

COLLEGE OF BUSINESS AND ECONOMICS

Legal Constraints to Water Transfers in Idaho

by

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INTRODUCTION

Water is unlike any other form of property. A house, a car, or a coat may be bought and sold with little effect on other persons. But when water is sold, the property rights of others are affected. Downstream users may suffer a loss of return flow, and in certain circumstances may legally prevent the sale of water.

One irrigator's waste water may become another irrigator's valuable irrigation water which might later emerge as cold, pure spring water that a third household might use for domestic purposes. The law recognizes this hydrologic interdependence, and tries to protect all users. In its effort to protect, certain constraints to free water transfers are introduced, and these constraints reduce the efficiency of water use.

This paper will examine Idaho law in an effort to identify the particular legal constraints to efficient, economic transfers of water in Idaho.

A water supply bank has been proposed in the Idaho State Water Plan.¹ Such a bank might be able to combine the twin

¹The State Water Plan, Part Two, Policy 11, states: "A water supply bank should be established for the purpose of acquiring water rights or water entitlements from willing sellers for reallocation by sale or lease to other new or existing uses..."

The State Water Plan was adopted by the Second Regular Session of the 44th Idaho Legislature, (1978)

objectives of increasing efficiency and maintaining existing water rights. This paper will examine present legal constraints, and the W.S.B.'s role in overcoming those constraints. Legal jargon will be kept to a minimum, as the intended readership for this paper includes all persons and agencies interested in the efficient use of water.

LOSS OF WATER RIGHTS THROUGH NON-USE: ABANDONMENT AND FORFEITURE

Under Idaho law, water rights can be lost through abandonment or forfeiture.² A prospective participant in a W.S.B. program might fear that his own non-use of his full water right might result in its total or partial loss through abandonment or forfeiture.

Abandonment and forfeiture are two separate and distinct legal concepts. Abandonment consists of non-use accompanied by an intent to forsake or desert the water right.³ The water right is abandoned and lost the instant that the two elements, non-use and intent, take place.⁴ Intent is a private, mental operation known only to the person involved, but it may be proven through an examination of the conduct

²Idaho Code, Sec 42-222. Joyce v. Murphy Land and Irrigation Co. 35 Idaho 549, 208 Pac.241 (1922)

³Joyce v. Murphy, supra

⁴Hutchins, Wells: The Idaho Law of Water Rights, 5 Idaho Law Review 1 (1968)

of the individual.⁵ Nevertheless, the burden of proving an abandonment is on the party alleging that abandonment has occurred, and this burden is substantial.⁶ The alleging party must show, by clear and convincing evidence, that an intent to abandon was present, as well as non-use.⁷ The Idaho Supreme Court is not sympathetic to claims of abandonment, and has stated that "it requires very convincing and satisfactory proofs to support a forfeiture by abandonment of a real property right!"⁸

Because of the difficulty of proving an abandonment, and the judicial hostility to the concept, the risk of loss of a water right through a claim of abandonment is slight.

Forfeiture is an entirely different concept and presents different problems. The Idaho forfeiture statute is contained in sec.42-222 (2) of the Idaho Code:

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...

⁵Syster v. Hazzard 39 Idaho 580, 229 Pac. 1110 (1924)

⁶Carrington v. Crandair, 65 Idaho 525, 147 P.2d 1009 (1944)

⁷Carrington v. Crandair, supra. Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220, (1976)

⁸Perry v. Reynolds 63 Idaho 457, 122 P.2d 508 (1942)

This statute provides for the loss of water rights via statutory forfeiture if non-use continues for a period of 5 years. This loss of water rights would result even though the water rights holder never intended to give them up.⁹ The burden of proof in establishing a statutory forfeiture is again on the party claiming that a forfeiture has occurred,¹⁰ and the judicial hostility to abandonment extends also to forfeiture.¹¹ Nevertheless, the risk of loss of water rights by statutory forfeiture is a substantial danger.

In the recent (1976) case of Gilbert v. Smith,¹² the Idaho Supreme Court emphasized the distinction between abandonment and forfeiture, stating:

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. (citing cases) Such intent may be evidenced by non-use for a substantial period of time but mere non-use 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

⁹Hutchins, Wells.^{supra},note 4; Gilbert v. Smith, ^{supra} note 7.

¹⁰Perry v. Reynolds.^{supra},note 8

¹¹Application of Boyer 73 Idaho 152, 248 P.2d 540 (1952)

¹²^{Supra}, note 7

appropriator...(citing cases). The effect of this provision is that an appropriator who fails to apply his water right to a beneficial use for a continuous five years period is regarded as having lost all rights to the use of such water.¹³

A critical legal issue in a case in which it was alleged that participation in a W.S.B. had resulted in a loss of water rights through statutory forfeiture would be whether participation in the W.S.B. would be considered a beneficial use. If not, then after 5 years of participation in the W.S.B. the participant would be in danger of losing his water rights. This loss of water rights is not automatic, that is, it does not automatically occur at the end of 5 years of continuous non-use. The party alleging the loss by forfeiture would have to bring a court action to have the forfeiture judicially decreed. The decree would issue if the requirement of 5 years of continuous non-use had indeed occurred.

Loss of water rights through statutory forfeiture is a real danger, because the loss could occur without the user's intent, or even his awareness that the loss was occurring. The issue of beneficial use is closely related to forfeiture and will be discussed next.

¹³Supra. at page 738

BENEFICIAL USE

The beneficial use doctrine lies at the core of western water law. It is incorporated in Idaho's State Constitution in Article XV, sec 3:

The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, shall never be denied...

To possess a water right is not the same thing as to possess the water described in that right. Possession of a water right merely bestows a right to take up to a certain amount of water if the user can apply it to the beneficial use for which he has appropriated it.¹⁴ The Idaho Supreme Court has stated the rule as follows:

it is against the public policy of the state... for a water user to take from an irrigation canal more water, of that to which he is entitled, than is necessary for the irrigation of his land and for domestic purposes...¹⁵

Ownership of water is more complex than ownership of other forms of property. While water is flowing in a public source of supply, such as a stream, it belongs to the State of Idaho.¹⁶

¹⁴Bradshaw v. Milner Lowlift Irrigation District, 85 Idaho 528, 381 P. 2d 285 (1963)

¹⁵Coulson v. Aberdeen-Springfield Canal Co. 39 Idaho 320, @ 323, 227 Pac. 29 (1924)

¹⁶Coulson v. Aberdeen-Springfield Canal Co., supra, note 15
(continued next page)

When a water user diverts water from a public water supply into his own works, he becomes the owner of the water diverted, if he can apply the water to beneficial use.¹⁷

The purpose of the beneficial use doctrine is to encourage efficient use of water and discourage waste.¹⁸ However, the contrary result may occur. A farmer concerned over the possible loss of his water right through statutory forfeiture might be encouraged to use his total allotment, even though he did not need the full amount.¹⁹ A prospective participant in a W.S.B. would be discouraged from participation, if his participation could later held by a court to constitute a non-beneficial use, which would lead to forfeiture.²⁰

The Idaho Supreme Court has recently demonstrated a liberal view towards what constitutes a beneficial use of water.²¹ It ruled that a preservation of aesthetic values

The state's ownership is not ownership in the normal sense of the word, but rather a holding of title in trust for all the citizens of the State.

¹⁷Washington County Irrigation District v. Talboy, 55 Idaho 382, 43 P.2d 943 (1935)

¹⁸Twin Falls Land and Water Co. v. Twin Falls Canal Co. 7 Fed. Supp. 238 (D. Idaho, 1933) See Hutchins, Wells Water Rights Laws in the 19 western states, Volume 1 p. 12 (1971)

¹⁹See: A Program to Promote Irrigation Conservation in Idaho, Idaho State Department of Water Resources. (1977)

²⁰I.C. sec. 42-222(2)

²¹State Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440 530 P.2d 924 (1974)

and recreational opportunities was a beneficial use which supported an appropriation of water. Nevertheless, because beneficial use is critical to the maintenance of existing water rights, specific statutory recognition of W.S.B. activity as a beneficial use should be obtained before even a limited, experimental W.S.B. should attempt to function.

A state statute which declared W.S.B. activities to be a beneficial use might be attacked on grounds of unconstitutionality. The U.S. and Idaho State Constitutions contain provisions forbidding the taking of private property by the government without due process and just compensation.²² Since W.S.B. uses involve transfers of water, and transfers have effects, sometimes harmful, on return flows to downstream users, the downstream users adversely affected might argue that a state statute recognizing W.S.B. operations as a beneficial use violated their constitutional rights to due process and just compensation. However, so long as the statute authorizing W.S.B. operations contained provisions for the protection of those constitutional rights, the attack based on unconstitutionality would probably fail. Moreover, Idaho's constitution, Article 15, section 1 provides:

²²U.S. Constitution, Amendment 14 sec. 1.; Amendment 5; Idaho Constitution, Article 1, section 14; Article 15, sec. 4.

The use of all waters...originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.

This section could arguably provide the constitutional basis for legislation authorizing W.S.B. operations and declaring them to be a beneficial use.

So long as established property rights were recognized and respected, and any unavoidable private losses were compensated fairly and with due process, the constitutional attack upon enabling W.S.B. legislation would very likely fail.

CHANGES IN THE PURPOSE OF USE OF WATER

A W.S.B. contemplated by this research project would operate to effect water transfers only between agricultural users. The question of whether changes in the purpose of use of water are now legally permitted in Idaho is therefore not immediately relevant to our project. However, as our State continues to grow, the question of transferring agricultural water to domestic or industrial uses will inevitably present itself. As one writer pointed out:

In the absence of new sources of low cost water, ways must be found for supporting more people with a given quantity of fresh water if the growth of the West we anticipate is to be accommodated... The pattern of water use in the West must change. In 1955 almost 90% of the withdrawals in the eleven western states were for irrigation purposes and less than 9% were for industrial uses. In the future it seems certain that these proportions will be altered significantly in view of the fact that an acre foot of water dedicated to industrial use and possibly to recreation will provide more income and employment and thus support more people than an acre foot dedicated to irrigation.²³

Because this will be an important issue in the near future, and because a future state-wide W.S.B. might be involved in water transfers in which a change in the purpose of use of water might be considered desirable, the legal status of such transfers under present Idaho law will be examined.

There is no specific statutory authority either authorizing a change in the purpose of use of water, or forbidding such a change. The statutes controlling changes in the use of water are Idaho Code sections 42-108, and 42-222. These sections deal with changes in the point of diversion and place of use of water. They are silent regarding changes in the purpose of use of water.

This silence has been variously interpreted by different parties. One writer feels that such changes are not now legally permitted.²⁴

²³Fox, Water: Supply, Demand and The Law 32 Rocky Mt. Law Review 452, page 456 (1960)

²⁴A Program to Promote Irrigation Conservation In Idaho,
(continued next page)

An opposite opinion was expressed by a different authority.²⁵

In two other areas of water law,²⁶ the Idaho Supreme Court has ruled that the absence of statutory authority did not prohibit appropriate action. The first area of water law dealt with the control of ground waters. In the case of Silkey v. Tiegs²⁷ the Idaho Supreme Court reviewed a case in which the District Court had issued a decree which included a provision for the commissioner of reclamation to supervise the use of ground water. Under the statutes then existing, the department of reclamation had authority over "all of the streams to the canals and ditches diverting therefrom."²⁸ The Court admitted that this statute "does not expressly contemplate

State of Idaho Department of Water Resources,(1977), pp 24 states:

Under present Idaho statutes, only changes in the point of diversion or place of use can be made as there is no statutory authority for making a change in the nature of use. This means that if an irrigator wishes to sell his water right he may only sell it to another irrigator. This limitation on transferability may act as a disincentive to more efficient use by the irrigator to the detriment of the welfare of the State.

²⁵ Professor Douglas Grant, Professor of Law at the University of Idaho Law School, expressed the opinion that I.C. sec. 42-222 did not necessarily prohibit judicial authorization of changes in the purpose of use of water, in an interview in August, 1978.

²⁶ Control of ground waters and rotation of use. See discussion which follows.

²⁷ 51 Idaho 344, 357-58, 5 P. 2d 1049 (1931)

²⁸ C.S. sec 5606, cited in Silkey v. Tiegs, supra, note 27, @ page 357.

it's (the department) control of subterranean waters not in a defined stream."²⁹

The question faced by the court in Tiegs (supra) is analogous to our question of whether changes in the purpose of use of water are now legally permitted. There was no specific statutory authority then authorizing the department to control ground waters,³⁰ nor was there any specific statutory authority denying the department that authority. Under these circumstances, the court in Tiegs (supra) concluded that the department did in fact have authority to control ground water. The court said:

Nor does the fact that the legislature has not legislated on this particular branch of the subject tie the hands of the court here.³¹

The second area of water law dealt with rotation. In the case of State v. Twin Falls Canal Co.³² one of the issues presented to the Idaho Supreme Court was whether rotation in the use of water was legally permitted. There was then no specific statutory authority either permitting it or forbidding it.

²⁹Supra, note 27, @ page 357

³⁰This authority was provided in 1963 and 1967 when additions to the Idaho Code sec 42-2239 were made. See Hutchins, supra, note 4.

³¹Supra, note 27, @ page 357

³²21 Idaho 410, 121 Pac.1039 (1911)

The court explained rotation as follows:

by concentrating the available supply in half or a third, or a less fraction of the canals, and giving the whole of it to the section whose turn it is to take water, the irrigation is made easy in consequence of the higher water levels produced in the canals... The crops require water at certain times and not continuously. It is better for them, as soon as they have received a watering, that the water supply should be shut off...³³

The court in State v. Twin Falls Canal Co. (supra) concluded that even though there was "no statute providing for use by rotation"³⁴, the practice was commendable and legally permissible.

In both Tiegs and Twin Falls Canal Co. (supra) the Idaho Supreme Court was faced with an absence of specific statutory authority either permitting or forbidding a practice which the court found to be desirable. If called upon to decide the question of the legality of changing the purpose of use of water today, the court might rule that it is likewise permissible, if it was persuaded that such changes were likewise desirable.

The foregoing is not meant as an argument in favor of the proposition that changes in the purpose of use of water are now legally permitted in Idaho or that they should be permitted. It is intended merely to show that substantial uncertainty

³³Supra, note 32, @ page 442

³⁴Supra, note 32, @ page 443

exists over this important question. A pronouncement by the legislature resolving this uncertainty would certainly be welcome.

IRRIGATION DISTRICTS

Irrigation districts are created and regulated by state statutes. Under the provisions of Idaho Code sections 43-304 and 43-322, the directors and other officers of an irrigation district are limited in their actions. Any act done by the officials of an irrigation district that is in excess of the express or implied provisions of the Code, is ultra vires (beyond their authority and therefore void).³⁵

As we have seen, irrigation districts must strictly comply with state laws regulating them. One of these laws is I.C. sec 43-316, which provides that all property acquired by an irrigation district, including water rights, is vested in the district and held by the district in trust for the uses set forth in the Code. The Code does not authorize transfers of irrigation district water for use outside of the district.

³⁵ Jensen v. Boise- Kunna Irrigation District, 75 Idaho 133, 269 P. 2d 755 (1954)

Applying the above reasoning , the Idaho Supreme Court has ruled that a contract entered into by an irrigation district which bound the district to supply its waters to a customer outside of the district was ultra vires , and void.³⁶

This same rule has been followed in the more recent case of Jones v. Big Lost River Irrigation District.³⁷

Justice Donaldson, writing the opinion of the Idaho Supreme Court in that case said:

Supporting our concluding that a contract, which would obligate an irrigation district to deliver any dedicated water for use outside the district in ultra vires and void, and that estoppel can not be invoked in aid of such a contract, are the following authorities: Jenison v. Redfield 149 Cal. 500, 87 p.62; Maclay v. Missoula Irrigation District, 90 Mont. 344, 3 p. 2d 286; Koch v. Colvin, 110 Mont. 594, 105 p.wd 334 ...(citing cases)³⁸

As we have seen, Idaho case law prohibits transfers of dedicated irrigation district water to a user outside of the of the district. The only exception involves surplus or waste waters, which may be transferred outside the district, so long as they are not needed within the district.³⁹

³⁶ Jensen v. Boise Kunna Irrigation District, supra, note 35, @ page 141

³⁷ 93 Idaho 227, 459 .2d 1009 (1969)

³⁸ Supra, note 37, at page 230

³⁹ Supra, note 37 at page 229

This is a legal constraint of the first magnitude. Inter-district transfers of surplus or waste water are permitted, but all other transfers are prohibited. An inter-district transfer of surplus or waste water would be likely to occur only in a year of abundant supply. In a draught, there would probably be little or no surplus or waste available. And it is precisely under draught conditions that transfers assume their greater importance, because if water is limited, it should be applied where it is needed most. Under present law, high value crops in one irrigation district might be forced to wither and die while in an adjacent irrigation district low value crops enjoy plentiful water.

Since the constraint in this particular situation was legislatively created, it could as easily be legislatively removed. But until its removal it presents a serious obstacle to effective and efficient water transfers, whether W.S.B. related or otherwise.

THE FEDERAL PROBLEM

A situation is likely to come about where a farmer has, (or could have with improved efficiency of use), surplus water which he would like to sell. However, if the water-course from which he draws his water is also drawn upon by federally owned land, a question of the federal government's water rights pre-

sents itself. What makes this matter difficult is that the full extent of the federal government's water rights are, in most cases, undetermined. If the federal government has a prior right which it chooses to exercise, our farmer may find that he has no surplus water left to market; instead, he might even find himself going to the W.S.B. as a buyer, not as a seller. Uncertainty as to whether he actually does have surplus water to market might deter a prospective participant from transferring his water. The magnitude of this problem can be appreciated when we realize that fully 61% of western natural runoff occurs on federal lands.⁴⁰ 64% of Idaho's land area is federally owned.⁴¹

This problem of uncertainty results from the Reservation Doctrine, also called the Winters doctrine. In 1908 the U.S. Supreme Court decided the case of Winters v. U.S.⁴² Winters had appropriated water from the Milk River in Montana. Downstream from Winters was an Indian Reservation that had been created prior to Winters' appropriation. When the Federal Government created the reservation, no specific appropriation of water was made. Nevertheless, the U.S. Supreme Court ruled that Congress must have intended to reserve water for use on the reservation, and it granted the government an appropriation

⁴⁰Public Land Law Review Commission, One Third of the Nation's Land, 141 (1970)

⁴¹Idaho State Water Plan- Part Two, supra, note 1.

⁴²207 U.S. 564 (1908)

priority date dating from the creation of the Indian reservation. Winters priority date was later, and he left with inadequate water to meet his needs.⁴³

From 1908 to 1963 the reservation doctrine was applied only to Indian lands. However, in 1963, the case of Arizona v. California⁴⁴ expanded the doctrine to apply it to any federally owned land. In the recent case of Cappaert v. U.S.⁴⁵ the U.S. Supreme Court said:

this court has long held that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the U.S. acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators...the doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams⁴⁶ (emphasis added)

The reason why the reservation doctrine is a source of uncertainty is that we are often left guessing as to what the original purpose of the reservation was. Both Arizona v. California⁴⁷ and Cappaert v. U.S.⁴⁸ rely on the government's

⁴³Water and Watercourses-Limiting the Reservation Doctrine
13 Land and Water Law Review 501 (1978)

⁴⁴373 U.S. 546 (1963)

⁴⁵426 U.S. 128, (1976)

⁴⁶Supra, note 45

⁴⁷Supra, note 44

⁴⁸Supra, note 45

intended purpose at the time of the original making of the reservation as the controlling factor. If the Federal Government's purpose at the time of the creation of the federal enclave included use of water, then the federal government possesses water rights sufficient to meet those needs, generally with very early priority dates. Further complicating the problem is that, for the most part, these federal water rights are unrecorded and unquantified.⁴⁹ These unrecorded rights have been called "Wild Cards"⁵⁰ and have a recognized deterrent effect on private projects requiring water.⁵¹

A W.S.B. operating near federally owned lands will have to take these "wild cards" into consideration. The Federal Government might be willing to cooperate with a state W.S.B.

⁴⁹Supra, note 43

⁵⁰Trelease, Federal-State Relations in Water Law, (1971) at p. 160:

Rights created by the Reservation Doctrine... are wild cards that may be played at any time, blank checks that may be filled in for any amount, or that may never be cashed. They deter other uses and cause losses of benefits, and they may encourage or permit federal uses that are financially possible with the money at hand but economically undesirable because more is lost than is gained.

⁵¹National Water Commission, Water Policies for the Future 469 (1973)

and quantify its reservation doctrine rights, as a gesture of federal-state cooperation in increasing the efficient use of our nation's water.

RETURN FLOW

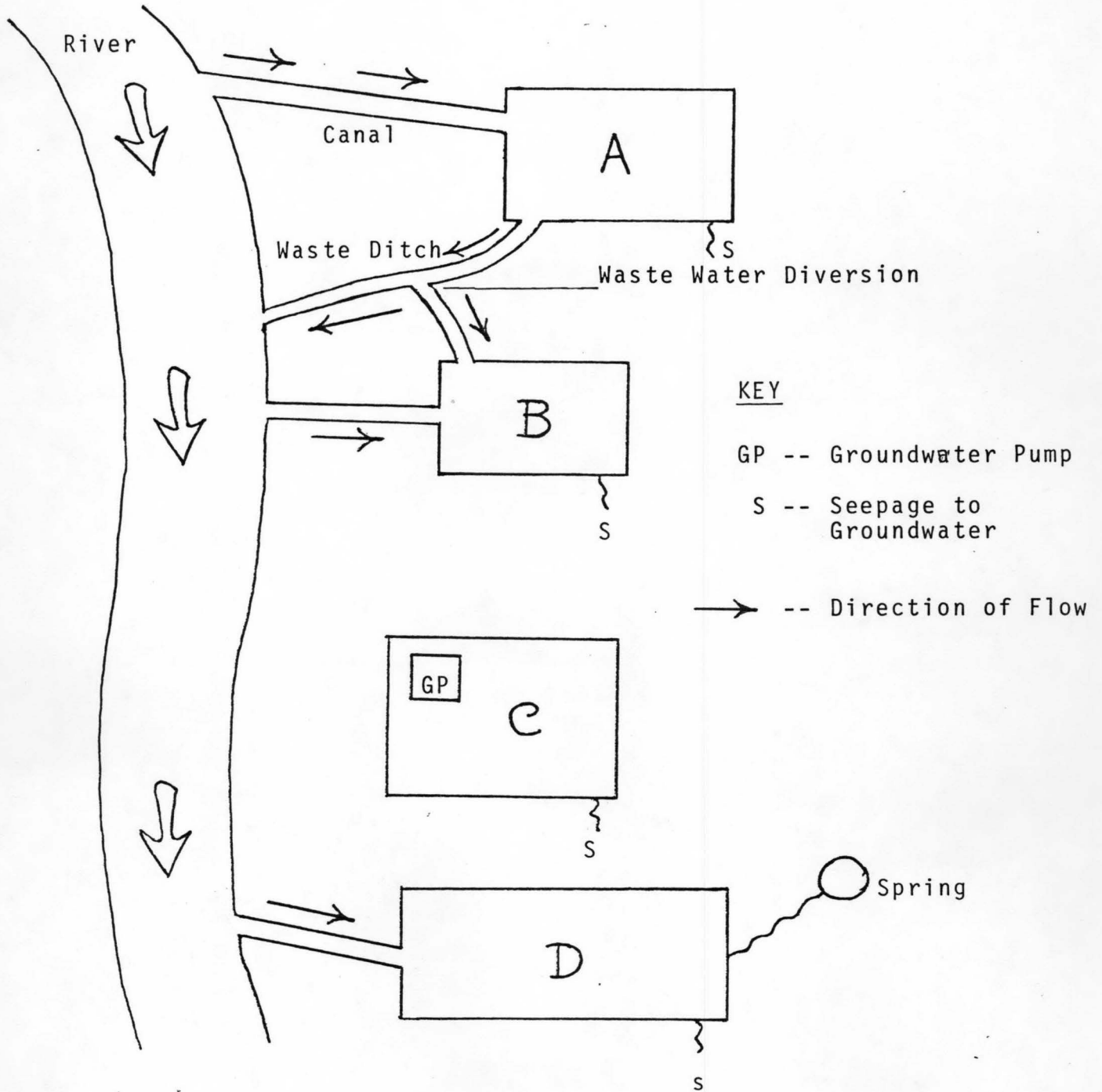
The problem of return flow is the knottiest problem that a W.S.B. will face. As Dean Trelease has succinctly stated:

The principal difficulty in attempting to treat a water right as a salable property is that many water uses are subject to a peculiar interdependency. Since the same water can be used and reused by several persons, all may have water rights that entitled them to receive the same molecules of water. If the sale and transfer of one person's water right will result in making those molecules unavailable to another who also has a right to them, the first user has sold the latter's water as well as his own.⁵²

The interdependence of water users is illustrated by Figure 1. Four irrigators, A,B,C, and D are described. A,B, and D take their water from the surface flow of the river, while C pumps from a ground water supply that is hydrologically related to the river. As we see, B uses some return flow from A, and also some water from A's waste ditch. C uses water which comes, in part, from seepage from A and B. D uses return flow from A, and also spring flow

⁵²Trelease, Cases and Materials on Water Law, 2d edition at page 205.

FIGURE 1. RETURN FLOWS



Source: A Program to Promote Irrigation Conservation in Idaho: State of Idaho Department of Water Resources, 1977. At page 6

that comes, in part, from seepage from A, B, and C. If, for example, A improved his efficiency and as a result returned less waste water and seepage to the hydro system, B, C, and D might suffer.

Let us assume now that A. wishes to sell his water to D. D may be growing a high value crop, while A may be growing a low value crop. If water is in short supply, it would make economic sense to apply the available water to its most beneficial use.⁵³ Idaho law permits a change in the point of diversion or place of use of water.⁵⁴ But the statutes permitting such changes also protect the other water users affected, B and C.⁵⁵

⁵³Trelease, The Model Water Code, The Wise Administrator, and the Goddam Bureaucrat, 14 Nat. Resources J. 207-29 (1974)

⁵⁴I.C. sec. 42-222 (1); I.C. sec. 42-108: "the person entitled to the use of water...may.. transfer the same to other lands, if the water rights of others are not injured by such change.."
The Idaho Supreme Court has said:"One of the valuable incidents of this property right [water] of which the owner cannot be deprived is the right to use it where he will and to change its place of use, provided always that by such use or change in the place of use the rights of others are not adversely affected." First Security Bank of Blackfoot v. State, 49 Idaho 740, @722, 291 Pac 1064 (1930) This same legal rule exists with respect to ground water. Noh v. Stoner 53 Idaho 651, 26 P. 2d 112 (1933)

⁵⁵Even if B and C hold appropriative water rights that (con't)

The Director of the Department of Water Resources must determine whether B and C will be harmed. He may approve the change in whole, in part, or upon conditions. The statute⁵⁶ does not provide for compensation to be paid to B and C for their losses.⁵⁷ Rather, the director is required to deny the change if losses to B and C will result. While the statutes do not provide for compensation, nothing prevents A, B, C, and D from coming to a private agreement where, for a mutually agreed upon price, B and C would withdraw their objections, thus allowing the change to take place. If such a private agreement could be reached, the scarce water would be allocated to its highest use, and all incidental losses would be fairly compensated.

Sales or rentals of water are today taking place using the above procedure.

are junior to A's, they have a vested right as against A to insist upon a continuance of the conditions that existed at the time their later appropriations were made, provided that a change would injure them. Bennett v. Nourse, 22 Idaho 249 125 Pac. 1038 (1912). This rule was later expanded to include a vested right to the maintenance of subsequent conditions, in 47 Idaho 497, 277 Pac. 550 (1929)

⁵⁶Supra note 54

⁵⁷Recommendation 7-28 of the report of the National Water Commission, 1973, recommends that the director be allowed to determine the value of B and C's losses, and award them compensation, in cases where the new use of water is substantially greater than the old use.

However, this procedure suffers from two flaws, which reduce its efficiency. First, it is a slow and expensive process; and second, difficult physical problems of identifying return flows are present. A must come to an agreement with D on price, quantity, and time of delivery. An attorney may be needed to draw up a binding contract. Then A must go to the Department of Water Resources and apply for approval for the change. A filing fee of \$15 to 35 must be paid. If A lacks the expertise to file the application, he may have to hire an attorney to do it for him. The Director must then advertise A's application for two weeks in a local newspaper. B and C must respond to this advertisement and file their notices of protest. They may need to hire lawyers to do this for them. Then the Director will have to schedule a hearing allowing time for all parties to prepare their cases. The Director must also notify the appropriate watermaster and get his recommendation regarding the change. The Director then holds a hearing, which is similar to a trial, and renders a decision. If the director denies A's application, A still has 60 days in which to file an appeal to the District Court. If the Director approves A's application, B or C have 60 days to appeal that decision. If an appeal is made, the District Court will start from scratch, disregarding all the proceedings

that took place earlier, and hear the case anew.⁵⁸ Then the case will be treated like any other civil matter. If an appeal is taken from the district court's decision, it could be years before the matter is finally resolved. If D happens to own valuable grapevines that took years to develop but which are dying because of a drought, he would probably feel that the procedure was too slow.

As we have seen, present Idaho law and procedure allows a water user to block another water user's proposed change of point of diversion and place of use of water, if that change would deprive other water users of return flow. This is a substantial right, but it is not absolute. One limitation upon this right is that the injury complained of must be substantial, that is, "not merely a fanciful injury but a real and actual injury!"⁵⁹ Such a real injury would result if there were an increase in the burden on the stream, or a decrease in the volume of water flowing in the stream.⁶⁰

⁵⁸42-222(3), appeal de novo

⁵⁹Beecher v. Cassia Cr. Irr. Co., 66 Idaho 1, 154 P.2d 507 (1944). To prevent a change in the point of diversion the injury must be to a water right, Colthorp v. Mountain Home Irrigation District, 66 Idaho 173, 157 P. 2d 1005 (1945)

⁶⁰Wood River Power Co. v. Arkoosh, 37 Idaho 348, 215 Pac. 975 (1923); Crockett v. Jones, 42 Idaho 652, 249 Pac. 483 (1926)

Another limitation on a downstream user's right to return flow is the rule that an upstream user cannot be required to continue wasting water.⁶¹ In Colthrop v. Mountain Home Irrigation District,⁶² the Idaho Supreme Court ruled that where the upstream user had been wasting 75% of the water applied to his fields, the downstream user, who had been appropriating this waste water, could not prevent the upstream user from changing his water use and discontinuing the waste. The Idaho Supreme Court followed the rule expressed in the Colthrop case (supra) in Application of Boyer,⁶³ and said:

The rule that a junior appropriator has the right to a continuation of stream conditions as they were at the time he made his appropriation could not compel respondent [upstream user] to continue to waste his water...⁶⁴

To sum up the foregoing, Idaho's present statutory scheme is somewhat cumbersome and slow, but it does operate to protect the interests of all water users. Downstream users can^{often} block

⁶¹Jones v. Big Lost River Irrigation District, 93 Idaho 227, 459 P. 2d 1009 (1969).

⁶²66 Idaho 172, 157 P.2d 1005 (1945)

⁶³73 Idaho 152, 248 P. 2d 540 (1952).

⁶⁴Supra, Note 63, @ page 162.

an upstream user's attempt to change his use of his water, unless the upstream user's change is to reduce or eliminate waste. And the harm that downstream users complain of must be real and substantial.

Let us now turn to the second basic problem with current Idaho law and procedure: The physical problem of determining and quantifying the return flow itself. Subterranean flows are difficult to identify, and waters percolating through the earth might take undermined amounts of time to affect other flows. This presents a problem to a prospective participant in a W.S.B., because the burden of proof is upon him; he must show that the change will not interfere with the rights of others.⁶⁵ An upstream water user seeking a change was unable to meet this burden of proof in Cartier v. Buck,⁶⁶ and therefore was denied the right to make a change. Let us examine this burden more closely.⁶⁷

⁶⁵Federal Land Bank of Spokane v. Union Central Life Insurance Co., 54 Idaho 161 29 P.2d 1009 (1934)

⁶⁶9 Idaho 571, 75 Pac. 612 (1904).

⁶⁷Burdens of proof differ in their size. In most civil cases, the burden of proof is to a preponderance, meaning just barely more proof than the opposition has mustered; numerically perhaps the equivalent of proof to a 51% degree of likelihood. Criminal cases require proof beyond a reasonable doubt; numerically perhaps the equivalent of proof to a 98% degree of likelihood. See McCormick, Handbook of the Law of Evidence, @ p. 676 (1954) for an expanded discussion of burdens of proof.

The Idaho Supreme Court has repeatedly ruled that an action (lawsuit) to ascertain, determine, and decree the extent and priority of an appropriative water right partakes of the nature of an action to quiet title to real estate.⁶⁸ Such an action is civil in nature, and so the burden of proof is to a preponderance of the evidence.

So while our prospective W.S.B. seller must prove that other users will not be harmed, he need not prove this absolutely or conclusively, but merely to the degree that it is more likely than not that no harm to other users will result. Further assisting our prospective W.S.B. seller is the case of United States v. Haga.⁶⁹ In that case an important issue was whether a downstream supply consisted of one's party's return flow, and what the extent of that return flow might be. Regarding the technical problem of ascertaining the precise amount of return flow, the court said:

Identification of the water to which it is thus found to be entitled is necessarily attended with a measure of uncertainty, but an approximation is thought to be practicable.⁷⁰ (emphasis added)

⁶⁸Taylor v. Hulett, 15 Idaho 265 97 Pac. 37 (1908); Harris v. Chapman, 51 Idaho 283, 5 P.2d 733 (1931); Olson v. Bedke, 97 Idaho 825, 555 P.2d 156 (1976).

⁶⁹276 Fed. 41 (D. Idaho 1921)

⁷⁰Note 69, supra, @ page 48

The court then went on to decree water rights based upon those practicable approximation.

Judge Dietrich's practical approach in the Haga case⁷¹ is consistent with the approach taken by courts generally, when faced with incomplete evidence in civil cases.⁷²

We may therefore conclude that the physical problem of determining and quantifying the return flow is serious but not insurmountable. At present this determination is being made by the Director, and by District Court Judges.

A highly trained and apecialized department within a W.S.B. would have to be developed, in order to employ the most advanced technology is making determinations of return flows. There is every reason to believe that W.S.B. personnel with the requisite expertise could do at least as well as current fact finders in this area.

WATER CONSERVATION: WHAT TO DO WITH CONSERVED WATER

As we have seen in the previous section, downstream users, even those with subordinate appropriative priorities,

⁷¹Supra, note 69

⁷²See for example Bradford v. Simpson, 98 Idaho 830, 573 p.2d 149 (1978) where in spite of conflicting and uncertain evidence, defendant was found liable for flood damage.

can often block a proposed change in the use of water by an upstream appropriator, if the change involves a change in the point of diversion or place of use of water, and if they will be injured by the proposed change. Viewed in terms of the right to return flow, B, C, and D in figure 1 have a legally vested right to a continuance of their customary return flow as opposed to A's restricted right⁷³ to change his place of use.

However, if A should decide to improve his water equipment for example, by ditch lining, or by substituting sprinkler for ditch irrigation, C, B, and D's return flow from A's land will be diminished, but the Idaho Supreme Court has clearly and repeatedly state that B,C, and D would have no legal right to insist on A's resuming his more wasteful, earlier practices.⁷⁴

Let us assume that A has a water right to 1000 acre-feet annually, and that in 1977 he used all of this water in growing crops. He calculates that by improving his water system he can cut his use to 500 acre feet annually, and maintain the same

⁷³Restricted by I.C. 42-108 and 42-222, conditioning a change in place of use on no injury to other users.

⁷⁴Supra note 61

crop yields as in 1977. A major consideration in deciding whether to proceed with this water saving plan is whether he will be able to make use of the 500 acre feet saved. His options are:

1. Make no use of the water saved
2. Make use of the water saved to irrigate more acres
3. Sell the water (permanently) to another user
4. Rent the water to another user for one season
5. Use the water for other than agricultural use
6. Switch to a more water intensive crop
7. Store the water

We will discuss these options in turn.

Option 1) Make no use of the water saved. Since B,C, and D can not compel A to use his full appropriative right of 1000 acre feet, A is free to cut his use to 500 acre feet without interference from B,C, or D. However, if he continues for 5 years to use only 500 acre feet annually, he risks loss by statutory forfeiture,⁷⁵ resulting in a total loss to A of the water saved. The forfeiture statute require 5 continuous years of non-use, however, and A might preserve his full 1000 acre feet water right by every fifth year reverting to a more wasteful irrigation method and beneficially applying his full 1000 acre feet. It would be a remarkable spectacle to see

⁷⁵Idaho Code sec. 42-222 (2)

modern, expensive irrigation equipment sitting idle every fifth year, and primitive methods reverted to, in order to satisfy a legal requirement. Such a turn of events would likely evoke dumb amazement by the public at the curious working of our legal system.⁷⁶

Option 2) Make use of the water saved to irrigate more acres. A might apply the saved 500 acre feet to new fields. This would involve a change of the place of use of water, and is therefore controlled by Idaho Code sec 42-222 and 42-108. As we have seen, the no injury test contained in those statutes could block A's plans here. Moreover, A must apply to the Department of Water Resources for a permit to change his place of use and irrigate additional acreage. This would probably be considered an enlargement of his water right, and denied even if other users are not directly harmed. This is still a viable alternative, but considerable uncertainty surrounds it. As a practical matter, A might simply by-pass the permit requirement and go ahead and irrigate new fields without

⁷⁶And, this device might fail, for B, C, or D could claim that A's relatively wasteful use of 1000 acre feet in the 5th year really constituted a waste of 500 acre feet; thus A's beneficial use was perhaps limited to 500 acre feet for 5 consecutive years, and he could lose 500 acre feet through statutory forfeiture.

permission. He would be in violation of law, but enforcement is unlikely unless someone, probably a neighbor, informs on him. And his neighbor is not likely to be an informer if the neighbor is also doing the same thing, or contemplating it. So perhaps the option of applying the 500 acre feet of water saved to additional acreage is more attractive than it is legally entitled to be.

Option 3) Sell the water, permanently, to another user. If A does not have (or can't acquire) additional acreage to irrigate, then a permanent sale of the 500 acre feet saved might defray part of the cost of installing the water saving equipment. Sale of a water right apart from the land is a recognized right in Idaho,⁷⁷ but the no injury test will still

⁷⁷The right to convey water rights apart from the land to which it was originally appurtenant is a recognized right in Idaho. In In re. Robinson 61 Idaho 462, @ 469, 103 P 2d 693 (1940), the Idaho Supreme Court said:

a water right is real property and may be sold or transferred separate and apart from the land on which it is used and may be made appurtenant to other lands so long as such transfer does not injure other appropriators.

Some other western states do not permit such bifurcation of rights. See Water Saved or Water Lost, 11 Land and Water Law Review 435 (1976)

have to be met. However, since the sale involves a permanent grant, the dollar amount might well justify the cumbersome and probably expensive procedure required. If A can find a buyer willing to pay a substantial price, this option could be a desirable choice under present Idaho law.

Option 4) Rent the water to another user for one season. Again, the constraint of no-injury to other users will have to be met. This option appears less attractive, because all of the difficulty and expense involved in obtaining Department approval will accrue to only one irrigation season. Perhaps in a draught year a one season rental might bring a high enough price to justify the effort and expense, but in an ordinary year this is less likely. In any event, the high transaction costs involved will certainly discourage A from trying to rent out his 500 acre feet saved on any short term basis.

Option 5) Use the water for other than agricultural use. A might consider, for example, building a PepsiCola bottling plant on his land, or some other business which requires large amounts of water to operate. This is an interesting option. Idaho law requires department approval for a change in point of diversion or place of use of water. A would not be changing his point of diversion; he would not be changing his place of use. Idaho

law is unclear as to whether a change in purpose of use is legally permissible.⁷⁸ B, C, and D could not complain of the loss of their return flow, because A would still be applying his 1000 acre feet to beneficial use. Industrial use is a recognized beneficial use,⁷⁹ and A had not changed his point of diversion or place of use. The chief drawback to this option is the uncertainty involved, and whatever practical problems may exist in installing an appropriate non agricultural use on the premises.

Option 6) Switch to a more water intensive crop. Of course, the only incentive to switch is if the more water intensive crop is also a higher value crop. If it is, then little stands in A's way. The Idaho Supreme Court has made it clear that a farmer may change the character of crops grown at will.⁸⁰ The court said:

Users of water may change the character of crops grown at will from those that require much water to those that require little water and vice versa,

⁷⁸See discussion entitled "Changes in the Purpose of Use of Water," supra, p. 9.

⁷⁹Idaho Constitution, Article XV sec.3

⁸⁰Muir v. Allison, 33 Idaho 146, 191 Pac. 206 (1920);
In re. Robinson, supra, note 77

and the extent of a user's permanent right may not be limited by the character of crops raised unless the soil is adapted only to one or to a limited kind of crops.⁸¹

If A elects this option, B,C, and D would lose return flow but they could not prevent A from growing his water intensive crop, and they would not be entitled to compensation for their loss. In view of the difficulties present with options 1-5, this last option has several attractions. No Department approval or permit is required; no loss of water rights through forfeiture threatens; no transaction costs accrue; no large investment in a non agricultural business is necessary.

Option 7) Store the saved water. Both Idaho statutory⁸² and case law⁸³ recognize storage as a beneficial use of water. However, the amount of stored water must bear a reasonable relation to the user's needs,⁸⁴ and may be limited to a maximum of 5 acre feet of stored water per acre of land to be irrigated,⁸⁵

⁸¹ Muir v. Allison, supra @159

⁸² Idaho Code sec. 42-1737, 42-202, 42-801, 42-802

⁸³ Payette Lakes Protective Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948), Anderson v. Dewey 82 Idaho 173, 350 P. 2d 734 (1960)

⁸⁴ I.C. sec 42-1737

⁸⁵ I.C. sec 42-202

where flood or winter flow waters are involved. Several problems accrue with this option. A will have to obtain a water storage right from the Department of Water Resources. This will not be granted unless it appears that the stored water will be beneficially used. Even if A obtains the storage permit, he will have to secure available space in a storage reservoir. A storage reservoir may not be available, or, if it is available, it might already be fully utilized. The no-injury test will have to be met,⁸⁶ so if B,C,and D suffer loss of return flow they could prevent A from storing his saved water.

In spite of these difficulties, storage of saved water is an attractive option in areas which are faced with repeated shortages.

The above seven options represent A's alternative uses for his saved water, and the legal constraints facing each. It should be noted that several of these options could be combined. For example, combining options 4 and 7, A could rent 300 acre feet and store 200 acre feet.

Reviewing the above seven options, we see that none is entirely satisfactory. Making no use of the water saved could result in a loss of water rights through statutory

⁸⁶Idaho Code sec.42-222

forfeiture. Irrigating more acres is likely to be viewed as an enlargement of the water right, and prohibited by the Department. A permanent sale involves substantial transaction costs and could leave A without water that he might need at a future time. Renting the saved water might not be economically practical in view of the high transaction costs and the relatively smaller amounts of income produced. Using the saved water for a non agricultural use might be legally prohibited and impractical. Switching to a more water intensive crop might not be feasible or more profitable. Storing the saved water might be impossible, if no storage space is available, and is limited by other constraints.

The unavailability of an efficient, cheap and quick method for A to profitably dispose of his saved water might very well deter him from investing in the expensive equipment that he must buy in order to create the water saving.

CONCLUSION

Legal and institutional constraints now stand in the way of efficient water transfers in Idaho. One of these, the prohibition of inter-district transfers, absolutely prevents certain transfers from taking place, but most merely discourage transfers through cumbersome bureaucratic procedures,

high transaction costs, and legal uncertainty.

It is likely that in some cases water conserving projects are being rejected by irrigators because of an absence of a convenient, effective means of marketing the conserved water.

It is possible that a W.S.B. would overcome these obstacles to freer water transfers. Transfers will cause certain losses of return flow, but the technical problems of determining and equitably compensating those affected can be overcome. This latter will be a difficult challenge, perhaps the greatest that the W.S.B. will have to meet. Due process and just compensation for any injury to established water rights are absolute essentials if the W.S.B. is to operate within constitutional guidelines.

No one will ever know whether the W.S.B. concept is merely a fanciful idea, or whether it is a practical and useful solution to basic transfer problems, until it is tried. A small scale, experimental W.S.B. should be set up between several irrigation districts, to test the concept.

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