

POOR QUALITY ORIGINAL

the law of this case was reaffirmed in *Smith v. Dunn*, 102 P. 2d 1073, 1074.

When the use is not secret or clandestine, but open, public, and notorious, the presumption of knowledge follows. It is burdened in the first instance upon the claimant to prove his title by prescription. After showing the continuous occupancy and use of the water, as shown by the owner, for more than 5 years, he establishes a prima facie case. It then devolves upon the defendant to show that the use was permissive, or without the knowledge of the defendant.

Smith v. Dunn, (Cal.) 102 P. 2d 1073, 1074.

The court notes, however, that the open and notorious use creates a presumption of knowledge. If purely a presumption, it may be rebutted or overcome by positive evidence. The court clearly holds the presumption of knowledge from the use may be rebutted. *Rodgers v. People's Water Co.*, 171 P. 2d 545, 546; *Chase v. Southern Pac. Co.* (Cal.) 171 P. 2d 712; *Smith v. Dunn*, supra. If there be such evidence it follows, if the issue be one of fact, that the positive evidence of lack of knowledge may overcome the presumption, and a finding that there was no knowledge will, therefore, under the law be sustained. See also, *Smith v. Dunn*, (Mont.) 102 P. 2d 1073.

What has been stated shows conclusively that it was not a claim of right as the parties disputing it exercised the usual acts of ownership. The diversion was open and notorious, affected by means of artificial contrivances which no one could be seen, but were actually used by representatives of appellants. The court held, from this long-continued use, might have presumed the knowledge and acquiescence of appellants; but it had the direct statements of the witnesses clearly revealing such knowledge and acquiescence. As the question of title is not involved, no amount of title by prescription is required.

Smith v. Dunn, (Cal.) 102 P. 2d 1073, 1074.

That the defendant openly and notoriously used water is not disputed, and that plaintiff, the owner, introduced no evidence tending to show want of knowledge of the defendant. We think that all of the elements of the

POOR QUALITY ORIGINAL

...the court could not find the contrary of what would
...that it could not legitimately be done, if the
...that reasonable mind might infer or be entitled
...under claim or hostile right, or with
...the finding either way, of knowledge, the extent of
...or lack of knowledge, and what the state of mind was,
...That is the chief purpose of the offer

...the court, on conflicting evidence, may find the fact was
...but with knowledge of adverse claim, by the same
...if there be evidence, as there was here, that the
...with knowledge, or without knowledge, whether under a theory
...193 7: 387; Kelly v. Smith, 27 Idaho 338,
...309. The negative or reverse of the expression in
...in *Barrett v. Smith*, (Cal.) 135 2: 199. 191 must be

...that rule is especially for the guidance of the
...The principle which controls is that, if
...is not substantial evidence in the record from which
...inference may be drawn that said elements of
...right exist, then this court as an appellate
...by the finding of the trial court."

...the other hand, when plaintiff claims the defendant
...has made a prima facie showing of a prop-
...title to the defendant, then it is incumbent upon
...by sufficient affirmative proof, to show that
...by virtue of a license or permission, or
...which would destroy the prima facie show-
...by plaintiff. (Case) And upon a prima
...showing of title by the plaintiff, it is solely the
...of the trial court to determine whether the same
...or has not been overcome or dispelled by evidence pre-
...by the defendant."

Contello v. Sharp, (Cal.) 223 7: 387, 389.

...the burden is on the claimant to prove all the elements of
...association:

POOR QUALITY ORIGINAL

... plaintiff acquired a right to more water than
... entry by reversing use for a period of 10 years.
... was upon plaintiff to show that fact."
... v. ... (Cal.) 134 P. 2d, 40.

Moreover, when the plaintiff had acquired a right
... company and use of the water for a period of 10 years
... he was the owner, he established a prima facie case
... then devolved upon the defendant to show that
... use was permissive or without the knowledge of
... defendant."
... v. ... (Cal.) 134 P. 2d, 40.

While one who asserts a prescriptive right to take
... from a stream or other source need not show the burden
... of establishing it, proof of the continuous use for an
... of the water as though he were the owner, for some time
... years, establishes a prima facie case, and then de-
... volve upon the original owner to show that the use of the
... was permissive only or without his knowledge."
... v. ... (Cal.) 30 P.(2) 660, 661-2.

As to the law, it is vigorously argued that, within a
... right is a more right to the use of water... pos-
... of it in any manner capable of giving rise to the
... If this be correct, there can be no claim based on
... right by prescription, since such title
... founded upon a possession no longer open and notorious
... the possession here pleaded; yet such title to a water
... can be required... Difficulties in the way of such
... may be, but it seems to us perfectly clear that such
... the defendant's plea ought to be enough to put a purchaser
... notice.

The burden to establish it was, however, upon the
... and the serious question is whether the
... successfully carried that burden."
... v. ... (Mont.) 134
... 1932, 1933.

Open actual knowledge of the user is insufficient for
... However, if the use made may properly be re-
... to some established right of claimant and if he is
... or notice that he is exercising it in excess of,
... to, such right."
... 230, § 402.

... v. ... (Mont.) 234 P. 1099, which, on a situation
... similar, supports the above pronouncement is especially
... applicable, in that therein the claimant attempted to assert a
... prescriptive right after and in addition to a deeded right in
... herein (2.5 cubic feet per second to Whitehead against the prior
... deeded rights).

Counsel for Whitehead cites authorities to the effect that,
... in an action to establish title to real estate by adverse
... possession, such declarations made by the claimant are inad-
... missible to show that the possession was hostile and the quality

BOOKS

The pertinent part of St. John Irrigating Co. v. Sanfath, 50 Idaho 514, 238 P. 545, as applied herein would authorize the holding that if the two springs involved herein are part of the same water source they were adjudicated adversely to appellant, securing his water right, as adjudicated is subsequent to respondents', or course, as indicated therein and in Mellen v. Great Western Salt Sugar Co., 51 Idaho 353, 182 P. 50, though so adjudicated, the waters of the springs could be later acquired by prescription, but the trial court found they were not. All of respondents testified positively and directly they had no notice or knowledge of appellants claim or use of the water as being adverse

to their rights, the court therefore, under the above authori-
ties, was justified in finding and concluding as above. No
right had been established.

The holding in the Mollen case, supra, justifies us in
saying that the trial judge having found lack of knowledge
on the record before us, we should affirm him. *People v. Wilver*,
43 Idaho 191, 195, 232 P. 553.

Having no right to the use of the water as such, the
question of the springs involved herein, the question of change
of place of use thereof need not be considered. This disposes
of the substance of all the errors assigned.

Judgment affirmed. Costs to respondents.

MORGAN and ALLSHIE, JJ., concur.

WILSON, J., being disqualified, did not participate.

POOR QUALITY ORIGINAL

MEMORANDUM

TO: File 13-0044
FROM: Jim Johnson
DATE: May 11, 1984
RE: Transfer No. 2840 on Right 13-0044

On 5/8/84 I received a copy of the proceedings in the case of The Village of Fairview Vs. Franklin Maple Creek Pioneer Irrigation Company, Inc. per request to the Franklin County Clerk.

However, a review of these proceedings revealed that they were not a copy of the Findings of Fact of original court action which decreed the water right to Franklin Maple Creek Pioneer Irrigation Inc. but rather a copy of a Supreme Court ruling made in 1938.

This case had no relationship to the earlier decree.

A follow-up call was made to the Frankling County Clerk and I was informed that they could not locate the Findings of Fact and Conclusions of Law for the 1905 decree.



State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

August 3, 1984

Lowell D. Castleton, Attorney at Law
P.O. Box 191
Preston, ID 83263

RE: Application for Transfer No. 2840, Franklin Maple Creek Pioneer
Irrigation Company

Dear Mr. Castleton:

This office is currently reviewing the above-referenced Application for Transfer. The information in the file associated with the application documents many of the activities that have transpired since the original application was filed on January 19, 1983. However, there is one item that needs to be clarified before we can take action on the transfer application.

The file contains a letter from you to Mr. Ernest Carlson of our Eastern Regional Office dated January 10, 1983, regarding "Transfer of Water Right for Franklin Maple Creek Pioneer Irrigation Company to Franklin Cub River Pumping Company". This letter provided some historical background to the Application for Transfer, and contained as an enclosure an exhibit B, which was an unsigned agreement between the Franklin Maple Creek Pioneer Irrigation Company and the Franklin Cub River Pumping Company. Both your letter and the agreement form specified two water rights. One of the water rights is identified by No. 13-0044, for 2.0 cubic feet per second, and the other is identified by No. 13-0045, for 4.0 cubic feet per second, both with priority date 1887.

The question that I have after reviewing the file regards the reason for deleting Water Right No. 13-0045 from the transfer application. The deletion was made on the original application form, and no mention of the deleted water right is made on the Amended Application for Transfer form which was received by our office on September 30, 1983.

Lowell D. Castleton
August 3, 1984
Page 2

For purposes of documenting the file, would you please send a letter to this office no later than September 5, 1984 regarding the reason for deleting Water Right No. 13-0045, and the impact of that deletion on the predicted change in point of diversion described in your letter dated January 10, 1983. Based on your response we will be able to take further action on this matter.

Sincerely,

David R. Tuthill Jr.

DAVID R. TUTHILL, JR., P.E.
Supervisor Water Allocation Section

DRT:ls

cc: Eastern Region

CONVERSATION MEMORANDUM

DATE September 5, 1984

FILE 13-0044 T2840

NAME OF PARTY Lowell D. Castleton, DRT

EMPLOYEE David R. Tuthill

RE: Page 2

Water Right No. 13-0045 from the application for transfer.

I indicated to Mr. Castleton that based on his telephone call, we would
continue to review the application for transfer, and that I would document
the file with the information that he provided since he is currently occupied
on other matters and has little time to prepare a letter.

CONVERSATION MEMORANDUM

DATE September 5, 1984

FILE 13-0044 T2840

NAME OF PARTY Lowell D. Castleton

EMPLOYEE David R. Tuthill *DMT*

RE: Response to letter dated August 3, 1984

On this day Mr. Castleton called to explain the reason that Water Right No. 13-0045 was deleted from Transfer No. 2840.

Mr. Castleton explained that he had several meetings with representatives of the Department in the Eastern Regional Office regarding this complex transfer of water rights. His original filing, which was received by the Department on January 19, 1983, identified two decreed water rights-Nos. 13-0044 and 13-0045. Both of these water rights were also identified in an unsigned agreement in the file between the Franklin Maple Creek Pioneer Irrigation Company and the Franklin Cub River Pumping Company. This agreement details the reason for the transfer of water rights.

Mr. Castleton has indicated that as a result of his discussions with the representatives from the Department, including Steve McCormick, a new application for transfer was prepared. This application, which was prepared by the Department staff, included only one of the decreed rights, No. 13-0044. The reason for the deletion of Water Right No. 13-0045 was the impetus for my letter dated August 3, 1984, because the matter was not clear in the documentation in the file. Mr. Castleton explained that both he and the Department representatives concluded, based on investigations during the summer of 1983, that Decreed Water Right No. 13-0045 had not, in fact, been diverted for many years. They concluded that to include that water right in the application for transfer would be unrepresentative of the diversion that had actually taken place since, in fact, only 2.0 cfs had been diverted rather than the 6.0 cfs shown on the original transfer application. Therefore, Mr. Castleton indicates that he concurred with the deletion of

September 10, 1984

RE: Transfer of Water Right No. 13-0044

Franklin Maple Creek Pioneer Irr. Co.
Box 191
Preston, ID 83263

Gentlemen:

Enclosed is a copy of your approved Application for Transfer of the above referenced water right (Transfer No. 2840). Be sure to note the conditions of approval as listed on the fourth page.

Sincerely,

DAVID R. TUTHILL, MR., P.E.
Supervisor, Water Allocation Section

DRT:sc

Enclosure

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

AMENDED

APPLICATION FOR TRANSFER OF WATER RIGHT

AMENDED

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

APPROVED

Name of applicant Franklin Maple Creek Pioneer Irr. Co. Phone 208-852-2680Post Office address P.O. Box 191, Preston, Idaho 83263

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

a. Decree No. 6538 Decreed to Franklin Maple Creek Pioneer Irr. Co. a Corp.
(Name)
in case of Village of Fairview vs Franklin Maple Creek Pioneer Irr.
dated in Oct. 16, 1905 in 5th Judicial Dist. county of Franklin
(Name of court)

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

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

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

3. Source of water Maple Creek tributary to Cub River

4. Date of priority 1877 (13-0044)

5. Water is used for the following purposes:

amount 2.0 cfs for flood irrigat. purposes from _____ to _____
amount _____ for _____ purposes from _____ to _____
amount _____ for _____ purposes from _____ to _____
(month/day — both dates inclusive)

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

7. Location of original point of diversion is SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 16
Township 16S Range 40E, B.M., in Franklin County
Additional points of diversion, if any _____

8. Lands irrigated or place of use:

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

Total number of acres to be irrigated _____

9. Describe any other water rights used for the same purpose as described above N/A

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of nonuse? No If yes, describe in item D, REMARKS.

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

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

3. Place of use:

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

Total number of acres to be irrigated _____

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

1. General Information
 - a. Amount of water to be diverted 2.00 c.f.s. &/or _____ acre feet
 - b. Description of diverting works _____

 - c. Describe the reasons for the proposed changes See attached explanation

2. Change in point of diversion
Point of diversion SE ¼ NE ¼, Section 30 Township 16S
Range 40E, B.M., Franklin County
Additional points SE¼SE¼ Sec. 16, T. 16S, R. 40E, B.M.

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

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

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

Total number of acres to be irrigated _____

4. Describe any other water rights used for the same purpose as described above. _____
5. Draw a map indicating the new point(s) of diversion and/or the new land to be irrigated. Show clearly the land involved by section, township and range number.

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

D. REMARKS

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

I understand that any willfull misrepresentations made in this application may result in voiding its approval.

Subscribed and sworn to before me this

29th

day of

Ramon H Wright

Pres. Franklin, Maple Creek, Pioneer Irr. Co.

September

19 83

Louise G. Gault

(Notary Public)

My commission expires

Lifetime

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. 13-0044

and said application is hereby APPROVED, subject to the following limitations and conditions:

1. A measuring device and lockable controlling works of a type acceptable to the Department shall be permanently installed and maintained as part of the diverting works.
2. Use of water under this right is subject to control by the watermaster of State Water District No. 13A, Cub River and tributaries.
3. The rate of flow diverted from Cub River under this water right is limited to the rate of flow available for diversion under this right at the point of diversion from Maple Creek.

Witness my hand this

6th

day of

September

19 84

A. Glen Saxton

Chief, Operations Bureau

FOR DEPARTMENT USE ONLY

Received by

CW

Date

9-30-83

Protest filed by

Prelim. check by

Fee

\$20.00

Receipted by

CW

Date

10-11-83 #29705

Published in

Preston Citizen

Pub. dates

10/27 & 11/3/83

Watermaster recommendation requested on

10-20-83

WD 13-A

rec'd.

Copies of protest forwarded by

Hearing held by

Date

Recommended for

approval

denial

by

EMC. Jim DRT

13 0041 foot per second of time; and the right of said plaintiff at all times to 2.5 cubic feet per second of time to the waters of said Maple Creek, in Franklin County, Idaho, for irrigation purposes during the irrigation season of each year, such right to date from the year 1885, and to be appurtenant to and become a part of one hundred sixty acres of land belonging to said plaintiff, in Sections 11 and 12, in Township 16 South, Range 40 East of the Boise Meridian, is hereby confirmed.

Said plaintiff is also awarded an easement to go upon the lands of defendant Charles Baker, for the purpose of diverting the waters of said Baker Springs during the time herein set forth.

13 0042 2. That the defendant and cross-complainant the Franklin Maple Creek Pioneer Irrigation Company, a corporation, organized and existing under the laws of the State of Idaho, for the purpose of distributing the waters of said Maple Creek to its several Stockholders, is entitled at all times, for the use and benefit of such stockholders, for irrigation, stock-watering and domestic purposes, during the irrigation season of each year, to 6.8 cubic feet per second of time of the waters of said Maple Creek and its tributaries, its right to the use thereof to date from the year 1860, and also to the use of two cubic feet per second of time of the waters of said Maple Creek and its tributaries, to date from the year 1877, and also to the use of four cubic feet per second of time of the waters of said Maple Creek and its tributaries, to date from the year 1897, and its right to the use of the same as decreed by the prior decree of this court in the Flack case, under date of October 16th, 1905, and recorded in Book "2" of Judgment Records of Franklin County, Idaho, at page 83 thereof, is hereby confirmed, and said defendant is hereby awarded a right to the use of one cubic foot per second of time of the waters of said Maple Creek and its tributaries, for stockwatering purposes, for its various stockholders, during the non-irrigation season of each year, its right to date from the year 1860. Said Maple Creek is declared to be a tributary of Cub River, in Franklin County, Idaho.

#825
MAY 27 1983

No 1840

AFFIDAVIT OF PUBLICATION

RECEIVED

JUN 6 1983

Department of Water Resources
Eastern District Office

STATE OF IDAHO, }
County of Franklin } ss.

J. Warren Ross

being duly sworn,

deposes and says:

That he is the Co-Publisher of THE PRESTON CITIZEN, a weekly newspaper published at Preston, in the County of Franklin and State of Idaho; that said paper has been and is in general circulation in the county aforesaid, and in the vicinity of Preston; that the advertisement, a copy of which is attached hereto, was published in said newspaper once

a week for 2 consecutive weeks in the regular and entire issue of said paper during the period of time of publication, and was published in the newspaper proper and not a supplement; that said paper has been established and regularly published for more than seventy-eight consecutive weeks prior to the date of first publication of said advertisement.

Such notice was published in the issue beginning with

May 12, 1983, and ending with the issue of May 19, 1983.

Fee \$ 24.37

Subscribed and sworn to before me this 31st day of May, 1983.

Ken O. Allen

Notary Public, Residing at Preston, Idaho

My Commission Expires June 7, 1986

NOTICE OF PROPOSED CHANGE
OF WATER RIGHT

No. 13-044/0045

Notice is hereby given that Franklin Maple Creek Pioneer Irrigation Co., Preston, Idaho, has applied to the Department of Water Resources for a change in the point of diversion of the waters of Maple Creek tributary to Cub River. The right sought to be changed is evidenced by Decree No. 6538 to Franklin Maple Creek Pioneer Irrigation Co., a Corp., in case of Village of Fairview vs. Franklin Maple Creek Pioneer Irrigation Co., dated in October 16, 1905 in Fifth Judicial District Court, Franklin County and is recorded as follows:

AMOUNT: 2.0 cfs

PRIORITY: 1877

POINT OF DIVERSION: SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 16, T. 16S, R. 40E, B.M. Franklin County.

The water is used for flood irrigation.

TO BE CHANGED AS FOLLOWS

The water will be diverted within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 30, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 16, T. 16S, R. 40E, B.M. Franklin County.

Any protests against the approval of the above proposed change of water right must be filed with the Department of Water Resources, 150 Shoup Ave., Suite 15, Idaho Falls, Idaho, 83401, on or before May 30, 1983.

A. KENNETH DUNN
Director

Published in the Preston Citizen on 5/12 or 5/19/83.

Legal No. 1840 —39L— Published May 12, 19, 1983.

#875

NOV 15 1983

No 1979

AFFIDAVIT OF PUBLICATION

STATE OF IDAHO, }
County of Franklin } ss.

J. Warren Ross

being duly sworn,

deposes and says:

That he is the Co-Publisher of THE PRESTON CITIZEN, a weekly newspaper published at Preston, in the County of Franklin and State of Idaho; that said paper has been and is in general circulation in the county aforesaid, and in the vicinity of Preston; that the advertisement, a copy of which is attached hereto, was published in said newspaper once

a week for 2 consecutive weeks in the regular and entire issue of said paper during the period of time of publication, and was published in the newspaper proper and not a supplement; that said paper has been established and regularly published for more than seventy-eight consecutive weeks prior to the date of first publication of said advertisement.

Such notice was published in the issue beginning with

Oct 27, 1983, and ending
with the issue of Nov. 11, 1983

Fee \$ 16.25

Subscribed and sworn to before me this 30th day
of Nov., 1983.

Kenn O. Allen

Notary Public, Residing at Preston, Idaho

My Commission Expires June 7, 1986

NOTICE OF PROPOSED AMENDING OF TRANSFER No. 13-0044

Notice is hereby given that Franklin Maple Creek Pioneer Irrigation Co., Preston, Idaho filed transfer No. 13-0044/0045 for the diversion of 2.00 cfs of water from Maple Creek tributary to Cub River with the point of diversion within the SE 1/4 SE 1/4, Sec. 16, T. 16S, R. 40E, B.M., Franklin County for irrigation purposes.

The right holder now proposes to amend Transfer No. 13-0044 amending the point of diversion to the SE 1/4 NE 1/4, Sec. 30, SE 1/4 SE 1/4, Sec. 16, T. 16S, R. 40E, B.M., Franklin County.

Any protest to the proposed amending of this right must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, Idaho, 83402, on or before November 14, 1983.

A. KENNETH DUNN
Director

Published Preston Citizen, 10/27 & 11/03/83.

Legal No. 1979 -26L- Published Oct. 27, Nov. 11, 1983.

RECEIVED
DEC 6 1983

Department of Water Resources
Eastern District Office

Transfer No. 2840Water Right No. 13-0044
13-0045STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR TRANSFER OF WATER RIGHT

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

Name of applicant Franklin Maple Creek Pioneer Irrigation Co. Phone 208-852-2680
Post Office address P. O. Box 191, Preston, Idaho 83263

A. DESCRIPTION OF RIGHT AS RECORDED

1. Right evidenced by:

- a. Decree No. 6538 Decreed to Franklin Maple Creek Pioneer Irrigation Co., a Corp.
(Name)
in case of Village of Fairview vs Franklin Maple Creek Pioneer Irrigation
dated in October 16, 1905 in Fifth Judicial District county of Franklin
(Name of court)
- b. License No. _____ Issued by the Idaho Department of Water Resources
- c. Claim No. _____ on file with the Idaho Department of Water Resources

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

3. Source of water Maple Creek tributary to Cub River
4. Date of priority 1877 (13-0044) and 1887 (13-0045)

5. Water is used for the following purposes:

13-0044 amount 2.0 c.f.s. for flood irrigation purposes from _____ to _____

~~13-0045~~ amount ~~4.0 c.f.s.~~ for flood irrigation purposes from _____ to _____

amount _____ for _____ purposes from _____ to _____
(month/day — both dates inclusive)

6. Total amount of water under right: a. ~~six (6)~~ 2.00 cubic feet per second
&/or
b. _____ acre feet per annum
7. Location of original point of diversion is SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 16
Township 16 S. Range 40 E., B.M., in Franklin County
Additional points of diversion, if any _____

8. Lands irrigated or place of use:

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

Total number of acres to be irrigated _____

9. Describe any other water rights used for the same purpose as described above N/A

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of nonuse? No If yes, describe in item D, REMARKS.

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

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

TWP.	RANGE	SEC.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total number of acres to be irrigated _____

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

1. General Information
 - a. Amount of water to be diverted 2.00 c.f.s. &/or _____ acre feet
 - b. Description of diverting works _____
 - c. Describe the reasons for the proposed changes See attached explanation
2. Change in point of diversion ^{SE} ^{NW}
Point of diversion SW 1/4 NW 1/4, Section 30 Township 16S
Range 40E, B.M., Franklin County
Additional points SE 1/4 SE 1/4, Sec. 16, T. 16S, R. 40E
3. Change in place of use
 - a. Are there liens, mortgages, or contracts on the lands from which you propose to transfer the water right which limit your authority to make the proposed change? Yes N/A See explanation No _____. If yes, provide a statement agreeing to the proposed change from the holder of the lien, mortgage or contract.
 - b. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer
See explanation

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

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

Total number of acres to be irrigated _____

4. Describe any other water rights used for the same purpose as described above. _____

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

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

D. REMARKS

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

I understand that any willfull misrepresentations made in this application may result in voiding its approval.

x Ramon Wright
(Signature of Applicant) President

Subscribed and sworn to before me this 18th day of January, 19 83.

Beverly W. Mortensen
(Notary Public)

My commission expires Lifetime

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____ and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, 19____.

FOR DEPARTMENT USE ONLY

Received by <u>QW</u>	Date <u>1-19-83</u>	Protest filed by _____
Prelim. check by <u>SM</u>	Fee <u>50.00</u>	_____
Receipted by <u>BP</u>	Date <u>3/9/83 #25479</u>	_____
Published in <u>Preston Citizen</u>	Copies of protest forwarded by _____	
Pub. dates <u>5/12; 5/19/83</u>	Hearing held by _____ Date _____	
Watermaster recommendation requested on _____	Recommended for _____ approval _____ denial _____	
<u>WD #13-A 5-6-83</u> rec'd. <u>7-28-83</u>	by _____	

Exhibit "B"

AGREEMENT (EXPLANATION)

This Agreement entered into this _____ day of _____, 1982, by and between the Franklin Maple Creek Pioneer Irrigation Company, hereinafter referred to as "Grantor" and Franklin Cub River Pumping Company, hereinafter referred to as "Grantee".

Whereas Grantor in the case of Village of Fairview vs. Franklin Maple Creek Pioneer Irrigation Company et al 59 Idaho 7, 79 2nd 531, (1938), was decreed several water rights one of which was for two (2) cubic feet per second with a priority date of 1877, and a second of which was for four (4) cubic feet per second with a priority date of 1887, said water rights hereinafter referred to as "Water Right", and

Whereas said water right has historically been a high water right representing the water which has been used over the years by and appertains to properties of the second class stockholders of Grantor, and

Whereas, over the past several years said water right has been diverted and pumped to said second class stockholders of Grantor by Grantee as a kindly gesture by Grantee to enable said second class stockholders to have use of said water, and

Whereas a transfer of said water right from Grantor to Grantee would facilitate the future administration of said water right for the benefits of said stockholders;

Now therefore in consideration of the mutual promises contained herein, the parties agree as follows:

1. Grantor shall at the time of closing hereof as hereinafter specified convey to Grantee by Deed and Grantee shall receive conveyance from Grantor of the following:

a. Water rights consisting of:

Those certain water rights decreed in Village of Fairview vs. Franklin Maple Creek Pioneer Irrigation Company et al., 59 Idaho 7, 79 P. 2nd 531, (1938), consisting of and not to exceed: (a) two (2) cubic feet per second with a priority date of 1877; and
(b) Four (4) cubic feet per second with a priority date of 1887.

excepting therefrom .198 cubic feet per second with a priority date of _____ which are the water rights represented by the second class shares of stock held by the following shareholders in the following amounts:

<u>Shareholder</u>	<u>No. of Shares</u>	<u>Cubic feet/ Seconds</u>	<u>Priority Date</u>
DILWORTH MORRISON	123	.186	
HAROLD LOWE	25	.006	
ROBERT LOWE	25	.006	
TOTAL	173	.198	

b. Grantor shall grant to Grantee a fifteen (15) year easement along Grantor's easement where Grantor has put its gravity flow pipeline and continuing therefrom along the easements historically used by said second class shareholders to carry their water to the various points of use. Said easement shall be for the express and limited purpose of placing a second pipeline by Grantee for the benefit of said second class stockholders through which said water right can thereafter be diverted and carried for the benefit of said second class stockholders. If and when said easement is used as prescribed herein, then said easement shall become and thereafter be an easement in perpetuity. Grantor shall notify in writing all land owners to whose property said easements appertain of Grantors intent not to abandon said easements.

2. Said closing shall occur no later than ten (10) days following the satisfaction of the following conditions:

a. Ratification of this Agreement by the stockholders of both parties:

b. Receipt of approval of Grantors Application For Transfer of Water Right from the State of Idaho authorizing said transfer. Disapproval by the Department of Water Resources shall cause this Agreement to become null and void.

3. Upon satisfaction of the conditions herein contained, a duly authorized officer of each party shall inform the Law Firm of Williams & Castleton that the conditions have been met whereupon said parties shall mutually set the date of closing in compliance with the terms hereof. Closing shall be at the office of Williams & Castleton, 24 North State, Preston, Idaho 83263.

4. Immediately following the closing hereof, Grantor will recall and cancel all of the second class shares of stock issued to and outstanding among the second class stockholders of Grantor, exceptions excluded under Paragraph 1(a) hereof, a list of said stockholders and shares of stock is attached hereto as Exhibit "A". Thereafter Grantee shall issue a new class of stock

which shall be titled Second Class Stock of Grantee, which shall represent said water right which new class of stock shall be issued to the same stockholders listed on Exhibit "A" and in exactly the same amounts and/or in exactly the same ratios or percentages as indicated on said Exhibit "A" excepting the Stockholders noted in paragraph 1.a. above.

5. It is the understanding of the parties that said water right shall remain appurtenant to the exact same acreage of said second class stockholders after said transfer as before. It is further understood between the parties that there will be no change in the place of use of said water right nor will the number of acres being irrigated by said water right be increased or enlarged.

6. Grantor agrees to pay legal costs and fees incurred by both parties necessitated in the completion of the terms of this Agreement.

7. Except as to the express agreements contained herein, the parties hereto make no additional promises, agreements or covenants express or implied to the other party or any of its stockholders.

IN WITNESS WHEREOF the parties hereto have executed this contract as of the day and year first above written.

GRANTOR

GRANTEE

FRANKLIN MAPLE CREEK
PIONEER IRRIGATION COMPANY

FRANKLIN CUB RIVER
PUMPING COMPANY

President

President

Attest:

Attest:

Secretary

Secretary

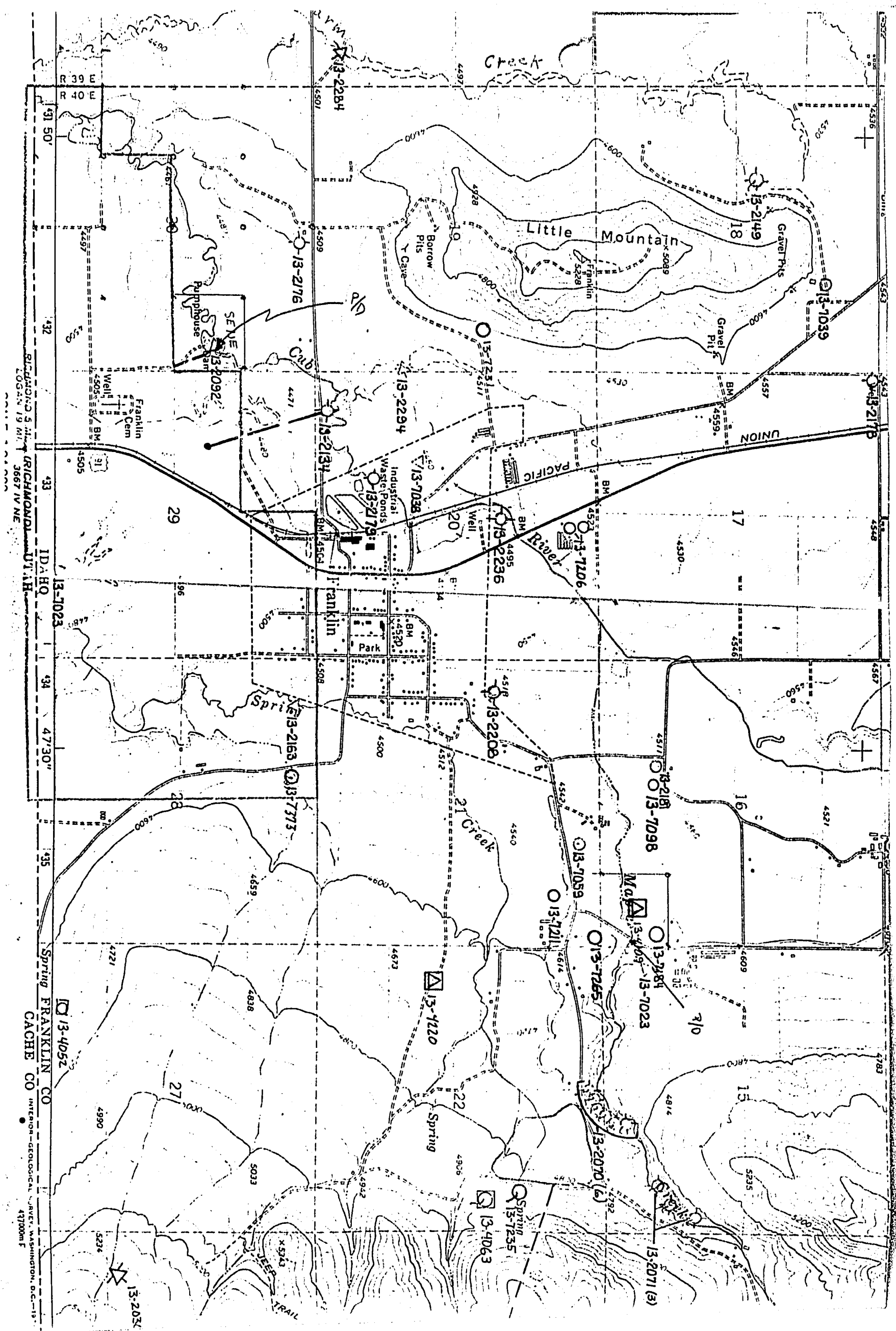
EXHIBIT "A"

Shares and percent of water rights being transferred.

	Number of Shares	Percent of Total
Erma Woodward	70	.0176
Schablans	135	.0340
Woodrow Butterworth	432 1/2	.1089
Ann Olsen	233 1/2	.0588
Adrain Geddes	200	.0503
Ray Morrison	502 1/2	.1265
Dave Beckstead	60	.0151
Roy Geddes	860	.2165
Larry Hobbs	824	.2074
Clayton Larsen	10	.0025
Alton Larsen	42	.0106
Glen Larson	20	.0050
Frank Priestley	400	.1007
Herbert Rallison	10	.0025
TOTAL	3,799-1/2	.9564

Shares and percent of water right not being transferred.

Dilworth Morrison	123	.0310
Harold Lowe	25	.0063
Robert G. Lowe	25	.0063
TOTAL	173	.0436
GRAND TOTAL	<u>3,972-1/2</u>	<u>100.00</u>



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FRANKLIN, IDAHO

SPRING CREEK

21 CREEK

SPRING

FRANKLIN PARK

FRANKLIN CEMETERY

WASTE POND

GRAVEL PIT

INDUSTRIAL

WELL

BENCH MARK

ELEVATION

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13-3000

FRANKLIN MAPLE CREEK PIONEER IRRIGATION CO.
(Explanation of Map)

Points

- A -- Present diversion of second class water rights
- B -- Second class water mingled with first class water from point B to point C
- C -- Point where second class water rights are all that is left in ditch. All first class rights are taken out prior to this point.
- D -- Pumping plan station. Desired point for the second class water diversion.
- E -- First class water rights which have now been put into a pipeline for gravity sprinkling.
- *Red -- indicates the old ditch line for second class water flow (from point A through B and C)
- *Dark Blue -- indicates old creek channels or proposed route for second class water rights (from point A to point D)
- *Green -- indicates water after it passes through proposed diversion point.
- *Black -- indicates first class water rights or newly constructed pipeline.
- *Yellow -- first class water district -- approximately 800 acres
- *Light Blue -- second class water district -- approximately 500 acres

**MAP(S) TOO
LARGE TO FILM -
SEE FILE...**

WILLIAMS & CASTLETON

LAW OFFICES

24 NORTH STATE - P. O. BOX 191

PRESTON, IDAHO 83263

J. DENNIS "J. D." WILLIAMS
LOWELL D. CASTLETON

DALLIN J. PHILLIPS

July 2, 1981

TELEPHONE:
(208) 662-2680

RECEIVED

JUL 6 1981

Department of Water Resources
Eastern District Office

Department of Water Resources
State Office
373 West Franklin 150 Shoup
Idaho Falls, Idaho 83401

Re: Franklin, Maple Creek Pioneer Irrigation Company
and
Franklin, Cub River Pumping Company
Our File No. 1069.6C

Attention: Ernest Carlson

Dear Mr. Carlson:

Our law firm represents the Franklin, Maple Creek Pioneer Irrigation Company with offices in Franklin, Idaho. The Franklin, Maple Creek Pioneer Irrigation Company presently has two classes of stock. Recent changes in their by-laws and also a conversion from ditch water flooding to a gravity sprinkler system has made the value of the second-class stock relatively nil to the Franklin, Maple Creek Pioneer Irrigation Company.

However, a neighboring company, namely the Franklin, Cub River Pumping Company has as some of its share holders essentially the same people who held the second-class stock in the Franklin, Maple Creek Pioneer Irrigation Company.

In the case of Village of Fairview vs. Franklin, Maple Creek Pioneer Irrigation Company et. al., 59 Idaho 7, 79P.2d 531, (1938), the Franklin, Maple Creek Pioneer Irrigation Company acquired several water rights. One of those was for two cubic feet per second with a priority date of 1877. This right for two cubic feet per second is basically a high-water right and represents the water which has been used over the years by the second-class stockholders.

Mr. Ernest Carlson
Page 2
July 2, 1981

In order to more fully utilize the water resources of both companies and of their respective shareholders, both companies have been negotiating a possible transfer of the two cubic feet per second right from the Franklin, Maple Creek Pioneer Irrigation Company to the Franklin, Cub River Pumping Company in order that the Pumping Company have complete authority for the manner in which said two c.f.s. of water is distributed. I have in my possession a letter signed by the officers of the Pumping Company authorizing me to pursue through the Department of Water Resources a transfer of the second-class water rights from the Franklin, Maple Creek Pioneer Irrigation Company to the Franklin, Cub River Pumping Company.

Could you have someone look into these respective rights and advise us as to the appropriate procedure for the transfer of said rights. We recognize that we are essentially talking about retirement of all second-class stock in the Franklin, Maple Creek Pioneer Irrigation Company and the transfer of a decreed water right from the Franklin, Maple Creek Pioneer Irrigation Company to the Franklin, Cub River Pumping Company. I believe that both companies and all shareholders will be in agreement on this transaction. I will look forward to hearing from you and thank you in advance for your cooperation.

Yours very truly,

WILLIAMS & CASTLETON



LOWELL D. CASTLETON
Attorney at Law

LDC/kw

RECEIVED

AUG 26 1981

Department of Water Resources
Eastern District Office

July 2, 1981

Department of Water Resources
State Office
373 West Franklin 150 Shoup
Idaho Falls, Idaho 83401

Re: Franklin, Maple Creek Pioneer Irrigation Company
and
Franklin, Cub River Pumping Company
Our File No. 1069.6C

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Mr. Ernest Carlson
Page 2
July 2, 1981

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Could you have someone look into these respective rights and advise us as to the appropriate procedure for the transfer of said rights. We recognize that we are essentially talking about retirement of all second-class stock in the Franklin, Maple Creek Pioneer Irrigation Company and the transfer of a decreed water right from the Franklin, Maple Creek Pioneer Irrigation Company to the Franklin, Cub River Pumping Company. I believe that both companies and all shareholders will be in agreement on this transaction. I will look forward to hearing from you and thank you in advance for your cooperation.

Yours very truly,

WILLIAMS & CASTLETON

LOWELL D. CASTLETON
Attorney at Law

LDC/kw

WILLIAMS & CASTLETON

LAW OFFICES
24 NORTH STATE - P. O. BOX 191
PRESTON, IDAHO 83263

J. DENNIS "J. D." WILLIAMS
LOWELL D. CASTLETON
DALLIN J. PHILLIPS

August 25, 1981

RECEIVED

AUG 28 1981

Department of Water Resources
Eastern District Office
(208) 852-2680

Department of Water Resources
150 Shoup
Idaho Falls, Idaho 83401

Re: Franklin, Maple Creek Pioneer Irrigation Company
and
Franklin, Cub River Pumping Company
Our File No. 1069.6C

Attention: Ernest Carlson

Dear Mr. Carlson:

On July 2, 1981 our office forwarded to you correspondence outlining a proposal for a stock transfer/retirement plan between the two companies listed above which would also affect the respective water rights of the companies. For your reference, I am enclosing a photocopy of our July 2 letter. In reviewing our file I note that there was some discrepancy in the address to which that letter was sent and therefore I realize it is possible that the letter was not properly delivered.

Nevertheless, I would renew our request on behalf of the companies to the Department of Water Resources to review this matter and advise our office as to how we should proceed further. While this summer's irrigation activities will not be affected by such a transfer, it is the desire of both companies that the matter be resolved prior to the commencement of irrigating next spring in 1982. Thus, we desire to proceed as quickly as possible but feel unable to do so without the advice of the department.

We look forward to your response.

Yours very truly,

WILLIAMS & CASTLETON


LOWELL D. CASTLETON
Attorney at Law

LDC/kw

Enclosure

cc: Ramon Wright

October 7, 1981

Lowell D. Castleton
Attorney at Law
P.O. Box 191
Preston, Idaho 83263

Dear Mr. Castleton:

In response to your letter concerning the transfer of 2.00 cfs of late priority water from Franklin, Maple Creek Pioneer Irrigation Company to the Franklin, Cub River Pumping Company, a review of the decree was of little value since the points of diversion and place of use were not identified. Although, it is understood from your letter that both parties are in agreement regarding the transfer, the director of the department must also consider the possibility of injury to other water rights, whether the change is in the local public interest as defined in Section 42-203, Idaho Code, and whether the change will constitute an enlargement in use of the original right. In this case, the later condition would be of greatest concern. Expansion of the right would not occur if there were no change in the place of use, or if as a result of the change, the number of acres being irrigated were not increased. This normally requires drying up those lands the water is being removed from. If those lands irrigated by the second class right also have an earlier priority right appurtenant to them, then the second class water must be transferred to a like number of acres which also is covered by an earlier priority right(s).

To implement the desired change, please complete the enclosed application for transfer and return it to this office along with a check for \$50.00 as payment of the statutory filing fee.

Should you have any questions or wish assistance in completing the application, feel free to contact this office.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosure

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

Name of applicant Franklin Maple Creek Pioneer Irrigation Co. Phone 208-852-2680Post Office address P. O. Box 191, Preston, Idaho 83263**A. DESCRIPTION OF RIGHT AS RECORDED**

1. Right evidenced by:

a. Decree No. 6538 Decreed to Franklin Maple Creek Pioneer Irrigation Co., a Corp.
In case of Village of Fairview vs Franklin Maple Creek Pioneer Irrigation
dated in October 16, 1905 in Fifth Judicial District county of Franklin
(Name of court)

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

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

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

3. Source of water Maple Creek tributary to Cub River

4. Date of priority 1877

5. Water is used for the following purposes:

amount 2.0 c.f.s. for flood irrigation purposes from _____ to _____amount 4.0 c.f.s. for flood irrigation purposes from _____ to _____amount _____ for _____ purposes from _____ to _____
(month/day — both dates inclusive)

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

7. Location of original point of diversion is SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 16

Township 16 S. Range 40 E., B.M., in Franklin CountyAdditional points of diversion, if any SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 30, Township 16 South, Range 40 East,
Boise Meridian, Franklin County, Idaho

8. Lands irrigated or place of use:

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

Total number of acres to be irrigated _____

9. Describe any other water rights used for the same purpose as described above N/A

10. To your knowledge, has any portion of this water right undergone a period of five or more consecutive years of nonuse? _____ If yes, describe in item D, REMARKS.

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

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

3. Place of use:

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

Total number of acres to be irrigated _____

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

1. General Information

- a. Amount of water to be diverted 5.74 c.f.s. &/or _____ acre feet
- b. Description of diverting works _____

- c. Describe the reasons for the proposed changes See attached explanation

2. Change in point of diversion No Change

Point of diversion _____ $\frac{1}{4}$ _____ $\frac{1}{4}$, Section _____ Township _____
Range _____, B.M., _____ County
Additional points _____

3. Change in place of use

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

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

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

Total number of acres to be irrigated _____

4. Describe any other water rights used for the same purpose as described above. _____

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

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

D. REMARKS

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

I understand that any willfull misrepresentations made in this application may result in voiding its approval.

Ramon Wright
(Signature of Applicant)

Subscribed and sworn to before me this 18th day of January, 19 83

Beverly M. Mortensen
(Notary Public)

My commission expires Lifetime

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____
and said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, 19____.

FOR DEPARTMENT USE ONLY

Received by <u>Dev</u>	Date <u>1-19-83</u>	Protest filed by _____
Prelim. check by _____	Fee <u>1.00</u>	_____
Receipted by _____	Date _____	_____
Published in _____	Copies of protest forwarded by _____	
Pub. dates _____	Hearing held by _____	Date _____
Watermaster recommendation requested on _____	Recommended for _____	approval _____ denial _____
_____ rec'd. _____	by _____	

Exhibit "B"

AGREEMENT

This Agreement entered into this _____ day of _____, 1982, by and between the Franklin Maple Creek Pioneer Irrigation Company, hereinafter referred to as "Grantor" and Franklin Cub River Pumping Company, hereinafter referred to as "Grantee".

Whereas Grantor in the case of Village of Fairview vs. Franklin Maple Creek Pioneer Irrigation Company et al 59 Idaho 7, 79 2nd 531, (1938), was decreed several water rights one of which was for two (2) cubic feet per second with a priority date of 1877, and a second of which was for four (4) cubic feet per second with a priority date of 1887, said water rights hereinafter referred to as "Water Right", and

Whereas said water right has historically been a high water right representing the water which has been used over the years by and appertains to properties of the second class stockholders of Grantor, and

Whereas, over the past several years said water right has been diverted and pumped to said second class stockholders of Grantor by Grantee as a kindly gesture by Grantee to enable said second class stockholders to have use of said water, and

Whereas a transfer of said water right from Grantor to Grantee would facilitate the future administration of said water right for the benefits of said stockholders:

Now therefore in consideration of the mutual promises contained herein, the parties agree as follows:

1. Grantor shall at the time of closing hereof as hereinafter specified convey to Grantee by Deed and Grantee shall receive conveyance from Grantor of the following:

a. Water rights consisting of:

Those certain water rights decreed in Village of Fairview vs. Franklin Maple Creek Pioneer Irrigation Company et al., 59 Idaho 7, 79 P. 2nd 531, (1938), consisting of and not to exceed: (a) two (2) cubic feet per second with a priority date of 1877; and

(b) Four (4) cubic feet per second with a priority date of 1887.

excepting therefrom .198 cubic feet per second with a priority date of _____ which are the water rights represented by the second class shares of stock held by the following shareholders in the following amounts:

<u>Shareholder</u>	<u>No. of Shares</u>	<u>Cubic Feet/ Seconds</u>	<u>Priority Date</u>
DILWORTH MORRISON	123	.186	
HAROLD LOWE	25	.006	
ROBERT LOWE	25	.006	
TOTAL	173	.198	

b. Grantor shall grant to Grantee a fifteen (15) year easement along Grantor's easement where Grantor has put its gravity flow pipeline and continuing therefrom along the easements historically used by said second class shareholders to carry their water to the various points of use. Said easement shall be for the express and limited purpose of placing a second pipeline by Grantee for the benefit of said second class stockholders through which said water right can thereafter be diverted and carried for the benefit of said second class stockholders. If and when said easement is used as prescribed herein, then said easement shall become and thereafter be an easement in perpetuity. Grantor shall notify in writing all land owners to whose property said easements appertain of Grantors intent not to abandon said easements.

2. Said closing shall occur no later than ten (10) days following the satisfaction of the following conditions:

a. Ratification of this Agreement by the stockholders of both parties:

b. Receipt of approval of Grantors Application For Transfer of Water Right from the State of Idaho authorizing said transfer. Disapproval by the Department of Water Resources shall cause this Agreement to become null and void.

3. Upon satisfaction of the conditions herein contained, a duly authorized officer of each party shall inform the Law Firm of Williams & Castleton that the conditions have been met whereupon said parties shall mutually set the date of closing in compliance with the terms hereof. Closing shall be at the office of Williams & Castleton, 24 North State, Preston, Idaho 83263.

4. Immediately following the closing hereof, Grantor will recall and cancel all of the second class shares of stock issued to and outstanding among the second class stockholders of Grantor, exceptions excluded under Paragraph 1(a) hereof, a list of said stockholders and shares of stock is attached hereto as Exhibit "A". Thereafter Grantee shall issue a new class of stock

which shall be titled Second Class Stock of Grantee, which shall represent said water right which new class of stock shall be issued to the same stockholders listed on Exhibit "A" and in exactly the same amounts and/or in exactly the same ratios or percentages as indicated on said Exhibit "A" excepting the Stockholders noted in paragraph 1.a. above.

5. It is the understanding of the parties that said water right shall remain appurtenant to the exact same acreage of said second class stockholders after said transfer as before. It is further understood between the parties that there will be no change in the place of use of said water right nor will the number of acres being irrigated by said water right be increased or enlarged.

6. Grantor agrees to pay legal costs and fees incurred by both parties necessitated in the completion of the terms of this Agreement.

7. Except as to the express agreements contained herein, the parties hereto make no additional promises, agreements or covenants express or implied to the other party or any of its stockholders.

IN WITNESS WHEREOF the parties hereto have executed this contract as of the day and year first above written.

GRANTOR

GRANTEE

FRANKLIN MAPLE CREEK
PIONEER IRRIGATION COMPANY

FRANKLIN CUB RIVER
PUMPING COMPANY

President

President

Attest:

Attest:

Secretary

Secretary

EXHIBIT "A"

Shares and percent of water rights being transferred.

	Number of Shares	Percent of Total
Erma Woodward	70	.0176
Schablands	135	.0340
Woodrow Butterworth	432 1/2	.1089
Ann Olsen	233 1/2	.0588
Adrain Geddes	200	.0503
Ray Morrison	502 1/2	.1265
Dave Beckstead	60	.0151
Roy Geddes	860	.2165
Larry Hobbs	824	.2074
Clayton Larsen	10	.0025
Alton Larsen	42	.0106
Glen Larson	20	.0050
Frank Priestley	400	.1007
Herbert Rallison	10	.0025
TOTAL	3,799-1/2	.9564

Shares and percent of water right not being transferred.

Dilworth Morrison	123	.0310
Harold Lowe	25	.0063
Robert G. Lowe	25	.0063
TOTAL	173	.0436
GRAND TOTAL	3,972-1/2	100.00

FRANKLIN MAPLE CREEK PIONEER IRRIGATION CO.
(Explanation of Map)

Points

- A -- Present diversion of second class water rights
- B -- Second class water mingled with first class water from point B to point C
- C -- Point where second class water rights are all that is left in ditch. All first class rights are taken out prior to this point.
- D -- Pumping plan station. Desired point for the second class water diversion.
- E -- First class water rights which have now been put into a pipeline for gravity sprinkling
- *Red -- indicates the old ditch line for second class water flow (from point A through B and C)
- *Dark Blue -- indicates old creek channels or proposed route for second class water rights (from point A to point D)
- *Green -- indicates water after it passes through proposed diversion point.
- *Black -- indicates first class water rights or newly constructed pipeline.
- *Yellow -- first class water district -- approximately 800 acres
- *Light Blue -- second class water district -- approximately 500 acres

TRANS #
13-00441 JAS

WILLIAMS & CASTLETON

LAW OFFICES

24 NORTH STATE - P. O. BOX 191

PRESTON, IDAHO 83263

January 10, 1983

J. DENNIS "J. D." WILLIAMS
LOWELL D. CASTLETON
DALLIN J. PHILLIPS

TELEPHONE:
(208) 852-2680

RECEIVED

JAN 15 1983

Mr. Ernest Carlsen
Assistant Regional Supervisor
Department of Water Resources
150 Shoup Avenue
Idaho Falls, ID 83401

Department of Water Resources
Eastern District Office

Re: Transfer of Water Right for Franklin Maple Creek Pioneer
Irrigation Company to Franklin Cub River Pumping Company

Dear Mr. Carlsen:

The enclosed application for transfer of water right and the attached supporting documentation is intended to present to the Water Resource Board the application of Franklin Maple Creek Irrigation Company to transfer to Franklin Cub River Pumping Company certain water rights as hereinafter set forth, and for the reasons hereinafter delineated. This letter is intended as a supplement to the application itself.

1. The Franklin Maple Creek Pioneer Irrigation Company (hereinafter Maple Creek Company) in the case of Village of Fairview vs. Franklin Maple Creek Pioneer Irrigation Company, et. al., 59 Idaho 7, 79 2nd 531, (1938) was decreed several water rights, one of which was for two cubic feet per second with a priority date of 1877 and a second right for four (4) cubic feet per second with a priority date of 1887 both of which are the subject water right of this application. Both rights shall be hereinafter referred to as "Water Right". This water right is basically a high water right and represents the water which has been used over the years by the "second class" stockholders of Maple Creek Company. Properties irrigated by this water of right is specified in blue on the attached map Exhibit "A".

2. Referring to the attached aerial photo map, Exhibit "A", historically the water in question was diverted at point A from Maple Creek (blue line) into the Company's canal (red line). In recent years, the Company installed a gravity sprinkling system between points E and C for the "first class" stockholders. Consequently, it became difficult for the second class stockholders to get their water from point A, which was the point of diversion, beyond point C where the water was to be used by them.

Mr. Ernest Carlsen
January 10, 1983
Page 2

3. As an alternative, for the past several years, Franklin Cub River Pumping Company, hereinafter Pumping Company, has allowed the second class stockholder's water to continue in Maple Creek and then course into Cub River (along blue line) from point A to point D where it has been pumped from the Cub River at point D to point F where it could then be utilized by the second class stockholders.

4. Because many of the second class stockholders of Maple Creek Company are also stock holders of Pumping Company, and to facilitate the continued availability of the water to the stockholders, and to eliminate administrative difficulties between the two companies, it has been agreed, between the two companies, subject to the approval of the Department of Water Resources, that all of the water right except the amounts specified in paragraph 5 hereof will be transferred from Maple Creek Company to Pumping Company for the benefit of the original second class stockholders of Maple Creek Company. Said stockholders will receive new stock in Pumping Company representing their original interest in the water right whereupon their second class stock in the Maple Creek Company will be cancelled.

5. The following three second class stockholders will not have their water rights transferred per this application. Instead, upon your recommendation, we are submitting under separate cover on their behalf, claims of water right on the water rights represented by their shares of stock as follows:

<u>Shareholder</u>	<u>No. of Shares</u>	<u>Cubic Ft./Sec.</u>
Dilworth Morrison	123	.186
Harold Lowe	25	.0378
Robert Lowe	25	.0378
TOTAL	173	.2616

6. With regard to the water rights proposed to be transferred, the water right will be utilized by the same users, to irrigate the same properties. The only change that results is that the water right will be transferred to Pumping Company from Maple Creek Company.

Mr. Ernest Carlsen
January 10, 1983
Page 3

7. Because the users do not change and because the use will be on the same acreage after the transfer as before, no enlargement in use of the original right will result.

8. Because beneficial users and irrigated acres are the same after the transfer as before, the application contains this Supplemental Memo with the attached color-coded map in lieu of the specific data called for in Item A-8, B and C of the Application.

9. The stockholders of both companies, in duly called separate stockholder meetings have approved the transaction as set forth in the proposed agreement, which is attached hereto as Exhibit "B". Upon approval by the Water Resource Board, the officers of both companies will effectuate the transfer according to the terms thereof, subject to any additional requirements of the Water Resource Board.

Respectfully submitted,

WILLIAMS & CASTLETON



LOWELL D. CASTLETON
Attorney at Law

LDC/cr

Enclosure

MEMORANDUM

FROM: Steve McCormick

TO: File

RE: Transfer for Franklin Maple Creek Pioneer Irr. Co.
13-0044/0045

Lowell Castleton was in today to explain the purpose of the transfer.

The company has drawn up an agreement to split the stock of the company. The agreement takes the second class stock out of the company. The water represented by the first class stock was put into a pipeline a few years ago. The second class water was not put in the pipeline since it was cut early in the season. The ditch which previously conveyed all the water was used for the pipeline and consequently could not be used by the 2nd class stock holders. The second class stockholders water was left in Maple Creek and allowed to flow in the Cub River and be pumped out by Cub River Pumping Co. The 1st class stockholders have paid the pumping costs until now.

The agreement splits the company so that the 1st class stockholders do not pay the pumping costs and the second class stockholders can receive their water directly from Cub River.

The place of use is not included because only the point of diversion is being transferred and according to Lowell, the agreement would not be finalized if the 2nd class stockholders had to put a land list on the application.

1069.6



John V. Evans
Governor

A. Kenneth Dunn
Director

RECEIVED FEB 7 1983

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
EASTERN REGION

150 Shoup
Idaho Falls, Idaho 83401
(208) 525-7161

February 3, 1983

Lowell D. Castleton *phone 852-2680.*
Atty at Law
P.O. Box 191
Preston, ID 83263

RE: Franklin Maple Creek Pioneer Irr. Co., Transfer

Dear Mr. Castleton:

Enclosed is the Application for Transfer of a Water Right submitted in behalf of F.M.C.P. Irr. Co.

The Department cannot begin processing of the application at this time for the following reasons.

1. The statutory filing fee of \$50.00 must accompany the application.
2. The place of use must be indicated in part C.3.C of the form identifying the irrigated acres in each quarter-quarter section.
3. The information in your letter indicates the amount of water to be transferred should be cut down by the amount shown in part 5 of the letter. The point of diversion for this amount (0.2616 cfs) will not be moved and therefore the total amount of water for which a change in point of diversion will occur is 5.7384 cfs. This will eliminate the need to file claims to water rights for these individually.
4. Part C4 must show other water rights used for the lands identified in Part C 3.C.

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

Sincerely,

Steve McCormick

STEVE McCORMICK
Sr. Resource Analyst

SM:bp

Enclosure

May 3, 1983

RE: Application for Transfer No. 13-0044/0045

Lowell D. Castleton
Attorney at Law
P.O. Box 191
Preston, ID 83263

Dear Mr. Castleton:

Enclosed for your records is a copy of the application for transfer filed by Franklin Maple Creek Pioneer Irrigation Company. This copy reflects those items we recently discussed by telephone.

Notification of this application is scheduled for publication in the Preston Citizen on May 12 and 19. If there is a need to have this publication delayed or if the application must be modified, please contact us immediately.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosure

NOTICE OF PROPOSED CHANGE OF WATER RIGHT

NO. 13-0044/0045

Notice is hereby given that Franklin Maple Creek Pioneer Irrigation Co., Preston, Idaho, has applied to the Department of Water Resources for a change in the point of diversion of the waters of Maple Creek tributary to Cub River. The right sought to be changed is evidenced by Decree No. 6538 to Franklin Maple Creek Pioneer Irrigation Co., a Corp. in case of Villiage of Fairview vs. Franklin Maple Creek Pioneer Irrigation Co., dated in October 16, 1905 in Fifth Judicial District Court, Franklin County and is recorded as follows:

AMOUNT: 2.0 cfs

PRIORITY: 1877

POINT OF DIVERSION: SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 16, T. 16S, R. 40E,
B.M. Franklin County.

The water is used for flood irrigation.

TO BE CHANGED AS FOLLOWS

The water will be diverted within the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 30, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 16, T. 16S, R. 40E, B.M. Franklin County.

Any protests against the approval of the above proposed change of water right must be filed with the Department of Water Resources, 150 Shoup Ave., Suite 15, Idaho Falls, Idaho, 83401, on or before May 30, 1983.

A. KENNETH DUNN

Director

Published in the Preston Citizen on 5/12 & 5/19/83.

May 6, 1983

Conan Foster, Watermaster
Water District No. 13-A
Rt. 3,
Preston, ID 83263

RE: Application for Transfer No. 13-0044/0045 FRANKLIN MAPLE CREEK
PIONEER IRRIG. CO.

Dear Mr. Foster:

Please find enclosed a copy of the above referenced application and a
watermaster recommendation form. Please review the application and com-
plete the form, returning it to this office on or before May 30, 1983.

Thank you for your cooperation in this matter.

Sincerely,

BARBARA L. POWERS
Secretary

bp

Enclosures

June 3, 1983

RE: Application for Transfer No. 13-0044/0045 FRANKLIN MAPLE CK

Preston Citizen
Box 472
Preston, ID 83263

Gentlemen:

Would you please submit an affidavit of publication and certified bill in connection with the above referenced application(s). The legal notice was to have been published in your paper on May 12 and 19, 1983.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

COLLEEN WRAY
Adm. Secretary

June 7, 1983

RE: Application for Transfer No. 13-0044/0045 FRANKLIN MAPLE CREEK

Conan Foster, Watermaster
Water District No. 13-A
Rt. #3
Preston, ID 83263

Dear Mr. Foster:

Our files indicate we have not received your watermaster comments on the above captioned application for transfer, which was forwarded to you on May 6, 1983. Therefore, enclosed please find a copy of the application and another watermaster recommendation form.

Section 42-222 of the Idaho Code states that watermaster recommendations must be submitted to the Department before proceeding with final administrative action. Since advertising of the application is completed, I urge you to give this matter immediate attention.

Your cooperation is appreciated.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosures

RECEIVED

APPLICATION FOR TRANSFER OF WATER RIGHT JUL 28 1983

NO. 13-0044/0045

Department of Water Resources
Eastern District Office

RECOMMENDATION OF WATERMASTER

I, Conan Foster, watermaster of Cub River,
of Water District No. 13 A, County of Franklin, State of Idaho,
whose address is Rt # 3 Preston, Idaho 83263

have read the attached copy of the application for transfer of water right for Franklin Maple
Creek Pioneer Irrigation Co., and to the best of my knowledge believe the
(name)
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 re-
quested for the following reasons:

Dated at Preston, Idaho, this 27th day of July 19 83.

Conan Foster
(signature)

Please use reverse side if needed.

September 23, 1983

Lowell D. Castleton
Atty. at Law
P.O. Box 191
Preston, ID 83263

RE: Application for Transfer No. 13-0044/0045
Franklin Maple Creek Pioneer Irrigation Co.

Dear Mr. Castleton:

Recently I was notified by our State Office that an apparent error had been identified on the above captioned application and final administrative action would be postponed until an amended application had been submitted and regional processing completed. To expedite this procedure, we have prepared the enclosed amended application for signature by the company's president.

The modified portion is item 2 of Section C describing the points of diversion to be used. The original application listed the SW¹/₄ NW¹/₄ Section 30 and SE¹/₄ SE¹/₄ Sec. 16, T. 16S, R. 40E. While the SE¹/₄ SE¹/₄ Sec. 16 appears correct, comparison of the aerial photo included with the application and a USGS Quad Map of the area, indicates the other point of diversion is actually in the SE¹/₄ NE¹/₄ Section 30. For your reference a copy of the quad map is also enclosed.

If you do not concur, please contact me. Otherwise, return the amended application to this office after it has been signed and notarized.

There is a statutory fee of \$20.00 for amendments, so please include a check for that amount with the application.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:bp

Enclosure

WILLIAMS & CASTLETON
LAW OFFICES

24 NORTH STATE • P. O. BOX 191
PRESTON, IDAHO 83263

J. DENNIS "J.D." WILLIAMS
LOWELL D. CASTLETON
JOHN TAFT BENSON
(MEMBER UTAH BAR ONLY)

September 29, 1983

RECEIVED

SEP 30 1983

Department of Water Resources
Eastern District Office
(208) 682-2680

Mr. Ernest Carlsen
Assistant Regional Supervisor
State of Idaho
Department of Water Resources
150 Shoup
Idaho Falls, ID 83401

Re: Application for Transfer No. 13-0044/0045
Franklin Maple Creek Pioneer Irrigation Co.
Our File No. 1069.6C

Dear Mr. Carlsen:

I have reviewed your letter of September 23, 1983, and concur with your findings. The Amended Application is enclosed with the required notarized signature. A check for the \$20.00 amendment fee is also enclosed.

Thank you for your assistance in this matter. If there is anything further that I can help with, please let me know.

Yours very truly,

WILLIAMS & CASTLETON


LOWELL D. CASTLETON
Attorney at Law

LDC/mt

cc: Ramon Wright

Enclosures

October 12, 1983

Lowell D. Castleton
Attorney at Law P.O. Box 191
Preston, ID 83263

Dear Mr. Castleton:

Enclosed please find your check No. 92-171 in the amount of \$20.00 for the filing fee of amended transfer No. 13-0044/0045 in the name of Franklin Maple Creek Pioneer Irrigation Company. The check is being returned as no signature appeared on the check.

Very truly yours,

COLLEEN WRAY
Adm. Secretary

Enclosure

NOTICE OF PROPOSED AMENDING OF TRANSFER

No. 13-0044

Notice is hereby given that Franklin Maple Creek Pioneer Irrigation Co., Preston, Idaho filed transfer No. 13-0044/0045 for the diversion of 2.00 cfs of water from Maple Creek tributary to Cub River with the point of diversion within the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 16, T. 16S, R. 40E, B.M., Franklin County for irrigation purposes.

The right holder now proposes to amend Transfer No. 13-0044 amending the point of diversion to the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 30, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 16, T. 16S, R. 40E, B.M., Franklin County.

Any protest to the proposed amending of this right must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, Idaho, 83402, on or before November 14, 1983.

A. KENNETH DUNN

Director

Published Preston Citizen, 10/27 & 11/03/83

*Proofed
10/25/83
BP*

October 20, 1983

RE: Amended Application for Transfer No. 1B-0044 FRANKLIN MAPLE CK.

Conan Foster, Watermaster
Water District No. 13-A
Rt. #3
Preston, ID 83263

Dear Mr. Foster:

Please find enclosed a copy of the above referenced application(s) and water recommendation form(s). Please review the application(s) and complete the form(s), returning it to this office on or before November 14, 1983.

Thank you for your cooperation in this matter.

Very truly yours,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:CW

Enclosure



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

EASTERN REGION

John V. Evans
Governor

A. Kenneth Dunn
Director

150 Shoup — Suite 15
Idaho Falls, Idaho 83402
(208) 525-7161

November 15, 1983

RE: Application for Transfer No. 11-0836A MINK CREEK IRRIGATION COMP.
13-0044 FRANKLIN MAPLE CREEK PIONEER (Am.)

Preston Citizen
Box 472
Preston, ID 83263

Gentlemen :

Would you please submit an affidavit of publication and certified bill in connection with the above referenced application(s). The legal notice was to have been published in your paper on October 27 and November 3, 1983.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

COLLEEN WRAY
Adm. Secretary

November 16, 1983

RE: Amended Application for Transfer No. 11-0044 FRANKLIN MAPLE CK.

Conan Foster, Watermaster
Water District No.13-A
Rt.#2
Preston, ID 83263

Dear Mr. Foster:

Our files indicate we have not received your watermaster comments on the above captioned application for transfer, which was forwarded to you on October 20, 1983. Therefore, enclosed please find a copy of the application and another watermaster recommendation form.

Section 42-222 of the Idaho Code states that watermaster recommendations must be submitted to the Department before proceeding with final administrative action. Since advertising of the application is completed, I urge you to give this matter immediate attention.

Your cooperation is appreciated.

Respectfully submitted,

ERNEST CARLSEN
Assistant Regional Supervisor

EC:cw

Enclosures

*Decided to use
original comments
submitted 7-28-83*

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
TRANSFER ANALYSIS SHEET

INITIAL REVIEW BY: Steve McCormick

1. Right number _____ Applicant Franklin Maple Cr
2. Type of right: ☒ Decree ☐ License ☐ Claim
3. Purpose of transfer: ☒ Change point of diversion ☐ Add diversion point(s) ☐ Change place of use
☐ Other _____

4. Check:

- a. ☒ Source ☒ Priority ☒ Amount ☒ Purpose ☒ Period of use
- b. ☒ Description of original point of diversion.
- c. ☐ Description of original place of use. See attached memo.

5. Amount of land &/or water transferred:

- ☒ All of right.
- b. ☐ Part of right (NOTE! Part B should be filled in only if part of the right is owned by the applicant).
- ☒ Check description of point(s) of diversion.
- d. ☐ Check description of place of use. No change
- ☒ Check map (shows p.d. and p.u. after transfer).
- ☒ Check for correct signature, notarization, and fee.
- g. ☒ Check proof of ownership of right &/or land from which water is transferred. owner same as name on transfer app.
- ☒ Check for expansion in use of right. Comments None - P/S change only

☒ Check for existing water rights from same source, on land water is being transferred to.

Right number(s) _____

j. ☐ Is use within a Watermaster District? ☒ Yes ☐ No

If yes, what district? District # 13A Maple Creek

FINAL PROCESSING REVIEW BY: _____

1. Watermaster recommendation requested on 5-6-83 Received on 7-28-83
2. Is transfer published correctly? ☒ Yes ☐ No
3. Protest received? ☐ Yes ☒ No

RECOMMENDED ACTION

1. ☒ Approve
2. ☐ Deny

3. Conditions* Code 01E, 05 (W.D. 13A Maple Creek)

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AUG 01 1983

Department of Water Resources

4. By Ernest Carlson Date July 29, 1983
Jim 3-6-84 use above conditions

* All uses within Watermaster Districts require special conditions.

Department of Water Resources

INTER-DEPARTMENT MEMO — 1

FROM Jim

DATE 3-8-84

TO File

SUBJECT

Per conversation w/ Glen he wanted to see if the place of use of this right could be determined prior to approving the transfer.

The findings of facts and conclusions of law should be requested.

SIGNATURE

INTER-DEPARTMENT MEMO — 1

FROM Jim

DATE 3-8-84

TO File

SUBJECT Request of findings of facts and conclusions
of law for the case of:

The Village of Fairview vs Franklin Maple
Creek Pioneer Irrigation Company etal. (13-B)

Per request w/ Mike Kunz 857-1094
the above was requested this day.

SIGNATURE

Greider County - Lou

766-4116

INTER-DEPARTMENT MEMO — 1

FROM Jim

DATE 4-11-84

TO File

SUBJECT Request see memo 3-8-84

Called Patty at Franklin County.
She informed me that they do not
have records prior to 1910

SIGNATURE

INTER-DEPARTMENT MEMO — 1

DATE 4-17-84

FROM Jim

TO File

SUBJECT Request per 3-8-84 memo

The clerk at Franklin County (Patty) found ~~the~~ findings and conclusions and will be sending us a copy when the paper for one of ~~the~~ the microfilm printers arrives.

Call-up in two wks.

SIGNATURE

RECEIVED

MAY 8 1984

Department of Water Resources

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 4580

THE VILLAGE OF FAIRVIEW,
a municipal corporation,

Appellant

-VS-

FRANKLIN MAPLE CREEK PIONEER
IRRIGATION COMPANY, a corpora-
tion, et al.

Respondents.

Pocatello, April Term, 1983

Filed May 13, 1984

Clay Koelsch, Clerk

Appeal from the District Court of the Fifth Judicial Dis-
trict for Franklin County. Hon. Jay L. Downing, Judge.

Action to quiet title to certain waters and to change the
point of diversion thereof. Judgment for defendants. Affirmed.

Arthur W. Hart and Merrill & Merrill for appellant.

P. J. Evans for respondents.

GIVENS, J.

The Village of Fairview, situated in Franklin County, with
a population of about four hundred fifty people, owns its own
water system, which, as to the amount of water, is inadequate,
and to remedy this situation in 1932 purchased a tract of land
about nine miles north-east with all appurtenant water rights
from Levi Olson, who through mesne conveyances deraigned
title from John C. Whitehead. Upon this land there arises a
small spring of water referred to as the "Whitehead Spring." A
short distance to the north of this spring, and upon the lands
owned by the defendant, Charles Baker, arises another small
spring referred to as the "Baker Spring."

On October 16, 1905, a decree adjudicating the rights to
the waters of Maple Creek was entered in the District Court of
the Fifth Judicial District.

POOR QUALITY ORIGINAL

Oneida County, (which then included the territory now embraced in Franklin County) wherein J. S. Fleck was plaintiff and Franklin Maple Creek Pioneer Irrigation Company was defendant and there were various intervenors, including John C. Whitehead, who was awarded 2.5 cubic feet per second of time, with a priority of 1886. There is no specific reference in said Decree, pleadings or proof as to the waters of the two springs above mentioned.

In the case of said respondents contend said Decree was res judicata of the use of the waters of these particular springs, while appellant contends that one of said springs was not involved in the Fleck litigation, and even though impliedly therein indicated, that respondents' predecessors in interest during all said period, both before and after the entry of said Decree, have consistently, lawfully and openly claimed and used the waters of said springs for domestic and irrigation purposes adversely to all the world and without claim therefor on the part of respondents or any of them.

So far as the litigation herein is concerned the above mentioned J. S. Whitehead is the predecessor in interest of appellant and the only past decreed rights it claims it is entitled to are by reason of said Decree to him. The decreed priorities of respondents are superior in point of time to appellant's. By the amendment appellant asks to quiet title to the flow of the springs involved in addition to the 2.5 cubic feet awarded its predecessor in interest, John C. Whitehead in the 1905 Decree, and to change the point of diversion and use thereof.

Respondents' assertion of res judicata is correct because of the 1905 Decree was absolute and conclusive as to the waters of Maple Creek and its tributaries, it reciting:

"It is further ordered, adjudged and decreed that the said plaintiff, the said defendant, and each and every of the intervenors, their agents, servants, or employees and successors in interest, be and they and each of them are hereby

POOR QUALITY ORIGINAL

perpetually enjoined and restrained from in any manner interfering with the free flow of said waters of Maple Creek and its several tributaries, except as may be decreed to the said respective parties, and in the order of their several priorities."

True, these springs were not mentioned in the 1906 suit, but the subject matter of that litigation was the waters of Maple Creek and those springs then were and now are, clearly, unless interfered with, tributary to and augment the flow of Maple Creek; hence, appellant's predecessors in interest should have claimed all the water in the creek he was entitled to, and the 1906 Decree declares 2.5 cubic feet in all Whitehead was entitled to, which concededly does not cover the flow of these springs which is now claimed in addition to the 2.5 cubic feet awarded in said previous decrees.

Whatever water in Maple Creek or its tributaries was claimed by appellant or its predecessors in interest, in the previous case could and should have been litigated, therefore they will now be held to have been litigated, hence the 2.5 cubic feet awarded as of 1885 is all the decreed water appellant has as derived from Whitehead. *Forde v. Murphy Land etc. Co.*, 35 Idaho 549, 208 P. 341; *South Idaho Water Co. v. McDonald*, 80 Idaho 409, 326 P. 331; *Marshall v. Underwood*, 38 Idaho 464, 331 P. 1105.

The trial court herein found with regards to the claim of prescription:

"That plaintiff and its predecessors in interest have used the said 2.5 cubic feet per second of the waters of said Maple Creek above described, continuously, uninterruptedly, openly notoriously and in hostility to defendants and all the world, and with claim of right thereto, under the said previous decree of this court, dated October 16th, 1906, and with claim of right thereto, as of the year, 1885; but has not peaceably or without interference or adverse claims used the waters of any of said springs whether arising on the lands of said plaintiff or upon the lands of defendant Charles Baker, nor has the plaintiff or its predecessors in interest operated or maintained a ditch or pipe line for a distance of approximately 75 feet or at all, or used the easement aforesaid or at all, peaceably or uninterruptedly and with claim of title aforesaid, to the amount of one-third of one cubic foot of water per second of land, or for any beneficial purpose, or for agricultural purposes, or for culinary use or for the irrigation of crops and

POOR QUALITY ORIGINAL

October, 1900, the 1st day of October each year up to and including the 1st day of March each year, and after the 1st day of March each year when the waters of said Maple Creek are not sufficient to supply the prior decreed right of said waters of said Maple Creek, and that any use of the waters of said springs or any of them after the 1st day of March each year is insufficient during the 1st day of March each year to supply the water rights of prior decreed waters of said springs as a license to the use of water from the line from said springs to the house on said premises for culinary purposes, and any further use of said waters by said plaintiff or its predecessors in interest without the knowledge or consent of any of the defendants herein, and in violation of the said decree of the court dated October 16th, 1900."

Applying the above section is that the entire record shows a prescription right with respondent's knowledge of the adverse use, and that the court erred in making the above finding, citing among other authorities, *Barnes v. Antelope Creek etc. Water Co.*, (Cal.) 92 P. 284, which is in point but when analyzed and cases following it are examined we find this to be the law: When the use is open, visible or clandestine, but open, visible and not clandestine, notice of knowledge follows. *Barnes v. De- rock*, (Cal.) 92 P. 284, which cites *Frank v. Mendocino*, (Cal.) 83 P. 341. The above section and rule is set forth at length:

"The law has been stated under claim of title and acquiescence of the owner of the land (right of title) and acquiescence of the owner of the land. It may well have been inferred from the facts of the case for the court to determine as a fact the acquiescence of the parties and of the owner of the land. In *Cox v. Forrest*, 80 Cal. 111, 112, the court in an action to recover damages for obstructing a public right of way said: 'By "adverse" is meant open without license or permission, for an adverse right is one that cannot grow out of a mere permissive enjoyment, the real point of distinction being between a permissive or tolerated user, and one which is claimed as a matter of right. Where one, however, has used a right of way for twenty years, unexplained, it is but fair to presume the user is a matter of right, unless it appears to have been a mere license.' Mr. Justice Story, in *Richard v. Williams*, 12 Mass. 195, 3 U. S. 102, in speaking of the inference to be drawn from possession said: 'Possession per se evidence does not even the mere fact of present occupation of land, for the law will not presume a wrong. From the circumstances of the case, therefore, it must depend upon the actual circumstances what is the quality and extent of the interest claimed by the party, and to that extent only will the presumption of law go in his favor.' These cases

POOR QUALITY ORIGINAL