be required to deliver water. The vertical lift from Jump Creek to the head of the Wilkerson ditch is less than the vertical lift from the Snake River Pump Station on the Snake River. Young summarized Plaintiff's proposal is to pump water near the pump platform on the Snake River with a buried pipeline and come across the RV resort to the head of the concrete ditch. This would require a pump, electrical power, the use of the inverted siphons (weirs), and a pipeline. Young estimated that an approximately 30 foot wide by 500 foot easement (.33 acres) would be necessary to maintain the pipeline. For this proposal Young estimated the costs to include: 1) getting access and permits (an easement), 2) electrical supply, 3) the electrical station itself, the power meter, 4) the pumping station itself, and 5) the pipeline conveying water from the pumping station.

Beam Plant Alternative

The Beam Plant Alternative would include the same five above-mentioned costs and would essentially require moving the Snake River Pump Station downstream a few hundred feet and going along the boundary line of the Filler King property. In addition, there would be the cost of an easement which was not established by the evidence.

Jump Creek Pump Station

Again, this proposal would use the same five categories referenced above. The total cost for this option was estimated at \$23,245⁵, with no cost for an easement.⁶ This option would require an IDWR transfer or exchange approval to transfer the water right from the Snake River point of diversion to Jump Creek. Young's opinion was that IDWR would likely approve such a transfer.

The mere fact that one owns a water right does not vest in the owner thereof the right to enter the lands of another for the purpose of maintaining the flow of water. *Branson v. Miracle*, 107 Idaho 221, 227, 684 P. 2d 1348 (1984) (*reh. den.*) (*citations omitted*) ("*Branson I*").

⁵ This is consistent with the testimony of Plaintiff's witness Daniel Sevy who testified that he could set up a pumping station from Jump Creek for approximately \$20,000.00.

⁶ The Defendants stated at trial that they were willing to grant an easement over their property to Jump Creek in favor of Wilkerson.

Idaho Code § 42-222 allows Plaintiff to change the point of diversion of his decreed water right:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Idaho Code § 42-222 (emphases added). Also, Idaho law provides for water right exchanges whereby a water right may be relocated to a different surface water source, such as Jump Creek. *See Idaho Code § 42-240.*

Additionally, the Court found that the fact that Steve Nash was successfully pumping water from Jump Creek just one-quarter mile upstream from the Wilkerson property was compelling. Nash's testimony eviscerated any notion that the quality and quantity of the water in Jump Creek was not sufficient for irrigation purposes.

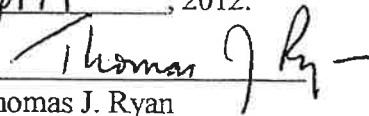
Ultimately, Young concludes that Jump Creek is a reasonable alternative to the Snake River Pump Station proposed easement.

Conclusion

The testimony of Norm Young and Steve Nash established that Jump Creek presents a "convenient" option for irrigation of Plaintiff's land. Also, Mr. Young's testimony established that there are other options available to Plaintiff that constitute convenient alternatives to utilizing the Plaintiff's proposed location on the Snake River. In view of these other available convenient alternatives to the proposed easement across Defendants' land, Plaintiff Wilkerson has failed to prove by a preponderance of the evidence that he has a right to a statutory easement across the property of Defendants under I.C. § 42-1102.

THEREFORE, Defendants' counsel is directed to prepare a Final Judgment consistent with this Memorandum of Findings of Fact and Conclusions of Law and in accordance with Idaho Rule of Civil Procedure 54.

Dated this 10th day of April, 2012.


Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

Josephine P. Beeman
Jane M. Newby
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702

Dana L. Hofstetter
Hofstetter Law Office, LLC
608 West Franklin Street
Boise, ID 83702

Debra K. Ellers
Attorney at Law
P.O. Box 1030
McCall, ID 83638

4/10/12
Date

Shirley Aman
Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 02-02318A

Fifth Judicial District
of Twin Falls - State of Idaho

OCT 31 2011

By

Clerk

Deputy Clerk

NAME AND ADDRESS:

IMOGENE E WILKERSON
WILLIAM R. WILKERSON SR
2520 S POWERLINE RD
NAMPA, ID 83686

SOURCE:

SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY:

0.27 CFS

PRIORITY DATE:

06/05/1964

POINT OF DIVERSION:

T03N R05W S14 LOT 6 (NWNW) Within Owyhee County

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE
Irrigation

PERIOD OF USE
03-15 TO 11-15

QUANTITY
0.27 CFS

The use of water for irrigation under this right may begin as early as March 1 provided other elements of the right are not exceeded. The use of water before March 15 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE:

Irrigation

Within Owyhee County

T03N R05W S14 LOT 6 (SWNW) 4.3 LOT 5 (SENW) 9.0
13.3 Acres Total

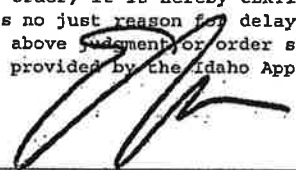
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in Wilkerson v. Snake River R.V. Resort, et. al., Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

The Owyhee Avalanche

P.O. Box 97 • HOMEDALE, ID 83628 • 208/337-4681

AFFIDAVIT OF PUBLICATION

RECEIVED

OCT 30 2017

WATER RESOURCES
WESTERN REGION

STATE OF IDAHO)
) ss
COUNTY OF OWYHEE)

I, Robert E. Aman, being first duly sworn, depose and say:

1. That I am a citizen of the United States of America, and at all times hereinafter mentioned was and now over the age of twenty-one years, not a party to nor interested in the proceedings hereinafter mentioned.

2. That during the time of publication of the notice hereinafter mentioned, I was and now am the president of The Owyhee Avalanche, a newspaper of general circulation printed and published weekly, on Wednesday of each and every week, in the City of Homedale, County of Owyhee and State of Idaho.

3. That the said The Owyhee Avalanche has been printed and published continuously and uninterruptedly in said County during a period of more than seventy-eight weeks prior to the first publication of the attached notice.

4. That said notice of which a printed copy, taken from said newspaper, is hereto affixed, was published in the regular issue thereof, and not a supplement thereto, in said newspaper, in TWO (2)
(consecutive) calendar weekly issue(s) of said newspaper, in the following date(s):

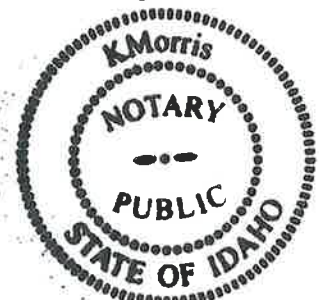
OCTOBER 18, 25 2017

SIGNED: *Robert E. Aman*

STATE OF IDAHO }
COUNTY OF OWYHEE }

On this 25th day of October in the year of 2017 before me, a

Notary Public, personally appeared ROBERT E. AMAN
known or identified to me to be the person whose name subscribed to the within instrument, and being by me duly sworn, declared that the statements therein are true, and acknowledged to me that he executed the same.



K. Morris

Notary Public of Idaho

Residing at WILDER, IDAHO

My commission expires: August 18, 2023

THE FOLLOWING
APPLICATION HAS BEEN
FILED TO APPROPRIATE
THE PUBLIC WATERS OF
THE STATE OF IDAHO:

NOTICE OF PROPOSED
CHANGE OF WATER
RIGHT

TRANSFER NO. 81936
WILLIAM R WILKERSON
SR, 2520 S POWERLINE
RD, NAMPA, ID 83686; has
filed Application No. 81936
for changes to the following
water rights within OWYHEE
County(s): Right No(s). 2-2318A.
The purpose of the transfer is to
add a point of diversion to water
right no. 2-2318A. The original
point of diversion diverts water
from the Snake River, and the
point to be added diverts water
from Jump Creek, an upstream
tributary of the Snake River.
Water will continue to be used at
the current place of use southeast
of the intersection of River Resort
Dr. and N Jump Creek Rd.,
approximately 2.0 miles southeast
of Homedale, Idaho.

For additional information
concerning the property location,
contact Western Region office
at (208) 334-2190; or for a full
description of the right(s) or
proposed transfer(s), please see
www.idwr.idaho.gov. Protests
may be submitted based on the
criteria of Idaho Code § 42-222.
Any protest against the proposed
change(s) must be filed with
the Director, Dept. of Water
Resources, Western Region, 2735
Airport Way, Boise, ID 83705
together with a protest fee of
\$25.00 for each application on or
before 11/6/2017. The protestant
must also send a copy of the
protest to the applicant.

GARY SPACKMAN, Director
10/18,25/2017

11/17/17