

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

2015

**IN THE MATTER OF APPLICATION)
FOR TEMPORARY CHANGE OF)
WATER RIGHT NOS.: 34-2386)**

**ORDER AUTHORIZING
TEMPORARY CHANGE**

TC-34-143

WHEREAS, a drought emergency has been declared for Butte County to allow administrative actions to lessen the severe impacts of the drought conditions in the county; and

WHEREAS, section 42-222A, Idaho Code, provides that upon declaration of a drought emergency, the director of the Department of Water Resources ("Department") is authorized to allow temporary changes in the point of diversion, the place of use, and the purposes of use for valid existing water rights or temporary exchanges of water authorized under water rights when the director determines that such changes can be accomplished in accordance with the provisions of section 42-222A, Idaho Code; and

WHEREAS, on May 14, 2015, Jay and De Ann Jensen submitted the attached temporary change application TC-34-143 to the Department; and

WHEREAS, the Department has reviewed the application and has determined the application can be approved with certain conditions;

ORDER

IT IS HEREBY ORDERED that the application is APPROVED subject to the following conditions:

- 1. Diversion and use of the changed portion of right 34-2386 is authorized only at the point of diversion and place of use described on the application.**
- 2. This temporary change approval does not authorize construction of a new well as a point of diversion.**
- 3. The applicant assumes all risk of curtailment or mitigation should the diversion and use of water under the temporary change approval cause injury to other water rights, constitute an enlargement in use of the original right, be inconsistent with the conservation of water resources within the state of Idaho, or not be in the local public interest.**
- 4. This temporary change approval may only be used to provide a replacement water supply to lands or other uses that normally have a full water supply, except for the drought conditions. This temporary change approval may not be used to provide water for new development or to allow expansion of the use of water under existing water rights.**

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5. Rights 34-264, 34-265, 34-434, and 34-2386 when combined shall not exceed a total diversion rate of 3.81 cfs and the irrigation of 150 acres.
6. This temporary approval does not authorize the use of diversion works or a delivery system owned by or managed by a corporation or an irrigation district without the written consent of such corporation or irrigation district.
7. The applicants agree to hold the director and the state of Idaho harmless from all liability on account of the diversion and use of water under this temporary change approval.
8. This temporary change does not grant any right-of-way or easement to use the diversion works or conveyance works of another person or entity.
9. The Watermaster of Water District No. 34 is authorized to administer the temporary change approval.
10. This temporary change approval expires on October 31, 2015 unless rescinded or extended by the director. Thereafter, the water right shall revert to the point of diversion, place of use, and nature of use existing prior to the temporary change approval.

DATED this 15th day of May, 2015.



Lyle Swank
Eastern Regional Manager

TC-34-143

RECEIVED

MAY 14 2015

Department of Water Resources
Eastern Region

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TEMPORARY CHANGE APPLICATION

(To change point of diversion, place of use, or purpose of use of a water right upon declaration of a drought emergency in accordance with Section 42-222A, Idaho Code.)

Name of Applicant Jay and De Ann Jensen Phone _____

Mailing Address 3165 W 3300 N, Moore ID 83255 Email _____

A. PURPOSE OF TRANSFER

- ☒ Change point of diversion ☐ Add diversion point(s) ☒ Change place of use
☐ Change purpose of use ☐ Other
- Describe the proposed change(s) and explain the reason(s) they are needed. The Applicant has entered into an agreement with Marilyn Lambert to utilize her ground water rights as needed. This application proposes to move a portion of Water Right No. 34-2386 to the place of use of Water Right No. 34-690B as a supplement to that surface water right. The proposed point of diversion is a well owned by Jay Jensen's parents. He has an oral agreement with them to utilize the well.

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 |
|--------------|------------|-----------------------|---------------|----------------|
| 34-2386 | 09/09/1960 | 1.53 cfs | Irrigation | 04/01 to 10/31 |
| _____ | _____ | _____ | _____ | _____ to _____ |
| _____ | _____ | _____ | _____ | _____ to _____ |
| _____ | _____ | _____ | _____ | _____ to _____ |
- Total amount of water being transferred 1.53 cubic feet per second and/or _____ acre-feet per annum.
- Source of water Ground water tributary to _____.
- Point(s) of diversion:

Twp	Rge	Sec	Govt Lot	1/4	1/4	1/4	County	Source	Local name or tag number
04N	26E	04		NW	NW	SE	Butte	Ground water	

- Lands irrigated or place of use:

Twp	Rge	Sec	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Acre Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
04N	26E	09													36	9.2	6.5	25	76.7

Total Acres 76.7

6. General Information:

- a. Who owns the water right to be changed? Marilyn Lambert
- b. Describe the arrangement allowing use of the right. The Applicants have entered into an agreement to utilize the water right.
- c. Describe the affect on the land now irrigated if the change is approved pursuant to this application:
The land will not be irrigated.
- d. Has the water right sought to be transferred been used this year? ☐ Yes ☒ No If yes, explain. _____
- e. Absent the changes, how would the right be used for the remainder of the year? It would be used at its current place of use.
- f. Describe other water rights used for the same purpose. _____
- g. Remarks: _____

I hereby assume all risk in accordance with Section 42-222A, Idaho Code, and 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.


Signature of Applicant

5/11/2015
Date

FOR DEPARTMENT USE ONLY

Received by sc Date 5/14/15 \$50 fee received by sc Receipt No. ED41025
Recommend: ☐ approve ☐ deny Watermaster recommendation _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Temporary Change Application No. TC-34-143, and said application is hereby _____, subject to the following limitations and conditions:

Temporary Change Expiration Date _____

Signed this _____ day of _____, _____.

For the Director

WATER RIGHT, WELL, & EASEMENT AGREEMENT

THIS WATER RIGHT, WELL, & EASEMENT AGREEMENT (this "Agreement") is made and entered into this 17 day of September, 2014 (the "Effective Date"), by and between MARILYN MOWREY LAMBERT, whose address is 2524 N. 3300 W., Arco, Idaho 83213 (hereinafter "Lambert"), and JAY AND DEANN JENSEN, husband and wife, whose address is 3320 W. 2800 N., Moore, Idaho 83255 (hereinafter "Jensens"). Lambert and Jensens are individually a "Party" and together the "Parties".

RECITALS:

A. Lambert is the owner of certain real property located approximately two and half (2.5) miles northwest of Arco, Idaho (the "Lambert Property").

B. Water Right Nos. 34-2386 and 34-7233, both ground water rights, (the "Water Rights") are appurtenant to the Lambert Property. The Water Rights were decreed on December 14, 2001 in the Snake River Basin Adjudication by the District Court for the Fifth Judicial District of the State of Idaho. The Water Rights are more fully described in the reports obtained from the Idaho Department of Water Resources ("Department" or "IDWR") attached hereto as **Exhibit 1**.

C. A well located in the NW1/4NW1/4NW1/4, of Sec. 26, 04N, 26E serves as the authorized point of diversion for the Water Rights. Another well located in the SE1/4NW1/4NW1/4, of Sec. 26, 04N, 26E serves as an additional authorized point of diversion for Water Right No. 34-7233.

D. The wells described in paragraph C above (the "Wells") have fallen into a state of disrepair and as a result, are unable to produce the water necessary for the Water Rights. Lambert has no desire to replace the Wells or to utilize the Water Rights. Instead, Lambert desires to obtain additional surface water for the irrigation of the Lambert Property.

E. Jensens farm land to the north and south of the Lambert Property for which they desire to obtain additional ground water rights.

F. Jensens are entitled to ten thousand (10,000) inches¹ of storage water from Mackay Reservoir through their membership in the Big Lost River Irrigation District, each year.

G. Lambert desires to convey the Water Rights to Jensens in exchange for [REDACTED] inches of their storage water described above in paragraph F.

¹ This unit of measurement is used locally in the Big Lost River Valley and it is understood that 50 inches of water equals 2 acre-feet of water. Thus, Jensens' 10,000 inches equals 200 acre-feet of water at the reservoir. After water is released from the Mackay reservoir there are conveyance losses in the system resulting in the loss of sometimes significant amounts of water before it reaches the field headgate. As a result, 10,000 inches of water in the reservoir does not equal 10,000 inches of water at the field. Furthermore, the availability of all 10,000 inches is dependent on water supplies each year, and it is understood that in dry years, not all 10,000 inches of water will be available. For example, if the reservoir only fills to 80% of capacity, Jensens are entitled to 80% of 10,000 inches, or 8,000 inches.

H. Jensens desire to drill a new well (the "Replacement Well") to replace the Wells in order to pump the Water Rights for delivery to their farm ground.

IN CONSIDERATION of the mutual representations, warranties, and covenants contained herein, the Parties, intending to be legally bound hereby, agree as follows:

AGREEMENTS:

1. First Contingency (Replacement Well Construction).

(a) This Agreement is contingent upon development of a successful Replacement Well. Lambert hereby consents to allow Jensens to construct the Replacement Well on the Lambert Property, at Jensens' sole cost and expense, and to provide access to the Lambert Property for purposes of constructing the Replacement Well.

(b) In the event that the Replacement Well is not successful, the determination of which shall be made by Jensens in their sole discretion, this Agreement shall be null and void and neither party will be under any further obligations to perform under this Agreement. In the event the Replacement Well is not successful, Jensens will not be entitled to any reimbursement of costs to drill the Replacement Well from Lambert.

(c) Upon a determination by the Jensens that the Replacement Well is successful, Lambert agrees to grant a perpetual easement (the "Easement") granting all necessary access to the Replacement Well to the Jensens. Furthermore, Lambert agrees to execute an easement document substantially in the form attached to this Agreement as **Exhibit 2** to convey the Easement to the Jensens.

(d) The Parties agree that nothing in this agreement shall be construed to give Lambert any interest, ownership or otherwise, in the Replacement Well. Furthermore, the parties agree that performance under these paragraphs is not subject to Paragraph 2 below.

2. Second Contingency (Amendment of Water Rights Through Transfer).

(a) Satisfactory Transfer Approval Contingency. Upon a determination by the Jensens that the Replacement Well is successful, Jensens shall file an application for transfer of a water right under Idaho law ("Application for Transfer" or "Transfer") of the Water Rights with the Department amending the Water Rights to be authorized to irrigate Jensens' farm or other property of Jensens' choosing. Because of the uncertainty associated with possibility of protest of the Transfer or other conditions that may be imposed by the Department through the Transfer (including a determination of forfeiture of some or all of the Water Rights), the Parties expressly acknowledge and agree that further performance under this Agreement (except for Paragraph 1 above) is also fully contingent upon the approval of the Application for Transfer by the Department in a manner satisfactory to the Jensens, unless such contingency is waived by the Jensens.

(b) Transfer Application Submission to the Department. Lambert and Jensens agree to cooperate in obtaining Department approval of the Transfer. Jensens shall be responsible for the costs associated with the Transfer, including all consultant fees for

preparation of the Transfer application and calculation of mitigation, as well as the costs of filing and prosecuting and defending the Transfer application, including all attorney fees, in the event the Transfer is protested and the subsequent administrative process associated with such protest(s). The Parties shall use best efforts to obtain timely Transfer approval.

3. Conveyance of the Water Rights and Assignment of Storage Water. If the Transfer described in Paragraph 2 is approved in a manner satisfactory to Jensens, then the Parties will proceed to close this transaction with the conveyance of the following:

(a) Water Rights to Jensens: Lambert shall convey the Water Rights to the Jensens. Lambert agrees to execute a Special Warranty Deed (the “Deed”) substantially in the form attached to this Agreement as **Exhibit 3** to convey the Water Rights to the Jensens.

(b) Assignment of Storage Water to Lambert. In exchange for the Deed and the Easement, Jensens agree to convey [REDACTED] inches of their storage water described above in paragraph F to Lambert by executing a document substantially in the form attached to this Agreement as **Exhibit 4**.

4. Lambert’s Representations and Warranties. Lambert hereby represents and warrants to Jensens, as of the effective date of this Agreement as follows:

(a) Authority. Lambert has the full legal power, right and authority to enter into this Agreement and to perform Lambert’s obligations hereunder.

(b) Conveyance. Provided that the contingencies in Paragraph 3 are satisfied, Lambert shall then convey the Water Rights free and clear of all liens, encumbrances and restrictions, except such restrictions on the use of water as may appear on the water right records contained in **Exhibit 1** and in the Transfer approved by the Department.

(c) No Representation or Warranty Concerning Suitability for Jensens’ Intended Use. Lambert has not made, and hereby makes, no representation or warranty to Jensens except as expressly contained in this Agreement.

5. Jensens’ Representations and Warranties. Jensens hereby represent and warrant to Lambert as of the effective date of this Agreement as follows:

(a) Authority. Jensens have the legal power, right and authority to enter into this Agreement and to perform Jensens’ obligations hereunder.

(b) Jensens’ Due Diligence. Jensens and Jensens’ consultants and counsel have had a full opportunity to review all documents, records and other information made available to Jensens by Lambert and/or otherwise reasonably available to Jensens through public or other sources, related to the nature and extent of the Water Rights, the laws and rules affecting their transfer and use by Jensens, and the suitability or fitness of the Water Right for Jensens’ intended purposes.

6. Miscellaneous.

(a) Attorneys' Fees. If either party commences any legal action or proceeding to enforce any of the terms of this Agreement (or for damages by reason of an alleged breach hereof), the prevailing party therein shall be entitled to recover from the other, in addition to any other relief granted, its reasonable attorney's fees, costs and expenses incidental to such legal action.

(b) Notices. Any notice under this Agreement shall be in writing and be delivered in person, by U.S. Mail, by private courier, or by facsimile. Notice shall be provided to the following:

Lambert

Marilyn Mowrey Lambert
2524 N. 3300 W.
Arco, ID 83213
(208) 604-1480

Jensens

Jay and DeAnn Jensen
3320 W. 2800 N.
Moore, ID 83255
(208) 390-2093

Jensens' Representative

Luke H. Marchant
Holden, Kidwell, Hahn & Crapo,
P.L.L.C.
P.O. Box 50130
Idaho Falls, ID 83405
(208) 523-0620

(c) Merger. This Agreement supersedes any and all other written or verbal agreements between the Parties hereto. Neither Lambert nor Jensens shall be bound by any understanding, agreement, promise, representation or stipulation, express or implied, not specifically contained herein.

(d) Remedies Cumulative. Upon any breach, any and all rights and remedies which either Party may have under this Agreement or by operation of law or equity, shall be distinct, separate and cumulative and shall not be deemed inconsistent with each other. No such right or remedy, whether exercised by said Party or not, shall be deemed to be in exclusion of any other right or remedy, any two or more of all such rights and remedies may be exercised at the same time or separately as desired.

(e) Further Documents. The Parties hereby agree that they shall sign such other and further documents as may be required to carry into effect the terms and conditions of this Agreement.

(f) Enforceability. The validity or enforceability of any term, phrase, clause, paragraph, restriction, covenant, agreement or other provision hereof, shall in no way affect the validity or enforcement of the remaining provisions, or any part hereof.

(g) Counterparts. This Agreement may be executed in any number of counterparts for the convenience of the Parties, all of which, when taken together and after execution by all Parties hereto, shall constitute one and the same Agreement.

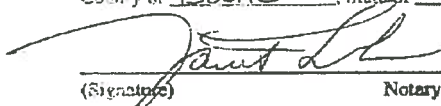
(h) Governing Law. This Agreement shall be governed by the laws of the State of Idaho.

(i) Successors. This Agreement is for the benefit only of the Parties hereto and shall inure to the benefit of and bind their respective heirs, agents, personal representatives, successors and assigns.

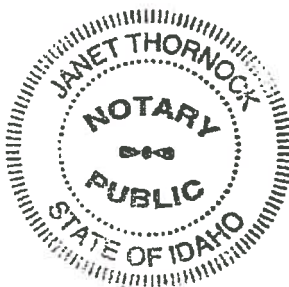
(j) Essence of Time. Time is of the essence in this Agreement.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement effective on the date set forth above.

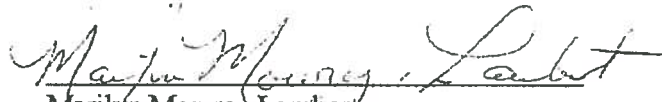
I, Janet Thornock, do hereby certify that I am a Notary Public in and for the State of Idaho, and I have this day signed and sworn to before me in my presence this 18th day of September, 2014, a Notary Public in and for the County of Butte, State of Idaho.


(Signature) Notary Public

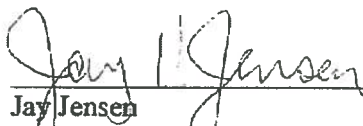
My Commission expires 9-16-2020

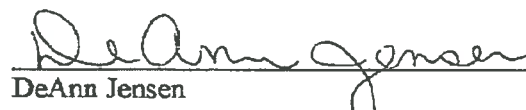


"LAMBERT"


Marilyn Mowrey Lambert

"JENSENS"


Jay Jensen


DeAnn Jensen

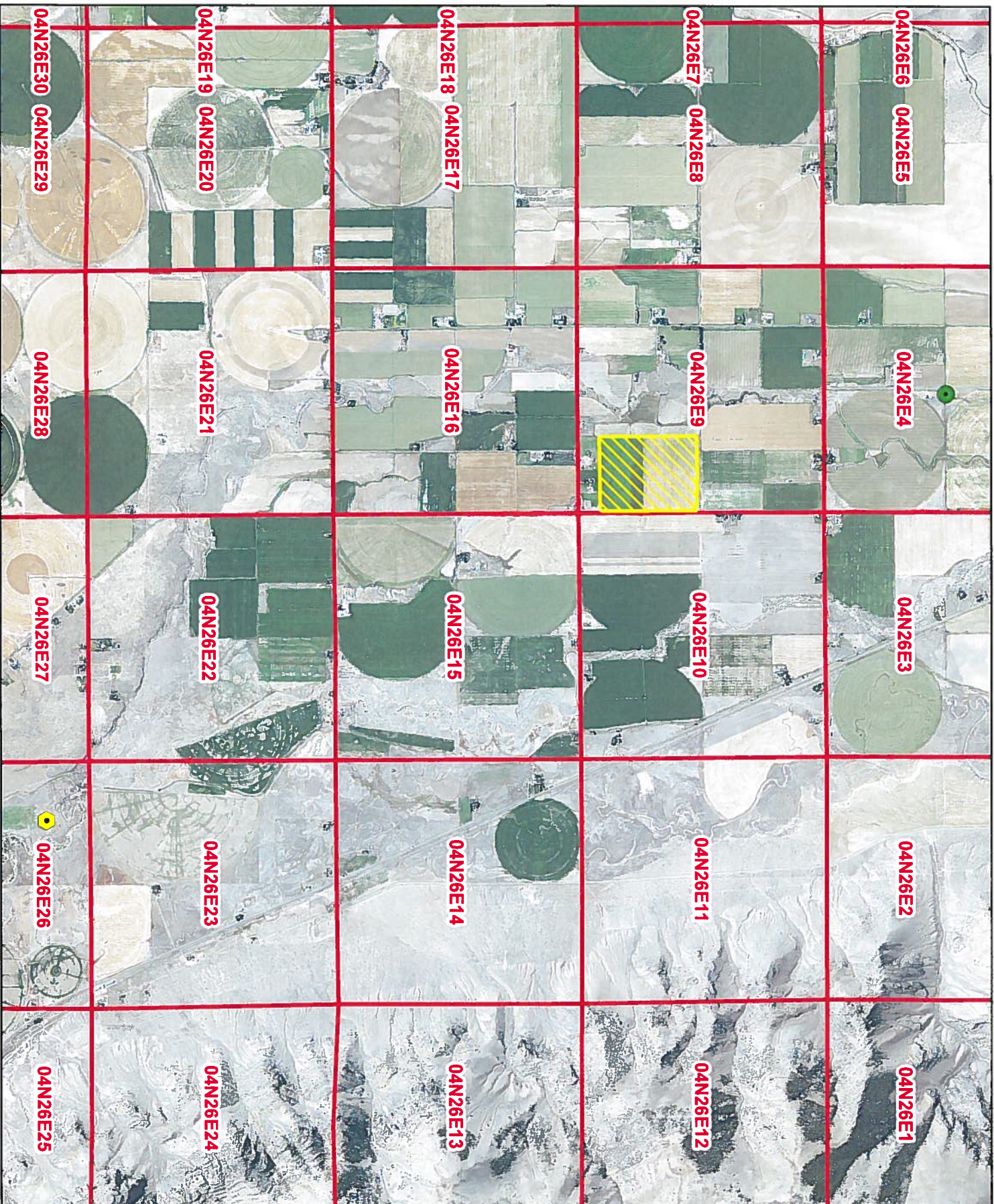
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JENSEN TEMPORARY CHANGE APPLICATION



Legend

- Proposed POD
- Current POD
- Proposed POU
- Section Lines



2013 NAIP Photo



Prepared by:
Luke H. Marchant
05/08/2015



Holden Kidwell
Hahn & Crapo P.L.L.C.
LAW OFFICES

1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, Idaho 83405

RECEIVED

MAY 14 2015

Department of Water Resources
Eastern Region

Tel: (208) 523-0620
Fax: (208) 523-9518
www.holdenlegal.com

Email: lmarchant@holdenlegal.com

May 11, 2015

Michael Holliday
Idaho Department of Water Resources
900 S. Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

RE: Temporary Change Application for Water Right No. 34-2386

Dear Michael:

Enclosed for processing is a Temporary Change Application filed for Jay and De Ann Jensen. This application seeks to change the point of diversion and place of use for a portion of Water Right No. 34-2386. This water right is owned by Clifford and Marilyn Lambert. This water will be used to supplement surface Water Right No. 34-690B owned by the Jensens. The Jensens have entered into an agreement with Ms. Lambert authorizing them to transfer this water right as they see necessary.

Along with the application, you will find the necessary filing fee as well as, the agreement between the Jensens and Marilyn Lambert, and the GIS map showing the current and proposed points of diversion and the proposed place of use. If you have any questions, do not hesitate to contact me.

Best Regards,

Luke H. Marchant
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Enclosures

G:\WPDATA\RLH\17425 Jensen, Jay & Deann\03 Lambert WR Transfer\2015-05-11, Holliday.docx

12/99

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECOMMENDATION OF WATERMASTER

Application No: TC-34-143

Applicant's Name: JAY JENSEN

Watermaster's Recommendation:

a) LY I do not oppose approval of this application.

b) _____ I do not oppose approval of this application if it is conditioned as follows: _____

c) _____ I oppose approval of this application for the following reasons: _____

d) _____ Additional Comment: _____

Dated this 14 day of May, 2015.

Water District No: 34

[Signature]
Watermaster's Signature

Use reverse side of page if you need more space.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECOMMENDATION OF WATERMASTER

Application No: TC-34-143

Applicant's Name: JAY JENSEN

Watermaster's Recommendation:

- a) ☒ I do not oppose approval of this application.
- b) ☐ I do not oppose approval of this application if it is conditioned as follows: _____

- c) ☐ I oppose approval of this application for the following reasons: _____

- d) ☐ Additional Comment: _____

Dated this 15 day of May, 2015.

Water District No: 34

[Signature]
Watermaster's Signature
B2017, mgr.

Use reverse side of page if you need more space.