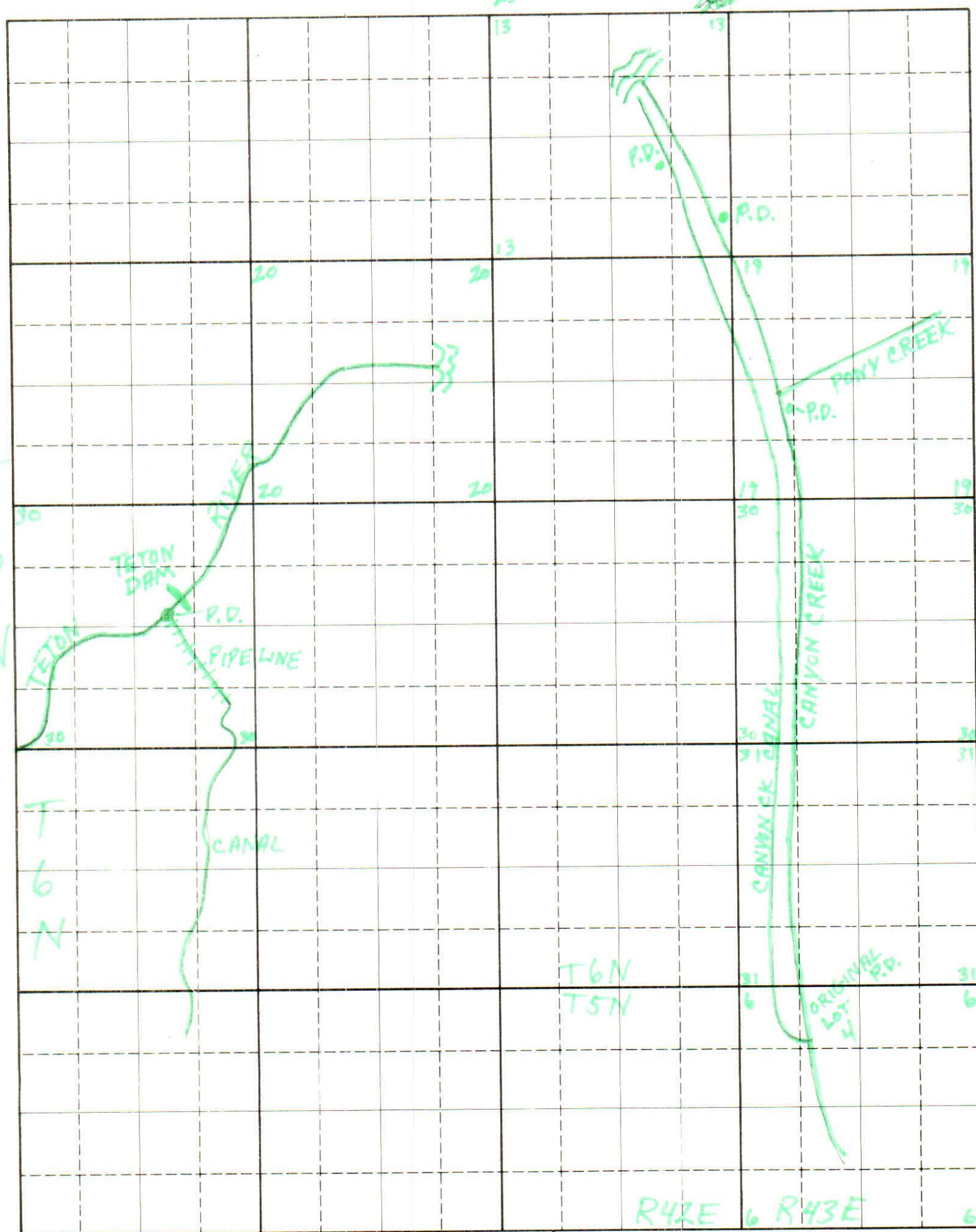


- b. Draw a map indicating the new point(s) of diversion and/or the new land to be irrigated. Show clearly the land involved by section, township and range number.



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

The REXBURG STANDARD and
The REXBURG JOURNAL
REXBURG, IDAHO

Affidavit of Publication

STATE OF IDAHO }
County of Madison } ss.

I, Terry T. Weatherston,
being first duly sworn, depose and say,
that I am the printer of THE REXBURG

Journal, a newspaper printed and
published weekly at Rexburg, Madison
County, Idaho; and I do solemnly swear
that the

change of water right

a copy of which notice appears attached
hereto, was published in the regular and
entire issue of said newspaper, and not in

any supplement issue thereof for two
consecutive issues, the first publication hav-

ing been made on May 13, 1976
and the last publication having been made

on May 20, 1976.
Further, that said newspaper is one of
general circulation in said county; that it
is a legal newspaper, conforming to legal
specifications under the Idaho Statutes; that
it has at least two hundred bona fide sub-
scribers living within the county of publica-
tion; and that it has been continuously and
uninterruptedly published in said county dur-
a period of seventy-eight consecutive weeks
prior to the first publication of the said not-
ice.

Terry T. Weatherston

Subscribed to and sworn to before me

this May 21, 1976

(SEAL)

For - D. Porter
Notary Public.

My commission expires August 5, 1977

RECEIVED

MAY 26 1976

Department of Water Resources
Eastern District Office

**NOTICE OF PROPOSED
CHANGE OF WATER RIGHT
NO. 22-0195/22-0196**

Notice is hereby given that Canyon
Creek Canal Company, has applied to
the Department of Water Resources
for a change in the point of diversion
of the waters of Canyon Creek tribu-
tary to Teton River. The right sought
to be changed is evidenced by decree
to Canyon Creek Canal and Irrigation
Co. in case of Rexburg Irrigation Co.,
et al -vs- Teton Irrigation Canal Co., et
al, dated 12-16-1910 in Sixth Judicial
Court, County of Fremont and is
recorded as follows:

DECREE NO. 22-0195. AMOUNT
16.0 cfs. PRIORITY: 6-01-1900.

DECREE NO. 22-0196. AMOUNT
54.0 cfs. PRIORITY: 6-01-1902.

DECREED POINT OF DIVER-
SION: Lot 4, Sec. 6, T. 5N, R. 43E,
B.M., Madison County.

The water is used to irrigate 10,615
acres within the W $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 25,
E $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 26, W $\frac{1}{2}$ SW $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$,
Sec. 34, Sec. 35, Sec. 36, T. 7N, R.
41E; S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$, Sec. 31, SE $\frac{1}{4}$ NE $\frac{1}{4}$,
S $\frac{1}{2}$, Sec. 32, NE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$,
S $\frac{1}{2}$, Sec. 33, SW $\frac{1}{4}$, Sec. 34, T. 7N, R.
42E; Sec. 1, Sec. 2, NE $\frac{1}{4}$ NE $\frac{1}{4}$,
S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 3, NW $\frac{1}{4}$ NW $\frac{1}{4}$,
Sec. 11, NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 12, T.
6N, R. 41E; SW $\frac{1}{4}$, Sec. 1, SW $\frac{1}{4}$, Sec.
2, E $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 3, Sec. 4, Sec. 5,
Sec. 6, Sec. 7, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec.
8, N $\frac{1}{2}$, Sec. 9, E $\frac{1}{2}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$,
Sec. 10, SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$,
S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 11, NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$,
SE $\frac{1}{4}$, Sec. 12, E $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$,
N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13,
N $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$,
Sec. 14, E $\frac{1}{2}$, Sec. 15, T. 6N, R. 42E;
SW $\frac{1}{4}$, Sec. 7, T. 6N, R. 43E, B.M.

TO BE CHANGED AS FOLLOWS

The water will be diverted within Lot
4, Sec. 6, T. 5N, R. 43E, NW $\frac{1}{4}$ SE $\frac{1}{4}$,
Sec. 13, T. 6N, R. 42E, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec.
13, T. 6N, R. 42E, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 30,
T. 7N, R. 42E, NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 19, T.
6N, R. 43E, B.M.

Any protest against approval of the
above proposed change of water right
must be filed with the Idaho Depart-
ment of Water Resources, 1515 Lin-
coln Road, Idaho Falls, Idaho, 83401,
on or before June 1, 1976.

R. KEITH HIGGINSON
Director

Published in the Rexburg Journal,
Rexburg, Idaho, on May 13 and May
20, 1976.

TRANSFER NO.	NAME	AMOUNT C.F.S.	BALANCE C.F.S.	RIGHT NO.
	Canyon Creek Canal Co.	16.0 cfs		22-0195
1985	Canyon Creek Canal Co.	16.0 cfs	n/a	22-0195

TRANSFER

Transfer No. 1985

Application No. 22-0195/22-0196

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR TRANSFER OF WATER RIGHT
To Change the Point of Diversion and/or the Place of Use

APPROVED

Name of applicant Canyon Creek Canal Co. Phone 458-4231 (Grant)
458-4282 (Wally)
Post office address Newdale, Idaho (c/o Wally Little, Chairman)

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree to Canyon Creek Canal and Irrigation, Co.
(Name)
in case of Rexburg Irrigation Co. et al vs Teton Irrigation Canal Co. et al
dated 12-16-1910 in Sixth Judicial Court County of Fremont
(Name of court)
- b. License No. issued by the Idaho Department of Water Resources
- c. Claim No. on file with the Idaho Department of Water Resources

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

3. Source of water Canyon Creek tributary to Teton River

4. Date of priority 22-0195 - 6/1/1900 22-0196 - 6/1/1902

5. Water is used for the following purposes:

22-0195 amount 16.0 c.f.s. for irrigation purposes from Apr. 1 to Nov. 1
22-0196 amount 54.0 c.f.s. for irrigation purposes from Apr. 1 to Nov. 1
amount for purposes from to
(month/day - both dates inclusive)

6. Total amount of water under right: a. 70.0 cubic feet per second
&/or
b. acre feet per annum

7. Location of original point of diversion is Lot 4 1/4 of 1/4 of Section 6
Township 5N Range 43E., B.M., in Madison County
Additional points of diversion, if any

8. Lands irrigated or place of use:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
			AS PER ORIGINAL DECREE: LANDS OF STOCKHOLDERS OF SAID COMPANY SITUATED IN T. 5N., R. 43E., B.M., T. 6N., R. 41E., B.M., T. 6N., R. 42E., B.M., AND IN T. 7N., R. 41E., B.M., AGGREGATING OVER 10,000 ACRES, DESCRIBED ON THE ATTACHED LIST AND LISTED SPECIFICALLY HERE AND IN C.2 FOR CLARIFICATION AND TO IDENTIFY THE LANDS NOT SPECIFICALLY LISTED IN THE DECREE WITH ANY CHANGES HERETOFORE OR NOW BEING MADE.																

(see attachment)

Total number of acres to be irrigated 10,615

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

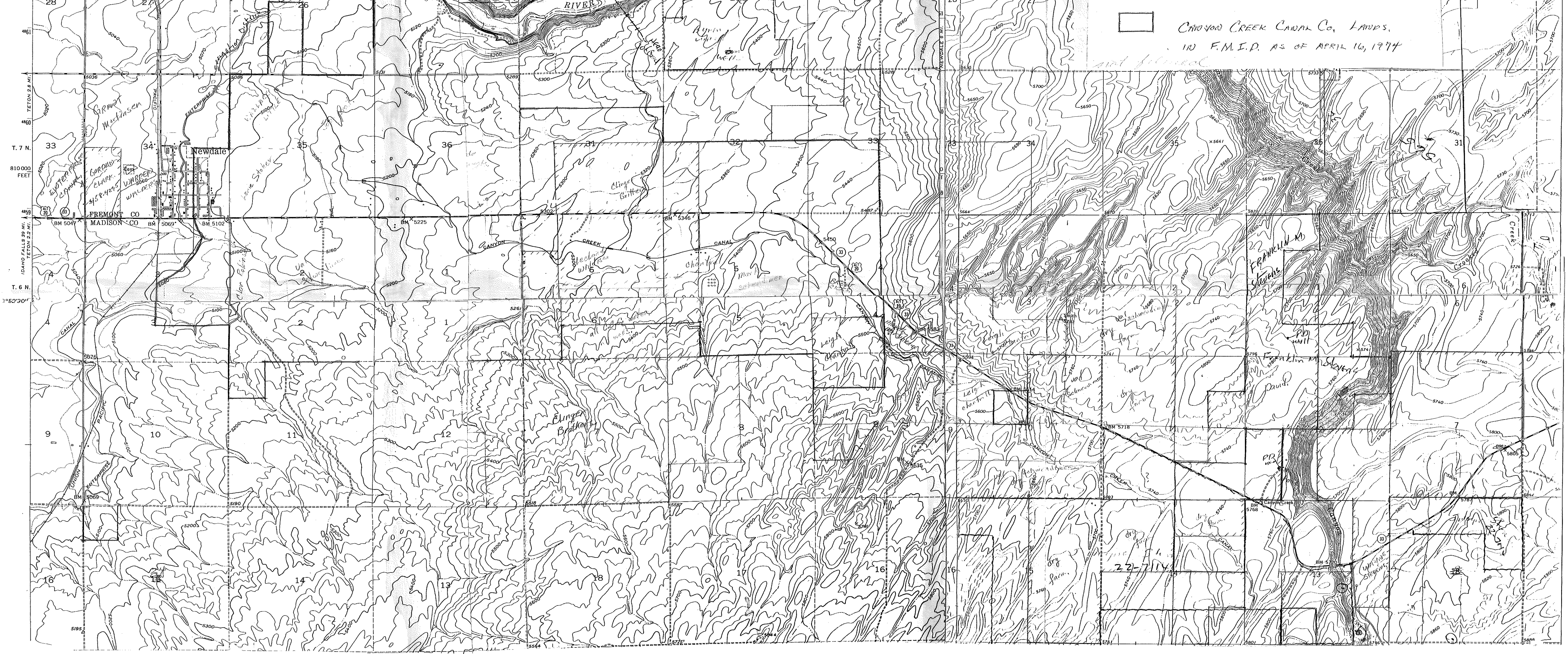
1. Amount of water: a. _____ cubic feet per second
&/or
b. _____ acre feet per annum
2. Point of diversion _____ ¼ _____ ¼, Section _____ Township _____
Range _____, B.M., _____ County
Additional points _____
3. Place of use:

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

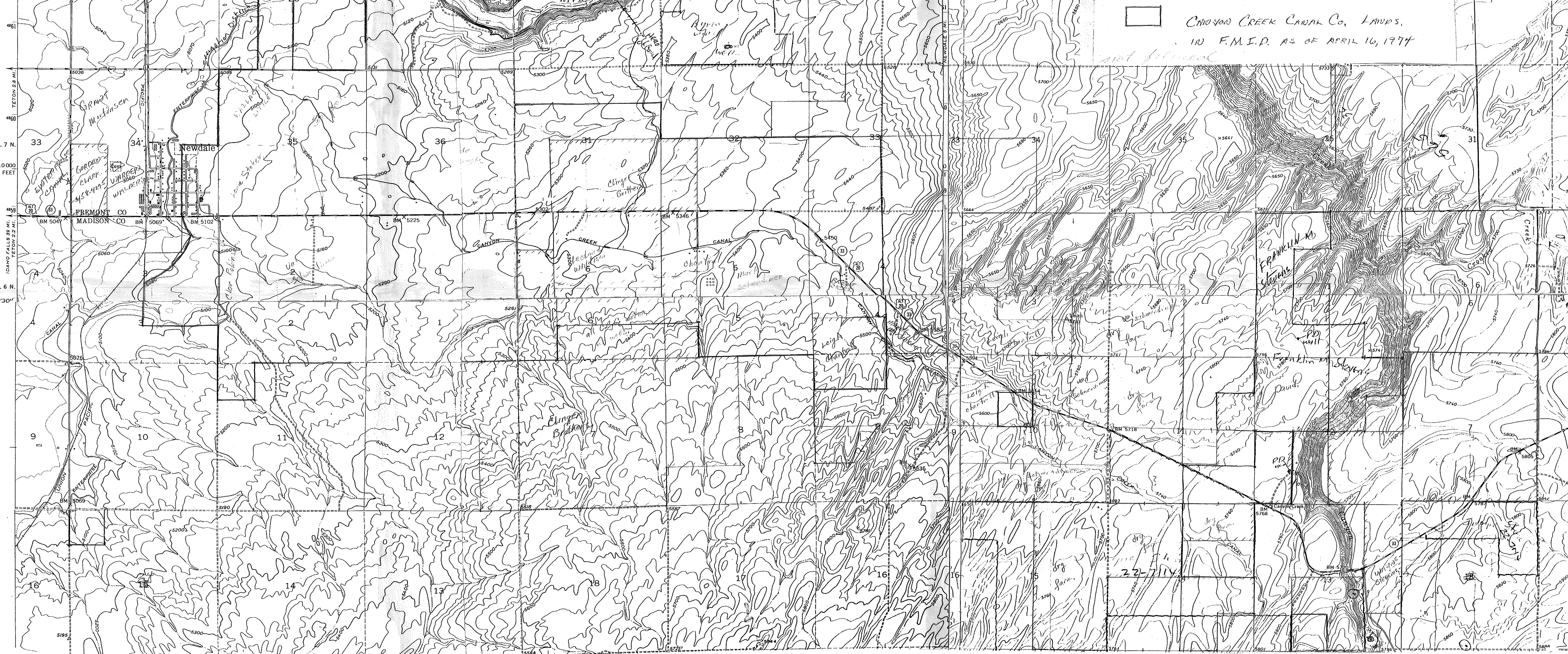
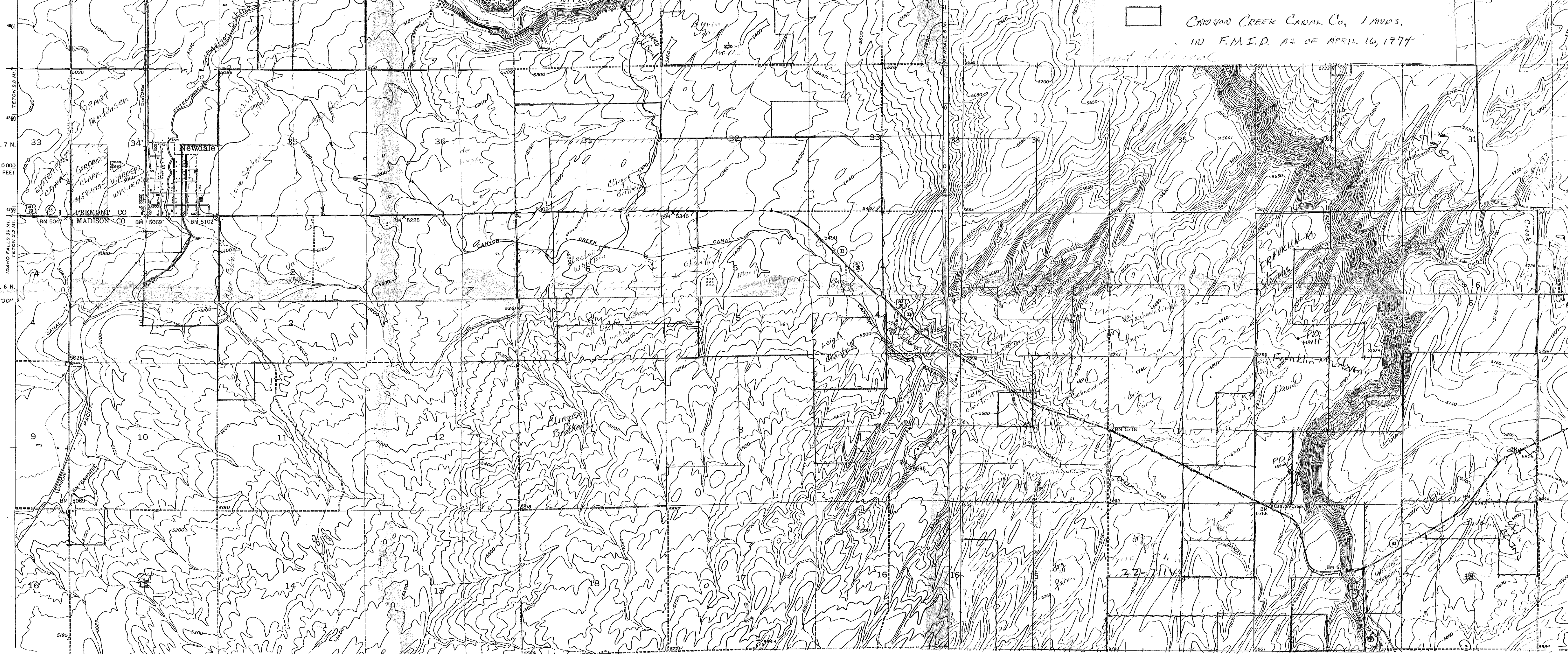
C. DESCRIPTION OF RIGHT OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Change in point of diversion
- a. Amount of water to be diverted 70.0 c.f.s. &/or _____ acre feet
- b. Point(s) of diversion Lot 4 ¼ _____ ¼, Section 6 Township 5N
Range 43 E., B.M., Madison County
Additional points NW¼SE¼, Sec. 13, T. 6N, R. 42E; SE¼SE¼, Sec. 13, T. 6N,
R. 42E; SW¼NE¼, Sec. 30, Twp. 7 N, R. 42 E; NW¼SW¼, Sec. 19, T. 6N,
R. 43E:
- c. Description of diverting works New points of diversion will be pumps &
motors and pipelines and new canals and ditches.
- d. Describe the reasons for applying for a change in the point(s) of diversion As the spring river
flows decrease, the head reduces and it becomes difficult to fill
our decreed right at the original point of diversion. The new point
of diversion will pump water from Canyon Creek into our canal and/or
directly onto lands of stockholders of the corporation.
2. Change in place of use
- a. Describe the lands or place of use to which the right will be transferred: NO CHANGE

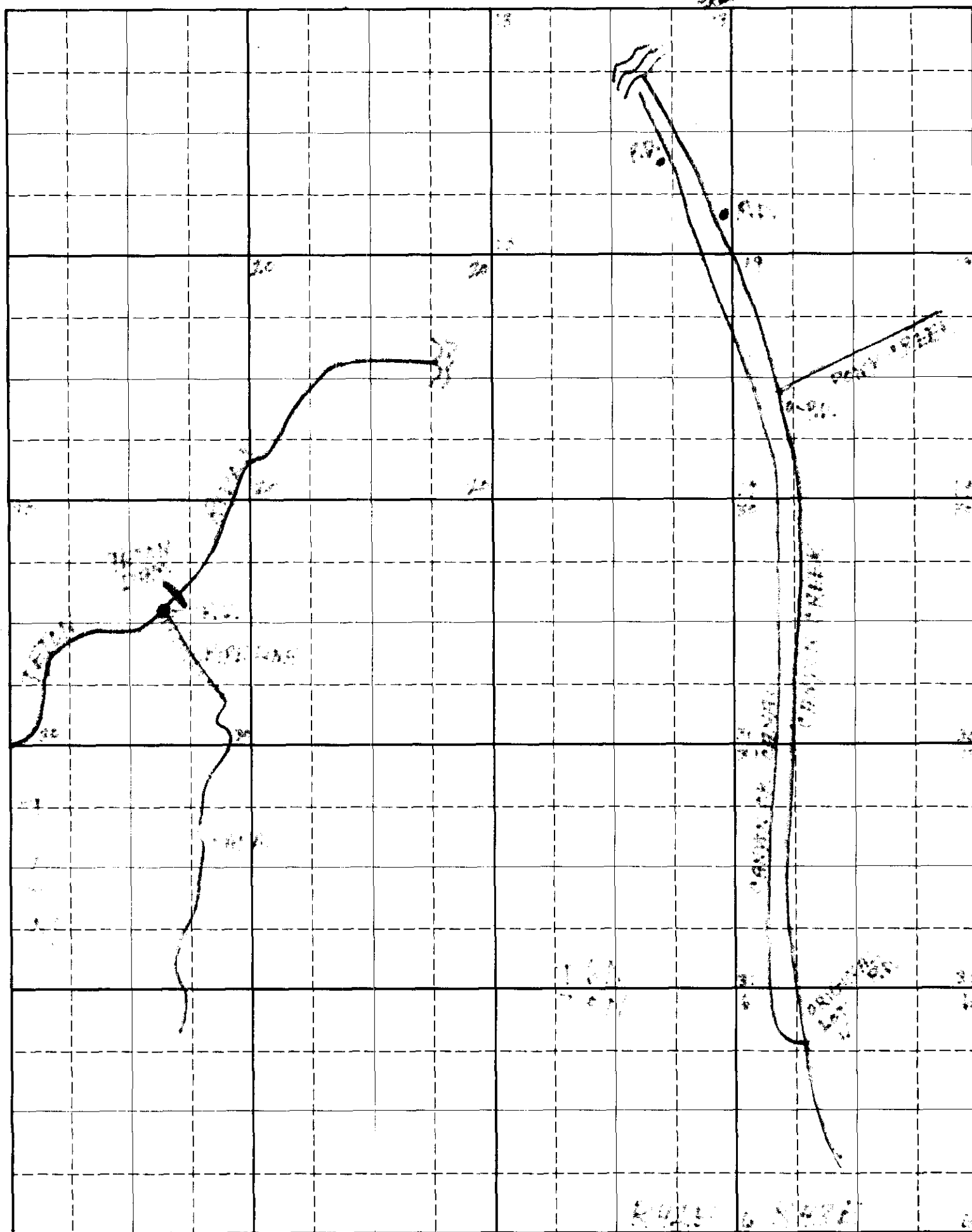
TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	



CANYON CREEK CANAL CO., LANDS.
IN F.M.I.D. AS OF APRIL 16, 1974



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



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

3. Remarks _____

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

Carson Creek Canal Co.
Blair Robinson, Sec.
(Signature of applicant)

Subscribed and sworn to before me this 30th day of April, 19 76

My commission expires Life

Lay W. Higby
(Notary public)
Rexburg, Idaho

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 22-0195/22-0196, and said application is hereby APPROVED.

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

PURSUANT TO MEMORANDUM DECISION AND ORDER OF THIS DATE

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

Witness my hand this 30th day of December, 19 76

R. Keith Higginson
R. KEITH HIGGINSON, Director

FOR DEPARTMENT USE ONLY

Received by WD Date 5-04-76
Prelim. check by WD Fee \$30.00
Receipted by WD Date 5-06-76
Published in Rexburg Journal #15746
Pub. dates May 13 & 20, 1976
Watermaster recommendation requested on 5-07-76
WD #01 rec'd.

Protest filed by _____

Copies of protest forwarded by _____
Hearing held by _____ Date _____
Recommended for approval _____ denial _____
by _____

[illegible]

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

IN THE MATTER OF:

Application for Transfer of Water Right
No. 22-0195/22-0196 in the name of
CANYON CREEK CANAL COMPANY

MEMORANDUM DECISION
AND ORDER

The Canyon Creek Canal Company holds decreed water rights from Canyon Creek for 16.0 cubic feet per second with priority of June 1, 1900, and 54.0 cubic feet per second with priority of June 1, 1902. The decree is silent as to the point of diversion, but these rights have historically been diverted at the Canyon Creek Canal heading which is located within Lot 4, Sec. 6, Twp. 5 N, Rge. 43 E, B.M., Madison County. The decree describes the lands irrigated by these rights as follows:

"Lands of stockholders of said company, situated in Township 5 North, Range 43 E., B.M., T. 6, N., R. 41 E., B.M., T. 6 N., R. 42 E. B.M., and in T. 7 N. R. 41 E., B.M., aggregating over 10,000 acres."

On April 6, 1976, the Canyon Creek Canal Company applied to the Department of Water Resources for a water right transfer which would add three additional points of diversion on Canyon Creek, downstream from the existing canal heading, and one proposed point of diversion on the Teton River. Notice of this application was published in the Rexburg Journal on May 13 and May 20, 1976.

The Director of the Department of Water Resources has reviewed the application and other files of the Department, and based upon his understanding of the law, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

- 1) Assessment records indicate water users pay Canyon Creek Canal Company assessments on a total of only 1,385 acres of land.
- 2) Records of the Fremont-Madison Irrigation District indicate that as much as 2,547 acres may have been irrigated with water diverted from the Canyon Creek Canal.
- 3) The application for transfer describes lands claimed to have a water right from Canyon Creek totaling 10,615 acres.

4) Section 42-222, Idaho Code, provides that, "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 and the change does not constitute an enlargement in use of the original right."

5) There are several intervening rights to divert water from Canyon Creek downstream from the Canal Company's present point of diversion.

CONCLUSIONS OF LAW

1) The decreed water rights of the Canyon Creek Canal Company entitle it to divert up to 70.0 cubic feet per second from Canyon Creek if available under its priorities to irrigate "over 10,000 acres of land". While it is questionable that that much land has ever previously been irrigated due to availability of water supply and former surface methods of irrigation, the decreed right so provides.

2) Other water right holders who divert water from Canyon Creek under priorities subsequent to the Canyon Creek Canal Company rights are entitled to protection of their diversion and use of water under conditions which existed as their subsequent rights were established.

ORDER

IT IS, THEREFORE, ORDERED and Application for Transfer of Water Right No. 22-0195/22-0196 is hereby APPROVED subject to the following conditions:

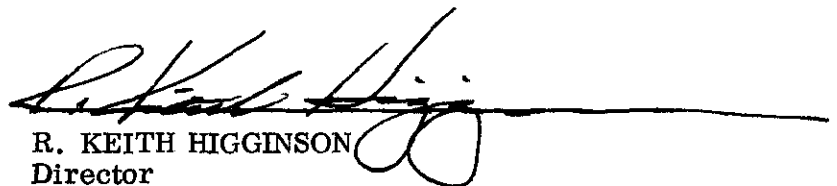
1) The applicant shall install a permanent measuring device in Canyon Creek at the applicant's present point of diversion, in the Canyon Creek Canal, and at each new point of diversion.

2) No more water may be diverted from Canyon Creek and the Teton River under these rights than is actually available and could have been diverted by the Canal Company at its original point of diversion as demonstrated by the record of the measuring devices required in paragraph 1) above.

3) This approval is subject to all prior and intervening water rights which would otherwise be injured by such approval.

4) No more water may be diverted under this approval than the amount heretofore required to irrigate lands served by the Canyon Creek Canal Company.

Dated this 30th day of December, 1976.


R. KEITH HIGGINSON
Director

RECEIVED

MAY 26 1976

Department of Water Resources
Eastern District Office

The REXBURG STANDARD and
The REXBURG JOURNAL
REXBURG, IDAHO



Affidavit of Publication

STATE OF IDAHO }
County of Madison } ss.

I, Terry T. Weatherston,
being first duly sworn, depose and say,
that I am the printer of THE REXBURG

Journal, a newspaper printed and
published weekly at Rexburg, Madison
County, Idaho; and I do solemnly swear
that the

change of water right

a copy of which notice appears attached
hereto, was published in the regular and
entire issue of said newspaper, and not in

any supplement issue thereof for two
consecutive issues, the first publication hav-

ing been made on May 13, 1976
and the last publication having been made

on May 20, 1976.

Further, that said newspaper is one of
general circulation in said county; that it
is a legal newspaper, conforming to legal
specifications under the Idaho Statutes; that
it has at least two hundred bona fide sub-
scribers living within the county of publica-
tion; and that it has been continuously and
uninterruptedly published in said county dur-
a period of seventy-eight consecutive weeks
prior to the first publication of the said not-
ice.

Terry T. Weatherston

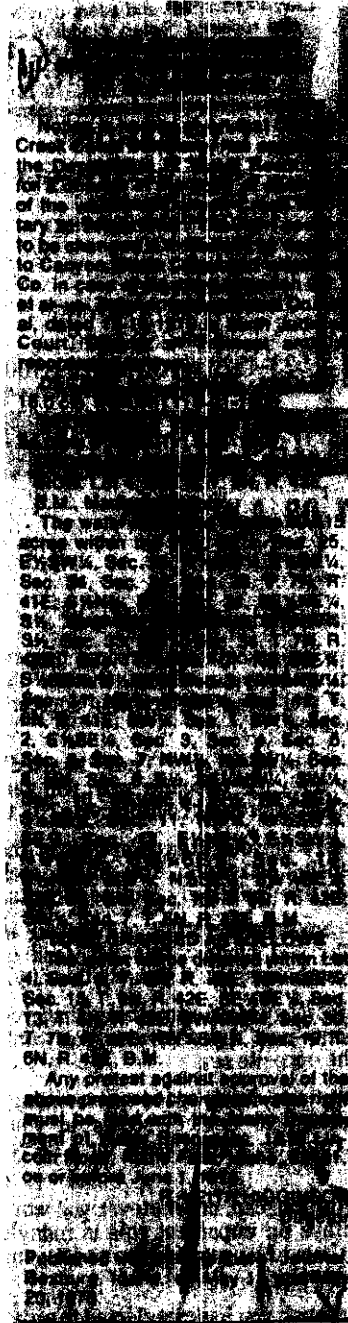
Subscribed to and sworn to before me

this May 21, 1976

(SEAL)

Foy O. Porter
Notary Public.

My commission expires August 5, 1977



22-0101
 Bush, Sarah K. 150 inches. June 1, 1895. Teton Creek.
 22-0189
 Butteano, James (Sold to N. Tanner, Jr.)
 1 635
 Butler Island
 Canal Company, 3,500 inches June 1, 1885. Snake River. Trans 189-20
 Trans 645-641-643-677-714-764-1025
 Butler, J. H. Swan Valley Irrigation Company, Limited.
 Butler, Joseph W. Swan Valley Irrigation Company, Limited
 Butler, Mary A. Swan Valley Irrigation Company, Limited.

1 636
 Butte & Market
 Lake Canal
 Company 18,000 inches Oct. 16, 1890. Snake River. Trans 267
 22 0190
 Buxton, John 160 inches. June 1, 1896. Mohogany Creek.
 22 0191
 Buxton, Lucy,
 Admr. Estate of
 Joseph Buxton,
 deceased. 100 inches June 1, 1896. Spring Creek.
 27-0111
 Buxton, Mary A. 100 inches. June 1, 1890. Sloughs from Twin
 Creeks.
 27-0112
 Buxton, Stillman 100 inches. June 1, 1903. Sloughs from Twin
 Creeks.
 22 0192
 Byrne, Michael 120 inches. June 1, 1890. Fox Creek.
 2036 35-0047
 Byther, C. J. 140 inches. Oct. 11, 1901. Bear Trap Creek.
 25-0249

C.

Cahoon, H. S. Lowder Canal Company. ✓
 23-0063
 Caldwell, Charles 120 inches. June 15, 1898. Rainey Creek. 2014
 23-0064
 Caldwell, John T. 120 inches. June 15, 1898. Rainey Creek.
 Caldwell, L. S.
 and S. C. Parsons Ditch Company. ✓
 22 0193
 Caldwell, Moroni 160 inches. June 1, 1895. Pack Saddle Creek.
 Campbell, U. E. Parsons Ditch Company.
 22 0194
 Cannon, Harry L. 100 inches. June 1, 1897. Darby Creek. TRANS 1985
 22 0195
 Canyon Creek.
 Canal & Irri-
 gation Company. 800 inches. June 1, 1900. Canyon Creek. TRANS 1985
 22 0196
 Canyon Creek
 Canal & Irri-
 gation Company 2,700 inches. June 1, 1902. Canyon Creek.
 01-201
 Carlson, Carl T. 250 inches. June 1, 1903. Bannock Jim Slough.
 Carlson, Frans E. The Sunny Dell Irri-
 gation Canal Company. ✓

Campbell, C. C.,
Trustee, and
Great Western
Canal & Improve-
ment Company.

(Description of lands not given.)

Campbell, U. F.

NE $\frac{1}{4}$ of SW $\frac{1}{4}$ and W $\frac{1}{2}$ of Lot 2, Sec. 2 T.

3 S., R 34 E., B. M. containing 160 acres.

Cannon, Harry

SW $\frac{1}{4}$ of Sec. 1, T. 4 N., R., 45 E., B. M.,
containing 160 acres.

Canyon Creek
Canal & Irriga-
tion Company.

Lands of stockholders of said company,
situated in Township 5 North, Range 43
E., B. M., T. 6, N., R. 41 E., B. M.,
T. 6 N., R. 42 E. B. M., and in T. 7 N. R.
41 E., B. M., aggregating over 10,000 acres.

Carlson, Carl T.

E $\frac{1}{2}$ of NE $\frac{1}{4}$, NW $\frac{1}{4}$ of NE $\frac{1}{4}$. Sec. 34, SE $\frac{1}{4}$
of SE $\frac{1}{4}$ of Sec. 27. T. 5 N., R. 39 E.B.M.

Carlson, Carl T.

E $\frac{1}{2}$ of NE $\frac{1}{4}$, NW $\frac{1}{4}$ of NE $\frac{1}{4}$. Sec. 34, SE $\frac{1}{4}$
of SE $\frac{1}{4}$ of Sec. 27, T. 5 N., R. 39E.B.M.

Carlson, Charles

Lots 2, 3 and 4, of Sec. 18, and Lot 1 of
Sec. 19, T. 15 N., R. 42 E., B. M. containing
160 acres.

Carlson, Peter O.

E $\frac{1}{2}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$ of NE $\frac{1}{4}$, and NW $\frac{1}{4}$ of
SE $\frac{1}{4}$ of Sec. 27. T. 5 N., R. 39 E., B. M.
containing 160 acres.

Carrier, Annie E.

S $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 25, and Lot 4, less 13
acres sold, in T., 2 N. R., 37 E., B. M.
containing 110 acres.

Carrington, Enoch

NW $\frac{1}{4}$ of Sec. 5, and NE $\frac{1}{4}$ of Sec. 6, T. 4 N.,
R. 45 E., B. M., W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 32,
and E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 31, T. 5 N. R.,
45 E. B., M., containing 480 acres.

January 5, 1977

Re: Transfer No. 1985

Canyon Creek Canal Company
c/o Wally Little, Chairman
Newdale, Idaho 83436

Gentlemen:

Enclosed herewith is a copy of your approved Application for Transfer 22-0195/
22-0196 along with a copy of the Memorandum Decision and Order. We direct
your attention to the conditions of approval as set forth in the Order.

Be sure to note condition of approval 1) which requires the installation of measuring
devices. Enclosed is a letter describing different types of measuring devices ac-
cepted by the Director.

Should you have questions regarding the transfer, please do not hesitate to contact us.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

BDF:DR
Enclosures
cc: IDWR - Idaho Falls

M E M O R A N D U M

TO: File

FROM: Ron Carlson *RC*

RE: Application for Transfer No. 22-0195/22-0196

DATE: July 28, 1976

I believe the intent behind filing this application for transfer was to enable J. Wayne Stevens to pump from Canyon Creek under the priority of these decreed rights rather than his permits No. 22-7069, 22-7103 and 22-7114.

The problem I see with this application for transfer is that the lands were not specified in the decree and many of those lands that have now been submitted by the applicant have only been irrigated during recent years. I am confident that the approval of this application for transfer would be an expansion of the right and would interfere with the water rights of Owen J. Neeley.

I believe to have consistency in our administration and with the principle that a water right can only be maintained for the amount that has been traditionally diverted and the acreages that have traditionally been irrigated, we should make a field review of the Canyon Creek system and prepare a Memorandum Decision approving the transfer showing the lands that could have been irrigated at the time of the decree and with the condition that it can not interfere with any downstream water rights.

Twp 610. Rye 42E.

	Acres Assessed.	Waste land.	Sec.	DESCRIPTION.
Robert Ricks.	100		4	NW $\frac{1}{4}$ & SW $\frac{1}{4}$, L-3-4 SW $\frac{1}{2}$ NW $\frac{1}{4}$
Seth Ricks	50		4	Part NW $\frac{1}{4}$ SW $\frac{1}{4}$; L-3-4 SW $\frac{1}{4}$ NW $\frac{1}{4}$
Ellis Widdison	80		6	E $\frac{1}{2}$ NW $\frac{1}{4}$
Merrill Martineau	65	15	4	SE $\frac{1}{4}$ NW $\frac{1}{4}$; NE $\frac{1}{4}$ SW $\frac{1}{4}$.
Mark Schwendimen	30	10	5	NE $\frac{1}{4}$ SE $\frac{1}{4}$
Lugh Chantrell	70	10	5	L-4; SW $\frac{1}{4}$ NW $\frac{1}{4}$; NW $\frac{1}{4}$ SW $\frac{1}{4}$
Wayne Stevens	40 $\frac{1}{2}$		13	SE $\frac{1}{4}$ SW $\frac{1}{4}$
FRANKLIN Stevens	30	10	12	NW $\frac{1}{4}$ SW $\frac{1}{4}$
Wayne Stevens	32 $\frac{1}{2}$	7 $\frac{1}{2}$	24	NW $\frac{1}{4}$ NW $\frac{1}{4}$

	Acres Assessed	Waste Land	Twp 7 N Sec.	Rge 4 E Description
Donald Trapp	160	—	25	$W\frac{1}{2}$ NW $\frac{1}{4}$; $W\frac{1}{2}$ SW $\frac{1}{4}$
Wayne Larsen	16	—	26	NW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$

Donald Trapp

Wayne Larsen

Turn. 610. Rge. 41 E.

	Acres Assessed	Waste Land	Sec.	DESCRIPTION.
Clyde Haws	40	0	1	NE $\frac{1}{4}$ NE $\frac{1}{4}$
Val Schwendimen	260	-	1	S $\frac{1}{2}$ NE $\frac{1}{4}$; N $\frac{1}{2}$ SE $\frac{1}{4}$; E $\frac{1}{2}$ L-3; E $\frac{1}{2}$ NW $\frac{1}{4}$
E. Imer Schwendimen	70	0	2	L-1; SE $\frac{1}{2}$ NE $\frac{1}{4}$
Clair Robinson	80	0	2	W $\frac{1}{2}$ NW $\frac{1}{4}$
Reese Godfrey.	67	10	3	Part W $\frac{1}{2}$ E $\frac{1}{2}$; SW $\frac{1}{4}$ NE $\frac{1}{4}$; Tax 3.
George Ostermiller	40	0	3	Tax 3.
R. S. Howard	40	0	3	Tax 10

Owner

Town 7N Rge 42E.

Assessed
Waste
Land

Sec.

DESCRIPTION.

Clyde Haws.

80

—

31

NE $\frac{1}{4}$ NE $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ *

Grant Klingler

46

31

SE $\frac{1}{4}$ SE $\frac{1}{4}$

LAW OFFICES

RIGBY, THATCHER & ANDRUS, P. A.

25 NORTH SECOND EAST - P. O. BOX 437 - REXBURG, IDAHO 83440
RAY W. RIGBY - GORDON S. THATCHER - G. RICH ANDRUS
TELEPHONE (208) 366-3633

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Department of Water Resources
Eastern District Office

July 15, 1976

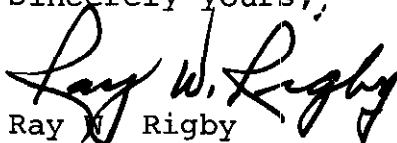
Idaho Department of Water Resources
Eastern Dist. Office
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Canyon Creek Canal Company

Gentlemen:

I enclose herewith a "Brief of Applicant" in the above entitled matter, an affidavit and copies of both the brief and affidavit.

Sincerely yours,,


Ray W. Rigby

RWR:br

Enclosure

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JUL 19 1976

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO
Department of Water Resources
Eastern District Office

IN THE MATTER OF THE APPLICATION FOR
TRANSFER OF WATER RIGHT BY
CANYON CREEK CANAL COMPANY

BRIEF OF APPLICANT

STATEMENT OF FACTS

Applicant, Canyon Creek Canal Company, has a decreed right to 16.0 c.f.s., with a priority date of June 1, 1900, and 54.0 c.f.s., with a priority date of June 1, 1902, of the waters of Canyon Creek, a tributary to the Teton River. Said decree provides that the point of diversion is on Canyon Creek in Lot 4 of Section 6, Twp. 5 N., Rge. 43, E.B.M., in Madison County, Idaho. Historically, all of said water was diverted at that point. Through the years, because of seepage, and the erosion of the area, applicant found it difficult to maintain the type and capacity of a canal system sufficient to carry all its decreed water to the lands of its stockholders.

The applicant, from time to time, made many attempts to strengthen the canal system, to enlarge it, to line it with concrete, and to employ other measures to utilize said decreed water in full, but found it practically impossible to do so because of the cost involved. Accordingly, many of the stockholders of the company, and the company itself, diverted the waters under said decree from the Canyon Creek itself or from the Teton River, into which Canyon Creek empties. At times all of the water decreed was appropriated. At other times, it was impossible to appropriate all of the decreed waters.

Prior to the filing of this application, by means of modern equipment, applicant and its stockholders have and are now appropriating to beneficial use the full amount of the water decreed to said company, but at several points of diversion. This has become necessary, because of the impossibility, for all practical purposes, of diverting said decreed water along the canyon walls which are porous and difficult to maintain a canal system on.

Applicant has never intended to abandon or forfeit any part of the decreed water, and has resisted any attempts on the part of anyone, not a stockholder of the company, to use said water. Applicant requires the full use of its decreed water for the proper irrigation of the lands of its stockholders.

POINTS AND AUTHORITIES

"Forfeiture of water rights is not favored, and all intendments are to be indulged in against the forfeiture." Hodges vs. Trail Creek Irrigation Company, 78 Idaho 10, 297 Pac. (2D) 524.

"No forfeiture or abandonment results if the non-user is prevented from exercising his rights by circumstances over which he has no control."

Hodges vs. Trail Creek Irrigation Company, Ibid (a full copy of that Supreme Court Decision is attached to this brief).

"Water right was not forfeited even though abandoned for over five years where applicant for transfer resumed use of water prior to filing petition for transfer." Application of Boyer, 73 Idaho 152, 248 Pac. 2d 540.

"Where protestants asserted that water, which applicant had tried to appropriate by his permit, was seepage water to which they had superior rights through prior use and enjoyment, and there was no evidence as to the actual amount of water used by protestants over and above their decreed rights, or amount claimed at point of diversion that had not been adjudicated, the evidence was insufficient to establish that any of the protestants had abandoned any right to the use of their prior decreed rights". Cantlin vs. Carter, 88 Idaho 179, 397 Pac. 2d 761.

"Where the original permit incorrectly located at the point of diversion, subsequent petition to correct this designation to conform to the actual point of diversion was not a petition to change point of diversion." Keller vs. Magic Water Company, 92 Idaho 276, 441 Pac. 2d 725.

"One of the essential elements of claim of perscriptive right to the use of water for irrigation, is that the claimant must show that he has used the water during each of the irrigation seasons of the five year period when it was actually needed ." Mountain Home Irrigation District vs. Duffey, 79 Idaho 435, 319 Pac. 2d 965. (and in the cases therein cited).

"It is axiomatic that no appropriator can compel any other appropriator to continue the waste of water whereby the former may benefit." Application of Boyer, Ibid.

ARGUMENT

Applicant has never knowingly or purposely abandoned any of its water right. It needs all of the waters that have been decreed to it. It has had a difficult time in always having available a system that would accomodate its full decreed water right, but diligent efforts have been made over the years, to correct this inadequacy. In the last several years, by means of extra diversionary points, and modern pumping equipment, applicant is now able and does appropriate all of its water decreed to it, when not restricted or impeded by other persons or any control agencies.

A water right is a property right, and of extreme value, therefore, positive and strong evidence must be shown to prove abandonment or forfeiture of that right. There is no such evidence in this case, and no protests have been filed to the granting of this application.

Records of the department, or of anyone else, are inadequate to establish forfeiture or abandonment of any part of applicants decreed water rights.

It is common knowledge, recognized by the Courts (see again Mountain Home Irrigation District vs. Duffey, sited above, and the cases sited in that case and in several other cases) that an appropriator, who has a valid decree, or license, does not have to, thereafter, fully use said decreed right all of the time. This would lead to the waisting of water, to the detriment of junior appropriators, who could be using that water when not in use by the senior appropriator.

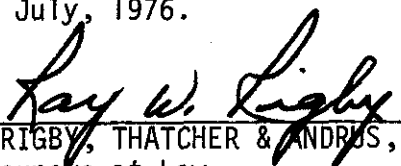
To declare a forfeiture or abandonment of any part of applicants decreed water right would be an unusual action, not supported by precedent in the Department of Water Resources of the State of Idaho, and contrary to the practice in this state, and particularly in the area of the applicants operations.

A junior appropriator, has knowledge by the public record, and by actual knowledge, of the water right owned by the applicant in this case, and therefore, can not be heard to complain, and the Department of Water Resources should not be concerned for the subsequent appropriator when no action had ever been taken to prove abandonment or forfeiture of applicants water right, particularly in light of the facts, as evidenced by the affidavit filed by a director of applicant, that said water right has been fully utilized from time to time, to the best of applicants ability to do so, over the years since the decree.

CONCLUSION

It is respectfully submitted that the Department should grant this application to allow several points of diversion to fully utilize the decreed right of the applicant, and to specify in the record the descriptions of the actual lands of the stockholders of the applicant.

Respectively submitted this 14th day of July, 1976.


OF RIGBY, THATCHER & ANDRUS, P.A.
Attorneys at Law
Rexburg, Idaho
Attorneys for applicant

for the abuse of such privilege. *Robison v. Hotel & Restaurant Employees Loc. 782*, 35 Idaho 418, 207 P. 132, 27 A.L.R. 642.

We conclude the activities engaged in by the Union were not proper exercises of freedom of speech or of the press; and the Union is not in a position to claim protection on that theory.

[5] The contention of the Union that Sec. 44-712, I.C. is unconstitutional in failing to protect minorities is not here presented for determination. The Union did not represent a majority, a minority, or any of Simplot's employees. Hence it may not challenge the statute as discriminating against minorities. *Poffenroth v. Culinary Workers Union Local No. 328*, 71 Idaho 412, 232 P.2d 968.

There is no showing that either Elle or Simplot was unfair to organized labor under any definition called to our attention or of which we are aware.

The judgment is reversed and the cause remanded, with instructions to the trial court to make the temporary injunction issued in each case permanent. Costs to appellants.

TAYLOR, C. J., and ANDERSON and SMITH, JJ., concur.

PORTER, J., sat at the hearing but did not participate in the opinion.

297 P.2d 524

W. M. HODGES, Plaintiff-Appellant,
v.

TRAIL CREEK IRRIGATION COMPANY,
Inc., Defendant-Respondent.

No. 8407.

Supreme Court of Idaho.

May 1, 1956.

Rehearing Denied June 5, 1956.

Action against irrigation company to quiet plaintiff's title to water decreed to plaintiff's predecessor but denied plaintiff and his predecessor by company upon predecessor's failure to pay maintenance assessment made by the company which had been created subsequently to entry of the water decree. The company cross-complained to establish its rights as subsequent appropriator. The District Court, Ninth Judicial District, Teton County, Henry S. Martin, J., entered judgment adverse to plaintiff, and plaintiff appealed. The Supreme Court, Keeton, J., held that title to the water was in plaintiff and had not been forfeited or abandoned even though plaintiff and his predecessor had failed to use the decreed water for more than five years.

Judgment reversed, and cause remanded with directions.

1. Waters and Water Courses ⇨232

Irrigation company, which was organized to take over pre-existing water dis-

tribution system, took over such system subject to outstanding water rights of landowners. I.C. § 42-222.

2. Waters and Water Courses ⇨151

Appropriator may forfeit his water right where he fails to make beneficial use thereof for the five-year statutory period, but title to such water rights cannot be acquired by another where such other was party at fault in preventing its use by appropriator for purpose for which water was originally appropriated. I.C. § 42-222.

3. Waters and Water Courses ⇨151

Forfeiture or abandonment of water rights is not favored and is not to be presumed, but all intendments are to be indulged in against a forfeiture.

4. Waters and Water Courses ⇨151

There can be no abandonment or forfeiture if nonuser of water rights is prevented from exercising his rights to the water by circumstances over which he has no control or if claimant to the water to which such user is entitled is prevented from using it by wrongful acts of another.

5. Waters and Water Courses ⇨152(8)

In action against irrigation company to quiet plaintiff's title to water decreed to plaintiff's predecessor but denied plaintiff and his predecessor by company upon predecessor's failure to pay maintenance assessment by the company which had been created subsequently to the water decree, wherein company cross-complained to es-

tablish its rights as subsequent appropriator, evidence was not sufficient to establish that company had appropriated the water for use of another. I.C. § 42-222.

6. Waters and Water Courses ⇨152(2)

If irrigation company was to prevail in action against company to quiet plaintiff's title to water decreed to plaintiff's predecessor but denied plaintiff and his predecessor upon predecessor's failure to pay maintenance assessment made by the company, which cross-complained to establish its rights as subsequent appropriator, company would have to prevail on strength of its own title. I.C. § 42-222.

7. Waters and Water Courses ⇨151

Where, following failure of plaintiff's predecessor to pay maintenance assessment made by irrigation company, such company, which had been created subsequent to water decree, denied plaintiff and his predecessor water which had been decreed to plaintiff's predecessor, title to the water was in plaintiff and had not been forfeited or abandoned, even though plaintiff and his predecessor had failed to use the decreed water for more than five years. I.C. § 42-222.

A. A. Merrill, Idaho Falls, Nels T. Sahl, St. Anthony, for appellant.

Forfeitures are not favored and courts will not lightly decree the abandonment of so valuable a property as a water right in

an irrigated region. *Union Grain etc. Co. v. McCammon Ditch Co.*, 41 Idaho 216, 240 P. 443; *Application of Boyer*, 73 Idaho 152, at page 160, 248 P.2d 540; *Carrington v. Crandall, et al.*, 1944, 65 Idaho 525, 147 P.2d 1009; *Perry v. Reynolds*, 63 Idaho 457, 122 P.2d 508; *Syster v. Hazzard*, 39 Idaho 580, 229 P. 1110; *Sullivan C. Co. v. Twin Falls Amusement Co.*, 44 Idaho 520, 258 P. 529; *St. John Irrigation Co. v. Danforth*, 50 Idaho 513, 298 P. 365; *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50; *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400; *Hall v. Blackman*, 8 Idaho 272, 68 P. 19; *Long on Irrigation 2d Edition* P. 335; *Ada County Farmer's Irr. Co. v. Farmers' Canal Co.*, 1898, 5 Idaho 793, 51 P. 990, 40 L. R.A. 485; *Hurst v. Idaho-Iowa Lateral*, 1926, 42 Idaho 436, 246 P. 23; *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418.

There can be no abandonment if the non-user is prevented from exercising his right to water by circumstances beyond his control. *Hurst v. Idaho-Iowa Lateral*, 34 Idaho 342, 202 P. 1068; *Welch v. Garrett*, 5 Idaho 639, 51 P. 405; *Ada County Farmers' Irrigation v. Farmers' Canal Co.*, 5 Idaho 793, 51 P. 990, 40 L.R.A. 485.

A water carrier corporation organized to take over pre-existing ditch system takes it subject to the outstanding rights of the land owner. *Wanamaker Ditch Co. v. Crane*, 132 Colo. 366, 288 P.2d 339.

Appellant's water right has not been abandoned, it having been diverted each and every year from the natural stream (Trail Creek) into the Humble Ditch for the use and benefit of appellant and his five co-tenants. The possession of one co-tenant is the possession of all co-tenants and no presumption of abandonment arises in such cases. *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943; *Hall v. Blackman*, 8 Idaho 272, 68 P. 19; *Carnes v. Dalton*, 56 Or. 596, 110 P. 170.

Holden & Holden, R. Vern Kidwell, Idaho Falls, for respondent.

A water right is abandoned for failure for a period of five years to apply it to the beneficial use for which it was appropriated. Idaho Code, sec. 42-222.

Proof of intent to abandon is not required—the statute provides for a forfeiture, without regard to question of intent. If intent can be shown, it is not necessary to wait for the five year period. *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009.

A decreed water right can be abandoned, where the abandonment pertains to a time subsequent to the decree. *Graham v. Leek*, 65 Idaho 279 at page 287, 144 P.2d 475.

KEETON, Justice.

The parties to this action will be referred to as they appear in the trial court. Appellant will be designated as plaintiff and respondent as defendant.

Plaintiff's predecessor in interest appropriated 1.6 second feet of the waters of Trail Creek for irrigation use on the North Half of the Northwest Quarter (N $\frac{1}{2}$ NW $\frac{1}{4}$) of Section 10, Township 3 N, R. 45 E, B.M. in Teton County by priority of 1896. Plaintiff acquired title to the land in 1940. The water was decreed to plaintiff's predecessor in 1910. The waters were diverted to plaintiff's land, or his predecessor's in interest, by certain irrigation works, and the water to which plaintiff was entitled ran through the Humble Canal, which crosses the southern part of his land. There were five other appropriators of Trail Creek water who received water through this canal and the waters decreed to plaintiff and others were until 1938 used by the appropriators in the proportions established by the decree of 1910. In March 1938 some of the landowners receiving diversion water from Trail Creek created the Trail Creek Irrigation Company, Inc., for the purpose of acquiring, owning, managing and controlling the ditches, canals, laterals, diversion works, rights of way and appurtenances then in existence and for the conveyance of water for the beneficial uses that may be made thereof by the stockholders and landowners entitled to such water. Defendant itself owns no irrigable land and no water. Neither plaintiff nor the former owner of his land was an incorporator.

From 1910, or prior thereto, until the time of the trial (1955) plaintiff's water, with

other decreed water, was turned into the Humble Canal. Immediately after the creation of defendant, statements of assessments for maintenance, upkeep and other expense were sent to the stockholders and landowners and plaintiff's predecessor, his father, was sent a statement for an assessment on 160 acres. He answered in substance that he only owned 80 acres. He was then sent a bill for \$24. For reasons not clear, the bill, or the part that may have been a proper charge, was not paid.

Plaintiff was a nonresident of the state, living at the time, and until 1950, in Nebraska. In the spring of 1939, by order of the president of defendant, or others acting on its behalf, the watermaster or ditchrider did not allow any water decreed to plaintiff to be taken from the Humble Canal, and by order of the president of defendant, no water was permitted to be used in subsequent years on plaintiff's land, except some run-over water in some years during the high water flow.

While the water decreed to plaintiff was at all times pertinent here in the Humble Canal, it was taken, subsequent to 1939, and used, or partly used, by the five other water users receiving water from that source. Thus the five other water users received 1.6 cubic feet per second of water more than their decreed rights. The watermaster, deputy watermaster and ditchrider testified that plaintiff's decreed water was turned into the Humble Canal each and every year for his use.

For supplemental water during the low water season, water users from the decreed rights of Trail Creek were augmented by stored water from the Fremont-Madison Irrigation District. This water was distributed through the irrigation works of defendant. Plaintiff in 1951, on advice of the president of defendant company, purchased and paid for three-fifths of a foot of stored water in Fremont-Madison Irrigation District. This placed him on a par with other water users receiving water through Trail Creek. This water has to be delivered to him, if at all, through the Humble Canal.

Plaintiff's land was leased to a tenant, and plaintiff being a nonresident of the state and not personally on the land did not know, and was never advised by defendant or anyone else, that he was being deprived of his decreed water until 1950. He then made demand for the water to which he claimed he was entitled. The Board of Directors of defendant refused to recognize such claim and continued to order the watermaster to allow him no water from the Humble Canal, or otherwise.

Defendant alleged in an answer and cross-complaint failure of plaintiff to apply the water decreed to him to a beneficial use and sought to establish rights to the 1.6 second feet (80 inches) of water as a subsequent appropriator, and claimed that the water had been abandoned for a period of in excess of five years and title to the same had been secured by defendant by adverse subsequent appropriation.

The trial court found that plaintiff's right had been forfeited and abandoned and that defendant is the owner of the water formerly decreed to plaintiff. Appeal was taken from the judgment.

In assignments of error plaintiff contends generally that the evidence does not support the findings made by the trial court or the conclusion reached; that the testimony was insufficient to sustain the finding that defendant was a subsequent appropriator and that plaintiff's rights had been lost by failure to apply the water decreed to him to a beneficial use. Further, plaintiff assigns as error certain rulings on the admissibility of evidence and the exclusion of other evidence. While there were many questions propounded to plaintiff's witnesses to which objections were sustained and here assigned as error that should have been overruled, we shall not discuss such assignment separately, but shall limit the discussion to the general contention that the facts found and the conclusion reached are not supported by the law or the evidence.

The only reason we can determine from a perusal of the evidence as to why plaintiff was not furnished or allowed to use the water decreed to him, subsequent to 1938, was the alleged failure to pay the assessments sent to plaintiff's father at the time the corporation was created. No other statements were sent and plaintiff was not advised of any subsequent maintenance charges, if any there were. The only testimony in the record relative to the cost of

the upkeep is that subsequent to the creation of defendant it performed a limited amount of work on the Humble Canal, and installed a new headgate for diversion purposes. None of the landowners taking water from the Humble Canal claimed any right to plaintiff's decreed water, and the last user taking water from the canal testified that he had changed the canal at his own expense in a limited particular and that he personally maintained and performed the necessary work on the canal running through plaintiff's land. Neither he, nor anyone else, except defendant, claimed to have any subsequent appropriation and defendant made no application to the Department of Reclamation for a permit to appropriate plaintiff's water. The record of the watermaster corrected to 1949 shows plaintiff's water right and the watermaster testified that in apportioning the water to the various water users, he turned into the Humble Canal plaintiff's water to which he was entitled, each and every year up to the time of the trial, for plaintiff's use. The watermaster was corroborated by the deputy watermaster and the ditchrider. No testimony was offered to dispute these witnesses.

By what lawful right defendant's officers ordered the watermaster or ditchrider, or either, not to allow plaintiff to use his decreed water subsequent to 1938 and up to the time of the trial is not explained, and no authority for such act, or acts, is cited.

Defendant contends that plaintiff's water right had been abandoned, had reverted to the State and become the subject of appropriation under the provisions of Sec. 42-222, I.C. The pertinent part of the provision reads:

"All rights to the use of water acquired under this chapter or otherwise shall be lost and abandoned by a failure for the term of five years to apply it to the beneficial use for which it was appropriated, and when any right to the use of water shall be lost through non-use or abandonment such rights to such water shall revert to the state and be again subject to appropriation under this chapter."

[1] The only reason the water owned by plaintiff was not applied to a beneficial use for the five year period relied on by defendant to establish its asserted rights was that the defendant wrongfully deprived plaintiff of its use, and no landowner, particularly defendant, has subsequent to the alleged abandonment, appropriated the water to which plaintiff is entitled. The other water users taking water from the Humble Canal, subsequent to 1939, received more water than they were entitled to under the decree of 1910. When defendant organized to take over the pre-existing water distribution system, the same was taken subject to the outstanding rights of the landowners.

If plaintiff's water right in Trail Creek is taken from him he is deprived of that

which is necessary to sustain the land and make it valuable. Without the water the land deteriorates and simply reverts to a desert area.

[2] While under the statutory provision above quoted an appropriator may, under the circumstances therein provided, forfeit his water right where he fails to make beneficial use of the same for the statutory period, title to such water right cannot be acquired by another, where such other claimant was the party at fault in preventing its use for the purpose for which the water was originally appropriated.

[3] Forfeiture or abandonment of water rights is not favored and is not to be presumed, and all intendments are to be indulged in against a forfeiture. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50; *Idaho Farms Co. v. North Side Canal Co.*, D.C., 24 F.Supp. 189; *Application of Boyer*, 73 Idaho 152, 248 P.2d 540; 93 C.J.S., *Waters*, § 193 c., p. 997.

[4] There can be no abandonment or forfeiture if the non-user is prevented from exercising his right to the water by circumstances over which he has no control, or where claimant to the water to which such user is entitled is prevented from using it by the wrongful acts of another. *Welch v. Garrett*, 5 Idaho 639, 51 P. 405.

[5] Further, defendant in this case did not apply the water it here claims to a bene-

ficial use adverse to the prior owner. In fact, defendant has no land to irrigate and the evidence does not sustain the contention that defendant appropriated the water for the use of another.

What the remedy is or was for the failure of plaintiff, or his predecessor in interest, to pay the purported upkeep charge we do not decide. Such nonpayment did not authorize defendant company to shut off arbitrarily the water to which plaintiff was entitled, particularly where he was given no notice thereof and no demand was made on him for payment.

The purpose of the creation of defendant was to distribute to the landowners through the irrigation system water to which they were entitled, and not to confiscate water rights from stockholders or landowners.

[6, 7] If defendant is to prevail in this case, it must be on the strength of its own title. Title to the water in question was clearly established as owned by plaintiff, and has never been forfeited or abandoned, nor has defendant secured title by subsequent appropriation.

It follows that the judgment is reversed and the cause remanded with instructions to the trial court to set aside the judgment and enter a judgment favorable to plaintiff quieting in him 1.6 cubic feet of water per second (80 inches) conformable to the decree of 1910, and requiring defendant to convey that water to him as well as the stored water represented by his right in

the Fremont-Madison Irrigation District subject to reasonable assessments for maintenance as are charged other users in defendant's system. The court will make all appropriate and necessary orders to carry the judgment when entered into effect. Plaintiff will be allowed his costs in the district court. Costs to appellant.

TAYLOR, C. J., ANDERSON and SMITH, JJ., and BAKER, District Judge, concur.

On Petition for Rehearing

KEETON, Justice.

Defendant's petition for rehearing asserts that the above opinion overrules the case of *Farmers Co-op. Ditch Co. v. Riverside Irrig. Dist. Ltd.*, 14 Idaho 450, 94 P. 761, and in effect holds that it is necessary in order to appropriate water to a beneficial use that an application for a permit to the State Reclamation Engineer should be made.

The opinion does not overrule the holding in *Farmers Co-op. Ditch Co. v. Riverside Irrig. Dist. Ltd.*, supra, nor does it hold that an application to appropriate water to the State Reclamation Engineer is necessary, nor does it hold that defendant cannot appropriate and own water.

The opinion simply holds that the water in question in this action was not appropriated or used by defendant, and the opinion is conformable to many precedents

long recognized and established. Petition for rehearing is denied.

TAYLOR, C. J., ANDERSON and SMITH, JJ., and BAKER, District Judge, concur.



296 P.2d 1024

Richard A. ANDERSON and Birdie Marie Anderson, husband and wife,
Plaintiffs-Respondents,

v.

W. David SPRINGER, Defendant-Appellant,
and

Orvill E. Merrell, Defendant.

No. 8416.

Supreme Court of Idaho.

May 2, 1956.

Malpractice action wherein defendant moved for change of place of trial. The District Court, Fifth Judicial District, Bannock County, John A. Carver, J., denied motion, and defendant appealed. The Supreme Court, Baker, District Judge, held that where nonresident defendant, who sought to have place of trial changed to county of his residence, properly filed affidavit of merits and demand for removal, and question was argued on merits, and it did not appear

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Department of Water Resources
Eastern District Office

AFFIDAVIT

STATE OF IDAHO)
County of Madison)^{SS}

GRANT L. KLINGLER, being first duly sworn, deposes and says :

1. That he is a member of the Board of Directors of Canyon Creek Canal Company, and has been authorized by said Board to make this Affidavit in support of said Companys application for change in Point of Diversion and place of use.

2. That Canyon Creek Canal Company was decreed 16.0 c.f.s., with the priority date of June 1, 1900, and 54.0 c.f.s., with a priority date of June 1, 1902, of the waters of Canyon Creek, tributary of the Teton River, in the case of Rexburg Irrigation Company, et al., vs. Teton Irrigation Canal Company, et al., by a decree of the 6th Judicial District Court, dated December 16, 1910.

3. Said Decree designated the lands irrigated with said water and to which said water right was appurtenant, as follows:

Lands of stockholders of said company situated in Twp. 5N., Rge. 43 E.B.M., Twp. 6 N., Rge. 41 E.B.M., Twp. 6 N., Rge. 42 E.B.M., and in Twp. 7 N., Rge. 41 E.B.M., aggregating over 10,000 acres.

4. The stock holders of said Company did in fact use all of said decreed water on their lands at the time of said decree and thereafter.

5. That through the years, the specific lands irrigated by the stockholders have undoubtedly changed somewhat from time to time, and the means by which the water was diverted has changed somewhat from time to time, and the ability of said shareholders to divert and apply all of their decreed water has, at times, been thwarted by porous soils, erosion, unclean canals and ditches, and other things; but said shareholders have always diligently striven to divert and apply all of their said decreed water and have in fact, at various times, over the years, diverted and applied to a beneficial use all of said decreed water, up to the total amount of water flowing in said Canyon Creek.

6. Although many of the "old-timers", who were stockholders in said Company, and used said water are now dead, many of the present stockholders of said Company are relatives of said "old-timers", and would testify as to these things, based on information handed down to people now living,

both stockholders and non-stockholders who live in the area.

7. Present stockholders of said Company who would testify as to the use of said decreed water rights through diversions other than the main point of diversion of said Company system are as follows:

A. Henry Trupp, by means of a diesel motor and pump, pumped Canyon Creek water out of the Teton River onto his lands, as a stockholder of Canyon Creek Canal Company, regularly between the years of 1943 to and including 1960.

B. Your affiant, in behalf of said Company, in approximately the year 1959, pumped said decreed water out of Canyon Creek, at the point where Wright Creek empties into Canyon Creek, and at a point below said companys usual point of diversion, into Canyon Creek Canal.

C. In at least one season prior to 1961, Spence Haws, as a stockholder of said Company pumped said decreed water from the Teton River onto his lands, via Henry Trupp lateral ditch.

D. In approximately the year 1961, your affiant, as a stockholder of said Company, pumped said decreed water from the Teton River onto the said Spence Haws lands, via Henry Trupp lateral ditch.

8. On June 20, 1974, J. Wayne Stevens, a stockholder in said Company, pumped said Companys decreed water from said Canyon Creek from a point on said Creek in the SE $\frac{1}{4}$ of Section 13, Twp. 6 N., Rge 42 E.B.M. onto his lands, and otherwise, using all of the water of Canyon Creek (Hugh Ireland of Burggraf Construction Company can verify this) and said pumping continued until September 30, 1974. Said J. Wayne Stevens did the same in 1975 and is doing the same in this year, 1976.

9. Said J. Wayne Stevens pumped from Canyon Creek said decreed water for about 15 years prior to 1974, for irrigation of his yard, and for culinary use in his home and shop, watering livestock, washing machinery and for garden use.

10. That it is common knowledge among the present shareholders of said Company, although it is difficult now to verify times and amounts, that said Company and its stockholders have, over the years, used said decreed water by other means than through just their canal system.

11. That said Company, at various times over the years, has enlarged the canal system, lined with concrete portions of said system and improved the system in various ways, but that said system degenerates

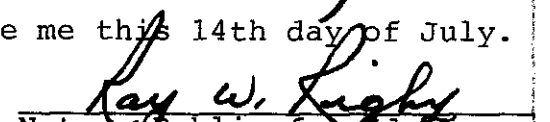
and more of the water of Canyon Creek, by seepage and otherwise, gets back into said Canyon Creek, until maintenance and conservation measures are implemented, which reduces the amount of water lost almost completely, for periods of time during the irrigation season, until deterioration of the system causes losses to occur again.

12. That at the time of the decree vesting said water rights in said Company, said Company was using all of its decreed water; it has made every attempt, although sometimes unsuccessfully, to use all of its water available since said decree, and now, before the filing of this application said Company has installed facilities for and is now resuming full use of its decreed water.

13. Your affiant, in behalf of said Company and all its stockholders requests the Department of Water resources of the State of Idaho to grant approval to said Company application for change of point of diversion and place of use of water, which application is, in effect, a clarification and specification of the lands to be watered under the terminology used in said decree, and a further request for authority to divert the water from more than one point of diversion, in recognition of the problems that have developed over the years in trying to take all of said decreed water through a single point of diversion, allowing modern means of taking the water from Canyon Creek or Teton River, rather than to have to lose the water due to extreme seepage.


Grant L. Klingler

SUBSCRIBED AND SWORN To before me this 14th day of July.


Notary Public for Idaho
Residing at: Rexburg, Idaho
My Commission Expires: Life

May 7, 1976

RE: Application for Transfer No. 22-0196/22-0196 CANYON CREEK CANAL CO.

Porter Publishing Company
Box 7
Rexburg, Idaho 83440

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the publication dates allowing time for you to submit us a galley proof for review before publication.

After sending us a galley proof, proceed with the publication on the dates we have inserted, assuming the notice is correct. If we have any corrections, we will notify you before the first publication. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

Bill submitted 5-26-76 by lw

RDC:CN

Enc: Legal Notice (1)

**NOTICE OF PROPOSED
CHANGE OF WATER RIGHT
NO. 22-0195/22-0196**

Notice is hereby given that Canyon Creek Canal Company, has applied to the Department of Water Resources for a change in the point of diversion of the waters of Canyon Creek tributary to Teton River. The right sought to be changed is evidenced by decree to Canyon Creek Canal and Irrigation Co. in case of Rexburg Irrigation Co., et al -vs- Teton Irrigation Canal Co., et al, dated 12-16-1910 in Sixth Judicial Court, County of Fremont and is recorded as follows:

DECREE NO. 22-0195. AMOUNT: 16.0 cfs. PRIORITY: 6-01-1900.

DECREE NO. 22-0196. AMOUNT: 54.0 cfs. PRIORITY: 6-01-1902.

DECREED POINT OF DIVERSION: Lot 4, Sec. 6, T. 5N, R. 43E, B.M., Madison County.

The water is used to irrigate 10,615 acres within the W $\frac{1}{2}$, SE $\frac{1}{4}$, Sec. 25, E $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 26, W $\frac{1}{2}$ SW $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 34, Sec. 35, Sec. 36, T. 7N, R. 41E; S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$, Sec. 31, SE $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$, Sec. 32, NE $\frac{1}{4}$ NW $\frac{1}{4}$, S $\frac{1}{2}$ NW $\frac{1}{4}$, S $\frac{1}{2}$, Sec. 33, SW $\frac{1}{4}$, Sec. 34, T. 7N, R. 42E; Sec. 1, Sec. 2, NE $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 3, NW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 11, NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 12, T. 6N, R. 41E; SW $\frac{1}{4}$, Sec. 1, SW $\frac{1}{4}$, Sec. 2, E $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 3, Sec. 4, Sec. 5, Sec. 6, Sec. 7, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 8, N $\frac{1}{2}$, Sec. 9, E $\frac{1}{2}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, Sec. 10, SE $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, Sec. 11, NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$, Sec. 12, E $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, N $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 14, E $\frac{1}{2}$, Sec. 15, T. 6N, R. 42E; SW $\frac{1}{4}$, Sec. 7, T. 6N, R. 43E, B.M.

TO BE CHANGED AS FOLLOWS

The water will be diverted within Lot 4, Sec. 6, T. 5N, R. 43E, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T. 6N, R. 42E, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 13, T. 6N, R. 42E, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 30, T. 7N, R. 42E, NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 19, T. 6N, R. 43E, B.M.

Any protest against approval of the above proposed change of water right must be filed with the Idaho Department of Water Resources, 1515 Lincoln Road, Idaho Falls, Idaho, 83401, on or before June 1, 1976.

R. KEITH HIGGINSON
Director

Published in the Rexburg Journal, Rexburg, Idaho, on May 13 and May 20, 1976.

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

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TO BE CHANGED AS FOLLOWS

The water will be diverted within Lot 4, Sec. 6, T. 5N, R. 43E, $NW\frac{1}{4}SE\frac{1}{4}$, Sec. 13, T. 6N, R. 42E, $SE\frac{1}{4}SE\frac{1}{4}$, Sec. 13, T. 6N, R. 42E, $SW\frac{1}{4}NE\frac{1}{4}$, Sec. 30, T. 7N, R. 42E, $NW\frac{1}{4}SW\frac{1}{4}$, Sec. 19, T. 6N, R. 43E, B.M.

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R. KEITH HIGGINSON

Director

Published in the Rexburg Journal, Rexburg, Idaho, on May 13 and May 20, 1976.

me. H. A.

May 7, 1976

RE: Application for Transfer No. 22-0195/22-0196 CANYON CREEK CANAL COMPANY

Mr. Arthur L. Larson, Watermaster
Water District 01
Box 1099
Idaho Falls, Idaho 83401

Dear Art:

Please find enclosed a copy of the above referenced application and a watermaster recommendation form. Please review the application and complete the form, returning it to this office on or before June 1, 1976.

Thank you for your cooperation in this matter.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

Enclosures

May 7, 1976

RE: Application for Transfer No. 22-0195/22-0196 CANYON CREEK CANAL COMPANY

Mr. Ray W. Rigby
Attorney at Law
P.O. Box 437
Rexburg, Idaho 83440

Dear Mr. Rigby:

Attached herewith is departmental receipt No. 15796 in the amount of \$30.00 for the above referenced transfer.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

Attachment

LAW OFFICES

RIGBY, THATCHER & ANDRUS, P. A.

25 NORTH SECOND EAST - P. O. BOX 437 - REXBURG, IDAHO 83440
RAY W. RIGBY - GORDON S. THATCHER - G. RICH ANDRUS
TELEPHONE (208) 356-3633

April 30, 1976

RECEIVED

MAY 4 1976

State of Idaho

Department of Water Resources
Eastern District Office

Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Dear Sirs:

Enclosed for filing and processing is an "Application for Transfer of Water Right" for Canyon Creek Canal Company. Their check for \$30.00 is also enclosed.

Sincerely Yours,


Ray W. Rigby

RWR/jr

Enclosures

DEPARTMENT OF WATER RESOURCES

TRANSFER ANALYSIS SHEET

1. Source Canyon Creek + Teton R. (one P.D.) Name Canyon Cr Canal Co
2. Right Being Transferred Right No. 22-0195 + 0196
- a. ☒ Decree Transfer No. _____
- _____ License
- _____ Use
- b. 1900 Priority + 1902 respectively
- c. ☒ Location - Original P. D.
- d. ☒ " - Original P. U.
- e. ☒ " - New P.D. - four new P.D.'s in addition to
- f. Same " - New P.U. old one. One P.D. to be on Teton R.
- g. 70.0 cfs Amount below confluence w/ Canyon Cr.
- _____ All
- ☒ Part
3. N/A Proof of Ownership of Right
- Comment Canal company - decreed
- lands shown on land list.
4. No Expansion of Right
- Comment _____
- _____
5. ☒ Map
6. ☒ Signature
7. ☒ Fee
8. Watermaster's Comments _____
- _____
- _____
9. Comments _____
- _____
- _____
10. Initial Review by [Signature] Date 5/6/76
11. Recommended Action
- _____ Approve
- ☒ Deny SEE MEMO DECISION
- _____ Conditions _____
- By RDC Date 12/13/76