BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 81800 IN THE NAME OF CASA DEL NORTE LP	)))	**AMENDED PRELIMINARY ORDER APPROVING TRANSFER**

PROCEDURAL HISTORY

On July 12, 2017, Casa Del Norte, LP ("CDN") filed Application for Transfer 81800 with the Idaho Department of Water Resources ("Department"), proposing to change certain elements of water rights 61-301B, 61-2111 and 61-11885. The Department published notice of the application on August 2 and 9, 2017. Double Anchor Ranches, Inc. ("DAR") filed a timely protest.

On July 2, 2018, CDN filed an amended transfer application, adding water right 61-301A to the list of water rights proposed to be changed. The Department published notice of the amended application on August 1 and 8, 2018. The United States Bureau of Land Management ("BLM") filed a timely protest.

On December 3, 2018, CDN filed a second amended transfer application ("Application 81800"), proposing to change certain elements of eighteen water rights. The Department published notice of the second amended transfer application on January 16 and 23, 2019. Kelly Riggs ("Riggs") filed a timely protest.

On February 25, 2020, BLM withdrew its protest, subject to the following conditions being included on any transfer approval:

1. This right does not grant any right-of-way or easement across the land of another.

2. Prior to diversion and use of water on or across federal land under this approval, the right holder shall obtain authorization necessary to access the point of diversion, or place of use, or to convey water across federal lands.

The Department conducted an administrative hearing for the contested case on February 25 and 26, 2020 in Boise. James Cefalo served as hearing officer. CDN was represented by attorney Norman Semanko. DAR was represented by attorney Charles Honsinger. Riggs represented himself.

During the hearing, Scott King ("King") and Terry Scanlan ("Scanlan"), both from SPF Engineering, testified as expert witnesses for CDN. Ed Squires ("Squires") from Hydrologic, Inc. testified as an expert witness for DAR. Harley Riggs, a director for DAR, testified for DAR. Riggs testified on his own behalf.

Exhibits 1, 2, 5, 6, 8, 9, 12, 13, 16, 25, 26 and 27 offered by CDN, Exhibits 101 and 102 offered by Riggs, and Exhibits 201-208, 210, 219, and 223-225 offered by DAR were admitted into the administrative record. Exhibits 226 and 227 offered by offered by DAR were excluded from the record. Exhibits 3, 4, 7, 10, 11, 14, 15, 17-24, 103-106, 209, 211-218, and 220-222 were not offered or were duplicative of other exhibits. The hearing officer took official notice of certain documents found within the Department's records. These documents were identified as Exhibits IDWR2 through IDWR5.

On May 1, 2020, the hearing officer issued a *Preliminary Order Approving Transfer* ("Preliminary Order") and *Transfer Approval 81800*. On May 12, 2020, Fred Price, a Water Rights Specialist for the BLM, notified the hearing officer of certain clerical errors in *Transfer Approval 81800*. Specifically, some of the water rights included in the approval contained errors in the place of use descriptions. The hearing officer reviewed the information provided by the BLM and agreed that the *Transfer Approval 81800* contained clerical errors. Pursuant to Rule 760 of the Department's Rules of Procedure (IDAPA 37.01.01) the hearing officer withdrew the *Preliminary Order* and *Transfer Approval 81800* and has replaced those documents with this order and its associated transfer approval.

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

FINDINGS OF FACT

1. CDN holds twenty-four irrigation water rights in the Cold Springs Creek ("CSC") drainage. Ex. 27. Some of these water rights have partially or fully overlapping places of use and many bear combined use limits. Ex. 6. The following table identifies the twenty-four CDN irrigation rights:

Right Number	Priority Date	Source	Diversion Rate (cfs)	Acre Limit	Combined Acre Limit	Combined Acre Limit
61-332	5/18/1875	CSC & Spring	2.72		847.3	1368
61-333	5/1/1885	CSC	0.54			
61-334	5/1/1886	CSC	0.50			
61-335	5/1/1889	CSC	0.48			
61-336	5/1/1895	CSC	0.80			
61-337	12/1/1895	CSC	2.40			
61-338	6/30/1870	CSC	1.84			
61-339	5/1/1875	CSC	1.50			
61-340	6/30/1887	CSC	0.50			
61-343	6/30/1888	CSC	0.60			
61-364	5/1/1887	CSC	0.12			
61-2008	2/26/1908	CSC	6.96	247.3		
61-11847	3/15/1957	Ground Water	0.60	30.6	30.6	
61-11844	2/15/1911	Unnamed Stream	0.54	50.6	50.6	
61-2095A	3/7/1953	Ground Water	3.05	315	800.9	
61-2199A	7/19/1966	Ground Water	5.88			
61-2209A	9/12/1966	Ground Water	0.41			
61-11887A	3/15/1977	Ground Water	2.36	206.9		
61-11854	4/1/1910	Springs	0.42	161	161	
61-301A	6/10/1955	Ground Water*	5.38		246.6	
61-10363	3/15/1870	Springs	3.25			
61-301B	6/10/1955	Ground Water*	1.02		215	215
61-2111	7/5/1955	CSC	1.02			
61-11885	7/5/1955	CSC	0.48			

* Low-Temperature Geothermal Ground Water

2. Water rights 61-332 through 61-340, 61-343, 61-364 and 61-2008 authorize six points of diversion on CSC. Ex. 6. Currently, only two of the six points of diversion from CSC are actively used by CDN. King Testimony; Ex. 8 at 3.

3. The primary active point of diversion ("Upper CSC Diversion") for CDN is located in the SWNE of Section 35, T03S, R09E. Ex. 8 at 3. At the Upper CSC Diversion, CDN diverts water into an 18-inch gravity pressure mainline or into an open ditch for stockwater. *Id.*

4. The other active CSC point of diversion for CDN ("Lower CSC Diversion") is located in the NENE of Section 16, T04S, R09E. *Id.*

5. Water rights 61-2111 and 61-11885 from CSC only describe one point of diversion, the Upper CSC Diversion. Ex. 6

6. Water rights 61-301B, 61-2111 and 61-11885 authorize the irrigation of 215 acres in Sections 8 and 17, T04S, R09E. The irrigated area in Sections 8 and 17 is referred to as the Bull Pasture. At some point prior to 2009, CDN installed a center pivot ("Bull Pasture Pivot") at the Bull Pasture which is used to irrigate approximately 174 acres.

7. Ground water right 61-301A authorizes the diversion of 5.38 cfs from a low-temperature geothermal ("LTG") well ("2-Plus Well") in the SESE of Section 9, T04S, R09E.

8. Ground water right 61-301B authorizes the diversion of 1.02 cfs from a LTG well ("Walker Well") in the NWNE of Section 8, T04S, R09E.

9. The authorized places of use for water rights 61-332 through 61-340, 61-343, 61-364, 61-2008, 61-11854, 61-301A and 61-10363 include a combined 161 irrigated acres in Section 29, T04S, R09E.

10. Water right 61-301A includes the following condition:

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 4.92 CFS. COMBINED RIGHT NOS.: 61-332, 61-333, 61-334, 61-335, 61-336, 61-337, 61-338, 61-339, 61-340, 61-343, 61-364, 61-2008, 61-2095A, 61-2095B, 61-2199, 61-2209A, 61-2209B, 61-10363, 61-11844, 61-11847, 61-11854 & 61-11887.

11. Water right 61-10363 includes the following conditions:

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 4.92 CFS. COMBINED RIGHT NOS.: 61-00301A, 61-11854, 61-02095A, 61-2095B, 61-02199, 61-02209A, 61-2209B & 61-11887.

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 246 ACRES IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 61-00301A, 61-02095A, 61-2095B, 61-02199, 61-02209A, 61-2209B & 61-11887.

12. Water right 61-11854 includes the following conditions:

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A TOTAL COMBINED DIVERSION RATE OF 3.22 CFS. COMBINED RIGHT NOS.: 61-00301, 61-02095, 61-02199, 61-02209, 61-11887.

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 1371.7 ACRES IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS.: 61-00301, 61-00333, 61-00334, 61-00335, 61-00336, 61-00337, 61-00338, 61-00339, 61-00340, 61-00343, 61-00364, 61-02008, 61-02095, 61-02199, 61-02209, 61-10363, 61-11844, 61-11847, 61-00332 & 61-11887.

13. Application 81800, as amended in December 2018, proposes to make the following changes to the water rights included in the application:

> Add both LTG wells (Walker Well and 2-Plus Well) as authorized points of diversion for ground water rights 61-301A and 61-301B.

> List all six of the existing CSC points of diversion on water rights 61-2111 and 61-11885.

> Move a 161-acre portion of overlapping water rights 61-332 through 61-340, 61-343, 61-364, 61-2008, 61-11854, 61-301A and 61-10363 from Section 29, T04S, R09E to the Bull Pasture Pivot.

> Move a 161-acre portion of water rights 61-301B, 61-2111 and 61-11885 from the Bull Pasture area to backfill the irrigated acres removed from Section 29, T04S, R09E.

> Consolidate the remaining (54 acre) portion of water rights 61-301B, 61-2111 and 61-11885 onto 13 acres and combine the 13 acres with the 161 acres moved from Section 29, T04S, R09E to irrigate the 174-acre Bull Pasture Pivot.

> Correct or remove the combined limit conditions set forth above for water rights 61-301A, 61-10363 and 61-11854.

14. CDN's sprinkler irrigation system is comprised of an 18-inch trunk line extending through the ranch, with smaller branch mainlines supplying water to the individual sprinkler systems. Ex. 8 at 2-3.

15. The pipeline infrastructure extends all the way from the Upper CSC Diversion in Section 35, T03S, R09E to the Bull Pasture Pivot and to the sprinkler irrigation system in Section 29, T04S, R09E. King Testimony.

16. CDN's CSC water rights, ground water rights and LTG ground water rights can all be routed into the common mainline, either through gravity flow or through pumps. King Testimony.

17. "Several small regulating ponds are utilized as part of the irrigation water management." Ex. 8 at 2-3. "The ponds are used as temporary storage locations, from which water can be repumped into the sprinkler system." *Id.*

18. "The mainline system is divided into two pressure zones." *Id.* "The high-pressure and low-pressure portions of the mainline are separated by a pressure sustaining valve" near one of the regulation ponds. *Id.* "A booster pump on the low-pressure side of the mainline can pump water [from the pond] into the high-pressure side of the mainline as needed to meet demands." *Id.*

19. "Because of the ability to supply water from the low-pressure zone to the high-pressure zone, and vice-versa, any source of water can supply any sprinkler irrigated land within the farm." *Id.*

20. CDN can irrigate the 161 authorized acres in Section 29, T04S, R09E through a pressurized sprinkler system. King Testimony. Water can be conveyed to the Section 29 acres through a pipeline with little or no conveyance loss. *Id.*

21. CDN has installed measuring devices at the Upper CSC Diversion, the Lower CSC Diversion and the 2-Plus Well.

22. The Bull Pasture Pivot is located in the Ryegrass Creek drainage. Ex. 204 at Figure 1. Ryegrass Creek is a tributary of CSC and flows into CSC in Section 5, T05S, R09E, downstream of the DAR and Riggs properties. *Id.*

23. "[CSC] flows out of the Boise National Forest on the southeast side of Bennett Mountain in Elmore County and flows southward several miles through a canyon until it emerges onto an alluvial fan in Section 35, [T03S, R09E]." Ex. 9 at 2. "From there, [CSC] continues southward to where it drops into the Snake River Canyon in Section 20, [T05S, R09E]." *Id.*

24. "[CSC] is an intermittent stream that generally 'breaks' with dry reaches in June depending on snow-pack." Ex. 204 at App. A, page 7. "On plentiful snow-pack years, CSC runs from its head waters on Bennett Mountain to the Snake River." *Id.* "On dry years, the creek is perennial where it exits the mountain front canyon at the CDN Upper Diversion but, depending on CDN diversions, the stream dries up in the reach from just below the CDN diversion to below the Ross Road crossing [approximately 1.5 miles downstream]." *Id.* "However, depending on CDN diversions, the stream returns to the surface just above the DAR weir and diversion before it eventually goes completely dry in July." *Id.*

25. Water District 61E regulates the surface water rights in the CSC drainage. The watermaster for Water District 61E monitors and regulates CDN's Upper CSC Diversion and Lower CSC Diversion.

26. Early in the irrigation season, flow in CSC is sufficient to irrigate many of the acres authorized under CDN's CSC water rights. During this time period (prior to April 1), flows in CSC can be as high as 30-40 cfs. H. Riggs Testimony. High flows usually last for three to four weeks. H. Riggs Testimony. After the high flow period, flow in CSC drops to a level where the senior right holders (CDN and DAR) capture all of the flow in the creek. *Id.* On average, the creek goes dry below the upstream DAR diversion by mid-June. *Id.*

27. Water rights held by CDN, DAR, and Riggs are the uppermost irrigation water rights on CSC. Ex. 204 at App. A, Table 1. As streamflow begins to decline, CDN, DAR and Riggs divert all of the water in the upper part of CSC. H. Riggs Testimony. Eventually, there is only enough water in CSC to fill the senior rights held by CDN and DAR. *Id.* By mid-summer, CSC no longer flows to the DAR headgate and CDN diverts all of the water in the creek at the Upper CSC Diversion. *Id.*

28. Water rights 61-2111 and 61-11885 bear 1955 priority dates and are rarely available for diversion. K. Riggs Testimony. Water rights senior to rights 61-2111 and 61-11885 authorize a cumulative diversion rate of more than 65 cfs from CSC. Ex. 204 at App. A, Table 1.

29. The CDN property overlies a deep aquifer of LTG water[1]. Scanlan Testimony; Exs. 16, 25 and 26. Water rights 61-301A and 61-301B were developed from this LTG water source. The Walker Well and the 2-Plus Well divert from the same LTG aquifer. Scanlan Testimony. There is little communication between the LTG aquifer and CSC or the shallow cold water aquifer. *Id.*

30. The LTG aquifer is highly-confined and is under artesian pressure. Ex. 8 at 10. The Walker Well and 2-Plus Well free flow under artesian pressure. The LTG aquifer has high local transmissivity but limited areal extent. Scanlan Testimony. The aquifer is capable of producing high short-term artesian flow rates, but flow rates decline significantly throughout the irrigation season. *Id.*

31. The Walker Well was completed in 1961. Exhibit 25. The 2-Plus Well was completed in 1976. Exhibit 16. From the time the 2-Plus Well was drilled until today, it has served as the primary LTG well on CDN's property. Scanlan Testimony. The Walker Well loses artesian pressure early in the irrigation season and cannot provide sufficient water for irrigation use. King Testimony. The well is currently used only for stockwater. *Id.*

32. In 1997, the Department measured the flow at the 2-Plus Well and found a flow rate of 6.25 cfs. Scanlan Testimony. There was no pump in the well at that time. *Id.* Currently, there is a pump installed in the 2-Plus Well, which is used to augment the well production later in the irrigation season. *Id.*

33. The 2-Plus Well, if pumped, is able to produce at least as much as the free flow measurement from 1997 (6.25 cfs). Scanlan Testimony. Based on the measured flow rate, the 2-Plus Well would be able to supply the full diversion rate of water right 61-301A and most of water right 61-301B for a portion of the irrigation season. There are no recent measurements taken at the 2-Plus Well. *Id.*

34. The 2-Plus Well is discharged into a cooling pond before being pumped into the pressurized irrigation system. King Testimony. Early in the season there is sufficient artesian pressure that the pump in the 2-Plus Well is not used.

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1 Idaho Code § 42-230 defines low-temperature geothermal water as "having a temperature of greater than eighty-five (85) degrees Fahrenheit and less than two hundred twelve (212) degrees Fahrenheit in the bottom of a well."

35. In 2009, CDN installed a pipeline connecting the Bull Pasture Pivot to the rest of its pressurized irrigation system. Scanlan Testimony. Since 2009, it has been possible to deliver water from the 2-Plus Well to the Bull Pasture Pivot. *Id.*

36. CDN holds several cold ground water rights in the CSC drainage. These water rights (61-2095A, 61-2199A, 61-2209A, 61-11887A, and 61-11847) are not included in the pending transfer application. King Testimony.

37. Water District 161 administers the ground water rights in the CSC drainage. The 2-Plus Well is currently equipped with a flow meter which is monitored by Water District 161. King Testimony.

38. DAR holds the following water rights in the CSC drainage:

Right Number	Priority Date	Source	Diversion Rate (cfs)	Water Use	Acre Limit	Combined Acre Limit
61-322	5/1/1871	Spring	0.08	Irrigation	74.7	708.5
61-323	5/1/1872	CSC	1.00	Irrigation		
61-10349	5/1/1873	CSC	1.26	Irrigation		
61-326	5/1/1878	CSC	1.00	Irrigation		
61-327	5/1/1879	CSC	2.50	Irrigation		
61-330	5/1/1884	CSC	0.36	Irrigation		
61-331	5/1/1886	CSC	1.00	Irrigation		
61-2038	7/10/1913	CSC	1.20	Irrigation	60	
61-4147	3/15/1971	CSC	10.00	Irrigation		
61-10296	1/1/1800	Springs	0.23	Domestic, Stockwater		
61-10304*	1/1/1890	Springs	0.23	Domestic, Stockwater		

* Located more than 5 miles upstream of the CDN Upper CSC Diversion.

39. The primary point of diversion for DAR's CSC irrigation water rights is located in the SWSE of Section 16, T04S, R09E, approximately two miles north of the DAR irrigated acres. This primary point of diversion is located approximately ½ mile downstream of CDN's Lower CSC Diversion.

40. DAR has a second point of diversion on CSC, located approximately three miles downstream of DAR's primary point of diversion. H. Riggs Testimony. Water only reaches this lower point of diversion during high flow events on CSC. *Id.*

41. DAR calls for delivery of its water rights early in the irrigation season to "wet" the stream channel. H. Riggs Testimony. It takes multiple weeks for the creek flow to finally reach the DAR headgates in the early irrigation season. *Id.* The losses in the stream help to build up the local water table and the infiltrated water returns to the creek later in the season. *Id.* The creek losses also support flow of the springs on the DAR property. *Id.*

42. DAR irrigates its property using one partial pivot and one full pivot. H. Riggs Testimony. The rest of the DAR irrigated land is flood irrigated pasture. *Id.* DAR uses one ground water well and springs arising on the DAR property for domestic and stockwater purposes. *Id.*

43. During the time period when flows are high on the creek, DAR flood irrigates its meadow ground. H. Riggs Testimony. As CSC flows decline, water will no longer reach the downstream DAR diversion. *Id.* At that point, DAR diverts water only at its main diversion and conveys water through a pipeline to the pivots on its property. *Id.*

44. Riggs owns and irrigates 120 acres of land along CSC for cattle pasture. Riggs Testimony. Riggs purchased his property in 2018. *Id.*

45. Riggs holds the following water rights in the CSC drainage:

Right Number	Priority Date	Source	Diversion Rate (cfs)	Water Use	Acre Limit	Combined Acre Limit
61-341	5/7/1887	CSC	1.22	Irrigation		120.0
61-342	6/30/1887	CSC	1.18	Irrigation		
61-10299	3/15/1943	CSC	6.73	Irrigation		
61-10300	4/16/1960	Ground Water	0.09	Stockwater		
61-12323	9/13/2017	Ground Water	0.07	Domestic, Heating		

46. Riggs diverts water from CSC at a location approximately 2.5 miles downstream of the Lower CDN Diversion. Riggs Testimony.

47. There are several springs on the Riggs property that begin to flow during the snow melt run-off period. K. Riggs Testimony. Riggs does not divert these springs for irrigation use. *Id.* These springs either sink into the ground or flow into the CSC channel. *Id.*

RELEVANT LEGAL PROVISIONS

Idaho Code § 42-222(1) sets forth the criteria used 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, 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.

Idaho Code § 42-222(2) establishes the parameters of water right forfeiture:

> All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code.

ANALYSIS

Validity of Water Rights

As part of its review of a transfer application under Idaho Code § 42-222(1), the Department must confirm that each water right, or portion thereof, included in the application is valid and has not been forfeited through non-use. If the Department determines that a water right is no longer valid, then the water right, or portion thereof, cannot be changed. The Idaho Supreme Court has confirmed the Department's jurisdiction to evaluate forfeiture as part of the Department's injury review:

> [T]he director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. . . . The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injure other water rights.

Jenkins v. State, Dep't of Water Resources, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982).

Pursuant to Idaho Code § 42-222(2), a water right "shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated . . . ." Forfeiture must be proven by clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693, 699 (2001). "Clear and convincing evidence is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain." *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (quotation marks and citations omitted). A portion of a water right may be lost to forfeiture through non-use, even if the

remaining portion of the water right is regularly used. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997).

DAR provided evidence suggesting that the Bull Pasture area had not been irrigated for many years prior to 2009. Ex. 204 at 4-5. DAR also provided evidence suggesting that the 161 acres in Section 29 have not been irrigated for at least 20 years. *Id.* at 6-7. During the hearing, however, DAR and Riggs confirmed that they do not contend that any portion of CDN's water rights have been lost or forfeited through non-use. The 174-acre Bull Pasture Pivot has been consistently irrigated since 2009. King testified that the 161 acres in Section 29 have been periodically irrigated with wheel lines since the water rights were decreed in the Snake River Basin Adjudication ("SRBA"). The record does not contain clear and convincing evidence that the portions of the CDN water rights proposed to be changed have been forfeited through non-use. The water rights included in Application 81800 continue to be valid rights and may be used to the full extent authorized by the rights.

Injury to Existing Water Rights

DAR and Riggs argue that CDN's use of senior CSC water rights to irrigate the Bull Pasture Pivot, as proposed in Application 81800, removes water from the CSC drainage, eliminating return flows to CSC and injuring senior and junior water rights that rely on the return flows. The rebuttal expert report prepared by Squires frames the injury concern as follows:

> Because DAR depends on the CSC stream flows, ditch losses, leakage, infiltration, return flows, and CSC bank storage of irrigation for its water supply, the more CSC water that is piped away from the CSC drainage, the less water is available to DAR; especially later in the irrigation season. The non-consumptive portions of the CDN CSC diversions to the Bull Pasture area, as proposed under this Transfer, will no longer benefit CSC water users below CDN because CSC will dry up earlier and DAR's springs will flow at reduced rates and dry up sooner in the year.

Ex. 4 at 1-2.

The irrigated acres for the senior CSC water rights being moved to the Bull Pasture Pivot are currently located in Section 29, T04S, R09E. Given the irrigation infrastructure that currently exists on the CDN property, water from CSC can be diverted at the Upper CSC Diversion and delivered to the acres in Section 29 with little or no conveyance loss. Pipelines extend from the Upper CSC Diversion to the irrigated acres in Section 29. CDN can irrigate the acres in Section 29 through sprinkler irrigation, which results in limited return flow. Return flow from the sprinkler irrigation occurring in Section 29 does not contribute to springs on the Riggs property or the DAR property. K. Riggs Testimony (springs on the Riggs property only arise when there is water in the creek or when the Riggs property is irrigated); H. Riggs Testimony (confirming that CDN's sprinkler irrigation in Section 29 does not provide any benefit to DAR).

The irrigated acres being moved to the Bull Pasture Pivot (into the Ryegrass Creek drainage) currently contribute little or no return flow to the CSC drainage upstream of the DAR

and Riggs points of diversion. DAR acknowledges that CDN's pipeline system has already eliminated conveyance losses and return flows that would otherwise augment the flow in CSC. Ex. 204 at 11, 17 ("[T]he continued construction of pipelines of the steadily evolving CDN 'integrated system' has already resulted in significantly less surface water in irrigation ditches and CSC that continually 'eats into' the leakage back to the aquifer that provides DAR's return flows and its spring flows later in the season"). The protestants' arguments related to diminished return flows are not persuasive. The irrigation of the acres in Section 29 already provides little or no return flow to CSC. The proposed changes will not significantly reduce the amount of water available to supply existing water rights on CSC.

DAR and Riggs also raise concerns about lack of measurement and regulation in Water District 61E. A contested case arising from a transfer application is not the ideal forum to raise concerns about water district operations. The pending contested case does not include all of the water users in Water District 61E. If DAR or Riggs have concerns about the current measurement and regulation of water rights within Water District 61E, they should raise those concerns with the local watermaster or with the Department's water distribution section, if the local watermaster is unable to address the concerns.

Enlargement

Bull Pasture Pivot

Application 81800 proposes leaving a 54-acre portion of water rights 61-301B, 61-2111 and 61-11885 at the Bull Pasture Pivot and consolidating the 54-acre portion onto 13 acres. Consolidation would increase the combined authorized diversion rate to 0.26 cfs for the 13 acres. This equates to 0.02 cfs/acre, which constitutes a full water supply. The 13 acres will be combined with the 161-acre portion of senior CSC rights (and other rights) to cover the full 174 acres under the Bull Pasture Pivot. This combination of water rights creates some risk that the senior CSC rights will be enlarged to irrigate the entire 174-acre pivot. To prevent enlargement, water rights 61-301B, 61-2111 or 61-11885 must constantly supply at least 0.26 cfs to the Bull Pasture Pivot to irrigate the 13 acres in question when the pivot is operating. Water rights 61-2111 and 61-11885 bear 1955 priority dates and are rarely, if ever, available. Therefore, delivery of water right 61-301B is critical to prevent enlargement of the senior CSC rights.

Application 81800 proposes adding the 2-Plus Well as an authorized point of diversion for water right 61-301B. The existing point of diversion (Walker Well) is not actively used by CDN for irrigation. The Walker Well is not equipped with a pump and artesian flow from the well declines quickly during the irrigation season. Scanlan Testimony. Consequently, to prevent enlargement, the 2-Plus Well must produce at least 0.26 cfs during all times that the Bull Pasture Pivot is operating. Evidence presented at hearing indicates that the 2-Plus Well produces more than 0.26 cfs under flowing artesian conditions. Ex. 225. Water from the 2-Plus Well flows into a cooling pond and is then pumped into the CDN mainline, which supplies water to the CDN pivots, including the Bull Pasture Pivot. Therefore, given the flow rate of the 2-Plus Well and the design of the CDN delivery system, it is unlikely that the senior CSC water rights will be enlarged at the Bull Pasture Pivot.

Section 29 Acres

Application 81800 proposes moving a 161-acre portion of water rights 61-301B, 61-2111 and 61-11885 to the irrigated acres in Section 29, T04S, R09E. Water rights 61-2111 and 61-11885 bear 1955 priority dates and are rarely, if ever, available. *See* Ex. 204 at Table 1 (65 cfs of water rights senior to water rights 61-2111 and 61-11885 on CSC); H. Riggs Testimony (CSC generally peaks at a flow of about 40 cfs). Therefore, if the transfer is approved, any irrigation in Section 29 will likely occur under water right 61-301B. Application 81800 proposes to transfer 161 acres (0.76 cfs) of water right 61-301B to Section 29, T04S, R09E. This equates to only 0.005 cfs/acre and is significantly less than a full water supply.

Currently, the Walker Well is the only point of diversion described on water right 61-301B. The Walker Well is not equipped with a pump and artesian flow from the well declines quickly during the irrigation season. Application 81800 proposes adding the 2-Plus Well as an authorized point of diversion under water right 61-301B. However, the 2-Plus Well has been historically used to irrigate other acres at the CDN property. It is unclear whether the 2-Plus Well will has the capacity to serve all of its existing irrigation demands and the acres in Section 29. Assuming the 2-Plus Well has the capacity to serve the acres in Section 29, CDN could only convey 0.76 cfs of water from the 2-Plus Well to the Section 29 acres.

If Transfer 81800 is approved, water diverted from CSC can only be used to irrigate acres in Section 29 when the 1955 water rights are in priority, which is extremely rare. Further, water from the cold ground water wells cannot be used to irrigate acres in Section 29. To prevent the use of unauthorized water sources on the Section 29 acres and to prevent the use of water in excess of the 0.76 cfs described in the transferred portion of water right 61-301B, CDN should be required to maintain a flow meter on the pipeline delivering water to the Section 29 acres. The flow meter will allow the watermasters for Water Districts 61E and 161 to easily verify that the instantaneous rate and annual volume of water delivered through the Section 29 pipeline does not exceed the amounts authorized by CDN's available water rights.

Exchanging Water Rights

DAR raises a concern that CDN proposes to remove poor water rights from the Bull Pasture area and replace those poor rights with more-reliable water rights. Ex. 204 at 10 (expressing a concern that the water rights currently at the Bull Pasture would only allow for one cutting of hay per year, while the water rights proposed to be moved to the Bull Pasture will allow for up to three cuttings per year). DAR is correct that the existing water rights at the Bull Pasture area are poor. Water rights 61-2111 and 61-11885 from CSC bear very junior priority dates and would only be available for a small window of time in some years. The only other existing water right at the Bull Pasture is water right 61-301B, which authorizes a diversion rate of 1.02 cfs. Therefore, for most of the irrigation season, there would only be at most 1.02 cfs available to irrigate the 174 acres at the Bull Pasture Pivot. This equates to 0.006 cfs/acre and does not constitute a full water supply. Evidence in the record suggests that the Walker Well, which was historically used to supply water to the Bull Pasture area, is not equipped with a pump and does not produce enough water under artesian flow for irrigation use. In the absence of the

transfer approval or some other authorization, the water rights existing at the Bull Pasture area would not support significant crop yields.

Application 81800 proposes to move irrigated acres under senior CSC water rights and ground water rights associated with the 2-Plus Well to the Bull Pasture area. The 2-Plus Well produces much more water than the Walker Well under artesian flow and is also equipped with a pump. Idaho Code § 42-222 does not contain any prohibition on moving senior water rights to more productive ground. In fact, many transfer applications in the state of Idaho are filed for that very purpose. If CDN has determined that its senior water rights will be more effective at a different location, then CDN may pursue a transfer application to move its senior rights to that location.

Water Right Conditions

CDN proposes changing certain conditions listed on water rights 61-301A, 61-10363 and 61-11854. These conditions impose combined rate and acre limits that seem to be inconsistent with other water rights held by CDN. Upon closer inspection, however, it appears that three of the conditions proposed to be changed are not in error and were simply intended to create a diversion rate limit of 0.02 cfs per acre.

In Idaho, irrigation water rights are generally limited to a diversion rate of 0.02 cfs per acre. Idaho Code § 42-202. When there are multiple water rights associated with an irrigation place of use, the rights, in combination, are generally limited to a diversion rate of 0.02 cfs per acre. This combined rate limit is especially important for irrigated acres receiving water from multiple sources. Often, each source of water appurtenant to irrigated acreage supplies up to 0.02 cfs per acre. Conditions have been developed by the Department to confirm that water rights from multiple sources used to irrigate the same acres are still limited to a combined diversion rate of 0.02 cfs per acre.

Water right 61-301A includes a condition describing a combined diversion rate limit of 4.92 cfs. This condition is not in error, but it is ambiguous and overly complicated. The hearing officer interprets this condition as setting a 4.92 cfs diversion rate limit for the 246.6-acre place of use described on the face of water right 61-301A. This creates a diversion rate limit of 0.02 cfs per acre, consistent with Idaho Code § 42-202. If the condition were to operate as an overall diversion rate limit on water rights 61-301A, 61-332 through 61-340, 61-343, 61-364, 61-2008, 61-2095A, 61-2095B, 61-2199, 61-2209A, 61-2209B, 61-10363, 61-11844, 61-11847, 61-11854 and 61-11887, the condition would be inconsistent with diversion rates listed on some of the individual rights and the combined rate limits listed on all of the other water rights.

The existing combined rate condition on water right 61-301A is an inefficient way to create a 0.02 cfs per acre diversion rate limit. Every time a water right is moved into or out of the authorized place of use, the condition must be changed. The Department has developed a more-efficient, general condition for limiting overlapping irrigation rights to the standard diversion rate (0.02 cfs per acre): "This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa[2] per acre at the field headgate for irrigation

[2] The maximum annual field headgate demand for the CSC area is 4.0 acre-feet per acre.

of the place of use."[3] This condition should be used to replace the current combined rate limit condition. Doing so will eliminate any ambiguity and will avoid the need to make changes to the condition in the future.

The analysis is identical for water rights 61-10363 and 61-11854. Both of these water rights include overly complicated conditions that are meant to create a 0.02 cfs per acre diversion rate limit on water rights from various sources. These conditions should be replaced with the more-efficient, general condition: "This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the place of use."

Water right 61-11854 includes a condition limiting the right, when used in combination with twenty other rights, to the irrigation of 1,371.7 acres. This condition includes water right numbers that are no longer valid. Further, the combined acre limit is inconsistent with the combined acre limits included on many of the other CDN water rights (1,368 acres). During the hearing CDN confirmed that the combined acre limit listed on water right 61-11854 should be reduced to be consistent with the other CDN water rights. Because the proposed change results in a slight reduction in authorized acres, the change does not constitute an enlargement.

Water right 61-10363 includes a condition limiting the right, when used in combination with water rights 61-301A, 61-2095A, 61-2095B, 61-2199, 61-2209A, 61-2209B, 61-11887, to the irrigation of 246 acres. The condition includes water right numbers (61-2199, 61-11887) that are no longer valid. These water rights were split into A and B portions prior to partial decrees being issued in the SRBA. Further, water rights 61-2095B, 61-2199B, 61-2209B and 61-11887B are owned by the BLM and are appurtenant to BLM acres. These BLM water rights should not be included in combined limit conditions on CDN water rights. The SRBA partial decrees for water rights 61-301A, 61-2095A, 61-2199A, 61-2209A and 61-11887A did not include any reference to a 246-acre combined limit condition with water right 61-10363. Because the subject condition includes water rights that were not recognized in the SRBA, is not consistent with conditions on other water rights, and is not confirmed by identical conditions on other water rights, the subject condition is meaningless and should simply be removed from the water right.

Conservation of Water Resources

CDN proposes to use sprinkler irrigation at the proposed places of use. This is an efficient means of irrigation and is consistent with the conservation of water resources within the state of Idaho.

[3] Water right 61-301A authorizes a diversion rate of 5.38 cfs, but includes the condition limiting the right and twenty-two other rights to a combined diversion rate of 4.92 cfs. CDN provided evidence that 0.46 cfs of the 5.38 cfs authorized under water right 61-301A was meant to offset conveyance losses in open ditches. CDN proposes a condition designating 0.46 cfs of water right 61-301A for conveyance losses. The general condition, limiting all water rights to 0.02 cfs per acre at the field headgate, eliminates the need for a special conveyance loss condition.

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 for water users to change the elements of their water rights to improve the efficiency of their irrigation systems. The changes proposed by CDN are in the local public interest.

Other Arguments

Right to Pursue Transfer Application

The administrative record includes evidence that CDN has irrigated acres without a water right, irrigated acres with water from the wrong source, and/or used water in a manner inconsistent with its water rights in the past. *See* Exs. 1, 2, 101, 102, 206, 207, 208, 210. During the hearing, Riggs argued that CDN should not be allowed to pursue the pending transfer application because of CDN's past water right violations. K. Riggs Testimony ("I do not believe that somebody who has broken the law, not allegedly but admittedly, for at least ten years should be rewarded . . . I don't think there should be a reward for breaking the law.") The statute governing transfer applications states:

> 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 (emphasis added).

The term "any person" is not ambiguous. It includes good actors, bad actors, previous violators, model citizens, scofflaws, etc. There is no requirement that a transfer applicant have a clean water use record as a pre-requisite to filing an application. In fact, transfer applications are often filed to address existing water right violations. CDN's prior water right violations do not restrict CDN's statutory right to pursue the pending transfer application or future transfer applications. The protestants' arguments about past violations have no bearing on the pending contested case.

Riggs expressed frustration that CDN forged ahead with changes to its irrigation system, as proposed in Application 81800, without first seeking the proper authorization. It is important to note that making changes prior to seeking the authorization required by law does not create a presumption of validity. In other words, a water user who makes changes prior to filing a transfer application is not put in a more-favorable position when a transfer application is ultimately filed. Each transfer application must satisfy the elements of Idaho Code § 42-222(1), regardless of past water use or previously accomplished changes.

Irrigation of Bull Pasture Pivot

During the hearing there was a substantial amount of testimony provided about the source of water used to irrigate the Bull Pasture Pivot since the time it was constructed (around 2009). *See* Ex. 204 at 4-6; Squires Testimony. Determining what source of water has been used to supply the Bull Pasture Pivot over the last ten years has very little probative value in evaluating the pending transfer application. If LTG ground water from the 2-Plus Well and senior CSC rights have already been used at the Bull Pasture Pivot for ten years, it does not make it more likely that the transfer application will be approved. Regardless of previous irrigation practices, the hearing officer must determine if changing the water right elements from those that currently exist on the face of the rights to those proposed by the applicant will result in injury, enlargement, an inefficient use of water, or will impact local public interests.

Partially Overlapping Water Rights

DAR stated a concern that CDN's comingled sources of water have not been, and cannot be, properly administered. CDN holds irrigation water rights from cold ground water, LTG ground water, springs, an unnamed stream, and CSC. These water rights do not share identical places of use. Instead, some acres on the CDN ranch can only be irrigated with cold ground water, some acres can only be irrigated with water from CSC, and other acres can be irrigated from multiple sources. According to DAR, the common distribution system used by CDN, which comingles sources into a single delivery pipeline, creates a significant risk that CDN will use CSC water on acres not authorized under its CSC water rights. Similarly, DAR argues that there is a significant risk that CDN will use cold ground water on acres not authorized under its cold ground water rights.

A single delivery system, which combines water from various sources, certainly presents challenges for the proper administration of water rights. These challenges, however, already exist for the CDN system. There is no evidence that approval of the proposed transfer will exacerbate these existing administrative challenges. Application 81800 does not propose to change how the various water rights on the CDN property are overlapped. The watermasters for Water Districts 61E and 161 must carefully monitor flow meters and measuring devices to ensure CDN operates within the limits of its water rights.

Clerical Errors in *Preliminary Order*

Application 81800, as amended in December 2018, contained an error in the legal description for the proposed place of use in Section 17, T04S, R09E. The Department's application form includes a table where applicants can simply enter the number of irrigated acres per quarter-quarter. The table includes a separate column for each of the sixteen quarter-quarters found in a standard legal section. Application 81800 incorporated a similar table to describe the proposed irrigated acres. It appears that two of the entries for the irrigated acres in Section 17 were entered into the table one column to the left from the correct column. For example, instead of listing 32 acres in the NENW of Section 17 (to match the application map), the application listed 32 acres in the SENE (one column to the left). Similarly, instead of listing 22 acres in the NWNW of Section 17 (to match the application map), the application listed 22 acres in the

NENW (one column to the left). This error was carried forward into the Department's database and, consequently, was carried forward into *Transfer Approval 81800.*

The map provided with Application 81800 depicts the correct proposed place of use in the NWNE, NENW and NWNW of Section 17, T04S, R09E. The expert report filed by CDN identified the correct proposed irrigated acres in Section 17. Further, CDN's expert, King, testified that the acres proposed to be irrigated in Section 17 are the acres covered by the Bull Pasture Pivot. The Bull Pasture Pivot only extends onto the NWNE, NENW and NWNW of Section 17. The protestants clearly understood that the acres proposed to be irrigated in Section 17 were those acres associated with the Bull Pasture Pivot and provided extensive evidence about the historical irrigation of the Bull Pasture Pivot. Therefore, the hearing officer will treat the cumulative evidence about the Bull Pasture Pivot as an amendment of the proposed place of use, sufficient to correct the clerical error in Application 81800. The amended transfer approval, issued in conjunction with this order, will reflect the amended place of use and will describe the subject acres in the NWNE, NENW, and NWNW of Section 17, T04S, R09E.

Transfer Approval 81800, issued on May 1, 2020, contained a clerical error in the legal descriptions for certain CDN water rights. Instead of describing the acres in Section 8 and 17, T04S, R09E, *Transfer Approval 81800* described the irrigated acres in Sections 8 and 17, T03S, R09E. Application 81800 described the Township for the irrigated acres correctly. The clerical error occurred during the Department's data entry for Application 81800 and was not recognized by the hearing officer during his initial review. The amended transfer approval, issued in conjunction with this order, will describe the subject acres in Sections 8 and 17, T04S, R09E.

CONCLUSIONS OF LAW

CDN has satisfied all of the elements of review under Idaho Code § 42-222(1) for the changes proposed in Application 81800. To prevent enlargement of water rights 61-301B, 61-2111 and 61-11885, CDN shall be required to install and maintain a measuring device on the pipeline supplying water to the irrigated acres in Section 29, T04S, R09E.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 81800 filed in the name of Casa Del Norte, LP is APPROVED as set forth in the transfer approval document issued in conjunction with this order.

Dated this 14th day of May 2020.

James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2020, 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:

Documents Served: Amended Preliminary Order Approving Transfer (81800)
Amended Transfer Approval 81800

CASA DEL NORTE LP
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