

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

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 86130)	PRELIMINARY ORDER
IN THE NAME OF RICHARD AND)	DENYING TRANSFER
<u>JACQUELINE REYNOLDS</u>)	

On April 20, 2022, Richard and Jacqueline Reynolds (“Applicants”) filed Application for Transfer 86130 (“Application 86130”) with the Idaho Department of Water Resources (“Department”). The Department published notice of Application 86130 in the Arco Advertiser (Butte County) on May 12 and 19, 2022. No protests were filed against the application.

FINDINGS OF FACT

1. Application 86130 proposes to add a second point of diversion to water rights 34-301E and 34-301F. The point of diversion proposed to be added to the water rights is a pump station on the Eastside Canal, located on the canal approximately seven miles downstream from the head of the canal.

2. Currently, water rights 34-301E and 34-301F describe only one point of diversion, the head of the Eastside Canal on the Big Lost River, located in the SESE of Section 4, T05N, R26E. There is a large diversion dam on the Big Lost River at this location, known as the Moore Diversion, that is used to divert water into the Moore Canal on the west side of the river and the Eastside Canal on the east side of the river.

3. The Eastside Canal is a large canal. The head of the Eastside Canal is the authorized point of diversion for over 100 privately held water rights, with a total combined diversion rate of approximately 100 cfs.

4. Water rights diverted from the Big Lost River or its tributaries are administered by Water District 34. The Department has adopted administrative rules to govern the delivery of water rights in Water District 34. *See* IDAPA 37.03.12 (Water Distribution Rules – Water District 34) (“WD34 Rules”).

5. Rule 30.01 of the WD34 Rules states:

Eastside Canal. The watermaster, with the approval of the director and after consultation with the Big Lost River Irrigation District, may elect to deliver the natural flow of the river through the Eastside Canal when the following conditions are met:

- a. The full flow of the river, including impounded water, to be delivered downstream of the Moore diversion is not greater than the capacity of the Eastside Canal.
- b. More natural flow water can be delivered to calls for natural flow than could be delivered by using the natural river channel.
- c. No water right is injured.
- d. Measuring devices of a type acceptable to the director are installed and maintained where the flow leaves the river channel and where it returns to the river channel.
- e. When used for the delivery of natural flow to the Arco diversion, the Eastside Canal is considered to be the river channel for water delivery accounting purposes and the watermaster shall protect the natural flow for delivery to prior water rights. Water rights diverting water from the river channel downstream from the point the Eastside Canal returns to the river channel shall be measured at their point of diversion from the river downstream from the Eastside Canal return.
- f. Conveyance losses in the Eastside Canal, when considered to be the river channel, shall be proportioned between the river flow, the diversions from the Eastside and pumps that inject ground water into the Eastside Canal. The proportioning will be based upon the ratio of total Eastside diversions and injected ground water to the total inflow to the canal.

IDAPA 37.03.12.30.01 (emphasis added).

6. During the irrigation season, the Eastside Canal is often used by Water District 34 to convey Big Lost River water to downstream canals on the river such as the Arco Canal and the Munsey Ditch. Because the seepage losses in the Big Lost River channel below the Moore Diversion are so large, the Eastside Canal is used to convey the river flow instead of the natural river channel. The river flow conveyed through the Eastside Canal is injected back into the Big Lost River channel at the end of the Eastside Canal, immediately upstream of the Arco and Munsey headgates.

7. There are significant conveyance losses in the Eastside Canal. Pursuant to Rule 30.01.f of the WD34 Rules, the conveyance losses in the canal are divided between the water users on the Eastside Canal, water users who use the canal to transport pumped ground water, and the river flow conveyed through the canal. Therefore, the amount of water delivered at a water user's headgate on the Eastside Canal is less than the amount of water diverted by the water user from the Big Lost River at the head of the Eastside Canal.

8. Application 86130 proposes to add Applicants' pump station on the Eastside Canal as an authorized point of diversion for water rights 34-301E and 34-301F. According to

Applicants, “When East Side Canal is acting as the Big Lost River channel, [they] will operate a pump station on the river (canal) at [their] property.”

9. If Applicants’ pump station on the canal is recognized as an authorized point of diversion for water rights 34-301E and 34-301F, Applicants argue that they would no longer bear any of the conveyance losses in the Eastside Canal. The conveyance losses previously borne by Applicants would be shifted to other water users on the Eastside Canal or the river flow in the canal, resulting in a reduced water supply to satisfy water rights on the Big Lost River.

RELEVANT LEGAL PROVISIONS

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

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

ANALYSIS

Validity of Transferred Rights

The existing place of use for water rights 34-301E and 34-301F has been consistently irrigated. Based on the evidence available to the Department at this time, water rights 34-301E and 34-301F are valid rights and have not been lost or forfeited because of non-use.

Injury to Existing Water Rights

The injury analysis in this case is simple. During most of the irrigation season, the flow in the Big Lost River is not sufficient to satisfy all the irrigation rights from the river and junior water rights are curtailed. Thus, for most of the irrigation season there is a finite amount of water that is available to satisfy the water rights in the basin.

Currently, Applicants use the Eastside Canal to deliver their water rights. Applicants are charged a proportionate share of the conveyance losses in the canal. Therefore, the amount of water delivered at Applicants' pump station on the Eastside Canal is less than the amount of water diverted by Applicants at the head of the Eastside Canal under their water rights.

Applicants propose to add their pump station on the Eastside Canal as an authorized point of diversion for water rights 34-301E and 34-301F. Applicants do not propose to make any other changes to the delivery system. They only propose to add a point of diversion to their rights. The changes proposed by Applicants would not reduce the overall conveyance losses in the Eastside Canal but, according to Applicants, would make it so that they would no longer have to bear any of the conveyance losses in the canal. The conveyance losses might be shifted to the other users in the Eastside Canal and the river flow, when the Big Lost River is conveyed through the canal, thereby reducing the quantity of water under existing water rights.¹ If the conveyance losses currently borne by the Applicants were shifted to other users in the Eastside Canal or the river flow, the proposed change would injure other water rights and must be denied.

Enlargement

In most years, there is a finite amount of water available to satisfy irrigation rights from the Big Lost River. This limited amount of water is comprised of the total water supply in the basin minus the conveyance losses in the river and in the delivery systems. The conveyance losses in the aptly named Big Lost River drainage are very high. The conveyance losses in the Eastside Canal are also very high. Frequently, water users implement efficiency projects, such as lining canals or installing pipelines, to reduce conveyance losses. In this case, Applicants are not proposing any project to reduce the conveyance losses in the Eastside Canal. Therefore, the conveyance losses in the canal will remain the same, with or without the Applicants' transfer. The proposed changes will not result in any additional water in the Eastside Canal.

Applicants propose to add their pump station on the Eastside Canal as an authorized point of diversion to water rights 34-301E and 34-301F. The flow of the Big Lost River at the Moore Diversion is conveyed through the Eastside Canal during much of the irrigation season. During such times, according to the WD34 Rules, the Eastside Canal acts as the river channel. Applicants argue that their point of diversion should be located where they divert water from the de facto river channel. If the proposed changes were approved, Applicants water rights might be delivered to the added point of diversion without loss. The conveyance losses in the Eastside Canal might be shifted to other water users in the canal and Applicants would be entitled to a greater portion of the finite amount of water in the Big Lost River. This would result in an enlargement in use of water rights 34-301E and 34-301F.

¹ It is not certain that Applicants could avoid bearing a proportionate share of conveyance losses, even if the Application 86130 were approved. Rule 30.01.f states that the conveyance losses in the Eastside Canal shall be divided between the river flow conveyed in the canal, the ground water conveyed in the canal and the "diversions from the Eastside." Even if the transfer were approved, Applicants' pump station would still be considered a "diversion from the Eastside," suggesting that they might continue to be treated like all other water users diverting from the Eastside Canal and might continue to bear the same amount of conveyance loss as they currently bear.

The proposed changes are akin to a water user moving downstream on a gaining water source or upstream on a losing water source. Both changes would result in the water user diverting and using more water than would be available at the original point of diversion. Assume for example, that Farmer Smith holds a right to divert water from Aspen Creek, which is a gaining stream. At Farmer Smith's existing point of diversion, there is only enough water in Aspen Creek to satisfy one-half of the Farmer Smith's authorized diversion rate. Because Aspen Creek is a gaining stream, if Farmer Smith were to move his point of diversion downstream by a mile, he would be able to divert his full water right.² This, however, would constitute an enlargement of use under the water right.³ Changing a point of diversion to capture more water than is naturally available at the original point of diversion is an enlargement. Applicants' proposal to change a point of diversion to capture and use more water from the Eastside Canal than would otherwise be available to Applicants will result in an enlargement in use.

Conservation of Water Resources

An applicant must demonstrate that the changes proposed in a transfer application will not result in waste or reduce the supply of water available for use by the applicant or other water users in the state. In this case, if Applicants were able to shift their conveyance losses to other users in the Eastside Canal or to the river flow conveyed in the canal, it would diminish the value of using the Eastside Canal as the river channel. If other water users on the Eastside Canal were to make similar changes to their water rights, it would force Water District 34 to discontinue the practice of diverting the Big Lost River natural flow through the Eastside Canal, increasing the total losses to the river, and reducing the amount of Big Lost River water available for diversion and use within the district. Applicants have not demonstrated that the proposed changes are consistent with the conservation of water resources in the state of Idaho.

Local Public Interest

Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B(3). There are over 100 water rights delivered through and diverted from the Eastside Canal, similarly situated to water rights 34-301E and 34-301F. If all the water users on the Eastside Canal were to pursue the same change sought by the Applicants, there would be multiple dozens of additional points of regulation added to Water District 34, with no increase in water district members. This additional cost of regulation for Water District 34 would be borne

² If Aspen Creek were fully appropriated, moving the point of diversion downstream would also result in injury to the other water rights on Aspen Creek because Farmer Smith would be diverting more water from the new point of diversion than he could from the original point of diversion, thereby reducing the amount of water available to satisfy other water rights on Aspen Creek.

³ A water user can always improve their diversion and conveyance infrastructure to reduce or eliminate conveyance loss without enlarging the use under his water right as long as the water use does not exceed the elements of the subject water rights. Idaho Code § 42-250; *Application of Boyer*, 248 P.2d 540, 546, 73 Idaho 152, 162-63 (1952). Applicants and other water users on the Eastside Canal could implement efficiency projects, such as lining the canal, to reduce the conveyance losses in the canal and increase the amount of water available to satisfy the water rights on the canal.

by all water users in the district, even those receiving no benefit from the changes. Applicants have not demonstrated that the proposed changes are in the local public interest.

CONCLUSIONS OF LAW

Based on the evidence available to the Department at this time, Applicants have not demonstrated that the proposed changes will not injure other water rights, will not result in an enlargement of use under the rights, are consistent with the conservation of water resources in the state of Idaho, or are in the local public interest. Therefore, Application 86130 should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 86130 in the name of Richard and Jacqueline Reynolds is DENIED.

Dated this 18th day of July 2022.

A handwritten signature in blue ink, appearing to read 'J. Cefalo', is written over a horizontal line.

James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2022, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Denying Transfer (86130)

RICHARD AND JACQUELINE REYNOLDS
3253 W 2800 N
ARCO, ID 83213



Christina Henman
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department 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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

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.