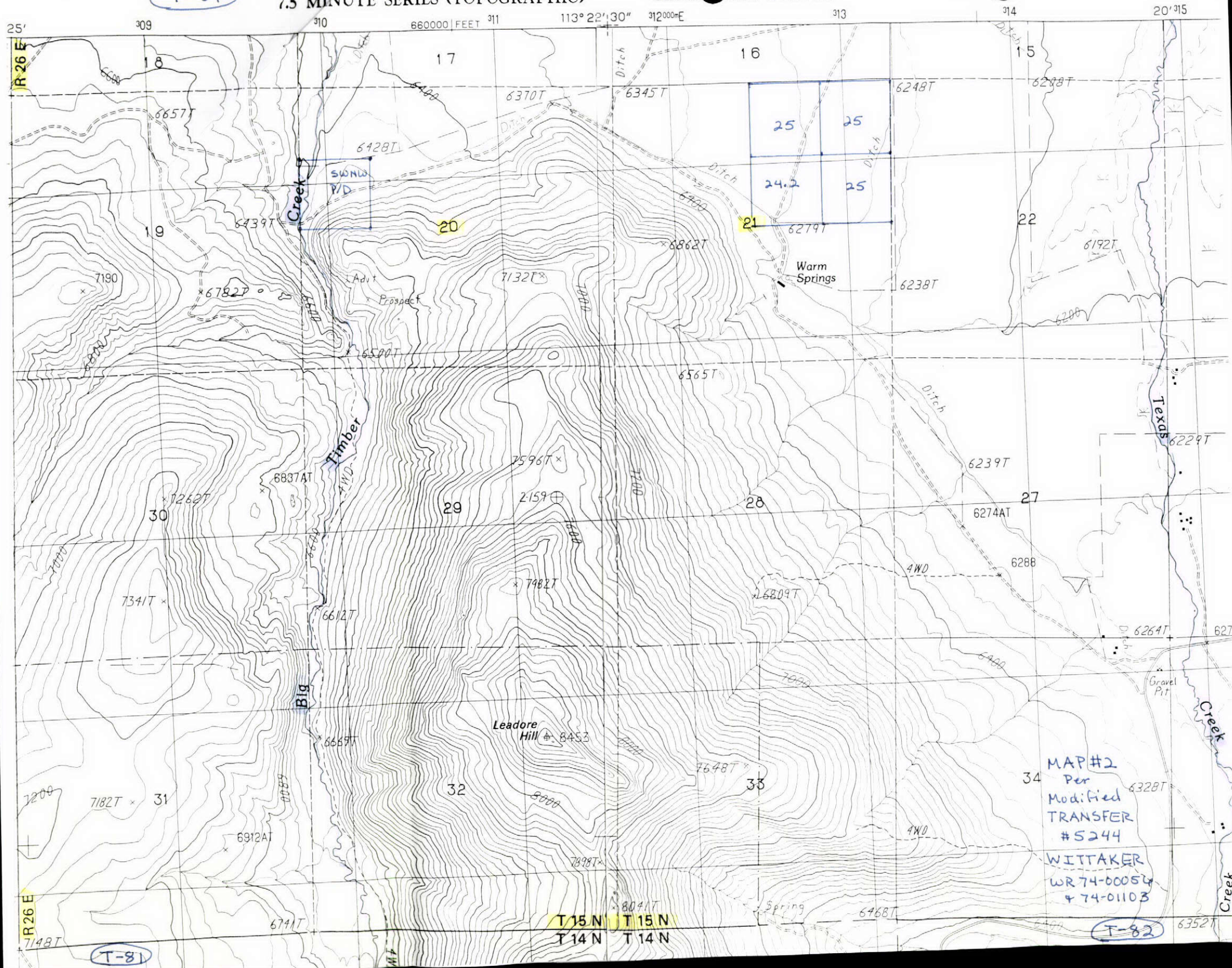


SHEEPHORN PEAK QUADRANGLE
IDAHO-LEMHI CO.
7.5 MINUTE SERIES (TOPOGRAPHIC)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

T-81

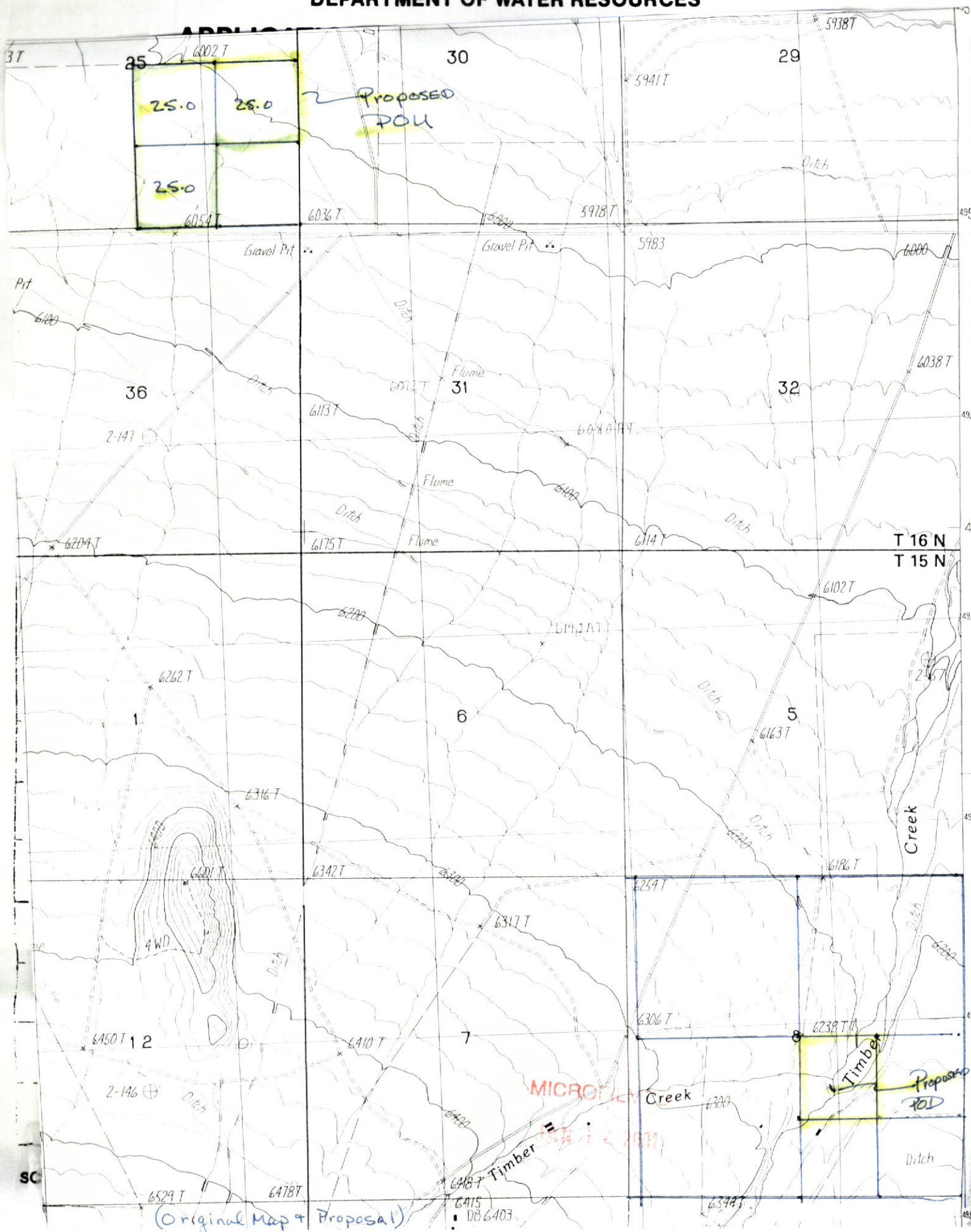
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+ 74-01103

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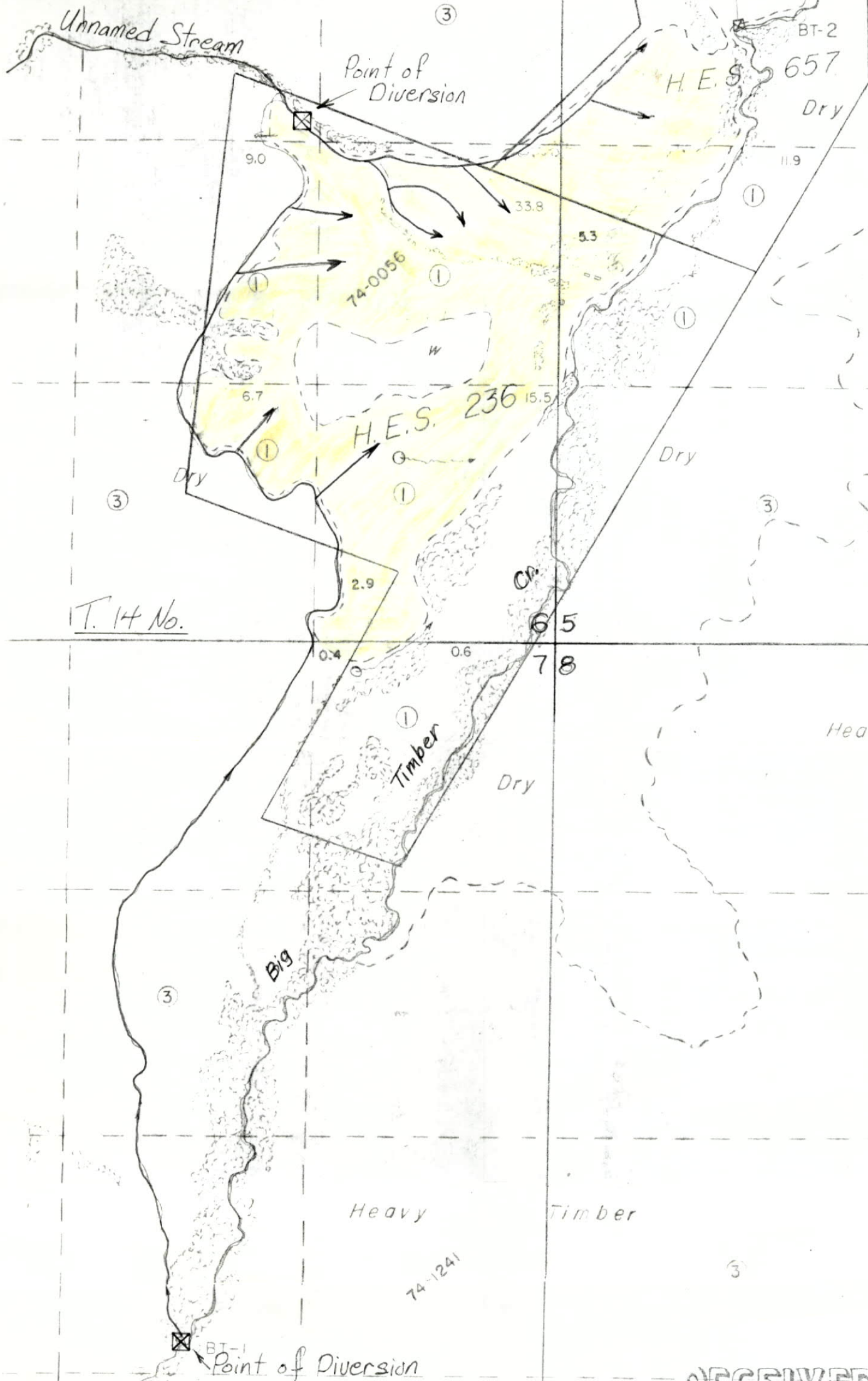
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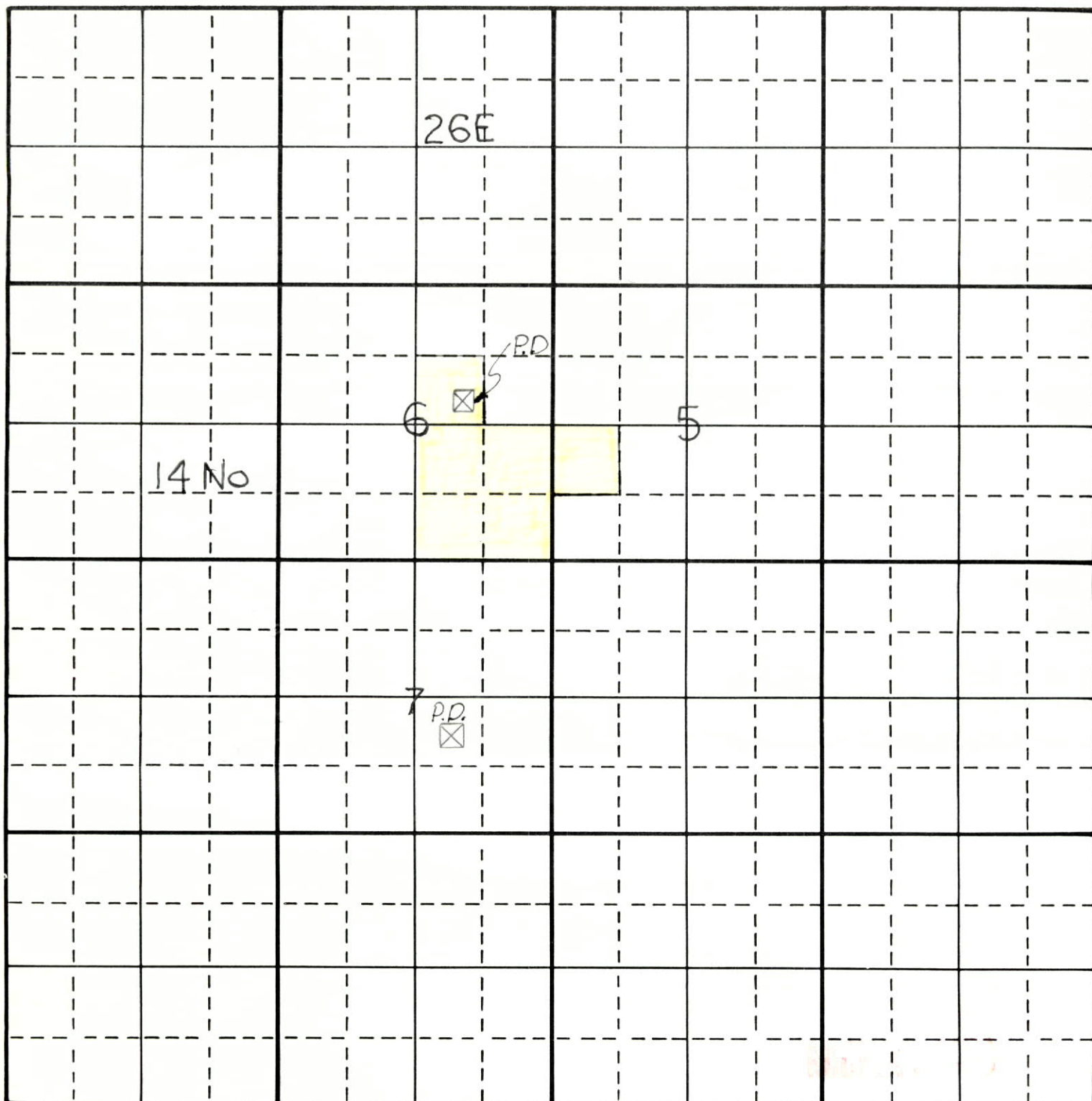
Department of Water Resources
Eastern District Office

c. Describe the lands and place of use to which the right will be transferred:

TWP.	RANGE	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	
14N	26E	6			1										34	9	7	18	69
		5									5								5

Total number of acres to be irrigated 74

4. Describe any other water rights used for the same purpose as described above. None
5. 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.



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

NOTICE OF PROPOSED
CHANGE OF WATER
RIGHT
NO. 74-0056

Notice is hereby given that Floyd J. Whittaker, Leadore, Idaho, has applied to the Department of Water Resources for a change in the point of diversion of the waters of Big Timber Creek tributary to Lemhi River. The right sought to be changed is evidenced by Findings of Fact, Lemhi River Basin Case #4948 dated in 12-30-1982 in 7th District Court county of Lemhi and is recorded as follows:

Amount: 2.0 cfs. Priority: 5-1-1910. Point of Diversion: NW ¼ SE ¼, Sec. 7, T. 14N, R. 26E, B.M., Lemhi County.

The water is used to irrigate 74 acres within the SW ¼ NE ¼, SE ¼, Sec. 6, NW ¼ SW ¼, Sec. 5, T. 14N, R. 26E.

TO BE CHANGED AS
FOLLOWS

The water will be diverted within the NW ¼ SE ¼, Sec. 7, SW ¼ NE ¼, Sec. 6, T. 14N, R. 26E, B.M.

Any protest against the approval of the above proposed change of water right must be filed with the Idaho Department of

Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, 83402, on or before August 20, 1984.

A. KENNETH DUNN
Director

Published in The Recorder-Herald, Salmon, Idaho, on August 2 and 9, 1984.

8-2-2-tc

Affidavit of Publication

STATE OF IDAHO

County of Lemhi

ss.

AUG 10 1984

Department of Water Resources
Eastern District Office

JERRY G. ROSIN

being first duly sworn, deposes and says that he is one of the printers (publisher) of the RECORDER HERALD, a newspaper published weekly at Salmon, Lemhi County, Idaho, and of general circulation therein,

That the Notice of Proposed Change of Water Right 74-0056

a true printed copy of which is attached to the margin hereof, has been and was correctly printed and published in the regular and entire issue of every number of said newspaper and not in any supplement thereof or thereto for 2 consecutive issues, commencing with the issue dated Aug. 2, 1984 and ending with the issue dated Aug. 9, 1984.

Jerry G. Rosin

Subscribed and sworn to before me, this ninth day of August, 1984.

Neil Armstrong
Notary Public for the State of Idaho,
Residing at Salmon, Idaho

Publication Fee \$ 33.39

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Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

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MAR 31 1999
Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER IN THE
APPLICATION FOR TRANSFER NO.
5243 AND 5244 IN THE NAME OF
JAMES OR PAULA WHITTAKER

WITNESS AND EXHIBIT LIST

Protestants intend to call the following witnesses and to introduce the following exhibits at the hearing of this matter scheduled for April 7, 1999:

WITNESS LIST

Dr. Charles E. Brockway- Dr. Brockway is prepared to testify from his personal inspection and examination of relevant data and information that he expects there will be an expansion of acres actually receiving and consumptively using water as a result of transfer no. 5244 because, of the 99.2 acres proposed to be dried up by the transfer, at least 30 is effectively sub-irrigated from the existing creek and spring flows and so, some 30 acres of pasture

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Copies
of
Exhibits
for
Bless.

AMENDED NOTICE OF
PROPOSED CHANGE OF A
WATER RIGHT NO. T5244

Notice is hereby given that James and/or Paula Whittaker, PO Box 240, Leadore, ID 83464, has applied to the Department of Water Resources to change place of use of the waters of Big Timber Creek tributary to Lemhi River. The rights sought to be changed are evidenced by licenses and recorded as follows:

License No.: 74-00056

Source: Big Timber Creek

Amount: 2.0 cfs

Priority: 05/01/1910

Point(s) of Diversion: NWSE SEC 07 T14N R26E, LEMHI COUNTY

The water is used for irrigation of 75 acres from 04/01 to 11/01 within SEC 5, 6, 7, T14N R26E, B.M.

License No.: 74-01103 Source: Big Timber Creek

Amount: 0.48 Priority: 11/19/1922

Point(s) of Diversion: SWNW SEC 05 T14N R26E, LEMHI COUNTY The water is used for irrigation of 24 acres from 03/15 to 11/15 within SEC 5 T14N, SEC 32 T15N, R26E, B.M.

TO BE CHANGED AS FOLLOWS:

The applicant intends to change the point of diversion to the SWNW SEC 20 T15N R26E and the place of use to 99.2 acres in the NE 1/4 SEC 21 T15N R26E, B.M.

Any protests against approval of the proposed change must be filed with the Idaho Department of Water Resources, 900 N Skyline Dr., Idaho Falls, ID 83402, together with a protest fee of \$25 on or before May 11, 1998. The protestant must also send a copy of the protest to the applicant.

KARL J. DREHER

Director

Published in The Recorder Herald on April 23 and 30, 1998. 4-23-2tc

Affidavit of Publication

STATE OF IDAHO

County of Lemhi

ss.

RICKY G. HODGES being first duly sworn, deposes and says he is one of the publishers (printers) of The Recorder Herald, a newspaper published weekly at Salmon, Lemhi County, Idaho, and of general circulation therein. That the NOTICE OF PROPOSED WATER T5244

a true printed copy of which is attached to the margin hereof, has been and was correctly printed and published in the regular and entire issue of every number of said newspaper and not in any supplement thereof or thereto for Two(2) consecutive issues, commencing with the issue dated 4-23-1998 and ending with the issue dated 4-30-1998

STATE OF IDAHO

County of Lemhi

ss.

On this 30th day of April in this year of 1998 before me, A Notary Public, personally appeared RICKY G. HODGES, known or identified to me to be the person whose name subscribed to the within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that he executed the same.

Sheila K. Hodges

Notary Public for Idaho

Residing At Salmon, Idaho

My Commission expires: 9-21-2001

Publication Fee \$ 63.36

Account No. 630

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JAN 12 2001

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5244 IN THE)
NAME OF JAMES AND/OR)
PAULA WHITTAKER)

FINAL ORDER

On May 17, 1999, the hearing officer for the Idaho Department of Water Resources (the "Department") issued a Recommended Order in connection with Application for Transfer No. 5244 (the "application") filed in the name of James and/or Paula Whittaker (the "applicant"). On June 7, 1999, the applicant filed "Applicants' Exceptions to Proposed Memorandum Decision and Order" with the Department. On June 29, 1999, Beva Lue Clark (the "protestant") filed a response to the exceptions.

The Director has reviewed the exceptions and response to exceptions and responds as follows:

Finding of Fact No. 9 – This finding is changed to recognize that Big Timber Creek ("Timber Creek") is the primary source of water diverted for irrigation to the homesteads and that water diverted from springs provides only a small portion of the water diverted for irrigation. This finding is also reworded to clarify that consistent with Finding of Fact No. 16, water diverted for irrigation is not the only source of water consumed by crops growing on the homesteads. The fourth sentence in Finding of Fact No. 9 of the Recommended Order (the last sentence of Finding of Fact No. 9 in this Final Order) is accurate, since none of the parties could specifically quantify the acreage supplied with water from the various sources. However, this sentence is reworded for clarification. Regarding the validity of the water rights sought for transfer, there is no intent in the Recommended Order to infer that the rights are "invalid" as alleged in the exceptions filed by the applicant.

The number of springs or the specific acreage supplied with water from the various sources is not at issue in this matter. The central issue that applies to this application for transfer is whether injury to any other water rights would occur if the applicant transfers its water rights for irrigation from the current point of diversion and place of use downstream approximately 4½ miles to another point of diversion and place of use.

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When the holder of a senior water right seeks to cease irrigating the original land under the water right and transfer the water right to another place of use, the junior appropriators downstream of the original place of use are entitled to that portion of the water diverted under the senior water right that would ordinarily not be consumed by crops growing at the original place of use but would return back to the stream. If such return flow is not maintained, injury occurs to those junior appropriators who have relied on that return flow. A transfer of a water right that would result in significantly increased consumption of water diverted under the water right from that which historically occurred under the water right would result in a corresponding decrease in return flow to the stream. Since such a transfer would reduce the return flow relied upon by downstream junior appropriators, injury would occur as a result of such increase in consumptive use, unless stream flows are otherwise sufficient at all times to supply the junior water rights.

Finding of Fact No. 10 – This finding is changed to clarify that diversion from the Unnamed Stream would also need to cease, along with ceasing diversions from the two points of diversion from Timber Creek, if the proposed transfer would otherwise be approved.

Finding of Fact No. 11 – This finding is not changed. Although the applicant and the protestant disagree on how much land would be irrigated under the proposed transfer, the testimony described that 105 to 112 acres would be irrigated. The applicant testified that 17 acres of the land that would be irrigated under the proposed transfer is already irrigated and would continue to be irrigated from an existing pivot system. However, the applicant testified that all of the acreage at the proposed place of use is presently planned to be irrigated using water diverted under the proposed transfer.

Finding of Fact No. 16 – This finding is not substantially changed, since the applicant did not show that at least 88 acres would be dried up at the original place of use so that consumptive use of the water diverted under the water rights at the proposed new place of use would not be significantly greater, and return flows significantly less, than what historically occurred under the water rights at the current place of use. Ceasing the diversion of water from Timber Creek, from the Unnamed Stream, and from springs would dry up substantially less than 88 acres at the original place of use because growing vegetation would continue to consume water from subflows originating from Timber Creek and the Unnamed Stream as well as from spring flows.

Finding of Fact No. 17 – While there is contradictory testimony about the number of springs that arise on land comprising the current place of use for the water rights proposed to be transferred, this finding is believed to be accurate and is not changed.

Finding of Fact No. 18 – The finding in the Recommended Order did not state that if the application for transfer is approved, water “lost” as a result of diversions to the proposed new place of use would be “lost to the system.” In Finding of Fact No. 18, the hearing officer concludes that if the application for transfer is approved, the portion of water diverted that would not be consumed by growing crops at the new place of use would return to the system downstream of locations where return flows originating from diversions under the water rights currently return to Timber Creek. As a result, some of the return flows would be “lost” for use by downstream holders of junior water rights. In this Final Order, this finding is revised for clarification.

Finding of Fact No. 19 – Finding of Fact No. 19 is deleted from this Final Order.

Additional Finding of Fact – A new Finding of Fact regarding Water Right No. 74-00042 is not included in this Final Order. With qualifications, the protestant’s expert acknowledged that if Water Right No. 74-00042 from Timber Creek is always filled, approval of the application would not injure the rights of the protestant on Texas Creek. However, the protestant’s expert did not agree that there would be no enlargement in use or that there would be no injury to other water users on Timber Creek if the application is approved.

Conclusion of Law No. 5 – Implicit to this conclusion of law, as set forth in the Recommended Order, is that since the applicant did not establish that use of water at the new pivot would result in the same or smaller consumptive use than when used on the homesteads, the applicant did not establish that return flow relied upon by downstream junior appropriators would be the same or greater under the proposed transfer. However, this conclusion of law is revised in this final order to clarify that the applicant did not show that return flow relied upon by downstream junior appropriators would not be reduced under the transfer since the consumptive use resulting from use of the water rights at the new pivot would be greater than the consumptive use occurring from use of the water rights at the homesteads.

The applicant asserts that the holder of a water right for irrigation can change cropping patterns and the use of water for irrigation in ways that would increase consumptive use provided the acreage irrigated within the authorized place of use is not increased. Therefore, the applicant argues, the only requirement for transferring a water right for irrigation to a new location within the same general area is the amount of acreage irrigated, and so long as the acreage irrigated at the new location is the same or less than the acreage irrigated at the original location, there is no requirement to show that consumptive use at the new location will be the same or less. The applicant is correct in asserting that the holder of a water right for irrigation can make changes that would increase consumptive use provided the acreage irrigated within the authorized place of use is not increased. However, Idaho Code § 42-222(1) specifically requires that "no other water rights are injured" for the transfer of a water right to a new place of use to be approved. Since a reduction in the return flow relied upon by downstream junior appropriators constitutes injury, the transfer of a water right that would reduce the return flow relied upon by downstream junior appropriators can not be approved.

Conclusion of Law No. 7 – This conclusion of law is not changed. The rewording of the conclusion suggested by the applicant concedes that use of water under the transfer "may decrease the amount of return flow to Timber Creek [sic], in certain reaches" The applicant further suggests that because the decrease in return flow would not prevent Water Right No. 74-00042 from being fully satisfied, the protestant would not be injured. However, the requirement set forth by Idaho Code § 42-222(1) that "no other water rights are injured" for the transfer of a water right to be approved is not limited to only water rights held by a protestant.

With qualifications, the protestant's expert acknowledged that if Water Right No. 74-00042 from Timber Creek is always filled, the proposed transfer would not injure the rights of the protestant on Texas Creek. But he did not agree that there would not be an enlargement in use or that there would not be injury to other water rights on Timber Creek. Since the proposed transfer would reduce the return flow relied upon by other holders of downstream junior water rights, one or more of those water right holders would be injured whether or not they protested the proposed transfer.

Conclusion of Law No. 8 – This conclusion of law is not changed.

Exceptions to Analysis – The analysis section has been revised to more clearly describe that if all diversions to the current place of use on the homesteads from Timber Creek, from the Unnamed Stream, and from springs were

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terminated, only 30 to 40 acres of the decreed 99.2 acre place of use would actually be dried up. The applicant did not show that return flow relied upon by holders of downstream junior water rights would be the same or greater under the transfer because the consumptive use under the water rights at the new pivot would be greater than the consumptive use at the current place of use, the homesteads. The amount of land that would be irrigated under the proposed transfer (88 acres as claimed in the applicant's exceptions to Finding of Fact No. 11) is substantially more than the estimated 30 to 40 acres which would be dried up at the homesteads. An increase in the consumptive use from 30 or 40 acres to approximately 88 acres would reduce return flow and would injure other water rights.

The Department is authorized to approve a proposed change in whole or in part under certain circumstances. In this instance, however, the applicant did not propose a partial project. Additionally, the applicant did not show how 30 to 40 acres could be irrigated under the new pivot, which was set up to irrigate 99.2 to 105 acres, without injuring other water rights. Therefore, the Department should not partially approve this application.

Exceptions to Order – Paragraph 2 of the order is not changed.

Based upon his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law, and Final Order:

FINDINGS OF FACT

1. On October 24, 1984, the Department approved Transfer No. 3056 in connection with Water Right No. 74-00056 as follows:

Source:	(a) Unnamed Stream, tributary to Big Timber Creek (b) Big Timber Creek, tributary to Lemhi River
Priority:	May 1, 1910
Rate of diversion:	2.0 cubic feet per second ("cfs")
Point of diversion:	a) SW1/4NE1/4, Section 6, T14N, R26E, B.M. ¹ b) NWSE, Section 7, T14N, R26E, B.M.
Use:	Irrigation

¹ The "1/4" designations will be omitted from subsequent legal descriptions in this order.

Season of use: March 15 to November 15

Place of use: 75 acres² within parts of Sections 5, 6 and 7, T14N, R26E, B.M.

2. Water Right No. 74-01103 was decreed to Floyd J. Whittaker on December 30, 1982 as follows:

Source: Big Timber Creek, tributary to Lemhi River

Priority: November 19, 1922

Rate of diversion: 0.48 cfs

Point of diversion: SWNW, Section 5, T14N, R26E, B.M.

Use: Irrigation

Season of use: April 1 to November 1³

Place of use: 24.2 acres within parts of Section 5, T14N, R26E, B.M. and Section 32, T15N, R26E, B.M.

3. On March 30, 1998, James and/or Paula Whittaker ("applicant") filed Application for Transfer No. 5244 ("application") with the Department seeking to change the point of diversion and place of use of Water Right Nos. 74-00056 and 74-01103. The proposed new point of diversion is located within the SWNW, Section 20, T15N, R26E, B.M., and the proposed new place of use is 99.2 acres within the NE, Section 21, T15N, R26E, B.M.

4. The Department published notice of the application which was subsequently protested by Beva Lue Clark ("protestant").

5. Issues raised by the protestant are as follows:

- a. The proposed changes would injure other water rights;
- b. The proposed changes would constitute an enlargement in use of the original right; and
- c. The proposed changes would not be in the local public interest.

² Transfer No. 3056 inadvertently shows 74 acres instead of 75 acres as decreed in December 30, 1982.

³ The season of use recommended by the Department in the Snake River Basin Adjudication for Basin 74 is March 15 to November 15.

6. On April 7, 1999, the Department conducted a hearing on the application. The applicant was present and was represented by Jerry Rigby. The protestant was present and was represented by Kent Foster.
7. Exhibits accepted at the hearing as a part of the record are as follows:
 - a. Applicant's Exhibit A – Map showing Big Timber Creek, Texas Creek Area
 - b. Applicant's Exhibit B – Map showing the Big Timber Creek, Texas Creek Area, and the location of existing irrigation pivots
 - c. Applicant's Exhibit C – Map showing the location of the present place of use for Water Right Nos. 74-00056 and 74-01103 along Big Timber Creek
 - d. Applicant's Exhibit D – Map showing the location of ditches from Big Timber Creek and irrigation pivots
 - e. Protestant's Exhibit 1 – Large topographical map made up of portions of four U. S. Geological Survey quadrangle maps
 - f. Protestant's Exhibit 2 – Report titled Impacts Assessment of the Proposed Stephenson Water Rights Transfer Application dated February 1, 1995
 - g. Protestant's Exhibit 3 – U. S. Geological Survey Map No. GQ-733. prepared by Edward T. Ruppel in 1968
 - h. Protestant's Exhibit 4 – Photocopy of a map prepared in 1972 by the Department of Water Resources for the Lemhi River Basin Adjudication showing the location of H.E.S. 236 and part of H.E.S. 657 on Big Timber Creek
 - i. Protestant's Exhibit 5 – Orthophotoquad Map, Leadore SW
 - j. Protestant's Exhibit 6 – Five colored photographs of present place of use for Water Right Nos. 74-00056 and 74-01103 along Big Timber Creek
 - k. Protestant's Exhibit 7 – Photograph of weir on diversion from Big Timber Creek to the present place of use for Water Right Nos. 74-00056 and 74-01103

- l. Protestant's Exhibit 8 – Photograph of weir in Whittaker high ditch (the ditch to the pivots)
- m. Protestant's Exhibit 9 – Photograph showing Whittaker high ditch (the ditch to the pivots)
- n. Protestant's Exhibit 10 – Computer printouts of current meter calculations for measurements taken by Dr. Charles Brockway of flows in Whittaker high ditch from diversions out of Big Timber Creek
- o. Protestant's Exhibit 11 – U. S. Department of Agriculture ("USDA") aerial photograph showing location of existing pivots
- p. Protestant's Exhibit 12 – Computer enhanced photograph based on aerial photograph from Agricultural Stabilization and Conservation Service ("ASCS"), now the USDA Farm Service Agency, showing location of existing pivots
- q. Protestant's Exhibit 13 – Orthophotoquad Map of Purcell Springs Area, Leadore SE
- r. Protestant's Exhibit 14 – Computer enhanced copy of ASCS aerial photo showing location of new pivot
- s. Protestant's Exhibit 15 – Two combined USDA aerial photographs showing Purcell Springs Area
- t. Protestant's Exhibit 16 – Two combined aerial photographs showing panoramic view of location for new pivot and area that will cease to be irrigated
- u. Protestant's Exhibit 17 – Photograph of Whittaker property along Big Timber Creek

8. The general location of the irrigation use proposed in the application is in the upper end of the Lemhi River drainage about 4 miles south of Leadore, Idaho. Big Timber Creek ("Timber Creek") and Texas Creek, which are located approximately 3 miles apart, flow in a northerly direction toward Leadore. Texas Creek lies generally east of Timber Creek and joins with Timber Creek near Leadore to form the Lemhi River.

9. The property from which the applicant seeks to transfer water rights consists of parts of two homestead entries (the "homesteads") near the most upstream diversions on Timber Creek. The irrigated land is typical of a high mountain meadow, being rough and rolling in nature with high spots and low areas. Water consumed by crops growing on the homesteads originates from a combination of sources including two diversions for irrigation from Timber

Creek, a diversion for irrigation from an Unnamed Stream, spring flows, subsurface water, and precipitation. Timber Creek is the primary source of water diverted for irrigation on the homesteads. Every year, water is diverted from Timber Creek beginning in the spring and continuing until the diversions are shut off in early July, based on the relatively junior priorities of the decreed water rights. Diversions from the springs on the property provide only a small portion of the water diverted for irrigation. However, a determination of the amounts of water from specific sources consumed by crops growing on the homesteads is difficult, if not impossible, due to the nature of the land and the method of irrigation, which is termed "wild flooding."

10. The applicant proposes to cease using two diversions from Timber Creek and one diversion from the Unnamed Stream to the homesteads and to divert water under the water rights proposed for transfer at a location approximately 4½ miles downstream at another existing diversion on Timber Creek. From the latter existing point of diversion, water would be conveyed easterly approximately 2 miles through an existing ditch and pipeline to a new pivot irrigation system located in the NE of Section 21, T15N, R26E, B.M ("new pivot"). The existing ditch and pipeline delivers water diverted under other rights of the applicant to lands in the vicinity of the new pivot.

11. The location of the new pivot is approximately midway between Timber Creek and Texas Creek, but is closer to Texas Creek. The new pivot is adjacent to an existing pivot of the applicant set up in 1993 that irrigates about 195 acres. The new pivot, as constructed, is about 1,250 feet long and consists of 10 towers and an end gun. The new pivot is capable of irrigating from approximately 105 acres to 112 acres and overlaps irrigation coverage under an existing pivot of the applicant in the amount of 13 to 17 acres. The applicant proposes to irrigate the overlapping land with both pivots.

12. Water Right No. 74-00042 was decreed to James and Maybelle Ellsworth as follows:

Source:	Timber Creek
Priority:	November 1, 1888
Rate of diversion:	4.8 cfs
Place of use:	Same as for Right Nos. 74-00066 and 74-00067

13. Water Right Nos. 74-00066 and 74-00067 ("Ellsworth water rights") with priorities of June 1, 1880, and June 1, 1881, respectively, authorize diversion of water from Texas Creek to Ellsworth lands. These rights are related to Water Right No. 74-00042 diverted from Timber Creek, since Water Right Nos. 74-00066 and 74-00067 are each conditioned with the following language:

The rate of diversion from Texas Creek when added to a portion of right 74-00042 from Timber Creek actually delivered into the channel of Texas Creek by and through the Yearian-Timber Creek ditch shall not exceed 2.74 cfs (3.89 cfs for 74-00067).

14. The protestant's water rights authorize diversion of water from Texas Creek but not Timber Creek. The priorities of the protestant's rights from Texas Creek are 1913 and 1920 and are junior to the Ellsworth water rights described above. The protestant's rights are reduced or shut off when there is insufficient water in Texas Creek to fill prior rights.

15. The protestant generally explained the basis of her protest as follows: Use of water as proposed in the application will enlarge the applicant's use of Timber Creek water. Enlarged use will make less Timber Creek water available for diversion to Texas Creek by Ellsworth under Water Right No. 74-00042. As a result, Ellsworth will need to divert more water from Texas Creek to fill Water Right Nos. 74-00066 and 74-00067 causing the protestant's junior rights on Texas Creek to be diminished or shut off earlier in the irrigation season than otherwise would occur.

16. There was substantial testimony, some of which was conflicting, in connection with the specific land included in the 99.2 acres to be dried up on the homesteads. The protestant provided substantial, credible testimony that if all diversions to the 99.2 acres shown as irrigated on the homesteads were shut off, only about 30 or 40 acres within the authorized place of use would actually be dried up. The remaining land would continue to be sub-irrigated with water from Timber Creek, the Unnamed Stream, and from spring flows.

17. There are approximately 6 or 8 springs that arise on the homesteads.

18. Water lost as a result of diversions to the homesteads returns to Timber Creek and is available for use by other downstream water rights on Timber Creek. If the application is approved, some of the water diverted to the new pivot would be lost in the conveyance ditch. Part of the lost water would return to lower portions of Timber Creek and part would be lost to deep percolation, probably returning to the surface near Leadore, Idaho.

19. The watermaster on Timber Creek and Texas Creek regulates or shuts off some diversions of water in most years due to water shortages.

ANALYSIS

The applicant is entitled to divert and use a water right, as decreed or as changed by an approved transfer, assuming the water right is used (and has been used) in compliance with the decree or transfer and has not been forfeited through non-use. The applicant is entitled to transfer the decreed water rights only to the extent of the historic beneficial use made of the water rights in the past. The applicant is not entitled to increase, through a transfer, the consumptive use of water made under the water rights, even if the applicant could have legally made a larger use of water under the water rights at the original place of use.

Testimony at the hearing shows that if the application is approved, an area of 99 to 105 acres would be irrigated under the new pivot and would consumptively use water diverted under the water rights. If all diversions cease to be made to the present authorized place of use at the

homesteads, only 30 to 40 acres of the decreed 99.2 acre place of use would actually be dried up and cease consumptively using water tributary to Timber Creek. The effect of approving the application would be to allow a larger consumptive use of water than has historically occurred under the water rights, thereby reducing return flows, and other water rights would be injured.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use, and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Idaho Code § 42-222.

5. The applicant has not shown that transferring the water rights for use at the new pivot would not reduce return flows relied upon by downstream junior appropriators since the consumptive use of the water diverted to the new pivot under the water rights would be greater than the consumptive use of the water diverted at the homesteads under the water rights.

6. Allowing a larger volume of water to be consumptively used after the transfer than the historic consumptive use of the water diverted by the applicant under the decreed water rights would constitute an enlargement in use of the original right and would violate Idaho Code § 42-222.

7. The applicant's use of water as proposed in the application will increase consumptive use, will decrease return flows to Timber Creek, and will injure other rights on Timber Creek. The proposed changes in use could also adversely affect the rights of the protestant who diverts water from Texas Creek, depending on the diversion practices of Ellsworth, on management practices of the applicant, and on the nature of return flows of water to Timber and Texas Creeks.

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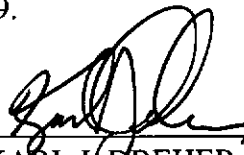
8. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that the motion of the protestant made during the hearing to summarily deny the application for failure to make a prima facie showing is **DENIED**.

IT IS FURTHER hereby ORDERED that Application for Transfer No. 5244 in the name of James and/or Paula Whittaker is **DENIED** for failure of the applicant to show that the original right will not be enlarged and that there will not be injury to other water rights.

Signed this 20th day of December, 1999.



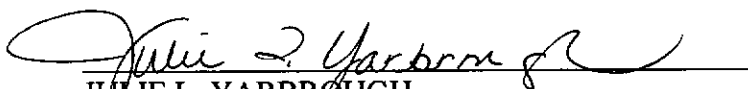
KARL J. DREHER
Director

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on the 20th day of December, 1999, 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:

JERRY RIGBY
RIGBY THATCHER ANDRUS
RIGBY KAM AND MOELLER
25 N 2ND E
REXBURG ID 83440

KENT FOSTER
HOLDEN KIDWELL HAHN
AND CRAPO
PO BOX 50130
330 SHOUP AVE 3RD FLOOR
IDAHO FALLS ID 83405


JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5244 IN THE)
NAME OF JAMES AND/OR PAULA)
WHITTAKER)
_____)

RECOMMENDED ORDER

This matter came before the Idaho Department of Water Resources ("Department") in the form of a protested application for transfer. The Department held a conference and a hearing in the matter. During the hearing, counsel for the protestant moved to have the application denied for failure of the applicant to make a prima facie showing that the application could be approved. The hearing officer took the motion under advisement and stated that the motion would be addressed in the recommended order of the hearing officer. Based upon his understanding of the facts in this matter and his understanding of the law, the hearing officer recommends the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On October 24, 1984, the Department approved Transfer No. 3056 in connection with Water Right No. 74-00056 as follows:

Source:	a) Unnamed Stream tributary to Big Timber Creek b) Big Timber Creek tributary to Lemhi River
Priority:	May 1, 1910
Rate of diversion:	2.0 cubic feet per second ("cfs")
Point of diversion:	a) SW1/4NE1/4 Section 6, T14N, R26E, B.M. b) NW1/4SE1/4 Section 7, T14N, R26E, B.M.
Use:	Irrigation
Season of use:	March 15 to November 15
Place of use:	75* acres within parts of Sections 5, 6 and 7, T14N, R26E, B.M. (* Transfer No. 3056 inadvertently shows 74 acres instead of 75 acres as decreed in December 30, 1982)

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. Water Right No. 74-01103 was decreed to Floyd J. Whittaker on December 30, 1982 as follows:

Source:	Big Timber Creek tributary to Lemhi River
Priority:	November 19, 1922

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Rate of diversion: 0.48 cfs
Point of diversion: SWNW Section 5, T14N, R26E, B.M.
Use: Irrigation
Season of use: *April 1 to November 1
Place of use: 24.2 acres within parts of Section 5, T14N, R26E, B.M. and
Section 32, T15N, R26E, B.M.

Note: *The season of use being used in the Snake River Basin Adjudication for
Basin 74 is March 15 to November 15.

3. On March 30, 1998, James and/or Paula Whittaker ("applicant") filed
Application for Transfer No. 5244 ("application") with the Department seeking to change
the point of diversion and place of use of Water Right Nos. 74-00056 and 74-01103.
The proposed new point of diversion is located within the SWNW Section 20, T15N,
R26E, B.M. and the proposed new place of use is 99.2 acres within the NE Section 21,
T15N, R26E, B.M.

4. The Department published notice of the application which was
subsequently protested by Beva Lue Clark ("protestant").

5. Issues raised by the protestant are as follows:

- a. The proposed changes will injure other water rights.
- b. The proposed changes will constitute an enlargement in use of the
original right.
- c. The proposed changes are not in the local public interest.

6. On April 7, 1999, the Department conducted a hearing in the matter. The
applicant was present and was represented by Jerry Rigby. The protestant was
present and was represented by Kent Foster.

7. Exhibits accepted as a part of the record in the matter are as follows:

- a. Applicant's Exhibit A - Map showing Big Timber Creek - Texas Creek area
- b. Applicant's Exhibit B - Map showing the Big Timber Creek - Texas Creek
area and the location of existing irrigation pivots
- c. Applicant's Exhibit C - Map showing the location of Whittaker property in
upper Big Timber Creek
- d. Applicant's Exhibit D - Map showing the location of ditches from Big
Timber Creek and irrigation pivots

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- e. Protestant's Exhibit 1 - Large topographical map made up of portions of 4 USGS quadrangle maps
- f. Protestant's Exhibit 2 - Report titled Impacts Assessment of the Proposed Stephenson Water Rights Transfer Application dated February 1, 1995
- g. Protestant's Exhibit 3 - US Geological Survey map No. GQ-733 prepared by Edward T. Ruppel in 1968
- h. Protestant's Exhibit 4 - Photocopy of a map prepared in 1972 by IDWR for the Lemhi River Adjudication, said map showing the location of H.E.S. 236 and part of H.E.S. 657 on Big Timber Creek
- i. Protestant's Exhibit 5 - Orthophotoquad map - Leadore SW
- j. Protestant's Exhibit 6 - Five colored photographs of Whittaker property on Big Timber Creek
- k. Protestant's Exhibit 7 - Photograph of weir on upper Whittaker diversion from Big Timber Creek (The diversion to the original place of use)
- l. Protestant's Exhibit 8 - Photograph of weir in Whittaker high ditch (the ditch to the pivots)
- m. Protestant's Exhibit 9 - Photograph showing Whittaker high ditch (the ditch to the pivots)
- n. Protestant's Exhibit 10 - Computer printouts of current meter calculations of measurements taken by Dr. Charles Brockway on Whittaker high ditch from Big Timber Creek
- o. Protestant's Exhibit 11 - USDA aerial photograph showing location of existing and proposed Whittaker pivot
- p. Protestant's Exhibit 12 - Computer enhanced photo of ASCS aerial photo showing location of existing and proposed pivots
- q. Protestant's Exhibit 13 - Orthophotoquad map of Purcell Springs area - Leadore SE
- r. Protestant's Exhibit 14 - Computer enhanced copy of ASCS aerial photo showing location of proposed Whittaker pivot
- s. Protestant's Exhibit 15 - Two combined USDA aerial photographs showing Purcell Springs area

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- t. Protestant's Exhibit 16 - Two combined aerial photographs showing panoramic view of area containing new pivot and area to be dried up
- u. Protestant's Exhibit 17 - Photograph of Whittaker property in upper Big Timber Creek

8. The general location of the irrigation use proposed in the application is in the upper end of the Lemhi River drainage and is about 4 miles south of Leadore, Idaho. Big Timber Creek ("Timber Creek") and Texas Creek, which are located approximately 3 miles apart, flow in a northerly direction toward Leadore where they join near Leadore to form the Lemhi River. Texas Creek is located east of Timber Creek.

9. The property from which the applicant wants to remove the decreed water rights consists of parts of two homestead entries ("homesteads") near the most upstream diversions on Timber Creek. The irrigated land is typical of a high mountain meadow, being rough, rolling in nature with high spots and low areas. Water used to irrigate the homesteads originates from a combination of sources including two diversions from Timber Creek, an unnamed stream, flow from springs on the land and subsurface water. A determination of the specific land irrigated from a specific water source on the homesteads would be difficult if not impossible due to the nature of the land and method of irrigation which is termed "wild flooding." Water diverted from Timber Creek to the homesteads is turned on in the spring and allowed to flow continually until shut off in early July every year due to the junior priorities of the water rights.

10. The applicant proposes to close off the two diversions from Timber Creek to the homesteads and to divert the water approximately 4.5 miles downstream at an existing diversion on Timber Creek. From the existing point of diversion, water will be conveyed approximately two miles easterly through an existing ditch and pipeline of the applicant to a proposed new pivot ("new pivot") located in the NE1/4 Section 21, T15N, R26E, B.M. The existing conveyance system delivers water under other rights of the applicant to lands in the vicinity of the new pivot.

11. The location of the new pivot is approximately midway between Timber Creek and Texas Creek but is closer to Texas Creek. The new pivot is adjacent to an existing pivot of the applicant set up in 1993 that irrigates about 195 acres. The new pivot, as constructed, is about 1,250 feet long and consists of 10 towers and an end gun. The new pivot is capable of irrigating from approximately 105 acres to 112 acres and overlaps irrigation coverage under an existing pivot of the applicant in the amount of 13 to 17 acres. The applicant's present plan is to irrigate the overlapping land with both pivots.

12. Water Right No. 74-00042 was decreed to James and Maybelle Ellsworth as follows:

Source: Timber Creek
Priority: November 1, 1888
Rate of diversion: 4.8 cfs
Place of use: Same as for Right Nos. 74-00066 and 74-00067

13. Water Right Nos. 74-00066 and 74-00067 ("Ellsworth rights") with priorities of June 1, 1880 and June 1, 1881, respectively, authorize diversion of water from Texas Creek to Ellsworth lands. These rights are related to Water Right No. 74-00042 diverted from Timber Creek, since Water Right Nos. 74-00066 and 74-00067 are each conditioned with the following language:

The rate of diversion from Texas Creek when added to a portion of right 74-00042 from Timber Creek actually delivered into the channel of Texas Creek by and through the Yearian-Timber Creek ditch shall not exceed 2.74 cfs (3.89 cfs for 74-00067).

14. The protestant's water rights authorize diversion of water from Texas Creek but not Timber Creek. The priorities of the protestant's rights from Texas Creek are 1913 and 1920 and are junior to the Ellsworth rights described above. The protestant's rights are reduced or shut off when there is insufficient water in Texas Creek to fill prior rights.

15. The protestant generally explained the basis of her protest as follows: Use of water as proposed in the application will enlarge the applicant's use of Timber Creek water. Enlarged use will make less Timber Creek water available for diversion to Texas Creek by Ellsworth under Water Right No. 74-00042. As a result, Ellsworth will need to divert more water from Texas Creek to fill Water Right Nos. 74-00066 and 74-00067 causing the protestant's junior rights on Texas Creek to be diminished or shut off earlier in the irrigation season than otherwise would occur.

16. There was substantial testimony, some of which is conflicting, in connection with the specific land included in the 99.2 acres to be dried up on the homesteads. The protestant provided substantial credible testimony that if all diversions to the 99.2 acres shown as irrigated on the homesteads were shut off, only about 30 or 40 acres within the authorized place of use would actually be dried up. The remaining land would continue to be sub-irrigated with water from Timber Creek, the Unnamed Stream, and from spring flows.

17. There are approximately 6 or 8 springs that arise on the homesteads.

18. Water lost as a result of diversions to the homesteads returns to Timber Creek and is available for use by other downstream water rights on Timber Creek. If the application were approved, some of the water diverted to the new pivot would be lost in the conveyance ditch. Part of the lost water would return to lower Timber Creek, part would be lost to deep percolation probably returning to the surface near Leadore, Idaho, and part would flow to lower Texas Creek.

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19. The applicant has other land in the Warm Springs Creek area and has the means to use excess water diverted to the new pivot but not used at the pivot.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

5. The applicant has not shown that the use of water at the new pivot will have the same or a smaller consumptive use than on the homesteads.

6. To allow a larger volume of water to be diverted and consumptively used after the transfer than what the applicant has historically consumptively used under the decreed water rights would constitute an enlargement in use of the original right in violation of Section 42-222, Idaho Code.

7. The applicant's use of water as proposed in the application will decrease the amount of return flow to Timber Creek which has historically been available to fill other rights diverted from Timber Creek. The proposed changes in use will injure other water rights on Timber Creek and could adversely affect the rights of the protestant who diverts water from Texas Creek, depending on the diversion practices of Ellsworth, on management practices of the applicant and on the nature of return flows of water to Timber and Texas Creeks if the transfer were approved.

8. The Department should deny the application.

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ANALYSIS

The applicant is entitled to divert and use a water right as decreed or as changed by an approved transfer assuming the right has been and is used in compliance with the decree or transfer and has not been forfeited through non-use.

The applicant is entitled to transfer the decreed right only to the extent of the beneficial use made of the right in the past. A transfer applicant is not entitled to increase the historical use made under the right, even if the right holder could have legally made a larger use at the original place of use.

Testimony at the hearing shows that if the application were approved, the land consumptively using water would consist of approximately 99.2 to 105 acres under the proposed new pivot. Testimony further established that about 50 to 60 acres at the homesteads would continue to receive water through natural or artificial water spreading of other spring and stream sources. The effect of approving the transfer would be a larger consumptive use of water with associated injury to other water rights. The application should not be approved.

ORDER

IT IS THEREFORE, hereby ORDERED that the motion of the protestant made during the hearing to summarily deny the application for failure to make a prima facie showing is **DENIED**.

IT IS FURTHER hereby ORDERED that Application for Transfer No. 5244 in the name of James and/or Paula Whittaker is **DENIED** for failure of the applicant to show that the original right will not be enlarged and that there will not be injury to other water rights.

Signed this 17th day of May, 1999.



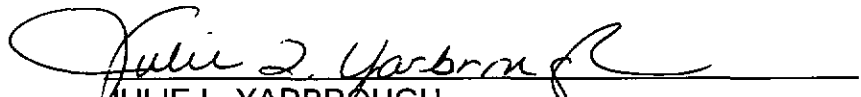
L. GLEN SAXTON
Hearing Officer

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on the 17th day of May, 1999, 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:

JERRY RIGBY
RIGBY THATCHER ANDRUS
RIGBY KAM AND MOELLER
25 N 2ND E
REXBURG ID 83440

KENT FOSTER
HOLDEN KIDWELL HAHN
AND CRAPO
PO BOX 50130
330 SHOUP AVE 3RD FLOOR
IDAHO FALLS ID 83405


JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau

ORDER - Pg 8
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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCESTransfer No. 5244APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1Name of applicant JAMES AND/OR PAULA WHITTAKER Phone (208) 768-2491
Post Office address PO Box 240 LEADORE ID 83464

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 transfer WATER TO MORE PRODUCTIVE
ground

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

Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of Use
<u>74-00056</u>	<u>5-1-1910</u>	<u>2.0 cfs</u>	<u>IRRIGATION</u>	<u>3-15</u> to <u>11-15</u> <u>24-01</u> to <u>11-01</u>
<u>74-01103</u>	<u>11-19-1922</u>	<u>0.48</u>	<u>" "</u>	<u>"</u> to <u>"</u>
_____	_____	_____	_____	_____ to _____
_____	_____	_____	_____	_____ to _____

2. Total amount of water being transferred 2.48 cfs cubic feet per second and/or _____ acre-feet per annum.
3. Source of water Big Timber Creek tributary to Lemhi River
4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
		<u>NW</u>	<u>SE</u>	<u>8</u>	<u>15N</u>	<u>26E</u>	<u>Lemhi</u>	
		<u>SW</u>	<u>NW</u>	<u>20</u>	<u>15N</u>	<u>26E</u>	<u>Lemhi</u>	

5. 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	
<u>16N</u>	<u>25E</u>	<u>25</u>													<u>25</u>	<u>25</u>	<u>25</u>		<u>75.0</u>
<u>15N</u>	<u>26E</u>	<u>21</u>	<u>25</u>	<u>25</u>	<u>24.2</u>	<u>25</u>													<u>99.2</u>

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Total acres 75.0
99.2

PART 1**6. General Information:**

a. Description of diversion system pump + pivot DITCH from Big Timber Creek

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? None Yes X 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:

existing place of use will be taken out of production

d. Remarks:

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____.

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PART 2

A. DESCRIPTION OF RIGHT AS RECORDED:

Water Right No. 74-00056

STAGE: DECREED

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
IRRIGATION	03/15 to 11/15	2.00 CFS

<u>SOURCE</u>	<u>TRIBUTARY OF</u>
BIG TIMBER CREEK	LEMHI RIVER
UNNAMED STREAM	BIG TIMBER CREEK

Priority: 05/01/1910

LOCATION OF POINT(S) OF DIVERSION:

SWNE , Sec. 6, Township 14N, Range 26E
 NWSE , Sec. 7, Township 14N, Range 26E
 LEMHI County

PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
14N	26E	5	NWSW 5.3			5.3
		6	SWNE 1 (.8)	NESE 34 (33.8)	NWSE 9.0	
			SWSE 7 (4.7)	SESE 18.4		69 (48.7)
		7	NENE 1.0	Total number of acres irrigated:		74 1.0
						* 75.0

CONDITIONS/REMARKS:

1. A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.
2. Use of water under this right is subject to control by the watermaster of State Water District No. .
3. TRANS. 3056. THE COMBINED RATE OF DIV. FROM THE 2 SOURCES
4. IDENTIFIED UNDER THIS TRANS. SHALL NOT EXCEED 2.0 CFS.

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* Acres per Proposed Findings of Water Rights in the Lemhi River Basin.
 (see attached page.)

PROPOSED FINDING OF WATER RIGHTS - LEMHI RIVER DRAINAGE

SOURCE: Timber Creek and Tributaries

IDENT. NO.	NAME AND ADDRESS	PRIORITY	PURPOSE	PERIOD OF USE		MAXIMUM RATE OF DIVERSION (cfs)	POINT OF DIVERSION	PLACE OF USE and LANDS IRRIGATED		BASIS OF RIGHT and REMARKS
				From	To					
74-0056	WHITTAKER, Floyd J. Box 177 Leadore, Idaho Place of use is H.E.S. No. 236.	5 -1 -1910	Irrigation	4/1	11/1	2.0	NW $\frac{1}{4}$ SE $\frac{1}{4}$, S.7 T14N, R26E	Sec. 5		Decree Big Timber Creek
								NW $\frac{1}{4}$ SW $\frac{1}{4}$,	5.3	
								Sec. 6		
								SW $\frac{1}{4}$ NE $\frac{1}{4}$,	0.8	
								NE $\frac{1}{4}$ SE $\frac{1}{4}$,	33.8	
								NW $\frac{1}{4}$ SE $\frac{1}{4}$,	9.0	
								SW $\frac{1}{4}$ SE $\frac{1}{4}$,	6.7	
								SE $\frac{1}{4}$ SE $\frac{1}{4}$,	18.4	
								Sec. 7		
								NE $\frac{1}{4}$ NE $\frac{1}{4}$,	1.0	
								T14N, R26E		
									75.0	
74-2095	WHITTAKER, Floyd J. Box 177 Leadore, Idaho	7 -22-1910	Irrigation	4/1	11/1	2.5	Sec. 1 NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 2 SE $\frac{1}{4}$ NE $\frac{1}{4}$ T14N, R25E	Sec. 1		License Basin Creek (Swan Creek)
								NW $\frac{1}{4}$ NW $\frac{1}{4}$,	27.0	
								SW $\frac{1}{4}$ NW $\frac{1}{4}$,	20.0	
								Sec. 2		
								NE $\frac{1}{4}$ NE $\frac{1}{4}$,	32.0	
								SE $\frac{1}{4}$ NE $\frac{1}{4}$,	24.0	
								T14N, R25E		
									103.0	
74-0055	WHITTAKER, Floyd J. Box 177 Leadore, Idaho	8 -19-1910	Irrigation	4/1	11/1	6.2	NW $\frac{1}{4}$ NE $\frac{1}{4}$, S.26 T15N, R25E	Sec. 14		Decree Little Timber Creek
								SW $\frac{1}{4}$ NE $\frac{1}{4}$,	2.4	
								SW $\frac{1}{4}$ NW $\frac{1}{4}$,	7.7	
								SE $\frac{1}{4}$ NW $\frac{1}{4}$,	34.8	
								NE $\frac{1}{4}$ SW $\frac{1}{4}$,	22.4	
								NW $\frac{1}{4}$ SW $\frac{1}{4}$,	12.5	
								SW $\frac{1}{4}$ SW $\frac{1}{4}$,	16.5	
								SE $\frac{1}{4}$ SW $\frac{1}{4}$,	0.5	
								NW $\frac{1}{4}$ SE $\frac{1}{4}$,	38.0	
								SW $\frac{1}{4}$ SE $\frac{1}{4}$,	4.5	
								Sec. 15		
								SE $\frac{1}{4}$ SE $\frac{1}{4}$,	5.5	
								T15N, R25E		
									144.8	

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

PART 2

(Attach one copy for each right)

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree No. 74-00026 Decreed to FLOYD J. WHITAKER
in case of STATE OF IDAHO vs. FLOYD J. WHITAKER
dated 06-17-1971 in IDAHO county of LEMHI
- 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 Big Timber Creek tributary to Lemhi River

4. Date or priority 5-1-1910

5. Water is used for the following purpose:

amount 2.0 cfs for IRRIGATION purposes from 3-15 to 11-15
(cfs/ac-ft) 04-01 to 11-01
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft) _____
amount _____ for _____ purposes from _____ to _____
(cfs/ac-ft) _____

6. Total amount of water under right 2.0 cfs 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
		NW	SE	7	14N	26E	LEMHI	

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	
14N	26E	5									5.3								5.3
		6			.8										33.8	9	67	184	68.7
		7	1.0																1.0

JAN 12 2001

Total acres 75.0

9. Describe any other water rights used for the same purpose as described above None

10. To your knowledge, has any portion of this water right undergone a period of one or more consecutive years of non-use?

NO 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 2

TRANS NO.

A. DESCRIPTION OF RIGHT AS RECORDED:

Water Right No. 74-01103

STAGE: DECREED

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
IRRIGATION	03/15 to 11/15	0.48 CFS

<u>SOURCE</u>	<u>TRIBUTARY OF</u>
BIG TIMBER CREEK	LEMHI RIVER

Priority: 11/19/1922

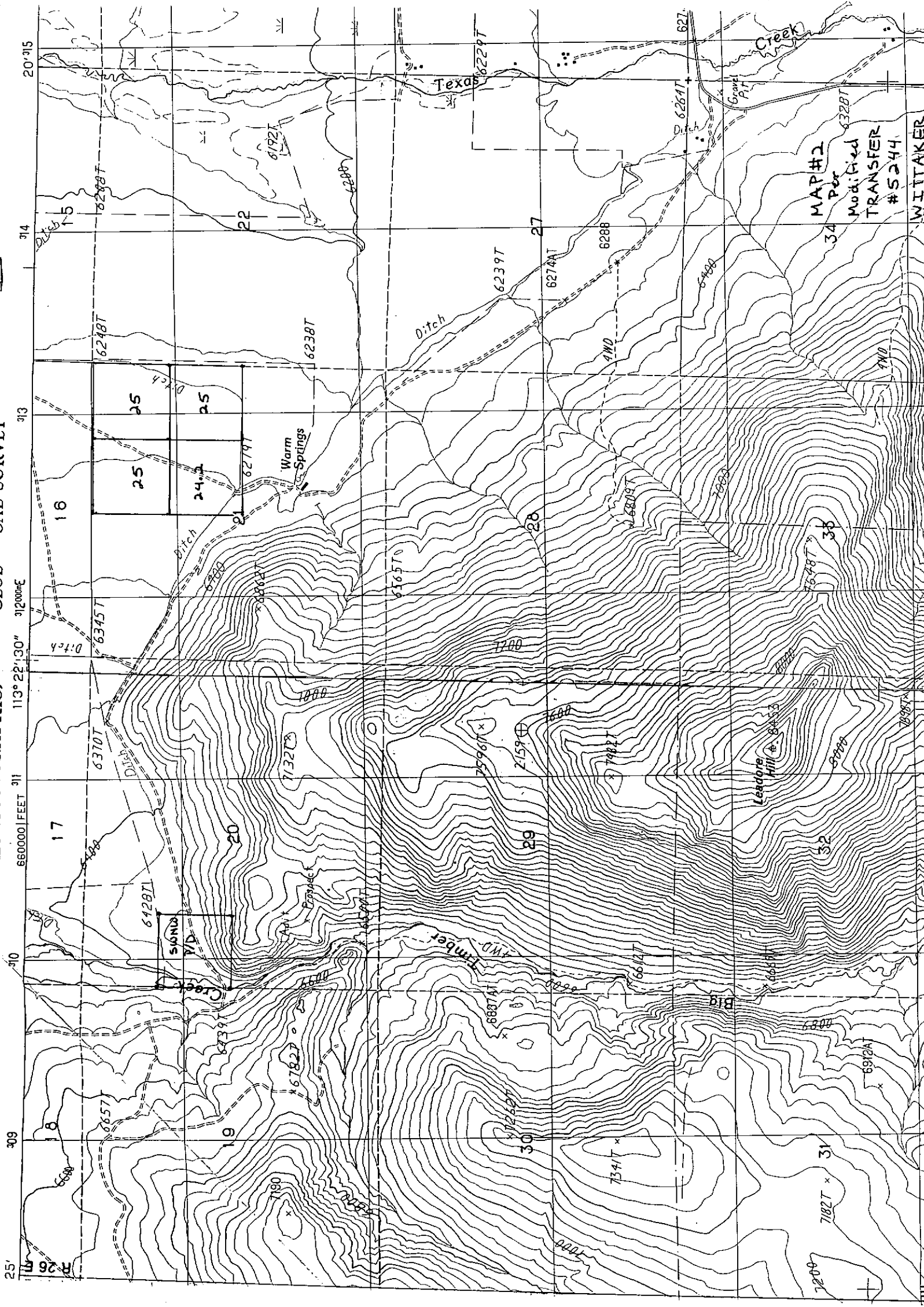
LOCATION OF POINT(S) OF DIVERSION:SWNW , Sec. 5, Township 14N, Range 26E
LEMHI CountyPLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>		<u>ACRES</u>		<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
14N	26E	5	Lot 4 (NWNW)	10	SWNW	8		18
15N	26E	32	SWSW	6				6
Total number of acres irrigated:								24

CONDITIONS/REMARKS:

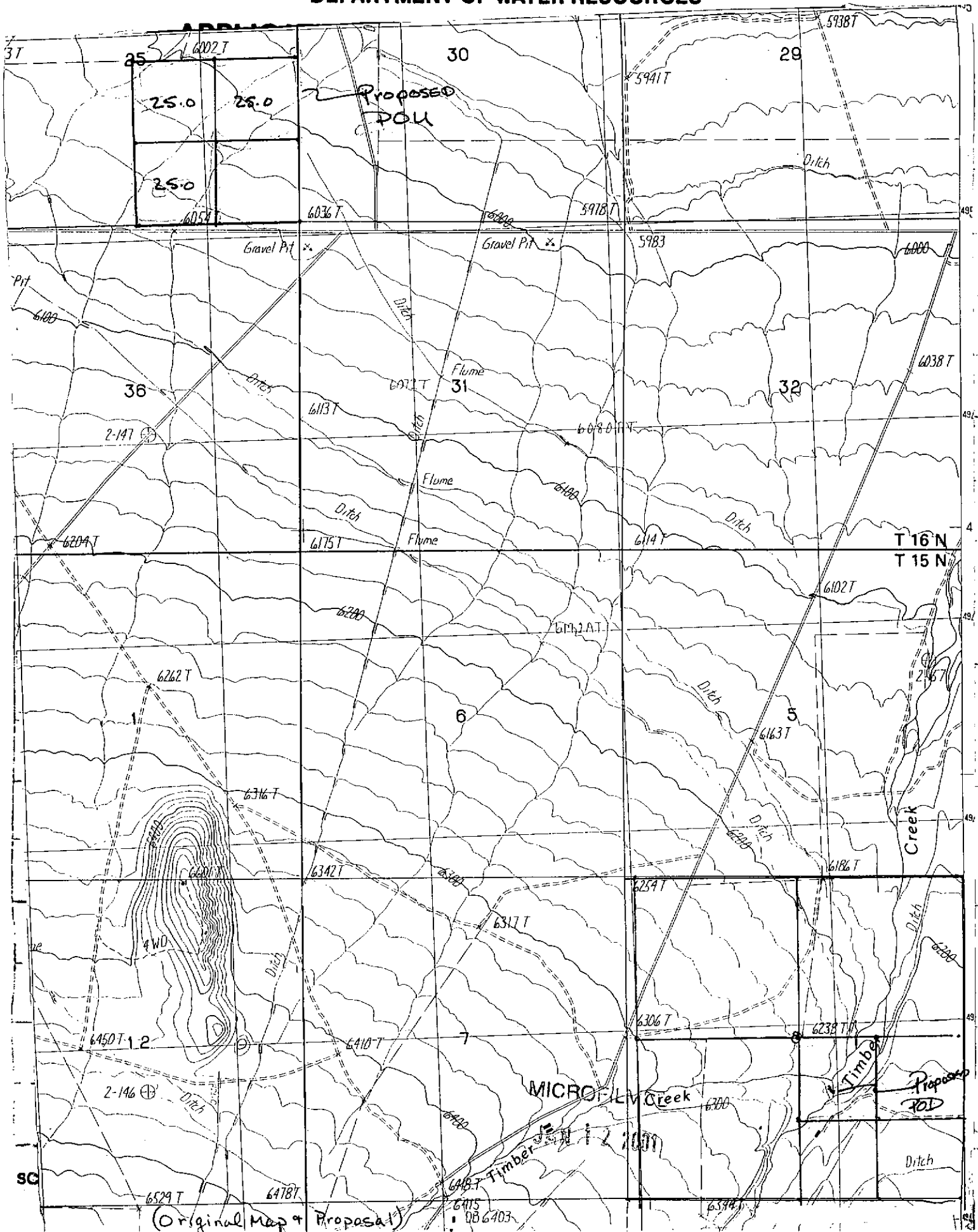
1. AC. IRR.=24.2.
2. P/U H.E.S. 657.

MICROFILMED
JAN 12 2001



MAP #2
Per
Modified
TRANSFER
#5244
WITTAKER

STATE OF IDAHO DEPARTMENT OF WATER RESOURCES



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

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

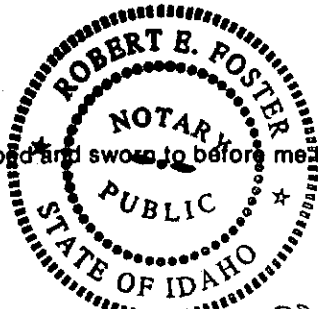
2. Quantity and quality of return flows and location of discharge:

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 _____



James W. Whittaker
(Signature of Applicant)

27th

day of

March

, 19 98

Robert E. Foster
(Notary Public)

My commission expires

02-16-2001

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments

Received by SC Date 3-30-98

Protest filed by _____

Prelim. check by _____ Fee #100.00Receipted by HWS #E024006 Date 3-30-98Published in Recorder Herald

Copies of protest forwarded by _____

Pub. dates April 16 & 23, 98

Hearing held by _____ Date _____

Watermaster recommendation requested on _____

Recommended for ☐ approval ☐ denial

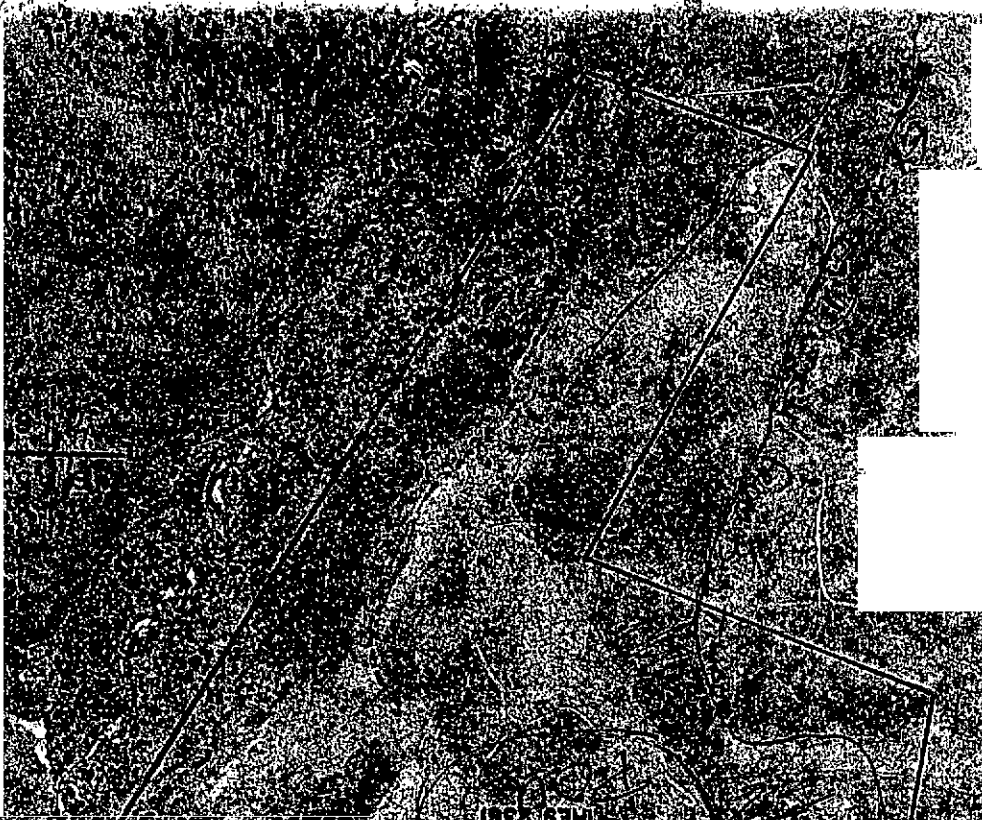
rec'd.

by _____

Copy of transfer sent to lien holder _____

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JAN 12 2001



PARCEL NO.
RP 14N26E061201 A

CATEGORY DESCRIPTION	TAX CODE	LOTS/ACRES	1997 MARKET VALUE
2 IRRGTD PASTURE	3 00	15.042 AC	4,732
5 DRY GRAZING		139.238 AC	5,152
		155.280	9,884*

OWNER WHITTAKER F JAMES
& WHITTAKER PAULA J
P O BOX 240
LEADORE ID 83464

LEGAL HES 236
6 14 26
F JAMES 75%
PAULA J 25%

PROPERTY ADDRESS
PARCEL NO. RP 14N26E061201 A TAX CODE 3 00

PARCEL NO.
RP 16N25E254800 A

CATEGORY DESCRIPTION	TAX CODE	LOTS/ACRES	1997 MARKET VALUE
5 DRY GRAZING	3 00	198.485 AC	28,979
19 WASTE		1.515 AC	858
32 RURAL IMP ON AG		200.000	29,837*

OWNER WHITTAKER FLOYD JAMES
& WHITTAKER PAULA J
P O BOX 240
LEADORE ID 83464

LEGAL N2SE4 SW4SE4 SE4SW4
NE4SW4
25 16 25
FLOYD JAMES 50%
PAULA J 50%

PROPERTY ADDRESS
PARCEL NO. RP 16N25E254800 A TAX CODE 3 00

MICROFILMED

JAN 12 2001

APR-07-1998 09:36

JAMES WHITTAKER

P.02

ARLA BOOTS
LEWIS COUNTY ASSESSOR
LEWIS COUNTY COURTHOUSE
208 COURTHOUSE DR.
SALMON, ID 83467

IMPORTANT NOTICE-PLEASE READ

FORWARD & ADDRESS CORRECTION

TAX CODE 3 00

CATEGORY DESCRIPTION	LOTS/ACRES	MARKET VALUE
5 DRY GRAZING	91.200 AC	3,374
	91.200	3,374*

1997

TAXPAYER'S
VALUATION

ASSESSMENT NOTICE
TAXES ARE BASED ON THE VALUATION
LISTED ON THIS STATEMENT

IF THERE ARE ANY QUESTIONS
REGARDING THIS STATEMENT
NOTIFY THE ASSESSOR'S OFFICE BEFORE

JUNE 16, 1997

See the reverse side for further references
KEEP THIS COPY FOR YOUR RECORDS

PROPERTY ADDRESS

PARCEL NUMBER RP 14N26E053001 A

Mail To:

HES 657
5 14 26
F JAMES 75%
PAULA J 25%

WHITTAKER F JAMES
& WHITTAKER PAULA J
P O BOX 240
LEADORE ID 83464

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JAN 12 2001

TOTAL P.02

Form No. 222-10/80
RECEIVED

Transfer No. 3056

Water Right No. 74-0056

JUL 16 1984

STATE OF IDAHO

Department of Water Resources
Eastern District Office

DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT

APPROVED

To Change the Point of Diversion and/or the Place of Use

Name of applicant FLOYD J. WHITTAKER Phone 768-2491

Post Office address Box 240, Leadore, ID 83464

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

a. Decree No. 74-0056 Decreed to Floyd J. Whittaker
in case of Findings of Fact, Lemhi River Basin Case #4948
dated in 12-30-1982 in 7th District Court county of Lemhi
(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 Applicant
is original and current owner.

3. Source of water Big Timber Creek tributary to Lemhi River

4. Date of priority 5-1-1910

5. Water is used for the following purposes:

amount 2.00 for Irrigation purposes from 3-15 to 11-15
amount _____ for _____ purposes from _____ to _____
amount _____ for _____ purposes from _____ to _____
(month/day — both dates inclusive)

6. Total amount of water under right: a. 2.00 cubic feet per second
&/or
b. _____ acre feet per annum

7. Location of original point of diversion is NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 7
Township 14N Range 26E, B.M., in Lemhi County
Additional points of diversion, if any _____

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 $\frac{1}{4}$	
14N	26E	6			1										33.8	9	6.7	18.4	69
		5									5.3								5
		7	1																

Total number of acres to be irrigated 74

9. Describe any other water rights used for the same purpose as described above None

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years

No

If yes, describe in item D. REMARKS

B. DESCRIPTION OF PORTION OF RIGHT OWNED BY APPLICANT (If the entire right is owned by the applicant, omit part B).

1. Amount of water: a. _____ cubic feet per second
&/or
b. _____ acre feet per annum
2. Point of diversion _____ ¼ _____ ¼, Section _____ Township _____
Range _____, B.M., _____ County
Additional points _____
3. Place of use:

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TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	

Total number of acres to be irrigated _____

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

1. General Information

- a. Amount of water to be diverted 2.00 c.f.s. &/or _____ acre feet
- b. Description of diverting works Headgate and weir on Big Timber Creek, portable dam and open ditch on unnamed stream.
- c. Describe the reasons for the proposed changes Historically the flows from the unnamed stream have been diverted to irrigate a portion of the land described under this decreed right.

2. Change in point of diversion

Point of diversion NW ¼ SE ¼, Section 7 Township 14N
Range 26E, B.M., Lemhi County
Additional points SWNE Sec. 6, T. 14N, R. 26E.

3. Change in place of use

- a. Are there liens, mortgages, or contracts on the lands from which you propose to transfer the water right which limit your authority to make the proposed change? Yes _____ No X. If yes, provide a statement agreeing to the proposed change from the holder of the lien, mortgage or contract.
- b. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer
There is no change in place of use being proposed by this application.

R 26E.

Unnamed Stream

Point of Diversion

H.E.S.

BT-2

657

Dry

74-0056

H.E.S.

236

Dry

T. 14 No.

Timber

Dry

Heavy Timber

Heavy

Timber

74-1241

Point of Diversion

RECEIVED

JUL 16 1984

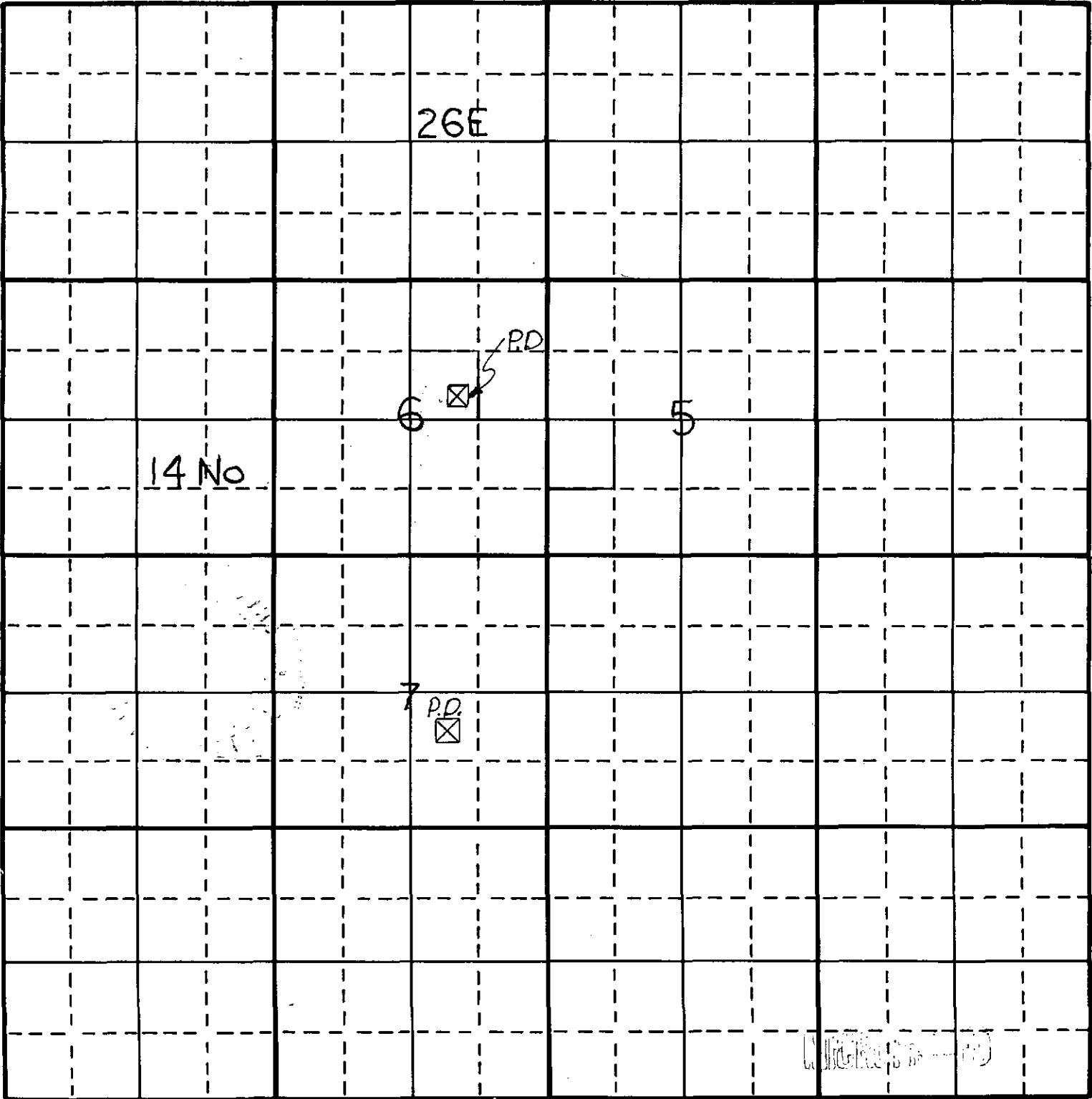
Department of Water Resources
Eastern District Office

c. Describe the lands place of use to which the right will be transferred:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
14N	26E	6			1										34	9	7	18	69
		5									5								5

Total number of acres to be irrigated 74

4. Describe any other water rights used for the same purpose as described above. None
5. 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.



MICROFILM

D. REMARKS

The unnamed stream diverted in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 6 originates from springs in the SE corner Sec. 1, NE $\frac{1}{4}$ Sec. 12, T. 14N, R. 25E and SW corner Sec. 6, T. 14N, R. 26E. The entire flow of this stream has always been diverted in conjunction with and used in conjunction with right 74-0056.

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 willfull misrepresentations made in this application may result in voiding its approval.

Lloyd W. Whitaker
(Signature of Applicant)

Subscribed and sworn to before me this 13th day of July, 1984

Clara E. Ellis
(Notary Public)

My commission expires Life

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 74-0056

and said application is hereby APPROVED, 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 at both points of diversion.
2. Use of water under this right is subject to control by the watermaster of State Water District No. 74W, Timber, Hawley, Texas, Junction, Bull, Jake & Canyon Creeks.
3. The combined rate of diversion from the two sources identified under this transfer shall not exceed 2.0 cfs.

Witness my hand this 24th day of October, 1984

L. Glen Saxton
Chief, Operations Bureau

Received by <u>CW</u> Date <u>7-24-84</u> FOR DEPARTMENT USE ONLY		Protest filed by _____
Prelim. check by _____	Fee <u>750 00 #34248</u>	_____
Receipted by <u>CW</u>	Date <u>7-24-84</u>	_____
Published in <u>Recorder Herald</u>	Copies of protest forwarded by _____	_____
Pub. dates <u>Aug 2 & 9th, 1984</u>	Hearing held by _____ Date _____	_____
Watermaster recommendation requested on _____	Recommended for <u>approval</u> denial	_____
_____ rec'd. _____	by <u>RDC DPT</u>	_____

NOTICE OF PROPOSED
CHANGE OF WATER
RIGHT
NO. 74-0056

Notice is hereby given that Floyd J. Whittaker, Leadore, Idaho, has applied to the Department of Water Resources for a change in the point of diversion of the waters of Big Timber Creek tributary to Lemhi River. The right sought to be changed is evidenced by Findings of Fact, Lemhi River Basin Case #4948 dated in 12-30-1982 in 7th District Court county of Lemhi and is recorded as follows:

Amount: 2.0 cfs. Priority: 5-1-1910. Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, T. 14N, R. 26E, B.M., Lemhi County.

The water is used to irrigate 74 acres within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, Sec. 6, NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 14N, R. 26E.

TO BE CHANGED AS
FOLLOWS

The water will be diverted within the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 6, T. 14N, R. 26E, B.M.

Any protest against the approval of the above proposed change of water right must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, 83402, on or before August 20, 1984.

A. KENNETH BUNN
Director

Published in The Recorder-Herald, Salmon, Idaho, on August 2 and 9, 1984.

8-2-2-tc

Affidavit of Publication

STATE OF IDAHO
County of Lemhi

ss.

AUG 10 1984

Department of Water Resources
Eastern District Office

JERRY G. ROSIN

being first duly sworn, deposes and says that he is one of the printers (publisher) of the RECORDER HERALD, a newspaper published weekly at Salmon, Lemhi County, Idaho, and of general circulation therein,

That the Notice of Proposed Change of Water Right 74-0056

a true printed copy of which is attached to the margin hereof, has been and was correctly printed and published in the regular and entire issue of every number of said newspaper and not in any supplement thereof or thereto for 2 consecutive issues, commencing with the issue dated Aug. 2, 1984 and ending with the issue dated Aug. 9, 1984.

Jerry G. Rosin

Subscribed and sworn to before me, this ninth day of August, 1984.

Neil Armstrong
Notary Public for the State of Idaho
Residing at Salmon, Idaho

Publication Fee \$ 33.39

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02-21-1910 IRRIGATION 03-15 11-15

SWNW S33 NE(01)

DECREE

74-0043B MEAD, WILLIAM H.

WRD416

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WATER RIGHTS ABSTRACT

PAGE 25

05/04/83

INDICATES TOTAL

SOURCE: BIG TIMBER CREEK

TRIBUTARY TO: LEMHI RIVER

RIGHT NUMBER	NAME AND ADDRESS	PRIORITY DATE	USE	USE PERIOD FROM TO	MAX AMOUNT MAX RATE	DIVERSION POINT	PLACE OF USE AND ACREAGE	BASIS FOR RIGHT
-----------------	---------------------	------------------	-----	-----------------------	------------------------	--------------------	-----------------------------	--------------------

74-0043B MEAD, DONNA G.
P.O. BOX 71
LEADORE ID 83464
REMARKS: AC. IRR. = 0.3.
P/U IN LOTS 15-18, BLOCK 2, CITY OF LEADORE.

* 1 ACRES*

74-0043C LINDSTROM, MARY 02-21-1910 IRRIGATION 03-15 11-15
LEADORE ID 83464
REMARKS: AC. IRR. = .5.
P/U IN LOTS 17-22, BLK. 7, CITY OF LEADORE.

SWNW S33 NE(01)
T16N R26E S33 T16N R26E

DECREE

* 1 ACRES*

74-0043D STROUD, JAMES B. 02-21-1910 IRRIGATION 03-15 11-15
STROUD, LA VINNA
P.O. BOX 162
LEADORE ID 83464
REMARKS: P/U IN LOTS 1-12, BLK. 8, CITY OF LEADORE.

SWNW S33 NE(01)
T16N R26E S33 T16N R26E

DECREE

* 1 ACRES*

74-0043E STROUD, EVERETT E. 02-21-1910 IRRIGATION 03-15 11-15
P.O. BOX 164
LEADORE ID 83464
REMARKS: AC. IRR. = .5.
P/U IN LOTS 6-10, BLK. 7, CITY OF LEADORE.

SWNW S33 NE(01)
T16N R26E S33 T16N R26E

DECREE

* 1 ACRES*

74-0043G PARK, KITTIE L. 02-21-1910 IRRIGATION 03-15 11-15
CLARK, BEVA LUE
ANDERSON, E. JOYCE
LEADORE ID 83464
REMARKS: AC. IRR. = .5.
P/U IN LOTS 7-12, BLOCK 11, CITY OF LEADORE.

SWNW S33 NE(01)
T16N R26E S33 T16N R26E

DECREE

* 1 ACRES*

74-0056 WHITTAKER, FLOYD J. 05-01-1910 IRRIGATION 03-15 11-15
P.O. BOX 177
LEADORE ID 83464
REMARKS: P/U IN H.E.S. 236.

NWSE S07 SWNE(01) NESE(34) DECREE
2.00 CFS T14N R26E NWSE(09) SWSE(07)
SESE(18)
S06 T14N R26E
NWSW(05)
S05 T14N R26E

* 74 ACRES*

74-0059A PURCELL, ALLAN F. 07-08-1911 IRRIGATION 03-15 11-15
NENE S05 NWNW(20) SWNW(28) DECREE

RECEIVED

JAN 28 2002

Department of Water Resources

FILED IN CHAMBERS

at Idaho Falls

Booneville County

Honorable Richard T. St. Clair

Date 1/24/02

Time 3:10

Deputy Clerk M Southwick

Files 74-00056
&
74-01103

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 5244 IN THE NAME OF
JAMES AND/OR PAULA WHITTAKER

JAMES AND/OR PAULA WHITTAKER,

Applicant-Appellant,

vs.

IDAHO DEPARTMENT OF WATER RESOURCES,

Agency-Respondent

and

BEVA LUE CLARK

Protestant-Respondent.

Case No. CV-00-009

ORDER DISMISSING APPEAL

The appellants having filed a motion to dismiss appeal with prejudice, and the agency-respondent having joined in the motion, and the protestant-respondent not having appeared after her attorney was granted leave to withdraw, and this Court finding good cause for the granting of said motion, and being fully advised in the premises;

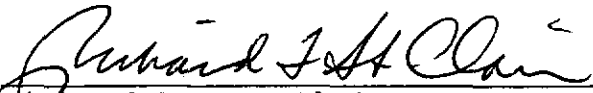
ORDER DISMISSING APPEAL

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MAR 27 2002

NOW THEREFORE IT IS HEREBY ORDERED that the appeal is dismissed with prejudice, and the agency record and transcript is to be returned to the agency by the Clerk of Court.

DATED this 23rd day of January, 2002.


Richard T. St. Clair
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2002, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

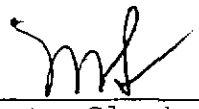
Jerry R. Rigby, Esq.
25 North Second East
Rexburg, ID 83440

(MAIL)

Phillip J. Rassier, Esq.
Deputy Attorney General
P. O. Box 83720
Boise, ID 83720-0098

(MAIL)

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By 
Deputy Clerk

ORDER DISMISSING APPEAL

MICROFILMED

2

MAR 27 2002

74-00056

Jerry R. Rigby (ISBN: 2470)
of RIGBY, THATCHER, ANDRUS,
RIGBY, KAM & MOELLER, Chartered
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208 356-3633

RECEIVED

SEP - 7 2000

Department of Water Resources

Attorneys for Appellants JAMES AND/OR PAULA WHITTAKER

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 5244 IN THE NAME
OF JAMES AND/OR PAULA WHITTAKER,

Case No. CV-00-009

JAMES AND/OR PAULA WHITTAKER

Applicant-Appellant,
vs.

IDAHO DEPARTMENT OF WATER
RESOURCES,

Respondent.

Whittaker

*Protestant Exhibit #1
is located in the vault,
room where hearing tapes
are kept. Exhibit #1 is
too big to microfilm.*

REPLY BRIEF OF APPELLANTS, JAMES AND PAULA WHITTAKER

Appeal from the Department of Water Resources' December 20, 1999 FINAL ORDER,
by Karl J. Dreher, Director of the Idaho Department of Water Resources

Counsel for Appellant:

Jerry R. Rigby
RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, CHTD.
25 N. 2nd E.
P.O. Box 250
Rexburg, ID 83440

Counsel for Respondent:

Phillip J. Rassier
Deputy Attorney General
Department of Water Resources
1301 N. Orchard Street (83706)
P.O. Box 83720
Boise, ID 83720-0098

MICROFILMED

JAN 12 2001

Hearing Tapes
in vault file
drawer.

Exhibits w/
legal file.

Note to Daila for
filming:

Get Copies of exhibits
from Glen's hearing
from Lisa Hall for
filming. Orig exhibits are
with the Court. JAL

Counsel for Protestant:

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
330 Shoup Ave., 3rd Floor
P.O. Box 50130
Idaho Falls, ID 83405-0130

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REPLY TO BRIEFS FILED BY PROTESTANT AND RESPONDENT

A. No Injury to Clark's Water Right.

Although Whittakers' opening brief adequately refuted Mrs. Clark's claim that her water right would be injured by Whittakers' Application for transfer of water rights 74-00056 and 74-01103 pursuant to Transfer No. 5244, to the new point of diversion and place of use (Appellants Opening Brief P. 9-10), because both the Clark' brief and the IDWR's brief failed to address the testimony concerning the real reason why Mrs. Clark cannot claim injury, it seems that this point needs to be addressed again. All parties seems to agree that before we can look to potential injury of Mrs. Clark's water right, a determination must be made as to what impact the Whittakers' application would have on the Ellsworth's water right in Big Timber Creek (water right number: 74-0042). If Whittakers' application would not impact the Ellsworth water right, then **there can be no injury to Mrs. Clark's water right.**

IDWR spent a substantial time in its brief arguing the legal reasons why injury can exist to one water right if another senior water right is affected by this type of application. However, we don't need to speculate. The evidence at the hearing was at most conjecture. Because IDWR chose not to produce its own evidence at the hearing, it can only rely upon the testimony given by Mr. Brockway, the expert for Mrs. Clark. Yet even his testimony was not specific as to any injury. His bottom line was that in his opinion, the transfer only had the "potential impact" to junior Texas Creek water users (Transcript Brockway P. 124).

Furthermore, IDWR fails to address the evidence before this Court. In Whittakers' opening brief, we set forth the testimony that was introduced at the hearing and no one, not even Mr. Brockway, contested the evidence produced by the water master, Dan Smith. There was **no**

contradicting evidence to the clear and convincing evidence put on by the Whittakers and the water master, who testified that the Whittakers water rights were always cut before the Ellsworth's water right would ever need to make a call on their water from Big Timber Creek and more importantly, Ellsworth's rights from Timber Creek are senior enough that they **will always be filled**, regardless of Whittakers' transfer. Therefore, if the Ellsworth's water rights will always be filled, then by the admission of all briefs and arguments filed herein, including the admission of all experts who testified at the hearing upon this matter, Mrs. Clark's water rights cannot legally or factually be injured.

B. Not Whittakers' initial Burden of Proof to Show No Injury.

IDWR claims that it is the Whittakers' duty to prove that their application will cause no injury to other water rights. If the duty is one which Whittakers must assume, they have done so. They have proven, by a preponderance of the evidence, that the only protestant's water right, Mrs. Clark's water right, cannot be injured by the proposed application.

However, IDWR goes on to claim that even though there are no other protestors, and even though there was no testimony at the hearing of any specific water rights (other than Mrs. Clark's) which might be injured by this application, the law somehow requires Whittakers to bear the burden to prove the negative. Every single case which has been cited in the briefs before this court have dealt with a specific water right claiming an injury against another specific water right or application. To impose the burden upon Whittakers is not what is required by Idaho's Courts. A protestant must first come forth and prove his right to claim a water right and also to at least claim that his specific water right would be injured by the proposed transfer. Furthermore, if IDWR feels that it is duty bound to protect those limited, identifiable and easily ascertainable

water holders who could have, but chose not to file protests themselves, then at the very least IDWR must be required to produce evidence at the hearing which establishes specific water rights that IDWR claims will be injured by the application and why at least prima facie evidence as to why they would be injured. Then and only then should the burden of proof be shifted to Whittakers to prove that there is no legal injury. Otherwise, it requires Whittakers to chase the phantom protestor as was addressed in Appellant's Opening Brief.

Obviously, all records of any water right which IDWR claims to be injured by Whittakers' application are held by IDWR. Also, IDWR is very familiar with the requirements of addressing the conflict of rights between water rights, as it is presently embroiled in the Snake River Adjudication and is required to present such evidence before the Water Court pursuant to I.C. § 42-1401 et. seq. It simply chose not to produce any evidence at the hearing on Whittakers' application and now is asking this Court to uphold the Director's conjecture and speculation that other downstream water rights, in a 4-5 mile stretch, may be injured. This cannot be what the legislature intended in its requirements for transfer. Otherwise, there could be no legal transfers.

Although there seems to be no cases on the subject of "burden of proof" with the same set of facts as are now before this Court, several cases lead one to conclude that under the present facts, the Court would concur with the above analysis. An example is found in *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984), where there was a party claiming they had acquired a prescriptive right to another's water right, which is not dissimilar to a "phantom protestor" downstream claiming that they are now entitled to the late summer seepage from Whittakers' present diversions, the Supreme Court placed the burden on the "protestor" to establish that he has satisfied all of the necessary elements in order to claim his rights to the water. Why shouldn't this

burden be the same in this case? Yet in the matter at hand we don't even have a water right before us to determine its right, regardless of who was required to carry the burden.

Because IDWR and other downstream water rights failed to "appear" at the hearing and introduce any evidence of any down stream water rights, then Whittakers certainly cannot be held to the standard of burden of proof now claimed by IDWR. Remember that by all accounts, the only reach of Big Timber Creek which can be affected by this application is from the original point of diversion to where Big Timber Creek and Texas Creek join, a distance of approximately 4-5 miles.

C. No Increase in Consumptive Use or Enlargement.

IDWR truly misses the point of Whittakers' argument concerning no increase in consumptive use by Whittakers' transfer. It spends a considerable amount of time trying to argue what it believes to be the intent of the transfer statutes and fails to directly address the very words which are contained in the statutes and which clearly define what must be considered by the Director in a determination of an increase of consumptive use.

Just as IDWR's brief argued in a different section of its brief, "the clear language of the statute is to be given its plain and ordinary meaning" (IDWR Respondent's Brief, Page 25), citing *State v. Moore*, 111 Idaho 854, 856, 727 P.2d 1282, 1283 (1986), this Court **must** give the clear language of Idaho Code § 42-202B its plain and ordinary meaning. The legislature unquestionably defined consumptive use as that water which is "diverted" and not water which is no longer "diverted" or which was never diverted in the first place. Otherwise, why would the legislature have used the word "diverted" at all. What else could it mean?

Furthermore, IDWR's attempt to use other state's opinions based upon other state's statutes which are not identical to Idaho's statutes cannot form a basis for a different conclusion. A good example is found in the Supreme Court case of *Sherwood v. Carter*, 119 Idaho 246, 805 P.2d 452, where the Court, in its interpretation of the meaning of "informed consent" set forth Idaho's position on interpretation of the language of statutes:

Hence, because we have a clear, express and unequivocal legislative directive, I.C. § 39-4304, stating the law of informed consent, we must look directly to the language of the Idaho statute to resolve the issue. We cannot continue to be controlled by the common law adoption in *LePelley v. Grefenson*, or to be bound by the analysis of another state's court which did not have an informed consent statute to interpret or apply. *Id.* at 460.

The Supreme Court then went on to rule that: "It is a basic rule of statutory construction that, unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute." *Id.* at 460. There is nothing "palpably absurd" to the notion that the legislature intended only "diverted" water should be considered in a transfer under I.C. § 42-222 to determine if there is an increase of consumptive use. Furthermore, the "diversion" of water have always been inseparably connected with the rights in water. See *In re SRBA Case No. 39576, Minidoka National Wildlife Refuge (State vs. U.S.)*, 134 Idaho 106, 996 P.2d 806 (1999).

In Whittakers' opening brief, we discussed the reasons why it is clear that the legislature required only diverted water to be used in determining "consumptive use". However, in addition to those arguments, we would submit that to define "consumptive use" in the manner argued by the other parties to this action, would literally deprive a water user the right to have his water right fully transferred, and thus deprive him of his full rights under I.C. § 42-222, should there be spots in his fields which receive certain un-diverted precipitation or other forms of moisture even though the amounts of said moisture are not sufficient to adequately raise any commercial crop.

This certainly could not be the intent of the legislature.

When is water "diverted" then? In the case of *Hidden Springs Trout Ranch v. Hagerman Water Users*, 101 Idaho 677, 619 P.2d 1130 (1980), the Supreme Court defined diversion as follows: "we rely upon those cases which refer to diversion from the natural channel of the water, making it sufficient, for establishing diversion, that the water flows in a different channel than it would have done absent intervention by the appropriator." *Id.* at 1133. See also *Minidoka National Wildlife Refuge, supra*.

The bottom line is that a previous decree of a court of competent jurisdiction has determined that 99.2 acres of land have been watered and have a valid water right. There is no testimony or even a claim that said water rights have been abandoned or forfeited. Therefore, because Whittakers have applied for a transfer of the entire water right and will stop diverting any water on the 99.2 acres, then they are entitled to water 99.2 acres in the new place of use regardless of the number of acres which remain on the original place of use which receive some form of moisture from springs or otherwise. Therefore there can be no claim of increase of consumptive use or expansion of use based upon the original acreage not being completely "dried up".

In their opening brief, Whittakers also adequately addressed the claim by Mrs. Clark and IDWR that the acres under the new pivot are larger than the 99.2 acres under the present place of use. The other parties to this action have failed to address Whittakers' position that the testimony was uncontradicted as to their being less than 99.2 acres of lands to be watered under the new pivot because the new pivot crossed over an existing pivot with an existing water right. Whittakers' again submit that the Director of the Department of Water Resources has the right as

well as obligated to grant Whittakers a water right to only the lands lying outside of the existing pivot and thus to lands which do not exceed 99.2 acres (the "... in part, or upon conditions" language of I.C. §42-222). This is not a new concept. It is done all of the time by IDWR when it grants licenses to supplemental wells and restricts the water rights within a well to certain acres and to a certain maximum volume and rate when used in conjunction with other licenses and wells. By such restriction, IDWR takes any claim of increase in consumptive use completely away.

Notwithstanding the above, even if the entire 105 to 112 (depending upon the other parties' calculations) acres under the new pivot were determined to be the new "place of use", there cannot be an increase in true consumptive use as determined by the very concept of "consumptive use". Because the original pivot has its own water right, then by definition, it has adequate water which is being applied to a beneficial use. This means that there is sufficient water to grow crops already being applied by the present pivot. Any extra water could not be consumptively used because the existing water right is supplying all the water necessarily required to grow the crops in the overlap area. Any additional water will not be consumptively used and will sink into the ground just as excess water from a pivot or flood irrigation sinks into the ground and there is no increase in consumptive use and therefore no expansion of use.

D. Whittakers Do Not Have an Obligation to Benefit Downstream Users.

IDWR has cited a few late 19th Century and early 20th Century cases in order to advance its claim that Whittakers owe some continued certain obligation to downstream users in Big Timber Creek. The theory [it is only a theory because we have no evidence before this Court that downstream water rights even exists in Big Timber Creek, or that if they do exist, what

particulars exist as to each water right, including its priority date], is that Whittakers must continue to divert water in the early spring in order to provide a "storage" of sorts for seepage back into the creek in the later summer months, which is claimed to have been benefitting downstream users.

Again, in their opening brief, Whittakers have addressed the more recent Idaho cases which clearly set forth the fact that Whittakers are **not** obligated to provide storage for downstream water users in this manner and which, in effect overrule the previous cases cited by the Department. Whittakers previously cited cases are: *In re: Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) and *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945). Two additional cases addressing similar rights are: *Linford v. Hall*, 297 P.2d 893 (Idaho 1956) and *Reynolds Irrigation District v. Sproat*, 214 P.2d 880 (Idaho 1950). IDWR attempts to distinguish these cases claiming that the cases deal only with "waste" waters and that they are in some way different than other returning waters. However, Whittakers' line of cases cited, which have been decided after the line of cases cited by IDWR, also consistently deal with "seepage" waters which are similar to waters which are claimed to be seeping back into Big Timber Creek and waters which Mrs. Clark's expert, Mr. Brockway, testified benefit the creek in the later months of the summer. Coincidentally enough, an old lawsuit in Lemhi County between the predecessors-in-interest to Whittakers and Mrs. Clark addressed the same line of cases. The case was litigated in 1960 as *Lloyd Clark v. Floyd J. Whittaker*, Case No. 4150. Attached hereto, as Exhibit "A" is a copy of Defendant's Reply Brief filed by the late Ralph L. Albaugh, attorney for Floyd J. Whittaker and which make a clear and concise argument as to the relationship between the older cases cited by IDWR and those more recent cases now cited by Whittakers.

Even Federal Courts have concurred with Whittakers' position herein. See *U.S. v. Haga*, 275 Fed. 41, at 43-44 (Idaho) and expressly approved by the Supreme Court of the United States in *Ide v. U.S.*, 68 Law Ed. 407 at 412, 263 U.S. 497 at 506.

Furthermore, the 1980 case of *Hidden Spring v. Hagerman*, 101 Idaho 677, 619 P.2d 1130, reaffirmed the law that seepage water may be reclaimed by the appropriator, even if the junior has using the water right for forty years and that the right is granted pursuant to the very nature of the property right under I.C. §42-101. Because there was an attempt in the *Hidden Spring* case to draw a distinction between what is waste and what is seepage in the case [as claimed in the present matter] the court went on to say:

As noted by the trial court, this is an ingenious distinction, but no support is found for it in the case law. In fact, case law indicates that the opposite is true; that no distinction is to be drawn between waste water appropriated after it has been put to irrigation use and waste water seeping from irrigation canals. See *Bower v. Big Horn Canal Assoc.*, 77 Wyo. 80, 307 P.2d 593 (1957) Moreover, it would be difficult to establish such a precedent on the basis of public policy. No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former. *Crawford v. Inglin*, 44 Idaho 663, 258 P. 541 (1927). While the waste of the original appropriator is not to be encouraged, the recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water. *Id.* at 1133.

Even assuming, arguendo, that there is a distinction between the clear language of the above line of cases and the cases decided prior to said cases and cited by IDWR, one needs to look closely at who the older cases were trying to protect: In the case of *Crockett v. Jones*, 47 Idaho 497, 277 P. 550, (1929), the Court made it clear that if there was any protection at all it was only a protection for "junior appropriators" and then only to a "continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations". *Id.* at 552.

IDWR claims that any junior water right on Big Timber Creek would be injured, in spite

of the fact that no junior water right filed a protest or claimed any injury. However, that is not the evidence which was produced at the hearing and is now before this Court. In fact there was no evidence of any junior water right held or injured on Timber Creek downstream of Whittakers' application. It is only speculation of a "paper" claim of injury by IDWR. What we do know is that we have no Protestants downstream in Timber Creek who are parties to this action and if there are any junior water rights downstream, they have chosen not to protest Whittakers' application.

Because we don't have any facts before us, can only surmise what a phantom protestor's claim of injury could be. The only claim of alleged "injury" by the evidence at the hearing was a claim by Mr. Brockway that water diverted in the early spring by Whittakers would seep into the sidehill grounds owned by Whittakers and eventually find its way down to the Timber Creek in the late summer season, thus benefitting the volume of water in the creek during that time of the year for downstream users. (Transcript Brockway P. 123 L. 1-12)

Therefore, again assuming arguendo, that this evidence were true: Who actually has the right to make a claim of injury? The senior water right holders certainly do not. Their claims of water rights are based upon rights acquired before any diversion of Whittakers ever took place and therefore they could not have relied upon the late summer return flows in order to establish their rights. In fact, the only reason that Whittakers or any high water right holder can divert the water in the first place is that the senior water users rights must be filled completely. Otherwise a "high water" right could never be decreed. This is also consistent with the caselaw cited and incorrectly relied upon by IDWR to argue its claim that Whittakers' application should be disallowed because they cannot recover their return flows.

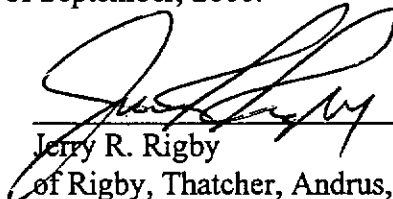
This then leaves junior water right holders. The interesting thing here is that junior water right holders don't have a right to expect these return flows either. Why? Because they are junior to Whittakers water right, which, as was testified to, is a "high water" right and which is shut off early in the year after the snow runoff is gone. Therefore, any right junior to Whittakers would only be shut off even earlier and therefore, even if there was a benefit to Big Timber Creek during the late summer, these juniors could only watch it flow by because they certainly could never legally divert it once their rights were shut off.

Conclusion

Protestant and Respondent, having failed to produce evidence or law sufficient to show why Appellants are not entitled to transfer water rights nos. 74-00056 and 74-01103 to the new point of diversion and place of use as set forth in their Application for Transfer (Transfer No. 5244). IDWR chose not to produce any evidence of any injury to any specific water user. The record is devoid of evidence showing injury to any other water user. On the other hand, Appellants have produced clear and convincing evidence that Mrs. Clark's water rights cannot be injured by the proposed transfer and that no other downstream water user can legally claim injury. The evidence before this court, when correctly interpreted under Idaho water laws, also demonstrates that the transfer will not constitute an enlargement in the original right, is consistent with the conservation of water resources and is in the local public interest, all as required by I.C. § 42-222 and related statutes.

Therefore, Appellants respectfully submit that the Final Order of IDWR be rescinded and reversed with a directive to the Director to grant the Appellants' application immediately, with the restriction that no more than 99.2 new acres be watered.

Respectfully submitted this 5th day of September, 2000.


Jerry R. Rigby
of Rigby, Thatcher, Andrus, Rigby
Kam & Moeller, Chtd.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 5th day of September, 2000, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid to the following:

Kent Foster
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Phillip J. Rassier
Deputy Attorney General
Department of Water Resources
1301 N. Orchard Street (83706)
P.O. Box 83720
Boise, ID 83720-0098

Courteous Copy:
The Honorable Judge James C. Herndon
District Judge
Bingham County Courthouse
P.O. Box 807
Blackfoot, ID 83221

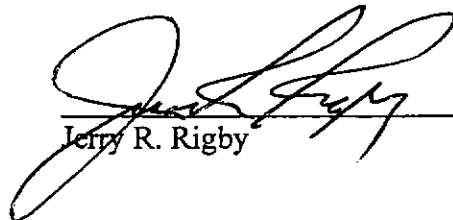

Jerry R. Rigby

EXHIBIT A "

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

LLOYD CLARK,

Plaintiff

DEFENDANT'S REPLY BRIEF

-vs-

Case No. 4150

FLOYD J. WHITTAKER,

Defendant

It is apparent from plaintiff's brief that plaintiff is relying, and must rely, on the case of Hall vs. Blackman, 22 Idaho, 556. This case is an anomaly among Idaho decisions. No authorities were cited on appeal by either party to the action. In the opinion, comprising two pages, not a single authority was cited in support thereof. The rule announced in this case is not, and has not, been the law in Idaho for many years.

Approximately thirty-five years later while J. Ailshie, who wrote the opinion in the Hall vs. Blackman case was still a Justice of the Supreme Court, our Supreme Court decided the case Colthorp vs. Mt. Home Irr. Dist., 66 Idaho 173, which is cited and quoted quite extensively on pages 1 and 2 of our previous brief. While the Colthorp vs. Mt. Home Irr. Dist. involved the identical questions of law, and while the attorney for appellant cited as his first authority in support of his case the Hall vs. Blackman case as appears at page 174, this case was not discussed or mentioned in the long opinion which cites many authorities. This Colthorp vs. Mt. Home Irr. Dist. case positively, clearly and completely reverses the Hall vs. Blackman case. It is also noticeable that J. Ailshie, who was a member of the Court, took no part in the Colthorp decision. Apparently he did not want to affirmatively agree to over-rule his previous decision in the Hall vs. Blackman case; but on the other hand, if he had felt that the Hall vs. Blackman decision was sound, he would certainly have written a dissenting opinion in the Colthorp case. When the Hall vs. Blackman case was expressly relied on by the attorney for the appellant in the Colthorp case, there could be only one reason for entirely over-looking it and ignoring it, and it was omitted from the decision -- out of deference to J. Ailshie who was then a member of the Court.

At page 180 of the Colthorp case appears the following significant statement:

"And it is further urged that the change injures appellant in this: That appellant would thereby be deprived of the use of the Lockman waste water.

"The injury which appellant urges against the right of respondents to change the point of diversion and place of use of the Lockman water is not the kind of an injury that will prevent the making of the change."

In other words, the fact that the plaintiff in the instant case may not be able to obtain the waste water from defendant's land is not such an injury as is contemplated by the decisions of our court.

This case is in line with a long line of decisions covering waste water, seepage and return flow in the State of Idaho. Many cases appeared in our former brief and if not cited in our former brief, they were cited and quoted from in the opinions which we did cite.

While the Colthorp case directly and positively over-rules the Hall vs. Blackman case, other decisions rendered by our Supreme Court prior to that time had in effect repudiated the doctrine enunciated in the Hall vs. Blackman case, such as in re Robinson, 61 Idaho 462, and other cases cited in our former brief.

Plaintiff claims that the Robinson case is ^{not} in point because Section 42-108, I.C. relating to the change in point of diversion and place of use expressly excepts therefrom irrigation systems operating under the Carey Act. This contention of plaintiff is wholly erroneous. This Section 42-108, I.C. was amended in 1943 to provide that a water user could not move his water without the consent of the board of directors of his canal company or irrigation district, and in that amendment, it was provided that the act should not apply to Carey Act water rights. This provision as to Carey Act water rights was excepted in the statute because the transfer of water is expressly provided for in Section 42-2503, I.C. under ~~the~~ general Carey Act law. Two sections of the statute would have conflicted if Carey Act water rights had not been ex-

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cepted from Section 42-108, I.C. At the time the Robinson case was decided, Section 42-108, I.C. was Section 41-108, I.C.A. Section 41-108 I.C.A. made no exception as to water rights under the Carey Act. It was a general law applying to all water rights and the Robinson case as decided under that law, is squarely in point.

In the case Saborn vs. Moore, 44 Idaho 410, at P. 418, and in the case Crawford vs. Englin, 44 Idaho 663, at P. 669, our court also, in effect, repudiated the Hall vs. Blackman decision.

Plaintiff also cites and quotes from the case Wood River Power vs. Arkoosh, 37 Idaho 348. This case is not in point. It does not involve any waste water, seepage or return flow. The water user in that case maintained his diversion works below the power company's power plant, and they used his water to operate their power plant. He attempted to change the point of diversion so as to divert his water in the power company's forebay above the power plant, and thereby deprive the power company of the flow of the water so diverted by the water user. This water would generate approximately 8 h.p. and the change in point of diversion reduced the power output of the plaintiff's plant.

It is the settled law in this state that the water user may use his waste water as he sees fit and that a subsequent appropriator has no vested right in the waste water. It is also the settled law in this state that the deprivation of the use of waste water or return flow is not the kind of an injury that will prevent the change in place of use. This point is expressly discussed and decided in the Colthorp case at the bottom of page 180 of the opinion.

In writing this reply brief, we are not unmindful of the fact that it has been the policy of our Supreme Court throughout the years to encourage a hearing on the merits so that all of the facts may be before the court. We think a trial of this case will be a waste of time for the court, the attorneys and a waste of time and money for our clients, and that if plaintiff established by competent proof every fact alleged in his complaint, the judgment must still be for the defendant. However, if there is a serious question in this Court's mind, we would rather have the facts presented to the Court and final decision rendered after the evidence is adduced rather than incur the expense to our

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clients involved in an appeal to the Supreme Court.

Along this line of thought, it will be observed, however, that the Colthorp case was decided on demurrers which were sustained and judgment of dismissal entered thereon.

The Colthorp case also cited and approved in re Boyer, 73 Idaho 152 at P. 162 and 163.

For other authorities in support of our position, we respectfully refer the Court to our brief previously filed herein.

Respectfully submitted,

s RALPH L. ALBAUGH
Of Albaugh, Bloem & Smith
Attorneys for Defendant
Address: Idaho Falls, Idaho

I, June Bowcutt, a secretary in the firm of Albaugh, Bloem & Smith, do hereby certify that I did mail a copy of the within Defendant's Reply Brief to Furey & Furey, Salmon, Idaho, attorneys for plaintiff, on this 23rd day of November, 1960.

s June Bowcutt

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quarter, and the southwest quarter, and the west half of the southeast quarter of Section Fourteen [14] in Td. 15 N. R. 25 E. B. M., her right thereto to date from August 19, 1910.

That the defendant Samuel B. Chandler is entitled to the use of Two cubic feet per second of time, or 100 inches of the waters of Timber Creek for the purpose of irrigating a certain strip of land described as follows: Beginning at Corner No. 1, a quartzite rock marked H-1, whence Forest Service Monument bears S. 13o 30' W. 5.50 chains, extending thence S. 6o W. 33 chains; thence S. 72o E. 19 chains; thence S. 23o W. 23 chains; thence S. 72o E. 10 chains thence N. 30o 30' E. 56.30 chains; thence N. 72o W. 46 chains to place of beginning with variation 19o 40' E. Said Forest Service Monument above referred to consists of a quartzite rock whence the southwest corner of Township 15 N. R. 26 E. bears N. 53o 15' W. 62 chains. Said tract comprising 152 acres. His right thereto to date from May 1st, 1910.

That the defendant William B. Jones is entitled to the use of One and one-tenth [1.1] cubic feet per second of time, or 60 inches of the waters of Timber Creek, and eighty six hundredths [.86] of a cubic foot per second of time, or 43 inches of the waters of Lee Creek, for the purpose of irrigating a strip of land described as follows: A strip of unsurveyed land extending from the mouth of Lee Creek, down the north branch of Timber Creek a distance of one mile, the same being one fourth of a mile in width, and including the land on both sides of said Timber Creek; his right thereto to date from May 17, 1909.

TOTAL P.06

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Department of Water Resources

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Attorneys for Applicant-Appellant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5244 IN THE NAME OF)
JAMES AND/OR PAULA WHITTAKER)

Case No. CV 00-009

JAMES AND/OR PAULA WHITTAKER,)

Applicant-Appellant,)

**MOTION FOR EXTENSION OF
TIME TO FILE APPLICANT-
APPELLANT'S REPLY BRIEF**

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES,)

Respondent.)
_____)

COMES NOW the Applicant-Appellant, James and/or Paula Whittaker, by and through
its undersigned counsel of record, pursuant to Rule 84(t) and 84(x) of the Idaho Rule of Civil
Procedure, and Rule 34 (e) of the Idaho Appellate Rules, and moves this court for an extension
of time until September 6, 2000 for filing of its Reply Brief in this appeal.

MOTION FOR EXTENSION OF TIME TO FILE APPLICANT-APPELLANT'S REPLY
BRIEF - Page 1

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This motion is based upon the affidavit of counsel filed herewith.

DATED this 29th day of August, 2000.



JERRY R. RIGBY
Attorney for Applicant-Appeallant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29th day of August, 2000, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid, to the following:

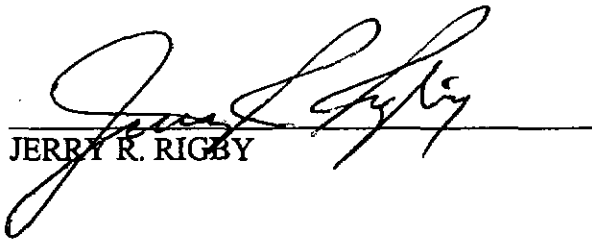
Documents served: MOTION FOR EXTENSION OF TIME TO FILE APPLICANT-
 APPELLANT'S REPLY BRIEF

 AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR
 EXTENSION OF TIME TO FILE APPLICANT-APPELLANT'S
 REPLY BRIEF

 (PROPOSED) ORDER GRANTING EXTENSION OF TIME TO
 FILE APPLICANT-APPELLANT'S REPLY BRIEF

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Attorneys for Applicant-Appellant

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5244 IN THE NAME OF)
JAMES AND/OR PAULA WHITTAKER)

Case No. CV 00-009

JAMES AND/OR PAULA WHITTAKER,)
Applicant-Appellant,)

**AFFIDAVIT OF COUNSEL IN
SUPPORT OF MOTION FOR
EXTENSION OF TIME TO FILE
APPLICANT-APPELLANT'S
REPLY BRIEF**

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES,)
Respondent.)

STATE OF IDAHO,)
ss.
County of Madison.)

JERRY R. RIGBY, being first duly sworn, deposes and says:

1. I am the attorney for the Applicant-Appellant James and/or Paula Whittaker in the
above entitled matter.

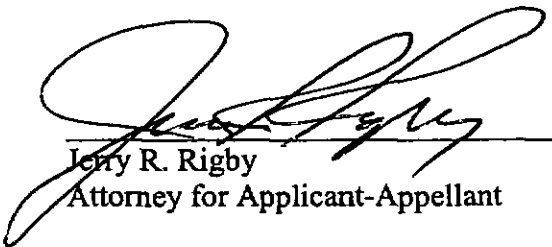
AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO
FILE APPLICANT-APPELLANT'S REPLY BRIEF - Page 1
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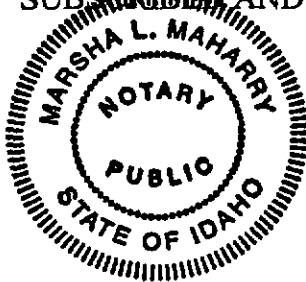
JAN 12 2001

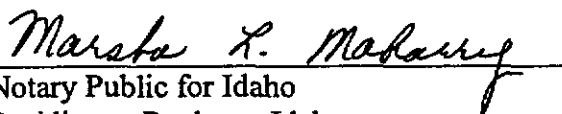
2. That the Reply Brief of the Applicant-Appellant is due August 31, 2000.
3. Appellant has not previously requested an extension of time in this matter.
4. That counsel for Applicant-Appellant has had an emergency Section 1031 Contract of Exchange required to be closed which your affiant had not anticipated prior to last week.
5. Your affiant believes that an extension of one week, to and including September 6, 2000, is reasonable and necessary extension.
6. I have communicated this request to counsel for the other parties and received no objection to the extension of time.
7. I am reasonably assured that Applicant-Appellant's Reply Brief will be timely filed on or before September 6, 2000 should this request be granted.

Dated this 29th day of August, 2000.


Jerry R. Rigby
Attorney for Applicant-Appellant

SUBSCRIBED AND SWORN to before me this 29th day of August, 2000.




Notary Public for Idaho
Residing at Rexburg, Idaho
My Commission Expires: 4-10-2006

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR)
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vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES,)
Respondent.)
_____)

The Applicant-Appellant, James and/or Paula Whittaker, having filed a Motion for Extension of Time for Filing Applicant-Appellant's Reply Brief with supporting Affidavit, and it appearing appropriate that Applicant-Appellant be allowed the requested extension of time.

IT IS HEREBY ORDERED that the time to file Applicant-Appellant Reply Brief is extended to September 6, 2000.

DATED this _____ day of _____, 2000.

James C. Herndon
District Judge

ORDER GRANTING EXTENSION OF TIME TO FILE APPLICANT-APPELLANT'S REPLY
BRIEF - Page 1

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Department of Water Resources

LEMHI COUNTY DISTRICT COURT

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BY [Signature] DEPUTY

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5244 IN THE NAME OF)
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Case No. CV-00-009

JAMES AND/OR PAULA WHITTAKER,)

RESPONDENT'S BRIEF

Applicant-Appellant,)

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES and BEVA LUE CLARK,)

Respondents,)

74-00056

BRIEF OF RESPONDENT IDAHO DEPARTMENT OF WATER RESOURCES

Appeal from the Idaho Department of Water Resources
Karl J. Dreher, Director

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(WCA)

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5244 IN THE NAME OF)
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COPY

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
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STATEMENT OF THE CASE

A. Nature of the Case

This case is an appeal from an administrative decision of the Idaho Department of Water Resources ("IDWR" or the "Department") denying an application to transfer two irrigation water rights. The Appellant, James and/or Paula Whittaker ("Whittaker" or "applicant") filed the transfer application with IDWR. The application proposes to change the place of use and point of diversion for two water rights from Big Timber Creek. Big Timber Creek is a tributary to the Lemhi River and flows in a northerly direction toward the town of Leadore, Idaho. The two water rights are appurtenant to 99.2 acres of land located in a high mountain meadow about 4 miles south of Leadore. A local water user, Beva Lue Clark ("Clark" or "protestant") protested the transfer application before the Department. The Department denied the transfer application upon determining that Whittaker failed to show that the original right would not be enlarged and that the transfer would not cause injury to other water rights.

The appeal challenges the Department's denial of the transfer. The appeal raises issues of fact and law. Whittaker argues that the Department wrongly determined that the proposed transfer would increase the historical consumptive use of the original water rights. Whittaker also asserts that the protestant did not prove that the transfer would cause injury. IDWR's position on appeal is that it properly determined the facts in this case and that it correctly applied the applicable law to those facts.

B. Course of the Proceedings

On March 30, 1998, Whittaker filed Application for Transfer No. 5244 with the Department, seeking to change the place of use and point of diversion of water right nos. 74-00056 and 74-01103. R. pp. 1-12. The Department published notice of the application pursuant to . R. p. 14. Beva Lue Clark, protested the transfer application on May 4, 1998. R. p. 15.

The Department conducted two pre-hearing conferences in the matter on June 23, 1998 and March 15, 1999. R. pp. 22, 24 and 26. The Department conducted a hearing on the protested transfer application on April 7, 1999 at the Department's offices in Idaho Falls. R. p. 26. Thereafter, on May 17, 1999 the hearing officer issued a Recommended Order proposing denial of the transfer application. R. pp. 38-45. The hearing officer recommended denial of the application due to the applicant's failure to show that the original rights would not be enlarged and that the transfer would not cause injury to other water rights. R. p. 44.

Whittaker filed "exceptions" to the hearing officer's recommended order accompanied by a supporting brief on June 7, 1999. R. pp. 56-67. The protestant filed a response to the exceptions on June 29, 1999. R. pp. 68-72. Pursuant to I.C. § 67-5246, the director of IDWR reviewed the recommended order, the exceptions and the response to the exceptions and issued a Final Order on December 20, 1999. R. pp. 75-86. The final order denies the transfer application for the reasons stated in the recommended order. R. p. 86. Whittaker filed a notice of appeal to the district court on January 12, 2000.

C. Statement of Facts

Whittaker owns a parcel of land in Lemhi County, Idaho, just south of the town of Leadore, Idaho. Appurtenant to this property are two decreed water rights with points of diversion on the upper reaches of Big Timber Creek. Water right no. 74-00056 for 2.0 cfs is appurtenant to 75 acres of land and has a priority date of May 1, 1910. This right has two authorized points of diversion, one on Big Timber Creek and one from an unnamed tributary to Big Timber Creek. Water right no. 74-01103 for 0.48 cfs is appurtenant to 24.2 acres and has a priority date of November 19, 1922. This second right has a single point of diversion on Big Timber Creek. The total acreage authorized for irrigation under the two water rights is 99.2 acres.

The irrigated land from which Whittaker wants to move the decreed water rights consists of parts of two homestead entries referred to as "the homesteads." The land is typical of high mountain meadow, being rough, rolling in nature with high spots and low areas. The water used to irrigate the land originates from a combination of sources, including the two diversions on Big Timber Creek, the unnamed tributary, flow from 6 to 8 springs, and diffused subsurface water. Tr. pp. 25, 110-111; R. pp. 75, 77, 82-83. A determination of the specific land irrigated from a specific water source would be difficult if not impossible due to the nature of the land and the method of irrigation, which is termed "wild flooding." R. p. 82-83, Finding of Fact No. 9. Under this method of irrigation, water is turned on in the spring and continues to be diverted until shut off in early July every year in order to satisfy more senior priorities on the system.

Under the transfer application filed on March 30, 1998, Whittaker seeks to change the point of diversion and place of use of the two decreed water rights. R. pp. 1-2. The application proposes to close off the two currently authorized diversions from Big Timber Creek and instead divert the water from the stream approximately 4.5 miles downstream (northerly) at another existing diversion on Big Timber Creek. From this point, the water would travel approximately two miles in an easterly direction through an existing ditch and pipeline owned by the applicant to a proposed new pivot located adjacent to other lands currently served by this existing conveyance system. The new pivot, with an attached end gun, covers approximately 1250 feet and is capable of irrigating from 105 to 112 acres including an overlap of 17 acres covered by another existing pivot operated by the applicant. R. p. 76. Whittaker testified that he planned to irrigate the overlapping lands under both systems. Tr. p. 45, L. 6-10; R. p. 76.

The basis of the protest filed by Clark involved water rights held by Clark on Texas Creek, which flows parallel to Big Timber Creek. R. p. 15. Both streams flow in a northerly direction, toward Leadore where they join to form the Lemhi River. Maybelle Ellsworth also holds water rights on Texas Creek, senior to those of Clark. The Ellsworth's water needs are partially filled with water diverted under another right on Big Timber Creek. However, use of the Ellsworth rights are such that, to the extent irrigation needs are not satisfied by water diverted from Big Timber Creek, the diversions from Texas Creek may be increased to fill those needs. R. p. 84 (Finding of Fact No. 15). If there were not enough water in Texas Creek to satisfy both the Ellsworth and the Clark rights, then the Clark rights would be reduced or shut off in order to satisfy the senior rights of Ellsworth. *Id.*

Protestant Clark maintains that use of water under the proposed transfer would enlarge the Whittaker's use of Big Timber Creek water. This enlarged use, according to Clark, would make less water available for diversion to Texas Creek under the Ellsworth rights. As a result, Ellsworth would need to divert more water from Texas Creek to fill her rights, thus causing Clark's junior rights to be diminished or shut off earlier in the irrigation season than otherwise would occur. *Id.* The evidence in the record demonstrates that the hydrologic basis for Clark's concern is valid, however, there is conflicting testimony over the likelihood of such a result ever occurring. Tr. p. 90, L. 18-25, p. 91, L. 1, p. 124, L. 6-13.

The record demonstrates that a significant portion of the lands currently irrigated under the water rights sought to be transferred would not be dried up. Consequently, the consumptive use of water would be increased under the proposed transfer. R. p. 84 (Finding of Fact No. 18). Expert testimony, provided by Dr. Charles E. Brockway, showed that if all the diversions from Big Timber Creek and the unnamed tributary were discontinued, only about 30 or 40 acres of land would actually be dried up due to water provided by the numerous springs flowing on the land. Tr., p. 111, L. 6-12.

Additionally, a portion of water diverted and not consumed by crops at the new place of use would return to the system downstream of locations where return flows resulting from diversions under the water rights currently return to Big Timber Creek. R. p. 84 (Finding of Fact No. 18). Also of significance is the fact that the proposed point of diversion is 4.5 miles downstream and the water must be conveyed two miles further before application, resulting in a considerably more transmission loss that would not reenter either the Big Timber Creek or

Texas Creek surface systems until at or below Leadore. Tr. p. 125, L. 2-7; R. p. 84.

Consequently, if the transfer is approved, substantial return flows would be "lost" for use by downstream holders of junior water rights. R. p. 77.

In addition to the potential injury to the protestant's rights caused by the enlargement in use of Big Timber Creek water, there is substantial evidence to show that the proposed transfer would injure other appropriators. Such injury would occur because the portion of water diverted and not consumed by crops at the new place of use would return to the system downstream of locations where return flows originating from diversions under the water rights currently return to Big Timber Creek. R. p. 77.

ISSUES PRESENTED ON APPEAL

IDWR suggests that the five issues presented by the Appellant may be encompassed in the following two issues:

1. Did IDWR err in concluding that the proposed transfer would result in an enlargement in use of the original water rights?
2. Did IDWR err in concluding that the proposed transfer would cause injury to other water rights?

STANDARD OF REVIEW

Judicial review of a final decision of the director of IDWR is governed by the provisions and standards set forth in the Idaho Administrative Procedure Act (IDAPA), chapter 52, title 67, Idaho Code. I.C. § 42-1701(4). Under IDAPA, the court reviews an appeal from an agency decision based upon the record created before the agency. I.C. § 67-5277 (1995) *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529; *University of Utah Hosp. v. Board of Comm'rs. of Payette Co.*, 128 Idaho 517, 915 P.2d 1375 (Ct. App. 1996). The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. I.C. § 67-5279; *Castaneda v. Brighton Corp.*, 130 Idaho 923, 925-26, 950 P.2d 1262, 1264-65 (1998). The court shall affirm the agency decision unless the court finds that the agency's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; not supported by substantial evidence on the record as a whole; or arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279 (3); *Howard v. Canyon County Bd. of Comm'rs.*, 128 Idaho 479, 915 P.2d 709 (1996); *Willig v. State, Dep't of Health & Welfare*, 127 Idaho 259, 899 P.2d 969 (1995). The agency action shall be affirmed unless substantial rights of the appellant have been prejudiced. I.C. § 67-5279(4); *Angstman v. City of Boise*, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996). If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary. I.C. § 67-5279(3); *University of Utah Hosp. v. Board of Comm'rs. of Ada Co.*, 128 Idaho 529, 915 P.2d 1387 (Ct. App. 1996).

ARGUMENT

Introduction

The right of an appropriator to change the place of use, purpose of use, or point of diversion of a water right is recognized under Idaho law. *See* I.C. § 42-108 and 42-222. However, this right is not absolute. *See Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 42-43, 147 P. 1073, 1078-79 (1915) Although now codified in all prior appropriation states, the right to transfer has always been a qualified right subject to a number of limitations or conditions. *See 2 Waters and Water Rights*, § 16.02 (Robert E. Beck ed., 1991). In Idaho, I.C. § 42-222, sets forth the criteria governing the right of an appropriator to transfer a water right and provides, in pertinent part, as follows:

The director the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided (1) no other water rights are injured thereby (2) the change does not constitute and enlargement in use of the original water right (3) the change is consistent with the conservation of water resources within the state of Idaho and (4) is in the local public interest

I.C. § 42-222 (1)

In addition to making the right to effectuate a transfer conditional, all western states require administrative or judicial approval of a transfer. And, in nearly all of the western states, including Idaho, the burden is on the proponent of the transfer to prove that the conditions imposed by the state have been met. George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 Land & Water L. Rev. 1, 20 (1988). The Idaho transfer statute is consistent with those of the other prior appropriation states. The following argument asserts that IDWR has

properly complied with both the letter and the spirit of Idaho's transfer statute in denying Transfer Application No. 5244.

I. IDWR PROPERLY DETERMINED THAT THE PROPOSED TRANSFER WOULD RESULT IN AN ENLARGEMENT OF THE ORIGINAL WATER RIGHTS.

Whittaker challenges IDWR's conclusion that the proposed transfer will result in an enlargement in use of the original water rights. Pursuant to I.C. § 42-222(1), the director shall approve a transfer provided, *inter alia*, "the change does not constitute an enlargement in use of the original water right." Contrary to Whittaker's assertions, the record contains substantial evidence that enlargement would occur in terms of an increase in the total acreage irrigated, and especially in terms of an increase in the amount of the historical consumptive use under the water rights. Taken together, the evidence of enlargement provides a clear and sufficient legal basis for IDWR to deny the transfer application.

A. The evidence shows that the transfer would result in some increase in irrigated acreage.

A change in use that results in an increase in irrigated acreage under the existing water right constitutes an enlargement in use and is prohibited by I.C. § 42-222. See Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 275 (1990-91) (asserting that I.C. § 42-222 clearly establishes that an expansion of irrigated acreage is an enlargement and that such enlargement is prohibited). In Idaho,

[t]he term enlargement has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. See I.C. § 42-1426(1)(a). An enlargement may include such events

as an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion.

In re SRBA Case No. 39576, Fremont-Madison Irrigation District and Mitigation Group v.

Idaho Ground Water Appropriators Group, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996).

See also Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9, (9th Cir. 1917) (holding that an appropriator could not subsequently apply decreed water to additional lands not diligently prepared for beneficial use, despite a showing that the water was appurtenant to such lands under the original decree).

Though not in the context of a transfer proceeding, an enlargement in irrigated acreage was at issue before the Idaho Supreme Court in *Hall v. Blackman*, 22 Idaho 556, 126 P. 1047 (1912). The plaintiff sought to enjoin the defendant from spreading water decreed and historically applied to a particular parcel of land to approximately ten acres of new land recently acquired by the defendant. Finding that the application of water by the defendant to the new lands deprived the plaintiff of the benefit of seepage, percolation and waste water when used upon lands under the original decree, the Idaho Supreme Court upheld the decision of the trial court perpetually enjoining the defendant from irrigating the recently acquired tract. 22 Idaho at 558, 126 P. at 1048.

In the present case, Whittaker has applied to change the point of diversion and place of use of two water rights. The two rights are appurtenant to 99.2 acres referred to as the "homesteads." The proposed transfer would move the water right to a new location some four (4) miles downstream from the original location. The evidence shows that the irrigation pivot

proposed for use at the new location is capable of irrigating between 105 and 112 acres. Were the transfer approved, the water right decreed and used to irrigate the 99.2 acres at the homesteads would be diverted and applied to a minimum of 105 acres at the new location. By definition this would constitute an enlargement in irrigated acreage and is prohibited by I.C. § 42-222.

B. The evidence shows that the transfer would result in a change in return flows and an increase in consumptive use.

In addition to considering any increase in irrigated acreage, I.C. § 42-222(1) provides that "the director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in the nature of use of an original water right." Contrary to the assertions of Whittaker, the director properly determined that consumptive use would be increased under the proposed transfer.

Although case law in Idaho does not specifically address the issue of consumptive use as it relates to a section 42-222 transfer proceeding, Idaho courts have addressed consumptive use as it relates to effects on return flows and on the related concept of beneficial use. The well-established rule throughout prior appropriation states is that a junior appropriator is entitled to the maintenance of stream conditions in existence at the time of the junior's appropriation. Wells A. Hutchins, 1 *Water Rights Laws in the Nineteen Western States* 1, 577 (1971). With respect to the law in Idaho, Hutchins states:

However, after recognizing this general rule, the Idaho Supreme Court felt concerned that in some situations this might not afford adequate protection to the junior. 'So we now declare and determine the rule, generally applicable, to be that junior appropriators have a vested right to a continuance of the conditions

existing on the stream at *and subsequent to* the time they made their appropriations, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.' [emphasis supplied].

Id. (citing *Crockett v. Jones*, 47 Idaho 497, 503-504, 277 P. 550, 552 (1929)). Thus, in an effort to protect junior appropriators, the focus in a transfer proceeding is on the preservation of flow regimes; and this is particularly true on heavily appropriated streams. See Gould, *supra*, at 22.

To this end, the notion of consumptive use, or "historical consumptive use," is typically employed as the measure of the right that may be transferred. See 2 *Waters and Water Rights*, *supra*, § 16.02(b) at 277. An excerpt from a Colorado case is instructive on this issue:

[O]nce an appropriator exercises his or her privilege to change a water right . . . the appropriator runs a real risk of requantification of the water right based on the actual historical consumptive use. In such a change proceeding a junior water right . . . which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historical use of the right.

Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986). The Wyoming courts follow this same principle, limiting the amount of water that may be reallocated under a transfer to the historic beneficial consumptive use. See e.g., *Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557 (Wyo. 1978).

In general, consumptive use may be defined as "diversions less returns." 2 *Waters and Water Rights*, *supra*, § 16.02(b) at 277. In Idaho, consumptive use is defined as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state." I.C. § 42-202B. Thus, "any act that

increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use." 2 *Waters and Water Rights, supra*, § 16.02(b) at 277. Likewise, any act that reduces the return flows historically relied upon, or that in any way alters the flow regimes others have become dependant upon in the exercise of vested water rights, may be considered an increase in consumptive use. The law in Idaho, as it has been both statutorily enacted and judicially applied, operates to preserve such flow regimes when an appropriator seeks to exercise a change in the place of use or point of diversion of an otherwise valid water right.

In *Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co.*, 49 F. 430 (D. Idaho 1892), the defendant had attempted to change the location at which waters appropriated for the operation of a mill returned to the stream. The court found that the defendant for in excess of three years had appropriated the water and allowed it to return to the stream in such a way that the plaintiff had come to rely upon it for his own appropriation. The court perpetually enjoined the defendant from changing the usage of his water right in any way that interfered with the plaintiff's exercise of his junior water right. 49 F. at 435. Similarly, in *Hall v. Blackman*, discussed *supra*, the plaintiff complained when the defendant began to move water from lands to which the water was originally decreed to other newly acquired lands. 22 Idaho 556, 126 P.1047 (1912). The Idaho Supreme Court in *Hall* upheld the decision of the trial court preventing the change in place of use because it would have deprived the plaintiff from making use of the seepage, percolation and waste water associated with the defendant's water use upon the lands to which the water right was originally decreed. 22 Idaho at 558, 126 P. at 1049.

In the present case, IDWR's decision to deny the Whittaker transfer is based on the finding that the change in place of use and point of diversion would alter the stream conditions to the detriment of junior appropriators. The reason for the conclusion that stream conditions would be altered is twofold and derives from the following facts.

First, the transfer proposed to move the point of diversion some four and one-half (4.5) miles downstream from the current point of diversion and then to convey the water another two miles via ditch and pipeline before using the water to operate an irrigation pivot at the new place of use. The record contains credible evidence demonstrating that under the proposed transfer water diverted and not consumed at the new location would return to the system downstream of the locations where return flows now occur on Big Timber Creek under the current usage. *See* Tr. p. 124, L. 14-24; R. pp.77 and 84, Finding of Fact No. 18. In addition, the evidence showed that the transfer would result in considerably more transmission loss that would not reenter either the Big Timber Creek or Texas Creek surface systems until at or below Leadore. *See* Tr. p. 125, L. 2-7; R. p. 84. Consequently, if the transfer were approved, substantial return flows would be "lost" for use by downstream holders of junior water rights. *See* R. p. 84, Finding of Fact No. 18.

The second effect on stream flow that would be caused by the proposed transfer stems from the increase in consumptive use that would result from use of water at the new location. The evidence presented shows that the 99.2 acres currently irrigated at the homesteads is partially sub-irrigated by the flow from 6 to 8 springs. Expert testimony provided by Dr. Charles E. Brockway showed that if the transfer were approved and all the diversions from Big

Timber Creek and the unnamed tributary were shut off. only about 30 or 40 acres of land would actually be dried up, due to the continued watering provided by the flowing springs. Tr. p. 111. L. 6-12 ("if you ceased all diversions on here, you probably would not dry up more than 30 or 40 acres"). In other words, 50 to 60 acres of land at the authorized place of use currently receives most of its consumptive water requirements irrespective of the diversions from Big Timber Creek. This fact indicates that the consumptive use of the water rights diverted and applied to the land at the current place of use is significantly less than would be expected were the water diverted and applied at the new location where no such springs exist. This increase in consumptive use is a proper basis on which to deny the transfer.

In sum, the law in Idaho prohibits a transfer where such transfer would result in an enlargement of the original water right. Idaho Code § 42-222(1) authorizes the director to consider consumptive use as a factor in determining whether a proposed change constitutes an enlargement. The record contains sufficient credible evidence of two sources of enlargement that would be occasioned by the proposed transfer. First, the evidence shows that the transfer would result in an increase in the number of acres irrigated. Second, the evidence shows that under the transfer there would be an alteration in flow regimes caused by: (1) a loss of return flows to sections of the stream that have historically benefited from the use of water on the lands to which the water is currently appurtenant; and, (2) an increase in the consumptive use under the water rights due to differences in the natural conditions of the lands existing at the present place of use and the proposed place of use under the transfer application. Based on

these findings of fact demonstrating an enlargement in the use of the water rights, the Department properly denied the Whittaker transfer application.

C. IDWR's determination of enlargement is consistent with the case law and with the principles of the prior appropriation doctrine.

Whittaker asserts that there would be no enlargement under the transfer, or in the alternative, that IDWR has undermined the intent of the legislature by taking into consideration factors irrelevant to the transfer proceeding. Whittaker first contends that no other appropriators, including protestant Clark, has a right to rely on the return flows generated by use of the water on the Whittaker's land. Second, Whittaker contends that IDWR has misapplied the definition of consumptive use in the transfer proceeding.

Whittaker points to two Idaho cases to support the contention that downstream junior appropriators are not entitled to the return flows generated by other appropriators in the use of their rights: *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1002 (1945), and *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). However, both of these cases contain unique circumstances and holdings that make them readily distinguishable from the present case and other Idaho cases holding that a junior appropriator is entitled to the maintenance of stream conditions existing on the stream at and subsequent to the time they made their appropriations.

There are at least three aspects of *Colthorp* and *Boyer* that are distinguishable from other cases more similar to the Whittaker transfer request. First, the rule applied in both cases was that no appropriator may compel any other appropriator to continue the waste of water whereby the former may benefit. See *Colthorp*, 66 Idaho at 182; *Application of Boyer*, 73 Idaho at 162.

This rule, followed in both cases, was not intended to displace or contradict the general rule requiring the maintenance of stream conditions to the benefit of junior appropriators. Instead, it was invoked in the situation where the amount of return flow was so excessive as to impute wastefulness and not beneficial use of the original water right. See Wells A. Hutchins, *The Idaho Law of Water Rights*, 5 Idaho Law Rev. 1, 70 (1968). Second, in *Colthorp*, the Court's holding was based on the failure of the plaintiff to allege any injury to a water right as a result of the contested transfer. In fact the Court states that it would have reached an opposite holding "if a change in the point of diversion and place of use of the [defendant's] water actually injured [plaintiff's] use or right to use water decreed to the Ake ranch" 66 Idaho at 181. In *Application of Boyer*, the Court was not only dissatisfied with the claim of injury by plaintiff, but found that the plaintiff had merely relied on the excessive returns, either when the defendant had not used them at all, or when the returns were waste water from use in a particular parcel. 73 Idaho at 161-162. Finally, in both cases the failure of the defendants to fully put their water rights to beneficial use prompted the Court in each instance to undertake an abandonment and forfeiture analysis in order to address the asserted claims. Finding that neither defendants' actions met the requirements of abandonment or forfeiture, the Court felt compelled to allow each defendant to change the place of use in order to fully put the excess water to beneficial use.

Whittaker next contends that IDWR has undermined the intent of the legislature to allow the transfer of water rights by considering factors unnecessary to the determination of consumptive use and in the conclusion that consumptive use would be increased. IDWR's decision, however, is consistent with the relevant case law and the basic tenets of the prior

appropriation doctrine. The rule against enlargement in use of a water right is firmly rooted in the prior appropriation doctrine and can be treated as a corollary to two of its foundational principles: the doctrine of beneficial use and the no injury rule. The no injury rule is discussed, *infra*, under Argument II.

The doctrine of beneficial use, as traditionally stated, provides that beneficial use is "the basis, the measure and the limit of the right to the use of water" under an appropriative right. Hutchins, 1 *Water Rights Laws in the Nineteen Western States*, *supra*, at 9. To this it is usually added that the beneficial use to which the water is applied must be reasonable and economical. *See e.g., Hufford v. Dye*, 121 Pac. 400, 162 Cal. 147, 159 (Cal. 1912). The reasonableness of the use is a question of fact and must take into consideration the purpose for which the water is appropriated and the lands for which it is appurtenant. *See Washington State Sugar Co.*, 27 Idaho at 43, 147 P. at 1079.

In Idaho, the doctrine of beneficial use is constitutionally recognized and permeates the Idaho water code. *See State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). The Idaho Supreme Court articulated the principles discussed above in 1915:

It is held that the test of an appropriator's right to water for irrigation is the amount of water actually used for a beneficial purpose. [citation omitted]. It is settled law of this state that no person can, by virtue of a prior appropriation, claim or hold more water than is necessary for the purpose of the appropriation, and the amount of water necessary for the purpose of the irrigation of the lands in question and the condition of the land to be irrigated should be taken into consideration. [citation omitted]. A prior appropriator is only entitled to the water to the extent that he has use for it when it is economically and reasonably used. It is the policy of the law of this state to require the highest and greatest possible duty of the waters of the state in the interest of agriculture and for useful and beneficial purposes.

Washington State Sugar Co., 27 Idaho 43-44, 147 P. at 1079. Thus, the notion that the limit of an appropriator's right is the amount of water actually put to beneficial use, has been, and continues to be, the law in Idaho.

In *Washington State Sugar Co.*, the appropriator proposed both a change in the nature of use and the point of diversion of a water right used in the operation of a mill. The proposed change was to an irrigation use and would have moved the point of diversion upstream above the headgates of junior appropriators. The change was denied on the grounds that it would have expanded the beneficial use of the water right and defeated the rights of junior appropriators. *Id.*

Closer on point to the facts in the present case is the early federal court case of *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 F. 9 (9th Cir. 1917). There, the proposed change was to irrigate additional lands that, although included in the original decree, had not been previously developed for irrigation. Several junior appropriators complained. Based upon the evidence, the court found: "By reason of the water table being near the surface, and the natural percolation that takes place in the soil, and considering also the overflowing, this method of irrigation results in returning very large quantities of water to the natural streams." *Id.* at 13. Finding that the change would expand the beneficial use of the water right, the court prevented the change in order to protect the rights of junior appropriators to the return flows, and limited the senior to the number of acres irrigated prior to the junior appropriations.

The *Washington State Sugar and Vineyard Land* cases illustrate the rule that junior appropriators are entitled to the maintenance of the stream conditions existing at the time of their appropriation. But the cases also illustrate adherence by courts to the principle that the measure of an appropriator's right is that which is actually put to beneficial use. In both cases the courts found that the quantity of water sought to be transferred largely exceeded the quantity of water put to beneficial use and therefore exceeded the quantity of water actually appropriated. 27 Idaho at 43-44, 147 P. at 1079; 245 F. at 12-13, 21. To make this determination the courts looked to the duty of water, the conditions of the land to which the water was applied, and the method of application. *Id.* And in both cases, rather than alter the decrees to reflect the water beneficially used, the court merely restricted the place of use and points of diversion so as to prevent injury.

In the current case, IDWR's decision to deny the transfer was based, in part, on its determination that the proposed transfer would increase the historic consumptive use of the water rights. Similar to the cases discussed above, IDWR made the determination by looking at the purpose for which the appropriation was made on the lands to which it is presently appurtenant. Like the facts in *Vineyard Land and Stock Co.*, the evidence revealed that the method of water application, the location at which it was used, and the purpose of use resulted in a significant portion of the water diverted being returned to the stream. The applicant himself testified to the condition of the land and even stated that it was hard to irrigate efficiently. *See* Tr. p. 19, L. 19-20. Whittaker described a portion of the ground as follows:

This ground is characterized by big rocky gravelly knolls, and it's hard to utilize your water efficiently. and there's also a spring over here at this point right here, maybe runs five inches or something like that that flows in and comes on around the ditch, and then there's another spring that comes down through here that this flows into, and we irrigate out of there sometimes, irrigate this area in here.

Tr. p. 19, L. 18-25.

It was further determined that to allow the transfer would have deprived junior appropriators of the right to the use of the excess water. Although IDWR's decision to deny the transfer was framed in terms of an expansion in consumptive use, this is another way of saying that the proposed transfer would have increased the beneficial use under the water rights. For the foregoing reasons, Whittaker's contention that IDWR has misapplied the law or undermined the intent of the legislature is misplaced.

II. IDWR PROPERLY DETERMINED THAT THE PROPOSED
TRANSFER WOULD CAUSE INJURY TO DOWNSTREAM JUNIOR
APPROPRIATORS.

Whittaker next challenges IDWR's conclusion that the proposed transfer would result in injury to other water rights. Idaho Code § 42-222(1) states: "the director shall examine all the evidence and available information and shall approve the change in whole or in part . . . provided no other rights are injured thereby." However, as noted previously, the burden is on the proponent of the transfer to prove that no other rights would be injured. *See also Federal Land Bank of Spokane v. Union Central Life Insurance Co.*, 51 Idaho 490, 493-494, 6 P.2d 486 (1961). IDWR has fairly examined all the evidence and available information in this case, and

has determined that the applicant has not met its burden of proving that the change will not cause injury. Therefore, the application for transfer was properly denied.

A. The proposed transfer would cause injury to protestant Clark and other downstream junior water right holders.

IDWR's decision to deny the transfer was based in part on the potential injury to the water rights of protestant Clark that would be caused by the enlarged use of Whittaker's Big Timber Creek water rights. As Whittaker correctly points out, the type of injury protected against under the transfer statute is injury that is "actual and real." *See Colthorp, supra*. In addition, the injury contemplated must be to a water right. *See Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 8, 154 P.2d 507, 509 (1944). Whittaker failed to establish that such injury would not occur.

Whittaker's characterization of the injury to the Clark's water rights as "indirect" is misleading given the nature of the priority system and the general interrelationship among water rights. On any system where there exists multiple appropriators having different priority dates, with different points of diversion, an enlargement in use by one could potentially affect every other appropriator on the system. This is because the impacts of an enlargement in use are transmitted through the system until they manifest as decreased flows at a particular time and place to deprive a junior appropriator of the use of water to which the junior is otherwise entitled. In this sense, every injury to a junior water right in a priority system could be characterized as indirect. Clearly, the statute contemplates such injury; and just as clearly, IDWR is obligated to ensure that such injury does not occur.

As set out in the agency record, protestant Clark's claim of injury is based on the effect of the proposed enlargement on the rights of another water user and the impact on the upper Lemhi system in general. A description of the potential injury to Clark's water right is explained in IDWR's Final Order:

The protestant generally explained the basis of her protest as follows: Use of water as proposed in the application will enlarge the applicant's use of Big Timber Creek water. Enlarged use will make less Big Timber Creek water available for diversion to Texas Creek by Ellsworth under Water Right No. 74-0042. As a result, Ellsworth will need to divert more water from Texas Creek to fill Water Right Nos. 74-00066 and 74-00067 causing the protestant's junior rights on Texas Creek to be diminished or shut off earlier in the irrigation season than otherwise would occur.

R. p. 84, Finding of Fact No. 15. It is apparent from the quoted finding that if Clark's water rights were "diminished or shut off earlier in the irrigation season than otherwise would occur," this would constitute a "real and actual injury" to her water rights.

It is acknowledged that Clark's expert witness admitted, with qualifications, that if water right no. 74-00042 (Ellsworth right) were always filled with water from Big Timber Creek, then the proposed transfer would not injure the rights of Clark on Texas Creek. Tr. p. 131, L. 2-15. However, this admission does not make the potential injury to Clark's water rights any less real. It is also not a basis on which to conclude that approval of the transfer will not injure the protestant's rights.

- B. The concern for potential injury cannot be limited to the water rights of the protestant.

Assuming arguendo that the evidence of potential injury to Clark's water rights is tenuous, that alone would not justify overturning IDWR's decision denying the transfer because of the potential impacts of the proposed transfer upon other water users within the system.

Idaho Code § 42-222 provides that the director shall approve the transfer provided "no other rights are injured thereby." Regardless of the procedures available for other water users to protest a transfer application, the statute cannot be fairly read to imply "provided no other rights 'of protesters' are injured thereby," as Whittaker has suggested. To do so would be to violate a basic rule of statutory construction that in the absence of ambiguity, the clear language of the statute is to be given its plain and ordinary meaning. *See State v. Moore*, 111 Idaho 854, 856, 727 P.2d 1282, 1283 (1986). More importantly, however, the Idaho Supreme Court has already ruled that "[t]he director is statutorily required to examine all evidence of whether the proposed transfer will injure **other** water rights or constitute an enlargement of the original right" *Jenkins v. State, Dept. of Water Resources*, 130 Idaho 384, 387, 647 P.2d 1256, 1259 (1982) (emphasis added).

Secondly, the director cannot issue a permit or license that in any manner interferes with the vested rights of other prior appropriators. *See Lockwood v. Freeman*, 15 Idaho 395, 398, 98 Pac. 295 (1908). Consequently, before IDWR may authorize a change in use of a water right under an application for transfer, the director is obligated to scrutinize the application to ensure that what it proposes does not injure other appropriative rights. In the present case, the evidence shows that the rights of junior appropriators would be injured by a decrease of return flows in

reaches of Big Timber Creek, and by an increase in consumptive use at the proposed place of use. Based on this evidence, IDWR properly denied the transfer request.

Whittaker stresses the fact that IDWR has not identified the junior appropriators that would be injured by the transfer. Whittaker then suggests that because these "phantom protestors" have not objected they should be treated as though they do not exist. The applicant further argues that if these appropriators are deemed not to exist there can be no injury and the transfer should be approved. This argument is flawed for several reasons.

Neither the statute nor the case law requires IDWR to separately identify the rights alleged to be injured. On the contrary, there is case law in Idaho and in other states that suggests the opposite. In *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (1944), the Idaho Supreme Court stated:

While it would have been of material assistance had the trial court found the particular facts causing material injury to each of the respondents, and specified definitely the cause, nature and extent of such injury, however, the cause should not be reversed for that reason.

66 Idaho at 10, 154 P.2d at 510. Similarly, in *Farmers' Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d 629 (Colo. 1954), the Colorado Supreme Court reversed a decision of the trial court that had approved a transfer, despite a showing of increased consumptive use, because the injury could not be shown to effect any junior appropriator specifically. In reaching the holding that the injury to a stream can be a "general injury," the court reasoned, in effect, that on a fully appropriated stream, the enlargement of a right is bound to affect some appropriator. *Id.* at 633.

Another reason that the applicant's argument is flawed is because the statute does not require the director to find injury in order to deny an application for transfer. The language of the statute is clear that the criteria listed under I.C. § 42-222(1) are separate criteria and that if any one of the four criteria are not met, then the director is obligated to deny the transfer. The Idaho Supreme Court so ruled in, *Jenkins, supra*, where the Court stated:

[t]he statute provides that the director shall approve the transfer provided two conditions are met, i.e., that no other water rights are injured, **and** that the original use is not enlarged. Hence if **either** of the two conditions are not met, there is no authorization to approve the proposed transfer.

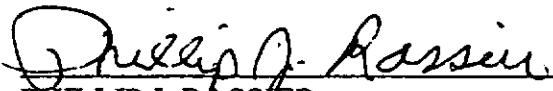
Jenkins, 130 Idaho at 388, 647 P.2d at 1260 (emphasis added). Therefore, IDWR may deny a transfer application based upon a finding of enlargement alone, independent of any finding of injury to a specific water right.

CONCLUSION

For all of the foregoing reasons, IDWR respectfully requests that this Court affirm the decision of IDWR denying Transfer Application No. 5244.

DATED this 8th day of August, 2000.

ALAN G. LANCE
Attorney General


PHILLIP J. RASSER
Deputy Attorney General
Department of Water Resources

CERTIFICATE OF SERVICE

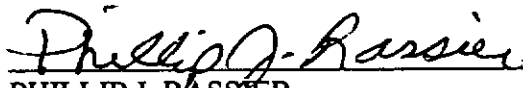
I hereby certify that I am a duly licensed attorney in the State of Idaho, employed by the Attorney General of the State of Idaho and residing in Boise, Idaho; and that I served a true and correct copy of the following described documents on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed on this 8th day of August, 2000.

Documents Served: BRIEF OF RESPONDENT IDAHO DEPARTMENT OF WATER RESOURCES

Persons served: Jerry R. Rigby
Rigby Thatcher Andrus
Rigby Kam & Moeller, Chtd
25 North Second East
Rexburg, ID 83440
(2 copies)

Kent W Foster
Holden Kidwell Hahn & Crapo, PLLC
330 Shoup Ave., 3rd floor
P.O. Box 50130
Idaho Falls, ID 83405-0130
(2 copies)

Courteous Copy:
The Honorable Judge James C. Herndon
District Judge
Bingham County Courthouse
P.O. Box 807
Blackfoot, ID 83221


PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

THIS MATTER HAS BEEN APPEALED TO
THE DISTRICT COURT IN LEMHI COUNTY

LEGAL SERVICES IS PROCESSING THIS
FILE FOR THAT APPEAL. PLEASE
DIRECT ANY QUESTIONS TO LEGAL.

(THE ORIGINAL HEARING EXHIBITS HAVE BEEN SUBMITTED TO THE
DISTRICT COURT. COPIES OF THE EXHIBITS ARE LOCATED WITH THE
LEGAL FILES UNTIL THE CASE IS DECIDED.

1/18/00

MICROFILMED

JAN 12 2001

FILED 5-4-00

TIME 3:58 PM

LEMHI COUNTY CLERK

BY [Signature] DEPUTY**RECEIVED****MAY 8 - 2000**

Department of Water Resources

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ISBA No. 1750

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5244 IN THE NAME OF)
JAMES AND/OR PAULA WHITTAKER,)

Case No. CV-00-009

**AMENDED NOTICE OF
LODGING OF TRANSCRIPT**

JAMES AND/OR PAULA WHITTAKER,)

Applicant-Appellant,)

vs.)

IDAHO DEPARTMENT OF WATER)
RESOURCES,)

Respondent)

TO: THE DISTRICT COURT AND ALL PARTIES OR THEIR COUNSEL OF RECORD

MICROFILMED

JAN 12 2001

COPY

YOU ARE HEREBY NOTIFIED, pursuant to I.R.C.P. 84(o), that the transcript of the testimony and proceedings of the hearing of October 13, 1999 before the Department of Water Resources in this matter has been lodged with the Department in accordance with I.R.C.P. 84(k)(1).

YOU ARE FURTHER NOTIFIED, that the appellant, having paid the transcript preparation fee, the Department is enclosing with this notice to counsel for the respective parties one copy of the transcript;

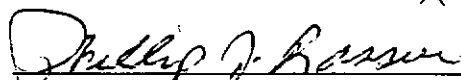
THAT pursuant to I.R.C.P. 84(o) the parties have fourteen (14) days from the date of this notice in which to file any objection to the transcription;

THAT any objections to the transcript shall be made in writing to the Department and shall be determined thereby;

THAT upon failure of the parties to file any objection within such 14-day period, the transcript shall be deemed settled; and,

THAT upon the settlement of the transcript, the Department shall file with the district court to which appeal has been made the original of the transcript together with a copy of the agency record and all exhibits offered or admitted in the proceeding.

DATED this 2nd day of May, 2000.



PHILLIP J. RASSIER

Deputy Attorney General

Idaho Department of Water Resources

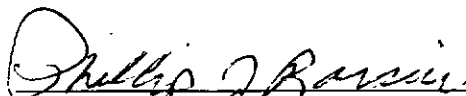
CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereto on the 2nd day of May, 2000.

Documents served: AMENDED NOTICE OF LODGING OF TRANSCRIPT

Persons served: JERRY R RIGBY
RIGBY THATCHER ANDRUS
RIGBY KAM & MOELLER, CHTD
25 NORTH SECOND EAST
REXBURG ID 83440

KENT W FOSTER
HOLDEN KIDWELL HAHN & CRAPO, PLLC
330 SHOUP AVE., 3RD FLOOR
PO BOX 50130
IDAHO FALLS ID 83405-0130


PHILLIP J. RASSIER

Deputy Attorney General
Idaho Department of Water Resources

RECEIVED

JAN 18 2000

Department of Water Resources

Law Offices

**RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered**

Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam
Gregory W. Moeller

P.O. Box 250
25 North Second East
Rexburg, ID 83440

Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: Rexlaw@srv.net

January 13, 2000

District Court Clerk
Lemhi County Court House
206 Courthouse Dr.
Salmon, ID 83467

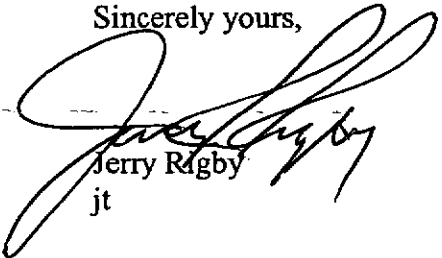
Re: Filing of an Amended Notice of Appeal

Dear Clerk,

Enclosed you will find an Amended Notice of Appeal, which corrects a clerical error of Custer County with the correct County of Lemhi. Please file the same. We have previously paid the filing fee of \$72.00 to cover the filing fee.

Thank you again for your assistance in this matter. If you have any questions or concerns, feel free to give me a call.

Sincerely yours,


Jerry Rigby
jt

Enclosures

F:\WP6\Sb\WHITTJA.LT1

MICROFILMED

JAN 12 2001

Jerry R. Rigby
of RIGBY, THATCHER, ANDRUS,
RIGBY, KAM & MOELLER, Chartered
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208 356-3633

Attorneys for Appellants JAMES AND/OR PAULA WHITTAKER

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR	)	AMENDED
TRANSFER NO. 5244 IN THE NAME	)	NOTICE OF APPEAL
OF JAMES AND/OR PAULA WHITTAKER,	)	
_____	)	Fee Cat. R.2.
	)	Fee- \$72.00

TO: THE IDAHO DEPARTMENT OF WATER RESOURCES; KENT FOSTER, attorney for
protestant; AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN that:

1. JAMES AND PAULA WHITTAKER, the above-named Appellants, appeal to
the District Court for the Seventh Judicial District of the State of Idaho, in and for the County of
Lemhi, from the Final Order of the Idaho Department of Water Resources, dated December 20,
1999, by Karl J. Dreher, Director.

2. Appellate has a right to appeal to this Court and venue for this matter is proper
in Lemhi County, Idaho, pursuant to Idaho Code § 67-5272(d). The Department of Water
Resources' Final Order is a final, appealable Order pursuant to Idaho Code § 67-5270.

MICROFILMED

JAN 12 2001

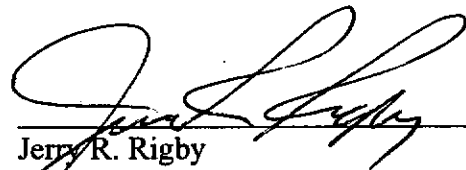
3. The Final Order appealed from by Appellant was served by mailing a copy to Appellant on December 20, 1999. This appeal has been filed within twenty-eight (28) days of service as per the Department's letter of December 20, 1999.

4. This appeal is made on both issues of fact and issues of law.

5. Appellant requests, pursuant to Idaho Code § 67-5275, that the Idaho Department of Water Resources, within 42 days after the service of this notice, transmit a copy of the agency record of the proceedings in this matter to the Lemhi County District Court.

6. Appellant hereby applies to the Court for leave to present additional material evidence relating to the validity of the agency action and alleges that there is just cause for the receipt of this evidence pursuant to Idaho Code § 67-5276.

DATED This 13th day of January, 2000.



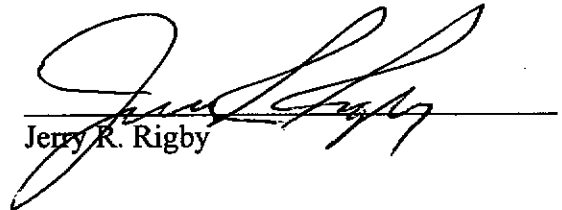
Jerry R. Rigby
of Rigby, Thatcher, Andrus, Rigby
Kam & Moeller, Chtd.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 13th day of January, 2000, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid to the following:

Kent Foster
West One Bank Bldg.
330 Shoup Ave., 3rd Floor
P.O. Box 50130
Idaho Falls, ID 83405-0130

Department of Water Resources
1301 N. Orchard St.
Statehouse Mail
Boise, ID 83702-9000


Jerry R. Rigby

No. V - enclosed

RECEIVED

JAN 14 2000

Department of Water Resources

Law Offices

**RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered**

Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
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Gregory W. Moeller

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25 North Second East
Rexburg, ID 83440

Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: Rexlaw@srv.net

January 11, 2000

District Court Clerk
Lemhi County Court House
206 Courthouse Dr.
Salmon, ID 83467

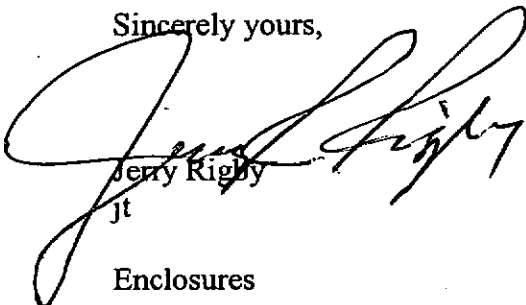
Re: Filing of a Notice of Appeal

Dear Clerk,

Enclosed you will find a Notice of Appeal, please file the same. I have also enclosed a check in the amount of \$72.00, to cover the filing fee.

Thank you for your assistance in this matter. If you have any questions or concerns, feel free to give me a call.

Sincerely yours,


Jerry Rigby
jt

Enclosures

F:\WP6\SB\WHITTJA.LTR

MICROFILMED

JAN 12 2001

Jerry R. Rigby
of RIGBY, THATCHER, ANDRUS,
RIGBY, KAM & MOELLER, Chartered
Attorneys at Law
25 North Second East
Rexburg, Idaho 83440
Telephone: 208 356-3633

Attorneys for Appellants JAMES AND/OR PAULA WHITTAKER

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO IN AND FOR THE COUNTY OF LEMHI

IN THE MATTER OF APPLICATION FOR	)	
TRANSFER NO. 5244 IN THE NAME	)	NOTICE OF APPEAL
OF JAMES AND/OR PAULA WHITTAKER,	)	
_____	)	Fee Cat. R.2.
	)	Fee- \$72.00

TO: THE IDAHO DEPARTMENT OF WATER RESOURCES; KENT FOSTER, attorney for
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MICROFILMED
JAN 12 2001

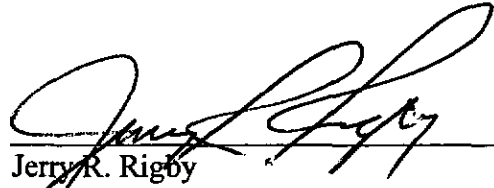
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4. This appeal is made on both issues of fact and issues of law.

5. Appellant requests, pursuant to Idaho Code § 67-5275, that the Idaho Department of Water Resources, within 42 days after the service of this notice, transmit a copy of the agency record of the proceedings in this matter to the Lemhi County District Court.

6. Appellant hereby applies to the Court for leave to present additional material evidence relating to the validity of the agency action and alleges that there is just cause for the receipt of this evidence pursuant to Idaho Code § 67-5276.

DATED This 11th day of January, 2000.

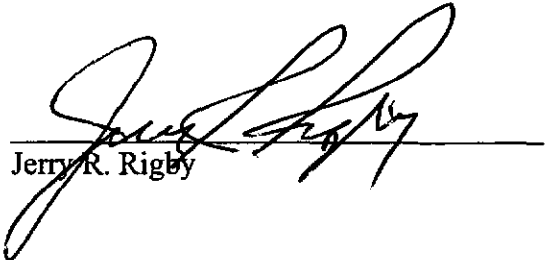

Jerry R. Rigby
of Rigby, Thatcher, Andrus, Rigby
Kam & Moeller, Chtd.
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 11th day of January, 2000, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid to the following:

Kent Foster
West One Bank Bldg.
330 Shoup Ave., 3rd Floor
P.O. Box 50130
Idaho Falls, ID 83405-0130

Department of Water Resources
1301 N. Orchard St.
Statehouse Mail
Boise, ID 83702-9000


Jerry R. Rigby



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

January 12, 2000

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

Jerry Rigby
RIGBY, THATCHER, et. al.
25 N. 2nd E.
Rexburg, ID 83440

RE: REQUEST FOR HEARING TAPES

Dear Mr. Rigby:

As requested in your January 5, 2000 letter, please find enclosed copies of two (2) cassette tapes which the department has reproduced for your use. Also enclosed is an invoice in the amount of \$9.18 for reproduction of the tapes.

As you probably know, the tapes are recorded at one-half of the normal speed of most tape recorders in order to better utilize the tapes. Hence, the tapes can not be understood when played back on a recorder at the normal recording speed.

Please sent the payment to my attention so that it will be properly credited to the billing for these tapes.

Sincerely,

L. GLEN SAXTON, P.E.
Chief, Water Allocation Bureau

Encl: 3

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JAN 12 2001

CUSTOM RECORDING & SOUND, INC.
3907 Custer Drive
Boise, Idaho 83705
(208) 344-3535

Invoice No.
20-50097

4

01.12.00

ID Dept. of Water Resources
Attn: Dick Larsen
1301 N. Orchard St.
Boise, ID

83706

Pages: 1 Resale Number: GOVERNMENT

ACCT #	F.O.B.	TERMS	ORDER NUMBER
DEP102	Boise	Due 01.12.00	GLEN SAXTON

2.00	DUFOSC90	C-90 STEREO 1-1 Dup.	M	4.45	8.90
2.00	PD26	Soft Poly Case Box	N	0.14	0.28

Hinda Carley

MICROFILMED
JAN 12 2001

Sub Total	\$	7.18	Sales Tax	\$	
Net Total	\$	9.18	Invoice Total:		9.18
			Received	\$	
TOTAL DUE					9.18

Your Change \$

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JAN 07 2000

Law Offices

**RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered**

Department of Water Resources

Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam
Gregory W. Moeller

P.O. Box 250
25 North Second East
Rexburg, ID 83440

Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: Rexlaw@srv.net

January 5, 2000

Glen Saxton
Department of Water Resources
1301 N. Orchard
Boise, ID 83706-2237

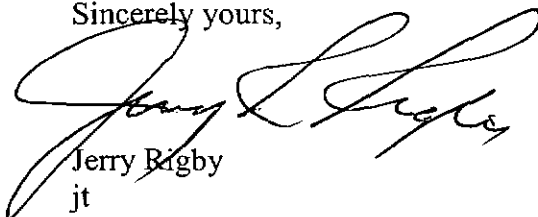
RE: Written request for hearing tapes regarding the James Whittaker matter.

Dear Glen,

I am requesting the tapes for the hearing before the Department in the MATTER OF APPLICATION FOR TRANSFER NO. 5244 IN THE NAME OF JAMES AND/OR PAULA WHITTAKER.

I would appreciate it if you could send those tapes as soon as possible to the address above. Thank you for your help in this matter. If you have any questions or concerns feel free to give me a call. Please bill me for any costs associated with this request.

Sincerely yours,


Jerry Rigby
jt

MICROFILMED
JAN 12 2001

Law Offices

**RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered**

*Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam
Gregory W. Moeller*

*P.O. Box 250
25 North Second East
Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: rexlaw@srv.net*

FAX Transmission Sheet

Date: January 5, 2000
To: Glen Saxton
Fax No: (208) 327-7866
From: Jerry Rigby
Sent By: jt
Subject: Hearing Tapes request.

You should receive 2 page(s) including this cover sheet.

COMMENTS:

If transmission was incomplete or not legible, please call the sender at 208-356-3633.

CONFIDENTIALITY NOTICE: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the US Postal Service. Thank you.

MICROFILMED

JAN 12 2001

Law Offices

**RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered**

*Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
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25 North Second East
Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: Rexlaw@srv.net*

January 5, 2000

Glen Saxton
Department of Water Resources
1301 N. Orchard
Boise, ID 83706-2237

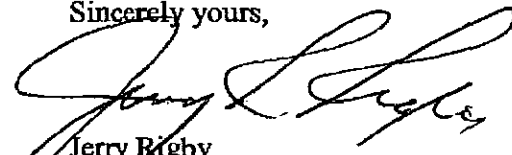
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Sincerely yours,


Jerry Rigby
jt

MICROFILMED
JAN 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

December 20, 1999

KARL J. DREHER
DIRECTOR

RE: In the Matter of Application for Transfer No. 5244 in the name of James and/or Paula Whittaker

Dear Interested Parties:

The accompanying order is a "final order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

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JAN 12 2001

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

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

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

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

Enclosure

c: IDWR - Eastern Region

Law Offices
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

RECEIVED

JUN 29 1999

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS
DALE W. STORER
MARIE T. TYLER
ROBERT M. FOLLETT
FREDERICK J. HAHN, III
SHAN B. PERRY
AMELIA A. CANEGALY

U.S. BANK OF IDAHO BUILDING
330 SHOUP AVENUE, THIRD FLOOR
P.O. BOX 50130
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
FACSIMILE (208) 523-9518
E-MAIL KFOSTER@HOLDENLEGAL.COM

Department of Water Resources

Arthur W. Holden
(1877-1967)
Robert B. Holden
(1911-1971)
Terry L. Crapo
(1939-1982)
William S. Holden
(1907-1988)

June 24, 1999

Mr. Glen Saxton
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Re: Application for Transfer 5244 in the name of James and/or Paula Whittaker

Dear Mr. Saxton:

Our client in the above matter, Mrs. Beva Clark, and her daughter and sons have indicated they would like us to file a response to the Exceptions and the Brief in support of the exceptions filed by the applicant. The Clarks went to a great deal of effort in pointing out to us the kinds of things they wanted addressed in the response and have done such a thorough job that we have attached, as the response, a letter from Mrs. Eva Selleck, the daughter of Mrs. Beva Clark, addressed to us on June 17, 1999 with the attached copies of the applicants brief and exceptions on which she has made reference numbers and letters. Mrs. Selleck's letter and the referenced attachments which are enclosed with this letter constitute the protestant's response to the exceptions and brief of the applicant.

Thank you for your kind attention to this matter.

Very truly yours,



Kent W. Foster

Enclosures

- c. Jerry Rigby (w/enc.)
- Mrs. Beva Clark
- Eva Selleck

G:\WPDATA\KWF\6061\SAXT0624.LTR:kmc

MICROFILMED

JAN 12 2001

Eva Selleck
1189 S. Eagle Rd.
Kina, Idaho 83634

RECEIVED

JUN 29 1999

Department of Water Resources

Kent Foster
West One Bank Bldg.
330 Shoup Ave., 3rd Floor
P.O. Box 50130
Idaho Falls, Idaho 83702

June 17, 1999

Dear Mr. Foster:

We would like you to file a response, to the exceptions filed by Mr. Rigby, on transfer #5244, in case it should be appealed to a higher court. If you and Dr. Brockway take the portions of our input you feel are pertinent and write a response to the Director, we would appreciate it. We would like to go over it with you before it is submitted, as our understanding of the law is very limited. I have gone through Mr. Rigby's response and put numbers and letters to match numbers and letters in my letter, so you will know to which part I'm referring. I disagree with almost everything he wrote, these are some points I feel could be addressed.

Exceptions to findings of fact:

- A. There are at least 6 to 8 springs according to Mr. Whittaker's testimony but, we know of 13 and there may be others we are unaware of.
- B. This transfer has two priority dates, 1910 and 1922. Mrs. Clark's priority dates are 1913, and 1920. It was testified that the irrigation is called wild flooding. Paragraph 9 is very accurate the way it was written.
- C. The new pivot is ten towers 128 ft. each, 19 ft to the end gun, with at least 75 ft. coverage with the end gun. This pivot covers at least 136 acres. Even if the new pivot was only 1250 ft long it has a tail of 19 feet to the end gun. Average distance for an end gun is 95 feet. To be on the conservative side, I figured 75 feet. This gives you a circle, with a radius of 1344 ft. The area covered would be over 130 acres. There is no water decreed to the existing over lap, so it would have to be covered under the transfer.
- D. There is no way it was shown that 136 acres would be dewatered. There are more than a few springs and they have ditches going north and south out of them for irrigation.
- E. There are approximately 13 springs that arise or flow onto the homestead, which will not be dried up.
- F. Dr. Brockway has studied water flows for many years. He testified it would be lost to Timber Creek and affect its water users and also the water users of Texas Creek, if it was transferred to the new location.
- G. Mr. Whittaker testified the water would not be left in Timber Creek when the sprinkler system is not in use, but would flow on in the ditch to a pond. He didn't state how much of it would be used for irrigation along the way or if it would be pumped out of the pond and used or if it would be drank by animals, or just evaporate into the air. All of which would cause more loss of water.
- H. The water master did not have any records with him, nor did Mr. Whittaker to prove anything about the water of Timber Creek.

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JAN 12 2001

- I. Applicants have not carried their burden of proof. The hearing officer was clearly stating that more water would be used at the pivot, than at the homestead.
- J. Mr. Rigby is saying this transfer will injure others on Timber Creek. A transfer is not supposed to be granted that would injure any water right. Dr. Brockway, testified how Mrs. Clarks water would be affected.
- K. They gave their unprofessional opinions, with no proof or evidence to support them.
- L. Should be denied.
- M. If you add the figures they gave at the hearing it, come out to more than 130 acres instead of 105 acres. And the figures are larger than they represented to be.
- N. The order is pretty close to perfect as written.
- #1. Because Ellsworth's have a water right, decreed out of Timber Creek, which mixes with the waters from Texas Creek, and their water rights are senior to Mrs. Clark's water rights, anything that affects the water of either creek affects Mrs. Clark's water rights.
-Mr. Whittaker's water right 74-00056 in this transfer has a priority date, of 1910. Mrs. Clark's priority dates are 1913 and 1920.
- #2. Just by saying a water right will always be filled, doesn't guarantee a water right will always be filled.
-The weir where water right, 74-00042, is filled, is in such bad shape as to make it impossible to get a true and accurate measurement. Ask Dr. Brockway and see picture of weir. (Dr. Brockway has them, 245,246,247, and 248 or call Larry if he doesn't, phone 745-7764.)
-Mr. Smith also testified he did not regulate the water for this transfer, his wife did. He stated this water is always shut off in mid July. The water was turned off before Dr. Brockway's inspection of the ground, but was turned on again when they didn't think anyone was watching. The picture we entered as exhibit "U. #17" shows irrigation occurring on the September 22, 1998. Picture enclosed #163, with arrows marking irrigation water and numbers where the springs are located, marked on the overlay.
-Mr. Whittaker also testified that if the County Assessor visited the land in September he would still see land being irrigated.
- The pictures we put in as exhibit "6-J" (our #175, 176, 189, 190, and 191) shows that in September and October the grass is still green, not brown and dried up as it would be, if it had not been watered since mid July.
- #3. Mrs. Clark's water rights, would be adversely, affected by this transfer. Why would she invest thousands of dollars if it didn't adversely affect her?
-Mr. Rigby misconstrued what Dr. Brockway and Mrs. Clark said.
- #4. Dr. Brockway stated that there *might* be some return flow to Texas Creek from this water in the lower reaches of Texas Creek. Mr. Whittaker's expert had not studied the geology to give an option.
- #5. Applicant must prove no injury will accrue, not just say it won't.
- #6. In short water years the protestant would be injured.
- #7. If consumptive-use, was never intended to be used, why was it written.
- #8. The new pivot covers 136 plus acres. Mr. Whittaker has no water rights for any land in Township 15 North; Range 26 East; Section 21. If there is no decreed water right for the overlapping ground it would have to be covered under the new transfer.

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JAN 12 2001²

#9. The protestant has proven there will be injury and enlargement if this transfer is granted.

In Finding of fact #9. The water is not shut off in July as it should be. Protestant's exhibit "U. 17" (photo enclosed, overlay, with springs numbered and arrows pointing to irrigation water you can see in the picture. Our number on back is 163.) and the testimony of Mr. Whittaker he indicated the County Assessor may see irrigation in September if he visited the land.

Finding of fact # 10. There would need to be at least 3 points of diversion closed.

Finding of fact #11. The new pivot as now constructed is about 1299 ft long plus 19 foot to the end gun. Ten towers of 128 ft each, 19 ft from last tower to end gun, plus what the end gun would cover. This would be at least 131 acres, plus the overlap area would be larger also.

Conclusions of law #5. Applicant has not shown that the number of acres at the new pivot, are the same or less than the acres irrigated now. In fact when you irrigate the same ground with two pivots, it does not prove that the water added by the second pivot is not consumed.

Third paragraph on page 7 of order. The water would be used on approximately 131 acres at the new pivot.

Mr. Whittaker testified the weir he had used to check the shrinkage had been removed before the hearing on April 7, 1999. When Dr. Brockway was in the area later he observed the weir and how it was installed. It didn't have any pond behind it and was slopping 1/2 inch per 2 ft. or 1 inch towards the side closet to the road where it would be measured. Photos enclosed

James testified that part of the ground the water was being removed from belongs, to the Forest Service, which is 3.3 acres. Where does it say he may transfer the Forest Service's water? Water right 74-00056 is only 74 acres not 75. When you remove the 3.3 acres of Forest Service water, that leaves 70.7 acres.

Dan Smith testified that he did not measure the water on this land.
But, that when he was in this area it was for recreation.

Listed below are the locations, by Township, range, and section, of springs which run directly onto the ground or that arise on the ground which we are aware of. Photos and maps with overlays marking the locations enclosed. Numbers 45, 189, 190, 199, 175, and 176.

Approximate locations of springs.

1. T 14 N R 26 E Sec. 6 swse
2. T 14 N R 26 E Sec. 6 nwse
3. T 14 N R 26 E Sec. 6 nwse
4. T 14 N R 26 E Sec. 6 nwse
5. T 14 N R 25 E Sec. 12 nene
T 14 N R 25 E Sec. 1 sese
T 14 N R 26 E Sec. 6 swsw
T 14 N R 26 E Sec. 6 nws
T 14 N R 26 E Sec. 6 senw
6. T 14 N R 26 E Sec. 6 nese
7. T 14 N R 26 E Sec. 5 swnw

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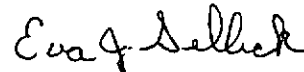
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8. T 14 N R 26 E Sec. 5 nwnw
9. T 15 N R 26 E Sec. 32 swsw
10. T 15 N R 26 E Sec. 32 swsw
11. T 15 N R 26 E Sec. 32 swsw
12. T 15 N R 26 E Sec. 32 swsw
13. T 14 N R 26 E Sec. 5 swnw

I am sending copies of things you already have with more information on them incase you can use them later in this matter. s If we can be of any help, or if you need clarification on any of this please call. Beva 768-2446, Eva 922-5074, Larry 745-7764.

Thank you


Eva J. Selbeck

Enclosures:

C. Chuck Brockway

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 5244 IN THE
NAME OF JAMES AND/OR PAULA
WHITTAKER.

BRIEF IN SUPPORT OF APPLICANTS'
EXCEPTIONS TO PROPOSED
MEMORANDUM DECISION AND
ORDER

COMES NOW, JAMES WHITTAKER and PAULA WHITTAKER, by and through
counsel of record and hereby file the following brief in support of Applicants' exceptions to the
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which, coupled with the evidence in the proceeding below, establish Petitioners right to have
their transfer no. 5244 granted. The two areas deal with (1) no injury and (2) no enlargement.

5243

NO INJURY

1 Initially, it must be recognized that Beva Lue Clark's (the Protestor) claim of injury is not
a direct claim of injury. Her water right, which is located on Texas Creek, is not even on the
same creek as Applicants' water right which is located on Timber Creek. She is not upstream or
downstream of Applicant. From the evidence introduced at the hearing held on Applicant's
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Basically, the argument of Protestant's claim of injury is that because the Ellsworth's rights are senior to her rights, then if Ellsworth's rights on Timber Creek were in any way reduced, Ellsworth would demand water from Texas Creek earlier than they otherwise would and therefore "potentially" require Protestant to such off her water sooner than she otherwise would.

2. The testimony of the state watermaster and Mr. Whittaker established that there has always been sufficient waters in Timber Creek to more than fully fill the senior water rights of Ellsworth, even in the worst of years. In fact the state watermaster went so far as to testify that Ellsworth's rights from Timber Creek will always be filled. Add to that the testimony of the state watermaster who testified that at the time Ellsworth's water rights needed to be filled, the high water rights of Applicants are always turned off anyway. 3. In other words, there is absolutely no way that Applicants' water right, either in its present application or in its transferred place of use can affect, in any way, the water rights of Ellsworth. Therefore, because Protestant's claim of injury lives and dies with an injury to Ellsworth's water right, Protestant is absolutely uninjured by her own admission and that of her expert. Protestant's protest should therefore be dismissed and Protestant has no standing to protest Applicant's transfer. denied again

Idaho law is clear that in order to preclude an transfer, the "injury" to other water rights must be substantial, that is "not merely a fanciful injury but a real and actual injury" Beecher v. Cassia Creek Irrig. Co., 66 Idaho 1, 154 P.2d 507 (1944); Colthorp v. Mountain Home Irr. Dist., 66 Idaho 173, 157 P. 1005 (1945).

4. Even though the above argument should be the consideration in dismissing Protestant's protest, one other piece of evidence was overlooked by the hearing officer. The proposed transfer actually moves more water from Timber Creek to Texas Creek drainage, thus only helping the flow of Texas Creek when Applicant's water is actually being diverted and beyond as it seeps.

Water is used on big, rocky knoll & is further down creek. Water doesn't "return" to Texas Creek - so doesn't help Texas either.

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into the Texas Creek drainage. Basically, Applicant's transfer would only help Protestant and not

injure her.

The mere fact that injury "might" occur if other events happen in addition to the transfer has been held insufficient by the Idaho Supreme Court to dis-allow a transfer. See Application of Boyer, 73 Idaho 152, 248 P.2d 540. Also, even though Applicant believes that it is not applicable, a downstream appropriator does not have an unqualified right to the continuance of return-flow conditions upstream upon a dependence claim. See Boyer, supra and Colthorp.

supra

Because of the above arguments, Protestant has failed to show injury and therefore her protest should be dismissed.

NO EXPANSION OF USE

The hearing officer incorrectly found that there would be an expansion of use of Applicant's water right if the transfer were granted. Interestingly, he based his decision entirely upon what he believes would be an increase of "consumptive use" (proposed Conclusions of Law, paragraphs 5 and 6). Although the law grants the right of the director to consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right (I.C. Sec. 42-222), it is not intended to and cannot disallow a transfer based upon the rationale and finding of the hearing officer.

Section 42-202B defines consumptive use as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as

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precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right." (Emphasis Added).

Pursuant to statute, only that portion which is "diverted" can be used to determine consumptive use and not anything that arises naturally. Therefore, because all diversions will be ceased under this transfer, there will be no consumptive use from diversions and therefore the entire 99.2 acres will be deemed dried up.

Furthermore, Applicant, his daughter (who has watered the homesteads) and the watermaster all testified that the entire homesteads property had been watered from actual diversions and not substantially by ^{the springs} natural springs as was claimed by Protestant. To base his findings upon the visual inspection of Protestant's expert who spent one day viewing the homesteads instead of those who had watered and worked the property for many years, was grossly against the overwhelming evidence produced by Applicants and their witnesses. This is especially true when Applicant testified that the 99.2 acres intended to be transferred did not include some of the grounds which Dr. Brockway viewed as having been inundated by springs.

As stated above, Applicant testified that all diversions, from the homesteads would cease. Even the diversions of the two springs (unnamed spring) which rise above the actual area being de-watered. The springs would then flow back to Timber Creek. Except for the small amount of bank next to the springs, there would be no place watered that was watered before. The hearing officer was incorrect in believing the testimony established that there was true sub watering in the area being de-watered.

Furthermore, to take the hearing officer's logic to its natural conclusion, one could never transfer water rights. The rain that falls on the de-watered property would be consumptively used on the natural plants which exist there and therefore would not seep into the

Again - The attorneys Rigby are drawing conclusions on the expertise & wisdom of Mr. Sexton, who has had several years experience & training in these matters. He knows the law.

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ground or run to the stream (ie Timber Creek) and therefore would be an increase of consumptive use. If a creek or river ran past the area being de-watered, there would be some natural plants which would be watered along the banks. The point is that when the legislature added the consumptive use language to the statute, it never intended that this type of logic and scrutiny be used.

Applicants testimony was clear that even though the new pivot is capable of irrigating 105 acres, it overlaps some of the irrigation coverage under an existing Applicants' pivot in the amount of 17 acres. This was even the estimate of Protestant's expert. Therefore the new irrigated ground would be only 88 acres, which is far less than the 99.2 acres which will be de-watered.

Furthermore, assuming *arguendo* that there is an expansion by this application, the amount which is not an expansion should have been granted nonetheless.

The testimony has clearly established that there is no illegal expansion of use for the intended transfer and therefore the finding by the hearing officer was in error. Protestant failed to establish that an expansion would occur from the intended transfer.

CONCLUSION

Based upon the foregoing, Applicant respectfully requests that the Director of the Department of Water Resources hear this matter by the transcripts, these briefs and oral argument and that he reverse the hearing officer's proposed Findings of Fact and Conclusions of Law and order that Applicant's transfer be granted.

I feel that the Hearing Officer has had many years of experience & that he is much more astute in sorting "fact from fiction" & has not misconstrued the evidence & testimony presented at the hearing of April 7, 1998.

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

RECEIVED
JUN 07 1999
Department of Water Resources

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 5244 IN THE
NAME OF JAMES AND/OR PAULA
WHITTAKER.

APPLICANTS' EXCEPTIONS TO
PROPOSED MEMORANDUM DECISION
AND ORDER

COMES NOW, JAMES WHITTAKER and PAULA WHITTAKER, by and through
counsel of record and hereby file the following exceptions to the departments proposed
memorandum decision and order, which exceptions are supported by applicants brief submitted
herewith.

EXCEPTIONS TO FINDINGS OF FACT

A. Paragraph 9 of Findings of Fact should be amended as follows:

The third sentence should read as follows:

A Water used to irrigate the homesteads originates from a combination of sources
including two diversions from Timber Creek (which diversions divert water to the
vast majority of the homesteads), and a small amount of flow from a few springs
(which have been diverted onto the homesteads).

The proposed sentence is inconsistent with the testimony which established that
most of the irrigation on the homesteads was accomplished by two diversions from Timber
Creek. Although there are perhaps two springs which originate upon the premises, they too are

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diverted if required to irrigate the lands. Otherwise they flow directly back into Timber Creek and do not spread out and water the lands of the homesteads.

(2) The fourth sentence should be entirely deleted. This is completely contrary to the evidence which was produced. There is only a small amount of ground watered from the diverted springs. Otherwise the entire homesteads are watered from the two diversions off of Timber Creek. Furthermore, the water right is a "high water" right in the first place and by its nature is only used in the high water runoff periods of the year. The present proposed findings of fact are an attempt to make it seem as though such a right is by its very nature "invalid" when it clearly is not.

B. Paragraph 11 of Findings of Fact should be amended as follows:

The fourth sentence should be amended as follows: The new pivot is capable of irrigating 105 acres and overlaps irrigation coverage under an existing pivot of the applicant in the amount of 17 acres, for a total of 88 acres of new irrigation.

C. Paragraph 16 of Findings of Fact should be amended as follows:

Although disputed, there was a preponderance of evidence to establish that more than sufficient acres of the 99.2 acres proposed to be dried up by Applicants will in fact be dried up to equal the number of new acres to be watered under the pivots included in the transfer.

The proposed findings of fact is contrary to the evidence. Mr. Whittaker, his daughter, and the state watermaster all testified the diversion and use of water could be terminated as proposed with the exception of a few areas associated with two springs. Furthermore, Mr. Whittaker testified that the "wet areas" associated with those two springs were not a part of the

99.2 acres that were proposed to be dried up.

D. Paragraph 17 of Findings of Fact should be replaced as follows:

E There are approximately 2 springs that arise above the homesteads which are part of the property which shall be dried up.

E. Paragraph 18 of Findings of Fact should be replaced as follows:

F Although there was contradictory evidence, there was no proof that water intended to be transferred under this permit would be lost to the system any more that it is in its present diversion. Furthermore, because even the protestant's expert agreed that all non-consumptive water would eventually surface down below at some point, there was no evidence which established any downstream water user would be injured along any reach in which the non-consumed water could even potentially be lost to the system.

G F. Paragraph 19 of Findings of Fact should be deleted entirely as not relative to this application for transfer.

G. A new paragraph 20 should be added to Findings of Fact as follows:

H Uncontradicted evidence by the Applicant and the state watermaster established that there has always been sufficient water and there will always be sufficient water in Timber Creek in order to fully fill water right number 74-00042 owned by the Ellsworths. Protestants expert, Dr. Brockway, acknowledged that if Ellsworths water right through Timber Creek was always filled, there could be no injury to the Protestants.

EXCEPTIONS TO CONCLUSIONS OF LAW

A. Paragraph 5 of proposed Conclusions of Law should be replaced as follows:

The applicants have carried their burden of proof and established that the use of water at the new pivot will not water additional acres beyond the amount now watered at the homesteads.

It is very unclear as to what the hearing officer was attempting to say under the proposed paragraph 5 of conclusions of law. There is no requirement that applicant prove a transfer of equal acres also include a showing that the equal acreage will consume equal to or less than the grounds from which the water has been transferred. Therefore, the only test is acreage, not consumptive use. It is traditional for a user to be allowed to move in a general area the consumptive use from one field to another without having to prove that there might be a slight elevation change or there might be a slight change in cropping patterns and, hence, the consumptive use would be different.

B. Paragraph 7 of proposed Conclusions of Law should be replaced as follows:

Although the applicant's use of water as proposed in the application may decrease the amount of return flow to Timber Creek, in certain reaches, such decrease will not decrease the flow in Timber Creek sufficient to decrease the flows necessary to fully fill water right number 74-00042 owned by Ellsworth. Therefore, because Ellsworth's right will not be injured by the proposed transfer, the Protestants cannot be injured thereby.

The testimony from Mr. Whittaker and the state watermaster was that there has never been a time when the Whittaker water right in question would have been "on" at a time when the Ellsworth's water right would even potentially face a cut in diversion from Big Timber Creek. In fact, the same uncontradicted evidence established that there has never been a time

when the full Timber Creek stream was required to fill the water right of Ellsworth. The state watermaster testified that this event "could not occur". He testified that in all his experience there had never been a time when the Ellsworth right was cut. Protestant's expert even conceded that if these uncontradicted facts were true, there was no injury from the transfer proposed by Applicants.

C. Paragraph 8 of proposed Conclusions of Law should be amended as follows: The
✓ department should approve the application.

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M The Analysis should be reworded to be consistent with the findings of fact and conclusions of law as amended above. The testimony was clear that only 99.2 acres would be benefitted by the second pivot and therefore any overlapping was not an expansion of use and no new consumptive use would be created beyond the said 99.2 acres. Furthermore, even if it were determined that the acreage actually transferred is less than the total pivot area under new pivot, and not covered by an existing pivot, the transfer must be approved for at least the acreage which can actually be transferred rather than an outright denial of the total transfer application.

EXCEPTIONS TO ORDER

The proposed order must be amended or rewritten as follows:

Paragraph two needs to be replaced as follows:

IT IS FURTHER hereby ORDERED that Application for Transfer No. 5244 in the name of James and/or Paula Whittaker is **GRANTED** for the reason that the applicants have established their original right will not be an enlargement in use; there will be no injury to the Protestants herein; the change is consistent with the conservation of water resources

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

RECEIVED

JUN 07 1999

Department of Water Resources
Eastern Region

RECEIVED

JUN 10 1999

Department of Water Resources

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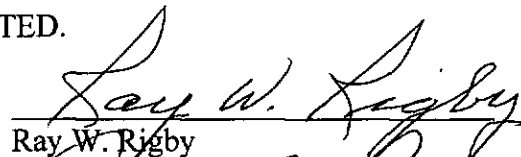
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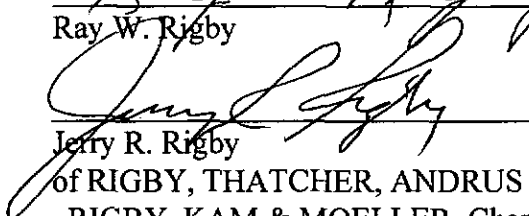
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within the state of Idaho; the change is in the local public interest as defined in Idaho Code Section 42-203A(5), and the new use is a beneficial use, all as set forth in I.C. Sec. 42-222.

DATED this 7th day of June, 1999.

RESPECTFULLY SUBMITTED.


Ray W. Rigby


Jerry R. Rigby

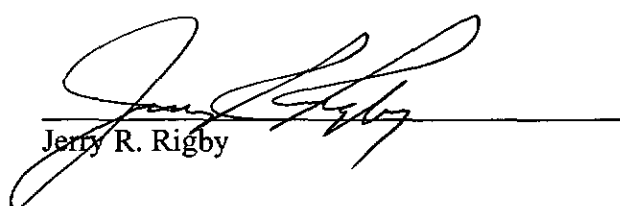
of RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered
Attorneys for Applicants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 7th day of June, 1999, a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid, and facsimile to the following:

Karl J. Dreher
Director of Idaho Dept. of Water Resources
1301 N. Orchard St.
Boise, ID 83702
Fax: 208-327-7866

Kent Foster
West One Bank Bldg.
330 Shoup Ave., 3rd Floor
P.O. Box 50130
Idaho Falls, ID 83405-0130
Fax: 208-523-9518


Jerry R. Rigby

RECEIVED
JUN 10 1999

Department of Water Resources

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

RECEIVED

JUN 07 1999

Department of Water Resources
Eastern Region

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JAN 12 2001

into the Texas Creek drainage. Basically, Applicant's transfer would only help Protestant and not injure her.

The mere fact that injury "might" occur if other events happen in addition to the transfer has been held insufficient by the Idaho Supreme Court to dis-allow a transfer. See *Application of Boyer*, 73 Idaho 152, 248 P.2d 540. Also, even though Applicant believes that it is not applicable, a downstream appropriator does not have an unqualified right to the continuance of return-flow conditions upstream upon a dependence claim. See *Boyer, supra* and *Colthorp, supra*.

Because of the above arguments, Protestant has failed to show injury and therefore her protest should be dismissed.

NO EXPANSION OF USE

The hearing officer incorrectly found that there would be an expansion of use of Applicant's water right if the transfer were granted. Interestingly, he based his decision entirely upon what he believes would be an increase of "consumptive use" (proposed Conclusions of Law, paragraphs 5 and 6). Although the law grants the right of the director to consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right (I.C. Sec. 42-222), it is not intended to and cannot disallow a transfer based upon the rationale and finding of the hearing officer.

Section 42-202B defines consumptive use as "that portion of the annual volume of water **diverted under a water right** that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as

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precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right." (Emphasis Added).

Pursuant to statute, only that portion which is "diverted" can be used to determine consumptive use and not anything that arises naturally. Therefore, because all diversions will be ceased under this transfer, there will be no consumptive use from diversions and therefore the entire 99.2 acres will be deemed dried up.

Furthermore, Applicant, his daughter (who has watered the homesteads) and the watermaster all testified that the entire homesteads property had been watered from actual diversions and not substantially by natural springs as was claimed by Protestant. To base his findings upon the visual inspection of Protestant's expert who spent one day viewing the homesteads instead of those who had watered and worked the property for many years, was grossly against the overwhelming evidence produced by Applicants and their witnesses. This is especially true when Applicant testified that the 99.2 acres intended to be transferred did not include some of the grounds which Dr. Brockway viewed as having been inundated by springs.

As stated above, Applicant testified that all diversions, from the homesteads would cease. Even the diversions of the two springs (unnamed spring) which rise above the actual area being de-watered. The springs would then flow back to Timber Creek. Except for the small amount of bank next to the springs, there would be no place watered that was watered before. The hearing officer was incorrect in believing the testimony established that there was true sub watering in the area being de-watered.

Furthermore, to take the hearing officer's logic to its natural conclusion, one could never transfer water rights. The rain that falls on the de-watered property would be consumptively used on the natural plants which exist there and therefore would not seep into the

JAN 12 2001

ground or run to the stream (ie Timber Creek) and therefore would be an increase of consumptive use. If a creek or river ran past the area being de-watered, there would be some natural plants which would be watered along the banks. The point is that when the legislature added the consumptive use language to the statute, it never intended that this type of logic and scrutiny be used.

Applicants testimony was clear that even though the new pivot is capable of irrigating 105 acres, it overlaps some of the irrigation coverage under an existing Applicants' pivot in the amount of 17 acres. This was even the estimate of Protestant's expert. Therefore the new irrigated ground would be only 88 acres, which is far less than the 99.2 acres which will be de-watered.

Furthermore, assuming *arguendo* that there is an expansion by this application, the amount which is not an expansion should have been granted nonetheless.

The testimony has clearly established that there is no illegal expansion of use for the intended transfer and therefore the finding by the hearing officer was in error. Protestant failed to establish that an expansion would occur from the intended transfer.

CONCLUSION

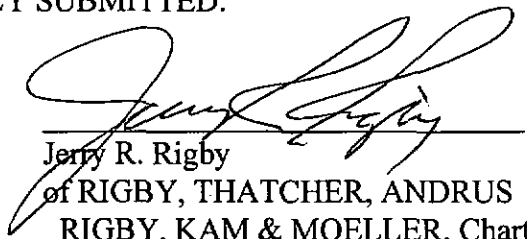
Based upon the foregoing, Applicant respectfully requests that the Director of the Department of Water Resources hear this matter by the transcripts, these briefs and oral argument and that he reverse the hearing officer's proposed Findings of Fact and Conclusions of Law and order that Applicant's transfer be granted.

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DATED this 7th day of June, 1999.

RESPECTFULLY SUBMITTED.



Jerry R. Rigby

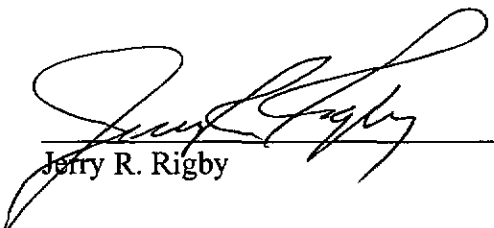
of RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered
Attorneys for Applicants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 7th day of June, 1999, a true and accurate copy
of the foregoing was sent by U.S. Mail, postage prepaid, and facsimile to the following:

Karl J. Dreher
Director of Idaho Dept. of Water Resources
1301 N. Orchard St.
Boise, ID 83702
Fax: 208-327-7866

Kent Foster
West One Bank Bldg.
330 Shoup Ave., 3rd Floor
P.O. Box 50130
Idaho Falls, ID 83405-0130
Fax: 208-523-9518



Jerry R. Rigby

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JAN 12 2001

Law Offices

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FAX Transmission Sheet

Date: June 7, 1999

To: Karl J. Dreher
Kent Foster

Fax No: 208-327-7866
208-523-9518

From: Jerry Rigby

Sent By: sj

Subject: Application for Transfer

You should receive 13 page(s) including this cover sheet.

COMMENTS:

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JAN 12 2001

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

RECEIVED

JUN 07 1999

Department of Water Resources

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 5244 IN THE
NAME OF JAMES AND/OR PAULA
WHITTAKER.

APPLICANTS' EXCEPTIONS TO
PROPOSED MEMORANDUM DECISION
AND ORDER

COMES NOW, JAMES WHITTAKER and PAULA WHITTAKER, by and through
counsel of record and hereby file the following exceptions to the departments proposed
memorandum decision and order, which exceptions are supported by applicants brief submitted
herewith.

EXCEPTIONS TO FINDINGS OF FACT

A. Paragraph 9 of Findings of Fact should be amended as follows:

The third sentence should read as follows:

Water used to irrigate the homesteads originates from a combination of sources
including two diversions from Timber Creek (which diversions divert water to the
vast majority of the homesteads), and a small amount of flow from a few springs
(which have been diverted onto the homesteads).

The proposed sentence is inconsistent with the testimony which established that
most of the irrigation on the homesteads was accomplished by two diversions from Timber
Creek. Although there are perhaps two springs which originate upon the premises, they too are

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diverted if required to irrigate the lands. Otherwise they flow directly back into Timber Creek and do not spread out and water the lands of the homesteads.

(2) The fourth sentence should be entirely deleted. This is completely contrary to the evidence which was produced. There is only a small amount of ground watered from the diverted springs. Otherwise the entire homesteads are watered from the two diversions off of Timber Creek. Furthermore, the water right is a "high water" right in the first place and by its nature is only used in the high water runoff periods of the year. The present proposed findings of fact are an attempt to make it seem as though such a right is by its very nature "invalid" when it clearly is not.

B. Paragraph 11 of Findings of Fact should be amended as follows:

The fourth sentence should be amended as follows: The new pivot is capable of irrigating 105 acres and overlaps irrigation coverage under an existing pivot of the applicant in the amount of 17 acres, for a total of 88 acres of new irrigation.

C. Paragraph 16 of Findings of Fact should be amended as follows:

Although disputed, there was a preponderance of evidence to establish that more than sufficient acres of the 99.2 acres proposed to be dried up by Applicants will in fact be dried up to equal the number of new acres to be watered under the pivots included in the transfer.

The proposed findings of fact is contrary to the evidence. Mr. Whittaker, his daughter, and the state watermaster all testified the diversion and use of water could be terminated as proposed with the exception of a few areas associated with two springs. Furthermore, Mr. Whittaker testified that the "wet areas" associated with those two springs were not a part of the

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WHITTAK.EXC

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99.2 acres that were proposed to be dried up.

D. Paragraph 17 of Findings of Fact should be replaced as follows:

There are approximately 2 springs that arise above the homesteads which are part of the property which shall be dried up.

E. Paragraph 18 of Findings of Fact should be replaced as follows:

Although there was contradictory evidence, there was no proof that water intended to be transferred under this permit would be lost to the system any more that it is in its present diversion. Furthermore, because even the protestant's expert agreed that all non-consumptive water would eventually surface down below at some point, there was no evidence which established any downstream water user would be injured along any reach in which the non-consumed water could even potentially be lost to the system.

F. Paragraph 19 of Findings of Fact should be deleted entirely as not relative to this application for transfer.

G. A new paragraph 20 should be added to Findings of Fact as follows:

Uncontradicted evidence by the Applicant and the state watermaster established that there has always been sufficient water and there will always be sufficient water in Timber Creek in order to fully fill water right number 74-00042 owned by the Ellsworths. Protestants expert, Dr. Brockway, acknowledged that if Ellsworths water right through Timber Creek was always filled, there could be no injury to the Protestants.

EXCEPTIONS TO CONCLUSIONS OF LAW

A. Paragraph 5 of proposed Conclusions of Law should be replaced as follows:

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The applicants have carried their burden of proof and established that the use of water at the new pivot will not water additional acres beyond the amount now watered at the homesteads.

It is very unclear as to what the hearing officer was attempting to say under the proposed paragraph 5 of conclusions of law. There is no requirement that applicant prove a transfer of equal acres also include a showing that the equal acreage will consume equal to or less than the grounds from which the water has been transferred. Therefore, the only test is acreage, not consumptive use. It is traditional for a user to be allowed to move in a general area the consumptive use from one field to another without having to prove that there might be a slight elevation change or there might be a slight change in cropping patterns and, hence, the consumptive use would be different.

B. Paragraph 7 of proposed Conclusions of Law should be replaced as follows:

Although the applicant's use of water as proposed in the application may decrease the amount of return flow to Timber Creek, in certain reaches, such decrease will not decrease the flow in Timber Creek sufficient to decrease the flows necessary to fully fill water right number 74-00042 owned by Ellsworth. Therefore, because Ellsworth's right will not be injured by the proposed transfer, the Protestants cannot be injured thereby.

The testimony from Mr. Whittaker and the state watermaster was that there has never been a time when the Whittaker water right in question would have been "on" at a time when the Ellsworth's water right would even potentially face a cut in diversion from Big Timber Creek. In fact, the same uncontradicted evidence established that there has never been a time

when the full Timber Creek stream was required to fill the water right of Ellsworth. The state watermaster testified that this event "could not occur". He testified that in all his experience there had never been a time when the Ellsworth right was cut. Protestant's expert even conceded that if these uncontradicted facts were true, there was no injury from the transfer proposed by Applicants.

C. Paragraph 8 of proposed Conclusions of Law should be amended as follows: The department should approve the application.

EXCEPTIONS TO ANALYSIS

The Analysis should be reworded to be consistent with the findings of fact and conclusions of law as amended above. The testimony was clear that only 99.2 acres would be benefitted by the second pivot and therefore any overlapping was not an expansion of use and no new consumptive use would be created beyond the said 99.2 acres. Furthermore, even if it were determined that the acreage actually transferred is less than the total pivot area under new pivot, and not covered by an existing pivot, the transfer must be approved for at least the acreage which can actually be transferred rather than an outright denial of the total transfer application.

EXCEPTIONS TO ORDER

The proposed order must be amended or rewritten as follows:

Paragraph two needs to be replaced as follows:

IT IS FURTHER hereby ORDERED that Application for Transfer No. 5244 in the name of James and/or Paula Whittaker is **GRANTED** for the reason that the applicants have established their original right will not be an enlargement in use; there will be no injury to the Protestants herein; the change is consistent with the conservation of water resources

APPLICATION FOR TRANSFER PAGE - 5

WHITTAK.EXC

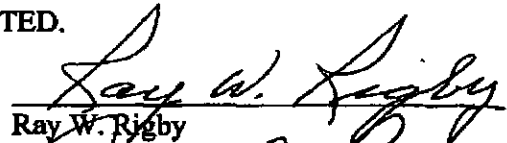
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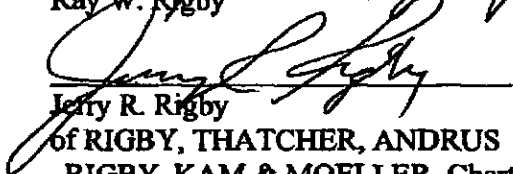
JAN 12 2001

within the state of Idaho; the change is in the local public interest as defined in Idaho Code Section 42-203A(5), and the new use is a beneficial use, all as set forth in I.C. Sec. 42-222.

DATED this 7th day of June, 1999.

RESPECTFULLY SUBMITTED.


Ray W. Rigby


Jerry R. Rigby

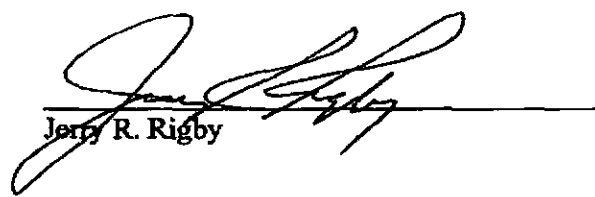
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Jerry R. Rigby

APPLICATION FOR TRANSFER PAGE - 6
WHITTAK.EXC

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JAN 12 2001

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 5244 IN THE
NAME OF JAMES AND/OR PAULA
WHITTAKER.

BRIEF IN SUPPORT OF APPLICANTS'
EXCEPTIONS TO PROPOSED
MEMORANDUM DECISION AND
ORDER

COMES NOW, JAMES WHITTAKER and PAULA WHITTAKER, by and through
counsel of record and hereby file the following brief in support of Applicants' exceptions to the
departments proposed memorandum decision and order.

There are basically two areas of the law which these Petitioners desire to address and
which, coupled with the evidence in the proceeding below, establish Petitioners right to have
their transfer no. 5244 granted. The two areas deal with (1) no injury and (2) no enlargement.

NO INJURY

Initially, it must be recognized that Beva Lue Clark's (the Protestor) claim of injury is not
a direct claim of injury. Her water right, which is located on Texas Creek, is not even on the
same creek as Applicants' water right which is located on Timber Creek. She is not upstream or
downstream of Applicant. From the evidence introduced at the hearing held on Applicant's
transfer application, Protestant and her expert, Dr. Brockway, both conceded that the only way
that Protestant could be injured by granting Applicants' transfer would be if the transfer injured a
third party's water right which has water rights on both Timber Creek and Texas Creek. That
third party is known as the Ellsworth rights Nos. 74-00066 and 74-00067. Said third party is not
a Protestant in this action.

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Basically, the argument of Protestant's claim of injury is that because the Ellsworth's rights are senior to her rights, then if Ellsworth's rights on Timber Creek were in any way reduced, Ellsworth would demand water from Texas Creek earlier than they otherwise would and therefore "potentially" require Protestant to such off her water sooner than she otherwise would.

The testimony of the state watermaster and Mr. Whittaker established that there has always been sufficient waters in Timber Creek to more than fully fill the senior water rights of Ellsworth, even in the worst of years. In fact the state watermaster went so far as to testify that Ellsworth's rights from Timber Creek will always be filled. Add to that the testimony of the state watermaster who testified that at the time Ellsworth's water rights needed to be filled, the high water rights of Applicants are always turned off anyway. In other words, there is absolutely no way that Applicants' water right, either in its present application or in its transferred place of use can affect, in any way, the water rights of Ellsworth. Therefore, because Protestant's claim of injury lives and dies with an injury to Ellsworth's water right, Protestant is absolutely uninjured by her own admission and that of her expert. Protestant's protest should therefore be dismissed and Protestant has no standing to protest Applicant's transfer.

Idaho law is clear that in order to preclude an transfer, the "injury" to other water rights must be substantial, that is "not merely a fanciful injury but a real and actual injury" *Beecher v. Cassia Creek Irrig. Co.*, 66 Idaho 1, 154 P.2d 507 (1944); *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P. 1005 (1945).

Even though the above argument should be the consideration in dismissing Protestant's protest, one other piece of evidence was overlooked by the hearing officer. The proposed transfer actually moves more water from Timber Creek to Texas Creek drainage, thus only helping the flow of Texas Creek when Applicant's water is actually being diverted and beyond as it seeps

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into the Texas Creek drainage. Basically, Applicant's transfer would only help Protestant and not injure her.

The mere fact that injury "might" occur if other events happen in addition to the transfer has been held insufficient by the Idaho Supreme Court to dis-allow a transfer. See *Application of Boyer*, 73 Idaho 152, 248 P.2d 540. Also, even though Applicant believes that it is not applicable, a downstream appropriator does not have an unqualified right to the continuance of return-flow conditions upstream upon a dependence claim. See *Boyer, supra* and *Colthorp, supra*.

Because of the above arguments, Protestant has failed to show injury and therefore her protest should be dismissed.

NO EXPANSION OF USE

The hearing officer incorrectly found that there would be an expansion of use of Applicant's water right if the transfer were granted. Interestingly, he based his decision entirely upon what he believes would be an increase of "consumptive use" (proposed Conclusions of Law, paragraphs 5 and 6). Although the law grants the right of the director to consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right (I.C. Sec. 42-222), it is not intended to and cannot disallow a transfer based upon the rationale and finding of the hearing officer.

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Pursuant to statute, only that portion which is "diverted" can be used to determine consumptive use and not anything that arises naturally. Therefore, because all diversions will be ceased under this transfer, there will be no consumptive use from diversions and therefore the entire 99.2 acres will be deemed dried up.

Furthermore, Applicant, his daughter (who has watered the homesteads) and the watermaster all testified that the entire homesteads property had been watered from actual diversions and not substantially by natural springs as was claimed by Protestant. To base his findings upon the visual inspection of Protestant's expert who spent one day viewing the homesteads instead of those who had watered and worked the property for many years, was grossly against the overwhelming evidence produced by Applicants and their witnesses. This is especially true when Applicant testified that the 99.2 acres intended to be transferred did not include some of the grounds which Dr. Brockway viewed as having been inundated by springs.

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JAN 12 2001

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Furthermore, assuming *arguendo* that there is an expansion by this application, the amount which is not an expansion should have been granted nonetheless.

The testimony has clearly established that there is no illegal expansion of use for the intended transfer and therefore the finding by the hearing officer was in error. Protestant failed to establish that an expansion would occur from the intended transfer.

CONCLUSION

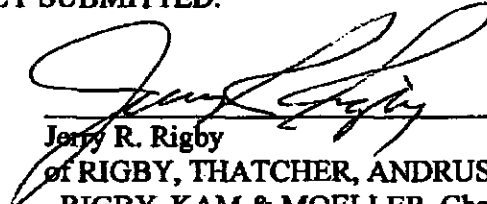
Based upon the foregoing, Applicant respectfully requests that the Director of the Department of Water Resources hear this matter by the transcripts, these briefs and oral argument and that he reverse the hearing officer's proposed Findings of Fact and Conclusions of Law and order that Applicant's transfer be granted.

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JAN 12 2001

DATED this 7th day of June, 1999.

RESPECTFULLY SUBMITTED.

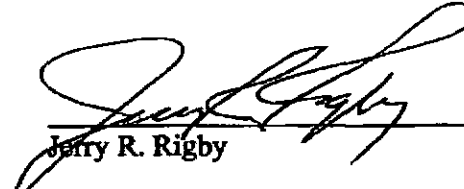

Jerry R. Rigby
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Fax: 208-523-9518


Jerry R. Rigby

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JAN 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

May 17, 1999

KARL J. DREHER
DIRECTOR

RE: In the matter of Application for Transfer No. 5244 in the name of James and/or Paula Whittaker

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) 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 a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

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JAN 12 2001

CERTIFICATE OF SERVICE

Any petition for reconsideration or other motion to the hearing officer shall be served upon all other parties to the proceeding. All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

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

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

Enclosure

c: Skip Jones - Eastern Region

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JAN 12 2001

TRANSFER REVIEW SHEET

(07-98)

Transfer # 5244

Date Reviewed 04-14-99
C28

Right(s) 74-00056 _____
74-01103 _____

☒ WRQ/Split Summary ☒ ^{No Activity} SRBA Status _____ Run POU Comparison Report

B:Change P/D C:Add P/D D:Change P/U E:Change Nature of Use
F:Change Period of Use G:Other H:Change P/D & Add P/D
☒ I:Change P/D & P/U J:Add P/D & Change P/U

Proof of Ownership _____

Transfer ☒ All of Right _____ Portion of Right
Resulting Split(s) NONE

Check Transfer Against Recorded Right Season/Vol. B/3.5

(1) ☒ Priority (2) ☒ Use (3) _____ Season (4) ☒ Rate (5) _____ Volume

(6) _____ Source (7) _____ P/D (8) _____ P/U (9) ☒ Proof/Owner (10) ☒ Map

(11) 74 Water District (12) Yes Pertinent Conditions (13) _____ Expansion
74-W WM Comment Rcvd. 4-27-98 WM/MD

(3) Standard season (4-15 to 10-15) instead of 03-15 to 11-15.

(5) standard vol = $3.5 \times 75 = (262.5 \text{ ac})$ 74-00056

$3.5 \times 24.2 = (84.7 \text{ ac})$ 74-01103

(6) Drop Unnamed Stream as source.

(7) Change P/D

(8) Change P/U - 2 rts = 98.2 total acres (14+24.2) instead of 99.2 on app.*

(10) Application map matches original legals - 2nd map made.

* Acres match original P/U from proposed findings - 75 Acres total.
SRBA claims same as WRS.

Transfer Remarks W57 PP/U each rt.

Conditions R04, R43, R59, T07, T08, T09

Database/Processing Notes

Standard ☒ Non-Standard _____

T Files

Edit remarks T74-00056 when approved

2 Update per Order

"T" Files Update Complete ☒ Approval Form _____ Transfer Memo _____

Database Updated Following Approval _____ Memo/Form Files Deleted _____

Database updated to reflect Final Order denying transfer signed 12-20-99.

5-9-00 C28

WR0749NP
No. T74-00056

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 04/15/99
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	JAMES WHITTAKER	05/01/1910	IRRIGATION	04/15 10/15	2.000 CFS	262.50 AFA
C	PAULA WHITTAKER					
	PO BOX 240					
	LEADORE ID 83464					
	(208) 768-2491					
TOTAL DIVERSION:					2.000 CFS	262.50 AFA

Water Source: BIG TIMBER CREEK

Tributary to: LEMHI RIVER

Stage: DECREED

Point(s) of Diversion: T15N R26E S20 SWNW LEMHI County

Place of use Legal Description for: IRRIGATION

NE				NW				SW				SE								
T	R	S		Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	SUM
15N	26E	21	:	25		25		24		25										99.2
TOTAL ACRES																			99.2	

Pou County: LEMHI

On Order

Conditions of Approval:

- R04 - Use of water under this water right will be regulated by the watermaster of State Water District No. 74W.
- R43 - 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.
- R59 - This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the lands above.
- T07 - The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
- T08 - Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
- T09 - Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.

Remarks: GEN Right 74-00056 is limited to the irrigation of 75.0 acres within the place of use described above in a single irrigation season. Right 74-01103 is limited to the irrigation of 24.2 acres within the place of use described above in a single irrigation season. Approval of Transfer 5244 does not grant any right-of-way or easement for use of a delivery system owned by person(s) other than the right owner. *Delete after approval created.*

Dates: App. Received: Priority Date: 05/01/1910
Proof Due Date: Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

WR0749NP
No. T74-00056

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 04/15/99
PAGE: 2

=====

Misc: Water District Number: 74W Field Exam Fee:

Comments: Date: 04/15/1999 User-ID: PSKAGGS Subject: TRANSFER 5244
 Transfer 5244 changes the point of diversion & place of use under
 Rights 74-00056 & 74-01103.

Audit: 04/06/98 SCOX 04/15/99 PSKAGGS

WR0749NP
No. T74-01103

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 04/15/99
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	JAMES WHITTAKER	11/19/1922	IRRIGATION	04/15 10/15	0.480 CFS	84.70 AFA
C	PAULA WHITTAKER					
	PO BOX 240			TOTAL DIVERSION:	0.480 CFS	84.70 AFA
	LEADORE ID 83464					
	(208) 768-2491					

Water Source: BIG TIMBER CREEK

Tributary to: LEMHI RIVER

Stage: DECREED

Point(s) of Diversion: T15N R26E S20 SWNW LEMHI County

Place of use Legal Description for: IRRIGATION

NE				NW				SW				SE												
T	R	S		NENE	NWNE	SWNE	SENE	:	NENW	NWNW	SWNW	SENW	:	NESW	NWSW	SWSW	SESW	:	NESE	NWSE	SWSE	SESE	:	SUM
				Lt	Ac	Lt	Ac		Lt	Ac	Lt	Ac		Lt	Ac	Lt	Ac		Lt	Ac	Lt	Ac		
15N	26E	21	:	25		25			24		25		:											99.2
																							TOTAL ACRES	99.2

Pou County: LEMHI

Conditions of Approval:

- R04 - Use of water under this water right will be regulated by the watermaster of State Water District No. 74W.
- R43 - 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.
- R59 - This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the lands above.
- T07 - The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
- T08 - Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
- T09 - Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.

Remarks: GEN Right 74-01103 is limited to the irrigation of 24.2 acres in the place of use described above in a single irrigation season. Approval of Transfer 5244 does not grant any right-of-way or easement for use of a delivery system owned by person(s) other than the right owner.

Dates: App. Received: Priority Date: 11/19/1922
Proof Due Date: Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 74W Field Exam Fee:

WR0749NP
No. 174-01103

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 04/15/99
PAGE: 2

=====
Comments: Date: 04/15/1999 User-ID: PSKAGGS Subject: TRANSFER 5244
Transfer 5244 changes the point of diversion & place of use under
Rights 74-00056 & 74-01103.

Audit: 04/15/99 PSKAGGS 04/15/99 PSKAGGS 04/15/99 PSKAGGS

AJ5809NP
No. A74-00056

IDAHO DEPARTMENT OF WATER RESOURCES
ADJUDICATION CLAIM PROFILE REPORT

DATE: 04/15/99
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	F JAMES WHITTAKER	05/01/1910	IRRIGATION	03-15 11-15	2.000 CFS	
C	PAULA J WHITTAKER					
	TWO DOT : RANCH			TOTAL DIVERSION:	2.000 CFS	
	BOX 240					
	LEADORE ID 83464					
	(208) 768-2491					

Water Source: BIG TIMBER CREEK
UNNAMED STREAM

Tributary to: LEMHI RIVER
BIG TIMBER CREEK

Stage: DECREED

Point(s) of Diversion: T14N R26E S06 S07 SWNE NWSE LEMHI County LEMHI County

Place of use Legal Description for: IRRIGATION

NE				NW				SW				SE				
T	R	S	: Lt Ac Lt Ac Lt Ac Lt Ac	:	NENW NWNW SWNW SENW	:	NESW NWSW SWSW SESW	:	NESE NWSE SWSE SESE	:	Lt Ac Lt Ac Lt Ac Lt Ac	:	SUM			
14N	26E	5	:	:	:	:	05	:	:	:	:	:	5.0			
14N	26E	6	:	:	:	:	:	:	34	09	07	18	69.0			
TOTAL ACRES													74.0			

POU County: LEMHI

Conditions of Approval:

- 01E - A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.
- 005 - Use of water under this right is subject to control by the watermaster of State Water District No. .
- 016 - See remarks for additional conditions of approval.

Remarks: GEN TRANS. 3056. THE COMBINED RATE OF DIV. FROM THE 2 SOURCES IDENTIFIED UNDER THIS TRANS. SHALL NOT EXCEED 2.0 CFS.

Dates: Exam Made Date: Verified Date: Objection Filed Date:

Misc: Water District Number: Field Inspection Flag: Presumption Flag:

Audit: 06/08/90 THOMPSON 03/30/95 POST-STD

AJ5809NP
No. A74-01103

IDAHO DEPARTMENT OF WATER RESOURCES
ADJUDICATION CLAIM PROFILE REPORT

DATE: 04/15/99
PAGE: 2

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	F JAMES WHITTAKER	11/19/1922	IRRIGATION	03-15 11-15	0.480 CFS	
C	PAULA J WHITTAKER					
	TWO DOT : RANCH			TOTAL DIVERSION:	0.480 CFS	
	BOX 240					
	LEADORE ID 83464					
	(208) 768-2491					

Water Source: BIG TIMBER CREEK

Tributary to: LEMHI RIVER

Stage: DECREED

Point(s) of Diversion:

T14N R26E S05

SWNW

LEMHI County

Place of use Legal Description for: IRRIGATION

NE				NW				SW				SE												
T	R	S		NENE	NWNE	SWNE	SENE	:	NENW	NWNW	SWNW	SENW	:	NESW	NWSW	SWSW	SESW	:	NESE	NWSE	SWSE	SESE	:	SUM
				Lt	Ac	Lt	Ac		Lt	Ac	Lt	Ac		Lt	Ac	Lt	Ac		Lt	Ac	Lt	Ac		
---	---	---	:	---	---	---	---	:	---	---	---	---	:	---	---	---	---	:	---	---	---	---	:	---
14N	26E	5	:					:	04-10		08		:					:					:	18.0
15N	26E	32	:					:					:			06		:					:	6.0
																							TOTAL ACRES	24.0

POU County: LEMHI

Remarks: GEN AC. IRR.=24.2.
P/U H.E.S. 657.

Dates: Exam Made Date:

Verified Date:

Objection Filed Date:

Misc: Water District Number:

Field Inspection Flag:

Presumption Flag:

Audit: 06/11/90 THOMPSON 03/30/95 POST-STD

WR0725NP
(OD-725)

IDAHO DEPARTMENT OF WATER RESOURCES
I-R-S PLACE OF USE 1/4 1/4 COMPARISON REPORT

DATE: 04/15/99
PAGE: 1

(WATER RIGHT NUMBERS THAT BEGIN WITH AN '**' ARE ADJUDICATION CLAIMS)
(QUARTER-QUARTERS WITH A '?' HAVE DIFFERENT ACREAGE AMOUNTS--CHECK THE DATA BASE RECORDS)

		NE				NW				SW				SE				
WR-NUMBER	SOURCE	NE		NW		SW		SE		NE		NW		SW		SE		SUM
		Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	

T14N R26E S 5																		
7400056	BIG TIMBER :																	5
A7400056	BIG TIMBER :																	5
7401103	BIG TIMBER :																	18
A7401103	BIG TIMBER :																	18
NO MAPPING INFO AVAILABLE																		

T14N R26E S 6																		
7400056	BIG TIMBER :																	69
A7400056	BIG TIMBER :																	69
NO MAPPING INFO AVAILABLE																		

T15N R26E S 21 25 25 24.2 25 Proposed P/U - No Overlaps

NO MATCHES FOR THIS POU IN WR-POU
NO MATCHING IRRIGATION RIGHTS WERE FOUND FOR THIS POU

--86 MAP-- C59Q-T 82 : : : : 8 : 8

T15N R26E S 32																		
7401103	BIG TIMBER :																	6
A7401103	BIG TIMBER :																	6
NO MAPPING INFO AVAILABLE																		

No other rights overlap original P/U

WATER RIGHT NO.	NAME	OWNER	PRIORITY	DATE	STG/STS	SOURCE	USE DESC	SYSTEM
74-00056	WHITTAKER, FLOYD J.	C	05/01/1910	D/	BIG TIMBER CREEK UNNAMED STREAM	IRR		WR
T74-00056	WHITTAKER, JAMES WHITTAKER, PAULA	C C	05/01/1910	D/	BIG TIMBER CREEK	IRR		WR

A74-00056	WHITTAKER, F JAMES WHITTAKER, PAULA J	C C	05/01/1910	D/	BIG TIMBER CREEK UNNAMED STREAM	IRR		AJ

WR0631NP

IDAHO DEPARTMENT OF WATER RESOURCES
PREFIX/SPLIT QUERY

DATE: 04/14/99
TIME: 15:57:46
PAGE: 1

WATER RIGHT NO.	NAME	OWNER	PRIORITY DATE	STG/STS	SOURCE	USE DESC	SYSTEM
74-01103	WHITTAKER, FLOYD J.	C	11/19/1922	D/	BIG TIMBER CREEK	IRR	WR
A74-01103	WHITTAKER, F JAMES	C	11/19/1922	D/	BIG TIMBER CREEK	IRR	AJ
	WHITTAKER, PAULA J	C					

TS244

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

James Whittaker
P.O. Box 240
Leadore, ID 83464

MICROFILMED
JAN 4 2 1994

4a. Article Number

2555 922 115

4b. Service Type

- ☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☒ Return Receipt for Merchandise ☐ COD

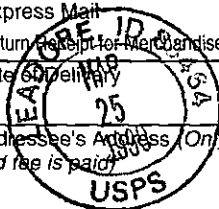
7. Date of Delivery

8. Addressee's Address (Only if requested and fee is paid)

5. Received By: (Print Name)

6. Signature: (Addressee or Agent)

X Paula Whittaker



Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT OFFICE
900 N. SKYLINE DR.
IDAHO FALLS, IDAHO 83402

MICROFILMED
JAN 12 2001

RECEIVED

MAR 26 1999

Department of Water Resources
Eastern Region

(HAROLD W. JONES)

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Beva Lue Clark
PO Box 8
Leadore ID 83464

4a. Article Number

2 555 922 113

4b. Service Type

- ☒ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

3.24.99

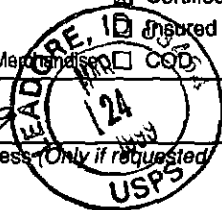
5. Received By: (Print Name)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature: (Addressee or Agent)

X Beva Clark

MICROFILMED
JAN 12 1999



Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

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MAR 25 1999

Department of Water Resources
Eastern Region

DEPARTMENT OF WATER RESOURCES

EASTERN DISTRICT OFFICE

900 N. SKYLINE DR.

IDAHO FALLS, IDAHO 83402

MICROFILMED

JAN 12 2001

TRANSFER #5243 & 5244



Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Ray Rigby
PO Box 250
Rexburg ID 83440

4a. Article Number

2 555 922 111

4b. Service Type

- ☒ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

3 24 99

5. Received By: (Print Name)

Marsha Maharry

6. Signature: (Addressee or Agent)

X Marsha Maharry

8. Addressee's Address (Only if requested and fee is paid)

Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE



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USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

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MAR 25 1999

Department of Water Resources
Eastern Region

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JAN 12 2001

DEPARTMENT OF WATER RESOURCES

EASTERN DISTRICT OFFICE

900 N. SKYLINE DR.

IDAHO FALLS, IDAHO 83402

TRANSFER # 5243 & 5244



Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Kent Foster
Holden Kidwell Hahn
PO Box 50130
Idaho Falls ID 83405

4a. Article Number

Z 555 922 114

4b. Service Type

- ☐ Registered ☒ Certified
☒ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

1999 2 3 1999

5. Received By: (Print Name)

K. McLean

6. Signature (Addressee or Agent)

X [Signature]

8. Addressee's Address (Only if requested and fee is paid)

Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE



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Postage & Fees Paid
USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

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MAR 21

Department of Water Resources
Eastern Region

DEPARTMENT OF WATER RESOURCES

EASTERN DISTRICT OFFICE

900 N. SKYLINE DR.

IDAHO FALLS, IDAHO 83402

MICROFILMED

JAN 12 2001

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

James Whittaker
PO Box 240
Leadore ID 83464

4a. Article Number

Z 555 922 112

4b. Service Type

- ☐ Registered ☒ Certified
☐ Express Mail ☐ Insured
☐ Return Receipt for Merchandise ☐ COD

7. Date of Delivery

3.23.99

5. Received By: (Print Name)

PAULA WHITTAKER

8. Addressee's Address (Only if requested and fee is paid)

6. Signature: (Addressee or Agent)

X Paula Whittaker

MICROFILM
JAN 1 1999

Thank you for using First-Class Mail Service.

UNITED STATES POSTAL SERVICE



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USPS
Permit No. G-10

• Print your name, address, and ZIP Code in this box •

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MAR 24 1999

Department of Water Resources
Eastern Region

DEPARTMENT OF WATER RESOURCES

EASTERN DISTRICT OFFICE

900 N. SKYLINE DR.

IDAHO FALLS, IDAHO 83402

NOT RECORDED
MAR 2 2001

TRANSFER # 5243 & 5244

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

RECEIVED
MAR 31 1999
Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER IN THE
APPLICATION FOR TRANSFER NO.
5243 AND 5244 IN THE NAME OF
JAMES OR PAULA WHITTAKER

WITNESS AND EXHIBIT LIST

Protestants intend to call the following witnesses and to introduce the following exhibits at the hearing of this matter scheduled for April 7, 1999:

WITNESS LIST

Dr. Charles E. Brockway- Dr. Brockway is prepared to testify from his personal inspection and examination of relevant data and information that he expects there will be an expansion of acres actually receiving and consumptively using water as a result of transfer no. 5244 because, of the 99.2 acres proposed to be dried up by the transfer, at least 30 is effectively sub-irrigated from the existing creek and spring flows and so, some 30 acres of pasture

MICROFILMED
JAN 12 2001

included within the place of use will continue to produce grass much the same as it presently does. In addition, Dr. Brockway will testify that diversion of 2.48 cfs through the High Ditch will experience a good deal (30% or more) of transmission loss. The water which seeps through the bottom of the ditch will not reenter either the Big Timber Creek or the Texas Creek surface systems until at or below Leadore which effectively deprives both of those streams of the amount of water lost to seepage. Since the protestant's right on Texas Creek is junior to most of the other water users, and since Big Timber Creek is used to supplement certain of those senior rights, to the extent such senior rights are shorted, the call will be made on the junior Clark priority and reduce the Clark's water right.

Dr. Brockway will also testify that with respect to transfer 5243, in addition to other errors and discrepancies in the application for transfer, there is approximately 30 acres proposed to be dried up so that the new land can be irrigated. The land to be dried up is virtually in the center of a wet meadow area and once again cannot physically be dried up in the sense that the grass will not continue to grow and utilize water. This will effectively constitute an enlargement in the use of the water right. The consumptive use of the water will be increased in this drainage by as much as a half cubic foot per second, and once again, because the Clarks have the junior priority on Texas Creek, the reduction in water supply will directly affect their right.

EXHIBIT LIST

Protestant's Exhibit 1: Large topographical map made up of portions of USGS quadrangle maps of Sheep Horn Peak, Purcell Spring, West of Leadore and Leadore (copies have not been furnished to IDWR or the applicants because the map has not yet been assembled on the board and is too large to reproduce.)

MICROFILMED

JAN 12 2001

Protestant's Exhibit 2: Geologic report prepared by PMA Engineering for Lemhi Irrigation District dated February 1, 1995.

Protestant's Exhibit 3: US Geological survey map no. GQ-733 prepared by Edward T. Ruppel in 1968.

Protestant's Exhibit 4: Photocopy of USDA map of Big Timber Creek area to be dried up under Transfer no. 5244 taken from records of IDWR.

Protestant's Exhibit 5: Orthophotoquad map-Leadore SW- obtained from Salmon National Forest Leadore Ranger District.

Protestant's Exhibit 6: Set of five colored photographs of Whittaker property on Big Timber Creek showing land currently irrigated.

Protestant's Exhibit 7: Photograph of upper diversion on Big Timber Creek.

Protestant's Exhibit 8: Photograph of weir in High Ditch.

Protestant's Exhibit 9: Photograph showing portion of High Ditch.

Protestant's Exhibit 10: Current meter calculations for measurements taken by Dr. Charles E. Brockway on Whittaker ditch from Big Timber Creek dated July 29, 1998 (2 pages).

Protestant's Exhibit 11: USDA aerial photograph of area where existing pivot and proposed new pivot under 5244 are located.

Protestant's Exhibit 12: Computer enhanced photo of ASCS aerial photo showing location of existing and proposed pivots.

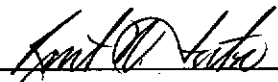
Protestant's Exhibit 13: Orthophotoquad map of Purcell Springs area-Leadore SE-obtained from Salmon National Forest, Leadore Ranger District.

Protestant's Exhibit 14: Computer enhanced copy of ASCS aerial photo with proposed pivots shown.

Protestant's Exhibit 15: Combination of two USDA aerial photos dated July 18, 1995 showing Purcell Springs area.

Protestant's Exhibit 16: Combination of two photographs taken from the hill to the South and East of Purcell Spring giving a panoramic view of area containing new pivot and area to be dried up.

Dated this 31st day of March, 1999.



Kent W. Foster

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 31st day of March, 1999.

DOCUMENT SERVED: WITNESS AND EXHIBIT LIST

PARTIES SERVED:

Jerry Rigby, Esq.
RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER
25 North 2nd East
Rexburg, ID 83440

[Hand Delivery]

Idaho Department of Water Resources
900 North Skyline Drive
Idaho Falls, ID 83402

[Hand Delivery]



Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

G:\WPDATA\KWF\6061\WITNESS.LST:kmc

Jerry R. Rigby, Esq.
 RIGBY, THATCHER, ANDRUS,
 RIGBY, KAM & MOELLER, *Chartered*
 Attorneys at Law
 25 North Second East
 Rexburg, Idaho 83440
 Telephone: 208-356-3633

Attorneys for Applicant

BEFORE THE DEPARTMENT OF WATER RESOURCES
 OF THE STATE OF IDAHO

IN THE MATTER IN THE APPLICATION	)	Case No.
FOR TRANSFER NO. 5243 AND 5244 IN	)	
THE NAME OF JAMES OR PAULA	)	WITNESS AND EXHIBIT LIST
WHITTAKER.	)	
_____	)	

COMES NOW Applicants James and Paula Whittaker, by and through counsel of record and hereby declare that they intend to call the following witnesses and to introduce the following exhibits at the hearing of this matter scheduled for April 7, 1999 at the Department of Water Resources, Idaho Falls, Idaho:

WITNESS LIST

1. Jack Barnett: Barnett Intermountain Water Consulting, 106 W. 500 S., Suite 101, Bountiful, Utah. Mr. Barnett will testify as to all aspects of the two applications for transfer.
2. James Whittaker: Applicant. Mr. Whittaker will testify as to all aspects of the two applications for transfer.
3. April Hawkes: Daughter Hamilton Montana
4. Dan Smith: Water master over the area which are affected by the two applications. Mr. Smith will testify as to his knowledge of the area, the water rights affected and the parcels to which the water is being transferred as well as from which the water is being transferred.
5. Curt Bird: a neighbor and water user. Mr Bird is expected to testify as to his personal

JAN 12 2001

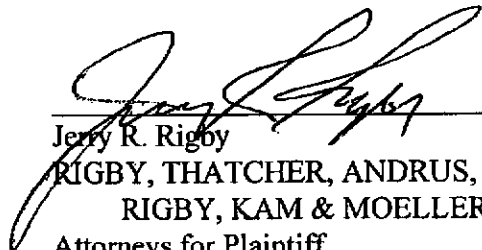
knowledge of the water use in the area, the creeks, ditches and the parcels to which the water is being transferred as well as from which the water is being transferred.

EXHIBIT LIST

Applicants intend to introduce the following exhibits at the hearing on this matter:

- A. The maps created by Mr. Jack Barnett of application nos. 5243 and 5244 previously produced to the department and opposing counsel at the pretrial hearing upon this matter.
- B. Maps created by Applicant showing the original place of use together with the intended place of use (some of which were produced to the department and opposing counsel at the pretrial hearing upon this matter).
- C. Photos taken by Applicant showing the original place of use and the intended place of use.
- D. SCS soil maps of the original place of use and the intended place of use.

Dated this 2nd day of April, 1999.


Jerry R. Rigby
RIGBY, THATCHER, ANDRUS,
RIGBY, KAM & MOELLER, *Chartered*
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 2nd day of April, 1999, a true and accurate copy of the foregoing was sent by facsimile to the following:

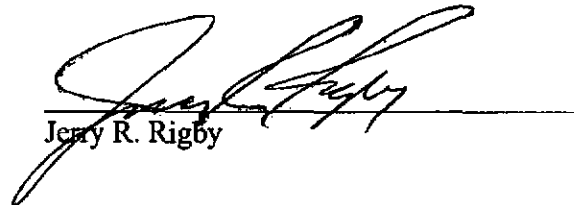
Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
330 Shoup Ave. Third Floor
Idaho Falls, ID 83405
Fax No. 523-9518

APPLICANTS' WITNESS & EXHIBIT LIST - Page 2
WHITTAKER.WEL

MICROFILMED

JAN 12 2001

Idaho Department of Water Resources
900 North Skyline Drive
Idaho Falls, ID 83402
Fax No. 525-7177



Jerry R. Rigby

APPLICANTS' WITNESS & EXHIBIT LIST - Page 3
WHITTAKER.WEL

MICROFILMED

JAN 12 2001

Law Offices

***RIGBY, THATCHER, ANDRUS
RIGBY, KAM & MOELLER, Chartered***

*Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam
Gregory W. Moeller*

*P.O. Box 250
25 North Second East
Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: rexlaw@srv.net*

FAX Transmission Sheet

Date: April 2, 1999
To: Department of Water Resources
Fax No: 525-7177
From: Jerry Rigby
Sent By: jrr
Subject: Witness & Exhibit List for Transfer No. 5243 & 5244

You should receive 4 page(s) including this cover sheet.

COMMENTS:

Attached please find Applicants witness & exhibit list for Transfer Application Nos. 5243 & 5244, please file the same in the respective files. Thank you, Jerry.

If transmission was incomplete or not legible, please call the sender at 208-356-3633.

CONFIDENTIALITY NOTICE: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the US Postal Service. Thank you.

MICROFILMED
JAN 12 2001

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

**IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5243 AND 5244 IN THE)
NAME OF JAMES OR PAULA WHITTAKER)**

**NOTICE OF
HEARING**

On March 30, 1998, application for transfer No. 5243 and 5244 were filed in the name of James or Paula Whittaker.

On May 4, 1998 application No. 5243 and 5244 were protested by Beva Lue Clark.

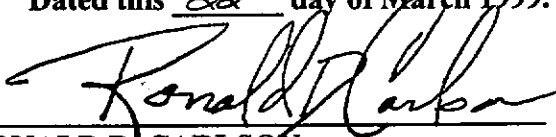
The Department held a 2nd prehearing conference on March 15, 1999.

The Department has scheduled the matter for a hearing at 9:30 a.m. on April 7, 1999, at the Idaho Department of Water Resources office at 900 N. Skyline Drive Ste A, Idaho Falls, ID in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources. The hearing officer will be Glen Saxton.

If you plan to offer exhibits for the record, note that IDAPA Rule of Procedure 37.01.01606 requires that you provide a copy of exhibits to each party and to the presiding officer.

The hearing will be conducted in a facility, which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within ten (10) days prior to the conference.

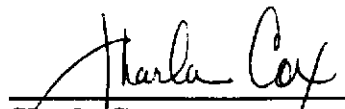
Dated this 22nd day of March 1999.



RONALD D. CARLSON
Regional Manager

MICROFILMED
JAN 12 2001

I hereby certify that on the 22ND day of March 1999, I mailed a true and correct copy, postage prepaid, of this document to the applicant (s) and protestant (s) listed below:



Sharla Cox
Administrative Assistant

Certified

Ray Rigby
PO Box 250
Rexburg ID 83440

James Whittaker
PO Box 240
Leadore ID 83464

Beva Lue Clark
PO Box 8
Leadore ID 83464

Kent Foster
Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls ID 83405

MICROFILMED
JAN 12 2001

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5243 AND 5244 IN THE)
NAME OF JAMES OR PAULA WHITTAKER)

NOTICE OF
HEARING

On March 30, 1998, application for transfer No. 5243 and 5244 were filed in the name of James or Paula Whittaker.

On May 4, 1998 application No. 5243 and 5244 were protested by Beva Lue Clark.

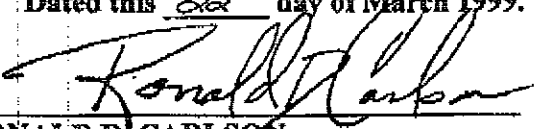
The Department held a 2nd prehearing conference on March 15, 1999.

The Department has scheduled the matter for a hearing at 9:30 a.m. on April 7, 1999, at the Idaho Department of Water Resources office at 900 N. Skyline Drive Ste A, Idaho Falls, ID in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources. The hearing officer will be Glen Saxton.

If you plan to offer exhibits for the record, note that IDAPA Rule of Procedure 37.01.01606 requires that you provide a copy of exhibits to each party and to the presiding officer.

The hearing will be conducted in a facility, which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within ten (10) days prior to the conference.

Dated this 22ND day of March 1999.

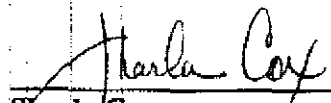

RONALD D. CARLSON
Regional Manager

NOTICE OF HEARING CONFERENCE 1

MICROFILMED

JAN 12 2001

I hereby certify that on the 22ND day of March 1999, I mailed a true and correct copy, postage prepaid, of this document to the applicant (s) and protestant (s) listed below:


Sharla Cox
Administrative Assistant

Certified

Ray Rigby
PO Box 250
Rexburg ID 83440

James Whittaker
PO Box 240
Leadore ID 83464

Beva Lue Clark
PO Box 8
Leadore ID 83464

Kent Foster
Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls ID 83405

NOTICE OF HEARING CONFERENCE 2

MICROFILMED

JAN 12 2001

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

**IN THE MATTER OF APPLICATION FOR)
THE TRANSFER NO. 5243 AND 5244 IN THE) NOTICE OF
NAME OF JAMES OR PAULA WHITTAKER) PREHEARING CONFERENCE**

On March 30, 1998, applications for transfer No. 5243 and 5244 were filed in the name of James or Paula Whittaker. On May 4, 1998 transfer No. 5243 and 5244 were protested by Beva Lue Clark.

The Department has scheduled the matter for a prehearing conference at 10:00 a.m. on March 15, 1999, at the Idaho Dept of Water Resources in Idaho Falls, ID in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources.

Agenda items for this prehearing conference will include:

1. Identify spokesman and/or counsel representing the protestant.
2. Review of the application.
3. Identify issues of protest.
4. Designate date for identifying witnesses.
5. Designate target date for conducting administrative hearing if resolution is not possible during the prehearing conference.

The hearing will be conducted in a facility, which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within ten

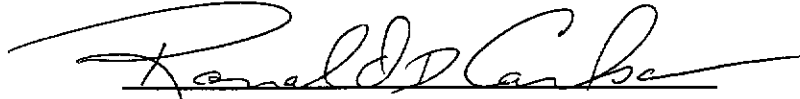
NOTICE OF PREHEARING CONFERENCE 1

MICROFILMED

JAN 12 2001

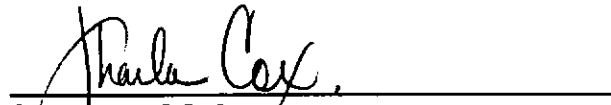
(10) days prior to the conference.

Dated this 25th day of February 1999.



RONALD D. CARLSON
Regional Manager

I hereby certify that on the 24th day of February 1999, I mailed a true and correct copy, postage prepaid, of this document to the applicant(s) and protestant(s) listed below:


SHARLA COX
Senior Secretary

CERTIFIED

James or Paula Whittaker
PO Box 240
Leadore ID 83464

Beva Clark
PO Box 8
Leadore ID 83464

Ray Rigby, Attorney
PO Box 250
Rexburg ID 83440

Kent Foster, Attorney
PO Box 50130
Idaho Falls ID 83405

NOTICE OF PREHEARING CONFERENCE 2

MICROFILMED
JAN 12 2001

TO: TRANSFER APPLICATION NO.'S 5243 AND 5244 (WHITTAKER)

FROM: NORM YOUNG

DATE: January 6, 1999

RE: TELEPHONE CONVERSATIONS WITH JAMES WHITTAKER

Mr. Whittaker called on January 4, 1999, asking if there was anyway to expedited a decision on these protested matters. Don Barnett had told him that there was a way to avoid a hearing under some conditions. Skip Jones then talked with Barnett and determined that he was thinking of an informal conference. Skip suggested that Barnett follow through by contacting the attorneys to see if they would agree to a conference.

I relayed this information to Mr. Whittaker this morning. He is willing to try the conference route, but will want a hearing soon. He is aware that the ball is in his court to advise us that his consultant is prepared for hearing. I assured him that we would set a hearing or a conference quickly when notified that the parties were ready.

Skip: I suggest that a written inquiry be sent soon from the region to all involved to explore timing of a conference or hearing.

c. Skip Jones

MICROFILMED

JAN 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - Fax (208) 525-7177

EASTERN REGION

May 5, 1998

JAMES & PAULA WHITTAKER
PO BOX 240
LEADORE ID 83464

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RECEIVED

MAY 11 1998

Department of Water Resources

RE: Application for Transfers No.: 5243 AND 5244

Dear Mr. Whittaker:

Enclosed please find a copy of the protest filed against the above referenced application for transfer of a water right. You should be aware that the following are the items we can consider at a conference and/or hearing in either approving or denying an application for transfer:

- 1) Are other water rights injured by the transfer?
- 2) Does the change constitute enlargement in the use of the original water right?
- 3) Is the change consistent with the conservation of water resources within the state of Idaho?
- 4) Does the change conflict with the local public interest?

The applicant must be prepared to present evidence and/or testimony addressing each of the four items should an additional hearing be necessary. You will be notified at a later date as to the time and place set for conference and/or hearing.

If we may be of further assistance, please contact us.

Respectfully submitted,

HAROLD W. JONES
Water Rights Supervisor

HWJ/sc

enclosures

cc: IDWR - State Office

MICROFILMED

JAN 12 2001

~ Celebrating Our Centennial Year of Service to Idaho 1895-1995 ~

Receipt # E02409

Leadore ID.
May 1, 1998

Karl J. Dreher-Dir.
Idaho Dept. of Water Resources
900 No. Skyline Dr.
Idaho Falls, Idaho 83402

Dear Mr. Dreher;

I am submitting this letter of protest to you in accordance to instructions in the April 16 and 23, 1998 issue of the Recorder Herald, published at Salmon ID. I am protesting change of water rights No. T5244 by James and/or Paula Whittaker, P.O. Box 240, Leadore, ID 83464.

My protest is based on the following facts: (1) Shrinkage will be much greater due to evaporation and shrinkage in the ditch carrying the water to the area to be irrigated. (2) Sprinkler irrigation loses more moisture due to evaporation and the ground is not soaked down as far, thus no sub or return flow to the creek. (3) When this water is taken out of Timber Creek and ^{there is} no return flow, the Ellsworth rights are low, then Ellsworth can claim water out of Texas Creek ahead of any others. (4) With little or no return flow, my water right is liable to be left without enough water to fill it.

Respectfully,

Beva Lue Clark

Beva Lue Clark
P.O. Box 8
Leadore, ID 83464

Copy

James & Paula

P.O. Box 240

Leadore, ID 83464

RECEIVED

MAY 04 1998

Department of Water Resources
Eastern Region

MICROFILMED

JAN 12 2001

Receipt # E024091

Leadore *ID*
May 1, 1998

Karl J. Dreher-Dir.
Idaho Dept. of Water Resources
900 No. Skyline Dr.
Idaho Falls, Idaho 83402

Dear Mr. Dreher;

I am submitting this letter of protest to you in accordance to instructions in the April 25, 1998 issue of the Recorder Herald, published at Salmon ID. I am protesting change of water rights No. T5243 by James and/or Paula Whittaker, P.O. Box 240, Leadore, ID 83464.

The reason for protest is that the use of water is further from Texas Creek thus, more evaporation and shrinkage in the longer ditch route. Also it is my understanding that this water will be used in sprinkler irrigation causing more evaporation and less water being absorbed into the ground and consequently less return flow to Texas Creek. As any one knows, the further from the creek you put water, the less will return to the creek.

Return flow in the Lemhi Valley streams is what enables so much production.

My water right will be in grave jeopardy if these practices are allowed.

Sincerely,

Beva Lue Clark

Beva Lue Clark
P.O. Box 8
Leadore, ID 83464

*Copy -
James & Paula Whittaker
P.O. Box 240
Leadore, ID 83464*

MICROFILMED
JAN 12 2001

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5243 AND 5244 IN THE) NOTICE OF
NAME OF JAMES AND/OR PAULA WHITTAKER) PREHEARING CONFERENCE

On March 30, 1998, application for transfer No. 5243 and 5344 was filed in the name of James and/or Paula Whittaker.

On May 4, 1998 application No. 5243 and 5244 was protested by Beva Lue Clark.

The Department has scheduled the matter for a prehearing conference at 9:30 a.m. on June 23, 1998, at the Senior Citizens Center in Mud Lake, ID in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources.

Agenda items for this prehearing conference will include:

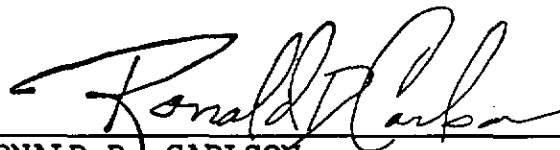
1. Identify spokesman and/or counsel representing the protestant.
2. Review of the application.
3. Identify issues of protest.
4. Designate date for identifying witnesses.
5. Designate target date for conducting administrative hearing if resolution is not possible during the prehearing conference.

NOTICE OF PREHEARING CONFERENCE 1

MICROFILMED
JAN 12 2001

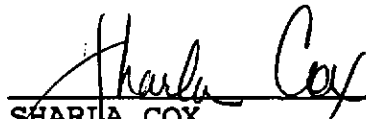
The hearing will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within ten (10) days prior to the conference.

Dated this 11th day of June 1998.



RONALD D. CARLSON
Regional Manager

I hereby certify that on the 11th day of June 1998, I mailed a true and correct copy, postage prepaid, of this document to the applicants (s) and protestant (s) listed below:



SHARLA COX
Secretary

Certified

JAMES AND/OR PAULA WHITTAKER
PO BOX 240
LEADORE ID 83464

BEVA LUE CLARK
PO BOX 8
LEADORE ID 83464

**AMENDED NOTICE OF
PROPOSED CHANGE OF A
WATER RIGHT NO. T5244**

Notice is hereby given that James and/or Paula Whittaker, PO Box 240, Leadore, ID 83464, has applied to the Department of Water Resources to change place of use of the waters of Big Timber Creek tributary to Lemhi River. The rights sought to be changed are evidenced by licenses and recorded as follows:

License No.: 74-00056

Source: Big Timber Creek

Amount: 2.0 cfs

Priority: 05/01/1910

Point(s) of Diversion: NWSE SEC
07 T14N R26E, LEMHI COUNTY

The water is used for irrigation of
75 acres from 04/01 to 11/01 within SEC
5, 6, 7, T14N R26E, B.M.

License No.: 74-01103 Source: Big
Timber Creek

Amount: 0.48 Priority: 11/19/1922

Point(s) of Diversion: SWNW SEC
05 T14N R26E, LEMHI COUNTY The
water is used for irrigation of 24 acres
from 03/15 to 11/15 within SEC 5 T14N,
SEC 32 T15N, R26E, B.M.

TO BE CHANGED AS FOLLOWS:

The applicant intends to change the
point of diversion to the SWNW SEC
20 T15N R26E and the place of use to
99.2 acres in the NE 1/4 SEC 21 T15N
R26E, B.M.

Any protests against approval of
the proposed change must be filed
with the Idaho Department of Water
Resources, 900 N Skyline Dr., Idaho
Falls, ID 83402, together with a protest
fee of \$25 on or before May 11, 1998.
The protestant must also send a copy
of the protest to the applicant.

KARL J. DREHER

Director

Published in The Recorder Herald
on April 23 and 30, 1998. 4-23-2tc

Affidavit of Publication

STATE OF IDAHO

County of Lemhi

ss.

RICKY G. HODGES being first duly sworn, deposes and says he is one of the publishers (printers) of The Recorder Herald, a newspaper published weekly at Salmon, Lemhi County, Idaho, and of general circulation therein. That the NOTICE OF PROPOSED WATER T5244

a true printed copy of which is attached to the margin hereof, has been and was correctly printed and published in the regular and entire issue of every number of said newspaper and not in any supplement thereof or thereto for Two(2) consecutive issues, commencing with the issue dated 4-23-1998 and ending with the issue dated 4-30-1998

STATE OF IDAHO

County of Lemhi

ss.

On this 30th day of April in this year of 1998 before me, A Notary Public, personally appeared RICKY G. HODGES, known or identified to me to be the person whose name subscribed to the within instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that he executed the same.

Ricky G. Hodges
Notary Public for Idaho

Residing At Salmon, Idaho

My Commission expires: 9-21-2001

Publication Fee \$ 63.36

Account No. 630

MICROFILMED
JAN 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - Fax (208) 525-7177

EASTERN REGION

May 5, 1998

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

JAMES & PAULA WHITTAKER
PO BOX 240
LEADORE ID 83464

RE: Application for TransferS No.: 5243 AND 5244

Dear Mr. Whittaker:

Enclosed please find a copy of the protest filed against the above referenced application for transfer of a water right. You should be aware that the following are the items we can consider at a conference and/or hearing in either approving or denying an application for transfer:

- 1) Are other water rights injured by the transfer?
- 2) Does the change constitute enlargement in the use of the original water right?
- 3) Is the change consistent with the conservation of water resources within the state of Idaho?
- 4) Does the change conflict with the local public interest?

The applicant must be prepared to present evidence and/or testimony addressing each of the four items should an additional hearing be necessary. You will be notified at a later date as to the time and place set for conference and/or hearing.

If we may be of further assistance, please contact us.

Respectfully submitted,

HAROLD W. JONES
Water Rights Supervisor

HWJ/sc

enclosures

cc: IDWR - State Office

MICROFILMED

JAN 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - Fax (208) 525-7177

EASTERN REGION

PHILIP E. BATT
GOVERNOR

May 5, 1998

KARL J. DREHER
DIRECTOR

BEVA LUE CLARK
PO BOX 8
LEADORE ID 83464

RE: Applications for Transfer No.s 5243 and 5244

Dear Ms. Clark:

This letter acknowledges receipt of the protests filed by you against the above referenced applications for transfer. The following are the principle items considered by the Department at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?
2. Does the change constitute enlargement in the use of the original right?
3. Is the change consistent with the conservation of water resources within the state of Idaho?
4. Does the change conflict with the local public interest?

The protestant must be prepared to present proof of the allegations involving one or more of the items. You will be notified at a later date as to the time and place set for conference and/or hearing.

In addition, Rule 302 of the Department's Rules of Procedure requires a protestant to send a copy of the protest to the applicant in question. The address is as follows:

JAMES & PAULA WHITTAKER
PO BOX 240
LEADORE ID 83464

If we may be of further assistance, please contact us.

Respectfully submitted,

HAROLD W. JONES
Water Rights Supervisor

HWJ/sc

MICROFILMED

JAN 12 2001

Receipt # 1202409

Leadore ID .
May 1, 1998

Karl J. Dreher-Dir.
Idaho Dept. of Water Resources
900 No. Skyline Dr.
Idaho Falls, Idaho 83402

Dear Mr. Dreher;

I am submitting this letter of protest to you in accordance to instructions in the April 16 and 23, 1998 issue of the Recorder Herald, published at Salmon ID. I am protesting change of water rights No. T5244 by James and/or Paula Whittaker, P.O. Box 240, Leadore, ID 83464.

My protest is based on the following facts: (1) Shrinkage will be much greater due to evaporation and shrinkage in the ditch carrying the water to the area to be irrigated.

(2) Sprinkler irrigation loses more moisture due to evaporation and the ground is not soaked down as far, thus no sub or return flow to the creek. (3) When this water is taken out of Timber Creek and ^{there is} no return flow, the Ellsworth rights are low, then Ellsworth can claim water out of Texas Creek ahead of any others. (4) With little or no return flow, my water right is liable to be left without enough water to fill it.

Respectfully,

Beva Lue Clark

Beva Lue Clark
P.O. Box 8
Leadore, ID 83464

*Copy
James & Paula
P.O. Box 240
Leadore, ID 83464*

MICROFILMED

JAN 12 2001

RECEIVED

MAY 04 1998

Department of Water Resources
Eastern Region

APPLICATION FOR TRANSFER OF
WATER RIGHT NO. 74-00056

74-01103

WATER DISTRICT: 74-W

WATERMASTER: Dan P. Smith

DATE: 4-27-98

HAS THIS WATER RIGHT(S) BEEN DELIVERED WITHIN THE LAST FIVE YEARS?

YES ☒ NO ☐

COMMENTS: I see no problems with this change.

☒ I do endorse approval of this change.

☐ I do not endorse approval of this change.

I recommend the following conditions of approval:

MICROFILMED

JAN 12 2001

Dan P. Smith
Watermaster



State of Idaho

DEPARTMENT OF WATER RESOURCES

900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - Fax (208) 525-7177

EASTERN REGION

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

April 16, 1998

DAN SMITH
WATERMASTER #74-W
BOX 22
LEADORE ID 83464

RE: Application for Transfer No. T5243 AND 5244
James or Paula Whittaker

Dear Mr. Smith:

Please find enclosed a copy of the above referenced application for transfer. Please review the application and submit any comments you may have to our Department as soon as possible.

If we may be of further assistance, please feel free to contact us. Thank you for your cooperation in this matter.

Respectfully submitted,

Harold W. Jones
Water Right Supervisor

HWJ/sc
enc.

MICROFILMED

JAN 12 2001

~ Celebrating Our Centennial Year of Service to Idaho 1895-1995 ~



State of Idaho

DEPARTMENT OF WATER RESOURCES

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EASTERN REGION

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

April 16, 1998

JAMES WHITTAKER
PO BOX 240
LEADORE ID 83464

RE: Application for Transfers #5243 and #5244

Dear Applicant:

This office is currently in the process of advertising the application in the Recorder Herald on April 16 and 23, 1998. The advertisement will be published once a week for two consecutive weeks, and a period of ten days following the second publication will be allowed for the submittal of protests.

If the application is protested, you will be sent a copy of the protest. The protest must be resolved before the application is approved or denied. If the protest is not resolved voluntarily, this Department will conduct a conference and/or hearing on the matter.

Please feel free to contact this office if you have any questions regarding this procedure.

Sincerely,

Harold W. Jones
Water Right Supervisor

HWJ::sc

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JAN 12 2001

NOTICE OF PROPOSED CHANGE OF A WATER RIGHT
NO. T5244

Notice is hereby given that James and/or Paula Whittaker, PO Box 240, Leadore, ID 83464, has applied to the Department of Water Resources to change place of use of the waters of Big Timber Creek tributary to Lemhi River. The rights sought to be changed are evidenced by licenses and recorded as follows:

License No.: 74-00056 Source: Big Timber Creek
Amount: 2.0 cfs Priority: 05/01/1910
Point(s) of Diversion: NWSE SEC 07 T14N R26E, LEMHI COUNTY
The water is used for irrigation of 75 acres from 04/01 to 11/01 within SEC 5, 6, 7, T14N R26E, B.M.

License No.: 74-01103 Source: Big Timber Creek
Amount: (0.48) Priority: 11/19/1922
Point(s) of Diversion: SWNW SEC 05 T14N R26E, LEMHI COUNTY
The water is used for irrigation of 24 acres from 03/15 to 11/15 within SEC 5 T14N, SEC 32 T15N, R26E, B.M.

TO BE CHANGED AS FOLLOWS:

The applicant intends to change the point of diversion to the SWNW SEC 20 T15N R26E and the place of use to 99.2 acres in the NE1/4 SEC 21 T15N R26E, B.M.

Any protests against approval of the proposed changed must be filed with the Idaho Department of Water Resources, 900 N Skyline Dr., Idaho Falls, ID 83402, together with a protest fee of \$25 on or before May 4, 1998. The protestant must also send a copy of the protest to the applicant.

lrm

KARL J. DREHER
Director

Published in the Recorder Herald on April 16 and 23, 1998.

23rd 30th

*Filed
4-9-98*

MICROFILMED

JAN 12 2001



State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS

Governor

A. KENNETH DUNN

Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

October 25, 1984

RE: Transfer of Water Right No. 74-0056

Floyd J. Whittaker
Box 240
Leadore, ID 83464

Dear Mr. Whittaker:

Enclosed is a copy of your approved Application for Transfer of the above referenced water right (Transfer No. 3056). Be sure to note the conditions of approval as listed on the fourth page.

Sincerely,

DAVID R. TUTHILL, JR., P.E.
Supervisor, Water Allocation Section

DRT:sc

Enclosure

WILSON

APPLICATION FOR TRANSFER OF
WATER RIGHT NO. 74-0056

RECEIVED

AUG 22 1984

Department of Water Resources
Eastern District Office

WATER DISTRICT 74-W

WATERMASTER RICK BROWN

DATE: AUG 20, 1984

COMMENTS: NONE

☒ I do endorse approval of this change.
☐ I do not endorse approval of this change.

I recommend the following conditions of approval:

Rick Brown
Watermaster

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July 31, 1984

RE: Application for Transfer No. 74-0056 WHITTAKER

Richard Brown, Watermaster
Water District 74-W
Box 173
Leadore, ID 83464

Dear Mr. Brown:

Please find enclosed a copy of the above referenced application(s) and water recommendation form(s). Please review the application(s) and complete the form(s), returning it to this office on or before August 20, 1984.

Thank you for your cooperation in this matter.

Very truly yours,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:CW

Enclosure

RECEIVED
JUL 31 1984



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES EASTERN REGION

John V. Evans
Governor

A. Kenneth Dunn
Director

150 Shoup — Suite 15
Idaho Falls, Idaho 83402
(208) 525-7161

July 20, 1984

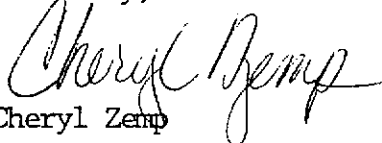
Floyd J. Whittaker
Box 240
Leadore, Id 83464

Dear Mr. Whittaker,

Please return the enclosed Application for Transfer with the
statutory filing fee of \$50.00.

If you have any questions please feel free to call our office
at 525-7161.

Sincerely,


Cheryl Zemp

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
TRANSFER ANALYSIS SHEET
G. F. RAMSEY

INITIAL REVIEW BY: JUL 19 1984

1. Right number 74-0056 Applicant FLOYD J. WITTAKER
2. Type of right: ☒ Decree ☐ License ☐ Claim
3. Purpose of transfer: ☐ Change point of diversion ☒ Add diversion point(s) ☐ Change place of use
☐ Other _____
4. Check:
 - a. ☒ Source ☒ Priority ☒ Amount ☒ Purpose ☒ Period of use
 - b. ☒ Description of original point of diversion.
 - c. ☒ Description of original place of use.
5. Amount of land &/or water transferred:
 - a. ☒ All of right.
 - b. ☐ Part of right (NOTE! Part B should be filled in only if part of the right is owned by the applicant).
 - c. ☒ Check description of point(s) of diversion.
 - d. ☒ Check description of place of use.
 - e. ☒ Check map (shows p.d. and p.u. after transfer).
 - f. ☒ Check for correct signature, notarization, and fee.
 - g. ☒ Check proof of ownership of right &/or land from which water is transferred. *§ 12-511 No change in place of use.*
 - h. ☒ Check for expansion in use of right. Comments NO
- i. ☒ Check for existing water rights from same source, on land water is being transferred to.
Right number(s) _____
- j. ☒ Is use within a Watermaster District? ☒ Yes ☐ No
If yes, what district? 74-W

FINAL PROCESSING REVIEW BY: _____

1. Watermaster recommendation requested on 8-01-84 Received on _____
2. Is transfer published correctly? ☒ Yes ☐ No
3. Protest received? ☐ Yes ☐ No *combined*

RECOMMENDED ACTION

1. ☒ Approve
2. ☐ Deny
3. Conditions* 1) <01> adding - "... at both points of diversion." 2) <05> (74-W) TIMBER, HAWLEY, TEXAS, Junction, Bull, Snake, and Canyon Creeks)
3) THE RATE OF DIVERSION FROM THE TWO SOURCES IDENTIFIED UNDER THIS RIGHT SHALL NOT EXCEED 2.0 cfs.

MICROFILMED

RECEIVED
SEP 10 1984

4. By RDC Date 9/5/84
10-17-84 USE ABOVE CONDITIONS

Department of Water Resources

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

No. 74-0056

Notice is hereby given that Floyd J. Whittaker, Leadore, Idaho, has applied to the Department of Water Resources for a change in the point of diversion of the waters of Big Timber Creek tributary to Lemhi River. The right sought to be changed is evidenced by Findings of Fact, Lemhi River Basin Case #4948 dated in 12-30-1982 in 7th District Court county of Lemhi and is recorded as follows:

Amount: 2.0 cfs Priority: 5-1-1910

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, T. 14N, R. 26E,
B.M., Lemhi County

The water is used to irrigate 74 acres within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, Sec. 6, NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 14N, R. 26E.

TO BE CHANGED AS FOLLOWS

The water will be diverted within the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 6, T. 14N, R. 26E, B.M.

Any protest against the approval of the above proposed change of water right must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, 83402, on or before August 20, 1984.

A. KENNETH DUNN

Director

Published in the Recorder-Herald, Salmon, Idaho, on August 2 and 9, 1984.

MICROFILMED

NOTICE OF PROPOSED
CHANGE OF WATER
RIGHT
NO. 74-0056

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Amount: 2.0 cfs. Priority: 5-1-1910. Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 7, T. 14N, R. 26E, B.M., Lemhi County.

The water is used to irrigate 74 acres within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$, Sec. 6, NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, T. 14N, R. 26E.

TO BE CHANGED AS
FOLLOWS

The water will be diverted within the NW $\frac{1}{4}$ -SE $\frac{1}{4}$, Sec. 7, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 6, T. 14N, R. 26E, B.M.

Any protest against the approval of the above proposed change of water right must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, 83402, on or before August 20, 1984.

A. KENNETH DUNN
Director

Published in The Recorder-Herald, Salmon, Idaho, on August 2 and 9, 1984.