

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	PRELIMINARY ORDER
FOR TRANSFER NO. 85632	)	APPROVING TRANSFER
IN THE NAME OF JOHN LEZAMIZ	)	
<u>FAMILY LTD PARTNERSHIP</u>	)	

On December 17, 2021, John Lezamiz Family Ltd. Partnership (“Applicant”) filed Application for Transfer 85632 (“Application 85632”) with the Idaho Department of Water Resources (“Department”). Application 85632 proposes to change the point of diversion and place of use for water right no. 34-633 (“WR 34-633”). Application 85632 was published in the Challis Messenger (Custer County) and the Arco Advertiser (Butte County) on January 20 and 27, 2022, and was not protested.

On March 23, 2022, the Department approved Application 85632. On April 6, 2022, Applicant filed a *Petition for Reconsideration*, rejecting one of the conditions in the transfer approval. The Department granted Applicant’s *Petition for Reconsideration* and withdrew the order approving Application 85632. On April 15, 2022, the Department issued a *Preliminary Order Denying Transfer* (“Preliminary Order”).

On April 29, 2022, Applicant filed its *Petition Contesting Preliminary Order and Request for Hearing* (“Petition”). In its Petition, Applicant asked the Department to conduct a hearing on Application 85632 pursuant to Idaho Code § 42-1701A, asserting factual and legal errors in the Preliminary Order. *Petition* at 2 – 5.

Simultaneously, on April 29, 2022, Applicant filed its *Exceptions to Preliminary Order* (“Exceptions”). In its Exceptions, Applicant asserted the same factual and legal errors in the Preliminary Order as it did in the Petition. *Compare Exceptions* at 1 – 5 and *Petition* at 2 – 5. The Exceptions reiterated the request for hearing. *Exceptions* at 5.

On May 9, 2022, the Department issued an *Order Granting Request for Hearing* in response to both the Exceptions and Petition.

A prehearing conference was held in this matter pursuant to notice on June 21, 2022. The Department issued a *Prehearing Order and Notice of Hearing* following the conference. A hearing was held on July 21, 2022, in Twin Falls, Idaho.

The Applicant called two witnesses at the hearing—John Lezamiz and Greg Sullivan. The following exhibits were admitted into the record:

Ex. 1	Application 85632
Ex. 2	Affidavit of Publication dated 1/31/22
Ex. 3	Register of Actions for Transfer 85632

Ex. 4	Second Request for Watermaster Comments
Ex. 5	James Cefalo Memorandum Re: Transfer 85632
Ex. 6	Emails Re: Seefried Comments
Ex. 7	Congdon Springs Creek Water Rights Spreadsheet
Ex. 8	Congdon Springs Water Rights NAIP
Ex. 9	Congdon Springs Water Rights NAIP 2019 Aerial Photo
Ex. 10	Brockway Engineering Site Photographs
Ex. 11	John Lezamiz Statement on Congdon Springs Water Rights Holders
Ex. 12	Request for Watermaster Recommendation dated 1/13/22
Ex. 14	34-633 Water Right Report ¹
Ex. 15	34-2356 Water Right Report
Ex. 16	34-232 Water Right Report
Ex. 17	34-2418 Water Right Report
Ex. 18	34-610A Water Right Report
Ex. 19	34-610D Water Right Report
Ex. 20	34-13882 Water Right Report
Ex. 21	34-13883 Water Right Report
Ex. 22	34-14341 Water Right Report
Ex. 23	34-14382 Water Right Report
Ex. 24	34-14383 Water Right Report
Ex. 25	34-14730 Water Right Report
Ex. 26	34-14755 Water Right Report
Ex. 27	34-2275 Water Right Report
Ex. 28	34-2276B Water Right Report
Ex. 29	34-13942 Water Right Report
Ex. 20	34-13943 Water Right Report
Ex. 31	34-13892 Water Right Report
Ex. 32	34-13893 Water Right Report
Ex. 33	Transfer of Water Right No. 84995
Ex. 40	John Lezamiz hand drawn location map
Ex. 202	34-230 Water Right Report
Ex. 203	34-231 Water Right Report
Ex. 206	34-2350 Water Right Report
Ex. 208	34-14312 Water Right Report
Ex. 229	Congdon Springs Water Location Map, dated July 2022 (small print)
Ex. 230	Congdon Springs Water Location Map, dated July 2022 (large print with handwritten additions)

The hearing record was held open until August 2, 2022, for Applicant to file its hearing brief and proposed Exhibit 35. On August 1, 2022, Applicant indicated that it could not find the Seefried Complete Letter that was to be designated Exhibit 35. On August 1, Applicant also requested that the Department take notice of the Department's transfer memorandum. The Department takes notice of its Transfer Processing Policies & Procedures memorandum dated

¹ The term "water right report" in the exhibit list refers to a document including the Department's publicly available water right report and map for the numbered water right.

December 21, 2009, as Exhibit 231. Applicant filed its *Applicant's Post Hearing Brief* on August 2, 2022, and the record was closed and fully submitted to the Department on that day.

STANDARD FOR DECISION

Idaho Code § 42-222(1) sets forth the criteria used by the Department to evaluate transfer applications:

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 The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. . . . In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth.

The Applicant bears the burden of proof for the criteria listed in Idaho Code § 42-222. *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 420-421 (2001).

FINDINGS OF FACT

The Department, having examined Application 85632 and the written record and having heard the testimony of the witnesses, makes the following findings of fact:

Application 85632

1. Application 85632 proposes to change the point of diversion and place of use of WR 34-633. Ex. 1.
2. WR 34-633 authorizes the following use of water with a 6/1/1896 priority date:

Source: Congdon Springs Creek²
Point of Diversion: SESWNW, Sec. 32, T07N, R25E, B.M.
Use: Irrigation of 149 acres
 Stockwater 1000 Range Cattle
Quantity: Irrigation 2.98 cfs
 Stockwater 1.00 cfs
 Combined Limit 2.98 cfs
Place of Use: Lots 3 and 4, Sec. 4, T6N, R25E, B.M.
 NESW, SESW, Sec. 33, T7N, R25E, B.M.
Combined Right: 34-2356

Ex. 14.

3. Applicant has the authority to file Application 85632. Prior to the filing of the Application, WR 34-633 was owned by Seefried Ranch, LLC (“Seefried Ranch” or “Seefrieds”). Ex. 1 at 27. Seefried Ranch owns the existing place of use. Ex. 5 at 1. Seefried Ranch conveyed all of its right, title, and interest in WR 34-633 to Applicant by quit claim deed on December 13, 2021. The deed was signed by Holly Seefried, registered agent for Seefried Ranch. Ex. 1 at 26. Application 85632 was signed on December 14, 2021, by John Lezamiz, owner and manager of the Applicant. Exs. 1 and 5. Applicant owns the proposed place of use and point of diversion. Ex. 5 at 1.

4. At its current place of use, water right 34-633 is combined with water right 34-2356. Exs. 14 and 15. Water right 34-2356 authorizes the diversion of 2.98 cfs from ground water for the irrigation of 149 acres. Ex. 15. WR 34-633 and water right 34-2356, in combination, are limited to a diversion rate of 2.98 cfs and the irrigation of 149 acres. Water right 34-2356 does not authorize stockwater use. Ex. 15.

5. Application 85632 states that the current 149-acre place of use will continue to be irrigated with ground water right 34-2356. Ex. 1 at 5.

6. Application 85632 proposes to combine WR 34-633 with the following water rights (“Lezamiz Rights”):

Table 1

Right No.	Priority Date	Uses	Source	Rate (cfs)	Irrigated Acres
34-230	6/1/1895	Irrigation	Big Lost River	2.40	155.0
34-231	6/1/1889	Irrigation	Big Lost River	2.70	135.0

² The water right report for WR 34-633 shows two sources—Congdon Springs Creek and Swauger Creek. Ex. 14. The associated map shows only one diversion point. *Id.* The legal description for point of diversion for the two sources is the same. *Id.* Testimony indicates that Swauger Springs is well upstream of Congdon Springs Creek and may be a source of flow in Congdon Springs Creek. Sullivan Test. The two listed sources for WR 34-633 are essentially the same, and will be referred to as Congdon Springs Creek. The public water source for WR 34-633 is not “Congdon Springs Ditch.”

34-232	6/1/1886	Irrigation	Congdon Springs	0.80	40.0
34-2275	6/11/1946	Irrigation	Congdon Springs	1.30	60.0
34-2350	7/13/1959	Irrigation	Ground Water	1.60	80.0
34-2418	5/24/1961	Irrigation	Ground Water	1.26	75.0
34-14312	8/29/1960	Irrigation	Ground Water	0.38	18.9
Combined Limits:				6.28	173.9

Ex. 1 at 3-4, 9-22; Exs. 16, 17, 27, 202, 203, 206, 208.

7. Application 85632 does not propose any new irrigated acres. Instead, the application proposes to combine WR 34-633 with the Lezamiz Rights to irrigate 173.9 acres owned by the Applicant shown on Exhibit 10, p. 18. Water right 34-633 would continue to bear an individual acre limit of 149 acres. Ex. 1 at 2. The Lezamiz ground water rights provide a full supply of water for the proposed 173.9-acre place of use for WR 34-633. Sullivan Test.; Ex. 5 at 2.

8. Application 85632 also proposes to move the point of diversion of WR 34-633 1-mile upstream on Congdon Springs Creek to an existing mixing pond and pump station used to divert water rights 34-232 and 34-2275, which irrigate the same place of use as proposed in Application 85632. Sullivan Test.; Exs. 16, 27.

Use of WR 34-633

9. Delivery of water for irrigation from Congden Springs Creek under WR 34-633 to its current place of use has not occurred in many years. Ex. 6. There is a concrete headgate structure on Congdon Springs Creek at the point of diversion for WR 34-633 and the main delivery ditch is still in place. Sullivan Test.; Ex. 6 at 4; Ex. 10 at 12. The most recent year that the Seefrieds attempted to use WR 34-633 for irrigation was in 2011 or 2012, as a flood stream to cover the corners of an existing pivot. Ex.6 at 4. This attempt was unsuccessful. *Id.*

10. There is evidence that the Seefrieds or their predecessors may have intended to abandon WR 34-633. The long history of non-use is evidence of intent to abandon. Ex. 6. The Seefrieds removed a potential delivery system in 2011 when they first started working the WR 34-633 place of use. At that time, they found a pump sitting on an upended 55 gallon barrel near a power pole and small pond that may have once been used to pump Congdon Springs water through the wheel lines to the WR 34-633 place of use. Ex. 6 at 4-5. The pump was not connected to a power source and was inoperable. *Id.* Several years later, while burying main line, the Seefrieds also found that the main line from that pump had been disconnected. *Id.* Seefried Ranch removed the disconnected, unworking ditch pump in 2014. *Id.* Holly Seefried indicates that “This water right is of no use to the Seefried’s & [sic] can no longer be used for its intended purpose on the property that it is allocated to. Hence, this transfer.” Ex. 6 at 5.

11. There is not clear and convincing evidence, however, establishing that the Seefrieds intended to abandon WR 34-633. Rather, their actions regarding the use of WR 34-633 constituted an understandable reaction to the very unreliable Congden Springs water supply. Ex. 6 at 4. See Findings of Fact 14 - 16 below. In fact, if the Seefrieds

could have delivered the small amount of available Congden Springs water to their property under WR 34-633, they demonstrated an intent to do so.

12. The Seefrieds made multiple efforts to deliver Congden Springs water to the WR 34-633 place of use from its point of diversion. Ex. 6 at 5. The WR 34-633 main delivery ditch is a small, dirt- and rock-lined ditch that loses water along its 1.5-mile length from the current WR 34-633 point of diversion to its current place of use. Lezamiz Test.; Ex. 10 at 12 – 14. Seefried's had the Big Lost River Irrigation District work on the ditch. Ex. 6 at 5. The ditch was burned several times. *Id.* Ditchers were run through it. *Id.* The Seefrieds have shoveled, burned, and straightened the ditch, spending hours on their backhoe trying to get a stream of water.³ *Id.* All to no avail. Holly Seefried wrote, "For Seefried's [sic] to get a reliable, consistent stream of water from right 34-633 that would allow them to irrigate through their pivots would require a miracle." Ex. 6 at 5.

13. Instead, ground water right 34-2356 has been used to fully irrigate the 149.0 acres place of use under WR 34-633 since at least 2011. Ex. 1; Ex. 5 at 2.

14. The Seefrieds diverted stockwater at the WR 34-633 point of diversion in 2017 and 2019.⁴ Ex. 6 at 2.

Congdon Springs and Congdon Springs Creek

15. Congdon Springs heads at two locations west of the place of use proposed in Application 85632. Sullivan Test.; Lezamiz Test.; Ex. 8. From those headings, the spring water flows to the east as Congdon Springs Creek⁵ in a north and south channel. Ex. 10, pp. 1, 18. The two channels combine into what is referred to as Lezamiz Pond. Sullivan Test.; Lezamiz Test.; Ex. 8; Ex. 10 at 3; Ex. 230 (labeled "Pond"). Congdon Springs Creek flows out of Lezamiz Pond through a culvert under the Burnett Ditch. Sullivan Test.; Ex. 10 at 3, 19. From that culvert Congdon Springs Creek wends its way through Applicant's property for approximately one mile until it reaches the current point of diversion of WR 34-633.⁶ Ex. 8 (green and black lines); Ex. 10 at 17, 19; Ex. 230. There continues to be a discernible Congdon Springs Creek channel through the Applicant's property to the existing WR 34-633 point of diversion. Ex. 10 at 10, 12-15; Ex. 230.

16. The amount of water flowing from Congdon Springs into the Creek is variable and small. Lezamiz Test. With one exception since 2008, less than 0.8 cfs has flowed from the Springs. Lezamiz Test. In the exceptional 2017 water year more than 0.8 cfs flowed from the Springs. Lezamiz Test.; Ex. 6. In 2021, no water flowed from Congdon

³ John Lezamiz assisted with some of this work. Lezamiz Test.

⁴ The testimony and exhibits do not indicate whether the stockwater was actually delivered all the way to the WR 34-633 place of use, but water would have flowed down Congdon Springs Creek to the WR 34-633 point of diversion.

⁵ At various times Congdon Springs Creek is identified in the record as the Congdon Springs ditch, Ex. 8; Sullivan Test., or the Swauger ditch, Exs. 229 and 230. This order will refer to the channel as Congdon Springs Creek.

⁶ Lezamiz testified that Congdon Springs Creek is mistakenly labeled "Swauger Ditch" on Exhibits 229 and 230.

Springs. In 2022, an insignificant amount of water has flowed into Lezamiz Pond. Lezamiz Test.

17. Congdon Springs Creek is a losing stream. Sullivan Test.; Lezamiz Test. Based on his experience, John Lezamiz estimated that 2 to 4 times the amount of water to be diverted at the current WR 34-633 point of diversion would need to flow out of Lezamiz Pond for the water to reach the current WR 34-633 diversion. Lezamiz Test. For example, using the lowest estimated amount of stream loss (50%), 4.96 cfs would need to flow down Congdon Springs Creek at Lezamiz Pond to deliver 2.98 cfs at the current WR 34-633 diversion. The Department finds Lezamiz's stream loss estimate to be credible based on the experience of John Lezamiz and stream losses in the Big Lost River Valley. Lezamiz Test. The amount of water flowing through Lezamiz Pond needed to deliver a full water supply from Congdon Springs Creek at the WR 34-633 point of diversion could be much more than 4.96 cfs.

Diversions from Congdon Springs Creek

18. The following water rights (sorted by priority date) authorize diversion of water from Congdon Springs or Congdon Springs Creek:

Table 2

Right No.	Priority Date	Rate (cfs)	Owner of Record
34-232	6/1/1886	0.800	John Lezamiz Family Ltd. Partnership
34-633	6/1/1896	2.980	John Lezamiz Family Ltd. Partnership
34-610A	7/9/1908	2.000	Warner, Bruce K
34-610D	7/9/1908	0.100	Wilkie, Lenie, Wilkie Nicolas
34-13882	7/9/1908	1.230	Magee Group Inc.
34-13883	7/9/1908	0.670	Bruley, Gregory M; Bruley Laura M
34-14341	7/21/1910	0.130	Johnston, Brenda; Johnston, Jerald
34-14382	7/21/1910	0.280	Hensley, Deanna; Hensley, Tom
34-14383	7/21/1910	0.120	Johnston, Jerald; Schaefer, Jarrie; Schaefer, Jeffrey
34-14730	7/21/1910	0.020	Raber, Mary; Raber, Paul
34-14755	7/21/1910	1.650	Giesbrecht, Jana; Giesbrecht, Jayson
34-2275	6/11/1946	1.300	John Lezamiz Family Ltd. Partnership
34-2276B	7/25/1946	0.100	Wilkie, Lenie, Wilkie Nicolas
34-13942	7/25/1946	1.230	Magee Group Inc.
34-13943	7/25/1946	0.670	Bruley, Gregory M; Bruley Laura M
34-13892	9/3/1971	1.080	John Lezamiz Family Ltd. Partnership
34-13893	9/3/1971	0.200	Montierth, Gary; Montierth, Nettie

Ex, 7; Exs. 16, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 31 (listed in order of priority); Sullivan Test.

19. The water rights highlighted in green in Table 2 are owned by the Applicant and are diverted from Congdon Springs Creek below Lezamiz Pond, after the Creek flows from the Pond through a culvert under the Burnett Ditch. Sullivan Test.; Ex. 10 at 6 and 19. Water diverted

pursuant to the green highlighted rights flows into the Applicant's mixing pond and then flows through a pipe to a lower pond where it is pumped for irrigation. Sullivan Test.; Ex. 10 at 7 and 11; Ex. 230. The point of diversion from Congdon Springs Creek to Applicant's mixing pond is the proposed point of diversion for WR 34-633 under Application 85632.

20. Because of the lack of flow from Congdon Springs only water right 34-232 regularly receives water from Congdon Springs Creek in priority, and even that right may not receive its full quantity. Lezamiz Test.; Findings of Fact 15, 16.

21. WR 34-633, highlighted in blue in Table 2, is next in priority after water right 34-232. Any water in Congdon Springs Creek above the 0.8 cfs diverted by Water Right 34-232 can flow down to the current WR 34-633 point of diversion for its use. Ex. 10 at 6 and 19. Because of Congdon Springs Creek stream loss, an amount of water in excess of 2.98 cfs would need to flow down the Creek to deliver the full WR 34-633 water supply at its current point of diversion. Finding of Fact 16. In 2017, enough water flowed down Congdon Springs Creek, including stream loss, to deliver stockwater at the current WR 34-633 point of diversion. Ex. 6 at 2.

22. The remaining junior water rights highlighted in orange in Table 2 are diverted into the Burnett Ditch from Lezamiz Pond through an overflow channel (the "Burnett rights"). Sullivan Test.; Ex. 10 at 4-5; Lezamiz Test; Ex. 40. Congdon Springs water in excess of senior water right use backs up in Lezamiz Pond. Lezamiz Test. That excess water in the Lezamiz Pond then overflows into the Burnett Ditch. *Id.* Since 2008, the Burnett rights received water from Congdon Springs only in water year 2017. *Id.*

23. All holders of Burnett Rights, other than Bruce Warner and the Magee Group Inc., have signed documents stating that "I believe IDWR should grant the request for transfer as requested by Lezamiz."⁷ Ex. 11; Lezamiz Test.

ANALYSIS

Validity of the Transferred Right

The existing place of use for WR 34-633 has been consistently irrigated. Although WR 34-633 has not been diverted for irrigation use since 2011 or 2012, the place of use has been continuously irrigated using water right 34-2356. WR 34-633 was diverted in 2017 for stockwater use. Because Seefried maintained the full beneficial use authorized by WR 34-633, the right has not been forfeited because of non-use.

There is some evidence that Seefrieds intended to abandon WR 34-633, but there is not clear and convincing evidence to that effect. Substantial evidence indicates that water flows down Congdon Springs Creek to the WR 34-633 point of diversion have been inadequate to deliver sufficient water for irrigation at the WR 34-633 place of use. The Seefrieds took numerous actions to reduce ditch losses in the main delivery ditch intending to deliver irrigation water from Congdon Springs Creek to the WR 34-633 place of use, with no success. In 2017 the Seefrieds were able to divert some water at the WR 34-633 diversion for stockwater. Because

⁷ The Applicant, owner of water right 34-13892, did not sign such a statement for obvious reasons.

there is not clear and convincing evidence that the Seefrieds intended to abandon WR 34-633, the Department cannot conclude that it has been abandoned.

WR 34-633 is a valid water right eligible for the changes proposed in Application 85632.

Enlargement of Use

At the existing place of use, water right 34-633 is combined with ground water right 34-2356. These rights provide a full supply (0.02 cfs per acre) for the irrigation of the existing place of use. Ground water right 34-2356, by itself, is a full supply water right and has been used in recent years to irrigate the entire existing place of use. WR 34-633 and water right 34-2356 bear conditions limiting the two rights to a diversion rate of 2.98 cfs and 149 acres of irrigation. There are no conditions requiring either water right to be used first (as a primary right).

The Department has identified that there are factual circumstances when a combined water right may be unstacked from its partner right, and recombined with new water rights to avoid enlargement. In its Transfer Processing Policies & Procedures memorandum the Department states:

An application for transfer proposing to "unstack" one or more water rights used for irrigation or other use, without changing all the rights for the same use, is presumed to enlarge the water right. However, the place of use for a supplemental irrigation right may be changed for continued use as a supplemental irrigation right at a different place of use without, by definition, enlarging the original right or the supplemental right proposed for transfer, so long as the primary rights at the original and proposed places of use provide comparable water supplies.

Ex. 231 at 28.

Using this analysis, to approve Application 85632 WR 34-633 must be combined with a full supply ground water right and conditioned in a manner comparable to the existing conditions on the right to prevent enlargement of use. The proposed place of use under Application 85632 is covered by ground water rights 34-2350, 34-2418 and 34-14312. Exs. 206, 17, and 208. These three ground water rights combine to authorize a diversion rate of 3.24 cfs and the irrigation of 173.9 acres. The combined diversion rate equates to a diversion rate of 0.019 cfs per acre, which constitutes a full supply. Combining WR 34-633 with ground water rights 34-2350, 34-2418 and 34-14312, limited to a combined diversion rate of 3.24 cfs and the irrigation of 173.9 acres, prevents enlargement in water use at the proposed place of use under WR 34-633.

The seven water rights at the proposed place of use bear a combined limit condition, restricting the rights to a total diversion rate of 6.28 cfs and the irrigation of 173.9 acres. The transfer will not increase the total number of irrigated acres. In order to prevent enlargement of the water use of WR 34-633, the right, in combination with the seven rights at the proposed place of use, must be limited to a combined diversion rate of 6.28 cfs and the irrigation of 173.9 acres.

Currently, if WR 34-633 calls for its Condon Springs Creek water supply the amount of

water that it will receive will equal the total flow of Congdon Springs Creek, less the 0.8 cfs delivered to water right 34-232 and the amount of stream loss between Lezamiz Pond and the current WR 34-633 point of diversion, up to a maximum of 2.98 cfs.⁸ If the change in point of diversion is approved without conditions, when WR 34-633 called for its Congdon Springs Creek water supply at the proposed point of diversion it would receive the total flow of Congdon Springs Creek less only the 0.8 cfs delivered to water right 34-232, up to the 2.98 cfs maximum. Applicant would have enlarged the water supply for WR 34-633 at the new point of diversion by capturing water that would have otherwise seeped into the public ground water supply while flowing down Congdon Springs Creek to its original point of diversion.

This enlargement in water supply can be cured by adding a mitigation condition to WR 34-633 in the approval of Application 85632. That mitigation condition should read as follows:

Diversion of water under this right is limited to those times when water is available for diversion under the priority of this right at the original point of diversion from Congdon Springs Creek in T07N, R25E, Sec 32, SESWNW.

This mitigation provision ensures that the Applicant will not divert and use more water pursuant to WR 34-633 as changed, than it would have before the change.

Injury to Existing Water Rights

Idaho Code § 42-222(1) does not provide a definition for the term “injured.” The Idaho Supreme Court stated regarding the necessary analysis: “[J]unior appropriators have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.” *Crocket v. Jones*, 47 Idaho 497, 504 (1929). The injury must be real. *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7 (1944) (“The question here presented is whether other users ... are injured or will be injured by the change, or, as frequently said, substantially injured, not merely a fanciful injury but a real and actual injury.”).

The place of use change proposed by Application 85632 will not injure existing rights. As discussed above, the change in place of use, with appropriate conditions, does not enlarge the water use under WR 34-633. Applicant established that there will be no real or substantial injury to other rights by granting the change in place of use under Application 85632.

Determining whether transferring the point of diversion of WR 34-633 upstream on Congdon Springs Creek under Application 85632 will injure the Burnett rights is difficult because at the present time other than water right 34-232 the rights listed in Table 2 are essentially “paper rights.” The water uses described on paper no longer exist due to the ongoing shortage of water flowing from Congdon Springs. The best and only definition of the conditions

⁸ This scenario is essentially a hypothetical because of the lack of water flowing from Congdon Springs. It does, however, reflect what happened when the Seefrieds diverted stockwater under WR 34-633 at the current point of diversion.

existing on Congdon Springs Creek at the time WR 34-633 and the Burnett rights were established is provided by the water right listing in Finding of Fact 18, Table 2.

That list shows the water use that may occur under the decreed priority date for each right. The Burnett rights have always been junior to WR 34-633 and subject to its diversion of 1.98 cfs one mile downstream of Lezamiz Pond. So long as the historic WR 34-633 water use is not enlarged by the Application 85632 transfer, the Burnett rights are not injured. The mitigation condition discussed above, limiting the diversion of water under WR 34-633 at the new point of diversion to the amount of water available at the original point of diversion, prevents enlargement and injury.

The Applicant has a piped delivery system from the proposed point of diversion to the proposed place of use, so delivery and use of water under WR 34-633 will be more feasible and consistent at the proposed point of diversion. Improving the delivery of a water right from its point of diversion to its place of use, however, does not injure junior water uses.⁹ See e.g. *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681 (1980).

Conservation of Water Resources

Application 85632 describes irrigation of the proposed place of use through pressurized sprinkler systems, which is a conservative use of water and a common irrigation practice in Idaho. The changes proposed in Application 85632 are consistent with the conservation of water resources within the state of Idaho.

Local Public Interest and Economy

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 changes proposed in Application 85632, as conditioned, increase the amount of water available to a local farm and ranch without injuring junior rights. The proposed change is in the local public interest and will not adversely affect the local economy.

CONCLUSIONS OF LAW

Based on the evidence presented at hearing in support of Application 85632, Applicant has demonstrated that the proposed changes are consistent with the conservation of water resources within the state of Idaho and, if conditioned properly, will not result in an enlargement in use under water right 34-633 and will not injure the Burnett rights. The proposed changes will improve the water supply for a local farm and ranch and is in the local public interest and will not adversely affect the local economy. Therefore Application 85632 should be approved, with conditions.

⁹ For instance, Seefrieds could have piped the water from the current WR 34-633 point of diversion to its place of use without injuring the Burnett rights.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 85632 in the name of John Lezamiz Family Ltd. Partnership is APPROVED with conditions as shown on the attached **Transfer of Water Right, Transfer No. 85632.**

Dated this 19th day of August, 2022.

A handwritten signature in blue ink, appearing to read "Peter R. Anderson", written over a horizontal line.

Peter R. Anderson
Hearing Officer

CERTIFICATE OF SERVICE

I certify that on the 19th day of August, 2022, I served or caused to be served the **Preliminary Order Approving Transfer (85632)** to the party by the following method(s):

FRITZ X HAEMMERLE
HAEMMERLE LAW PLLC
PO BOX 1800
HAILEY, ID 83333
haemmerlefilings@gmail.com

- ☐ U.S. Mail, Certified, postage prepaid
- ☐ U.S. Mail, postage prepaid
- ☐ Overnight Mail
- ☒ Email



Jean Hersley
Technical Records Specialist II

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.