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WITHDRAWN

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

Transfer No. 70343

Page 1
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APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

WATER RESOURCES
WESTERN REGION

Name of applicant Black Mesa Farms, LLC Phone 366-7433
Post Office address P O Box 82, Glens Ferry ID 83623

A. PURPOSE OF TRANSFER

1. ☐ Change point of diversion ☐ Add diversion point(s) ☒ Change place of use
☐ Change nature of use ☐ Change period of use ☐ Other _____
2. Describe the reason for the proposed changes General place of use

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

- | 1. Right Number | Priority | Amount
(cfs/ac-ft) | Nature
of Use | Period of Use |
|-------------------|-------------------|-----------------------|-------------------|--|
| <u>2-103</u> | <u>5/10/1965</u> | <u>8.54 cfs</u> | <u>irrigation</u> | <u>March 15</u> to <u>Nov 15</u> |
| <u>2-2209B</u> | <u>2/25/1963</u> | <u>12.8 cfs</u> | <u>irrigation</u> | <u>March 15</u> to <u>Nov 15</u> |
| <u> </u> | <u> </u> | <u> </u> | <u> </u> | <u> </u> to <u> </u> |
| <u> </u> | <u> </u> | <u> </u> | <u> </u> | <u> </u> to <u> </u> |
2. Total amount of water being transferred 21.34 cubic feet per second and/or acre-feet per annum.
3. Source of water Snake River tributary to Columbia River
4. Point(s) of Diversion:

[illegible]

5. Lands irrigated or place of use: *plus general place of use listed on 2-2209R (attachment B)*

[illegible]

Total acres 3971

PART 1**6. General Information:**

a. Description of diversion system See old exam
Improvements include New 18" main Lines Portable
18" Buried To Fields - use 3" solid set for crop delivery

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ Yes / No. If yes, provide a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes.

c. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer:

N/A

d. Remarks:

See attachment A

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

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

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

Witness my hand this _____ day of _____, 19____.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT

PART 2
(Attach one copy for each right)

*(2-103 + 2-2209B
 claim reports
 attached to this
 Part 2 page)*

A. DESCRIPTION OF RIGHT AS RECORDED**1. Right evidenced by:**

- a. Decree No. _____ Decreed to _____
 in case of _____ vs. _____
 dated _____ in _____ county of _____
- b. License No. _____ issued by the Idaho Department of Water Resources.
- c. Claim No. _____ on file with the Idaho Department of Water Resources.
- d. Transfer No. _____ which produced this right.

2. Attach a copy of last year's tax notice for the property to which the water right is appurtenant or other documents which show ownership. Label document as attachment A. Check appropriate box below:

☐ Tax Notice ☐ Warranty Deed ☐ Other _____

3. Source of water _____ tributary to _____

4. Date or priority _____

5. Water is used for the following purpose:

amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

6. Total amount of water under right _____ cubic feet per second and/or _____ acre-feet per annum.

7. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

8. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total acres _____

9. Describe any other water rights used for the same purpose as described above _____

PART 2 ATTACHMENT

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Claim Report 2-103

03/05/2003

WATER RIGHT NUMBER: 2-103

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	CHRISTINE W WOOTAN PO BOX 636 GLENNS FERRY, ID 83623 (208)366-2575
Current Owner	BRENDA BRYANT GLENNS FERRY, ID 83623
Original Owner	COTTONWOOD MUTUAL CANAL CO PO BOX 789 BURLEY, ID 83318
Current Owner	BLACK MESA FARMS PO BOX 82 GLENNS FERRY, ID 83623
Current Owner	WESLEY R WOOTAN PO BOX 636 GLENNS FERRY, ID 83623 (208)366-2575
Current Owner	DON J BRYANT GLENNS FERRY, ID 83623

Priority Date: 05/10/1965

Basis: Beneficial Use

Status: Active

<u>Source</u>	<u>Tributary</u>
SNAKE RIVER	COLUMBIA RIVER

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	3/15 to 11/15	8.540 CFS	
	<u>Total Diversion:</u>	8.540 CFS	

Location of Point(s) of Diversion

SNAKE RIVER	L6 (NW1/4SW1/4)	Sec. 9, Twp 06S, Rge 11E, B.M.
ELMORE County		

Place of Use

IRRIGATION

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	10E	14	39.0	39.0	40.0	40.0	40.0	40.0	40.0	40.0	39.0				39.0	30.0			426.0

Total Acres: 426

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Claim Report 2-103

Conditions of Approval:Remarks:

1. General BLACK MESA PROJECT.
FIELD EXAMINATION FOR 02-02209 IDENTIFIED THE LAND CLAIMED HEREIN WAS
IRRIGATED AT THE TIME. THIS CLAIM IS TO COVER THE ADDITIONAL PLACE OF USE
NOT COVERED IN THE LICENSE ISSUED FOR 02-02209.
ADDRESS CHANGED PER CLAIMANT REQUEST. DB 5/2/2000.
2. General Claim amended to include 40 acres in SWNW, 06S, 10E, Sec. 14 that were not licensed on
permit 2-2389, but were included in original Snake River Adjudication on claim 2-103.

Comments:Dates and Other Information:

Claim Received Date: 4/17/1991
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
State or Federal: S
Owner Name Connector: OR
Water District Number:
Generic Max Rate Per Acre:
Generic Max Volume Per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Carey Act Number:
Mitigation Plan: False

Element Reviewed/Verified Dates:

<u>Element</u>	<u>Last Reviewed Date</u>	<u>Reviewer</u>	<u>Last Verified Date</u>	<u>Verifier</u>	<u>Status</u>
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Verification Log:

<u>Element</u>	<u>Date Time Stamp</u>	<u>Reviewer</u>	<u>Log text</u>
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PART 2 ATTACHMENT

01/15/2003

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Claim Report 2-2209B

WATER RIGHT NUMBER: 2-2209B

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	BLACK MESA FARMS PO BOX 82 GLENNS FERRY, ID 83623
Original Owner	COTTONWOOD MUTUAL CANAL CO C/O RINGERT CLARK CHARTERED PO BOX 2773 BOISE, ID 83701 (208)342-4591
Current Owner	BRENDA BRYANT GLENNS FERRY, ID 83623
Current Owner	WESLEY R WOOTAN PO BOX 636 GLENNS FERRY, ID 83623 (208)366-2575
Current Owner	DON J BRYANT GLENNS FERRY, ID 83623
Current Owner	CHRISTINE W WOOTAN PO BOX 636 GLENNS FERRY, ID 83623 (208)366-2575

Priority Date: 02/25/1963

Basis: License

Status: Active

<u>Source</u>	<u>Tributary</u>
SNAKE RIVER	COLUMBIA RIVER

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	3/15 to 11/15	12.800 CFS	3,200.00 AF
<u>Total Diversion:</u>		12.800 CFS	3,200.00 AF

Location of Point(s) of Diversion

SNAKE RIVER	L6 (NW1/4SW1/4)	Sec. 9, Twp 06S, Rge 11E, B.M.
ELMORE County		

Place of Use

IRRIGATION

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	10E	1									35.0		40.0	40.0		30.0	40.0	30.0	215.0
06S	10E	2															40.0		40.0

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Claim Report 2-2209B

06S 10E 11	40.0	40.0	40.0							40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	440.0
06S 10E 12	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	640.0
06S 10E 13	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0				40.0	40.0	40.0	560.0
06S 10E 24	40.0	40.0	40.0	40.0											40.0	40.0		240.0
06S 11E 6											10.0							10.0
06S 11E 7	25.0	25.0	40.0	40.0	30.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	600.0
06S 11E 17						40.0	40.0			40.0								120.0
06S 11E 18	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0	40.0		600.0
06S 11E 19							40.0			40.0								80.0

Total Acres: 3545

Conditions of Approval:

1. 016 See remarks for additional conditions of approval.

Remarks:

1. General DESC. OF DIVERTING WORKS - RIVER PUMPING STATION, PENSTOCK, RELIFT STATION, RELIFT PENSTOCK, MAIN TRUNKLINE AND LATERAL MAIN LINES, WITH SOME BOOSTER PUMPS.
NOTE: PLACE OF USE ON CLAIM STATES: LANDS AND ACREAGES IN EACH SUBDIVISION, IN TOWNSHIP 6 SOUTH, RANGES 10 AND 11 EAST, ARE AS STATED IN THE COPY OF THE APPLICATION FOR EXTENSION OF TIME TO AVOID FORFEITURE OF A WATER RIGHT ATTACHED HERETO AS EXHIBIT A & INCORPORATED HEREIN BY THIS REFERENCE. SECTION ACRES ARE AS SHOWN IN EXHIBIT A OF INITIAL CLAIM BY COTTONWOOD CANAL CO. FOR THIS WATER RIGHT.
PLACE OF USE IS 640 ACRES WITHIN TOTAL PERMITTED PLACE OF USE DESCRIBED IN LICENSE FOR THIS WATER RIGHT AND SECTION 14 COVERED BY A02-00103. PLACE OF USE IS ROTATED WITHIN THE TOTAL PLACE OF USE.
*ADDRESS CHANGED PER CLAIMANT REQUEST. DB 5/2/2000.
2. General Claim amended to eliminate 440 acres that belong to BLM. 1/10/03

Comments:

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Claim Report 2-2209B

Dates and Other Information:

Claim Received Date: 3/7/1990
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
State or Federal: S
Owner Name Connector: OR
Water District Number:
Generic Max Rate Per Acre:
Generic Max Volume Per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Carey Act Number:
Mitigation Plan: False

Element Reviewed/Verified Dates:

<u>Element</u>	<u>Last Reviewed Date</u>	<u>Reviewer</u>	<u>Last Verified Date</u>	<u>Verifier</u>	<u>Status</u>
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Verification Log:

<u>Element</u>	<u>Date Time Stamp</u>	<u>Reviewer</u>	<u>Log text</u>
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10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of non-use?
N/A If yes, describe _____

B. DESCRIPTION OF PORTION OF RIGHT BEING TRANSFERRED

(If the entire right is to be changed by the applicant, omit part B and C.)

1. amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total acres _____

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

1. amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)
 amount _____ for _____ purposes from _____ to _____
 (cfs/ac-ft)

2. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion

3. Lands irrigated or place of use:

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total acres _____

PART 3**B. CHANGES IN NATURE OF USE**

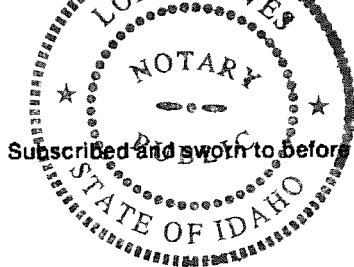
1	New Nature of Use	Amount (cfs/ac-ft)	Hours/days/year	Period of Use
				_____ to _____
				_____ to _____

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

3. Describe effects on other water uses resulting from the proposed change:

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

I understand that any willful misrepresentations made in this application may result in voiding its approval.



Subscribed and sworn to before me this

18th day of Dec, 192002

(Signature of Applicant)

Louis Graves

(Notary Public)

My commission expires

6/18/04**FOR DEPARTMENT USE ONLY**

Transfer contains _____ pages and _____ attachments

Received by ly Date 12/20/02 Protest filed by _____Prelim. check by _____ Fee \$570 W029939Receipted by ly Date 12/20/02

Published in _____ Copies of protest forwarded by _____

Pub. dates _____ Hearing held by _____ Date _____

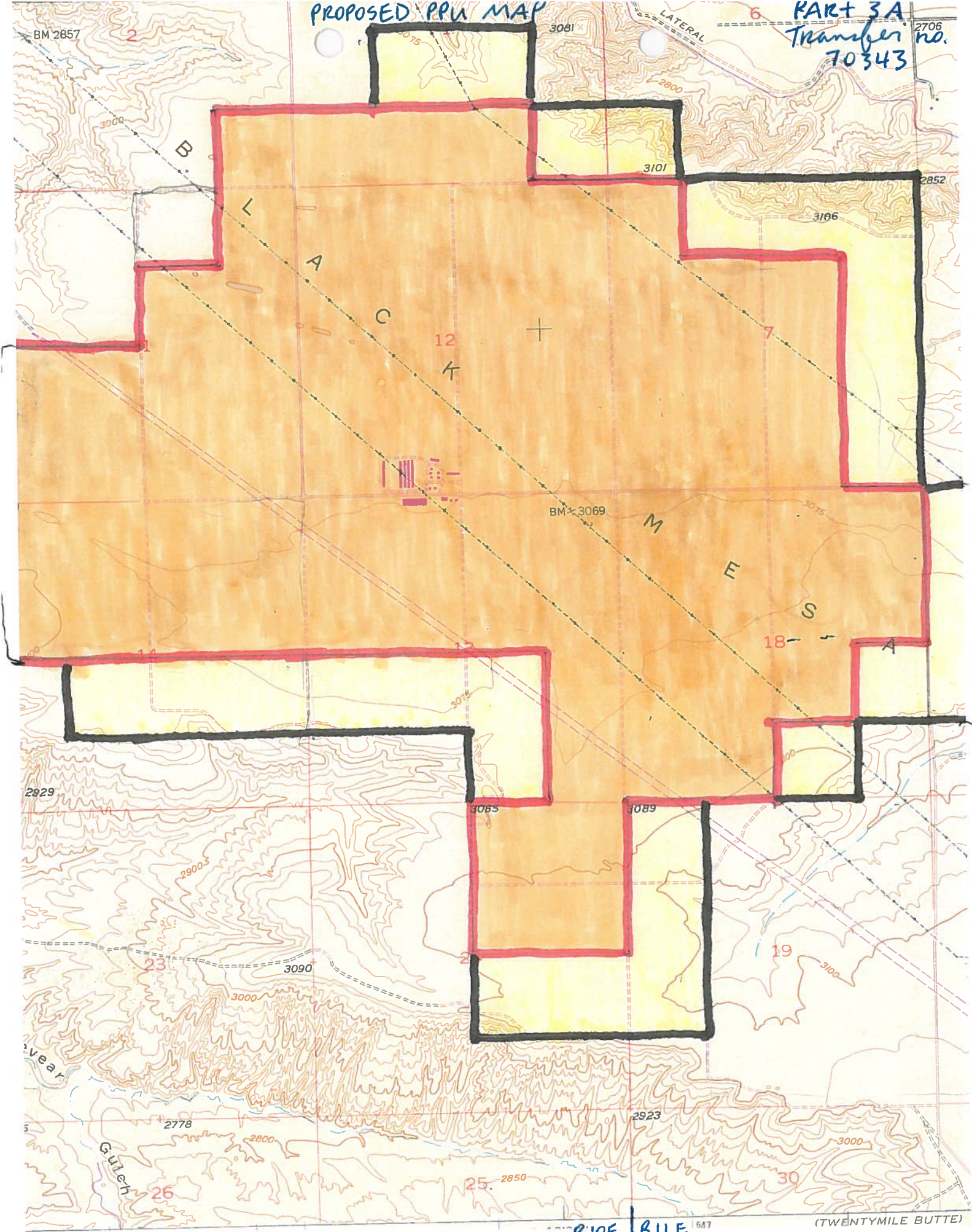
Watermaster recommendation requested on _____ Recommended for ☐ approval ☐ denial

_____ rec'd. _____ by _____

Copy of transfer sent to lien holder _____

PROPOSED PPU MAP

PART 3A
Transfer no.
70343



T65

R10E R11E 6A7

(TWENTYMILE BUTTE)

Attachment A

The Cottonwood Canal Co. project was started in 1962. The field exam for license 2-2209 described lands irrigated in section 14, T6S R10E but the resulting license issued by the department did not list lands in section 14. No appeal was filed regarding the exclusion of section 14. Cottonwood Canal Co. filed a Petition to Correct License 2-2209 to include the Section 14 acres 10/31/2000. A Recommended Decision and Order dated 1/24/2002 denied the petition explaining the reason for this transfer (see attachment B).

The department started an adjudication of Snake River Rights in the mid eighties, which was never completed. At that time, Cottonwood Mutual Canal Co. filed an amended claim on 2-2209 to account for the acres in section 14, which resulted in creation of beneficial claim 2-103 for 426 acres. Around the same time, Extensions of Time to Avoid Forfeiture filed by Cottonwood Mutual Canal Company and BLM protected right 2-2209 until July, 1991. The farm was put back into production in 1990, when BLM conveyed the majority of the project acres to Wes and Christine Wootan (see attachment D). The Wootans then became partners with Don and Brenda Bryant and formed Black Mesa Farms LLC.

In 1998, approved Transfer 5125 resulted in the split of license 2-2209 with Black Mesa's portion recognized as 2-2209B for 12.8 cfs and irrigation of 640 acres within a 3985 permissible place of use (ppu). The 3985 ppu incorrectly included 440 acres of BLM land. The ppu should have been listed as 3545 on 2-2209B. On 1/10/2003, we amended SRBA claim 2-2209B from 3985 acres to 3545 acres in association with this transfer.

The purpose of this transfer is to describe a 3971 acre ppu for rights 2-2209B and 2-103, which accounts for 426 acres in S14 plus Black Mesa Farm's 3545 acre ppu.

Please refer to dept. files regarding the above rights and also the Petition to Correct License 2-2209 for farm history, affidavits and other information that supports development of this project.

Black Mesa Farms LLC partners are Wes and/or Christine Wootan and/or Don and/or Brenda Bryant.

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

RECEIVED
JAN 24 2002
WATER RESOURCES
WESTERN REGION

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)

**RECOMMENDED DECISION
AND ORDER**

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO 0202209 IN THE)
NAME OF BLACK MESA FARMS, LLC)
_____)

STANDARD FOR DECISION

This matter comes before the Idaho Department of Water Resources ("IDWR") on an *Petition to Correct License* dated October 31, 2000, filed by Cottonwood Canal Co. (the "Petitioner") seeking to amend water right license no. 02-02209, issued on February 11, 1970. In response, a *Cross-Petition to Correct License and Petition to Change Ownership of License* was filed by Black Mesa Farms, also seeking amendments to water right license no. 02-02209 (the "Cross-Petition"). The Petition and Cross-Petition request IDWR to modify license no. 02-02209 pursuant to I.C. § 67-5254, which provides, in part, that:

(1) An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license... unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

For purposes of this section, a license is "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes." I.C. §67-5201(9).

Although the language of I.C. § 67-5254 does not provide a direct authorization to amend a water right license, the language presupposes an agency may modify or amend a license, and then adds the condition that notice and opportunity for a contested case be provided before doing so. IDWR previously used this interpretation of I.C. §67-5254 to authorize the amendment of a water right license. *In the Matter of License No. 61-07189 in the Name of Magic West, Inc.*, Final Order (January 22, 1999); *In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay*, Preliminary Order Correcting License (February 1, 2000).

The authority to amend or modify a water right license under I.C. § 67-5254 is circumscribed by I.C. § 42-220, which provides that a water right license “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right....” IDWR cannot use I.C. § 67-5254 to increase or change the beneficial use described by a water right license. Such an amendment would be an unlawful enlargement of the beneficial use under the licensed priority date. See Fremont-Madison v. Ground Water Approp., 129 Idaho 454, 461 (1996). The time for making such substantive changes in 1970 was through an appeal filed within sixty days of license issuance. I.C. § 42-219 (1967 Supp.); § 42-224 (1948).

Amendments to water right licenses under I.C. § 67-5254 may be issued to correct errors made by IDWR in describing the licensed beneficial use. Such errors may be patent—as when there is an obvious transposition of numbers or two elements of the described beneficial use are obviously contradictory or incompatible.¹ Latent errors may also be corrected where

¹For instance, a right to irrigate 50 acres which is described as using 0.01 cubic feet per second (“cfs”) has a patent error in the description of the beneficial use. This was the case *In the Matter of License No. 61-07189 in the Name of Magic West, Inc.*, Final Order (January 22, 1999) where IDWR erroneously licensed an industrial use for 0.67 cfs,

investigation reveals a licensing provision that does not correctly describe the beneficial use.² In each instance, the license to be amended must have given junior appropriators some notice of the extent of beneficial use under the license. Completely new beneficial uses may not be shoe-horned into a licenses' priority date, under the guise of a license amendment.

The Idaho Department of Water Resources (IDWR), having examined the Petition and the written record, and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings

1. The *Petition to Correct License* was filed on October 31, 2000, by Petitioner seeking to amend water right license no. 02-02209 to include the irrigation of 400 acres in T. 6 S., R. 10 E, Sec. 14, with an additional 8.0 cfs and 1,338.95 AFA. A filing fee of \$50 from Petitioner was received by IDWR on January 11, 2001. A Notice of Petition to Change Water Right License No. 02-02209 in the Name of Cottonwood Canal Company was published on January 24 and 31, 2001, in the Mountain Home News. A Notice of Protest was filed by Black Mesa Farms, LLC with IDWR on February 13, 2001.

2. Cross-Petitioner filed the *Cross-Petition to Correct License and Petition to Change Ownership of License* with IDWR on April 27, 2001, and also sought to amend water right license no. 02-02209 to include the irrigation of 400 acres in T. 6 S., R. 10 E,

but only 12.9 acre feet per annum (afa). IDWR amended the license to correctly describe the annual volume of the use as 58 afa.

² This was the case *In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay*, Preliminary Order Correcting License (February 1, 2000) where IDWR removed approval conditions requiring the use of appurtenant surface water before using the licensed groundwater right, when information revealed that the right was never used with appurtenant surface water. The change in this case did nothing to change the beneficial use, it simply removed essentially meaningless approval conditions.

Sec. 14, with 8.0 cfs and 1,338.95 AFA, but requested such amended license be issued in the name of Cross-Petitioner.

3. On June 6, 2001, IDWR issued its *Order Authorizing Discovery and Order of Recusal*. On June 19, 2001, IDWR issued its *Order Appointing Hearing Officer*. Following a prehearing conference on July 20, 2001, the Hearing Officer issued a *Prehearing Order* on July 23, 2001, that, among other things, bifurcated the issues in this matter as follows:

Two issues are raised by the Petitions and Cross-Petitions:

1. Whether License No. 02-02209 should be modified to include more acres and an increased quantity of water; and
2. Whether the additional acres and increase quantity of water should be shown on the License as owned by Cottonwood Canal Co. or Black Mesa Farms.

Because *the* second issue need not be decided if IDWR does not modify License No. 02-02209, the parties agreed that the first issue should be processed prior to the second issue. If the Hearing Officer determines that License No. 02-02209 should not be modified, he will issue that decision in the form of a recommended order to the Director of IDWR. If the Hearing Officer determines that License No. 02-02209 should be modified, he will issue that decision in the form of a draft decision to the parties and set an additional prehearing conference to discuss resolution of the second issue.

4. The *Prehearing Order* also provided that the determination of whether License No. 02-02209 should be modified would be made upon a written record and established a schedule for submission of written materials.

5. On July 23, 2001, the Hearing Officer issued a *Request for Submission of IDWR Staff Memorandum*. IDWR responded with its *Response to Request for Submission of IDWR Staff Memorandum* on September 31, 2001. Cross-Petitioner submitted its inappropriately named *Black Mesa's Response to IDWR Staff Memorandum* on October

26, 2001.³ The Petitioner filed its similarly name *Memorandum in Response to IDWR Staff Memorandum* on November 2, 2001, with supporting affidavits.

II. Evidence Considered.

6. IDWR considered the following evidence in making the substantive findings of facts:

- a. Application for Permit to Appropriate the Public Waters of the State of Idaho No. 39069, including map. Approved as Permit No. 30990, and subsequently renumbered 02-2209.
- b. Application for Amendment LAND LIST Permit No. 30990 received April 25, 1963.
- c. State of Idaho Water License no. 30990/02-2209.
- d. Notice of Proof of Completion of Works and Application of Water to Beneficial Use received on June 11, 1965, by the Department of Reclamation, with accompanying letter signed by Otis Williams on behalf of Cottonwood Canal Company.
- e. Letter dated June 15, 1965, from Carl E. Tappan, State Reclamation Engineer, to Cottonwood Canal Company re Permit No. 30990.
- f. Affidavit of Publication received August 3, 1965 by the Department of Publication.

³ This document is inappropriately named because the IDWR staff memorandum is not a pleading to which a "response" is filed. It is a factual memorandum by IDWR staff, akin to an affidavit. IDWR is not a party to this matter, it is the decision-maker.

- g. Deposition of Holder signed by Otis Williams and notarized by Phyllis Butterfield on July 29, 1965.
- h. Deposition of Witness signed by George R. Lake and notarized by Phyllis Butterfield on July 29, 1965.
- i. Deposition of Witness signed by Lawrence Roemer and notarized by Phyllis Butterfield on July 29, 1965.
- j. Letter dated August 4, 1965, from Carl E. Tappan, State Reclamation Engineer to Otis H. Williams, Secretary, Cottonwood Canal Co.
- k. Draft Report of Examiner for Permit No. 30990, and loose map
- l. Letter dated January 26, 1970 from Dorian Clay, Field Examiner, to Cottonwood Canal Company, c/o Wm. A. Anderson..
- m. Memorandum dated August 24, 1984, from D. Shaff to D. Tuthill.
- n. Inter-Department Memo dated August 28, 1984, from Dave Tuthill to Glen Saxton.
- o. Inter-Department Memo dated August 29, 1984, from Dave Tuthill to Don Shaff.
- p. Letter dated December 29, 2000, from Charles L. Honsinger to Glen Saxton, with attachments.
- q. Response to Request for Submission of IDWR Staff Memorandum, dated September 13, 2001.
- r. Affidavit of Shelley Keen, dated November 1, 2001.

s. Affidavit of Clifford Smith, dated October 22, 2001.

III. Permitting and Licensing Process

7. On February 25, 1963, Cottonwood Canal Company filed an Application for Permit to Appropriate the Public Water of the State of Idaho with the Idaho Department of Reclamation. Cottonwood Canal Company was identified as a non-profit corporation. The Idaho Department of Reclamation is a predecessor agency of the current Idaho Department of Water Resources, and will also be referred to as IDWR. That Application was assigned application no. 39069.

8. The Application requested authorization to develop a water right with which to irrigate 4480 acres, with 89.6 cfs of water to be diverted from the Snake River. The Application envisioned the construction of a pumping plant, canals ditches and pipeline over 5 years, and application of the water to the proposed use within an additional 5 years. The land to be irrigated was located in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Among these lands, 400 acres was identified within Section 14 of Township 6 South, Range 10 East ("Section 14 lands").

9. The Application was approved and a permit issued for the development of this water use on March 1, 1963. The Permit was assigned no. 30990, subsequently renumbered to 02-2209, and required one-fifth of the work to be completed by September 1, 1965, and the remainder was to be completed by September 1, 1968. Beneficial use of all the water to be used under the Permit was required to be made by March 1, 1973.

10. A Notice of Proof of Completion of Works and Application of Water to Beneficial Use was submitted for publication by Otis Williams of the Cottonwood Canal Company on June 11, 1965. The Notice indicated that the place where the water was

used under Permit No. 30990 included the Section 14 lands. The Notice indicated that proof of completion was to be submitted to Phyllis Butterfield, Notary Public, on July 29, 1965, at 10:00 a.m. in Burley Idaho. On June 15, 1965, the State Reclamation Engineer sent three depositions to Cottonwood Canal Company. The first deposition was to be executed by Cottonwood Canal Company, as the "holder" and the other two by two disinterested witnesses. All three were to be submitted on July 29, 1965. The June 15, 1965, letter provided, "It is very important and necessary that each question be answered in detail." (Underscoring in original). The Notice of Proof of Completion of Works and Application of Water to Beneficial Use was published in the Mountain Home News and included reference to the Section 14 lands.

11. The Deposition of Holder for Permit No. 30990, signed by Otis Williams, Secretary of Cottonwood Canal Company, was submitted on July 29, 1965. In its answer to a portion of question 6. "If for irrigation, name each subdivision in which used and number of acres in each subdivision that have actually been irrigated with said water:" the Holder stated "See attached list." A listing of lands which was unattached to the first page of the Holder Deposition, but which was directly behind that page in the file and with staple holes that corresponded to the first page, did not include the Section 14 lands. Total land area listed in the Holder Deposition was 3985 acres.

12. The Deposition of Witness for Permit No. 30990, signed by George R. Lake, the supervisor of irrigators, was submitted on July 29, 1965. In his answer to a portion of * question 6: "If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision:" George Lake stated "there (sic) are 14 320 acre tracts of which nearly all of each is irrigated as per attached list." A listing of lands

which was unattached to the first page of the Lake Deposition, but which was directly behind that page in the file and with staple holes that corresponded to the first page, did not include the Section 14 lands. Total land area listed in the Lake Deposition was 3985 acres.

13. The Deposition of Witness for Permit No. 30990, signed by Lawrence Roemer, farm manager and partial supervisor of irrigators, was submitted on July 29, 1965. In his answer to a portion of question 6: "If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision:" George Lake stated "irrigation 14 - 320 acre tracts described below" and then there is a listing of lands, including the Section 14 lands. Total land area listed in the Roemer Deposition was 4350 acres, although he also indicates 14 -320 acre tracts as the total land area, which is 4480 acres.

14. On August 4, 1965, the State Reclamation Engineer wrote to the Cottonwood Canal Co. acknowledging the receipt of the Holder, Lake and Roemer Deposition and the affidavit of publication submitted in proof of completion of Permit No. 30990. The letter indicated that before final action could be taken a field examination had to be made by the department.

15. The form for the Report of Examiner requires in paragraph 7 as follows: "List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact numbers of acres under cultivation in each forty-acre tract. ... (Submit map on attached plat, showing location and details of above description." The Report lists the lands to be irrigated as provided in Permit No. 30990, including the Section 14 lands. It does not list the exact number of acres under cultivation in each forty-acre tract, either in writing or on

the attached map (although the attached map does show some erased pencil figures on some of the "quarter-quarters" that could be irrigated acreages). It does indicate adjacent to the term "Area" the number 3,985 acres, which corresponds to the total number of acres indicated in both the Holder and Lake Depositions. Behind the Report of Examiner in the file is a map of Cottonwood Canal Co.'s proposed place of use with each "quarter-quarter" numbered, with acreage figures written in red. The red figures correspond to the Holder and Lake Depositions which indicated a total of 3985 irrigated acres, and does not include the Section 14 lands. By letter dated January 26, 1970, Field Examiner Dorian Clay indicated that the field examination for Permit 02-2209 found irrigation of 3,985 * acres of irrigation within the lands under Permit 02-2209, including lands in Section 14. Mr. Clay found 79.70 cfs of water to be beneficially used. This amount was likely calculated by multiplying the statutory limit of 0.02 cfs per acre by 3,985 acres. The January 26, 1970, then indicated that upon the payment of a fee of \$231.00 a water license would be issued consistent with the findings in the letter.

16. Water Right License No. 30990, issued on February 11, 1970. The License indicated that the proposed works of pumps, motors and sprinkler system with a capacity of 90.24 cfs were completed on May 10, 1965. The License indicates that on July 29, 1965, proof of beneficial use of 13,339.33 acre feet per season with a maximum rate of diversion of 79.70 cfs of Snake River water for irrigation was made to the satisfaction of the State Reclamation Engineer. The place of use was found to include 3,985 acres within Township 6 South, Ranges 10 and 11 East. The described place of use included no land within Section 14 of Township 6 South, Range 10 East. No appeal was filed by the Petitioner regarding the Section 14 lands.

IV. Irrigation of Section 14 Lands.

17. The Section 14 lands were irrigated commencing May 10, 1965, using the irrigation system of the Cottonwood Canal Co.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, IDWR makes the following Conclusions of Law:

1. IDWR made no error regarding the Section 14 lands in the issuance of License No. 02-02209. The permit holder, Cottonwood Canal Co., did not include those lands in its deposition. IDWR could not issue the license for more acres than submitted by the permit-holder. There is no evidence that Cottonwood Canal Co. ever tried to change its deposition, or amend the attached list of irrigated lands. If Cottonwood Canal Co. disagreed with License No. 02-02209 it could have appealed that license pursuant to I.C. § 42-219 (1967 Supp.); § 42-224 (1948). If there was an error made in the licensing process, it was Petitioner's.
2. There is no patent error on the face of License No. 02-02209. The beneficial use described on the face of the license is internally consistent, with adequate instantaneous flow and yearly volume for the number of acres irrigated.
3. Neither Petitioner nor Cross-Petitioner have shown a latent error in the description of the beneficial use in License No. 02-02209. The beneficial use described on the face of the license is internally consistent, with adequate instantaneous flow and yearly volume for the number of acres irrigated.
4. The Petition and Cross-Petition request that an entirely new beneficial use, 400 acres of irrigation using 8 cfs and 1,338.95 AFA on the Section 14 lands, be licensed

under the February 25, 1963, priority date of License No. 02-02209. Such a modification would constitute an enlargement of the water use under License No. 02-02209 and injure junior water rights.

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Petition and Cross-Petition are **DENIED**.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any 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.

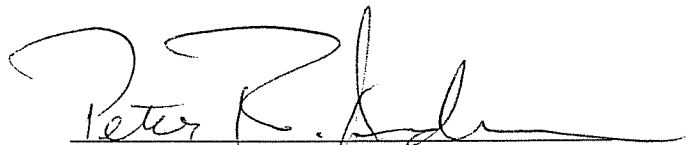
Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

- i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

- ii. The service date of a denial of a petition for reconsideration by the hearing officer;
- or
- iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

DATED this 18th day of January, 2002.

A handwritten signature in black ink, appearing to read "Peter R. Anderson", written over a horizontal line.

PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

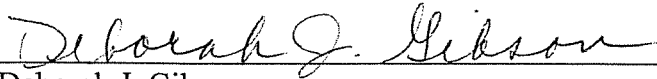
I HEREBY CERTIFY that on this 22nd day of January, 2002, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

CHARLES L. HONSINGER
RINGERT CLARK
PO BOX 2773
BOISE ID 83701

MIKE CREAMER
GIVENS PURLSEY LLP
PO BOX 2720
BOISE ID 83701

WES WOOTEN & DON BRYANT
BLACK MESA FARMS
PO BOX 82
GLENN'S FERRY ID 83623

NORMAN C YOUNG
IDAHO DEPT OF WATER
RESOURCES
1301 N. ORCHARD ST
BOISE ID 83706



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

WHEREAS

Wesley R. Wootan and Christina W. Wootan

are entitled to a land patent pursuant to the Act of October 21, 1976 (Section 206, 90 Stat. 2756; 43 U.S.C. 1716), for the following-described land:

Boise Meridian, Idaho

T. 6 S., R. 10 E.,

sec. 1, NE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{4}$ SW $\frac{1}{4}$, W $\frac{1}{4}$ SE $\frac{1}{4}$, and SE $\frac{1}{4}$ SE $\frac{1}{4}$;
sec. 2, SE $\frac{1}{4}$ SE $\frac{1}{4}$;
sec. 11, E $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, and S $\frac{1}{4}$;
sec. 12;
sec. 13, N $\frac{1}{4}$, N $\frac{1}{4}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$;
sec. 14, N $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and N $\frac{1}{4}$ SE $\frac{1}{4}$;
sec. 24, NE $\frac{1}{4}$ and N $\frac{1}{4}$ SE $\frac{1}{4}$.

T. 6 S., R. 11 E.,

sec. 6, lot 7;
sec. 7;
sec. 17, W $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$;
sec. 18, lots 1 to 4, inclusive, NE $\frac{1}{4}$,
E $\frac{1}{4}$ W $\frac{1}{4}$, N $\frac{1}{4}$ SE $\frac{1}{4}$, and SW $\frac{1}{4}$ SE $\frac{1}{4}$;
sec. 19, lots 1 to 3, inclusive.

Containing 4,097.57 acres.

NOW KNOW YE, that there is, therefore, granted by the UNITED STATES, unto the above named claimants the land above described; TO HAVE AND TO HOLD the said land with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimants, their successors and assigns, forever;

EXCEPTING AND RESERVING TO THE UNITED STATES a right-of-way thereon for ditches or canals constructed by the authority of the United States. Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945.

SUBJECT TO:

1. Those rights for powerline purposes granted to Pacific Power and Light Company, its successors or assigns, by Right-of-Way No. IDI-8875A, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).

Patent Number 11-91-0001

EXHIBIT A

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AUG 07 1992

2. Those rights for powerline purposes granted to Idaho Power Company, its successors or assigns, by Right-of-Way No. IDBL-056096, pursuant to the Act of March 4, 1911, as amended (43 U.S.C. 961).
3. Those rights for powerline purposes granted to Idaho Power Company, its successors or assigns, by Right-of-Way No. IDI-017359, pursuant to the Act of March 4, 1911, as amended (43 U.S.C. 961).
4. Those rights for canal purposes granted to Glens Ferry Land and Irrigation Company, its successors or assigns, by Right-of-Way No. IDE-027316, pursuant to the Act of March 3, 1891, as amended (43 U.S.C. 946-949).
5. Those rights for powerline and substation purposes granted to Idaho Power Company, its successors or assigns, by Right-of-Way No. IDI-016110, pursuant to the Act of March 4, 1911, as amended (43 U.S.C. 961).
6. Those rights for irrigation pipeline purposes granted to Walter Trail, his successors or assigns, by Right-of-Way No. IDI-12250, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).
7. Those rights for county road purposes granted to Glens Ferry Highway District, its successors or assigns, by Right-of-Way No. IDI-20029, pursuant to the Act of July 26, 1866 (14 Stat. 253).
8. Those rights for powerline purposes granted to Idaho Power Company, its successors or assigns, by Right-of-Way No. IDI-14749, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).
9. Those rights for powerline purposes granted to Idaho Power Company, its successors or assigns, by Right-of-Way No. IDI-14868, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).
10. Those rights for petroleum pipeline purposes granted to Chevron Pipe Line Company, its successors or assigns, by Right-of-Way No. IDI-0602, pursuant to the Act of February 25, 1920, as amended (30 U.S.C. 185).
11. Those rights for natural gas pipeline purposes granted to Northwest Pipeline Corporation, its successors or assigns, by Right-of-Way No. IDI-14943, pursuant to the Act of February 25, 1920, as amended (30 U.S.C. 185).
12. Those rights for natural gas pipeline purposes granted to Northwest Pipeline Corporation, its successors or assigns, by Right-of-Way No. IDI-06421, pursuant to the Act of February 25, 1920, as amended (30 U.S.C. 185).

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13. Those rights for powerline purposes granted to Idaho Power Company, its successors or assigns, by Right-of-Way No. IDI-2457, pursuant to the Act of March 4, 1911, as amended (43 U.S.C. 961).
14. Those rights for fiber optic cable purposes granted to Mountain States Telephone and Telegraph Company, its successors or assigns, by Right-of-Way No. IDI-20976, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).
15. Those rights for access road and communication site purposes granted to King Hill Irrigation District, its successors or assigns, by Right-of-Way No. IDI-16919, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).

SUBJECT TO THE FOLLOWING:

The patentees, on behalf of themselves, their heirs, assigns and successors in interest, in consideration for receiving title to this property, covenant and agree that the following described lands will not be used for irrigated farming:

Boise Meridian, Idaho

T. 6 S., R. 10 E.,
 - sec. 1, NE $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, and SE $\frac{1}{4}$ SE $\frac{1}{4}$;
 - sec. 13, N $\frac{1}{4}$ SW $\frac{1}{4}$ and W $\frac{1}{4}$ SE $\frac{1}{4}$;
 - sec. 14, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and N $\frac{1}{4}$ SE $\frac{1}{4}$;
 - sec. 24, N $\frac{1}{4}$ SE $\frac{1}{4}$.

T. 6 S., R. 11 E.,
 - sec. 6, lot 7;
 - sec. 7, E $\frac{1}{4}$ SE $\frac{1}{4}$, RW $\frac{1}{4}$ SE $\frac{1}{4}$, and NE $\frac{1}{4}$ NW $\frac{1}{4}$;
 - sec. 17, W $\frac{1}{4}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$;
 - sec. 18, NE $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$;
 - sec. 19, lots 1 to 3, inclusive.



IN TESTIMONY WHEREOF, the undersigned authorized officer of the Bureau of Land Management, in accordance with the provisions of the Act of June 17, 1948 (62 Stat. 475), has, in the name of the United States, caused these letters to be made Patent, and the Seal of the Bureau to be hereunto affixed.

GIVEN under my hand in Boise, Idaho
 the TWELFTH day of OCTOBER in the year
 of our Lord one thousand nine hundred and NINETY
 and of the Independence of the United States the two hundred
 and FIFTYTHIR

By John Davis
 Deputy State Director for Operations

Patent Number 11-91-0001

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Black Mesa Trms 1991

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Def-Prop

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H-1/2/1/2

5750 H-1/2/1/2

10970 H-1/2/1/2

H-1/2/1/2

Def-Prop

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