

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

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 83485 IN THE)	ORDER DENYING MOTION
NAME OF ECCLES FLYING HAT)	IN LIMINE
RANCH LLC)	
_____)	

BACKGROUND

On July 3, 2019, Eccles Flying Hat Ranch, LLC (“Eccles”) filed Application for Transfer No. 83485 (“Application”) with the Idaho Department of Water Resources (“Department”). The Application seeks to make the following changes to water right 37-577BP: (1) remove the point of diversion in the SWNW, Sec 20, T03N, R18 E, B. M., and (2) change 1.4 cubic feet per second (cfs) mitigation use to irrigation use. On August 7 and 14, 2019, the Idaho Mountain Express published notice of the Application. The Hiawatha Canal Water Users’ Association of Lateral or Laterals (“Hiawatha Canal Water Users”) and the Idaho Water Resource Board (“Board”) filed protests. On July 19, 2021, the Board withdrew its protest.

On July 21, 2021, the Department held a prehearing conference in the above referenced matter. On November 16, 2021, the Department held a prehearing status conference to discuss prehearing motions and other scheduling matters.

On December 6, 2021, Hiawatha Canal Water Users’ filed a *Motion in Limine* (“Motion”) along with the *Brief in Support of Motion in Limine* (“Brief”) and the *Declaration of Fritz X. Haemmerle*. The Motion requests oral argument. Pursuant to IDAPA 37.01.01.565, Eccles had until December 20, 2021 to respond to the Motion. Eccles did not file a response to the Motion.

The Motion requests oral argument and asks the hearing officer to prevent Eccles “...from presenting any evidence or arguing that: (1) the amount of water necessary for mitigation, 1.4 cfs, is wrong or should be something different; and (2) the 1.4 cfs is not necessary for mitigation.” *Motion* at 1.

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) states, in part:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use,

period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Idaho Code 42-222(1) also states, in 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, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize the filing of motions in limine. The rules do, however, authorize the filing of prehearing motions, which would include motions in limine. IDAPA 37.01.01.260 and 37.01.01.565.

Rule 565 of the Department's Rules of Procedure states, in part: "The presiding officer may consider and decide prehearing motions with or without oral argument or hearing." IDAPA 37.01.01.565.

Rule 600 of the Department's Rules of Procedure states, in part: "Evidence should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development." IDAPA 37.01.01.600.

ANALYSIS

The Brief asserts that Eccles is prevented from "attempting to alter or amend any part of the Partial Decrees" (*Brief* at 3), because the Snake River Basin Adjudication ("SRBA") Court *Final Unified Decree* states: "This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987. *See Haem. Dec. Exh. 4.*" *Id.* at 1.

The SRBA Court issued the *Order of Partial Decree Subcase No. 37-00577BP* ("Partial Decree") on August 30, 2011, with a priority date of March 24, 1883. The Partial Decree states:

A portion of Right 37-577BP, 1.40 cfs, shall continue to be diverted into the Hiawatha Canal to mitigate the removal of Rights 37-481D,

37-482J, 37-483D, 37-577BP, 37-917, 37-11975, 37-11976, 37-11977 and 37-11978 diverted into Cove Canal and Kohler Ditch under Transfer 68526 until such time as the canal ceases operation or is otherwise no longer necessary for such mitigation.

The Partial Decree and subsequent *Final Unified Decree* is conclusive as to the extent and nature of water right 37-577BP. However, the Partial Decree indicates the mitigating portion of water right 37-577BP may not be necessary if the canal ceases operation "...or is otherwise no longer necessary for such mitigation." *Partial Decree* at 1. The last clause of this statement anticipates a change in circumstances after the *Final Unified Decree* that would negate Eccles' mitigation obligation.

Idaho Code § 42-222 provides the opportunity to file applications to change the point of diversion, place of use, period of use, or nature of use of a water right. Eccles' Application requests a change to the point of diversion and nature of use of the mitigation aspect of water right 37-577BP, as Idaho Code § 42-222 allows.

The Department is required to examine all available evidence and information when deciding to approve or deny the Application. Idaho Code § 42-222. Eccles is required to "...present sufficient evidence to the Department so that the director can make an informed determination..." *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 420, 18 P.3d 219, 225 (2001). Pursuant to Rule 600 of the Department's Rules of Procedure (IDAPA 37.01.01), the Department should not frustrate Eccles' opportunity to present evidence to develop the record in this matter.

Pursuant to Rule 565 of the Department's Rules of Procedure (IDAPA 37.01.01), a hearing officer can decide prehearing motions with or without oral argument. Parties will have sufficient opportunity to present arguments and evidence at the evidentiary hearing. Therefore, oral argument on the Motion is not warranted.

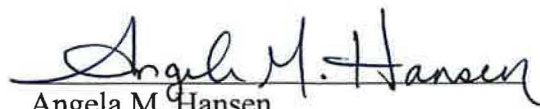
CONCLUSION

Based on the above analysis, the Department should deny Hiawatha Canal Water Users' *Motion in Limine*, because questions of fact remain regarding the intent of the Partial Decree language stated above and whether circumstances regarding Eccles' mitigation obligation changed since issuance of the *Final Unified Decree*. The Department will allow Eccles' to develop the record regarding this matter at the evidentiary hearing.

ORDER

IT IS HEREBY ORDERED that Hiawatha Canal Water Users' *Motion in Limine* and request for oral argument is **DENIED**.

Dated this 4th day of January, 2022.


Angela M. Hansen
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on January 4th, 2022, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER DENYING MOTION IN LIMINE** to the person (s) listed below:

RE: TRANSFER NO 83485

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