BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; No. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030-DELMAR CLARK	MEMORANDUM DECISION AND ORDER

On February 5, 1976, Lorraine Kent and the Claude Kent Trust filed application no. 15-7025 to appropriate 0.50 cubic feet per second at a point within the SW¼NE¼, Sec. 23, Twp. 11S, Rge. 34E, from an unnamed spring, tributary to Dairy Creek for the irrigation of forty (40) acres of land. On February 24, 1976, Lyle R. Burnham filed application no. 15-7026 to appropriate 1.60 cubic feet per second at a point within the SW¼SE¼, Sec. 24, Twp. 11S, Rge. 34E, from an unnamed spring, tributary to Dairy Creek for the irrigation of eighty (80) acres of land. Notice of these applications was published in the Idaho Enterprise and was subsequently protested by Clarence Kent and St. Johns Irrigating Company. A conference was held in Pocatello, Idaho, on April 9, 1976. At this conference, Larry Kent, representing Lorraine Kent and the Claude Kent Trust, requested the hearing in the matter be continued to a later date to allow him an opportunity to consult with legal counsel.

On April 26, 1976, Delmar Clark filed with the Department of Water Resources applications no. 15-7029 and 15-7030 requesting to appropriate 0.13 cubic feet per second for domestic, stockwater and irrigation purposes from unnamed springs in the SE¼NE¼, Sec. 23; NESW¼, NW¼SW¼, Sec. 24; Twp. 11S, Rge. 34E, and 2.40 cubic feet per second for irrigation purposes from unnamed springs in the NW¼SW¼, Sec. 24, Twp. 11S, Rge. 34E. Notice of these applications were published in the Idaho Enterprise and was protested by Clarence Kent. Department action in this matter was delayed because of a court action involving the water of the springs between Delmar Clark and Clarence Kent.

On January 12, 1977, because of the issues involved, a combined hearing was held in Malad, Idaho, on all of the above referenced applications. At that time, St. Johns Irrigating Company, through their attorney, contacted the Department and indicated they did not wish to appear at this hearing and would like the information presented at the previous conference to be considered by the Department

in making a decision in the matter. All of the applicants were present. Applicant Delmar Clark was represented by attorney, Robert C. Huntley, Jr., of the firm Racine, Huntley and Olson, Pocatello, Idaho. The protestant, Clarence Kent was present and represented by attorney J. W. Crowther. The testimony of both the applicants and protestant was heard primarily on two issues: These issues were: (1) Does the protestant, Clarence Kent, have a water right from the subject springs that will be injured, and (2) is there sufficient water in the source for the purposes intended by the applicant.

FINDINGS OF FACT

On June 5, 1928, the cause of St. John Irrigating Company v.s. Asa H. Danforth, H. O. Kent, Marvin A. Butler and James Burnham came before the Fifth Judicial District Court at Malad, Idaho, Oneida County. This trial resulted in the adjudication of certain rights from springs arising in the SE¼NE¼, Sec. 23, Twp. 11S, Rge. 34E. The court decreed that the defendants and cross-complainants, Henry O. Kent and James Burnham were decreed owners of a right to the perpetual use of waters from a certain more southerly spring to the extent of five-tenths of a cubic foot per second of time, with a priority dating from June 1, 1914. In this same action, Asa Danforth was decreed the owner of water from a certain more northerly spring at the head of Sheep Creek and had a right to the extent of one-half cubic foot of water per second of time, with a priority dating from June 1, 1915. The use is described for both rights for irrigation and domestic purposes.

The evidence presented at the hearing was that very little use was made of this water and between 1950 and 1973, the only water used from the springs was for domestic purposes.

In 1973, Mr. Clarence Kent constructed a reservoir within the NW¼SE¼, Sec. 24, Twp. 11S, Rge. 34E, and began diverting water for the irrigation of about 160 acres of land. The water supply for this reservoir originated from the same springs listed in the Danforth Decree. During 1975 to take advantage of the available head between the springs and the place of his use to reduce pumping requirements, Clarence Kent installed a plastic pipeline to collect the water from the springs and transport it to his pump. The installation of this pipeline eliminated the flow in the creek between the springs and the reservoir and, therefore, through the property of Mr. Delmar Clark.

In the decree entitled St. John Irrigating Company -vs- Asa H. Danforth, et. al., it is specified that these springs are not a tributary of Dairy Creek.

From the records available, it appears that Clarence Kent is the successor in interest to the five-tenths cubic foot per second originally decreed to H. O. Kent and James Burnham.

The best available data indicates that the springs flow at the rate of at least one cubic foot per second of time.

CONCLUSIONS OF LAW

1. Even though the water from the springs was not used for irrigation for a period of time greater than five years, and, therefore, the water right may have been lost by nonuse under Section 42-222, Idaho Code, the courts have been reluctant to declare a water right lost if use of the water was resumed prior to the water being taken by subsequent appropriators. Carrington v.s. Crandall, 65 Idaho 525, 147 P2d 1009 (1944); Rams-horn Ditch Co. v.s. United States, 269 Fed. 80; Zezi v.s. Lightfoot, 57 Idaho 707, 713, 68 P2d 50. The protestant Clarence Kent, as successor in interest to the H. O. Kent and James Burnham water right is entitled to 0.50 cubic feet per second.

2. There is not sufficient water in the springs, under existing conditions, to supply the water requested under each of these applications for permit but each applicant should have the opportunity to develop additional water and use the unappropriated water that is available in the source.

3. The use of the existing water should be developed according to the priority of the water right, therefore, the date that proof of completion of works and application of water to beneficial use should be set later for the junior priority right holders to allow them to construct their projects if the senior right holders do not construct their projects.

4. The water rights of the protestant, St. John Irrigating Company will not be injured since the source of water was declared in the case of St. John Irrigating Company v.s. Asa H. Danforth, et. al. not to be a tributary of Dairy Creek.

ORDER

IT IS, THEREFORE, HEREBY ORDERED and Applications for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030 are APPROVED subject to the following conditions:

1. Subject to all prior water rights including that of Clarence Kent to divert 0.50 cubic feet per second of water with a priority of June 1, 1914.

2. That the following priority of right be recognized between the permit holders:

15-7025	February 5, 1976
15-7026	February 24, 1976
15-7029	April 26, 1976
15-7030	April 26, 1976

3. Proof of construction of works and application of water to beneficial use be submitted to the Department on or before:

June 1, 1979 on Permit No. 15-7025
June 1, 1981 on Permit No. 15-7026
June 1, 1982 on Permit No. 15-7029 and 15-7030

and that no extensions of time shall be granted past these dates until the permit holder showing he was prevented from proceeding by circumstances beyond his control.

4. That a measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works on each of the permits.

Dated this 17 day of June, 1977.

C. STEPHEN ALLRED
Director

Identification No. 15 7025

Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

APPLICATION FOR PERMIT

APPROVED

To Appropriate the Public Waters of the State of Idaho

(TYPE OR PRINT IN INK)

1. Name of applicant Lorraine Kent & Claude Kent Trust Phone: 524-0825
   post office address 2223 Oak Trail Drive, Idaho Falls, ID
2. Source of water supply Unnamed Spring which is a tributary of Dairy Creek
3. a. Location of point of diversion is SW ¼ of NE ¼ of Section 23 Township 11 S.
   Range 34 E B.M. Oneida County; additional points of diversion if any: _____

   b. If water is not consumed, it will be discharged into Dairy Creek at a point in SE ¼ of SE ¼ of Section 24 Township 11S Range 34E ~~JK~~ B.M. Oneida County ~~JK~~
4. Water will be used for the following purposes:
   Amount ~~.80~~ 0.50 (cfs or acre-feet per annum) for irrigation purpose from April 1 to Nov. 1 (both dates inclusive)
   Amount _____ (cfs or acre-feet per annum) for _____ purpose from _____ to _____ (both dates inclusive)
   Amount _____ (cfs or acre-feet per annum) for _____ purpose from _____ to _____ (both dates inclusive)
5. Total quantity to be appropriated:
   a. ~~.80~~ 0.50 cubic feet per second and/or
   b. _____ acre feet per annum.
6. Proposed diverting works:
   a. Description of ditches, flumes, pumps, headgates, etc. ditches to utilize gravity flow irrigation. Also, installation of a pump and sprinkler system.

   b. Height of storage dam 6 feet, active reservoir capacity 5 acre feet; total reservoir capacity 5 acre feet, materials used in storage dam: dirt fill
   Period of year during which storage will occur April 1 (Mo. Day) to Nov. 1 (Mo. Day) inclusive.
   c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years.
   b. Estimated construction cost is $ 10,000 .
8. Description of proposed uses:
   a. If water is **not** for irrigation:
      (1) Give the place of use of water: _____ ¼ of _____ ¼ of Section _____ Township _____ Range _____ B.M.
      (2) Amount of power to be generated: _____ hp under _____ feet of head.
      (3) List number of each kind of livestock to be watered _____
      (4) Name of municipality to be served _____, or number of families to be supplied with domestic water _____.
      (5) If water is to be used for other purposes describe: _____

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

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	34 E	23													10	5	3	15	33
11 S	34 E	23			4	3													7

Total number of acres to be irrigated 40

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

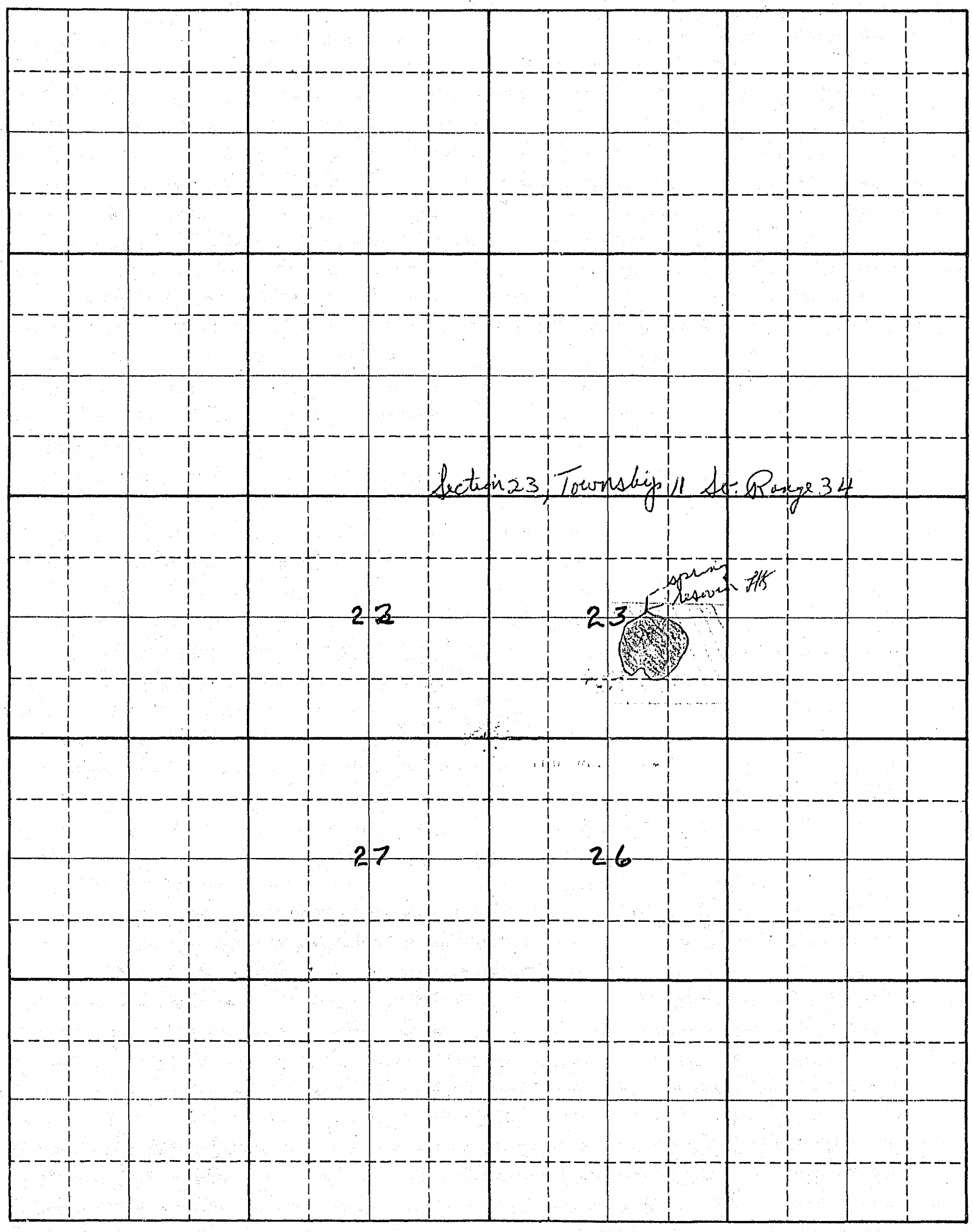
9. a. Who owns the property at the point of diversion Lorraine Kent & Claude Kent Trust

b. Who owns the land to be irrigated or place of use Lorraine Kent & Claude Kent Trust

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

10. Remarks

11. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number. Also see attached aerial Photo



Scale: 2 inches equal 1 mile

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

Lorraine Kent L Kent
(Applicant) Trustee

Proposed Priority: 2-05-1976

Received by mc Date 2-5-76 Time 12:08 p.

Preliminary check by FDC Fee $5.00

Receipted by mc Date 2-05-76 # 13605

Publication prepared by mc Date 2-06-76

Published in The Idaho Enterprise

Publication dates 2-12-76 + 2-19-76

Publication approved Dwl Date 2-24-76

Priority reduced to _____ Reason _____

Protests filed by: Owsley Ranch, St. Johns Irrig. Co.

Copies of protests forwarded by Dwl 2-20-76 - 3-02-76

Hearing held by _____ Date _____

Recommended for approval denial by _____

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 15-7025, and said application is hereby APPROVED.

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

   a. SUBJECT TO ALL PRIOR WATER RIGHTS.

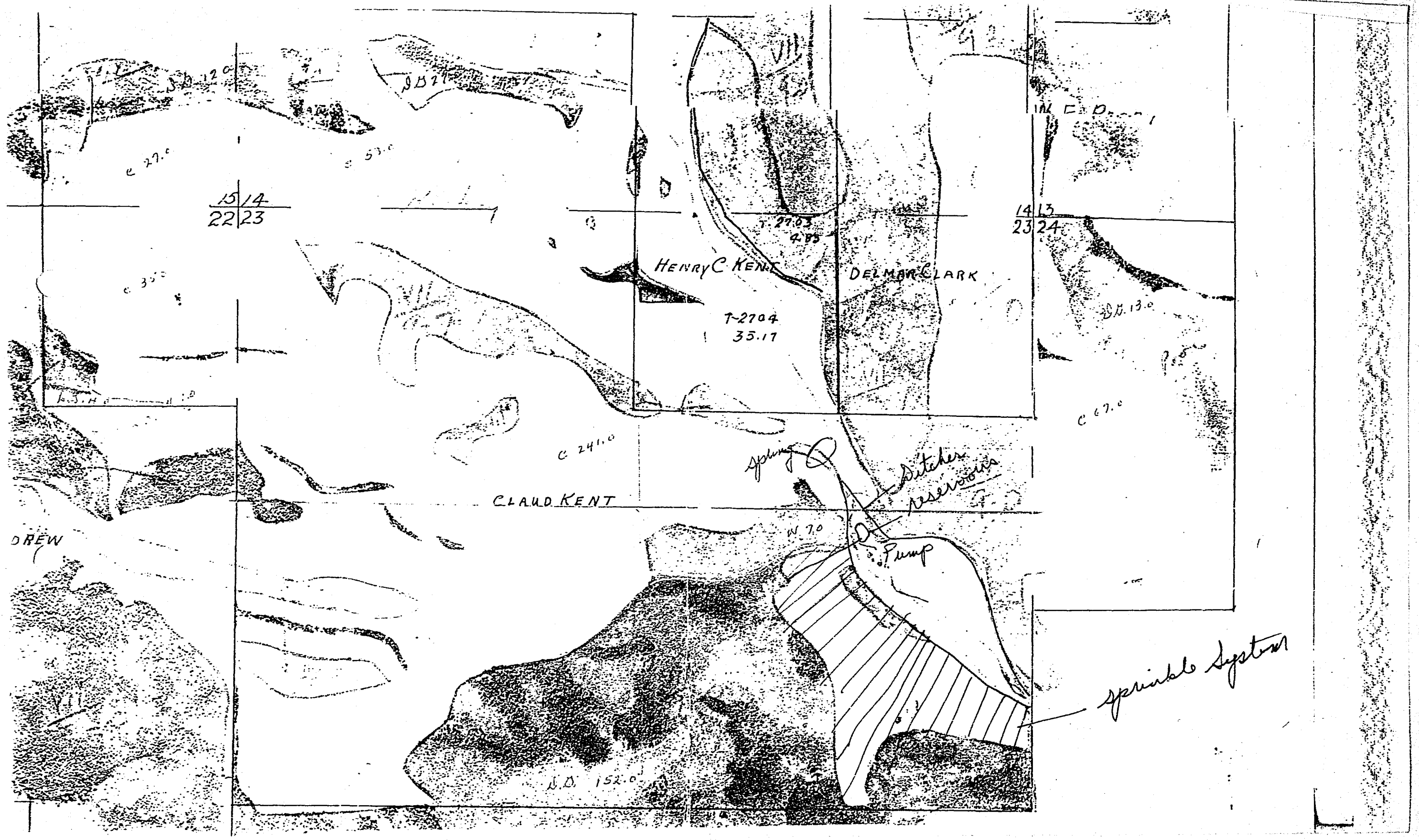
   b. Proof of construction of works and application of water to beneficial use shall be submitted on or before June 1, 1979.

   c. Other: PURSUANT TO MEMORANDUM DECISION AND ORDER DATE JUNE 17, 1977.

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

Witness my hand this 17 day of June 1977.

Director


15 14
22 23
HENRY C KENT
DELMAR C LARK
T-2704
35.17
T 27.03
4.85
14 13
23 24
CLAUD KENT
DREW
Ditches
reservoirs
Pump
sprinkle System
spring
N.D. 152.0
W 7.0
C 241.0
C 67.0
B.M. 13.0

RECEIVED
FEB 24 1976
Department of Water Resources
Eastern District Office

NOTICE OF APPLICATION FOR WATER PERMIT

NOTICE IS HEREBY GIVEN that Lorraine Kent & the Claude Kent Trust, Idaho Falls, Idaho, have on 2-05-76 submitted Application No. 15-7025 for a permit to appropriate 0.80 cubic feet per second of water from an unnamed spring tributary to Dairy Creek by means of ditch and pump within the SW¼NE¼, Sec. 23, T. 11S, R. 34E, B.M., Oneida County; to be used from Apr. 1 to Nov. 1 for irrigation of 40 acres within S½NE¼, SE¼, Sec. 23, T. 11S, R. 34E, B.M.

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Resources, 1515 Lincoln Road, Idaho Falls, Idaho, 83401 on or before March 1, 1976.

R. Keith Higginson
Director

Published in the Idaho Enterprise, Malad City, Idaho on February 12 and February 19, 1976.

AFFI. .VIT OF PUBLICATION

State of Idaho
County of Oneida, ss.

Paula Heimdal being first duly sworn on h.e oath, states: That she is Clerk of the Idaho Enterprise, a newspaper of general circulation in Oneida County, Idaho published weekly at Malad, in said county, that said newspaper has been published in said county uninterruptedly and continuously for over seventy-eight consecutive weeks, prior to the first publication of the annexed notice or advertisement:

That said Idaho Enterprise was at all of the times of publication of said notice a newspaper of general circulation made up of at least four pages of at least five columns each, printed from type matter or stereotyped forms of at least seventeen and three fourths inches depth, and said newspaper during all of the times of publication aforesaid had more than 200 bonafide subscribers thereto living within the county of Oneida in which said newspaper was published at regular intervals not less frequently than once a week.

That the annexed notice was published per clipping attached in the regular and entire edition of said newspaper and not in any supplement thereof for 2 successive weekly issues thereof the date of the first publication being the 12 day of Feb., 1976 the date of the last publication being the 19 day of Feb., 1976.

Paula Heimdal

Subscribed and sworn to before me this 22 day of Feb., 1976.

H. D. Naylor

Notary Public, residing at Malad, Idaho

My Commision expires the 10 day of Oct, 1977.

Costs:

30 lines at 23c per line first insertion $ 6.90

..... lines tabulated at 34½c per line $.....

15c per line each subsequent insertion $ 4.50

TOTAL ..... $ 11.40

(Rates for legal notices are fixed by Idaho law)

DEPARTMENT OF WATER RESOURCES
- STAFF ANALYSIS -

Item	Initial	Date	
			Application No. _____
			✓ Source
			✓ Point of Diversion
			✓ County
			✓ Quantity of Water and Period of Use
			✓ Description of Diverting Works
			✓ Time required for B/U of water
			✓ Place of Use or Acres Irrigated
			✓ Map
			✓ Signature
			✓ Fee
(1)	[illegible]	2/6/76	In form to receipt
(2)	[illegible]	2/6/76	Send Copies to:
			_____ Idaho State Health Department N/A
			_____ Idaho Fish and Game Department
			_____ Bureau of Land Management
			_____
(3)	[illegible]	2/6/76	_____ Request Special Use Permit from U.S.F.S. N/A
			_____ Request Easement from B.L.M.
			_____ Request Information from Applicant
(4)	[illegible]	2/6/76	In form for advertising
(5)	[illegible]	2/6/76	Platted on Map No. T11S, R34E
(6)	[illegible]	2/6/76	Located within Water District No. N/A
(7)	[illegible]	2/6/76	Critical groundwater area: yes _____ no X
(8)	[illegible]	2/6/76	Groundwater levels: N/A
			_____ Declining, _____ Stable, _____ Increasing
			(comment) _____
(9)	[illegible]	2/6/76	Cat places Other rights on the same place of use No - none
(10)	[illegible]	2/6/76	Comments: None
(11)	CW	2-24-76	Affidavit of Publication received(date) 2-24-76
(12)	CW	2-19-76	Final date for protests March 1, 1976
			Protests received: yes ✓ no ____
(13)	RDC	4/11/77	All requested information received from agencies or applicant: yes ____ no ____
(14)	"	"	Action recommended:
			1 ✓ Approve _____ Deny
			2/5/76 Proposed Priority
			_____ Reason for Reduction _____
			✓ Measuring device required
			✓ See attached sheet for other conditions of approval MEMO DECISION
			_____ No special conditions for approval
(15)	District E		By RDC Date 4/11/77

15-7025, 15-7026
15-7029, 15-7030
Combined M.D.

Copy

NOTICE OF APPLICATION FOR WATER PERMIT

Notice is hereby given that **Lorraine Kent & the Claude Kent Trust, Idaho Falls, Idaho**

~~have~~ ~~has~~ on **2-05-76** submitted Application No. **15-7025**

for a permit to appropriate **0.80** cubic feet per second ~~acre feet~~

of water from **an unnamed spring tributary to Dairy Creek**

by means of **ditch and pump**

within the **SW¼NE¼, Sec. 23, T. 11S, R. 34E, B.M., Oneida County;**

to be used from **Apr. 1 to Nov. 1**

for **the irrigation of 40 acres**

within ~~the~~ **S½NE¼, SE¼, Sec. 23, T. 11S, R. 34E, B.M.**

If issued, this permit will be subject to all prior water rights. Protests against the granting of the permit must be filed with the Idaho Department of Water Resources, 1515 Lincoln Road, Idaho Falls, Idaho, 83401 on or before **March 1, 1976**.

R. KEITH HIGGINSON

Director

Published in the **Idaho Enterprise, Malad City, Idaho**

on **February 12** and **February 19, 1976.**

cw-l.
cw-A.

February 6, 1976

RE: Application for Permit No. 15-7025

The Idaho Enterprise
P.O . Box 205
Malad City, Idaho 83252

Gentlemen:

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

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

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
kEastern Region

Bill submitted 2-24-76 by CW

RDC:ME

Legal ~~Ad~~ Notice (1)

BEFORE THE DIRECTOR OF IDAHO DEPARTMENT
OF WATER RESOURCES
Idaho Falls, Ida

RE: Claim of Lorraine Kent & the Claude Kent Trust Water Right No. 15-7025

AFFIDAVIT OF PROTEST

Comes now Clarence Kent who, after being first duly sworn, deposes and says: My name is Clarence Kent. I do hereby file objection and protest to the above referenced application on the following grounds:

1. All waters tributary to Dairy Creek arising within Section 23, Township 11 South, Range 34 EBM, Oneida County, have been previously appropriated and have been continuously used by this objector and his predecessor in interest at least since 1928.

2. All of said waters are now incorporated in a sprinkler irrigation system of this objector.

3. Granting of applicants' application would seriously deplete the waters used in the said sprinkler irrigation system to the extent that he would suffer irreparable damage and loss through diminished water flow.

Dated this 17th day of February, 1976.

Clarence Kent

Clarence Kent

STATE OF IDAHO
County of Oneida,ss

On this 17th day of February, 1976, before me Laura E. Crowther, Notary Public, personally appeared Clarence Kent known to me to be the person whose name is subscribed to the within

instrument and acknowledged to me that he is the person who executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Laura F Crowley

Notary Public
Residing at: Malad, Idaho

RECEIVED
FEB 18 1976
Department of Water Resources
Eastern District Office

BEFORE THE DIRECTOR OF IDAHO DEPARTMENT
OF WATER RESOURCES
Idaho Falls, Ida

RE: Claim of Lorraine Kent & the Claude Kent Trust
Water Right No. 15-7025

AFFIDAVIT OF PROTEST

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2. All of said waters are now incorporated in a sprinkler irrigation system of this objector.

3. Granting of applicants' application would seriously deplete the waters used in the said sprinkler irrigation system to the extent that he would suffer irreparable damage and loss through diminished water flow.

Dated this 17th day of February, 1976.

Clarence Kent
Clarence Kent

STATE OF IDAHO
County of Oneida,ss

On this 17th day of February, 1976, before me Laura E. Crowther, Notary Public, personally appeared Clarence Kent known to me to be the person whose name is subscribed to the within

instrument and acknowledged to me that he is the person who executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Louis E. Crowther
Notary Public
Residing at: Malad, Idaho

RECEIVED
FEB 26 1976
Department of Water Resources
Eastern District Office

D. James Manning
RACINE, HUNTLEY & OLSON, CHARTERED
Attorneys at Law
Center Plaza; P. O. Box 1391
Pocatello, Idaho 83201
Telephone: (208) 232-6101

Attorneys for St. John Irrigating Company

BEFORE THE STATE OF IDAHO,

DEPARTMENT OF WATER RESOURCES

Application of Lorraine Kent and Claude Kent Trust for Permit.	PROTEST RE APPLICATION NO. 15-7025

COMES NOW St. John Irrigating Company, by and through its counsel, and protests against the approval of the application for water permit in the above matter.

The name and address of protestant is as follows: St. John Irrigating Company, Malad City, Idaho 83252.

This protest is made upon the grounds and for the reason that the water permit sought in the above application would interfere with the prior existing right of this protestant to the use of the waters of Dairy Creek and its tributaries and sources including those from which the applicant seeks to divert or use water.

DATED this 25 day of February, 1976.

RACINE, HUNTLEY & OLSON, CHARTERED

By: _____
D. James Manning
Attorneys for St. John Irrigating Co.

J. W. CROWTHER
ATTORNEY AT LAW

RECEIVED
19 cw
FEB 18 1976
Department of Water Resources
Eastern District Office

60 NORTH MAIN MALAD CITY, IDAHO
PHONE 766-2644

February 18, 1976

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

Re: Claim of Lorraine Kent & the
Claude Kent Trust

Gentlemen:

Enclosed please find two affidavit of protests to be filed with your agency.

Yours very truly,

J. W. Crowther

JWC/lec
cc

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

February 20, 1976

Ms. Lorraine Kent
2223 Oak Trail Drive
Idaho Falls, Idaho 83401

RE: Application for Permit No. 15-7025

Dear Ms. Kent:

We have enclosed a copy of the protest filed against the issuance of a permit pursuant to your Application No. 15-7025. You should be aware that the following are the principal items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

(1) Will the proposed use reduce the quantity of water under existing water rights?

(2) Is the proposed water supply insufficient for the purposes intended?

(3) Is the application made in good faith or for delay or speculative purposes?

(4) Has the applicant sufficient financial resources with which to complete the project?

The Department cannot allow a permit for irrigation purposes which would entail the use of more than a continuous flow of 0.02 cubic feet per second of water for each acre of land, or an annual amount of 5 acre feet for each acre of land, unless the applicant can show that more is required (Section 41-202, Idaho Code).

A permit issued by this office is subject to all prior water rights and does not in any way convey or establish a right-of-way over private or governmental lands. Any right-of-way or easement must be obtained by the applicant through action outside of the water right proceedings.

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. Legal counsel is not mandatory at any proceeding before the Department, although you may desire to employ an attorney in your behalf.

If we may be of any assistance, please contact us.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

cc: IDWR - State Office

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

February 20, 1976

RE: Application for Permit No. 15-7025

Mr. J. W. Crowther, Attorney
60 North Main
Malad City, Idaho 83252

Dear Mr. Crowther:

This is to acknowledge receipt of your protest to issuance of a permit pursuant to the above referenced application. The following are the principle items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

(1) Will the proposed use reduce the quantity of water under existing water rights?

(2) Is the proposed water supply insufficient for the purposes intended?

(3) Is the application made in good faith or for delay or speculative purposes?

(4) Has the applicant sufficient financial resources with which to complete the project?

The Department may reject an application and refuse issuance of a permit, partially approve the permit, approve the permit for a quantity of water less than applied for, or approve the permit subject to special conditions.

A permit issued by this office is subject to all prior water rights and does not in any way convey or establish a right-of-way over private or governmental lands. Any right-of-way or easement must be obtained by the individuals concerned through action outside of the water right proceedings.

You will be notified at a later date as to the time and place set for 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
Supervisor,
Eastern Region

RDC:cw

cc: IDWR - State Office

LOUIS F. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON

D. JAMES MANNING, JR.
W. MARCUS W. NYE
GARY L. COOPER

LAW OFFICES OF
Racine, Huntley & Olson, Chartered
CENTER PLAZA - CORNER FIRST STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83201
TELEPHONE (208) 232-6101

RECEIVED
FEB 26 1976
Department of Water Resources
Eastern District Office

February 25, 1976

Director, Idaho Dept. of Water Resources
c/o Ron D. Carlson, District Engineer
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Application of Lorraine and Claude Kent Trust for Permit

Dear Mr. Carlson:

Herewith for filing in the above matter Protest of St. John Irrigating Company.

Very truly yours,

D. JAMES MANNING

DJM: gma
Enclosure

RECEIVED
FEB 26 1976
Department of Water Resources
Eastern District Office

D. James Manning
RACINE, HUNTLEY & OLSON, CHARTERED
Attorneys at Law
Center Plaza; P. O. Box 1391
Pocatello, Idaho 83201
Telephone: (208) 232-6101

Attorneys for St. John Irrigating Company

BEFORE THE STATE OF IDAHO,

DEPARTMENT OF WATER RESOURCES

Application of Lorraine Kent and Claude Kent Trust for Permit.	PROTEST RE APPLICATION NO. 15-7025

COMES NOW St. John Irrigating Company, by and through its counsel, and protests against the approval of the application for water permit in the above matter.

The name and address of protestant is as follows: St. John Irrigating Company, Malad City, Idaho 83252.

This protest is made upon the grounds and for the reason that the water permit sought in the above application would interfere with the prior existing right of this protestant to the use of the waters of Dairy Creek and its tributaries and sources including those from which the applicant seeks to divert or use water.

DATED this 25 day of February, 1976.

RACINE, HUNTLEY & OLSON, CHARTERED

By: _____
D. James Manning
Attorneys for St. John Irrigating Co.

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

March 2, 1976

Mr. D. James Manning
Attorney at Law
P.O. Box 1391
Pocatello, Idaho 83201

RE: Application for Permit No. 15-7025

Dear Mr. Manning:

This is to acknowledge receipt of your protest to issuance of a permit pursuant to the above referenced application. The following are the principle items we can consider at a conference and/or hearing in either approving or denying an application for permit (Section 42-203, Idaho Code):

(1) Will the proposed use reduce the quantity of water under existing water rights?

(2) Is the proposed water supply insufficient for the purposes intended?

(3) Is the application made in good faith or for delay or speculative purposes?

(4) Has the applicant sufficient financial resources with which to complete the project?

The Department may reject an application and refuse issuance of a permit, partially approve the permit, approve the permit for a quantity of water less than applied for, or approve the permit subject to special conditions.

A permit issued by this office is subject to all prior water rights and does not in any way convey or establish a right-of-way over private or governmental lands. Any right-of-way or easement must be obtained by the individuals concerned through action outside of the water right proceedings.

You will be notified at a later date as to the time and place set for 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
Supervisor,
Eastern Region

RDC: CW

cc: IDWR - State Office

March 2, 1976

RE: Application for Permit No. 15-7025

Ms. Lorraine Kent
2223 Oak Trail Drive
Idaho Falls, Idaho 83401

Dear Ms. Kent:

Enclosed please find an additional protest filed against the above referenced application for permit.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

Enclosure

cc: IDWR - State Office

March 30, 1976

Mr. Merle Wilhelm
Airport Manager
Pocatello Municipal Airport
P.O. Box 1021
Pocatello, Idaho 83201

Dear Mr. Wilhelm:

This is to confirm the use of the Conference Room for conference and/or hearing to be held by this office on Friday, April 9, 1976 at 9:00 a.m.

Thank you for your cooperation in this matter.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protests Against Approval of Application for Permit No. 15-7025 in the name of LORRAINE KENT AND CLAUDE KENT TRUST	NOTICE OF CONFERENCE AND/OR HEARING

On February 5, 1976, Lorraine Kent and L. H. Kent, Trustee, filed with the Department of Water Resources an application to appropriate the public waters of the State of Idaho. On February 19, 1976, the Department received a protest against approval of said application from Clarence Kent. On February 26, 1976, the Department received an additional protest from St. John Irrigating Company.

The Department has set the matter of protest for conference and/or hearing for Friday, April 9, 1976, at 9:00 a.m., in the Conference Room of the Pocatello Municipal Airport, Pocatello, Idaho. Because of the similarity of the issues involved this hearing has been combined with Application for Permit No. 15-7026, Lyle R. Burnham. 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.

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 protestant 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 30th day of March, 1976.

Ronald D Carlson

RONALD D. CARLSON

Supervisor, Eastern Region

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	HANDLING CHARGE	REMARKS*
1	46	Brent Abbott, Swanlake, Ida.	13	30	15				13-2122
2	47	Lloyd L. Roberts Swanlake, Ida	13	30	15				"
3	48	Lynn L. Merrill, Swanlake, Ida	13	30	15				"
4	49	James Abbott, Swanlake, Ida	13	30	15				"
5	50	Lowell G. Castleton, Atty. P.O. Box 191, Cooston	13	30	15				"
6	51	Lyn L. Burkett, Downey, Ida	13	30	15				
7	62	Lorraine Rust, 2223 Bat Trail Drive, Pt. Hl.	13	30	15				15-7025
8	53	James A Manning, P.O. Box 1391, Pocatello, Id.	13	30	15				"
9	54	J.D. Crowther, Atty. 60 N. Main, Malad, Id.	13	30	15	/			"
10					/				
11					/				
12					$5.22				
13									
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19									
20									

FEB 10 1975

TOTAL NO. OF PIECES LISTED BY SENDER: 9

TOTAL NO. OF PIECES REC'D AT P.O.: 9

POSTMASTER, PER (Name of receiving employee)

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

PS Form 3877, Dec. 1973

APPLICATION FOR REGISTERED, REGISTERED C.O.D. AND CERTIFIED MAIL

(Declaration of value is required on international registered mail)

★ U. S. GOVERNMENT PRINTING OFFICE: 1974-0-529-726

FORM MUST BE MADE OUT IN INK OR BALL POINT PEN

Sent for Certified Mail 5-30-75 CW

April 5, 1976

RE: Application for Permit No. 15-7025 and 15-7026

Mr. D. James Manning
Attorney At Law
Box 1391
Pocatello, Idaho 83201

Dear Mr. Manning:

Pursuant to a telephone request, please find enclosed copies of the above referenced applications and the protests concerning them.

If you have any further questions, please feel free to contact this office.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

Enclosures

15-7025 - Lorraine Kent and Claude Kent Trust

Conference Room, Pocatello Municipal Airport, Pocatello, Idaho

April 9, 1976 - 9:00 a.m.

ROSTER OF ATTENDANCE

Name	Address	Representing

See Roster of Attendance in 15-7026

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS

SENDER INSTRUCTIONS

Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, and 3 on reverse side.
- Moisten gummed ends and attach to back of article.

RETURN TO

DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT OFFICE
1515 LINCOLN ROAD
IDAHO FALLS, IDAHO 83401

POCATELLO, ID 83201 PM 31 MAR 1976

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

U.S.MAIL

ID BANNOCK STA MAR 31 1976

RECEIVED

APR 1 1976

Department of Water Resources
Eastern District Office

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS

SENDER INSTRUCTIONS

Print your name, address, and ZIP Code in the space below.
- Complete items 1, 2, and 3 on reverse side.
- Moisten gummed ends and attach to back of article.

RETURN TO

DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT OFFICE
1515 LINCOLN ROAD
IDAHO FALLS, IDAHO 83401

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

U.S.MAIL

RECEIVED

APR 1 1976

Department of Water Resources
Eastern District Office

UNITED STATES POSTAL SERVICE

OFFICIAL BUSINESS

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- Complete items 1, 2, and 3 on reverse side.
- Moisten gummed ends and attach to back of article.

RETURN TO

DEPARTMENT OF WATER RESOURCES
EASTERN DISTRICT OFFICE
1515 LINCOLN ROAD
IDAHO FALLS, IDAHO 83401

IDAHO FALLS, ID PM APR 1 1976 83401

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

U.S.MAIL

RECEIVED

APR 2 1976

Department of Water Resources
Eastern District Office

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☑ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY.
  Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
Lorraine Kent
2223 Oak Grove Drive
Idaho Falls, Ida

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	52	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent
Larry N. Kent

4. DATE OF DELIVERY: 4-1-76
POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:
CLERK'S INITIALS

☆ GPO: 1975—O-568-047

45-7325

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☑ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY.
  Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
W. Crawthis Atty
60 No Main
Malad City Ida

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	54	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☑ Authorized agent

4. DATE OF DELIVERY: 3-31-76
POSTMARK: MALAD CITY, IDAHO MAR 31 1976

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:
CLERK'S INITIALS

☆ GPO: 1975—O-568-047

PS Form 3811, Jan. 1975 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
- ☑ Show to whom and date delivered..... 15¢
- ☐ Show to whom, date, & address of delivery.. 35¢
- ☐ RESTRICTED DELIVERY.
  Show to whom and date delivered..... 65¢
- ☐ RESTRICTED DELIVERY.
  Show to whom, date, and address of delivery 85¢

2. ARTICLE ADDRESSED TO:
James H. Manning Atty.
P.O. Box 1391
Preston Ida

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	53	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY: MAR 31 1976
POSTMARK: MAR 31 1976

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:
CLERK'S INITIALS

☆ GPO: 1975—O 568-047

IN THE MATTER OF)
APPLICATION FOR) STIPULATION
PERMIT NO 15-7026) AND
LYLE R. BURNHAM) AGREEMENT

WE HERE BY AGREE THAT ALL OF THE PURTANENT INFORMATION CONCERNING THE PROTESTS AND AVAILABILITY OF WATER WERE PRESENTED BEFORE THE DEPT. OF WATER RESOURCES AT THE CONFERENCE HELD IN POCOTELLO, IDAHO APRIL 9, 1976. HOWEUER BECAUSE THE ISSUES ARE SUBSTANTIALLY THESAME AS THOSE INUOLUED IN APPLICATION 15-7025, WHICH WAS CONTINUED, WE FEEL THAT IF A HEARING IS HELD TO CONSIDER PROTESTS FILED AGAINST THIS APPLICATION, PROTESTS AGAINST 15-7026 SHOULD ALSO BE HEARD AT THAT TIME.

THEREFORE WE AGREE TO ALLOW THE DEPT OF WATER RESOURCES TO MAKE A DECISION BASED UPON THE INFORMATION PRESENTED AT THE CONFERENCE IF APPLICATION FOR PERMIT 15-7025 IS WITHDRAWN. IF 15-7025 IS NOT WITHDRAWN WE WISH TO BE INCLUDED AT ANY SUBSIQUENT HEARING.

Clarence Kent
Larry D. Kent
Lyle R Burnham

St. John Irrig. Co - Protestant
By: D Jan Manning

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

April 14, 1976

RE: Application for Permit No. 15-7025 LORAINNE KENT & CLAUDE KENT TRUST
" " " No. 15-7026 LYLE R. BURNHAM

Ms. Lorraine Kent
2223 Oak Trail Drive
Idaho Falls, Idaho 83401

Dear Ms. Kent:

Please find enclosed a copy of the agreement reached at the conference held in Pocatello, Idaho, April 9, 1976.

Pursuant to the agreement reached at this conference, the Department will reschedule a hearing for April 27, 1976, unless action by the applicants or protestants prior to that time make a hearing in this matter unnecessary.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

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

April 14, 1976

RE: Application for Permit No. 15-7025 LORAINNE KENT & CLAUDE KENT TRUST
" " " No. 15-7026 LYLE R. BURNHAM

Mr. Clarence Kent
48 N. 150 E.
Malad City, Idaho 83252

Dear Mr. Kent:

Please find enclosed a copy of the agreement reached at the conference held in Pocatello, Idaho, April 9, 1976.

Pursuant to the agreement reached at this conference, the Department will reschedule a hearing for April 27, 1976, unless action by the applicants or protestants prior to that time make a hearing in this matter unnecessary.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

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

April 14, 1976

RE: Application for Permit No. 15-7025 LORAINNE KENT & CLAUDE KENT TRUST
" " " No. 15-7026 LYLE R. BURNHAM

Mr. J. W. Crowther
Attorney at Law
60 North Main
Malad City, Idaho 83252

Dear Mr. Crowther:

Please find enclosed a copy of the agreement reached at the conference held in Pocatello, Idaho, April 9, 1976.

Pursuant to the agreement reached at this conference, the Department will reschedule a hearing for April 27, 1976, unless action by the applicants or protestants prior to that time make a hearing in this matter unnecessary.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

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

April 14, 1976

RE: Application for Permit No. 15-7025 LORAINNE KENT & CLAUDE KENT TRUST
" " " No. 15-7026 LYLE R. BURNHAM

Mr. D. James Manning
Attorney at Law
P.O. Box 1391
Pocatello, Idaho 83201

Dear Mr. Manning:

Please find enclosed a copy of the agreement reached at the conference held in Pocatello, Idaho, April 9, 1976.

Pursuant to the agreement reached at this conference, the Department will reschedule a hearing for April 27, 1976, unless action by the applicants or protestants prior to that time make a hearing in this matter unnecessary.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

April 21, 1976

Mr. Ronald D. Carlson
State of Idaho
Dept. of Water Resources
1515 Lincoln Rd.
Idaho Falls, ID 83401

Please be advised that the attached copy of judgement (dated June 5, 1928) establishes our rights to the following:

One-half cubic foot of water per second, with priority dating from June 1, 1915 to be used on the following described land:

The West Half of the Northwest Quarter (W½NW¼) of Section Twenty-four (24), the South Half of the Northeast Quarter (S½NE¼), the North Half of the Southeast Quarter (N½SW¼), and the North Half of the Southwest Quarter (N½SW¼) of Section Twenty-three (23), Township Eleven (11), South, Range Thirty-four (34) East, Boise Meridian.

Notwithstanding this judgement, we wish to allow our present application for Permit No. 15-7025 to stand. In this regard we are willing to have your office make a determination based upon our previous hearing and the content of the application and protests thereto without an additional hearing.

This action should not be construed as relinquishing our decreed rights as identified in the attached judgement.

Thank you for your interest, time and attention.

Sincerely,

L. H. Kent

lm

RECEIVED
NOV 21 1975
Department of Water Resources
Eastern District Office

APPENDIX "A"

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ONEIDA.

ST. JOHN IRRIGATING COMPANY, a corporation,

Plaintiff,

vs.

ISA H DANFORTH, H.O. KENT, MARVIN A BUTLER and JAMES BURNHAM,

Defendants.

D E C R E E

State of Idaho } ss.
County of Oneida }

I hereby certify that the foregoing is a full, true and Original
in the matter of the Decree of
Witness my hand and the seal of said Court
12th day of May 1975
Barbara Colton
Clerk

This cause came regularly on for trial before the Court without a jury on the 5th day of June 1928, at Malad, Oneida County, Idaho. Jones, Pomeroy & Jones, attorneys at law, appeared for and on behalf of the plaintiff. Merrill & Merrill, attorneys at law, appeared for and on behalf of the defendants and cross-complainants, Isa H. Danforth and Marvin A. Butler. Thomas & Andersen, attorneys at law, appeared for and on behalf of the defendants and cross-complainants, H.O.Kent and James Burnham. Evidence was introduced by and on behalf of the respective parties upon the issues framed by the complaint of the plaintiff and the answer and cross-complaint of the defendants and cross-complainants, Isa H. Danforth and Marvin A. Butler, and also the answer and cross-complaint of the defendants, H.O.Kent and James Burnham, and the answer of the plaintiff and cross-defendant to each of said cross-complaints. After the introduction of the evidence, said cause was argued and briefed by the respective parties and submitted to the Court for decision, and the Court having heretofore made and filed its findings of fact and conclusions of law in writing constituting the decision of the Court in this cause,

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff take nothing by reason of its complaint but that the same be dismissed

as to each and all of the defendants herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant and cross-complainant, Asa H. Danforth, is hereby declared to be the owner, subject only to a contract interest in the cross-complainant Marvin A. Butler, of the right to the perpetual use of the waters of that certain more northerly spring at the head of Sheep Creek located in the Southwest Quarter of the Northeast Quarter of Section Twenty-three (23), in Township Eleven (11) South, Range Thirty-four (34) East, Boise Meridian, for irrigation and domestic purposes to the extent of one-half cubic foot of water per second of time, with priority dating from June 1st, 1915, and with point of diversion located at said spring in the said Southwest Quarter of the Northeast Quarter of Section Twenty-three (23), Township Eleven (11) South, Range Thirty-four (34) East, Boise Meridian, and that the use of said waters be and the same hereby are made appurtenant to the following described land situated in Oneida County, Idaho, to-wit:

The West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) of Section Twenty-four (24), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), and the North Half of the Southwest Quarter ($N\frac{1}{2}SW\frac{1}{4}$) of Section Twenty-three (23), Township Eleven (11), South, Range Thirty-four (34) East, Boise Meridian.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants and cross-complainants, Henry O. Kent and James Burnham, be and they are hereby decreed to be the owners of the right to the perpetual use of the waters of that certain more southerly spring at the head of Sheep Creek located in the Southeast Quarter of the Northeast Quarter of Section Twenty-three (23), in Township Eleven (11) South, Range Thirty-four (34) East, Boise Meridian, for irrigation and domestic purposes, to the extent of five-tenths of a cubic foot of water per second of time, with priority dating from June 1st, 1914, and with point of diversion located at said spring in the said Southeast

Quarter of the Northeast Quarter of Section Twenty-three (23), Township Eleven (11) South, Range Thirty-four (34) East, Boise Meridian, and that the use of said water be and the same is hereby made apourtenand to the following described land situated in Oneida County, Idaho, to-wit:

The South Half of the Northeast Quarter (S½ NE¼), the North Half of the Southeast Quarter (N½ SE¼), the South Half of the Southeast Quarter (S½ SE¼), of Section Twenty-four (24), and the North Half of the Northeast Quarter (N½ NE¼), of Section Twenty-five (25), Township Eleven (11) South Range Thirty-four (34) East, Boise Meridian.

IT IS FURTHER ADJUDGED AND DECREED that the title to the use of said waters be quieted in said respective defendants and cross-complainants in the amounts and from the sources aforesaid, free from any claim of the plaintiff whatsoever and that the plaintiff be forever debarred and enjoined from in any manner interferring with the free, lawful and complete use of the said waters by the said defendants and cross-complainants and each of them.

IT IS FURTHER ADJUDGED that the defendants and cross-complainants have and recover of and from the plaintiff herein their necessary costs and disbursements incurred in this action hereby taxed in the sum of _____.

Dated this 20 day of March, 1929.

Judge.

LAW OFFICES OF
RACINE, HUNTLEY & OLSON
CHARTERED
CENTER PLAZA - CORNER FIRST & CENTER
POST OFFICE BOX 1391
POCATELLO, IDAHO 83201

LOUIS F. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON

D. JAMES MANNING
W. MARCUS W. NYE
GARY L. COOPER

TELEPHONE
AREA CODE 208
232-6101

June 17, 1976

RECEIVED
JUN 18 1976
Department of Water Resources
Eastern District Office

Mr. Ronald D. Carlson
Supervisor, Eastern Region
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

RE: Application for Permit No. 15-7025 and 15-7026

Dear Mr. Carlson:

Would you please advise status of the above water applications. Inasmuch as we received no further word about a hearing, I assume that there will be none and the matter has been submitted to the Department based on the informal conference held earlier.

Very truly yours,

D. JAMES MANNING

DJM:jc

CC: Mr. Dave Deschamps

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protests Against Approval of Application for Permits No. 15-7025, LORRAINE KENT and CLAUDE KENT TRUST; No. 15-7026, LYLE R. BURNHAM; No. 15-7029 and No. 15-7030 in the Name of DELMAR CLARK	NOTICE OF COMBINED HEARING

Application for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030 have been filed with the Idaho Department of Water Resources to appropriate the public waters of the State of Idaho, and protests have been received pursuant to Section 42-203, Idaho Code.

Because of the similarity of the issues involved these hearings have been combined. The Department has set the matter of protests for hearing for Wednesday, August 11, 1976, at 10:00 a.m., in the Commissioners Room of the Oneida County Courthouse, Malad City, 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.

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 applications. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing parties.

Dated this 29th day of July, 1976

Ronald D Carlson

RONALD D. CARLSON
Supervisor, Eastern Region

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	RCPT. DEL. FEE	ACTUAL VALUE	HANDLING CHARGE	REMARKS*
1	114	Fritz Herrmann, Star Route Box 48, Pocatello	13	~~10~~ 60					29-2321
2	115	Oliver Rowe, Box 52, Pocatello							"
3	116	D. James Manning, P.O. Box 1391, Pocatello							15-7025
4	117	Jill Crawford, 60 E. Main, Malad						Combined	7026
5	118	Eugene Lent, 2223 Old Mill Drive, Ogden							7029
6	119	Lyle C. Burnham, Box 8, Ayer							7030
7	120	Robert C. Huntley, P.O. Box 1391, Pocatello							"
8	121	Delmar Clark, 298 S. Main, Malad							"
9	122	P. Isabel & Elizabeth Keller, P.O. Box 66, Weston							13-7131
10	123	Edward A. Keller, Box 146, Weston							"
11	124	Grant Denison, Weston							"
12	125	Gordon S. Hatch, 258 Dec. C, Rexburg							21-7083
13	126	Roy & Ila Mae Hardbarger Rt. #2, Ashton							"
14	127	Clarence Lunz, Victor							22-0255
15	128	Keith Lunz, Victor							"
16	129	Agnes B. Lunz, Victor							"
17	130	Lyle Carl Rubalcaba							32-00146 etc.
18	131	Hugh L. Gubatayao, Rubalcaba							"
19	132	Ben S. Sagle, Rupalcaba							"
20	133	Salome Baca, Rubalcaba							"

Sent Certified Mail 7-30-76

TOTAL NO. OF PIECES LISTED BY SENDER	TOTAL NO. OF PIECES REC'D AT P.O.	POSTMASTER, PER (Name of receiving employee)	*Show under "Remarks" class postage paid if other than first or if international
20	20		

PS Form 3877, Dec. 1973

APPLICATION FOR REGISTERED, REGISTERED C.O.D. AND CERTIFIED MAIL

(Declaration of value is required on international registered mail)

FORM MUST BE MADE OUT IN INK OR BALL POINT PEN

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974-0-538-736

Art Larson - 21-7083 & 22-0255 Not Certified
Don Shelton - 32-00146 et. Not Certified

Mrs. Robert Judd - 29-2321 Sent Not Certified " "
Bud Harrison - 21-7083

August 2, 1976

Oneida County Clerk
Oneida County Courthouse
Malad City, Idaho 83252

Gentlemen:

This is to confirm the use of the Commissioners Room for a conference and/or hearing to be held by this office on Wednesday, August 11, 1976, at 10:00 a.m.

Thank you for your cooperation in this matter.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

COMBINED HEARING

15-7025 Kent, 15-7026 Burnham, 15-7029-15-7030 Clark

Commissioners Room, Oneida County Courthouse, Malad City, Idaho

August 11, 1976 - 10:00 a.m.

ROSTER OF ATTENDANCE

Name	Address	Representing

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protest Against Approval of Application for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030	NOTICE OF CANCELLATION COMBINED HEARING

Notice is hereby given that the Department of Water Resources has cancelled the conference and/or hearing concerning the above applications at the request of J. W. Crowther, attorney for Clarence Kent.

Mr. Crowther has requested a continuance because the parties involved will be in grain harvest at that time, and because a court hearing will be held in the near future concerning matters germane to those issues involved in these hearings.

The Department will reschedule the conference and/or hearing in the near future, at which time all interested parties will again be notified.

Dated this 4th day of August, 1976.

RONALD D. CARLSON
Supervisor, Eastern Region

December 29, 1976

Oneida County Clerk
Oneida County Courthouse
Malad City, Idaho 83252

Dear Sir:

This is to confirm the use of the courtroom for conference and/or hearing to be held by this office on Wednesday, January 12, 1977, at 9:00 a.m.

Thank you for your cooperation in this matter.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

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	RESTR. DEL. FEE	ACTUAL VALUE	HANDLING CHARGE	REMARKS*
1	233	J. N. Hancock 305 2nd W. Rexburg	13	60					22-7199
2	234	Kenneth Ward 536 S. 4th E. Rexburg	13	60					"
3	235	Boyd B. Bickmore Rt. #1 Sugar City	13	60					"
4	236	K. Merle Jeppesen 431 Main Rexburg	13	60					"
5	237	Keith Jeppesen Rt. #2 Rexburg	13	60					"
6	238	J. Elmo Jeppesen Rt. #2 Rexburg	13	60					"
7	239	Wall Eastman Rt. #5 Rexburg Ida.	13	60					"
8	240	Harlow L. Shelton 25 N 2nd E Rexburg	13	60					"
9	241 *	Hill Enterprises 36 N. 2nd West Rexburg	13	60					"
10	242 *	Lorin Kent 2223 Bah Trail Arimo 84	13	60					15-7625+26
11	243	Jones Mowing P.O. Box 1591 Pocatello	13	60					15-7694-30
12	244	J. W. Crowther 68 N. Main Malad	13	60					"
13	245	Clarence Kent 48 N. 150 E. Malad	13	60					"
14	246 *	Ezra L. Bybee Box 8 Arimo Ida.	13	60					"
15	247 *	Delmer Clark 278 S. Main Malad	13	60					"
16	248	Robert C. Huntley Jr. P.O. Box 1324 Pocatello	13	60					"
17	249	J. M. Grow Hdw. 223 N. State Preston	13	60					13-7153
18	250	L. L. Hoopes Agency U.S. Preston	13	60					"
19	251	Lyle M. Smith P.O. Box 158 Ft.	13	60					"
20	252	Neil C. Hall Box 283 Dugway Utah	13	60					13-7136

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PS Form 3877, Dec. 1973

APPLICATION FOR REGISTERED, REGISTERED C.O.D. AND CERTIFIED MAIL

(Declaration of value is required on international registered mail)

FORM MUST BE MADE OUT IN INK OR BALL POINT PEN

★ U. S. GOVERNMENT PRINTING OFFICE: 1974-0-529-726

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protests Against Approval of Application for Permits No. 15-7025, LORRAINE KENT and CLAUDE KENT TRUST; No. 15-7026, LYLE R. BURNHAM; No. 15-7029 and No. 15-7030 in the Name of DELMAR CLARK	NOTICE OF COMBINED HEARING

Application for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030 have been filed with the Idaho Department of Water Resources to appropriate the public waters of the State of Idaho, and protests have been received pursuant to Section 42-203, Idaho Code.

Because of the similarity of the issues involved these hearings have been combined. The Department has rescheduled the matter of protests for hearing for Wednesday, January 12, 1977, at 9:00 a.m., in the Courtroom of the Oneida County Courthouse, Malad City, 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.

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 28th day of December, 1976.

Ronald D. Carlson

RONALD D. CARLSON

Supervisor, Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protests Against Approval of Application for Permits No. 15-7025, LORRAINE KENT and CLAUDE KENT TRUST; No. 15-7026, LYLE R. BURNHAM; No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	NOTICE OF COMBINED HEARING

Notice is hereby given that the Department of Water Resources has rescheduled the conference and/or hearing concerning the above referenced applications for permit for Wednesday, January 12, 1977, at 2:00 p.m., in the Jury Room of the Oneida County Courthouse, Malad City, 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 as previously indicated in the conference and/or hearing notice dated December 28, 1976.

Dated this 3rd day of January, 1977.

Ronald D Carlson

RONALD D. CARLSON

Supervisor, Eastern Region

January 5, 1977

Oneida County Clerk
Oneida County Courthouse
Malad City, Idaho 83252

Gentlemen:

This is to confirm the rescheduling of the use of the Jury Room for conference and/or hearing to be held by this Department on Wednesday, January 12, 1977, at 2:00 p.m.

Your cooperation in this matter is greatly appreciated.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

January 6, 1977

Oneida County Clerk
Oneida County Courthouse
Malad City, Idaho 83252

Gentlemen:

This is to confirm our telephone conversation of this date, rescheduling the use of the Jury Room for Thursday, January 13, 1977, at 9:00 a.m.

Your cooperation has been greatly appreciated.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:CW

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Protests Against Approval of Application for Permits No. 15-7025, LORRAINE KENT and CLAUDE KENT TRUST; No. 15-7026, LYLE R. BURNHAM; No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	NOTICE OF COMBINED HEARING

Notice is hereby given that the Department of Water Resources has rescheduled the conference and/or hearing concerning the above referenced applications for permit for Thursday, January 13, 1977, at 9:00 a.m., in the Jury Room of the Oneida County Courthouse, Malad City, 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 as previously indicated in the conference and/or hearing notice dated December 28, 1976.

Dated this 6th day of January, 1977.

Ronald D Carlson

RONALD D. CARLSON

Supervisor, Eastern Region

LAW OFFICES OF
RACINE, HUNTLEY & OLSON
CHARTERED
CENTER PLAZA - CORNER FIRST & CENTER
POST OFFICE BOX 1391
POCATELLO, IDAHO 83201

LOUIS F. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON
D. JAMES MANNING

W. MARCUS W. NYE
GARY L. COOPER

TELEPHONE
AREA CODE 208
232-6101

January 4, 1977

RECEIVED
JAN 7 1977
Department of Water Resources
Eastern District Office

Mr. Ronald D. Carlson
Supervisor, Eastern Region
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Application for Permit No. 15-7025 and 15-7026
Lorraine Kent & Claude Kent & Lyle R. Brunham

Dear Mr. Carlson:

I represent St. John Irrigating Company, a protestant in the above consolidated water hearings. I appeared on their behalf, as did members of their Board of Directors, at the initial conference on these applications.

We have determined that St. John Irrigating will not be participating further by way of attendance at or offering of evidence on its protest at the subsequent hearing scheduled for January 12, 1977. We recognize that under the procedural rules this may result in dismissal of our protest, and are writing this letter mainly to avoid any imposition of costs. We would, however, prefer that the protest by St. John Irrigation Company to these applications, and our remarks at the original conference remain for consideration by the Department.

Very truly yours,

D. JAMES MANNING

DJM:jc

January 10, 1977

RE: Applications for Permit No. 15-7025 and 15-7026

Mr. D. James Manning
Attorney at Law
P.O. Box 1391
Pocatello, Idaho 83201

Dear Mr. Manning:

We are in receipt of your letter of January 7, 1977, which indicates St. John Irrigating Company will not be represented at the hearing scheduled for January 13, 1977, to hear objections against approval of the above referenced applications for permit.

In reaching a decision in this matter, the department will consider all of the information contained in the Department's files, which includes that presented by St. John Irrigating Company at the conference held in Pocatello, Idaho. If, since that time, additional information has become available that you wish the Department to consider it may be submitted and will be considered by the Department before taking final action on these applications.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:cw

Revised 1-06-77

RECEIVED

JAN 7 1977

Department of Water Resources

H E A R I N G S C H E D U L E

THURSDAY, January 13, 1977

Oneida County Courthouse, Malad City, Idaho

9:00 a.m. (15-7025 - KENT
(15-7026 - BURNHAM
(15-7029 - CLARK
(15-7030 - CLARK

COMBINED

Franklin County Courthouse, Preston, Idaho

2:30 p.m. 11-7098 - PHELPS

FRIDAY, January 14, 1977

Madison County Courthouse, Rexburg, Idaho

9:00 a.m. 22-7199 - HILL ENTERPRISES

January 18, 1977

RE: Application for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030

Mr. Robert C. Huntley, Jr.
Attorney at Law
P.O. Box 1391
Pocatello, Idaho 83201

Dear Mr. Huntley:

This letter is to confirm the agreement reached at the combined hearing for the above referenced applications for permit.

It is our understanding that you will submit a closing brief on the issues involved on or before February 3, 1977. A copy of this brief will be sent to Mr. Crowther and to the Department of Water Resources, and Mr. Crowther will be allowed until the 28th of February to respond. You will then have an additional ten (10) days for a rebuttal, if you wish to submit one.

The Department, therefore, is planning to commence preparation of the decision in this matter on March 14, 1977.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:cw

January 18, 1977

RE: Applications for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030

Mr. J. W. Crowther
Attorney at Law
60 North Main
Malad City, Idaho 83252

Dear Mr. Crowther:

This letter is to confirm the agreement reached at the combined hearing for the above referenced applications for permit.

It is our understanding that Mr. Huntley will submit a closing brief on the issues involved on or before February 3, 1977. A copy of this brief will be sent to you and to the Department of Water Resources, and you will be allowed until the 28th of February to respond. Mr. Huntley will then have an additional ten (10) days for a rebuttal, if he wishes to submit one.

The Department, therefore, is planning to commence preparation of the decision in this matter on March 14, 1977.

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

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:cw

January 18, 1977

Ms. Barbara Colton
Deputy Clerk
Oneida County Courthouse
Malad City, Idaho 83252

Dear Ms. Colton:

This letter is to express our appreciation for your assistance at the recent hearing the Department held in Malad. Through your help we have an excellent record which otherwise would have been impossible for us to obtain.

We will transcribe the tape you made for us and return it to the court after the appeal period which will be in May. If it is not reasonable to keep the tape for that period, we certainly can copy it and return it sooner.

Again thank you for your help.

Very truly yours,

RONALD D. CARLSON
Supervisor,
Eastern Region

RDC:cw

MEMORANDUM

TO: FILE NO.s 15-7025, 15-7026, 15-7029 and 15-7030

FROM: BOB FLEENOR

DATE: JAN. 18, 1977

A hearing was held and final arguments are to be presented by the attorneys. The first brief should be submitted to the Department within 10 days and 15 days following that for the reply briefs.

15-7025 Mr. Larry Kent will let us know during the next week if he wishes to continue with his application,

JAN 3, 1977

— 15-7030 — WITHDRAWN BY APPLICANT

— 15-7025 — Lorraine Kent —
Reduce to 0.50 cfs By Applicant
Larry Kent.

— 15-7026 — Burnham — would
Reduce his applicat— down —
ward — % basis, (?)

CLARENCE KENT — Application —
— 15-7029 — is for 3 Peak Water
out of Snake — 4 Domestic
Same as that Specified By
the court

— 15-7029
Applicant Contends 3 acres
have been irrigated through
sub irrigation.

— ISSUES

Injury

15-7025 – LARRY KENT

15-7026 – LYLE BURNHAM

15-7029 – Delmar Clark

–LARRY KENT

1. have revised application to .50 to be Consistant w/ decree
2. Application filed to be consistant w/ Dan forks decree and to maintain some effect if right has been abandoned
X – Crawther
3. Water has not been used for irrigation since 1950 for irrigation of 12 acres by flooding consistant by stock watering from stream
4. Ditch periodically maintained
5. Now Contemplating irrigating 12 ACres. Is interested in preserving water rights

X-Huntley – APPLICANT Del CLark
EXHIBIT A

Livestock watered every year
Sid Kents livestock = 100head
After harvest = SEPT 15

Pd just 5 of N Spring (not flow-a-ap.

LYLE BURNHAM — 15-7026

At time of applicat.o — no water had been diverted o— property — Natural provided sub irrigatio— — 12 years puta ditch — to keep water fro— spreading

1971 — built ditch to dra— property

X - Crowther -

1. Has never maintained ditch to property

2. 1972 - Took over property & started runing property

X — HUNTLEY

3. Has never asserted water right i— past.

X - Del Clark EXHIBIT ER — conf.—vatio— of map to Bur—h — property

4. Started diverting water w/ 2 Canvas Dams 0, — 1973 w/ (9-10 AC)

5. Burnham lands part of Danforth decree

6. Mr Kent dug his Reservoir i— 1973

Delmar Clark — 15-7029

X - Huyt Bi

1. Del Clark house — exhibit A.
   Irr. — house May 1 — Oct 1
2. Came — to lands 1938
3. Has had a garden in 40's
4. Has had sub irrigat. — aland
   ½ mile of Creek — 3 acres
5. 100 head of Cattle water
   to — Creek. 3 head of horses
6. Has watered livestock for
   ~ 20 years
7. Would like to Brief
   Beneficial use of livestock
   water — 5yr — Aesthetics — Denied consideration.
8. 1976 — 3 horses
   1975 — 3 horses
   No Cattle for 10 years or longer
   until after harvest. Sept. or
   October
9. Mr Kent offered to supply
   water for livestock
10. Never maintained ditch
11. Clarence Kent has maintained
    ditch
12. Flow Measured Aug 2 by Mr. Forbush

JACK FORBUSH — TECH for SCS
has been W/ ENGINEERS who have made measurements.
MEASUREMENT — W/ RECTANGULAR WEIR
Velocity Checked by Block METHOD

— PROTESTANT

WAYNE D. KENT —
X- Crowfoot
1. Clarence Kent : Brother
2. Father used water for livestock & garden — 1924 — 1941.
3. Maintained ditch 1929 - 1941
4. Used for Garden — last time planted was corn for livestock spring
5. No diversion noted on Burba property IN APRIL 1975
~~Neighbor~~
6 Water would not have ~~ponded~~ entered Burba 1 year in 10.

ROSS DANIELS
1. ~~Leonard~~ Ditchers to Claude & Clarence Kent 2 or 3 Times
2. Kents only one he knows of that has maintained ditch

Clarence Kent

1. Has lived on property all of his life since 1928
2. St. John closed d. Feb 1 — 1927
3. Kents have Closed since
4. Water used for garden & stockwater.
5. Upper Spring Creek to use ~1938 — collected w/ lower spring.
6. Does not irrigate d. land adjacent land irrigated.
7. Began building pond in 1973
8. 1975 put in sprinkler system
9. $5-4,000 invested in system
10. Claud said go ahead and use water.
    Lorraine — go ahead and use water.
11. Del Clark objected late Summer 1975

X — HUNTLEY

12. Diversion — prior to 1975
    4 rods X 7 rods
13. No Transfer applied for — By Kent
14. No Application for Permit.

NOTE DAN Fork Decree —

15. More than ½ water comes from upper spring.

16. Told Clark in Sept 1975 that he was going to put all of water into one pipe.

17. ~~Wanted to~~ Clark pipeline goes from lower spring.

18. There is a difference in Desert P.U. & deeded P.U.

19. Kent is entitled to irrig. to 160 acres of land.

Bob Kent —

1. Son of Carmen Kent.

2. has seen results of use of water

3. Has not seen need in Sleepy Creek.

4. Dams would have been hidden by grass.

Lyle Burnham —

Del Clark — has never seen a time when water does not reach Burnham.

— Would Kents Present development stop water from entering Burnham's Property

Rick Clark — Never noticed any dams in creek

Briefs - 20 Days — NUNTLOW

20 —

15-7029

Delmar Clark

Live in area May to October each year

Moved there in 1938

What use of the water

Garden 4 years during 1940's

Pasture land is subirrigated — 3 acres

Desire to now divert and irrigate 3 acres —

Want to grow wheat & barley

Livestock use 100 3 head horses head beef drink from creek. last 20 year

No previous opposition to stockwatering —

Delmar
Mr Clark is above Mr. Clarence Kent —

Benefit — For increase valued of property — Issue denied

Natural streambed since 1930

Born June 4, 1914

Any Diversions on Clarence Kent's land by Mr C. Kent. None until 1973.

Only irrigation by C. Kent was a garden —

Mr Kent has dry farmed the area

X-exam of Mr Clark by Mr. Crowther

No cattle except during Sept, Oct.

8 hogs each year 1938 to 1971 or 2

Has never cleaned the ditch —

Clarence Kent has been cleaning the ditch

Re-direct

Flow of stream Aug 2. —

Re-exam

$3^{3}26\,40$
$\quad\;\; 6$
$15,840$

Jack Forbush

S.C.S Technician

education ~~4/4~~ + 1/4 College

training -

Requested to measure water by Del Clark and Clarence Kent

Method — Constructed Rectangular ~~water~~ flume —

Timed float on surface of water —

Protestant

Direct

→ Wayne Kent. brother to Clarence Kent

Familiar with area since 1924 ~~1941 — Watered garden & livestock~~

From 1924 to 1941 Watered garden & livestock

~~Flow~~ Ditch maintained until 1941 that he knows of since he left the area

Operated farm in 1947 & 48 raised a garden —

Ditch cleaned twice a year —

No Diversion noted in April 1976 on Mr. Burnhams property

Mr. Burnham's Grandfather grew a garden in 1920's

X-exam - by Huntley

No irrigation of Clarence Kent property

X-exam - by Burnham

Re-direct

+ Direct

Russell O. Daniels -

Loaned Ditcher to Clarence Kent to clean the channel —

—

Dire

Robert O. Kent - Son of Clarence Kent

Remember last 11 years

Steam ~~dam~~ by Clarence Kent observed

No earthern dams observed —

Redirect

Why weren't dams seen because

D

Direct

Del ~~Clark~~ Clark

Has ~~never~~ seen stream dry — since 1958 — Differing testimony —

X-eam

Direct

~~Rick~~ Clark

lived there 22 years

X-~~exam~~-

Mr. Huntley - Rick Clark - Rebuttal witness

= Noticed - no dam —

~~X-exam~~ —

= Tim - Linda Clark — also same testimony —

=

Direct - Clarence Kent

Born 1922

lived there every summer except during war and mission

Clarence cleaned the ditch

Left 1942

1928-1942 - Garden & Stockwatering

Upper Spring diverted to lower spring in 1937

In 1949 Clarence began living there

1949 & 50 garden grown

Subbed ground adjacent to ditch by placing small dams.

Channel cleared each year.

[redacted]

→ Does cleaning ditch preserve a decreed water right

Sprinkler System purchased $54,000

[redacted] Ask → How much land is irrigated planned — 160 acres

[redacted] → How much land was previously irrigated — 3½ acres

No objections voiced to the improvement —

until Del Clark objected.

[redacted]

X-exam by Mr. Huntley

Subbed 12/32 rods by 250 yards = area =

No Application for [redacted] change in p.d. of p. u.

No Application for permit filed =

H.O Kents lands as shown in the decree

To

Take — Judical notice of Danforth decree

More the ½ water comes from upper spring —

First time you told [redacted] Clark in 1975

X-exam by Mr. Burnham

Did water leave —

Re-direct — land described in Decree is same as being irrigated

Hearing

15-7025

Lorraine Kent & Claude Kent Trust - Larry H. Kent

Protestant

Clarence Kent & - J. M Crowther - T

Belmar Clark - Robert Huntley

Lyle R. Burnham -

15-7026

Lyle R Burnham - Ha

Protestant - Delmar Clark Huntley ; Clarence Kent J. M. Crowther ; Larry H. Kent

15-7029

Delmar Clark - Ha - R

15-7025

0.50 same decree - Danforth Decree

X-exam by Crowther of Larry Kent

Water last used - 1950 for garden

used by Claude Kent.

Stockwatering has been used consistantly

Mr Kents last work dome prior to 1956 - As far as Larry Kent

- No diversion works at present --

Intrested in preserving w/r by using the water

Born 1943

X-exam by Huntley of Larry Kent

-12 acres

-Last livestock within 3 year — approx 100 head after harvest. late Sept

-Decreed water right never sold or given away -

-Diversion works above the Lower S

15-7025 - Q - Reduced to 0.50 by Larry Kent—
Lorraine Kent & Claude Kent Trust

Protestant

Crowther

~~Aff~~ Del Clark
Robert Huntley

15-7026—

15-7029 - 1

The Domestic Use is the same as recent decree
The Stockwater has been used for many year.
Irrigation has subed for year known wish to
sprinkle irrigate—

Issue

- Speculation
- Water Available
- Injury to other water right —
- ~~Injury to~~ to stream by drying up aesthetic value —

Larry Kent's Final Statement

Mr. Burnham —

Mr. Huntley — Summary

Mr Crowther — Thank

→ Mr.

15-7026

Lyle Burnham

Water from spring always sank on his property since 1971 –

The Last user downstream –

X-exam by J. Crowther

No

All the water

Moved to the land in 1972

Natural irrigation prior to 1972 –

Never observed maintenance of ditch above

Have never asserted a claim –

X-exam by Mr Huntley

No diversions above Mr. Burnham's Property until recently

~~Until~~

Irrigated 9 or 10 acres by canvas dam since 1973

Prior to that land just subbed –

Land originally owned by Grandfather - included in Danforth decree

Grandfather left in 1920 –

Garden in 1932 by Father –

Re-exam by Mr Crowther

Ditch constructed 1978 on Mr Kents property on lower end.

Canvas dam 1973 what month - Fall of 1973

Mr. Kent began digging his reservoir in 1973 –

June 17, 1977

Re: Permit No. 15-7025

Lorraine Kent & Claude Kent Trust
2223 Oak Trail Drive
Idaho Falls, Idaho 83401

Dear Ms. Kent:

Enclosed is a copy of the approved Application for Permit No. 15-7025 along with a copy of the Memorandum Decision and Order issued on this permit. We direct your attention to the conditions of approval as listed on the fourth page of the Order.

Be sure to note that a special condition requiring you to install and maintain a measuring device at your point of diversion has been placed upon your permit. We are enclosing a letter describing different types of measuring devices accepted by this office.

Sincerely,

BOBBY D. FLEENOR
Chief, Operations Bureau

BDF:jfr

Encls.

ROUTING SLIP

DATE 4-20-77

TO: Bob Fleenor	REF. No. (if any)
FROM: (show title) Ron Carlson	

FOR YOUR:
- [XX] Information
- [ ] Approval
- [ ] Signature

REVIEW AND:
- [ ] Call Me
- [ ] See Me
- [ ] Comment & Return
- [ ] Take Proper Action
- [ ] Draft a Reply for Me

PER:
- [ ] Our Conversation
- [ ] Your Request
- [ ] Boss's Request

This info goes with the proposed Memorandum Decision for the applications circled in red.

WHILE YOU WERE OUT

TO _____

DATE _____ TIME _____

M _____

OF _____

PHONE: _____ AREA CODE _____ NUMBER _____ EXT.

- [ ] Telephoned
- [ ] Returned Your Call
- [ ] Called to See You
- [ ] Please Call
- [ ] Will Call Again

Delman Clark — 15-7030

Pr- 4/28/76

Q- 2.40

Pd- NW¼ SW¼ S 24 T 11 S R 34E

Pu- N½ SW¼, SW¼ SW¼

Delmar Clark — 15-7029

Pr — 4/28/76

Q -0.04 Domestic

-0.03 Stock water

-0.06 Irrigation

Pd - SE¼ NE¼ S 23

NW¼ SW¼, NE¼ SW¼ S24 T 11S R 34E

Pu — NE¼ SW¼ S 24 T 11S R 34E

NW¼ SW¼

Lyle Burnham — 15-7026

Pr - 2/24/76

Q - 1.60

Pd - SW¼ SE¼ S 24 T 11S R 34E

Pu - S½ SE¼ S 24 T 11S R 34E

Larry Kent — 15-7025

Pr - 2/5/76

Q - 0.80

Pd - SW¼ NE¼ S 23 T 11S R 34

Pu - SE¼, S½ S 23

NAME OF APPLICANT.....

Form No. 0

T34E

T

1

1

S

13

Kent

Burnham

23

24

26

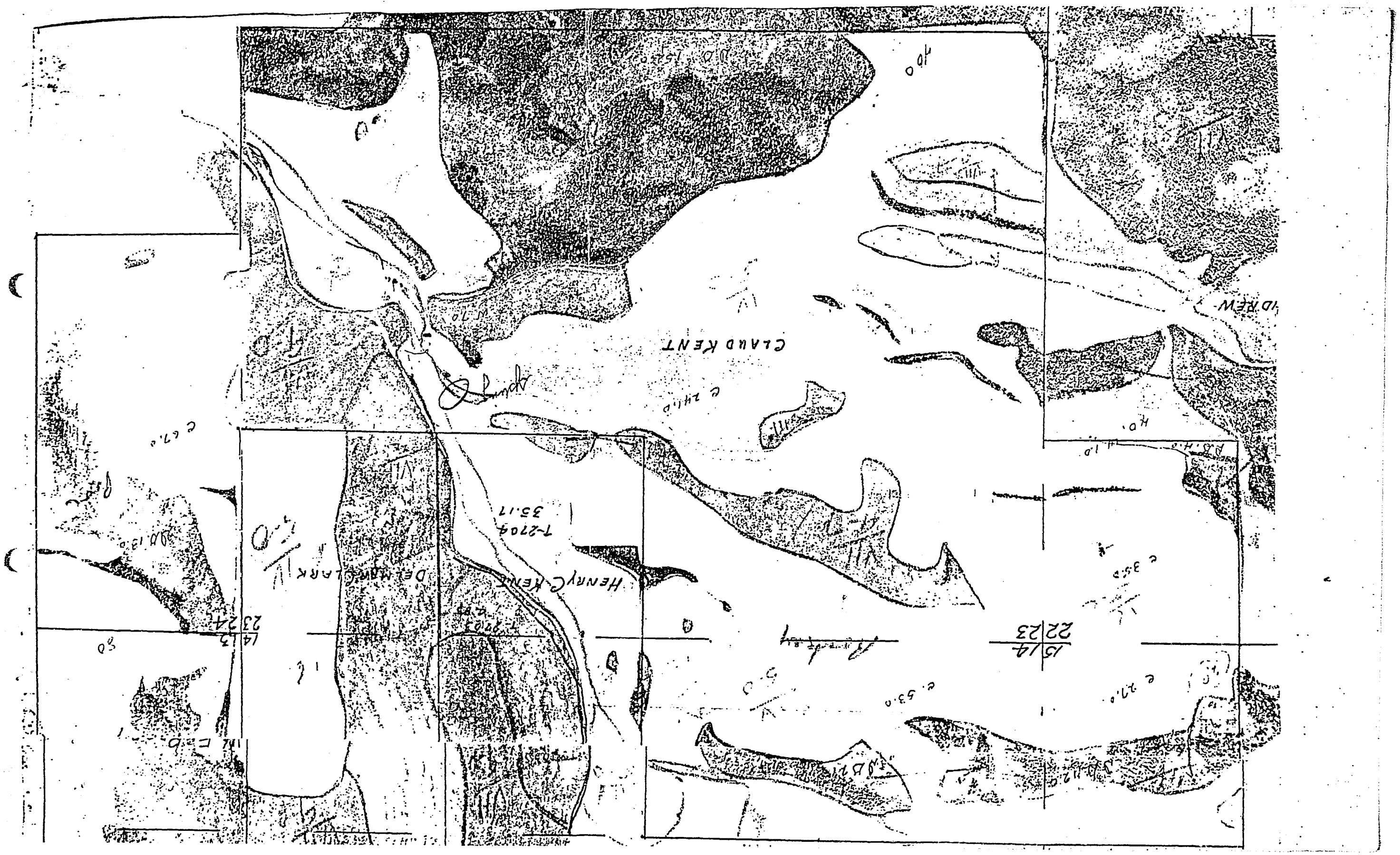
25

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

DECREE
ST. JOHN IRR
VS
ASA H. DANFORTH,
H.O. KENT ET AL.

0.50 CFS - 6/1/1915
PD SW¼ NE¼ SEC 23 T11S R 34E

0.50 CFS 6/1/1914
PD SE¼ NE¼ SEC 23 T11S R 34E


CLAUD KENT
HENRY C. KENK
DEL MAR C. PARK
T-2704
33.17
T-2703
22 23
14 15
23 24

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NOS. 15-7025, LORRAINE KENT AND THE CLAUDE KENT TRUST: NO. 15-7026, LYLE R. BURNHAM; NO. 15-7029 AND 15-7030, DELMAR CLARK	MEMORANDUM DECISION ON ISSUES RAISED AT REHEARING AND AMENDED ORDER

On June 17, 1977, the Director of the Department of Water Resources issued a memorandum decision and order approving Applications for Permit Nos. 15-7025, 15-7026, 15-7029 and 15-7030.

On June 27, 1977, Robert C. Huntley, Jr., Attorney for Delmar Clark filed a Petition for Rehearing on Permit Nos. 15-7029 and 15-7030, and on July 5, 1977 a Motion for Rehearing was filed by James B. Green, Attorney for Lyle R. Burnham. These requests for rehearing were approved by the Director on August 25, 1977. On September 16, 1977, a second hearing in the matter was held.

The attorneys for Delmar Clark and Lyle Burnham argued that the Director's decision was faulty in the following areas:

1) The water rights decreed in the Danforth Decree have been abandoned.

2) Clarence Kent should have only been the successor to, at most, 0.25 cubic feet per second under the Danforth Decree.

3) The decision is in error because the protestant, Clarence Kent, did not resume a water right because the only previous use of water was for the irrigation of a garden.

4) The decision should have limited Clarence Kent to use of the south (lower) spring.

5) The decision is in error for not requiring Clarence Kent to install a measuring device to measure the water he is diverting.

6) Lyle R. Burnham has made uninterrupted use of the water rights originally decreed to James Burnham.

7) The decisison and order are in error in awarding Lyle Burnham a permit to irrigate 80 acres of land.

8) The Director erred by not ruling on Delmar Clark's right to water livestock from the creek.

9) Protestant, Clarence Kent, needs a transfer to change the point of diversion if he still has a right under the Danforth Decree or an application for

permit if he wishes to appropriate water; and has filed neither.

FINDINGS OF FACT

1) In 1929, a decree was issued in the case of St. John Irrigating Co. vs. Asa H. Danforth et al, in which 0.50 cubic feet per second was decreed to H. O. Kent and James Burnham with a 1914 priority from two unnamed springs which flow into Sheep Creek. Clarence Kent and Lyle Burnham are successors in interest to H. O. Kent and James Burnham, respectively.

2) The Department of Water Resources does not confirm or issue water rights based upon diversion of water and application to beneficial use. The Department will accept a claim based upon such use which is admissible as evidence in a general adjudication of water rights.

3) There is unappropriated water from the two unnamed springs during portions of the irrigation season at the present time.

4) Water has been measured at about 1.00 cubic feet per second below the unnamed springs which flow into Sheep Creek.

5) It is within the discretion of the Department of Water Resources to require measuring devices on diversions from sources of water supply not within a water district, (Idaho Code, Sec. 42-701). In an area where a water district has not been formed, the Department will exercise its discretion under Idaho Code, Sec. 42-701 by requiring measuring devices only for water rights, the priorities of which are at issue before the Department.

6) Application for Permit No. 15-7030 was withdrawn by Delmar Clark on January 3, 1977.

CONCLUSIONS OF LAW

1) There is insufficient water available from the springs under existing conditions to satisfy all of the amounts requested under each of the applications for permit. The applicants are entitled to develop additional water from the springs and to use, according to the priority of the application for permit, the unappropriated water that is presently available from the springs after recognizing the water rights established pursuant to the decree issued in St. John Irrigating Co. vs. Asa H. Danforth et al, if they have not been lost by abandonment or forfeiture.

2) The water right claimed to have been established by diversion and beneficial use by Delmar Clark for stockwatering directly from the stream cannot be determined by the Director, as beneficial use rights can only be determined by a court.

3) No measuring device is required at this time to be installed on the

diverting works of Clarence Kent but may be required at the time a water district is formed.

ORDER

IT IS, THEREFORE, HEREBY ORDERED and Applications for Permit Nos. 15-7025, 15-7026 and 15-7029 are APPROVED subject to the following conditions:

1) Subject to all prior water rights including those established under decree or by the diversion and beneficial use of water.

2) The following priorities of right shall be recognized between the permit holders:

Permit No. 15-7025	February 5, 1976
Permit No. 15-7026	February 24, 1976
Permit No. 15-7029	April 26, 1976

3) Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before:

Permit No. 15-7025	October 1, 1980
Permit No. 15-7026	October 1, 1982
Permit No. 15-7029	September 1, 1983

and that no extensions of time shall be granted beyond these dates unless the permit holder can show he was prevented from completing the appropriation by circumstances beyond his control.

4) An access port or other device as specified by the Department shall be installed by each permit holder to provide the installation of measuring equipment and the determination of the rate of diversion by the Department.

IT IS FURTHER ORDERED that the approval of Permit No. 15-7030 is hereby VOIDED.

Dated this 15 day of September, 1978.

C. STEPHEN ALLRED

Director

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NO'S. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST: NO. 15-7026 - LYLE R. BURNHAM: NO. 15-7029 and 15-7030 - DELMAR CLARK	ORDER APPROVING PETITION FOR REHEARING

WHEREAS, on February 5, 1976, February 24, 1976, and April 28, 1976, the Department received applications for permits from Lorraine Kent and the Claude Kent Trust (15-7025), Lyle R. Burnham (15-7026), and Delmar Clark (15-7029 and 15-7030), respectively; and,

WHEREAS, on February 19, 1976, Clarence Kent filed a protest against the approval of Permit No. 15-7025 and on March 11, 1976 he filed a protest against Permit No. 15-7026. On February 26, 1976, a protest was received on Permit No. 15-7025 and on March 16, 1976, a protest was received on Permit No. 15-7026, both from the St. John Irrigating Company. On May 20, 1976, Clarence Kent submitted protests against the approval of Permit No's. 15-7029 and 15-7030; and,

WHEREAS, on January 12, 1977, a hearing concerning these permits was held at Malad, Idaho; and,

WHEREAS, on June 17, 1977, a Memorandum Decision and Order was issued based upon the testimony of both the applicants and the protestants and information in the Department's files; and,

WHEREAS, on June 27, 1977, Robert C. Huntley, Jr., attorney for Delmar Clark filed a Petition for Rehearing on Permit No's. 15-7030 and 15-7029, and on July 5, 1977, a Motion for Rehearing was filed by James B. Green, attorney for Lyle R. Burnham; and,

WHEREAS, after considering those petitions, the Department finds that a rehearing should be held;

IT IS, THEREFORE, HEREBY ORDERED that the peitions for rehearing be APPROVED.

Dated this 25 day of August, 1977.

C. STEPHEN ALLRED
Director

DEPARTMENT COPY

KENT CLARK File

(withdrawn)

# 15-7030	D. CLARK — Atty Huntley	} asked for rehearing	4/26/76
# 15-7029	~~L. Burnham — Atty — Case~~		
# 15-7026	~~Kent Clark~~ Lyle Bowham	(Green)	2/24/76
# 15-7005	CLARK Kent		2/5/76

FINDINGS OF FACT:

3. CLARK's stockwatering claim has not been adjudicated and is not properly an issue before the Dept. CLARK did not protest ANY of the Applications being considered.

4. CLARK's claim to domestic water from the springs was not contested and was not an issue before the Dept. CLARK has not protested ANY of the Applications nor shown that the GRANTING of the permits will interfere w/ his water rights.

5. There Appears to be a resumption of rights decreed to ASA DANFORTH by the DANFORTH Decree (0.50 cfs). Resumption by H. O. Kent and James Burnham

7. Director Finds that his Approval of #15-7030 was in error because on 1/3/1977 CLARK through his Attorney Bob Huntley formally requested that Application 15-7030 be withdrawn.

EXHIBIT MED

June 17, 1977

Re: Permit No's. 15-7030 and 15-7029

Delmar Clark
298 S. Main
Malad City, Idaho 83252

Dear Mr. Clark:

Enclosed are copies of the approved Applications for Permit No's. 15-7029 and 15-7030 along with a copy of the Memorandum Decision and Order issued on these permits. We direct your attention to the conditions of approval as listed on the fourth page of the Order.

Be sure to note that a special condition requiring you to install and maintain a measuring device at your point of diversion has been placed upon your permits. We are enclosing a letter describing different types of measuring devices approved by this office.

Sincerely,

BOBBY D. FLEENOR
Chief, Operations Bureau

BDF:jfr

Encls.

cc: Protestants and Attorneys

RECEIVED

Sixth Judicial District — District Court
P. O. BOX 121
MALAD CITY, IDAHO 83252

RECEIVED
FEB 21 1978
Department of Water Resources
Eastern District Office

February 17, 1978

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

Dear Mr. Carlson

Enclosed you will find testimony given by Lyle R. Burnham on the Clark -vs- Kent hearing held on the 13th day of January, 1977.

We are sorry that the testimony was at times very hard to understand.

We hope that what is here will be of help to you.

If there is anything else we can be of assistance to you please feel free to contact this office.

Sincerely

Barbara Colton

Barbara Colton
Deputy Clerk

bc/kt
enclosure

MICROFILMED

FEB 21 1978
Department of Water Resources
Eastern District Office

#157026 filed by Lyle R. Burnham, Mr. Burnham representing self. Testimony of Lyle R. Burnham as follows:

Lyle R. Burnham sworn

INQUIRER. State your full name and address for our record then, please?

MR. BURNHAM. My name is Lyle Burnham, address Box 8 Arimo, Idaho.

Q. Okay you may present any statement you have concerning why you feel there is water available, why you wish to have this particular permit.

MR. BURNHAM. I, at the time I submitted my application little water had been diverted from the stream for any use down from where it come from in my property of any noticable amount and it's also there on the property and we've always had, since the property, what I have is flat there, it always, the water always went into the ground there after it went on my property so we all got beneficial value because the water just naturally spread out from it so more of less a total amount of that water out of all these streams for the last, except it naturally went out over the sub irrigation along, in the people above me had all died there on the property up till 71, where a ditch was put through so it would run all through, some times this water was a problem, subbing out and getting in the way, prior to that put a ditch in to keep it from spreading out, oh I guess it was about 12 years ago on

MICROFILMED

part of it and then the rest of it ? ? ? build a ditch clear on through now. I've had been taking it out since then by throwing a canvas across the stream and having to pull them up several times for irrigation.

INQUIRER. Okay so you're actually the last user or the last furtherest down on the stream that's formed by these springs, is that correct?

A. Yes, due to the conture of the land normally it would spread out on my property which is fairly flat, above me it's always been in a sort of narrow canyon where it spreads out till 71 then water normally would ? ? property till 71 when I built a ditch through there and then almost a full stream would go through unless I diverted it. It's just goes across the, several hundred yards now the number of ? ? Clarks property and go in the Dairy Creek now.

INQUIRER. Okay Mr. Crowther do you have any questions for Mr. Burnham?

MR. CROWTHER. Mr. Burnham, have you ever taken any action as far as maintaining the ditches bringing the streams down from the spring to your place?

A. No I have not, I'd been trespassing if I would have done...

Q. So you've never done anthing?

A. No.

Q. I see and so all the water that came is just what

CONFIDENTIAL

flowed off Kent's through whatever means it got there?

A. Yes, for all practical purposes up till last year same amount of water got to my place as got to Kents.

Q. Now I think at the trail it was testified that you came onto the land about 1973 to actually take it over and run it yourself.

A. Well see, it would have ? ? 72.

Q. 72?

A. Yuh.

Q. When was the first time you put the dam in the ditch after you came onto?

A. It would have been the first year or 72.

Q. 72?

A. Yuh.

Q. Are you sure it's 72 or was it 73?

A. ? ? 72.

Q. I see where you testified 73 at the prior hearing.

A. Did I, if I did why I don't think I'll make a mistake here or I could go for 72, pay for it by chance anyway but even prior to 71, see it naturally went onto my property and irrigated so it only been a year ? ? we had the ditch in. Flowed right on through maybe or 1 year maybe 2 years it flowed straight through without getting, went straight through my property of no use.

Q. Now as I recall the testimony at the trial you and

EXHIBIT

your father testified that it did pond on your property and caused kind of a mud hole?

A. Well, well it was spread out on quite a few acres really and in the spring it was a problem.

Q. And that's why you dig the ditch was to get it out of there so it wouldn't create the problem?

A. Right so and then we could just trun it back in when we wanted it.

Q. And that the ditch was more for the purpose of draining the land than it was for irrigating it?

A. Well, well it depends on, in the spring it's for drainage and then later in the summer it would be for irrigation.

Q. Okay but prior to 7 at least 72 you didn't put a dam in to irrigate?

A. Well true but water was already there all the time irrigating.

Q. Running through the ditch?

A. Right, well spreading out on the property, just wasn't any ditch there down below the ? ? part ot 71.

Q. Prior to 71?

A. No.

Q. Prior to 71 it just spread out and was a mud hole?

A. ? ? lucrene sometimes.

Q. You didn't mow it where that mud was did you?

A. Well ? ? later in the year usually and got into a

DIGITIZED

little later when Bill was home it was a problem but just to work around.

Q. It was a problem and that's why the ditch was dug so ?

MR. HUNTLEY. I object, this is argumentative. He stated it was for two purposes draining earlier and for irrigation later it was in the year in the season.

INQUIRER. I do think we understand the problem that your on the point that your trying to make.

MR. CROWTHER. Okay, do you know who maintained the ditch and kept the flow coming down Mr. Burnham?

A. No I never could see any ditch work done on the ditch.

Q. You never observed any?

A. Well I will go back in the 20's when my father, great grandfather had a ditch, diverted that.

Q. Excuse me were you there in the 20's?

A. I saw the remains of the ditch and I...

Q. Where is this ditch?

A. It went around the side of the hill up there to divert water up so it came directly onto the property and Mr. Clarence there, was a ditch there.

Q. You never observed the use of that ditch?

A. No, my father did and he's here to testify to that fact.

Q. Okay, you personally didn't?

A. No.

SCANNED

Q. Up until up until the present time have you ever asserted a claim or a specific amount of water for irrigation purposes?

A. No, it was always there and so there wasn't any need to.

Q. I see. I have no further questions.

INQUIRER. I think I failed to ask you, do you have any witnesses that you wanted to call in your behalf?

MR. BURNHAM. Well it depends if not unless I have a rebuttal ? ? I don't care, something in qiestion and ? ? my fathers been there and living there since 1912 so if there any question comes up, extablish a point then I'll...

INQUIRER. Yes Mr. Huntley do you have any questions for Mr. Burnham?

MR. HUNTLEY. Yes. Mr. Burnham, I have taken exhibit A which is the card map and put a larger sheet of paper on and marked it exhibit B to try to extend this map to more of your property. Now would you draw where the stream goes onto exhibit B now from A?

A. Comes off where it comes here, goes around this hill goes around the hill there then ditch right along the fence ? ? normally it would spread out down to here all the way.

Q. Okay now you got to be kind of doing so these gentlemen can see what your talking about. Why don't you stand up here. Now the stream normally you say went like this around?

DECLASSIFIED

A. Okay. Well normally would have come out here like this and start spreading out here, spread out here all during this area down here and ? ? this is 12 - 15 years ago and when my father had the place and he ditched around this hill and it's made a narrow ditch around the hill like that and then it still apread out down here like this up til 71 and then I and my father put together, we ditched over here and we put it right along this fence line right down here and this right here would be Ray Clarks right here this would be half right here or half right here, this would be Ray Clarks.

Q. Would you write the word ditch and point a arrow toward this ditch?

A. Okay this ditch goes right down the fence line.

Q. In the, where was some diversion, when you first testified you I wasn't clear what you said you, you opened your statement with a statement that there had been no water ever diverted down to your property, do you mean there's never been any diversions above your property?

A. No there never have been.

Q. How many years have you been acquainted with this stream?

A. Oh since the, I've began to remember 33, 34.

Q. And since 1933 or 34, have you ever seen any diversions put in this stream along the protion of the stream that flows through Clarence Kent's land?

PROFILMED

A. Oh well we did have a garden there but of course that didn't divert the whole stream.

Q. Okay now other than diversion for a garden have you seen any irrigation by Clarence Kent along that stream by way of gravity flow irrigation?

A. No.

Q. And how many of the years since 1973 have you, 33, have you been back there from time to time?

A. I was usually come back, well I missed one period of 4 years to ? ?, I was there most years and missed a few.

Q. And when was that 4 year period?

A. It was in 56 through 60.

Q. Now the distance from what is marked a pond here on the Clarence Kent's land to your bondary is about how long?

A. Well from the end of the pond it's it's not a hundred yards. It's only I believe measured on the map, there's only two, this was most about at most 220 about 200 yards between here and here where it normally flow, in other words...

Q. Records showing I'm putting a bracket here and showing 220 yards and is that 220 represent of what your estimate of the distance from the raod to where the stream finally come onto your property?

A. ? ? Well yuh, it's from here to here, yuh it would be well be a little farther from here to there I guess I haven't figured out.

RECEIVED

Q. Okay so the 220 is this distance here to here?

A. Yuh but I'd say it would be less than 30 yards from here to here no it would be less than that, no it would be oh half hundred, hundred believe little bit 120 feet say from here to here something like that from here to here.

Q. Okay now after when did you construct the ditch thats on exhibit B?

A. Well this down here the first portion of this ditch was constructed by my father bout 12 - 15 years ago around here.

Q. Okay.

A. And then it spread out here and the one I put in was put in 71, it extended the rest of the distance down here.

Q. Now you testified at the earlier trial I believe that you've for several years irrigated about 9 or 10 acreas did you?

A. Yuh.

Q. Pardon?

A. Yuh.

Q. Now where are those 9 or 10 acres, would you draw a dashed line?

A. Be this normal run right in here see where because I just throw either I put a canvas right across here or right across here to get ? ? and it just spreads out down here.

Q. Okay now I'm going to put a mark across the channel in two places and is that where you had canvas dams?

PHOTOCOPIED

A. Yes.

Q. And starting when did you put those canvas dams there?

A. A year after ? ? .

Q. And now would you draw a dashed line around the 9 or 10 acres that you've irrigated from time to time since 1973?

A. Well be right, take this ditch right down here, dashed line, Okay starting right there, goes over, comes down there, down this fence line, be that normal low place in the ground.

Q. Now would it be fair to say that the only lands that had ever received irrigation water in the last oh say 10 years has been the land within that dashed area?

A. Yes that's true.

Q. Okay?

A. And in the 20's of course there's a stream that went up across here, come out of here and went right in the corner there but that was a long long time ago.

Q. Now did your predecessors and interest ever have any interest under that Dan Forth decree of 1929?

A. Interest.

Q. Well were your land purchased from anybody that was connected with that Dan Forth law suit?

A. Well yes my ? ? was my great grandfather.

Q. And what lands did he own?

A. Exactly the same I have at the present time. He

MICROFILMED

originally was trying to irrigate the upper end there but that would be back in the 20's ? ? but they didn't use that little ditch there.

Q. Okay would it be fair to say that after he left in the 20's that there was no actual attempt to irrigate any land on the Burnham propertys by putting dikes in and any kind of gravity flow laterals or anything other than what you testified what you've done the last few years, is that correct or not?

A. Well there's always a natural irrigation down there but there's never, my parents had lived in the house on the place there I think there in 32 about 32, 33, 31, 32 anyway I was to young to remember but anyway we did have a garden there.

Q. Okay then what I'm trying to ask is for as other than garden, first attempts of putting of using canvas dams to divert water out of the stream?

A. Well dad would always go down there with a shovel if it wasn't going in the right place, shovel out of the way in one place and into another.

Q. For the garden?

A. Well no just on the ground down there.

Q. Okay. But then you're, when your talking about that ground down there your still talking about that same approximate 10 acres aren't you?

A. Well yuh ? ? about 10 acres there usually ? ? .

ADMONISHED

Q. I've no further questions.

INQUIRER. Mr. Kent do you have any questions for Mr. Burnham?

MR. KENT. No.

INQUIRER. Yes, do you have any?

MR. CROWTHER. Yes. Mr. Burnham regarding the map which you've been looking at and which you've drawn, could you tell us who owns the land immediately north of the ditch in that 10 acres?

A. Well that's Clarence Kent.

Q. Could you mark that in it please?

A. ? ? yuh.

Q. So that it goes over that far. Okay now when and you say you extended the straight part along the boundary between you and Mr. Kent, Clarence Kent then?

A. Yuh.

Q. Is ther is there anything to mark physically mark the division line between your property and Mr. Kents?

A. No, we've, well the fence was taken out.

Q. Are there any remaining post at all or anything?

A. Well, well up on this hill there is where marks were made from the main post and but on this ditch no, the ditch was run ? ? so we took, a fence was had been down for many years and we tore out the tore out the posts and then ditch ? ? .

MICROFILMED

Q. Now would you say the ditch was exactely on the dividing line or on Mr. Kents side of the line?

A. Well I have to admit the real problem was 2 big post down the end here after we tore it out we dug it and then I didn't have the mark ? ? ditch down here. I was trying to stay on my side of the line but down here I got wound up on the wrong post by accident I got over there I'd say about over 3 feet at any place.

Q. So that the ditch actually though was on Mr. Kent's side of the line?

A. Well after I'd made it but that was due ? ? they had 2 big post down here. I got wound up over here ? ? I been well it giving him all this property up here ? ? it was...

Q. Yuh but well the ditch was physically there on his side of the line?

A. Well.

Q. We're not arguing about property we're not suggesting you trying to get extra land but just where the ditch was?

A. Well when I made it at the lower end here I got over by it cause there's nothing to mark where it's showing where I was ditching, I did get of a little bit on this lower end maybe a foot or so on to his property.

Q. Okay and that has been the ? ? ?

A. But the normal stream bed would be way to the inside my property ? ? ditch that.

MICROFILMED

Q. But this became the normal stream bed after you put the ditch there?

A. Well except when it breaks out, breaks out it looks like this whole stream bed.

Q. Has it broken out since you put the ditch there?

A. Well ? ? this canvas dam well it has once.

Q. It has once and then you put it back?

A. Yuh when I put a canvas dam it goes down to normal...

Q. This past summer has there been a pond from the runof that came out of Mr. Kents?

A. Has there been a pond?

Q. From his runof caused by his runof?

A. Well he flooded me out once last spring when he filled up his dam and then opened it up and yuh there was quite a pond down there.

Q. Now where abouts was that pond?

A. Well it flooded out down in the bottom of here and it even broke out on his over here and broke out on both sides of this ditch.

Q. So it went as much on him as it did on you?

A. Well on that case yuh but it was quite that was quite a full when he opened that up wide open with all that water behind here was quite full there too.

Q. Now this canvas dam that you said you put in about 1972?

MICROFILMED

A. Well it been later than that because I planted alfalfa in 72 so it been 73 ? ? canvas dam right there.

Q. Okay so the canvas dam was put in 73 now can you tell us approximately what month of the year that that was put in?

A. Well it been ? ? took water out of it a couple of times a year, first ? ? just put in a earth dam and diverted it out and then last two years I put in a, last two or three years I put in a canvas dams and diverted it for a few days twice a year this year was ? ? only twice.

Q. This year was only twice?

A. Yuh.

Q. But the canvas dam can you tell us when that first went in? Was that the fall or the spring or about when, what part of the year of 73?

A. Well usually, I ? ? could I in well in June, just before I cut my alfalfa a week before I tried to get a little water down there so I could and then let it dry and then cut it so and it's around the first part of July so it's been the first part of July somewhere.

Q. At the previous hearing didn't you testify it was in the fall of the year?

INQUIRER. I think what he's looking for is that first year when you did...

Q. First year?

INQUIRER. First year of 73, were you able to get in in

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June that year or was it? ?

A. Well after I cut the alfalfa I the first year I put it in I think I just used earth dams for using canvas ones.

INQUIRER. Was that in the fall?

A. Yuh I used I put partially one in, why I put it in a couple of times it washed out.

Q. That was in the fall of 73?

A. Yuh it's hard to remember exactly.

Q. And you remember when Mr. Kent first started digging his the reservoir for his system?

A. Well I believe it was well it been I think it been 73 he did a little bit most of he did the next he didn't do much that one year and then next summer he did most of it.

Q. He started it in 73?

A. Just barely yuh didn't do very much, the next summer if I remember right did most of it, almost all of it was done the next year after.

Q. I have no further...

INQUIRER. Do you have anything further Mr...

MR. HUNTLEY. No I don't.

INQUIRER. Mr. Burnham do you have anything further you would like to say at this time?

A. No I don't think so.

INQUIRER. I believe at this time we're ready to proceed to application No. 15029 which is in the name of Delmar Clark.

MICROFILMED

INTER-DEPARTMENT MEMO — 1

DATE 4-10-78

FROM Glen + BDF

TO Jo Beeman

SUBJECT attached info.

We think the Dept should become involved as an intervenor on behalf of the watermaster

Glen + BDF

SIGNATURE

MICROFILMED

TO Norm

WHILE YOU WERE OUT

DATE 6/15 TIME 9:45

M Linda Clark

OF Pocatello

PHONE: 232-2268
AREA CODE NUMBER EXT.

☒ Telephoned ☐ Returned Your Call ☐ Will Call Again
☒ Please Call ☐ Called to See You

Please sign permit also.

she's
Call if
decision will be
delayed past
6/22/78

MB

MICROFILMED

MICROFILMED

Drafted by BDF

M. B. Hiller
Richard T. St. Clair
ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered
P. O. Box 29
Idaho Falls, Idaho 83401
Telephone: (208) 522-2350
Attorneys for Lorraine Kent
and Claude Kent Trust

RECEIVED
OCT 6 1977
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Approved Permits No. 15-7025 in the Name of LORRAINE KENT and CLAUDE KENT TRUST, No. 15-7026 in the Name of LYLE R. BURNHAM, No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	SUPPLEMENTAL MEMORANDUM

COME NOW Lorraine Kent and the Claude Kent Trust, by and through their attorneys of record, and submit the following supplemental memorandum.

At the hearing of the above entitled matter before the Water Resources Board on the 16th day of September, 1977, testimony established that Lorraine Kent and the Claude Kent Trust were the successors in interest to .5 c.f.s. of water from the Northerly spring to Sheep Creek decreed to Asa Danforth. Further, testimony established that Lorraine Kent and the Claude Kent Trust resumed application of the water right to beneficial use in the summer of 1976. The question arose as to whether the subsequent filing of an application for permit to appropriate water from the unnamed springs to Sheep Creek by Lorraine Kent and the Claude Kent Trust constituted a waiver of the rights succeeded to under the Danforth Decree.

DISCLOSED

The Idaho Supreme Court long ago resolved this question in Joyce vs. Reuben, 23 Idaho 296, 130 P.2d 793 (1913), and Newport Water Company vs. Kellogg, 31 Idaho 574, 174 P.2d 602 (1918).

In Newport Water Company vs. Kellogg, the Court stated:

> Appellants assigned as error, the action of the trial court admitting in evidence, over objection, respondent's Exhibit N. This exhibit was a water license issued by the State Engineer pursuant to Rev. Codes, Section 3261. It granted to respondent a perpetual right to two cubic feet per second of water to be conducted to the towns of Newport, Washington, and Newport, Idaho, for the purpose of fire protection and domestic use. Rev. Codes, Section 3262, makes such a license prima facia evidence as to the water right. As the license on its face indicated that it was granted for the same system of works and the same water right referred to in the complaint, its admission in evidence was not error. By obtaining the issuance of this license, respondent did not waive any rights they may have had previously through actual diversion and application to a beneficial use. (Citation Omitted).

Later in Pioneer Irrigation District vs. American Ditch Association, 50 Idaho 732, 1 P.2d 196 (1931), the Idaho Supreme Court affirmed its earlier holdings to the effect that application to the State Water Resources Department did not waive an earlier right to water established by court decree. In that instance, the Court affirmed in the Farmers Cooperative Ditch Company, 154.455 second feed of water with a priority of April 1, 1905, based on a court decree, notwithstanding a subsequent application for and issuance of a license to appropriate 140 second feet of water.

In the instant case, the filing of an application to appropriate by Lorraine Kent and the Claude Kent Trust, does not constitute a waiver of the decreed amount or priority of water rights obtained by way of the Danforth Decree. Therefore, the resumption of appropriation by Lorraine Kent and The Claude Kent Trust would

DENIED

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CLENCY ST. CLAIR (1871-1957)
PAUL T. PETERSON (1892-1967)
ROBERT W. ST. CLAIR
GILBERT C. ST. CLAIR
MORTON B. HILLER
WILLIS B. BENJAMIN
THEODORE V. WOOD
STEPHEN J. McGRATH
JOHN G. ST. CLAIR
RICHARD T. ST. CLAIR
STEVEN K. TOLMAN

RECEIVED
OCT 6 1977
Department of Water Resources
Eastern District Office

October 5, 1977

Mr. Ronald D. Carlson
State of Idaho
Dept. of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Larry Kent Natural Spring Matter

Dear Ron:

I am sending you a Supplemental Memorandum in behalf of Lorraine Kent and the Claude Kent Trust; this memorandum was requested by the hearing officer. I have sent copies to Jim Green, Bob Huntley and Wesley Crowther.

Sincerely yours,

ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered

M. B. Hiller

MBH:csr
Enc.

MICROFILMED

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF THE PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; NO. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030 - DELMAR CLARK	MOTION FOR REHEARING TO ALTER AND AMEND DECISION AND ORDER

COMES NOW Delmar Clark, and moves the Water Resources Board for an opportunity to present oral argument, as well as any further testimony the Board might desire, regarding rehearing of the Memorandum Decision and Order entered herein on the 17th day of June, 1977. The rehearing would be for the purpose of presenting arguments as to all areas wherein it is felt that the Decision and Order is in error, including, but not limited to, the following:

(1) The Conclusion of Law No. 1 is in error in finding that Clarence Kent "resumed a water right prior to it being taken by subsequent appropriators." That conclusion is in error for the following reasons:

(A) The water right under the Danforth Decree had been totally abandoned by Clarence Kent and his predecessors for many, many years.

(B) To <u>resume</u> a water right means to go back to use of a water right that had been exercised before. The testimony established that the most use that had ever been used by Clarence Kent and his predecessors was for the watering of a garden, and therefore the application of .5 cfs into an irrigation system to irrigate 160 acres of land is not a resumption, but rather is a total new application of water to new lands, and the works in 1973 also constitute a new point of diversion which requires an application.

(C) The only provision in the Idaho law for Clarence Kent to establish a new water right or a new point of diversion

ENDORSED

is to make an application for same, which fact he has not done, and therefore the applications for permit of Del Clark under Nos. 15-7029 and 15-7030 constitute a taking of water by a subsequent appropriator prior to any legal resumption by Clarence Kent.

(2) The Memorandum Decision and Order is in error when it finds that Clarence Kent was the successor to 0.50 cfs under the Danforth Decree -- the fact was that his maximum right under the Decree, in any event, was 0.25 cfs.

(3) The Board erred in failing to rule and find that the watering of livestock by Del Clark since 1928 constituted a diversion giving him a water right for that purpose with date of priority from 1923.

(4) The Decision and Order is in error in awarding Lyle Burnham a permit to develop irrigation on 80 acres at the rate of 6 feet per cfs when, at the hearing, he testified he was seeking water only for about 10 acres, which would be a maximum entitlement of 0.2 cfs.

(5) That the Decision and Order errs in failing to require Clarence Kent to place a measuring device or splitting device at his portion of diversion in order to ascertain that he receives no more than 0.5 cfs into a pipe system, leaving the balance in the stream channel.

(6) The Decision errs in failing to limit the rights of Clarence Kent to flows awarded his predecessors in interest under the Danforth Decree from the south (lower) spring, which spring, under the Danforth Decree, was divided between Clarence Kent's predecessor, H. O. Kent, and Lyle Burnham's predecessor in interest.

Petitioner respectfully requests that this Petition for Rehearing be granted and that a time and place be set for the rehearing, with notice to all parties.

RACINE, HUNTLEY & OLSON

By_____
Robert C. Huntley, Jr.
P. O. Box 1391
Pocatello, Idaho 83201

UNPUBLISHED

preserve the priority of use awarded them in the Danforth Decree.

Respectfully submitted this 4 day of October, 1977.

ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered

BY _____
M. B. Hiller
Attorneys for Lorraine Kent
and The Claude Kent Trust

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of October, 1977, I mailed a true and correct copy of the within and foregoing SUPPLEMENTAL MEMORANDUM on the following attorneys of record:

James B. Green, Esq.
Terrell, Green, Service & Gasser
P. O. Box 4883
Pocatello, Idaho 83201

J. W. Crowther, Esq.
Attorney at Law
60 North Main Street
Malad, Idaho 83252

Robert C. Huntley, Jr., Esq.
Racine, Huntley & Olson
P. O. Box 1391
Pocatello, Idaho 83201

_____
M. B. Hiller

FILMED

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF THE PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; NO. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030 - DELMAR CLARK	MOTION FOR REHEARING TO ALTER AND AMEND DECISION AND ORDER

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(B) To resume a water right means to go back to use of a water right that had been exercised before. The testimony established that the most use that had ever been used by Clarence Kent and his predecessors was for the watering of a garden, and therefore the application of .5 cfs into an irrigation system to irrigate 160 acres of land is not a resumption, but rather is a total new application of water to new lands, and the works in 1973 also constitute a new point of diversion which requires an application.

(C) The only provision in the Idaho law for Clarence Kent to establish a new water right or a new point of diversion

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Accepted

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(3) The Board erred in failing to rule and find that the watering of livestock by Del Clark since 1928 constituted a diversion giving him a water right for that purpose with date of priority from 1928.

(4) The Decision and Order is in error in awarding Lyle Burnham a permit to develop irrigation on 80 acres at the rate of 6 feet per cfs when, at the hearing, he testified he was seeking water only for about 10 acres, which would be a maximum entitlement of 0.2 cfs.

(5) That the Decision and Order errs in failing to require Clarence Kent to place a measuring device or splitting device at his portion of diversion in order to ascertain that he receives no more than 0.5 cfs into a pipe system, leaving the balance in the stream channel.

(6) The Decision errs in failing to limit the rights of Clarence Kent to flows awarded his predecessors in interest under the Danforth Decree from the south (lower) spring, which spring, under the Danforth Decree, was divided between Clarence Kent's predecessor, H. O. Kent, and Lyle Burnham's predecessor in interest.

Petitioner respectfully requests that this Petition for Rehearing be granted and that a time and place be set for the rehearing, with notice to all parties.

RACINE, HUNTLEY & OLSON

By_____
Robert C. Huntley, Jr.
P. O. Box 1391
Pocatello, Idaho 83201

CONFIDENTIAL

I HEREBY CERTIFY that a copy of the foregoing Motion was mailed this 24th day of June, 1977, to the following parties of record:

J. W. Crowther
60 North Main
Malad, Idaho attorney for Clarence Kent

Larry Kent
2222 Oak Trail Dr.
Idaho Falls, Idaho

Lyle Burnham
Arimo, Idaho

Robert C. Huntley, Jr.

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Robert C. Huntley, Jr.
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Telephone: (208) 232-6101

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

In the Matter of the Claim to a Water Right of DELMAR CLARK	No. 15-7029 BRIEF OF DELMAR CLARK

The evidence establishes that Del Clark is entitled to the granting of his Application No. 15-7029 for 0.13 cfs of the waters of Sheep Creek (tributary to Dairy Creek), as per his Application, for the following reasons:

(1) It is undisputed that he has had the domestic supply from the springs to his home through a pipe (the claim being 0.04 cfs) continuously since 1938 -- no party disputes that right, and we would like it formalized by the granting of the permit even though the right predates the 1971 filing requirement.

(2) ALL OF THE REMAINING WATERS OF SHEEP CREEK REMAIN UNAPPROPRIATED AND SUBJECT TO APPROPRIATION AT THIS TIME FOR THE FOLLOWING REASONS:

(a) Under the 1929 Danforth Decree, the waters were decreed on the following basis, based on 1.0 cfs total flow:

0.5 to the predecessors of Lorraine Kent and Claude Kent Trust

0.23 to the predecessors of Lyle Burnham

0.25 to the predecessor of the protestant, Clarence Kent.

(b) All of those rights under the Danforth Decree have been lost through forfeiture under the ruling of Gilbert vs Smith, 23 Idaho Capital Reports 479, a copy of which is attached hereto, and which decision reads, in part, as follows:

At page 431:

"Although framed in the language of abandonment, appellants' principal argument in this appeal concerns not only the doctrine of abandonment but likewise the question of statutory forfeiture. This doctrine, although similar to abandonment, involves characteristics of significant difference which must be borne in mind in resolving this and similar disputes addressing the relinquishment of decreed water rights.

"Abandonment is a common law concept involving the concurrence of an intention to abandon and the actual relinquishment or surrender of the water right. 93 C.J.S., Waters §193, at 994; Wiel, 1 Water Rights in the Western States, §567 (1911). It is not dependant necessarily upon length of time but upon the essential element of intent. Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944); Union Grain & Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 240 P. 443 (1925); St. Johns Irr. Co. v. Danforth, 50 Idaho 513, 298 P. 365 (1931); Chill v. Jarvis, 50 Idaho 531, 298 P. 373 (1931); Smith Land Co. v. Furhiman, 36 F. Supp. 667 (1941). Such intent may be evidenced by non-use for a substantial period of time but mere non-use is not per se abandonment. Wiel, supra, §569. In contrast, the doctrine of forfeiture is predicated upon a statutory declaration that all rights to use water may be lost where an appropriator fails to make beneficial use of the water for a statutory period regardless of the intent of the appropriator. 93 C.J.S. Waters §193; Wiel, supra, §574; East Side Canal & Irr. Co. v. U.S., 76 F. Supp. 836, 839 (Ct. Claims, 1948); Hammond v. Johnson, 66 P. 2d 894, 899 (Utah 1937). In Idaho this concept is set forth in I.C. §42-222(2). The effect of that provision is that an appropriator who fails to apply his water right to a beneficial use for a continuous five year period is regarded as having lost all rights to the use of such water. Although the terms abandonment and forfeiture have often been used by this Court interchangeably see, Hodges v. Trail Creek Irrigation Co., 78 Idaho 10, (citing cases), the case of Carrington v. Crandall, supra, at 532, makes it clear that they are distinct legal concepts and should be considered as such. We recognize that this Court has in the past failed to indicate this difference in addressing cases involving water rights disputes. Nevertheless, we deem it essential for this and other future cases of a similar nature to keep the concepts of abandonment and statutory forfeiture, and their application, distinct." (Emphasis supplied) **NOTE

(c) The testimony is undisputed that since the 1930s, none of the people under the Danforth Decree or their successors have used the waters, the non-use being for many years in excess of the five years required for forfeiture.

In fact, from 1929 to the date of this hearing, Lorraine Kent and Claude Kent Trust made no use of their water except for gardening, and

**See specific text of I.C. 42-222(2) at page 6 herein.

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Clarence Kent made no use of his water prior to 1973, except for gardening, up to 1942, with no use between 1942 and 1949, then four years of gardening from 1949 to 1952, and then a period of 19 years of total non-use occurred from that time up until 1971, the effective date of the Act requiring applications for uses of water.

As to the Lyle Burnham right under the Danforth Decree, the evidence is clear that there has never been any use made except for what spread out naturally on about 10 acres of ground, until about seven years ago when he started making some diversions for, again, the same 10 acres of ground, which would be a maximum usage of 0.2 cfs.

The Claude and Lorraine Kent Trust last used water in 1950 for a one-acre garden, which was 27 years ago, and which would have preserved a maximum entitlement of 0.02 cfs even if the time lapse had not occurred.

(d) There is a conflict in the evidence as to whether Clarence Kent has made any diversions, or whether his watering was merely sub-irrigation, and the Hearing Board will have to resolve that conflict. The credible evidence is that there were no diversions. Clarence Kent testified there had been some dirt dams placed in the stream one or two times in a couple of the summers, but it is clear that all other persons who were in a position to observe never saw those dams, and it is clear that he had no lateral ditches constructed to take the water. Even assuming that the Board resolves that question in favor of him, the maximum that the testimony will support would be irrigation of a strip 220 yards long and about 6 to 7 rods wide on one side of the stream, and 4 rods wide on the other side of the stream, or an area of 3 acres, or a preservation of water rights to the extent of 0.06 cfs.

WESTCROFT

(e) It is undisputed that Del Clark also had the benefits of sub-irrigation on about 3 acres of ground since 1938, which entitles him to 0.06 cfs which he now wishes to physically divert pursuant to the Application.

Likewise, Del Clark has had stock water rights by way of beneficial use by livestock all summer and 100 head of cattle in the fall since 1938.

Under the Avondale case (a copy of which we will furnish as soon as we receive the District Court opinion), it has been held that watering of livestock directly from a stream is a beneficial use, which constitutes a water right.

However, should the Board feel there is a problem with that type of diversion, Del Clark will make an actual diversion and establish a pond or a watering trough for the diversion of the 0.03 cfs he requests for his cattle.

ON THE AVAILABILITY OF WATER

The evidence establishes that there is adequate unappropriated water available for the 0.13 cfs Del Clark requests in his Application No. 15-7029, the record establishing the following maximum existing water rights and availability of water:

NAME OF PARTY	AMOUNT OF RIGHT IN CFS	MANNER IN WHICH OBTAINED
Del Clark	0.04 for domestic purposes	a. Usage since 1938 b. Application 15-7029
Del Clark	0.03 for stock water	a. Usage since 1938 b. Application 15-7029
Del Clark	0.06 for irrigation	a. Sub-irrigation since 1938 b. Application 15-7029 By diversion works
Lyle Burnham	0.20	a. Diversion in last 7 years b. Application 15-7026
Lorraine Kent and Claude Kent Trust	0.50	a. Application 15-7025
Clarence Kent	0.06	a. DISPUTED diversion of approximately 3 acres
TOTAL CLAIMS ESTABLISHED OR PENDING	0.89	

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The above total maximum provable claims by the four parties involved of 0.89 cfs does not utilize the whole stream, based on the August flow measured at 0.975 at the Lorraine and Claude Kent Trust property, leaving still unappropriated waters of 0.086 cfs over and above all valid claims at that time of year.

In providing the Board with the foregoing table, we would point out that the domestic water right of Del Clark is established by diversion and application to beneficial use prior to 1971, and was decreed to him in the decision of Judge Hargraves, as was stipulated into evidence.

Furthermore, the livestock right of Del Clark also dates from 1939 by actual application to beneficial use, and both of these claims have priority over any claims of any of the other parties because they were utilized and exercised in all cases during five-year forfeiture periods by the other parties, and the law is that if a forfeiture period has occurred and during that interval another appropriation takes place, the forfeiting party cannot reestablish his right under an earlier decree in derogation of that intervening appropriation.

We further dispute that Clarence Kent has established by his testimony any pre-existing water right even to the 0.06 cfs for 3 acres. If we understood his testimony correctly, there was no testimony showing any diversion by placing dirt dams in the stream during any particular years prior to 1971, and the use of earth dams after 1971 would be of no effect because an application for a permit is required.

It is to be further noted that Clarence Kent's own testimony clearly establishes a total abandonment as well as forfeiture of all waters since 1929 except possibly for the garden plot, and even the garden plot was abandoned and forfeited for non-use since 1952.

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With respect to the claim of Lyle Burnham, he presented no testimony of any intent to construct any irrigation system or any financial ability to construct any irrigation system for any acreage in excess of 10 acres, and therefore, although his claim is for many more acres, any granting of an application should be limited to 10 acres.

CONCLUSION

The testimony establishes that Del Clark has a prior right by diversion and application to beneficial use prior to 1971 for the claim of 0.04 cfs for domestic water, and 0.03 cfs for stock water, and that claim should be confirmed by granting of the application.

Furthermore, the evidence shows his financial ability to construct the irrigation works for the three acres of irrigated land, entitling him to 0.06 cfs therefor, which amount of water is available in the stream for appropriation, and therefore his application for a total of 0.13 cfs should be granted in full.

Respectfully submitted,

RACINE, HUNTLEY & OLSON

By_____
Robert C. Huntley, Jr.

**NOTE FROM PAGE 2:
I.C. 42-222(2):
"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 beneficial use for which it was appropriated 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. Provided, further, that upon proper showing before the director of the department of water resources of good and sufficient reason for non-application to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for non-use thereof, to such waters for a period of not to exceed five (5) additional years. . ."

MICROFILMED

M. B. Hiller
Richard T. St. Clair
ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered
P. O. Box 29
Idaho Falls, Idaho 83401
Telephone: (208) 522-2350
Attorneys for Lorraine Kent
and Claude Kent Trust

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Approved Permits No. 15-7025 in the Name of LORRAINE KENT and CLAUDE KENT TRUST, No. 15-7026 in the Name of LYLE R. BURNHAM, No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	MEMORANDUM BRIEF IN SUPPORT OF APPROVAL OF APPLICATION FOR PERMIT NO. 15-7025

COMES NOW Lorraine Kent and the Claude Kent Trust, by and through their attorney M. B. Hiller of the firm of St. Clair, Hiller, Benjamin, Wood & McGrath, Chartered, Idaho Falls, Idaho and submits the following points and authorities in support of the approval of Application for Permit No. 15-7025.

A chronology of the material facts presented the Department of Water Resources at the hearing on January 12, 1977, is as follows. On June 5, 1928, the District Court of the Fifth Judicial District decreed to Henry O. Kent and James Burnham a right to the perpetual use of waters from the Southerly spring arising in the Northeast Quarter (NE1/4) Northeast Quarter (NE1/4) of Section Twenty-three (23), Township Eleven (11) South, Range 34 E.B.M. to the extent of .5 c.f.s., with a priority date from June 1, 1914.

MICROFILMED

Accepted as
Argument

Asa Danforth was decreed a right to perpetual use of .5 c.f.s. of water from the Northerly spring arising from said situs. The use was described for irrigation and domestic purposes. During the years 1950 through 1973 water was diverted from the Southerly spring for domestic purposes only, and not for irrigation. Mr. Clarence Kent succeeded to the interest of H. O. Kent prior to 1973. Lorraine Kent and Claude Kent Trust succeeded to the interest of Asa Danforth. In 1973, Mr. Clarence Kent began diverting water from the Southerly spring and in 1975 installed a plastic pipeline to collect water from the Southerly spring and transport to a pump.

On February 5, 1976, applicant Lorraine Kent and the Claude Kent Trust made application to appropriate .50 c.f.s. from tributaries to Sheep Creek for irrigation purposes. On June 17, 1977, applicant's application for permit was approved subject to the right of Clarence Kent to divert .50 c.f.s. of water with a priority date of June 1, 1974. Applicant submits that the Department of Water Resources errored in recognizing the priority claim of Clarence Kent in excess of .25 c.f.s. of water.

ARGUMENT

1. Contrary to the testimony, the Water Resources Board in the Memorandum Decision of June 17, 1977, held that Clarence Kent "resumed" a water right to .50 c.f.s. from the Southerly spring in 1973. This finding is in error inasmuch as Clarence Kent succeeded to at most .25 c.f.s. from H. O. Kent his predecessor under the Danforth Decree. Clarence Kent's resumption of appropriation in 1973 was ineffectual to establish a right to water in excess of .25 c.f.s., inasmuch as the only permissible method for establishing a new water right in 1973 was through application under the provisions of Idaho Code §42-201 et seq.

MICROFILMED

2. Contrary to the claims of Lyle Burnham and Delmar Clark, the Department of Water Resources correctly found that the testimony presented at the hearing established no appropriation to beneficial use of water from the Southerly spring by Lyle Burnham or Delmar Clark at any time prior to February 5, 1976. To the extent that Lyle Burnham succeeded to the .25 c.f.s. water right awarded James Burnham pursuant to the Danforth Decree, such water right was abandoned and forfeited by Lyle Burnham and his predecessors through non-use.

Abandonment is a common law concept involving the concurrence of an intention to abandon and the actual relinquishment or surrender of the water right. It is not dependent necessarily upon length of time but upon the essential element of intent. Such intent may be evidenced by non-use for a substantial period of time. Gilbert vs. Smith, 97 Idaho 735, 552 P.2 1220, 1223 (1976). It is established that a water right in Idaho, although affirmed by court decree, may be abandoned and subject to subsequent appropriation. Idaho Code §42-222 (2); Gilbert vs. Smith, id. at 1223.

The doctrine of forfeiture is predicated upon a statutory declaration that all rights to use water may be lost where an appropriator fails to make beneficial the use of the water for a statutory period regardless of the intent of the appropriator. In Idaho this concept is set forth in Idaho Code §42-222(2). The effect of that provision is that an appropriator who fails to apply his water right to a beneficial use for a continuous five (5) year period is regarded as having lost all rights to the use of such water. Gilbert vs. Smith, id. at 1223.

3. In the event the Department of Water Resources affirms its decision recognizing a water right in Clarence Kent in the

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amount of .25 c.f.s., or any other amount, the Department should require installation of a measuring device at Clarence Kent's place of diversion so that the amount of the appropriation may be ascertained.

CONCLUSION

In view of the testimony presented by all parties to this action, it is manifest that Clarence Kent did not establish an appropriation to beneficial use of water from the southerly spring in excess of .25 c.f.s. The other applicants Lyle Burnham and Delmar Clark established no appropriation to beneficial use of water from the southerly spring.

Therefore, the application of Lorraine Kent and the Claude Kent Trust should be approved subject only to the Clarence Kent priority of June 17, 1977 to appropriate .25 c.f.s. of water from the Southerly spring.

Respectfully submitted this 16 day of September, 1977.

ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered

BY _____
M. B. Hiller
Attorney for Lorraine Kent
and the Claude Kent Trust

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Department of Water Resources
Eastern District Office

M. B. Hiller
Richard T. St. Clair
ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered
P. O. Box 29
Idaho Falls, Idaho 83401
Telephone: (208) 522-2350
Attorneys for Lorraine Kent
and Claude Kent Trust

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Approved Permits No. 15-7025 in the Name of LORRAINE KENT and CLAUDE KENT TRUST, No. 15-7026 in the Name of LYLE R. BURNHAM, No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	BRIEF IN OPPOSITION TO BRIEF OF CLARENCE KENT

COME NOW Lorraine Kent and the Claude Kent Trust, by and through their attorneys of record, and submit the following Memorandum Brief in Opposition to the Brief submitted by Clarence Kent on the 10th day of November, 1977.

Applicants Lorraine Kent and the Claude Kent Trust object to the mischaracterization of testimony before the hearing officer of the Department of Water Resources and the conclusions therefrom as expressed in the recent brief filed on behalf of Clarence Kent. At the very outset and throughout the several hearings in this matter, the appropriation and use of the springs which are tributary to Sheep Creek were shown to be non-continuous, intermittent, and infrequent by all parties having an interest therein from and after the Danforth Decree announced June 5, 1928. It was further

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evident from the testimony of all witnesses, that what little use was made of the water from these springs, such use was prior to 1950 and subsequent to 1972.

It is eminently clear that Clarence Kent seeks to establish a claim to all the waters of the Northern and Southern Springs solely by virtue of his appropriation from a reservoir constructed in 1973, into which both Northern and Southern Spring are comingled. However, the only claim of Clarence Kent having any support at all in the presented facts and law, is to an amount not in excess of .25 c.f.s. The support for this claim lies in the decree of .5 c.f.s. to Harry O. Kent and James Burnham from the Southerly Spring, one-half (1/2) of which passed to Clarence Kent from his predecessor Harry O. Kent, and the other half to Lyle Burnham. In 1973, Clarence Kent resumed his use of the .25 c.f.s. interest by appropriation and use of the water. However, from and after 1971, the sole method of establishing a water right in the State of Idaho has been by virtue of the filing of an application for a permit with the Department of Water Resources, which admittedly has never been done by Clarence Kent. Therefore, if the Department is to recognize the doctrine of resumption, the maximum water right to which Clarence Kent is entitled, by any stretch of the facts or law, is at most .25 c.f.s. from the Southerly Spring. If the Department is not to recognize resumption in this instance then Clarence Kent has no recognizable claim to any water from the springs.

Lorraine Kent and the Claude Kent Trust take issue and deny the contentions in Clarence Kent's recent brief that Claude Kent "turned the entire flow of the Northern Spring into the stream with the Southern Spring in 1938 or 1939," advised Clarence Kent "go ahead, it's a cinch, I'm not going to use it," or that

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Lorraine Kent stated to Clarence Kent "that's fine, we always intended that you should have it." To the best recollection of these applicants, the foregoing quoted remarks were not presented as testimony at any of the hearings in this matter.

Attached hereto, and incorporated herein, are Affidavits of Lorraine Kent and Sidney Kent, specifically denying and rebutting the foregoing remarks. Moreover, these applicants submit that the true "intent" of Claude Kent was to resume utilization of the Northern Spring in the summer of 1974, but for the untimely death of Claude Kent.

Lastly, it is submitted that applicants Lorraine Kent and the Claude Kent Trust resumed use and appropriation of waters from the Northernly Spring simultaneously with their Application for Permit No. 15-7025 in the spring of 1976. That if the Department of Water Resources intends to apply the doctrine of resumption to the resumption of Clarence Kent's Danforth rights in the spring of 1973, it is equitable and just that the Department of Water Resources also apply the doctrine of resumption to the resumption of their Danforth rights by Lorraine Kent and the Claude Kent Trust in the spring of 1976. Prior to the filing of this brief, applicants Lorraine Kent and the Claude Kent Trust submitted a Supplemental Memorandum to the Department outlining Idaho Supreme Court decisions to the effect that the filing of an application for permit does not constitute waiver or estoppel as to an earlier right established by court decree.

Therefore, having rebutted the mischaracterizations found in the brief filed on behalf of Clarence Kent, applicants Lorraine Kent and the Claude Kent Trust respectfully request the Department to either (1) modify its Memorandum Decision and Order of the 17th day of June, 1977, reducing the priority right of

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Clarence Kent to .25 c.f.s., and affirm as modified, or (2) find that applicants established a resumption of their Danforth decreed rights to .50 c.f.s. of the Northern Spring with priority of June 1, 1915.

Respectfully submitted this 21st day of December, 1977.

ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered

BY Richard T. St. Clair
Richard T. St. Clair
Attorneys for Lorraine Kent and
the Claude Kent Trust

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of December, 1977, I mailed a true and correct copy of the within and foregoing BRIEF IN OPPOSITION TO BRIEF OF CLARENCE KENT to the following attorneys, prepaying the pastage thereon and depositing the same with the U. S. Mail.

Ron Kerl, Esq.
Terrell, Green, Service & Gasser
P. O. Box 4883
Pocatello, Idaho 83201

J. W. Crowther, Esq.
Attorney at Law
60 North Main Street
Malad City, Idaho 83252

Robert Huntley, Esq.
Racine, Huntley & Olson, Chartered
P. O. Box 1391
Pocatello, Idaho 83201

Richard T. St. Clair

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M. B. Hiller
Richard T. St. Clair
ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered
P. O. Box 29
Idaho Falls, Idaho 83401
Telephone: (208) 522-2350
Attorneys for Lorraine Kent
and Claude Kent Trust

RECEIVED
MAR 16 1978
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Approved Permits No. 15-7025 in the Name of LORRAINE KENT and CLAUDE KENT TRUST, No. 15-7026 in the Name of LYLE R. BURNHAM, No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	AFFIDAVIT

STATE OF IDAHO)
) ss.
County of Bonneville)

COMES NOW Sidney Kent after first being duly sworn upon oath, deposes and says:

1. That affiant has been the Lessee of the property owned by Lorraine Kent and Claude Kent out of which the springs at issue in this matter arise from 1970 through the present.

2. That during 1973 through May 1974, affiant and Claude Kent discussed the reservoir constructed by Clarence Kent, and Claude Kent never indicated that he wanted Clarence Kent to have waters from the Northern Spring.

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3. That affiant and Claude Kent discussed the reservoir and diversion of Clarence Kent in the spring of 1974 at the location of the reservoir, and affiant recalls Claude Kent stating "we ought to start using the water again."

4. That affiant and Claude Kent did not make further plans to divert and use the waters from the springs thereafter because Claude Kent passed away in June of 1974.

Further affiant sayeth not.

DATED this 10th day of December, 1977.

Sidney Kent
Sidney Kent

Subscribed and sworn to before me this 10th day of December, 1977.

H. Larry Spilker
Notary Public for Idaho
Residing at Idaho Falls, Idaho
Commission Expires: _____

(SEAL)

MICROFILMED

M. B. Hiller
Richard T. St. Clair
ST. CLAIR, HILLER, BENJAMIN,
WOOD & McGRATH, Chartered
P. O. Box 29
Idaho Falls, Idaho 83401
Telephone: (208) 522-2350
Attorneys for Lorraine Kent
and Claude Kent Trust

RECEIVED
MAR 16 1978
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Approved Permits No. 15-7025 in the Name of LORRAINE KENT and CLAUDE KENT TRUST, No. 15-7026 in the Name of LYLE R. BURNHAM, No. 15-7029and 15-7030 in the Name of DELMAR CLARK	AFFIDAVIT

STATE OF IDAHO)
) ss.
County of Bonneville)

COMES NOW Lorraine Kent after first being duly sworn upon oath, deposes and states:

1. That affiant is the widow of Claude Kent and the applicant in Application for Approval of Water Permit No. 15-7025 filed before the Department of Water Resources for the State of Idaho.

2. That affiant is familiar with the recitation of facts contained in the brief filed by counsel for Clarence Kent with the Department of Water Resources on the 10th day of November, 1977.

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3. That affiant recalls certain conversations with Clarence Kent prior to the beginning of work on the reservoir, and affirmatively states that affiant never advised Clarence Kent that he might have or appropriate the water from the Northern Spring mentioned in the Danforth Decree.

4. Affiant further affirmatively states that affiant and her former husband Claude Kent never intentionally directed the water flowing from the Northern Spring mentioned in the Danforth Decree into the flow of the Southern Spring.

5. That affiant and her former husband, Claude Kent, never intended to abandon and give up, any rights to appropriation and use of the waters from the Northern Spring awarded to them and their predecessors under the Danforth Decree.

6. That affiant was present at certain hearings in this matter at which Clarence Kent gave testimony, and to affiant's best recollection, neither Clarence Kent nor any witness testified that affiant had stated at any time to Clarence Kent "that's fine, we always intended that you should have it." Had this testimony been presented, affiant would have denied it at the time, and presently affirmatively states that the comment was never made by affiant to Clarence Kent.

Further affiant sayeth not.

DATED this 10th day of December, 1977.

Lorraine Kent
Lorraine Kent

Subscribed and sworn to before me this 10th day of December, 1977.

H. Larry Spilker
Notary Public for Idaho
Residing at Idaho Falls, Idaho
Commission Expires: _____

(SEAL)

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ROUTING SLIP

DATE 3/15/78 TIME

TO: Colleen	REF. No. (if any)
FROM: (show title) Janice	

FOR YOUR:
- ☐ Information
- ☐ Approval
- ☐ Signature

REVIEW AND:
- ☐ Call Me ☐ See Me
- ☐ Comment & Return
- ☑ ~~Take~~ Proper Action
- ☐ Draft a Reply for Me

PER:
- ☐ Our Conversation
- ☐ Your Request
- ☐ Boss's Request

Please file these in 15-70298 7030

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Law Offices of
ST. CLAIR, HILLER, BENJAMIN, WOOD & McGRATH
CHARTERED
FIRST SECURITY BANK BUILDING
POST OFFICE BOX 29
IDAHO FALLS, IDAHO 83401
(208) 522-2350

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MAR 16 1978
Department of Water Resources
Eastern District Office

MESSAGE

REPLY

TO State of Idaho
Department of Water Resources
Statehouse
Boise, Idaho 83720

DATE

Re: Lorraine Kent and Claude Kent
Trust - Water Permit

DATE

FOLD

Gentlemen:

Enclosed please find our Brief in Opposition to Brief of Clarence Kent in the above matter. Would you please file the same with the Department of Water Resources.

Thanks for your assistance.

Yours very truly,

Richard T. St. Clair

RTS:dw
Enclosure

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BY

SIGNED

ORIGINAL

LOUIS E. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON
D. JAMES MANNING, JR.
W. MARCUS W. NYE
GARY L. COOPER
DENNIS W. OLLEY

LAW OFFICES OF
Racine, Huntley & Olson, Chartered
CENTER PLAZA - CORNER FIRST STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83201
TELEPHONE (208) 232-6101

RECEIVED
DEC 7 1977
Department of Water Resources

December 3, 1977

Mr. Norman Young
State of Idaho
Department of Water Resources
State House
Boise, Idaho 83720

Re: Permit Nos. 15-7030 and 15-7029
Delmar Clark

Dear Mr. Young:

Please be advised that we do not intend to file a brief in response to the briefs of the other parties, in that our position has been fully covered in our opening brief. Accordingly, we consider the case submitted.

Thank you for your kind consideration.

Very truly yours,

Robert C. Huntley Jr.

ROBERT C. HUNTLEY, JR.

RCH:bm

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LOUIS F. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON
D. JAMES MANNING
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GARY L. COOPER
DENNIS W. OLLEY

TELEPHONE
AREA CODE 208
232-6101

February 6, 1978

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FEB 8 1978
Department of Water Resources

Mr. Norman Young
State of Idaho
Department of Water Resources
State House
Boise, Idaho 83720

Re: Permit Nos. 15-7030 and 15-7029,
Delmar Clark

DIRECTOR	
DEPUTY DIR.	
RESO. ADMIN.	✓
RESO. ANALYSIS	
OPER. BUREAU	
TECH. SER. BUR.	
PROJ. STUD. BUR.	
LEGAL	
FISCAL	
PERSONNEL	
FILES	
Fleenor	

Dear Mr. Young:

We are in receipt of the Reply Briefs of Lorraine Kent and Lyle Burnham.

We have no other matters to submit that were not covered in our Opening Brief, and we would hope there is an early decision of this matter since another irrigation season is upon us.

Very truly yours,

ROBERT C. HUNTLEY, JR.

RCH:bm
cc: Del Clark
Tim Clark
M. B. Hiller
J.W. Crowther
Ron Kerl

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NOV 18 1977
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of Approved Permits No. 15-7025 in the Name of LORRAINE KENT and CLAUDE KENT TRUST, No. 15-7026 in the Name of LYLE R. BURNHAM, No. 15-7029 and 15-7030 in the Name of DELMAR CLARK	BRIEF

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Department of Water Resources
Western Regional Office

RESTATEMENT OF FACTS

The ownership of the waters of Sheep Creek by Clarence Kent is based upon a history of nearly fifty (50) years of continuous care, use and development. The salient facts elecited through the hearings before this Board have established that Clarence Kent's father, H. O. Kent, dug the original ditch flowing from the Southern Springs in 1914. The waters of the Northern Springs were originally diverted and developed by John Turner in 1915. These were the waters which were the subject of the so-called Danforth Decree. Clarence Kent and his brother Wayne Kent testified that from 1928 on, their family had the exclusive use of the waters from the Southern Springs. James Burnham, great-grandfather of applicant Lyle Burnham, and one of the parties in the original Danforth Decision left the area in about 1929 and made no effort to use any of the waters decreed to him in the Danforth Decision. This was explained

by Clarence and Wayne Kent as being because of the fact that there simply was not sufficient flow at that time to reach the Burnham property in sufficient quantity to be useful.

There has been no dispute of Clarence Kent's statement that Claude Kent, successor in interest to the Danforth property and the Northern Spring, turned the entire flow of that spring into the stream with the Southern Spring in 1938 or 1939, nor has there been any dispute of the fact that from that time on until the present, the Claude Kent interests took no action in regard to the waters from the Northern Spring. In fact, the lack of interest by Claude Kent was established through the testimony of Clarence Kent to the fact that prior to his beginning work on his new reservoir, he advised Claude of his intentions and received the assurance, "Go ahead, it's a cinch I'm not going to use it." He further discussed the matter with Claude's wife, Lorraine, who responded, "That's fine, we always intended that you should have it." This testimony of Clarence Kent stands unrefuted.

The only real area of dispute lies between Lyle Burnham and Clarence Kent as to the use the Burnhams made of the water. The effort has been made by the Burnhams to lead us to believe that they were diligent irrigators. However, the acknowledged facts are that Burnhams never, at any time, made any effort to develop or even maintain the flow of this water, nor did they develop any kind of irrigation system. The significant points to be understood in this regard are that Clarence Kent and his

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brother, Wayne Kent, testified that it was necessary to clean the springs and the ditch not less than every two (2) years and often it required several cleanings in one (1) year in order to keep the stream flowing, an exercise that apparently was completely unnoticed by the Burnhams and reflects how much attention they were paying to the flow of the water. It is also noteworthy that the ditch to which the Burnhams point as being their system was dug by them to flow back over the Kent land as far as possible and finally back and off of the Burnham property. This simple fact adds credence to the admission by Lewis Burnham that he had, in fact, testified in the District Court hearing that during the time he operated the Burnham farm between 1968 and 1973 he considered the water more of a nuisance and his efforts were directed toward getting rid of it rather than irrigating with it. This is further consistent with the Clarence Kent testimony that Burnhams did not even place a canvas dam in the ditch until 1975 after Clarence Kent had completed work on his reservoir site.

Subsequently, the Claude Kent Trust filed an application to appropriate .8 c.f.s. with a priority date of February 5, 1976. Lyle Burnham filed an application to appropriate 1.6 c.f.s. (nearly double the total summer flow of the stream) with a priority date of February 24, 1976, and Delmar Clark filed an application to appropriate .13 c.f.s. with a priority date of April 28, 1976.

ARGUMENT

It is quite apparent that there is insufficient water to

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satisfy the demand of all claimants to Sheep Creek. It is also quite apparent that the Claude Kent interest in the waters were appropriated by Clarence Kent and predecessors subsequent to 1938. The only evidence pertaining to the Claude Kent interest was that his stream was turned in with the flow of the Southern Spring and was used by Clarence Kent and his predecessors from that time forward. The record is void of any attempt by anyone to refute the Clarence Kent testimony to this effect.

It cannot be overlooked or overemphasized that prior to beginning work on the project Clarence Kent discussed his project with both Claude Kent and his wife, Lorraine, and both expressed their desire for him to proceed with the project because they had no intention to use the water. This corroborates Clarence Kent's understanding of their intention to abandon the stream subsequent to the 1938 diversion into the Southern Spring.

It would certainly be unfair and without justification for the trust to now attempt to reclaim the abandoned rights to the detriment of the present owners.

The disinterest of the Burnhams toward this water is evidenced by the fact that inspite of applicant's bland assertion of "irrigating" the evidence is undisputed that his system consisted solely of a ditch picking up the water where it ran on to his property continuing it along the Clarence Kent boundary line where the two properties abut and finally off of the Burnham property via the shortest possible route. This is, of course, understandable when one considers that during the summer months the quantity of water reaching the Burnham property

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would be probably less than one-half c.f.s. even if the stream were allowed to flow unimpeded by use of upstream irrigators. The figures supplied by the Soil Conservation Service establishes that in August 1976 the total flow below the Southern Spring was .976 c.f.s. and by the time it had reached the Kent property was down to .742 c.f.s. Obviously, the flow remaining after passing through the Kent property would be of a quantity insufficient for significant irrigation purposes. This would easily explain why Burnhams considered the water to be more of a nuisance than an asset. It is also significant that the applicants chose to apply for a new appropriation rather than to rely on their alleged rights under the Danforth Decree.

It will be recalled that at the time of the first hearing before this Board on these applications the Board advised the applicants that proceeding under their applications it constituted a waiver of their decreed rights inasmuchas the applications were for different amounts and priorities.

In this regard it should be noted this situation is different from those considered by the Court in Newport Water Company vs. Kellogg, 31 Idaho 574, 174 P.2d 602 (1918) and Pioneer Irrigation District vs. American Ditch Association, 50 Idaho 732, 1 P.2d 196 (1931). In those cases the Court held that where a license was issued for the same system of works and the same water right previously appropriated there was no waiver of the rights under the prior appropriation, however, in this instance: (1) the applicants did not have a system (2) the water rights originally applied for under the new applications

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were entirely different than the rights provided for under the Danforth Decree (3) the date of priority is 50 years later.

SUMMARY

The Claude Kent Trust application should be denied for the following reasons: (1) the Trust and/or its predecessors have exhibited no interest in the water since 1938 and have taken no part in improving the springs or the flow and (2) gave vocal approval and acquiescence to Clarence Kent's use of the water for nearly 40 years up to and including approval of his expenditure of over $50,000.00 in modernizing the system.

The Burnham application should be denied in that they have asserted no use of the water for practical purposes for nearly 50 years. They have taken no part during that period of time in maintaining the springs or the flow. They have by silence and inaction allowed Clarence Kent to exert full and complete control over the water for 50 years and to expend over $50,000.00 in improvements without a voice of protest.

Both applicants manifested a prior abandonment of their decreed interest by failing to assert them at any time prior to this proceeding and by applying for new rights in new quantity with new works and new priority dates.

Under no view of the record is applicant, Delmar Clark, entitled to any water. The District Court has determined he has no right other than the flow from the 2" pipe for culinary purposes and under any view of the facts there is no water available to provide for his application.

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Therefore, respectfully submitted that all applications should be denied and the rights of Clarence Kent to the stream be affirmed.

DATED this 10th day of November, 1977

J. W. Crowther
Attorney for Protestant

I hereby certify that I am a duly licensed attorney of Idaho, resident of and with my office in Idaho County, Idaho; that I served a copy of the foregoing on named attorney, by mailing a true and correct copy to said attorney at his below listed address, prepaying the postage and that there is a regular communication by U.S. Mail between said Malad City and said address of said named attorney.

Attorney: Robert Huntley

Address: P.O. Box 1321, Pocatello

Dated this 14 day of Nov 19 77

J. W. CROWTHER, ATTORNEY AT LAW
60 North Main Street, Malad City, Idaho

I hereby certify that I am a duly licensed attorney of Idaho, resident of and with my office in Idaho County, Idaho; that I served a copy of the foregoing on named attorney, by mailing a true and correct copy to said attorney at his below listed address, prepaying the postage and that there is a regular communication by U.S. Mail between said Malad City and said address of said named attorney.

Attorney: Wm. B Heller

Address: P.O Box 29, Shelley Falls, Ida

Dated this 11 day of Nov 19 77

J. W. CROWTHER, ATTORNEY AT LAW
60 North Main Street, Malad City, Idaho

I hereby certify that I am a duly licensed attorney of Idaho, resident of and with my office in Idaho County, Idaho; that I served a copy of the foregoing on named attorney, by mailing a true and correct copy to said attorney at his below listed address, prepaying the postage and that there is a regular communication by U.S. Mail between said Malad City and said address of said named attorney.

Attorney: Ron Ford

Address: P.O Box 4883 Pocatello

Dated this 11 day of Nov 19 77

J. W. CROWTHER, ATTORNEY AT LAW
60 North Main Street, Malad City, Idaho

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J. W. Crowther
Attorney for Protestant
60 N. Main
Malad, Idaho
Telephone: 766-2644

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Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

In the Matter of the Applications for Permits No. 15-7025 - LORRAINE KENT and the CLAUDE KENT TRUST; No. 15-7026 - LYLE R. BURNHAM; No.15-7029 and 15-7030 - DELMAR CLARK	REPLY BRIEF TO THE LYLE R. BURNHAM BRIEF

In response to the brief of Applicant Lyle R. Burnham salient points stand out:

1. The Burnham's admittedly have never taken any interest in maintaining the flow of the stream and, as has been previously noted, this responsibility was left entirely to Clarence Kent.

2. There is not now and never has been any type of system of laterals for irrigation purposes on the Burnham property.

3. Lyle R. Burnham's father admitted in testimony before this Board that during the five (5) years he ran the place between 1968 and 1973 he considered the water to be more of a nuisance than a benefit.

4. The only ditch dug and maintained by the Burnhams during the entire history of this stream, at least since 1929, was a ditch to convey the waters <u>off</u> of the Burnham property and this was even dug so close to the boundary line of their property that for a maximum distance possible it lay entirely upon Clarence Kent's bordering lands.

5. From the time that Clarence Kent started construction of his reservoir in 1975 he was able to, and did for long periods of time, completely shut off the flow to the Burnham property, without any objection whatever from anyone.

From these facts, all of which appear in the record before this Board, it is at once clear that the Burnham rights under the Danforth Decree were and have been abandoned by them since 1929, and that no one has interferred in any way with the Clarence Kent use of the waters since that time until the present. We again reiterate the point made in our opening brief and in the companion brief in opposition to the Lorraine Kent and Claude Kent Trust brief, that the abandonment of the Burnham's is recognized by the fact that their original application before this Board was for a different amount of water, with a different date of priority, to be used in a yet to be constructed system of laterals.

We further refer to the comments in our previous and accompanying briefs on the cases which they have cited showing the distinction between the facts of these cases and the facts of the instant matter and the lack of applicability of the cases which they cite.

It is, therefore, respectfully sunitted that the applications should be denied or made subject to the prior rights of Clarence Kent.

Respectfully submitted,

J. W. Crowther

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of February, 1978 I mailed a true and correct copy of the within and foregoing REPLY BRIEF TO THE LYLE R. BURNHAM BRIEF on the following attorneys of record.

James B. Green, Esq.
Terrell, Green, Service & Gasser
P. O. Box 4883
Pocatello, Idaho 83201

Robert C. Huntley, Jr., Esq
Racine, Huntley & Olsen
P. O. Box 1391
Pocatello, Idaho 83201

M. B. Hiller, Esq.
St. Clair, Hiller, Benjamin,
Wood & McGrath
P. O. Box 29
Idaho Falls, Idaho

Dana E. Cowles

J. W. Crowther
Attorney for
60 N. Main
Malad, Idaho
Telephone: 766-2644

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Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In The Matter of the Applications for Permits No. 15-7025 - LORRAINE KENT, and the CLAUDE KENT TRUST; No. 15-7026 - LYLE R. BURNHAM; No. 15-7029 and 15-7030 - DELMAR CLARK	REPLY BRIEF TO BRIEF OF LORRAINE KENT AND CLAUDE KENT TRUST

Reply is hereby tendered to the Brief in Opposition heretofore filed by Lorraine Kent and Claude Kent Trust.

Perhaps the disparity in facts established by the record and those alleged in the referenced brief can be explained by the fact that counsel for Lorraine Kent and Claude Kent Trust was not present at all of the previous hearings and thus is not familiar with the record. It must be reiterated as has been stated before and undisputed until this belated attempt to "muddy the waters" as it were, that the northerly springs flowing from the Claude Kent property have never been used for irrigation purposes by the Claude Kent Interest at least since 1939 when Claude Kent took ownership of that farm. This fact has been testified to in every hearing under oath by various witnesses and the record is completely void of any evidence to the contrary.

It should be further noted that Lorraine Kent was present along with her son Larry at the hearing bfore this Board when Clarence Kent again testified that the waters of the northern

Burnhams or the Claude Kent interest, ever took any action to maintain the flow of water from the springs involved. The record stands uncontradicted that Clarence Kent diligently maintained the flow by cleaning the ditch at least every two years and sometimes as often as two or three times in a single year in order to maintain his flow of water. No one questioned his right to do so or questioned his use of the water he thus obtained.

These facts are completely different from any of the authorities cited by the Claude Kent interest. For example, in Joyce vs. Reuben, 23 Idaho 296, 130 P.2d 793(1913), the Court strictly held that where a party had constructed his ditches and diverted water and irrigated his land for a number of years and thereafter filed his claim with the State, his right dated from the time of his appropriation and not from the time of his filing. As noted here, Claude Kent interest had not used the water, at least since 1939, and have never had up to the present time, a system of ditches.

The Newport Water Company vs. Kellogg, 31 Idaho 574, 174 P.2d 602 (1918) case is in the same vein. There, the respondent was using the water upon which he applied for a State license. Similarly in the Pioneer Irrigation District vs. American Ditch Association, 50 Idaho 732, 1 P.2d 196(1931) case, the Court merely held that where the applicant had an existing water right in a ditch and subsequently filed with the State for an additional water right, he did not waive his right to the already existing and used original right. The obvious difference, the Claude Kent interests have never irrigated with these waters nor have they at any time had a system in which

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spring were turned into the southern spring in 1938 or 1939 and that he and his predecessor had exclusive use thereof up until the present time. This was the same hearing in which Clarence Kent testified that before beginning his project in 1975 he told Claude Kent of his plans and was advised, "Go ahead, it's a cinch I'm not going to use it", and later received the assurance from Claude's wife Lorraine that she had no objections, that "we always intended you should have it". Neither Lorraine nor Larry Kent offered any comment or testimony in refutation of the Clarence Kent testimony at that hearing where they would have been subject to cross-examination and we submit the affidavits offered in the second reply brief several months and one hearing later are ill-timed, inappropriate, and certainly lack credulity and are not properly submitted for this Board's examination.

However, to buttress Clarence Kent's testimony that Claude Kent interests have not been using the the water prior to this time, we submit as a supplemental to this brief, the Affidavit of Cordell Williams who observed the condition of the ditch prior to the beginning of Clarence Kent's project.

It should be further noted in reply to the Claude Kent interests' Supplemental Memorandum that none of the cases cited therein are pertinent to the issues involved. According to all of the facts properly adduced before this Board, Clarence Kent and his predecessors had sole use of the water from 1929 until approximately 1950. While there is some testimony by the Burnhams that some water came onto their premises during this period, it seems very clear that this was only water which escaped after use by the Clarence Kent interests. The record is still void of contradiction of the fact that during the entire period from 1929 to the present time no one, either

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to use them. Their rights were without question abandoned at least by 1939 and have not been used since, until an abortive attempt in 1977 after the issuance of this Board's opinion. On the other hand, Clarence Kent has never completely stopped using the water, but even if we were to admit, (which we do not) arguendo, that there was a break in his use of the water, certainly under any view of the facts elicited before this Board, Clarence Kent was the first to resume any use and certainly has shown his intent and good faith through the expenditure of in excess of $50,000.00 to utilize the waters to their fullest potential.

We submit that Clarence Kent should be allowed to continue his beneficial use until such time as the other pretenders to a water right are prepared to spend an equal sum to apply the water in as beneficial a use.

Respectfully submitted,

J. W. Crowther

J. W. Crowther
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60 North Main
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Telephone: 766-2644

BEFORE THE DEPARTMENT OF WATER

RESOURCES OF THE STATE OF IDAHO

In the Matter of the Applications for Permits No. 15-7025 - LORRAINE KENT and the CLAUDE KENT TRUST: No. 15-7026 - LYLE BURNHAM; No. 15-7029 and 15-7030 - DELMAR CLARK	AFFIDAVIT

COMES NOW Cordell Williams, who after being duly sworn deposes and says: My name is Cordell Williams. I am the owner and manager of Williams Irrigation Services, Inc. During the summer of 1975 my company installed an underground pipe and irrigation system for Clarence Kent. The system gathered water from various springs extending from Clarence Kent's property on the Northwest and running thence Southeasterly through the Claude Kent property past the Del Clark property and back on to Clarence Kent property and into the Clarence Kent reservoir, which was then in existence. The system generally followed the existing ditch conveying the waters known as Sheep Creek except that the segment Northwest of the Claude Kent property was a new spring developed by Clarence Kent specifically for this system and had not previously been a part of the Sheep Creek drainage.

Prior to beginning our project and during the course of the work thereon, I had opportunity to become intimately acquainted with the channel from the spring rising on the Claude Kent

property and running southeasterly to the Clarence Kent reservoir. I could detect no evidence of any sort of irrigation system, laterals, dams, diversions or any other indication of irrigation use of said stream through the Claude Kent property. I did note, however, that the channel had been maintained to allow a free flow of water from the springs on the Claude Kent property through to the Clarence Kent reservoir.

During the entire time of our work upon the Claude Kent property (late summer and fall of 1975), we observed persons working the farm, but no one, at any time, raised any question as to our right to be there or to proceed with the work we were doing.

Cordell Williams

SUBSCRIBED AND SWORN to before me this 26 day of January, 1978.

Laura E. Crowtakes
Notary Public for Idaho
Residing at Malad, Idaho

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CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of February, 1978 I mailed a true and correct copy of the within and foregoing REPLY BRIEF TO BRIEF OF LORRAINE KENT AND CLAUDE KENT TRUST, and AFFIDAVIT, on the following attorneys of record.

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ROBERT M. TERRELL
1883 - 1971

February 24, 1978

RECEIVED
FEB 28 1978
Department of W:
Eastern Distric

Mr. Ronald Carlson
Supervisor, Eastern Region
Department of Water Resources
1515 Lincoln Road
Idaho Falls, Idaho 83401

Re: Lyle R. Burnham

Dear Mr. Carlson:

Enclosed herein please find the original response to the Reply Brief of Clarence Kent in the above entitled matter. Would you please file same.

Thank you.

Very truly yours,

GREEN, SERVICE, GASSER & KERL

Ron Kerl

Ron Kerl

RK:cf
Enc.

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FEB 28 1978
Department of Water Resources
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In the Matter of the Applications for Permits No. 15-7025-LORRAINE KENT and the CLAUDE KENT TRUST, No. 15-7026-in the Name of LYLE R. BURNHAM, No. 15-7029 and 15-7030-DELMAR CLARK.	RESPONSE TO THE REPLY BRIEF OF CLARENCE KENT

COMES NOW Lyle R. Burnham, by and through his attorney of record and submits the within response to the Reply Brief filed on behalf of Clarance Kent, by his attorney on or about February 4, 1978.

Counsel for Clarence Kent, apparently believing in the old adage that the "squeaky wheel gets the grease" has belatedly supplied a Reply Brief to the board for the purposes of confusing, maligning and ignoring testimony before the board and part of this record. Therefore, we submit this response to the Brief of Clarence Kent in an effort to correct any erroneous misunderstandings the board may derive from the statements of Clarence Kent.

Contrary to the statement of Clarence Kents' counsel, the Burnhams have, since prior to the entry of the Danforth Decree, taken considerable interest in maintaining the flow of the stream from the sight of the springs, through and until its entry upon their property. At no time, prior to 1975, did the Burnhams observe or become aware of any actions on the part of Clarence Kent to maintain, clear or erect channels which would facilitate the flow of this water.

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Contrary to the statements contained in Clarence Kents Reply Brief, this water has always had a beneficial effect upon the property now owned by Lyle R. Burnham, and while no formal system of laterals for irregation was created, this water was during each year, save and except those where the ground lay fallow, redirected the water by shovel or plow to aid the Burnhams in harvesting and irregating the subject property.

Contrary to the Reply Brief of Clarence Kent, Lyle R. Burnhams' father Louis Burnham, considered the water to be a nuisance upon the property only on those occasions when it was necessary to bring heavy equipment or harvesting equipment in the area where the water had been sitting. When no longer needed for irrigation purposes, and the season calls for harvesting equipment to be brought upon the property then, in that event only, saturation from this irrigation water became unnecessary. However, by use of shovels and plows, this water was redirected onto other propertys and the property earlier irregated allowed to dry and firm up so that equipment could be brought thereon for harvesting purposes.

Contrary to the Reply Brief of Clarence Kent, the ditch referred to as being the only ditch dug and maintained by the Burnhams was not the only ditch created and maintained. While the same was placed along the boundary lines of their respective propertys, its purpose was to facilitate the irrigation and drainage of

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crop land as the same was necessary during the course of each growing season. In 1967 another ditch was dug by Louis Burnham for approximately 120 yards where the stream first enters on the property of Lyle R. Burnham for purposes of controlling the water and turning the same out upon the property as needed.

Until Clarence Kent began construction on his reservoir in the fall of 1975, the stream water flowed freely, when available, upon the property of Lyle R. Burnham. The water contained in the reservoir of Clarence Kent was not used for the purposes of growing crops until mid July of 1976, and prior to that time was not used by Clarence Kent in any beneficial manner. Rather, since the stream crossed approximately 220 yards of Clarence Kents' property, and the terrain is such that the property adjacent to the stream rises sharply on each side, the only benefit gained by Clarence Kent through the use of this water was in the area immediately adjacent to the stream bed. As indicated in the testimony before the board, there is no evidence of any growing crops or livestock raising on this portion of the ground, save and except for a garden maintained in approximately 1950 and not maintained thereafter.

It is respectfully submitted that the board carefully review the testimony in all of the previous hearings so that further confusion from miss-statements of fact do not become the basis for the board's decision.

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Again, as submitted in our origional brief, an abandonment of the Burnham's water right cannot flow from the fact that they made application to this board for a water permit, even though the same asked for a different amount of water to be used in a yet unconstructed system of laterals. As the board is aware, upon granting the permit, the improvements can be made within the statutatory period of time and the date of priority runs back to, for the extra water requested, the date of application.

It is, therefore, respectifully submitted by your applicant Lyle R. Burnham, that his application be approved for the full amount therein, that his decreed rights under the Danforth Decree be affirmed and that the balance thereof be licensed to Lyle R. Burnham prior to any right of Clarence Kent to appropriate and divert the waters of this southerly spring.

SUBMITTED this 24 day of February, 1978

GREEN, SERVICE, GASSER & KERL
Attorneys for Applicant
Lyle R. Burnham
Residing at: Center Plaza
Pocatello, Idaho

By: Ron Kerl
Ron Kerl

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CERTIFICATE OF MAILING

I hereby certify that on this 24 day of February, 1978 I mailed a true and correct copy of the within and foregoing RESPONSE TO THE REPLY BRIEF OF CLARENCE KENT on the following attorneys record.

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232-6101

October 27, 1977

RECEIVED
OCT 28 1977
Department of Water Resources
Eastern District Office

COPY

Mr. Norman Young
State of Idaho
Department of Water Resources
Statehouse
Boise, Idaho 83720

Re: Permit Nos. 15-7030 and 15-7029
Delmar Clark

Dear Sir:

Enclosed please find Posthearing Brief of Delmar Clark in the above-captioned matter.

Very truly yours,

ROBERT C. HUNTLEY, JR.

RCH:bm
Encl.
cc: Mr. Ron Carlsen

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OCT 28 1977
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF THE PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; NO. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030 - DELMAR CLARK	POSTHEARING BRIEF OF DELMAR CLARK

The Posthearing Brief of Delmar Clark is comprised of the following comments, together with our Motion for Rehearing and our earlier brief before the Department of Water Resources, which documents are bound hereto.

The evidence at the rehearing established the following facts:

(1) As per Exhibit 101, Clarence Kent is the successor in interest of not more than 0.25 cfs, with that water right being limited to the south spring.

(2) He has forfeited and abandoned even that 0.25 cfs in that he has used none of it except for a small amount on a garden 8 rods by 10 rods -- even that garden use has not been used since 1952 and, therefore, is forfeited and abandoned.

(3) Clarence Kent's present works require an application for a permit since they commenced after 1971, a permit being required for the following three purposes:

(a) Additional water;
(b) Application of water to different lands;
(c) New point of diversion.

Since no applications have been filed, Clarence Kent has no water right at all which is superior to the claims of Del Clark.

(4) Clarence Kent can demonstrate no beneficial use of the water whatsoever between 1952 and the date the filing law became in effect in 1971.

(5) Lyle Burnham's maximum claim should be limited to 0.20 cfs because that is the maximum acreage his testimony established he was using the water on.

(6) Del Clark has an established water right for culinary purposes both by use and application, and by the Decree of Judge Hargraves, for 0.04 cfs, he established a right to a decree for 0.03 cfs for stock water, based on

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diversion by the cattle since 1928, and also based on his Application 15-7029.

(7) The attempt by Clarence Kent to take all of the water out of the stream constitutes a violation of the stream channel law, requiring appropriate applications thereto.

(8) Clarence Kent's own testimony at the rehearing established that the flow from the two springs is as follows:

South Spring	33 gpm
North Spring	154 gpm

Therefore, even if the Board were to decide he has a right under the Danforth Decree, it would be to only one-half of the flow of the south spring, or 16.5 gpm.

Respectfully submitted,

RACINE, HUNTLEY & OLSON

By _____

Robert C. Huntley, Jr.
ATTORNEY FOR DEL CLARK
P. O. Box 1391
Pocatello, Idaho 83201

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF THE PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; NO. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030 - DELMAR CLARK	MOTION FOR REHEARING TO ALTER AND AMEND DECISION AND ORDER

COMES NOW Delmar Clark, and moves the Water Resources Board for an opportunity to present oral argument, as well as any further testimony the Board might desire, regarding rehearing of the Memorandum Decision and Order entered herein on the 17th day of June, 1977. The rehearing would be for the purpose of presenting arguments as to all areas wherein it is felt that the Decision and Order is in error, including, but not limited to, the following:

(1) The Conclusion of Law No. 1 is in error in finding that Clarence Kent "resumed a water right prior to it being taken by subsequent appropriators." That conclusion is in error for the following reasons:

(A) The water right under the Danforth Decree had been totally abandoned by Clarence Kent and his predecessors for many, many years.

(B) To <u>resume</u> a water right means to go back to use of a water right that had been exercised before. The testimony established that the most use that had ever been used by Clarence Kent and his predecessors was for the watering of a garden, and therefore the application of .5 cfs into an irrigation system to irrigate 160 acres of land is not a resumption, but rather is a total new application of water to new lands, and the works in 1973 also constitute a new point of diversion which requires an application.

(C) The only provision in the Idaho law for Clarence Kent to establish a new water right or a new point of diversion

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is to make an application for same, which fact he has not done, and therefore the applications for permit of Del Clark under Nos. 15-7029 and 15-7030 constitute a taking of water by a subsequent appropriator prior to any legal resumption by Clarence Kent.

(2) The Memorandum Decision and Order is in error when it finds that Clarence Kent was the successor to 0.50 cfs under the Danforth Decree -- the fact was that his maximum right under the Decree, in any event, was 0.25 cfs.

(3) The Board erred in failing to rule and find that the watering of livestock by Del Clark since 1928 constituted a diversion giving him a water right for that purpose with date of priority from 1928.

(4) The Decision and Order is in error in awarding Lyle Burnham a permit to develop irrigation on 80 acres at the rate of 6 feet per cfs when, at the hearing, he testified he was seeking water only for about 10 acres, which would be a maximum entitlement of 0.2 cfs.

(5) That the Decision and Order errs in failing to require Clarence Kent to place a measuring device or splitting device at his portion of diversion in order to ascertain that he receives no more than 0.5 cfs into a pipe system, leaving the balance in the stream channel.

(6) The Decision errs in failing to limit the rights of Clarence Kent to flows awarded his predecessors in interest under the Danforth Decree from the south (lower) spring, which spring, under the Danforth Decree, was divided between Clarence Kent's predecessor, H. O. Kent, and Lyle Burnham's predecessor in interest.

Petitioner respectfully requests that this Petition for Rehearing be granted and that a time and place be set for the rehearing, with notice to all parties.

RACINE, HUNTLEY & OLSON

By _____
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STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

In the Matter of the Claim to a Water Right of DELMAR CLARK	No. 15-7029 BRIEF OF DELMAR CLARK

The evidence establishes that Del Clark is entitled to the granting of his Application No. 15-7029 for 0.13 cfs of the waters of Sheep Creek (tributary to Dairy Creek), as per his Application, for the following reasons:

(1) It is undisputed that he has had the domestic supply from the springs to his home through a pipe (the claim being 0.04 cfs) continuously since 1932 -- no party disputes that right; and we would like it formalized by the granting of the permit even though the right predates the 1971 filing requirement.

(2) ALL OF THE REMAINING WATERS OF SHEEP CREEK REMAIN UNAPPROPRIATED AND SUBJECT TO APPROPRIATION AT THIS TIME FOR THE FOLLOWING REASONS:

(a) Under the 1929 Danforth Decree, the waters were decreed on the following basis, based on 1.0 cfs total flow:

0.5 to the predecessors of Lorraine Kent and Claude Kent Trust

0.25 to the predecessors of Lyle Burnham

0.25 to the predecessor of the protestant, Clarence Kent.

(b) All of these rights under the Danforth Decree have been lost through forfeiture under the ruling of Gilbert vs Smith, 23 Idaho Capital Reports 479, a copy of which is attached hereto, and which decision reads, in part, as follows:

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At page 431:

"Although framed in the language of abandonment, appellants' principal argument in this appeal concerns not only the doctrine of abandonment but likewise the question of statutory forfeiture. This doctrine, although similar to abandonment, involves characteristics of significant difference which must be borne in mind in resolving this and similar disputes addressing the relinquishment of decreed water rights.

"Abandonment is a common law concept involving the concurrence of an intention to abandon and the actual relinquishment or surrender of the water right. 93 C.J.S., Waters §193, at 994; Wiel, 1 Water Rights in the Western States, §567 (1911). It is not dependent necessarily upon length of time but upon the essential element of intent. Carrington v. Crandall, 63 Idaho 525, 147 P.2d 1009 (1944); Union Grain & Elevator Co. v. McCammon Ditch Co., 41 Idaho 216, 240 P. 443 (1925); St. John Irr. Co. v. Danforth, 50 Idaho 513, 298 P. 365 (1931); Chill v. Jarvis, 50 Idaho 531, 298 P. 373 (1931); Smith Land Co. v. Furniman, 36 F. Supp. 667 (1941). Such intent may be evidenced by non-use for a substantial period of time but mere non-use is not per se abandonment. Wiel, supra, §569. In contrast, the doctrine of forfeiture is predicated upon a statutory declaration that all rights to use water may be lost where an appropriator fails to make beneficial use of the water for a statutory period regardless of the intent of the appropriator. 93 C.J.S. Waters §193; Wiel, supra, §571; East Side Canal & Irr. Co. v. U.S., 76 F. Supp. 836, 839 (Ct. Claims, 1948); Hammond v. Johnson, 65 P. 2d 894, 899 (Utah 1937). In Idaho this concept is set forth in I.C. §42-222(2). The effect of that provision is that an appropriator who fails to apply his water right to a beneficial use for a continuous five year period is regarded as having lost all rights to the use of such water. Although the terms abandonment and forfeiture have often been used by this Court interchangeably see, Hodges v. Trail Creek Irrigation Co., 73 Idaho 10, (citing cases), the case of Carrington v. Crandall, supra, at 532, makes it clear that they are distinct legal concepts and should be considered as such. We recognize that this Court has in the past failed to indicate this difference in addressing cases involving water rights disputes. Nevertheless, we deem it essential for this and other future cases of a similar nature to keep the concepts of abandonment and statutory forfeiture, and their application, distinct." (Emphasis supplied) **more

(c) The testimony is undisputed that since the 1930s, none of the people under the Danforth Decree or their successors have used the waters, the non-use being for many years in excess of the five years required for forfeiture.

In fact, from 1979 to the date of this hearing, Lorraine Kent and Claude Kent Trust made no use of their water except for gardening, and

**See specific text of I.C. 42-222(2) at page 6 herein.

Clarance Kent made no use of his water prior to 1973, except for gardening, up to 1942, with no use between 1942 and 1949, then four years of gardening from 1949 to 1953, and then a period of 19 years of <u>total non-use</u> occurred from that time up until 1971, the effective date of the Act requiring applications for uses of water.

As to the Lyle Burnham right under the Danforth Decree, the evidence is clear that there has never been any use made except for what spread out naturally on about 10 acres of ground, until about seven years ago when he started making some diversions for, again, the same 10 acres of ground, which would be a maximum usage of 0.2 cfs.

The Claude and Lorraine Kent Trust last used water in 1930 for a one-acre garden, which was 27 years ago, and which would have preserved a maximum entitlement of 0.02 cfs even if the time lapse had not occurred.

(d) There is a conflict in the evidence as to whether Clarence Kent has made any diversions, or whether his watering was merely sub-irrigation, and the Hearing Board will have to resolve that conflict. The credible evidence is that there were no diversions. Clarence Kent testified there had been some dirt dams placed in the stream one or two times in a couple of the summers, but it is clear that all other persons who were in a position to observe never saw those dams, and it is clear that he had no lateral ditches constructed to take the water. Even assuming that the Board resolves that question in favor of him, the maximum that the testimony will support would be irrigation of a strip 220 yards long and about 6 to 7 rods wide on one side of the stream, and 4 rods wide on the other side of the stream, or an area of 3 acres, or a preservation of water rights to the extent of 0.06 cfs.

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(e) It is undisputed that Del Clark also had the benefits of sub-irriation on about 3 acres of ground since 1933, which entitles him to 0.06 cfs which he now wishes to physically divert pursuant to the Application.

Likewise, Del Clark has had stock water rights by way of beneficial use by livestock all summer and 100 head of cattle in the fall since 1933.

Under the Avondale case (a copy of which we will furnish as soon as we receive the District Court opinion), it has been held that watering of livestock directly from a stream is a beneficial use, which constitutes a water right.

However, should the Board feel there is a problem with that type of diversion, Del Clark will make an actual diversion and establish a pond or a watering trough for the diversion of the 0.03 cfs he requests for his cattle.

ON THE AVAILABILITY OF WATER

The evidence establishes that there is adequate unappropriated water available for the 0.13 cfs Del Clark requests in his Application No. 15-7029, the record establishing the following maximum existing water rights and availability of water:

NAME OF PARTY	AMOUNT OF RIGHT IN CFS	MANNER IN WHICH OBTAINED
Del Clark	0.04 for domestic purposes	a. Usage since 1923 b. Application 15-7029
Del Clark	0.03 for stock water	a. Usage since 1923 b. Application 15-7029
Del Clark	0.06 for irrigation	a. Sub-irrigation since 1923 b. Application 15-7029 By diversion works
Lyle Burnham	0.20	a. Diversion in last 7 years b. Application 15-7026
Lorraine Kent and Claude Kent Trust	0.50	a. Application 15-7035
Clarence Kent	0.06	a. DISPUTED diversion of approximately 3 acres
TOTAL CLAIMS ESTABLISHED OR PENDING	0.89	

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The above total maximum provable claims by the four parties involved of 0.89 cfs does not utilize the whole stream, based on the August flow measured at 0.975 at the Lorraine and Claude Kent Trust property, leaving still unappropriated waters of 0.085 cfs over and above all valid claims at that time of year.

In providing the Board with the foregoing table, we would point out that the domestic water right of Del Clark is established by diversion and application to beneficial use prior to 1971, and was decreed to him in the decision of Judge Hargraves, as was stipulated into evidence.

Furthermore, the livestock right of Del Clark also dates from 1929 by actual application to beneficial use, and both of these claims have priority over any claims of any of the other parties because they were utilized and exercised in all cases during five-year forfeiture periods by the other parties, and the law is that if a forfeiture period has occurred and during that interval another appropriation takes place, the forfeiting party cannot reestablish his right under an earlier decree in derogation of that intervening appropriation.

We further dispute that Clarence Kent has established by his testimony any pre-existing water right even to the 0.06 cfs for 3 acres. If we understood his testimony correctly, there was no testimony showing any diversion by placing dirt dams in the stream during any particular years prior to 1971, and the use of earth dams after 1971 would be of no effect because an application for a permit is required.

It is to be further noted that Clarence Kent's own testimony clearly establishes a total abandonment as well as forfeiture of all waters since 1929 except possibly for the garden plot, and even the garden plot was abandoned and forfeited for non-use since 1952.

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With respect to the claim of Lyla Burnham, he presented no testimony of any intent to construct any irrigation system or any financial ability to construct any irrigation system for any acreage in excess of 10 acres, and therefore, although his claim is for many more acres, any granting of an application should be limited to 10 acres.

CONCLUSION

The testimony establishes that Del Clark has a prior right by diversion and application to beneficial use prior to 1971 for the claim of 0.04 cfs for domestic water, and 0.03 cfs for stock water, and that claim should be confirmed by granting of the application.

Furthermore, the evidence shows his financial ability to construct the irrigation works for the three acres of irrigated land, entitling him to 0.05 cfs therefor, which amount of water is available in the stream for appropriation, and therefore his application for a total of 0.13 cfs should be granted in full.

Respectfully submitted,

RACINE, HUNTLEY & OLSON

By _____
Robert C. Huntley, Jr.

*NOTE FROM PAGE 2:
I.C. 42-222(2):
"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 beneficial use for which it was appropriated 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. Provided, further, that upon proper showing before the director of the department of water resources of good and sufficient reason for non-application to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for non-use thereof, to such waters for a period of not to exceed five (5) additional years. . ."

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OCT 27 1977
Department of Water Resources
Eastern District Office

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Attorneys at Law
P. O. Box 4883
Pocatello, Idaho
83201
(208) 232-4471

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

In The Matter of the Applications for Permits No. 15-7025 - LORRAINE KENT and the CLAUDE KENT TRUST; No. 15-7026 - LYLE R. BURNHAM; No. 15-7029 and 15-7030 - DELMAR CLARK	MEMORANDUM OF LYLE R. BURNHAM

COMES NOW Lyle R. Burnham, by and through his attorney, Ron Kerl, of the law firm of Terrell, Green, Service & Gasser, attorneys, Pocatello, Idaho, and submits the within Memorandum to the Department of Water Resources, pursuant to its request dated September 16, 1977.

Rehearing on the above named applications was held at the Pocatello Municipal Airport on September 16, 1977, after petitions for rehearing were timely submitted to the Department of Water Resources by applicants, Lyle R. Burnham and Delmar Clark. The petitions for rehearing set forth the applicants' assignments of error regarding the Memorandum Decision issued by the Department on June 17, 1977. Additional testimony was taken from Louis Burnham, Lyle R. Burnham and Clarence Kent.

Pursuant to stipulation of all parties, it was agreed that Lyle R. Burnham is the successor in interest to the real property owned by James Burnham and subject to the Danforth Decree entered on the 5th day of June, 1928. It was also stipulated that Clarence Kent is the successor in interest to the real property owned by H.O. Kent and subject to the Danforth Decree. It was further stipulated that Lorraine Kent and the Claude Kent Trust are the successors in interest to the real property owned by Asa

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Danforth, and also subject to the Danforth Decree.

The testimony taken during the rehearing establishes that since the Danforth Decree was rendered, Lyle Burnham and his predecessors in interest have made beneficial use of the water from the southerly spring. This was done by flood irrigating grain, alfalfa and hay crops. In fact, the Burnhams had used more than the .25 c.f.s. allotted to them under the Danforth Decree since the water was not diverted or used by any other individuals from the early 1950's until Clarence Kent began building a dam and point of diversion in 1973 or 1974. During this period of time Louis Burnham hand ditched the water on the Lyle Burnham property so as to direct and redirect the water from one area to another. In 1967 a ditch was dug by Louis Burnham for approximately 120 yards where the stream first enters the property now owned by Lyle R. Burnham, in an effort to facilitate the irrigation of the crops. Counsel for Clarence Kent would have the Department believe that the only reason Louis Burnham took these steps was because the water was not wanted and in fact was a nusiance. As explained by Louis Burnham at the rehearing, this is not true. After the stream had been allowed to flow and irrigate crops on the Burnham property, the stream would then be diverted to another area of the property in order to allow that which was first irrigated to dry out sufficiently to permit harvesting machinery to enter and work. It may be true that when a machine would become bogged down in mud that Louis Burnham felt the water was a nuisance, we all would at that point in time. This, however, can not overcome the fact that the water irrigated growing crops and resulted in their harvest. This was accomplished by reason of the beneficial use of the water by the Burnhams. The use of this water by James Burnham and his successors

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in interest dates from the Danforth Decree, and is in all respects similar in scope and nature as was the use made by James Burnham at the time the Danforth Decree was entered. Only when the Burnham's property was in summer fallow was the water from the southerly spring not used to irrigate growing crops. In no respects did there exist any length of time of five (5) years or more where the water was not used by Lyle Burnham or his predecessors in interest for the purposes of irrigating growing crops.

The testimony also established that Clarence Kent used a portion of the water from the southerly spring around 1950 for the purpose of irrigating a domestic garden. The water was thereafter allowed to run in the ditch until it entered the property now owned by Lyle Burnham and was never diverted or placed upon growing crops by Clarence Kent until July 1976. During this period of 25 years, the water was not diverted for irrigation purposes or any other beneficial use by Clarence Kent. The only use made of the water was possibly through seepage from the stream which may then have irrigated wild grass growing upon Clarence Kent's property. Even then, the grass was never cut for hay nor used for the pasture of livestock. Such nonuse of the water by Clarence Kent constitutes both the abandonment and forfeiture, under Idaho law, of any water rights Clarence Kent may have had under the Danforth Decree.

The Department in its Memorandum Decision entered previously herein, found that Clarence Kent had resumed a water right prior to the water being taken by subsequent appropriators. The testimony provided the Department at the rehearing clearly established that any rights Clarence Kent may have had under the Danforth Decree had

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been totally abandoned by Clarence Kent and his predecessors, for many, many years. In addition, to resume a water right is to go back to the use of a water right that had been exercised before. The testimony established that the most use ever made by Clarence Kent or his predecessors of the water involved was for the watering of a garden, and therefore, the application .5 c.f.s. into an irrigation system to irrigate 160 acres of land is not a resumption, but rather a total new application of water to a new land with a new point of diversion. The only provision in Idaho law for Clarence Kent to establish such a new water right, or new point of diversion, is to make application for same, with the Department, which in fact he has not done.

STATEMENT OF LAW AND ARGUMENT

The first question asked to be resolved by the Department's Hearing Officer was whether or not the subsequent filing of an Application for Permit to appropriate waters from the unnamed springs of Sheep Creek by Lyle R. Burnham constitutes a waiver of any right Lyle R. Burnham may have succeeded to under the Danforth Decree. This is the position taken by Clarence Kent and is no doubt the reason Clarence Kent has not yet made application for appropriation of the water he is attempting to use at his current point of diversion.

The Idaho Supreme Court many years ago resolved this question and held that no waiver of an earlier right to water established by a court decree will occur if the owner of the decreed rights thereafter makes applications to the Department of Water

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Resources for a water permit. Joyce vs. Reuben, 23 Idaho 296, 130 P.2d 793 (1913), Newport Water Company vs. Kellogg, 31 Idaho 574, 174 P.2d 602 (1918).

In Pioneer Irrigation District vs. American Ditch Assoication, 50 Idaho 732, 1 P.2d 196 (1931), the Idaho Supreme Court reaffirmed its earlier holdings that an application to the State of Idaho does not act as a waiver of any earlier water right of the applicant which has been established by court decree. In the present matter, the filing of an application to appropriate water by Lyle R. Burnham can not be construed to be a waiver of the .25 c.f.s. amount of priority water awarded Lyle R. Burnham's predecessors in interest through the Danforth Decree. The priority set forth in the Danforth Decree remains in effect and for the benefit of Lyle R. Burnham. The Application for Permit was for the purpose of establishing a license to his Danforth Decree priority which license is prima facie proof of his priority, as well as application for an increased appropriation commensuate with the use of this water made by Lyle R. Burnham and his predecessors for over the past 30 years. The claim of Clarence Kent that Lyle R. Burnham's application for a permit constitutes a waiver of any rights he may have under the Danforth Decree can not be accepted under the law and must be dismissed by the Department.

The second issue raised at the rehearing was whether or not a forfeiture or abandonment had occured regarding the parties respective rights. The law on abandonment and forfeiture in the State of Idaho is quite clear and explicit.

Abandonment is a common law concept involving the concurrence of an intention to abandon and the actual relinquishment or

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surrender of a water right. It is not dependent necessarily upon length of time but upon the essential element of intent. Such intent to abandon may be evidenced by nonuse for a substantial period of time but mere nonuse is not per se abandonment. In contrast, the doctrine of forfeiture is predicated upon a statutory declaration that all rights to use water may be lost where an appropriator fails to make beneficial use of the water for a statutory period regardless of the intent of the appropriator. In Idaho this concept is set forth in Idaho Code Section 42-222(2). This section provides that an appropriator who fails to apply his water right to a beneficial use for a continuous 5 year period is regarded as having lost all rights to the use of such water. There are, however, recognized exceptions to this rule. An appropriator by showing good cause and sufficient reason for the nonuse, may extend the five year period. The reasons for nonuse may be due to involuntary cessation of use to the unlawful acts of another and where there is a resumption of use prior to subsequent appropriation, the water right is not forfeited. Gilbert vs. Smith, 97 Idaho 735, 552 P.2d 1220 (1976).

The intention to abandon must be evidence by clear, unequivocal, and decisive acts. Gilbert vs. Smith, supra. A detailed review of the evidence before the Department on the above applications reveals that there is no clear, unequivocal, and decisive acts on the part of Lyle R. Burnham or his predecessors in interest which shows an actual intent to abandon and relinquish the water right. The evidence does establish, however, a long period of nonuse on the part of Clarence Kent which may not automatically prove abandonment, but does present evidence which

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would support a finding of intent to abandon and relinquish the water right claimed by Clarence Kent.

The statutory forfeiture issue, as set forth primarily in Idaho Code Section 42-222(2), requires a continuous five year period during which the owner of a water right or their predecessors in interest fail to apply their water to the beneficial use for which it was appropriated. I again point out to the Department that Lyle R. Burnham and his predecessor's in interest have used the water continuously since the date of the Danforth Decree, precisely in the same manner as it was used when the Danforth Decree was entered on June 5, 1928. As stated by the court in Gilbert:

> "... While there is evidence of continuous non-use in this case, the record does not identify any measurable five year period of non-use which would have supported the trial court in making the requisite findings to establish a statutory forfeiture. Forfeiture of water rights is not favored and all intendments are indulged in against a forfeiture." 97 Idaho at 740.

See also, Hodges vs. Trail Creek Irrigation Company, 78 Idaho 10, 297 P.2d 524 (1956). The applicant, Lyle R. Burnham's decreed water right under the Danforth Decree constitutes real property. Lyle Burnham's right to the water is appurtenant to Mr. Burnham's lands and the water rights can not be interferred with if the water has been beneficially applied. Anderson vs. Cummings, 81 Idaho 327 340 P.2d 1111 (1959). It is clear that Lyle Burnham and his predecessors in interest application of the Decreed water right constitutes beneficial use, since it has been applied for agricultural purposes and specifically has been applied for the irrigation of growing grain and alfalfa crops. The testimony at the hearings does not establish otherwise. Should Lyle R. Burnham be denied the .25 c.f.s. of water as set forth in the Danforth

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Decree, an unconstitutional taking of real property would occur.

Although the Idaho Supreme Court in the application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), held that although a statutory forfeiture of a water right occurs, the forfeiture is not effective if after the five year period the original owner or appropriator resumes the use of the water prior to any claim of right by a third party, the facts of this case do not support the holding of the Memorandum Decision which states that Clarence Kent resumed use of .5 c.f.s. from the southerly spring. In fact Clarence Kent has expanded greatly the use of the water as compared with any prior use he may have made. In addition, any resumption of the water by Clarence Kent did not occur prior to any claim of right by a third party. Since the facts establish that Lyle R. Burnham or his predecessors in interest used the full flow of the stream for a period of approximately twenty-five years, Lyle R. Burnham became a subsequent appropriator, by prescription, of any water right of Clarence Kent. As owner of the full flow of the southerly stream, any resumption of use by Clarence Kent would abridge the rights of Lyle R. Burnham to the full flow of water from the southerly spring. The case of Gilbert vs. Smith, supra, held:

> "... Prescriptive title to water, which is real property, may be acquired by adverse use for five years. (Citations omitted). Such use must be open, hostile, exclusive, continuous and under claim of right. (Citations omitted). Those elements of prescription must be shown by clear and convincing evidence and the burden to do so is on the claimant. (Citations omitted)." 97 Idaho at 740.

The testimony of Louis Burnham and Lyle R. Burnham established by a prepondurance of the evidence that for a period extending beyond five years, Lyle R. Burnham and his predecessors in interest used the full flow of the southerly spring. During this period of

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time Clarence Kent was not using his decreed right under the Danforth Decree. Burnham's use of the full flow of the stream was open and obvious, and not by reason of any license, either oral or written, given by Clarence Kent or his predecessors to Lyle Burnham or his predecessors. The use by Lyle R. Burnham of the full flow of the stream, therefore, constitutes an adverse and prescriptive appropriation of any claim now held or heretofore held by Clarence Kent.

By reason of the foregoing, it is respectively submitted by the applicant, Lyle R. Burnham, that his application be approved for the full amount therein, that his decreed rights under the Danforth Decree be affirmed and that the balance thereof, be licensed to Lyle R. Burnham prior to any right of Clarence Kent to appropriate and divert the waters of the southerly spring.

Respectively submitted this 25 day of October, 1977.

TERRELL, GREEN, SERVICE & GASSER
Attorneys for Applicant, Lyle R. Burnham
Residence: Center Plaza
Pocatello, Idaho

By: Ron Keri
Ron Keri

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SERVICE & GASSER
Attorneys at Law
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CERTIFICATE OF SERVICE BY RESIDENT ATTORNEY

I hereby certify that I am a duly licensed attorney for the State of Idaho resident of and with my office in Pocatello, Bannock County, Idaho; that I served a copy of the foregoing upon the below named attorney, by mailing a true and correct copy thereof to said attorney at his below listed address, prepaying the postage thereon and that there is a regular communication by U.S. Mail between said Pocatello and said address of said named attorney.

Attorney: F. W. Cornwall

Address: 60 W. Main, Mesa Idaho

Dated this 25 day of October 19 27

Don Kerl

TERRELL, GREEN, SERVICE and GASSER
Center Plaza - Pocatello, Idaho

CERTIFICATE OF SERVICE BY RESIDENT ATTORNEY

I hereby certify that I am a duly licensed attorney for the State of Idaho resident of and with my office in Pocatello, Bannock County, Idaho; that I served a copy of the foregoing upon the below named attorney, by mailing a true and correct copy thereof to said attorney at his below listed address, prepaying the postage thereon and that there is a regular communication by U.S. Mail between said Pocatello and said address of said named attorney.

Attorney: Robert C. Huntley

Address: P.O. Box 1391, Pocatello, Idaho

Dated this 25 day of October 19 27

Don Kerl

TERRELL, GREEN, SERVICE and GASSER
Center Plaza - Pocatello, Idaho

CERTIFICATE OF SERVICE BY RESIDENT ATTORNEY

I hereby certify that I am a duly licensed attorney for the State of Idaho resident of and with my office in Pocatello, Bannock County, Idaho; that I served a copy of the foregoing upon the below named attorney, by mailing a true and correct copy thereof to said attorney at his below listed address, prepaying the postage thereon and that there is a regular communication by U.S. Mail between said Pocatello and said address of said named attorney.

Attorney: M. L. Hillis

Address: P.O. Box 29, Idaho Falls, Idaho

Dated this 25 day of October 1927.

Don Kerl

TERRELL, GREEN, SERVICE and GASSER
Center Plaza - Pocatello, Idaho

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BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; No. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030-DELMAR CLARK	MEMORANDUM DECISION AND ORDER

On February 5, 1976, Lorraine Kent and the Claude Kent Trust filed application no. 15-7025 to appropriate 0.50 cubic feet per second at a point within the SW¼NE¼, Sec. 23, Twp. 11S, Rge. 34E, from an unnamed spring, tributary to Dairy Creek for the irrigation of forty (40) acres of land. On February 24, 1976, Lyle R. Burnham filed application no. 15-7026 to appropriate 1.60 cubic feet per second at a point within the SW¼SE¼, Sec. 24, Twp. 11S, Rge. 34E, from an unnamed spring, tributary to Dairy Creek for the irrigation of eighty (80) acres of land. Notice of these applications was published in the Idaho Enterprise and was subsequently protested by Clarence Kent and St. Johns Irrigating Company. A conference was held in Pocatello, Idaho, on April 9, 1976. At this conference, Larry Kent, representing Lorraine Kent and the Claude Kent Trust, requested the hearing in the matter be continued to a later date to allow him an opportunity to consult with legal counsel.

On April 26, 1976, Delmar Clark filed with the Department of Water Resources applications no. 15-7029 and 15-7030 requesting to appropriate 0.13 cubic feet per second for domestic, stockwater and irrigation purposes from unnamed springs in the SE¼NE¼, Sec. 23; NESW¼, NW¼SW¼, Sec. 24; Twp. 11S, Rge. 34E, and 2.40 cubic feet per second for irrigation purposes from unnamed springs in the NW¼SW¼, Sec. 24, Twp. 11S, Rge. 34E. Notice of these applications were published in the Idaho Enterprise and was protested by Clarence Kent. Department action in this matter was delayed because of a court action involving the water of the springs between Delmar Clark and Clarence Kent.

On January 12, 1977, because of the issues involved, a combined hearing was held in Malad, Idaho, on all of the above referenced applications. At that time, St. Johns Irrigating Company, through their attorney, contacted the Department and indicated they did not wish to appear at this hearing and would like the information presented at the previous conference to be considered by the Department

making a decision in the matter. All of the applicants were present. Applicant Delmar Clark was represented by attorney, Robert C. Huntley, Jr., of the firm Racine, Huntley and Olson, Pocatello, Idaho. The protestant, Clarence Kent was present and represented by attorney J. W. Crowther. The testimony of both the applicants and protestant was heard primarily on two issues: These issues were: (1) Does the protestant, Clarence Kent, have a water right from the subject springs that will be injured, and (2) is there sufficient water in the source for the purposes intended by the applicant.

FINDINGS OF FACT

On June 5, 1928, the cause of St. John Irrigating Company v.s. Asa H. Danforth, H. O. Kent, Marvin A. Butler and James Burnham came before the Fifth Judicial District Court at Malad, Idaho, Oneida County. This trial resulted in the adjudication of certain rights from springs arising in the SE¼NE¼, Sec. 23, Twp. 11S, Rge. 34E. The court decreed that the defendants and cross-complainants, Henry O. Kent and James Burnham were decreed owners of a right to the perpetual use of waters from a certain more southerly spring to the extent of five-tenths of a cubic foot per second of time, with a priority dating from June 1, 1914. In this same action, Asa Danforth was decreed the owner of water from a certain more northerly spring at the head of Sheep Creek and had a right to the extent of one-half cubic foot of water per second of time, with a priority dating from June 1, 1915. The use is described for both rights for irrigationand domestic purposes.

The evidence presented at the hearing was that very little use was made of this water and between 1950 and 1973, the only water used from the springs was for domestic purposes.

In 1973, Mr. Clarence Kent constructed a reservoir within the NW¼SE¼, Sec. 24, Twp. 11S, Rge. 34E, and began diverting water for the irrigation of about 160 acres of land. The water supply for this reservoir originated from the same springs listed in the Danforth Decree. During 1975 to take advantage of the available head between the springs and the place of his use to reduce pumping requirements, Clarence Kent installed a plastic pipeline to collect the water from the springs and transport it to his pump. The installation of this pipeline eliminated the flow in the creek between the springs and the reservoir and, therefore, through the property of Mr. Delmar Clark.

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In the decree entitled St. John Irrigating Company -vs- Asa H. Danforth, et. al., it is specified that these springs are not a tributary of Dairy Creek.

From the records available, it appears that Clarence Kent is the successor in interest to the five-tenths cubic foot per second originally decreed to H. O. Kent and James Burnham.

The best available data indicates that the springs flow at the rate of at least one cubic foot per second of time.

CONCLUSIONS OF LAW

1. Even though the water from the springs was not used for irrigation for a period of time greater than five years, and, therefore, the water right may have been lost by nonuse under Section 42-222, Idaho Code, the courts have been reluctant to declare a water right lost if use of the water was resumed prior to the water being taken by subsequent appropriators. Carrington v.s. Crandall, 65 Idaho 525, 147 P2d 1009 (1944); Rams-horn Ditch Co. v.s. United States, 269 Fed. 80; Zezi v.s. Lightfoot, 57 Idaho 707, 713, 68 P2d 50. The protestant Clarence Kent, as successor in interest to the H. O. Kent and James Burnham water right is entitled to 0.50 cubic feet per second.

2. There is not sufficient water in the springs, under existing conditions, to supply the water requested under each of these applications for permit but each applicant should have the opportunity to develop additional water and use the unappropriated water that is available in the source.

3. The use of the existing water should be developed according to the priority of the water right, therefore, the date that proof of completion of works and application of water to beneficial use should be set later for the junior priority right holders to allow them to construct their projects if the senior right holders do not construct their projects.

4. The water rights of the protestant, St. John Irrigating Company will not be injured since the source of water was declared in the case of St. John Irrigating Company v.s. Asa H. Danforth, et. al. not to be a tributary of Dairy Creek.

ORDER

IT IS, THEREFORE, HEREBY ORDERED and Applications for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030 are APPROVED subject to the following conditions:

1. Subject to all prior water rights including that of Clarence Kent, to divert 0.50 cubic feet per second of water with a priority of June 1, 1914.

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2. That the following priority of right be recognized between the permit holders:

15-7025	February 5, 1976
15-7026	February 24, 1976
15-7029	April 26, 1976
15-7030	April 26, 1976

3. Proof of construction of works and application of water to beneficial use be submitted to the Department on or before:

June 1, 1979 on Permit No. 15-7025
June 1, 1981 on Permit No. 15-7026
June 1, 1982 on Permit No. 15-7029 and 15-7030

and that no extensions of time shall be granted past these dates until the permit holder showing he was prevented from proceeding by circumstances beyond his control.

4. That a measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works on each of the permits.

Dated this 17 day of June, 1977.

STEPHEN ALLRED
Director

September 18, 1978

Re: Permit No. 15-7025

Lorraine Kent & Claude Kent Trust
2223 Oak Trail Drive
Idaho Falls, ID 83401

Dear Ms. Kent:

Enclosed is a copy of the amended Memorandum Decision and Order on issues raised at the rehearing held on September 16, 1977.

Yourshould be aware that any person who does not agree with the decision may request a re-hearing before the Director of the Department of Water Resources within 20 days or may appeal directly to the District Court within 60 days of the date of the decision.

Sincerely,

L. GLEN SAXTON
Chief, Operations Bureau

LGS:kw
Enclosure

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Form 204
5/78

Identification No. _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED
SEP 22 1980
Department of Water Resources

REQUEST FOR EXTENSION OF TIME

To provide additional time in which to submit proof of beneficial use on a water right permit

RECEIVED
SEP 22 1980
Department of Water Resources

Larry H. Kent (Name) of 2223 Oaktrail Drive IDAHO FALLS (Address)

State of Idaho, deposes and says:

That he is the holder, or the duly authorized agent of the holder*, of Permit to Appropriate the Public Waters of the State of Idaho No. 15-7025.

That under the terms and conditions of said permit, work thereunder was required to be completed on or before Oct. 1, 19 80.

That he has heretofore performed the following work described under said permit: _____

_____

_____

_____

_____ Costing $ _____

That he is unable to complete the remainder of the work within the required time for the following reasons, to-wit: The water rights under the above application have been the subject of litigation since its original submittal. The matter has been through the water board procedures on disputes and into District Court. It has not yet been fully decided. Until it is decided, I do not consider it prudent to invest in the intended sprinkler system. We are presently utilizing a flood irrigation system.

Wherefore, he asks that the Department of Water Resources extend the time for the completion of obligations under said permit to Oct., 19____.

Larry H. Kent
(Signature)*

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

IT IS HEREBY ORDERED that the above application for extension of time be APPROVED and the time within which to submit the statement of beneficial use be submitted on or before January 1, 1984.

Signed this 8th day of October, 19 80.

L. Glen Sayton
Chief, Operations Bureau

LITIGATION DELAY Jm 10/7/80

** IF OTHER THAN HOLDER, Power of Attorney must be supplied.*

$15 fee received by _____ Date 10-2-80 Receipt # 16168

Larry H. Kent
2223 Oaktrail Dr.
Idaho Falls, ID 83401





Department of Water Resources
Statehouse
Boise, Idaho 83720

State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS
Governor

C. STEPHEN ALLRED
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 384-2215

January 3, 1979

Mr. J. W. Crowther
Attorney at Law
60 N. Main Street
Malad City, ID 83252

Dear Mr. Crowther:

Re: Permit Nos. 15-7025, 15-7026, 15-7029 and 15-7030

Pursuant to your phone call on December 28, 1978 to Ron Carlson of our Eastern Regional office in Idaho Falls, we checked the above referenced files and determined that we inadvertently did not forward to you a copy of the Memorandum Decision on Issues Raised at Rehearing and Amended Order.

Enclosed is a copy of the amended Memorandum Decision and Order on issues at the rehearing held on September 16, 1977.

Be sure to note that the approval of Permit No. 15-7030 has been voided.

You should be aware that if you do not agree with the decision, you may request a rehearing before the Director of the Department of Water Resources within 20 days from the date of this letter or may appeal directly to the District Court within 60 days from the date of this letter.

I hope the mailing oversight has not caused you any inconvenience.

Sincerely,

L. GLEN SAXTON
Chief, Operations Bureau

Enclosure

cc: Clarence Kent with enclosure
Delmar Clark
Robert C. Huntley
Lorraine Kent and Claude Kent Trust
Ron Kerl
Lyle Burham
James B. Green

bcc: Ron Carlson

In the Supreme Court of the State of Idaho

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 2/28/29

R. H. Young Clerk

By: Judy E. Gilbert Deputy

W-7025

In the Supreme Court of the State of Idaho

RECEIVED
MAR 2 1979
Department of Water Resources

Reference No. 79-19

DEL CLARK and BEATRICE CLARK, husband and wife,

Plaintiffs-Appellants,

v.

CLARENCE KENT and VIRGINIA KENT, husband and wife,

Defendants-Respondents.

Supreme Court No. 12614

ORDER TO AUGMENT

The Appellants herein by and through their attorney of record having filed with the Clerk of this Court on the 26th day of January, 1979, a MOTION TO SUPPLEMENT RECORD, said MOTION showing service on counsel and no filing in opposition having been filed to this date, and

The Court having fully read and considered said MOTION and being fully advised in the premises,

IT IS HEREBY ORDERED AND THIS DOES ORDER that the MOTION be GRANTED, and that the Director of the Department of Water Resources certify to this Court to become a part of the record herein, as EXHIBITS, the following:

1. MEMORANDUM DECISION AND ORDER dated June 17, 1977.

2. ORDER APPROVING PETITION FOR REHEARING dated August 25, 1977.

3. MEMORANDUM DECISION ON ISSUES RAISED AT REHEARING AND AMENDED ORDER dated September 15, 1978.

IT IS FURTHER ORDERED that the three EXHIBITS above mentioned shall be returned to the Director of the Department of Water Resources at the conclusion of this case in the Supreme Court.

DATED This 28th day of February, 1979.

Chief Justice

ATTEST: R. H. Young
Clerk

R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

March 6, 1979

RECEIVED
MAR 8 1979
Department of Water Resources

Mr. C. Stephen Allred, Director
Department of Water Resources
Statehouse
Boise, ID 83720

Re: Supreme Court No. 12614
Clark v. Kent

Dear Mr. Allred:

We hereby acknowledge receipt of Augmentation of the Record pursuant to the order of this Court, dated February 28, 1979.

These documents are received as exhibits and will be returned to your office at the conclusion of this appeal.

Sincerely,

R. H. Young
Clerk

RHY:mb
cc: Counsel of Record

ROUTING SLIP

DATE Mar. 6, 1979 TIME

TO:	REF. No. (if any)
Go	15-7025
FROM: (show title)	
Dorothy	

FOR YOUR:	REVIEW AND:	PER:
☐ Information	☐ Call Me ☐ See Me	☐ Our Conversation
☐ Approval	☐ Comment & Return	☐ Your Request
☐ Signature	☐ Take Proper Action	☐ Boss's Request
	☐ Draft a Reply for Me	

Certified copies have been made and a copy of the cover letter attached and taken to Supreme Court Clerk

ICES OF
LEY & OLSON
TERED
NER FIRST & CENTER
E BOX 1391
IDAHO 83201
208] 232-6101

TELEPHONE
AREA CODE 208
232-6101

5, 1979

RECEIVED
MAR 6 1979
Department of Water Resources

Kent

upreme Court to Augment the
of three of the Water Board's Orders and Decisions.

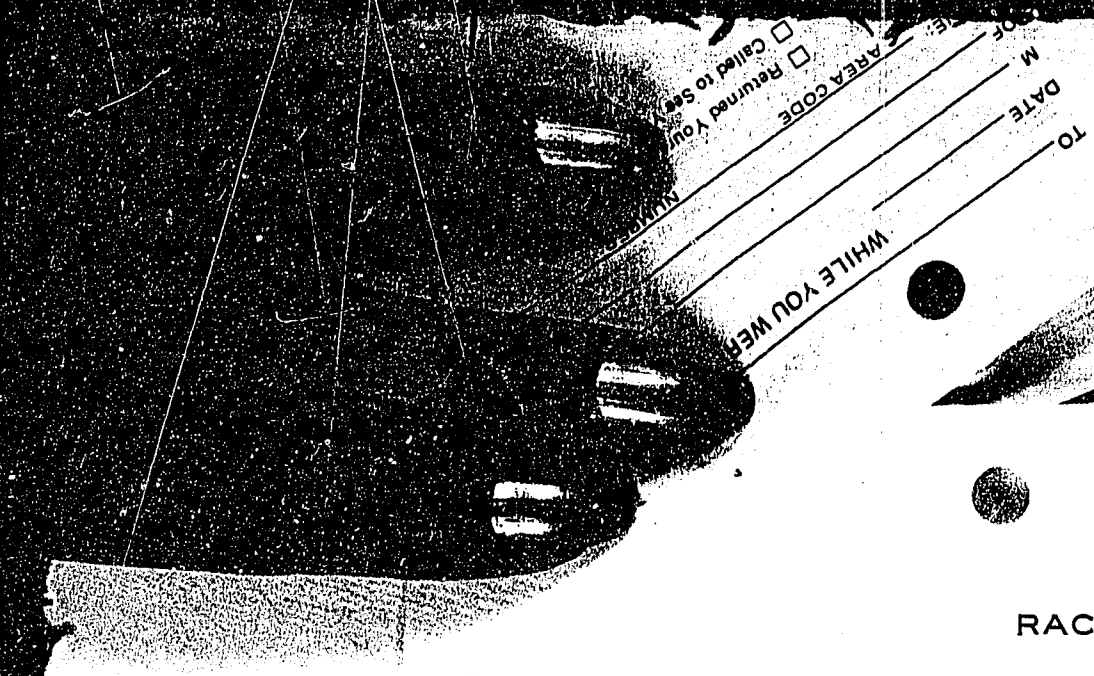
Enclosed are three copies, together with a certificate, and we would appreciate your certifying the Orders and then delivering them over to Bill Young, the clerk of the Idaho Supreme Court.

Thank you for your kind consideration.

Very truly yours,

ROBERT C. HUNTLEY, JR.

RCH:bm
Encl.



LAW OFFICES OF
RACINE, HUNTLEY & OLSON
CHARTERED
CENTER PLAZA - CORNER FIRST & CENTER
POST OFFICE BOX 1391
POCATELLO, IDAHO 83201
TELEPHONE [208] 232-6101

LOUIS F. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON
D. JAMES MANNING
W. MARCUS W. NYE
GARY L. COOPER
—
DENNIS W. OLLEY

TELEPHONE
AREA CODE 208
232-6101

March 5, 1979

RECEIVED
MAR 6 1979
Department of Water Resources

Ms. Ann Harada, Secretary
State of Idaho
Department of Water Resources
Statehouse
Boise, Idaho 83720

Re: Clark v. Kent

Dear Ms. Harada:

Enclosed is an Order of the Supreme Court to Augment the Record with certified copies of three of the Water Board's Orders and Decisions.

Enclosed are three copies, together with a certificate, and we would appreciate your certifying the Orders and then delivering them over to Bill Young, the clerk of the Idaho Supreme Court.

Thank you for your kind consideration.

Very truly yours,

ROBERT C. HUNTLEY, JR.

RCH:bm
Encl.

State of Idaho

DEPARTMENT OF WATER RESOURCES

STATE OFFICE, 373 W. Franklin Street, Boise, Idaho

JOHN V. EVANS
Governor

C. STEPHEN ALLRED
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 384-2215

CERTIFIED MAIL

March 30, 1979

Re: Permit No. 15-7025

Lorraine Kent and Claude Kent Trust
2223 Oak Trail Drive
Idaho Falls, ID 83401

Dear Ms. Kent:

One of the conditions of approval of your water Permit No. _____ (see last page of your approved permit) was that evidence of the extent of development be submitted as proof of application of water to beneficial use to this office on or before _____. Enclosed is an affidavit form which must be used to submit the required proof of beneficial use.

If you have not fully completed your project, and you have not previously received an extension of time, you may request an extension of time provided the delay is for reasonable cause as indicated in Section 42-204, Idaho Code, amended. If you have been prevented from proceeding by a governmental agency or by litigation, more than one extension of time can be granted.

Either the beneficial use affidavit or a request for an extension of time must be received by this Department on or before the above mentioned date, otherwise, the permit will lapse and be of no further force or effect.

Rita Fleck

RITA FLECK
Water Rights

Encl: Proof affidavit

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

STATEHOUSE
BOISE, IDAHO 83720
(208) 334-4440
CERTIFIED MAIL

KENT, LORRAINE
2223 OAK TRAIL DR.
IDAHO FALLS, ID 83401

138324

JULY 31, 1980

DEAR PERMIT HOLDER:

ONE OF THE CONDITIONS OF APPROVAL OF YOUR WATER PERMIT NO. 15-7025 WAS THAT EVIDENCE OF THE EXTENT OF DEVELOPMENT MUST BE SUBMITTED TO THIS OFFICE ON OR BEFORE OCTOBER 01, 1980. (SEE LAST PAGE OF YOUR APPROVED PERMIT). ENCLOSED IS A POST CARD WHICH MAY BE USED TO SUBMIT THE REQUIRED PROOF OF BENEFICIAL USE.

IF YOU HAVE NOT FULLY COMPLETED YOUR PROJECT, AND YOU HAVE NOT PREVIOUSLY RECEIVED AN EXTENSION OF TIME, YOU MAY REQUEST AN EXTENSION OF TIME PROVIDED THE DELAY IS FOR REASONABLE CAUSE AS INDICATED IN SECTION 42-204, IDAHO CODE, AMENDED. IF YOU HAVE BEEN PREVENTED FROM PROCEEDING BY A GOVERNMENTAL AGENCY OR BY LITIGATION, MORE THAN ONE EXTENSION OF TIME CAN BE GRANTED. A REQUEST FOR EXTENSION OF TIME FORM IS ENCLOSED FOR YOUR CONVENIENCE. PLEASE NOTE THAT A FEE OF $15.00 MUST BE SUBMITTED WITH THIS FORM.

EITHER THE BENEFICIAL USE POST CARD OR A REQUEST FOR AN EXTENSION OF TIME MUST BE RECIEVED BY THIS DEPARTMENT ON OR BEFORE THE ABOVE MENTIONED DATE, OTHERWISE, THE PERMIT WILL LAPSE AND BE OF NO FURTHER FORCE OR EFFECT WITHIN 60 DAYS.

SINCERELY,

RITA FLECK
SR. SECRETARY

ENCLOSURES



TO: File

FROM: Jim Johnson

15-7025 REE NOTES FROM REVIEW OF EXTENSION REQUEST

APP received	2/05/76
APP (By Order) APPROVED	6/17/77
PERIOD Asked	5 yrs
FOR DEVELOPMENT	
B/U due by	10/1/80
Mc. DEC. & ORDER CHANGE	9/15/78
MOTION TO SUPPLEMENT	
RECORD SUBMITTED TO	
SUPREME COURT	1/26/79

PROTESTANTS APPEALED TO DISTRICT COURT ?

MEMORANDUM DECISION & ORDERS ISSUED ON 6/7/77 AND 9/15/78 REQUIRED THAT THE PERMITS (15-7025 etal) would not be granted extensions of time unless the Permit holder can show he was prevented from development by circumstances beyond his control.

Time between Memorandum Decision Issued (9/15/78) and evidence showing that case was in the Supreme Court (1/26/79) is A LITTLE OVER 4 months.

ANALYSIS

Existing records in the water right file can show that Permit holder was prevented from development from date of submitting his application thru MARCH 1979.

Permit holder makes a statement on extension request that litigation issues have still not been decided yet.

IF WE ACCEPT THIS STATEMENT THEN THE PERIOD THAT CAN BE ALLOWED WOULD BE AS FOLLOWS;

Memorandum Decesion AND ORDER ISSUED 6/17/77
REDUCED TIME REQUESTED ON APPLICATION FROM 5YRS to 2yrs. Proof due 6/1/1979

Memorandum Decesion AND ORDER ISSUED 9/15/78
changed Proof due date to Oct 1, 1980
which added 16 months or 1yr 4 mo.

Total years allowed for development is 3 yrs. 4 mo.

RECOMMENDATION:

Permit holder was prevented from development during those years by litigation so therefore present extension request should allow an additional 3 yrs 4 mo. to JANUARY 1, ~~1983~~ 1984.

October 6, 1980

Larry H. Kent
2223 Oaktrail Drive
Idaho Falls, ID 83401

Dear Mr. Kent:

Re: Permit No. 15-7025

Enclosed is a copy of the approved request for extension of time. The time within which to submit the statement of beneficial use is extended to January 1, 1984.

Also enclosed is receipt No. 16468 in the amount of $15.00.

Sincerely,

RITA FLECK
Sr. Secretary

Enclosure

15-7025 ✓
15-7026
15-7027
15-7030

SUPREME COURT OF THE STATE OF IDAHO
451 W. State Street Boise, Idaho 83720

Director, Dept. of Water Resources
~~CLERK OF THE DISTRICT COURT~~

Boise , Idaho August 28, 1980

Re: Supreme Court No. 12614

CLARK v. KENT

I enclose herewith Augmentation (Exhibit) in the above case for filing in your court.
Please fill out form of receipt below and return to this office.

R. H. Young, *Clerk*

The Augmentation (Exhibit) in the above entitled case has been received and filed by me this 9th day of December , 1982

~~Clerk of the District Court~~

By Roberta Garrett ~~Deputy~~.

R. H. YOUNG
Clerk of the Supreme Court

State of Idaho
Supreme Court

(208) 384-2210

451 W. STATE STREET
BOISE, IDAHO 83720

RECEIVED

SEP 4 1980

Department of Water Resources

March 6, 1979

Mr. C. Stephen Allred, Director
Department of Water Resources
Statehouse
Boise, ID 83720

Re: Supreme Court No. 12614
Clark v. Kent

Dear Mr. Allred:

We hereby acknowledge receipt of Augmentation of the Record pursuant to the order of this Court, dated February 28, 1979.

These documents are received as exhibits and will be returned to your office at the conclusion of this appeal.

Sincerely,

R. H. Young
Clerk

RHY:mb
cc: Counsel of Record

COPY

MAR - 6 1979

LAW OFFICES OF
RACINE, HUNTLEY & OLSON
CHARTERED
CENTER PLAZA - CORNER FIRST & CENTER
POST OFFICE BOX 1391
POCATELLO, IDAHO 83201
TELEPHONE [208] 232-6101

LOUIS F. RACINE, JR.
ROBERT C. HUNTLEY, JR.
WILLIAM D. OLSON
D. JAMES MANNING
W. MARCUS W. NYE
GARY L. COOPER
DENNIS W. OLLEY

TELEPHONE
AREA CODE 208
232-6101

March 5, 1979

RECEIVED
MAR 6 1979
Department of Water Resources

Ms. Ann Harada, Secretary
State of Idaho
Department of Water Resources
Statehouse
Boise, Idaho 83720

Re: Clark v. Kent

Dear Ms. Harada:

Enclosed is an Order of the Supreme Court to Augment the Record with certified copies of three of the Water Board's Orders and Decisions.

Enclosed are three copies, together with a certificate, and we would appreciate your certifying the Orders and then delivering them over to Bill Young, the clerk of the Idaho Supreme Court.

Thank you for your kind consideration.

Very truly yours,

ROBERT C. HUNTLEY, JR.

RCH:bm
Encl.

In the Supreme Court of the State of Idaho

RECEIVED
MAR 2 1979
Department of Water Resources

Reference No. 79-19

Supreme Court No. 12614

DEL CLARK and BEATRICE CLARK, husband and wife,

Plaintiffs-Appellants,

v.

CLARENCE KENT and VIRGINIA KENT, husband and wife,

Defendants-Respondents.

ORDER TO AUGMENT

The Appellants herein by and through their attorney of record having filed with the Clerk of this Court on the 26th day of January, 1979, a MOTION TO SUPPLEMENT RECORD, said MOTION showing service on counsel and no filing in opposition having been filed to this date, and

The Court having fully read and considered said MOTION and being fully advised in the premises,

IT IS HEREBY ORDERED AND THIS DOES ORDER that the MOTION be GRANTED, and that the Director of the Department of Water Resources certify to this Court to become a part of the record herein, as EXHIBITS, the following:

1. MEMORANDUM DECISION AND ORDER dated June 17, 1977.

2. ORDER APPROVING PETITION FOR REHEARING dated August 25, 1977.

3. MEMORANDUM DECISION ON ISSUES RAISED AT REHEARING AND AMENDED ORDER dated September 15, 1978.

IT IS FURTHER ORDERED that the three EXHIBITS above mentioned shall be returned to the Director of the Department of Water Resources at the conclusion of this case in the Supreme Court.

DATED This 28th day of February, 1979.

Chief Justice

ATTEST: R. B. Young
Clerk

In the Supreme Court of the State of Idaho

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 2/28/79

R. H. Young Clerk

By: Judy E. Gilbert Deputy

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NOS. 15-7025, LORRAINE KENT AND THE CLAUDE KENT TRUST: NO. 15-7026, LYLE R. BURNHAM; NO. 15-7029 AND 15-7030, DELMAR CLARK	MEMORANDUM DECISION ON ISSUES RAISED AT REHEARING AND AMENDED ORDER

On June 17, 1977, the Director of the Department of Water Resources issued a memorandum decision and order approving Applications for Permit Nos. 15-7025, 15-7026, 15-7029 and 15-7030.

On June 27, 1977, Robert C. Huntley, Jr., Attorney for Delmar Clark filed a Petition for Rehearing on Permit Nos. 15-7029 and 15-7030, and on July 5, 1977 a Motion for Rehearing was filed by James B. Green, Attorney for Lyle R. Burnham. These requests for rehearing were approved by the Director on August 25, 1977. On September 16, 1977, a second hearing in the matter was held.

The attorneys for Delmar Clark and Lyle Burnham argued that the Director's decision was faulty in the following areas:

1) The water rights decreed in the Danforth Decree have been abandoned.

2) Clarence Kent should have only been the successor to, at most, 0.25 cubic feet per second under the Danforth Decree.

3) The decision is in error because the protestant, Clarence Kent, did not resume a water right because the only previous use of water was for the irrigation of a garden.

4) The decision should have limited Clarence Kent to use of the south (lower) spring.

5) The decision is in error for not requiring Clarence Kent to install a measuring device to measure the water he is diverting.

6) Lyle R. Burnham has made uninterrupted use of the water rights originally decreed to James Burnham.

7) The decisison and order are in error in awarding Lyle Burnham a permit to irrigate 80 acres of land.

8) The Director erred by not ruling on Delmar Clark's right to water livestock from the creek.

9) Protestant, Clarence Kent, needs a transfer to change the point of diversion if he still has a right under the Danforth Decree or an application for

permit if he wishes to appropriate water; and has filed neither.

FINDINGS OF FACT

1) In 1929, a decree was issued in the case of St. John Irrigating Co. vs. Asa H. Danforth et al, in which 0.50 cubic feet per second was decreed to H. O. Kent and James Burnham with a 1914 priority from two unnamed springs which flow into Sheep Creek. Clarence Kent and Lyle Burnham are successors in interest to H. O. Kent and James Burnham, respectively.

2) The Department of Water Resources does not confirm or issue water rights based upon diversion of water and application to beneficial use. The Department will accept a claim based upon such use which is admissible as evidence in a general adjudication of water rights.

3) There is unappropriated water from the two unnamed springs during portions of the irrigation season at the present time.

4) Water has been measured at about 1.00 cubic feet per second below the unnamed springs which flow into Sheep Creek.

5) It is within the discretion of the Department of Water Resources to require measuring devices on diversions from sources of water supply not within a water district, (Idaho Code, Sec. 42-701). In an area where a water district has not been formed, the Department will exercise its discretion under Idaho Code, Sec. 42-701 by requiring measuring devices only for water rights, the priorities of which are at issue before the Department.

6) Application for Permit No. 15-7030 was withdrawn by Delmar Clark on January 3, 1977.

CONCLUSIONS OF LAW

1) There is insufficient water available from the springs under existing conditions to satisfy all of the amounts requested under each of the applications for permit. The applicants are entitled to develop additional water from the springs and to use, according to the priority of the application for permit, the unappropriated water that is presently available from the springs after recognizing the water rights established pursuant to the decree issued in St. John Irrigating Co. vs. Asa H. Danforth et al, if they have not been lost by abandonment or forfeiture.

2) The water right claimed to have been established by diversion and beneficial use by Delmar Clark for stockwatering directly from the stream cannot be determined by the Director, as beneficial use rights can only be determined by a court.

3) No measuring device is required at this time to be installed on the

diverting works of Clarence Kent but may be required at the time a water district is formed.

ORDER

IT IS, THEREFORE, HEREBY ORDERED and Applications for Permit Nos. 15-7025, 15-7026 and 15-7029 are APPROVED subject to the following conditions:

1) Subject to all prior water rights including those established under decree or by the diversion and beneficial use of water.

2) The following priorities of right shall be recognized between the permit holders:

Permit No. 15-7025	February 5, 1976
Permit No. 15-7026	February 24, 1976
Permit No. 15-7029	April 26, 1976

3) Proof of construction of works and application of water to beneficial use shall be submitted to the Department on or before:

Permit No. 15-7025	October 1, 1980
Permit No. 15-7026	October 1, 1982
Permit No. 15-7029	September 1, 1983

and that no extensions of time shall be granted beyond these dates unless the permit holder can show he was prevented from completing the appropriation by circumstances beyond his control.

4) An access port or other device as specified by the Department shall be installed by each permit holder to provide the installation of measuring equipment and the determination of the rate of diversion by the Department.

IT IS FURTHER ORDERED that the approval of Permit No. 15-7030 is hereby VOIDED.

Dated this 15 day of September, 1978.

C. STEPHEN ALLRED

Director

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 6 day of March, 1979.

Bobby D. Hearn

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NO'S. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST: NO. 15-7026 - LYLE R. BURNHAM: NO. 15-7029 and 15-7030 - DELMAR CLARK	ORDER APPROVING PETITION FOR REHEARING

WHEREAS, on February 5, 1976, February 24, 1976, and April 28, 1976, the Department received applications for permits from Lorraine Kent and the Claude Kent Trust (15-7025), Lyle R. Burnham (15-7026), and Delmar Clark (15-7029 and 15-7030), respectively; and,

WHEREAS, on February 19, 1976, Clarence Kent filed a protest against the approval of Permit No. 15-7025 and on March 11, 1976 he filed a protest against Permit No. 15-7026. On February 26, 1976, a protest was received on Permit No. 15-7025 and on March 16, 1976, a protest was received on Permit No. 15-7026, both from the St. John Irrigating Company. On May 20, 1976, Clarence Kent submitted protests against the approval of Permit No's. 15-7029 and 15-7030; and,

WHEREAS, on January 12, 1977, a hearing concerning these permits was held at Malad, Idaho; and,

WHEREAS, on June 17, 1977, a Memorandum Decision and Order was issued based upon the testimony of both the applicants and the protestants and information in the Department's files; and,

WHEREAS, on June 27, 1977, Robert C. Huntley, Jr., attorney for Delmar Clark filed a Petition for Rehearing on Permit No's. 15-7030 and 15-7029, and on July 5, 1977, a Motion for Rehearing was filed by James B. Green, attorney for Lyle R. Burnham; and,

WHEREAS, after considering those petitions, the Department finds that a rehearing should be held;

IT IS, THEREFORE, HEREBY ORDERED that the peitions for rehearing be APPROVED.

Dated this 25 day of August, 1977.

C. STEPHEN ALLRED
Director

UNCERTIFIED COPY

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 6 day of March, 1979.

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PROTESTS AGAINST THE APPROVAL OF APPLICATIONS FOR PERMITS NO. 15-7025 - LORRAINE KENT AND THE CLAUDE KENT TRUST; No. 15-7026 - LYLE R. BURNHAM; NO. 15-7029 and 15-7030-DELMAR CLARK	MEMORANDUM DECISION AND ORDER

On February 5, 1976, Lorraine Kent and the Claude Kent Trust filed application no. 15-7025 to appropriate 0.50 cubic feet per second at a point within the SW¼NE¼, Sec. 23, Twp. 11S, Rge. 34E, from an unnamed spring, tributary to Dairy Creek for the irrigation of forty (40) acres of land. On February 24, 1976, Lyle R. Burnham filed application no. 15-7026 to appropriate 1.60 cubic feet per second at a point within the SW¼SE¼, Sec. 24, Twp. 11S, Rge. 34E, from an unnamed spring, tributary to Dairy Creek for the irrigation of eighty (80) acres of land. Notice of these applications was published in the Idaho Enterprise and was subsequently protested by Clarence Kent and St. Johns Irrigating Company. A conference was held in Pocatello, Idaho, on April 9, 1976. At this conference, Larry Kent, representing Lorraine Kent and the Claude Kent Trust, requested the hearing in the matter be continued to a later date to allow him an opportunity to consult with legal counsel.

On April 26, 1976, Delmar Clark filed with the Department of Water Resources applications no. 15-7029 and 15-7030 requesting to appropriate 0.13 cubic feet per second for domestic, stockwater and irrigation purposes from unnamed springs in the SE¼NE¼, Sec. 23; NESW¼, NW¼SW¼, Sec. 24; Twp. 11S, Rge. 34E, and 2.40 cubic feet per second for irrigation purposes from unnamed springs in the NW¼SW¼, Sec. 24, Twp. 11S, Rge. 34E. Notice of these applications were published in the Idaho Enterprise and was protested by Clarence Kent. Department action in this matter was delayed because of a court action involving the water of the springs between Delmar Clark and Clarence Kent.

On January 12, 1977, because of the issues involved, a combined hearing was held in Malad, Idaho, on all of the above referenced applications. At that time, St. Johns Irrigating Company, through their attorney, contacted the Department and indicated they did not wish to appear at this hearing and would like the information presented at the previous conference to be considered by the Department

in making a decision in the matter. All of the applicants were present. Applicant Delmar Clark was represented by attorney, Robert C. Huntley, Jr., of the firm Racine, Huntley and Olson, Pocatello, Idaho. The protestant, Clarence Kent was present and represented by attorney J. W. Crowther. The testimony of both the applicants and protestant was heard primarily on two issues: These issues were: (1) Does the protestant, Clarence Kent, have a water right from the subject springs that will be injured, and (2) is there sufficient water in the source for the purposes intended by the applicant.

FINDINGS OF FACT

On June 5, 1928, the cause of St. John Irrigating Company v.s. Asa H. Danforth, H. O. Kent, Marvin A. Butler and James Burnham came before the Fifth Judicial District Court at Malad, Idaho, Oneida County. This trial resulted in the adjudication of certain rights from springs arising in the SE¼NE¼, Sec. 23, Twp. 11S, Rge. 34E. The court decreed that the defendants and cross-complainants, Henry O. Kent and James Burnham were decreed owners of a right to the perpetual use of waters from a certain more southerly spring to the extent of five-tenths of a cubic foot per second of time, with a priority dating from June 1, 1914. In this same action, Asa Danforth was decreed the owner of water from a certain more northerly spring at the head of Sheep Creek and had a right to the extent of one-half cubic foot of water per second of time, with a priority dating from June 1, 1915. The use is described for both rights for irrigation and domestic purposes.

The evidence presented at the hearing was that very little use was made of this water and between 1950 and 1973, the only water used from the springs was for domestic purposes.

In 1973, Mr. Clarence Kent constructed a reservoir within the NW¼SE¼, Sec. 24, Twp. 11S, Rge. 34E, and began diverting water for the irrigation of about 160 acres of land. The water supply for this reservoir originated from the same springs listed in the Danforth Decree. During 1975 to take advantage of the available head between the springs and the place of his use to reduce pumping requirements, Clarence Kent installed a plastic pipeline to collect the water from the springs and transport it to his pump. The installation of this pipeline eliminated the flow in the creek between the springs and the reservoir and, therefore, through the property of Mr. Delmar Clark.

In the decree entitled St. John Irrigating Company -vs- Asa H. Danforth, et. al., it is specified that these springs are not a tributary of Dairy Creek.

From the records available, it appears that Clarence Kent is the successor in interest to the five-tenths cubic foot per second originally decreed to H. O. Kent and James Burnham.

The best available data indicates that the springs flow at the rate of at least one cubic foot per second of time.

CONCLUSIONS OF LAW

1. Even though the water from the springs was not used for irrigation for a period of time greater than five years, and, therefore, the water right may have been lost by nonuse under Section 42-222, Idaho Code, the courts have been reluctant to declare a water right lost if use of the water was resumed prior to the water being taken by subsequent appropriators. Carrington v.s. Crandall, 65 Idaho 525, 147 P2d 1009 (1944); Rams-horn Ditch Co. v.s. United States, 269 Fed. 80; Zezi v.s. Lightfoot, 57 Idaho 707, 713, 68 P2d 50. The protestant Clarence Kent, as successor in interest to the H. O. Kent and James Burnham water right is entitled to 0.50 cubic feet per second.

2. There is not sufficient water in the springs, under existing conditions, to supply the water requested under each of these applications for permit but each applicant should have the opportunity to develop additional water and use the unappropriated water that is available in the source.

3. The use of the existing water should be developed according to the priority of the water right, therefore, the date that proof of completion of works and application of water to beneficial use should be set later for the junior priority right holders to allow them to construct their projects if the senior right holders do not construct their projects.

4. The water rights of the protestant, St. John Irrigating Company will not be injured since the source of water was declared in the case of St. John Irrigating Company v.s. Asa H. Danforth, et. al. not to be a tributary of Dairy Creek.

ORDER

IT IS, THEREFORE, HEREBY ORDERED and Applications for Permit No. 15-7025, 15-7026, 15-7029 and 15-7030 are APPROVED subject to the following conditions:

1. Subject to all prior water rights including that of Clarence Kent to divert 0.50 cubic feet per second of water with a priority of June 1, 1914.

MICROFILMED

2. That the following priority of right be recognized between the permit holders:

15-7025	February 5, 1976
15-7026	February 24, 1976
15-7029	April 26, 1976
15-7030	April 26, 1976

3. Proof of construction of works and application of water to beneficial use be submitted to the Department on or before:

June 1, 1979 on Permit No. 15-7025
June 1, 1981 on Permit No. 15-7026
June 1, 1982 on Permit No. 15-7029 and 15-7030

and that no extensions of time shall be granted past these dates until the permit holder showing he was prevented from proceeding by circumstances beyond his control.

4. That a measuring device of a type approved by the Department shall be permanently installed and maintained as part of the diverting works on each of the permits.

Dated this 17 day of June, 1977.

C. STEPHEN ALLRED
Director

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 6 day of March, 1979.
Bobby D. Flemon

In the Supreme Court of the State of Idaho

DEL CLARK and BEATRICE CLARK, husband and wife,	)	
Plaintiffs-Appellants,	)	
v.	)	NO. 12614
CLARENCE KENT and VIRGINIA KENT, husband and wife,	)	REMITTITUR
Defendants-Respondents.	)	

Stipulation of counsel to dismiss the appeal herein having been approved August 28, 1980, by order of the Court,

IT IS NOW THEREFORE ORDERED that the appeal herein from the judgment of the District Court of the Sixth Judicial District of the State of Idaho, in and for Oneida County, be and is hereby dismissed.

DATED This 28th day of August, 1980.

Clerk of the Supreme Court
STATE OF IDAHO

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

STATEHOUSE
BOISE, IDAHO 83720
(208) 334-4440
CERTIFIED MAIL

138115

KENT, LORRAINE
2223 OAK TRAIL DR.
IDAHO FALLS, ID 83401

PROOF DUE NOTICE

OCTOBER 31, 1983

DEAR PERMIT HOLDER:

ONE OF THE CONDITIONS OF APPROVAL OF YOUR WATER PERMIT NO. 15-7025 WAS THAT PROOF OF THE EXTENT OF YOUR BENEFICIAL USE MUST BE SUBMITTED TO THIS OFFICE ON OR BEFORE JANUARY 01, 1984. (SEE LAST PAGE OF YOUR APPROVED PERMIT OR YOUR LAST APPROVED EXTENSION REQUEST). ENCLOSED IS A POSTCARD WHICH MAY BE USED TO SUBMIT THE REQUIRED PROOF.

IF YOU HAVE NOT FULLY COMPLETED YOUR PROJECT, AND YOU OR A PREVIOUS OWNER OF THIS PERMIT HAVE NOT RECEIVED A PRIOR EXTENSION OF TIME, YOU MAY REQUEST AN EXTENSION OF TIME IF THE DELAY IS FOR REASONABLE CAUSE AS PROVIDED IN SECTION 42-204, IDAHO CODE. IF YOU HAVE BEEN PREVENTED FROM PROCEEDING BY A GOVERNMENTAL AGENCY OR BY LITIGATION, MORE THAN ONE EXTENSION OF TIME CAN BE GRANTED. AN EXTENSION OF TIME REQUEST FORM IS ENCLOSED FOR YOUR CONVENIENCE.

EITHER THE BENEFICIAL USE POSTCARD OR A REQUEST FOR AN EXTENSION OF TIME MUST BE RECEIVED BY THIS DEPARTMENT ON OR BEFORE THE ABOVE DESCRIBED PROOF DUE DATE. IF NEITHER IS RECEIVED, THE DEPARTMENT WILL SEND YOU A LAPSE NOTICE. WITHIN SIXTY (60) DAYS OF THE MAILING OF THE LAPSE NOTICE, THE PERMIT WILL NO LONGER BE OF ANY FORCE NOR EFFECT.

SINCERELY,

RITA FLECK
SECRETARY/RECORDS MANAGER

ENCLOSURES

DEPARTMENT OF WATER RESOURCES

The Idaho Department of Water Resources will consider this card as a statement that the permit holder(s) has completed development to the extent shown below of Permit No. 15-7025.

Name(s) of Permit Holder: Claude Kent Trust % Larry N. Kent

Post Office Address: 1313 Laurel Dr.

Idaho Falls, 83401 Tel. No. 524-0825

Source of Water: Sheep Creek

Extent of Use:
- ☐ Domestic _____ (number of households)
- ☐ Stockwater _____ (number and type of stock)
- ☑ Irrigation _____ (acres)
- ☐ Other _____

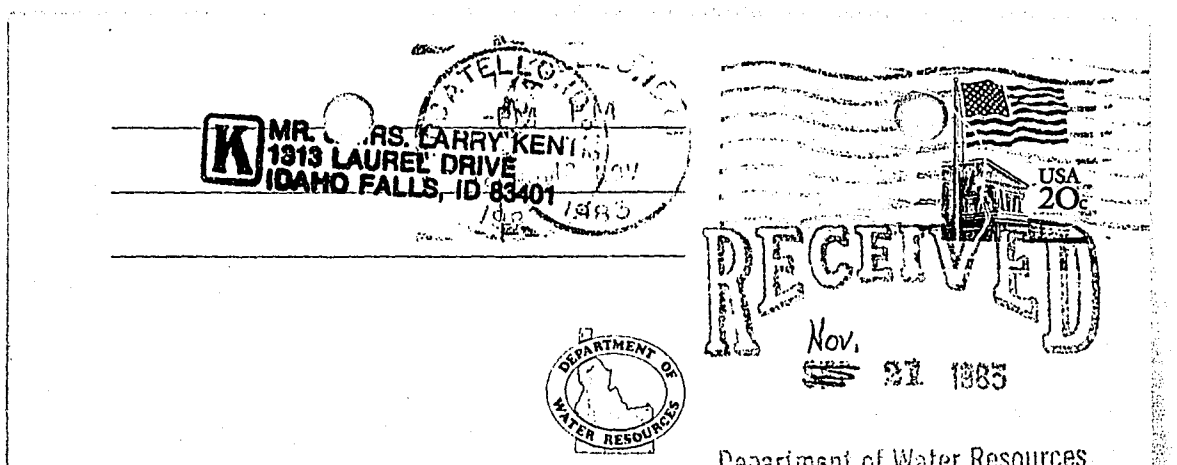
Measuring Device: Required? ☒ Yes ☐ No Installed? ☑ Yes ☐ No

Access Port: Required? ☐ Yes ☒ No Installed? ☐ Yes ☐ No

The above information is a true statement of the extent to which the above numbered permit has been developed.

11-15-83
Date

Larry N. Kent
Signature of Permit Holder



IDAHO DEPARTMENT OF WATER RESOURCES
STATEHOUSE
BOISE, IDAHO 83720

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 15-7025 IN THE NAME OF LORRAINE & CLAUDE KENT TRUST	**ORDER ADVANCING DATE OF PRIORITY**

This matter having come before the Department of Water Resources (Department) as a result of preparing Permit No. 15-7025 for issuance of a license, the Department finds, concludes and orders:

FINDINGS OF FACT

1. The Department approved Application for Permit No. 15-7025 to appropriate the public waters of the State of Idaho with a proposed priority of February 5, 1976.

2. On December 8, 1986 the Department advised the permit holder that a license examination fee was required before an examination could be conducted to confirm the extent of use developed under the permit. The examination fee was due on February 6, 1987.

3. The license examination fee was received on February 9, 1987, 3 day(s) late.

CONCLUSIONS OF LAW

1. The Director may advance the priority date of the permit one day for each day the license examination fee is late, pursuant to the provisions of Section 42-217, Idaho Code.

2. The date of priority of Permit No. 15-7025 should be advanced 3 day(s).

ORDER

IT IS HEREBY ORDERED that the date of priority of Permit No. 15-7025 is advanced to February 8, 1976.

Dated this 16th day of August, 1989.

J. Glen Saxton
Chief, Water Allocation Bureau

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 15-07025

Priority: February 8, 1976

Maximum Diversion Rate: 0.25 CFS
Maximum Diversion Volume:[1] 43.8 AF

This is to certify, that LORRAINE KENT
CLAUDE KENT TRUST
1313 LAUREL DR.
IDAHO FALLS, ID 83401 has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated February 5, 1976; and has submitted Proof of Beneficial Use on November 21, 1983. An examination indicates that the works have a diversion capacity of .400 cfs of water from:

SPRING tributary to DAIRY CREEK

source, and a water right has been established as follows:

BENEFICIAL USE	PERIOD OF USE	RATE OF DIVERSION	ANNUAL VOLUME
IRRIGATION	03/15 to 11/15	0.25 CFS	43.8 AF

LOCATION OF POINT(S) OF DIVERSION: SWNE , Sec. 23, Township 11S, Range 34E
ONEIDA County

PLACE OF USE: IRRIGATION

TWN	RGE	SEC		ACRES		ACRES	ACRES	TOTAL
11S	34E	23	SENE	9	NESE	3.5		12.5
					Total number of acres irrigated:			12.5

CONDITIONS/REMARKS:

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to reflect cropping patterns or acceptable standards of water delivery efficiency.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 15-07025

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this 14TH day of DECEMBER, 1990.

Acting for R. Keith Higginson, Director

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

January 4, 1984

Claude Kent Trust
c/o Larry H. Kent
1313 Laurel Dr.
Idaho Falls, ID 83401

RE: Permit #15-7025

Dear Mr. Kent:

We acknowledge receipt of your statement submitted as proof of beneficial use for the above referenced permit.

Before a license can be issued, a field examination must be made by a representative of this Department.

____ A field examination of your system has been scheduled for _____.

If this time and date is not convenient for you, please contact this office as soon as possible.

__X__ A field examiner will contact you to arrange to examine your system.

If you have any questions regarding the field examination, please contact this office.

Sincerely,

HAROLD W. JONES
Sr. Resource Agent

HWJ:JK

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

RECEIVED
DEC 10 1986
Department of Water Resources

15-7025
KENT, LORRAINE
1313 LAUREL DR.
IDAHO FALLS, ID 83401

December 8, 1986

CERTIFIED
No. 13602

EXAMINATION FEE NOTICE

Dear Permit Holder:

Department records show that proof of beneficial use has been submitted for the above-referenced permit, but that a field examination has not yet been conducted to determine the extent of beneficial use of the water for licensing purposes.

House Bill 671 (effective April 4, 1986) enacted by the 1986 Idaho Legislature requires the payment of a fee before this Department can conduct the field examination needed to issue a license confirming use of water under the permit. This letter is notification that the license examination fee is due within sixty (60) days of the date of this letter. The examination fee information sheet (enclosed) must be returned with the fee.

As an alternative to submitting the fee, the Department will accept a field examination report completed by a certified water right examiner from the private sector. If you choose to have the examination done by a certified water right examiner, you need not submit the license examination fee to the Department, but you must within sixty (60) days of the date of this letter return to the Department, the examination fee information sheet showing appropriate information together with a statement from the certified examiner to verify that you have retained a certified examiner to conduct the field examination. If you choose this alternative, a completed field examination report must be submitted within one year of the date of this letter. You cannot later change your decision to use this alternative and submit the fee needed for the Department to conduct the field examination, but you may change to another certified examiner.

Certified water right examiners are licensed engineers, geologists, or land surveyors certified by the Department to conduct water right examinations. The procedure for certifying examiners results from the recently enacted HB 671 and is being developed at this time. A listing of certified water right examiners will be available from this Department when examiners have been certified.

If your permitted use, in fact, has already been examined by the Department and you have not asked to have the examination repeated, the fee requirement is not applicable to your permit. If you believe this is the case, please contact the Department.

The license examination fee is to be based on the amount of water you indicate you have developed, as listed in item 6 on the examination fee information sheet. The amount of water on which the examination fee is based can be less than the permitted amount, if less water has been diverted and benefically used. The licensed amount of water, however, will not exceed the amount you claim on the examination fee information sheet. The enclosed license examination fee schedule shows a listing of applicable fees.

FAILURE TO SUBMIT WITHIN THE SIXTY (60) DAY PERIOD THE FEE OR THE STATEMENT THAT A CERTIFIED EXAMINER HAS BEEN RETAINED TO MAKE THE FIELD EXAMINATION WILL BE CAUSE TO ADVANCE THE PRIORITY OF THE PERMIT ONE DAY FOR EACH DAY THAT THE FEE SUBMITTAL IS LATE.

FAILURE TO SUBMIT THE FEE OR THE COMPLETED FIELD EXAMINATION REPORT WITHIN A YEAR WILL BE CAUSE TO CONSIDER THE PROOF OF BENEFICIAL USE TO BE INCOMPLETE AND TO LAPSE THE PERMIT.

The attached examination fee information sheet and the fee may be submitted to the following Department office:

Eastern Region
Idaho Dept. of Water Resources
150 Shoup Ave., Suite 15
Idaho Falls, Idaho 83401
Phone: 525-7161

Very Truly Yours,

Ronald D. Carlson
Eastern Regional Manager

Enclosures

4/86

RECEIVED
FEB 9 1987
Department of Water Resources
Eastern District Office

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

EXAMINATION FEE INFORMATION

EBV

For Office Use Only
Fee Received 100.00
Date 2-9-87
Receipt # 41034
Receipt by MM
Sent to S.O.

RECEIVED
FEB 27 1987
Department of Water Resources

1. Permit No. 15-7025

ONE OF THE FOLLOWING BOXES SHOULD BE MARKED TO DESIGNATE YOUR CHOICE:

☐ I choose to have the department make the field examination of this permit; attached is the examination fee. (If this box is marked, complete items 1 thru 8.)

2. Permit Holder: Lorraine K & Claude Kent Trust

3. Post Office Address: 1313 Laurel Idaho Falls, Id. 83401

Telephone No. 524-0825

4. Source of Water: Dairy Creek

5. Extent of Use:

Domestic _____(No. of households) Stockwater _____(No. and type of stock)

Irrigation 40 (acres) Other/Remark _____

6. Total rate &/or volume for which proof is submitted .50 cfs _____acre-feet

7. Show the date water was first diverted and beneficially used under this permit:

1977

8. Person to contact to accompany the department representative during the field examination:

LARRY H KENT
(Name)

1313 Laurel Idaho Falls Id. 524-0825 Home
(Address) 526-1304 Work
(Telephone Number)

☐ I choose to have the field examination conducted by a certified water right examiner. Attached is a statement from the certified examiner I have selected verifying that he has been retained to conduct the examination. (If this box is marked, complete items 1 thru 7.)

Feb 3, 1987
Date

Larry H Kent Personal Representative of Claude & Lorraine Kent
Signature of Permit Holder (and title, if appropriate)

copy retained

Form 219
6/86

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

BENEFICIAL USE FIELD REPORT

A. GENERAL INFORMATION

Permit No. 15-7025

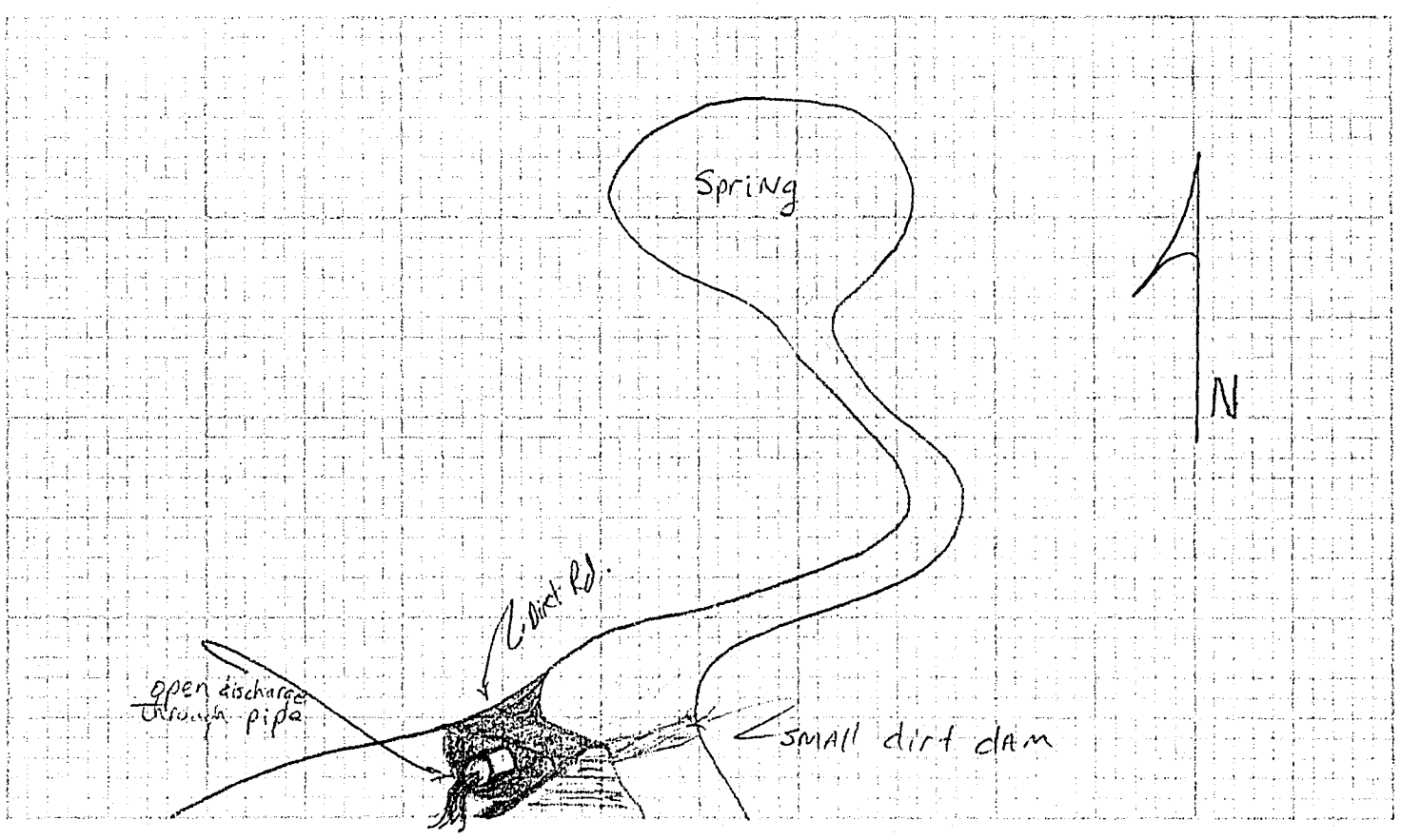
1. Owner: LARRY KENT — work Phone No. 526-1304
   Current Address: 1313 LAURAL Idaho Falls Idaho 83401
2. Accompanied by: Sid Kent — EXAM. DATE: 7-20-87
   Address: Box 194, ARIMO Idaho — Phone No. 254-3314
   Relationship to Permit Holder: Leases LAND
3. Source: Unnamed Spring tributary to malad river

B. OVERLAP REVIEW

1. Other water rights with same place of use: N.A.
   ☐ Copies Attached
2. Other water rights with same point of diversion: N.A.
   ☐ Copies Attached ☐ Copies of Field Exam's Attached

C. SYSTEM DESCRIPTION

1. **Diversion System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable. ☐ Alternative diagram attached



Scale: ~~1"~~ = _____.

2. ☑ Copy of U.S.G.S. Quadrangle Attached Showing location(s) of point(s) of diversion and place(s) of use (required).
   ☑ Aerial Photo Attached (required for irrigation of 10 acres or more).
   ☑ Photo of Diversion and System Attached (required for all but single household domestic groundwater, and stockwater.

System Description (continued)

3. **Narrative:** Description (As operating at time of measurement. Indicate pressure, number of sprinklers, etc.)

Spring to ditches for Flood irrigation.

☐ See Remarks on page 4 for continuation

4.

Well or Diversion Identification No.*	Motor Make	Hp	Motor Serial No.	Pump Make	Pump Serial No. or Discharge Size
NONE	—	—	—	—	—

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

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

Ident. No.	Gov't. Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Method of Determination/Remarks
			SW	NE	23	11S	34E	ONeida	

6. **Place(s) of Use:** Indicate Method of Determination

Twp.	Rge.	Sec.	NE¼				NW¼				SW¼				SE¼				Totals
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
11S	34E	23				9									3.5				12.5

Do not use this space

Do not use this space

D. FLOW MEASUREMENTS

☐ Additional Data Sheets Attached

1.

Measurement Equipment	Type	Make	Model No.	Serial No.	Size	Calib. Date
Bucket					5 gall	
STopwATch						

2. **Measurements:**

Spring Filled a 5 gallon bucket in 2 sec., 1.6 sec., 1.4 sec. through a culvert under dirt Rd.

Average time = 1.67 sec.

E. FLOW CALCULATIONS

☐ Additional Computation Sheets Attached

1. Measured Method:

$$Q = \frac{5 \text{ gall.}}{1.67 \text{ sec.}}\left(\frac{60 \text{ sec.}}{1 \text{ min}}\right)\left(\frac{1 \text{ min}}{448.8 \text{ gal.}}\right)\left(\frac{\text{Ft}^3}{\text{sec.}}\right) = 0.40 \text{ Ft}^3/\text{sec.}$$

2. Alternate Method for Checking Purposes:

12.5 acres X 0.02 ft = 0.25 cfs

F. PUMP EFFICIENCY DATA (Optional)

Discharge Pressure: _____ psi x 2.31 = _____ ft (1); Dynamic pumping level: _____ ft (2)

Total Head: (1) + (2) = _____ (3) ; Flow rate: _____ cfs (4)

Water HP: (3) x (4) ÷ 8.8 = _____ (5)

Meter Input KW: 3.6 x _____ KH x _____ CTR or _____ MULT x _____ PTR x _____ N/ _____ T = _____ (6)

Meter Input HP: (6) x 1.34 = _____ (7)

Panel Input KW: _____ Ave PF x _____ Ave Volts x _____ Ave Amps x .001732 = _____ (6)

Panel Input HP: (6) x 1.34 = _____ (7) Efficiency: (5)/(7) x 100 = _____ %

G. VOLUME CALCULATIONS

1. Volume Calculations for Irrigation:

$V_{I.R.}$ = (Acres Irrigated) x (Irrigation Requirement) = $\frac{(12.5)(3.5) = 43.75}{0.25}$ 12.5

$V_{D.R.}$ = [Diversion Rate (cfs)] x (Days in Irrigation Season) x 1.9835 = ~~(0.40)(245)(1.9835) = 194.38~~

V = Smaller of $V_{I.R.}$ and $V_{D.R.}$ = 43.75

~~2.~~ Volume Calculations for Other Uses:

H. REMARKS AND OVERLAP REVIEW ANALYSIS

I. RECOMMENDATIONS

1. Recommended Amounts

Beneficial Use	Period of Use From	To	Rate of Diversion Q (cfs)	Annual Volume V (afa)
Irrigation	March 25	NOV. - 15	0.25	43.75
		Totals:	0.25	43.75

2. Recommended Amendments

☐ Change P.D. as reflected above ☐ Add P.D. as reflected above ☑ None

☐ Change P.U. as reflected above ☐ Add P.U. as reflected above ☐ Other

J. AUTHENTICATION

Field Examiner's Name Richard Lenow JR

Signature Richard Lenow JR

Certification Date Steve McCormick 10-5-07

Field Report Preparation Date _____

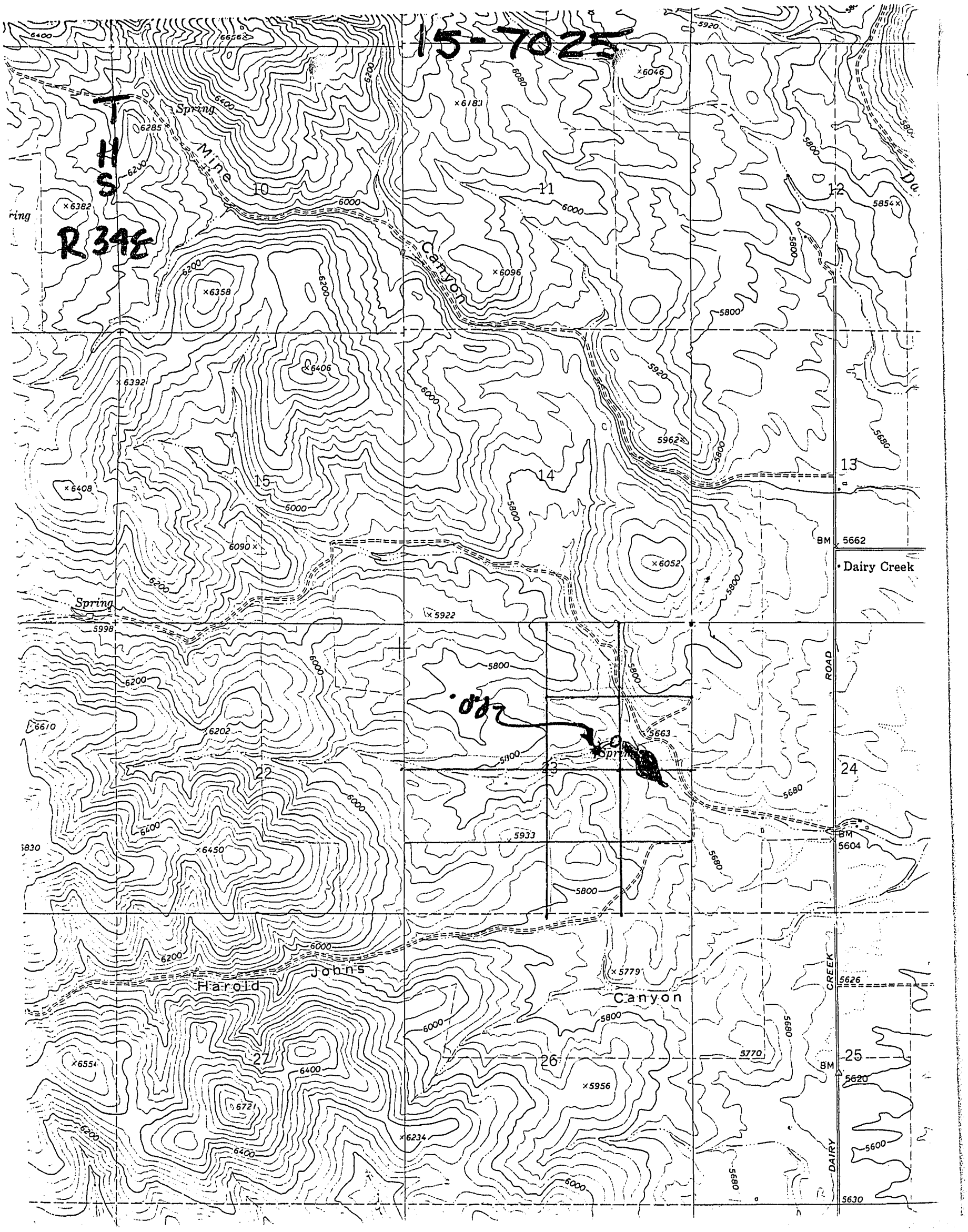
Steve McCormick

CONSULTANT SEAL

K. **Licensing recommendation shall be prepared by an Idaho Department of Water Resources employee on a computer printout attached hereto.**

15-7025

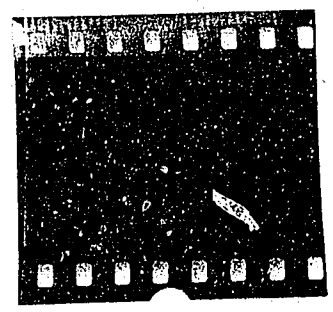
T 11 S
R 34E



$\frac{1\,mile = 20''\,cm}{1\,mile = 8''}$



#15-7025





For Clarity of Photographs Filmed Please See File

BENEFICIAL USE FIELD REPORT REVIEW

TO: FILE 15-7025

FROM: JIM JOHNSON

RE: PRIORITY ADVANCE REVIEW

DATE: 3-MAR-1989

==========

This review memo is prepared to show the process for determining what elements were involved in advancement of the priority.

	DATE	JULIAN	
PERMIT			
Permit priority Date:	FEBRUARY 05 1976	36	
EXAM FEE NOTICE			
Exam Fee Notice Date:	DECEMBER 08 1986	342	
Exam Fee/Info Sheet Received Date:	FEBRUARY 09 1987	40	
Exam Fee or Info Due Date:	FEBRUARY 06 1987	37	
Days Late:		3	DAY(S)
NEW PRIORITY DATE			
Original Priority Date:	FEBRUARY 05 1976	36	
Total Days Late:		3	DAY(S)
New Priority Date:	**FEBRUARY 08 1976**	39	

August 22, 1989

LORRAINE KENT
CLAUDE KENT TRUST
1313 LAUREL DR.
IDAHO FALLS, ID 83401

RE: PERMIT NO. 15-07025

Dear Permit Holder(s):

Enclosed is a draft copy of the license proposed to be issued on the above referenced water right.

This right is currently being reviewed by this office for licensing. The enclosed preliminary copy is subject to change upon further administrative review.

Also enclosed is an order advancing the date of priority of this right due to late submittal of the examination fee.

We ask that you review the proposed license and if you do not concur with the information, please let us know within 10 days.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:sc

Enclosure

MEMORANDUM

TO: Norm

FROM: Sharla

DATE: December 4, 1990

RE: Conditions (15-7025)

The conditions originally placed on this right by order were not carried forward to the license for the following reasons.

1. Condition #3 on the license reinforces the subjection to all prior rights.

2. The priority date of this right has been advanced due to late submittal of the exam fee. The other two files have lapsed.

3. Proof was submitted in a timely manner. An extension was granted based upon litigation.

4. An access port was required for the determination of the rate of diversion by the Department. The examiner has not stated whether the access port or other device was there at the time of the exam, but the determination of the diversion rate has already occurred and because of the amount of water to be recognized under this right, 0.25 cfs, maintenance of such a device is not required.

December 18, 1990

LORRAINE KENT
CLAUDE KENT TRUST
1313 LAUREL DR.
IDAHO FALLS, ID 83401

RE: WATER RIGHT NO. 15-07025

Dear Water Right Holder(s):

Enclosed herewith is a copy of the Water Right License issued on the above referenced permit.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

JJ:blm

Enclosure