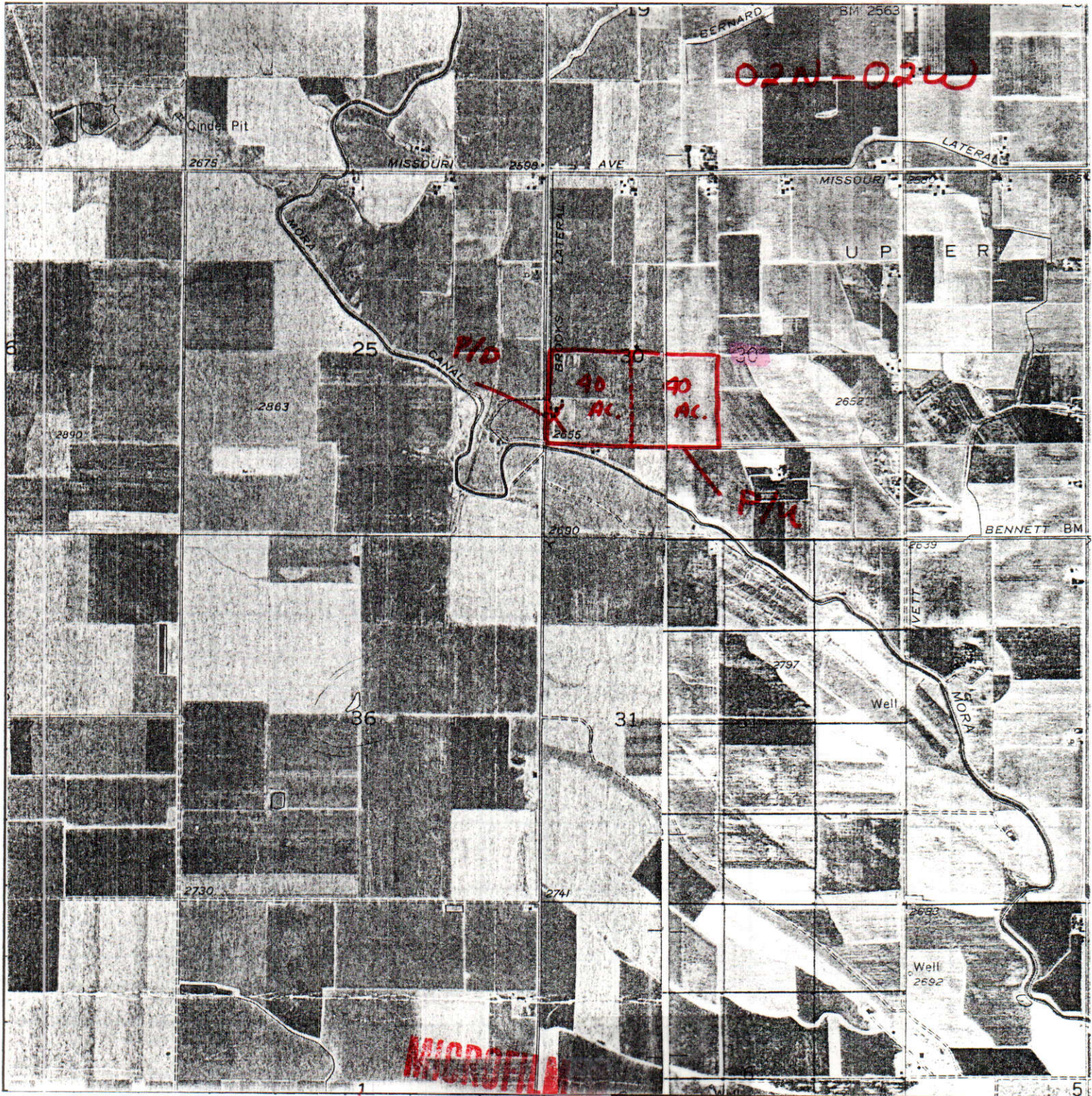


13. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



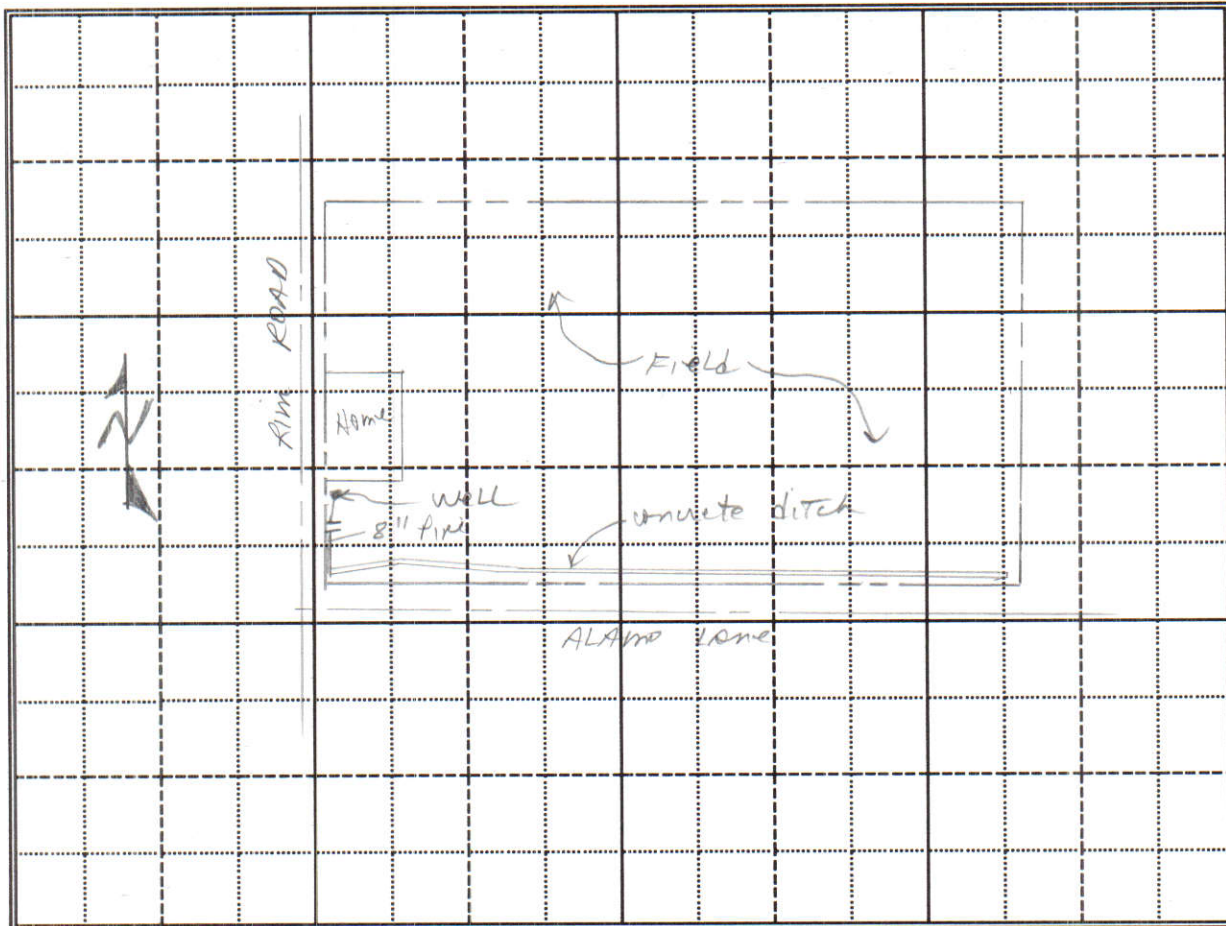
Scale 2 inches equal 1 mile.

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

DEC 11 1990

*M. L. Jensen*  
(Applicant)

3. **Delivery System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable.



Scale: 1" = NTS

☒ Copy of USGS Quadrangle Attached Showing location(s) of point(s) of diversion and place(s) of use (required).

☒ Aerial Photo Attached (required for irrigation of 10+ acres)

☒ Photo of Diversion and System Attached

4.

| Well or Diversion Identification No.* | Motor Make    | Hp | Motor Serial No.    | Pump Make | Pump Serial No. or Discharge Size |
|---------------------------------------|---------------|----|---------------------|-----------|-----------------------------------|
|                                       | U.S. Electric | 75 | 6326/T065326R010R-9 | N/A       | N/A                               |
|                                       |               |    |                     |           |                                   |
|                                       |               |    |                     |           |                                   |

\*Code to correspond with No. on map and aerial photo

#### D. FLOW MEASUREMENTS

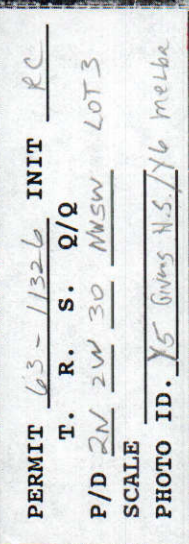
N/A - Winter Exam.

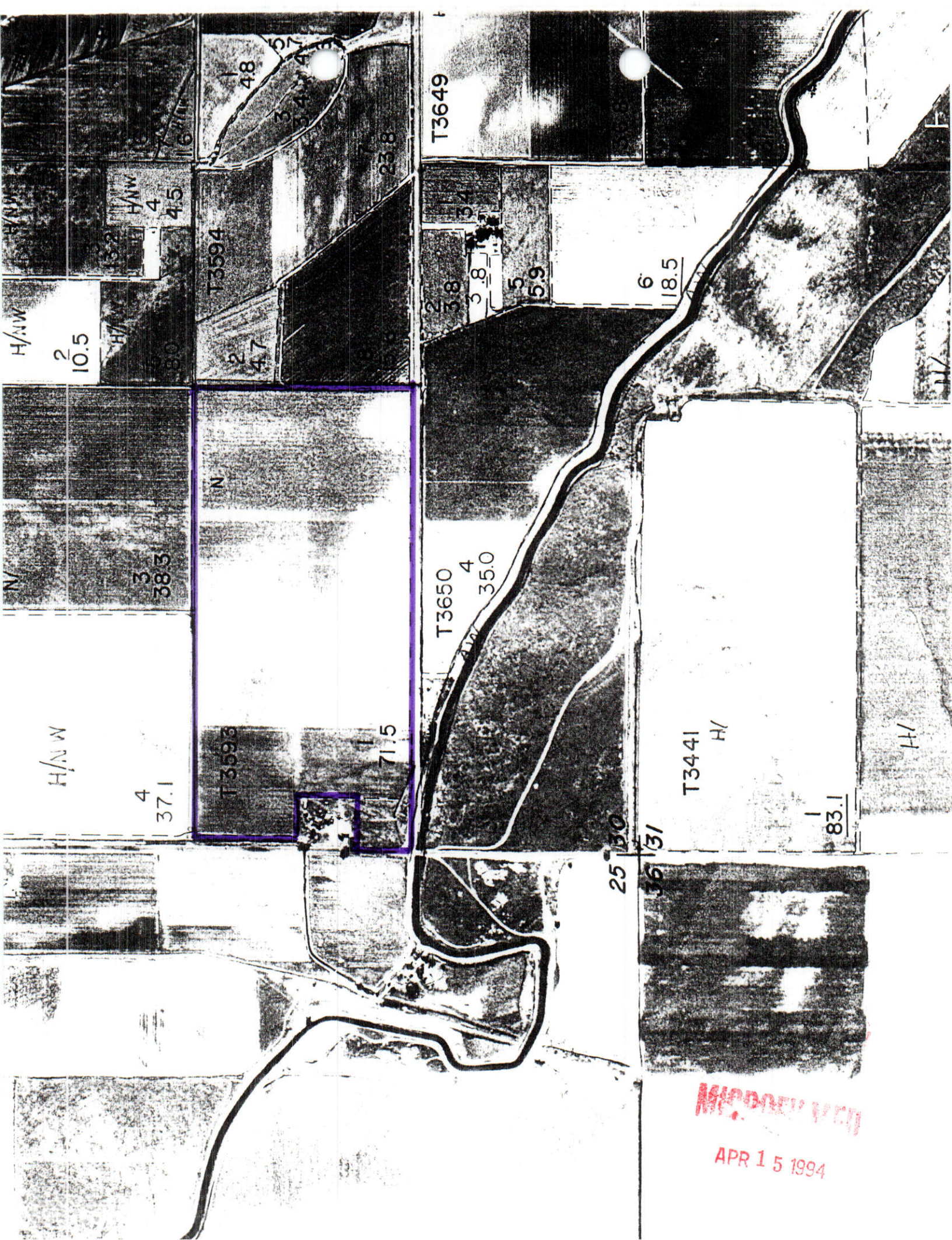
1.

| Measurement Equipment | Type | Make | Model No. | Serial No. | Size | Calib. Date |
|-----------------------|------|------|-----------|------------|------|-------------|
|                       |      |      |           |            |      |             |
|                       |      |      |           |            |      |             |

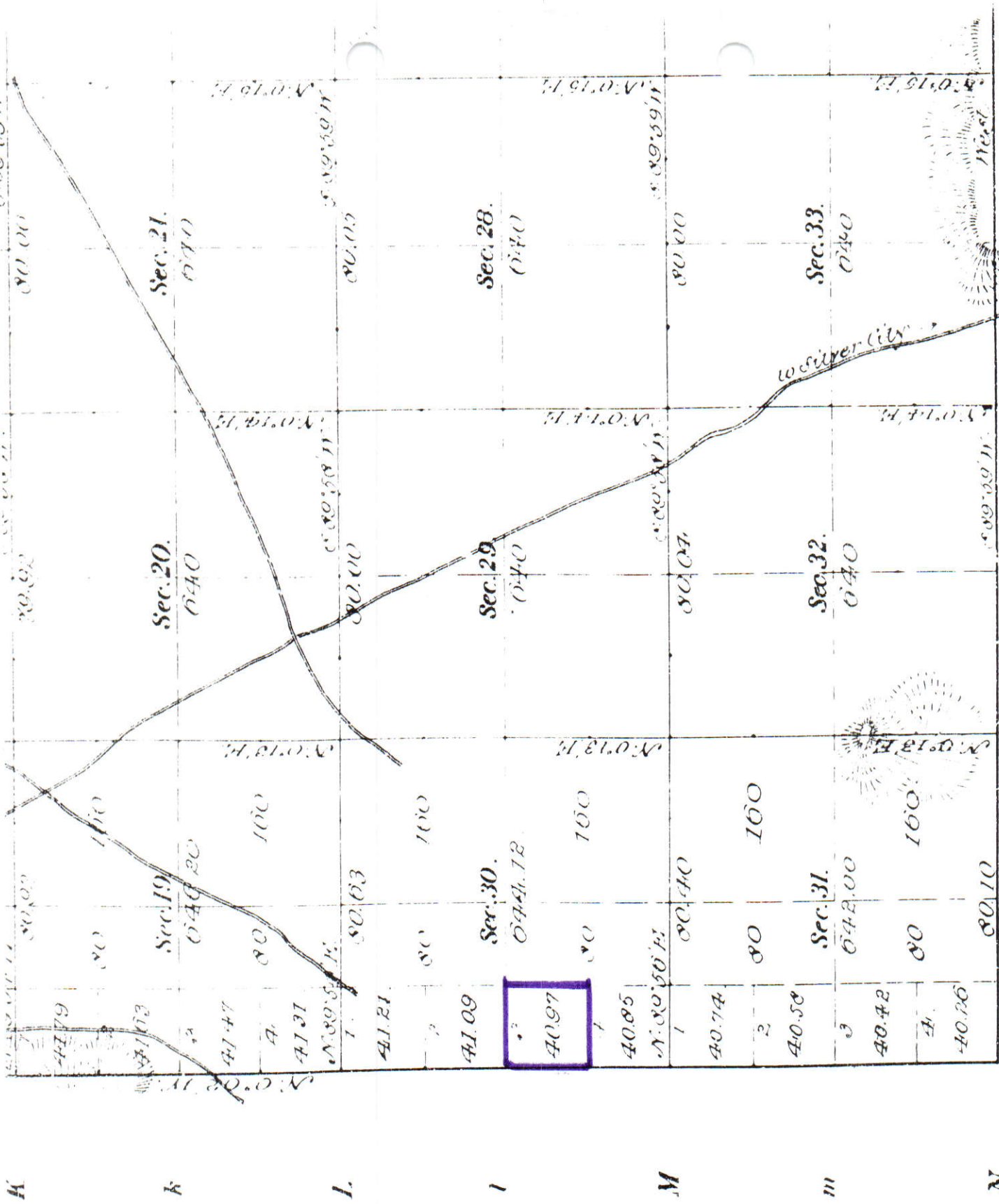
2. Measurements:

APR 15 1994





APR 15 1994



Total number of Acres 2325

| Survey Designated | By Whom Surveyed | Date of Contract | Amount of Survey | Witness | Monetary |
|-------------------|------------------|------------------|------------------|---------|----------|
|                   |                  |                  |                  |         |          |

APR 15 1994



PHOTO ONE- well and 8" discharge line which leads to concrete irrigation ditch.



View southerly of well and 8" discharge line to upper concrete ditch.

APR 15 1994

PHOTO TWO-



PHOTO THREE- View easterly of west end of concrete ditch and portion of irrigated land.



APR 15 1994

PHOTO FOUR- View westerly of concrete ditch and irrigated land.

State of Idaho  
Department of Water Resources

**WATER RIGHT LICENSE**  
WATER RIGHT NO. 63-11326

Priority: May 25, 1990

Maximum Diversion Rate: 1.43 CFS  
Maximum Diversion Volume: 321.8 AF

This is to certify, that M L CLEMENTS  
4121 RIM RD  
NAMPA ID 83686

has complied with the terms and conditions  
of the permit, issued pursuant to Application for Permit dated May 25, 1990; and  
has submitted Proof of Beneficial Use on September 5, 1991. An examination indicates  
that the works have a diversion capacity of 1.460 cfs of water from a GROUNDWATER  
source, and a water right has been established as follows:

| <u>BENEFICIAL USE</u> | <u>PERIOD OF USE</u> | <u>RATE OF DIVERSION</u> | <u>ANNUAL VOLUME</u> |
|-----------------------|----------------------|--------------------------|----------------------|
| IRRIGATION            | 03/15 to 11/15       | 1.43 CFS                 | 321.8 AF             |

LOCATION OF POINT(S) OF DIVERSION: Lot 3( NWSW), Sec. 30, Township 02N, Range 02W  
CANYON 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> |
|------------|------------|------------|--------------|------------------|--------------|--------------|
| 02N        | 02W        | 30         | NESW 40      | Lot 3(NWSW) 31.5 |              | 71.5         |

Total number of acres irrigated: 71.5

CONDITIONS/REMARKS:

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount that can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
5. This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 4.5 afa per acre for the lands above.

APR 15 1994

State of Idaho  
Department of Water Resources

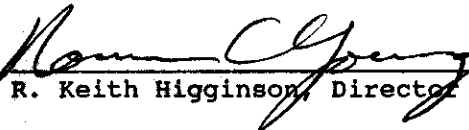
**WATER RIGHT LICENSE**  
WATER RIGHT NO. 63-11326

CONDITIONS/REMARKS:

6. This right authorizes only supplemental use of water. Ground water diverted under this right cannot be used as the sole source of water supply but must always be associated with another primary water supply from either a surface water or ground water source. Surface water shall continue to be used as the primary source of supply for the ground upon which it is now appurtenant, and ground water shall be used only when surface water supplies are insufficient for irrigation of the property.
7. The Department retains jurisdiction over this right to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the development.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code.  
Witness the seal and signature of the Director, affixed at Boise, this 9<sup>th</sup>  
day of APRIL, 1994.

Acting for

  
R. Keith Higginson, Director

APR 15 1994

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SEP 05 1991

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
**PROOF OF BENEFICIAL USE**

**Department of Water Resources**

The Idaho Department of Water Resources will consider this form as a statement that the permit holder(s) has/have completed all development that will occur under this permit and that water has been applied according to the provisions of the permit for the beneficial use(s) described below. This form must be accompanied by a license examination fee or a completed field examination report prepared by a certified water right examiner who has been appointed by the department.

1. Permit No. 63-11326 Telephone No. 495-2201
2. Name(s) of Permit Holder(s): M. L. Clements
3. Post Office Address: 4121 Rim Road Nampa, ID. 83686
4. Source of Water: Well
  - a. If ground water, well driller's name: Cope Date drilled: July 1990
  - b. Pump horsepower: 75 HP Pressure (psi): 0 Dynamic pumping level (ft.): 275

5. Extent of Use:

Domestic \_\_\_\_\_ (No. of households) Irrigation 75 (No. of acres)  
Stockwater \_\_\_\_\_ (No. and type of stock) Other Lawn.

- \_\_\_\_\_ 75 Inches
6. Total rate and/or volume for which proof is submitted 1.5 cfs \_\_\_\_\_ acre/feet

7. Refer to the approval conditions on your permit and respond accordingly:

Measuring device: Required? ☐ Yes ☐ No Installed? ☐ Yes ☐ No  
OR  
Flow Measurement Port: Required? ☒ Yes ☐ No Installed? ☐ Yes ☐ No

8. Fee Enclosed: \$ 125.00 (See License Examination Fee Schedule)

9. Person to contact to accompany the Department representative during the field examination:

M. L. Clements Off. - 495-2201  
Name Home - 466-1102 Telephone No.  
4121 Rim Road Nampa ID. 83686  
Address

10. The above information is my true statement of the extent to which the above numbered permit has been developed and I relinquish any undeveloped portion of the permit to the state of Idaho.

Sept. 4, 1991 M. L. Clements  
Date Signature (and title if on behalf of a company or organization)

NOV 19 1991

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OCT 22 1992

174  
COPY

Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
Post Office Box 1368  
Boise, Idaho 83701  
Phone: (208) 344-8535

Department of Water Resources

COPY

NO. \_\_\_\_\_  
FILED  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

OCT 21 1992

Attorneys for M. L. Clements

J. DAVID NAVARRO, Clerk  
By KATHY URLEZAGA  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 63-11326 IN THE NAME )  
OF M. L. CLEMENTS, )

Case No. 94266

HARVEST FARM CO., )

ORDER FOR DISMISSAL  
WITH PREJUDICE

Appellant, )

vs. )

IDAHO DEPARTMENT OF WATER )  
RESOURCES AND M. L. CLEMENTS, )

Respondent. )

The above-entitled matter having come before this court on the  
parties' Stipulation for Dismissal with Prejudice, and good cause  
appearing therefore,

ORDER FOR DISMISSAL WITH PREJUDICE - Page 1.

10/8/92/jmv

IT IS HEREBY ORDERED, that the above-entitled action be dismissed with prejudice, each party to bear their own costs and attorney's fees.

DATED this 16 day of OCT, 1992.

DEBORAH A. BAIL

---

DEBORAH A. BAIL  
District Judge

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 63-11326 IN THE NAME OF )  
M. L. CLEMENTS )  
\_\_\_\_\_ )

NOTICE OF LODGING  
OF TRANSCRIPT

TO: ALL PARTIES OR THEIR COUNSEL OF RECORD

YOU ARE HEREBY NOTIFIED, pursuant to I.R.C.P. 83(o), that the transcript of the testimony and proceedings of the hearing before the Department of Water Resources in this matter has been lodged with the Department in accordance with I.R.C.P. 83(k)(2).

THAT the total cost for preparation of the transcript is \$310.00 at the rate of \$2.00 per page for 155 pages. The appellant Harvest Farm Company paid the estimated transcript preparation fee of \$180.00 and is required to pay the additional amount of \$130.00 prior to the settlement of the transcript.

YOU ARE FURTHER NOTIFIED, that the Department is sending a copy of the transcript with this notice to Bruce M. Smith, attorney for the appellant, Harvest Farm Company and to Stephen A. Bradbury, attorney for respondent M. L. Clements.

THAT the parties have 21 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;

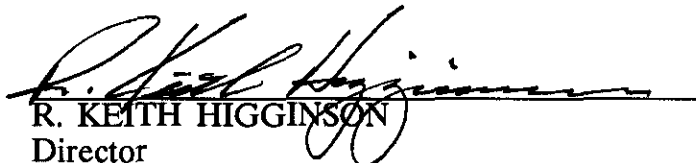
THAT upon failure of the parties to file any objection within such 21 day period, the transcript shall be deemed settled; and,

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NOV 19 1991

THAT within seven (7) days of 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 certified copy of the agency record and all exhibits offered or admitted in the proceeding.

DATED this 15<sup>TH</sup> day of May, 1991.

  
R. KEITH HIGGINSON  
Director

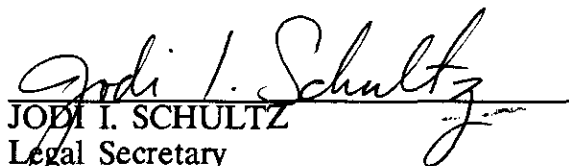
#### CERTIFICATE OF SERVICE

I hereby certify 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 thereto on the 15<sup>th</sup> day of May, 1991.

Documents served: NOTICE OF LODGING OF TRANSCRIPT  
TRANSCRIPT

Persons served: Stephen A. Bradbury  
Eberle, Berlin, Kading, Turnbow & McKlveen  
300 N. 6th St.  
P.O. Box 1368  
Boise, Idaho 83701

Bruce M. Smith  
Rosholt, Robertson, Tolman & Tucker  
P.O. Box 2139  
Boise, Idaho 83701-2139

  
JODI I. SCHULTZ  
Legal Secretary  
Idaho Department of Water Resources

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BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

IN THE MATTER OF APPLICATION )  
FOR PERMIT NO. 63-11326 )  
\_\_\_\_\_ )

M. L. Clements, )

Applicant; )

Harvest Farm Co., )

Protestant. )  
\_\_\_\_\_ )

MEMORANDUM  
DECISION AND ORDER  
APPROVING APPLICATION

On September 11, 1990, the Department of Water Resources (Department) issued a Proposed Memorandum Decision in connection with protested Application for Permit No. 63-11326 in the name of M. L. Clements.

On September 21, 1990, the Department received exceptions to the proposed decision and a request for oral argument from the protestant, Harvest Farm Co.

The Director has reviewed the exceptions and the request for oral argument and has changed Finding of Fact Nos. 10, 11, 13 and 14 and Conclusion of Law No. 9 as shown in this final decision. Conclusion of Law No. 10 as shown in the Proposed Memorandum Decision and Order has been deleted. The request for oral argument is denied.

FINDINGS OF FACT

The Application

1. On May 25, 1990, M.L. Clements (hereinafter

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applicant) submitted to the Department of Water Resources an application for permit to appropriate groundwater. The application, which has been assigned the number 63-11326, proposes the diversion of 1.6 cubic feet per second (cfs) of water for supplemental irrigation of up to 80 presently irrigated acres. The proposed point of diversion is in Government Lot 3 (NW 1/4 SW 1/4) Sec. 30, T02N, R02W, Canyon County.

2. The application was published in the Idaho Press Tribune on June 20 and 27, 1990.

Protest and Cease and Desist Order

3. On June 21, 1990, the Department received a protest to the approval of the application from Harvest Farm Co. (hereinafter protestant).

4. On July 18, the Department received from the protestant a request for issuance of a Cease and Desist Order to prohibit the pumping of the well described in this application for permit. On July 31, 1990, the Director of the Department issued an order requiring that the applicant cease and desist use of the well on August 6, 1990.

5. On August 17, 1990, the Department received from the applicant a Petition for Stay of Cease and Desist Order and Request for Administrative Hearing in this matter. In response to this request, the Department held a conference with the applicant, his attorney Steven A. Bradbury, and protestant's attorney Bruce M. Smith, on August 20, 1990. Based in part on the discussions at the conference, the protestant provided a

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DEC 11 1990

letter to the Department on August 22, 1990, objecting to the approval of a stay of the Cease and Desist Order. On August 23, 1990, the Department issued an Order Denying Petition for Stay of Cease and Desist Order.

Hearing

6. A hearing regarding the protested application was held on September 6, 1990. At the hearing the applicant was present and was represented by attorneys Steven A. Bradbury and William J. McKlveen. Expert testimony was provided for the applicant by Charles F. Feast, registered geologist. The protestant was represented by attorney Bruce M. Smith, and by expert witness Sherl Chapman, registered geologist.

7. The protestant raised objections to the proposed project by alleging that the proposed use is such that:

- (a) it will reduce the quantity of water under existing water rights,
- (b) the water supply is insufficient for the proposed use, and
- (c) it will conflict with the local public interest.

8. The applicant testified that the well as described in the application was drilled during late June, 1990, and that pumping from the well occurred from approximately July 14 through August 6, 1990. He stated that pumping of the well has not occurred since August 6, 1990, because of the prohibition imposed by the Cease and Desist Order.

9. All of the lands described in the application are

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presently served by the Boise-Kuna Irrigation District. The applicant stated that the intended use for the well is to provide a supplemental supply when Boise-Kuna Irrigation District water is insufficient for the irrigation needs of the acres described in the application. He stated that the cost of delivery of the water obtained from Boise-Kuna Irrigation District is lower than the cost of providing the same amount of water from the supplemental well.

10. Testimony at the hearing was consistent that the aquifer from which the applicant proposes to divert is the same as that utilized by a well located about 1670 feet to the south, which is owned by Harvest Farm, Co. (protestant's well). Both wells have been described as being in the same aquifer as was identified in hearings held on Applications for Permit Nos. 63-10740 and 63-10741, in the name of Bing-Frost Ranch Co. (predecessor in interest to Harvest Farm Co.) The hearing officer took official notice of permit files 63-10740 and 63-10741. Information in the former decision regarding this aquifer, termed "the aquifer in the Dry Lake area", relative to data from the monitoring well system was not disputed in the present case and is considered by the Department to remain unchanged.

11. Testimony by Mr. Feast provided computational estimates of the effect between the applicant's well and the protestant's well. This effect could result in a maximum predicted additional drawdown impact of up to about 15 feet in the protestant's well.

12. Testimony by Mr. Chapman indicated that pumping of

MEMORANDUM DECISION  
& ORDER APPROVING APPLICATION -- Page 4

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the applicant's well could cause the water level in the Harvest Farm well to drop below the top of the upper screen, which could result in potential sanding, difficulty in pumping desired flows, and increased pumping costs. There was no testimony that pumping of the applicant's well this year adversely affected the operation of the protestant's wells.

13. There is insufficient information regarding the aquifer in the Dry Lake area to definitely predict the amount of water available for appropriation. However, data from the monitoring well system in the aquifer in the Dry Lake area indicate that water levels are not generally declining. This is an indication that water is available for appropriation.

14. The applicant presented testimony relative to the economic benefits of the proposed project, and other factors relating to the local public interest. The protestant presented no convincing testimony in this regard.

#### CONCLUSIONS OF LAW

1. Idaho Code, Sec. 42-203A(5) states in part as follows:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people directly affected by

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the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. Idaho Code, Sec. 42-226 states in part as follows:

The traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of the underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the Director of the department of water resources as herein provided.

3. Rule 4,4,2,1. of the Water Appropriation Rules and Regulations requires the applicant to carry the burden of coming forward with evidence that water is available for appropriation, and that the proposed diversion will not reduce the quantity under existing rights.

4. Rule 4,4,2,2. of the Water Appropriation Rules and Regulations states that both the applicant and protestant have the burden of coming forward with evidence regarding public interest of which they are most cognizant.

5. Rule 4,4,3. states that the applicant bears the ultimate burden of persuasion for all criteria considered under Idaho Code § 42-203A.

6. The local public interest criterion of Idaho Code, Sec. 42-203A(5) is defined by Rule 5,1,5. of the Water Appropriation Rules and Regulations to include:

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DEC 11 1990

The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both long and short term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

The effect the project will have on recreation, fish and wildlife resources in the local public area affected by the proposed use;

Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

7. Although there is no specific quantification of water availability in the Dry Lake area, there appears to be water available in the ground water aquifer to satisfy the additional supplemental purposes proposed under this application.

8. Full economic development of the ground water resources of the state requires that the Department gather information about water levels and also approve applications until it determines that water is not available for appropriation.

9. Where some water appears to be available for appropriation but the quantity of available water is not defined, the applicant should bear the burden of monitoring the effect of its diversion on existing rights.

10. The Department specifically finds that the local public interest criterion described in Rule 5,1,5. of the Water Appropriation Rules and Regulations has been satisfied.

#### ANALYSIS

The protestant identified three reasons for objection:

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of water to satisfy the proposed use; injury to existing water rights; and conflict with the local public interest. The protestant, however, presented little or no evidence regarding the first and third items, and the application can be approved with respect to these two factors based on the ruling on similar Applications for Permit Nos. 63-10740 and 63-10741. The element of greatest concern in the present case is whether there is injury to existing rights.

Based on the testimony at the hearing, the maximum predicted amount of drawdown on the protestant's well caused by the applicant's well is about 15 feet. The question is whether this amount of predicted impact should cause the newly proposed appropriation to be denied.

The principal statutory guidance in this situation is the portion of Section 42-226, Idaho Code, provides:

... [w]hile the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.

No evidence was provided by either the applicant or protestant with respect to quantification of the reasonable pumping level. The department also has not conducted studies in the Dry Lake area to determine such a level.

The testimony provided was in connection with the anticipated "effect" of a new well on the protestant's existing

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well. The fact that there is an effect is not sufficient reason to deny a new appropriation. There generally will be some effect from the pumping of a well which is in relatively close proximity to another well.

The effect caused by an additional drawdown of 15 feet is relatively minor and is not sufficient reason to deny the application. The protestant will be able to reasonably obtain ground water under its existing water rights if Application for Permit No. 63-11326 is approved.

#### ORDER

IT IS HEREBY ORDERED that Application for Permit No. 63-11326 is APPROVED subject to the following conditions:

1. This water right is subject to all prior water rights.
2. A flow measurement port or other device as specified by the Department shall be installed by the permit holder at the point of diversion for installation of measuring equipment and the determination of the rate of diversion by the Department.
3. The rate of diversion under this water right, when combined with all other rights, shall not exceed 0.02 cfs per acre.
4. This permit authorizes only supplemental use of water. Ground water diverted under this permit cannot be used as the sole source of water supply but must always be associated with another primary water supply from either a surface water or ground water source as identified in the

**MICROFILMED**

DEC 11 1990

application. Surface water shall continue to be used as the primary source of supply for the ground upon which it is now appurtenant, and ground water shall be used only when surface water supplies are insufficient for irrigation of the property.

5. The Department retains jurisdiction over this permit to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the proposed development.

6. Proof of construction of works and application of water to beneficial use shall be submitted on or before November 1, 1991.

Dated this 21<sup>st</sup> day of November, 1990.

  
R. KEITH HIGGINSON  
Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this the 26<sup>th</sup> day of November, 1990 a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER APPROVING APPLICATION was mailed, postage prepaid to:

M. L. Clements  
4121 Rim Road  
Nampa, ID 83651

Steven A. Bradbury  
P. O. Box 1368  
Boise, ID 83701

Bruce Smith  
NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER  
P. O. Box 2139  
Boise, ID 83701-2139

  
RITA I. FLECK  
Secretary/Assistant Secretary

DEC 11 1990

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
APPLICATION FOR PERMIT

*Approved*

*Approved*

To appropriate the public waters of the State of Idaho

1. Name of applicant M. L. Clements Phone 425-2201  
Post office address 4121 Kim Road Nampa Id. 83686
2. Source of water supply Underground Water which is a tributary of \_\_\_\_\_
3. Location of point of diversion is NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of \_\_\_\_\_  $\frac{1}{4}$ , Govt. Lot 3  
Sec. 30 Township 2N Range 2W B.M. Canyon County; additional  
points of diversion if any: \_\_\_\_\_

4. Water will be used for the following purposes:

Amount 1.6 for Irrigation purposes from 3-15 to 11-15 (both dates inclusive)  
(cfs or acre-feet per annum)

Amount \_\_\_\_\_ for \_\_\_\_\_ purposes from \_\_\_\_\_ to \_\_\_\_\_ (both dates inclusive)  
(cfs or acre-feet per annum)

Amount \_\_\_\_\_ for \_\_\_\_\_ purposes from \_\_\_\_\_ to \_\_\_\_\_ (both dates inclusive)  
(cfs or acre-feet per annum)

Amount \_\_\_\_\_ for \_\_\_\_\_ purposes from \_\_\_\_\_ to \_\_\_\_\_ (both dates inclusive)  
(cfs or acre-feet per annum)

5. Total quantity to be appropriated is (a) 1.6 and/or (b) \_\_\_\_\_  
cubic feet per second acre feet per annum

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. Well with discharge pipe into ditch for gravity system.

b. Height of storage dam \_\_\_\_\_ feet; active reservoir capacity \_\_\_\_\_ acre-feet; total  
reservoir capacity \_\_\_\_\_ acre-feet; period of year when water will be diverted to storage:  
\_\_\_\_\_ to \_\_\_\_\_ inclusive.

c. Proposed well diameter is 16 inches; proposed depth of well is 500 feet.

d. Is ground water with a temperature of greater than 90°F being sought? No

7. Time required for the completion of the works and application of the water to the proposed beneficial use is  
1 years (minimum 1 year).

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12. Remarks: Supplemental water. to Boise - KUNA IRR. DIST

applicant to make this filing.

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the

b. Who owns the land to be irrigated or place of use?

11. a. Who owns the property at the point of diversion?

10. Describe any other water rights used for the same purposes as described above.

Total number of acres to be irrigated

80 AC.

[illegible]

ponding place of use below. See instructions for standard symbols.

b. If water is used for other purposes, place a symbol of the use (example: *D for Domestic*) in the corresponding column.

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

9. Description of place of use:

e. Other; describe fully.

d. Domestic; show number of households.

c. Municipal; show name of municipality.

b. Stockwatering; list number and kind of livestock.

a. Hydropower, show total feet of head and proposed capacity in kW.

8. Description of proposed uses (if irrigation only, go to item 9):

13. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile.

DEC 11 1990

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth.

*M. L. Jensen*  
(Applicant)

Received by JFW Date May 25, 1990 Time 10:00 AM Preliminary check by [Signature]  
Fee \$ 65.00 Receipted by JFW # W012408 Date May 25, 1990  
Publication prepared by GG Date 6-13-90 Published in Press-Tribune  
6/20 & 6/27/90  
Publication approved AT Date 7-9-90

### ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 63-11326, and said application is hereby APPROVED.

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

a. SUBJECT TO ALL PRIOR WATER RIGHTS.

b. Proof of construction of works and application of water to beneficial use shall be submitted on or before November 1, 19 91.

c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.

d. The water right acquired under this permit if for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.

e. Other: PURSUANT TO PROPOSED MEMORANDUM DECISION AND ORDER AND MEMORANDUM DECISION AND ORDER.

Dated this 21<sup>ST</sup> day of NOVEMBER, 1990.

[Signature]  
Director MS



BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

IN THE MATTER OF APPLICATION )  
FOR PERMIT TO APPROPRIATE )  
WATER NO. 63-11326 IN THE )  
NAME OF M. L. CLEMENTS )

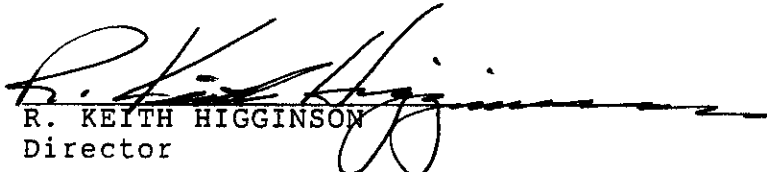
ORDER

On July 31, 1990, the Director of the Department of Water Resources (department), issued a Cease and Desist Order to M. L. Clements in connection with the diversion of water from a well located in Lot 3, Sec. 30, Twp. 2N, Rge. 2W, B.M.

On September 6, 1990, the department conducted a water right hearing in connection with protested Application for Permit No. 63-11326 (application) in the Name of M. L. Clements.

On September 11, 1990, the department issued a Proposed Memorandum Decision and Order approving the application.

IT IS, THEREFORE, ORDERED that the Cease and Desist Order issued by the department on July 31, 1990, is STAYED pending issuance of the Final Decision on the application for permit.

  
R. KEITH HIGGINSON  
Director

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

IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 63-111326 IN THE NAME )  
OF M. L. CLEMENTS )  
\_\_\_\_\_ )

ORDER ISSUING  
PROPOSED MEMORANDUM  
DECISION

R. Keith Higginson, Director of the Department of Water Resources, having reviewed the attached proposed decision prepared by this appointee, L. GLEN SAXTON, who conducted the hearing or who has read the record in this case, hereby approves the same as a proposed decision pursuant to Idaho Code, Sec. 67-5211.

Each party to these proceedings who appeared at the hearing is given the opportunity, pursuant to Idaho Code, Sec. 42-1701A and 67-5211, to file exceptions to the proposed decision and to present briefs and oral arguments. If no timely and proper exceptions are received, an order by the Director will be entered adopting the proposed decision as his final decision.

I.  
EXCEPTIONS

A. To be considered by the Director, exceptions must:

1. be received by the Director on or before the 15th day following the day of service of this Order and the proposed decision,
2. specifically identify the portions of the proposed decision to which exceptions are made and specifically state the grounds for those exceptions, and
3. be sent to each of the parties who appeared or their attorneys.

II.  
BRIEFS

A. Any briefs in support of exceptions to the proposed decision shall be filed with the Director at the same time that party's exceptions are filed with the Director.

B. All response briefs to the exceptions must be filed with the Director within 15 days after the exceptions were served upon the responding party.

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III.

A. No oral arguments before the Director on the proposed decision will be held unless specifically requested by a party filing exceptions to the proposed decision and unless that request is filed with the Director concurrently with the filing of that party's exception.

B. If oral arguments have been properly requested by a party filing exceptions, any other party, upon reasonable notice to the Director, shall have the right to present oral argument in response to the exceptions filed.

C. Oral arguments before the Director on exceptions to the proposed decision shall be heard at the discretion of the Director, pursuant to Idaho Code, Sec. 42-1701A. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour the oral arguments will take place and of the period of time allocated for the arguments of this case. Unless the Director orders otherwise, all oral arguments shall be heard in Boise, Idaho.

IV.

CERTIFICATE OF SERVICE

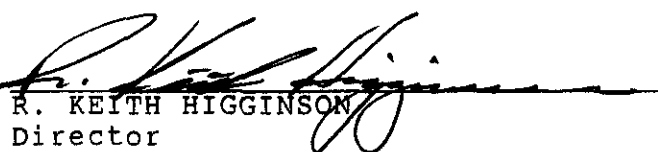
All exceptions, briefs, requests for oral argument and other matters filed with the Director in connection with the proposed decision shall be served on all other parties to these proceedings in accordance with Rule 7.2.

V.

FINAL DECISION

Following the submission of all exceptions, briefs and oral arguments, if they are heard, the Director shall issue a final decision adopting, modifying or rejecting and replacing the proposed decision. Copies of the decision and order shall be served on all parties.

Dated this 11th day of September, 19 90.

  
R. KEITH HIGGINSON  
Director

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IN THE MATTER OF APPLICATION  
FOR PERMIT NO. 63-11326

PROPOSED MEMORANDUM  
DECISION AND ORDER  
APPROVING APPLICATION

## FINDINGS OF FACT

1. On May 25, 1990, M.L. Clements (hereinafter applicant) submitted to the Department of Water Resources an application for permit to appropriate groundwater. The application, which has been assigned the number 63-11326, proposes the diversion of 1.6 cubic feet per second (cfs) of water for supplemental irrigation of up to 80 presently irrigated acres. The proposed point of diversion is in Government Lot 3 (NW 1/4 SW 1/4) Sec. 30, T02N, R02W, Canyon

County.

2. The application was published in the Idaho Press Tribune on June 20 and 27, 1990.

Protest and Cease and Desist Order

3. On June 21, 1990, the Department received a protest to the approval of the application from Harvest Farm Co. (hereinafter protestant).

4. On July 18, the Department received from the protestant a request for issuance of a Cease and Desist Order to prohibit the pumping of the well described in this application for permit. On July 31, 1990, the Director of the Department issued an order requiring that the applicant cease and desist use of the well on August 6, 1990.

5. On August 17, 1990, the Department received from the applicant a Petition for Stay of Cease and Desist Order and Request for Administrative Hearing in this matter. In response to this request, the Department held a conference with the applicant, his attorney Steven A. Bradbury, and protestant's attorney Bruce M. Smith, on August 20, 1990. Based in part on the discussions at the conference, the protestant provided a letter to the Department on August 22, 1990, objecting to the approval of a stay of the Cease and Desist Order. On August 23, 1990, the Department issued an Order Denying Petition for Stay of Cease and Desist Order.

Hearing

6. A hearing regarding the protested application was held on September 6, 1990. At the hearing the applicant was

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DEC 11 1990

present and was represented by attorneys Steven A. Bradbury and William J. McKlveen. Expert testimony was provided for the applicant by Charles F. Feast, registered geologist. The protestant was represented by attorney Bruce M. Smith, and by expert witness Sherl Chapman, registered geologist.

7. The protestant raised objections to the proposed project by alleging that the proposed use is such that:

- (a) it will reduce the quantity of water under existing water rights,
- (b) the water supply is insufficient for the proposed use, and
- (c) it will conflict with the local public interest.

8. The applicant testified that the well as described in the application was drilled during late June, 1990, and that pumping from the well occurred from approximately July 14 through August 6, 1990. He stated that pumping of the well has not occurred since August 6, 1990, because of the prohibition imposed by the Cease and Desist Order.

9. All of the lands described in the application are presently served by the Boise-Kuna Irrigation District. The applicant stated that the intent of the well is to provide a supplemental supply when Boise-Kuna Irrigation District water is insufficient for the irrigation needs of the acres described in the application. He stated that the cost of delivery of the water obtained from Boise-Kuna Irrigation District is lower than the cost of providing the same amount of water from the

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supplemental well.

10. Testimony at the hearing consistently held that the aquifer from which the applicant proposes to divert is the same as that utilized by a well located about 1670 feet to the south, which is owned by Harvest Farm, Co. (protestant's well). Both wells have been characterized to be in the same aquifer as was identified in hearings held relative to Applications for Permit Nos. 63-10740 and 63-10741, in the name of Bing-Frost Ranch Co. (predecessor in interest to Harvest Farm Co.) The hearing officer took official notice of Permit files 63-10740 and 63-10741. Information in the former decision regarding this aquifer, termed "the aquifer in the Dry Lake area", was not disputed in the present case and is considered by the Department to remain unchanged.

11. Testimony by Mr. Feast provided undisputed computational estimates of the effect between the applicant's well and the protestant's well. This effect could result in a maximum predicted additional drawdown impact of up to about 15 feet.

12. Testimony by Mr. Chapman indicated that pumping of the applicant's well could cause the water level in the Harvest Farm well to drop below the top of the upper screen, which could result in potential sanding, difficulty in pumping desired flows, and increased pumping costs. There was no testimony that pumping of the applicant's well this year adversely affected the protestant's rights.

13. There is insufficient information regarding the

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DEC 11 1990

aquifer in the Dry Lake area to definitely predict the amount of water available for appropriation. Evidence that water levels are not generally declining, however, is indicative that water is available for appropriation.

14. The applicant presented testimony relative to the economic benefits to the proposed project, and other factors relating to the local public interest. The protestant presented no testimony in this regard.

#### CONCLUSIONS OF LAW

1. Idaho Code, Sec.42-203A(5) states in part as follows:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people directly affected by the proposed use; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. Idaho Code, Sec. 42-226 states in part as follows:

The traditional policy of the State of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, a reasonable exercise of this right shall not block full economic development of the underground water resources. Prior appropriators of underground water

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DEC 11 1990

shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the Director of the Department of Water Resources as herein provided.

3. Rule 4,4,2,1. of the Water Appropriation Rules and Regulations requires the applicant to carry the burden of coming forward with evidence that water is available for appropriation, and that the proposed diversion will not reduce the quantity under existing rights.

4. Rule 4,4,2,2. of the Water Appropriation Rules and Regulations states that both the applicant and protestant have the burden of coming forward with evidence regarding public interest of which they are most cognizant.

5. Rule 4,4,3. states that the applicant bears the ultimate burden of persuasion for all criteria considered under Idaho Code § 42-203A.

6. The local public interest criterion of Idaho Code, Sec. 42-203A(5) (Supp. 1989) is defined by Rule 5,1,5. of the Water Appropriation rules and Regulations to include:

The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both long and short term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

The effect the project will have on recreation, fish and wildlife resources in the local public area affected by the proposed use;

Compliance with applicable air, water and hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

7. Although there is no specific quantification of water availability in the Dry Lake area, there appears to be

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DEC 11 1990

water available in the ground water aquifer to satisfy the additional supplemental purposes proposed under this application.

8. Full economic development of the ground water resources of the state requires that the Department gather information about water levels and also approve applications until it determines that water is not available for appropriation.

9. Where some water appears to be available for appropriation but the quantity of available water is not defined, the applicant should bear the burden of monitoring ground water levels to determine the quantity of available water, and monitoring the effect of its diversions on existing rights.

10. The information provided by the applicant at the hearing and in the records of the Department is found to satisfy the requirements of Rule 4,5,3. of the Water Appropriation Rules and Regulations.

11. The Department specifically finds that the local public interest criteria described in Rule 5,1,5. of the Water Appropriation Rules and Regulations has been satisfied.

#### ANALYSIS

The protestant identified three reasons for objection: lack of water to satisfy the proposed use; injury to existing water rights; and conflict with the local public interest. The protestant, however, presented little or no evidence regarding the first and third items, and the application was approved

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DEC 11 1990

with respect to these two factors based on the ruling on similar Applications for Permit Nos. 63-10740 and 63-10741. The element of greatest concern in the present case is whether there is injury to existing rights.

Based on the testimony at the hearing, the maximum predicted amount of drawdown on the protestant's well as caused by the applicant's well is about 15 feet. The question is whether this amount of predicted impact should cause the newly proposed appropriation to be denied.

The principal statutory guidance in this situation is the portion of Section 42-226 which describes that:

... while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources. Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided.

No evidence was provided by either the applicant or protestant with respect to quantification of the reasonable pumping level. The department also has not conducted studies in the Dry Lake area to determine such a level.

The testimony provided was in connection with the anticipated "effect" of a new well on the protestant's existing well. The fact that there is an effect is not sufficient reason to deny a new appropriation. There generally will be some effect from the pumping of a well which is in relatively close proximity to another well.

The effect caused by an additional drawdown of 15 feet is

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relatively minor in extent and is not sufficient reason to deny the application. The protestant will be able to reasonably obtain groundwater under its existing water rights if for Permit No. 63-11326 is approved.

**ORDER**

IT IS HEREBY ORDERED that Application for Permit No. 63-11326 is APPROVED subject to the following conditions:

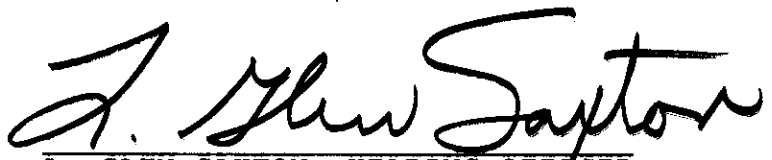
1. This water right is subject to all prior water rights.
2. A flow measurement port or other device as specified by the Department shall be installed by the permit holder at the point of diversion for installation of measuring equipment and the determination of the rate of diversion by the Department.
3. The rate of diversion under this water right, when combined with all other rights, shall not exceed 0.02 cfs per acre.
4. This permit authorizes only supplemental use of water. Ground water diverted under this permit cannot be used as the sole source of water supply but must always be associated with another primary water supply from either a surface water or ground water source as identified in the application. Surface water shall continue to be used as the primary source of supply for the ground upon which it is now appurtenant, and ground water shall be used only when surface water supplies are insufficient for irrigation of the property.
5. The Department retains jurisdiction over this

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permit to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the proposed development.

6. Proof of construction of works and application of water to beneficial use shall be submitted on or before the date indicated on the final order.

Dated this 11<sup>th</sup> day of September, 1990.

  
L. GLEN SAXTON, HEARING OFFICER

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on this the 12<sup>th</sup> day of September, 1990 a true and correct copy of the foregoing ORDER ISSUING PROPOSED DECISION and PROPOSED MEMORANDUM DECISION AND ORDER APPROVING APPLICATION was mailed, postage prepaid to:

M. L. Clements  
4121 Rim Road  
Nampa, ID 83651

Steven A. Bradbury  
P. O. Box 1368  
Boise, ID 83701

Bruce Smith  
NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER  
P. O. Box 2139  
Boise, ID 83701-2139

  
RITA A. FLECK  
Secretary/Records Manager

**MICROFILMED**

DEC 11 1990

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

|                                          |   |                        |
|------------------------------------------|---|------------------------|
| IN THE MATTER OF APPLICATION FOR PERMIT  | ) |                        |
|                                          | ) |                        |
| TO APPROPRIATE WATER NO. 63-11326 IN THE | ) | ORDER DENYING          |
|                                          | ) | PETITION FOR STAY OF   |
| NAME OF M.L. CLEMENTS                    | ) | CEASE AND DESIST ORDER |
|                                          | ) |                        |

---

On July 31, 1990, the Director ordered that M.L. Clements CEASE AND DESIST diversion and use of water from his well located in Lot 3 (NW1/4SW1/4), Section 30, T2N, R2W, B.M. on August 6, 1990, unless he could show cause before the Department that withdrawal and use of water from the well is authorized by a valid water right.

On August 17, 1990, the Department received from Mr. Clements a PETITION FOR STAY OF CEASE AND DESIST ORDER AND REQUEST FOR ADMINISTRATIVE HEARING. On August 20, 1990, the Department held a conference with Mr. Clements, his attorney Mr. Stephen A. Bradbury, and protestant's attorney Mr. Bruce M. Smith. Based on information received at the conference and in the files of the Department, the Department has determined that there is presently no water right that would allow Mr. Clements to pump from said well.

On August 22, 1990 the Department received a letter from Mr. Smith stating that Harvest Farm Company objects to any stay of the Cease and Desist Order.

The Department has determined that water is available for purchase from members of the Boise Kuna Irrigation District for the irrigation of Mr. Clements' lands.

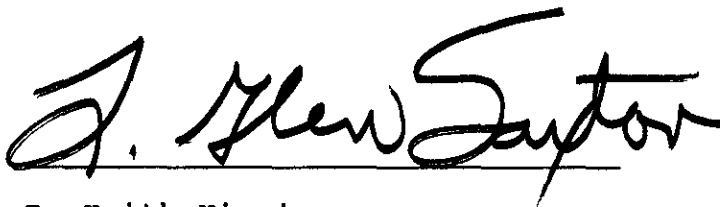
**MICROFILMED**

DEC 11 1990

IT IS HEREBY ORDERED that a stay in the Cease and Desist Order is denied.

IT IS FURTHER ORDERED that a hearing in the matter of the protest against approval of Application for Permit No. 63-11326 will be held at the earliest possible opportunity.

Dated this 23<sup>rd</sup> day of August, 1990.



for

R. Keith Higginson

Director

**MICROFILMED**

DEC 11 1990

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

|                                                         |   |                  |
|---------------------------------------------------------|---|------------------|
| IN THE MATTER OF APPLICATION FOR PERMIT                 | ) |                  |
|                                                         | ) |                  |
| TO APPROPRIATE WATER NO. 63-112 <sup>32</sup> 36 IN THE | ) | CEASE AND DESIST |
|                                                         | ) | ORDER            |
| NAME OF M.L. CLEMENTS                                   | ) |                  |
|                                                         | ) |                  |

---

M.L. Clements filed an application for permit to appropriate water, numbered 63-112<sup>32</sup>36, on May 25, 1990. The application proposed diversion of 1.6 cfs from ground water for irrigation of 80 acres located in the NE1/4SW1/4 and Lot 3 (NW1/4SW1/4) of Section 30, T2N, R2W, B.M.

The applicant obtained drilling permit no. 63-90-W-117 prior to approval of the application. The drilling permit authorized drilling of a well in Lot 3 (NW1/4SW1/4) of Section 30, T2N, R2W, B.M. The drilling permit specifically stated that it did not represent a right to divert and use the water of the State of Idaho.

A protest against the application was timely received from Harvest Farms Co. on June 21, 1990. On July 17, 1990, the Department received a report from Harvest Farms that Clements was diverting water from the well without first having obtained a permit. The Department communicated with Clements, and determined that he has diverted water from the well drilled pursuant to drilling permit no. 63-90-W-117 for the irrigation of the 80 acres set forth in the application. The Department also

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determined that there are no other ground water rights which authorize diversion from the well.

Idaho Code § 42-351 prohibits the diversion of water without a valid water right. Section 42-351 authorizes the Director to issue an order directing a person diverting water without having obtained a valid water right to cease and desist the diversion. The order may also provide a time schedule to bring the person's action into compliance with applicable law and with any existing water right. Illegal use of water following issuance of the cease and desist order could result in civil penalties of up to \$100 per day.

IT IS HEREBY ORDERED that M.L. Clements shall CEASE AND DESIST diversion and use of water from his well located in Lot 3 (NW1/4SW1/4), Section 30, T2N, R2W, B.M. on August 6, 1990, unless he can show cause before the Department that withdrawal and use of water from the well is authorized by a valid water right.

IT IS FURTHER ORDERED that M.L. Clements shall CEASE AND DESIST irrigation of land located in the NE1/4SW1/4 and Lot 3 (NW1/4SW1/4) of Section 30, T2N, R2W, B.M. with ground water on August 6, 1990, unless he can show cause before the Department that irrigation of the lands described with ground water is authorized by a valid water right.

IT IS FURTHER ORDERED that, if M.L. Clements irrigates the lands described above with well water from the well described above in violation of this cease and desist order, determination

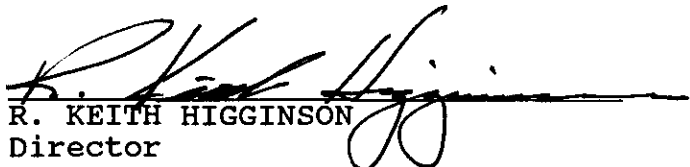
**MICROFILMED**

DEC 11 1990

of civil penalties will be reserved for the protest hearing, or until after resolution of the protest.

IT IS FURTHER ORDERED that M.L. Clements may request a hearing regarding this cease and desist order at any time prior to or on August 20, 1990. The Department may issue a stay of the cease and desist order, if sufficient facts are set forth and verified by the petition and supporting documents to raise issues of fact regarding M.L. Clement's right to divert and use ground water from the above identified well.

Dated this 31<sup>st</sup> day of July, 1990.

  
R. KEITH HIGGINSON  
Director

CERTIFICATE OF MAILING

I hereby certify that on the 31<sup>st</sup> day of July, 1990, I mailed a true and correct copy of the Order to Show Cause, certified mail, to the following individuals:

Bruce Smith  
Nelson, Rosholt, et al  
1020 Main Suite 400  
Boise, ID 83702

M.L. Clements  
4121 Rim Road  
Nampa, ID 83651

  
JENNIFER SEIFERT  
Clerical Assistant

RECORDED

DEC 1 1990

RECEIVED  
JUN 28 1990

AFFIDAVIT OF PUBLICATION

Department of Water Resources  
Western Regional Office

STATE OF IDAHO )  
 ) ss.  
County of Canyon )

NOTICE OF APPLICATION FOR WATER RIGHT

The following application(s) have been filed to appropriate the public waters of the State of Idaho:

63-11223

RIM RANCHES INC.  
23034 BATT CORNER RD.  
PARMA, ID 83660  
Source: GROUNDWATER  
Diversion Pt:  
Use: IRRIGATION

SWSWSW

Sec 33 T 05N R 05W  
(1.600 CFS)

Total Diversion: (1.600 CFS)

NESE

NWSE

80.0 ACRES TOTAL

63-11326

CLEMENTS, M.L.  
4121 RIM RD.  
NAMPA, ID 83686  
Source: GROUNDWATER  
Diversion Pt:  
Use: IRRIGATION

LOT 3 (NWSW)

Sec 30 T 02N R 02W  
(1.600 CFS)

Total Diversion: (1.600 CFS)

NESW Lot 3 (NWSW)

80.0 ACRES TOTAL

63-11332

BENHAM, KEVIN  
26286 GAIL LN.  
MIDDLETON, ID 83644  
Source: GROUNDWATER  
Diversion Pt:  
Use: IRRIGATION

NENESE

Sec 21 T 05N R 02W  
(.200 CFS)

Total Diversion: (.200 CFS)

NESE

10.0 ACRES TOTAL

63-11333

HOUSING AUTHORITY OF THE CITY OF WILDER  
P.O. BOX 685  
WILDER, ID 83676  
Source: GROUNDWATER  
Diversion Pt:  
Use: IRRIGATION

SWNW

Sec 23 T 04N R 05W  
(.680 CFS)

Total Diversion: (.680 CFS)

SWNW

33.8 ACRES TOTAL

63-11335

CHERRY LANE CONSTRUCTION  
C/O HARMON JOHNSON  
912 12TH AVE. S.  
NAMPA, ID 83651  
Source: GROUNDWATER  
Diversion Pt:  
Use: IRRIGATION

NESESE

Sec 33 T 03N R 02W  
(.300 CFS)

Total Diversion: (.300 CFS)

15.0 ACRES TOTAL

Kathleen D. Steed

Nampa, Canyon County, Idaho, being first duly sworn, deposes says:

That I am a citizen of the United States of America, and at all times hereinafter mentioned was over the age of eighteen years, not a party to the above entitled action.

That I am the Principal Clerk of the Idaho Press-Tribune, a newspaper published in the City of Nampa and Caldwell, in the County of Canyon, State of Idaho; the said newspaper is in general circulation in the said County of Canyon, and in the vicinity of Nampa and Caldwell, and has been uninterruptedly published in said County during a period of twenty-eight consecutive weeks prior to the first publication of notice, a copy of which is hereto attached.

That the notice, of which the annexed is a printed copy, was published in said newspaper the Idaho Times

in the regular and entire issue of said paper, and was printed in said newspaper proper, and not in a supplement.

That said notice was published the following dates:  
June 20, 27, 1990

STATE OF IDAHO )  
 )  
COUNTY OF CANYON )

On this 27th day of June in the year of 1990, before me, a Notary Public, personally appeared Kathleen D. Steed, known and identified to me to be the person whose name subscribed to the foregoing instrument, and being by me first duly sworn, declared that the statements therein are true, and acknowledged to me that she executed the same.

RECORDED

DEC 11 1990

The permit(s) will be subject to all prior water rights. Protests must be filed with the Director, Dept. of Water Resources, Western Region, 2735 Airport Way, Boise, Idaho 83705 on or before JULY 9, 1990.  
R. KEITH HIGGINSON, Director  
June 20, 27, 1990

Kathleen D. Steed  
Notary Public for Idaho  
Residing at Nampa

MY COMMISSION EXPIRES  
JULY 12th, 1991



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

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

CECIL D. ANDRUS  
GOVERNOR

R. KEITH HIGGINSON  
DIRECTOR

April 11, 1994

M L CLEMENTS  
4121 RIM RD  
NAMPA ID 83686

RE: WATER RIGHT NO. 63-11326

Dear Water Right Holder(s):

Enclosed herewith is a copy of the Water Right License issued on the above referenced permit. If you have any questions, please contact me within 10 days of receipt of this license.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jim Johnson', written over a circular stamp.

JIM JOHNSON  
Water Rights Supervisor

JJ:dc

Enclosure

MAILED

APR 15 1994

WRO749NP  
No. L63-11326

IDAHO DEPARTMENT OF WATER RESOURCES  
WATER RIGHT PROFILE REPORT

DATE: 03/30/94  
PAGE: 1

| OWNER<br>CODE    | NAME & ADDRESS                                                  | PRIORITY<br>DATE | WATER USE  | USE PERIOD<br>FROM TO | DIVERSION<br>RATE | DIVERSION<br>VOLUME |
|------------------|-----------------------------------------------------------------|------------------|------------|-----------------------|-------------------|---------------------|
| C                | M L CLEMENTS<br>4121 RIM RD<br>NAMPA ID 83686<br>(208) 495-2201 | 05/25/1990       | IRRIGATION | 03-15 11-15           | 1.43 CFS          | 321.80 AFA          |
| TOTAL DIVERSION: |                                                                 |                  |            |                       | 1.43 CFS          | 321.80 AFA          |

Water Source: GROUNDWATER

Tributary to:

Stage: LICENSE

Point(s) of Diversion Capacity: 1.46 CFS

Point(s) of Diversion: T02N R02W S30 Lot 03( NWSW)

CANYON 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 | : | SUM  |
| 02N         | 02W | 30 | : |    |    |    |    |    |    |    |    | 40 | 03-31 |    |    | : | 71.5 |
| TOTAL ACRES |     |    |   |    |    |    |    |    |    |    |    |    |       |    |    |   | 71.5 |

Pou County: CANYON

Other Rights: BOISE-KUNA IRRIGATION DISTRICT

Other Water Rights with Same Point(s) of Diversion and Source:  
63-11326

Other Water Rights Listing Overlapping Place(s) of use:  
63-11326

Conditions of Approval:

- R32 - This right when combined with all other rights shall provide no  
- more than .02 cfs per acre nor more than 4.5 afa per acre for the  
- lands above.

Remarks: This right authorizes only supplemental use of water. Ground water diverted under this right cannot be used as the sole source of water supply but must always be associated with another primary water supply from either a surface water or ground water source. Surface water shall continue to be used as the primary source of supply for the ground upon which it is now appurtenant, and ground water shall be used only when surface water supplies are insufficient for irrigation of the property. The Department retains jurisdiction over this right to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the development.

|        |                 |            |                    |            |
|--------|-----------------|------------|--------------------|------------|
| Dates: | App. Received:  | 05/25/1990 | Priority Date:     | 05/25/1990 |
|        | Proof Due Date: | 11/01/1991 | Proof Made Date:   | 09/05/1991 |
|        | Exam Made Date: | 02/02/1994 | Exam Sent to S.O.: | 02/16/1994 |
|        | Licensed Date:  |            |                    |            |

WR0750NP  
(00-138)

IDAHO DEPARTMENT OF WATER RESOURCES  
PLACE OF USE 1/4 1/4 COMPARISON REPORT

DATE: 03/30/94  
PAGE: 1

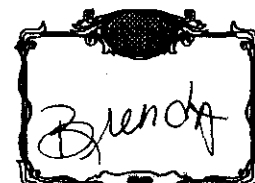
(WATER RIGHT NUMBERS THAT BEGIN WITH AN '\*' ARE ADJUDICATION CLAIMS)

| WR-NUMBER | SOURCE        | NE          |    |    |    |    |    |    |    | NW |    |    |    |    |    |    |    | SW       |    |    |    |    |    |    |    | SE |    |    |    |    |    |    |  | SUM |
|-----------|---------------|-------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|--|-----|
|           |               | NE          |    | NW |    | SW |    | SE |    | NE |    | NW |    | SW |    | SE |    | NE       |    | NW |    | SW |    | SE |    | NE |    | NW |    | SW |    | SE |  |     |
|           |               | Lt          | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt       | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac | Lt | Ac |    |  |     |
| L6311326  | T02N R02W S30 | GROUNDWATER |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  | 71  |
|           | :             |             |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 40 03-31 |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  |     |
| 6302388   | BOISE RIVE :  |             |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  |     |
| A6302388  | BOISE RIVE :  |             |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  |     |
| 6308547   | GROUNDWATE :  | 37          |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    |    |    | 37 |    |    |    |    |  |     |
| A6308547  | GROUNDWATE :  | 37          |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    |    |    | 37 |    |    |    |    |  |     |
| 6310607   | GROUNDWATE :  |             |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    | 40 |    |    |    |    |    |    |  |     |
| L6310607  | GROUNDWATE :  |             |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    | 36 |    |    |    |    |    |    |  |     |
| 6311109   | GROUNDWATE :  |             |    | 40 |    | 40 |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    | 80 |    |    |    |    |    |    |  |     |
| 6311326   | GROUNDWATE :  |             |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |          |    |    |    |    |    |    |    | 80 |    |    |    |    |    |    |  |     |
| A6321339  | GROUNDWATE :  |             |    |    |    |    |    |    |    | 38 |    |    |    |    |    |    |    | 40       |    |    |    |    |    |    |    |    |    |    |    |    |    |    |  | 78  |

No Overlaps

# LICENSE REVIEW CHECKLIST

PERMIT NO 63-11326 DATE 3-30-94



|               |                                                                                             |                                                                                                                                                                                                                                                                                                  |
|---------------|---------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| NAME          | Yes <u>    </u> No <u>✓</u>                                                                 | Or Address Change?                                                                                                                                                                                                                                                                               |
| PRIORITY DATE | <u>    </u> <u>✓</u>                                                                        | Advance? <u>    </u> Advanced to: <u>    </u><br>Order to reinstate needed? <u>    </u><br>Incorrect fee for rate recommended? <u>NO</u>                                                                                                                                                         |
| SOURCE        | <u>    </u> <u>✓</u>                                                                        | Changes or just clarification of originally intended source? <u>    </u><br>Notice of Intent to Void necessary? <u>    </u>                                                                                                                                                                      |
| POINT OF DIV  | <u>    </u> <u>✓</u><br><u>    </u> <u>✓</u>                                                | Amendment needed? <u>    </u><br>Overlaps? <u>    </u>                                                                                                                                                                                                                                           |
| PLACE OF USE  | <u>    </u> <u>✓</u><br><u>    </u> <u>✓</u>                                                | Amendment needed? <u>    </u><br>Overlaps? <u>63-2338 (BUR OF REC IRR WATER)</u>                                                                                                                                                                                                                 |
| DIV RATE      | <u>    </u> <u>✓</u>                                                                        | Measurement done? <u>NONE</u> Theoretical only? <u>    </u><br><u>THEORETICAL COULD VARY GREATLY. Static level @ 98'.</u><br><u>Examiner recommends going with .02 per acre.</u><br>Capacity: <u>1.46</u> Combined rates exceed capacity <u>NA</u><br>Allowable amount: <u>71.5 x .02 = 1.43</u> |
| ANNUAL VOLUME | <u>    </u> <u>    </u>                                                                     | Season of use: <u>0/4.5 3-15 to 11-15</u><br>Calculations: <u>71.5 x 4.5 = 321.8</u><br><br>Flow limit: <u>246</u> x <u>1.43</u> cfs x 1.9835 = <u>697</u><br>Combined volumes exceed capacity/allowable <u>NA</u>                                                                               |
| USES          | <u>    </u> <u>✓</u>                                                                        | Change(s) in Nature of Use? <u>    </u><br>Amendment necessary? <u>    </u>                                                                                                                                                                                                                      |
| REMARKS       | <u>WB3</u> <u>✓</u>                                                                         | Multiple p/d(s) in 1/4 1/4? <u>    </u><br>Other <u>BOISE KUNA IRR DISTRICT</u> / <u>Special per mem DEC + Order</u>                                                                                                                                                                             |
| CONDITIONS    | <u>    </u> <u>✓</u><br><u>R32</u> <u>✓</u><br><u>    </u> <u>✓</u><br><u>    </u> <u>✓</u> | Measuring/Locking Devices <u>    </u><br>Watermaster control - District <u>    </u><br>Irrigation Overlap <u>    </u><br>Water Quality <u>    </u><br>Other <u>SEE ORDER</u>                                                                                                                     |
| COMMENTS:     | <u>Reduce acres and rate.</u>                                                               |                                                                                                                                                                                                                                                                                                  |

|                   |             |              |                                    |
|-------------------|-------------|--------------|------------------------------------|
| RECOMMENDED       | CFS         | VOLUME       | LICENSE <u>✓</u>                   |
| <u>Irrigation</u> | <u>1.43</u> | <u>321.8</u> |                                    |
| <u>    </u>       | <u>    </u> | <u>    </u>  | 1ST AMENDMENT LETTER <u>    </u>   |
| <u>    </u>       | <u>    </u> | <u>    </u>  | FINAL AMENDMENT LETTER <u>    </u> |

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FEB 18 1994

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
**BENEFICIAL USE FIELD REPORT**

Department of Water Resources

**A. GENERAL INFORMATION**

Permit No. 63-11326

1. Owner: M.L. Clements Phone No. 495-2201

Current Address: 4121 Rim Road, Nampa, ID 83686

2. Accompanied by: M.L. Clements EXAM DATE: 2/2/94

Address: SAME Phone No. SAME

Relationship to Permit Holder: Applicant

3. Source: Groundwater tributary to \_\_\_\_\_

**B. OVERLAP REVIEW**

1. Other water rights with the same place of use: 63-02388

2. Other water rights with the same point of diversion: NONE

**C. DIVERSION AND DELIVERY SYSTEM**

**1. Point(s) of Diversion:**

| Ident No. | Gov't Lot | 1/4 | 1/4 | 1/4 | Sec. | Twp. | Rge. | County | Method of Determination/Remarks |
|-----------|-----------|-----|-----|-----|------|------|------|--------|---------------------------------|
|           | 3         |     | NW  | SW  | 30   | 2N   | 2W   | Canyon | Aerial Map                      |
|           |           |     |     |     |      |      |      |        |                                 |
|           |           |     |     |     |      |      |      |        |                                 |
|           |           |     |     |     |      |      |      |        |                                 |

**2. Place(s) of Use:**

Indicate Method of Determination SAME as P/D

| TWP | RGE | SEC | NE |    |    |    | NW |    |    |    | SW |      |    |    | SE |    |    |    | Totals |
|-----|-----|-----|----|----|----|----|----|----|----|----|----|------|----|----|----|----|----|----|--------|
|     |     |     | NE | NW | SW | SE | NE | NW | SW | SE | NE | NW   | SW | SE | NE | NW | SW | SE |        |
| 2N  | 2W  | 30  |    |    |    |    |    |    |    |    | 40 | 31.5 |    |    |    |    |    |    | 71.5   |
|     |     |     |    |    |    |    |    |    |    |    |    | L3   |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |
|     |     |     |    |    |    |    |    |    |    |    |    |      |    |    |    |    |    |    |        |

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2. Measurements:

| Measurement Equipment | Type | Make | Model No. | Serial No. | Size | Calib. Date |
|-----------------------|------|------|-----------|------------|------|-------------|
|                       |      |      |           |            |      |             |
|                       |      |      |           |            |      |             |

D. FLOW MEASUREMENTS

N/A - winter EXAM.

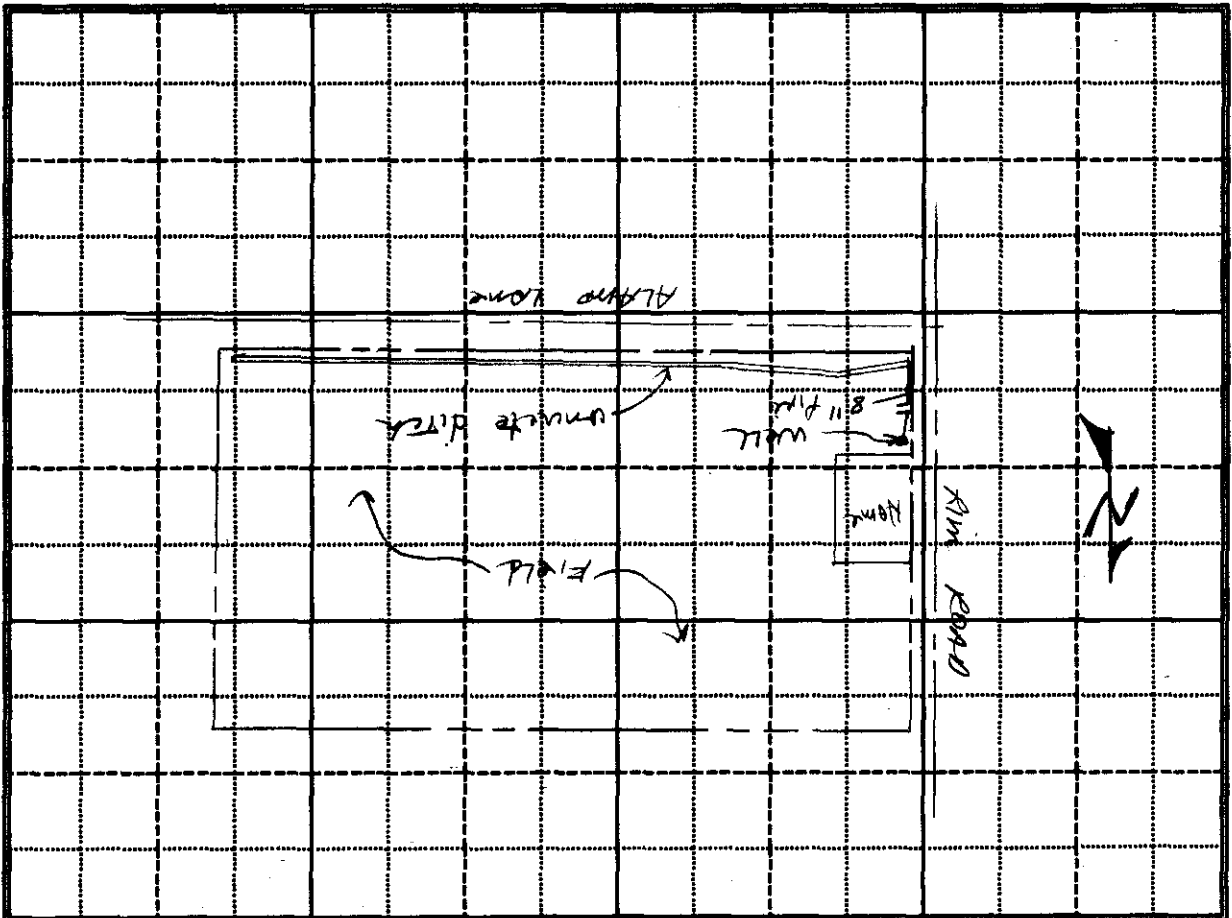
\*Code to correspond with No. on map and aerial photo

| Well or Diversion Identification No.* | Motor Make    | Hp | Motor Serial No.   | Pump Make | Pump Serial No. or Discharge Size |
|---------------------------------------|---------------|----|--------------------|-----------|-----------------------------------|
|                                       | U.S. Electric | 75 | 6324/T065326210R-9 | N/A       | N/A                               |
|                                       |               |    |                    |           |                                   |
|                                       |               |    |                    |           |                                   |

4.

✓ Copy of USGS Quadrangle Attached Showing location(s) of point(s) of diversion and place(s) of use (required).  
 ✓ Aerial Photo Attached (required for irrigation of 10+ acres)  
 ✓ Photo of Diversion and System Attached

Scale: 1" = 100'



3. Delivery System Diagram: Indicate all major components and distances between components. Indicate well size/ditch size/pipe l.d. as applicable.

E. NARRATIVE/REMARKS/COMMENTS

OVERLAP - P/U - Same QD, different p/h.

Well is used to irrigate approximately 71.5 acres of land. Well water is discharged through 8" pipe to concrete ditch. Siphoning is used to irrigate land. This system is supplemental to <sup>Boise River</sup> irrigation district water. Though the theoretical flow capacity is a little less than the 0.02 cfs/acre requested, the actual dynamic level is unknown, therefore 256' is only an estimate. ~~Since the system is used to fill the concrete ditch for gravity irrigation, and not for sprinkler irrigation, recommend licensing for 1.43 cfs for 71.5 acres, or 0.02 cfs/acre.~~

~~Since the theoretical capacity is 1.24 cfs, a little with the assumptions of 50 psi and dynamic pumping level of 256 feet. Though this flow is less than the requested 0.02 cfs/acre, recommend 0.18 cfs/acre, recommend licensing for 1.43 cfs for irrigation of 71.5 acres.~~

Theoretical: 
$$Q = \frac{(8.8)(0.7)(75)}{256 + (231 \times 50)} = \frac{462}{371.5} = 1.24 \text{ cfs}$$

Note: Dynamic level not known, therefore used theoretical dynamic pumping level diagram.

Assumed 50 psi due to pump size.

Have conditions of permit approval been met? ☒ yes ☐ no

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# F. FLOW CALCULATIONS

N/A

Additional Computation Sheets Attached

Measured Method:

None - Winter Exam (See Narrative for Theoretical Capacity)

# G. VOLUME CALCULATIONS

## 1. Volume Calculations for Irrigation:

$$V_{I.R.} = (\text{Acres Irrigated}) \times (\text{Irrigation Requirement}) = 71.5 \times 4.5 = 321.80 \text{ AFA}$$

$$V_{D.R.} = [\text{Diversion Rate (cfs)}] \times (\text{Days in Irrigation Season}) \times 1.9835 = \frac{1.6}{1.43} \times 246 \times 1.9835 = 780.7 \text{ AFA}$$

$$V = \text{Smaller of } V_{I.R.} \text{ and } V_{D.R.} = 321.8 \text{ AFA}$$

## 2. Volume Calculations for Other Uses:

# H. RECOMMENDATIONS

## 1. Recommended Amounts

| Beneficial Use | Period of Use |       | Rate of Diversion<br>Q (cfs) | Annual Volume<br>V (afa) |
|----------------|---------------|-------|------------------------------|--------------------------|
|                | From          | To    |                              |                          |
| IRRIGATION     | 3/15          | 11/15 | 1.43                         | 321.8                    |
|                |               |       |                              |                          |
|                |               |       |                              |                          |
|                |               |       |                              |                          |
|                |               |       |                              |                          |
|                |               |       |                              |                          |
| Totals:        |               |       | 1.43                         | 321.8                    |

## 2. Recommended Amendments

☐ Change P.D. as reflected above    ☐ Add P.D. as reflected above    ☒ None  
☐ Change P.U. as reflected above    ☐ Add P.U. as reflected above    ☐ Other

# I. AUTHENTICATION

Field Examiner's Name Rick Collingwood Date 2/4/94

Reviewer \_\_\_\_\_ Date \_\_\_\_\_

SEAL

APR 15 1994

[illegible]

H/W  
2  
10.5

H/NW

4  
37.1

11.5

T3649

T3650  
4  
350

3.8

5.5

6  
18.5

T3441

H/

25

31

83.1

MIDNIGHT

APR 15 1994



# IDAHO DEPARTMENT OF WATER RESOURCES

## WELL INSPECTION FORM

1. DRILLING PERMIT NO: 63-11326-63-90-W-117 OTHER APPLICABLE NO: \_\_\_\_\_
2. OWNER: M. L. Clements Phone: 495-2201  
Address: 4121 Rim Road, Nampa, ID 83686
3. WELL LOCATION: Twp 2N, Rge. 2W, Sec. 30, NW 1/4 SW 1/4  
County Canyon (Provide sketch map and photo on reverse.)
4. DRILLER: Pete Cope Drilling Lic. No. 213  
When Drilled? 6/20/90
5. WELL CONSTRUCTION (not visible) (not visible)  
Casing Diameter 16 inches Water tight cap? ☐ Yes ☐ No Access Port: ☐ Yes ☒ No  
Casing  $\geq$  12 inches above ground? ☐ Yes ☒ No - Describe Flush with concrete pad  
Depth of Casing 455 ft. Method Drilled Reverse Rotary  
Condition of Well Casing: ☐ Good ☐ Fair ☐ Poor Describe Can't see due to pump  
Control Valve? ☒ Yes ☐ No Pressure Gauge: ☐ Yes ☒ No  
Condition of Piping and Valving Good  
Auger to a depth of 344604 ft. Evidence of Annular Seal ☐ Yes ☐ No  
Are there obvious construction problems that may be a source for contamination or waste of water?  
☐ Yes ☒ No (Describe in Remarks and Attach Photo - On Reverse)
6. HYDROLOGIC INFORMATION  
Depth to Static Water 98 ft. Water Temperature N/A °F  
Flowing Artesian ☐ Yes ☒ No Pressure: N/A (psi)  
Water Sample Taken? ☐ Yes ☒ No If yes, describe purpose \_\_\_\_\_  
Water Quality Measurements/Observations (Describe) \_\_\_\_\_
7. WELL USE:  
☐ Domestic ☒ Irrigation ☐ Stock  
☐ Test ☐ Municipal ☐ Industrial  
☐ Abandoned ☐ Waste Disposal/Injection ☐ Not Used  
☐ Other: \_\_\_\_\_

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9.

REMARKS:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Rick Collingwood, Water Rights Examiner  
Signature of Dept. Representative & Title

2/2/94  
Inspection Date

PHOTOS, DRAWINGS, OTHER ATTACHMENTS:

Microsoft Word

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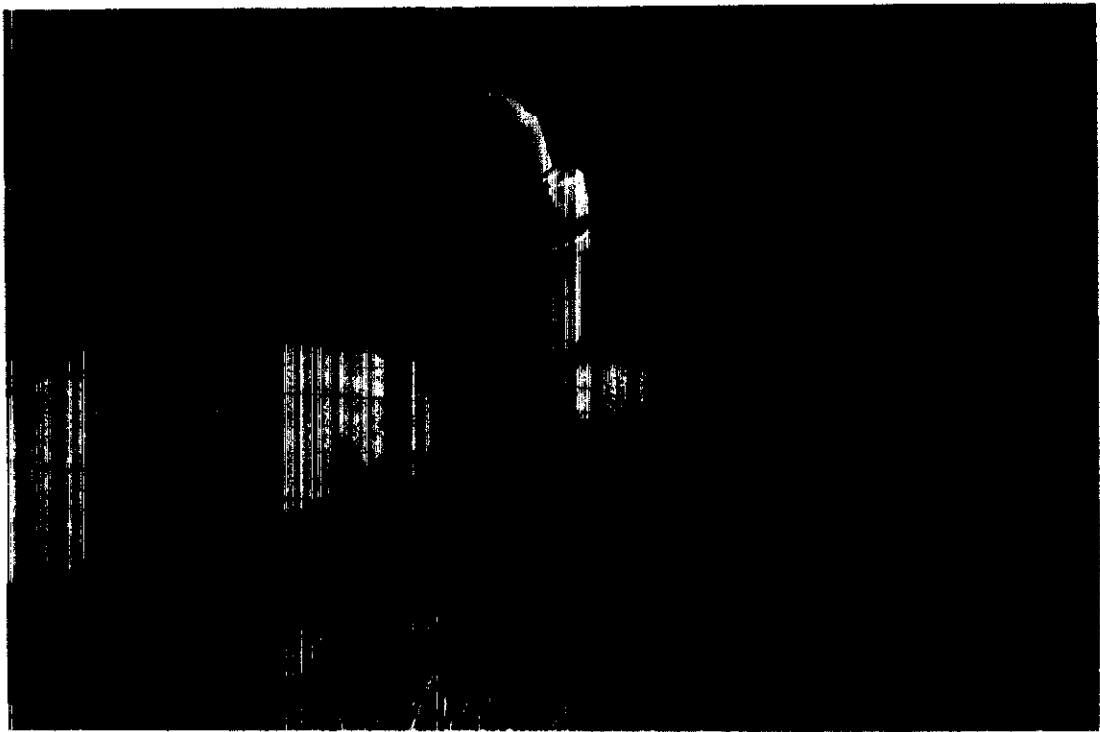
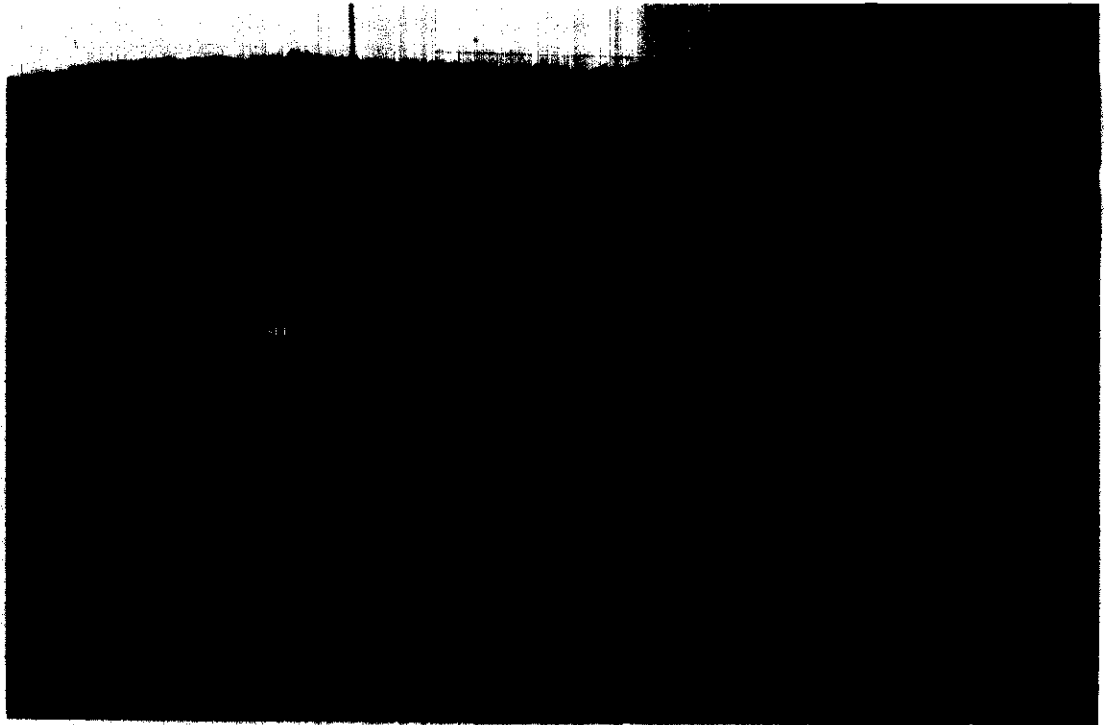


PHOTO ONE-

well and 8" discharge line which leads to concrete irrigation ditch.



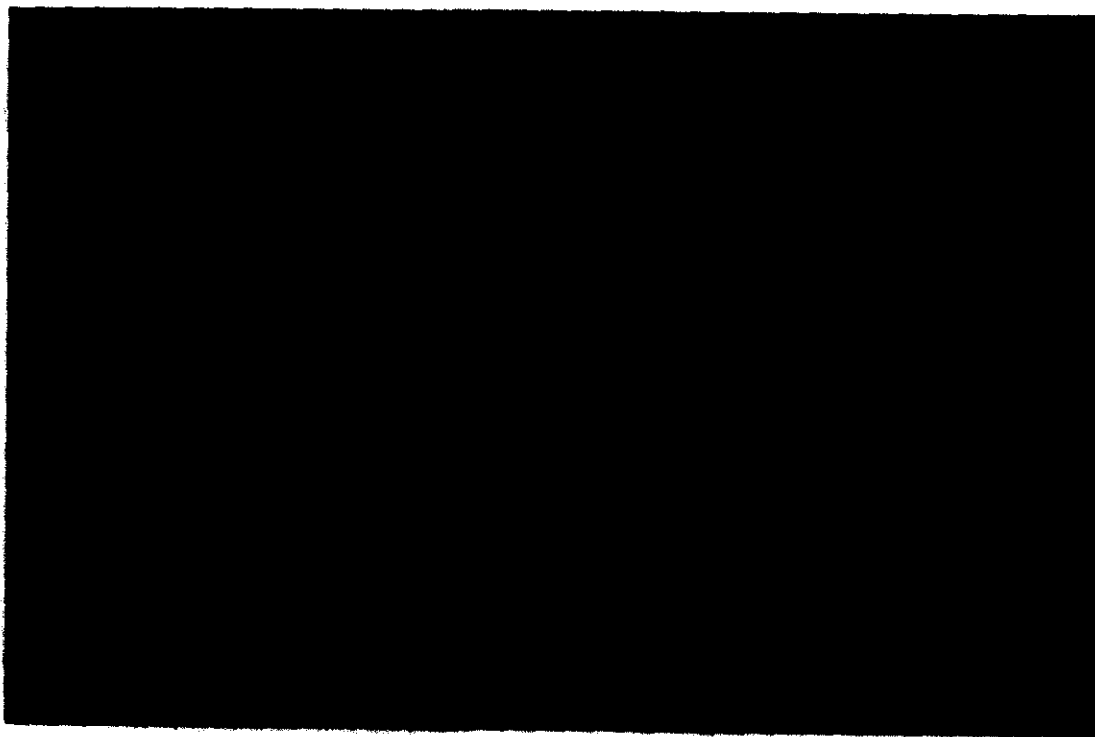
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PHOTO TWO-

View south of well and 8" discharge line to upper concrete ditch.



PHOTO THREE- View easterly of west end of concrete ditch  
and portion of irrigated land.



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PHOTO FOUR-

View westerly of concrete ditch and irrigated  
land.

October 9, 1991

M L CLEMENTS  
4121 RIM RD  
NAMPA ID 83686

PROOF ACKNOWLEDGMENT LETTER

RE: PERMIT NO. 63-11326

Dear Permit Holder:

The department acknowledges receipt of the proof of beneficial use form submitted for the above referenced permit. The next step in the process of developing a water right is for the department to conduct a field examination to determine and confirm the use being made of the water.

If you have questions concerning this matter, please feel free to contact the WESTERN Regional Office in Boise at (208)334-2190.

Sincerely,

Nina Shields  
Secretary/Records Manager

c: IDWR - Region

**MICROFILMED**

NOV 19 1991

ANALYSIS SHEET  
for  
PROOF OF BENEFICIAL USE

Permit No. 63-11326

Date 10.4.91

GENERAL CONSIDERATIONS

- ☒ Name same as permit?  
☒ Address same as permit? If no, indicate below.  
☒ Proof timely received? If no, complete priority advancement below.

SOURCE OF WATER

- ☐ Surface water source  
☒ Ground water source  
☒ Drill permit req'd?  
☒ Copy in file? Drill permit no. 63-90-W-117  
1990 150.00 Amt paid for drilling permit? ☒ Correct?  
☒ Well log in file?

LICENSE EXAMINATION FEE

- ☒ Required?  
125.00 Amount submitted?  
☒ Correct amount?

MEASURING DEVICE

- Yes Measuring device or access port required?  
No Installed?  
☐ Waiver requested or needed?

DEFICIENCIES OR ACTION ITEMS

*Needs flow meas.*

*Proof acceptable*

PRIORITY CALCULATION

Date proof received NA

Date proof due -

No. of days late =

Priority date +

NEW PRIORITY DATE =

*LB*

September 4, 1991

M L CLEMENTS  
4121 RIM ROAD  
NAMPA ID 83651

Dear Mr. Clements:

Re: Permit No. 63-11326

Pursuant to your conversation with L. Glen Saxton, enclosed is a copy of the Instructions for Installation of Flow Measurement Port. Note that this device must be installed before the department can conduct the field examination.

If you have questions about the installation of this device, please call a field agent from the Western Regional office at 334-2190.

Sincerely,

RITA I. FLECK  
Secretary/Records Manager

Enclosure

**RECEIVED**

NOV 19 1991

August 30, 1991

138043  
CERTIFIED MAIL

M L CLEMENTS  
4121 RIM ROAD  
Nampa ID 83651

**PROOF DUE NOTICE**

RE: PERMIT NO. 63-11326

Dear Permit Holder:

One of the conditions of approval of the above referenced water permit was that proof of the extent of your beneficial use must be submitted to this office on or before November 1, 1991. (See last page of your approved permit or your last approved extension request.) Enclosed is a form which when accompanied by the license examination fee or a complete field examination report prepared by a certified water right examiner may be used to submit the required proof.

If you have not fully completed your project, and you or a previous owner of this permit have not received a prior extension of time, you may request an extension of time provided the delay is for reasonable cause as described in Section 42-204, Idaho Code. If you have been prevented from proceeding by a governmental agency or by litigation which might bring title to the water in question, more than one extension of time can be granted. An extension of time request form is enclosed for your convenience.

Either an acceptable proof of beneficial use submittal or an acceptable request for an extension of time must be received by this department on or before the above described proof due date. If neither is received, the department will send you a lapse notice. Within sixty (60) days of the mailing of the lapse notice, the permit will no longer be of any force nor effect.

Sincerely,

RITA I. FLECK  
Secretary/Records Manager

Enclosures

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NOV 9 1991

- Practice + Proc.  
Rule 11,4 allows  
10 days, in  
which answer  
to support or  
oppose the request  
for rehearing.

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NOV 19 1991

*Call up  
no cost*

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

IN THE MATTER OF APPLICATION)  
FOR PERMIT NO. 63-11326 IN )  
THE NAME OF M. L. CLEMENTS )

---

ORDER DENYING PETITION  
FOR REHEARING

On November 21, 1990, the Director of the Department of Water Resources (Director) issued a Memorandum Decision and Order approving the above captioned application for permit.

On December 14, 1990, the protestant, Harvest Farm Co., filed a petition for rehearing in connection with the approved application. The applicant filed an answer to the petition for rehearing on December 24, 1990.

The Director has reviewed the protestant's petition and the applicant's answer and finds that the protestant has raised no new issues of fact which have not previously been considered by the Department before issuing a final memorandum decision and order in this matter.

Furthermore, the Director finds that the petition for rehearing merely seeks clarification or modification of the final order signed by the Director and does not require the submittal of any additional facts.

IT IS THEREFORE HEREBY ordered that the petition for rehearing submitted by the protestant is DENIED.

IT IS FURTHER HEREBY ordered that the Memorandum Decision and Order Approving Application dated November 21, 1990, be amended as follows:

- a) Finding of Fact No. 14. should read

"The applicant presented testimony relative to the economic benefits of the proposed project, and other factors relating to the public interest. The protestant presented no convincing testimony in this regard. The proposed project is found to be in the public interest".

- b) The first sentence of the Analysis section should read

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"The protestant identified three reasons for objection:  
Lack of water to satisfy the proposed use; injury to  
existing water rights; and conflict with the local public  
interest".

Dated this 4<sup>TH</sup> day of JANUARY, 1991.

  
R. KEITH HIGGINSON  
Director



NOV 19 1991

ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

ATTORNEYS AT LAW

1020 MAIN STREET

SUITE 400

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GARY D. SLETTE  
JERRY JENSEN  
F. BRUCE COVINGTON  
BRUCE M. SMITH  
G. RICHARD BEVAN  
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Twin Falls Office  
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P.O. BOX 1906  
TWIN FALLS, IDAHO 83303-1906  
TELEPHONE (208) 734-0700  
FAX (208) 736-0041

February 6, 1991

M.L. Clements  
4121 Rim Road  
Nampa, Idaho 83651

Steven A. Bradbury  
P.O. Box 1368  
Boise, Idaho 83701

Keith Higginson, Director  
Idaho Department of Water Resources  
1301 North Orchard  
Statehouse Mail  
Boise, Idaho 83720

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FEB 07 1991  
Department of Water Resources

Re: Attachment to Petition for Review of Decision by  
Idaho Department of Water Resources in the Matter  
of Application No. 63-11326

Gentlemen:

Enclosed is the attachment to the Petition for Review of Decision by Idaho Department of Water Resources which was inadvertently omitted. I apologize for any inconvenience this may have caused.

Sincerely,

*Darla Joyce*

Darla Joyce  
Secretary to Bruce M. Smith

/dj  
58461

NOV 19 1991



State of Idaho  
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

January 4, 1991

Bruce M. Smith  
ROSHOLT, ROBERTSON, TOLMAN & TUCKER  
P. O. Box 2139  
Boise ID 83701-2139

Dear Mr. Smith:

Re: Application for Permit No. 63-11326 - M. L. Clements

Enclosed is a copy of the Order Denying Petition for Rehearing.

Any person who does not agree with the decision of the department may  
may appeal directly to the district court within 30 days of the date the  
decision is mailed.

Sincerely,

L. GLEN SAXTON  
Chief, Water Allocation Bureau

LGS:rf

c: Stephen A. Bradbury

NOV 19 1991

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO

IN THE MATTER OF APPLICATION)  
FOR PERMIT NO. 63-11326 IN )  
THE NAME OF M. L. CLEMENTS )  
\_\_\_\_\_ )

ORDER DENYING PETITION  
FOR REHEARING

On November 21, 1990, the Director of the Department of Water Resources (Director) issued a Memorandum Decision and Order approving the above captioned application for permit.

On December 14, 1990, the protestant, Harvest Farm Co., filed a petition for rehearing in connection with the approved application. The applicant filed an answer to the petition for rehearing on December 24, 1990.

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Furthermore, the Director finds that the petition for rehearing merely seeks clarification or modification of the final order signed by the Director and does not require the submittal of any additional facts.

IT IS THEREFORE HEREBY ordered that the petition for rehearing submitted by the protestant is DENIED.

IT IS FURTHER HEREBY ordered that the Memorandum Decision and Order Approving Application dated November 21, 1990, be amended as follows:

- a) Finding of Fact No. 14. should read

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- b) The first sentence of the Analysis section should read

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NOV 19 1991

"The protestant identified three reasons for objection:  
Lack of water to satisfy the proposed use; injury to  
existing water rights; and conflict with the local public  
interest".

Dated this 4<sup>TH</sup> day of JANUARY, 1991.

  
R. KEITH HIGGINSON  
Director

NOV 19 1991

1-3-90

P12

Following are some questions <sup>& comments</sup> raised by a review of the Memorandum Decision;

✓ info included 1-03-90  
1. FINDING 10 - Is the information retained from files 63-10740 and 63-10741 included in the present record so that it will be available for review by the court in case of an appeal?

✓ info included 1-03-90  
2. FINDING 13 - Is the <sup>monitoring</sup> data referred to in the finding contained in the record in this proceeding?

✓ changed 1-03-90  
3. FINDING 14 - DOES not make finding as to the economic benefits and other public interest testimony.

ok now  
4. CONCLUSION 10 - Conclusion that public interest criterion is satisfied is supported only ~~by~~ <sup>for</sup> FINDING NO. 14 which does not actually make a finding by states only that "the applicant presented testimony."

✓ corrected  
5. Analysis section - Language appears to be missing from the top of page 8 of the Order: "Lack"

MICROFILMED

NOV 19 1991

25-11526

ROSHOLT, ROBERTSON, TOLMAN & TUCKER  
Chartered

ATTORNEYS AT LAW

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TWIN FALLS, IDAHO 83303-1906  
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FAX (208) 736-0041

December 14, 1990

**RECEIVED**  
DEC 17 1990

Department of Water Resources  
1301 N. Orchard Street  
Statehouse Mail  
Boise, Idaho 83720

Department of Water Resources

Dear Sir/Madam:

Enclosed is an original Petition for Rehearing and copy thereof. Please file the original and return a conformed copy in the envelope provided.

Sincerely,

*Darla Joyce*  
Darla Joyce

/dj  
56141

**RECEIVED**  
NOV 19 1991

1 Bruce M. Smith  
2 ROSHOLT, ROBERTSON,  
3 TOLMAN & TUCKER  
4 P. O. Box 2139  
5 Boise, Idaho 83701-2139  
6 Telephone: (208) 336-0700  
7 4303p/dj/12-14-90

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DEC 17 1990

Department of Water Resources

8 BEFORE THE DIRECTOR OF THE DEPARTMENT  
9 OF WATER RESOURCES OF THE  
10 STATE OF IDAHO

11 IN THE MATTER OF APPLICATION FOR )  
12 PERMIT NO. 63-11326 IN THE NAME ) PETITION FOR REHEARING QX  
13 OF M.L. CLEMENTS )  
14 )

15 COMES NOW HARVEST FARM CO., and petitions the Director  
16 for a rehearing on the Memorandum Decision and Order Approving  
17 Application issued November 21, 1990. This petition is brought  
18 pursuant to IDWR Rule of Practice and Procedure 11.

19 The grounds for rehearing are that: (1) the Findings  
20 omit and misstate testimony at the hearing, (2) the Conclusions  
21 do not consider the factual information presented at the  
22 hearing and also identified in the Protestant's Brief in  
23 Support of exceptions to Proposed Memorandum Decision and Order  
24 Approving Application, and (3) the Findings and Conclusions  
25 neglect the applicable burdens of proof. As such, the Decision  
26 is an abuse of the Director's discretion. The Order is  
27 unlawful in that it represents a violation of the Protestant's  
28 rights under the Equal Protection provisions of the United  
States and Idaho Constitutions.

NOV 19 1991

1           The Director filed a Proposed Memorandum Decision and  
2 Order Approving Application on September 11, 1990. The  
3 Protestant submitted its Exceptions to the Proposed Decision  
4 and a Brief in Support of the Exceptions on September 21,  
5 1990. The Applicant filed his Brief in Opposition to the  
6 Protestant's Exceptions on November 7, 1990. The Protestant  
7 filed a Reply Brief to the Applicant's Brief on November 21,  
8 1990. The Director issued a Memorandum Decision and Order  
9 Approving Application on November 21, 1990.

10           The Protestant reaffirms and realleges the exceptions  
11 submitted in its original exceptions to the proposed decision  
12 except for Conclusion No. 10 which the Director has deleted  
13 from the final decision. The Protestant realleges the  
14 exception because the Decision fails to address most of the  
15 exceptions noted.

16           In the final decision, the Director indicates changes  
17 to Findings No. 10, 11, 13 and 14. Finding No. 10 now  
18 indicates "data from the monitoring well system" was not  
19 disputed. This Finding as now stated is even more confusing  
20 than the original Finding. What "data" does this Finding refer  
21 to? How does this Finding relate to any Conclusion and to the  
22 Director's decision? The Protestant objected at the hearing to  
23 the Director's taking judicial notice of all files, records,  
24 notes, etc. that the Department has collected. The objection  
25 appears well taken now that these Findings reflect an apparent  
26 reliance on "information" not identified. As noted by the  
27 Protestant in its brief in support of exceptions, it cannot be  
28

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1 expected to respond to information it is not aware of and that  
2 is used to make a decision.

3 Finding No. 11 has been changed only in a superficial  
4 manner, and the substance of the Protestant's original  
5 exception to this Finding has not been addressed.

6 Finding No. 13 now refers to "data from the monitoring  
7 well system" as apparently now forming the basis for a  
8 determination that water is available for appropriation.  
9 Again, this information has not been identified. This Finding  
10 also makes unclear if the Director considered the Applicant's  
11 expert's testimony on water availability, a burden the  
12 Applicant must meet.

13 The Decision also reflects that Conclusion No. 9 has  
14 been modified. The modification simply deleted the Applicant's  
15 burden of monitoring to determine the water available. The  
16 Decision still does not reflect how the Applicant shall monitor  
17 the effect of its diversion an existing rights.

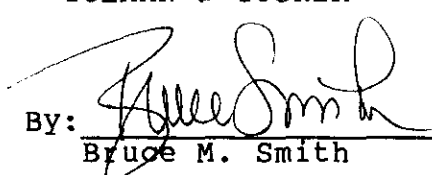
18 It remains the Protestant's position that the Decision  
19 contains such significant errors and omissions that the  
20 Director's decision constitutes an abuse of discretion. It is  
21 particularly noteworthy that the Decision does not address in a  
22 substantive manner most of the Protestant's exceptions. The  
23 Decision fails to even mention the Constitutional issues posed  
24 by the Protestant and the apparent inconsistent positions taken  
25 by the Department in regard to this Application and Application  
26 Nos. 63-10740 and 63-10741. As the decision now reads, it is  
27 impossible to tell on what basis the Director has made a  
28 decision as to the availability of water for appropriation.

NOV 19 1991

1 Pursuant to IDWR Rule of Practice and Procedure 3,5,  
2 the Protestant must indicate the nature and quantity of new and  
3 additional evidence that the petitioner will offer if rehearing  
4 is granted. The Protestant will offer new and additional  
5 evidence on the financial impacts to the Protestant of the  
6 Applicant's diversion. This evidence could not have been  
7 presented at the hearing because the Protestant had no  
8 opportunity to review the conclusions of the Applicant's  
9 expert. The Protestant will also examine the effects of the  
10 Applicant's pumping this year on the Harvest Farm Co. wells.  
11 This information could not be presented on the original hearing  
12 because the Protestant did not know the extent of the  
13 Applicant's pumping until the hearing. The Protestant will  
14 also examine the monitoring well system data to attempt to  
15 identify which information the Department is apparently relying  
16 on in making its decision. Based on additional research, the  
17 Protestant may offer the deposition testimony of Steve Baker,  
18 the apparent author of a September 9, 1988 IDWR memorandum.

19 DATED this 14th day of December, 1990.

20 ROSHOLT, ROBERTSON,  
21 TOLMAN & TUCKER

22  
23 By:   
24 Bruce M. Smith

25 CERTIFICATE OF MAILING

26 I hereby certify that on this 14th day of December,  
27 1990, I served a copy of the foregoing PETITION FOR REHEARING,  
28

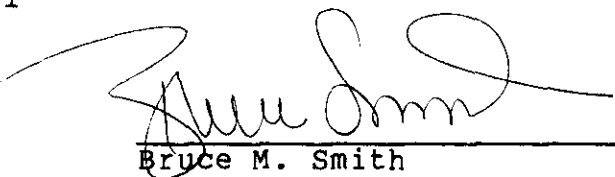
NOV 19 1991

1 by depositing same in the United States mail, postage prepaid,  
2 in an envelope, addressed to the following:

3 M.L. Clements  
4 4121 Rim Road  
5 Nampa, Idaho 83651

6 Steven A. Bradbury  
7 P.O. Box 1368  
8 Boise, Idaho 83701

9 4303p

  
Bruce M. Smith

NOV 19 1991

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DEC 24 1990

William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Department of Water Resources

Attorneys for Petitioner

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES .

OF THE

STATE OF IDAHO

|                                          |   |              |
|------------------------------------------|---|--------------|
| In the Matter of Application for Permit  | ) | ANSWER TO    |
|                                          | ) | PETITION FOR |
| To Appropriate Water No. 63-11236 In The | ) | REHEARING    |
|                                          | ) |              |
| Name of M. L. Clements                   | ) |              |
|                                          | ) |              |
|                                          | ) |              |

COMES NOW the applicant, M. L. Clements, by and through his attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and in answer to the protestant's Petition for Rehearing, states as follows:

1. The Findings of Fact as set forth in the Director's Memorandum Decision and Order Approving Application are reasonably based upon the testimony and evidence presented at the hearing.

2. The Conclusions of Law as set forth in the Director's Memorandum Decision and Order Approving Application were

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NOV 19 1991

ANSWER TO PETITION FOR REHEARING, P. 1

sufficiently supported by the Findings of Fact and correctly applied the applicable law.

3. The Findings and Conclusions as set forth in the Director's Memorandum Decision and Order Approving Application properly allocated and considered the burdens of proof applicable to the Application for Permit.

4. The Director's Memorandum Decision and Order Approving Application was neither unlawful nor violative of the protestant's rights under the equal protection provisions of the United States and Idaho Constitutions.

5. The applicant hereby adopts and incorporates herein by this reference its responses to the protestant's Exceptions to Proposed Decision and Order Approving Application and its Brief in Support of Exceptions, which responses are contained in Applicant's Brief in Opposition to Protestant's Exceptions to Memorandum Decision and Order Approving Application attached hereto as Exhibit A.

6. The protestant now claims that it should be permitted to offer new and additional evidence on the financial impacts to the protestant of the applicant's diversion and the effects of the applicant's pumping on the protestant's well claiming that it was unable to do so at the hearing of September 6, 1990. During that hearing, the protestant's expert testified on cross-examination that no such information existed. The applicant's invitation to the protestant's counsel to address the question received no response. If any information exists as to the actual impact of

NOV 19 1991

the applicant's diversion on the protestant's water rights it should have been introduced at the September 6, 1990 hearing.

7. The protestant had sufficient opportunity to present any and all evidence in support of its protest at the hearing conducted on September 6, 1990 and has not alleged that it has discovered the existence of any new evidence which it could not, with reasonable diligence, have discovered and produced at that hearing.

WHEREFORE, the applicant prays that the protestant's Petition for Rehearing be denied and that the Memorandum Decision and Order Approving Application be permitted to stand as the Department's final decision in this matter.

DATED this 2<sup>nd</sup> day of December, 1990.

EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED

BY Stephen A. Bradbury  
Stephen A. Bradbury

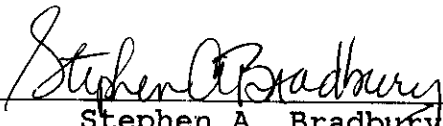
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NOV 19 1991

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21<sup>st</sup> day of December, 1990, a true and correct copy of the within and foregoing ANSWER TO PETITION FOR REHEARING was served upon the following attorney by depositing the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Bruce Smith, Esq.  
Nelson, Rosholt, Robertson, Tolman & Tucker  
P. O. Box 2329  
Boise, Idaho 83701

  
\_\_\_\_\_  
Stephen A. Bradbury

**RECEIVED**

NOV 19 1991

William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner

RECEIVED  
NOV 31 1990  
Department of Water Resources

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

|                                          |   |                     |
|------------------------------------------|---|---------------------|
| In the Matter of Application for Permit  | ) | APPLICANT'S BRIEF   |
|                                          | ) | IN OPPOSITION TO    |
| To Appropriate Water No. 63-11236 In The | ) | PROTESTANT'S        |
|                                          | ) | EXCEPTIONS TO       |
| Name of M. L. Clements                   | ) | PROPOSED MEMORANDUM |
|                                          | ) | DECISION AND ORDER  |
|                                          | ) | APPROVING           |
|                                          | ) | APPLICATION         |

COMES NOW the applicant, M. L. Clements, by and through his attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this brief in opposition to protestants, Harvest Farm Co., exceptions to the proposed Memorandum Decision and Order Approving Application for Permit No. 63-11326.

In its Brief in Support of Exceptions to Proposed Memorandum Decision, the protestant acrimoniously complains at length about certain of the hearing officer's findings of fact and conclusions of law as set forth in the proposed Memorandum Decision and Order Approving the Application. The protestant's complaints, however, when stripped of their acrimony, are reduced

BRIEF IN OPPOSITION, P. 1

EXHIBIT A

NOV 19 1991

to the bare protest that it simply disagrees with the facts found and conclusions reached by the hearing officer. Nevertheless, mere disagreement with the findings and conclusions of the hearing officer is insufficient to form the basis for the reversal of the hearing officer's decision.

The findings of a hearing officer may only be overturned where they are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Collins Bros. Corp. v. Dunn, 114 Idaho 600, 759 P.2d 891 (1988). If the proposed decision of the hearing officer is not (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority of the Department of Water Resources, (3) made upon unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, then the decision may stand. Idaho Code §67-5215. In the instant case, the findings of fact and conclusions of law as proposed by the hearing officer, fall into none of those categories. They should, accordingly, be accepted by the Director as proposed.

The applicant will, however, comment upon those findings of fact and conclusions of law about which the protestant complains.

#### FINDING OF FACT #8

The hearing officer found that pumping from the well occurred from approximately July 14 through August 6, 1991. The

NOV 19 1991

evidence is clear and uncontradicted that the applicant did in fact pump from the well between those dates. The protestant, however, complains not about the finding itself but instead about the fact that the applicant's expert based his conclusion that the applicant's well will have minimal impact, if any, upon the protestant's well upon a 14-day pumping period rather than the longer period of 24 days. What the protestants have incorrectly assumed, however, is that the applicant pumped the well continuously between those dates. The fact of the matter is that the applicant did not do so but instead pumped only on approximately 14 of those days. The protestant has also failed to mention that Mr. Feast based his opinion on a 14 day pumping period, not as a result of what happened during the 1990 season but upon his best estimate for expected future use and that he also concluded that the impact caused by a pumping period of greater than 14 days is insignificant when compared with the impact, if any, caused by a 14-day pumping period.

In sum, Finding of Fact #8 is accurate (except that it fails to note that the well was not pumped continuously between those dates). The protestant's problem with the finding of fact is not with the fact itself but with the conclusion which the protestants assume were drawn from that fact.

#### FINDING OF FACT #9

The hearing officer found that the purpose of the well is to provide a supplemental supply of water when the primary source of water is insufficient for the applicant's irrigation needs.

NOV 19 1991

The protestant complains that the applicant testified that he intended to use the well at the tail end of the irrigation season when the surface supplies are almost exhausted and for that reason the well is not a supplemental well. The protestants have failed to recall, however, that the applicant also testified that he would not use the well at all if he was assured that there would be a sufficient supply of surface water to meet his needs and that in the event the well was used he might use it at some time other than the very end of the irrigation season, thereby holding a certain amount of surface water in reserve in the event there was a malfunction of the pump and well. The applicant further testified that before the irrigation season ended, he would switch back to the surface water supply and use it until it was exhausted. The use of the well as proposed by the applicant most certainly fits into the category of a supplemental supply of water. The protestant's exception to Finding of Fact #9 is based upon its own lack of understanding of the facts as presented at the hearing.

#### FINDING OF FACT #10

In this finding, the hearing officer recognized that some of the issues presented by the instant application were similar to the issues presented by applications for permit nos. 63-10740 and 63-10741 and that therefore the information regarding the aquifer in the Dry Lake area generated by the applicant for those permits (here the protestants) which was not disputed was relevant to and could form the basis for a decision in the instant application.

**RECORDED**

NOV 19 1991

That finding is absolutely accurate. The protestant's problem now is that the information which the protestant generated in support of its application and relied upon by the Department in reaching its decision, does not support its protest to the instant application. Consequently, during the hearing in the instant application, the protestant attempted to impeach the evidence they introduced in the prior hearing. That attempted impeachment, however, was incomplete, and unpersuasive. Thus, the hearing officer was entitled to find that the information regarding the aquifer in the Dry Lake Area remained unchanged and should be considered.

#### FINDING OF FACT #11

The hearing officer found that the applicant's expert witness provided undisputed computational estimates of the effect between the applicant's well and the protestant's well. That effect, the hearing officer recognized, could result in a maximum predicted additional drawdown impact of up to about 15 feet. The protestants argue that the applicant's testimony in that respect was not undisputed. The protestants are, once again, incorrect. The applicant's expert's computational estimates of the effect were in fact undisputed and the protestant even accepted the applicant's expert's method and analysis. What the protestants did do at the hearing was suggest that some of the variables used by the applicant's expert should be changed. The hearing officer, having had an opportunity to consider the variables used in the applicant's expert's computational estimate and the variables

NOV 19 1991

suggested by the protestant, determined that the effect caused by an additional drawdown of 15 feet is relatively minor in extent and is not sufficient reason to deny the application. The protestant has once again confused an exception to a Finding of Fact with the conclusion which the hearing officer drew from that fact. The Director is, however, entitled to accept the testimony which the hearing officer found most reliable, reasonable, credible, and probable.

#### FINDING OF FACT #12

Protestant's complaint about Finding of Fact #12 concerns the hearing officer's recognition that there was no testimony that pumping of the applicant's well this year (1990) adversely affected the protestant's rights. That finding is absolutely correct. The protestant failed to produce one shred of evidence that the pumping of the applicant's well this year had any impact whatsoever upon the protestant's well. The protestant complains that it was unable to produce such testimony because it did not know when the applicant was pumping. The protestant, however, knew full well when the applicant was pumping as is evidenced by the fact that the protestant sought and obtained a cease and desist order preventing the applicant from pumping from that well. Furthermore, as the protestant complains at length elsewhere in its brief, the applicant's pump is within just a few feet of a public roadway, is readily observable from that roadway, making a determination as to the times of operation of that pump readily ascertainable by observation from the roadway.

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Accordingly, the protestant knew full well when and for what periods of time that pump was operating. If the protestant wanted to ascertain the effect between the applicant's well and the protestant's well while it was pumping, it easily could have done so. Indeed, the protestant was the only part which had access to any information concerning the actual impact of the applicant's well on the protestant's well. The protestant failed to offer any evidence of such an impact during the hearing either because the evidence did not exist or because the evidence did not show an impact. In either event, no evidence was produced. The hearing officer recognized that no evidence was produced and, as a finding of fact, stated that no evidence of actual impact was produced at the hearing. The finding is, therefore, accurate.

#### FINDING OF FACT #13

This finding states that: "Evidence that water levels are not generally declining, however, is indicative that water is available for appropriation." The protestant claims that no evidence was presented as to that issue. The protestant, however, overlooks the fact that applicant's Exhibit No. 5 was introduced and admitted during the hearing. That exhibit is a report prepared by the Department of Water Resources which concludes that "long-term trends in water level in the observation well suggest no appreciable declines have occurred in the [Dry Lake] area." The protestants complaint about Finding #13 is, once again, based upon an inaccurate recollection of the evidence admitted during the hearing.

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FINDING OF FACT #14

The hearing officer correctly found that "the applicant presented testimony relative to the economic benefits to the proposed project, and other factors relating to the local public interest. The protestant presented no testimony in this regard." The protestant, however, suggests that the applicant only testified he would be able to produce revenue by growing crops on his 80 acres and that the applicant's project would not affect fish and wildlife. The protestant also suggests that it also offered testimony relating to the local public interest.

The protestant, once again, is incorrect. The applicant testified that he had spoken to many of the neighboring landowners and none of them, except the protestant, was opposed to his well. The applicant also testified that he was unaware of any impacts his well would have on fish and wildlife habitat, aquatic life, recreation, transportation or navigation, water quality, and aesthetic beauty of the area. The applicant further testified that he was unaware of any concerns having been expressed by the city of Nampa, the county of Canyon, Idaho Fish and Game Department, the Idaho Department of Health & Welfare, or any irrigation district or canal company. Moreover, the applicant further testified that his well would have a positive impact on the local economy by increasing employment opportunities. Finally, the applicant testified that use of his well would affect the economy of his farm by permitting the land to be put to its highest and best use in an economically efficient fashion. As the

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hearing officer recognized, the protestant, on the other hand, offered absolutely no evidence with respect to the local public interest. The protestant only presented evidence respecting its private, as opposed to the general public interest. The testimony of the protestant established personal financial interest, but did not establish any conflict with the broader public interest.

#### CONCLUSION #7

The hearing officer concluded that although there is no specific quantification of water availability in the Dry Lake area, there appears to be water available in the ground water aquifer to satisfy the additional supplemental purposes proposed under this application. The protestant claims that the applicant failed to present any evidence as to water availability other than the Department of Water Resources' report which was admitted as applicant's Exhibit No. 5.

Protestant's recollection of the evidence presented at the hearing is, once again, inaccurate. In addition to the report prepared by the Department of Water Resources finding water available for appropriation in the Dry Lake area, the applicant's expert testified that in his opinion, and based upon his background, education, experience and investigation of the circumstances surrounding the instant application, there is water available for appropriation. The applicant introduced the best evidence available on that issue and the protestant, although it had an expert witness at the hearing, failed to controvert the applicant's evidence in that respect. Accordingly, the hearing

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officer's Conclusion of Law #7 is based upon evidence admitted at trial and cannot be characterized as an abuse of discretion as the protestant suggests.

#### CONCLUSION #8

This conclusion suggested that the Department should gather information about water levels and approve applications until it determines that water is not available for appropriation. The protestant complains that the Department is required to approve applications only if the criteria for showing water is available and other factors are met, and once again asserts that no showing of water availability was made by the applicant. That, however, as discussed above, is incorrect and requires no further comment.

#### CONCLUSION #9

The hearing officer concluded that the applicant should bear the burden of monitoring ground water levels to determine the quantity of available water and the effect of its diversions on existing rights. The hearing officer's order in that respect permits the Department to retain jurisdiction over the permit to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the proposed development. The hearing officer's order in that respect is well reasoned. In the event there is evidence of declining water tables, the Department has the right to require the applicant to take reasonable steps to monitor the water level at his well. The fact that the hearing officer has left for another day the determination of the precise activities

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in which the applicant may or may not be required to engage in the future makes a great deal of sense under the circumstances. If some monitoring activities are needed at some point in the future, the Department has the right to require them.

#### CONCLUSION #10

The applicant agrees that Rule 4,5,3 does not apply to this application and may, therefore, be deleted.

#### ANALYSIS SECTION OF DECISION

The protestant also characterizes the Analysis section of the hearing officer's proposed Memorandum Decision and Order as being "seriously flawed". First, the protestant rehashes its position that the applicant failed to present evidence regarding the availability of water for the proposed use. As noted above, the protestant is incorrect in that respect. Although the protestant reads the hearing officer's analysis as shifting the burden of proof to the protestant to prove the lack of availability of water, the hearing officer actually recognized that the applicant did present evidence in that respect and the protestant failed to offer any evidence in rebuttal. Accordingly, the hearing officer properly relied upon the applicant's evidence in that respect.

The protestant also complains about the hearing officer's analysis of the impact of the applicant's well on the protestant's existing well. The protestant claims that the data used by the applicant in order to determine the extent of the predicted drawdown on the protestant's well was inaccurate and erroneous.

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The protestant's recollection of its own expert opinion is, however, inaccurate. The protestant's own expert did not dispute the 15 foot drawdown but only disputed the level within the well at which the predicted 15 foot drawdown might take place. In other words, the protestant's applicant accepted the calculations of the applicant's expert and simply suggested to the hearing officer that the 15 feet may be felt in a place different than what the applicant's expert suggested. The protestants, however, failed to produce any evidence whatsoever of any actual impact the applicant's well would have on the protestant's well, including any actual impact resulting from a predicted 15-foot drawdown.

The hearing officer, as he was entitled to, in the absence of any direct evidence simply accepted the applicant's prediction as being more reliable than the protestant's prediction. And, as a result of the evidence presented at the hearing, the hearing officer concluded that the impacts, if any, on the protestant's well were minimal and not sufficient to deny the application. Said simply, the applicant presented evidence that the impact, if any, on the protestant's water rights would be minimal and the protestant failed to persuade the hearing officer otherwise.

#### EQUAL PROTECTION UNDER THE LAW

Finally, in its Brief in Support of Exceptions to Proposed Memorandum Decision and Order Approving Application, the protestant argues that the Department's decision in Application No. 63-10740 and 63-10471, wherein the protestant here was the applicant there, when compared with the proposed decision in this

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case constitutes a violation of the equal protection guarantees of the United States Constitution and Constitution of the State of Idaho. "The equal protection clauses of the state and federal constitutions embrace the principle that all persons in like circumstances should receive the same benefits and burdens of the law." State v. Breed, 111 Idaho 497, 500, 725 P.2d 201 (1986). "The guarantee of equal protection under the laws has been defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in the pursuit of happiness. (Citation omitted.) In other words, the equal protection clause of the Fourteenth Amendment is designed to assure that those persons similarly situated with respect to a governmental action should be treated similarly. (Citation omitted.)" State v. Hayes, 108 Idaho 556, 560, 700 P.2d 959 (1985).

In this instance, however, it is clear that the circumstances surrounding Application Nos. 63-10740 and 63-10741 as compared to the instant application are not at all the same. The earlier application sought approval for a total of 12 proposed well sites seeking to appropriate a total of 29.12 cfs of water, whereas the instant application seeks approval for a single existing well site for 1.6 cfs of water. Clearly, in that respect alone, the applications differ, demonstrating that the parties to those applications are not similarly situated or in like circumstances.

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Furthermore, the Harvest Farm application was approved only with the restriction that certain of the 12 proposed well sites be first developed and that later sites be developed only if necessary and upon proof of no impact on other existing rights in the area. That restriction did not prohibit the development of those wells outright but merely sought to impose a restriction of logical and orderly development so as to minimize any potential impacts. The instant application, however, is to be approved based upon an existing and contemporaneous finding of no significant impact on existing rights by a well which is located more than one-fourth of a mile from the protestant's well and separated by land not now nor ever having been cultivated. Thus, the protestant's claim that the two decisions result from "blatant bias and inequitable treatment" is not supported by the facts and circumstances existent in the applications the protestant seeks to compare.

In any event "the United States Supreme Court and Idaho Supreme Court are in perfect accord in their requirement that, in order to establish an instance of discriminatory application of the laws such that equal protection standards have been violated, there must first be shown a deliberate plan of discrimination based on some unjustifiable classification such as race, sex, religion, etc." Henson v. Department of Law Enforcement, 107 Idaho 19, 23, 684 P.2d 996 (1984). The protestant in this case has made absolutely no showing of a deliberate plan of

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discrimination based on some unjustifiable classification, nor can it ever hope to do so.

CONCLUSION

In conclusion, the hearing officer's proposed findings are not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The proposed decision of the hearing officer is not in violation of a constitutional or statutory provision, is not in excess of the statutory authority of the Department of Water Resources, was not made upon unlawful procedure, is not effected by other error of law, nor is it arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Accordingly, the hearing officer's proposed Memorandum Decision and Order Approving Application may and should be adopted and approved.

DATED this 7<sup>th</sup> day of November, 1990.

EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED

By Stephen A. Bradbury  
Stephen A. Bradbury

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 7<sup>th</sup> day of November, 1990, a true and correct copy of the within and foregoing BRIEF was served upon the following attorney by depositing the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Bruce Smith, Esq.  
Nelson, Rosholt, Robertson, Tolman & Tucker  
P. O. Box 2329  
Boise, Idaho 83701

  
Stephen A. Bradbury

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NOTES

Exceptions to M.L. Clements Proposed Decision

The following are comments in connection with the exceptions submitted by the protestant.

1. The exception with respect to Finding No 8. makes no sense. The 14 day period and the 24 day period are associated with different matters and do not need to be the same period.
2. The exception to Finding 9 is speculative and has no merit.
3. Finding 10 needs minor clarification and will be changed in the final decision. In addition, there is no reason to believe there has been a significant change to the aquifer since July 1989.
4. The word "undisputed" should be deleted from Finding No. 11. The undisputed aspect of Mr. Feast's computations, however, was that the maximum predicted drawdown is computed to be 15 feet. The differences cited in the exceptions between Mr. Feast's information and Mr. Chapman's information do not impact the 15 foot computation.
5. Conclusion No. 3 does not need to be changed. The applicant did meet his burden of proof. Subsequent development has not been significant.
6. The exception to Finding No. 12 is without merit. Long term impacts of pumping in the area in question was fully developed in the decision for 63-10740 and 63-10741.
7. Finding No. 13 will be changed to clarify that "data" from well monitoring in the Dry Lake area rather than "evidence" presented in the hearing show that water levels generally are not declining.
8. Finding No. 14 should be changed to read ... The protestant presented no "convincing" testimony in this regard.
9. Conclusion No. 7 is almost identical to the decision for 63-10740 and 63-10741 and requires no change.
10. Conclusion No. 8 is almost identical to the decision for 63-10740 and 63-10741 and requires no change.
11. Conclusion No. 9 as shown in the proposed decision was identical to the conclusion used in the Bing Frost (Harvest Farm Co.) decision and was not objected to by the protestant in the decision for 63-10740 and 63-10741. The conclusion, however, perhaps should be a little more general.

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and only require monitoring of the "effects" of its diversion. The conclusion should be so changed.

12. Conclusion of Law 10. should be deleted.

13. Comments on the analysis:

The comment on burden of proof is without merit since the applicant made a sufficient showing. Information presented by Harvest Farm Co. relative to the hearing on 63-10740 and 63-10741 is not considered to be "protestant's information" as related to the Clements matter. Instead the information presented in the Harvest Farms matter has been officially noticed by the hearing officer and incorporated into the Clements matter.

The comment on assumptions used in Feast's calculations is also without merit, since any calculations will change with different input as Mr. Feast stated. The assumptions used by Mr. Feast, however, in computing the 15 foot draw down were not disputed by Mr Chapman or other evidence presented at the hearing. Data which were disputed involved actual static water level and measured drawdown, which do not impact the computational estimate of 15 feet of drawdown.

The 1,044 gpm referred to by the applicant was the rate measured during a pump test which typically exceeds intended sustained yield.

The exceptions object to location of the well with respect to property lines. The exception also describes the filings of Harvest Farm Co. and the filing of Clements as identical situations. This is not the case. The Harvest Farm apps showed a diversion rate of 12.8 cfs, some 8 times as large as the Clements application. In addition, Hat Butte water is not as restricted as Boise Project water. Thus the Clements farm likely has more need for supplemental water than the "Allen Place" farm.

The exceptions allege "blatant bias and inequitable treatment" with respect to well siting conditions. The allegation is totally without any merit since the condition of approval in the Harvest Farm matter does not prevent the drilling of a well such as sited by Clements, but requires analysis of the effect of such a well and requires submittal of that information to the department. Clements has provided that information for his well in the hearing before the department.

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

IN THE MATTER OF APPLICATIONS FOR  
PERMIT NOS. 63-10740 & 63-10741

Bing-Frost Ranch Company

Applicant,

John A. Babcock, Brandt Agency, Inc.  
Cole's Inc., Kenneth W. Cole,  
Barbara Craven, Desert Sun farms, Inc.,  
Dry Lake Farms, Inc., Melvin L. Farmer,  
Johnson Land Co., George R. Johnson,  
John R. Johnson, Mitz Nato, Pickle Butte  
Farms, Inc., Pintler and Son,  
Charlie Pintler, George W. Pintler,  
James and Martha Rosti,  
Harold H. Rutherford,  
Ed and Gordon Tiegs, Inc.,  
Donald E. Tiegs and Sons, Inc.,  
Tiegs Farms, Inc., Harold Tiegs Estate,  
Leland Tiegs, Leonard Tiegs,  
and The Travelers Insurance Co.,

Protestants.

*Info notred  
from files  
63-10740 and  
63-10741*

FINAL MEMORANDUM  
DECISION AND ORDER

After issuance of a Proposed Memorandum Decision and Order, the applicant, Bing-Frost Ranch Company (hereinafter applicant), filed exceptions to the Decision. The exceptions state the following objections to the Proposed Decision:

1. The definition of "interior" as one quarter mile from any property boundary line does not properly define what a property boundary line is.

2. The applicant should not be restricted to development of the "interior" of its property defined as one quarter mile from any boundary line, because the condition requires more of the

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applicant than many other applicants. The applicant proposes a less stringent requirement that "interior" be defined as a boundary one-eighth of a mile from a property boundary or one quarter mile from any existing well.

The applicant also took exception to Paragraph No. 5 of the Order, which states that the permits only authorize supplemental use of water. The applicant did not discuss in its brief, however, why it objected to Paragraph 5.

#### ANALYSIS

The applicant alleged that the decision limits drilling within the boundaries of the "Home Place" and the "Allen Place." The applicant also alleged that it has acquired or leased additional property that would extend the boundaries of the total property.

The applications precisely describe the proposed points of diversion and the places of use. If additional land is acquired, and the new lands are proposed for a place of use or point of diversion, an amendment must be filed.

Where the applicant has purchased or leased property that enlarges the boundaries, the applicant apparently wants the flexibility to drill to the old "Home Place" and "Allen Place" boundaries rather than be restricted by an offset distance. This proposal is permissible for purchased property. For leased property, however, the offset from an original property boundary must be honored.

The applicant's proposal to define "interior" as one-eighth mile from any property boundary or one-fourth of a mile from any

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existing well is a reasonable definition, and the Paragraph No. 2 of the Order should be modified as follows:

2. The applicant must first develop wells located within the interior of the "Home Place" and "Allen Place." "Interior" is defined as one-quarter mile from any existing well, or as one-eighth mile from any property boundary line, as described in the application, or to the boundary of the "Home Place" or the "Allen Place" if property has been purchased which extends ownership at least one-eighth mile past the boundaries described in the applications. As each well is developed, the applicant must submit a report of water production capability to the Department. If a well is proposed outside the interior, the applicant must submit a proposal to the Department showing the exact location of the proposed well, and must establish that it will not interfere with other water rights. Once the flow limit of the permits is reached, the applicant must cease further well development.

The above condition will redefine the term "property boundary line," and will also expand the interior definition.

The reason for the exception to Paragraph 5 is not evident from the exceptions submitted by the applicant. The applicant represented that these ground water rights were being sought as a supplemental source of water. The applications were submitted to the Department as supplemental filings. The permits must be supplemental to the primary rights now appurtenant to the land.

Pursuant to the above discussion, the Findings of Fact, and Conclusions of Law and Order are modified as follows:

#### FINDINGS OF FACT

1. On November 14, 1988, Bing-Frost Ranch Company submitted to the Department of Water Resources (Department) two applications for permit to appropriate ground water. The first, numbered 63-10740, proposes the diversion of 16.32 cubic feet per second (cfs) of water for supplemental irrigation on 1960

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presently irrigated acres, located on a farm locally known as the "Home Place." The proposed points of diversion are five (5) locations within Sections 22, 23, 26 and 27, T2N, R3W, B.M. The second application, numbered 63-10741, proposes the diversion of 12.8 cfs of water for supplemental irrigation of 640 presently irrigated acres, located on a ranch locally known as the "Allen Place." The proposed points of diversion are seven (7) locations within Section 36, T2N, R3W, B.M.

2. Because each of the applications exceeds the statewide publication threshold of 10.0 cfs, each was published in the Idaho Statesman, Times-News, Post-Register, Lewiston Morning Tribune, and Idaho Press-Tribune, on either January 4 and 11, 1989, or January 5 and 12, 1989.

3. Protests against approval of the applications were received prior to the January 23, 1989 deadline from 25 parties. Initial attempts to reach a negotiated settlement were unsuccessful, and, on March 13, 1989, a conference was held by the Department at the Southside Grange Community Center. The applicant was represented by attorneys Thomas G. Nelson and Bruce M. Smith, and the 24 protestants in attendance represented themselves.

4. The protestants raised objections to the proposed projects by alleging that the proposed use is such that:

- (a) it will reduce the quantity of water under existing water rights,
- (b) the water supply is insufficient for the proposed use, and
- (c) it will conflict with the local public interest.

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5. On April 24, 1989, the Department received from the applicant detailed responses for both applications regarding the information required for diversions of greater than 5.0 cfs under Rule 4,5,3. of the Water Appropriation Rules and Regulations.

6. On July 6, 1989, a hearing regarding both applications was held in Boise by the Department. The applicant was again represented by attorneys Thomas G. Nelson and Bruce M. Smith, and farm manager George Fenn was also in attendance. Expert testimony was provided for the applicant by Sherl Chapman. All the protestants were represented by attorney James. S. Schiller.

7. Copies of a report prepared by the Department entitled "Water Level Trends in Dry Lake Area" dated September 8, 1988, were distributed and the hearing officer stated that he would consider the report in reaching a decision. The protestants requested 30 days to employ a hydrogeological expert and submit a technical document. The applicant objected to the request. The request was granted, but the hearing officer limited the scope of the submittal to those matters raised in the Department report. Both parties were allowed 30 days following the hearing to submit any responses regarding this report. No responses were received by the Department.

8. At the hearing the protestants stated that they objected to the applications because: (1) The proposed use would impact existing water rights, (2) Water was not available for appropriation, and (3) The proposed use would not be in the local public interest.

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9. The protestants irrigate extensively with ground water from wells located in the Dry Lake area. Water for some existing systems is supplied from the Snake River by irrigation organizations such as the Hat Butte Mutual Canal Company canal and the West End project. Ground water supplies the sole source of water for other systems. These ground water uses, to the extent they are perfected and have priority dates earlier than the applications, are senior to the applications.

10. The applicant presently irrigates all irrigated acres at the Allen Place with Snake River water delivered by the Hat Butte Mutual Canal Company, and irrigates 400 acres at the Home Place with West End project water. The remainder of the 1,960 acres at the Home Place are irrigated with water diverted from eight wells.

11. Testimony at the hearing clarified that the applications do not propose irrigation of any new lands. Instead, the applications propose to increase the amount of ground water supply to a full 0.02 cfs (one miner's inch) per acre for all presently irrigated acres. The applicants do not intend to decrease the reliance on surface water if the applications are approved, and new wells will be utilized solely for supplemental purposes.

12. Production from some wells in the Dry Lake area has decreased, leading to a suspicion by some protestants that the ground water level is declining. Ground water levels have been recorded in only two U.S. Geological Survey observation wells

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near the proposed points of diversion. Data from these wells do not indicate a long-term aquifer decline.

13. A factor that has contributed to a reduction in water availability from some wells in the Dry Lake area is well casing corrosion. Production rates in some wells have been restored using rehabilitation procedures.

14. No information was presented regarding the impact of local surface water recharge on the availability of ground water in the Dry Lake area. However, in many areas of irrigated agriculture, deep percolation of surface irrigation provides significant long-term recharge to the local ground water aquifer. Water imported to the area from the Snake River likely serves to increase ground water availability in the area.

15. In this case, the issue of sufficiency of water supply and the issue of possible reduction in the quantity of water under existing rights are related issues that can be resolved by determining the impact on existing water rights.

16. Evidence was submitted to show that ground water levels have remained stable each spring before pumping begins or even risen despite existing ground water diversions. Sherl Chapman, expert witness for the applicant, testified that water is available for appropriation.

17. Mr. Chapman stated that he has observed local well interference for wells located less than a quarter of a mile apart. He stated that the interior wells located the farthest distance from existing wells owned by neighboring farmers will be developed first. If the wells developed in the interior of the

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Bing-Frost property do not produce sufficient water, Mr. Chapman stated that the wells closer to the perimeter will be developed.

18. There is insufficient information regarding the aquifer in the Dry Lake area to definitely predict the amount of water available for appropriation. Evidence that water levels are not declining, however, is indicative that some water is available for appropriation.

19. Development of a supplemental ground water supply as proposed would ensure the availability of water to irrigate the applicant's lands.

20. Significant long-term lowering of the ground water level caused by a new ground water development would increase the cost of pumping to existing users.

#### CONCLUSIONS OF LAW

1. Idaho Code, Sec. 42-203A(5) states in part:

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

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2. Idaho Code, Sec. 42-226 (Supp. 1989) states in part as follows:

The traditional policy of the State of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of the underground water resources.

3. Rule 4,4,2,1. of the Water Appropriation Rules and Regulations requires the applicant to carry the burden of coming forward with evidence that water is available for appropriation, and that the proposed diversion will not reduce the quantity under existing rights.

4. Rule 4,4,2,2. of the Water Appropriation Rules and Regulations states that both the applicant and protestant have the burden of coming forward with evidence regarding public interests of which they are each most cognizant.

5. Rule 4,4,3. states that the applicant bears the ultimate burden of persuasion for all criteria considered under Idaho Code § 42-203A.

6. The local public interest criterion of Idaho Code, Sec. 42-203A(5) (Supp. 1989) is defined by Rule 5,1,5. of the Water Appropriation Rules and Regulations to include:

The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both long and short term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

The effect the project will have on recreation, fish and wildlife resources in the local public area affected by the proposed use;

Compliance with applicable air, water, and hazard laws

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substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

7. Although there is not specific quantification of water availability in the Dry Lake area, there appears to be water available in the ground water aquifer to satisfy the additional supplemental purposes proposed under these applications.

8. Full economic development of ground water resources of the state requires that the Department gather information about water levels and also approve applications until it determines that water is not available for appropriation.

9. Where some water appears to be available for appropriation but the quantity of available water is not defined, the applicant should bear the burden of monitoring ground water levels to determine the quantity of available water, and monitoring the effect of its diversions on existing rights.

10. Development of interior wells will reduce the risk that new wells will interfere with prior rights.

11. Both the applicant and the protestant discussed the direct benefits and detriments of the project as it relates to them. The protestants were charged with the responsibility to show existence of a genuine public, not private, interest, and that the proposal would likely damage the public interest. Upon such a showing the burden would be upon the applicant to either prove that the public benefits from the proposal would outweigh the detriments or prove that the public interest would not be damaged.

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12. The testimony of the protestants established personal financial interests, but did not establish broader public interest.

13. The information provided by the applicant at the conference, the hearing and the information submitted on April 24, 1989, is found to satisfy the requirements of Rule 4,5,3. of the Water Appropriation Rules and Regulations.

14. The Department specifically finds that the local public interest scrutiny required by Rule 4,5,3. of the Water Appropriation Rules and Regulations has been satisfied.

#### ORDER

IT IS HEREBY ORDERED that Applications for Permit Nos. 63-10740 and 63-10741 are APPROVED subject to the following conditions:

1. These water rights are subject to all prior water rights.

2. The applicant must first develop wells located within the interior of the "Home Place" and "Allen Place." "Interior" is defined as one-quarter mile from any existing well, or as one-eighth mile from any property boundary line, as described in the application, or to the boundary of the "Home Place" or the "Allen Place" if property has been purchased which extends ownership at least one-eighth mile past the boundaries described in the applications. As each well is developed, the applicant must submit a report of water production capability to the Department. If a well is proposed outside the interior, the applicant must submit a proposal to the Department showing the

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exact location of the proposed well, and must establish that it will not interfere with other water rights. Once the flow limit of the permits is reached, the applicant must cease further well development.

3. A flow measurement port or other device as specified by the Department shall be installed by the permit holder at each point of diversion for installation of measuring equipment and the determination of the rate of diversion by the Department.

4. The rate of diversion under these water rights, when combined with all other rights, shall not exceed 0.02 cfs per acre.

5. These permits authorize only supplemental use of the water. Ground water diverted under these permits cannot be used as the sole source of water supply but must always be associated with another primary water supply from either a surface water or ground water source as identified in the applications. Surface water shall continue to be used as the primary source of supply for the ground upon which it is now appurtenant, and ground water shall only be used when earlier priority rights or mechanical pumping problems prevent delivery of the surface water.

6. The Department retains jurisdiction over these permits to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the proposed development.

7. Proof of construction of works and application of water to beneficial use shall be submitted on or before September 1, 1993.

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Dated this 21<sup>ST</sup> day of FEBRUARY, 1990.

  
R. KEITH HIGGINSON, Director  
Department of Water Resources

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State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - (208) 334-7900

63-10740 *file*

*AK*

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

MEMORANDUM

*MS*  
TO: Glen Saxton  
Hal Anderson *AA*  
Alan Robertson *R*

DATE: September 9, 1988

FROM: Steve Baker *B*

SUBJECT: Water-Level Trends in Dry Lake Area

This memo is in response to the work request that stated the concern that residents in the Dry Lake area have expressed over declining water levels. After review of all the available water-level data in the vicinity of Dry Lake, only one observation well exists in the area that has a sufficient period of record. The well (1N-2W-5ADD1) lies less than a mile to the northeast of Dry Lake (as shown on the attached map). The USGS has bi-annually measured depth to water in the well since 1967. A hydrograph of water-level measurements obtained from the well for the past 12 years (1977-1988) is shown on the attached sheet. Except for two measurements that were taken while the well was pumping, only annual fluctuations appear to exist (Spring-rise and Fall-decline), with no apparent long-term declines.

Well Driller's Reports of the observation well and others in the area indicate the water-bearing material is primarily composed of interbedded layers of sand, silt, and clay. Well test data suggests the hydraulic properties of the local aquifer system are relatively poor. As a result, steep cones of depression of local extent most likely occur around pumping wells to provide the necessary hydraulic head differential for water to flow to the wells. According to a hypothetical analysis of the assumed hydrologic conditions that occur locally, for well interference to be a primary cause of the observed declines of 40-50 feet, an area would have to have a series of wells closely-spaced (less than one mile apart) and pumping in excess of 1000 gpm.

Another item that may be part of the cause of the observed declines is the degree of well efficiency for a given well. For wells that are completed in unconsolidated aquifers without well screen and a gravel envelope, the amount of well loss can be substantial. As the pumping rate increases, the head of

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JUL 24 1990

September 9, 1988

well loss dramatically increases. Under the present drought conditions, inefficient wells may be being pumped more severely than in a normal year. Therefore, the amount of pumping lift substantially increases and could be misinterpreted as a rapidly declining water table in an area.

In conclusion, long-term trends in water level in the observation well suggest no appreciable declines have occurred in the area. That is to say that net discharge is in apparent equilibrium with net recharge, indicating that over-development has not taken place locally. According to the assumed hydraulic properties of the local aquifer system, for well interference to be the cause of the observed declines, wells would have to be closely-spaced and pumping at high rates throughout the irrigation season. Well inefficiency in conjunction with increased pumpage during this present drought period are most likely the cause of the observed declines. If precipitation returns to normal or above normal in the up-coming years, these local anomalies should vanish and future water-level trends should remain stable as they have in the past.

SB:cjk  
Attachments

NOV 19 1991

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JUL 24 1990

PLAINTIFF'S  
EXHIBIT  
105  
PERCAMP-Baynes, N. L.

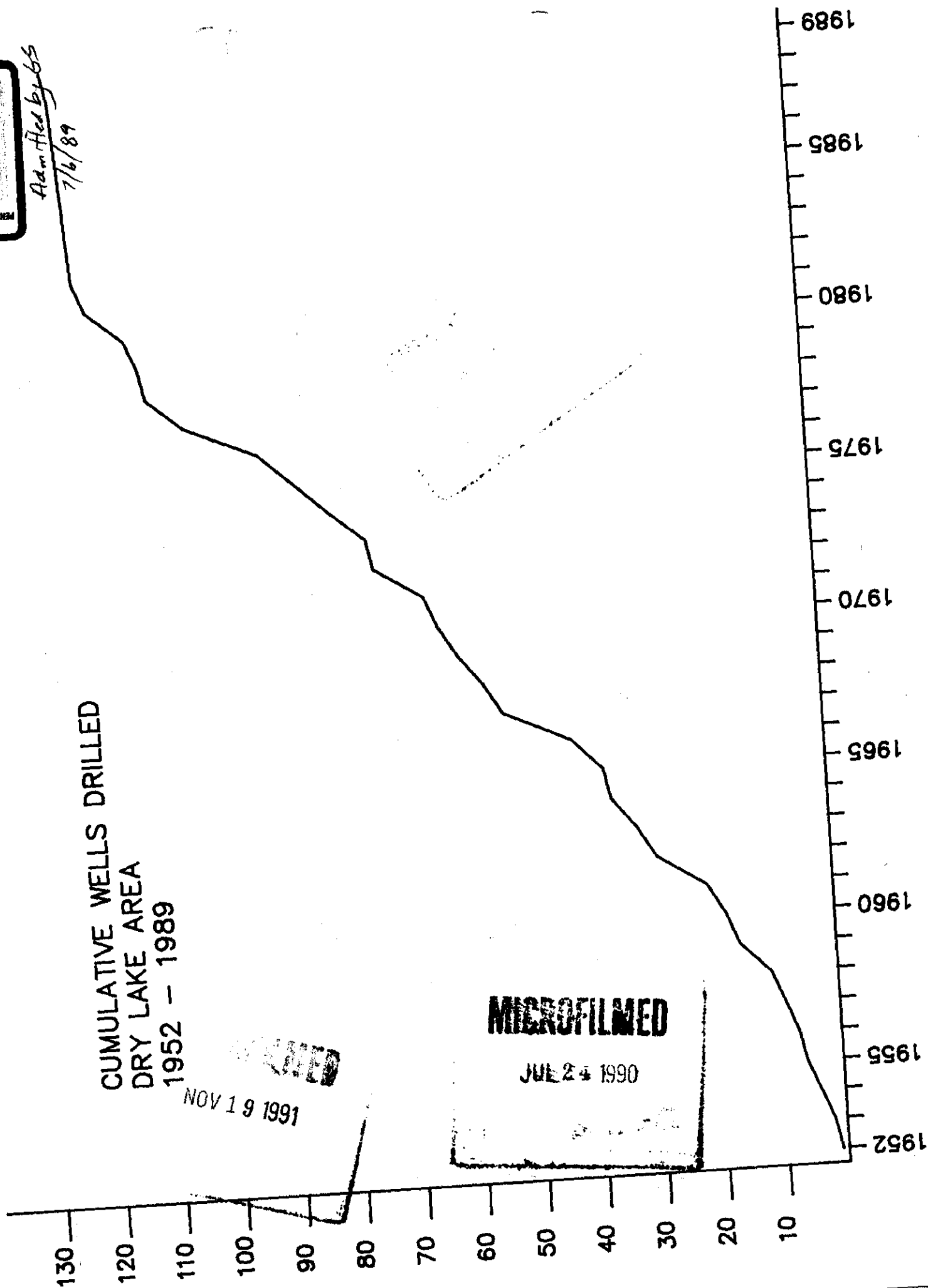
Admitted by 65  
7/6/89

CUMULATIVE WELLS DRILLED  
DRY LAKE AREA  
1952 - 1989

NOV 19 1991

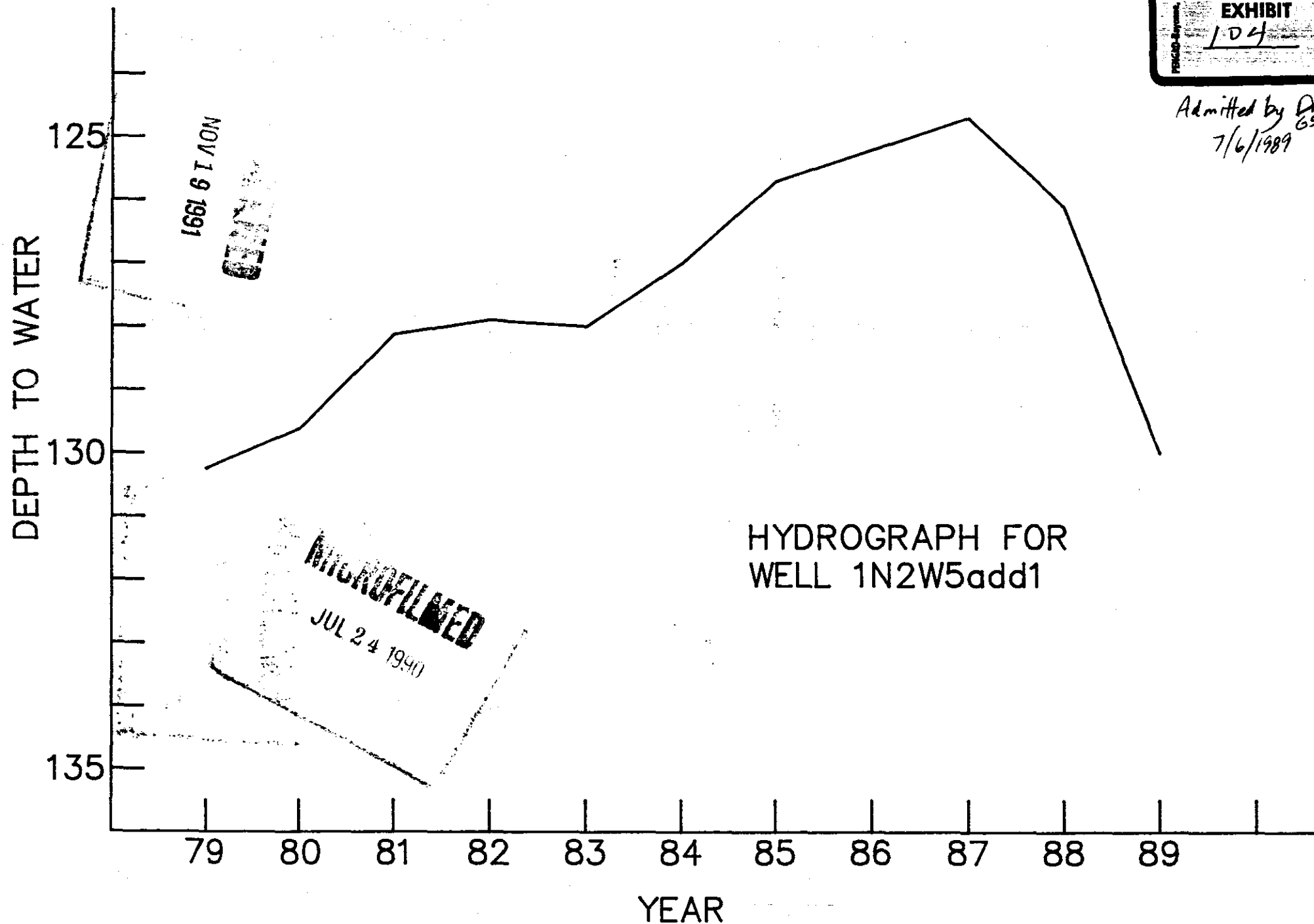
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JUL 24 1990





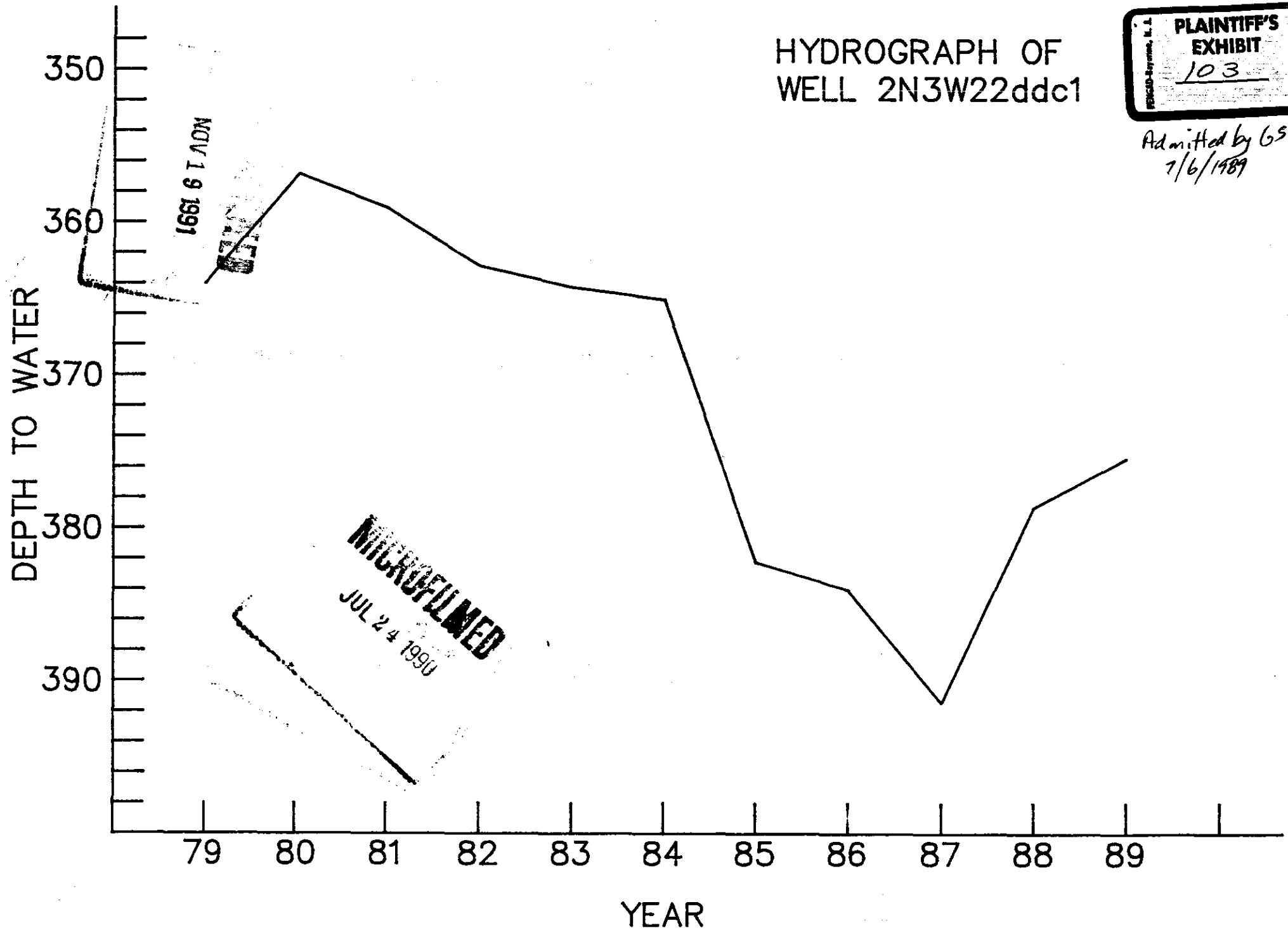
Admitted by Dep  
65  
7/6/1989



HYDROGRAPH OF  
WELL 2N3W22ddc1



Admitted by GS  
7/6/1989



BASIC DATA  
USGS OBSERVATION WELLS  
6/28/89



1N2W5add1

3/29/79 - 130.25  
3/27/80 - 129.62  
3/16/81 - 128.07  
3/17/82 - 127.89  
3/28/83 - 127.99  
3/30/84 - 127.03  
3/22/85 - 125.72  
3/25/86 - 125.24  
3/25/87 - 124.78  
3/16/88 - 126.06  
3/24/89 - 130.06

DRILLED IRRIGATION WATER-TABLE WELL IN IDAHO GROUP, DIAM 12 TO 10 IN, REPORTED DEPTH 720 FT, 12-IN CASING 0-423 FT, 10-IN CASING 415-625 FT, PERFORATED 415-625 FT. LSD ABOUT 2,675 FT NGVD OF 1929. MP NO. 1 BOTTOM EDGE OF ACCESS HOLE IN SOUTH SIDE OF CASING, 0.40 FT ABOVE LSD (SINCE APR. 18, 1967).

RECORDS AVAILABLE 1967 TO CURRENT YEAR.  
HIGHEST WATER LEVEL 124.78 FEET BELOW LAND SURFACE DATUM MAR 25, 1987.  
LOWEST WATER LEVEL 201.76 FEET BELOW LAND SURFACE DATUM AUG 28, 1967.

2N3W22ddc1

3/29/79 - 364.12  
4/3/80 - 356.48  
3/16/81 - 359.32  
3/17/82 - 362.82  
3/28/83 - 364.29  
3/30/84 - 364.93  
3/22/85 - 382.19  
3/25/86 - 384.07  
3/25/87 - 391.41  
3/16/88 - 378.62  
3/28/89 - 375.36

DRILLED IRRIGATION WATER-TABLE WELL IN IDAHO GROUP, DIA 14 IN, REPORTED DEPTH 603 FT, CASED TO 580 FT, PERFORATED 400-580 FT, GRAVEL PACKED 0-1/2 FT, LSD ABOUT 2,750 FT NGVD OF 1929. MP NO. 1 TOP OF 3/4-IN SLANTED ACCESS PIPE ON SOUTHWEST SIDE OF PUMP, 0.90 FT ABOVE LSD (SINCE APR. 17, 1967).

RECORDS AVAILABLE 1967 TO CURRENT YEAR.  
HIGHEST WATER LEVEL 313.00 FEET BELOW LAND SURFACE DATUM APR 27, 1967.  
LOWEST WATER LEVEL 394.60 FEET BELOW LAND SURFACE DATUM JUL 21, 1982.

IDAHO DEPARTMENT OF WATER RESOURCES  
WATER RIGHT CLAIMS PROOF READING REPORT  
(REGIONAL)

11/27/90 15:23:21  
Page 1

Water Right Number - 63-11326

Adj. Flag Translation: WATER RIGHT

Old (D) Number -

+ - - - - Last Name - - - - + + - First Name - - + + - - - - - Address - - - - - +

\*\*\* C - CURRENT OWNER \*\*\*  
CLEMENTS

M. L.

1 - 4121 RIM RD.  
2 -  
3 -  
City- NAMPA  
Phone - 208-495-2220

State- ID Zip- 83686

+ - - Priority Date - - + + - - Region - - - + + - - Stage - - - + + - - Status - - - +  
05/25/1990 14 ERROR IN REGION A - APPLICATION

+ - - - - Source - - - - - + + - - - - Tributary - - - - - +  
GROUNDWATER

+ - - - - Point of Diversion - - - - - +  
Twn Rng Sec Tract Lot RFlg County  
02N 02W 30 NW SW 3 (27) CANYON

+ - - - - Water Use - - - - - +  
Code Description Period From Period To Diversion Rate Diversion Volume  
01 - IRRIGATION 03/15 11/15 1.600

+ - Total Div. Rate - + + - Total Div. Volume - + + - Total Div. Capacity - +  
1.600

+ - - - - Place of Use - - - - - +  
Twn Rng Sec Tract Lot Acres Code Description County  
02N 02W 30 NE SW 40.0 01 IRRIGATION (27 ) CANYON  
NW SW 3 40.0 (27 ) CANYON

Total Acres: 80.0

+ - - Diversion Means - WELL, PUMP AND PIPELINE  
+ - - Non-Irrigation Use -  
+ - - Other Rights for Same Use - BOISE-KUNA IRRIGATION DISTRICT

NOV 19 1991

Remarks

This filing is for supplemental water to Boise-Kuna Irrigation District.  
This permit authorizes only supplemental use of water. Ground water diverted under this permit cannot be used as the sole source of water supply but must always be associated with another primary water supply from either a surface water or ground water source as identified in the application. Surface water shall continue to be used as the primary source of supply for the

Water right number - 63-11326

Adj. flag translation: WATER RIGHT

+ - - - - Remarks - - - - - +

ground upon which it is now appurtenant, and ground water shall be used only when surface water supplies are insufficient for irrigation of the property.  
The Department retains jurisdiction over this permit to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the proposed development.

+ - - - - Conditions of Approval - - - - - +

- 01C - A flow measurement port or other device as specified by the  
- Department shall be installed by the permit holder to provide for  
- the installation of measuring equipment and the determination of  
- the rate of diversion by the Department.  
03A - The rate of diversion of water for irrigation under this permit  
- and all other water rights on the same land shall not exceed 0.02  
- cubic feet per second for each acre of land.

+ - - - Decree Plaintiff - - - +

+ - - - Decree Defendant - - - +

+ - Decree Date - +  
00/00/0000

+ - - - - Comments - - - - - +

No comments Found

+ - - Audit Fields - SKAGGS

+ - - - - Water Rights Dates and Flags Area - - - - - +

|                  |              |                 |              |                  |     |
|------------------|--------------|-----------------|--------------|------------------|-----|
| Proof Due Date   | - 11/01/1991 | Field Exam Made | - 00/00/0000 | Field Exam Fee   | -   |
| Approved/Denied  | - 00/00/0000 | Protested Date  | - 00/00/0000 | Swan Falls       | -   |
| Proof Made Date  | - 00/00/0000 | Hearing Date    | - 00/00/0000 | Temporary Right  | - P |
| Start Work Date  | - 00/00/0000 | Verified Date   | - 00/00/0000 | DLE/Carey Act    | -   |
| Order Show Cause | - 00/00/0000 | Receipt Number  | - W012408    | Water District   | -   |
| Licensed Date    | - 00/00/0000 | Appl Received   | - 05/25/1990 | Transfer/Amended | -   |
| Decree Date      | - 00/00/0000 |                 |              |                  |     |

NOV 19 1991

November 26, 1990

M. L. Clements  
4121 Rim Rd.  
Nampa, ID 83651

Dear Mr. Clements:

Re: Application for Permit No. 63-11326

Enclosed is a copy of the approved Application for Permit No. 63-11326 along with a copy of the Memorandum Decision and Order. Please note the conditions of approval as set forth in the decision.

Condition of Approval No. 2 requires the installation a flow measurement port or measuring device to provide for the installation of measuring equipment by the department. Enclosed please find a list of measuring device options and specifications for the installation of the flow measurement port.

Any person who does not agree with the decision of the director may request a rehearing within 20 days or may appeal directly to the district court within 30 days of the date the decision is mailed.

Sincerely,

L. GLEN SAXTON, Chief  
Water Allocation Bureau

Enclosures

c w/enc: Steven A. Bradbury  
Bruce Smith

**RECEIVED**

**DEC 12 1990**

ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

ATTORNEYS AT LAW

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SUITE 400

P. O. BOX 2139

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CAROLYN M. MINDER  
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GARY L. QUIGLEY  
TIM J. WILLIAMS  
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P.O. BOX 1906  
TWIN FALLS, IDAHO 83303-1906  
TELEPHONE (208) 734-0700  
FAX (208) 736-0041

November 21, 1990



Department of Water Resources

Department of Water Resources  
1301 N. Orchard Street  
Statehouse Mail  
Boise, Idaho 83720

63-11231

Dear Sir/Madam:

Enclosed is an original Protestant Harvest Farm Co.'s Reply Brief to Applicant's Brief and copy thereof. Please file the original and return a conformed copy in the envelope provided.

Sincerely,

*Darla Joyce*  
Darla Joyce

/dj  
55071

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DEC 12 1990

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NOV 23 1990

Department of Water Resources

Bruce M. Smith  
ROSHOLT, ROBERTSON,  
TOLMAN & TUCKER  
P. O. Box 2139  
Boise, Idaho 83701-2139  
Telephone: (208) 336-0700  
4241p/dj/11-21-90

Attorney for Protestant

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

\* \* \* \* \*

|                                    |                         |
|------------------------------------|-------------------------|
| In the Matter of Application for ) |                         |
| Permit to Appropriate Water )      | PROTESTANT HARVEST FARM |
| No. 63-11236 in the Name of )      | CO.'S REPLY BRIEF TO    |
| M.L. Clements )                    | APPLICANT'S BRIEF       |

\* \* \* \* \*

COMES NOW Harvest Farm Co. and submits this brief in  
reply to the Applicant's, M.L. Clements, brief in opposition to  
Harvest Farm Co.'s exceptions to **MICROFILMED** memorandum  
decision in the above matter.

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It remains the Protestant's position that certain of  
the Findings of Fact, the Analysis and Conclusions in the  
proposed decision are clearly erroneous. Thus, the decision to  
approve the permit 63-11326 is an abuse of discretion. As  
noted in the Applicant's brief, the findings of a hearing  
officer must be based on the whole record. Harvest Farm Co.  
insists that the Findings, the Analysis, the Conclusions, and  
the Decision in this matter be based on the whole record. The

1 following specific comments are necessary to address statements  
2 made by the Applicant in his brief.

3 The Applicant states regarding Finding No. 8 that his  
4 expert made his analysis on a 14-day pumping period "based upon  
5 expected future use and not the actual pumping done during the  
6 1990 season" when the Applicant was illegally using the well.  
7 However, the record is clear that the expert did not establish  
8 the long term effects (greater than 30 days) of pumping the  
9 well on the Harvest Farm Co. well. Long term effects are an  
10 important aspect with regard to impacts on Harvest Farm Co..

11 The Applicant has completely failed to grasp the  
12 Harvest Farm Co. objection to Finding No. 9. Harvest Farm Co.  
13 did not state that the well is not a supplemental well. It is  
14 Harvest Farm Co.'s understanding that the well is for  
15 supplemental purposes. Harvest Farm Co.'s objection is that  
16 the Finding as stated does not adequately reflect the testimony  
17 at the hearing and omits certain information. The testimony  
18 was that the Applicant intends to use the water early in the  
19 season prior to irrigation district deliveries, during the  
20 interim period, and at the end of the irrigation season.

21 Harvest Farm Co. strongly disagrees with the  
22 Applicant's characterization of the objections to Finding  
23 No. 10, the Analysis, and Conclusion Nos. 7 and 8 with regard to  
24 the availability of water. The Applicant indicates Harvest  
25 Farm Co. now does not want to accept the opinion of its expert  
26 presented in the hearings for applications for permit Nos.  
27 63-10740 and 63-10741 because that opinion does not support  
28 Harvest Farm Co.'s position in this proceeding. That is

1 completely wrong. Harvest Farm Co. stands by the opinion of  
2 its expert in those hearings that there was water available for  
3 appropriation.

4 However, the fact is the Applicant's expert in the  
5 present proceedings based his opinion on Mr. Chapman's opinion  
6 in the proceedings on 63-10740 and 63-10741 that water was  
7 available for appropriation. However, Mr. Chapman made a  
8 contemporaneous and detailed analysis of development in the  
9 area at that point in time in order to reach his opinion. In  
10 the present situation, Mr. Chapman testified that in order for  
11 his original opinion to still be valid, one should examine the  
12 development in the area since his original analysis. Yet, the  
13 Applicant's expert testified he did not do so. The Applicant  
14 cannot have it both ways. If he wants to rely on Mr. Chapman's  
15 opinion, he must accept the total opinion, not the parts that  
16 suit his arguments. Under the Applicant's theory, he could  
17 rely on an opinion as to availability that is 100 years old  
18 without examining subsequent development. The burden is on the  
19 Applicant to show availability and the Applicant did not do so.

20 The Applicant indicates with regard to Finding No. 11  
21 that Harvest Farm Co. has objected to the hearing officer's  
22 Conclusion rather than the Finding. The Finding states there  
23 were "undisputed estimates of the effect between the  
24 Applicant's well and the Protestant's well." It was an  
25 erroneous Finding when made by the hearing officer, and it is  
26 wrong today. The Protestant did dispute the Applicant's  
27 expert's testimony on effects. Not only is the Finding wrong,  
28 the conclusion of the Applicant's expert as to effects on the

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1 Harvest Farm Co. well was and is wrong. The Applicant's expert  
2 based his conclusions on information obtained (in some  
3 instances incorrectly) from 1981 documents. Mr. Chapman  
4 testified, based on personal observation and work on the well,  
5 that well characteristics had changed in the nine years  
6 since. Even assuming the 15 foot drawdown figure used by the  
7 Applicant's expert was correct, the Applicant's expert applied  
8 that figure to the Harvest Farm Co. well incorrectly.  
9 Therefore, any estimate of damage to the Harvest Farm Co. well  
10 was also incorrect. Most notably, the Applicant's expert in  
11 (see sheet 6 of 8, Applicant's Exhibit A-6) concluded that  
12 Harvest Farm Co. would not be harmed because the "Harvest Farm  
13 Co. pumping level will be above [the] top screen." Yet the  
14 Applicant's expert did not even correctly determine the level  
15 of the top screen in the Harvest Farm Co. well. Thus, any  
16 guess as to damages to the Harvest Farm Co. well would be  
17 correspondingly wrong.

18 The Applicant, in commenting on Conclusion No. 9,  
19 states that if "there is evidence of declining water tables,  
20 the Department has the right to require the Applicant to  
21 monitor . . . his well." That is not what Conclusion No. 9  
22 states. It says "Where some water appears to be available for  
23 appropriation, but the quantity of available water is not  
24 defined," the Applicant must bear the burden of monitoring.  
25 Finding No. 13 says there is some **MICROFILMED** amount of water  
26 available. If that is the Finding and the Department's  
27 conclusion is that the Applicant should monitor, then the  
28 Applicant should monitor. The Department is under an

1 obligation to tell the Applicant what to do to monitor so that  
2 the Protestant is not harmed.

3 The Applicant's comments on the Analysis section  
4 address water availability and damages to the Harvest Farm Co.  
5 well. These have been alluded to earlier. However, the  
6 Applicant specifically states in this portion of his brief that  
7 Harvest Farm Co. suggests the impacts of the drawdown may be  
8 felt in a different place than what the Applicant's expert  
9 testified to. This evasive statement does not address the fact  
10 that even if everyone assumes the Applicant's drawdown figure  
11 is correct, the damage he described is in error because he did  
12 not correctly identify the location of the screen in the  
13 Harvest Farm Co. well.

14 As to the Applicant's arguments about the equal  
15 protection issue, Harvest Farm Co. stands by its original  
16 statements. The treatment of both parties in similar  
17 situations is vastly different. Both parties sought to drill  
18 supplemental wells in the same aquifer in an area where  
19 interference has been noted at approximately 1/4 mile. Yet the  
20 Applicant is permitted to drill only 30 feet from his property  
21 line, while Harvest Farm Co. is required to offset its wells by  
22 1/8 mile from its property line. Furthermore, the Applicant is  
23 permitted supplemental use based on the same conditional  
24 language that was denied to Harvest Farm Co. The Applicant's  
25 attempt to distinguish the parties is illogical. The  
26 distinction is artificial, and even if accepted, ignores the  
27 testimony in the Harvest Farm Co. supplemental proceedings  
28 that Harvest Farm Co. did not intend to drill 12 wells but

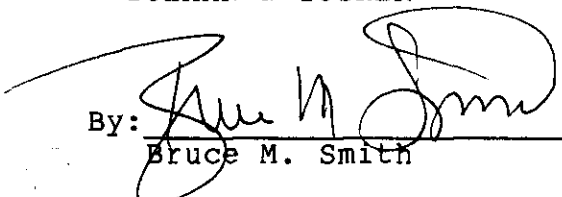
1 rather was providing itself flexibility as to the location of  
2 its wells. The fact is there is disparate treatment of two  
3 similarly situated parties that has not been explained.

4 CONCLUSION

5 Harvest Farm Co. respectfully submits that the  
6 existing Findings, Analysis, Conclusions, and Order in the  
7 Proposed Memorandum Decision must be rewritten. Harvest Farm  
8 Co. believes accurate and complete Findings, Analysis and  
9 Conclusions will direct a decision not to approve this  
10 application.

11 RESPECTFULLY SUBMITTED this 21st day of November, 1990.

12 ROSHOLT, ROBERTSON,  
13 TOLMAN & TUCKER

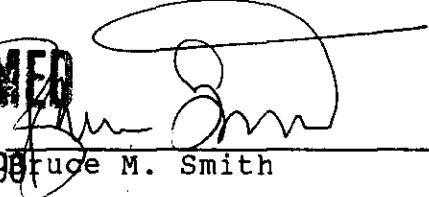
14 By:   
15 Bruce M. Smith

16 CERTIFICATE OF MAILING

17 I hereby certify that on this 21st day of November,  
18 1990, I served a copy of the foregoing REPLY BRIEF, by  
19 depositing same in the United States mail, postage prepaid, in  
20 an envelope, addressed to the following:

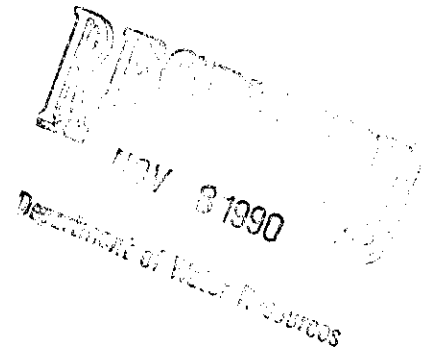
21 William J. McKlveen  
22 Stephen A. Bradbury  
23 EBERLE, BERLIN, KADING, TURNBOW  
24 & MCKLVEEN, CHARTERED  
25 P.O. Box 1368  
26 Boise, Idaho 83701

27 **MICROFILMED**

28 DEC 12 1990   
Bruce M. Smith

William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner



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

|                                          |   |                     |
|------------------------------------------|---|---------------------|
| In the Matter of Application for Permit  | ) | APPLICANT'S BRIEF   |
|                                          | ) | IN OPPOSITION TO    |
| To Appropriate Water No. 63-11236 In The | ) | PROTESTANT'S        |
|                                          | ) | EXCEPTIONS TO       |
| Name of M. L. Clements                   | ) | PROPOSED MEMORANDUM |
|                                          | ) | DECISION AND ORDER  |
|                                          | ) | APPROVING           |
|                                          | ) | APPLICATION         |

COMES NOW the applicant, M. L. Clements, by and through his attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and submits this brief in opposition to protestants, Harvest Farm Co., exceptions to the proposed Memorandum Decision and Order Approving Application for Permit No. 63-11326.

In its Brief in Support of Exceptions to Proposed Memorandum Decision, the protestant acrimoniously complains at length about certain of the hearing officer's findings of fact and conclusions of law as set forth in the proposed Memorandum Decision and Order Approving the Application. The protestant's complaints, however, when stripped of their a reduced



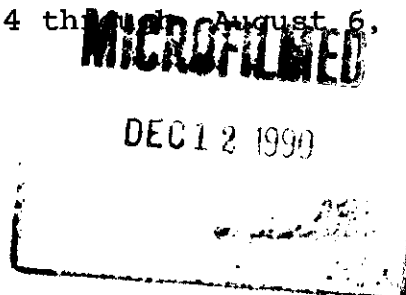
to the bare protest that it simply disagrees with the facts found and conclusions reached by the hearing officer. Nevertheless, mere disagreement with the findings and conclusions of the hearing officer is insufficient to form the basis for the reversal of the hearing officer's decision.

The findings of a hearing officer may only be overturned where they are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Collins Bros. Corp. v. Dunn, 114 Idaho 600, 759 P.2d 891 (1988). If the proposed decision of the hearing officer is not (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority of the Department of Water Resources, (3) made upon unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, then the decision may stand. Idaho Code §67-5215. In the instant case, the findings of fact and conclusions of law as proposed by the hearing officer, fall into none of those categories. They should, accordingly, be accepted by the Director as proposed.

The applicant will, however, comment upon those findings of fact and conclusions of law about which the protestant complains.

#### FINDING OF FACT #8

The hearing officer found that pumping from the well occurred from approximately July 14 through August 6, 1990. The



evidence is clear and uncontradicted that the applicant did in fact pump from the well between those dates. The protestant, however, complains not about the finding itself but instead about the fact that the applicant's expert based his conclusion that the applicant's well will have minimal impact, if any, upon the protestant's well upon a 14-day pumping period rather than the longer period of 24 days. What the protestants have incorrectly assumed, however, is that the applicant pumped the well continuously between those dates. The fact of the matter is that the applicant did not do so but instead pumped only on approximately 14 of those days. The protestant has also failed to mention that Mr. Feast based his opinion on a 14 day pumping period, not as a result of what happened during the 1990 season but upon his best estimate for expected future use and that he also concluded that the impact caused by a pumping period of greater than 14 days is insignificant when compared with the impact, if any, caused by a 14-day pumping period.

In sum, Finding of Fact #8 is accurate (except that it fails to note that the well was not pumped continuously between those dates). The protestant's problem with the finding of fact is not with the fact itself but with the conclusion which the protestants assume were drawn from that fact.

#### FINDING OF FACT #9

The hearing officer found that the purpose of the well is to provide a supplemental supply of water when the primary source of water is insufficient for the applicant's irrigation needs.

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The protestant complains that the applicant testified that he intended to use the well at the tail end of the irrigation season when the surface supplies are almost exhausted and for that reason the well is not a supplemental well. The protestants have failed to recall, however, that the applicant also testified that he would not use the well at all if he was assured that there would be a sufficient supply of surface water to meet his needs and that in the event the well was used he might use it at some time other than the very end of the irrigation season, thereby holding a certain amount of surface water in reserve in the event there was a malfunction of the pump and well. The applicant further testified that before the irrigation season ended, he would switch back to the surface water supply and use it until it was exhausted. The use of the well as proposed by the applicant most certainly fits into the category of a supplemental supply of water. The protestant's exception to Finding of Fact #9 is based upon its own lack of understanding of the facts as presented at the hearing.

#### FINDING OF FACT #10

In this finding, the hearing officer recognized that some of the issues presented by the instant application were similar to the issues presented by applications for permit nos. 63-10740 and 63-10741 and that therefore the information regarding the aquifer in the Dry Lake area generated by the applicant for those permits (here the protestants) which was not disputed was relevant to and could form the basis for a decision in the instant application.

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That finding is absolutely accurate. The protestant's problem now is that the information which the protestant generated in support of its application and relied upon by the Department in reaching its decision, does not support its protest to the instant application. Consequently, during the hearing in the instant application, the protestant attempted to impeach the evidence they introduced in the prior hearing. That attempted impeachment, however, was incomplete, and unpersuasive. Thus, the hearing officer was entitled to find that the information regarding the aquifer in the Dry Lake Area remained unchanged and should be considered.

FINDING OF FACT #11

The hearing officer found that the applicant's expert witness provided undisputed computational estimates of the effect between the applicant's well and the protestant's well. That effect, the hearing officer recognized, could result in a maximum predicted additional drawdown impact of up to about 15 feet. The protestants argue that the applicant's testimony in that respect was not undisputed. The protestants are, once again, incorrect. The applicant's expert's computational estimates of the effect were in fact undisputed and the protestant even accepted the applicant's expert's method and analysis. What the protestants did do at the hearing was suggest that some of the variables used by the applicant's expert should be changed. The hearing officer, having had an opportunity to consider the variables used in the applicant's expert's computational estimate and the variables

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suggested by the protestant, determined that the effect caused by an additional drawdown of 15 feet is relatively minor in extent and is not sufficient reason to deny the application. The protestant has once again confused an exception to a Finding of Fact with the conclusion which the hearing officer drew from that fact. The Director is, however, entitled to accept the testimony which the hearing officer found most reliable, reasonable, credible, and probable.

#### FINDING OF FACT #12

Protestant's complaint about Finding of Fact #12 concerns the hearing officer's recognition that there was no testimony that pumping of the applicant's well this year (1990) adversely affected the protestant's rights. That finding is absolutely correct. The protestant failed to produce one shred of evidence that the pumping of the applicant's well this year had any impact whatsoever upon the protestant's well. The protestant complains that it was unable to produce such testimony because it did not know when the applicant was pumping. The protestant, however, knew full well when the applicant was pumping as is evidenced by the fact that the protestant sought and obtained a cease and desist order preventing the applicant from pumping from that well. Furthermore, as the protestant complains at length elsewhere in its brief, the applicant's pump is within just a few feet of a public roadway, is readily observable from that roadway, making a determination as to the times of operation of that pump readily ascertainable by observation from the roadway.

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Accordingly, the protestant knew full well when and for what periods of time that pump was operating. If the protestant wanted to ascertain the effect between the applicant's well and the protestant's well while it was pumping, it easily could have done so. Indeed, the protestant was the only part which had access to any information concerning the actual impact of the applicant's well on the protestant's well. The protestant failed to offer any evidence of such an impact during the hearing either because the evidence did not exist or because the evidence did not show an impact. In either event, no evidence was produced. The hearing officer recognized that no evidence was produced and, as a finding of fact, stated that no evidence of actual impact was produced at the hearing. The finding is, therefore, accurate.

#### FINDING OF FACT #13

This finding states that: "Evidence that water levels are not generally declining, however, is indicative that water is available for appropriation." The protestant claims that no evidence was presented as to that issue. The protestant, however, overlooks the fact that applicant's Exhibit No. 5 was introduced and admitted during the hearing. That exhibit is a report prepared by the Department of Water Resources which concludes that "long-term trends in water level in the observation well suggest no appreciable declines have occurred in the [Dry Lake] area." The protestants complaint about Finding #13 is, once again, based upon an inaccurate recollection of the evidence admitted during the hearing.

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FINDING OF FACT #14

The hearing officer correctly found that "the applicant presented testimony relative to the economic benefits to the proposed project, and other factors relating to the local public interest. The protestant presented no testimony in this regard." The protestant, however, suggests that the applicant only testified he would be able to produce revenue by growing crops on his 80 acres and that the applicant's project would not affect fish and wildlife. The protestant also suggests that it also offered testimony relating to the local public interest.

The protestant, once again, is incorrect. The applicant testified that he had spoken to many of the neighboring landowners and none of them, except the protestant, was opposed to his well. The applicant also testified that he was unaware of any impacts his well would have on fish and wildlife habitat, aquatic life, recreation, transportation or navigation, water quality, and aesthetic beauty of the area. The applicant further testified that he was unaware of any concerns having been expressed by the city of Nampa, the county of Canyon, Idaho Fish and Game Department, the Idaho Department of Health & Welfare, or any irrigation district or canal company. Moreover, the applicant further testified that his well would have a positive impact on the local economy by increasing employment opportunities. Finally, the applicant testified that use of his well would affect the economy of his farm by permitting the land to be put to its highest and best use in an economically efficient fashion. As the

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hearing officer recognized, the protestant, on the other hand, offered absolutely no evidence with respect to the local public interest. The protestant only presented evidence respecting its private, as opposed to the general public interest. The testimony of the protestant established personal financial interest, but did not establish any conflict with the broader public interest.

#### CONCLUSION #7

The hearing officer concluded that although there is no specific quantification of water availability in the Dry Lake area, there appears to be water available in the ground water aquifer to satisfy the additional supplemental purposes proposed under this application. The protestant claims that the applicant failed to present any evidence as to water availability other than the Department of Water Resources' report which was admitted as applicant's Exhibit No. 5.

Protestant's recollection of the evidence presented at the hearing is, once again, inaccurate. In addition to the report prepared by the Department of Water Resources finding water available for appropriation in the Dry Lake area, the applicant's expert testified that in his opinion, and based upon his background, education, experience and investigation of the circumstances surrounding the instant application, there is water available for appropriation. The applicant introduced the best evidence available on that issue and the protestant, although it had an expert witness at the hearing, failed to controvert the applicant's evidence in that respect. Accordingly, the hearing

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officer's Conclusion of Law #7 is based upon evidence admitted at trial and cannot be characterized as an abuse of discretion as the protestant suggests.

#### CONCLUSION #8

This conclusion suggested that the Department should gather information about water levels and approve applications until it determines that water is not available for appropriation. The protestant complains that the Department is required to approve applications only if the criteria for showing water is available and other factors are met, and once again asserts that no showing of water availability was made by the applicant. That, however, as discussed above, is incorrect and requires no further comment.

#### CONCLUSION #9

The hearing officer concluded that the applicant should bear the burden of monitoring ground water levels to determine the quantity of available water and the effect of its diversions on existing rights. The hearing officer's order in that respect permits the Department to retain jurisdiction over the permit to require monitoring and reporting of ground water levels if it finds that ground water levels are declining in observation wells near or within the proposed development. The hearing officer's order in that respect is well reasoned. In the event there is evidence of declining water tables, the Department has the right to require the applicant to take reasonable steps to monitor the water level at his well. The fact that the hearing officer has left for another day the determination of the precise activities

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in which the applicant may or may not be required to engage in the future makes a great deal of sense under the circumstances. If some monitoring activities are needed at some point in the future, the Department has the right to require them.

CONCLUSION #10

The applicant agrees that Rule 4,5,3 does not apply to this application and may, therefore, be deleted. ✓

ANALYSIS SECTION OF DECISION

The protestant also characterizes the Analysis section of the hearing officer's proposed Memorandum Decision and Order as being "seriously flawed". First, the protestant rehashes its position that the applicant failed to present evidence regarding the availability of water for the proposed use. As noted above, the protestant is incorrect in that respect. Although the protestant reads the hearing officer's analysis as shifting the burden of proof to the protestant to prove the lack of availability of water, the hearing officer actually recognized that the applicant did present evidence in that respect and the protestant failed to offer any evidence in rebuttal. Accordingly, the hearing officer properly relied upon the applicant's evidence in that respect.

The protestant also complains about the hearing officer's analysis of the impact of the applicant's well on the protestant's existing well. The protestant claims that the data used by the applicant in order to determine the extent of the predicted drawdown on the protestant's well was inaccurate and erroneous.

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The protestant's recollection of its own expert opinion is, however, inaccurate. The protestant's own expert did not dispute the 15 foot drawdown but only disputed the level within the well at which the predicted 15 foot drawdown might take place. In other words, the protestant's applicant accepted the calculations of the applicant's expert and simply suggested to the hearing officer that the 15 feet may be felt in a place different than what the applicant's expert suggested. The protestants, however, failed to produce any evidence whatsoever of any actual impact the applicant's well would have on the protestant's well, including any actual impact resulting from a predicted 15-foot drawdown.

The hearing officer, as he was entitled to, in the absence of any direct evidence simply accepted the applicant's prediction as being more reliable than the protestant's prediction. And, as a result of the evidence presented at the hearing, the hearing officer concluded that the impacts, if any, on the protestant's well were minimal and not sufficient to deny the application. Said simply, the applicant presented evidence that the impact, if any, on the protestant's water rights would be minimal and the protestant failed to persuade the hearing officer otherwise.

#### EQUAL PROTECTION UNDER THE LAW

Finally, in its Brief in Support of Exceptions to Proposed Memorandum Decision and Order Approving Application, the protestant argues that the Department's decision in Application No. 63-10740 and 63-10471, wherein the protestant here was the applicant there, when compared with the proposed decision in this

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case constitutes a violation of the equal protection guarantees of the United States Constitution and Constitution of the State of Idaho. "The equal protection clauses of the state and federal constitutions embrace the principle that all persons in like circumstances should receive the same benefits and burdens of the law." State v. Breed, 111 Idaho 497, 500, 725 P.2d 201 (1986). "The guarantee of equal protection under the laws has been defined to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in the pursuit of happiness. (Citation omitted.) In other words, the equal protection clause of the Fourteenth Amendment is designed to assure that those persons similarly situated with respect to a governmental action should be treated similarly. (Citation omitted.)" State v. Hayes, 108 Idaho 556, 560, 700 P.2d 959 (1985).

In this instance, however, it is clear that the circumstances surrounding Application Nos. 63-10740 and 63-10741 as compared to the instant application are not at all the same. The earlier application sought approval for a total of 12 proposed well sites seeking to appropriate a total of 29.12 cfs of water, whereas the instant application seeks approval for a single existing well site for 1.6 cfs of water. Clearly, in that respect alone, the applications differ, demonstrating that the parties to those applications are not similarly situated or in like circumstances.

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Furthermore, the Harvest Farm application was approved only with the restriction that certain of the 12 proposed well sites be first developed and that later sites be developed only if necessary and upon proof of no impact on other existing rights in the area. That restriction did not prohibit the development of those wells outright but merely sought to impose a restriction of logical and orderly development so as to minimize any potential impacts. The instant application, however, is to be approved based upon an existing and contemporaneous finding of no significant impact on existing rights by a well which is located more than one-fourth of a mile from the protestant's well and separated by land not now nor ever having been cultivated. Thus, the protestant's claim that the two decisions result from "blatant bias and inequitable treatment" is not supported by the facts and circumstances existent in the applications the protestant seeks to compare.

In any event "the United States Supreme Court and Idaho Supreme Court are in perfect accord in their requirement that, in order to establish an instance of discriminatory application of the laws such that equal protection standards have been violated, there must first be shown a deliberate plan of discrimination based on some unjustifiable classification such as race, sex, religion, etc." Henson v. Department of Law Enforcement, 107 Idaho 19, 23, 684 P.2d 996 (1984). The protestant in this case has made absolutely no showing of a deliberate plan of

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discrimination based on some unjustifiable classification, nor can it ever hope to do so.

CONCLUSION

In conclusion, the hearing officer's proposed findings are not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The proposed decision of the hearing officer is not in violation of a constitutional or statutory provision, is not in excess of the statutory authority of the Department of Water Resources, was not made upon unlawful procedure, is not effected by other error of law, nor is it arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Accordingly, the hearing officer's proposed Memorandum Decision and Order Approving Application may and should be adopted and approved.

DATED this 7<sup>th</sup> day of November, 1990.

EBERLE, BERLIN, KADING, TURNBOW  
& McKLVEEN, CHARTERED

By Stephen A. Bradbury  
Stephen A. Bradbury

**MICROFILMED**

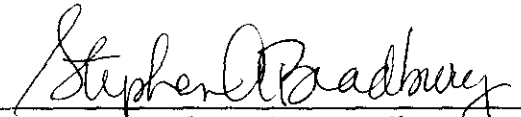
DEC 12 1990

BRIEF IN OPPOSITION, P. 15

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 7<sup>th</sup> day of November, 1990, a true and correct copy of the within and foregoing BRIEF was served upon the following attorney by depositing the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Bruce Smith, Esq.  
Nelson, Rosholt, Robertson, Tolman & Tucker  
P. O. Box 2329  
Boise, Idaho 83701

  
Stephen A. Bradbury

**MICROFILMED**

DEC 12 1990

EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN,  
CHARTERED

ATTORNEYS AND COUNSELORS AT LAW  
CAPITOL PARK PLAZA  
300 NORTH SIXTH STREET  
POST OFFICE BOX 1368  
BOISE, IDAHO 83701

STEPHEN A. BRADBURY

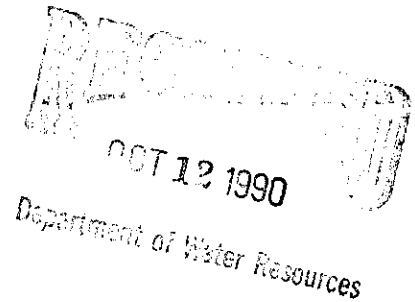
TELEPHONE  
(208) 344-8535

FACSIMILE  
(208) 344-8542

JAMES L. BERLIN  
OF COUNSEL

T. H. EBERLE (1922-1977)

October 11, 1990



Mr. Gary Spackman, Manager  
Water Right Permits Section  
Idaho Department of Water Resources  
1301 North Orchard Street  
Boise, Idaho 83720

Re: Petition of Stay of Cease and Desist Order -  
Application for Permit to Appropriate Water  
No. 63-11236 - M. L. Clements

11326

Dear Mr. Spackman:

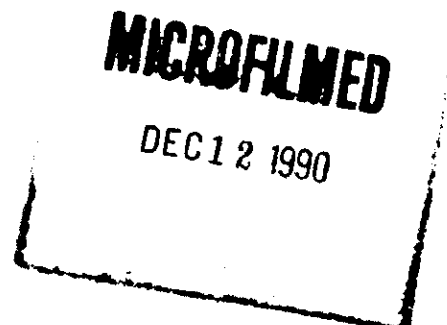
Enclosed is an original Stipulation for Extension of Time in the above referenced matter, signed by Bruce Smith and William J. McKlveen. Our Motion for Extension of Time was mailed to you on Tuesday, October 8.

Thank you for your attention to this matter.

Very truly yours,

  
Jan Trygg, Secretary to  
Stephen A. Bradbury

Enclosure



William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner

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

|                                          |   |                 |
|------------------------------------------|---|-----------------|
| In the Matter of Application for Permit  | ) |                 |
|                                          | ) |                 |
| To Appropriate Water No. 63-11236 In The | ) | STIPULATION FOR |
|                                          | ) | EXTENSION OF    |
| Name of M. L. Clements                   | ) | TIME            |
|                                          | ) |                 |

COME NOW the parties hereto, by and through their attorneys of record, and stipulate and agree that the Petitioner herein, Maurice L. Clements, may have up to and including November 8, 1990 in which to file his response to Harvest Farm Co. Exceptions to Proposed Memorandum Decision and Order Approving Application, and supporting brief.

DATED this 11<sup>th</sup> day of October, 1990.

EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED

BY

William J. McKlveen  
William J. McKlveen

NELSON, RSHOLT, ROBERTSON,  
TOLMAN & TUCKER

BY

Bruce M. Smith  
Bruce M. Smith

**MICROFILMED**

DEC 12 1990

10/8/90

RECEIVED OCT - 8 1990

William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner

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

|                                          |   |              |
|------------------------------------------|---|--------------|
| In the Matter of Application for Permit  | ) |              |
|                                          | ) |              |
| To Appropriate Water No. 63-11236 In The | ) | ORDER FOR    |
|                                          | ) | EXTENSION OF |
| Name of M. L. Clements                   | ) | TIME         |
|                                          | ) |              |

Upon reading the Stipulation for Extension of Time filed by  
the parties hereto, and good cause appearing therefor,

IT IS HEREBY ORDERED that Petitioner may have until and  
including November 8, 1990 in which to file a response to Harvest  
Farm Co. Exceptions to Proposed Memorandum Decision and Order  
Approving Application, and supporting brief.

DATED this \_\_\_\_ day of October, 1990.

DEPARTMENT OF WATER RESOURCES

By \_\_\_\_\_

ORDER, P. 1

**MICROFILMED**

DEC 12 1990

October 11, 1990

M. L. Clements  
4121 Rim Road  
Nampa, ID 83651

Dear Mr. Clements:

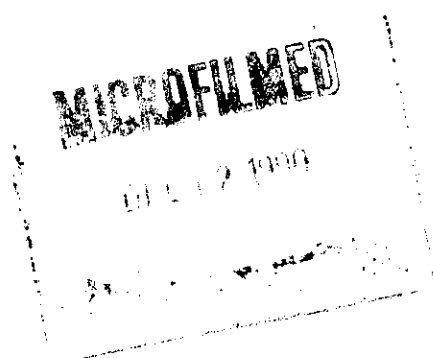
Re: Application for Permit No. 63-11236

Enclosed is a copy of the order for Extension of Time. It extends the time within which to submit exceptions to the Proposed Memorandum Decision and Order until November 8, 1990.

Sincerely,

RITA I. FLECK  
Secretary/Records Manager

Enclosure



October 11, 1990

Steven A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN  
P. O. Box 1368  
Boise, ID 83701

Dear Mr. Bradbury:

Re: Application for Permit No. 63-11236 -- M. L. Clements

Enclosed is a copy of the Order for Extension of Time. It extends the time within which to submit exceptions to the Proposed Memorandum Decision and Order until November 8, 1990.

Sincerely,

RITA I. FLECK  
Secretary/Records Manager

Enclosure



October 11, 1990

Bruce Smith  
Nelson, Rosholt, Robertson, Tolman & Tucker  
P. O. Box 2139  
Boise, ID 83701-2139

Dear Mr. Smith:

Enclosed is a copy of the Order for Extension of Time. It extends the time within which to submit exceptions to the Proposed Memorandum Decision and Order until November 8, 1990.

Sincerely,

RITA I. FLECK  
Secretary/Records Manager

Enclosure



William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner

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

|                                          |   |              |
|------------------------------------------|---|--------------|
| In the Matter of Application for Permit  | ) |              |
|                                          | ) |              |
| To Appropriate Water No. 63-11236 In The | ) | ORDER FOR    |
|                                          | ) | EXTENSION OF |
| Name of M. L. Clements                   | ) | TIME         |
|                                          | ) |              |

Upon reading the Motion for Extension of Time filed by M. L. Clements and supporting affidavit in the above entitled matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that Petitioner may have until and including November 8, 1990 in which to file a response to Harvest Farm Co. Exceptions to Proposed Memorandum Decision and Order Approving Application, and supporting brief.

DATED this 10<sup>th</sup> day of October, 1990.

DEPARTMENT OF WATER RESOURCES

By

*J. New Saxon*  
*Hearing Officer*

**MICROFILMED**  
ORDER, P.D. 10-10-90



received by this office on September 24, 1990, and thus a response and brief of petitioner would be due on Tuesday, October 9, 1990.

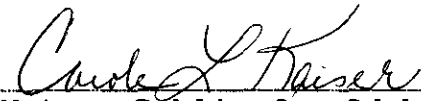
4. The response and brief were in the process of being prepared by Stephen A. Bradbury but cannot be completed at this time because he sustained injuries in an accident on October 6, 1990 and is incapacitated at this time.

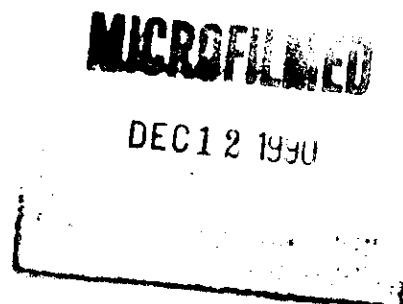
5. Your affiant therefore requests a thirty-day extension of time in which to respond to the exceptions and file a supporting brief, until and including November 8, 1990.

DATED this 8th day of October, 1990.

  
WILLIAM J. MCKLVEEN

SUBSCRIBED AND SWORN to before me this 8th day of October, 1990.

  
Notary Public for Idaho  
Residing at Boise, Idaho  
Commission expires: 3-19-92



William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner

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

|                                          |   |              |
|------------------------------------------|---|--------------|
| In the Matter of Application for Permit  | ) |              |
|                                          | ) |              |
| To Appropriate Water No. 63-11236 In The | ) | MOTION FOR   |
|                                          | ) | EXTENSION OF |
| Name of M. L. Clements                   | ) | TIME         |
|                                          | ) |              |

COMES NOW M. L. Clements, by and through his attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, and hereby moves for an extension of time in which to file a response to Harvest Farm Co. Exceptions to Proposed Memorandum Decision and Order Approving Application, and supporting brief.

The Affidavit of William J. McKlveen in support of this motion is filed concurrently herewith.

DATED this 8<sup>th</sup> day of October, 1990.

EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED

BY William J. McKlveen  
William J. McKlveen

**MICROFILMED**

MOTION FOR EXTENSION OF TIME,  
P. 1

DEC 12 1990

EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN,  
CHARTERED

ATTORNEYS AND COUNSELORS AT LAW  
CAPITOL PARK PLAZA  
300 NORTH SIXTH STREET  
POST OFFICE BOX 1368  
BOISE, IDAHO 83701

WILLIAM J. MCKLVEEN

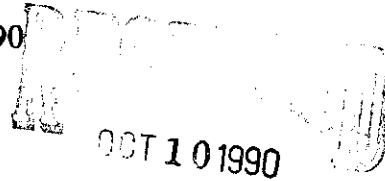
TELEPHONE  
(208) 344-8535

FACSIMILE  
(208) 344-8542

JAMES L. BERLIN  
OF COUNSEL

T. H. EBERLE (1922-1977)

June 6, 1990



Department of Water Resources

Hand Delivered

Bruce M. Smith, Esq.  
Nelson, Rosholt, Robertson, Tolman & Tucker  
1020 Main Street, Suite 400  
Boise, Idaho 83702

Re: Application for Permit - M. L. Clements

Dear Bruce:

Enclosed are a Motion and supporting Affidavit requesting an extension of time in which to answer Harvest Farm Co. Exceptions and to file our supporting brief. Steve Bradbury had started preparation of these documents, but was injured in a soccer accident over the weekend and is incapacitated for an undetermined period of time.

I also enclose a Stipulation for Extension of Time. If it meets with your approval, please sign and return to me and I will file it with the Department.

Thank you for your cooperation.

Very truly yours,

A handwritten signature in dark ink, appearing to read "William J. McKlveen". The signature is fluid and cursive, with a long horizontal stroke at the end. Below the signature, the name "William J. McKlveen" is printed in a standard, sans-serif font.

William J. McKlveen

WJM/jt

cc: Maurice Clements  
✓ Director, Department of Water Resources

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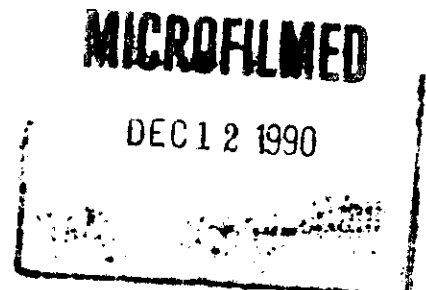
DEC 12 1990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of October, 1990, a true and correct copy of the within and foregoing MOTION was served upon the following attorney by personally delivering the same to:

Bruce Smith, Esq.  
Nelson, Rosholt, Robertson, Tolman & Tucker  
1020 Main Street, Suite 2139  
Boise, Idaho 83702

  
William J. McKlveen



## NOTES

## Exceptions to M.L. Clements Proposed Decision

The following are comments in connection with the exceptions submitted by the protestant.

1. The exception with respect to Finding No 8. makes no sense. The 14 day period and the 24 day period are associated with different matters and do not need to be the same period.
2. The exception to Finding 9 is speculative and has no merit.
3. Finding 10 needs minor clarification and will be changed in the final decision. In addition, there is no reason to believe there has been a significant change to the aquifer since July 1989.
4. The word "undisputed" should be deleted from Finding No. 11. The undisputed aspect of Mr. Feast's computations, however, was that the maximum predicted drawdown is computed to be 15 feet. The differences cited in the exceptions between Mr. Feast's information and Mr. Chapman's information do not impact the 15 foot computation.
5. Conclusion No. 3 does not need to be changed. The applicant did meet his burden of proof. Subsequent development has not been significant.
6. The exception to Finding No. 12 is without merit. Long term impacts of pumping in the area in question was fully developed in the decision for 63-10740 and 63-10741.
7. Finding No. 13 will be changed to clarify that "data" from well monitoring in the Dry Lake area rather than "evidence" presented in the hearing show that water levels generally are not declining.
8. Finding No. 14 should be changed to read ... The protestant presented no "convincing" testimony in this regard.
9. Conclusion No. 7 is almost identical to the decision for 63-10740 and 63-10741 and requires no change.
10. Conclusion No. 8 is almost identical to the decision for 63-10740 and 63-10741 and requires no change.
11. Conclusion No. 9 as shown in the proposed decision was

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DEC 12 1990

identical to the conclusion used in the Bing Frost (Harvest Farm Co.) decision and was not objected to by the protestant in the decision for 63-10740 and 63-10741. The conclusion, however, perhaps should be a little more general and only require monitoring of the "effects" of its diversion. The conclusion should be so changed.

12. Comments on the analysis:

The comment on burden of proof is without merit since the applicant made a sufficient showing. Information presented by Harvest Farm Co. relative to the hearing on 63-10740 and 63-10741 is not considered to be "protestant's information" as related to the Clements matter. Instead the information presented in the Harvest Farms matter has been officially noticed by the hearing officer and incorporated into the Clements matter.

The comment on assumptions used in Feast's calculations is also without merit, since any calculations will change with different input as Mr. Feast stated. The assumptions used by Mr. Feast, however, in computing the 15 foot draw down were not disputed by Mr Chapman or other evidence presented at the hearing. Data which were disputed involved actual static water level and measured drawdown, which do not impact the computational estimate of 15 feet of drawdown.

The 1,044 gpm referred to by the applicant was the rate measured during a pump test which typically exceeds intended sustained yield.

The exceptions object to location of the well with respect to property lines. The exception also describes the filings of Harvest Farm Co. and the filing of Clements as identical situations. This is not the case. The Harvest Farm apps showed a diversion rate of 12.8 cfs, some 8 times as large as the Clements application. In addition, Hat Butte water is not as restricted as Boise Project water. Thus the Clements farm likely has more need for supplemental water than the "Allen Place" farm.

The exceptions allege "blatant bias and inequitable treatment" with respect to well siting conditions. The allegation is totally without any merit since the condition of approval in the Harvest Farm matter does not prevent the drilling of a well such as sited by Clements, but requires analysis of the effect of such a well and requires submittal of that information to the department. Clements has provided that information for his well in the hearing before the department.

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Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR ) HARVEST FARM CO.  
PERMIT NO. 63-11326 IN THE NAME ) EXCEPTIONS TO PROPOSED  
OF M.L. CLEMENTS ) MEMORANDUM DECISION AND  
ORDER APPROVING APPLICATION

COMES NOW Harvest Farm Co. and submits the following  
exceptions to the proposed decision and order in the matter of  
the above application. The specific portions of the proposed  
decision and order to which exceptions are made are:

- Finding of Fact No. 8
- Finding of Fact No. 9
- Finding of Fact No. 10
- Finding of Fact No. 11
- Finding of Fact No. 12
- Finding of Fact No. 13
- Finding of Fact No. 14

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- Conclusion of Law No. 7
- Conclusion of Law No. 8
- Conclusion of Law No. 9
- Conclusion of Law No. 10

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Analysis

Order

The grounds for the exceptions are that the findings  
omit and misstate testimony at the hearing, and the conclusions  
fail to consider the factual evidence presented and neglect the  
applicable burdens of proof. The analysis and order misapply  
and neglect information provided to the Department, ignore

1 prior decisions of the Department, and raise constitutional  
2 issues concerning equal treatment of similarly situated  
3 parties. A brief in support is attached. Oral argument before  
4 the Director is requested.

5 Respectfully submitted this 21st day of September,  
6 1990.

7 NELSON, ROSHOLT, ROBERTSON,  
8 TOLMAN & TUCKER

9  
10 By:   
11 Bruce M. Smith  
12 Attorneys for Protestant

13 CERTIFICATE OF MAILING

14 I hereby certify that on this 21st day of September,  
15 1990, I served a copy of the foregoing HARVEST FARM CO.  
16 EXCEPTIONS TO PROPOSED MEMORANDUM DECISION AND ORDER APPROVING  
17 APPLICATION, by depositing same in the United States mail,  
18 postage prepaid, in an envelope, addressed to the following:

19 M.L. Clements  
4121 Rim Road  
Nampa, Idaho 83651

20 Steven A. Bradbury  
21 P.O. Box 1368  
Boise, Idaho 83701

22   
23  
24 Bruce M. Smith

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Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 63-11326 IN THE NAME )  
OF M.L. CLEMENTS )  
 )  
 )

BRIEF IN SUPPORT OF  
EXCEPTIONS TO PROPOSED  
MEMORANDUM DECISION AND  
ORDER APPROVING APPLICATION

COMES NOW Harvest Farm Co. (Protestant) and submits this brief in support of its exceptions to the proposed memorandum decision and order approving application for permit No. 63-11326 in the name of M.L. Clements (Applicant).

There are two topics relative to the Protestant's exceptions: (1) whether the Department erred in its decision with regard to the findings, conclusions, analysis and order, and (2) whether the Department's order approving the permit violates the constitutional rights of the Protestant.

Findings, Conclusions, Analysis and Order

The Protestant has reviewed the Department's Findings. A number of the Findings are erroneous and misleading or omit important information. In fact, there are such significant errors and omissions contained in the memorandum decision that the Protestant's position is that new,

BRIEF IN SUPPORT OF EXCEPTIONS TO PROPOSED  
MEMORANDUM DECISION AND ORDER APPROVING APPLICATION -1-

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1 complete Findings are required. An appropriate analysis and  
2 decision then needs to be made based on the revised Findings.

3 Finding No. 8 indicates the Applicant's well was  
4 pumped from July 14th through August 6th, a period of 24 days.  
5 Yet, Mr. Feast, the Applicant's expert, based his analysis and  
6 conclusions on a pumping period of 14 days. There was no  
7 testimony by the Applicant on the effects of prolonged  
8 pumping. The discrepancy between the actual pumping period and  
9 the pumping period on which Mr. Feast made his calculations  
10 raises questions about the reliability and accuracy of his  
11 conclusions.

12 Finding No. 9 indicates that the well is to be a  
13 supplemental supply for use when the surface water supply is  
14 insufficient for the irrigation needs of Mr. Clements' land.  
15 Mr. Clements actually testified on direct examination that he  
16 intended to use the well at the tail end of the irrigation  
17 season when the surface supplies are almost exhausted.  
18 However, he would hold a portion of the surface water supply in  
19 reserve. Mr. Clements also testified under cross examination  
20 that he intends to use the groundwater early in the irrigation  
21 season prior to delivery of water by the irrigation district.

22 Finding No. 10 states that information in the  
23 Department's decision on Permit files 63-10740 and 63-10741 was  
24 not disputed and is considered by the Department to remain  
25 unchanged. This finding is extremely unclear and ambiguous.  
26 Exactly what information the Department is referring to is  
27 totally unexplained. Because it is unexplained information  
28

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1 the Department is acknowledging as unchanged, the Protestant  
2 cannot adequately address all the possible ramifications.

3 However, such a broad statement would include Finding  
4 No. 18 and Conclusion No. 7 in the Department's decision in  
5 Permit files 63-10740 and 63-10741. These items indicate  
6 additional water is available in the aquifer for  
7 appropriation. However, the decision recognized there was no  
8 quantification of how much water is available. The finding in  
9 files 63-10740 and 63-10741 that water is available was based  
10 on Mr. Sherl Chapman's testimony about his studies of the  
11 aquifer in July, 1989. In the present hearing, Mr. Feast  
12 testified that he based his conclusion that water is available  
13 for appropriation on Mr. Chapman's conclusion in the earlier  
14 proceeding. However, Mr. Feast testified he had done no  
15 analysis or investigation of subsequent development in the  
16 area. Mr. Chapman stated that, as part of his earlier  
17 analysis, he had investigated development in the area. He also  
18 testified that it would be necessary to examine subsequent  
19 development to determine whether his conclusion reached in the  
20 earlier proceeding was still correct. This factual aspect has  
21 been completely ignored in the Department's decision.

22 Finding No. 11 is clearly erroneous in stating that  
23 there <sup>were</sup> was undisputed computational estimates of the effect of  
24 the Applicant's well on the Protestant's well. The truth is  
25 that Mr. Feast made an analysis based on figures he  
26 extrapolated from documents prepared <sup>1981</sup>. The fact is that  
27 conditions in the Protestant's well have <sup>changed</sup> the 9 years  
28 since. Mr. Chapman testified, in direct <sup>1990</sup> contradiction to

We have no  
reason to believe  
there has been  
a significant  
change to the  
aquifer since  
July 1989.

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1 Mr. Feast, about the characteristics of the Harvest Farm Co.  
2 well using information from 1989. This information was  
3 obtained directly by Mr. Chapman in his work on the  
4 Protestant's well. The static water level in the Protestant's  
5 well was 26 feet lower than Mr. Feast assumed. Mr. Feast  
6 assumed a pumping drawdown of 65 feet in the Protestant's  
7 well. Yet, Mr. Chapman testified to observed drawdowns of  
8 65-76 feet. Mr. Feast stated the top screen on the  
9 Protestant's well was located at 310 feet. Mr. Chapman pointed  
10 out based on his personal work on the well that the top screen  
11 was at 306 feet. Mr. Feast assumed a seasonal decline of 30  
12 feet. Mr. Feast, as pointed out earlier, failed to even  
13 consider development over the last year in the area which could  
14 certainly affect the seasonal declines. Mr. Feast's diagram of  
15 the Protestant's well shows a well depth of 550 feet. Yet, the  
16 same documents used by Mr. Feast and from which he extrapolated  
17 his data show the actual well depth is 570 feet. All these  
18 factual matters have been completely ignored by the  
19 Department. The statement that there was undisputed testimony  
20 by Mr. Feast is simply wrong. These factual distinctions raise  
21 further questions about the accuracy of Mr. Feast's  
22 calculations and his conclusion there would be a 15 foot  
23 maximum drawdown impact on the Protestant's well.

24 It is the Applicant who has the burden of proof of  
25 showing water is available for appropriation as acknowledged in  
26 the Department's Conclusion No. 3. The Applicant relied on  
27 Mr. Chapman's previous testimony to the availability  
28 of water, yet the Department ignored Mr. Chapman's testimony

The undisputed  
aspect of Mr. Feast's  
computations is that  
the max predicted  
drawdown is  
computed to  
be about 15'.  
The difference cited  
here between  
Mr. Feast's info  
and Mr. Chapman's  
info does not  
impact the  
15' computation.

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1 that subsequent development would have to be considered. In  
2 short, the Applicant did not meet his burden of showing water  
3 was available.

4 Finding No. 12 indicates there was no testimony that  
5 the Applicant's pumping this year adversely affected the  
6 Protestant's rights. As was pointed out to the Department in  
7 the hearing, the Protestant had no way of knowing how much and  
8 when the Applicant would be pumping. The Protestant had no  
9 reason to believe the Applicant would not comply with the  
10 drilling permit that said no pumping was allowed until a permit  
11 was issued. It is still unclear how much illegal pumping the  
12 Applicant did. The Applicant testified he pumped from July  
13 14th to August 6th, 24 days. The Applicant's expert made  
14 calculations based on 14 days of pumping. The Department's  
15 decision must address this fact.

16 The Applicant offered no evidence as to long term  
17 impacts of pumping on the Protestant's well even though the  
18 Applicant's expert testified there was direct interference with  
19 the Protestant's well by the Applicant's well. Yet, the  
20 Applicant has the burden of showing his diversion would not  
21 reduce the quantity of water available under the Protestant's  
22 existing rights. The Applicant did not meet this burden and  
23 the Department has ignored it.

24 Finding No. 13 states that "evidence" indicates that  
25 water levels are not declining. What evidence does this refer  
26 to? The Applicant presented no evidence as to this issue.

27 Finding No. 14 addresses evidence related to the  
28 local public interest criteria. Finding No. 14 misstates what

*Subsequent  
Development  
has not been  
significant.*

*Info re: this  
aspect was fully  
developed in the  
decision for  
63-10740 & 44  
remains  
unchanged.*

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1 actually took place at the hearing. The Applicant testified he  
2 would be able to produce revenue by growing crops on his 80  
3 acres and that his project would not affect fish and wildlife.  
4 The Protestant indicated that the impacts of the Applicant's  
5 project would affect the Protestant's revenue because of the  
6 damage to its well. It is ridiculous to conclude the  
7 Applicant's testimony is evidence, but the Protestant's is not.

8 Conclusion No. 7 acknowledges there is no  
9 quantification of water availability in the Dry Lake area, yet  
10 concludes there is water available for the Applicant's well.  
11 However, this conclusion ignores the previously indicated fact  
12 that the Applicant presented no evidence of water availability  
13 other than the Department's previous finding over a year ago.  
14 The Applicant did not even address subsequent development in  
15 the interim period. For the Department to reach this  
16 conclusion based on the Applicant's lack of evidence represents  
17 a clear abuse of discretion.

18 Conclusion No. 8 raises serious questions about the  
19 Department's role in this matter. The Applicant presented no  
20 independent evidence of water availability in the area. Nor  
21 did the Department present any evidence of water availability.  
22 If the Department is required to gather information about water  
23 levels as indicated in this conclusion, what has the Department  
24 done to gather such information and did any such effort play a  
25 part in this decision? Furthermore, the Department is required  
26 to approve applications only if the criteria showing water  
27 is available and other factors are met. Here, there is no  
28 showing of water availability.

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These conclusions  
are almost  
identical to those  
in the decision  
for 63-107404-41

1 Conclusion No. 9 indicates the Applicant should bear  
2 the burden of monitoring groundwater levels to determine the  
3 quantity of groundwater available and the effect of its  
4 diversions on the Protestant. Yet, the proposed order does not  
5 indicate what the Applicant has to do in this regard,  
6 particularly with respect to monitoring the effect on the  
7 Protestant's well.

8 Conclusion No. 10 indicates that Rule 4,5,3 has been  
9 satisfied. However, Rule 4,5,3 does not apply to this  
10 application. The reason for including this conclusion is  
11 unclear. It appears the decision may be a form decision based  
12 on other hearings.

13 The Analysis section of the decision is seriously  
14 flawed. First, the "analysis" that the Protestant did not  
15 present evidence regarding the lack of availability of water  
16 for the proposed use fails to grasp that the only evidence of  
17 availability of water was based on the Protestant's information  
18 provided during the hearing on Application Nos. 63-10740 and  
19 63-10741. The Applicant and the Department seem satisfied to  
20 rely on that information since neither provided any other  
21 information. Yet, the Protestant's data and analysis was done  
22 in 1989 and the Protestant's expert testified that subsequent  
23 development data would have to be analyzed to reconfirm the  
24 earlier findings. The Applicant's expert testified he did not  
25 do so.

26 Furthermore, holding that the Protestant failed to put  
27 on evidence of the availability of this comp. misconstrues

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Harvest Farm Co.  
did not object to  
an identical conclusion  
in the decision on  
63-10740 et al.

Information presented  
by Harvest Farm Co.  
relative to  
the hearing on  
63-10740 & 10741  
is not considered  
to be "protestant's  
information" in  
the present case.  
Instead, it is  
considered to be  
part of a file that  
has been recognized  
and incorporated by  
the hearing officer.

1 the burdens applicable to each party. It is the Applicant's  
2 burden to provide that evidence. The Applicant did not do so.

3 The analysis section goes on to focus on the  
4 Applicant's testimony that the maximum drawdown on the  
5 Protestant's well is 15 feet. The Applicant's data which was  
6 used to calculate this impact has been previously shown to be  
7 inaccurate and erroneous. The Applicant's expert further  
8 acknowledged that his conclusion was subject to change based on  
9 variances in his assumptions - variances he freely admitted  
10 could result. The Department seems to take "15 feet" as a  
11 magical, fixed number that was somehow proven to be true. It  
12 was not proven. Furthermore, Mr. Chapman testified there would  
13 be actual impacts from the drawdown even as calculated by Mr.  
14 Feast. This was also acknowledged by Mr. Feast and he was  
15 shown to have used erroneous data to calculate the 15 foot  
16 figure and the resultant impacts.

17 Finally, the Applicant's expert based his opinion on a  
18 pumping rate of 700 gpm. Yet the data provided by the  
19 Applicant showed the well can produce 1,044 gpm. However, the  
20 Department imposed no restrictions on the Applicant to assure  
21 that pumping would not be in excess of 700 gpm.

22 As stated in the beginning, the factual errors  
23 contained in this memorandum decision are so serious as to  
24 render any decision based on them a clear abuse of discretion.  
25 This decision needs to have revised, accurate Findings of Fact  
26 made and a new decision rendered based on these findings.

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Wrong.  
The assumptions  
used by Mr. Feast  
in computing  
the 15' drawdown  
were not at all  
disputed by either  
Mr. Chapman or  
the other evidence  
provided at the  
hearing.  
Data which  
was disputed  
involved actual  
static water level  
and measured  
drawdown, which  
is not impact  
estimate of 15'  
drawdown.

This was in a pump test,  
which typically exceeds  
intended sustained yield.

The water right app is  
for 717 gpm (1.6 cfs)

1 Comparison of this Decision and Order with the Decision and  
2 Order in Application Nos. 63-10740 and 63-10741

3       Aside from the issues noted above regarding the  
4 factual findings, conclusions and analysis, a very significant  
5 issue raised by the Department's decision in this matter is the  
6 Department's unequal treatment of the Applicant compared to the  
7 Department's treatment of the Protestant in Application Nos.  
8 63-10740 and 63-10741. Testimony from Mr. Clements, Mr. Feast,  
9 and Mr. Chapman all established that the Applicant and the  
10 Protestant are similarly situated parties. The purpose of both  
11 parties' applications for supplemental groundwater to be used  
12 in conjunction with a surface water supply is the same, the  
13 wells at issue here and in Application Nos. 63-10740 and  
14 63-10741 are in the same aquifer and the geology of the area is  
15 the same. In fact, much of the "evidence" relied on by the  
16 Applicant and the Department, particularly as to water  
17 availability, was the information produced by the Protestant.  
18 In short, there is no substantive difference between the  
19 Applicant's position here and the Protestant's position with  
20 regard to Application Nos. 63-10740 and 63-10741. Yet, the  
21 Department's handling and decision in each case is remarkably  
22 different. The Idaho Constitution, Article 1, Sections 2 and  
23 13, and the United States Constitution, in the 14th Amendment,  
24 guarantee equal protection to similarly situated parties. The  
25 Department's decisions in these two situations clearly raise  
26 constitutional issues as to the treatment of the Protestant as  
27 compared to treatment of the Applicant.

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1 A review of the Department's decision in each case is  
2 appropriate. When the Protestant applied for a supplemental  
3 groundwater right in this area, Mr. Clement's protest ~~was~~ based  
4 on his well which was located about 2 miles away from the  
5 Protestant's proposed well. Harvest Farm Co. presented  
6 convincing evidence as to the availability of water and other  
7 necessary criteria. The Department issued a decision  
8 permitting the development of Protestant's supplemental  
9 groundwater supply with the following restrictions:

- 10 2. [Harvest Farm] must first develop wells  
11 . . . one-quarter mile from any existing  
12 well, or . . . one-eighth mile from any  
13 [Harvest Farm] property boundary line. . . .  
14 If a well is proposed outside the  
15 [above-described area, Harvest Farm] must  
16 submit a proposal to the Department showing  
17 the exact location of the proposed wells,  
18 and must establish that it will not  
19 interfere with other water rights. . . .
- 20 5. These permits authorize only supplemental  
21 use of the water. . . . Surface water shall  
22 continue to be used as the primary source of  
23 supply for the ground upon which it is now  
24 appurtenant, and groundwater shall only be  
25 used when earlier priority rights or  
26 mechanical pumping problems prevent delivery  
27 of the surface water.

28 Yet, when Mr. Clements applied for the same  
supplemental supply of groundwater only 1,670 feet from the  
Protestant's well, the Department's order required only the  
following:

4. This permit authorizes only supplemental use  
of water. . . . Surface water shall continue  
to be used as the primary source of supply  
for the ground upon which it is now  
appurtenant. Groundwater shall be used  
only when surface water supplies are  
insufficient for irrigation to the property.

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1 Furthermore, the Department permitted the Applicant to drill  
2 30 feet from his property line as he testified.

3 It is important to note the Harvest Farm Co. filed a  
4 Petition for Rehearing based on Requirement No. 5's language  
5 seeking a clarification of "mechanical pumping problem" and  
6 non-delivery based on "earlier priority rights". Protestant  
7 proposed, as an alternative, using language that stated  
8 "groundwater shall only be used when the primary source or  
9 supply is insufficient or unavailable." Protestant's petition  
10 was denied and the alternative language was refused.

11 Thus, in these two identical situations, the  
12 Department required Harvest Farm Co. to develop at least  
13 one-eighth of a mile from its property line to allow for  
14 observed well interference at one-quarter of a mile and  
15 restricted use according to the indicated language. Yet, in  
16 the present order, the Department ~~permits~~ <sup>allows</sup> development 30 feet  
17 from the Applicant's property boundary and ~~permits~~ <sup>allows</sup> the same  
18 language that was rejected in the Harvest Farm Company's  
19 situation. This blatant bias and ~~unreasonable~~ <sup>unfair</sup> treatment has not  
20 been explained by the Department and must be addressed in its  
21 decision in this matter.

22 Harvest Farm Co. also objects to the order staying the  
23 Cease and Desist Order issued on July 31, 1996. Harvest Farm  
24 Co. has shown, and the Applicant has admitted, the interference  
25 with the Harvest Farm Co. well by the Applicant's well. On the  
26 other hand, the Applicant is not injured by having the Cease  
27 and Desist Order remain in effect. The Applicant testified  
28 that he had other water available and had not even used it to

The situations  
are not identical  
For one thing,  
the Harvest Farm  
app showed a  
diversion rate  
of 12.8 cfs,  
some 8 times  
as great as the  
Clements app.  
Second, Hat Butte  
water is not  
as restricted as  
Bessemer  
Bessemer Project  
water. Thus, the  
Clements farm has  
more need for  
supplemented  
water than the  
"Allen Place" farm

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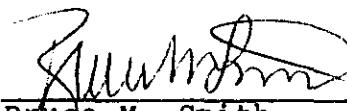
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1 date. The Department should not forget that Mr. Clement's had  
2 previously told the Department that additional water was not  
3 available while, in fact, it was. The Department's decision is  
4 only a proposed decision and is not final. Until the  
5 Department makes a final decision on this matter, it is  
6 inappropriate to stay the Cease and Desist Order considering  
7 the impacts on the two parties.

8 In summary, the clearly erroneous Findings have  
9 resulted in conclusions and an analysis that contradict the  
10 evidence presented. The order allowing the development thus  
11 represents a clear abuse of discretion. The Protestant  
12 believes the Findings should be rewritten to indicate the  
13 evidence that was presented. Conclusions based on correct  
14 findings can only lead to an order denying the permit.  
15 Furthermore, if the Department does permit any development, the  
16 Department must modify the order to require that the Applicant  
17 develop at least one-eighth mile from his property boundary and  
18 restrict use to the same conditions as applied to Protestant.

19 DATED this 21st day of September, 1990.

20 NELSON, RSHOLT, ROBERTSON,  
21 TOLMAN & TUCKER

22 BY:   
23 Bruce M. Smith  
24 Attorneys for Protestant

25 MICROFILMED

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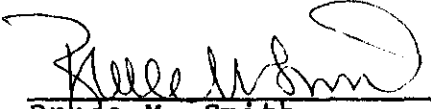
27 CERTIFICATE OF MAILING

28 I hereby certify that on this 21st day of September,  
1990, I served a copy of the foregoing BRIEF IN SUPPORT OF  
EXCEPTIONS TO PROPOSED MEMORANDUM DECISION AND ORDER APPROVING

1 APPLICATION, by depositing same in the United States mail,  
2 postage prepaid, in an envelope, addressed to the following:

3 M.L. Clements  
4 4121 Rim Road  
5 Nampa, Idaho 83651

6 Steven A. Bradbury  
7 P.O. Box 1368  
8 Boise, Idaho 83701

9   
Bruce M. Smith

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Department of Water Resources

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

|                                    |                             |
|------------------------------------|-----------------------------|
| IN THE MATTER OF APPLICATION FOR ) | HARVEST FARM CO.            |
| PERMIT NO. 63-11326 IN THE NAME )  | EXCEPTIONS TO PROPOSED      |
| OF M.L. CLEMENTS )                 | MEMORANDUM DECISION AND     |
| )                                  | ORDER APPROVING APPLICATION |

COMES NOW Harvest Farm Co. and submits the following exceptions to the proposed decision and order in the matter of the above application. The specific portions of the proposed decision and order to which exceptions are made are:

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Finding of Fact No. 9  
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Finding of Fact No. 11  
Finding of Fact No. 12  
Finding of Fact No. 13  
Finding of Fact No. 14

Conclusion of Law No. 7  
Conclusion of Law No. 8  
Conclusion of Law No. 9  
Conclusion of Law No. 10

Analysis

Order

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The grounds for the exceptions are that the findings omit and misstate testimony at the hearing, and the conclusions fail to consider the factual evidence presented and neglect the applicable burdens of proof. The analysis and order misapply and neglect information provided to the Department, ignore

1 prior decisions of the Department, and raise constitutional  
2 issues concerning equal treatment of similarly situated  
3 parties. A brief in support is attached. Oral argument before  
4 the Director is requested.

5 Respectfully submitted this 21st day of September,  
6 1990.

7 NELSON, RSHOLT, ROBERTSON,  
8 TOLMAN & TUCKER

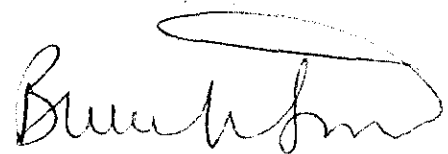
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10 By:   
11 Bruce M. Smith  
12 Attorneys for Protestant

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26 Bruce M. Smith

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Department of Water Resources

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

IN THE MATTER OF APPLICATION FOR )  
PERMIT NO. 63-11326 IN THE NAME )  
OF M.L. CLEMENTS )  
BRIEF IN SUPPORT OF  
EXCEPTIONS TO PROPOSED  
MEMORANDUM DECISION AND  
ORDER APPROVING APPLICATION

COMES NOW Harvest Farm Co. (Protestant) and submits this brief in support of its exceptions to the proposed memorandum decision and order approving application for permit No. 63-11326 in the name of M.L. Clements (Applicant).

There are two topics relative to the Protestant's exceptions: (1) whether the Department erred in its decision with regard to the findings, conclusions, analysis and order, and (2) whether the Department's order **MICROFILMED** permit violates the constitutional rights of the Protestant.

Findings, Conclusions, Analysis and Order

The Protestant has reviewed the Department's Findings. A number of the Findings are erroneous and misleading or omit important information. In fact, there are such significant errors and omissions contained in the memorandum decision that the Protestant's position is that new,

1 complete Findings are required. An appropriate analysis and  
2 decision then needs to be made based on the revised Findings.

3 Finding No. 8 indicates the Applicant's well was  
4 pumped from July 14th through August 6th, a period of 24 days.  
5 Yet, Mr. Feast, the Applicant's expert, based his analysis and  
6 conclusions on a pumping period of 14 days. There was no  
7 testimony by the Applicant on the effects of prolonged  
8 pumping. The discrepancy between the actual pumping period and  
9 the pumping period on which Mr. Feast made his calculations  
10 raises questions about the reliability and accuracy of his  
11 conclusions.

12 Finding No. 9 indicates that the well is to be a  
13 supplemental supply for use when the surface water supply is  
14 insufficient for the irrigation needs of Mr. Clements' land.  
15 Mr. Clements actually testified on direct examination that he  
16 intended to use the well at the tail end of the irrigation  
17 season when the surface supplies are almost exhausted.  
18 However, he would hold a portion of the surface water supply in  
19 reserve. Mr. Clements also testified under cross examination  
20 that he intends to use the groundwater early in the irrigation  
21 season prior to delivery of water by the irrigation district.

22 Finding No. 10 states that information in the  
23 Department's decision on Permit files 63-10740 and 63-10741 was  
24 not disputed and is considered by the Department to remain  
25 unchanged. This finding is extremely unclear and ambiguous.  
26 Exactly what information the Department is referring to is  
27 totally unexplained. Because it is **MICROFILMED** information  
28

1 the Department is acknowledging as unchanged, the Protestant  
2 cannot adequately address all the possible ramifications.

3 However, such a broad statement would include Finding  
4 No. 18 and Conclusion No. 7 in the Department's decision in  
5 Permit files 63-10740 and 63-10741. These items indicate  
6 additional water is available in the aquifer for  
7 appropriation. However, the decision recognized there was no  
8 quantification of how much water is available. The finding in  
9 files 63-10740 and 63-10741 that water is available was based  
10 on Mr. Sherl Chapman's testimony about his studies of the  
11 aquifer in July, 1989. In the present hearing, Mr. Feast  
12 testified that he based his conclusion that water is available  
13 for appropriation on Mr. Chapman's conclusion in the earlier  
14 proceeding. However, Mr. Feast testified he had done no  
15 analysis or investigation of subsequent development in the  
16 area. Mr. Chapman stated that, as part of his earlier  
17 analysis, he had investigated development in the area. He also  
18 testified that it would be necessary to examine subsequent  
19 development to determine whether his conclusion reached in the  
20 earlier proceeding was still correct. This factual aspect has  
21 been completely ignored in the Department's decision.

22 Finding No. 11 is clearly erroneous in stating that  
23 there was undisputed computational estimates of the effect of  
24 the Applicant's well on the Protestant's well. The truth is  
25 that Mr. Feast made an analysis based on figures he  
26 extrapolated from documents prepared in 1981. The fact is that  
27 conditions in the Protestant's well have ~~changed~~ in the 9 years  
28 since. Mr. Chapman testified, in direct contradiction to

1 Mr. Feast, about the characteristics of the Harvest Farm Co.  
2 well using information from 1989. This information was  
3 obtained directly by Mr. Chapman in his work on the  
4 Protestant's well. The static water level in the Protestant's  
5 well was 26 feet lower than Mr. Feast assumed. Mr. Feast  
6 assumed a pumping drawdown of 65 feet in the Protestant's  
7 well. Yet, Mr. Chapman testified to observed drawdowns of  
8 65-76 feet. Mr. Feast stated the top screen on the  
9 Protestant's well was located at 310 feet. Mr. Chapman pointed  
10 out based on his personal work on the well that the top screen  
11 was at 306 feet. Mr. Feast assumed a seasonal decline of 30  
12 feet. Mr. Feast, as pointed out earlier, failed to even  
13 consider development over the last year in the area which could  
14 certainly affect the seasonal declines. Mr. Feast's diagram of  
15 the Protestant's well shows a well depth of 550 feet. Yet, the  
16 same documents used by Mr. Feast and from which he extrapolated  
17 his data show the actual well depth is 570 feet. All these  
18 factual matters have been completely ignored by the  
19 Department. The statement that there was undisputed testimony  
20 by Mr. Feast is simply wrong. These factual distinctions raise  
21 further questions about the accuracy of Mr. Feast's  
22 calculations and his conclusion there would be a 15 foot  
23 maximum drawdown impact on the Protestant's well.

24 It is the Applicant who has the burden of proof of  
25 showing water is available for appropriation as acknowledged in  
26 the Department's Conclusion No. 3. The Applicant relied on  
27 Mr. Chapman's previous testimony to establish the availability  
28 of water, yet the Department ignored Mr. Chapman's testimony

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1 that subsequent development would have to be considered. In  
2 short, the Applicant did not meet his burden of showing water  
3 was available.

4 Finding No. 12 indicates there was no testimony that  
5 the Applicant's pumping this year adversely affected the  
6 Protestant's rights. As was pointed out to the Department in  
7 the hearing, the Protestant had no way of knowing how much and  
8 when the Applicant would be pumping. The Protestant had no  
9 reason to believe the Applicant would not comply with the  
10 drilling permit that said no pumping was allowed until a permit  
11 was issued. It is still unclear how much illegal pumping the  
12 Applicant did. The Applicant testified he pumped from July  
13 14th to August 6th, 24 days. The Applicant's expert made  
14 calculations based on 14 days of pumping. The Department's  
15 decision must address this fact.

16 The Applicant offered no evidence as to long term  
17 impacts of pumping on the Protestant's well even though the  
18 Applicant's expert testified there was direct interference with  
19 the Protestant's well by the Applicant's well. Yet, the  
20 Applicant has the burden of showing his diversion would not  
21 reduce the quantity of water available under the Protestant's  
22 existing rights. The Applicant did not meet this burden and  
23 the Department has ignored it.

24 Finding No. 13 states that "evidence" indicates that  
25 water levels are not declining. What evidence does this refer  
26 to? The Applicant presented no evidence as to this issue.

27 Finding No. 14 addresses evidence the  
28 local public interest criteria. Finding No. 14 misstates what

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1 actually took place at the hearing. The Applicant testified he  
2 would be able to produce revenue by growing crops on his 80  
3 acres and that his project would not affect fish and wildlife.  
4 The Protestant indicated that the impacts of the Applicant's  
5 project would affect the Protestant's revenue because of the  
6 damage to its well. It is ridiculous to conclude the  
7 Applicant's testimony is evidence, but the Protestant's is not.

8 Conclusion No. 7 acknowledges there is no  
9 quantification of water availability in the Dry Lake area, yet  
10 concludes there is water available for the Applicant's well.  
11 However, this conclusion ignores the previously indicated fact  
12 that the Applicant presented no evidence of water availability  
13 other than the Department's previous finding over a year ago.  
14 The Applicant did not even address subsequent development in  
15 the interim period. For the Department to reach this  
16 conclusion based on the Applicant's lack of evidence represents  
17 a clear abuse of discretion.

18 Conclusion No. 8 raises serious questions about the  
19 Department's role in this matter. The Applicant presented no  
20 independent evidence of water availability in the area. Nor  
21 did the Department present any evidence of water availability.  
22 If the Department is required to gather information about water  
23 levels as indicated in this conclusion, what has the Department  
24 done to gather such information and did any such effort play a  
25 part in this decision? Furthermore, the Department is required  
26 to approve applications only if the criteria for showing water  
27 is available and other factors are met. Here, there was no  
28 showing of water availability.

1 Conclusion No. 9 indicates the Applicant should bear  
2 the burden of monitoring groundwater levels to determine the  
3 quantity of groundwater available and the effect of its  
4 diversions on the Protestant. Yet, the proposed order does not  
5 indicate what the Applicant has to do in this regard,  
6 particularly with respect to monitoring the effect on the  
7 Protestant's well.

8 Conclusion No. 10 indicates that Rule 4,5,3 has been  
9 satisfied. However, Rule 4,5,3 does not apply to this  
10 application. The reason for including this conclusion is  
11 unclear. It appears the decision may be a form decision based  
12 on other hearings.

13 The Analysis section of the decision is seriously  
14 flawed. First, the "analysis" that the Protestant did not  
15 present evidence regarding the lack of availability of water  
16 for the proposed use fails to grasp that the only evidence of  
17 availability of water was based on the Protestant's information  
18 provided during the hearing on Application Nos. 63-10740 and  
19 63-10741. The Applicant and the Department seem satisfied to  
20 rely on that information since neither provided any other  
21 information. Yet, the Protestant's data and analysis was done  
22 in 1989 and the Protestant's expert testified that subsequent  
23 development data would have to be analyzed to reconfirm the  
24 earlier findings. The Applicant's expert testified he did not  
25 do so.

26 Furthermore, holding that the Protestant failed to put  
27 on evidence of the availability of groundwater misinterprets and misconstrues

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1 the burdens applicable to each party. It is the Applicant's  
2 burden to provide that evidence. The Applicant did not do so.

3 The analysis section goes on to focus on the  
4 Applicant's testimony that the maximum drawdown on the  
5 Protestant's well is 15 feet. The Applicant's data which was  
6 used to calculate this impact has been previously shown to be  
7 inaccurate and erroneous. The Applicant's expert further  
8 acknowledged that his conclusion was subject to change based on  
9 variances in his assumptions - variances he freely admitted  
10 could result. The Department seems to take "15 feet" as a  
11 magical, fixed number that was somehow proven to be true. It  
12 was not proven. Furthermore, Mr. Chapman testified there would  
13 be actual impacts from the drawdown even as calculated by Mr.  
14 Feast. This was also acknowledged by Mr. Feast and he was  
15 shown to have used erroneous data to calculate the 15 foot  
16 figure and the resultant impacts.

17 Finally, the Applicant's expert based his opinion on a  
18 pumping rate of 700 gpm. Yet the data provided by the  
19 Applicant showed the well can produce 1,044 gpm. However, the  
20 Department imposed no restrictions on the Applicant to assure  
21 that pumping would not be in excess of 700 gpm.

22 As stated in the beginning, the factual errors  
23 contained in this memorandum decision are so serious as to  
24 render any decision based on them a clear abuse of discretion.  
25 This decision needs to have revised, accurate Findings of Fact  
26 made and a new decision rendered based on the new Findings.

27  
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1 Comparison of this Decision and Order with the Decision and  
2 Order in Application Nos. 63-10740 and 63-10741

3       Aside from the issues noted above regarding the  
4 factual findings, conclusions and analysis, a very significant  
5 issue raised by the Department's decision in this matter is the  
6 Department's unequal treatment of the Applicant compared to the  
7 Department's treatment of the Protestant in Application Nos.  
8 63-10740 and 63-10741. Testimony from Mr. Clements, Mr. Feast,  
9 and Mr. Chapman all established that the Applicant and the  
10 Protestant are similarly situated parties. The purpose of both  
11 parties' applications for supplemental groundwater to be used  
12 in conjunction with a surface water supply is the same, the  
13 wells at issue here and in Application Nos. 63-10740 and  
14 63-10741 are in the same aquifer and the geology of the area is  
15 the same. In fact, much of the "evidence" relied on by the  
16 Applicant and the Department, particularly as to water  
17 availability, was the information produced by the Protestant.  
18 In short, there is no substantive difference between the  
19 Applicant's position here and the Protestant's position with  
20 regard to Application Nos. 63-10740 and 63-10741. Yet, the  
21 Department's handling and decision in each case is remarkably  
22 different. The Idaho Constitution, Article 1, Sections 2 and  
23 13, and the United States Constitution, in the 14th Amendment,  
24 guarantee equal protection to similarly situated parties. The  
25 Department's decisions in these two situations clearly raise  
26 constitutional issues as to the treatment of the Protestant as  
27 compared to treatment of the Applicant.

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1 A review of the Department's decision in each case is  
2 appropriate. When the Protestant applied for a supplemental  
3 groundwater right in this area, Mr. Clement's protested based  
4 on his well which was located about 2 miles away from the  
5 Protestant's proposed well. Harvest Farm Co. presented  
6 convincing evidence as to the availability of water and other  
7 necessary criteria. The Department issued a decision  
8 permitting the development of Protestant's supplemental  
9 groundwater supply with the following restrictions:

10 2. [Harvest Farm] must first develop wells  
11 . . . one-quarter mile from any existing  
12 well, or . . . one-eighth mile from any  
13 [Harvest Farm] property boundary line. . . .  
14 If a well is proposed outside the  
15 [above-described area, Harvest Farm] must  
submit a proposal to the Department showing  
the exact location of the proposed wells,  
and must establish that it will not  
interfere with other water rights. . . .

16 5. These permits authorize only supplemental  
17 use of the water. . . . Surface water shall  
18 continue to be used as the primary source of  
19 supply for the ground upon which it is now  
appurtenant, and groundwater shall only be  
used when earlier priority rights or  
mechanical pumping problems prevent delivery  
of the surface water.

20 Yet, when Mr. Clements applied for the same  
21 supplemental supply of groundwater only 1,670 feet from the  
22 Protestant's well, the Department's order required only the  
23 following:

24 4. This permit authorizes only supplemental use  
25 of water. . . . Surface water shall continue  
26 to be used as the primary source of supply  
27 for the ground upon which it is now  
appurtenant, and groundwater shall be used  
only when surface water supplies are  
insufficient for irrigation to the property.

1 Furthermore, the Department permitted the Applicant to drill  
2 30 feet from his property line as he testified.

3 It is important to note the Harvest Farm Co. filed a  
4 Petition for Rehearing based on Requirement No. 5's language  
5 seeking a clarification of "mechanical pumping problem" and  
6 non-delivery based on "earlier priority rights". Protestant  
7 proposed, as an alternative, using language that stated  
8 "groundwater shall only be used when the primary source or  
9 supply is insufficient or unavailable." Protestant's petition  
10 was denied and the alternative language was refused.

11 Thus, in these two identical situations, the  
12 Department required Harvest Farm Co. to develop at least  
13 one-eighth of a mile from its property line to allow for  
14 observed well interference at one-quarter of a mile and  
15 restricted use according to the indicated language. Yet, in  
16 the present order, the Department permits development 30 feet  
17 from the Applicant's property boundary and permits the same  
18 language that was rejected in the Harvest Farm Company's  
19 situation. This blatant bias and inequitable treatment has not  
20 been explained by the Department and must be addressed in its  
21 decision in this matter.

22 Harvest Farm Co. also objects to the order staying the  
23 Cease and Desist Order issued on July 31, 1990. Harvest Farm  
24 Co. has shown, and the Applicant has admitted, the interference  
25 with the Harvest Farm Co. well by the Applicant's well. On the  
26 other hand, the Applicant is not injured by having the Cease  
27 and Desist Order remain in effect. The Applicant testified  
28 that he had other water available and had not even used it to

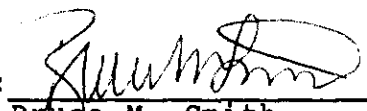
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1 date. The Department should not forget that Mr. Clement's had  
2 previously told the Department that additional water was not  
3 available while, in fact, it was. The Department's decision is  
4 only a proposed decision and is not final. Until the  
5 Department makes a final decision on this matter, it is  
6 inappropriate to stay the Cease and Desist Order considering  
7 the impacts on the two parties.

8 In summary, the clearly erroneous Findings have  
9 resulted in conclusions and an analysis that contradict the  
10 evidence presented. The order allowing the development thus  
11 represents a clear abuse of discretion. The Protestant  
12 believes the Findings should be rewritten to indicate the  
13 evidence that was presented. Conclusions based on correct  
14 findings can only lead to an order denying the permit.  
15 Furthermore, if the Department does permit any development, the  
16 Department must modify the order to require that the Applicant  
17 develop at least one-eighth mile from his property boundary and  
18 restrict use to the same conditions as applied to Protestant.

19 DATED this 21st day of September, 1990.

20  
21 NELSON, ROSHOLT, ROBERTSON,  
TOLMAN & TUCKER

22  
23 By:   
24 Bruce M. Smith  
Attorneys for Protestant

25 CERTIFICATE OF MAILING

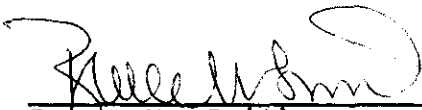
26 I hereby certify that on this 21st day of September,  
27 1990, I served a copy of the foregoing **BRIEF IN SUPPORT OF**  
28 **EXCEPTIONS TO PROPOSED MEMORANDUM DECISION AND ORDER APPROVING**

**BRIEF IN SUPPORT OF EXCEPTIONS TO PROPOSED**  
**MEMORANDUM DECISION AND ORDER APPROVING APPLICATION 12-**

1 APPLICATION, by depositing same in the United States mail,  
2 postage prepaid, in an envelope, addressed to the following:

3 M.L. Clements  
4 4121 Rim Road  
5 Nampa, Idaho 83651

6 Steven A. Bradbury  
7 P.O. Box 1368  
8 Boise, Idaho 83701

9   
10 Bruce M. Smith

11  
12  
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*Protested File in S.O. Vault*

**EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN,  
CHARTERED**

ATTORNEYS AND COUNSELORS AT LAW

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WILLIAM J. MCKLVEEN

TELEPHONE  
(208) 344-8535

FACSIMILE  
(208) 344-8542

JAMES L. BERLIN  
OF COUNSEL

T. H. EBERLE (1922-1977)

September 11, 1990

**RECEIVED**  
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Mr. David R. Tuthill, Jr. *DRT*  
Western Regional Office  
Idaho Department of Water Resources  
2735 Airport Way  
Boise, Idaho 83705

Department of Water Resources  
Western Regional Office

RE: Maurice L. Clements - Application for Permit No. 63-11326

Dear Dave:

Thank you and the hearing officer for your cooperation in scheduling the early hearing and your attention to testimony presented on Thursday, September 6, 1990.

I would appreciate it if you would give me or Steve Bradbury a call when the decision is made so that we don't lose a day or two through mailing.

Thank you for your cooperation.

Very truly yours,

*William J. McKlveen*

WILLIAM J. MCKLVEEN

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WJM/clk

9/12/90

*I called Rita Fleck who indicated that the proposed memo decision approving the app & issuing the permit was mailed today, along with an Order Staying the Cease & Desist. I called Steve Bradbury to advise him, in response to this letter. No further response req'd.*

*DRT*

1/  
Hearing on Maurice Clements Application No 63-11326

Hearing Officer: Glen Saxton

9/6/90

10:00 am Second Floor Conf Rm

Notes by: D. Tutthill

Applicant present and represented by:

<sup>A</sup>Stephen Bradbury, Esq.

William J. McKivren, Esq.

Charles F. Feast, Hydrogeologist with CH<sub>2</sub>M Hill

Protestant represented by:

Bruce M. Smith, Esq.

Sheri Chapman, Hydrogeologist

### Issues

1. Quantity will reduce water under other water rights
2. Insufficient water available
3. Not in local public interest

Applicant (Bradbury presenting)

Clements:

Irrigates about 75 acres in parcel

Primary source of water is Boise Kuna Irr Dist

This year's allotment was 139.68 AF - all used

More water is needed this season

60 AF is needed this year

Other landowners within Boise-Kuna Irr Dist are selling water

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## Clements (cont)

Cost for add'l water is  $\approx \$30^{00}/af$  (60 AF needed)

Lack of additional water would cost \$7,000+ (per earlier calculation)

Water has not been used from well since Cease & Desist Order was issued

BKID water is  $\approx 6^{00}/AF$  (less than cost of pumped water)

Worst case use is 30 days per year from supplemental well.

Time of use is late in the season.

Appeared that there would not be water available this year,  
thus the decision to drill the well.

Well was drilled  $\approx$  June 20. Pumping occurred from July 14 - 6 Aug.

(Not continuously). over objection et about 1950 on tape

Exhibits 1, 2, 3, 8b, 4

Cost of well: \$53,000 + legal fees

600' deep 16" casing, screened in 4 places, not a high-output well

Pump placed at 280', 75 hp motor, output is  $\approx 700 gpm$

Static water level was 98' at beginning of test.

Non-use of water from well would result in increased costs.

## X Exam

4 AF/acre need for property needed

Q: Add'l water available from BKID?

A: BKID was out - only water available when decision was made  
to drill well was for \$40/af from a private individual.

Q: What has been done since 6 Aug?

A: I have used remaining supplies from BKID.  
have been out for several days.

Q: Why did you protest the Harvest Farms app?

A: (1) Concerned about impact of wells on neighbors

(2) Concerned about impact on Hat Bottle Canal Company

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Clements XE Cont:

Q: What is the cost of Hatte Butte water?

A: About \$100/acre

Q: Why is water table down to 150'?

A: 1. Seasonal drawdown - many wells pumping in area

2. Clements pumping.

3. Harvest farms pumping.

Lunch break @ 4063 on tape

Charles F. Feast

Conclusion: There is available water.

No significant impact on Harvest Farm well.

Considered:

- Clements Well driller reports
- Exhibit A-4 - Pump test on Harvest Farms
- Pump test on Clements well
- Knowledge of the area

X Exam

Q: Did you factor in the time delay since 1981 (pump data for Harvest Farm well).

A: Assumed specific capacity info was same.

Checked long-term water levels in basin to ascertain no long-term declines.

Q: Confidence in Ties Equation analysis in this area.

A: Very confident of analysis, given sensitivity analysis

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Sheri Chapman:

≈ 7000  
(Tape 2)

1989 Rehabilitation of Naito (Harvest Farm) well.

1. Down-hole Camera results (prior to rehabilitation)

Static water level: 226 9/15/1989 (Well off for 8 days)

Top of screen:

Bottom of screen:

Conclusions:

Given Teis analysis (which is accurate):

Drawdown of 65' - 76' (has been measured) during 1800 gpm pumping (on at least 24 hrs)

$$\begin{array}{r} 226 \\ + 76 \\ \hline 301 \\ \hline 247 \end{array}$$

+ 15 (Elements)

366' + H<sub>sc</sub>

Screen @ 310 - 350

Chance that lower screen could be partially dewatered due to elements caused drawdown

x Exam:

Q: Max drawdown on 9/15/89?

A: No.

Q: How would you account for the difference between estimated 200' deep to water (per feast) vs 226' deep to water (per camera)

→ A: Greater aquifer drawdown than anticipated.

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Q: Could well have been recovering since that time?

A: Yes, in yield & elim of sand prod, but static water level recovery is anticipated.

Chapman, Cont

Q: Water level measurements made this year?

A: ?

Q: Pump curve info available?

→ A: Not at hearing.

Q: Screen location info?

A: See marked diagram. Upper screen at 313-313 instead of 310 to 350

Sand Production

Lowered water level

Objection to addition of other records of Dept without opportunity

Request for renewal of motion to cease & desist, - denied.

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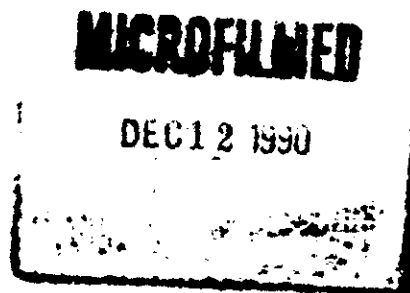
## List of Exhibits

### Applicant's Exhibits

| <u>Number</u> |                                                  | <u>Admitted?</u>     |
|---------------|--------------------------------------------------|----------------------|
| 1             | Map of Area                                      | yes                  |
| 2             | Log of Applicant's Well                          | yes                  |
| 3             | Layne of Idaho Pump Report - Test Pump           | yes                  |
| 3a            | Supplement to Layne Report                       | yes                  |
| 4             | Well Report, etc, for Harvest Farms well         | yes (over objection) |
| 5             | IDWR Assessment of Water Levels in Dry Lake area | yes                  |
| 6             | Hydrogeologic assessment prepared by Chuck Feast | yes                  |
| 7             | Chart prepared by Chuck Feast                    | yes                  |
| 8a            | Depth to water in Clements well                  | yes                  |
| 8b            | Water level readings                             | yes                  |

### Protestant's Exhibits

|   |                                              |                                  |
|---|----------------------------------------------|----------------------------------|
| A | Notice of Protest from Dry Lakes Farms, Inc. | yes                              |
| B | Decision of IDWR Re: 63-10740 & 63-10741     | Official (Judicial) Notice Taken |



[illegible]

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                     |                                  |                                               |                              |                                       |                                                         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|----------------------------------|-----------------------------------------------|------------------------------|---------------------------------------|---------------------------------------------------------|
| <p><b>SENDER:</b> Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.</p> <p>For your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.</p> <p>1. <input checked="" type="checkbox"/> Show to whom delivered, date, and addressee's address. (Extra charge)      2. <input type="checkbox"/> Restricted Delivery (Extra charge)</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                     |                                  |                                               |                              |                                       |                                                         |
| <p>3. Article Addressed to:</p> <p>Bruce Smith<br/>Nelson, Rosholt, et al<br/>1020 Main Suite 400<br/>Boise ID 83702</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <p>4. Article Number<br/>33506</p> <p>Type of Service:</p> <table border="0"> <tr> <td><input type="checkbox"/> Registered</td> <td><input type="checkbox"/> Insured</td> </tr> <tr> <td><input checked="" type="checkbox"/> Certified</td> <td><input type="checkbox"/> COD</td> </tr> <tr> <td><input type="checkbox"/> Express Mail</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> </table> <p>Always obtain signature of addressee or agent and <u>DATE DELIVERED</u>.</p> | <input type="checkbox"/> Registered | <input type="checkbox"/> Insured | <input checked="" type="checkbox"/> Certified | <input type="checkbox"/> COD | <input type="checkbox"/> Express Mail | <input type="checkbox"/> Return Receipt for Merchandise |
| <input type="checkbox"/> Registered                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <input type="checkbox"/> Insured                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                     |                                  |                                               |                              |                                       |                                                         |
| <input checked="" type="checkbox"/> Certified                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <input type="checkbox"/> COD                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                     |                                  |                                               |                              |                                       |                                                         |
| <input type="checkbox"/> Express Mail                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <input type="checkbox"/> Return Receipt for Merchandise                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                     |                                  |                                               |                              |                                       |                                                         |
| <p>5. Signature — Address<br/>X</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p>6. Addressee's Address (ONLY if requested and fee paid)<br/>32<br/>63-11206<br/><b>FEES NOT PAID</b><br/>Allocation</p>                                                                                                                                                                                                                                                                                                                                                                                  |                                     |                                  |                                               |                              |                                       |                                                         |
| <p>6. Signature — Agent<br/>X <i>Dana Gorge</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                     |                                  |                                               |                              |                                       |                                                         |
| <p>7. Date of Delivery</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                     |                                  |                                               |                              |                                       |                                                         |

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- Endorse article "Return Receipt Requested" adjacent to number.

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AUG 3 1990



PENALTY FOR PRIVATE  
USE, \$300

Department of Water Resources

RETURN  
TO



Print Sender's name, address and ZIP Code in the space below.

DEPT. OF WATER RESOURCES

STATE OF IDAHO  
DEPT. OF WATER RESOURCES

1301 N. ORCHARD  
BOISE, IDAHO 83706

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Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.  
1. ☒ Show to whom delivered, date, and addressee's address. (Extra charge)

3. Article Addressed to:

M.L. CLEMENTS  
4121 RIM ROAD  
NAMPA ID 83651

4. Article Number  
33507

Type of Service:

☐ Registered

☒ Certified

☐ Express Mail

☐ Insured

☐ COD

☐ Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

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

4121 Rim Rd  
Nampa ID 83651

5. Signature - Address

*M.L. Clements*

Signature - Agent

Date of Delivery

4-2-90

Form 3811, Mar. 1988

U.S.G.P.O. 1988

32

83686

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AUG 11 1990



PENALTY FOR PRIVATE  
USE, \$300

RETURN

**RECEIVED**

Print Sender's name, address, and ZIP Code in the space below.

STATE OF IDAHO  
DEPT. OF WATER RESOURCES  
301 N. ORCHARD  
BOISE, IDAHO 83706

AUG 3 1990

Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION )  
FOR PERMIT NO. 63-11326 IN THE )  
NAME OF M.L. CLEMENTS )

NOTICE OF HEARING

On May 25, 1990, M. L. Clements filed with the Department of Water Resources an application for permit to appropriate the public waters of the State of Idaho. The application was protested by Harvest Farm Co.

The Department has set the matter of protest for a Hearing on Thursday, September 6, 1990, at 10:00 a.m., in the Upstairs Conference Room, Department of Water Resources, 1301 N. Orchard St., Boise, Idaho, 83706. The hearing will be held in accordance with provisions of Chapters 2 and 17, Title 42, and Chapter 52, Title 67, of the Idaho Code, the adopted Rules of Practice and Procedure of the Department of Water Resources, and Rules 4 and 5 of the adopted Rules and Regulations of Water Appropriation of the Department of Water Resources. Opportunity shall be afforded all parties to respond and present information and argument on all issues involved.

Dated this 24<sup>th</sup> day of August, 1990.

*David R. Tuthill, Jr.*  
DAVID R. TUTHILL, JR., P. E.  
Manager, Western Regional Office

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DEC 11 1990

I hereby certify that on the 24<sup>th</sup> day of August, 1990, I mailed a true and correct copy, postage prepaid, of the Notice of Hearing and the Order Denying Petition for Stay of Cease and Desist Order to the applicant(s) and protestant(s) listed:

  
Sue Taylor  
Secretary

M.L. Clements  
4121 Rim Road  
Nampa, ID 83651

Bruce Smith, Esq.  
Nelson, Rosholt, et al  
1020 Main Suite 400  
Boise, ID 83702

Stephen A. Bradbury, Esq.  
Eberle, Berlin, et al  
300 N. sixth St.  
P.O. Box 1368  
Boise, ID 83701

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HEARING INFORMATION  
IN THE MATTER OF APPROVAL OF AN APPLICATION FOR PERMIT

In accordance with Idaho Code, Section 42-203, the following issues are involved in the consideration of the application and protest(s):

1. Will the proposed use reduce the quantity of water under existing water rights?
2. Is the proposed water supply insufficient for the purposes intended?
3. Is the application made in good faith or for delay or speculative purposes?
4. Has the applicant sufficient financial resources with which to complete the project?
5. Will the proposed use conflict with the local public interest?

Any party may request in writing five (5) days before any hearing that the oral proceedings thereof be taken in the form of stenographic notes at the expense of the requesting party. Any party may have such stenographic notes of the oral proceedings, or part thereof, transcribed at his own expense. A tape record of the proceedings will be maintained for the appeal period.

If the hearing is conducted by a hearing officer appointed by the Director, rather than the Director himself, a proposed decision will be submitted to the parties and the parties may be afforded an opportunity to file exceptions to the proposed decision and present briefs and oral arguments to the Director prior to the issuance of a final decision by the Director. This procedure is required by Idaho Code, Section 42-1701A.

The parties by written stipulation may waive their right to a proposed decision, however, the failure of either party to waive a proposed decision will not prejudice the Director's review of a party's evidence and arguments. However, such a waiver will shorten the decision-making process and may expedite substantially the issuance of a final decision. Whether compliance with Section 42-1701A is waived will not affect a party's right to petition for a rehearing of the final decision pursuant to Rule 11 of the Department's Rules of Practice and Procedure or affect a party's right to appeal the final decision to the district court.

Under the provisions of the Idaho Code, Sections 42-1701A and 67-5215, any court review of the Department's decision on appeal shall be confined to the record created before the Department.

Failure to appear at the time and place set for hearing by the applicant or protestant(s) may allow the Department to dismiss without prejudice the protest(s) or the application. Any and all cost incurred by the Department as a result of such non-appearance may be assessed against such non-appearing parties.

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DEC 11 1990

INTER-DEPARTMENT MEMO — 1

FROM Dave Tuttle  
Thru Phil, Gary Long  
TO Keith

DATE 8/23/90

OK - PJZ

SUBJECT Attached

We are coordinating with the applicant to schedule a hearing on the water right protest during the first week of September.

(the attached Order).

It is important that this document be issued immediately as Mr. Clements will be out of water on Friday (tomorrow) unless he purchases additional supplies. He needs to know he will not be able to use his well.

Dave

SIGNATURE

(WPL File transmitted to STATE.MV::JODI\_WPS:CLEMENTS.WPL)

CONVERSATION MEMORANDUM

DATE 8/22/1990

FILE 63-11326

NAME OF PARTY Boise Kuna Irr Dist

EMPLOYEE Dave Tutthill

RE: Availability of Water

Per my inquiry, the receptionist answered that water is available from private individuals in BKID.

\$20 to \$30 / ac ft is typical price during the last month.

No ditch loss added.

Names of those with water for sale are available at the BKID office.

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DEC 11 1990

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

ATTORNEYS AT LAW

1020 MAIN STREET

SUITE 400

P. O. BOX 2139

BOISE, IDAHO 83701-2139

TELEPHONE (208) 336-0700

FAX (208) 344-6034

THOMAS G. NELSON  
JOHN A. ROSHOLT  
J. EVAN ROBERTSON  
STEVEN K. TOLMAN  
JAMES C. TUCKER  
TERRY R. McDANIEL  
GARY D. SLETTE  
F. BRUCE COVINGTON  
JERRY JENSEN  
CAROLYN M. MINDER  
BRUCE M. SMITH  
C. RICHARD BEVAN  
GARY L. QUIGLEY  
TIM J. WILLIAMS  
JUSTIN R. SEAMONS

Twin Falls Office  
142 3rd AVENUE NORTH  
P.O. BOX 1906  
TWIN FALLS, IDAHO 83303-1906  
TELEPHONE (208) 734-0700  
FAX (208) 736-0041

**HAND DELIVERED**

August 22, 1990

RECEIVED  
AUG 22 1990

Department of Water Resources  
Western Regional Office

David R. Tuthill, Jr.  
Manager, Western Regional Office  
Department of Water Resources  
2735 Airport Way  
Boise, ID 83705

Dear Dave:

Harvest Farm Co. has considered the situation regarding Maurice Clements' petition for a stay of the Cease and Desist Order and Mr. Clements' comments at the August 20th meeting. Harvest Farm Company's position is that Mr. Clements has failed to show any basis for the Department to grant a stay. Harvest Farm Co. will not agree to a stay and requests that the Department not permit Mr. Clements to begin pumping prior to the issuance of a permit.

It is Harvest Farm Company's position that pumping of the Clements' well will harm Harvest Farm Company's water rights. This conclusion is based on previous Departmental findings regarding supplemental well applications by Harvest Farm Co. and statements made by Mr. Clements and his attorney at the meeting. In the Final Memorandum Decision and Order for Applications Nos. 63-10740 and 63-10741, issued February 21, 1990, the Department stated in Finding No. 17 that there is "observed local well interference for wells located less than a quarter mile apart." This finding was based on testimony by the applicant's expert witness. Mr. Clements and his attorney stated in the meeting that the nearest Harvest Farm Co. well was 1,500 feet from the Clements' well. on the Department's previous findings, damage in the form of interference is established.

In Finding No. 12 in the Order, the Department noted that the protestants' argued that the groundwater level in the area is declining. In the present situation, he has offered no proof to the contrary. Mr. Maurice Clements was one of the most vocal protestants. He should be required to adhere to his previous position rather than changing his opinion because it now suits his particular interest.

David R. Tuthill, Jr.  
August 22, 1990  
Page -2-

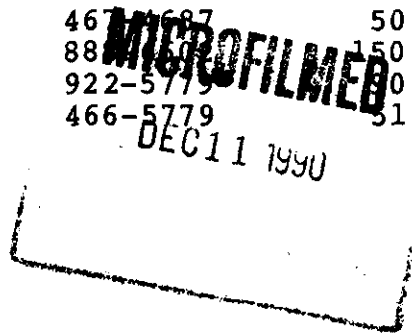
In the Cease and Desist Order, the Department indicated it may issue a stay if "sufficient facts are set forth and verified by the petition and supporting documents to raise issues of fact regarding M.L. Clements' right to divert and use groundwater from the above identified well." Mr. Clements came to the meeting with no facts meeting the standard set by the Department. Mr. Clements admitted after repeated questioning that the only legal way to pump would be pursuant to a permit issued by the Department. He acknowledged he has no permit.

The only other fact that might support a right to pump prior to issuance of a permit was Mr. Clements' assertion in his petition that he had been "verbally advised by a representative of the Department of Water Resources . . . that he could safely begin pumping water from that new well." After much discussion, Mr. Clements acknowledged that he had not been told he could begin pumping, but only that he took a chance on pumping because a Department employee told him no protest had been filed and that a permit would probably be issued shortly. Mr. Clements conveniently forgot the name of the Department employee. However, the falsehoods contained in his petition cannot be excused or overlooked.

Harvest Farm Co. vigorously protests the inclusion of such obviously false statements in the petition. Harvest Farm Co. also objects to such false statements as being the basis in any way for issuance of a stay.

Another example of blatant disregard for the truth is Mr. Clements' statement in his petition that no other water is available for purchase. Mr. Clements indicated he had contacted some neighbors and the Bureau of Reclamation. After the meeting, I called Boise-Kuna Irrigation District. I was told by the secretary that a number of Boise-Kuna members had water available for sale. I asked for a list of people with approximately 60 acre feet of water since that is what Mr. Clements indicated he needed. The secretary gave me the following partial list of people who have idle land with water available for sale:

|                |          |         |
|----------------|----------|---------|
| Angus Hill Jr. | 312-0603 | 100 a/f |
| Brad Janicek   | 467-587  | 50 a/f  |
| Anne Potts     | 88       | 150 a/f |
| Laver Thorton  | 922-5779 | 0 a/f   |
| Carol Clemons  | 466-5779 | 51 a/f  |



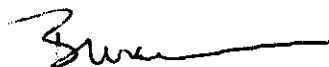
David R. Tuthill, Jr.  
August 22, 1990  
Page -3-

In light of these facts, it is simply untenable for the Department to stay enforcement of its Order.

Harvest Farm Co. has stated in the past and continues to request that fairness requires equal treatment of all parties. It was obvious during the meeting that equitable treatment is an important consideration for the Department in this matter. In previous proceedings before the Department, when Harvest Farm Co. offered a compromise solution to meet the concerns of Mr. Clements and attempt to avoid possible damage to Harvest Farm Company's irrigation system, Mr. Clements clearly established his position. In his June 14, 1990, letter to you, Mr. Clements' stated that any damage to the Harvest Farm Co. system was an "economic one" that was self-inflicted and "not one of concern to [Mr. Clements]." He further stated that if Harvest Farm Co. was required to disconnect its irrigation system, then that was "simply a cost of acting outside the scope of its contractual and legal duties". Mr. Clements has shown no sense of reasonableness or fairness in regard to the situation faced by his neighbors. Now that he is in a similar situation, he argues "this is different".

Mr. Clements has shown no fact that establishes a right to pump water from the well. His only argument is he needs water to avoid economic damage. That is simply insufficient given the standards imposed by the Department in order to stay the Cease and Desist Order. If the Department considers staying the order, the only reason would be based on equitable treatment. Equitable treatment under the precedent established by Mr. Clements requires that the order remain in effect.

Sincerely,



Bruce M. Smith

BMS/dj  
50171  
cc: George Fenn  
Sherl Chapman

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DEC 11 1990

Conference w/ Lawrence Clements, Steve Bradbury, Bruce Smith and Dan Tutkall  
Notes from Meeting on 20 Aug 90

- 25 more irrigation days are needed
  - finish beets
  - finish corn
  - fall prep on grain.

- 5 additional days of water are left

- 3 af/day (1.5 cfs) required

∴ 60 af needed to be pumped

- nearest Harvest Farms well is 1500' away

depth of Clements well  $\approx$  610'  
static water level  $\approx$  75'  
dynamic water level is unknown

- domestic well 100' away, <sup>Pump</sup> set at 95', continued to pump.

a new pump is being installed to increase pressure in the domestic well.  
When irrigation well had been pumped 4 days on / 2 days off for  
few weeks - the domestic well continued to pump.

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DEC 11 1990

- purchased 60 Af from Clyde Schuster (adjacent well owner)
- Land is part of the Boise Kuna Irrigation District
- No additional water is available in BKID - per inquiry

Inquired from about 12 people re: available additional water.  
No add'l water is available.

Crop loss of \$7280 is based on anticipated yield.

Allen wells are located to the SW.

Well is drilled about 30 east of ~~the~~ Rim Road (on section line)

Well is drilled just south of position shown on map.

Mr. Clements stated that he was advised by IDWR that approval of permit was

likely, as there <sup>were no</sup> protests. "I knew I was taking a chance at the time so I went ahead and irrigated."

Conference closed with a statement by Bruce Smith that he would provide a letter responding to the request for stay of the Cease & Desist order.

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DEC 11 1990

DAR

**EBERLE, BERLIN, KADING, TURNBOW & MCKLVEEN,  
CHARTERED**

ATTORNEYS AND COUNSELORS AT LAW

CAPITOL PARK PLAZA  
300 NORTH SIXTH STREET  
POST OFFICE BOX 1368  
BOISE, IDAHO 83701

TELEPHONE  
(208) 344-8535

FACSIMILE  
(208) 344-8542

JAMES L. BERLIN  
OF COUNSEL

T. H. EBERLE (1922-1977)

STEPHEN A. BRADBURY

**RECEIVED**

AUG 17 1990

August 16, 1990

Department of Water Resources

Mr. Gary Spackman, Manager  
Water Right Permits Section  
Idaho Department of Water Resources  
1301 North Orchard Street  
Boise, Idaho 83720

Re: Petition of Stay of Cease and Desist Order -  
Application for Permit to Appropriate Water  
No. ~~63-11236~~ - M. L. Clements

63-11326

Dear Mr. Spackman:

Enclosed is an original Petition for Stay of Cease and Desist Order and Request for Administrative Hearing in the above referenced matter. As we discussed in our telephone conversation of August 15, 1990, Mr. Clements will run out of irrigation water available to the subject land on August 20, 1990. For that reason, we are requesting that this petition be given expedited treatment and a hearing be held on or before that date. Please let me know as soon as possible when a hearing can be scheduled.

In order for us to adequately prepare for that hearing we are in need of a copy of the Department's entire file pertaining to Mr. Clements' Application for Permit and the Cease and Desist Order. I would appreciate it if you could arrange to have copies made of all materials in that file, including the Application, all protests, any orders issued, all correspondence and any memoranda or notes made in connection with the Application or the Cease and Desist Order. We will, of course, be pleased to pay any reproduction costs incurred by the Department.

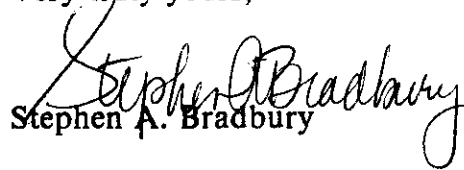
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DEC 11 1990

Page 2  
Mr. Gary Spackman  
August 16, 1990

Thank you for your attention to this matter. I will look forward to hearing from you in the immediate future.

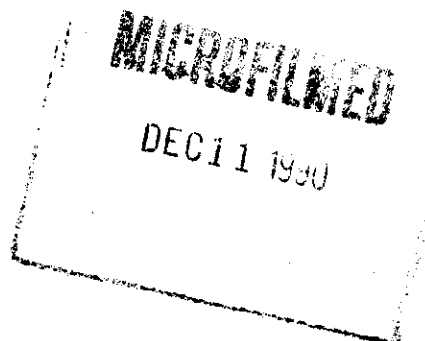
Very truly yours,

  
Stephen A. Bradbury

SAB/jt

Enclosure

cc: Dave Tuthill  
Bruce Smith, Esq.  
Maurice Clements  
(All with enclosure)



William J. McKlveen  
Stephen A. Bradbury  
EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED  
300 North Sixth Street  
P. O. Box 1368  
Boise, Idaho 83701  
Telephone: (208)344-8535  
Fax: (208)344-8542

Attorneys for Petitioner

RECEIVED

AUG 17 1990

Department of Water Resources

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

|                                          |   |                   |
|------------------------------------------|---|-------------------|
| In the Matter of Application for Permit  | ) | PETITION FOR STAY |
|                                          | ) | OF CEASE AND      |
| To Appropriate Water No. 63-11236 In The | ) | DESIST ORDER AND  |
|                                          | ) | REQUEST FOR       |
| Name of M. L. Clements                   | ) | ADMINISTRATIVE    |
|                                          | ) | HEARING           |

COMES NOW M. L. Clements, by and through his attorneys of record, Eberle, Berlin, Kading, Turnbow & McKlveen, and hereby petitions the Director of the Department of Water Resources of the State of Idaho for an order staying the effect of that certain Cease and Desist Order dated July 31, 1990 in the above captioned matter and further requests an administrative hearing before the Department pursuant to Idaho Code §42-351, and states and alleges as follows:

1. On May 25, 1990, M. L. Clements filed an Application for a Permit to Appropriate Water, numbered 63-11236 proposing the diversion of 1.6 cfs from ground water for irrigation of 80 acres

PETITION FOR STAY, P. 1

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DEC 11 1990

located in the NE  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  and the NW  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  of Section 20, Township 2 North, Range 2 West, B. M.

2. The above referenced Application for a Permit contemplated the use of water to be directed through the proposed well to be supplemental to the existing water rights for the subject parcel of property, which water is delivered to the property by the Boise-Kuna Irrigation District.

3. On May 25, 1990 M. L. Clements obtained Drilling Permit No. 63-90-W-117 authorizing the drilling of a well in the NW  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  of Section 30, Township 2 North, Range 2 West, B. M.

4. Sometime later, more than 30 days after the above referenced Application for Permit had been filed, M. L. Clements was verbally advised by a representative of the Department of Water Resources that no protest to his Application for Permit had been filed, that his application for a permit would in all likelihood be approved, and that he could safely begin pumping water from that new well.

5. On or about July 14, 1990, M. L. Clements began diverting water through that well and applying water to the lands described in his Application for a Permit for irrigation purposes, and continued to do so until served with a copy of the above referenced Cease and Desist Order, in reliance upon the verbal advice given by the above referenced representative of the Department of Water Resources. Mr. Clements had been doing so for

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DEC 11 1990

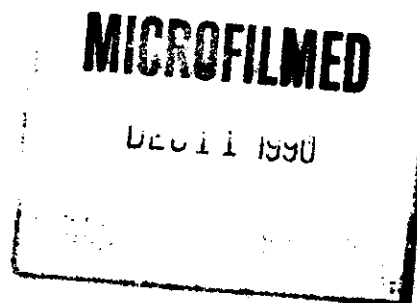
approximately three weeks prior to his receipt of the Cease and Desist Order.

6. On or about August 6, 1990, the above referenced Cease and Desist Order, dated July 31, 1990, was served upon M. L. Clements.

7. In a normal water year, sufficient water for the irrigation of the lands described in the subject Application for Permit is provided by the Boise-Kuna Irrigation District. However, during the 1989 irrigation season, all water available was used, thus leaving no carryover water for the 1990 season. The only water for the 1990 season came from new allotted water in the amount of 139.68 acre feet. That amount of water is insufficient to irrigate the subject land for the entire irrigation season. Only 5 days of water are now available to the subject land through the Boise-Kuna Irrigation District.

8. In order to supplement the water available for irrigation of the subject lands, M. L. Clements purchased approximately 60 acre feet of water -- 20 days worth -- from a neighboring landowner at a price to be negotiated in the future. No other water is available for purchase by M. L. Clements.

9. The water to be supplied by the well described in the subject Application for Permit is needed for the irrigation of beets and hybrid sweet corn now being cultivated on the subject lands. In addition, that water is needed for the fall preparation of those lands for the cultivation of wheat.



10. In the event that M. L. Clements is prevented from diverting water through the well described in the subject Application for Permit, Mr. Clements will sustain a crop loss in the estimated amount of \$7,280.00.

11. The protest against Mr. Clements' Application for Permit filed by Harvest Farm Co. is not well founded and is unlikely to be upheld making the above referenced Cease and Desist Order unnecessary for the reasons that the nearest point of diversion of water maintained by Harvest Farm Co. is approximately one-quarter of a mile away from the subject well, that Harvest Farm Co. has not and cannot present any evidence of damage to its water rights (as is evidenced by the lack of damage caused during the three weeks that the subject well had been in operation), and that the subject well will not interfere with other prior rights as is evidenced by the lack of interference, during the three weeks that the subject well was in operation, with M. L. Clements' own domestic well located approximately 250 feet from the subject well.

12. The protest against Mr. Clements' application for permit filed by Harvest Farm Co. is also not well founded and is unlikely to be upheld, making the above referenced cease and desist order unnecessary for the reason that the Department of Water Resources issued a Memorandum Decision and Order dated February 21, 1990 by which it approved the Applications for Permit No. 63-10740 and 63-10741 in the name of Bing Fro [redacted] Company (now known as Harvest Farm Co.) permitting Harvest Farm Co. to

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DEC 11 1990

divert ground water from sources approximately three-quarters of a mile from the point of diversion of the subject application. In doing so, the Department of Water Resources relied upon the testimony of Harvest Farm Co.'s witness, Mr. Shirl Chapman, that water is available for appropriation in that area. The protestants are, therefore, precluded by the doctrine of collateral estoppel from not taking a contrary position.

WHEREFORE, the applicant, M. L. Clements, requests that an order be issued staying the impact and effect of the Cease and Desist Order issued in the above captioned matter on July 31, 1990 and that an administrative hearing be held prior to August 20, 1990.

DATED this 16<sup>th</sup> day of August, 1990.

EBERLE, BERLIN, KADING, TURNBOW  
& MCKLVEEN, CHARTERED

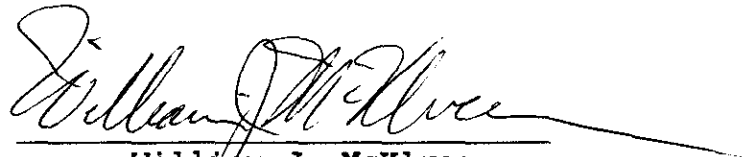
By William J. McKlveen  
William J. McKlveen



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 16<sup>th</sup> day of August, 1990, a true and correct copy of the within and foregoing PETITION was served upon the following attorney by depositing the same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Bruce Smith, Esq.  
Nelson, Rosholt, Robertson, Tolman & Tucker  
P. O. Box 2329  
Boise, Idaho 83701

  
William J. McKlveen

**MICROFILMED**

DEC 11 1990

SPECIAL NOTE: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

PROTEST INFORMATION SHEET

Protestant - Name(s)

Harvest Farms  
\_\_\_\_\_  
\_\_\_\_\_

Address Farm Office, 13735 Missouri Ave, Nampa, ID  
\_\_\_\_\_

Attorney - Name & Address Bruce Smith, 1020 Main, Suite 400,  
Boise, ID

Date Filed June 21, 1990 Protest Date July 9, 1990

Issues \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Applicant - Attorney - Name & Address \_\_\_\_\_  
\_\_\_\_\_

Dates: \_\_\_\_\_

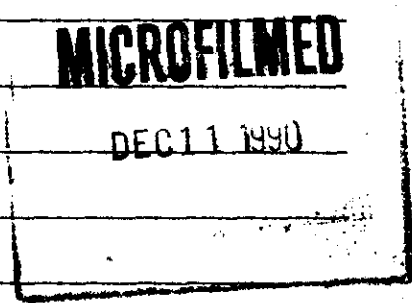
Acknowledgement letters: \_\_\_\_\_

Hearing Notice: \_\_\_\_\_

Hearing Date: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_





State of Idaho  
**DEPARTMENT OF WATER RESOURCES**

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

July 31, 1990

Bruce Smith  
Nelson, Rosholt, et al  
1020 Main, Suite 400  
Boise, ID 83702

CERTIFIED MAIL #33506

RE: Application for Permit to Appropriate Water No. 63-11236 in  
the Name of M.L. Clements

Dear Mr. Smith:

Enclosed is a Cease and Desist Order on the above referenced permit. Please note the date in which to cease and desist irrigation of land and also the deadline in which to request a hearing.

If you have further questions concerning this matter, feel free to contact this office.

Respectfully,

GARY SPACKMAN, Manager  
Water Right Permits Section

GS:js

Enclosure

cc: Western Region

**MICROFILMED**

DEC 11 1990



State of Idaho  
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

July 31, 1990

M.L. Clements  
4121 Rim Road  
Nampa, ID 83651

CERTIFIED MAIL #33507

RE: Application for Permit to Appropriate Water No. 63-11236 in  
the Name of M.L. Clements

Dear Mr. Smith:

Enclosed is a Cease and Desist Order on the above referenced permit. Please note the date in which to cease and desist irrigation of land and also the deadline in which to request a hearing.

If you have further questions concerning this matter, feel free to contact this office.

Respectfully,

A handwritten signature in cursive script that reads "Gary Spackman".

GARY SPACKMAN, Manager  
Water Right Permits Section

GS:js

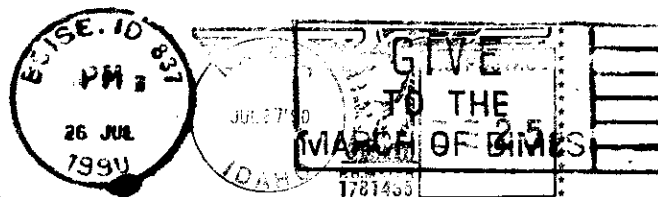
Enclosure

cc: Western Region

**MICROFILMED**  
DEC 11 1990



P.O. Box 1005  
Nampa, Idaho 83651



ROB WHITTNEY  
DEPT. WATER RESOURCES  
STATE OF IDAHO  
2735 AIRPORT WAY  
BOISE, IDAHO 83705



ERV

This is the pump  
test data for the well  
owned by M.L. Clements  
RE: #  
63-11326



# LAYNE OF IDAHO, Inc.

P.O. Box 1005  
Nampa, Idaho 83651  
(208) 466-7376

# RECEIVED

JUL 27 1990

Department of Water Resources  
Western Regional Office

## WELL TESTING REPORT AND AGREEMENT

CUSTOMER NAME Dry Lake Farm LOCATION \_\_\_\_\_ DATE 6-27-90

DRILLER Pete Cope

WELL ID. 116" WELL DEPTH 594' deep STATIC LEVEL 98'

AMOUNT OF CASING \_\_\_\_\_ AMOUNT OF SCREEN \_\_\_\_\_

PUMP SETTING 200 BOWL SIZE 14" DISCHARGE SIZE 10" ORIFICE SIZE 6"

| TIME  | WATER LEVEL FROM TOP | R.P.M. | G.P.M. | REMARKS                    |
|-------|----------------------|--------|--------|----------------------------|
| 12:35 |                      |        |        | Started test run           |
| 12:40 | 133'                 | 1100   |        | Muddy                      |
| 12:52 | 132'                 | 1100   |        | Muddy sand                 |
| 12:55 | 137'                 | 1100   |        | " sand                     |
| 1:03  | 139'                 | 1100   |        | muddy + sand               |
|       | 140'                 | 1100   |        | Muddy + sand clearing some |
|       | 140'                 | 1100   |        | " " clearing               |
| 1:35  | 158'                 | 1200   |        | muddy + sand               |
| 1:40  | 159'                 | 1200   |        | " "                        |
| 1:44  | 172'                 | 1275   | 300    | " "                        |
| 1:50  | 190'                 | 1350   | 320    |                            |
| 2:00  | 200'                 | 1400   | 400    |                            |
| 2:10  | 200 +                | 1425   | 604    | " " Surging                |
| 2:25  | 200 +                | 1400   | 559    | " "                        |
| 2:30  | 200 +                | 1400   | 559    | clearing                   |
| 2:45  | 200 +                | 1400   | 559    | mostly clear               |
| 2:55  | 200 +                | 1400   | 559    |                            |
| 3:10  | 200                  | 1400   | 559    | clear                      |
| 3:25  | 200                  | 1400   | 559    | clear                      |
| 3:50  | 200                  | 1400   | 559    | clear                      |

**MICROFILMED**

DEC 11 1990

TESTED BY

APPROVED BY

HRS. TESTED



# LAYNE OF IDAHO, Inc.

P.O. Box 1005  
Nampa, Idaho 83651  
(208) 466-7376

## WELL TESTING REPORT AND AGREEMENT

CUSTOMER NAME \_\_\_\_\_ LOCATION \_\_\_\_\_ DATE \_\_\_\_\_

DRILLER \_\_\_\_\_

WELL ID \_\_\_\_\_ WELL DEPTH \_\_\_\_\_ STATIC LEVEL \_\_\_\_\_

AMOUNT OF CASING \_\_\_\_\_ AMOUNT OF SCREEN \_\_\_\_\_

PUMP SETTING \_\_\_\_\_ BOWL SIZE \_\_\_\_\_ DISCHARGE SIZE \_\_\_\_\_ ORIFICE SIZE \_\_\_\_\_

| TIME  | WATER LEVEL FROM TOP | MONOMETER       | G.P.M. | REMARKS              |
|-------|----------------------|-----------------|--------|----------------------|
| 4:10  | 200'                 | <del>1400</del> | 557    | clear                |
| 4:30  | 200'                 | 1400            | 550    | clear                |
| 5:00  |                      |                 |        | SITTING DOWN         |
| 8:40  | <del>140'</del>      |                 |        | static 112'          |
| 8:45  | 140'                 | 1100            | -      | mostly clear         |
| 8:52  | 142'                 | 1200            | -      | clear                |
| 9:00  | 181'                 | 1300            | 370    | clear                |
| 9:10  | 202'                 | 1400            | 604    | mostly clear         |
| 9:25  | 203                  | 1400            | 595    | clear                |
| 9:30  | 208                  | 1500            | 740    | some sand            |
| 9:45  | 208                  | 1500            | 754    | mostly clear         |
| 9:58  | 208                  | 1525            | 812    | some sand            |
| 10:06 | 208                  | 1525            | 812    | clear                |
| 10:15 | 209                  | 1550            | 891    | some sand            |
| 10:25 | 209                  | 1550            | 892    | clear                |
| 10:40 | 209                  | 1400            | 1027   | some sand            |
| 10:55 | 209                  | 1600            | 1027   | some sand            |
| 11:15 | 208                  | 1600            | 1014   | very little sand     |
| 11:25 | 208                  | 1600            | 1014   | • suddenly more sand |

**MICROFILMED**

DEC 11 1990

TESTED BY \_\_\_\_\_

APPROVED BY \_\_\_\_\_

HRS. TESTED \_\_\_\_\_

**HRS. TESTED**

## CONVERSATION MEMORANDUM

DATE 7-26-90FILE 63-11326NAME OF PARTY M.L. ClementsEMPLOYEE R. Whitney

RE: Using well since  $\approx$  July 13 out of Rec.  
water for the most part (1wk @ 75"). Used  
to irrigate 80Ac corn, Beets, Grain (done for  
now)

Harvest Farms has a well about 1500'  
south aquifer may be related Well test  
pumped by Lane Pump (Bill Webb) will  
send data Stated that there was minimal  
drawdown at current pumping rate.

**MICROFILMED**

DEC 11 1990

9/89

Drilling Permit No. 63-90-W-117Water Right Permit 63-11326 APP.

Injection Permit No. \_\_\_\_\_

State of Idaho  
Department of Water Resources

## DRILLING PERMIT

**RECEIVED**  
MAY 30 1990

Department of Water Resources

1. Applicant ML Clements2. Mailing Address 4121 Bm Road, NampaTelephone 495-2201☒ Well Owner    ( ) Well Operator    ( ) Other, specify \_\_\_\_\_3. Proposed well location NW 1/4 SW 1/4, or Gov't lot No. \_\_\_\_\_,Sec. 30, Twp. 2N, Rge. 2W, County Canyon,

Street Address of Well Site \_\_\_\_\_,

Lot, block and subdivision \_\_\_\_\_

4. Proposed use of well:

( ) Single family or stockwater use (less than 13,000 gallons per day)

☒ Irrigation (more than 1/2 acre)( ) Monitoring - A well bore schematic and map is required for each well.  
No. of proposed wells: \_\_\_\_\_

( ) Other (describe fully) \_\_\_\_\_

5. Well construction information:

A. ☒ New well                      ( ) Deepen                      ( ) Replace - See Condition 9.B. Proposed surface diameter 16"                      Maximum depth 500'

C. Anticipated bottom hole temperature:

☒ 85°F or less (Cold water well)

( ) 85°F to 212°F (Low temp. geothermal well)

( ) 212°F or more (Geothermal well)

**MICROFILMED**6. Construction Start Date July 1, 1990                      DEC 11 19907. Anticipated Well Driller Cope DRILLING  
NOTE: The actual well driller must be identified prior to drilling.8. Applicant's signature M. L. Clements                      Date May 10, 1990Title \_\_\_\_\_  
(Owner, Firm Representative, Other)

## ACTION OF DEPARTMENT OF WATER RESOURCES

This Permit is Approved Date 25/1990

If approved, this permit authorizes the construction of a well subject to the following conditions. READ CAREFULLY!

GENERAL CONDITIONS:

1. The well must be constructed in compliance with the applicable statutes, specific conditions of approval shown on the water right permit, injection well permit, transfer or amendment and the rules and regulations of the Department for water appropriation, injection wells and well construction standards.
2. This drilling permit is valid for two (2) months from the above approval date for the start of construction and is valid for one (1) year from the approval date for completion of the well unless an extension has been granted.
3. This permit does not constitute the approval of the District Health Department or the Idaho Department of Health and Welfare which may be required before construction of this well.
4. The well shall be constructed by a driller currently licensed in the State of Idaho who must maintain a copy of the drilling permit at the drilling site.
5. Approval of this drilling permit does not authorize trespass on the land of another party.
6. This permit does not constitute other local, county, state or federal approvals which may be required for construction of a well.
7. This drilling permit does not represent a right to divert and use the water of the State of Idaho.
8. If a bottom hole temperature of 85°F or greater is encountered, well construction shall cease and the well driller and the well owner shall contact the Department immediately.
9. If this permit is for a replacement well, the well being replaced must be abandoned in accordance with Department Rules and Regulations.

SPECIFIC CONDITIONS:

David R. Tuttle  
Signature of Authorized Department Representative

Mgr, Western Regional Office  
Title

Receipt No. W012408 Receipted by JFW Fee 100.00 Date May 25 1990

## EXTENSION OF DRILLING PERMIT

**MICROFILMED**

Extension approved by \_\_\_\_\_ Approval Date \_\_\_\_\_

This extension is good for 60 days beyond the above extension approval date DEC 11 1990

INTER-DEPARTMENT MEMO — 1

FROM

*S. J.*

DATE

*7/23/90*

TO

*Western*

SUBJECT

*Returned to region per Allen Saxton.  
Project received.*

**MICROFILMED**

DEC 11 1990

**RECEIVED**

JUL 24 1990

Department of Water Resources  
Western Regional Office

*J. J. Saxton*  
SIGNATURE

## CONVERSATION MEMORANDUM

DATE 23 July 90FILE 63-11326NAME OF PARTY Bruce Smith/Nelson, Rosholt M. L. Clements, app.  
EMPLOYEE Erwin E. Ballou (336-0700)RE: Protest.

Mr. Smith called concerning Dave Tutthill's letter dated 20 July 90, advising Thomas Nelson, Esq. that Mr. Clements application (63-11326) was to be approved 23 July. - ie protest ?? 21 June may have been filed -

- I contacted Glen Saxton and advised him of Mr. Smith's call and possible protest.

Glen said he would locate the file and investigate for a protest. He will also return a call to Mr. Smith and advise him of the application status.

- Glen called back - has original protest letter in S.O. - appears to have been a mixup - letter rec. & not sent to Western - will follow-up & advise

**MICROFILMED**

DEC 11 1990

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

ATTORNEYS AT LAW

1020 MAIN STREET

SUITE 400

P.O. BOX 2139

BOISE, IDAHO 83701-2139

TELEPHONE (208) 336-0700

FAX (208) 344-6034

THOMAS G. NELSON  
JOHN A. ROSHOLT  
J. EVAN ROBERTSON  
STEVEN K. TOLMAN  
JAMES C. TUCKER  
TERRY R. McDANIEL  
GARY D. SLETTE  
F. BRUCE COVINGTON  
JERRY JENSEN  
CAROLYN M. MINDER  
BRUCE M. SMITH  
G. RICHARD BEVAN  
GARY L. QUIGLEY  
TIM J. WILLIAMS  
SHARON F. DUNKIN  
JUSTIN R. SEAMONS

Twin Falls Office  
142 3rd AVENUE NORTH  
P.O. BOX 1906  
TWIN FALLS, IDAHO 83303-1906  
TELEPHONE (208) 734-0700  
FAX (208) 736-0041

July 23, 1990

RECEIVED  
JUL 24 1990

Department of Water Resources  
Western Regional Office

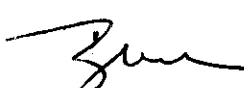
David R. Tuthill, Jr.  
Manager, Western Regional Office  
Department of Water Resources  
2735 Airport Way  
Boise, ID 83705

Re: Water Right Application #63-11326  
In The Name of M.L. Clements

Dear Dave:

In response to your letter of July 20, 1990 regarding the above application, please see the attached Notice of Protest filed with the Department on June 21, 1990. In light of the Department's response to the Harvest Farm Co. situation, it is only equitable that Mr. Clements not be allowed to pump prior to the issuance of a permit. It is also interesting that no one except Harvest Farm Co. protested this application in light of the protests to the Harvest Farm Co. application which preceded Mr. Clement's application. This is a clear indication that the protests to the Harvest Farm Co. applications were not based on valid objections. It is Harvest Farm's position that if the Department is to be consistent, a Cease and Desist Order is not only warranted but is required.

Sincerely,

  
Bruce M. Smith

BMS/dj  
48631

MICROFILMED  
DEC 11 1990

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

**RECEIVED**  
JUN 21 1990

\* \* \* \* \*

IN RE APPLICATION FOR PERMIT )  
NO. 63-11326 ) PROTEST Department of Water Resources  
)

\* \* \* \* \*

COMES NOW, HARVEST FARM CO. through its attorney of record Nelson, Rosholt, Robertson, Tolman & Tucker, and protests the approval of application No. 63-11326 in the name of M.L. Clements. Harvest Farm Co. is the holder of existing water rights in the area of proposed development and the proposed development is likely to detrimentally affect those water rights. This protest is based on the belief that the application if approved: (1) will reduce the quantity of water available under existing rights, (2) that the water supply is insufficient for the purpose for which it is sought to be appropriated, and (3) that approval will conflict with the local public interest.

DATED this 11 day of June, 1990.

**MICROFILMED**

DEC 11 1990

NELSON, ROSHOLT, ROBERTSON,  
TOLMAN & TUCKER

By: Bruce M. Smith  
Bruce M. Smith



State of Idaho  
DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way, Boise, Idaho 83705 - (208) 334-2190

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

July 20, 1990

RECEIVED  
JUL 24 1990

Thomas G. Nelson, Esq.  
Nelson, Rosholt, Robertson,  
Tolman & Tucker  
P.O. Box 2139  
Boise, ID 83701-2139

Department of Water Resources

RE: Water Right Application #63-11326 in the name of M. L. Clements

Dear Mr. Nelson:

The above-referenced application was advertised with a protest date of July 9, 1990, and no protests were received. The application was forwarded to the State Office earlier this week for final approval. They anticipate issuing the permit on Monday, July 23. Due to the lack of protestants to the application, and the fact that there appear to be no other impediments to the approval of the application, a Cease and Desist Order does not appear to be warranted at this time.

Please let me know if I can further assist you in this matter.

Sincerely,

DAVID R. TUTHILL, JR., P.E.  
Manager, Western Regional Office

DRT:st

✓cf: State Office

MICROFILMED

DEC 11 1990

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

ATTORNEYS AT LAW

1020 MAIN STREET

SUITE 400

P.O. BOX 2139

BOISE, IDAHO 83701-2139

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142 3rd AVENUE NORTH  
P.O. BOX 1906  
TWIN FALLS, IDAHO 83303-1906  
TELEPHONE (208) 734-0700  
FAX (208) 736-0041

July 17, 1990

RECEIVED  
JUL 18 1990

Department of Water Resources  
Western Regional Office

David R. Tuthill, Jr.  
Manager, Western Regional Office  
Department of Water Resources  
2735 Airport Way  
Boise, ID 83705

Re: Clements Application No. 63-11326

Dear Mr. Tuthill:

Mr. Clements is pumping the well which is the subject of Application No. 63-11326. This was personally observed by personnel of Harvest Farms Co. on July 16 and 17, 1990.

Since the application has not been approved, use of the water is improper and contrary to the laws of the State of Idaho. If Mr. Clements does not terminate the use of the water at once, the Department should issue a cease and desist order immediately.

If you need anything further prior to terminating this improper diversion, feel free to give me a call.

Yours very truly,



Thomas G. Nelson

TGN/dj  
48401

cc: George Fenn  
M.L. Clements

MICROFILMED

DEC 11 1990

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

**RECEIVED**  
JUN 21 1990

\* \* \* \* \*

IN RE APPLICATION FOR PERMIT  
NO. 63-11326

)  
)  
)  
)  
PROTEST

Department of Water Resources

\* \* \* \* \*

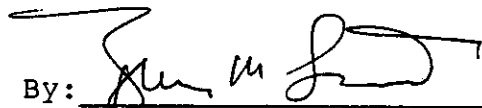
COMES NOW, HARVEST FARM CO. through its attorney of record Nelson, Rosholt, Robertson, Tolman & Tucker, and protests the approval of application No. 63-11326 in the name of M.L. Clements. Harvest Farm Co. is the holder of existing water rights in the area of proposed development and the proposed development is likely to detrimentally affect those water rights. This protest is based on the belief that the application if approved: (1) will reduce the quantity of water available under existing rights, (2) that the water supply is insufficient for the purpose for which it is sought to be appropriated, and (3) that approval will conflict with the local public interest.

DATED this 21<sup>ST</sup> day of June, 1990.

NELSON, ROSHOLT, ROBERTSON,  
TOLMAN & TUCKER

**MICROFILMED**

DEC 11 1990

By:   
Bruce M. Smith

Form No. 202a.  
3/89

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES  
APPROPRIATION APPLICATION ANALYSIS SHEET

INITIAL REVIEW BY: [Signature]

DATE: 5-30-90

APPLICATION: 63-11326

REQUIRED INFORMATION

- ☒ Name: (If applicant is a corporation or partnership, names and addresses for the director, officers, and other partners must be included.)  
☒ Address:  
☒ Source: (See USGS Quad for names of water sources)  
☒ Point of Diversion: (10 acres for spring, lot & block descriptions for Subdivisions, local name)  
☒ County:  
☒ Quantity: (flow and/or volume)  
☒ Period of use:  
☒ Nature of proposed use: (Include description of use)  
☒ Description of diverting works:  
☒ Time required for beneficial use of water:  
☒ Place of use or acres irrigated:  
☒ Map:  
☒ Signature: (If applicant is corp., partnership, or municipality, title of signatory is required)  
☒ Fee:  
☒ Yes ☐ No\* In form to receipt:
- Gov't. Lots:  
☒ P/D  
☒ P/U

ADDITIONAL INFORMATION

- | YES                                 | NO                       |                                                                                                        |
|-------------------------------------|--------------------------|--------------------------------------------------------------------------------------------------------|
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Overlapping place of use: (Describe source & relationship to present application on the back.)         |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Overlapping point of diversion:                                                                        |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Field check required: Field check by: _____                                                            |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Field report attached:                                                                                 |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Critical groundwater area:                                                                             |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Groundwater management area:                                                                           |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Diversion within interim protected river area                                                          |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Send dam safety information:                                                                           |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Send power requirement letter:                                                                         |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Send fish farm requirement letter:                                                                     |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Power residency affidavit:                                                                             |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Power efficiency form:                                                                                 |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Within trust water boundary: (If yes, attach Trust Water Supplementary Analysis Sheet.)                |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Diversion greater than 5 cfs or 500 af: (If yes, attach Large Diversion supplementary analysis sheet.) |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | *REQUEST ADDITIONAL INFORMATION FROM THE APPLICANT                                                     |

DATE REQUESTED: \_\_\_\_\_

Additional information on reverse side: \_\_\_\_\_

**RECEIVED**  
JUL 18 1990

Department of Water Resources

PROCESSING

APPLICATION NO. 63-11326

YES NO

☒ ☒ In form for advertising:

☒ ☒ Statewide advertising:

☒ ☒ Fee amount, receipt number and date recorded on application:

SEND COPIES TO

YES NO

☒ ☒ I.D. Health and Welfare

☒ ☒ I.D. Fish and Game

☒ ☒ I.D. Lands

☒ ☒ Adjudication Bureau

YES NO

☒ ☒ U.S. BLM

☒ ☒ U.S. Forest Svc.

☒ ☒ Water Dist. #

☒ ☒ Other

FINAL REGIONAL PROCESSING REVIEW

YES NO

☒ ☒ Affidavit of publication received:

☒ ☒ Application published correctly: If not, record action taken.

☒ ☒ Publication dates and paper recorded on application:

☒ ☒ Protests received. Final date for protest July 9, 1990

☒ ☒ Protest dates, resolution of protest recorded on application:

☒ ☒ Recommendations attached: Approved, Dnr

☒ ☒ Measuring device required:

☒ ☒ Measuring port required: Flow Task Force Memo P05

☒ ☒ Water delivered by water master? District # 63

☒ ☒ Special conditions of approval or cover letter:

☒ See below for additional information

Recommended Date or Priority 5/25/1990

Recommended by: Dnr Date 7/17/1990

STATE OFFICE REVIEW

P05, P23

P16

46

See below for additional information. By KW Date 7/20/90

ADDITIONAL INFORMATION

63-11326

CLEMENTS, M. L.  
4121 RIM RD.  
NAMPA, ID 83686

Source: GROUNDWATER

Diversion Pt: LOT 3 (NWSW) Sec 30 T 02N R 02W

Use: IRRIGATION ( 1.600 CFS)  
Total Diversion: ( 1.600 CFS)

Date Filed: 5/25/ 1990

In: T02N R02W S30 NESW Lot 3 (NWSW)

80.0 ACRES TOTAL

**MICROFILMED**

DEC 11 1990

JUL 16 1990

## WELL DRILLER'S REPORT

Department of Water Resources requires that this report be filed with the Director, Department of Water Resources  
Western Regional Office within 30 days after the completion or abandonment of the well.

## 1. WELL OWNER

Name M. L. CLEMENTS  
4121 Rim Rd.  
Address Nampa, ID 83686  
Owner's Permit No. 63-11326 - 63-90-W-117

## 7. WATER LEVEL

Static water level 98' feet below land surface.  
Flowing? ☐ Yes ☐ No G.P.M. flow \_\_\_\_\_  
Artesian closed-in pressure \_\_\_\_\_ p.s.i.  
Controlled by: ☐ Valve ☐ Cap ☐ Plug  
Temperature \_\_\_\_\_ °F. Quality \_\_\_\_\_  
Describe artesian or temperature zones below.

## 2. NATURE OF WORK

- ☐
- New well
- ☐
- Deepened
- ☐
- Replacement
- 
- ☐
- Well diameter increase
- 
- ☐
- Abandoned (describe abandonment procedures such as materials, plug depths, etc. in lithologic log)

## 8. WELL TEST DATA

☒ Pump ☐ Bailer ☐ Air ☐ Other \_\_\_\_\_

| Discharge G.P.M. | Pumping Level | Hours Pumped |
|------------------|---------------|--------------|
| 500              |               |              |
|                  |               |              |
|                  |               |              |

## 3. PROPOSED USE

- ☐
- Domestic
- ☒
- Irrigation
- ☐
- Test
- ☐
- Municipal
- 
- ☐
- Industrial
- ☐
- Stock
- ☐
- Waste Disposal or Injection
- 
- ☐
- Other \_\_\_\_\_ (specify type)

## 4. METHOD DRILLED

- ☐
- Rotary
- ☐
- Air
- ☐
- Hydraulic
- ☒
- Reverse rotary
- 
- ☐
- Cable
- ☐
- Dug
- ☐
- Other \_\_\_\_\_

## 5. WELL CONSTRUCTION

(See attached sheet)

Casing schedule: ☒ Steel ☐ Concrete ☐ Other \_\_\_\_\_

| Thickness    | Diameter     | From       | To         |
|--------------|--------------|------------|------------|
| _____ inches | _____ inches | _____ feet | _____ feet |
| _____ inches | _____ inches | _____ feet | _____ feet |
| _____ inches | _____ inches | _____ feet | _____ feet |
| _____ inches | _____ inches | _____ feet | _____ feet |

Was casing drive shoe used? ☐ Yes ☒ No  
Was a packer or seal used? ☐ Yes ☒ No  
Perforated? ☐ Yes ☒ No  
How perforated? ☐ Factory ☐ Knife ☐ Torch ☐ Gun  
Size of perforation \_\_\_\_\_ inches by \_\_\_\_\_ inches

| Number             | From       | To         |
|--------------------|------------|------------|
| _____ perforations | _____ feet | _____ feet |
| _____ perforations | _____ feet | _____ feet |
| _____ perforations | _____ feet | _____ feet |

Well screen installed? ☒ Yes ☐ No (See attached)Manufacturer's name Roscoe MossType Wirewrap Model No. \_\_\_\_\_

Diameter \_\_\_\_\_ Slot size \_\_\_\_\_ Set from \_\_\_\_\_ feet to \_\_\_\_\_ feet

Diameter \_\_\_\_\_ Slot size \_\_\_\_\_ Set from \_\_\_\_\_ feet to \_\_\_\_\_ feet

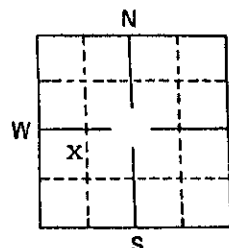
Gravel packed? ☒ Yes ☐ No ☐ Size of gravel 3/8-Placed from 18 feet to 604' feetSurface seal depth 18 material used for seal: ☐ Cement grout☐ Bentonite ☒ Puddling clay ☐ \_\_\_\_\_Sealing procedure used: ☐ Slurry pit ☐ Temp. surface casing☐ Overbore to seal depthMethod of joining casing: ☐ Threaded ☒ Welded ☐ Solvent

Weld

☐ Cemented between strataDescribe access port 2"

## 6. LOCATION OF WELL

Sketch map location must agree with written location



Subdivision Name \_\_\_\_\_

Lot No. \_\_\_\_\_ Block No. \_\_\_\_\_

County Canyon

NW 1/4 SW 1/4 Sec. 30, T. 2N, S. 1R, 2W, W 1/4

## 11. DRILLERS CERTIFICATION

I/We certify that all minimum well construction standards were complied with at the time the rig was removed.

PETE COPE DRILLING CO., INC.  
Firm Name \_\_\_\_\_ Firm No. 2136505 W. Chinden Blvd.  
Address Meridian, ID Date 6/20/90Signed by (Firm Official) Pete Copeand  
(Operator) Frank C. Cope

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCESUSE TYPEWRITER OR  
BALLPOINT PEN

## WELL DRILLER'S REPORT

State law requires that this report be filed with the Director, Department of Water Resources  
within 30 days after the completion or abandonment of the well.

## 1. WELL OWNER

Name M. L. CLEMENTS

Address \_\_\_\_\_

Owner's Permit No. \_\_\_\_\_

## 7. WATER LEVEL

Static water level \_\_\_\_\_ feet below land surface.

Flowing? ☐ Yes ☐ No G.P.M. flow \_\_\_\_\_

Artesian closed-in pressure \_\_\_\_\_ p.s.i.

Controlled by: ☐ Valve ☐ Cap ☐ Plug

Temperature \_\_\_\_\_ °F. Quality \_\_\_\_\_

Describe artesian or temperature zones below.

## 2. NATURE OF WORK

- ☐ New well ☐ Deepened ☐ Replacement  
☐ Well diameter increase  
☐ Abandoned (describe abandonment procedures such as materials, plug depths, etc. in lithologic log)

## 8. WELL TEST DATA

☐ Pump ☐ Bailer ☐ Air ☐ Other \_\_\_\_\_

| Discharge G.P.M. | Pumping Level | Hours Pumped |
|------------------|---------------|--------------|
|                  |               |              |
|                  |               |              |
|                  |               |              |

## 3. PROPOSED USE

- ☐ Domestic ☐ Irrigation ☐ Test ☐ Municipal  
☐ Industrial ☐ Stock ☐ Waste Disposal or Injection  
☐ Other \_\_\_\_\_ (specify type)

## 4. METHOD DRILLED

- ☐ Rotary ☐ Air ☐ Hydraulic ☐ Reverse rotary  
☐ Cable ☐ Dug ☐ Other \_\_\_\_\_

## 5. WELL CONSTRUCTION

Casing schedule: ☐ Steel ☐ Concrete ☐ Other \_\_\_\_\_

| Thickness    | Diameter             | From       | To         |
|--------------|----------------------|------------|------------|
| _____ inches | _____ inches + _____ | _____ feet | _____ feet |
| _____ inches | _____ inches         | _____ feet | _____ feet |
| _____ inches | _____ inches         | _____ feet | _____ feet |
| _____ inches | _____ inches         | _____ feet | _____ feet |

Was casing drive shoe used? ☐ Yes ☐ NoWas a packer or seal used? ☐ Yes ☐ NoPerforated? ☐ Yes ☐ NoHow perforated? ☐ Factory ☐ Knife ☐ Torch ☐ Gun

Size of perforation \_\_\_\_\_ inches by \_\_\_\_\_ inches

| Number             | From       | To         |
|--------------------|------------|------------|
| _____ perforations | _____ feet | _____ feet |
| _____ perforations | _____ feet | _____ feet |
| _____ perforations | _____ feet | _____ feet |

Well screen installed? ☐ Yes ☐ No

Manufacturer's name \_\_\_\_\_

Type \_\_\_\_\_ Model No. \_\_\_\_\_

Diameter \_\_\_\_\_ Slot size \_\_\_\_\_ Set from \_\_\_\_\_ feet to \_\_\_\_\_ feet

Diameter \_\_\_\_\_ Slot size \_\_\_\_\_ Set from \_\_\_\_\_ feet to \_\_\_\_\_ feet

Gravel packed? ☐ Yes ☐ No ☐ Size of gravel \_\_\_\_\_

Placed from \_\_\_\_\_ feet to \_\_\_\_\_ feet

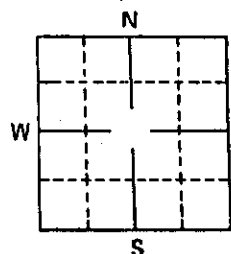
Surface seal depth \_\_\_\_\_ Material used for seal: ☐ Cement grout☐ Bentonite ☐ Puddling clay ☐ \_\_\_\_\_Sealing procedure used: ☐ Slurry pit ☐ Temp. surface casing☐ Overbore to seal depthMethod of joining casing: ☐ Threaded ☐ Welded ☐ Solvent

Weld

☐ Cemented between strata

Describe access port \_\_\_\_\_

## 6. LOCATION OF WELL

Sketch map location must agree with written location.Subdivision Name MICROFILMED

Lot No. \_\_\_\_\_ Block No. \_\_\_\_\_

County \_\_\_\_\_

1/4 Sec. \_\_\_\_\_ T. \_\_\_\_\_ N ☐ E ☐  
S ☐ R. \_\_\_\_\_ W ☐

## 10.

Work started \_\_\_\_\_ finished \_\_\_\_\_

## 11. DRILLERS CERTIFICATION

I/We certify that all minimum well construction standards were  
complied with at the time the rig was removed.Firm Name PETE COPE DRILLING CO., INC. Firm No. \_\_\_\_\_

Address \_\_\_\_\_ Date \_\_\_\_\_

Signed by (Firm Official) \_\_\_\_\_

and

(Operator) \_\_\_\_\_



# CASING SCHEDULE

M. L. CLEMENTS

CASING: 16" .250

|      |   |      |   |              |
|------|---|------|---|--------------|
| +18" | - | 200' | - | 201' C       |
| 220' | - | 235' | - | 15' C        |
| 255' | - | 450' | - | 195' C       |
| 500' | - | 534' | - | 34' C        |
| 584' | - | 594' | - | <u>10' C</u> |
|      |   |      |   | 455' C       |

Screens: Roscoe Moss Wirewrap  
16" - .040 Slot.

|      |   |      |   |              |
|------|---|------|---|--------------|
| 200' | - | 220' | - | 20' S        |
| 235' | - | 255' | - | 20' S        |
| 450' | - | 500' | - | 50' S        |
| 534' | - | 584' | - | <u>50' S</u> |
|      |   |      |   | 140' S       |