

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

IN THE MATTER OF APPLICATIONS)	
FOR TRANSFER 86942 AND 86951)	PRELIMINARY ORDER
IN THE NAME OF ROHN R. NELSON)	APPROVING TRANSFERS
<u>AND LORI A. NELSON)</u>	

PROCEDURAL HISTORY

On August 18, 2022, Rohn R. Nelson and Lori A. Nelson (collectively "Nelson") filed Applications for Transfer 86942 and 86951 with the Idaho Department of Water Resources ("Department"). The Department published notice of the applications on October 13 and 20, 2022. M. Gene Bair, Phil Moulton ("Moulton"), Kirk Klemmer ("Klemmer") and Fred Payne ("Payne") (collectively "Protestants") filed protests against Application 86942. Moulton, Klemmer and Payne also filed protests against Application 86951.

The Department consolidated Applications 86942 and 86951 into a single proceeding for the purpose of conducting an administrative hearing. The Department conducted a hearing for the contested cases on May 23 and 24, 2023. Nelson was represented by attorney Robert Harris. The Protestants were represented by attorneys Fred Snook and Chip Giles.

Exhibits 1, 2.1 - 2.29, 2.96, 2.126, 2.234, 2.235, 2.246, 2.256, 3.1 - 3.13, 4 - 13, 17 - 20, 50 - 60, 63, 64 and 65 offered by Nelson were admitted into the administrative record. Exhibits 101, 102, 105 and 106 offered by the Protestants were also admitted into the record. Nelson called Ronald Byers ("Byers"), Rohn Nelson, John Nelson, Lori Nelson and Bryce Contor as witnesses. Protestants called William (Rick) Sager, John Blower, Chad Stephenson, Edwin Gibson, Matthew Green, Lacey French, Kirk Klemmer, Fred Payne, and Phil Moulton as witnesses.

On May 30, 2023, the hearing officer for the Department issued a Request for Briefs, asking the parties to file argument briefs addressing the following questions of law:

1. Does Section 42-222(1), Idaho Code, or relevant case law require an applicant to demonstrate legal access to the proposed point(s) of diversion, conveyance system, and place of use in conjunction with an application for transfer?
2. Does a transfer applicant's legal access to the proposed point(s) of diversion, conveyance system, and place of use fall within any of the review criteria for transfer applications set forth in Section 42-222(1), Idaho Code.
3. Section 42-222(1), Idaho Code, states that the director of the Department shall approve a transfer application "provided no other water right are injured thereby" Does this protection against injury to existing rights extend to the use of

high flow described in the General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication?

4. Section 42-222(1), Idaho Code, states that the director of the Department shall approve a transfer application “provided . . . the change . . . is in the local public interest as defined in section 42-202B, Idaho Code . . .” Does this local public interest review extend to the use of high flow described in the General Provisions for Basin 74 as decreed in the Snake River Basin Adjudication?

On June 30, 2023, Nelson filed *Applicants’ Post-Hearing Brief*. Also on June 30, 2023, the Protestants filed *Protestant’s Post-Trial Brief*. On July 14, 2023, Nelson filed *Applicants’ Response to Protestant’s Post-Trial Brief*.

After carefully considering the evidence in the record and the arguments of the parties, the hearing officer finds, concludes and orders as follows:

FINDINGS OF FACT

1. On September 1, 2021, Byers conveyed a parcel of land in Lemhi County to Nelson. Ex. 2.13. The parcel of land (hereinafter “Nelson Parcel”) contains approximately 6.94 acres and is generally located in the SWSE of Section 34, T21N, R23E. Ex. 2.10 (Record of Survey); Ex. 5. A small portion of the Nelson Parcel lies in Lot 2 (NWNE) of Section 3, T20N, R23E. *Id.*

Water Rights on the Nelson Parcel

2. On August 13, 1970, the State of Idaho commenced an adjudication of water rights in the Lemhi River Basin. On December 30, 1982, the Seventh Judicial District of Idaho issued its proposed findings of water rights for the Lemhi River Basin adjudication (hereinafter “Lemhi Decree”).

3. The Lemhi Decree listed water right 74-2183, which included the following elements:

Water Right 74-2183

Current Owner: William Kornell and Charlotte Kornell

Source: Wimpey Creek

Priority Date: 10/18/1921

Beneficial Use: Irrigation

Season of Use: 3/15 – 11/15

Point of Diversion: NESW, Sec 35, T21N, R23E

Place of Use: SESW, Sec 34, T21N, R23E 17 acres (17.2 acres)

SWSE, Sec 34, T21N, R23E 20 acres (20.4 acres)

Total 37 acres (37.6 acres)

Ex. 12; Ex 19 (Lemhi Adjudication Map).

4. The Nelson Parcel is located entirely within the place of use described and mapped for water right 74-2183. Ex. 19 (Lemhi Adjudication Map).

5. On November 19, 1987, the State of Idaho commenced an adjudication of water rights for the entire Snake River Basin in Idaho, including the Lemhi River and its tributaries. Even though the Lemhi Decree had been issued only five years prior to the commencement of the Snake River Basin Adjudication (“SRBA”), water users in the Lemhi River Basin were required to participate in the SRBA.

6. Klemmer owns property immediately east of the Nelson Parcel. Ex. 14. The Klemmer property is also within the place of use described for water right 74-2183 in the Lemhi Decree. Ex. 19 (Lemhi Adjudication Map).

7. On April 26, 1990, Klemmer filed a claim in the SRBA, describing a 5-acre portion of water right 74-2183. Ex. 2.20. Klemmer’s claim was assigned claim number 74-2183A. *Id.*

8. During the review of Klemmer’s claim for water right 74-2183A, Department staff created a place of use shape for the claim in its mapping program but erroneously depicted the Nelson Parcel as the irrigation place of use. Ex. 2.20. The source of this error is unclear. The Department calculated Klemmer’s proportionate share of water right 74-2183 and other water rights¹ based on the erroneous map. Ex. 2.20.

9. On July 9, 2007, the SRBA Court issued partial decrees for water right 74-2183A and associated right 74-210B. The partial decrees listed Klemmer as the current owner of the rights. The Department’s mapping program and website continued to depict the Nelson Parcel as the irrigation place of use for the rights. Exs. 6 and 7.

10. Water right 74-2183 was not fully claimed in the SRBA. Ex. 11. A 15-acre (0.16 cfs) portion of the right went unclaimed. *Id.* The unclaimed portion of water right 74-2183 includes the Nelson Parcel. It is unclear whether the mapping error for Claim 74-2183A contributed to the failure of the previous owners of the Nelson Parcel to claim a portion of water right 74-2183 in the SRBA.

11. The SRBA Court issued a Final Unified Decree for the SRBA on August 26, 2014. It is no longer possible to file a claim in the SRBA for any remaining, unclaimed portions of water right 74-2183. With some exceptions, which do not apply to water right 74-2183, any water right not included in the Final Unified Decree is no longer valid.

12. When Byers conveyed the Nelson Parcel to Nelson in 2021, the Department’s mapping program and website still depicted the irrigation place of use for water rights 74-2183A and 74-210B as the Nelson Parcel. Exs. 6 and 7. Byers sold the property to Nelson with the assurance that there were water rights appurtenant to the property. Ex. 2.2.

¹ For example, Klemmer was decreed a portion of water right 74-210, which was historically delivered through a ditch located below (down-gradient of) Klemmer’s property and which could not be used to flood irrigate Klemmer’s property. The ditch could, however, be used to flood irrigate a 2-acre portion of the Nelson Parcel. Because the Klemmer water rights were erroneously determined based on a map of the Nelson Parcel, Klemmer became the decreed owner of a 2-acre portion of water right 74-210. Klemmer’s portion of this right was decreed as water right 74-210B.

13. After Byers conveyed the Nelson Parcel to Nelson, he discovered that the water rights appurtenant to the property were owned by Klemmer. Byers owns a property adjacent to the Nelson Parcel with appurtenant water rights from Wimpey Creek. In an attempt to resolve the water rights issue on the Nelson Parcel, Byers has agreed to move Wimpey Creek water rights from his property to the Nelson Parcel. Ex. 20.

14. Klemmer asked the Department to correct the mapping error for water rights 74-2183A and 74-210B. The Department updated its mapping program, shifting the irrigation shape for those rights to the Klemmer property, which lies within the same quarter-quarter as the Nelson Parcel.

Water Use on Nelson Parcel

15. Water right 74-2183, as set forth in the Lemhi Decree, described only one point of diversion: NESW, Sec 35, T21N, R23E (hereinafter "LWMP 5").

16. The ditch delivering water from LWMP 5 (hereinafter "LWMP 5 Ditch") runs along the north side of the Nelson Parcel. Ex. 19 (Figures 3 and 4). The Nelson Parcel is sloped with the highest elevation on the north side and the lowest elevation on the south side. *Id.* Therefore, the only way the Nelson Parcel can be irrigated by flood irrigation, without pumping, is through the LWMP 5 Ditch. *Id.*

17. Water right 74-2183 was a valid water right until the Final Unified Decree was issued by the SRBA Court on August 26, 2014. Therefore, any irrigation occurring on the Nelson Parcel prior to August 26, 2014, was authorized under water right 74-2183.

18. Aerial imagery shows the Nelson Parcel was irrigated in 1988, 2004, 2006, 2011, 2013, 2015, 2019 and 2021. Ex. 19; Klemmer Test. (confirming that water has been delivered to the Nelson Parcel through the LWMP 5 Ditch two to three times per summer for at least 30 years). It is unclear whether the Nelson Parcel was irrigated in 2009 and 2017. *Id.* The Nelson Parcel may have been irrigated in other years, but the administrative record does not contain aerial imagery for other years.

Application for Transfer 86942

19. Application 86942 proposes to change the point of diversion and place of use for all (2.3 acres) of water right 74-210A and a 3.5-acre portion of water right 74-734A.

20. Water rights 74-210A and 74-734A currently bear the following elements:

Right No.	Priority	Source	Rate (cfs)	Total Acres
74-210A	5/1/1891	Wimpey Creek	0.06	2.3
74-734A	4/1/1912	Wimpey Creek	0.09	4.5

21. The existing places of use for water rights 74-210A and 74-734A are located immediately west of the Nelson Parcel. Ex. 19 (Fig. 4: Map Pre-Transfer Places of Use and Points of Diversion). Aerial imagery shows consistent irrigation of the existing place of use for water right 74-210A and a 3.5-acre portion of water right 74-734A. Ex. 19.

22. The existing point of diversion for water right 74-210A, identified as LWMP 1, is in the SESE of Section 34, T21N, R23E.

23. The existing point of diversion for water right 74-734A, identified as LWMP 2, is in the SESE of Section 34, T21N, R23E.

24. Application 86942 proposes changing the point of diversion for the transferred portions of water rights 74-210A and 74-734A to LWMP 5, in the NESW of Section 35, T21N, R23E.

25. LWMP 5 is the authorized point of diversion for the following water rights:

Right No.	Priority Date	Rate (cfs)	Uses	Owner of Record
74-15873	5/1/1900	0.08	Irrigation	Carol Jean & Raymond A Brown
74-15874	5/1/1900	0.22	Irrigation	Dianne & Fred Payne
74-16028	5/1/1900	0.10	Irrigation	Jim & Judy Skinner
74-16031	5/1/1900	1.10	Irrigation	Pratt Creek Ranch LP
74-2183A	10/18/1921	0.05	Irrigation	Kirk Klemmer
74-2183B	10/18/1921	0.09	Irrigation	Edwin R & Marlene J Gibson
74-2183C	10/18/1921	0.10	Irrigation	Austin James Koncz
74-15840	2/28/2008	0.62	Fish Propagation	Idaho Department of Fish & Game
74-16067	1/17/2017	0.04	Stockwater	Clifford L Zielke
Total:		2.40		
Adjusted Total:		1.59		

26. Water right 74-15840 is held by the Idaho Department of Fish & Game and is used to maintain flow in a pipe from the fish screen on the LWMP 5 Ditch to Wimpey Creek to provide fish passage from the fish screen to the creek. Ex. 18 at 5-8. Water diverted under water right 74-15840 is removed from the ditch at the fish screen, near the head of the ditch.

27. Water rights 74-2183B and 74-2183C are not actively delivered through the LWMP 5 Ditch. Gibson Test. Water delivered through the LWMP 5 Ditch cannot make it to the Koncz and Gibson properties. *Id.* (describing a failed attempt to bring water to the Gibson property through the LWMP 5 Ditch).

28. If water rights 74-2183B, 74-2183C and 74-15840 are subtracted from the total, the total adjusted diversion rate for the water rights conveyed through the LWMP 5 Ditch is 1.59 cfs.

29. A measurement flume is installed in the LWMP 5 Ditch approximately 1,200 feet downstream of the point of diversion. Ex. 19 (Fig. 1); Ex. 18 at 13-17. Based on flow marks on

the staff gage attached to the side of the flume, the LWMP 5 Ditch regularly diverts 2.25 cfs. Ex. 18 at 15-16; French Test. (confirming that the LWMP 5 Ditch has a capacity of 2.25 cfs).

30. The natural flow in Wimpey Creek does not have significant gains or losses between LWMP 5 and LWMP 1. Ex. 18 at 52-57.

Application for Transfer 86951

31. Application 86951 proposes to change the point of diversion and place of use for a one-acre portion of water right 74-734A. The application also proposes to change the place of use for all (0.2 acres) of water right 74-16256.

32. Water rights 74-734A and 74-16256 currently bear the following elements:

Right No.	Priority	Source	Rate (cfs)	Total Acres
74-734A	4/1/1912	Wimpey Creek	0.09	4.5
74-16256	4/1/1912	Wimpey Creek	0.003	0.2

33. The existing point of diversion for water rights 74-734A and 74-16256, identified as LWMP 2, is in the SESE of Section 34, T21N, R23E.

34. The proposed point of diversion for Application 86951 is LWMP 1, located in the SESE of Section 34, T21N, R23E.

35. Application 86951 proposes to combine one acre of water right 74-734A and all (0.2 acres) of water right 74-16256 onto a 1.2-acre combined place of use.

Regulation on Wimpey Creek

36. Water District 74 administers water rights on the Lemhi River and certain tributaries to the Lemhi River. Sager Test. Wimpey Creek is within Water District 74. *Id.*

37. Rick Sager served as watermaster for Water District 74 for 32 years until he retired in 2021. During that time, Wimpey Creek never went under regulation based on priority date. During Sager's time as watermaster, water users on the lower end of Wimpey Creek never made a call for water against upstream junior water rights. Sager Test.; Gibson Test. There has always been enough water in Wimpey Creek to satisfy water users on the lower end of the creek. Sager Test. Water rights on Wimpey Creek are not currently regulated by priority date. French Test.

Validity of Water Rights

38. Water right 74-210A authorizes the irrigation of 2.3 acres within the SESW and SWSE of Section 34, T21N, R23E. The place of use described in water right 74-210A has been actively irrigated. Ex. 19.

39. Water right 74-734A authorizes the irrigation of 4.5 acres within Lot 2 (NWNE) of Section 3, T20N, R23E. The right is appurtenant to Lot 5 ("Byers Parcel") of the Sunny Acres Subdivision which is currently owned by Byers. Ex. 17.

40. A home, garage and driveway have been constructed on the Byers Parcel and have been in place for at least ten years. Ex. 19 (buildings and driveway clearly visible in 2013 aerial imagery). Wimpey Creek flows through the south end of the Byers Parcel. After accounting for the hardened surfaces and the creek channel, only 3.5 acres have been actively irrigated on the Byers Parcel within Lot 2 (NWNE) of Section 3, T20N, R23E.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications and states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(2) states:

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 nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code. The party asserting that a water right has been forfeited has the burden of proving the forfeiture by clear and convincing evidence.

Idaho Code § 42-203A(5) sets forth the criteria used to evaluate applications for permit (applications for new water rights) and states, in pertinent part:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to

be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

ANALYSIS

Validity of Water Rights

Water right 74-210A has been actively diverted for irrigation use and may be included in a transfer application. Ex. 19 (aerial photos showing ditches crossing property and regular irrigation of the entire existing place of use). The existing place of use for water right 74-734A has not been fully irrigated. A home, garage and driveway have been constructed on part of the authorized place of use. Further, Wimpey Creek flows through the property. The creek channel is not actively irrigated. In total, only 3.5 acres have been actively irrigated under the authorized place of use for water right 74-734A for the last ten years. The remainder of the right is subject to forfeiture for nonuse under Section 42-222(2), Idaho Code. Therefore, only 3.5 acres are available for transfer.

Application 86942 proposes to move a 3.5-acre portion of water right 74-734A to the Nelson Parcel to be irrigated through the LWMP 5 Ditch. Application for Transfer 86951 proposes to move the remaining one acre of water right 74-734A to the south end of the Nelson Parcel to be irrigated through the LWMP 1 Ditch. If only 3.5 acres of water right 74-734A can be moved, the hearing officer cannot approve both applications in full. The hearing officer could approve Application 86942 in full and deny Application 86951 altogether. On the other hand, the hearing officer could approve Application 86942, in part, but reduce the proposed place of use by one acre and still be able to approve Application 86951.

Part of the proposed place of use in Application 86942 lies above the LWMP 5 Ditch and is separated from the rest of the irrigated acres on the Nelson Parcel by a driveway connecting the main road to the Klemmer property. Ex. 5. The acreage north of the Klemmer driveway was not historically irrigated through flood irrigation. Nelson purchased the Nelson Parcel, in part, because the parcel was flood irrigated. Exs. 4, 12 and 52 (confirming Nelson's intent to purchase property that could be irrigated "hands free" through flood irrigation). Given Nelson's preference for flood irrigation, it appears the best way to address the one-acre shortfall in water right 74-734A is to remove the acreage north of the Klemmer driveway (above the LWMP 5 Ditch) from the proposed place of use for Application 86942. Therefore, the amount of water

that may be transferred through Application 86942 is 0.11 cfs and 4.8 acres (0.06 cfs and 2.3 acres under water right 74-210A; 0.05 cfs and 2.5 acres under water right 74-734A). The amount of water that may be transferred through Application 86951 is 0.03 cfs. (0.02 cfs and 1.0 acre under water right 74-734A; 0.01 (0.003) cfs and 0.2 acres under water right 74-16256). The remainder of the analysis in this order is based on these revised amounts.

Access to Conveyance System

Nelson proposes to move water right 74-210A and a portion of water right 74-734A into the LWMP 5 Ditch. Nelson does not currently own a water right delivered through the LWMP 5 Ditch. Protestants Moulton, Klemmer and Payne own water rights delivered through the LWMP 5 Ditch and assert that Nelson does not have a right-of-way or easement to convey water rights through the LWMP 5 Ditch. This assertion raises the question of whether a transfer applicant must demonstrate access to (or a possessory interest in) the proposed point of diversion and conveyance system. Stated differently, does access to the proposed point of diversion fall within the statutory review criteria for applications for transfer, set forth in Section 42-222(1), Idaho Code. The hearing officer invited the parties to file briefs addressing this specific legal question.

Section 42-203A(5) sets forth the criteria used to evaluate an application for permit (an application for a new water right). When an applicant proposes to develop a new water right, the applicant must demonstrate that they have access to the proposed point of diversion, conveyance system and place of use. Access to the proposed point of diversion falls under the good faith / anti-speculation element of Idaho Code § 42-203A(5). Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) provides further direction on this element of review:

Criteria for determining whether the application is made in good faith. The criteria requiring that the Director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of application requirements. The judgment of another person's intent can only be based upon the substantive actions that encompass the proposed project. Speculation for the purpose of this rule is an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence. Speculation does not prevent an applicant from subsequently selling the developed project for a profit or from making a profit from the use of the water. An application will be found to have been made in good faith if:

- i. The applicant shall have legal access to the property necessary to construct and operate the proposed project, has the authority to exercise eminent domain authority to obtain such access, or in the instance of a project diverting water from or conveying water across land in state or federal ownership, has filed all applications for a right-of-way. Approval of applications involving Desert Land Entry or Carey Act filings will not be issued until the United States Department of Interior, Bureau of Land Management has issued a notice classifying the lands suitable for entry; and

- ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and
- iii. There are no obvious impediments that prevent the successful completion of the project.

IDAPA 37.03.08.045.01.c.

The prohibition on speculation is primarily meant to prevent a corporation or individual from appropriating and hoarding the limited water resources of the state, with no intent to beneficially use the water, and then selling the undeveloped water permits to the highest bidder. If a person obtains a permit for a new water right but has no means or intent to develop the water right, then the resource becomes locked up, limiting the opportunities of others to use and develop the water resource. This concern about locking up the resource is not present in the context of a transfer application. A transfer application deals only with existing, already-appropriated water rights, established by decree, license, or through beneficial use.

Rule 45.01.c of the Department's Water Appropriation Rules (IDAPA 37.03.08) defines speculation as "an intention to obtain a permit to appropriate water without the intention of applying the water to beneficial use with reasonable diligence." Under this definition, speculation could never apply to a transfer application. First, a transfer application does not propose to "appropriate" water. The existing water rights included in a transfer application have already been appropriated. Second, future development of beneficial use makes no sense in the context of a transfer application. Existing water rights have already been put to beneficial use.

Section 42-222(1), which governs applications for transfer, and Section 42-203A(5), which governs applications for permit, contain three similar review criteria: a prohibition on injury, a review of water conservation practices, and a review of the local public interest. Although Section 42-203A(5) includes a review criterion related to good faith and speculation, Section 42-222(1) contains no similar criterion. The absence of language related to good faith or speculation is significant. The legislature has been aware of the anti-speculation doctrine for many years,² but has not chosen to adopt a good faith (no speculation) review criterion for transfer applications. The Department should not add review criteria to Section 42-222(1). If the legislature wants good faith (no speculation) to be an element of review for transfer applications, the legislature can easily add that provision to Section 42-222(1).

It is possible that Nelson holds a prescriptive easement to convey water through the LWMP 5 Ditch. Water was conveyed through the LWMP 5 Ditch to the Nelson Parcel for many years under water right 74-2183. That right remained a valid water right until the SRBA Final Decree was issued in 2014. Ultimately, however, the Department does not have the authority to require Nelson to demonstrate legal access to the LWMP 5 Ditch as part of its transfer review. Further, the hearing officer for the Department does not have the statutory authority to grant an easement to Nelson or confirm a prescriptive easement. The question of whether Nelson has an

² The prohibition on speculation was added to the Idaho Code in 1935. Idaho Sess. Laws, ch. 145, §2.

easement to use the LWMP 5 Ditch must be decided by a district court. Establishment of an easement, however, is not a pre-requisite to pursuing a transfer of water rights. If Nelson does not have legal access to or a possessory right in the LWMP 5 Ditch, then Nelson has transferred water rights into the ditch in vain.

Definition of Injury

Idaho Code § 42-222(1) does not contain a definition of injury. The prohibition on injury to existing water rights is found in other places in Title 42. For example, Idaho Code § 42-203A(5), which sets forth the criteria used to evaluate applications for permit states, in pertinent part:

In all applications . . . where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

The Department has adopted administrative rules for the processing and review of applications for permit. Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) states, in pertinent part:

Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.
- ii. The holder of an existing water right will be forced to an unreasonable effort or expense to divert his existing water right. Protection of existing groundwater rights are subject to reasonable pumping level provisions of Section 42-226, Idaho Code; or
- iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.
- iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

IDAPA 37.03.08.045.01.a.

The hearing officer finds that the definition of injury set forth in Rule 45.01.a of the Department's Water Appropriation Rules is instructive to the injury criterion found in Idaho Code § 42-222(1) and will use this definition of injury when evaluating whether Applications 86942 and 86951 will cause injury to existing water rights.

Scope of Injury Analysis

The SRBA Partial Decree for General Provisions in Basin 74 includes the following paragraph:

The following water rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in basin 74 in accordance with the prior appropriation doctrine as established by Idaho law:

24. Wimpey Creek and tributaries;

Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 74 (April 3, 2012).

This paragraph, often referred to as the separate streams provision, states that water rights on Wimpey Creek shall be administered separately from water rights on the Lemhi River. Therefore, the injury analysis for water rights moving between points of diversion on Wimpey Creek should be limited to an evaluation of injury to water rights on Wimpey Creek and its tributaries. The injury analysis should not be extended to the Lemhi River.

Injury to High Flow Use

Protestants argue that Nelson's proposal to move additional water rights into LWMP 5 will affect their ability to divert high flow from Wimpey Creek. The SRBA Partial Decree for General Provisions in Basin 74 includes the following paragraph:

The following general provision shall govern the use of "High Flow" surface water for irrigation use within the Lemhi Basin:

The Practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

(a) the waters so diverted are applied to beneficial use.

(b) existing decreed rights and future appropriations of water are first satisfied.

Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 74 (April 3, 2012) (hereinafter "High Flow Provision").

The High Flow Provision of the SRBA is not a water right and does not create a water right for the high flow users. *Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051 et al., In Re SRBA Case No. 39576 at 9-11 (January 3, 2012). The High Flow Provision does not contain any of the essential elements of a water right (priority date, quantity, point of diversion, place of use). See *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 416, 958 P.2d 568, 573 (1997).

The injury review criteria set forth in Section 42-222(1), Idaho Code, is limited to "other water rights" and, therefore, does not extend to high flow use. Further, the definition of injury from the Department's Water Appropriation Rules, set forth above, is limited to "the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights." High flow use does not fall within this definition of injury because high flow use is not a recorded right. In their Post Trial Brief, the Protestants cite multiple cases standing for the proposition that a transfer cannot injure existing water rights.³ The cases cited, however, do not address the question of whether a transfer can injure high flow use.

The hearing officer asked the parties to provide legal arguments about whether the injury analysis required by Section 42-222(1), Idaho Code, should extend to diversions under the High Flow Provision. The Protestants failed to provide any compelling arguments that diversions under the High Flow Provision should be included in the injury analysis. The hearing officer could find no support for such a proposition in statute or rule. Therefore, the Department's injury analysis under Section 42-222(1), Idaho Code, does not extend to the use of water under the High Flow Provision.

Injury and Ditch Capacity

Wimpey Creek is within Water District 74. Water rights on Wimpey Creek are administered by the watermaster for Water District 74. Lacey French, the current watermaster for Water District 74 provided persuasive testimony that the ditch capacity of the LWPM 5 Ditch is 2.25 cfs. The water rights actively diverted through the LWMP 5 Ditch, past the measuring device authorize a diversion rate of 1.59 cfs. Nelson proposes to transfer 0.11 cfs into the LWMP 5 Ditch.

As noted above, the Protestants argue that the transfer will reduce their ability to divert and use high flow when it is available. High flow use is a diversion above and beyond the rate authorized by existing water rights. The Protestants' argument about high flow serves as an admission that the capacity of the LWMP 5 Ditch exceeds the active diversions under existing water rights.

³ The cases cited by the Protestants state that water rights and "appropriations" are protected from injury. Chapter 2, Title 42, Idaho Code, sets forth the process to appropriate water. As part of this process, the Department establishes a point of diversion, place of use, priority date and quantity for the appropriation. Water use under the High Flow Provision does not set forth critical water right elements and does not fall within the scope of an appropriation.

A preponderance of the evidence demonstrates that the LWMP 5 Ditch has the capacity to convey the additional 0.11 cfs of water rights described in Application 86942.

Additional Injury Considerations

Application 86942 proposes to move water right 74-210A, which is a senior right on Wimpey Creek, from LWMP 1 to LWMP 5, located approximately 0.75 miles upstream of LWMP 1. Moving a senior water right upstream has the potential to injure upstream junior water rights if there are significant gains between the points of diversion for the junior rights and the existing point of diversion for the senior right. A preponderance of the evidence presented at hearing shows that Wimpey Creek does not have significant gains between LWMP 5 and LWMP 1. The current and former watermaster for Water District 74 testified that the water users on Wimpey Creek have never made a call for water during their terms of service. They also testified that water rights on Wimpey Creek have never been regulated with respect to priority date during their terms of service. The amount of water being moved is very small, only 0.11 cfs. Currently, Department records show 21.6 cfs of irrigation water rights within the Wimpey Creek drainage. The amount of water proposed to be moved represents one-half of 1% of the total irrigation rights in the drainage. The changes proposed in Application 86942 will not injure other water rights on Wimpey Creek.

The Protestants argue that they will be injured if Nelson is allowed to move senior water right 74-210A into the LWMP 5 Ditch. Water right 74-210A bears a priority date of May 1, 1891, and would become the most senior right in the LWMP 5 Ditch. Protestants' arguments on this subject are without merit. The water users on the LWMP 5 Ditch constitute a lateral water users association.⁴ As long as all rights are delivered at the creek headgate, priority date has no bearing on the delivery of water within a lateral ditch association. Consider, for example, a ditch with five water users. Assume that each water user holds a water right with a different priority date. If all water rights are in priority on the river, then all the rights would be delivered by the watermaster to the head of the ditch. Once the water is delivered to the head of the ditch, priority date is no longer a factor in water delivery. The person holding the senior-most water right would not have a better claim to the water in the ditch than the person holding the junior-most water right. Each water user would be entitled to their proportionate share of the water in the ditch. Therefore, it is of no consequence that one of the water rights proposed to be moved into the LWMP 5 Ditch is senior to the existing rights in the ditch.

The Protestants also argue that Nelson will disrupt the current rotation schedule on the LWMP 5 Ditch. According to the Protestants, Payne and Moulton primarily rotate the full flow of water in the ditch between their properties and occasionally send some water down to

⁴ Section 42-1301, Idaho Code, states:

When three (3) or more parties each own or possess and control land with appurtenant water rights which each are entitled to receive from the same point or points of delivery in a canal or reservoir, or from the same point or points of diversion from waters of the state, to be conveyed to their respective premises for any distance through the same lateral or distributing ditch or laterals or distributing ditches that are not operated and maintained by an irrigation district, canal company or other water delivery organization, such parties shall be members of and shall constitute a water users' association known as "Lateral Water Users' Association."

Klemmer when he needs it. Protestants are concerned that Nelson, located at the end of the ditch, will demand delivery of their water rights continuously. This concern does not rise to the level of injury and can be addressed through the installation of measuring devices on the ditch. After accounting for Nelson's share of any ditch losses, the water users could measure the delivery of Nelson's water rights at the lower end of the Moulton property.

Enlargement

A one-acre portion of water right 74-734A has not been irrigated since at least 2013 and is subject to forfeiture under Section 42-222(2), Idaho Code. Nelson proposes to move the entirety of water right 74-734A to the Nelson Parcel through Applications 86942 and 86951. The non-irrigated acre on the Byers Parcel is under buildings, driveways, and the Wimpey Creek channel. If a one-acre portion of water right 74-734A is left behind at the existing place of use, there is a risk that Byers will continue irrigating his pasture area with the remaining portion of the right. This, in effect, would be equivalent to Nelson moving the non-irrigated acreage to the Nelson Parcel and would constitute an enlargement in use under the rights. To prevent enlargement of water right 74-734A, the right must be reduced by 0.02 cfs and one acre. In other words, no portion of the right will be left on the Byers property, the right moved to the Nelson Parcel will simply be reduced to reflect the one acre lost and forfeited through at least ten years of non-use.

Conservation of Water Resources

Nelson proposes to irrigate their property through open ditches and flood irrigation. Other water users in the Wimpey Creek drainage use the same method of irrigation. The changes proposed by Nelson are consistent with the conservation of water resources in the state of Idaho.

Local Public Interest

Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). The local public interest review is meant to be separate and distinct from the injury review described above.

The Protestants argue that the local public interest review under Section 42-222(1), Idaho Code, should extend to the use of high flow. The Protestants cite testimony and evidence offered at hearing that the changes proposed in Application 86942 and 86951 will affect the use of high flow by other users in the Wimpey Creek drainage.

The High Flow Provision, quoted above, is unambiguous. High flow use is subordinate to and may be diminished by existing water rights and future appropriations. If high flow use can be reduced by existing and future water rights, it is logical that high flow use can also be reduced by changing the elements of existing water rights. The High Flow Provision does not contain any language restricting the subordination to the current configuration of existing rights.

Without such limiting language, high flow uses are subject to existing rights at their current points of diversion and places of use and at any future points of diversion or places of use.

Nelson's argument briefs include a citation to a decision issued by the Department in 2020 for contested Application for Permit 74-16187. That decision included an analysis of the relationship between high flow use and the local public interest:

Pursuant to the Basin 74 General Provisions, high flow uses are allowed provided existing quantified water rights, including future appropriations of water, are first satisfied. Therefore, high flow use cannot be protected against diminishment (reduction in flow) caused by future water rights. This limit on high flow uses has been reinforced by the SRBA Court. Water users in the Lemhi River Basin filed claims in the SRBA in an attempt to obtain recorded water rights for their high flow uses. As part of the review of those high flow claims, the SRBA District Court addressed a proposal to make high flow uses subject to only those future water rights located within the Lemhi River Basin. In other words, the proposal would have protected high flow uses from being subject to future, downstream (out-of-basin) water rights. The court rejected the proposal:

This court has already determined that the high flow general provision in the Lemhi Decree, based on its express language, was not intended to create a water right. ... Therefore, both factually and as a matter of law, the high flow general provision in this case did not create a water right. The direct consequence of limiting the application of the subordination provision to water rights within the Lemhi Basin de facto elevates the status of the high flow use to that of a water right as between in-basin and out-of-basin water users. Since the use of high flow water does not create a water right high flows are therefore unappropriated water.

The SRBA Court concluded the use of high flow water is subordinate to all future and existing water rights, both in-basin or out-of-basin, because the high flows are unappropriated water. The reasoning and conclusion of the SRBA Court is binding. Pursuant to the Basin 74 General Provisions and the related decision from the SRBA Court, high flow uses cannot restrict future appropriations based on the argument that the future appropriations will reduce the quantity of water available for high flow uses, because doing so would elevate the status of the high flow use to that of a water right.

Order on Exceptions; Final Order, Application for Permit 74-16187 in the Name of Kurt W. Bird or Janet E. Bird (May 21, 2020) (citations omitted).

The changes proposed in Applications 86942 and 86951, as a matter of law, cannot injure high flow use under the High Flow Provision, because such use does not constitute a water right. The local public interest criteria cannot be used to elevate high flow use to the status of a water right. Transfers of water rights may reduce the quantity of unappropriated water.

On October 28, 2022, The Nature Conservancy (TNC") sent a letter to the Department expressing concerns about Applications 86942 and 86951. Ex. 106. According to the letter, TNC holds a conservation easement for the Pratt Creek Ranch (owned by Moulton), which includes the Wimpey Creek channel flowing through the Pratt Creek Ranch property. *Id.* at 1. TNC is concerned that moving water right 74-210A and a portion of 74-734A to LWMP 5 will "directly impact the conservation values . . . the conservation easement was intended to protect" and will "directly impact the local public interest . . . of the natural systems of Wimpey Creek and the anadromous fish spawning and rearing habitat that it supports" *Id.* "Tributaries to the Lemhi River are important refuge habitat for these fish, especially in the summer months when the Lemhi [River] is low and warm." *Id.* at 2. "The cooler waters of tributaries like Wimpey Creek are critical for these fish and the habitat on Wimpey Creek has been protected and improved by the conservation easement by allowing fish the ability to survive those warm temperature months." *Id.* TNC concludes: "The impacts of [the] proposed actions in transfer application 86951 and 84942 will undermine decades of collaborative work that the local community and partners have done to improve natural systems and to reconnect important spawning and rearing tributaries for anadromous fish." *Id.*; Green Test. (confirming that juvenile Steelhead and Chinook Salmon use Wimpey Creek for cold-water refuge and Steelhead spawn in Wimpey Creek in April and May).

Based on the Department's water right records, the irrigation water rights in the Lower Wimpey Creek drainage authorize a diversion rate of approximately 1.02 cfs (0.39 cfs diverted at LWMP 1 and 0.63 cfs diverted at LWMP 2). Application 86942 proposes to move 0.11 cfs of water rights from LWMP 1 and 2 (downstream of the TNC conservation easement) to LWMP 5 (upstream of the TNC conservation easement). The water rights being changed through Application 86942 represent approximately 10% of the water rights in lower Wimpey Creek.

Neither TNC nor the Idaho Water Resource Board hold a minimum stream flow right for Wimpey Creek. Therefore, TNC is not entitled to or guaranteed a certain flow of water through the conservation easement section of Wimpey Creek. It is, however, in the local public interest to maintain flow in Wimpey Creek to provide habitat and cold-water refuge areas for anadromous fish species.

Water rights on Wimpey Creek are not regulated based on priority because senior water right holders, particularly the right holders in LWMP 2,⁵ have not made a call for water in the last thirty years. Evidence presented at hearing shows that 2.25 cfs is often diverted at LWMP 5. This exceeds the irrigation water rights authorized to be diverted at LWMP 5.⁶ If water users on Wimpey Creek are not regulated, the irrigators in the LWMP 5 Ditch are usually able to divert whatever they want from the creek under the High Flow Provision. If the capacity of the LWMP 5 Ditch is 2.25 cfs and the ditch diverts this amount throughout most of the summer, the addition of the Nelson water rights (0.11 cfs) will only have the affect of reducing the amount of high

⁵ The split portions of water right 74-210 are currently delivered through LWMP 2. These rights bear priority dates of May 1, 1891 and are senior to most other water rights on Wimpey Creek.

⁶ As described above, the total authorized diversion rate for LWMP 5 is 2.40 cfs. This amount includes water right 74-15840, which authorizes a diversion rate of 0.62 cfs and is used for fish passage at the LWMP 5 fish screen. The measuring device for the LWMP 5 Ditch is downstream of the fish screen. The observed diversion of 2.25 cfs has occurred at the measuring device.

flow diverted through the ditch. Further, the Nelson Parcel has been irrigated through the LWMP 5 Ditch for at least 30 years. Until 2014, the delivery of water to the Nelson Parcel occurred under water right 74-2183. Since 2014, the delivery of water has been without a water right. No more water will be diverted at LWMP 5 than has historically been diverted at that location. Therefore, the changes proposed in Applications 86942 and 86951 will not affect the flows in Wimpey Creek between LWMP 5 and LWMP 1 or 2. Further, the changes will not affect the local public interest related to cold-water refuge for anadromous fish.

It is in the local public interest for water users to be able to make changes to water right elements to address property or contract disputes and to correct errors arising through the SRBA. In this case, the transfer applications have the potential to settle a contract dispute between Nelson and Byers over representations made during the sale of the Nelson Parcel. Therefore, Nelson has demonstrated that the changes proposed in Applications 86942 and 86951 are in the local public interest.

CONCLUSIONS OF LAW

Nelson's proposal to change the place of use and point of diversion for water right 74-210A and a 2.5-acre portion of 74-734A will not injure other water rights, will not result in an enlargement of use under the water rights, is consistent with the conservation of water resources in the state of Idaho, and is in the local public interest. Nelson's proposal to change the place of use for water right 74-16256 and the point of diversion and place of use for a 1.0-acre portion of 74-734A will not injure other water rights, will not result in an enlargement of use under the water rights, is consistent with the conservation of water resources in the state of Idaho, and is in the local public interest. Therefore, Applications 86942 and 86951 should be approved.

ORDER

IT IS HEREBY ORDERED that Applications for Transfer 86942 and 86951 are APPROVED subject to the conditions set forth in Transfer Approvals 86942 and 86951 issued in conjunction with this order.

Dated this 31st day of July 2023.



James Cefalo
Hearing Officer

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 86942**

This is to certify that: LORI A NELSON AND
ROHN R NELSON
3800 E RUTH DR
WASILLA, AK 99654-7537

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
74-210A	WR/DECREED	5/1/1891	0.060 cfs	N/A	N/A	2.3	WIMPEY CREEK
74-734A	WR/DECREED	4/1/1912	0.090 cfs	N/A	N/A	4.5	WIMPEY CREEK

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
74-210A	NO	YES	YES	NO	NO	NO
74-734A	YES	YES	YES	NO	NO	NO

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
74-210A	74-210A	0.060 cfs	N/A	2.3	4.8	N/A	N/A	N/A	N/A	N/A
74-734A	74-16385	0.050 cfs	N/A	2.5	4.8	74-734A	0.020 cfs	N/A	1.0	1.2
COMBINED TOTALS		0.110 cfs	N/A	4.8	4.8		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 31st day of July, 2023.



Regional Manager

Transfer No. 86942

**Support Data
In File # 74-210A**

WATER RIGHT NO. 74-210A
As Modified by Transfer No. 86942

In accordance with the approval of Transfer No. 86942, Water Right No. 74-210A is now described as follows:

Right Holder: RONALD E BYERS
 1044 LEMHI RD
 SALMON, ID 83467-5148

Priority Date: 5/1/1891

Source: WIMPEY CREEK

Tributary: LEMHI RIVER

BENEFICIAL USE

IRRIGATION

From

03/15

To

to 11/15

Diversion Rate

0.060 cfs

0.060 cfs

LOCATION OF POINT(S) OF DIVERSION

WIMPEY CREEK

NENESW

Sec 35 Twp 21N Rge 23E LEMHI County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
21N	23E	34															4.8		4.8

Right Acre Limit: 2.3

POU Total Acres: 4.8

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 2.3 acres within the authorized place of use in a single irrigation season.
2. Rights 74-210A and 74-16385 when combined shall not exceed the irrigation of 4.8 acres.
3. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 74.
4. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
5. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
6. This right does not grant any right-of-way or easement across the land of another.

Transfer No. 86942

WATER RIGHT NO. 74-210A
As Modified by Transfer No. 86942

CONDITIONS OF APPROVAL

7. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
8. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
9. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

WATER RIGHT NO. 74-734A
As Modified by Transfer No. 86942

In accordance with the approval of Transfer No. 86942, Water Right No. 74-734A is now described as follows:

Right Holder: RONALD E BYERS
 1044 LEMHI RD
 SALMON, ID 83467-5148

Priority Date: 4/1/1912

Source: WIMPEY CREEK

Tributary: LEMHI RIVER

BENEFICIAL USE

IRRIGATION

From

03/15

To

to 11/15

Diversion Rate

0.020 cfs
 0.020 cfs

LOCATION OF POINT(S) OF DIVERSION

WIMPEY CREEK NWSESE Sec 34 Twp 21N Rge 23E LEMHI County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
20N	23E	3		0.2															0.2
				1.2															
21N	23E	34															1.0		1.0

Right Acre Limit: 1.0

POU Total Acres: 1.2

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 1.0 acre within the authorized place of use in a single irrigation season.
2. Rights 74-734A and 74-16256 when combined shall not exceed the irrigation of 1.2 acres.
3. The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.
4. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 74.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

Transfer No. 86942

WATER RIGHT NO. 74-734A
As Modified by Transfer No. 86942

CONDITIONS OF APPROVAL

6. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
7. This right does not grant any right-of-way or easement across the land of another.
8. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
10. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

WATER RIGHT NO. 74-16385
As Modified by Transfer No. 86942

In accordance with the approval of Transfer No. 86942, Water Right No. 74-16385 is now described as follows:

Right Holder: RONALD E BYERS
 1044 LEMHI RD
 SALMON, ID 83467-5148

Priority Date: 4/1/1912

Source: WIMPEY CREEK

Tributary: LEMHI RIVER

BENEFICIAL USE

IRRIGATION

From

03/15

To

to 11/15

Diversion Rate

0.050 cfs

0.050 cfs

LOCATION OF POINT(S) OF DIVERSION

WIMPEY CREEK NENESW Sec 35 Twp 21N Rge 23E LEMHI County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
21N	23E	34															4.8		4.8

Right Acre Limit: 2.5

POU Total Acres: 4.8

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 2.5 acres within the authorized place of use in a single irrigation season.
2. Rights 74-210A and 74-16385 when combined shall not exceed the irrigation of 4.8 acres.
3. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 74.
4. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
5. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
6. This right does not grant any right-of-way or easement across the land of another.

Transfer No. 86942

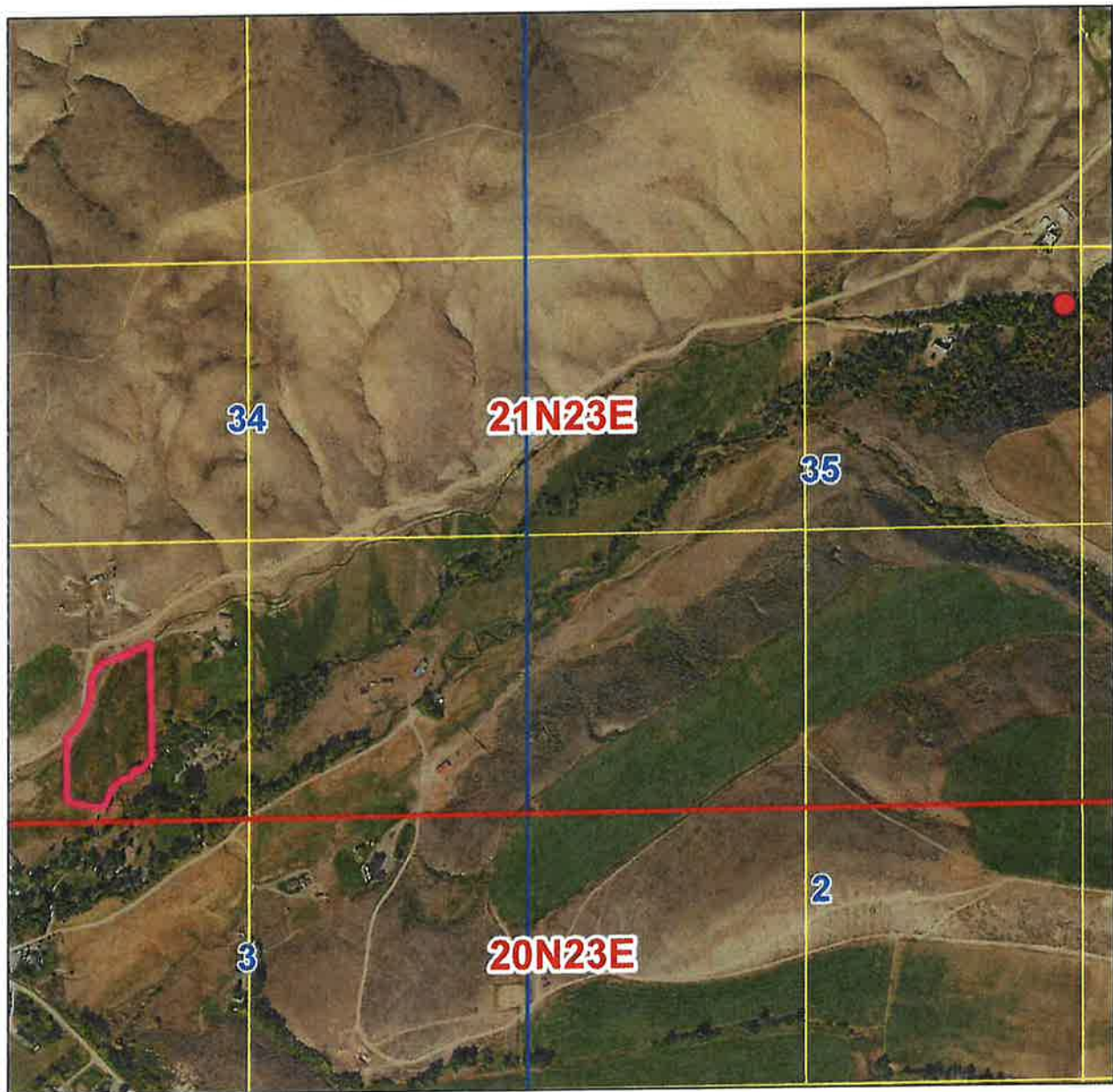
WATER RIGHT NO. 74-16385
As Modified by Transfer No. 86942

CONDITIONS OF APPROVAL

7. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
8. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
9. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

Attachment to Transfer Approval 86942

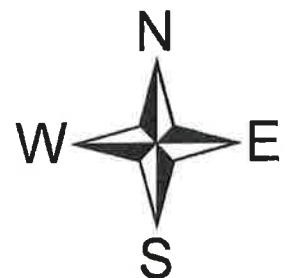
This map depicts the place of use boundary at the time of this transfer approval and is attached to the approval document solely for illustrative purposes.



Legend

- WR POD
- WR POU
- Township/Range
- Sections
- QQ

0 500 1,000 2,000 Feet



Date: 7/31/2023

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**

**TRANSFER OF WATER RIGHT
TRANSFER NO. 86951**

This is to certify that: **LORI A NELSON AND
ROHN R NELSON
3800 E RUTH DR
WASILLA, AK 99654-7537**

has requested a change to the water right(s) listed below. This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code. A summary of the changes is also listed below. The authorized change for each affected water right, including conditions of approval, is shown on the following pages of this document.

Summary of Water Rights Before the Proposed Changes

<u>Water Right</u>	<u>Origin/Basis</u>	<u>Priority Date</u>	<u>Diversion Rate</u>	<u>Diversion Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>Source</u>
74-16256	WR/DECREED	4/1/1912	0.010 cfs	N/A	N/A	0.2	WIMPEY CREEK
74-734A	WR/DECREED	4/1/1912	0.020 cfs	N/A	N/A	1.0	WIMPEY CREEK

Purpose of Transfer (Changes Proposed)

<u>Current Number</u>	<u>Split</u>	<u>POD</u>	<u>POU</u>	<u>Add POD</u>	<u>Period of Use</u>	<u>Nature of Use</u>
74-16256	NO	YES	YES	NO	NO	NO
74-734A	NO	YES	YES	NO	NO	NO

Summary Of Water Rights After the Approved Change

<u>Existing Right</u>	<u>New No. (Changed Portion)</u>	<u>Transfer Rate</u>	<u>Transfer Volume</u>	<u>Acre Limit</u>	<u>Total Acres</u>	<u>New No. (remaining portion)</u>	<u>Remaining Rate</u>	<u>Remaining Volume</u>	<u>Remaining Acre Limit</u>	<u>Remaining Total Acres</u>
74-16256	74-16256	0.010 cfs	N/A	0.2	1.2	N/A	N/A	N/A	N/A	N/A
74-734A	74-734A	0.020 cfs	N/A	1.0	1.2	N/A	N/A	N/A	N/A	N/A
COMBINED TOTALS		0.030 cfs	N/A	1.2	1.2		N/A	N/A	N/A	N/A

This water right(s) is subject to all prior water rights and shall be administered in accordance with Idaho law and applicable rules of the Department of Water Resources. Detailed Water Right Description(s) attached.

Dated this 31st day of July, 2023.



Regional Manager

Transfer No. 86951

**Support Data
In File # 74-734A**

WATER RIGHT NO. 74-734A
As Modified by Transfer No. 86951

In accordance with the approval of Transfer No. 86951, Water Right No. 74-734A is now described as follows:

Right Holder: RONALD E BYERS
 1044 LEMHI RD
 SALMON, ID 83467-5148

Priority Date: 4/1/1912

Source: WIMPEY CREEK

Tributary: LEMHI RIVER

BENEFICIAL USE

IRRIGATION

From

03/15

To

to 11/15

Diversion Rate

0.020 cfs

0.020 cfs

LOCATION OF POINT(S) OF DIVERSION

WIMPEY CREEK

NWSESE

Sec 34 Twp 21N Rge 23E LEMHI County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
20N	23E	3		0.2															0.2
				L 2															
21N	23E	34															1.0		1.0

Right Acre Limit: 1.0

POU Total Acres: 1.2

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 1.0 acre within the authorized place of use in a single irrigation season.
2. Rights 74-734A and 74-16256 when combined shall not exceed the irrigation of 1.2 acres.
3. The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.
4. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 74.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

Transfer No. 86951

WATER RIGHT NO. 74-734A
As Modified by Transfer No. 86951

CONDITIONS OF APPROVAL

6. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
7. This right does not grant any right-of-way or easement across the land of another.
8. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
10. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

WATER RIGHT NO. 74-16256**As Modified by Transfer No. 86951**

In accordance with the approval of Transfer No. 86951, Water Right No. 74-16256 is now described as follows:

Right Holder: ROHN R NELSON AND
LORI A NELSON
3800 E RUTH DR
WASILLA, AK 99654-7537

Priority Date: 4/1/1912

Source: WIMPEY CREEK

Tributary: LEMHI RIVER

BENEFICIAL USE

IRRIGATION

From

03/15

To

to 11/15

Diversion Rate

0.010 cfs

0.010 cfs

LOCATION OF POINT(S) OF DIVERSION

WIMPEY CREEK

NWSESE

Sec 34 Twp 21N Rge 23E LEMHI County

PLACE OF USE: IRRIGATION

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
20N	23E	3		0.2															0.2
				1.2															
21N	23E	34															1.0		1.0

Right Acre Limit: 0.2

POU Total Acres: 1.2

CONDITIONS OF APPROVAL

1. This right is limited to the irrigation of 0.2 acres within the authorized place of use in a single irrigation season.
2. Rights 74-734A and 74-16256 when combined shall not exceed the irrigation of 1.2 acres.
3. Actual diversion rate for this right is 0.003 cfs.
4. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 74.
5. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

Transfer No. 86951

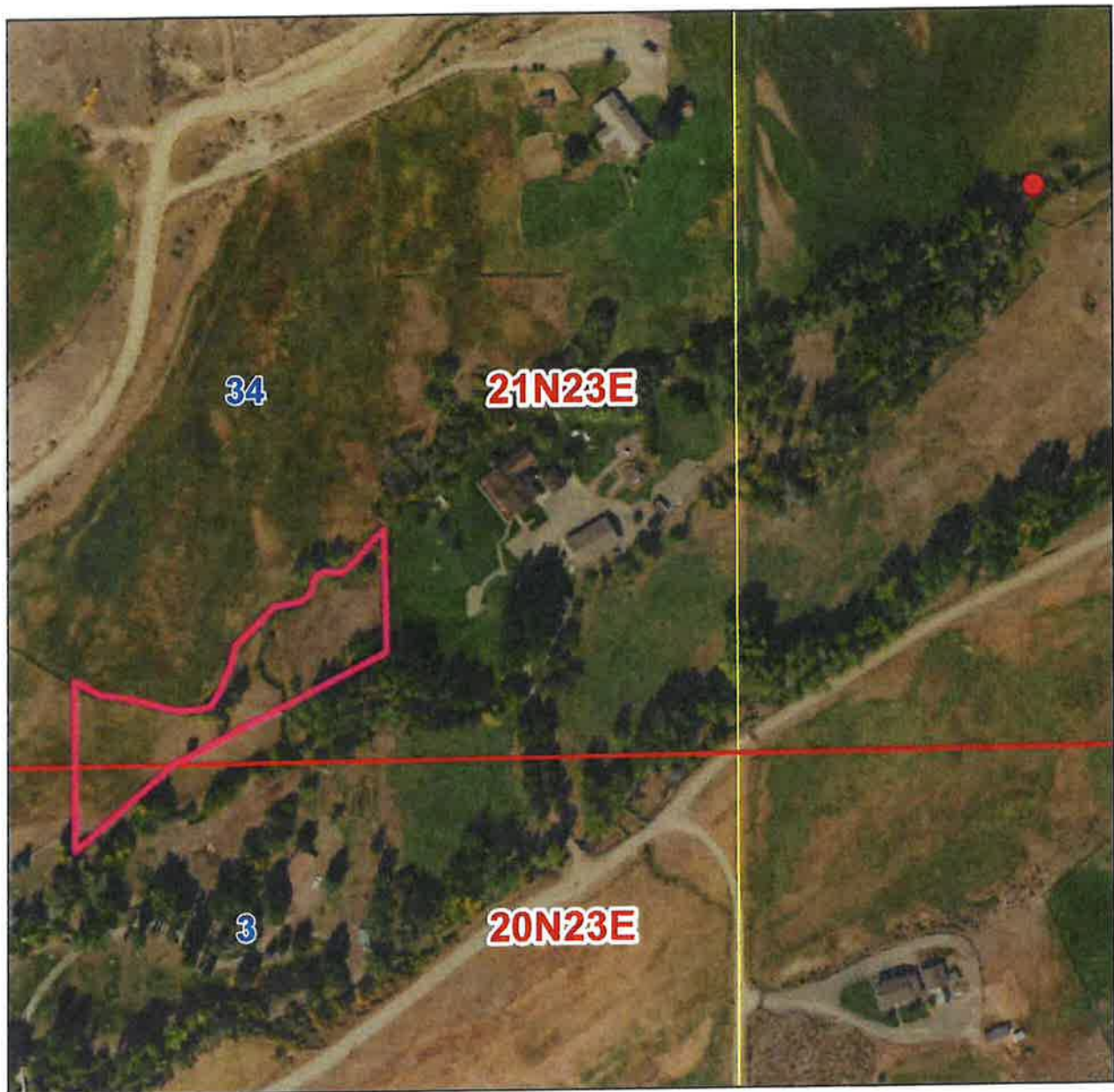
WATER RIGHT NO. 74-16256
As Modified by Transfer No. 86951

CONDITIONS OF APPROVAL

6. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
7. This right does not grant any right-of-way or easement across the land of another.
8. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.
9. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
10. Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

Attachment to Transfer Approval 86951

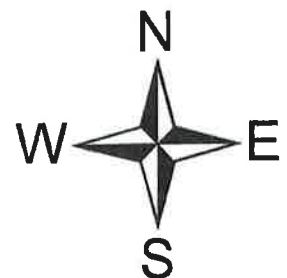
This map depicts the place of use boundary at the time of this transfer approval and is attached to the approval document solely for illustrative purposes.



Legend

- WR POD
- WR POU
- Township/Range
- Sections
- QQ

0 125 250 500 Feet



Date: 7/31/2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July 2023, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed to the following:

**Documents Served: Preliminary Order Approving Transfers
Transfer Approval 86942
Transfer Approval 86951**

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS, ID 83402
rharris@holdenlegal.com

FRED SNOOK
44 CEMETERY LN
SNOOK EVENTS CENTER, STE 12
SALMON, ID 83467
fsnook@custertel.net

CHIP GILES
GILES LAW GROUP
PO BOX 301
CONGRESS, AZ 85532
chip@gileslaw.org

Courtesy copy sent by email to:

Rohn & Lori Nelson	fullcurl@mtaonline.net
Gene Bair	pkbair@gmail.com
Kirk Klemmer	kirk047@centurytel.net
Fred Payne	fred@fpayne.com
Phil Moulton	prattcreekbranch71@yahoo.com



Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WATER RIGHTS ABSTRACT

TRIBUTARY TO: LEWIS RIVER

SOURCE: WINPEY CREEK

INDICATES TOTAL

RIGHT NUMBER	NAME AND ADDRESS	PRIORITY DATE	USE	USE PERIOD FROM TO	MAX AMOUNT MAX RATE	DIVERSION POINT	PLACE OF USE AND ACREAGE	BASIS FOR RIGHT
--------------	------------------	---------------	-----	--------------------	---------------------	-----------------	--------------------------	-----------------

74-0214

P/O: T21N R23E S15
S14 NW/4(12)
S10 NESE(43)

NAME(38)

SWNE(13)

SENE(23)

NESE(10)

NWSE(35)

SWNW(12)
NWSE(06)

SWSE(20)

SESE(38)

283 ACRES*

05-02-1919 IRRIGATION 03-15 11-15

2.80 CFS

NWSE S07 NESE(13) SESE(12) DECREE
T21N R24E S29 T21N R23E
SENE S05 NWSE(35) SWNW(20)
T21N R24E NESW(09)
S28 T21N R23E

74-0215

SWAHLEN, WILLIAM H.
SWAHLEN, MARIAN H.
RT. 1
SALMON

ID 83467

REMARKS: AC. IRR. = 88.3.
PT. OF INJECTION INTO EAST FK. BOHANNON CK.: SWNE, S12, T21N,
R23E & SESE, S6, T21N, R24E.
PT. OF REDIVERSION FROM EAST FK. BOHANNON CK.: NESW, S22, T21N,
R23E.
CHANGED FROM PROPOSED FINDING FILED WITH THE COURT PER
COURT-AUTHORIZED STIPULATION.

10-18-1921 IRRIGATION 03-15 11-15

.40 CFS

NESW S35 SESE(17) SWSE(20) DECREE
T21N R23E S34 T21N R23E

89 ACRES*

74-2183

KORNELL, WILLIAM
KORNELL, CHARLOTTE
P.O. BOX 521
SALMON

ID 83467

REMARKS: AC. IRR. = 37.0.

04-01-1930 IRRIGATION 03-15 11-15

.62 CFS

SESE S26 NESE(05) SWNE(25) DECREE
T21N R23E SESE(01)
S35 T21N R23E

37 ACRES*

74-0640

DILLON, ROBERT E.
DILLON, BETH
P.O. BOX 872
SALMON

ID 83467

04-01-1961 IRRIGATION 03-15 11-15

.77 CFS

SENE S05 SWNW(28) SENW(03) DECREE
T21N R24E NWSE(08)
NWSE S07 S12 T21N R23E
T21N R24E

31 ACRES*

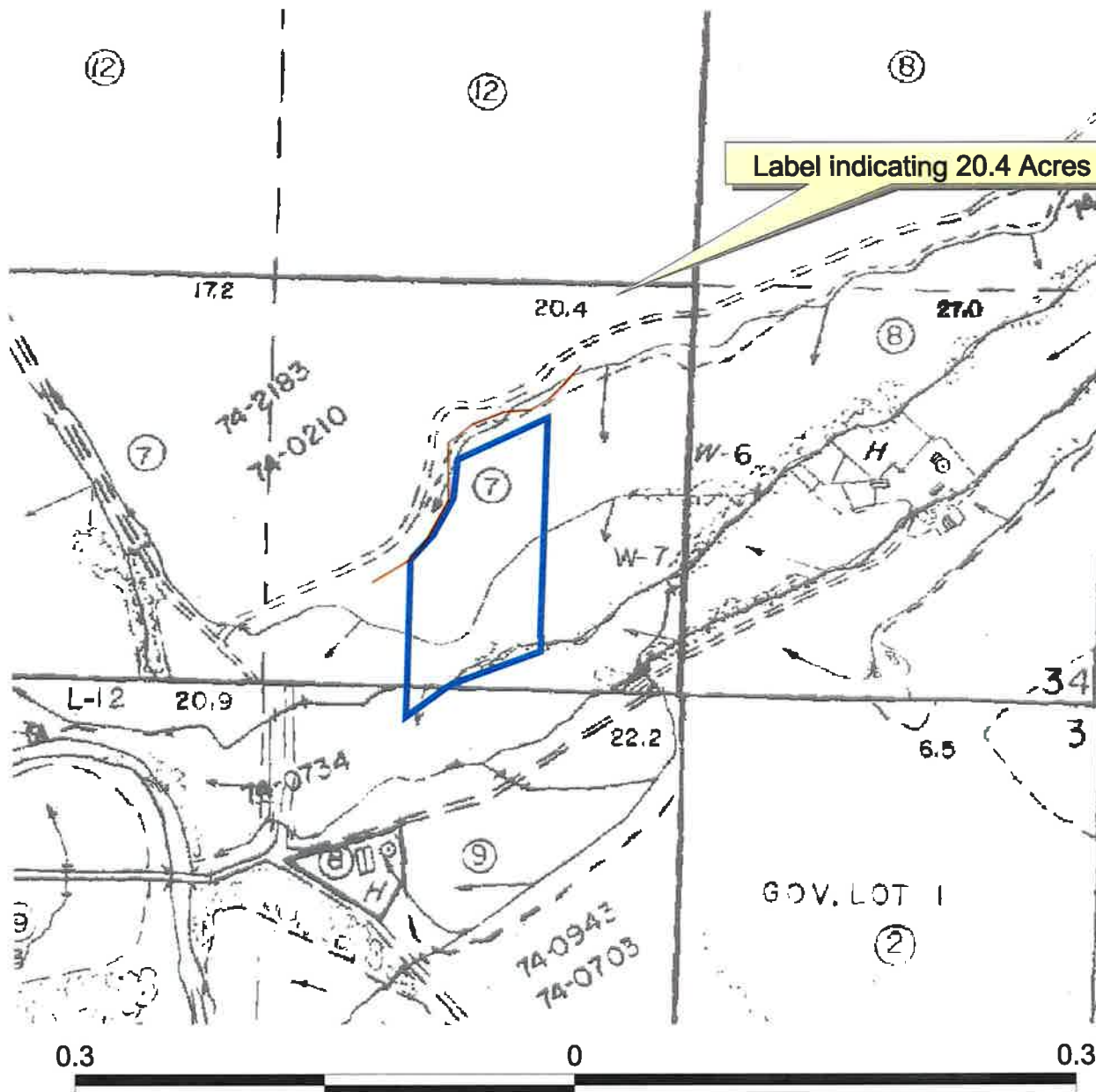
74-0724

SWAHLEN, WILLIAM H.
SWAHLEN, MARIAN H.
RT. 1
SALMON

ID 83467

REMARKS: PT. OF INJECTION INTO EAST FK. BOHANNON CK.: SWNE, S12, T21N,
R23E & 2 PTS. IN SESE, S6, T21N, R24E.
PT. OF REDIVERSION FROM EAST FK. BOHANNON CK.: SENW, S12, T21N,
R23E.
CHANGED FROM PROPOSED FINDING FILED WITH THE COURT PER
COURT-AUTHORIZED STIPULATION.

Exhibit
13



Label indicating 20.4 Acres Irrigation

 Road Snippet
 Approx. Proposed POU

RMEA Project 23-0010
Lori & Rohn Nelson Transfers



Map Review: Lemhi Adjudication Map