

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 4110 (WATER RIGHT NO.)
34-00518) IN THE NAME OF WILLARD O.)
OR GLADYS K. BELL)

ORDER ADOPTING
RECOMMENDED ORDER

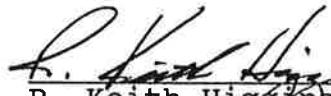
A Recommended Order in the above-captioned matter has been issued and a copy served on the parties;

WHEREAS; more than twenty-one days have passed since the service of the Recommended Order; and,

WHEREAS; no exception to that Recommended Order has been received,

IT IS, THEREFORE, HEREBY ORDERED that said Recommended Order be adopted and Application for Transfer No. 4110 is REJECTED.

Dated this 3rd day of March, 1994.


R. Keith Higginson, Director
Department of Water Resources

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 3rd day of March, 1994, I mailed a true and correct copy, postage prepaid, of the foregoing Order Adopting Recommended Order to the following:

Randall C. Budge
Racine, Olson, Nye, et al
P.O. Box 1391
Pocatello, ID 83204

Willard & Gladys Bell
P.O. Box 91
Arco, ID 83213

Lester/Dennis/Trudy Braswell
Arco, ID 83213

James Rindfleisch
P.O. Box 62
Arco, ID 83213

Lewis Rothwell
P.O. Box 62
Arco, ID 83213

Charles D. Huggins
P.O. Box 216, RR1
Arco, ID 83213

IDWR-Eastern Regional Office
Idaho Falls, Idaho



Carolyn Andregg
Secretary

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	
TRANSFER NO. 4110 (WATER RIGHT	)	
NO. 34-00518) IN THE NAME OF	)	RECOMMENDED
WILLARD O. OR GLADYS K. BELL	)	ORDER
	)	

A hearing was conducted on July 7, 1993, regarding protest filed against application for transfer no. 4110 in the name of Willard O. or Gladys K. Bell (Bell). After having reviewed the evidence and briefs submitted by the parties, the hearing officer as a representative of the Director of the Department of Water Resources, recommends the following Findings of Fact, Conclusion of Law, and Order:

FINDINGS OF FACT

1. Application for transfer no. 4110 proposes to add a point of diversion for water right no. 34-00518. The application proposes to locate an additional point of diversion approximately two to three miles upstream from the original point of diversion.

2. The Department recommended recognition of the right in the Snake River Basin Adjudication as follows:

Water Right No.: 34-00518

Priority: June 1, 1890

Quantity: 6.4 cfs

Point of Diversion: NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 1, Twp. 3N, Rge. 2E
(Commonly known as the Miller Ditch)

Basis of right: Decreed in Abbott v. Utah Construction

alleged the proposed point of diversion change conflicts with the local public interest because the stream will be further dewatered. Finally, Rothwell alleged the Munsey Ditch did not have sufficient capacity for the additional water.

9. Huggins and Braswells both divert water from the McLaughlin Ditch. The heading of the McLaughlin Ditch is located approximately one mile downstream from the Miller Ditch. The Director's report for Basin 34 recommends the following rights, claimed by Huggins, for diversion of water from the Big Lost River at the McLaughlin diversion:

<u>Name</u>	<u>Water Right No.</u>	<u>Priority</u>	<u>Quantity</u>
Charles Huggins	34-10626	09/24/1900	1.30 cfs
	34-02445	08/17/1962	0.30 cfs
	34-07104	03/12/1975	2.92 cfs

10. The Director's report for Basin 34 recommends the following rights for Braswells, diverted from the Big Lost River at the McLaughlin diversion:

<u>Name</u>	<u>Water Right No.</u>	<u>Priority</u>	<u>Quantity</u>
Dennis Braswell	34-00908	10/02/1885	0.80 cfs
	34-00133	09/24/1900	1.10 cfs
	34-10299	09/24/1900	2.10 cfs
Lester Braswell	34-00033	10/02/1885	0.80 cfs

11. The Director's report also recommends the following rights diverted at the McLaughlin headgate:

<u>Name</u>	<u>Water Right No.</u>	<u>Priority</u>	<u>Quantity</u>
Morgan	34-00244A	10/02/1885	0.16 cfs
Stonehill	34-00244C	10/02/1885	0.30 cfs
Parkinson	34-02313	08/21/1954	1.20 cfs

12. According to his testimony at the hearing, Lewis Rothwell owns 42 inches of 1886 water, 219 inches of 1887 water and 13 inches of 1888 water in addition to storage water in the Mackay Reservoir. All the water authorized for diversion pursuant to Rothwell's rights is diverted at the Arco diversion, which is the

same point of diversion Bell wants to add to water right no. 34-00518.

13. Records of the Department of Water Resources, and the Director's report, list water rights which are diverted at the Arco diversion or upstream from the Arco diversion, which have the same or later priority than water right no. 34-00518.

14. All the witnesses at the hearing agreed the Big Lost River loses water between the Arco diversion and the Miller diversion. Willard Bell testified that during a test conducted several years ago, 2500 miners inches (50 cfs) were allowed to pass through the Arco diversion, and the entire flow disappeared into the bed of the Big Lost River several hundred yards downstream from the Arco diversion.

15. Testimony at the hearing established that delivery of Bell's 6.4 cfs at the Miller headgate has transported water diverted at the McLaughlin headgate, including water diverted by Braswell and Huggins.

16. Within the Big Lost River Basin, natural flow right holders have traditionally stored their natural flow rights in Mackay Reservoir when water is not being used. Willard Bell implied by his testimony that if his application is approved, the remaining 3.4 cfs he would not divert at the Arco diversion would be stored in Mackay Reservoir for use later in the year.

17. Bell only intends to divert water at the new proposed point of diversion if water cannot be diverted at the Miller diversion.

18. When regulating water, the watermaster will deliver to the latest priority date right, or rights that can be filled, or partially filled, for the entire river reach administered by the watermaster. In other words, if all rights bearing a priority of June 1, 1890, can only be partially satisfied, the watermaster will deliver the pro rata share of the 1890 rights to each rightholder, regardless of the location of the point of diversion, and regardless of how much water may be lost in delivering each right.

19. If substantial water is lost in delivering Bell's water

to him, he is not penalized for the loss. Bell receives his water at his point of diversion in the same proportion as any other water right holder with the same priority.

20. When June 1, 1890 priority rights cannot be delivered, Bell and all other right holders with the same priority must cease diverting natural flow. Although Bell cannot divert water at the Miller Ditch heading, sufficient water must pass the Arco diversion to satisfy 1885 priority water rights diverted at the McLaughlin Ditch headgate, or any other deliverable, downstream senior rights.

21. As flows in the Big Lost River decline, Braswell should receive his water at the McLaughlin Ditch headgate in the same proportion as any other water right holder owning a water right with priority of October 2, 1895. At some reduced natural flow rate, water would not be available for Braswell's right, with all other rights of the same priority.

22. Because of the substantial loss in the Big Lost River between the Arco diversion and the McLaughlin Ditch heading, when water can no longer be delivered to Braswell, the water previously lost in delivering water downstream to Braswell is suddenly available for diversion at or upstream of the Arco diversion. The extra water may be sufficient that 1885 priority rights, or even later priority rights, including an 1890 right, may be deliverable at or above the Arco diversion.

23. Because Bell has never diverted his water right upstream of the Arco diversion, granting him the right to do so could injure other right holders with later priority rights who have used the water no longer lost when Braswell cannot divert water at the McLaughlin Ditch headgate.

24. Moving a water right upstream while water is still flowing in the Big Lost River could result in damage to the riparian habitat as well as damage to fish and aquatic habitat.

25. If Bell were allowed to divert water at the Arco diversion, storage of 3.4 cfs of natural flow for later use would further aggravate the injury.

26. After the hearing, Bell petitioned to augment the record

with an affidavit of the watermaster of water district no. 34, Doug Rosenkrance. The affidavit purports to add testimony regarding the capacity of the Munsey Ditch, the hydrologic characteristics of the Big Lost River and whether approval would injure other water users.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, sets forth the criteria that the Department can consider in determining whether an application for transfer should be approved:

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, and 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 42-203A(5), Idaho Code; . . .

2. The applicant carries the burden of coming forward with evidence that his proposed transfer will not result in an enlargement in use, will not injure other water rights, and that it is consistent with conservation of Idaho's water.

3. All parties carry the burden of coming forward with the evidence regarding matters of local public interest of which each is most cognizant, but the applicant bears the burden to show that his proposal is in the local public interest, or that public interests which favor the proposal are of greater worth than the public interests with which it conflicts.

4. The applicant carries the burden of proof for all the criteria of Idaho Code § 42-222.

5. Because the headgate for the Miller Ditch is located upstream from the McLaughlin Ditch, and right no. 34-00518 authorizes the diversion of 6.4 cfs, which is a large quantity of water relative to other rights delivered below the Arco diversion, other users have relied on the water in the past to carry their water for the smaller rights diverted from the McLaughlin Ditch.

6. All of the protestants would be injured if the 3.0 cfs is diverted at the Arco diversion, and the water is no longer in the river to carry the other water rights to the McLaughlin Ditch.

7. When a point of diversion is located within a losing reach of the river, a change in the point of diversion upstream improves the availability of water for diversion later in the year when the water is no longer deliverable at the original point of diversion. When water can no longer be delivered to the Miller headgate, the water normally diverted by Bell will be available for diversion from the Big Lost River upstream from the Arco diversion by individuals with the same or later priority rights than right no. 34-00518. If this application is approved, an additional 3.0 cfs will be diverted at the Arco diversion during periods when it was not diverted at the Miller diversion to the injury of other water users. Storing a portion of the 6.4 cfs (3.4 cfs) will further injure other water users.

8. There was no proposal offered to mitigate for the injury and enlargement of use.

9. Public interest values regarding the stream and its habitat are legitimate, however, there is no need to address the issue in this case.

10. The test for determining whether a motion to augment should be granted is whether there were good reasons for failure to present it at the hearing, essentially the same test set forth in Idaho Code §67-5276.

11. Idaho Code §42-222 states the Department must consider recommendations of the watermaster as evidence. The watermaster probably should have been called as a witness and been subject to cross examination, however. Nevertheless, admission of the affidavit will not change the holding in this matter. The watermaster's affidavit is admitted into evidence.

12. Failure to appear at the hearing is cause for dismissing the protest.

ORDER

IT IS HEREBY ORDERED that application for transfer no. 4110 is REJECTED.

IT IS FURTHER ORDERED that the protest filed by James Rindfleisch is DISMISSED.

IT IS FURTHER ORDERED that Bell's motion to augment the record is GRANTED.

Dated this 19th day of October, 1993.

Gary Spackman
Gary Spackman
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of October, 1993, I mailed a true and correct copy, postage prepaid, of the foregoing Recommended Order and Order Issuing the Recommended Order to the following:

Randall C. Budge
Racine, Olson, Nye et al
PO Box 1391
Pocatello, ID 83204-1391

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Karen L. Gustafson
Senior Secretary