BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PROTESTS AGAINST APPROVAL OF APPLICATION FOR TRANSFER OF WATER RIGHT NO. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION.	MEMORANDUM DECISION

The applicant, Agricultural Products Corporation, filed an application for transfer of its shares in the Georgetown Irrigation Company to a different place of use and also for a change in the nature of that use. The transfer was protested by Georgetown Irrigation Company. A hearing was held on October 18, 1974 at which time both parties agreed to submit two legal issues to the Director for decision prior to taking any evidence. Those issues are:

1) The effect of Idaho Code, §42-108 when the consent of the irrigation company has been withheld; and

2) Whether the Director of the Department of Water Resources has authority to grant a change in the nature of use of water.

Idaho Code, §42-108 provides in essence that any person entitled to the use of water may change the point of diversion and/or place of use upon application to and approval of the Director, Department of Water Resources. However, if the right is one based upon:

> "shares of stock in a corporation or if the works or system is owned and/or managed by an irrigation district, no change in the point of diversion or place of use of such water shall be made or allowed without the consent of such corporation or irrigation district, except to lands which may be irrigated through the same system . . ."

The protestant herein is the irrigation company from whom the applicant derives its shares of stock and rights to water. The protestant has refused to agree to the transfer. It is also evident from the argument of counsel that the applicant would not be using the same system. It is applicant's contention that

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the stream channel is the system used. This is unrealistic and not within the obvious intent or meaning of the statutory language. The language of the statute refers to the system, which in ordinary meaning and the context of this statute, is some man-made structure by which water is delivered. If we adopted the interpretation urged by the applicant, the statutory provision would have little or no effect, since all districts take water from a stream. An interpretation will not be given that has the effect of nullifying an act of the Legislature. Applicant's interpretation would nullify the exception in the statute because all the water of an irrigation company is derived from some stream and thus water shares could be transferred without any approval of the company as long as the point of diversion was from the company's source of supply.

I, therefore, find and hold that Georgetown Creek is not part of the irrigation company system and the applicant can not change its point of diversion or place of use without the approval of the company.

Even if the system was as contended for by the applicant, the Director has no authority to approve a change in the nature of use of a water right.

Idaho Code, §§ 42-108 and 42-222(1) speak to changes in place of use and point of diversion, but not the nature of the use. There is clearly no specific authorizing language which would allow the Director to approve such a change. It is argued by the applicant that because there is a fee for a change in use, and although not argued by applicant, there is a procedure for appeal from a decision approving or rejecting a change in use (42-222(3)) the legislative intent exists for the implied assumption of that power.

The statute in question was repealed and re-enacted in 1969 (Chapter 303, §2, pg. 905, 1969 Session Laws). The legislative history of that act reveals that the bill originally submitted to the Legislature provided the authority in Idaho Code, §42-222(1) for a change in nature of use. However, that language

was amended out of Idaho Code, §42-222(1), but by apparent oversight was not removed from §§ 42-221(b) and 42-222(3). It is thus clear that the Legislature did not intend to grant such power to the then Department of Reclamation, but instead specifically struck it from the bill.

It is therefore my conclusion and finding that the Director of the Department of Water Resources has no authority to grant a change in the nature of use of any water right.

IT IS THEREFORE ORDERED AND THIS DOES HEREBY ORDER that the application for transfer and change in the nature of use be and the same is hereby denied.

DATED this 26th day of December, 1974.

R. KEITH HIGGINSON
Director, Idaho Department
of Water Resources

Identification No. 11 0290

Transfer No. _____

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

DENIED

APPLICATION FOR TRANSFER OF WATER RIGHT

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

1. Name of Right Holder Agricultural Products Corporation with shares in Georgetown Irrigation Company

   Post office address Georgetown, Idaho 83239

2. Right obtained by:

   a. Decree to Georgetown Irrig. Company in Case of Utah Power & Light Co.
   The Last (Name) et al
   vs ~~Chance Canal Co.~~, Dated July 14, 1920 in U. S. District Court, District of Idaho
   (Name of Court)
   Court. County of Bear Lake.

   b. ~~License~~ Decree No. 11-0290 ~~issued by the State of Idaho, Department of Reclamation.~~

3. Source of water Georgetown Creek tributary to Bear River
   (Name of stream or source)

4. Date of Priority May 1, 1881

5. Amount of water a. 70 c.f.s. and/or

   b. _____ acre feet/annum

6. Water is used for Irrigation from Apr. 1 to October 31
   (Month, Day) (Month, Day)

7. ~~Original~~ Recorded location of point of diversion is SE ¼ NE ¼ of Section 4,

   Township 11S, Range 44E, B.M., in Bear Lake County;

   Additional points of diversion, if any SW¼SE¼, Sec. 32, T. 10S, R. 44E, (The points of diversion are as changed by the approved transfer dated 7/15/1971).

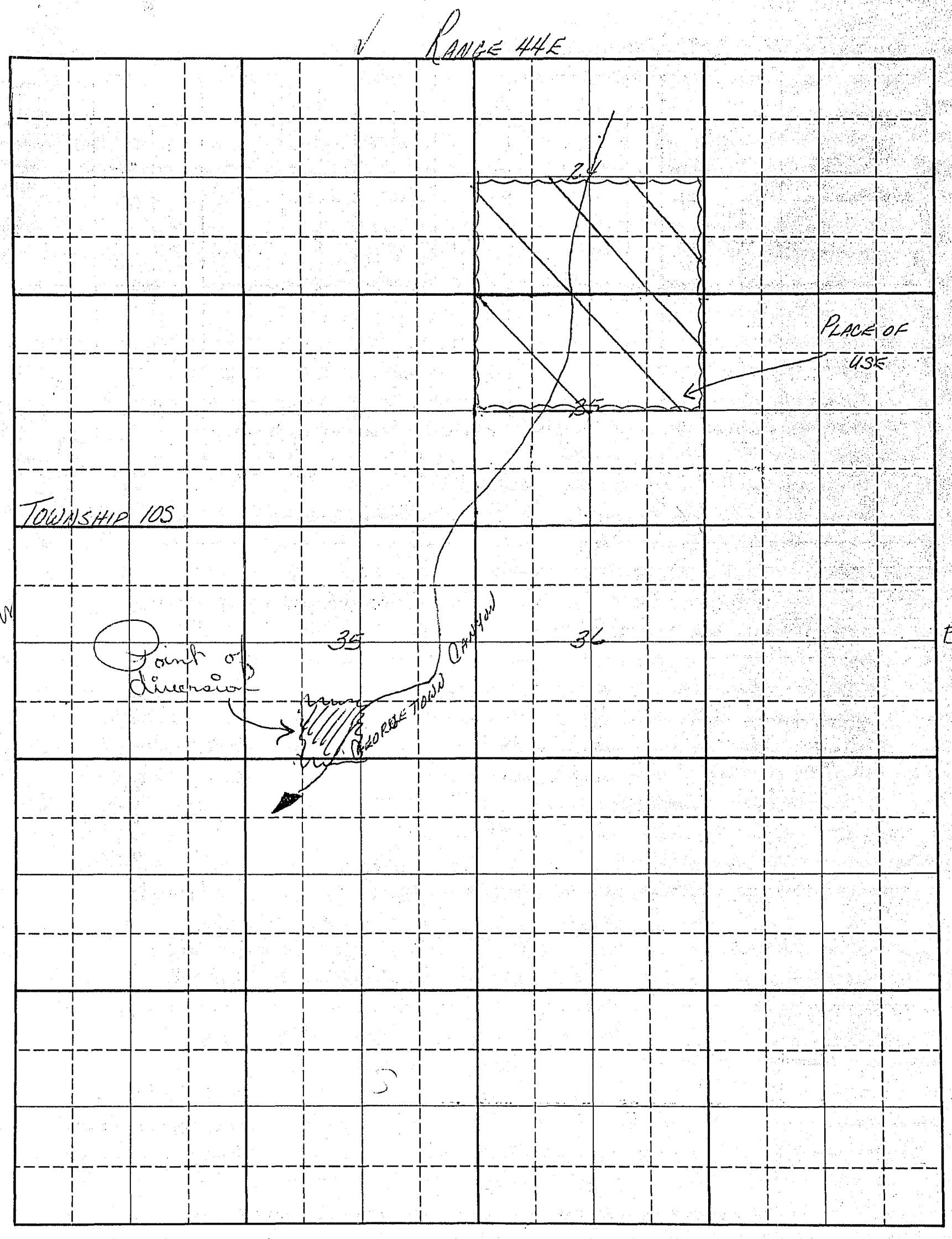
8. Lands presently irrigated or place of use:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
11S	43E	Section No. 1, 11, 12, 13, 14, and 24.																	
11S	44E	Section 5, 6, 7, 8, 18, and 19.																	

Total number of acres presently irrigated 3,500 acres

In the above sections

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SCALE: 2 Inches Equal 1 Mile. Draw Plan in Ink.

RECEIVED
AUG 2 1974
Department of Water Resources
Eastern District Office

ATTACHMENT TO APPLICATION FOR TRANSFER OF WATER RIGHT

Department of Water Administration
State of Idaho
Statehouse
Boise, Idaho

This statement is made as an attachment to application for transfer of water right and changing the point of diversion, place of use and nature of use. This application is being filed by Agricultural Products Corporation, a stockholder in Georgetown Irrigation Company, which is the holder of the water right. Applicant's interest and right in the water are represented by the shares of the corporation. Due consideration of the Department of Water Administration is urgently requested in this matter.

The shortage of fertilizer products throughout the nation and world is critical, and the federal task force concerned with the problem has requested increased production, including rehabilitation of existing plants. At the present time there are millions of tons of phosphate in the Georgetown Canyon owned by this applicant, in addition there is a plant site and machinery rusting and unproductive. In the opinion of this applicant, it is imperative that this resource be developed and the use of the water involved in this application is absolutely necessary.

AGRICULTURAL PRODUCTS CORPORATION

Dean F Cowley

By: DEAN F. COWLEY
Senior Vice-President - Production

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9. If applicant was not the original holder of this right explain how it was acquired:_____

10. CHANGE IN POINT OF DIVERSION 104 shares owned by Agricultural Products Corp.

a. Quantity to be diverted at new point: 2.08 c.f.s. and/or _____ acre feet

b. New point of diversion: SE ¼ SW ¼, Section 35, Township 10S, Range 44E, B.M.

c. Description of method of diversion and conveyance from new points of diversion:
Concrete sump pump and conveyed through a pipeline to a place of use

d. Is water to be conveyed to the lands previously irrigated? Yes X No _____.
If not, the place of use should be changed below.

e. Describe the reasons for applying for a change in the point of diversion:
Change from agricultural use to manufacturing to facilitate the operation of an elemental phosphorus producing plant. This application requests a change in the nature of use from irrigation to manufacturing.

f. Do you intend to make the transfer permanent? Yes

g. Do you intend to abandon completely the old point of diversion? No, the remainder of the Georgetown irrigation Co. users will continue to use the old points.

h. Indicate on the above plat the new point of diversion and lands to be irrigated.

11. CHANGE IN PLACE OF USE

a. Describe the new lands on which you wish to use your right.

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
						PLACE OF USE FOR MANUFACTURING:													
10S	44E	24									X	X	X	X	X	X	X	X	
"	"	25	X	X	X	X	X	X	X	X									
						CONTINUED PLACE OF USE FOR IRRIGATION:													
Properties for which the water has been attached for irrigation purposes and which use will be abandoned are more fully described on attached sheets																			

Total number of acres to be irrigated _____

b. Do you intend to make the transfer permanent? Yes

c. Are you completely abandoning the lands previously irrigated by this right? If not, explain your plans:

Yes, the lands previously irrigated by these 104 shares will be abandoned.

d. Describe any other water rights that you claim for the new ground upon which you wish to transfer this right:

e. Indicate on the above plat the new land to be irrigated and the point of diversion.

I hereby assert that no one will be injured by such transfer and that the change will be made at my own risk. The information contained in this application is true to the best of my knowledge.

Dean F Cowley
(Signature of Applicant)
AGRICULTURAL PRODUCTS CORPORATION
By: Dean F. Cowley, Senior Vice Pres.

Subscribed and sworn to before me this 1st day of August, 1974

Ferris L Call
(notary public)

My commission expires Apr. 1977.

SEE ATTACHED STATEMENT

ACTION OF DIRECTOR, DEPT. OF WATER RESOURCES AND CERTIFICATE OF TRANSFER

This is to certify that I have examined Application for Transfer of Water Rights No. 11-0290, and said application is hereby DENIED.

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

2. Denial of said application is for the following reasons:
Pursuant to Memorandum Decision dated December 26, 1974.

Witness my hand this 7 day of January, 19 75.

DENIED

R. KEITH HIGGINSON, Director
Idaho Department of Water Resources

FOR DEPARTMENT USE ONLY

Received by MB Date 8-2-74

Prelim. check by RDC Date 8/2/74

Fee received by MB Date 8-2-74 Fee $30.00 #12997

Approved for publication by CB - 9/16/74

Published in News-Examiner Dates Aug. 22 + 29, 1974

Hearing held

Watermaster Recommendation sent A.D. #11 Russell Stoker Sent 8-13-74

Protest filed by:	Date
M. Floyd Clark	8-27-74
Georgetown Irrig. Co.	9-5-74

Identification No. 11-0290

Transfer No.

RECEIVED
FEB 10 1971
Department of Water Administration

STATE OF IDAHO
DEPARTMENT OF RECLAMATION

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

APPROVED

1. Name of Right Holder GEORGETOWN IRRIGATION COMPANY

   Post office address GEORGETOWN, IDAHO 83239

2. Right obtained by:

   a. Decree to GEORGETOWN IRRIGATION CO. & OTHERS (Name) in Case of UTAH POWER & LIGHT CO. vs. CHANCE CANAL CO. Dated 14 JULY, 1920 In DISTRICT COURT (Name of Court)

   Court. County of BEAR LAKE.

   b. License No. _____ issued by the State of Idaho, Department of Reclamation.

3. Source of water GEORGETOWN CREEK (Name of stream or source) tributary to BEAR RIVER

4. Date of Priority MAY 1, 1881

5. Amount of water a. 70 c.f.s. and/or

   b. _____ acre feet/annum

6. Water is used for IRRIGATION from APRIL 1 (Month, Day) to OCTOBER 31 (Month, Day)

7. Original location of point of diversion is CORNER COMMON TO ~~XXX~~ Section 5, 6, 7 AND 8 Township 11 SOUTH, Range 44 EAST, B.M., in BEAR LAKE County;

   Additional points of diversion, if any A POINT NORTH 46° 41' EAST 4467.3 FEET FROM THE CORNER COMMON TO SECTIONS 5, 6, 7 AND 8, TWP. 11 SOUTH RANGE 44 EAST, B.M. IN BEAR LAKE COUNTY.

8. Lands presently irrigated or place of use:

TWP.	RANGE	SEC.	NE¼				NW¼				SW¼				SE¼				TOTALS
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
11S	43 E	1, 11, 12, 13, 14, 24.																	
11 S	44E	5, 6, 7, 8, 18, 19																	

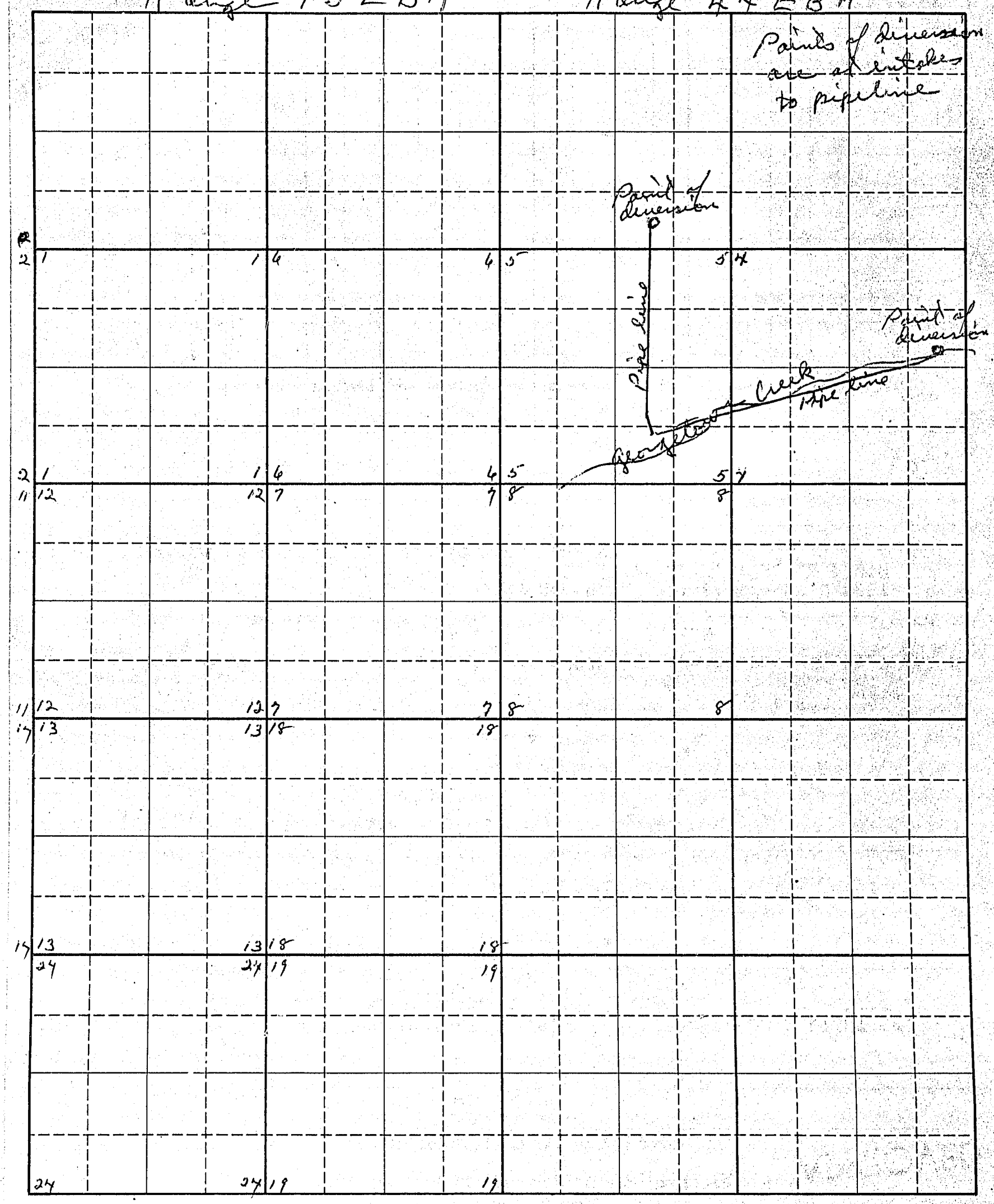
Total number of acres presently irrigated 3500 ACRES IN THE ABOVE SECTIONS

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Range 43 EBM

Range 44 EBM

Points of diversion are at intakes to pipeline



SCALE: 2 Inches Equal 1 Mile. Draw Plan in Ink.

9. If applicant was not the original holder of this right explain how it was acquired:_____

10. CHANGE IN POINT OF DIVERSION

a. Quantity to be diverted at new point: 70 c.f.s. and/or _____ acre feet

b. New point of diversion: SE ¼ NE ¼ Section 4, Township 11 SOUTH AND SW 1/4 SE 1/4 SECTION 32 TOWNSHIP 10 SOUTH BOTH IN _____, Range 44 EAST, B.M.

c. Description of method of diversion and conveyance from new points of diversion:

BURIED PIPELINE TO GRAVITY SPRINKLER SYSTEM

d. Is water to be conveyed to the lands previously irrigated? Yes X No _____.

If not, the place of use should be changed below.

e. Describe the reasons for applying for a change in the point of diversion:

CHANGE OF METHOD OF SPRINKLING FROM FLOOD IRRIGATION TO GRAVITY SPRINKLER SYSTEM

f. Do you intend to make the transfer permanent? YES

g. Do you intend to abandon completely the old point of diversion? YES

h. Indicate on the above plat the new point of diversion and lands to be irrigated.

11. CHANGE IN PLACE OF USE

a. Describe the new lands on which you wish to use your right.

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

Total number of acres to be irrigated _____

b. Do you intend to make the transfer permanent? _____

c. Are you completely abandoning the lands previously irrigated by this right? If not, explain your plans:

_____

_____

_____

d. Describe any other water rights that you claim for the new ground upon which you wish to transfer this right: _____

_____

_____

e. Indicate on the above plat the new land to be irrigated and the point of diversion.

I hereby assert that no one will be injured by such transfer and that the change will be made at my own risk. The information contained in this application is true to the best of my knowledge.

GEORGETOWN IRRIGATION COMPANY

BY: M. Floyd Clark PRESIDENT

(signature of applicant)

Subscribed and sworn to before me this 8th day of February, 1971.

Joan H. Crane

(notary public)

My commission expires 8/22/74.

APPROVED

ACTION OF STATE RECLAMATION ENGINEER AND CERTIFICATE OF TRANSFER

This is to certify that I have examined Application for Transfer of Water Rights No. LL-0290/1664, and said application is hereby APPROVED.

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

   That an adequate measuring device of a type approved by this Department be permanently installed and maintained.

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

_____

Witness my hand this 15 day of July, 1971.

State Reclamation Engineer
Director

FOR DEPARTMENT USE ONLY

Received by _____ Date 2-10-71

Prelim. check by _____ Date 2-10-71

Fee received by _____ Date 2/10/71 Fee $ 10.00

Approved for publication by _____

Published in Blue Examiner Dates 4/29/71 & 5/6/71

Hearing held _____

Watermaster Recommendation sent _____

Protest filed by:	Date

THE NEWS+EXAMINER

MONTPELIER, IDAHO

Advertising & Commercial Printers

Statement: Account of Department of Water Administration

Transfer No. 11-0290/1664 — Date June, 1971

40 Line Notice of

Proposed Change

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Published 2 issues $9.20

I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid.

The News-Examiner

By Ruth Taylor

RECEIVED
JUN 18 1971
Department of Water Administration

THE NEWS-EXAMINER

MONTPELIER, IDAHO

AFFIDAVIT OF PUBLICATION

STATE OF IDAHO,)
County of Bear Lake,) ss.

W. Jerome Taylor

being first duly sworn, deposes and says he is Publisher and Foreman of the **News-Examiner**; that the said **News-Examiner** is a weekly newspaper published at Montpelier, County of Bear Lake, State of Idaho, of general circulation in said County and State.

That the notice attached was published in the said **News-Examiner,** and not in a supplement, for two successive weeks, commencing with the issue dated April 29, 1971 and ending with the issue dated May 6, 1971

W. Jerome Taylor
Publisher and Foreman.

NOTICE OF PROPOSED CHANGE OF WATER RIGHT
NO. 11-0290/1664

Notice is hereby given that Georgetown Irrigation Company of Georgetown, Idaho has applied to the Department of Water Administration for a change of point of diversion of the waters of Georgetown Creek, tributary to Bear River.

The right sought to be changed is evidenced by Decree to Georgetown Irrigation Company in Case of Utah Power & Light Company vs. the Last Chance Canal Company and is recorded as follows.

Amount: 70 c.f.s. Priority: May 1, 1881. Point of Diversion: Corner common to Sec. 5, 6, 7 and 8, or T. 11 S, R. 44 E, P. M., Bear Lake County. The water is used for irrigation purposes within Sections 1, 11, 12, 13, 14 and 24, T. 11 S, R. 43 E, and Sections 5, 6, 7, 8, 18 and 19, T. 11 S, R. 44 E, B. M.

TO BE CHANGED AS FOLLOWS Point of Diversion: SE¼NE¼, Sec. 4, T. 11 S, R. 44 E, and SW¼SE¼, Sec. 32, T. 10 S, R. 44 E, B. M.

Any protests against approval of the proposed change of water right application must be filed with the Department of Water Administration on or before May 17, 1971.

R. KEITH HIGGINSON
Director

Published in The News-Examiner, Montpelier, Idaho on April 29, 1971 and May 6, 1971.

(a-29; m-6)

Subscribed and sworn to before me this 17th day of June, 1971

Notary Public.

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February 11, 1971

Georgetown Irrigation Company
Georgetown, Idaho 83239

Gentlemen:

Attached herewith is Departmental Receipt No. 5609 in the amount of $20.00 for your Application for Transfer of Water Right, which was received in this office under the above date.

Very truly yours,

M. RUSSELL BOSCH
Administrative Assistant

MRB:ejw

Enclosure

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NOTICE OF PROPOSED CHANGE OF WATER RIGHT

NO. 11-0290/1664

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The right sought to be changed is evidenced by Decree to Georgetown Irrigation Co. in Canal Co.
Case of Utah Power & Light Co. v.s. the Last Chance / and is recorded as follows.

Amount: 70 c.f.s. Priority: May 1, 1881

Point of Diversion: Corner common to Sec. 5, 6, 7 and 8, or T. 11 S, R. 44 E, B.M., Bear Lake County

The water is used for irrigation purposes within Sections 1, 11, 12,

13, 14 and 24, T. 11 S, R. 43 E, and Sections 5, 6, 7, 8, 18 and 19, T. 11 S, R. 44 E, B.M.

TO BE CHANGED AS FOLLOWS

Amount

Point of Diversion: SE¼NE¼, Sec. 4, T. 11 S, R. 44 E, and SW¼SE¼, Sec. 32, T. 10 S, R. 44 E, B

The [illegible]

Any protests against approval of the proposed change of water right appli-

cation must be filed with the Department of Water Administration on or before

May 17, 1971.

R. KEITH HIGGINSON
Director

Published in the News-Examiner, Montpelier, Idaho

on April 29, 1971 and May 6, 1971.

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April 19, 1971

Re: Transfer No. 11-0290/1664

The News-Examiner
Post Office Box # 278
Montpelier, Idaho 83254

Gentlemen:

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

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

An affidavit of publication must be submitted to the Department along with the publication bill. In order to receive payment, the following certification must appear on the bill:

"I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid.?

_____
(signature of claimant)

Very truly yours,

Donald W. McEldowney
Appropriation Supervisor

DWM:CM

Enclosure

MICROFILMED

June 15, 1971

Re: Transfer No. 11-0290/1664

The News-Examiner
Post Office Box #278
Montpelier, Idaho 83254

COPY

Gentlemen:

Would you please submit to this Department an affidavit of publication and certified bill in connection with the above referenced transfer application. The legal notices for this transfer were to have been published in your paper on April 29, 1971 and May 6, 1971.

Again, we wish to advise you that to receive payment, the following certification must appear on the bill:

> "I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid."

Your cooperation in this matter will be greatly appreciated.

Very truly yours,

Donald W. McEldowney
Appropriation Supervisor

DWM:CM

MICROFILMED

Bill submitted June 21, 1971

RECEIVED
JUN 18 1971
Department of Water Administration

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
Statehouse – Annex 2
Boise, Idaho 83707
(208) 384-2215

R. Keith Higginson
Director

Water Rights Administration
Water Resource Investigations
Dam and Reservoir Safety
Water Well Drilling
Flood Plain Management
Irrigation and
Flood Control Districts

June 15, 1971

Re: Transfer No. 11-0290/1664

The News-Examiner
Post Office Box #278
Montpelier, Idaho 83254

Gentlemen:

Would you please submit to this Department an affidavit of publication and certified bill in connection with the above referenced transfer application.

The legal notices for this transfer were to have been published in your paper on April 29, 1971 and May 6, 1971.

Again, we wish to advise you that to receive payment, the following certification must appear on the bill:

> "I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due, after allowing all just credits, and that no part of the same has been paid."

Your cooperation in this matter will be greatly appreciated.

Very truly yours,

Donald W. McEldowney
Appropriation Supervisor

DWM:CM

MICROFILMED

July 15, 1971

Re: Transfer No. 11-0290/1664

Georgetown Irrigation Co.
Georgetown,
Idaho 83239

ATTENTION: M. Floyd Clark, President

Dear Mr. Clark:

Please find enclosed a copy of the APPROVED Application for Transfer of a Water Right in the name of the Georgetown Irrigation Company.

We wish to direct your attention to the conditions of approval on the fourth page of the approved transfer.

If we may be of any further assistance, please do not hesitate to contact us.

Very truly yours,

Donald W. McEldowney
Appropriation Supervisor

DWM:CM

Enclosures

MICROFILMED

December 21, 1972

RE: Transfer of Water Right No. 11-0290
Georgetown Irrigation Company

Lict #9177

Mr. Don Rex
Georgetown,
Idaho 83239

Dear Mr. Rex:

Mr. John Taggart telephoned today and asked that we mail you a copy of the above transfer. The fee for this copy is $1.00 which you may remit at your earliest convenience.

Very truly yours,

(Mrs.) ELEANOR J. WOODS
Records Supervisor

EJW:e

Enclosure

MICROFILMED

GEORGETOWN IRRIGATION CO. 70.0 11-0290

TRANSFER NO.	NAME	AMOUNT C.F.S.	BALANCE C.F.S.	RIGHT NO.
11-0290	Georgetown Irrigation Co.	70.0	0	11-0290A

MICROFILMED

Georgetown Irrigation Company

Georgetown, Idaho

83239

August 20, 1974

RECEIVED
AUG 21 1974
Department of Water Resources
Eastern District Office

Re: Application for Transfer No. 11-0290

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

Gentlemen:

Your letter of August 16th, regarding the transfer of water from agricultural to manufacturing uses by Agricultural Products Corp. was received this morning. I do appreciate your correspondence upon this issue.

I will say that we are very much opposed to this application, and Agricultural Products personnel know this because as President of the Georgetown Irrigation Company, I refused to sign their application.

This transfer would be in violation of our Decree upon the water as well as our Articles of Incorporation and Bylaws. These state that 70 cubic feet per second are decreed for agricultural purposes from April 1st to October 1st on 12 designated sections of land. Agricultural Products Corp. is asking for 104 shares to be diverted for manufacturing purposes completely out of the area of the Decree, as well as asking for an increased time usage from October to April or for the use of water for the full calendar year.

We are in the process of converting our irrigation system from a gravity flow flood type system to a gravity flow piped sprinkler type system. We are spending upwards of $2,000,000.00 for this system and if they are permitted to divert water to other areas and for other uses other than was intended in our over all plan, it can throw our cost ratio out of balance.

The location of their plant on the very head waters of our source of water, gives us concern as this plant operated for a period of years and we saw the quality of our water deteriorate from a class A stream to an almost moving cess pool.

Therefore, with our concerns for the safety of our sprinkler system as well as the supply of water for irrigation being curtailed and the change of priorities of our Decree we as a company must bitterly oppose this transfer.

MICROFILMED

Sincerely,

Donald Rex

Donald Rex, President
Georgetown Irrigation Co.

LAW OFFICES
WALLACE M. TRANSTRUM
ATTORNEY AT LAW
PHONE 547-3944

159 SOUTH MAIN
SODA SPRINGS, IDAHO 83276

RECEIVED
JUN 20 1974
Department of Water Administration

RECEIVED
JUN 24 1974
Department of Water Administration
Eastern District Office

June 18, 1974

State of Idaho
Department of Water Administration
Statehouse
Boise, Idaho 83701
Attn: Mr. Bob Fleenor

Re: Georgetown Irrigation Company - Agricultural Products Corporation
Application for Change in Nature of Use of Water and to Extend
Period of Use - Your File No. 11-0290

Gentlemen:

Enclosed are an original and copy of an "Application for Change in Nature of Use of Water and to Extend Period of Use", on behalf of Agricultural Products Corporation, Conda, Idaho, and my check in the amount of $30.00 as and for filing fees pursuant to I.C. 42-221(B).

It appears that there is no official form for this application, and I have attempted to give you pertinent information as to the water right and our intended use. If you require additional information, would you please advise me right away.

I spoke with Mr. Bob Fleenor about this in a recent telephone conversation. At that time he indicated that you may want an application for a permit for a water right as this application may pertain to the extended use of the water through the winter months. I included in this application a request for both a change in the nature of use and for an extension of the period of use, noting that in the fee schedule (42-221(B)) that it covered applications for change of points of diversion, place, period or nature of use of water, among other things. If, in fact, you cannot handle both the change in use and the change in period of use on this one application and require an addition form to be filed, please let me know as soon as possible.

We appreciate your cooperation and help in this matter. I have already forwarded a copy of the application to the president of Georgetown Irrigation Company for his review and they are aware that your department will be contacting them about it.

MICROFILMED

Very truly yours,

Wallace M. Transtrum

WMT:db
Enclosures - 2
cc: Dean Cowley - Agricultural Products Corporation

INTER-DEPARTMENT MEMO — 1

FROM Boise

DATE 6/20/74

RECEIVED
JUN 24 1974
Department of Water Administration
Eastern District Office

TO Eastern District Office
Attn: Norm Young

SUBJECT App for Transfer (11-0290)

Herewith forwarding app for transfer along with check #92-204 for $30.00 received from Wallace M. Transtrum in behalf of Georgetown Irrigation Company-Agricultural Products Corp.

Also forwarding a copy of approved transfer 1664/11-0290 which was approved 7/15/71. This will be of help in transfering the information to the Department's transfer form (I hope).

If you should have any questions, please call Bob Fleenor.

MICROFILMED

Darlene
SIGNATURE

June 25, 1974

Mr. Wallace M. Transtrum
Attorney at Law
159 South Main
Soda Springs, Idaho 83276

Dear Mr. Transtrum:

We are herewith returning the application for change in nature of use and to extend the period of use for Right No. 11-0290 and your check No. 92-204 in the amount of $30.00. These items were forwarded to this office for processing by our State Office. After having conferred with our State Office concerning this application, we now ask that the application to change the nature of use and, apparently, the place of use and the point of diversion be submitted on our Application for Transfer of Water Right form. I have taken the liberty of partially completing a transfer form. The first page of the form describes the right as it is now recorded with the Department. The name of the right holder is listed as Georgetown Irrigation Company and the signature on page 4 should be that of an elected official of the Georgetown Irrigation Company or one holding a power of attorney.

In Item 10 complete the location of the point of diversion to the nearest 40 acre subdivision. In Item 11 indicate the land which will no longer be irrigated as a result of the transfer. Also, please complete any other incomplete blanks.

The Department cannot approve a transfer which results in an enlargement of the original right, Section 42-222 of the Idaho Code. Therefore, we are asking that the extended period of use be covered by a new Application for Permit. A partially completed application form is included for your use. If you will supply the additional information required, have the forms signed and return them to this office with the filing fee of $75.00 ($30.00 for the Transfer and $45.00 for the Application for Permit), we will commence processing.

If you have any questions, do not hesitate to contact me.

Very truly yours,

MICROFILMED

NORMAN C. YOUNG
District Engineer

NCY:mb

Enclosures

XXXXXXXXXXXXXXXXXXXX RESOURCES

August 16, 1974

RE: Application for Transfer No. 11-0290

Georgetown Irrigation Company
Georgetown,
Idaho 83239

Gentlemen:

On August 2, 1974, Agricultural Products Corporation applied to the Department of Water Resources to transfer shares in the Georgetown Irrigation Company from the lands indicated on the enclosed list.

The application for transfer indicates that Agricultural Products wishes to transfer 104 shares or 2.08 c.f.s. from agricultural use to manufacturing uses. Since the decreed rights are in the name of Georgetown Irrigation Company, the department wants to make sure that you are aware of this proposed transfer and that you have the opportunity to protest if you object to the proposed changes.

If we do not hear from you by September 9, 1974, we will assume you approve of the transfer and it will be forwarded to our Boise Office for final action, if we have received no other protests.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

RONALD D. CARLSON
Assistant to the
District Engineer

RDC:cb

Enclosure

MICROFILMED

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

NO. 11-0290

Notice is hereby given that Agricultural Products Corp. having shares in Georgetown Irrigation Co., Georgetown, Idaho, has applied to the Department of Water Resources for a change in the point of diversion and place of use of the waters of Georgetown Creek tributary to Bear River. The right sought to be changed is evidenced by decree to Georgetown Irrig. Co. in case of Utah Power & Light Co. -vs- The Last Chance Canal Co., et al, dated July 14, 1920 in U. S. District Court, District of Idaho, Bear Lake County and is recorded as follows:

Amount: 70 c.f.s. Priority: May 1, 1881

Decreed point of diversion: SE¼NE¼, Sec. 4, T. 11S, R. 44E; SW¼SE¼, Sec. 32, T. 10S, R. 44E, B.M., Bear Lake County;

Decreed place of use: Sec. 1, 11, 12, 13, 14, & 24, T. 11S, R. 43E; Sec. 5, 6, 7, 8, 18, & 19, T. 11S, R. 44E, B.M. The water is used to irrigate 3,500 acres.

TO BE CHANGED AS FOLLOWS

The water will be diverted within the SE¼SW¼, Sec. 35, T. 10S, R. 44E, using only 2.08 cfs and the remainder of the right will continue to be used by Georgetown Irrigation Co. users at the old points. The water will be used for manfacturing purposes within the S½, Sec. 24, N½, Sec. 25, T. 10S, R. 44E, B.M.

Any protest against approval of the above proposed change of water right must be filed with the Idaho Dept. of Water Resources, 1515 Lincoln Road, Idaho Falls, Idaho, 83401, on or before September 9, 1974.

R. KEITH HIGGINSON
Director

MICROFILMED

Published in the News-Examiner, Montpelier, Idaho on August 22 and August 29, 1974.

CB-A CB-A CB-A.

NOTICE OF PROPOSED CHANGE OF WATER RIGHT
No. 11-0290

Notice is hereby given that Agricultural Products Corporation having shares in Georgetown Irrigation Company, Georgetown, Idaho, has applied to the Department of Water Resources for a change in the point of diversion and place of use of the waters of Georgetown Creek tributary to Bear River. The right sought to be changed is evidenced by decree to Georgetown Irrigation Company in case of Utah Power & Light Company -vs.- The Last Chance Canal Company, et al, dated July 14, 1920 in U. S. District Court, District of Idaho, Bear Lake County and is recorded as follows:

Amount: 70 c.f.s.

Priority: May 1, 1881

Decreed point of diversion:

SE¼NE¼, Sec. 4, T. 11S, R. 44E; SW¼SE¼, Sec. 32, T. 10S, R. 44E, B. M., Bear Lake County;

Decreed place of use:

Sec. 1, 12, 13, 14, & 24, T. 11S, R. 43E; Sec. 5, 6, 7, 8, 18, & 19, T. 11S, 44E, B. M.

The water is used to irrigate 3,500 acres.

TO BE CHANGED AS FOLLOWS

The water will be diverted within the SE¼SW¼, Sec. 35, T. 10S, R. 44E, using only 2.08 cfs and the remainder of the right will continue to be used by Georgetown Irrigation Company users at the old points. The water will be used for manufacturing purposes within the S½, Sec. 24, N½, Sec. 25, T. 10S, R. 44E, B. M.

Any protest against approval of the above proposed change of water right must be filed with the Idaho Department of Water Resources, 1515 Lincoln Road, Idaho Falls, Idaho 83401, on or before September 9, 1974.

R. KEITH HIGGINSON
Director

Published in The News-Examiner, Montpelier, Idaho on August 22 and August 29, 1974.

(a-22|29)

XXXXXXXXXXXXXXXXXXXX RESOURCES

August 16, 1974

RE: App. for Transfer No. 11-0290 - Agricultural Products Corp.
Application for Permit No. 11-7063 - Agricultural Products Corp.
" " " No. 11-7068 - Johns

The News-Examiner
P.O. Box 278
Montpelier, ID 83254

Gentlemen:

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

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

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

Very truly yours,

RONALD D. CARLSON
Assistant to the
District Engineer

RDC:CB

Enc: Legal Notice (3)

Bill submitted 9-16-74 by CB

MICROFILMED

XXXXXXXXXXXXXXXXXXXXX RESOURCES

August 13, 1974

Mr. Russell D. Stoker, Watermaster
Water District No. 11
Box 726
Soda Springs, Idaho 83276

Dear Mr. Stoker:

Enclosed please find a copy of an application that may be of interest to your water district. Please complete the recommendation of watermaster form and return it to this office on or before September 9, 1974.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

RONALD D. CARLSON
Asst. to District Engineer

RDC:MB

Enclosures

MICROFILMED

XXXXXXXXXXXXXXXXXXXXXX RESOURCES

August 22, 1974

Re: Application for Transfer of Water Right No. 11-0290

Mr. Donald S. Rex, Pres.
Georgetown Irrigation Co.
Georgetown, ID 83239

Dear Mr. Rex:

The Department is in receipt of your letter of August 20, 1974. It is not clear from your letter whether you intend it to be an official protest against approval of the above referenced application for transfer. If you wish it to go on record as protesting this application, please indicate this intention in writing. It is my opinion that a statement by you as president of Georgetown Irrigation Co. requesting your letter of August 20, 1974, be accepted as a protest would be sufficient.

The last date the Department can accept protests against this office is September 9, 1974.

If you have any questions, please contact us.

Very truly yours,

RONALD D. CARLSON
Asst. to District Engineer

RDC:mb

MICROFILMED

RECEIVED
AUG 27 1974
Department of Water Resources
Eastern District Office

25 August, 1974
Georgetown, Idaho 83239

Idaho Dept. of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Change No. 11-0290
Application No. 11-7063
Agricultural Products Corp.

Gentlemen:

I strongly protest the above application and change for Agricultural Products Corporation.

The granting of this change and application would jeopardize the water right I have as a member of the Georgetown Irrigation Company and construction of a manufacturing plant in the Canyon would cause extensive pollution of the air and water.

Yours truly,

M. Floyd Clark

M. Floyd Clark

MICROFILMED

XXXXXXXXXXXXXXXXXXXXXX RESOURCES

August 28, 1974

Re: Application for Transfer of Water Right No. 11-0290 Ag. Products Corp.

Mr. M. Floyd Clark
Georgetown
Idaho 83239

Dear Mr. Clark:

We acknowledge receipt of your protest against the above referenced application for transfer of water right. The following are the items we can consider at a conference and/or hearing in either approving or denying a transfer application:

1. Are other water rights injured by the transfer?

2. Does the change constitute an enlargement in the use of the original right?

You will be notified at a later date as to the time and place set for a conference and/or hearing to discuss the matters of protests. If we may be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

MICROFILMED

XXXXXXXXXXXXXXXXXXXXXXX RESOURCES

August 28, 1974

Re: Application for Transfer of Water Right No. 11-0290

Mr. Dean F. Cowley, Senior Vice-Pres.
Agricultural Products Corporation
Georgetown, Idaho 83239

Dear Mr. Cowley:

Enclosed please find a copy of the protest filed by M. Floyd Clark against the above referenced transfer application.

You should be aware that the following are the items we can consider at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?

2. Does the change constitute an enlargement in the use of the original right?

You will be notified at a later date as to the time and place set for a conference and/or hearing to discuss the matters of protests. If we may be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

Enclosure

MICROFILMED

RECEIVED
AUG 28 1974
Department of Water Resources
Eastern District Office

APPLICATION FOR TRANSFER OF WATER RIGHT

NO. 11-0290

RECOMMENDATION OF WATERMASTER

I, Russell D. Stoker, watermaster of Bear River,

of Water District No. 11, County of Bear Lake, Caribou & Franklin, State of Idaho,

whose address is Box 726, Soda Springs, Idaho 83276

have read the attached copy of the application for transfer of water right for

Agricultural Products Corp.
(name)

, and to the best of my knowledge believe the application to be true.

A. I hereby endorse the above numbered Application for Transfer and recommend that the Director of the Department of Water Resources approve the transfer subject to the following conditions: None

OR

B. I do not endorse approval of the above numbered Application for Transfer as requested for the following reasons: _____

Dated at Soda Springs, Idaho, this 27th day of August 1974.

Russell D. Stoker
(signature)

MICROFILMED

Please use reverse side if needed.

Georgetown Irrigation Company

Georgetown, Idaho

83239

RECEIVED
SEP 5 1974
Department of Water Resources
Eastern District Office

Sept. 3, 1974

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

Dear Mr Carlson:

As per our telephone conversation on August 27, I am writing this letter to authorize you to except my letter of Aug. 20,1974 as a formal protest to the two applications for water Diversion and use made by the Agricultural Products Corperation. The application numbers referredto are 11-7063 and 11-0290.

Yours Truly

Donald L. Rex

President Georgetown Irrigation Co.

MICROFILMED

Georgetown Irrigation Company

Georgetown, Idaho

83239

August 27, 1974

RECEIVED
SEP 5 1974
Department of Water Resources
Eastern District Office

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

Mr. Ronald D. Carlson,

Dear Sir:

We the Directors of the Georgetown Irrigation Co., after meeting in a board meeting held August 26, 1974 decided by unanimous vote to protest the granting of a changeof point of diversion, change number 11-0290 to Agricultural Products Corperation.

Such change would be contrary to the decree pertaining to the water which we as directors of the Georgetown Irrigation Company administer.

Very Truly yours,

President Donald L Rex
Vice President Stanley Dunn
Secratary Bel Bartschi
Director James A Smith
Director Melvin J Clark.

MICROFILMED

XXXXXXXXXXXXXXXXXXXXX RESOURCES

September 5, 1974

Re: Application for Transfer of Water Right No. 11-0290 Agricultural Products Corp.

Mr. Donald S. Rex, Pres.
Georgetown Irrigation Company
Georgetown, Idaho 83239

Dear Mr. Rex:

We acknowledge receipt of your protest against the above referenced application for transfer of water right. The following are the items we can consider at a conference and/or hearing in either approving or denying a transfer application:

1. Are other water rights injured by the transfer?

2. Does the change constitute an enlargement in the use of the original right?

You will be notified at a later date as to the time and place set for a conference and/or hearing to discuss the matters of protest. If we may be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

MICROFILMED

XXXXXXXXXXXXXXXXXXXX RESOURCES

September 5, 1974

Re: Application for Permit No. 11-7063
Application for Transfer of Water Right No. 11-0290

Mr. Dean F. Cowley
Senior Vice-President
Agricultural Products Corp.
Conda, Idaho 83230

Dear Mr. Cowley:

We have enclosed copies of additional protests against the approval of the above referenced applications. If you have any questions, please contact us.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

Enclosures

MICROFILMED

XXXXXXXXXXXXXXXXXXXXX RESOURCES

September 10, 1974

Re: Application for Transfer of Water Right No. 11-0290 Ag. Products Corp.
Application for Permit No. 11-7063 Agricultural Products Corp.
" " " No. 11-7068 Johns

The News-Examiner
P.O. Box 278
Montpelier, ID 83254

Gentlemen:

Would you please submit affidavits of publication and certified bills in connection with each of the above referenced application. The legal notices were to have been published in your paper on August 22 and August 29, 1974.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

MICROFILMED

XXXXXXXXXXXXXXXXXXXXX RESOURCES

September 13, 1974

Re: Application for Transfer of Water Right No. 11-0290 Ag. Produces Corp.

Mr. Wallace M. Transtrum
Attorney at Law
159 South Main
Soda Springs, ID 83276

Dear Mr. Transtrum:

We have enclosed copies of correspondence and protests filed against the issuance of a permit pursuant to the above referenced application. You should be aware that the following are the principle items we can consider at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?

2. Does the change constitute an enlargement in the use of the original right?

You will be notified at a later date as to the time and place set for a conference and/or hearing to discuss the matters of protest. If we may be of further assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

Enclosures

MICROFILMED

LAW OFFICES
WALLACE M. TRANSTRUM
ATTORNEY AT LAW
PHONE 547-3944

35 West Center
SODA SPRINGS, IDAHO 83276

RECEIVED
SEP 30 1974
Department of Water Resources
Eastern District Office

September 27, 1974

State of Idaho
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401
Attn: Ronald D. Carlson
Acting District Engineer

Re: Agricultural Products Corporation Application - Georgetown Canyon - #11-0290

Gentlemen:

Enclosed is a Power of Attorney on one of your department forms. Would you please address all further correspondence on this matter through my office.

Thank you for your cooperation.

Very truly yours,

Wallace M. Transtrum

Wallace M. Transtrum

WMT:db
Enclosure

MICROFILMED

XXXXXXXXXXXXXXXXXXXXXX RESOURCES

September 30, 1974

Bear Lake County Courthouse
Clerk of the District Court
Paris, Idaho 83261

Dear Sir:

This is to confirm the use of the Courtroom for conferences and/or hearings to be held by this office on Wednesday, October 16, 1974, at 1:00 p.m., on Thursday, October 17, 1974, starting at 9:00 a.m. and on Friday, October 18, 1974, starting at 9:00 a.m.

Thank you for your cooperation in this matter.

Very truly yours,

RONALD D. CARLSON
Acting District Engineer

RDC:MB

MICROFILMED

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protests Against Approval of Application for Transfer of Water Right No. 11-0290 in the name of Agricultural Products Corporation	NOTICE OF CONFERENCE AND/OR HEARING

On August 2, 1974, Agricultural Products Corporation with shares in Georgetown Irrigation Company filed with the Department of Water Resources an application to transfer the waters of Georgetown Creek tributary to Bear River. On August 27, 1974, the Department received a protest against approval of said application from M. Floyd Clark. On September 5, 1974, the Department received additional protests from Donald S. Rex, President of Georgetown Irrigation Co., and also from the Board of Directors of Georgetown Irrigation Co.

The Department has set the matter of protests for conference and/or hearing for Friday, October 18, 1974, at 9:00 a.m., in the Courtroom of the Bear Lake County Courthouse, Paris, Idaho. Any hearing will be held in accordance with the Rules and Regulations of the Idaho Code and adopted Rules of Practice and Procedure of the Department of Water Resources. Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved. Because of the similarity of the issues involved in the protests to Applications No. 11-7063 and Application No. 11-0290 - Agricultural Products Corporation, the Department proposes to consolidate the conferences and hearings as provided in rule 9.7 of the Department's Rules of Practice and Procedure.

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. Any party may have such stenographic notes of the oral proceedings, or part thereof, transcribed at his own expense. A taped record of the proceedings will be maintained for the appeal period.

Failure to appear at the time and place set for hearing by the applicant or protestants may allow the Department without prejudice to dismiss the protests or the application. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing parties.

Dated this 2nd day of October, 1974.

MICROFILMED

Ronald D Carlson

RONALD D. CARLSON
Acting District Engineer

DEPARTMENT OF WATER RESOURCES

NAME AND ADDRESS OF SENDER ▶

Indicate type of mail:
☐ REGISTERED ☐ REGISTERED C.O.D.
☒ CERTIFIED

Affix stamp here if issued as certificate of mailing or for additional copies of this bill.
POSTMARK AND DATE OF RECEIPT

	NUMBER OF ARTICLE	NAME OF ADDRESSEE, STREET, AND POST OFFICE ADDRESS	POSTAGE	FEE	R. R. FEE	REST. DEL. FEE	ACTUAL VALUE	SURCHARGE	REMARKS*
1	489	Dixie J. Cowden, Ag. Products Corp., Cedar Creek	10	50	15				11-706.3 11-6250 (-)
2	490	M. Floyd Vick, Hereford, Texas	10	50	15				"
3	491	Ernest S. Ray, Hereford Irrig. Co., Hereford	10	50	15				"
4	492	Kellam W. Hamilton, Atty., 555 Main, Dodge City, Kans.	10	50	15				"
5									
6						$2.20			
7									
8									
9									
10									
11									
12		Sent by certified mail							
13		on 10-23-74 KS							
14									
15									
16									
17									
18									
19									
20									

OCT 8 1974 CLERK ARNER

TOTAL NO. OF PIECES LISTED BY SENDER 4 | TOTAL NO. OF PIECES REC'D AT P.O. 4 | POSTMASTER, PER (Name of receiving employee)

*Show under "Remarks" class postage paid if other than first or if International

POD Form 3877, Nov. 1968

APPLICATION FOR REGISTRATION OR CERTIFICATION

(Surcharges are not required on international registered mail)

c48—16—8702-15 U.S. GOVERNMENT PRINTING OFFICE

MICROFILMED

STATE OF IDAHO
DEPARTMENT OF WATER ADMINISTRATION
Eastern District Office
1515 Lincoln Road • Idaho Falls, Idaho
83401

Returned Receipts

MICROFILMED

AND	DATE OF PRIORITY	AMOUNT IN SECOND FEET	POINT OF DIVERSION AND PLACE OF USE
21, 22, 23, 24, 6;			
ge 4 West, S. 11, 12, 14, 15, 5;			
ge 4 West, S. 22;			
ge 3 West, S. 11, 12, 13, 14, 34, 35 and 36:			
ge 2 West, S. nd 31;			
ge 3 West, S. , 10, 11, 15, 16,			
from the main the Wheelon mediately pre- what is known l used for irri- n the following vit:			
nge 2 East, S. 30, 31 and 32;			
nge 2 West, S. , 16, 17, 18, 19, l 33;			
nge 2 West, S. 8, 9, 10, 15, 16, , 30, 31, 32 and			
nge 2 West, S. , 17, 20 and 21.			
ate quantity of diverted, under "East" and for power and/ hall not exceed of time.			
			GEORGETOWN CREEK.
	26. *Georgetown Irrigation Company*: 1881—May 1	70 c.f.s.	To be diverted from Georgetown Creek by means of ditches diverting therefrom as follows: Paine Ditch—North 72°19′ East 7957.3 ft. Hayes Ditch—North 73°32′ East 5301.3 feet. Smart Ditch—North 75°03′ East 4673.0 feet. Mill Ditch—North 84°06′ East 1932.9 feet. South Ditch—North 82°32′ East 2106.6 feet. Armitage Ditch—South 57°43′ West 1296.7 feet. Stoddard Ditch—South 61°52′ West 2554.6 feet. Church Ditch—South 61°46′ West 3510.9 feet. Hoff Ditch—South 62°20′ West 3976.0 feet. All from the corner common to Sections 5, 6, 7 and 8, Township 11 South, Range 44 East, B.M., also at a point on the left hand fork of said Georgetown Creek, which bears North 46°41′ East 4467.3 feet from the above mentioned Section corner where the said Paine Ditch intersects said left hand fork, and to be used for the irrigation of 3,500 acres of land situated in Sections 5, 6, 7, 8, 18 and 19, Township 11 South, Range 44 East, B.B.M., and Sections 1, 11, 12, 13, 14 and 24, Township 11 South, Range 43 East, B.B.M.
			NOUNAN CREEK.
	27. *Fred Stauffer*: (a) 1876—May 1	1.8 c.f.s.	To be diverted from Stauffer, later known as Nounan Creek, through three small ditches diverting therefrom in Sections 33 and 34, Township 11 South, Range 43 East, B.B.M.

MICROFILMED

TWP. 11 S RANGE 43 E COUNTY SCALE: 1" = 1 MILE RANGE 44 E COUNTY SCALE: 1" = 1 MILE

36	31	32	33	34	35	36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6	5	4	3	2	1	6
12	7	8	9	10	11	12	7	8	9	10	11	12	7
13	18	17	16	15	14	13	18	17	16	15	14	13	18
24	19	20	21	22	23	24	19	20	21	22	23	24	19
25	30	29	28	27	26	25	30	29	28	27	26	25	30
36	31	32	33	34	35	36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6	5	4	3	2	1	6

PD PD PD PD

MAGNOLIA

vii) 44 + 5 + 400 8 CFS ACRES = LEAUGS IJ

viii) SUBMIT BRIEFS ON CHANGE OF NATURE OF USE.

3) AG PRODUCTS

i) P.10 DIETRICH DECREE.
CHANGE IN NATURE INFERRED.

ii) CENTRAL FARMERS POLLUTION PROBLEM.

(iii NO RETURN WATER TO CREEK

4) ~~Is~~ IS THIS AN ENLARGEMENT?

AVERAGE STREAM FLOW ~35 CFS

AG PRODUCTS

5) PIPELINE BEING EXTENDED TO COVER LANDS FROM WHICH WATER WAS TRANSFERRED —

6) PHYSICAL IMPOSSIBILITY TO PREVENT POLLUTION DUE TO LOCATION OF PLANT.

7) DISPOSITION OF PROBLEM
— WILL SUBMIT BRIEFS —
AG PRODUCTS — EFFECT OF 108
CHANGE IN NATURE OF USE

— 10 DAYS — 10 DAYS — TRANSTRUM
~ 30 DAYS 10 DAYS — FOSTER
5 DAYS — REBUT.

MICROFILMED

AG PRODUCTS - GEORGETOWN IRRIGATION

TRANSFER 11-0290 2.08 CFS

SEC 42-108 - APPROVAL NEEDED BY GEORGETN.
SEC 42-222 - NATURE OF USE
SEC 42-221 - " " "

1) POSITION OF AG PRODUCTS

a.) WORDING OF STATUTES

i.) Cannot be arbitrarily administered
ii) not taking water out of boundaries of system.
iii) no showing of any possible injury of water rights

2) POSITION OF GEORGETOWN

i) IS NOT ARBITRARY
ii) QUESTION OF LEGALITY
iii) WILL BE INJURY TO SYSTEM
(CAPACITY OF PIPELINE 40 CFS)
BASIS OF SHARE — 1 SHARE/ACRE

1818/3500 70/3500

iv) PD & P.U. OUT OF AREA OF DECREE.

V) OUT OF SYSTEM BY VIRTUE OF CHANGE IN NATURE OF USE.

Vi) INJURY BY VIRTUE OF TAKING WATER FROM COMPANY

MICROFILMED

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT

Cecil D. Andrus
Governor

R. Keith Higginson
Director

1515 Lincoln Road
Idaho Falls, Idaho 83401
(208) 523-7186

October 22, 1974

RE: Application for Transfer No. 11-0290

Mr. Wallace M. Transtrum
Attorney-at-Law
159 South Main
Soda Springs, Idaho 83276

Dear Mr. Transtrum:

Rule 8.2 of the Rules of Practices and Procedures of the Department of Water Resources dictates that, "the action taken at a conference conducted by the Department and the agreements made thereat by the parties concerned shall be recorded and shall be approved by such parties."

It is the understanding of the Department that the attorneys for the applicant and the protestant, in the matter of the protest against the granting of application for transfer No. 11-0290, shall each submit briefs to support their position relative to Section 42-108, of the Idaho Code. Each attorney is also to submit a brief concerning his position and understanding of this change in the nature of use of water in view of the Idaho Code. The attorney for the applicant has agreed to submit briefs to the Department by November 1, 1974. The attorney for the protestant will then have until November 15, 1974 to submit his briefs. Any rebuttal by the applicant's attorney will be submitted to the Department by November 22, 1974. The matter has tentatively been set for hearing before the Department of Water Resources during the week of the 9th of December, 1974.

If this letter does not reflect your understanding of the agreements made during the conference held on October 18, 1974, please submit your objections within 10 days. Otherwise, the Department will consider that this agreement has been approved by all parties involved and will proceed in accordance with the schedule indicated above.

If you have any questions, please feel free to contact me.

Very truly yours,

Ronald D Carlson

RONALD D. CARLSON
Acting District Engineer

RDC:cw

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT

Cecil D. Andrus
Governor

R. Keith Higginson
Director

1515 Lincoln Road
Idaho Falls, Idaho 83401
(208) 523-7186

October 22, 1974

RE: Application for Transfer No. 11-0290

Mr. Kent Foster
Attorney-at-Law
330 Shoup
Idaho Falls, Idaho 83401

Dear Mr. Foster:

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Very truly yours,

Ronald D Carlson

RONALD D. CARLSON
Acting District Engineer

RDC:cw

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protest Against Approval of Application for Transfer No. 11-0290 in the name of AGRICULTURAL PRODUCTS CORPORATION.	CONFERENCE MEMORANDUM

On August 2, 1974, Agricultural Products Corporation filed with the Department of Water Resources an application to transfer point of diversion and the place and the nature of use of the waters of Georgetown Creek tributary to Bear River. The right sought to be transferred is represented by shares in Georgetown Irrigation Company. On August 27, 1974, the Department received a protest against the approval of said application by M. Floyd Clark, and on September 5, 1974, the Department received additional protests from Donald S. Rex, President of Georgetown Irrigation Company, and also from the Board of Directors of Georgetown Irrigation Company.

On October 18, 1974, the Department held a conference on the matter in the Courtroom of Bear Lake County Courthouse, Paris, Idaho. The applicants were represented by Wallace Transtrum, their attorney. The protestants attorney was Kent Foster. The issues brought out by the protestants during the conference were:

1. Their rights would be injured by virtue of taking water from the system of Georgetown Irrigation Company.
2. There would be possible pollution problems due to the location of the plant relative to Georgetown Creek.
3. This proposed change in the nature of the use may constitute an expansion of a water right.
4. It was the position of Georgetown Irrigation Company that a change in the nature of use can not be allowed under the Idaho Code without loss of priority.
5. Section 42-108 of the Idaho Code would forbid the approval of this transfer without the consent of the irrigation company.
6. It was feared by Georgetown Irrigation that if this transfer were approved they would not be able to regulate the diversion rate for Agricultural Products in the same manner as they do for other users on the system.

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It was the position of Agricultural Products Corporation that:

1. They are not taking water out of the boundries of the system.
2. There has been no showing of any possible injury to other water rights.
3. A provision for a change in the nature of use is made on Page 10 of the Dietrich Decree. Agricultural Products will pay an asses sment and be controlled the same as any other user on the system (Agricultural Products would not agree to having their rights shut off completely if there was water in Georgetown Creek, although they felt a porportional reduction would be acceptable.)
5. Agricultural Products felt that Section 42-108, of the Idaho Code does not apply because they are not taking water out of the boundries of the system of the irrigation company, and that basing a denial of this application for transfer on 42-108 would be arbitrary.

As a result of this conference it was agreed that the attorney for the applicant would submit briefs to support their position relative to Section 42-108, of the Idaho Code and also to the effect of the proposed change in the nature of use. These briefs are to be submitted to the Department by the 1st of November. Briefs by the protestants attorney is then to be submitted by November 15. After the protestant's briefs have been received; the applicant's attorney will then have until November 22 to submit any rebuttal that he wishes to make. The Department will re-schedule this matter for a hearing to be held during the week of the 9th of December, 1974.

Ronald D Carlson

RONALD D. CARLSON
Acting District Engineer

October 22, 1974

RDC:cw

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Cecil D. Andrus
Governor

R. Keith Higginson
Director

Statehouse
Boise, Idaho 83720
(208) 384-2215

MEMORANDUM

TO: File Nos. 11-0290 and 11-7063

FROM: R. Keith Higginson RKH

DATE: October 24, 1974

A conference was held in Paris, Idaho on Friday, October 18, 1974. The applicant, Agricultural Products Corporation, was represented by Attorney Wallace Transtrum and the protestant, the Georgetown Irrigation Company was represented by Kent Foster. After considerable discussion, it was agreed that briefs would be submitted upon two points. One, the interpretation of Section 42-108 of the Code with regard to the authority of Agricultural Products Company to transfer its water represented by 104 shares of stock in the Georgetown Irrigation Company to a new point of diversion and to a new use upstream from the present points of diversion of the Company.

Two, the question of whether an Application for Transfer can be processed by the department to change the nature of use of the water right. Transtrum agreed to submit his brief first within 10 days of the hearing and Foster then would be allowed 10 days within which to submit a reply brief, after which Transtrum would again have 5 days within which to rebut anything submitted by Foster. We indicated that we would then issue a decision as to the legal points within 10 days following the filing of all of the briefs. We tentatively agreed to reschedule the matter for hearing during the 2nd week of December, but the question

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WATER RESOURCE BOARD:

John F. Streiff, *Chairman*; George L. Yost, *Vice-Chairman*; Donald R. Kramer, *Secretary*; Edwin C. Schlender, *Member*; Franklin Jones, *Member*; M. Reed Hansen, *Member*; Scott W. Reed, *Member*; Joseph H. Nettleton, *Member*

whether a hearing would be held or not would be dependent upon the outcome of the briefs. Ron Carlson is to prepare a letter to go to the attorneys outlining the above and to obtain their concurrence, as this represents the consensus reached at the hearing.

LAW OFFICES
ALLACE M. TRANSTRUM
ATTORNEY AT LAW
PHONE 547-3944

35 West Center
SODA SPRINGS, IDAHO 83276

RECEIVED
OCT 29 1974
Department of Water Resources
Eastern District Office

October 25, 1974

Ronald D. Carlson
Acting District Engineer
State of Idaho
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Georgetown Canyon - Agricultural Products Corporation

Dear Mr. Carlson:

I have your letter of October 22 as referenced to 11-0290 and the informal conference held in Paris, Idaho on October 18th. I believe your statement of the two issued to be briefed as correct and the time for submission of briefs. Would your records also reflect that at the resumption of the hearing there will be no testimony required or taken concerning water quality. I believe this was the understanding reached at the conference, and that the position of the Department of Water Resources was that it was beyond the jurisdiction of their department.

Upon my return to my office, I found that I have a jury trial commencing December 9 and which will undoubtedly last all week unless it is settled before that time. Would it be satisfactory to leave this date open briefly to see if a settlement is reached, otherwise, I would request that a different date for the continued hearing be mutually agreed on.

Thank you for your consideration.

Very truly yours,

Wallace M. Transtrum

WMT:db
cc: Kent W. Foster, Idaho Falls

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LAW OFFICES
WALLACE M. TRANSTRUM
ATTORNEY AT LAW
PHONE 547-3944

35 West Center
SODA SPRINGS, IDAHO 83276

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NOV 12 1974
Department of Water Resources
Eastern District Office

November 8, 1974

Ronald D. Carlson
Acting District Engineer
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Application for Transfer No. 11-0290 - Brief

Dear Mr. Carlson:

Enclosed is initial brief with regard to the above-entitled matter. I apologize to you and Mr. Foster for filing this late, but seem to be overwhelmed with other things to do these days including another case involving your department which went to trial on Monday.

Very truly yours,

Wallace M. Transtrum

Wallace M. Transtrum

WMT:db
Enclosure
cc: Kent W. Foster

MICROFILMED

Wallace M. Transtrum
Attorney at Law
35 West Center
Soda Springs, Idaho 83276
Telephone: 547-3944

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NOV 12 1974
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PROTEST AGAINST APPROVAL OF APPLICATION FOR TRANSFER OF WATER RIGHT NO. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION.

Case No.
APPLICANT'S BRIEF

On August 2, 1974, Agricultural Products Corporation with shares in Georgetown Irrigation Company, filed with the Department of Water Resources, an application to transfer the waters of Georgetown Creek upstream from its present place of diversion and use and to change the nature of use from agricultural to industrial. Protests have been filed by M. Floyd Clark as a member of Georgetown Irrigation Company and also by Georgetown Irrigation Company. The matter was set for conference and/or hearing before the Department on Friday, October 18, 1974 at 9:00 o'clock a.m.. Representatives and attorneys of both applicant and protestants were present before the Board. An informal conference was held and the proceeding was then continued pending the filing of briefs by both applicant and protestants on the following issues:

1. The effect of I.C. 42-108 herein where the consent of the corporation, Georgetown Irrigation Company, has been withheld and,

2. The authority of the State Department of Water Resources to grant a change in the nature of use of the water in any event due to apparent lack of specific statutory authority.

I.

The pertinent portion of I.C. 42-108 would be first, that

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"if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation, or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion or place of use of said waters shall be made or allowed without the consent of such corporation or irrigation district", and second, there is an exception to that proviso wherein it states that "except to lands which may be irrigated through the same system." In view of the findings of the Court in Johnston vs. Pleasant Valley Irrigation Company, Ltd. (1949), 69 Ida 139, it would seem that the consent of the corporation is in fact a prerequisite to granting of such a change by the Department of Water Resources, unless the applicant comes within the exception to the requirement. The Applicant, of course, would disagree with the Court's findings of constitutionality and if necessary, request the Court to overrule the decision entered in the Johnston case.

The exception to the necessity for consent is as stated above and refers to lands which " may" be irrigated and is not limited to lands which "have been" irrigated. It further does not define "system". In the Johnston case, the corporation collected its water in a reservoir during the high water season and distributed the water to its shareholders apparently through a system of canals and ditches. During low water season the water didn't even reach the reservoir. The application was to move the diversion and place of use some four miles upstream from the reservoir (collecting system) and there to comingle it with other water rights arising out of the same watershed. Although there are very few facts before the Department at this time since any factual determination was postponed pending filing of briefs, it does appear that according to the decree setting the water rights of the Georgetown Irrigation Company, it is the only water right on Georgetown Creek;that the entire watershed and drainage area is part of the "system" of the corporation; there are no artificial reservoirs; the natural stream channel is used as a collecting system; and, the diversions made by the corporation are direct stream flow diversions on several ditches identified in the Decree itself and

by numerous direct flow diversions made by independent stockholders as the natural channel of Georgetown Creek flows through their individual properties.

The term "irrigated" used in the statute, of course, must be also taken into consideration along with the applicant's desire to change the point of diversion and place of use, it also wishes to change the nature of the use from that of agricultural to that of industrial. Practically the property may not be physically "irrigated" and this should be interpreted as "serviced" through the same system. The diversion applied for would be a direct stream flow diversion, a "system" already employed by the corporation. It is on the same stream channel a short distance above the first "ditch" of the corporation, and not unlike the many diversions made by the Company. It is simply upstream from any historical diversion, not upstream from the collecting and distributing system which is the stream channel itself.

The proposed lands in the Johnston case were, in fact, beyond either the collection or distribution part of the system, and even in that case the Court noted that the corporation "collects and stores water in its reservoir and distributes the same through its system of ditches and canals." The Court later refers to it as "irrigation system" and "distribution system". The Court further placed emphasis on the fact that they were taking from the corporation its right of distribution and placing such distribution under the control of the State Reclamation Engineer. This is certainly not the case in the present application.

In the Johnston case, the State Reclamation Engineer denied the application, finding that the water right sought to be transferred was represented by shares of stock in the objector corporation and that the lands to be irrigated at the proposed transfer "cannot be irrigated through the irrigation system of said objector corporation", and that the corporation had not consented. The ruling of the State Reclamation Engineer was confirmed by the Court. We submit to the Department that upon this application, the facts are substantially different and that

a determination of fact will have to be made in this regard to determine if, in fact, the proviso for consent in I.C. 42108 is applicable in this particular matter.

II.

There appears to be no specific statutory direction for an administrative proceeding before this Department for a change in the nature of use of water, however, the statutes and the constitution of this State generally would recognize that the nature of the use of water can be changed. Mr. Hutchens, in his article entitled "The Idaho Law of Water Rights", Vol. 5, No. 1, Idaho Law Review, Fall, 1968, at page 72, briefly discusses the matter and after observing the lack of specific statutory authorization, remarks that "however, the principles with respect to changes in point of diversion and place of use appear equally applicable." He goes on then to cite two Idaho Supreme Court cases which dealt with the change in the nature of use, among other things, and the Court apparently had no problem with the right to change the nature of the use, per se, but dealt with it on the basis of whether or not it was an enlargement of the use.

We do find in the statutes, however, at least indirect acknowledgment by the legislature of the right to change the nature of the use. I.C. 42-108 provides for an application to the Department of Water Resources to that section I. C. 42-221, we see that at subsection (B), a fee is prescribed "for filing application for change of point of diversion, place, period, or nature of use of water....." The "Dietrich Decree" (Federal District Court), wherein the water right of Georgetown Irrigation Company was determined, the Court, at page 10 therein, states among other things that the water is decreed appurtenant to the lands, and at "subject however to the rights of the appropriators or shareholders, in any appropriating canal company to change the place of diversion or use as provided by law, when no damage or injury results to others, or to make any beneficial use of such waters or any part thereof which does not injure any appropriators". Article 15, Section 3 of the Idaho Constitution discusses the

priority of better right as between those using the water and establishes a priority system between domestic, agricultural and manufacturing "when the waters of any natural stream are not sufficient." The right of Emminent Domain for the purpose of changing the nature of the use of water from one priority to another is recognized in Article I, Section 14 and Article 15, Section 3 of the Idaho Constitution.

III.

The declared policy of the people of the State of Idaho concerning water and its beneficial use is declared at Section 42-101, Idaho Code as follows: "Water, being an essential to the industrial prosperity of the State and all agricultural development throughout the greater portion of the State, depending upon its just apportionment to and economical use by those making a beneficial application of the same, its control shall be in the state, which in providing for its use, shall equally guard all the various interests involved." As noted above, the Court in the "Dietrich Decree" wherein the protestant was decreed a water right, provided that there should be beneficial use made of the water and that it was not necessarily limited to irrigation purposes.

On October 25, 1973, a report was issued by the Federal task force established under the Economic Stabilization Program which is made up of representatives of the Cost of Living Council, United States Department of Agriculture, United States Department of Commerce and the Council of Economic Advisors. In regard to the fertilizer industry, in general, this task force dictated that the individual fertilizer firms will continue operating marginally productive facilities and explore re-opening plants to alleviate current tight supplies of fertilizer, and further that individual fertilizer firms will undertake construction of new production facilities and work to insure early completion of new fertilizer plants under way. The refusal of the protestants to consent to the application herein under consideration is in the face of these historical and declared policies concerning beneficial use of water and other natural resources.

Respectfully submitted,

WALLACE M. Transtrum
Attorney for Applicant

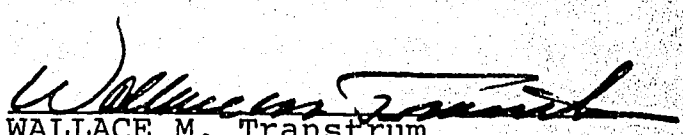
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WALLACE M. Transtrum
Attorney for Applicant

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Eastern District Office

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Wallace M. Transtrum
Attorney at Law
35 West Center
Soda Springs, Idaho 83276
Telephone: 547-3944

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF PROTEST AGAINST APPROVAL OF APPLICATION FOR TRANSFER OF WATER RIGHT NO. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION.

Case No.
APPLICANT'S BRIEF

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2. The authority of the State Department of Water Resources to grant a change in the nature of use of the water in any event due to apparent lack of specific statutory authority.

I.

The pertinent portion of I.C. 42-108 would be first, that

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LAW OFFICES
WALLACE M. TRANSTRUM
ATTORNEY AT LAW
PHONE 547-3944

35 West Center
SODA SPRINGS, IDAHO 83276

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Department of Water Resources
Eastern District Office

November 8, 1974

Ronald D. Carlson
Acting District Engineer
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Application for Transfer No. 11-0290 - Brief

Dear Mr. Carlson:

Enclosed is initial brief with regard to the above-entitled matter. I apologize to you and Mr. Foster for filing this late, but seem to be overwhelmed with other things to do these days including another case involving your department which went to trial on Monday.

Very truly yours,

Wallace M. Transtrum

Wallace M. Transtrum

WMT:db
Enclosure
cc: Kent W. Foster

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This section specifically provides that failure to apply the water to the beneficial use "for which it was appropriated" shall result in a forfeiture. It would appear that the legis-ture has at least implied that a change in the nature of use of water results in a new water right being acquired and the old water right is either eventually forfeited or abandoned.

We would submit to the Department that the Applicant's water rights herein are limited to Article XV, Section 4 of the Idaho Constitution, and I. C. 42-914. Under these sections, its rights to the use of water are limited exclusively to agricultural and domestic purposes. If the Applicant desires to change its nature of use from agricultural to industrial, it may do so only by applying for a new water right with its accompanying later priority date. If the Department should grant to the Applicant the right to change its nature of use in the manner it has now proposed, then it would be arbitrarily expanding the Applicant's rights beyond those limitations expressly given in the Constitution and statutes of the State of Idaho.

Respectfully Submitted,

Kent W. Foster
Attorney for the Protestants

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the right as a mere "user" or "consumer" to change its nature of use from the agricultural division of use to the completely separate industrial division of use.

Your Applicant has made reference to I. C. 42-221(b) (Supp. 1973), which provides for a fee to be paid for the filing of an application for a change in the nature of use. This statute does not necessarily mean that the right to change the nature of use and keep the prior water rights is approved by the legislature. We are of the position that the nature of use may be changed, but to do this it is required that a new permit be issued for a new water right and the old water right and priority date be abandoned. No one has questioned the right of an individual or corporation to apply for a change in the nature of use, when a new water right and priority date is sought. Therefore, it was natural for the legislature to provide for a filing fee upon the application for a new water right resulting from the change in the nature of use.

It should also be noted that I. C. 42-222(2) (Supp. 1973), provides in part:

> "All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the <u>beneficial use for which it was appropriated</u> and when any right to the use of water shall be lost through non-use or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter." (Emphasis added)

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unless it continues to use said water for agricultural or domestic purposes.

We have only been able to locate one Idaho case in which the change in the nature of use has been approved by the Idaho court. In Zezi v. Lightfoot, 57 Idaho 707, 68 P2d 50 (1937), the court found that the user of water who had previously been applying it to mining purposes did not lose his appropriation merely by changing the manner of use from one kind of mining use to another kind of mining use. The court stated at 57 Idaho 712 as follows:

> "Furthermore, article 15, section 3 of the State Constitution declares as one generic division, the use of water for mining, or milling purposes connected with mining, and the debates in the Constitutional Convention, volume 2, pages 1127-1129, 1157, 1166-1176, and 1351, emphasize and make clear that the change from one kind of mining, or use in mining to another, or from one place to another in such connection, does not invalidate an appropriation for mining purposes as contended for by respondents and all of the application, of the Noble waters at whatever times and whatever quantities used, was for mining "purposes." (Kinney, Irrigation & Water Rights, 2d ed., vol. 2, p. 1198, sec. 694; p. 1526, sec. 867.)

We would point out that the above approved change was merely a change within one of the generic divisions of use mentioned in Article XV, Section 3, of the State Constitution. Similarly, we would agree that, under Article XV, Section 4, and I. C. 42-914, the Applicant herein may change its nature of use from one type of agricultural use to another type of agricultural use, provided this does not result in injury to other appropriators. But, the Applicant does not have the power or

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"Sec. 4. Continuing rights to water guaranteed.-- Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law." (Emphasis added)

Provisions similar to this are also given in I. C. 42-914. In both of these sections it is expressly provided that the waters now claimed by the Applicant herein have been exclusively dedicated to use for agricultural purposes. Therefore, we would suggest that any change in the nature of use from agricultural purposes must come under a new appropriation.

We would further point out that these sections provide that the user or consumer may not be deprived of their annual water usage, "when needed for domestic purposes, or to irrigate the lands so settled upon or improved, upon payment therefor." Nowhere does it give the users a right to require that the water companies continue to provide water for uses other than agricultural or domestic use. Therefore, we would submit that the Georgetown Canal Company, as the true owner of the water rights involved herein, may refuse to supply water to the Applicant herein,

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Applicant abandons its old water right and takes up a new appropriation. The Applicant herein does not actually own a water right but rather is in the position of a "user" or "consumer", and its rights should be determined accordingly. The rights of a "user" or "consumer" have been stated in Nampa & Meridian Irrigation District v. Barclay, 56 Idaho 13, 18-19, 47 P2d 916 (1935), as follows:

> "The appropriation of waters carried in the ditch operated for sale, rental and distribution of waters does not belong to the water users, but rather to the ditch company. The right to the use of such water after having 'once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes,' becomes a perpetual right subject to defeat only by failure to pay annual water rents and comply with the lawful requirements as to the conditions of the use. (Sec. 3, art. 15 of the Constitution; Bardsley v. Boise Irrigation & Land Company, 8 Idaho 155, 67 Pac. 428; Wilterding v. Green, 4 Idaho 773, 45 Pac. 134.) . . .
>
> ". . . The consumers possess no water right which they can assert as against any other appropriator,--their rights are acquired from the district which is the appropriator and owner and it is the district's business to protect the appropriation and defend it in any litigation that arises. (Yaden v. Gem Irr. Dist., 37 Idaho 300, 216 Pac. 250.) One who acquires the right to use water from an appropriator, whose right was initiated by appropriation under sec. 1, art. 15, 'for sale, rental or distribution,' is not the owner of the appropriation and does not acquire the rights of an appropriator but he simply acquires the rights of a user and consumer, as distributee of the water under secs. 4 and 5, art. 15, of the Constitution."

As is mentioned above, the rights of a user or consumer are given in secs. 4 and 5, art. XV of the Idaho Constitution. Article XV, Section 4 provides:

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It should also be pointed out that the strict wording of the exception to I.C. 42-108 applies only to "lands which may be irrigated through the same system". (Emphasis added) The Applicant not only wants to change its point of diversion to lands outside of the system, but also to lands which may not be irrigated. The term "irrigated" should be given significance in order to preserve the statute with a valid purpose and meaning. Irrigation and canal companies have been formed and developed with the purpose of providing waters to needed farm lands for irrigation. If the water users are allowed to arbitrarily abandon the farm lands and divert the company's waters to other uses, then this will also "tend to disrupt the unity of the corporation and to impair the very purpose for which the same was formed." 69 Idaho 139. Therefore, we submit to the Department that I.C. 42-108 is directly applicable to the proposed application herein, and the said application may not be granted as long as the Georgetown Canal Company's consent is withheld.

II

The Applicant has applied for permission to change the nature of its use from agricultural to industrial. As has been recognized by the Applicant, there appears to be no specific statutory direction for an administrative proceeding for a change in the nature of use, and we would submit that the constitution and statutes of this State are presently designed to prevent such a change, unless the

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In the Johnston case the applicant proposed to move the point of diversion some four miles above the reservoir. The company withheld its consent to the transfer and the court properly denied the right to make said transfer without this requisite consent. The court stated at 69 Idaho 139:

> "Nowhere in the cited statutes or decisions or elsewhere have we been able to find any recognition of a right on the part of a shareholder in a water corporation to change his point of diversion and place of use, without the consent of the corporation, to a place where he could not be served by the irrigation system of the corporation. The exercise of such a right would tend to disrupt the unity of the corporation and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation. This is especially illustrated by this instant case where the appellant seeks to convert his pro-rata share in storage waters into a right to divert and use the natural flow of the stream before the same reaches the reservoir and at a place entirely outside the distribution system and beyond the control of the respondent; thus taking from the respondent its right of distribution and placing such distribution under the control of the State Reclamation Engineer."

Under the language given above, the proposed transfer was denied without the requisite consent because it would move the waters "entirely outside the distribution system and beyond the control of the respondent; thus taking from the respondent its right of distribution and placing such distribution under the control of the State Reclamation Engineer." Similarly, if the proposed application herein is allowed, your Applicant will be transferring its waters to a point and place beyond the control of Georgetown Canal Company, and placing them under the control of the State Department of Water Resources.

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town Canal System. If this is true, then the consent provision of the statute would have no purpose and be of no value to the canal company, because its various users would be free to abandon at will the water works under the control and maintenance of the company and use other facilities. The Georgetown Canal Company clearly does not have any direct power or control over the entire Georgetown Creek, but rather it is controlled by the Department of Water Resources and should not be considered to be part of the Georgetown Canal "System". The canal company does, however, have power and control over its various ditches and canals that divert water from Georgetown Creek. If the term "system" is limited to only include those water works or facilities which are owned, maintained or operated by the canal company, then the statute takes on a reasonable meaning and interpretation.

In Johnston v. Pleasant Valley Irrigation Company, Ltd., 69 Idaho 139, 141, 204 P2d 434 (1949), the corporation's facilities were described as follows:

> "It owns, maintains and operates a small reservoir in Ada County, Idaho. It collects and stores water in its reservoir and distributes the same through its system of ditches and canals to its shareholders for irrigation and domestic use."

The reservoir or collecting system of the canal company was properly included as part of the entire "system" because it was owned, maintained and operated by the canal company. The Georgetown Creek, however, is not owned, operated or controlled by the Georgetown Canal Company and is not part of its "system" under I. C. 42-108.

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I

I. C. 42-108 (Supp. 1974) provides in part:

"The person entitled to the use of water or owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of the constitution and statutes of this state, may change the point of diversion, and/or may voluntarily abandon the use of such water in whole or in part on the land which is receiving the benefit of the same and transfer the same to other lands, if the water rights of others are not injured by such change in point of diversion or place of use, provided; if the right to the use of such water, or the use of the diversion works or irrigation system is represented by shares of stock in a corporation or if such works or system is owned and/or managed by an irrigation district, no change in the point of diversion or place of use of such water shall be made or allowed without the consent of such corporation or irrigation district, except to lands which may be irrigated through the same system, . . . "

It is the Protestants' position that the Department of Water Resources may not grant the proposed change in point of diversion and place of use requested herein, because the requisite consent of Georgetown Irrigation Company has been withheld. Your Applicant has stated that this consent is not required, because the proposed change would be to "lands which may be irrigated through the same system". Although the term "system" is not defined in the statute, it clearly must be limited to some definable area to give the statute a valid purpose and meaning. We would suggest that the consent provision of I. C. 42-108 is designed to help the canal companies and irrigation districts protect and maintain their respective water rights and facilities by allowing them to require that their waters be used only in areas and through systems under their power and control. Your Applicant is of the position that the entire water shed and drainage area of the Georgetown Creek is part of the George-

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Kent W. Foster of
HOLDEN, HOLDEN, KIDWELL, HAHN & CRAPO
P. O. Box 129
Idaho Falls, Idaho 83401
Telephone: 523-0620

BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

IN THE MATTER OF PROTEST AGAINST APPROVAL OF APPLICATION FOR TRANSFER OF WATER RIGHT NO. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION.	Case No. PROTESTANTS' BRIEF

This brief is submitted on behalf of the Protestants to the application of Agricultural Products Corporation to transfer the waters of Georgetown Creek upstream from its present place of diversion and use and to change the nature of use from agricultural to industrial. The Protestants' arguments are limited herein to discussion of the following issues:

1. The effect of I. C. 42-108 where the consent of the corporation, Georgetown Irrigation Company, has been withheld and,

2. The right of Agricultural Products Corporation to change the nature of use of its water, and the authority of the State Department of Water Resources to grant said change in the nature of use.

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WILLIAM S. HOLDEN
R. VERN KIDWELL
FRED J. HAHN
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KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER

ARTHUR W. HOLDEN (1877-1967)
ROBERT B. HOLDEN (1911-1971)

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NOV 18 1974
Department of Water Resources
Eastern District Office

November 26, 1974

Mr. Ronald D. Carlson
Acting District Engineer
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Application for Transfer No. 11-0290 - Brief

Dear Mr. Carlson:

Enclosed is the Protestants' Brief to the above entitled matter which we are submitting in regards to those issues which the parties have agreed to discuss at this time.

Very truly yours,

Kent W. Foster

KWF:jr
cc: Wallace M. Transtrum
encl

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BEFORE THE DEPARTMENT OF WATER RESOURCES OF
THE STATE OF IDAHO

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In the Johnston case the applicant proposed to move the point of diversion some four miles above the reservoir. The company withheld its consent to the transfer and the court properly denied the right to make said transfer without this requisite consent. The court stated at 69 Idaho 139:

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It should also be pointed out that the strict wording of the exception to I.C. 42-108 applies only to "lands which may be irrigated through the same system". (Emphasis added) The Applicant not only wants to change its point of diversion to lands outside of the system, but also to lands which may not be irrigated. The term "irrigated" should be given significance in order to preserve the statute with a valid purpose and meaning. Irrigation and canal companies have been formed and developed with the purpose of providing waters to needed farm lands for irrigation. If the water users are allowed to arbitrarily abandon the farm lands and divert the company's waters to other uses, then this will also "tend to disrupt the unity of the corporation and to impair the very purpose for which the same was formed." 69 Idaho 139. Therefore, we submit to the Department that I.C. 42-108 is directly applicable to the proposed application herein, and the said application may not be granted as long as the Georgetown Canal Company's consent is withheld.

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As is mentioned above, the rights of a user or consumer are given in secs. 4 and 5, art. XV of the Idaho Constitution. Article XV, Section 4 provides:

"Sec. 4. Continuing rights to water guaranteed.--Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental or distribution thereof, such sale, rental or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law." (Emphasis added)

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the right as a mere "user" or "consumer" to change its nature of use from the agricultural division of use to the completely separate industrial division of use.

Your Applicant has made reference to I. C. 42-221(b) (Supp. 1973), which provides for a fee to be paid for the filing of an application for a change in the nature of use. This statute does not necessarily mean that the right to change the nature of use and keep the prior water rights is approved by the legislature. We are of the position that the nature of use may be changed, but to do this it is required that a new permit be issued for a new water right and the old water right and priority date be abandoned. No one has questioned the right of an individual or corporation to apply for a change in the nature of use, when a new water right and priority date is sought. Therefore, it was natural for the legislature to provide for a filing fee upon the application for a new water right resulting from the change in the nature of use.

It should also be noted that I. C. 42-222(2) (Supp. 1973), provides in part:

> "All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the <u>beneficial use for which it was appropriated</u> and when any right to the use of water shall be lost through non-use or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter." (Emphasis added)

This section specifically provides that failure to apply the water to the beneficial use "for which it was appropriated" shall result in a forfeiture. It would appear that the legislature has at least implied that a change in the nature of use of water results in a new water right being acquired and the old water right is either eventually forfeited or abandoned.

We would submit to the Department that the Applicant's water rights herein are limited to Article XV, Section 4 of the Idaho Constitution, and I. C. 42-914. Under these sections, its rights to the use of water are limited exclusively to agricultural and domestic purposes. If the Applicant desires to change its nature of use from agricultural to industrial, it may do so only by applying for a new water right with its accompanying later priority date. If the Department should grant to the Applicant the right to change its nature of use in the manner it has now proposed, then it would be arbitrarily expanding the Applicant's rights beyond those limitations expressly given in the Constitution and statutes of the State of Idaho.

Respectfully Submitted,

Kent W. Foster
Attorney for the Protestants

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SEP 16 1974
Department of Water Resources
Eastern District Office

THE NEWS-EXAMINER

MONTPELIER, IDAHO

AFFIDAVIT OF PUBLICATION

STATE OF IDAHO,)
County of Bear Lake,) ss.

W. Jerome Taylor

being first duly sworn, deposes and says he is Publisher and Foreman of the **News-Examiner**; that the said **News-Examiner** is a weekly newspaper published at Montpelier, County of Bear Lake, State of Idaho, of general circulation in said County and State.

That the notice attached was published in the said **News-Examiner,** and not in a supplement, for two successive weeks, commencing with the issue dated August 22, 19 74 and ending with the issue dated August 29, 19 74

W. Jerome Taylor

Publisher and Foreman

Subscribed and sworn to before me this 13th day of September, 19 74

Nola [illegible]
Notary Public.

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NOTICE OF PROPOSED CHANGE OF WATER RIGHT
No. 11-0290

Notice is hereby given that Agricultural Products Corporation having shares in Georgetown Irrigation Company, Georgetown, Idaho, has applied to the Department of Water Resources for a change in the point of diversion and place of use of the waters of Georgetown Creek tributary to Bear River. The right sought to be changed is evidenced by decree to Georgetown Irrigation Company in case of Utah Power & Light Company - vs. - The Last Chance Canal Company, et al, dated July 14, 1920 in U. S. District Court, District of Idaho, Bear Lake County and is recorded as follows:

Amount: 70 c.f.c.
Priority: May 1, 1881
Decreed point of diversi...
SE¼NE¼, Sec. 4, T. 11S, R. 44E; SW¼SE¼, Sec. 32, T. 10S, R. 44E, B. M., Bear Lake County;
Decreed place of use:
Sec. 1, 11, 12, 13, 14, & 24, T. 11S, R. 43E; Sec. 5, 6, 7, 8, 18, & 19, T. 11S, 44E, B. M.
The water is used to irrigate 3,500 acres.

TO BE CHANGED AS FOLLOWS

The water will be diverted within the SE¼SW¼, Sec. 35, T. 10S, R. 44E, using only 2.08 cfs and the remainder of the right will continue to be used by Georgetown Irrigation Company users at the old points. The water will be used for manufacturing purposes within the S½, Sec. 24, N½, Sec. 25, T. 10S, R. 44E, B. M.

Any protest against approval of the above proposed change of water right must be filed with the Idaho Department of Wafer Resources, 1515 Lincoln Road, Idaho Falls, Idaho 83401, on or before September 9, 1974.

R. KEITH HIGGINSON
Director

Published in The News-Examiner, Montpelier, Idaho on August 22 and August 29, 1974.

(a-22|29)

T-1317 .1-84

Commencing at a point 1566 feet E and 3419 feet S of the NW corner of Section 6, T 11 S, R 44 EBM, running thence S 38° W 243'; thence N 86° W 130'; thence S 50°45' W 435'; thence S 15°30' W 130'; thence E 610'; thence N 578' to the place of beginning, containing 5.12 acres, of land, more or less.

Melvin Clark Property (cont):

T-1318

Also commencing at a point 3 chains E from the NW corner of the SW¼ of the SW¼ of said Section 6, and running thence S 26° E 6 chains and 92 links; thence S 64° W 1.34 chains to head of ditch; thence NW, meandering along said ditch 3.66 chains; thence N. 4.85 chains; thence E 1.50 chains, more or less to place of beginning, and containing lacre and 148 square rods, more or less.

T-1319 =

Also commencing 6 rods W from the NE corner of the SE¼ of the SW¼ of said Section 6 and running thence W along Government line 34 chains; thence S 26° E 8 chains; thence E with variation Northward to a point within 4 chains from starting point; thence N 43°25' E 4 chains to place of beginning, containing 18 acres, more or less.

T-1290

Also commencing at a point 6 rods W from the NE corner of the SE¼ of theSW¼ of said Section 6 and running thence W along Government line 74 rods; thence North 40 rods; thence S 62° E 541'; thence S 57°15' E 833', more or less, to place of beginning, containing 9½ acres, more or less.

E. L. Solum Property:&

Russell Solum Property:

The southeast quarter of the Northwest quarter; also Lot No. 3 of Section 6, Township 11, South, Range 44 East of Boise Meridian; containing 81.41 acres of land. Together with 34 shares of capital (water) stock, Georgetown Irrigation Company, a corp., and ditch and ditch rights.

Also, the following described property:

The northeast quarter of the Southwest quarter of Section 6, Township 11 South, Range 44 East, Boise Meridian in Idaho.

SAVING AND ESCEPTING therefrom the following described land, to-wit: Commencing at a point 6 rods West from the Northeast corner of the Southeast Quarter of the Southwest quarter of Section 6, Township 11 South, Range 44 East, Boise Meridian in Idaho; running thence West along Government line 74 rods; thence North 40 rods; thence South 62° E. 541 feet; thence South 57°15' E. 833 feet, more or less, to the place of beginning.

Frank Bartschi Property:

70 acres in Section 31, T 10 S., R 44 E., Bear Lake County, Idaho, described as follows:

Commencing at a point at the southeast corner of SW¼ of Section 31 in Township 10, South of Range 44 East and running thence East 660 feet; thence north 90° 46,200 feet; thence west 90° 660 feet; thence south 90° 46,200 feet to the place of beginning and containing 70 acres.

130 acres in Section 36, T 10 S., R. 43 E., Bear Lake County, Idaho, described as follows:

Commencing at a point at the southwest corner of the SE¼ of Section 36 in Township 10, South of Range 43 East and running thence north 1320 feet; thence east 90° 1980 feet; thence north 90° 3300 feet; thence east 90° 660 feet; thence south 90° 46,200 feet; thence west 90° 2640 feet to the place of beginning and containing 130 acres

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Doris S. Hoff Property:

Township 11 South, Range 43 East of Boise Meridian; Lots 4 and 5 in Section 6, Township 11 South, Range 44 East of Boise Meridian; and Lots 1 and 2 in Section 1, Township 11 South, Range 43 East of Boise Meridian, containing 179.85 acres of land, more or less.

Wayne Clark Property:

T-4327 - Beginning at a point 434 feet North and 194 feet North, 63°45' East from the corner of Sections 5, 6, 7 and 8, Township 11 South, Range 44 East, Boise Meridian, running thence South 63°45' West 1,014 feet, more or less, to the Northeast corner of Clinton Hayes land; thence North 26 15' West 597 feet; thence North 63°40' East 750 feet; thence South 49°45' East along the creek 679 feet to the point of beginning and containing 12.35 acres of land; no shares of water are included.

Melvin Clark Property:

T-1324
Commencing at a point 3 chains W from NE corner of the SE¼ of SW¼ Section 6, T 11 S, R 44 EBM, and running thence W 31 chains; thence S 53°25' W 13.79 chains; thence S 26° E 7.60 chains; thence N 53°25' E 13.79 chains; thence S 26° E 10.10 chains; thence N 68°20' E 20.96 chains; thence N 28°35' E 6.60 chains to place of beginning, containing 4.57 acres of land, more or less. Save and except therefrom the two (2) following described portions thereof, to-wit: Commencing at a point 6 rods W from the NE corner of the SE¼ of SW¼ of Section 6, T 11 S, R 44 EBM, compass variation 18° E and running thence W along the Government survey 34 chains; thence S 26° E 8 chains; thence E with a variation Northward to a point 4 chains S 43°25' W from the starting point; thence N 43°25' E 4 chains to the place of beginning, containing 12 acres, more or less, and commencing at a point 34 chains W from NE corner of SE¼ of SW¼ of Section 6, T 11 S, R 44 EBM, and running thence S 53°25' W 13.79 chains; thence S 26° E 7.60; thence N 53°25' E 13.79 chains; thence N 26° 7.60 chains to the place of beginning.
T-1354
Commencing at NE corner of SE¼ of SW¼ of Section 6, T 11 S, R 44 EBM, in Georgetown, Bear Lake County, State of Idaho, compass variation 18° E, running thence W along Government line 3 chains; thence S 43°25' W 10 chains and 73 links; thence S 68°20' W 20 chains and 96 links; thence S 26° E 11 chains and 33 links; thence N 62°30' E 16 chains 45 links; thence N 26° W 68 links; thence N 54° E 16 chains and 90 links; thence N 25° W 11 chains and 52 links, more or less to the point of beginning and containing 35 37/100 acres of land, more or less.
T-1391
Section 6 Twp. 11 S., R. 44 E., Frac. Lot 6 as follows:
37.25 Acres Approximately
Commence at NW corner Lot 6 thence S 40 rods; thence E 17 rods; thence S 40 rods; thence E 7[illegible] rods, more or less to SE corner of Lot 6, thence N [illegible] rods; thence W 15 rods, more or less to [illegible]

MICROFILMED

NCY
8/6/74

COMMENTS ON 11-0290
APPLIC. FOR XFER

(1) NAME of APPLICANT + SIGNATURE IS IN-CONSISTENT,

(2) SIGNATURE AN ELECTED OFFICIAL OR IS POWER OF ATTORNEY REQUIRED?

(3) What evidence needed to demonstrate that applicant actually holds the shares claimed?

(4) CAN shareholder act independently of parent rightholder (Georgetown Indus. Co.)?

(5) MAP appears to agree with typed information for new use.

(6) Point of diversion is on Caribou USFS land. Need an easement - Coordinate w/ fc applic. # 11-7063.

(7)

MICROFILMED

RECEIVED
SEP 30 1974
Department of Water Resources
Eastern District Office

STATE OF IDAHO

DEPARTMENT OF WATER ADMINISTRATION

POWER OF ATTORNEY

The undersigned holder (s) of Permit (Application) No. 11-0290 of the Department of Water Administration of the State of Idaho hereby nominates

Wallace M. Transtrum, whose address is 35 West Center Soda Springs, Idaho 83276,

as attorney-in-fact, with full authority to act for and on behalf of the undersigned in all matters pertaining to the above numbered permit or application. Such acts shall include, but not be limited to, the filing of application, receiving of all notices, the signing and filing of applications for extension of time and for amendment of said Permit, and the submission of proofs of completion of works and beneficial use of water.

Dated this 18 day of September, 1974.

Dean F Cowley

AGRICULTURAL PRODUCTS CORPORATION
By: Dean F. Cowley
Vice-President

STATE OF IDAHO)
) ss
County CARIBOU)

On this 18 day of September 1974, personally appeared before me the signer (s) of the above instrument, who duly acknowledged to me that he (she) (they) executed the same.

Ferris L. Call
Notary Public

My Commission expires:
April 1977

MICROFILMED

January 7, 1975

Re: Application for Transfer of Water
Right No. 11-0290

Agricultural Products Corporation
Georgetown,
Idaho 83239

Gentlemen:

Enclosed herewith is a copy of your Application for Transfer No. 11-0290 which has been DENIED. Also enclosed is a copy of the Memorandum Decision.

If you have any questions regarding this matter, please contact us.

Sincerely,

BOBBY D. FLEENOR
Chief, Water Rights

BDF:DR
Enclosures

cc: Mr. Wallace M. Transtrum
Mr. Floyd Clark
Georgetown Irrigation Company
Mr. Russell D. Stoker, Watermaster

Enc: Copy of Memorandum Decision

MICROFILMED

February 20, 1975

Wallace M. Transtrum
35 West Center
Soda Springs, ID 83276

Dear Mr. Transtrum:

Enclosed are the certified copies, as requested by your secretary, of Application for Transfer No. 11-0290 and the Memorandum Decision and Order issued on this application.

The fee for these certified copies is $5.00, which you may remit to this office at your earliest convenience.

Sincerely,

Jan Grover
Secretary

JG
Enclosure

Transfer No. 1664

11 0290

PERMIT NO. 11-0290

No action of any kind is to be taken on this permit without first contacting ~~the Attorney General~~ NATHAN HIGER, since it is the subject of litigation in the State Courts.

2-24-75

[redacted] [redacted]

INTER-DEPARTMENT MEMO — 1

FROM Jo Beeman [redacted]

DATE 27 May 1977

TO Bob Fleenor

SUBJECT Neal v. Harris (Oneida Co.) 17-2063
Agricultural Products v. IDWR (Bear Lake Co.) 11-0290

Kent Foster has requested dismissal of both the cases on the grounds that an appeal bond was not filed as required by Rule 83(h) of the Idaho Rules of Civil Procedure.

That will be too bad if Kent is sucessful. No questions will be answered Bob-

Jo
SIGNATURE

11-0290

May 12, 1976

Mr. Kent Foster
Holden, Holden, Kidwell, Hahn & Crapo
Box 129
Idaho Falls, Idaho 83401

Dear Mr. Foster:

Enclosed please find copy of Transfer #1664 11-0290 under the name of Agricultural Products Corporation/Georgetown Irrigation Company.

The charge for the copy is $1.25 per billing attached. Please remit at your convenience.

Please advise if we can be of further assistance.

Sincerely,

Marcia L. Brown
Records Supervisor

mlb
Enc.

11-0290

INTER-DEPARTMENT MEMO — 1

DATE July 23, 1976

FROM Ron

TO Bob Fleenor

SUBJECT No. 11-7063 Agricultural Products Corporation

On June 26, 1975, you wrote to Wallace Transtrum, Attorney for Ag Products, requesting a copy of the petition appealing the Department's decision on Application for Transfer No. 11-0290. Has there been any further correspondence with Ag Products during the last year?

RECEIVED
JUL
Department of Water Resources

SIGNATURE

1980 OPINION NO. 77

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12938

IN THE MATTER OF THE APPLICATION FOR AND PROTEST AGAINST APPLICATION FOR TRANSFER OF WATER RIGHT No. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION. BEKER INDUSTRIES INCORPORATED, formerly AGRICULTURAL PRODUCTS CORPORATION, Applicants-Appellants, v. GEORGETOWN IRRIGATION DISTRICT, Protestant-Respondents.	Pocatello, September Term, 1979 Filed: April 18, 1980 R. H. Young, Clerk

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bear Lake County. Hon. Francis J. Rasmussen, District Judge.

Appeal from summary judgment dismissing an appeal of Beker Industries, Inc. from a decision of the director of the Idaho Department of Water Resources. Judgment affirmed.

A. Bruce Larson, of Transtrum & Budge, Soda Springs, for applicants-appellants.

Kent W. Foster, of Holden, Holden, Kidwell, Hahn & Crapo, Idaho Falls, for respondent.

McFADDEN, J.

This is an appeal from a summary judgment of the district court dismissing applicant-appellant Beker Industries' (Beker's) appeal from a ruling of the director of the Department of Water Resources dismissing Beker's application for transfer of the point of diversion, and place and nature of use of its water right.

The principal issue before the court in this appeal is whether the Director of the Department of Water Resources has the statutory authority to approve an application by a holder of a water right to change the use of that water right from agriculture to manufacturing.

Protestant-respondent Georgetown Irrigation District (GID) is entitled to divert up to 70 cubic feet per second (cfs) of water from Georgetown Creek between April and October for irrigation. It obtained rights to this water by decree of the federal district court for the district of Idaho in Utah Power & Light Co. v. Last Chance Canal Co., (known as the "Dietrich Decree"), July 14, 1920.

In the mid-1950's Central Farmers, Inc. acquired real property in Georgetown Canyon which included 104 shares of stock in GID. Subsequently these shares of stock and apparently the real property as well were transferred to El Paso Products Co., and then to Agricultural Products Company, which later merged with Beker Industries. The surviving corporation is applicant-appellant, Beker Industries (Beker).

Because Beker wishes to produce elemental phosphorous in Georgetown Canyon, it petitioned the Department of Water Resources (DOWR), on August 2, 1974, to allow it to make a change in point of diversion, place of use, and in nature of use of the water represented by its 104 shares of stock in GID. The change in place of use was to be to a place "several miles upstream" from the land which the 104 shares of stock had originally been used to irrigate; the change in point of diversion was to be to a place "some distance upstream" from the first of GID's diversion works; and the change in nature of use was to be from agri-cultural-irrigation to manufacturing.

GID refused to consent to the requested changes, and protested to DOWR. On October 18, 1974, the director of DOWR held a hearing, at which the parties agreed to submit two issues for resolution before any fact finding by the director. These were, first, whether GID's consent to the proposed changes in point of diversion and place of use was required, and second, whether, in any case, DOWR had authority to permit a change in

the nature of use of an established appropriation. These same two issues are the essence of this appeal.

On December 26, 1974, the director of DOWR issued his memorandum decision in which he held, first, that Beker's proposed changes in point of diversion and place of use were not "to lands which may be irrigated through the same system," and that GID's consent to the changes was thus required; and, second, that DOWR was not empowered to permit a change in the nature of use of the established appropriation.

Thereafter, on February 21, 1976, Beker appealed to the district court for relief from the director of DOWR's decision. The appeal was taken pursuant to I.C. § 42-222(3) which provides for a "trial de novo" at the district court level. GID and DOWR filed responses to Beker's appeal. Two months later GID filed its motion for summary judgment, on the ground that Beker had not obtained GID's consent to change the point of diversion and place of use (I.C. § 42-108) and on the additional ground that the Director could not authorize a change in nature of use of the water. This motion was supported by reference to the proceedings before and briefs submitted to the director of DOWR. No briefs in support of or in opposition to the motion for summary judgment were filed and no hearing was held by the district court at this time. A year later GID filed a motion to dismiss based on Beker's failure under I.R.C.P. 83(h) to file a cost bond on appeal to the district court. Rule 83(h) was promulgated on January 1, 1975, and rescinded effective July 1, 1977. Both GID and Beker submitted briefs to the court on the motion to dismiss which discussed Rule 83(h).[1]

The district court entered an order stating that the matter was before it on GID's motion for summary judgment, and

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1 At oral argument, GID conceded that I.R.C.P. 83(h) was not applicable to this case.

discussed the merits of the motion. Concluding that the decision of the director of DOWR was correct, it dismissed Beker's appeal. Beker thereafter moved for relief from the order, for its amendment, reconsideration and to have it set aside. These motions were denied.

Before consideration of the principal issue presented by this appeal, two procedural problems must first be discussed. The first is whether it was necessary for appellant to post an appeal bond pursuant to I.R.C.P. 83(h) on taking the appeal from the DOWR ruling to the District Court as asserted by respondent when it moved in the district court on May 5, 1977, to dismiss appellant's appeal for failure to do so. Respondent contends that if for any reason the ruling on the motion for summary judgment is not sustained, the appeal to the district court should be dismissed for lack of bond. On May 25, 1977, this court rescinded the provisions of I.R.C.P. 83(h) effective July 1, 1977, eliminating any necessity of posting a bond on an appeal to the district court. Here the trial court did not pass on this motion, but on February 14, 1978, entered summary judgment dismissing the action, not on the grounds of failure to post bond, but on other grounds. No decision being rendered until after rescission of the requirement, there would be no basis for dismissing the appeal. See, Erickson v. Amoth, 99 Idaho 907, 591 F.2d 1074 (1978).

The next procedural question presented deals with whether use of a summary judgment procedure is permissibl on an appeal under I.C. § 42-222(3) from a ruling by the director of DOWR. It is our conclusion that such procedure is permissible. I.C. § 42-222(3) authorizes an appeal from a ruling by the DOWR approving or rejecting an application "to change the point of diversion, place, period of use or nature of use of water under an established right ...." It provides the procedure to be used

to perfect such an appeal, and states, "[s]uch an appeal shall be heard and determined de novo." The term "de novo" generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. Black's Law Dictionary 5th ed. 1979, p. 649. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction. Collier & Wallis v. Astor, 70 P.2d 171, 173 (Cal. 1937). A moving party is entitled to a motion for summary judgment when there is no genuine issue as to any material fact. I.R.C.P. 56(c). All the rules of civil procedure apply uniformly in the district court in all actions, proceedings and appeals of a civil nature. I.R.C.P. 1(a). Therefore, on appeal from the magistrate's court to the district court, a motion for summary judgment is applicable on trial de novo when there is no genuine issue as to any material fact. Yribar v. Fitzpatrick, 87 Idaho 366, 373, 393 P.2d 588, 591 (1964); I.R.C.P. 56(c). The same reasoning should apply to an appeal from a ruling of the Director of DOWR to the district court, and we so hold.

In considering the merits of this appeal, the essential issue to be resolved is whether the director of DOWR has been granted the authority to approve an application for a requested change in the nature of the use of water.[2] The record reflects that appellant's right to the use of the water was by

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2 Other prior appropriation jurisdictions have recognized a common law right to change the nature of use of water without losing one's appropriation date. See Ramelli v. Irish, 31 P. 41 (Cal. 1892); Gallagher v. Montecito Valley Water Co., 35 P. 770 (Cal. 1894); Seven Lakes Reservoir Co. v. New Loveland and Greeley Irrig. and Land Co., 93 P. 485 (Colo. 1907); Power v. Switzer, 55 P. 32 (Mont. 1898); In re Water Rights in Alpowa Creek, 224 P. 29 (Wash. 1924); 2 Kinney on Irrigation and Water Rights, 2d ed. §§ 869-73 (1912). This court has never had to consider this issue, nor is such an issue presented in this case. Herein we address only the issue of whether the DOWR has the authority to grant the requested change in nature of use.

reason of ownership of 104 shares of stock of respondent GID.[3] The record also discloses that respondent GID was decreed its water right in the case of Utah Power & Light Company v. The Last Chance Canal Company, et al., dated July 14, 1920, in the United States District Court, the so-called "Deitrich Decree." Appellant by its petition before the DOWR stated that it desired to change its place of use and to

> "change from agricultural use to manufacturing to facilitate the operation of an elemental phosphorus producing plant. This application requests a change in the nature of use from irrigation to manufacturing."[4]

The DOWR denied the petition on the basis that it did not have the power to grant a change in nature of use. The district court did not discuss this issue. (District court order of February 14, 1978, C.T. p. 32)[5] We agree that the DOWR did not have the power and the respondent is entitled to a judgment as a matter of law. Because the answer to the question of authority is so resolved, we need not address the question of whether the proposed changes in point of diversion and place of use were to places within GID's system. It appears from the record that the only purpose for these changes was to produce elemental phosphorus.

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3 It is to be noted that in the title of this appeal, respondent has been referred to as Georgetown Irrigation District, although appellant in its petition for appeal in the district court alleged respondent was an irrigation company, which appellant "is informed and believes is a corporation organized under the laws of the State of Idaho." This allegation in the petition was admitted by the response to the petition filed by respondent and the response of the director of DOWR.

4 The petition referred to the fact that the recorded point of diversion was in the SE 1/4 NE 1/4 Sec. 4, Twp. 11S R. 44 E.B.M., Bear Lake Co., and that additional points of diversion are SW 1/4 SE 1/4 Sec. 32, T. 10 S. R. 44 E "The points of diversion are as changed by the approved transfer dated 7/15/1971."

5 "The facts that the plaintiff petitioner herein, the stockholder user, desires to change the point of diversion and had not obtained the consent of corporation owner, and in fact the corporation owner refuses to give consent to said change of point of diversion, fully determines this cause of action." District Court Order of February 14, 1978.

Beker requested the changes pursuant to I.C. § 42-108 and 222(1), the same sections relied upon by the DOWR in rendering its decision in this case. These sections speak to power to grant changes in place of use and point of diversion, but not the nature of use. There is no specific language allowing the director of DOWR to approve change in nature of use. The statutes in question were repealed and reenacted in 1969. 1969 Sess. Laws, ch. 303, p. 905-909. In the original version of the bill, language specifically allowing for a change in the nature of use of water was included. Before passage, the bill was amended twice. In the third and final version, the legislature struck the language providing for the change in the nature of use. By addressing the question directly and eliminating the provision in the amendment, this court cannot interpret this legislative action in any other manner than to say that it is not the intent of the legislature to give the DOWR the authority to grant a change in nature of use or allow an individual to make it without the possibility of abandonment.

In addition, during the 1978 legislative session, House Concurrent Resolution no. 48 was passed stating that water users should be allowed to change the nature of use of their own water rights and that I.C. § 42-222 should be amended to allow such changes. Also adopted was I.C. § 42-1736A which states that it is the legislative intent in the public interest that H.C.R. 48 be recognized as the guide for the state water plan. However, I.C. § 42-222 was not amended. Without such revisions, there are no provisions authorizing the DOWR to approve a change in the nature of use. An administrative agency like the DOWR has only such powers as the statute or ordinance confers. Idaho Const. art 15 § 7; I.C. § 42-1734, 1736; 1 Am.Jur.2d § 69, p.

865. See also Peters v. Hobby, 349 U.S. 331, 345, 99 L.Ed. 1129, 1140-41, 75 S.Ct. 790, 797 (1955).

As the appellant correctly points out, references to a change in the nature of use in I.C. § 42-221 providing for filing fees and I.C. § 42-222(3) providing appeal procedures remained at the time of this action. The fact that the references in these sections existed is not definitive. As the director of DOWR stated in his memorandum opinion, the remaining references appear to be an oversight in omission. This interpretation is supported by the fact that in 1978, during the same legislative session that I.C. § 42-1736A was passed, the legislature removed the reference to change in the nature of use from I.C. § 42-221. 1978 Sess. Laws ch. 143, p. 324. The remaining reference exists in § 42-222(3).[6]

In light of the more definitive action of the legislature outlined above, we cannot rely on a passing reference in § 42-222(3) for authority to allow the change in the nature of use requested here. While it may not make sense to give the DOWR authority to grant changes in place of use and point of diversion while not giving them power to grant such changes in the nature of use, we leave that incongruity to the legislature to remedy if they see fit. Until the current statutory provisions are amended there is no authority to grant a change in nature of use of water.

We have examined the cases cited by appellant in support of its claim that the DOWR was authorized to change the nature of use of water and find them unpersuasive in light of the above legislative actions. In Hard v. Boise City Irrig. and Land

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6 There is also a reference to a change in the nature of use in § 42-211. This section was originally enacted in 1907. In 1967, the legislature replaced it with totally new provisions although it was called an amendment. It refers to changes in permits and seems by its history to be part of I.C. §§ 42-205-210. It does not apply to the instant case as the water right was acquired by decree, not permit.

Co., 9 Idaho 589, 76 P. 331 (1904), the court only addressed the question of whether a change in place of use of water could be made. The court, however, quoted two cases, one federal and one California, which allowed changes in nature of use of water (9 Idaho at 598). As this language was unnecessary for the resolution of this case, we find it unpersuasive. In Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915), the court denied the change requested because the change was from non-consumptive to consumptive use and would injure the water rights of other appropriators, The court, therefore, did not address the specific issue presented here. Finally, in Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937), the only change made was from one type of mining to another. There is a distinction between a change from one generic use to another as requested here (agriculture to manufacturing) versus a change within a category of use in light of the fact that the Idaho Constitution grants a priority of appropriation based on the nature of use. (Art. 15, § 3) The change here would lower the priority of the appellant for appropriation where the change in Zezi did not. There are no cases in Idaho where a change from one type of use to another has been upheld.

Therefore, DOWR was without authority to authorize a change in the nature of the use and therefore there are no factual issues in dispute. We decline, to address the other issues raised by the appellant, and affirm the district court's granting of the motion for summary judgment. Costs to Respondent.

DONALDSON, C.J., SHEPARD, BAKES and BISTLINE, JJ., concur.

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

NO. 11-0290/1664

Notice is hereby given that Georgetown Irrigation Company of Georgetown, Idaho has applied to the Department of Water Administration for a change of point of diversion of the waters of Georgetown Creek, tributary to Bear River.

The right sought to be changed is evidenced by Decree to Georgetown Irrigation Company in Case of Utah Power & Light Company vs. the Last Chance Canal Company and is recorded as follows.

Amount: 70 c.f.s. Priority: May 1, 1881. Point of Diversion: Corner common to Sec. 5, 6, 7 and 8, or T. 11 S, R. 44 E, B. M., Bear Lake County. The water is used for irrigation purposes within Sections 1, 11, 12, 13, 14 and 24, T. 11 S, R. 43 E, and Sections 5, 6, 7, 8, 18 and 19, T. 11 S, R. 44 E, B. M.

TO BE CHANGED AS FOLLOWS Point of Diversion: SE¼NE¼, Sec. 4, T. 11 S, R. 44 E, and SW¼SE¼, Sec. 32, T. 10 S, R. 44 E, B. M.

Any protests against approval of the proposed change of water right application must be filed with the Department of Water Administration on or before May 17, 1971.

R. KEITH HIGGINSON
Director

Published in The News-Examiner, Montpelier, Idaho on April 29, 1971 and May 6, 1971.

(a-29; m-6)

Transtrum & Budge, Chartered
Attorneys for Appellant-Applicant
240 S. Main-P.O. Box 833
Soda Springs, Idaho 83276
Telephone: (208) 547-3944

A. Bruce Larson, Associate

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

IN THE MATTER OF THE APPLICATION FOR AND PROTEST AGAINST APPLICATION FOR TRANSFER OR WATER RIGHT NO. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION.	Case No. 2796
BEKER INDUSTRIES INCORPORATED, formerly AGRICULTURAL PRODUCTS CORPORATION, Applicants-Appellants, vs. GEORGETOWN IRRIGATION DISTRICT, Protestant-Respondents.	NOTICE OF APPEAL

TO THE ABOVE-NAMED RESPONDENTS, GEORGETOWN IRRIGATION DISTRICT AND ITS ATTORNEY, KENT W. FOSTER, Idaho First National Bank Building, Idaho Falls, Idaho, 83401, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN:

1. The above-named appellants, Beker Industries, formerly Agricultural Products Corporation appeals against the above-named respondents to the Idaho Supreme Court from an Order of Dismissal entered in the above-entitled action on the 14th day of February, 1978, Honorable Francis J. Rasmussen presiding.

2. A reporter's transcript is not requested.

3. The appellant requests the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:

(a.) Application to Idaho Water Resources by Agricultural Products Corporation.

(b.) Protest by Georgetown Irrigation Company.

(c.) Memorandum Decision of the Department of Water Resources of the State of Idaho.

4. I certify:

(a.) Not applicable.

(b.) Not applicable.

(c.) (1) That the estimated fee for preparation of the Clerk's or Agency's records has been paid.

(d.) That the appellant filing fee has been paid.

(e.) That service has been made upon all parties required to be served pursuant to Rule 20. (and the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 28th day of March, 1978.

/s/Wallace M. Transtrum
Transtrum & Budge, Chartered

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Notice of Appeal, postage prepaid, to:

Kent W. Foster
Holden, Holden, Kidwell,
Hahn & Crapo
P.O. Box 129
Idaho Falls, Idaho 83401

Hon. Wayne Kidwell
Attorney General of
the State of Idaho
Statehouse
Boise, Idaho 83701

on this 28th day of March, 1978.

/s/Wallace M. Transtrum
Transtrum & Budge, Chartered

RECEIVED
FEB 16 1978
Department of Water Resources

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

IN THE MATTER OF THE APPLICATION FOR AND PROTESTS AGAINST APPLICATION FOR TRANSFER OF WATER RIGHT NO. 11-0290 IN THE NAME OF AGRICULTURAL PRODUCTS CORPORATION.	Case #2796 O R D E R

This matter is before the Court on a motion for summary judgment.

It appears to the Court that the plaintiff's herein made application to the Department of Water Resources for transfer of the point of diversion of water and a change of character of use of water. Plaintiff's rights to the water exist by virtue of ownership of stock in an irrigation company.

The procedure for changing a point of diversion is outlined and set forth in Idaho Code 42-108. A portion of that section requires the owner of stock in an irrigation company to obtain the written consent of the corporation to change the point of diversion.

In this case, the corporation responding to the application for change of the point of diversion has refused to give consent to the transfer.

The points which control in this situation are set out in the case of Johnston vs. Pleasant Valley Irrigation Company, Ltd., 69 Idaho 139, 204 P2d 434, in which the court stated that a transfer of point of diversion without the consent of the corporation was not possible. The Court stated that the stockholde did not have any rights in changing the point of diversion, but only had a right to use the water under the direction of the corporation.

It is apparent to the Court on reading this case and other cases that the right to the use of the water vested in the corporation and the rights of the stockholder are only existant by reason of the grant of the corporation to the stockholder, and the stockholder only has those rights given to him by the corporation.

In recognizing the restriction that the corporation can apply to the water user, and the reasons therefore, the Court stated, "The exercise of such a right can tend to disrupt the unity of the corporation and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation." Thus the Court recognized that if the stockholder user had the right to change the point of diversion without the consent of the corporation, the purpose for which the corporation was originally formed would be destroyed and the corporation would not be a functioning, viable entity.

The facts that the plaintiff petitioner herein, the stockholder user, desires to change the point of diversion and had not obtained the consent of corporation owner, and in fact the corporation owner refuses to give consent to said change of point of diversion, fully determine this cause of action.

The Court will therefore not discuss the request for change of character of use of the water.

Petitioner contends that the transfer was within the system, however, the application evidences that the transfer was in the natural channel upstream and therefore not within the system.

IT IS HEREBY ORDERED AND ADJUDGED that this matter is dismissed with prejudice.

DATED this 14th day of February, 1978.

FRANCIS J. CHRISTENSEN
District Judge

cc: Wallace M. Transtrum
Nathan W. Higer
Kent W. Foster