

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

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

On December 17, 2021, John Lezamiz Family Ltd. Partnership (“Lezamiz”) filed Application for Transfer 85632 (“Application 85632”) with the Idaho Department of Water Resources (“Department”). 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 Regional Manager for the Eastern Regional Office of the Department approved Application 85632. The approval was designated as a preliminary order. On April 6, 2022, Lezamiz filed a *Petition for Reconsideration* (“Petition”), rejecting one of the conditions in the transfer approval. In conjunction with this order, the Regional Manager granted Lezamiz’s *Petition* and withdrew the preliminary order approving Application 85632.

FINDINGS OF FACT

1. Application 85632 proposes to change the point of diversion and place of use for water right 34-633.
2. Water right 34-633 authorizes the diversion of 2.98 cfs from Congdon Springs Creek and the irrigation of 149 acres.
3. At the existing place of use, water right 34-633 is combined with water right 34-2356. Water right 34-2356 authorizes the diversion of 2.98 cfs from ground water and the irrigation of 149 acres. Water rights 34-633 and 34-2356, in combination, are limited to a diversion rate of 2.98 cfs and the irrigation of 149 acres.
4. Application 85632 states that the 149-acre existing place of use will continue to be irrigated with ground water right 34-2356.
5. Application 85632 proposes to combine water right 34-633 with the following water rights (“Lezamiz Rights”):

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
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

6. Application 85632 does not propose any new irrigated acres. Instead, the application proposes to combine water right 34-633 with the Lezamiz Rights to irrigate 173.9 acres. Water right 34-633 would continue to bear an individual acre limit of 149 acres.

7. The proposed point of diversion is located 0.5 miles upstream of the existing point of diversion for water right 34-633. The proposed point of diversion is an existing pump station, used to divert water rights 34-232, 34-2275 and 34-13892 held by Lezamiz.

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

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	Seefried Ranch LLC
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

9. The proposed point of diversion is a pump station in a small pond north of Congdon Springs Creek. Water in excess of Lezamiz's senior right, backs up at the Lezamiz headgate and forms a large pond on the creek. Water from the large pond overflows into the Burnett Ditch. There is a measuring device on the overflow channel into the Burnett Ditch.

10. The overflow from the large pond on Congdon Springs Creek into the Burnett Ditch is the authorized point of diversion for water rights 34-610A, 34-610D, 34-13882, 34-13883, 34-13942, 34-13943, 34-14341 34-14382, 34-14383, 34-14730 and 34-14755.

11. The Big Lost River Irrigation District, who manages deliveries from the Burnett Ditch, measures the amount of water injected into the ditch and delivers the injected water to the water right holders. Often, there is only enough water in Congdon Springs Creek to partially satisfy the water rights with a 1908 priority date (34-601A, 34-601D, 34-13882, 34-13883).

12. Prior to Application 85632, the owner of record for water right 34-633 was Seefried Ranch LLC ("Seefried"). Application 85632 included a Quitclaim Deed from Seefried to Lezamiz for "All of water right 34-633, priority date 6/01/1896, and 2.98 cfs for the beneficial use of irrigation and stockwater." The ownership records for water right 34-633 were updated in conjunction with the original approval of Application 85632. Lezamiz is now the owner of record for water right 34-633.

13. Application 85632 included a cover letter from Lezamiz's consultant, Greg Sullivan ("Sullivan") with Brockway Engineering PLLC, which included the following statements:

Water from Congdon Springs is very unreliable. Delivery from water right 34-633 to its current place of use has not occurred in many years. The conveyance ditches and points of diversion are not functional, have been filled in over the years or simply do not exist anymore. Ground water right 34-2356 has historically been used to irrigate 149.0 acres.

14. To evaluate potential injury to existing water rights, the Department asked Lezamiz to provide additional information about the statements made in the cover letter from Sullivan. On March 15, 2022, Sullivan provided the Department a copy of a letter prepared by Holly Seefried, member and manager of Seefried, the previous owner of water right 34-633 and the current owner of the authorized place of use for water right 34-633.

15. The letter from Holly Seefried included, among others, the following statements:

The last year that Seefried's attempted to use Congdon Springs water to irrigate with was in 2011, or possibly 2012, as a flood stream to cover the corners [of an existing pivot]. This was highly unsuccessful. Delivery of this right is VERY unreliable because it is on the end of the delivery ditch.

In the past, Congdon Springs water MAY HAVE been delivered successfully to the property in question, however, it was still being operated under the entire Nelson Ranches enterprise & was able to benefit from the fact that several [storage] rights were available to add to the right to get it delivered. That is no longer the case & has not been since 2011, when Nelson Ranches ceased to exist as one property.

Seefried's did remove the disconnected, unworking "ditch pump" in 2014.

In 2011, when Seefried's first started working this property, they found the pump that MAY HAVE been used at one time to put Congdon Springs water (OCCASIONALLY) through the wheel lines was NOT CONNECTED to a power source. It was NEAR a power pole & looked like it would work but WAS NOT HOOKED UP & was in fact INOPERABLE. Several years later, while burying mainline, Seefried's also found that the main line that came off of that pump had also been disconnected. In 2014, Seefried's did remove this pump. It was NOT CONNECTED, OF NO USE & INOPERABLE.

As previously stated, many times, RELIABLE & CONSISTANT delivery of Congdon Springs water right 34-633 to this property is IMPOSSIBLE! Delivery MAY have happened at one time in the past, but without the help of additional water added when this property had the benefit of being under the Nelson Ranches umbrella, this right CANNOT be relied upon to irrigate this property. It cannot even be relied upon to deliver a consistent stock water stream.

The main line that tied the surface water pump & ditch to the ground water well was NOT in working order or even connected to power or water source when Seefried's took over operation of this property in 2011. There was a pump sitting on an upended 55 gallon barrel near a power pole & small pond that MAY have once been used to pump Congdon Springs water, however when Seefried's took over operation, this pump was NOT wired to the panel. It only had the appearance of being connected. ALL the wires had been disconnected, (or it was never hooked up to begin with) & the panels only provide power to move the 2 pivots. No main line was connected. The pump was removed in 2014 by Seefried's.

For Seefried's 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. By itself & at this time, water right 34-633 is unable to do any more than provide an inconsistent stock water stream. Without the benefit of added water to get this right to the end of the ditch, there is no way to get it there. In years past, Seefried's had the BLRID do some work on the ditch, (under protest of the then BLRID manager). The ditch has been burned several times, ditchers have been run through it, Seefried's have shoveled, burned & spent hours on their backhoe trying to get a stream of water. All to no avail. Seefried's have asked if they can use this right as a source of recharge, possible mitigation, or to trade or transfer it so they

could use it on their other property in the Big Lost River Valley. All of these ideas have been shot down. This water right is of no use to the Seefried's & can no longer be used for its intended purpose on the property that it is allocated to. Hence, this transfer.

Letter from Holly Seefried (capitalization and erroneous apostrophes in original).

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 Right

The existing place of use for water right 34-633 has been consistently irrigated. According to the letter provided by Seefried, the previous owner of water right 34-633, the right has not been diverted for irrigation use since 2012. Pursuant to Idaho Code § 42-223(9) "No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code." Because Seefried has maintained the full beneficial use authorized by water right 34-633, the right has not been lost and forfeited because of the non-use.

Injury to Existing Water Rights

Idaho Code § 42-222(1) does not provide a definition for the terms "injury" or "injured." The Department's Water Appropriation Rules (IDAPA 37.03.08), however, provide a useful definition for injury to existing water rights.

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

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

...

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

IDAPA 37.03.08.045.01.a.

The injury analysis in this case is simple. Based on the unambiguous statements from Holly Seefried, water right 34-633 has not recently been used and cannot be used for irrigation at its current place of use. In the absence of Application 85632, no water would be diverted from Congdon Springs Creek under water right 34-633. If Application 85632 is approved, Lezamiz will regularly divert water right 34-633. Approving Application 85632, therefore, will reduce the quantity of water available to satisfy existing water rights on Congdon Springs Creek

Often, changing the point of diversion or place of use for a senior surface water right has no effect on junior rights from the same source. If the senior right is actively diverted, then the junior rights holders on the stream are accustomed to diverting water only after the senior right has been satisfied. In this case, however, the senior right has not been used for at least ten years and cannot be used. Junior water rights on Congdon Springs Creek have not been curtailed to supply water to water right 34-633 for at least ten years. Currently, water right 34-633 is not diverted and, according to Seefried, cannot be diverted for beneficial use. If the changes proposed in Application 85632 are approved, the diversion occurring under water right 34-633 will change significantly. The proposed change will injure (reduce the quantity of water) under existing water rights.

A proposed change that would injure other water rights may still be approvable if conditions are adopted preventing or mitigating the potential injury. One way to prevent injury to existing water rights in this case would be to make water right 34-633 junior to the other water rights on Congdon Springs Creek. In doing so, the proposed change would not reduce the quantity of water currently available to satisfy the other rights on Congdon Springs Creek. Lezamiz has rejected this option to prevent injury. Lezamiz has not identified any mitigation plan or condition that would prevent injury to the existing water rights on Congdon Springs Creek. In the absence of a mitigation plan or means to prevent injury to existing rights, Application 85632 must be denied.

Enlargement

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. Water rights 34-633 and 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).

To prevent enlargement of use under water right 34-633, the right must be combined with a full supply ground water right and conditioned in a manner identical to the existing conditions on the right. The proposed place of use is covered by ground water rights 34-2350, 34-2418 and 34-14312. These three rights, in combination authorize a diversion rate of 3.24 cfs and the irrigation of 173.9 acres. This equates to a diversion rate of 0.019 cfs per acre, which constitutes a full supply. If the transfer were approved, water right 34-633 could be combined with ground water rights 34-2350, 34-2418 and 34-14312 and limited to a diversion rate of 3.24 cfs and the irrigation of 173.9 acres. Such a limitation would prevent enlargement in use under water right 34-633.

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

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). To the extent the changes proposed in Application 85632 will diminish the amount of water available to satisfy existing water rights on Congdon Springs Creek, the proposed changes are not in the local public interest.

CONCLUSIONS OF LAW

Based on the evidence provided with the application, Lezamiz 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. The evidence provided by Lezamiz, specifically the letter from Holly Seefried, demonstrates that the proposed changes will injure existing water rights on Congdon Springs Creek. Lezamiz has not identified any means to mitigate for the injury. The proposed changes will injure other water rights and are not in the local public interest. Therefore Application 85632 should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 85632 in the name of John Lezamiz Family Ltd. Partnership is DENIED.

Dated this 15th day of April 2022.



James Cefalo
Regional Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April 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 (85632)

JOHN LEZAMIZ FAMILY LTD PARTNERSHIP
847 CANYON SPRINGS RD
TWIN FALLS, ID 83301

Courtesy copy sent via regular mail to:

GREG SULLIVAN
BROCKWAY ENGINEERING
2016 WASHINGTON ST, STE 4
TWIN FALLS, ID 83301



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.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests 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 IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director 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.