

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

IN THE MATTER OF PETITION TO)
CORRECT LICENSE NO. 02-02209)
IN THE NAME OF COTTONWOOD)
CANAL COMPANY)
_____)

IN THE MATTER OF CROSS)
PETITION TO CORRECT AND)
PETITION TO CHANGE OWNERSHIP)
OF LICENSE NO. 02-02209 IN THE)
NAME OF BLACK MESA FARMS, LLC)
_____)

**FINAL ORDER GRANTING
PETITIONS TO CORRECT LICENSE
NO. 02-02209; INTERLOCUTORY
ORDER REGARDING OWNERSHIP
AND SETTING SCHEDULING
CONFERENCE**

INTRODUCTION

This matter came before the Idaho Department of Water Resources (“IDWR” or “Department”) on a *Petition to Correct License* (“Petition”) dated October 31, 2000, filed by Cottonwood Canal Co. (“Cottonwood”). The Petition sought to amend water right license no. 02-02209, issued on February 11, 1970, to include 400 additional acres, 8.0 cfs and 1,338.95 afa of water allegedly excluded from the license in error. Black Mesa Farms LLC (“Black Mesa”) filed a *Cross-Petition to Correct License and Petition to Change Ownership of License* (“Cross-Petition”). The Cross-Petition asserted that because Black Mesa owns the acres sought to be added, the amended portion of the license must be issued in the name of Black Mesa.

Following a hearing, an IDWR hearing officer determined that Cottonwood’s License could not be corrected to include the excluded acres and water. The hearing officer did not resolve the ownership issue raised by Black Mesa. Cottonwood subsequently filed Exceptions to Recommended Decision and Order with IDWR, to which Black Mesa filed a Response. On June 10, 2010, the interim Director of IDWR, Gary Spackman, issued *Order Designating Jeff*

Peppersack to Review Recommended Order. The order authorizes Peppersack to exercise all the decision-making power of the Director in this matter pursuant to Idaho Code § 67-5245(7).

This order determines that water right license no. 02-02209 should be corrected based on the facts in the record but then sets a status conference to discuss the ownership issue.

FINDINGS OF FACT

Permitting And Licensing Process

1. On February 25, 1963, Cottonwood Canal Company filed an Application for Permit to Appropriate the Public Water of the State of Idaho (“Application”) with IDWR.¹ The Application was assigned number 39069.

2. The Application requested authorization to develop a water right to irrigate 4,480 acres, with 89.60 cfs of water to be diverted from the Snake River. At the time of the application, the 4,480 acres were not owned outright by the irrigators, but were under an application for entry from the United States.

3. The Application envisioned the construction of a pumping plant, canals, ditches and pipeline over 5 years, and application of the water to the proposed use within an additional 5 years. The land to be irrigated was located in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Among these lands, 400 acres were identified within Section 14 of Township 6 South, Range 10 East (“Section 14 lands”).

4. IDWR approved the Application and issued permit no. 30990 (“Permit”) for the development of this water use on March 1, 1963. The Permit was subsequently renumbered to 02-2209. The Permit required one-fifth of the work to be completed by September 1, 1965, and

¹ The application was actually filed with the Idaho Department of Reclamation (“IDR”), a predecessor to IDWR and referred to as synonymous with IDWR in this order.

the remainder by September 1, 1968. The Permit required beneficial use of all water used under the Permit to be made by March 1, 1973.

5. On June 11, 1965, IDWR received a Notice of Proof of Completion of Works and Application of Water to Beneficial Use (“Notice of Completion of Works”) on behalf of Cottonwood Canal Company for publication. The Notice of Completion of Works stated that Cottonwood Canal Company was diverting 89.60 cfs of water onto 4,480 acres of land within Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Specifically included within the description of the acreage were the Section 14 lands. The Notice of Completion of Works stated that proof of completion was to be submitted no later than July 29, 1965. The Notice of Completion of Works was published in the *Mountain Home News* for four consecutive weeks.

6. On June 15, 1965, the State Reclamation Engineer sent three form depositions to Cottonwood Canal Company. One deposition was to be executed by Cottonwood Canal Company as the “holder.” Two other depositions were to be completed by disinterested witnesses. All three depositions were to be submitted by July 29, 1965.

7. The “holder” deposition, signed by Otis Williams, Secretary of Cottonwood Canal Company, was submitted on July 29, 1965. In his answer to a portion of question 6, “If for irrigation, name each subdivision in which used and number of acres in each subdivision that have actually been irrigated with said water[,]” Williams stated, “See attached list.” However, a listing of lands that was unattached to the first page of Williams’ deposition, but was directly behind Williams’ deposition in the file, and with staple holes that appear to correspond to holes on the top corner of the deposition, totaled 3,985 acres. The list of acreage did not include the Section 14 lands.

8. A disinterested person deposition was signed by George R. Lake on July 29, 1965. In his answer to the same portion of question 6, Lake stated, "there are 14 320 acre tracts of which nearly all of each is irrigated as per attached list." Therefore, Lake's deposition stated that nearly 4,480 acres were being irrigated (14 multiplied by 320 equals 4,480). However, a listing of lands that was unattached to the first page of Lake's deposition, but was directly behind Lake's deposition in the file, and with staple holes that appear to correspond to holes on the top corner of the deposition, totaled 3,985 acres. The list of acreage did not include the Section 14 lands.

9. A second disinterested person deposition was signed by Lawrence Roemer on July 29, 1965. In his answer to the same portion of question 6, Roemer stated, "irrigation 14 - 320 acre tracts described below." At the bottom of his deposition, Roemer included a land list of the acres with total acreage counts. The list totals 4,390 acres. Roemer's description of lands specifically included the Section 14 lands.

10. On August 4, 1965, IDWR informed Cottonwood Canal Company that it had received the Williams, Lake, and Roemer depositions, as well as the affidavit of publication submitted in proof of completion of the Permit. The letter indicated that before final action could be taken a field examination had to be made by the Department.

11. The field examination was performed by Dorian Clay. In paragraph 7 of the form for the Report of Examiner ("Report"), the field examiner is required to "[l]ist legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact numbers of acres under cultivation in each forty-acre tract. . . . (Submit map on attached plat, showing location and details of above description.)."

12. In paragraph 7 of the Report, Field Examiner Dorian Clay described the lands irrigated. The Section 14 lands were specifically included within paragraph 7.

13. On the attached map with predrawn section lines, the irrigated boundary and section numbers were drawn in by hand. The map specifically marked acreage within Section 14 as lands being irrigated.

14. Noted in pencil on the attached map was a lands total of 3,985 acres. Just below the acreage total was a water quantity total of 79.70 cfs.

15. Following completion of the Report, Field Examiner Clay sent a letter ("Letter") to Cottonwood Canal Company on January 26, 1970. According to the Letter, the "[q]uantity of water diverted" was 90.24 cfs, however, only 79.70 cfs could "be recognized as beneficially used under Idaho law." The Letter recognized that "[t]he maximum quantity diverted shall not exceed 13,339.33 acre feet per season." The amount of land upon which water could be beneficially used was 3,985 acres. The Section 14 lands were specifically listed as lands upon which water could be beneficially used. Finally, the Letter stated that, if within thirty days, a \$231.00 filing fee was received, "a Water License as described above" would be issued consistent with the findings in the letter.

16. On February 11, 1970, after receipt of a \$231.00 fee, IDWR issued Water Right License No. 30990/02-2209. The License indicated that the proposed works of pumps, motors, and sprinkler system, with a capacity of 90.24 cfs, were completed on May 10, 1965. The License indicated "that on July 29, 1965, proof was made . . . of the beneficial use of 13,339.33 acre feet per season, with a maximum rate of diversion of 79.70 cubic feet per second of the waters of [the] Snake River." The described place of use was: Township 6 South, Range 10 East, sections 1, 2, 11, 12, 13, and 24; Township 6 South, Range 11 East, sections 6, 7, 17, 18,

19, and 20. The amount of land within the place of use was calculated at 3,985 acres. The described place of use did not include the Section 14 lands. No appeal was filed by Cottonwood regarding the exclusion of the Section 14 lands.

17. On August 3, 1981, the Ninth Circuit Court of Appeals upheld a United States District Court decision on summary judgment in favor of the United States, cancelling the entries of the potential entrymen.

18. The United States conveyed the Section 14 lands to Wesley and Christine Wootan on or about October 12, 1990. The Wootans subsequently transferred their interest to the Wootan Bryant Partnership which is now known as Black Mesa Farms, LLC.

CONCLUSIONS OF LAW

Standard Of Review

1. This interlocutory order is subsequent to a recommended order from an IDWR hearing officer recommending denial of Cottonwood's Petition to Correct License.

2. According to Idaho Administrative Code 37.01.01.720, recommended orders are orders issued by a person other than the agency head that will become a final order of the agency only after review of the agency head (or the agency head's designee) pursuant to Section 67-5244, Idaho Code.

3. Idaho Code § 67-5244(3), "Review of recommended orders," states:

(3) The agency head on review of the recommended decision shall exercise all the decision-making power that he would have had if the agency head had presided over the hearing.

4. According to the Idaho Court of Appeals,

Under I.C. § 67-5244, the head of the agency shall exercise all the decision-making power on review of the recommended decision that he or she would have had if the agency head had presided over the hearing. The hearing officer's decision being only advisory, then, the director is free to

affirm the decision or to reverse, reject or alter the findings of the hearing officer and make his own determination. *The ultimate question is whether the director's order is supported by findings of fact which are based exclusively on the evidence in the record and on matters officially noticed in that proceeding.* I.C. § 67- 5248.

Although the director may disagree with the recommended decision, the hearing officer's findings are entitled to weight. The Examiner's decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. *The agency's departures are vulnerable only if they fail to reflect attentive consideration to the Examiner's decision.* Yet in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, *and where there is substantial evidence supporting each result, it is the agency's choice that governs.* *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971).

Northern Frontiers, Inc. v. State ex rel. Cade, 129 Idaho 437, 440, 926 P.2d 213, 216 (Ct. App. 1996) (emphasis added).

5. In this case, both the Petition and Cross-Petition requested that IDWR modify license no. 02-02209 pursuant to I.C. § 67-5254. Idaho Code § 67-5254 provides, in part:

(1) An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license... unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

For purposes of this section, a license is “the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes.” I.C. § 67-5201(9).

6. Although the language of I.C. § 67-5254 does not provide direct authorization to amend a water right license, the language presupposes an agency may modify or amend a license, and then adds the condition that notice and opportunity for a contested case be provided before so doing. IDWR has previously used this interpretation of I.C. § 67-5254 to authorize the amendment of a water right license. *See In the Matter of Petition to Correct Water Right License*

Submitted by Darwin McKay, Preliminary Order Correcting License (February 1, 2000); In the Matter of License No. 61-07189 in the Name of Magic West, Inc., Final Order (January 22, 1999).

7. The authority to amend or modify a water right license under I.C. § 67-5254 is circumscribed by I.C. § 42-220, which provides that a water right license “shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right. . . .” However, IDWR cannot use I.C. § 67-5254 to increase the beneficial use above the amount developed during the authorized development period for a water right. Such an amendment would be an unlawful enlargement of the beneficial use under the licensed priority date. *See Fremont-Madison v. Ground Water Approp.*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996).

8. Amendments to water right licenses under I.C. § 67-5254 may be issued to correct errors made by IDWR in describing the licensed beneficial use.

The License Should Be Amended To Account For The Section 14 Lands

9. In this case, the record demonstrates that on February 25, 1963, Cottonwood Canal Company filed an Application for Permit to appropriate the Public Water of the State of Idaho.

10. In its Application, Cottonwood sought to irrigate land in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Cottonwood’s Application specifically requested that it be entitled to irrigate lands within Section 14 of Township 6 South, Range 10 East. The total land to be irrigated was 4,480 acres.

11. On March 1, 1963, Cottonwood's Application was approved and a Permit issued for the development of water. Beneficial use of all of the water to be used under the Permit, which included the Section 14 lands, was required to be made by March 1, 1973.

12. On June 11, 1965, a Notice of Proof of Completion of Works and Application of Water to Beneficial Use was submitted for publication by Otis Williams of the Cottonwood Canal Company. The Notice of Completion of Works indicated that the place of use of the water was the 4,480 acres described in Cottonwood's Application and Permit. The Notice of Completion of Works specifically included the Section 14 lands and was published for four consecutive weeks in the *Mountain Home News*.

13. On June 15, 1965, the State Reclamation Engineer sent three deposition forms to Cottonwood Canal Company. One deposition was to be executed by Cottonwood Canal Company, as the "holder," and the other two by disinterested witnesses. All three depositions were to be submitted by July 29, 1965.

14. The "holder" deposition, signed by Williams, listed the total land irrigated as 3,985 acres. One disinterested person's deposition, signed by George R. Lake, listed the total lands irrigated as nearly 4,480 acres; however, a page that may have been attached to Lake's deposition listed the acreage as 3,985. A second disinterested person's deposition, signed by Lawrence Roemer, listed the total lands irrigated as 4,390 acres. Roemer's description of lands specifically included the Section 14 lands.

15. On August 4, 1965, the State Reclamation Engineer informed Cottonwood of the receipt of the "holder" and disinterested persons depositions, as well as the affidavit of publication submitted as proof of completion of the Permit. The State Engineer's letter indicated that before final action could be taken, a field examination had to be made by IDWR.

16. A field examination was conducted and a Report submitted to IDWR with findings. In the Report, Field Examiner Dorian Clay listed and drew the irrigated lands down to the quarter-quarter. Both the written and drawn descriptions included the Section 14 lands. While the total land irrigated was listed in the Report as 3,985 acres, that total is not consistent with the sum of the quarter-quarter listing or drawn descriptions.

17. By letter, dated January 26, 1970, Field Examiner Clay stated that even though 90.24 cfs had been used for irrigation, only 79.70 cfs could be beneficially used on the requested acreage. The Letter specifically found that Section 14 lands were included within the place of use. The Letter concluded by stating that upon the payment of a \$231.00 filing fee, a water license would be issued consistent with its findings.

18. The \$231.00 filing fee was paid and a Water License was issued on February 11, 1970. The License stated that the proposed works, with a capacity of 90.24 cfs, were completed on May 10, 1965. Thus, as of July 29, 1965, proof of beneficial use was established. The maximum diversion rate, however, was listed as 79.70 cfs from the Snake River and the maximum volume was listed as 13,339.33 acre feet. The place of use was found to include 3,985 acres within Township 6 South, Ranges 10 and 11 East. To the contrary of the Letter, the described place of use did not include any of the Section 14 lands.

19. On October 31, 2000, Cottonwood filed its Petition with IDWR, seeking to amend its License to specifically include the Section 14 lands. Cottonwood also sought 8.0 cfs and 1,338.95 afa. Cottonwood's \$50 filing fee to provide notice of the Petition was received by IDWR on January 11, 2001. A Notice of Petition to Change Water Right License No. 02-02209 in the Name of Cottonwood Canal Company was published in the *Mountain Home News* on January 24 and 31, 2001.

20. The only protest was filed by Black Mesa Farms, LLC with IDWR on February 13, 2001. On April 27, 2001, Black Mesa filed its Cross-Petition with IDWR, seeking to amend water right license no. 02-02209 to include the irrigation of 400 acres in Township 6 South, Range 10 East, Section 14, with 8.0 cfs and 1,338.95 afa. Black Mesa also requested that the amended license be issued in its name.

21. In this case, the Hearing Officer recommended denying Cottonwood's Petition to include the Section 14 lands as places of use under the License. Even though the Hearing Officer's decision must be given weight, substantial evidence exists in the record to support the conclusion that Section 14 lands have been irrigated with water from the Snake River since Cottonwood's irrigation works were completed on May 10, 1965. *Northern Frontiers*, 129 Idaho at 440, 926 P.2d at 216.

22. First, Cottonwood applied for and received a Permit to irrigate 4,480 acres of land, which specifically included the Section 14 lands. Second, no objections were received regarding the publication of the Notice of Completion of Works, which specifically included the Section 14 lands. Third, the Roemer deposition affirmatively stated that the Section 14 lands were being irrigated as of 1965. Fourth, the Report of Examiner and subsequent Letter specifically found that the Section 14 lands had been irrigated since 1965. The Letter stated that if Cottonwood timely paid the appropriate filing fee, which it did, a water right license would be issued in accordance with its findings. Fifth, aerial photography on file with the Department demonstrates that while the Section 14 lands were not irrigated as of 1964, the lands had been

irrigated since at least 1969. A 1974 orthophotoquad on file with the Department indicates that irrigation on the Section 14 lands has occurred since at least that time.²

23. With the exception of the Williams and Lake depositions, the information presented expressly stated that the Section 14 lands were being irrigated under the Permit. In addition, the filing fee was timely paid by Cottonwood, entitling it to a License based on the findings described in the Letter. Because there were numerous sections and thousands of acres described as places of use, it is reasonable to conclude that the Section 14 lands were inadvertently excluded from the License. Furthermore, the only protest received by the Department after Cottonwood filed its Petition to amend its license was on behalf of Black Mesa. However, Black Mesa did not protest the amendment of the license and specifically sought the inclusion of the Section 14 lands in its Cross-Petition. Therefore, based on the facts of this case, an amendment of License to include the Section 14 lands will not enlarge the water right because the Section 14 lands have been irrigated since 1965. I.C. §§ 42-220, 67-5254; *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. As a result, the License should be amended to include the Section 14 lands as a place of use.

The License Should Be Amended To Include The Accompanying Water

24. Next, it must be determined whether the License was erroneous in its finding of quantity. Here, the Hearing Officer recommended denying Cottonwood's Petition to increase quantity under the License by 8 cfs and 1,338.95 afa. Even though the Hearing Officer's decision must be given weight, substantial evidence exists in the record to support the conclusion that quantity should be increased. *Northern Frontiers*, 129 Idaho at 440, 926 P.2d at 216.

² While the 1969 aerial photography and the 1974 orthophotoquad do not conclusively establish that irrigation occurred by 1965, they bolster the evidence provided in the Notice of Completion of Works, the Deposition of Roemer, the Report of the Examiner and the subsequent Letter. If the aerial photography and the orthophotoquad failed to show any evidence of irrigation on the Section 14 lands, this would have been strong evidence against amending the license.

25. In Idaho, “no such license . . . allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated” I.C. § 42-220. One second foot of water is the equivalent of 50 miner’s inches; thus, one miner’s inch is the equivalent of .02 cfs.

26. In this case, the License provided 79.70 cfs for use on 3,985 acres. When acreage (3,985) is divided by quantity (79.70), the License establishes that one cfs is authorized for irrigation of 50 acres of land. Because one cfs is the equivalent of 50 miner’s inches, the License follows Idaho’s general rule authorizing one miner’s inch per acre. *See* I.C. § 42-220. The License also provided an annual volume of 13,339.33 afa for use on 3,985 acres. When quantity (13,339.33 afa) is divided by acreage (3,985), the License established a volume of 3.3474 afa per acre irrigated.

27. However, the License erroneously excluded 400 acres from Section 14, and the record supports the conclusion that the Section 14 lands have been historically irrigated. *See* Permit, Notice of Completion of Works, Roemer deposition, Report of Examiner, Letter, Aerial Photography, and Orthophotoquad. As a result, the amount of water available for irrigation under the License should be increased to allow an inch per acre of irrigation on the Section 14 lands and an appropriate increase in volume for irrigation of those lands. Therefore, quantity available for diversion under the License should be increased by 8cfs and 1338.95 afa.

28. The amendment to the License must not result in an unlawful enlargement of its beneficial use under the licensed priority date. *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. The record establishes that the Section 14 lands have been irrigated with water from the Snake River since 1965. *See* Permit, Notice of Completion of Works, Roemer deposition, Report of Examiner, Letter, Aerial Photography, and Orthophotoquad. No objections were

received in 1965 when Cottonwood claimed in its Notice of Completion of Works that it was diverting 89.60 cfs for use on 4,480 acres (one miner's inch per acre). No substantive objections were received in 2001 after Cottonwood's Notice of Petition to Change Water Right License No. 02-02209 was published in which it sought to include the Section 14 lands, 8.0 cfs and 1338.95 afa. The capacity of Cottonwood's irrigation system, as of May 10, 1965, further supports the conclusion that Cottonwood has not sought to expand its water right. The License currently allows it to divert 79.70 cfs and a total volume of 13,339.33 af for use on 3,985 acres. However, as of May 10, 1965, Cottonwood's irrigation system was capable of diverting 90.24 cfs. A diversion capacity of 90.24 cfs is easily sufficient to divert an additional volume of 1338.95 af during the irrigation season. Indeed, Field Examiner Clay found that 90.24 cfs had been diverted and used on the lands described in the Permit, including the Section 14 lands. Because the water has been historically used on the acres described in the License, including the erroneously excluded Section 14 lands, and no objections were received alleging enlargement, amendment of the License is consistent with Idaho law.

Ownership of New Portion of Water Right No. 02-2209.

Having concluded that the Department should amend the License, the sole remaining issue is ownership of the new portion of the amended license. Cottonwood Canal Company argues the new portion of the amended license should be in its name because the license was originally issued to it. Black Mesa argues the new portion of the amended license should be issued in its name because it now owns and irrigates the Section 14 lands. Before the Department makes any determination as to ownership issues, the Department would like to have briefing from the parties on the ownership issue. The Department will set a status conference to establish a briefing schedule.

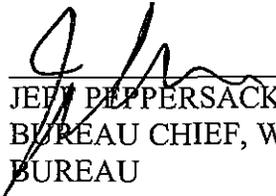
ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Cottonwood's October 31, 2000 Petition to Correct License and Black Mesa's Cross-Petition to Correct License are granted. Substantial evidence demonstrates that the Section 14 lands have been irrigated with water from the Snake River since 1965 when Cottonwood submitted its Notice of Completion of Works. Because amendment of the license will not result in an enlargement of use under the water right, the license shall be amended to allow for the irrigation of 400 acres of land in Section 14 using 8.0 cfs with a volume of 1338.95 afa from the Snake River.

It is further ORDERED that, pursuant to IDAPA 37.01.01.710 and IDAPA 37.01.01.740, the portion of this Order holding that the Department should amend the license is a final order and is subject to review by reconsideration or appeal. However, the issue of ownership still must be addressed. The issue of ownership will proceed forward as an interlocutory issue, separate from the issue of whether the Department should amend the license.

It is further ORDERED, that a scheduling conference is set on September 8, 2010 at 1:30 pm at the Idaho Department of Water Resources located at 322 East Front Street in Boise, Idaho. The parties shall be prepared to discuss a briefing schedule related to the ownership issue.

DATED this 12th day of August, 2010



JEFF PEPPERSACK
BUREAU CHIEF, WATER ALLOCATION
BUREAU

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2010, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

CHARLES L. HONSINGER
RINGERT CLARK
PO BOX 2773
BOISE ID 83701

WES WOOTEN & DON BRYANT
BLACK MESA FARMS
PO BOX 82
GLENN'S FERRY ID 83623

MIKE CREAMER
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701



Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau