

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

**IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 84270 IN THE)
NAME OF ELAINE R. SORESENSEN)**

**PRELIMINARY ORDER
APPROVING TRANSFER**

On July 21, 2020, Elaine R. Sorensen ("Sorensen") filed Application for Transfer 84270 ("Application 84270") with the Idaho Department of Water Resources ("Department"). Application 84270 was protested by Jerry Browne, Cindy Archer, Matea McCray ("McCray") and Karon Huggins ("Huggins"), Lenard Van Eps, and Joel Andersen. The Department conducted a pre-hearing conference on October 27, 2020. During the conference, the parties requested that an administrative hearing be held to decide the contested case.

Prior to the hearing, Sorensen executed a *Stipulation for Withdrawal of Protest* ("Stipulation") with Joel Andersen, Cindy Archer, Jerry Browne and Lenard Van Eps. The *Stipulation* set forth five limiting conditions to be included on Transfer 84270, if approved. After the *Stipulation*, the only remaining protest was the joint protest filed by Huggins and McCray.

The Department conducted an administrative hearing on February 17, 2021. Sorensen was represented by attorney Luke Marchant. McCray and Huggins were represented by McCray. Exhibits 1-8 offered by Sorensen and Exhibits 201-206 offered by McCray were admitted into the administrative record. Exhibits 207 and 208 offered by McCray were excluded from the record. Adam Sorensen testified on behalf of Sorensen and McCray and Huggins testified on their own behalf.

After carefully considering the evidence in the record, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 84270 proposes to change the points of diversion and place of use for water rights 34-7052 and 34-7110.

2. Water rights 34-7052 and 34-7110 currently bear the following elements:

Right No.	Source	Priority Date	Uses	Rate	Volume	Acres
34-7052	Ground Water	11/13/1973	Irrigation	6.00 cfs	2195.5 af	472
34-7110	Big Lost River	5/15/1975	Irrigation	8.07 cfs		472

3. Water rights 34-7052 and 34-7110, in combination, are limited to a total diversion rate of 13.49 cfs, an annual diversion volume of 2,360 acre-feet, and the irrigation of 472 acres.

4. The existing point of diversion for ground water right 34-7052 (known as the “Potter Well”) is located in the NWSWSW, Section 27, T05N, R26E. Water diverted from the Potter Well was conveyed to the existing place of use for water right 34-7052 by injecting water into a canal, then injecting the water from the canal into the Big Lost River, and re-diverting the water from the river at the Arco Canal heading in the NWNWNW, Section 26, T04N, R26E.

5. Application 84270 proposes to abandon the Potter Well and to list the following existing ground water wells owned by Sorensen as authorized points of diversion for water right 34-7052:

Well Name	Well Location
South Well	SESE, Section 5, T04N, R26E
Middle Well	SENE, Section 5, T04N, R26E
North Well or New Well	Lot 1 (NENE), Section 5, T04N, R26E
Moss Well	NWNW, Section 21, T05N, R26E
PU Well	NWNW, Section 21, T05N, R26E

6. The existing point of diversion for water right 34-7110 is the Arco Canal heading located in the NWNWNW, Section 26, T04N, R26E. The proposed point of diversion is the Moore Canal heading located in the NWSESE, Section 4, T05N, R26E, approximately ten miles upstream of the existing point of diversion.

7. Application 84270 also proposes to identify the South Well, Middle Well, North Well, Moss Well and PU Well as authorized points of diversion for the following ground water rights:

Right No.	Existing Point(s) of Diversion
34-2332	Moss Well, PU Well
34-2424B	North Well
34-2428	Middle Well
34-7035B	South Well
34-7079	Moss Well, PU Well
34-12416	Middle Well
34-13841	Moss Well

8. Application 84270 also proposes to combine water rights 34-7052 and 34-7110 with water rights 34-170, 34-496A, 34-556, 34-692D, 34-10319, 34-2332, 34-2424B, 34-2428, 34-7035B, 34-7079, 34-12416 and 34-13841 to irrigate 1,837 acres within a 2,598-acre permissible place of use. The water rights to be included in the permissible place of use currently bear the following elements:

Right No.	Source	Priority Date	Rate (cfs)	Volume (af)	Acre Limit	Total Acres
34-170	Big Lost River	5/1/1886	1.20		60	264
34-556	Big Lost River	5/1/1886	2.80		140	264
34-2332	Ground Water	5/6/1955	2.90		145	264
34-7079	Ground Water	9/17/1979	2.76		145	264
Combined Limits			6.90			264
34-496A	Big Lost River	6/1/1896	1.20		60	828
34-692D	Big Lost River	7/15/1884	1.20		60	828
34-2428	Ground Water	4/1/1979	3.85		193	945
34-12416	Ground Water	5/1/1982	3.85		365	945
34-7035B	Ground Water	4/12/1973	4.98	1293.3	369.5	828
Combined Limits			11.23			945
34-2424B	Ground Water	6/13/1961	2.27	371	106	116
34-10319	Big Lost River	3/23/1900	3.00		116	116
Combined Limits			3.12			116
34-7052	Ground Water	11/13/1973	6.00	2195.5	472	472
34-7110	Big Lost River	5/15/1975	8.07		472	472
Combined Limits			13.49	2360		472
34-13841	Ground Water	12/17/1975	0.80	140	40	40

9. Adam Sorensen is the manager for the farm ground owned by Sorensen. Adam Sorensen Testimony. He is familiar with the irrigation infrastructure. *Id.* If Application 84270 is approved, Sorensen will add mainline and tie together existing mainlines to make it possible for any of the five wells described above (Moss, PU, North, Middle, South) to supply water to any of the irrigated acres within the proposed permissible place of use. *Id.*

10. Water diverted from the Big Lost River at the Moore Canal can be delivered to any of the acres in the proposed permissible place of use. *Id.*

11. The existing 472-acre place of use for water rights 34-7052 and 34-7110 is located outside of the digital service boundary for the Big Lost River Irrigation District (“BLRID”).

12. The existing 116-acre place of use for water right 34-10319 is located within the digital service boundary for BLRID. These 116 acres are assessed by BLRID and are part of the 32,000 irrigated acres authorized under BLRID’s water rights. The 106-acre place of use for water right 34-2424B is located within the 116-acre place of use for water right 34-10319 and assessed by BLRID.

13. According to records from BLRID, there are 4,698 inches (186 acre-feet) of storage water associated with the 116 acres described in water right 34-10319. In recent years, this storage water has been used on other properties within the Big Lost River basin (properties not associated with Application 84270). Adam Sorensen Testimony.

14. A portion (117 acres) of the 945-acre place of use for water rights 34-2428 and 34-12416 is located within the digital service boundary for BLRID. Water rights 34-2428 and 34-12416 are ground water rights. There are no surface water rights associated with these 117 acres. The 117 irrigated acres described in water rights 34-2428 and 34-12416 are not assessed by BLRID.

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

Injury to Existing Water Rights

The protests filed by Andersen, Archer, Browne and Van Eps stated a concern that additional pumping from Sorensen's wells located in Section 5 (North Well, Middle Well, South Well) would interfere with other ground water wells in the area. Andersen Archer, Browne and Van Eps divert water from ground water wells located near Sorensen's Section 5 wells.

To address the concern about additional pumping in Section 5, and to resolve the protests filed by Andersen, Archer, Browne and Van Eps, Sorensen has agreed to the following conditions set forth in the *Stipulation*:

Diversion and use of water from the well located in NENE, Lt. 1, Sec. 05, 04N, 26E (known as the "North Well") under the following water rights shall be limited to the diversion of 2.27 cfs and 371 acre-feet/annum: 34-2332, 24-2424B, 24-2428, 34-7035B, 34-7079, 34-7052, 34-12416, and 34-13841.

Diversion and use of water from the well located in NWSENE, Sec. 05, 04N, 26E (known as the “Middle Well”) under the following water rights shall be limited to the diversion of 1,953 acre-feet/annum: 34-2332, 24-2424B, 24-2428, 34-7035B, 34-7079, 34-7052, 34-12416, and 34-13841.

Diversion and use of water from the well located in SESE, Sec. 05, 04N, 26E (known as the “South Well”) under the following water rights shall be limited to the diversion of 1,293.3 acre-feet/annum: 34-2332, 24-2424B, 24-2428, 34-7035B, 34-7079, 34-7052, 34-12416, and 34-13841.

Water Right Nos. 34-2332, 34-2424B, 34-2428, 34-7035B, 34-7079, 34-7052, 34-12416, and 34-13841 shall be limited to the irrigation of 1690.5 acres within the 2,598-acre permissible place of use.

The right holder shall maintain a measuring device, data logger, and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversions located in the NENE, Lt. 1, Sec. 05, 04N, 26E (known as the “North Well”), NWSENE, Sec. 05, 04N, 26E (known as the “Middle Well”), and the SESE, Sec. 05, 04N, 26E (known as the “South Well”).

Ex. 8 at 2.

The rate and volume caps in the proposed conditions reflect the existing rate and volume limits at the North, Middle and South Wells. The proposed conditions are intended to maintain the status quo at the North Middle and South Wells and to prevent additional pumping from those three wells as a result of this transfer approval. If the proposed conditions, or substantially similar conditions, are included on the transfer approval, the changes proposed in Application 84270 will not affect the ground water wells owned by Andersen, Archer, Browne or Van Eps.

The existing point of diversion for water right 34-7052 (Potter Well) is located in the SWSW, Section 27, T05N, R26E. Because of the volume caps on the North, Middle and South Wells, the volume associated with water right 34-7052 will be pumped from the Moss and PU Wells. The Moss and PU Wells are located in the NWNW, Section 21, T05N, R26E, approximately two miles northwest of the Potter Well. Water right 34-7052 has been diverted from the Moss and PU Wells since 2013, through approved Water Supply Bank rentals. The Moss and PU Wells are located in a productive area of the aquifer and are surrounded by other ground water wells used for irrigation. None of the wells within a ½ mile radius of the Moss and PU Wells have been re-drilled or deepened since 2013. The Moss and PU Wells are located farther away from the Big Lost River than the Potter Well. The proposal to move diversion volume from the Potter Well to the Moss and PU Wells is unlikely to injure existing water rights.

Water right 34-7110 authorizes the diversion of 8.07 cfs from the Big Lost River at the Arco Diversion. The proposal to change the point of diversion for water right 34-7110

from the Arco Diversion to the Moore Diversion will have no effect on other water rights on the Big Lost River. Water right 34-7110 bears a priority date of May 15, 1975 and is only in priority during high flow events on the Big Lost River. Water right 34-7110 is only available when the Big Lost River is flowing in the river channel between Moore and Arco and all irrigation rights are being filled on the river. Therefore, changing the point of diversion from the Arco Diversion to the Moore Diversion will have no effect on the amount of water available to satisfy existing water rights.

Enlargement

Water rights 34-2424B and 34-10319, in combination, authorize 116 acres of irrigation in the NENE, NWNE and SWNE, Section 5, T04N, R26E. Although water right 34-10319 from the Big Lost River is a junior right and is rarely available, ground water right 34-2424B represents a full supply water right, providing more than 0.02 cfs per acre for the irrigated acres authorized under the right. Water right 34-2424B is currently diverted from a ground water well located at the authorized place of use, meaning there is no conveyance loss between the point of diversion and place of use.

The 116-acre combined place of use for water rights 34-10319 and 34-2424B lies entirely within the digital service boundary for BLRID. Adam Sorensen confirmed that there are approximately 120 acres assessed by BLRID at the current place of use for water rights 34-2424B and 34-10319. According to records from BLRID, the 116 acres associated with water right 34-10319 are entitled to 4,698 inches (approximately 186 acre-feet) of storage water from BLRID.

BLRID holds water rights authorizing storage of water in Mackay Reservoir for irrigation use by its patrons. The BLRID water rights, in combination, are limited to the irrigation of 32,000 acres. The 32,000 acres described on the BLRID rights includes the 116 irrigated acres authorized under water right 34-10319.

Most of the proposed permissible place of use (2,358 acres of 2,598 acres) is located outside of the digital service boundary for the BLRID rights. Currently, the BLRID water rights (assessed acres) only overlap with two of the water rights included in Application 84270 (water rights 34-2424B and 34-10319). If the changes proposed by Sorensen were approved, the BLRID acres (in the NENE, NWNE and SWNE of Section 5) would become overlapped with all of the water rights included in Application 84270. Further, water rights 34-2424B and 34-10319 could be used for irrigation outside of the BLRID service boundary.

Water rights 34-10319, 34-2424B and the BLRID storage rights, in combination, represent more than a full supply of water for the 116 acres. These overlapping rights, however, are limited by the duty of water associated with the 116 acres. If these rights are combined with the other water rights in Application 84270, the extra water supply could be used to augment the water supply under the other water rights. There is a danger that water rights 34-10319, 34-2424B and the BLRID rights will be used to irrigate more than 116 acres. This would constitute an enlargement and cannot be approved.

It might be helpful to describe the enlargement concerns in a different way. There are three sources of water associated with the 116 irrigated acres in the NENE, NWNE, and SWNE of

Section 5, T04N, R26E: water right 34-10319 (Big Lost River, 3/23/1900, 3.00 cfs), water right 34-2424B (ground water, 6/13/1961, 2.27 cfs), and 186 acre-feet of storage water from BLRID. These three sources of water provide more than a full supply for the irrigation of 116 acres. In fact, these three sources of water likely provide twice the amount of water needed to irrigate 116 acres.

Sorensen proposes to combine water rights 34-10391 and 34-2424B with a number of other water rights to create a permissible place of use. Some of these other rights included in the permissible place of use do not constitute a full water supply. For example, the Potter water rights would only provide 0.013 cfs per acre to irrigate 472 acres after the 1975 priority dates are curtailed on the Big Lost River. There is a danger that Sorensen will use the extra water supply from the 116 acres in Section 5 to make up for the poor water supply under the other water rights included in Application 84270. This would be an enlargement of water rights 34-10319, 34-2424B and the BLRID water rights. In order to prevent enlargement of water rights 34-10319 and 34-2424B, the place of use for these rights cannot be combined with the other rights in Application 84270. Further, because water rights 34-2424B and 34-10319 must remain combined with the BLRID storage rights, water rights 34-2424B and 34-10319 cannot be transferred outside of the digital service boundary for the BLRID rights.

Conservation of Water Resources

The changes proposed in Application 84270 will not increase the conveyance losses for the water rights included in the application. Sorensen proposes to irrigate the proposed place of use by delivering water through mainlines and sprinklers. The changes proposed in Application 84270 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). It is in the local public interest to move water rights from less productive ground to more productive ground and to improve the efficiency and reliability of irrigation infrastructure. The changes proposed in Application 84270 are in the local public interest.

CONCLUSIONS OF LAW

The proposal to change the place of use for water rights 34-2424B and 34-10319 will result in an enlargement of those rights and cannot be approved. If the limiting conditions described above are added to Sorensen’s rights, Sorensen has demonstrated that the other changes proposed in Application 84270 will not injure other water rights, will not result in an enlargement of the transferred rights, that the proposed changes are consistent with the conservation of water resources in the state of Idaho, and that the proposed changes are in the local public interest. Therefore, Application 84270 should be approved with limiting conditions.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 84270 is APPROVED subject to the conditions set forth in Transfer Approval 84270 issued in conjunction with this order.

Dated this 5th day of March 2020.

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

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March 2021, 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 Approving Transfer (84270)

Elaine Sorensen
3871 W 2500 N
Moore, ID 83255

Cindy Archer
PO Box 463
Moore, ID 83255

Luke Marchant
Holden Kidwell Hahn & Crapo
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405

Matea McCray or Karon Huggins
3470 Cobblestone Lane
Idaho Falls, ID 83404

Jerry Browne
3041 N 3350 W
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Lenard Van Eps
3340 W 3000 N
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Jim Speck
Speck & Aanestad
PO Box 987
Ketchum, ID 83340



Christina Henman
Administrative Assistant

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.