

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

IN THE MATTER OF TRANSFER NO. 71234

IN THE NAME OF MIDDLETON

IRRIGATION ASSN INC

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PRELIMINARY ORDER

RESCINDING TRANSFER

FINDINGS OF FACT

1. On June 10, 2003, Pinewood Lakes LLC (Pinewood) applied to the Idaho Department of Water Resources (IDWR) for Application for Permit No. 63-31924 to appropriate shallow ground water tributary to the Boise River for three excavated aesthetic ponds located slightly downstream from the Star Bridge. On May 11, 2004 Middleton Irrigation Association filed Application for Transfer No. 71234 for right 63-198AC to mitigate evaporative losses from the proposed ponds.
2. IDWR approved Transfer 71234 on September 7, 2004, with a condition on water right 63-198AC as follows:

This right authorizes the diversion rate of 0.20 cfs and an annual diversion volume of 35.0 af for ground water recharge as replacement of losses caused by evaporation from the three ponds associated with Right 63-31924.
3. On September 15, 2004, IDWR approved Application for Permit No. 63-31924, including Condition No. 4 stating:

Each year the right holder shall mitigate for the consumptive use of water under this right by causing 35.0 af of water diverted for ground water recharge purposes under Right 63-198AC to flow into the ponds constructed in accordance with this right.
4. Pinewood filed proof of beneficial use for Permit 63-31924 on August 16, 2006.
5. On April 16, 2010, IDWR further modified water right 63-198AC through approved Transfer No. 76211 that changed 0.20 cfs and 35.0 af for ground water recharge to diversion to storage (0.20 cfs) and aesthetic storage (35.0 af) uses [plus an increment of water to mitigate different permit(s)] to comply with IDWR policy changes for beneficial use terminology.
6. IDWR conducted a beneficial use field exam for Permit 63-31924 on October 9, 2013. On October 23, 2013, IDWR requested verification from Pinewood that Permit 63-31924 Condition No. 4 had been met. Subsequently, Pinewood informed IDWR that compliance with Condition No. 4 had not commenced as of April 16, 2014, almost eight years after proof of beneficial use was filed.
7. On August 5, 2014, IDWR issued a Preliminary Order Voiding Permit 63-31924 for failure to comply with the mitigation required under Condition No. 4.
8. Middleton Irrigation Association, through its attorney of record S. Bryce Farris of Sawtooth Law Offices, PLLC, petitioned IDWR to rescind Transfer No. 71234 because the beneficial use change authorized under the transfer was not developed.
9. Middleton Irrigation Association and Middleton Mill Ditch Company share a common irrigation system and multiple water rights used in association with one another (Associated Rights). A change to a right(s) held by one of these entities can result in a change in a right(s) held by the other entity, i.e. total acres irrigated.

10. Both irrigation organizations retain the same attorney of record authorized to act on their behalf for their water rights.
11. On February 14, 2017, IDWR approved Transfer No. 79691 modifying the conditions of right 63-198AC as an associated right of right 63-125G whose elements were changed by the transfer approval.

CONCLUSIONS OF LAW

1. IDWR is authorized to issue a Preliminary Order changing a prior approval for cause.
2. Middleton Irrigation Association and Pinewood have shown sufficient cause for Transfer 71234 to be rescinded.
3. IDWR should rescind approval of Transfer 71234 regarding right 63-198AC.
4. Right 63-198AC should be restored to its pre-Transfer 71234 status, except as modified by Transfer 76211 for beneficial use terminology previously noted in Fact No. 5 and Transfer 79691 noted in Fact No. 11.
5. Associated Rights used in common with right 63-168AC should likewise be modified.

ORDER

IT IS HEREBY **ORDERED** that Transfer No. 71234 is **RESCINDED** and Right 63-198AC therefore authorizes the following uses:

- Irrigation from 3/1 to 11/15, 109.96 cfs
- Diversion to Storage from 3/1 to 11/15, 0.13 cfs
- Aesthetic Storage from 1/1 to 12/31, 21.0 af
- Total 110.09 cfs
- Aesthetic Storage is deleted from the place of use in T04N, R01W, Section 18 SWNE and SENW.

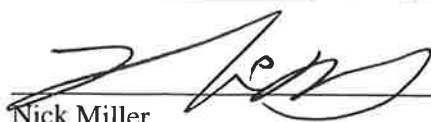
IT IS ALSO **ORDERED** that conditions of approval for right 63-198AC are modified as follows:

- Rights 63-124N, 63-125G, 63-126E, 63-161X, 63-168B, 63-173, 63-168D, 63-173, 63-198AC, 63-254, 63-255, 63-370, 63-4960, 63-12304, 63-32518, 63-32519, 63-32520, 63-32521 and 63-32522 when combined shall not exceed the irrigation of 9,390.5 acres.
- The following condition of approval is removed from the right:

This right authorizes the diversion rate of 0.20 cfs and an annual diversion volume of 35.0 af for ground water recharge under Transfer 71234 as replacement of losses caused by evaporation from the three ponds associated with Right 63-31924. Ground water recharge is amended to Aesthetic Storage under Transfer No. 76211.

IT IS ALSO **ORDERED** that all Associated Rights used in conjunction with right 63-168AC are modified for irrigation of the same 9390.5 acres.

DATED this 1st day of March 2017



Nick Miller
Manager, IDWR Western Region

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of March 2017, I mailed a true and correct copy, postage prepaid, of this Preliminary Order to the parties listed below:



Rachel Neely
Administrative Assistant I

MIDDLETON IRRIGATION ASSN INC
PO BOX 848
MIDDLETON ID 83644

MIDDLETON IRRIGATION ASSN INC
& MIDDLETON MILL DITCH CO
C/O BRYCE FARRIS
SAWTOOTH LAW OFFICES PLLC
PO BOX 7985
BOISE ID 83707

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.