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

IN THE MATTER OF PROTESTS AGAINST APPROVAL OF
APPLICATION FOR TRANSFER NO. 2103 OF WATER RIGHT
NOS. 11-1058, ETC. IN THE NAME OF DEAN WARD AND
GRANT HADDOCK

ORDER ADOPTING
PROPOSED MEMORANDUM
DECISION AND ORDER

WHEREAS, A. Kenneth Dunn, Director of the Department of Water Resources having issued and served a copy on the parties on September 11, 1984, a Proposed Memorandum Decision and Order in the above-captioned matter, pursuant to Idaho Code, Section 67-5211; and,

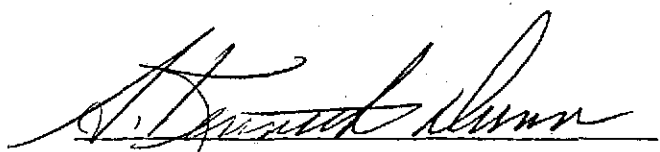
WHEREAS, on October 15, 1984, which is 34 days after the date of service of the proposed decision, an objection to the proposed decision was received from protestant Ardella Peterson; and,

WHEREAS, exceptions to be considered must be received on or before the 15th day following the service of the proposed decision; and,

WHEREAS, no timely exceptions were received to the Proposed Memorandum Decision and Order;

IT IS, THEREFORE, HEREBY ORDERED that said Proposed Memorandum Decision and Order be adopted and issued as the Final Decision and Order.

Dated this 18th day of October, 1984.



A. KENNETH DUNN

Director

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

IN THE MATTER OF APPLICATION FOR TRANSFER NO.)	PROPOSED
2103 OF WATER RIGHT NOS. 11-1058/1076/1060/)	
1077/1061/1078/1062/1079/1064/1065/1082/)	MEMORANDUM DECISION
1066/1089/1084/1068/1069/1087/1088/1073)	
IN THE NAME OF DEAN WARD AND GRANT HADDOCK)	AND ORDER
)	

This matter was first brought to the attention of the Idaho Department of Water Resources on January 3, 1976 when a letter from Mayo Krogue was received objecting to the change in point of diversion on Worm Creek initiated by Dean Ward and Grant Haddock. This change was made without benefit of the requisite transfer approval. Dean Ward was subsequently advised by the Department that it appeared a transfer would be necessary to legally accomplish the changes he and Grant Haddock were making. In response, personnel from the Department were invited to come and review the changes in the field. Based upon the information provided at that time, it was concluded that no changes which would require a transfer were being made. The conversion from surface to sprinkler irrigation does not necessarily represent a change in the associated water rights. However, the irrigation of previously unirrigated land would require a water right permit. Mayo Krogue and Nolan Krogue responded by filing an affidavit stating that for over forty (40) years all of the water users on Worm Creek have diverted their water at the same diversion located within the NW1/4SW1/4, Sec. 34, Twp. 14S, Rge. 43E, B.M. Mr. Krogue further explained that the ditch that would be used to supply the new gravity sprinkler system was a high water ditch that was located on the property of Ardella Peterson and had not been used for years. Based upon the sworn statement of Mayo and Nolan Krogue, Dean Ward was advised that an application for transfer appeared to be appropriate.

Dean Ward and Grant Haddock responded on April 26, 1977 and application for transfer No. 11-1058/etc. was filed with the Department of Water Resources. This application included nineteen rights totaling 2.67 cubic feet per second. Notice of the proposed change was published in the News Examiner in Montpelier, Idaho on May 26 and June 2, 1977. Because of a publication error, a corrected

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notice was advertised on June 23 and 30, 1977. Protests subsequently were received during the protest period from Ardella Peterson, Mayo Krogue, James E. Payne, and Arlen C. Wilkes.

A conference in the matter was held in the Bear Lake County Courthouse on September 1, 1977. The applicants were present and represented by Jay Kohler, Attorney at Law. Protestant Ardella Peterson was represented by Clyde Nelson, Attorney at Law. Protestant Mayo Krogue was represented by Leonard Kingsford, Attorney at Law. All others were without legal counsel. During the informal discussion of the matter several objections emerged.

1) The flow of water in Worm Creek is normally inadequate and has consequently been used in rotation. The protestants held that they would be injured if the applicants are permitted to separate water from the normal rotation.

2) The moving of water to the new point of diversion will cause unreasonable loss to other water users because of the increased time required to resoak the ditch.

3) Applicants plan to use a ditch which crosses Ardella Peterson's (Beck) property without first securing an easement from her.

4) The applicants do not have the necessary possessory interest in the water rights they are attempting to transfer.

5) The transfer will result in an expansion of the use of the original right.

When no agreement to resolve the objections could be reached Attorney Leonard Kingsford requested that a formal hearing be held at a later date. A hearing was scheduled for June 8, 1978. The applicants and protestants had the same legal representation they had at the previous conference. After review of the issues the parties requested an additional continuance to allow time to request a readjudication to determine the water rights on Worm Creek.

Over the next forty-eight (48) months numerous contacts were made by the Department to determine if the parties still intended to initiate a readjudication of Worm Creek. When no adjudication request was received and no apparent interest in pursuing readjudication was evident, the Department scheduled the matter for hearing on September 28, 1982. The applicant Mayo Krogue was represented by Leonard Kingsford, Attorney at Law. The remaining protestants represented themselves except Arlen Wilkes who was not present.

Review of Evidence

The following materials were submitted as evidence in this matter:

- 1) IDWR file No. 11-1058/etc. application for transfer.
- 2) Applicant's Exhibit No. 1 - Edward Haddock vs Joseph E. Thornock Judicial Decree.
- 3) Applicant's Exhibit No. 2 - a general sketch showing ditches, roads, lands of applicants and protestants.
- 4) Hearing tapes No. 1 through 5.

After reviewing the evidence and testimony presented at this hearing and based upon his understanding of the law, the hearing officer makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1) On October 10, 1904, District Judge James M. Stevens decreed the waters of Worm Creek, Bear Lake County, Idaho to thirty-four (34) parties. The rights decreed totalled 373.58 miner's inches, 7.4716 cubic feet per second but were only defined by name, amount, and priority date.

2) In June, 1959, Dean Ward, Grant Haddock, Mayo Krogue and James Payne established the present rotation of Worm Creek water. The rotation usually lasts about one and one-half months during the irrigation season.

3) The ditch which crosses protestant Ardella Peterson's property, labeled No. 5 on applicant's exhibit No. 2, washed out when she was a child but was reconstructed by Utah Power and Light when they constructed a power line through that area. Mrs. Peterson has refused to grant permission to use the ditch through her property.

4) The earliest priority date established by the case of Haddock vs Thornock is May 1, 1868. During the summer months of August and September there is normally only enough water to supply the rights with a priority earlier than 1890. During these periods, a 28-day rotation between the parties perviously named is started with Grant Haddock getting water for five and one-half (5 1/2) days, Mayo Krogue for nine (9) days, Dean Ward for ten and onehalf (10 1/2) days and James Payne three (3) days.

5) The intake structure for a gravity irrigation system was constructed by the applicants in 1976. This structure can be used only when water is conveyed into ditch No. 5 illustrated in applicant's exhibit No. 2.

6) The distance from the diversion into ditch 5 is about one mile above the next downstream diversion.

7) The successors in interest to the water entitlement granted by Judge Stevens in 1904 is not clear because of the vagueness of the decree and

the dispute that exists among the parties.

8) Protestant Arlen Wilkes did not appear at the hearing.

CONCLUSIONS OF LAW

1) The decree handed down by the court in the case of Haddock vs Thornock does not contain the elements necessary to define the water rights for the water users on Worm Creek. A watermaster could not be elected and charged with the distribution of waters of Worm Creek without an adjudication to further define the existing water rights.

2) The ownership of the particular rights claimed by the applicants cannot be confirmed without a court adjudication.

3) The continuation of the established rotation is in the local public interest and may have become an element of the respective water rights and therefore, cannot be abandoned or changed without unanimous agreement of the parties.

4) The applicant's have water rights on Worm Creek, and although not clearly defined, are entitled to change the point of diversion and/or place of use of these rights with certain limitations to protect the rights of others.

5) Although the applicant does not have a written easement across another's land, that may be obtained through condemnation or a right-of-way may already exist due to the past use of the ditch.

6) Failure to appear at the hearing is cause for setting aside a protest.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the protest of Arden Wilkes be set aside for failure to appear and that Application for Transfer No. 2103 of Water Right Nos. 11-1058/1076/1060/1077/1061/1078/1062/1079/1064/1065/1082/1066/1089/1084/1068/1069/1087/1088/1073 is APPROVED subject to the following conditions:

1) Only those lands which were regularly irrigated prior to 1976 may be irrigated. If other lands are to be irrigated, a water right permit could allow irrigation of these prior to June 5 of each year or the start of the rotation.

2) The established schedule of rotation shall be continued except the applicants shall release the water a sufficient amount of time before the end of the rotation period so the water will reach the point of diversion of the person next in line to use the water at the beginning of their period of use.

3) Approval of this application does not represent a finding of possessory interest in the waters of Worm Creek. The available evidence and testimony indicates that the applicants have beneficially used the waters of Worm Creek. The point of diversion of any rights the applicants possess, as may in the future be confirmed by court action, is hereby changed pursuant to this application for transfer of water right and the limitations herein stated.

4) Approval does not grant access or easement to use the lands of another person.

Dated this 11 day of September, 1984.


BOBBY D. FLEENOR
Hearing Officer

Transfer No. 2103Application No. 11-1058/etc.
(See attachment)STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES*Approved* **APPLICATION FOR TRANSFER OF WATER RIGHT**
To Change the Point of Diversion and/or the Place of UseName of applicant Dean Ward & Grant Haddock. Phone 945-2361Post office address Bloomington (Ward); Paris (Haddock), Idaho**A. DESCRIPTION OF RIGHT AS RECORDED**

1. Right evidenced by:

a. Decree to see attachmentin case of Edward Haddock (Name)
vs Joseph E. Thornick et al
dated Oct. 10, 1904 in Fifth Dist. county of Bear Lake
(Name of court)

b. License No. _____ issued by the Idaho Department of Water Resources

c. Claim No. _____ on file with the Idaho Department of Water Resources

2. If applicant is not the original holder of this right, explain how it was acquired and attach a copy of the deed or other evidence of ownership of the land to which the right is appurtenant _____

3. Source of water Worm Creek tributary to Bear River4. Date of priority see attachment

5. Water is used for the following purposes:

amount 2.67 for Irrigation purposes from Apr. 1 to Nov. 1

amount _____ for _____ purposes from _____ to _____

amount _____ for _____ purposes from _____ to _____
(month/day -- both dates inclusive)6. Total amount of water under right: a. 2.67 cubic feet per second
&/or
b. _____ acre feet per annum7. Location of original point of diversion is NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 34
Township 14S Range 43E, B.M., in Bear Lake CountyAdditional points of diversion, if any SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 34, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 34, T. 14S, R. 43E;
NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 4, T. 15S, R. 43E, B.M.

8. Lands irrigated or place of use:

TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
14S	43E	34	x	x	x	x									x	x	x	x	133.5

Total number of acres to be irrigated 133.5

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B. DESCRIPTION OF PORTION OF RIGHT FOR WHICH THE CHANGE IS REQUESTED (If the entire right is requested changed, omit part B)

1. Amount of water: a. _____ cubic feet per second
&/or
b. _____ acre feet per annum
2. Point of diversion _____ $\frac{1}{4}$ _____ $\frac{1}{4}$, Section _____ Township _____
Range _____, B.M., _____ County
Additional points _____
3. Place of use:

TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	

C. DESCRIPTION OF RIGHT OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Change in point of diversion.
 - a. Amount of water to be diverted 2.67 c.f.s. &/or _____ acre feet
 - b. Point(s) of diversion NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 4 Township 15S
Range 43E, B.M., Bear Lake County
Additional points NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 34, SE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 34, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 34, T. 14S, R. 43E
 - c. Description of diverting works ditches and headgates
 - d. Describe the reasons for applying for a change in the point(s) of diversion a gravity sprinkler system is supplied from the ditch located in NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 4, T. 15S, R. 43E; and will be the main point of diversion for a more efficient use of the existing water supply

2. Change in place of use

- a. Describe the lands or place of use to which the right will be transferred:

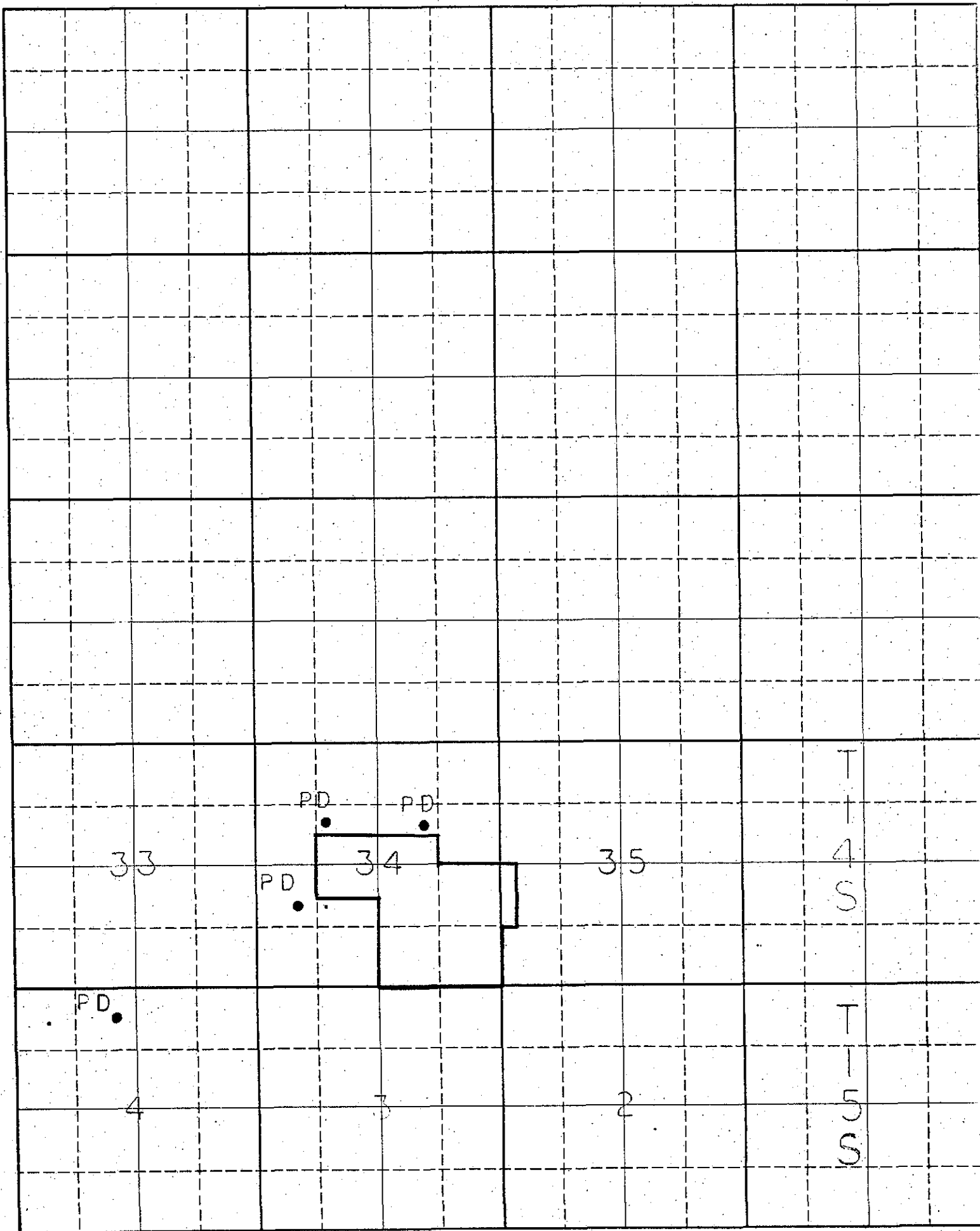
TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
14S	43E	34			10					10	15				30	25	20	20	130
		35									3.5								3.5

Total number of acres to be irrigated* 133.5

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- b. Draw a map indicating the new point(s) of diversion and/or the new land to be irrigated. Show clearly the land involved by section, township and range number.

R43E



SCALE: 2 inches equal 1 mile. Draw plan in ink.

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3. Remarks _____

I hereby assert that no one will be injured by such change and 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.

Spencer A. McGaddock
Dean Ward
(Signature of applicant)

Subscribed and sworn to before me this 26th day of April, 19 77

My commission expires 2/14/78

Ronald D. [Signature]
(Notary public)

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

No. 2103

This is to certify that I have examined Application for Transfer of Water Rights No. 11-1058 etc.,
and said application is hereby APPROVED

1. Approval of said application is subject to the following limitations and conditions:
as set forth in the Proposed Memorandum Decision and Order

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

Witness my hand this 22nd day of October, 19 84

A. Kenneth Dunn
A. KENNETH DUNN, Director

FOR DEPARTMENT USE ONLY

Received by CW Date 4-26-77

Prelim. check by RDC Fee \$30.00

Receipted by CW Date 4-26-77

Published in New Hampshire #6564

Pub. dates June 23 & June 30-1977
May 26 & June 2-1977

Watermaster recommendation requested on 6-01-77

WD #11 rec'd. 6-07-77

Russell Staker

Correction protested

Protest filed by Maya Kroger

Ardee Helms, Jr., Arden

C. Wilkes, James C. Payne

Copies of protest forwarded by CW

Hearing held by _____ Date _____

Recommended for approval denial
by EMC

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SEE FILE 11-1058
FOR CORRESPONDANCE
RELATING TO TRANSFER #2103

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