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OCT 23 2014

Department of Water Resources
Eastern Region

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Attorneys for Marshall Todd and Norma Perkes

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79006 IN THE NAME OF
MARSHAL AND NORMA PERKES

**STIPULATION FOR
WITHDRAWAL OF PROTESTS**

THIS STIPULATION FOR WITHDRAWAL OF PROTESTS (this "Stipulation") is made and entered into as of the ____ day of _____, 2014, by and between **Marshal Todd Perkes and Norma Perkes**, husband and wife, of 2790 N. 3325 W., Moore, Idaho 83255 (hereinafter collectively "Perkes"), **Joel S. Andersen** of 2791 N. 3375 W., Moore, Idaho 83255 (hereinafter, "Joel Andersen"), **Jason Joel Andersen** of 2791 N. 3375 W., Moore, Idaho 83255 (hereinafter "Jason Andersen"), **Kirby A. Jensen** of 2781 N. 3375 W, Moore, Idaho 83255 (hereinafter "Jensen"), and **Don Cain, Sr.**, P.O. Box 827, Moore, Idaho 83255 (hereinafter "Cain"). Perkes, Joel Andersen, Jason Andersen, Jensen, and Cain may hereinafter collectively be referred to as the "Parties." Joel Andersen, Jason Andersen, Jensen, and Cain may hereinafter collectively be referred to as the "Protestants."

RECITALS:

- A. Application for Transfer No. 79006 (hereinafter, simply "79006") was filed by Perkes with the Idaho Department of Water Resources ("IDWR") pursuant to Idaho Code § 42-222 in order to correct an oversight in the Snake River Basin Adjudication process by adding a well owned by Perkes, which is located in the SESENW, Sec. 5, 4N, 26E, to

Perkes' water rights.¹ 79006 also initially proposed to "stack" Perkes' water rights to provide flexibility in the management of their water supplies so that all of Perkes' water rights could be diverted from any of his wells and used within a permissible place of use. The spreadsheet attached as Exhibit 1 hereto summarizes Perkes' intended changes to his water rights if 79006 was approved as filed.

- B. Three of Perkes' water rights (34-7096A, 34-7097A, and 34-7223—hereinafter, the "Exchange Rights") are subject to two exchange agreements, the first of which was originally entered into between Boyd and Sandra Burnett, J. Doyle and Katherine Jensen, and Kirby and Sharon Jensen (a copy of which is attached as Exhibit 2), and the second of which was entered into between Mitchell D. and Elaine R. Sorensen and J. Doyle and Katherine Jensen (a copy of which is attached as Exhibit 3). The exchanges were administratively approved by IDWR under Exchange Nos. 2354 and 34-0032A, copies of which are attached hereto as Exhibits 4 and 5 respectively. The Exchange Rights are diverted from wells located on Joel Andersen's and Jason Andersen's property, and are legally described as the NESWSE, Sec. 8, 4N, 26E and NWSNW, Sec. 17, 4N, 26E (hereinafter, collectively the "Exchange Wells").
- C. Generally speaking, the exchange agreements provided that surface water owned by Jensen would be exchanged for ground water developed by Burnett and Sorensen, subject to the specific terms and conditions of the exchange agreements.
- D. Two of Perkes' other ground water rights (34-7035A and 34-7122A) are not subject to the exchange agreements, and are diverted from wells located in the NESW, Sec. 5, 4N, 26E and NENWNW, Sec. 8, 4N, 26E (hereinafter, collectively the "Non-exchange Wells").
- E. However, all of Perkes' ground water rights—as well as a surface water right (34-622A)—share a common place of use that necessitated inclusion of all of the water rights in order to amend the place of use of all of the rights.
- F. The exchange agreements were partially modified in a manner adjudicated and described in the *Findings of Fact and Conclusions of Law* from Case No. CV-96-19 in the Seventh Judicial District in and for Butte County (the "Herndon Decision"), a copy of which is attached hereto as Exhibit 6. For purposes of understanding one of Perkes' motivations for 79006, it is important that Conclusion of Law No. 4 in the Herndon Decision determined that Sorensen was responsible for reversion of the well water under the agreements if reversion becomes necessary. ("However, the evidence at trial shows that Sorensens should be responsible for the reversion of the well water, if it becomes necessary.").
- G. Through a settlement agreement entered into after the Herndon Decision, Perkes was

¹ The oversight was that Perkes understood that listing a point of diversion once in a quarter-quarter section would cover multiple wells within that quarter-quarter section. IDWR practice is to list the legal description of the point of diversion once for each well located within the quarter-quarter section.

substituted in for Mitchell and Elaine Sorensen as parties under the exchange agreements, and the exchange agreements remain in full force and effect, as partially modified by the Herndon Decision. Jensen eventually sold most of his farm to Joel Andersen and Jason Andersen, subject to the exchange agreements.

- H. Because the exchange agreements are binding on successors-in-interest, the current parties to the exchange agreements are Perkes, Joel Andersen, Jason Andersen, and Kirby and Sharon Jensen.
- I. Since Perkes became party to the exchange agreements, it was discovered that he has been over-charged for power costs by an estimated amount of approximately Eight Thousand Six Hundred Seventeen Dollars and Eighty-five Cents (\$8,617.85).
- J. Because it is Perkes' responsibility to provide for the reversion infrastructure, one of Perkes' motivations to amend the Exchange Rights through 79006 is so they could become available for diversion through the Non-exchange wells in the event the surface water rights identified in the exchange agreements "became unavailable for any reason." See, e.g., Exhibit 3 at p. 3.
- K. Joel Andersen, Jason Andersen, and Kirby Jensen protested 79006 because of their concern that 79006 would impact the exchange agreements. They each objected to the Exchange Rights being authorized for diversion from the Non-exchange Wells.
- L. Cain also objected to 79006, and asserted that "[w]ater is being taken from the Upper Valley to a Lower Portion of the District. This will take water from the Upper Valley with no chance of recapture to our aquafer [sic]. Protest for water conservation for the upper Lost River Valley."
- M. After discussions between the Parties, and in lieu of participating in administrative hearings provided for under Idaho law concerning 79006, the Parties hereby agree as set forth below, the result of which is withdrawal of the Protestants' protests and issuance of an approval for 79006 consistent with the terms of this Stipulation.

AGREEMENTS:

- 1. **Stipulation Does Not Modify the Exchange Agreements.** This Stipulation does not modify in any way the terms and conditions of the exchange agreements, as amended by the Herndon Decision, described in the recitals above.
- 2. **Modification of Application for Transfer 79006.** 79006 originally sought to modify Perkes' water rights in the manner set forth on Exhibit 1. The Parties hereto agree to partially modify what was originally sought by Perkes under 79006 such that Perkes' water rights will contain the elements set forth on the summary attached as Exhibit 7.

which does not permit diversion of the Exchange Rights from the Non-exchange Wells or the diversion of the Non-exchange Rights from the Exchange Wells, concerns voiced by Joel Andersen, Jason Andersen, and Jensen. This Stipulation shall serve as the instruction to IDWR to modify 79006 accordingly.

3. **Conditions To Be Included in Final Order Approving 79006.** IDWR shall include the following conditions, in addition to any others that may be included by, in the final order approving 79006:
 - a. A standard IDWR condition regarding measuring devices, such as this: “The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.”
 - b. A standard IDWR condition regarding permissible place of use, such as this: “This right is limited to the irrigation of a specific ____ acres within the 620 acre place of use authorized by this right in a single irrigation season. The specific ____ acres to be irrigated by the right holder are shown in the electronic shape file associated with this right in the geographic information system component of the water rights database maintained by the Department. Before changing the ____ acres to be irrigated within the 620 acre place of use, the right holder shall submit a new land list and representative electronic shapefile or map to the Department prior to the irrigation season in which the change will occur.”
4. **Issuance of Proposed Order and Subsequent Withdrawal of Protests.** The Parties shall instruct IDWR to issue a proposed order including the conditions (or condition in substantially the same form) as set forth in Paragraph 3 herein. The Parties shall have fourteen (14) days thereafter to object to the language in the proposed order by filing notice of such objection with IDWR if the proposed order does not fully comply with the terms and conditions of this Stipulation. If no objections are received within the fourteen (14) day time period, the protests of the Protestants shall be deemed withdrawn, and IDWR shall thereafter issue a final order approving 79006 consistent with this Agreement.
5. **Past Power Over-charges.** Perkes does hereby release, acquit and forever discharge Joel Andersen, Jason Andersen, and Kirby Jensen and their respective spouses, if any, and their respective officers, directors, shareholders, employees, agents, affiliates, successors and assigns, of and from any and all past, present, or future claims, rights, damages, demands, obligations, actions, causes of action, claims or demands, and any other claims for expenses and compensation of any nature whatsoever, which Perkes has had, now has or may hereafter have against any of them, which relate to or arise from past over-charges for power costs from the time when Perkes became a party to the exchange agreements as described in Recital I above. In exchange therefore, Joel Andersen, Jason Andersen, and Kirby Jensen agree that Perkes will not be billed power costs of any kind (i.e., share of power use, demand charges, etc.) for 2014 given the

unavailability of the exchange surface water (Water Right Nos. 34-14230, 34-14231, 34-14228, and 34-14229) for most of the 2014 irrigation season.

6. **Perkes Waiver of Reversion for 2014.** Despite the unavailability of the exchange surface water, and in further exchange for the agreements contained in this Stipulation, Perkes hereby agrees to waive the right of reversion under the exchange agreements for the 2014 irrigation season only (which ends on October 31, 2014).
7. **Reservation of Rights.** The Parties agree and acknowledge that this Stipulation only resolves the protests to 79006, and that the Protestants reserve all rights to protest other applications for transfer or any other proceedings that may be initiated in the future.
8. **Reliance Upon Statements/Integration and Merger.** The Parties hereto specifically acknowledge that they were represented by counsel in this matter, and agree that other than as is set forth herein, they have executed this Stipulation without relying upon any statements or representations written or oral, as to any statement of law or fact made by any other party or attorney. The Parties to this Stipulation have read and understand the Stipulation, and warrant and represent that this Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of any party. This Agreement represents the sole entire and integrated Stipulation by and between the parties hereto, and supersedes any and all prior understandings or agreements whether written or oral except as specifically provided herein.
9. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of each Parties' officers, directors, shareholders, heirs, successors and assigns, and shall be specifically enforceable.
10. **Waiver and Modification.** No provision of this Agreement may be waived, modified, or amended except by written agreement executed by all of the Parties hereto.
11. **Enforcement and Interpretation.** This Stipulation is a valid and binding obligation of the parties, and their successors or assigns. It shall be admissible and enforceable according to its terms, and venue in any subsequent action shall rest within the State of Idaho. This Stipulation is subject to interpretation in accordance with the laws of the State of Idaho.
12. **Counterparts.** This Stipulation may be executed in counterparts, each of which is deemed an original but all of which constitute one and the same instrument. The signature pages may be detached from each counterpart and combined into one instrument.

"PERKES"

Marshal Todd Perkes and Norma Perkes


By: Robert L. Harris, of the firm Holden, Kidwell,
Hahn & Crapo, P.L.L.C.
*Attorneys for Marshal Todd Perkes and Norma
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Joel S. Andersen and Jason Joel Andersen

By: James P. Speck, of the firm Speck & Aanestad,
P.C.
*Attorneys for Joel S. Andersen and Jason Joel
Andersen*

"JENSEN"

Kirby Jensen

"CAIN"

Don Cain, Sr.

"PERKES"

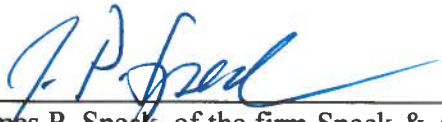
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“JENSEN”

Kirby Jensen

“CAIN”



Don Cain, Sr.

Marshal Todd Perkes Water Rights

WATER RIGHTS BEFORE TRANSFER

Water Right No.	Name on Water Right	Basin	Priority Date	Source	Beneficial Use	Individual Diversion Rate Limitation (cfs)	Combined Diversion Rate Limitation (cfs)	Individual Volume Limitation (AFA)	Combined Volume Limitation (AFA)	Individual Acre Limitation	Total Permissible Place of Use	Point of Diversion	Notes
34-7035A	Marshal Todd Perkes	Partial Decree	May 12, 1973	Ground water	Irrigation	0.64	4.95	166.3	920.5	47.5	561	NESENW, Sec. 5, 4N, 26E NEENWNW, Sec. 8, 4N, 26E	
34-7122A			January 15, 1976			4.31	754.3	215.5					
34-7096A			January 31, 1975	1.84		322	92	NESESE, Sec. 8, 4N, 26E NWSENW, Sec. 17, 4N, 26E					
34-7097A			January 31, 1975	1.58		276.5	79						
34-7223			April 16, 1979	1.58		280	80						
					GROUND WATER TOTALS	9.95	9.95	1799.1	1799	514	561		
34-622A	Marshal Todd and Norma Perkes	Partial Decree	June 1, 1896	Big Lost River	Irrigation	1.57	None	None	None	80	80	NWSESE, Sec. 4, 5N, 26E	
					OVERALL TOTALS	11.52				594	641		

WATER RIGHTS AFTER TRANSFER

34-7035A			May 12, 1973	Ground water		0.64	4.95	166.3	920.5	47.5	620	#1: NESENW, Sec. 5, 4N, 26E #2: NEENWNW, Sec. 8, 4N, 26E #3: NESWSE, Sec. 8, 4N, 26E #4: NWSENNW, Sec. 17, 4N, 26E #5: SESENNW, Sec. 5, 4N, 26E (#5 is being added to all Water Rights)	Well #5 was originally drilled and developed by Perkes under Water Right No. 34-7080A. This water right was sold to Juel Alkele, and is now currently owned by Standlee Hay Company. 34-7080A is still authorized to divert from Well #5. However, the well developed under 34-7080A is still owned by Perkes, and its non-inclusion in Perkes' water right SRBA partial decrees was an oversight that has recently come to light. Perkes thought that by listing a 1/41/4 section once, it would cover two wells in the same quarter quarter section, but this is not current IDWR policy. The transfer also proposes to stack Perkes' water rights to provide flexibility in the management of his water supplies by allowing his water rights to be diverted from all of his currently-owned wells.
34-7122A		January 15, 1976			4.31		754.3		215.5				
34-7096A	Marshal Todd Perkes	Partial Decree	January 31, 1975	Irrigation	1.84		322		92				
34-7097A			January 31, 1975	Ground water	1.58	5	276.5	878.5	79				
34-7223			April 16, 1979		1.58		280		80				
				GROUND WATER TOTALS	9.95	9.95	1799.1	1799	514				
34-622A	Marshal Todd and Norma Perkes	Partial Decree	June 1, 1896	Big Lost River	Irrigation	1.57	None	None	None	80		NWSESE, Sec. 4, 5N, 26E	
				OVERALL TOTALS	11.52					594	620		

Entered	☒
Compared	☒
Indexed	☒

No. 100-216
FILED
 MAY 21 1976
 A.M. 4:30 P.M.
 BUTTE COUNTY RECORDER

MEMORANDUM AGREEMENT, RE:
WATER EXCHANGE AND EASEMENT

THIS AGREEMENT, by and between BOYD BURNETT and SANDRA BURNETT, Husband and Wife, hereinafter called "Well Owners", and J. DOYLE JENSEN and KATHERINE K. JENSEN, Husband and Wife, and KIRBY JENSEN and SHARON W. JENSEN, Husband and Wife, hereinafter called "Decree Owners";

W I T N E S S E T H:

For and in consideration of the mutual covenants and agreements herein contained, the parties agree to exchange use of certain irrigation Water Rights hereinafter described.

TERM AND RENEWAL OPTION:

The term of this Agreement shall be fifteen (15) years from the date of this Agreement, and shall be renewable for an additional 15 year term, or terms, at the option of either of the parties, by giving Notice of exercise of option at least fifteen (15) days prior to the expiration of this agreement or any renewal hereof.

WATER RIGHTS EXCHANGED:

Decree Owners are the owners of the following Decreed Irrigation Water Rights in Big Lost River:

BBB 143 inches with a priority of 5/20/84;
 80 inches with a priority of 5/20/84

The use of which rights are hereby transferred to Well Owners for the term of this Agreement and any renewals hereof.

Well Owners shall drill and equip with pump and motor, an irrigation well, to be located on Decree Owners' property at a site approximately *1100 70' BAB* 140 feet East of the Northwest Corner of the Southeast Quarter of the Northwest Quarter (SE1/4NW1/4).



Section 17, Township 4 North, Range 26 East, Boise Meridian,
and further shall make applications for Water License from the
State of Idaho for irrigation water to be produced by said well,
and transfer to Decree Owners all right to the use of said Water
and Water Right for the term of this Agreement, and any renewals
hereof, in a minimum amount of 170 ⁷⁴/₁₀₀ miner's inches.

EXPENSES ALLOCATED:

Well Owners agree to pay all costs of drilling,
equipping, repairing and maintaining the well described above,
and all costs of delivery of the Decreed Water from the point
of diversion west of the North boundary of the aforescribed
Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) to Well
Owners' point of use.

Decree Owners agree to pay the annual cost of
delivery of the Decreed Water to the above described point
of diversion, i.e., charges of Big Lost River Irrigation Dis-
trict and Watermaster Tax Directly related to the delivery
of the water.

The parties agree to pay the cost of electric
power charges for the electric pump motor in the following
proportion: Well Owners: 60 ⁷⁴/₁₀₀; Decree Owners: 40 ⁷⁴/₁₀₀

EFFECT OF FAILURE OF WATER SUPPLY:

In the event the water supply from the well shall
be interrupted by failure of the well, pump, motor, or other
cause, the right to use of the Decree Water shall revert
to the Decree Owners, provided, however, that if said failure
is of short duration, the right to use the Decree Water shall
not so revert, if well owners shall use their best efforts
to repair the well, pump, motor or other cause.

In the event of complete, irreparable failure
of the well, the right to use of the Decree Water shall revert

to the Decree Owners, and this Agreement shall be terminated.

In the event the Decreed water shall become unavailable for any reason, the Decree Owners shall use all reasonable efforts to supply Well Owners with an alternative source of irrigation water. If Decree Owners are unable to provide such alternative source, the right to use the well water shall revert to Well Owners during such failure of the Decreed water.

OPTION TO PURCHASE:

At the termination of this Agreement, whether by expiration or by mutual agreement, the Decree Owners shall have the option to purchase the well, pump, motor and water license from Decree Owners. ^{Well #185} The purchase price shall be the fair market value of the well, pump, motor and associated equipment, less the now current fair market value of a certain column and motor owned by Decree Owners, and to be used by Well Owners in equipping the well.

GRANT OF EASEMENT:

By this Agreement, ^{Decree #185} Well Owners J. DOYLE JENSEN and KATHERINE K. JENSEN hereby grant to Well Owners easements and rights of way on, over and across the North boundary of the Southeast Quarter of the Northwest Quarter (SE1/4NW1/4), Section 17, Township 4 North, Range 26, East Boise Meridian, as follows:

An easement and right of way of sufficient size for the Well Owners to construct, drill, equip, repair, reconstruct, maintain and operate the irrigation well referred to above, which Easement shall be located approximately 740 400 ⁷⁴⁰ feet from the Northwest corner of the said Southeast Quarter of the Northwest Quarter (SE1/4NW1/4), at a site mutually selected by the parties.

An easement and right of way along the said North boundary from the County road east to the said right of way for ingress, egress and construction of an electrical power line to service the electric pump motor.

These easements shall continue so long as this Agreement shall be in effect, and shall continue thereafter so long as Well Owners maintain the well, unless the Decree Owners shall elect to purchase the well, under the "Option To Purchase" clause, above. In the event the Decree Owners do exercise and perform the Option to Purchase upon termination of the Lease, these easements and rights of way shall immediately terminate.

BINDING UPON HEIRS AND SUCCESSORS:

This Agreement shall be binding upon the heirs, assigns and successors in interest of the parties hereto.

IN WITNESS WHEREOF The parties hereto have hereunto set their hands this 19th day of May, 1976.

Boyd B. Burnett
Boyd Burnett

Sandra O. Burnett
Sandra Burnett
WELL OWNERS

J. Doyle Jensen
J. Doyle Jensen

Katherine K. Jensen
Katherine K. Jensen

Kirby A. Jensen
Kirby Jensen

Sharon W. Jensen
Sharon W. Jensen
DECREE OWNERS

STATE OF IDAHO)
County of Butte) ss.

On this 20th day of May, 1976, before me, the undersigned, a Notary Public in and for said State, personally appeared BOYD BURNETT and SANDRA BURNETT, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

NO. 026723

FILED

APR 01 1993

ADDENDUM TO MEMORANDUM AGREEMENT.

RE: WATER EXCHANGE AND EASEMENT

AM. 12:25 PM.
SOUTHERN COUNTY RECORDER
Dana G. Kelly

THIS ADDENDUM, To that certain Memorandum Agreement,
Re: Water Exchange and Easement, by and between BOYD BURNETT
and SANDRA BURNETT, Husband and Wife, therein and herein "Nail
Owners", and J. DOYLE JENSEN and CATHERINE K. JENSEN, Husband
and Wife, and KIRBY JENSEN and SHARON W. JENSEN, Husband and
Wife, therein and herein "Decree Owners";

WITNESSETH:

The parties agree that the provision in the afore-
mentioned Memorandum Agreement, entitled "TERM AND RENEWAL
OPTION", Page 1 of said Memorandum, shall be, and is revised
to read as follows:

"TERM AND RENEWAL OPTION: The term of this
Agreement shall be forty (40) years from the
date of this Agreement, and shall be renewable
for additional terms of fifteen (15) years, at
the option of either of the parties, by giving
Notice of exercise of option at least fifteen
(15) days prior to the expiration of this agree-
ment or any renewal hereof."

In all other respects, the said Memorandum Agreement
remains in full force and effect.

IN WITNESS WHEREOF, The parties hereto have hereunto
set their hands the 10th day of June, 1976.

Boyd Burnett
Boyd Burnett

Sandra Burnett
Sandra Burnett
NAIL OWNERS

J. Doyle Jensen
J. Doyle Jensen

Catherine K. Jensen
Catherine K. Jensen

WORKING COPY

MEMORANDUM AGREEMENT, RE:
WATER EXCHANGE AND EASEMENT

THIS AGREEMENT, by and between MITCHELL D. SORENSEN and ELAINE R. SORENSEN, Husband and Wife, hereinafter called "Well Owners", and J. DOYLE JENSEN and CATHERINE K. JENSEN, Husband and Wife, hereinafter called "Decree Owners";

W I T N E S S E T H:

For and in consideration of the mutual covenants and agreements herein contained, the parties agree to exchange use of certain irrigation Water Rights hereinafter described.

TERM AND RENEWAL OPTION:

The term of this Agreement shall be ^{Forty} ~~fifteen~~ (40) years from the date of this Agreement, and shall be renewable for an additional 15 year term, or terms, at the option of either of the parties, by giving Notice of exercise of option at least fifteen (15) days prior to the expiration of this agreement or any renewal hereof.

WATER RIGHTS EXCHANGED:

Decree Owners are the owners of the following Decreed Irrigation Water Rights in Big Lost River:

80 inches with priority of 5/20/84.

The use of which rights are hereby transferred to Well Owners for the term of this Agreement and any renewals hereof.

Well Owners shall drill an irrigation well, to be located on Decree Owners' property at a site in the Northeast corner of the Southwest Quarter of the Southeast Quarter, Section 6, Township 4 North, Range 26 East, Boise Meridian, and further shall make applications for Water License from the State of Idaho for irrigation water to be produced by



said well, and transfer to Decree Owners ^{the} right to the use of said Water and Water Right for the term of this agreement, and any renewals hereof, in ^{the} ~~minimum~~ amount of 1.6 c.f.s.

EXPENSES ALLOCATED:

The costs of construction, reconstruction, repair and maintenance of the well, pump, motor and associated electrical equipment, and the costs of ownership and use of the water shall be divided as follows:

1. The cost of drilling, casing and pouring the pump pad shall be paid by the Well Owner.
2. The cost of the pump, motor, and associated electrical controls shall be paid by the Decree Owner.
3. The cost of the electrical transmission line to the pump, and all electrical charges shall be divided equally between Well Owner and Decree Owner.
4. All costs of repair, maintenance and replacement of the well, pump, motor, and electrical equipment shall be divided equally between Decree Owner and Well Owner.
5. Decree Owner shall pay the operation and maintenance charge levied against his land by Big Lost River Irrigation District, for the 80" of Decreed Water, and Well Owner shall pay the ditch rider and watermaster charges for delivery of the Decreed Water.
6. Any other costs shall be divided equally between the parties.

EFFECT OF FAILURE OF WATER SUPPLY:

In the event the water supply from the well shall be interrupted by failure of the well, pump, motor, or other cause, the right to use of the Decree Water shall revert to the Decree Owners, provided, however, that if said failure is of short duration, the right to use the Decree Water shall not so revert, but Well Owners shall use their best efforts to have the cause of the failure repaired at the earliest possible time.

In the event of the complete, irreparable failure of the well, the right to use of the Decree Water shall revert to the Decree Owners, and this Agreement shall be terminated.

In the event the Decreed Water shall become unavailable for any reason, the Decree Owners shall use all reasonable efforts to supply Well Owners with an alternative source of irrigation water. If Decree Owners are unable to provide such alternative source, the right to use the well water shall revert to Well Owners during such failure of the Decreed Water.

OPTION TO PURCHASE:

At the termination of this Agreement, whether by expiration or by mutual agreement, the Decree Owners shall have the option to purchase the well, and Well Owners share of the pump, motor, and electrical accessories, and Water License from Well Owners. The purchase price shall be the then fair market value of the well, and one-half of the then market value of the pump, motor and accessories.

GRANT OF EASEMENT:

By this Agreement, Decree Owners J. DOYLE JENSEN and CATHERINE K. JENSEN hereby grant to Well Owners easements and rights-of-way on, over, and across the North boundary of the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$), Section 17, Township 4 North, Range 26, East Boise Meridian, as follows:

An easement and right-of-way of sufficient size for the Well Owners to construct, drill, equip, repair, reconstruct, maintain and operate the irrigation well referred to above, in the NE $\frac{1}{4}$ corner of SW $\frac{1}{4}$ SE $\frac{1}{4}$, at a site mutually selected by the parties.

An easement and right-ofway along the said North boundary from the County road to the said right of way for ingress, egress and construction of an electrical power line to service the electric pump motor.

These easements shall continue so long as this Agreement shall be in effect, and shall continue thereafter so long as Well Owners maintain the well, unless the Decree Owners shall elect to purchase the well, under the "Option to Purchase" clause above. In the event the Decree Owners do exercise and perform the Option to Purchase upon termination of the Lease, these easements and rights-of-way shall immediately terminate.

BINDING UPON HEIRS AND SUCCESSORS:

This agreement shall be binding upon the heirs, assigns and successors in interest of the parties hereto.

IN WITNESS WHEREOF The parties hereto have hereunto set their hands this 30 day of March, 1979.

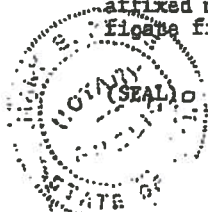
J. Doyle Jensen
J. Doyle Jensen
Catherine K. Jensen
Catherine K. Jensen
DECREE OWNERS

Mitchell B. Sorensen
Mitchell B. Sorensen
Elaine R. Sorensen
Elaine R. Sorensen
WELL OWNERS

STATE OF IDAHO)
County of Butte) ss.

On this 30 day of March, 1979, before me, the undersigned, a Notary Public in and for said State, personally appeared J. DOYLE JENSEN and CATHERINE K. JENSEN, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Mary E. Price
Notary Public for Idaho,
Residing at Arco, Idaho

Exchange No. 2354

APPROVED

1. Name of Right Holder J. Doyle Jensen

Post office address Moore, Idaho 83255

2. Right obtained by: David S. and

2. Decree to Sylvanus Boyack in Case of Utah Construction Company
(Name)

vs. Abbott and Others, Dated 5-15-1925 in U.S. District
(Name of Court)

Court, County of Butte & Custer. Fully describe decree

b. Permit, license, or claim No. _____ in the records of the Department of Reclamation.

3. Source of water: Big Lost River tributary to sinks
(Name of stream or source)

4. Date of Priority of Right 5-20-1884

5. Amount of water a. 1.60 cfs c.f.s. and/or
b. _____ acre feet/annum

6. Water is used for Tripitation from 4-1 to 11-1
(Purpose) (Month-Day) (Month-Day)
 from to
(Purpose) (Month-Day) (Month-Day)

7. Location of point of diversion is 1/2 88 1/2 of Section 4
Township 5N, Range 26E, B. M., in Butte County:
Additional points of diversion, if any _____

8. Lands irrigated or place of use:

[illegible]

Total number of acres to be irrigated 80

EXHIBIT

4

DESCRIBE RIGHT HELD BY USER WITH WHOM YOU WISH TO EXCHANGE WATER

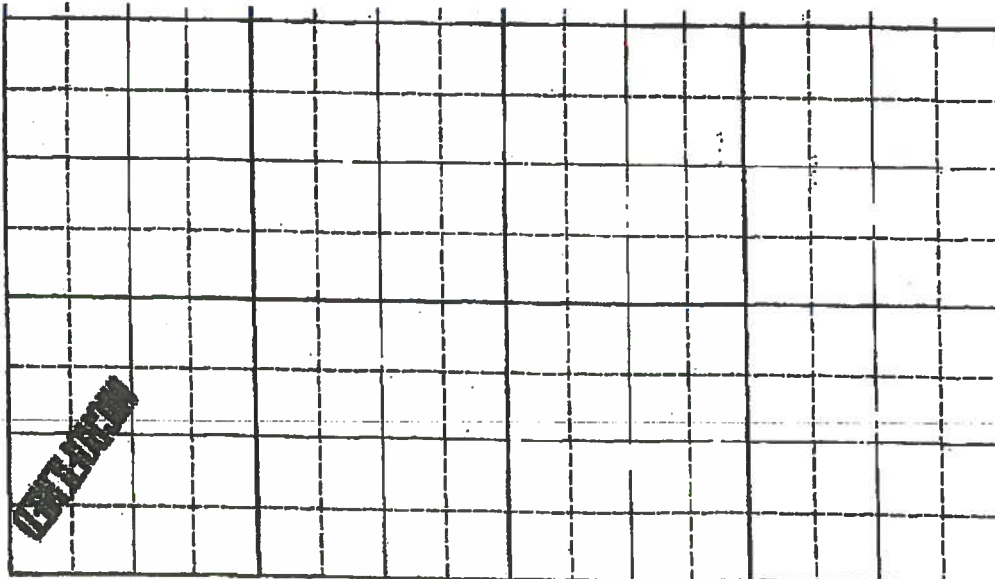
9. Name of Right Holder Mitchell D. Sorensen
Post office address Moore, Idaho 83255
10. Source of water groundwater tributary to _____
(Name of stream or source)
11. Name of canal or ditch _____
12. Amount of water a. 1.60 c.f.s. and/or
b. _____ acre feet/annum
13. Right obtained by:
a. Decree to _____ in Case of _____
(Name)
vs. _____, Dated _____ in _____
(Name of Court)
Court, County of _____. Fully describe decree (if known) _____

b. Permit, License, or Claim No. 34-7223 in the records of the Department of
Reclamation.

EXCHANGE

14. 1.60 c.f.s. and/or _____ acre feet per annum of water diverted at the
point described in line 7 and will be delivered into Moore Canal at a point in
SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 5N, Range 26E, B.M.,
in Butte County; Additional points, if any _____
15. In lieu thereof 1.60 c.f.s. and/or _____ acre feet per annum will be diverted
from a ground-water source at a point within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8,
Township 4N, Range 26E, B.M., in Butte County.
16. Explanation Mitchell D. Sorensen will drill a well on Sorensen's property for the
irrigation of his lands in exchange for decreed water from Big Lost River.

In the space below draw a sketch map showing your point of diversion under the exchange, where you will return the replacement water, land irrigated, and the general location of your conveyance system. Include any other information which would help in understanding the proposed exchange.



DESCRIBE RIGHT HELD BY USER WITH WHOM YOU WISH TO EXCHANGE WATER

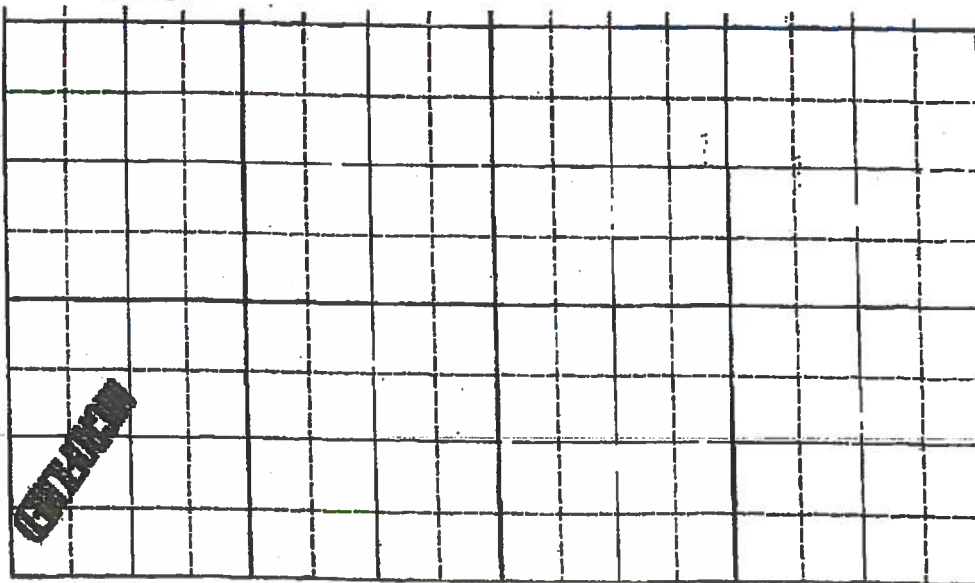
9. Name of Right Holder Mitchell D. Sorensen
Post office address Moore, Idaho 83255
10. Source of water groundwater tributary to _____
(Name of stream or source)
11. Name of canal or ditch _____
12. Amount of water a. 1.60 c.f.s. and/or _____
b. _____ acre feet/annum
13. Right obtained by:
a. Decree to _____ in Case of _____
(Name)
vs. _____, Dated _____ in _____
(Name of Court)
Court, County of _____. Fully describe decree (if known) _____

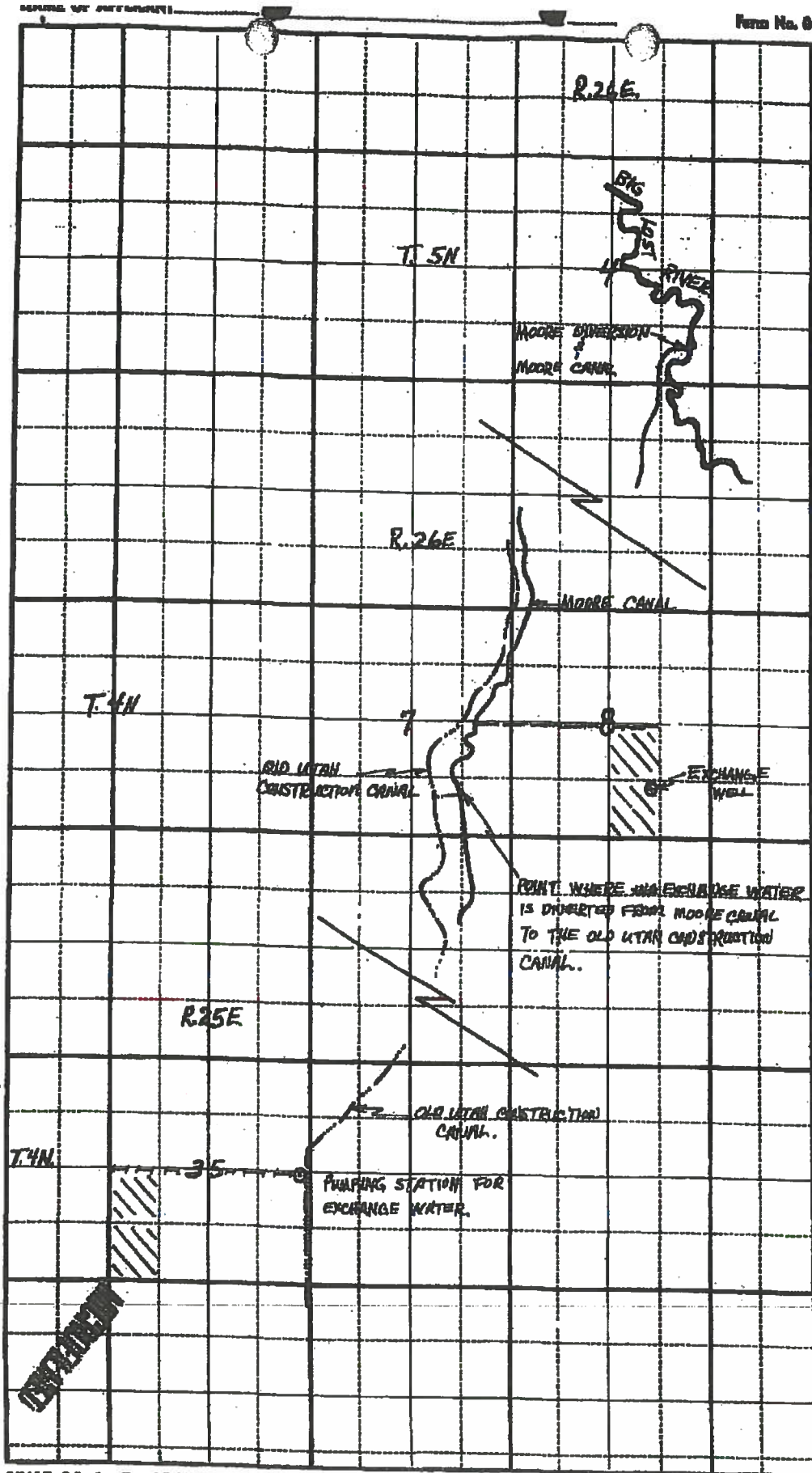
b. Permit, License, or Claim No. 34-7223 in the records of the Department of
Reclamation.

EXCHANGE

14. 1.60 c.f.s. and/or _____ acre feet per annum of water diverted at the
point described in line 7 and will be delivered into Moore Canal at a point in
SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4, Township 5N, Range 26E, B.M.,
in Butte County; Additional points, if any _____
15. In lieu thereof 1.60 c.f.s. and/or _____ acre feet per annum will be diverted
from a ground-water source at a point within the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8,
Township 4N, Range 26E, B.M., in Butte County.
16. Explanation Mitchell D. Sorensen will drill a well on Hansen's property for the
irrigation of his lands in exchange for decree water from Big Lost River.

In the space below draw a sketch map showing your point of diversion under the exchange, where you will return the replacement water, land irrigated, and the general location of your conveyance system. Include any other information which would help in understanding the proposed exchange.





SCALE: 2 inches Equal 1 Mile. Draw Plan in Ink.

I hereby assert that no one will be injured by such exchange and that the change will be made at my own risk. The information contained in this application is true to the best of my knowledge.

Michael J. Grinnon
(Signature of Applicant)

Subscribed and sworn to before me this 30th day of March, 1979.

William A. Carlson
(Notary Public)

My commission expires Life term

Bond 11/2/79

Director, Dept of Water Resources
ACTION OF THE STATE REGULATION ENGINEER

I have examined Application for Exchange of Water No. 2354 and said application is hereby approved.

1. Approval of said application is subject to the following limitations and conditions:

(1) A measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works. (2) Use of water under this permit is subject to control by the watermaster of State Water District #34, Rio Lost River.

2. Denial of said application is for the following reasons:

Witness my hand this 8th day of August, 1980.

J. Glen Saxton
Chief, Operations Bureau

FOR DEPARTMENT USE ONLY

Received by dh Date 8-27-79 Time 3:00 p.m. Preliminary check by

Fee \$ 35.00 Received by dh #13682 Date 8-27-79 Publication prepared by dh

Date 9/28/79 Published in Arco Advertiser Dates 10/4 & 10/11/79

Affidavit of Publication received 10-15-79 Publication approved by JL

Republished Dates

Protests Filed By:

Protestant	Address	Date Filed	Copies Forwarded by	Date	Action Taken
W. K. Sowards	3406 Backskin Road, Coeur d'Alene, Id	10/19	cw	10/23/79	Waived
W. T. Sowards	Rt. #1, Moore, ID	10/19	cw	10/23/79	"

Agreement needed Agreement received

Hearings held at 7/23/79, 10/23/79 Date

Recommended for approval denial by ENC. Saxton
(Title)



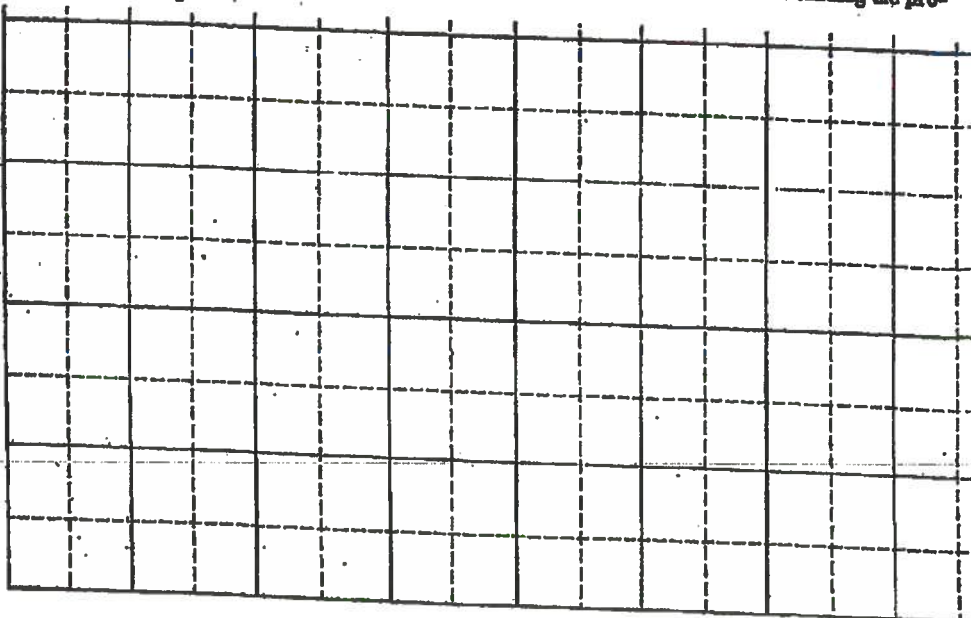
NAME GAIN BY USER WITH WHOM YOU WISH TO EXCHANGE WATER

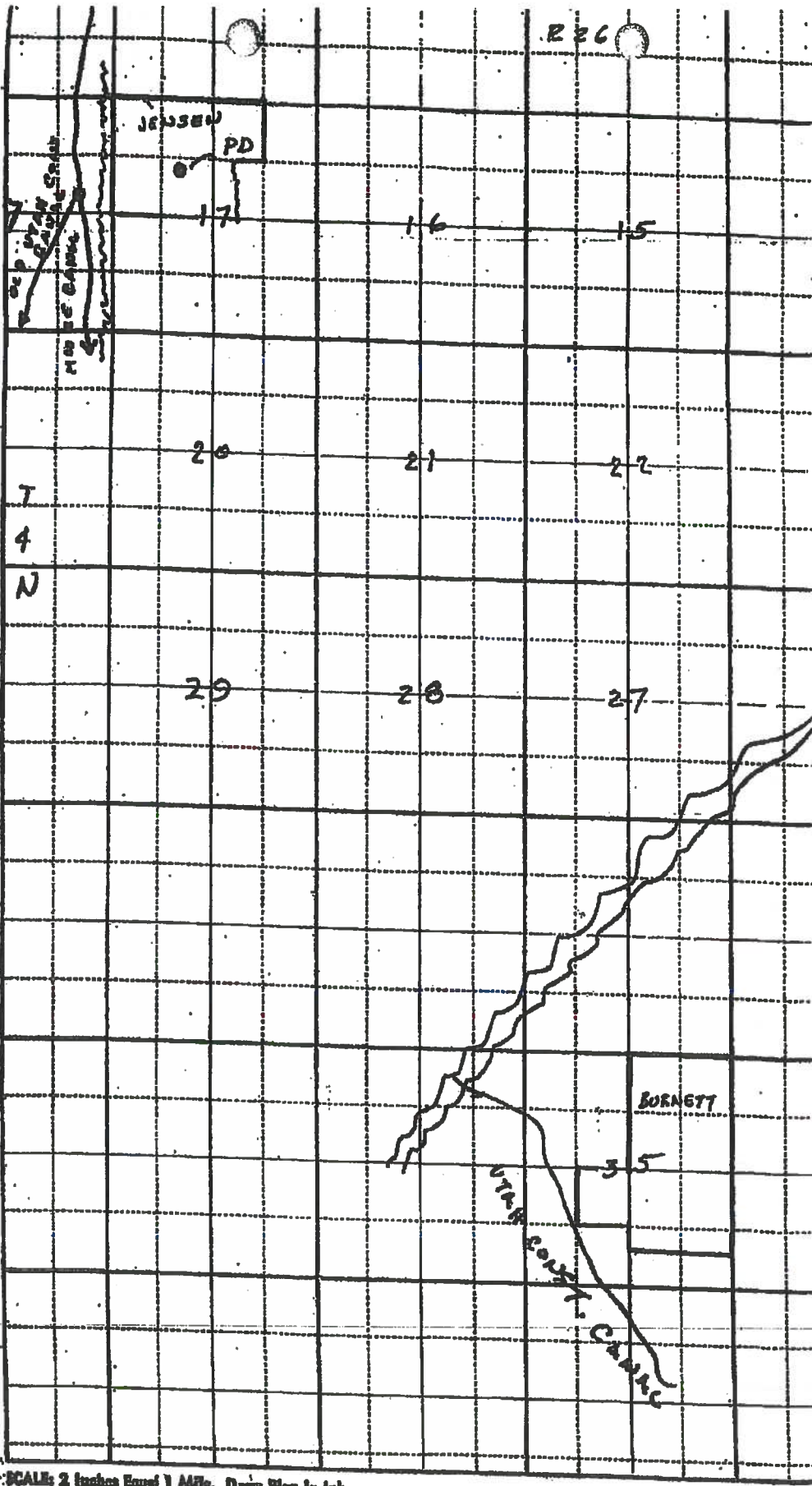
9. Name of Right Holder Boyd Burnett
 Post office address Moore, Idaho
10. Source of water ground water tributary to _____
 (Name of stream or source)
11. Name of canal or ditch _____
12. Amount of water a. 4.52 c.f.s. and/or
 b. _____ acre feet/annum
13. Right obtained by:
 a. Decree to _____ in Case of _____
 (Name)
 vs. _____, Dated _____ in _____
 (Name of Court)
 Court, County of _____. Fully describe decree (if known) _____
- b. Permit, ~~Reclamation~~ No. 34-7096 in the records of the Department of
34-7097 Reclamation.

EXCHANGE

14. 4.52 c.f.s. and/or _____ acre feet per annum of water diverted at the
 point described in line 7 and will be delivered into Old Utah Const. Canal at a point in
SE 1/4 NE 1/4 of Section 7, Township 4N, Range 26E, B.M.
 in Butte County; Additional points, if any _____
15. In lieu thereof 4.52 c.f.s. and/or _____ acre feet per annum will be diverted
 from ground water at a point within the SE 1/4 NW 1/4 of Section 17
 Township 4N, Range 26E, B.M., in Butte County.
16. Explanation Boyd B. Burnett will drill a well on Jensen's property for the
irrigation of their lands in exchange for decreed water from Lost River.

In the space below draw a sketch map showing your point of diversion under the exchange,
 where you will return the replacement water, land irrigated, and the general location of your
 conveyance system. Include any other information which would help in understanding the pro-
 posed exchange.





PAGE NO.

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PL. NO.	DECEASED NAME	PARENT OWNER	HOUSING AMT. SEC. P.L.	PRIORITY	DIVERSITY	REMARKS, LAND TO BE IRRIGATED, ETC.	
34 0542	James, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0856	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0629	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0940	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0801	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0582	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0581	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0017	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0032	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0068	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.
34 0092	John, John	1.0	1.0	4-30-24	24	24	REMARKS, LAND TO BE IRRIGATED, ETC.

February 20, 1998
3:15 P.M.

RECEIVED FEB 23 1998

James C. Herndon
JAMES C. HERNDON
District Judge

IN THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BUTTE

J. DOYLE JENSEN and CATHERINE
K. JENSEN, husband and wife;
KIRBY A. JENSEN and SHARON W.
JENSEN, husband and wife,

Plaintiffs,

vs.

MITCHELL D. SORENSEN and
ELAINE R. SORENSEN, husband
and wife,

Defendants.

Case No. CV-96-19

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

I. INTRODUCTION

Plaintiffs J. Doyle Jensen and Catherine K. Jensen, husband and wife, and Kirby A. Jensen and Sharon W. Jensen, husband and wife, (Jensens) filed this action against Defendants Mitchell D. Sorensen and Elaine R. Sorensen, husband and wife, (Sorensens) to collect past due (1991-1995) electrical charges owed by Sorensens pursuant to written agreements between the parties.

Sorensens counterclaimed that Jensens owed them money for damages for alleged crop losses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COPIES

EXHIBIT

6

Sorensens dispute the exact amount owed for electrical charges; Jensens deny that they are responsible for any crop losses.

On February 7, 1997, the Court denied both parties' motions for summary judgment.

However, the Court in its MEMORANDUM DECISION AND ORDER RE: PRE-TRIAL MATTERS resolved the following issues (See: Idaho Rule of Civil Procedure [IRCP] 16[f]):

1. Electrical fees are to be paid by both parties in a percentage to be established at trial.
2. Prejudgment interest cannot be readily calculated and therefore will not be awarded. Late payments, however, charged by the electrical coop are due and owing by the parties in a sum or percentage to be determined at trial.
3. Jensens must credit Sorensens for certain payments made by Sorensens against the electrical bills and watermaster fees. The amount to be credited will be resolved at trial.
4. Sorensens are entitled to a creditor set-off against Jensens share of delivery charges; however, like the electrical charges, allocation

of the delivery charges present issues of fact for trial.

Thereafter, this matter came on for trial and Jensens presented evidence on the issues raised in their verified complaint, and Sorensens responded by offering proof on the issues set forth in their counterclaim.

The Court has listened to the evidence, reviewed the documents and proceedings, and observed the credibility of the witnesses. The Court now enters its findings of fact and conclusions of law pursuant to Idaho Rule of Civil Procedure 52(a).

II. FINDINGS OF FACT

1 The Jensens and the Sorensens are owners and operators of farm land situated in Butte County, Idaho, near Arco, Idaho, in the Lost River Drainage area, identified by the Idaho Department of Water Resources (IDWR) as "Basin 34" or more formally as "Water District #34."

2 The Jensen land consists of two contiguous farms: the Kirby Jensen farm, 230 acres in the West half of Northwest quarter (W¹/₂N¹/₄) and the Northwest quarter (NW¹/₄) of Section 17, Township 4 North, Range 26 East, Boise Meridian; and the Doyle Jensen farm, approximately 80 acres, in the West half of the Southeast quarter (W¹/₂S¹/₄), Section 8, Township 4 North, Range 26 East, Boise Meridian.

3 Sorensens own or lease approximately 90 acres of contiguous irrigated farm land. They lease 120 acres, more or less, from Mitchell Sorensen's mother, in the Southeast quarter of the Northeast quarter (SE¹/₄NE¹/₄), and East half of the Southeast quarter (E¹/₂SE¹/₄), Section 5, Township 4 North, Range 26 East, Boise Meridian; the Sorensens own irrigated farm land, 860 acres, in the East half (E¹/₂) of Section 34 and the West half (W¹/₂) of Section 35, Township 4 North, Range 25 East, B.M., and the Northwest quarter (NW¹/₄), Section 2, and the North half of the Northwest quarter (N¹/₂NW¹/₄), Section 3, Township 3 North, Range 25 East, Boise Meridian; they lease of 40 acres of irrigated farm land from Kurt P. Acor, in the West half (W¹/₂) of Section 35, Township 4 North, Range 25 East, B.M.

4 Jensens and Sorensens are parties to exchange applications submitted to IDWR in 1976 and 1979, and which were subsequently approved.

5 On or about May 19, 1976, one of Sorensens' predecessors in interest, Boyd Burnett, with his wife, Sandra, entered into a "MEMORANDUM AGREEMENT. RE: WATER AND EXCHANGE AGREEMENT" ("Exchange Agreement") with Plaintiffs, Doyle, Catherine, Kirby and Sharon Jensen. Under the Exchange Agreement, Burnett appropriated a groundwater right, drilled a well on the Kirby Jensen farm to provide for sprinkler irrigation. Burnett could then use water available in the Moore

Canal under Jensens' decreed surface water rights, through the Crossover Ditch and the Timberdome Canal system for his farm on Era Flats.

6. A final application for exchange of the water rights was filed with and approved by IDWR and the exchange has been in place ever since. Prior to the 1985 irrigation season. Sorensens succeeded to the interests of Burnett under this 1976 exchange agreement.

7. On or about March 30, 1979, the Defendants, Sorensens, entered into a second "MEMORANDUM AGREEMENT, RE: WATER EXCHANGE AND EASEMENT" ("1979 Exchange") with the Plaintiffs, Doyle and Catherine Jensen. Sorensens drilled a second well on Doyle Jensen's 80 acre farm for sprinkler irrigation in exchange for the right to receive surface water available under another of Jensens' decreed surface water rights through the Moore Canal, the Crossover Ditch, and then the Timberdome Canal system for use on Sorensens' Era Flats lands. A second application for exchange of water was filed with and approved by IDWR, and the second exchange has also been in effect ever since.

8. Under the agreements, the parties divide electric and other costs. The 1976 Agreement provides that electrical fees are divided on 60% and 40% share; the 1979 Agreement provides that fees are divided "equally".

9. During a period of extended drought, beginning in 1986, surface water became scarce, and many farmers in the area relied on other sources, including groundwater, for irrigation. The exchange agreements provide for this situation:

EFFECT OF FAILURE OF WATER SUPPLY:

.

In the event the Decreed Water shall become unavailable for any reason, the Decree Owners shall use all reasonable efforts to supply Well Owners with an alternative source of irrigation water. If Decree Owners are unable to provide such alternative source, the right to use the well water shall revert to Well Owners during such failure of the Decreed Water.

1979 Exchange Agreement, Affidavit of Mitchell Sorenson, Exhibit A, No. 11.¹ The Exchange Agreements do not define when water becomes "unavailable."

10. In 1988, Sorensens experienced severe reductions in his surface water. Mitchell Sorenson complained to Kirby Jensen that the water was going "off" during irrigation, and requested an alternate water supply. Sorenson asserted irrigation water was "unavailable" under the terms of the contract, and Kirby disagreed. During the 1988 growing season and in 1989, Jensen and Sorenson both discussed alternatives to the water situation.

11. During the early part of the drought, Sorensens began suffering crop losses, which Sorensens attributed to the

¹ The 1976 agreement contains virtually identical language.

irregularity of surface water, and Jensens' failure to provide the water under the exchange agreements. As a result, Sorensens withheld their portion of the electrical fees under the exchange agreements.

12. In May, 1989, Kirby Jensen and Mitchell Sorenson met at the Sorenson residence. Kirby made some notes on a note pad; after the meeting he signed them. Mitchell also signed the notes (the "Notes"). The notes provide the following information:

Delivery charges Mitch pays or Doyles & Mitch's agreement

Electric 50/50

Maintain 50/50

Short Term: Mitch find source, Kirby pays. If no source available Kirby pays 100% power from Decree off.

Long Term: Goes to reversionary

Contract Void on termination

Natural disaster or war

Drought

Exhibit 1-D. Kirby then wrote "SAVE" and retained the notes. Although Sorenson signed the Notes, he never received a copy.

13. Kirby recorded the Notes on April 1, 1993, as "Agreement of Water Exchange Between Kirby A. Jensen & Mitchell D. Sorensen." The parties continued to irrigate throughout the drought period.

14 Under the exchanges, the Jensens pump ground water rights owned by the Sorensens (34-07096, 34-07097 and 34-07723) in exchange for Sorensens' use of surface water rights owned by the Jensens (34-0032A/34-10037 and 34-00093).

15 The exchanged ground water rights are pumped using electricity provided by the Lost River Electric Cooperative, Inc., Mackay, Idaho, under Coop. Pump Nos. 318 and 517.

16. The Sorensens were party to Agreements for Electric Service To Irrigation Pump with the Lost River Electric Cooperative from 1984 to 1992. Under these agreements, the Sorensens were responsible directly to the Lost River Electric Cooperative for their share of electrical charges for pumping under Coop. Pump Nos. 318 and 517.

17. During the 1990 and 1991 irrigation seasons, Jensen paid for alternative water sources, and offset the amount against his portion of the electric bill. Sorenson did not pay his portion of the electric bill; at trial, he claimed he offset the amount against claimed crop losses for the same period.

18. At all times during 1990 through 1994, both parties operated under the 1976 and 1979 Exchange Agreements, as modified by the 1989 Notes. Sorensen clearly assumed Kirby would be responsible for the full amount of the electrical fees when the surface rights were "off". Kirby expected notification of

reversion, or at least notice that Sorensen had found another source of water.

19. During 1991, the Sorensens failed to make full payment to Lost River Electric Cooperative for their share of electrical charges for pumping under Coop. Nip Nos. 318 and 517. As a result, late penalties were assessed against the two accounts by Lost River Electric Cooperative. These late penalties totaled \$271 .28.

20. The late penalties remained unpaid by the Sorensens through 1991. As a result, the Lost River Electric Cooperative required prepayment of the two accounts for 1992, as well as payment of the late fees and execution of new agreements for electric service, before the Co-op would provide for the 1992 irrigation season.

21. During 1991, the Sorensens failed to make full payment to Lost River Electric Cooperative for their share of electrical charges for pumping under Coop. Pump Nos. 318 and 517. As a result, late penalties were assessed against the two accounts by Lost River Electric Cooperative. These late penalties totalled \$271.28.

22. The late penalties referred to above remained unpaid by the Sorensens through 1991. As a result, the Lost River Electric Cooperative required prepayment of the two accounts for 1992, as well as payment of the late fees and execution of new agreements

for electric service, prior to electricity being provided for the 1992 irrigation season.

23. In order to receive electricity to pump the exchanged ground water rights during the 1992 irrigation season, the Jensens paid the 1991 late fees and prepaid for the 1992 irrigation season. In addition, they entered into new agreements for electric service with Lost River Electric Cooperative during 1992. The new agreements for Coop. Pump Nos. 318 and 517 were signed by the Jensens and Mitch Sorensen, as President of Lost River Electric Cooperative, Inc.

24 The total amounts billed to Coop. Pump No. 318 from 1991 to 1995, minus late penalties, were:

1991	1992	1993
\$6,921.97	\$7,902.69	\$5,886.23
1994	1995	
\$9,319.74	\$4,291.94	

25 The total amounts billed to Coop. Pump No. 517 from 1991 to 1995, minus late penalties, were:

1991	1992	1993
\$2,460.17	\$2,528.71	\$1,496.85
1994	1995	
\$2,694.69	\$1,998.32	

26. The total amounts actually refunded under Coop. Pump No. 318, as Irrigator's Tax Rebates and Energy Exchange payments, for the years 1991 to 1994, were:

1991 \$1,678.53	1992 \$1,940.63	1993 \$1,193.51
1994 \$1,735.34		

27 The total amounts refunded under Coop. Pump No. 517 for the years 1991 to 1994, were:

1991 \$614.08	1992 \$620.96	1993 \$274.78
1994 \$491.11		

28 During the 1991-1994 irrigation seasons, the Sorensens did not inform the Jensens that they believed the exchanged surface water rights were unavailable, that an alternative source was required or had been located, or that reversion was warranted during any period of failure in any specific instance.

29 The Sorensens received more water under the exchanges than did the Jensens during the 1991-1994 period.

30. Alternative supplies were not available from 1991-1994. Sorensens did not notify Jensens that he requested reversion or an alternate supply of water during the drought period.

31 The Jensens made offers to facilitate reversion, consistent with the terms of the exchange agreements, which were refused by the Sorensens.

32 The Sorensens have not provided a mechanism to facilitate reversion of the exchanged ground water rights. There exists no pipeline, ditch, or other mechanism to convey the exchanged ground water from the wells located on the Jensens' farms to the Sorensens' farm. The Sorensens have not utilized alternative points of diversion for reversion purposes.

33 At all times during the 1990 - 1991 irrigation seasons, the parties followed the Exchange Agreements, as modified by the 1989 Notes.

III. CONCLUSIONS OF LAW

A. Jensen's Complaint for Electrical Charges.

1. The Court reviews the Exchange Agreements and the 1989 Notes under the following terms:

The primary objective in construing a contract is to discover the intent of the parties, and in order to effectuate this objective, the contract must be viewed as a whole and considered in its entirety. The primary consideration in interpreting an ambiguous contract is to determine the intent of the parties. The determination of a contracts meaning and legal effect are questions of law to be decided by the court where the contract is clear and unambiguous. However, where a contract is determined to be ambiguous, the interpretation of the document presents a question of fact which focuses on the intent of the parties.

provide for reversion if "the Decree Owners are unable to provide such alternative source," a responsibility undertaken by Sorensen after the 1989 Notes. Given these modifications, reversion occurs after Sorensens notify Jensens that water is unavailable from any alternate source.

Nothing in the 1989 Notes or the Exchange Agreements identifies the party responsible for making the reversion possible.

However, the evidence at trial shows that Sorensens should be responsible for the reversion of the well water, if it becomes necessary.

5 Jensens have not violated the Exchange Agreements as modified by the 1989 Notes.

6 Under the Exchange Agreements, as modified by the 1989 Notes, the Sorensens are responsible for 50% of the electrical charges for Coop. Pump Nos. 318 and 517, minus 50% of the actual refunds made on the two accounts, for the years 1991 - 1995.

7 The Sorensens are responsible for the late fees charged in 1991.

B. Sorensens' Counterclaim for Crop Loss.

1 Even if Jensens failed to provide an alternative source under the agreements, Sorensens have failed to support their claim for crop loss.

2. Damages for breach of contract may not be recovered unless they are clearly ascertainable "both in their nature and origin and unless it is also so established that they are the natural and proximate consequence and are not contingent or speculative." Zanotti v. Cook, ____ Idaho ____, 922 P.2d 1077, 1081 (Ct.App. 1996, citing Wing v. Hulet, 106 Idaho 912, 918, 684 P.2d 314, 320 (Ct.App. 1984).

In Idaho, the measure of damages for crop loss is the difference between the value of the crop actually raised and the crop which would have been raised under normal conditions. See, e.g., Walker v. American Cyanimid Co., ____ Idaho ____, 948 P.2d 1123, 1131 (1997); Casey v. Nampa & Meridian Irr. Dist., 85 Idaho 299, 379 P.2d 409 (1963); Davisons Air Service, Inc. v. Montierth, 119 Idaho 991, 812 P.2d 298 (Ct.App. 1990). The burden of proof rests upon the party claiming the loss. Davisons Air Service, 119 Idaho at 994, 812 P.2d 301.

3. Sorensens attribute their crop loss solely to Jensens' alleged failure to provide water under the Exchange Agreements. Sorensens provided no evidence, expert or otherwise, to support their assumption. Sorensen has produced evidence that he did his best to minimize the effects of the drought. However, Sorensen did not provide sufficient evidence that his claimed crop losses were solely attributable to Jensen's failure to provide (a) an

alternates water source, or (b) revert the well water back to Sorensens.

4. Jensens provided conflicting evidence that the loss was caused by drought conditions over which Jensens had no control. Moreover, given the Court's finding that Sorensens bore responsibility for obtaining alternate sources of water and notifying Jensens of unavailability, the Sorensens have failed to show that Jensens' alleged breach caused his crop loss.

5. In support of their damage claim, Sorensens compare the average yield of their crops in good water years against the yield during the drought period. The loss for each crop was then multiplied by the actual average price per unit received for the crop to determine the value of the total crop loss for each year from 1991 through 1994. Sorensens then multiply by the percent of the water shortage attributable to Jensens to determine the value of crop loss resulting from the unavailability of water under the Exchange Agreements.

6. Such calculations are unsupported and speculative. In Walker, supra, the Supreme Court discussed the proper foundation for determining "normal circumstances." On appeal, the defendant chemical company claimed Walker's use of multi-year (1988 - 1992) averages lacked an adequate foundation for determining crop loss. The Court determined:

Walker could not prove the yield and quality of its crops under normal conditions without a multi-year average. Thirty-nine of Walker's forty-five fields were damaged by ASSERT. The remaining six fields were not good comparisons. Two were "planted back to back" in potatoes; two were not fields normally farmed by Walker and did not have typical soil and nutritional make-up; and the remaining two fields were marginal land being farmed for the first time in 1990 and were not brought up to their productivity potential. Because Walker's fields were either affected by ASSERT or were not of comparable quality, Walker submitted evidence of yields through the use of a multi-year average, based on yield records from 1988 through 1992.

948 P.2d at 1130-1131. The Court concluded that evidence of Walker's expected volumes of business and profit margins based on previous years of experience and knowledge was not too speculative to prove lost future earnings. Id. See also, Nora v. Safeco Ins. Co., 99 Idaho 60, 62-63, 577 P.2d 347, 349-50 (1978). In Nora, the plaintiffs expected business and profit volumes were substantiated by previous years' records, along with the evidence of other witnesses. Id. Walker substantiated his claims for loss through expert testimony of the multi-year average. 948 P.2d 1131. The Supreme Court determined that, supported by adequate evidence under Idaho Rule of Evidence 702, multi-year projections explained "normal conditions" sufficiently enough to support the jury's award of damages. Id.

7. Sorensens have provided no evidence of "normal conditions." Here, Sorensens apparently ask this Court to assume that 1987 and 1995-1996 provide a sufficient basis to determine such conditions. Sorensens' assumptions, without further

foundation or support, do not assist this Court in determining "normal conditions" under the circumstances.

8. Sorensens have failed to show the value of their crop under "normal conditions." They presented nothing at trial which would support their expected yield, or potential profit. The claimed damages, therefore, are entirely speculative.

9. Sorensens may not recover damages for the alleged crop loss. They may not offset their claimed crop loss against the amounts owed to Jensens on the electrical charges.

C. Prevailing Party.

1 Jensens are the prevailing parties in this action.

2 Jensens may not recover attorney fees. Attorney fees are available if provided by contract or statute. Idaho R.Civ.Pro. 54(e)(1). The Court finds no contractual arrangement providing for attorney fees. It further concludes this action is not a "commercial transaction" as identified in I.C. § 12-120(3). See, e.g., Spence v. Howell, 126 Idaho 763, 776, 890 P.2d 713, 727 (1995).

IV. ORDER

1. Sorensens shall pay Jensens 50% of all electrical charges attributable to Coop. Pump Nos. 318 and 517, minus 50% of the actual refunds made on the two accounts, from 1991 through 1995.

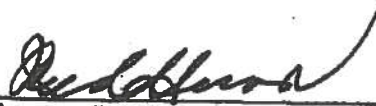
2. Sorensens shall reimburse Jensens for the late fees paid in 1991.

3. Jensens shall be awarded prejudgment interest on all amounts owed by the Sorensens from the dates the amounts came due.

4. Counsel for Jensens shall prepare an appropriate Judgment and submit it for the Court's review no later than ten days from the date below.

IT IS SO ORDERED.

DATED THIS 20th day of February, 1998.


James C. Herndon
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on _____, I served a true copy of the foregoing on the persons listed below by mailing, first class, postage prepaid, or by hand delivery.

Norman M. Semanko

P.O. Box 1906 Twin Falls, ID 83303-1906

Kent W. Foster

P.O. Box 50130 Idaho Falls, ID 83405

JUDY BAILEY, Butte County Clerk

BY: 
for Deputy Clerk

Marshal Todd Perkes Water Rights With Stipulation

WATER RIGHTS BEFORE TRANSFER

Water Right No.	Name on Water Right	Basis	Priority Date	Source	Beneficial Use	Individual Diversion Rate Limitation (cfs)	Combined Diversion Rate Limitation (cfs)	Individual Volume Limitation (AFA)	Combined Volume Limitation (AFA)	Individual Acre Limitation	Total Permissible Place of Use	Point of Diversion
34-7035A	Marshal Todd Perkes	Partial Decree	May 12, 1973	Ground water	Irrigation	0.64	4.95	166.3	920.5	47.5	561	#1: NESENN, Sec. 5, 4N, 26E #2: NENWNN, Sec. 8, 4N, 26E #3: NESWSE, Sec. 8, 4N, 26E #4: NWSENN, Sec. 17, 4N, 26E
34-7122A			January 15, 1976			4.31		754.3		215.5		
34-7096A			January 31, 1975	1.84		322	92					
34-7097A			January 31, 1975	1.58		276.5	79					
34-7223			April 16, 1979	Ground water		1.58	5	280		80		
					GROUND WATER TOTALS	9.95	9.95	1799.1	1799	514	561	
34-622A	Marshal Todd and Norma Perkes	Partial Decree	June 1, 1896	Big Lost River	Irrigation	1.57	None	None	None	80	80	NWSESE, Sec. 4, 5N, 26E
					OVERALL TOTALS	11.52				594	641	

WATER RIGHTS AFTER TRANSFER												
34-7035A	Marshal Todd Perkes	Partial Decree	May 12, 1973	Ground water	Irrigation	0.64	4.95	166.3	920.5	47.5	620	#1: NESENN, Sec. 5, 4N, 26E #2: NEUNWN, Sec. 8, 4N, 26E #5: SESENN, Sec. 5, 4N, 26E
34-7122A			January 15, 1976			4.31		754.3		215.5		
34-7096A			January 31, 1975	1.84		322	92	#3: NESWSE, Sec. 8, 4N, 26E #4: NWSENN, Sec. 17, 4N, 26E				
34-7097A			January 31, 1975	1.58		276.5	79					
34-7223			April 16, 1979	Ground water		1.58	5	280	878.5	80		
					GROUND WATER TOTALS	9.95	9.95	1799.1	1799	514		
34-522A	Marshal Todd and Norma Perkes	Partial Decree	June 1, 1896	Big Lost River	Irrigation	1.57	None	None	None	80		NWSESE, Sec. 4, 5N, 26E
					OVERALL TOTALS	11.52				594	620	