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Department of Water Resources
Eastern Region

Attorneys for Jorgensen Farms Limited Partnership

STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF WATER RIGHT
TRANSFER NO. 4842

**PETITION TO AMEND ORDER
APPROVING TRANSFER**

Jorgensen Farms Limited Partnership (“Jorgensen”), by and through counsel, hereby petitions the Idaho Department of Water Resources (“IDWR” or “Department”) pursuant to rule 152 of the Department’s Rules of Procedure to amend its order approving water right transfer no. 4842 (“Transfer 4842”). This petition is supported by the affidavits of Keith C. Jorgensen and Thomas J. Budge filed herewith.

As set forth below, the order approving Transfer 4842 was issued in a manner that violated Idaho Code sections 42-222 and 67-5248 and constitutional due process. Jorgensen respectfully requests that the Department exercise its express and inherent authority to rectify this error by amending the order.

BACKGROUND

On July 28, 1992, the Caribou County District Court entered a decree defining the elements of surface and ground water rights in the Bancroft-Lund Area. Transfer 4842 involves two of these rights: 13-2198 and 13-7005, which have since been renumbered 29-8240 and 29-8241 (the “Jorgensen Rights”). The Jorgensen Rights were decreed for the irrigation of 355 acres with the same point of diversion, the same place of use, and identical remarks.¹

This petition is concerned with the volume element of the Jorgensen Rights. Both rights were decreed with the following condition: “This right when combined with any other rights shall not exceed a diversion rate of 0.02 cfs per acre, a diversion amount of 3.0 AFY, nor a

¹ Final Decree excerpt (Budge Aff., Ex. A).

volume of consumptive use of 2.5 AFY per acre.”² With 355 acres the decree authorized a maximum diversion of 1,056 acre-feet (AF) and consumptive use of 887.5 AF per year.

In May of 1996—less than four years after the decree was issued—Terry C. Jorgensen and Keith C. Jorgensen dba Jorgensen Brothers filed an application for transfer to move the Jorgensen Rights to another parcel of farmland in the area. The application marked “change point of diversion” and “change place of use” as the purpose of transfer.³ All other elements of the Jorgensen Rights—including the volume element—were to remain unchanged.⁴

IDWR published notice of the application in June of 1996. Under the heading “To be changed as follows” the notice states: “The water will be diverted from the NENE, Sec 14, T09S, R40E, Caribou County and used to irrigate 355 acres within the NW, Sec 13, S1/2NE, W1/2NW, NENW, Sec 14, T09S, R40E, B.M.”⁵ The notice said nothing of changing the volume element of the Jorgensen Rights.

A protest was filed by Neibaur Farm Enterprises.⁶ This protest was later withdrawn with no strings attached.⁷

The Department approved Transfer 4842.⁸ However, in addition to approving the changes requested by the Jorgensens, the Department inserted a condition (condition #10) that took away 90 percent of the volume decreed to the Jorgensen Rights. This condition states: “Rights 13-02198 and 13-07005 when combined shall not exceed a total diversion rate of 3.82 cfs, a total annual maximum diversion volume of 108.6 af, and the irrigation of 355.0 acres.”⁹

Condition #10 contradicts condition #1 which states: “This right when combined with all other rights shall provide no more than . . . 3 afa per acre at the field headgate for irrigation of the lands above.”¹⁰ Condition #1 authorizes the diversion of 1,056 AF whereas condition #10 authorizes the diversion of only 108.6 AF.

With 3 AF per acre, as condition #1 provides, an irrigated crop can be raised on 355 acres. By contrast, with only 108.6 AF, as condition #10 provides, it is impossible to raise an irrigated crop on more than about 70-100 acres.¹¹ Thus, if condition #10 is given effect over condition #1 then Transfer 4842 purports to allow the irrigation of 355 acres while taking away the water needed to irrigate those acres. However, if condition #1 is given effect over condition #10 then Transfer 4842 provides sufficient water to irrigate the 355 authorized acres.

The Jorgensens were not given any warning that the Department was considering taking away 90 percent of the volume decreed to the Jorgensen Rights.¹² Neither the order approving Transfer 4842 nor the accompanying transmittal letter contained findings and conclusions to

² *Id.* (emphasis added).

³ Application for Transfer 4842 (Budge Aff., Ex. B).

⁴ *Id.*

⁵ Notice of Publication of Transfer 4842 (Budge Aff., Ex. C).

⁶ Neibaur Farm Enterprises protest (Budge Aff., Ex. D).

⁷ Neibaur Farm Enterprises withdrawal of protest (Budge Aff., Ex. E).

⁸ Order approving Transfer 4842 (Budge Aff., Ex. F).

⁹ *Id.* (emphasis added).

¹⁰ *Id.* (emphasis added).

¹¹ Jorgensen Aff., ¶ 7.

¹² *Id.*, ¶5.

support or explain the volume restriction. It appears that the Department inserted condition #10 with no other notice to the Jorgensens.

The Jorgensens did not detect the addition of condition #10 since their application had not requested a change in the volume element of the Jorgensen Rights, since no protest had been filed that challenged the volume element, and since the Department had not notified the Jorgensens of any concern with the volume element. The Jorgensens also did not think to scrutinize the volume condition because the Department had historically administered the Jorgensen Rights based on diversion rate, not volume.¹³ The Jorgensens' irrigation systems were all designed and operated based on diversion rate, and they had never been required to install a totalizing meter or otherwise report the annual volume of water diverted under the Jorgensen Rights.¹⁴ Consequently, when the Department sent a letter advising the Jorgensens that their transfer had been approved, they simply understood that the Department had approved a new point of diversion and new place of use as they had requested in their application.¹⁵

The Jorgensens have continuously irrigated 355 acres since Transfer 4842 was approved, using far more than 108.6 AF annually, with no assertion by the Department that they were exceeding a volume limit under the Jorgensen Rights.¹⁶ In 2017, after installing center-pivots to replace wheel lines, the Department advised Jorgensen to file a transfer application to change the place of use to match the pivots. The Department also advised Jorgensen for the first time that it could not divert more than 108.6 AF. This came as an utter surprise.¹⁷

Upon meeting with legal counsel and searching the backfiles of IDWR, Jorgensen discovered that the 108.6 AF restriction was inserted into the order approving Transfer 4842 based on an internal memo prepared by IDWR staff member Pam Skaggs.¹⁸ This memo explains that four years of diversion data (1996-1999) showed an average annual diversion of 98.7 AF during that period, and that this figure was increased by 10 percent to 108.6 AF and imposed as a volume limit "to avoid expansion of use through the transfer approval."¹⁹

Four years of diversion data provided the sole basis for the 108.6 AF condition. Another memo prepared by IDWR staff member Tim Luke found that while water usage under the Jorgensen Rights was considerably lower than other rights in the area, the farmland under the Jorgensen Rights had been used to grow grain which uses less water than potatoes grown on other fields.²⁰ The Luke memo also concluded that surface water had not been delivered to the place of use, and that the Jorgensen Rights were primary and not supplemental. The Luke memo includes diversion data but does not propose a volume restriction.²¹

¹³ *Id.*, ¶16.

¹⁴ *Id.*

¹⁵ *Id.*, ¶15.

¹⁶ *Id.*, ¶18.

¹⁷ *Id.*

¹⁸ Skaggs Memo (Budge Aff., Ex. G.)

¹⁹ *Id.*

²⁰ Luke Memo (Budge Aff., Ex. H.)

²¹ *Id.*

Had the Department notified Jorgensen of the enlargement concern, Jorgensen could have explained that the reason they were raising grain instead of potatoes, and one important reason for filing the transfer, was due to the low productivity of the well that supplied the Jorgensen Rights.²² As explained below, a water supply constraint like this does not support a finding of enlargement or forfeiture and was not a valid basis for extinguishing 90 percent of the volume decreed to the Jorgensen Rights, especially without providing meaningful notice and an opportunity to be heard before taking such drastic action.

LEGAL AUTHORITY TO AMEND TRANSFER 4842

The Department has both express and inherent authority to amend its order approving Transfer 4842, separate and apart from the reconsideration process provided by Idaho Code 67-5243. Express authority is found in Rule 152 which states:

Persons not applicants who seek to modify, amend or stay existing orders or rules of the agency, to clarify their rights or obligations under law administered by the agency, to ask the agency to initiate a contested case (other than an application or complaint), or to otherwise take action that will result in the issuance of an order or rule, are called "petitioners." IDAPA 37.01.01.152.

This authority is also reflected in Rule 2 which authorizes the filing of "pleadings requesting ... amendment ... of existing orders." IDAPA 37.01.01.152.

The Department also has inherent authority to amend its order approving Transfer 4842 which stems from its authority to approve the transfer in the first place. While there does not appear to be any published Idaho court decision that addresses the inherent authority of state agencies to reconsider and amend their orders, many surrounding states have recognized this authority. The Utah Supreme Court has held that "inherent in the power to make an administrative decision is the authority to reconsider a decision," explaining that "[t]he absence of specific authority in the governing statutes is not determinative;" rather, "[e]very tribunal has some power to correct its own mistakes." *Clark v. Hansen*, 631 P.2d 914, 915 (Utah 1981) (citing *Wammack v. Industrial Comm'n of Arizona*, 83 Ariz. 321, 320 P.2d 950 (Ariz. 1958) and *Handlon v. Town of Belleville*, 4 N.J. 99, 71 A.2d 624 (N.J. 1950)); see also *DLB Collection Trust v. Harris*, 893 P.2d 593, 595 n.1 (Utah Ct. App. 1995); Arizona has held that "[t]he power to reconsider is inherent in the power to decide," *Wammack*, 320 P.2d at 954; California has held that "[a]ny deliberative body—administrative, judicial or legislative—has the inherent power to reconsider an action taken by it unless the action is such that it may not be set aside or unless reconsideration is precluded by law," *In re Fain*, 65 Cal. App. 3d 376, 391 (1977); Nevada has held that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider," *L&T Corp. v. Henderson*, 654 P.2d 1015 (Nev. S. Ct. 1982); and Oregon has held that "[i]n the absence of a statutory provision limiting its authority to do so, an agency has

²² Jorgensen Aff., ¶4.

plenary authority . . . to withdraw an order and to reconsider the decision embodied in the order,” *SAIF Corp. v. Fisher*, 100 Ore. App. 288, 785 P.2d 1082, 1083 (Or. Ct. App. 1990).

The Department has authority to amend its order approving Transfer 4842 on its own initiative, or in response to a petition filed under Rule 152, or in response to a transfer application filed under Idaho Code section 42-222. Transfer Processing Memorandum No. 24 explains that a transfer application is “not always required” to correct errors in licenses or decrees,²³ but that a correction that requires “a change to any element of a decreed water right requires filing an application for transfer.”²⁴

Consistent with the foregoing, the Department has a long history of exercising its express and inherent authority to amend water right licenses, transfers, and other orders. While there is no searchable database of all Department orders, several orders have been found that amend prior orders. For example, the Department has amended water right licenses for water right nos. 11-2008, 22-7397 and 22-13457 and has amended the orders approving transfer nos. 69638, 75147, 77576 and 80061.²⁵ Many of these amendments occurred years—in some cases decades—after the original order was issued. Some amendments corrected clerical errors while others corrected substantive errors. For example, water right license no. 22-13457 was amended because Department staff mistakenly omitted 80 acres from the original license,²⁶ transfer no. 77576 was amended because Department staff miscalculated the combined use limits in the original transfer,²⁷ and license no. 22-7397 was amended because the Department “erred in its original determination of beneficial use.”²⁸ The amendment of license no. 22-7397 cited the Department’s statutory obligation “to issue a water right license that accurately portrays the water right developed in accordance with the permit.”²⁹ In each instance the Department exercised its express and inherent authority to fix a mistake and avoid erroneously depriving the appropriator of a lawful water right. Transfer 4842 should be amended for the same reason.

To avoid any concern over the proper approach for correcting Transfer 4842, Jorgensen has filed an application for transfer (Transfer 81731) as an alternative means of removing the 108.6 AF restriction. Should the Department remove the restriction as part of Transfer 81731, it need not decide this petition. However, if the Department declines to remove the 108.6 AF restriction as part of Transfer 81731 then we ask that the Department remove the restriction via an amendment of its order approving Transfer 4842 as requested in this petition.

TRANSFER 4842 ERROR

Idaho Code section 42-222 imposes an affirmative duty on the Department to approve transfer applications so long as certain negating conditions, such as injury to other rights or

²³ Transfer Processing Memo No. 24 at 3 (Budge Aff, Ex. I).

²⁴ *Id.*

²⁵ Budge Aff., Exs. J through P.

²⁶ Budge Aff., Ex. L.

²⁷ Budge Aff., Ex. O.

²⁸ Budge Aff., Ex. K.

²⁹ *Id.*

enlargement in use, do not exist. As mentioned above, the Department cited enlargement as the basis for the 108.6 AF condition. As explained below, this was an improper application of the enlargement doctrine. The rationale provided by the Skaggs memo effectively constituted a forfeiture analysis, yet there was no lawful basis for a finding of forfeiture either. In addition, the manner in which the restriction was inserted violated constitutional due process and Idaho Code section 67-5248.

A. No enlargement.

There is no statutory definition of enlargement but the doctrine has been given two applications in Idaho. First, enlargement occurs if an appropriator uses water in a way that exceeds the defined elements of their water right, such as by irrigating more acres, adding beneficial uses, etc. This application is the subject of Idaho Code section 42-1426 which allows water users to claim additional uses in a general adjudication under certain circumstances. This application is not at issue in this case because Jorgensen has never used water in a way that exceeds the decreed elements of the Jorgensen Rights.

The second application occurs solely within the context of transfer. Under section 42-222, the Department “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.” Even if a transfer will not cause water use to exceed the decreed diversion rate or volume elements of the water right, a transfer may be denied based on an increase in consumptive use.

The issue in this case is whether the enlargement analysis under section 42-222 is based on actual consumptive use or authorized consumptive use of the water right. At the time Transfer 4842 was approved, section 42-202B read:

“Consumptive use” means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right.

1997 Ida. ALS 373, 1997 Idaho Sess. Laws 373, 1997 Ida. Ch. 373, 1997 Ida. HB 256. The statute did not distinguish between actual and authorized consumptive use, but attendant principles of Idaho water law require that the enlargement analysis be based on authorized consumptive use.

It has always been the law in Idaho that water be used efficiently and without waste. *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 589-90 (1927); *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 324 (1924); *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 F. 30, 33, 35 (9th Cir. 1917); *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 44 (1915). In keeping with this policy, a transfer cannot be denied based on the doctrine of enlargement unless consumptive use after the change will exceed the *authorized* consumptive use before the change. Otherwise, farmers would be required to use as

much water as possible, as inefficiently as possible, to avoid the risk of enlargement being used to confine their water use to a lesser diversion rate or volume than is authorized on the face of their water right license or decree. A farmer, for example, would be incentivized to raise high-use crops and flood irrigation to avoid being confined to low-use crops and more efficient irrigation practices in the future.

The Idaho legislature subsequently amended section 42-202B to clarify that “changes in consumptive use do not require a transfer,” and that authorized consumptive use is the basis for evaluating enlargement under section 42-222. This legislation included the following statement of purpose:

This legislation secures the right to make full beneficial use of water rights by clarifying the meaning and role of “consumptive use.” By defining authorized consumptive use, this legislation makes it clear that a water right entitles the owner to make any use authorized by the right, without applying for approval of a transfer pursuant to Idaho Code 42-222. The owner of an irrigation right, for example, may grow any crop or vegetation at the authorized place of use, and may change from less water-consumptive crops to more consumptive crops without obtaining approval from the Idaho Department of Water Resources (IDWR). This legislation further secures the right to make full beneficial use by making it clear that, when a water right owner seeks to change an element of the right (e.g. point of diversion, place of use or nature of use), the consumptive use authorized by the right is retained. 2004 Ida. ALS 258, 2004 Idaho Sess. Laws 258, 2004 Ida. Ch. 258, 2004 Ida. HB 636.

Importantly, this amendment did not change Idaho law, it simply “clarified” that sections 42-222 and 42-202B must be applied harmoniously with the policy that water be used efficiently and without waste. The Idaho legislature has further reinforced this policy through the enactment of Idaho Code sections 42-250 and 42-223(9).

The Skaggs memo contains no analysis of consumptive use under the Jorgensen Rights. For this reason alone the 108.6 AF condition was improper. More importantly, the Jorgensen Rights had only four years earlier been decreed the right to 887.5 AF of consumptive use per year. While section 42-222 authorized the Department to ensure that consumptive use would not exceed 887.5 AF as a result of the transfer, it did not provide legal authority to reduce the authorized consumptive use that had been decreed to the Jorgensen Rights. Thus, the 108.6 AF condition was in error and should be removed.

B. No forfeiture.

While the Skaggs memo purported to impose the 108.6 AF condition based on the enlargement doctrine, its reliance on four years of diversion data was effectively a forfeiture analysis. Yet the Department did not have legal authority to reduce the decreed elements of the Jorgensen Rights based on forfeiture either.

Under Idaho law, “Forfeiture of water rights is not favored, and clear and convincing proof is required to find a forfeiture.” *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87 (1999). Forfeiture is disfavored because “the entire water distribution system under Title 42

of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.” *State v. Hagerman Water Right Owners*, 130 Idaho 727, 735 (1997) (quoting *Nettleton v. Higginson*, 98 Idaho 87, 91 (1977)). For forfeiture to occur there must be five consecutive years of non-use. Idaho Code § 42-222. Since the 108.6 AF restriction was based on only four years of diversion data there was no legal basis under the forfeiture doctrine to take away 90 percent of the volume decreed to the Jorgensen Rights.

C. Due process.

Under Idaho law, “individual water rights are real property rights which must be afforded the protection of due process of law before they may be taken by the state.” *Nettleton v. Higginson*, 98 Idaho 87, 90 (1977). Due process requires meaningful notice and a meaningful opportunity to be heard before an individual is deprived of a protected property interest. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91 (1999).

To be sufficient, the notice must be reasonably calculated to inform an interested party of an action and allow them the opportunity to present their opinions or objections. *LU Ranching Co. v. United States (In re Snake River Basin Adjudication Case No. 6)*, 138 Idaho 606, 608 (2003). The Idaho Supreme Court has held that “specific findings and notice of meetings—from which we infer the right to a reasonable opportunity to present and to rebut evidence—have been recognized as fundamental elements of procedural due process in a variety of contexts.” *Gay v. County Comm’rs*, 103 Idaho 626, 629 (Idaho Ct. App. 1982).

Except in circumstances requiring urgent action, the affected person must be given an opportunity to be heard *before* the decision is made. *Lowder v. Minidoka Joint Sch. Dist. No. 331*, 132 Idaho 834, 840 (1999) (Requiring an opportunity to be heard before the government makes a decision because that is “the only meaningful opportunity to invoke the discretion of the decisionmaker”); *Fridenstine v. Idaho Dep’t of Admin.*, 133 Idaho 188, 191-92 (1999) (“The minimum due process requirements are notice of the contemplated action and an opportunity to be heard before the deprivation of a substantial property interest”). If the decision maker considers new issues affecting the analysis regarding a property right, the affected individuals must be given an additional opportunity to comment on the decision. *Cooper v. Board of County Comm’rs*, 101 Idaho 407, 411 (1980).

In keeping with the requirements of due process, the Idaho legislature has required that all orders “be in writing,” contain “a concise and explicit statement of the underlying facts of record supporting the findings,” and “be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.” Idaho Code § 67-5248.

In this case, the 108.6 AF condition was imposed based on an internal Department memo that was never provided to the Jorgensens. It is unclear at what point the Department undertook its enlargement analysis, but the Skaggs memo was not completed until the day the order approving Transfer 4842 was issued. The memo was not sent to the Jorgensens, nor was any other written statement of facts or other explanation of the basis for the 108.6 AF condition provided. The Department took away 90 percent of the volume decreed to the Jorgensen rights with no notice that the Department was even considering such action, no opportunity to be heard before the decision was made, and no written statement of the underlying facts of record

supporting the findings. This was an egregious departure from the minimum requirements of due process and a violation of Idaho Code section 67-5248.

This error can and should also be corrected by the Department amending its order approving Transfer 4842 to remove the 108.6 AF restriction.

CONCLUSION

The Department has both express and inherent authority to amend its order approving Transfer 4842. The Department should exercise that authority be either removing the 108.6 AF condition as party of transfer no. 81731 or in response to this petition because the Department did not have legal authority to impose the 108.6 AF restriction under Idaho Code section 42-222 and because the condition was added in a manner that violated due process and Idaho Code section 67-5248.

DATED this 29th day of November, 2018.

RACINE OLSON, PLLP

By: 
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Partnership*

CERTIFICATE OF MAILING

I certify that on this 29th day of November, 2018, the foregoing document was served on the following persons in the manner indicated.



Signature of person mailing form

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