

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

IN THE MATTER OF APPLICATION FOR	) ORDER GRANTING PETITION FOR
TRANSFER NO. 81331, AND APPLICATIONS	) RECONSIDERATION, IN PART
FOR PERMIT NOS. 37-23021, 37-23022,	) AND DENYING PETITION FOR
37-23023, AND 37-23027 IN THE NAME OF	) RECONSIDERATION, IN PART
YARD BIRD LLC	)
	)

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of a transfer approval and approval of applications for permit to appropriate water, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On August 8, 2017 the Idaho Department of Water Resources ("Department") approved Application for Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 in the name of Yard Bird LLC as Preliminary Orders ("*Preliminary Orders*").
2. On August 18, 2017 and August 24, 2017 Brockway Engineering PLLC ("Brockway Engineering"), representative for Yard Bird LLC, filed *Petitions for Reconsideration* ("*Petitions*").
3. Pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01), a petition for reconsideration must be filed within 14 days of the service date of the preliminary order. Brockway Engineering filed its *Petitions* within the 14 days after the service date of the *Preliminary Orders* and, therefore, the *Petitions* were filed in a timely manner.
4. Brockway Engineering's *Petitions* contend that certain items included in the *Preliminary Orders* are incorrect or not consistent. The following contentions are raised by Brockway Engineering as quoted from the *Petitions*:
 - A. "Relative to the transfer, there is an error on the 1st page associated with the transfer volume listed in the portion titled "Summary of Water Rights After the Approved Change". Specifically, the 395.3 af should be 395.7. We also need to fix the diversion volumes on page 2 as they do not coincide with other volumes listed in the approved transfer and or our application."

SUPPORT DATA
IN FILE # 37-7319

- B. *"All existing rights as well as the four new permits are limited to no more than 0.02 cfs per acre for irrigation when combined. The surface water sources are not limited to 0.02 cfs per acre now when combined so this condition is not warranted and effectively limits the diversion rate under those rights to amounts less than were partially decreed."*
- C. *"Condition number three on all water right permits 37-23021, 37-23022, 37-23023 and 37-23027 requires excessive infrastructure and cost, and is inconsistent with how IDWR has permitted and or licensed irrigation and other non-consumptive water rights in the past."*
- D. *"The annual volume limit for irrigation storage and irrigation from storage associated with 37-23023 should be 391.9 acre-feet, not 391.6 acre-feet as listed on the permit."*
- E. *"Condition number eleven on water right permit 37-23023; pond evaporation should be 3.8 acre-feet as is listed in other permits for same ponds."*
- F. *"Annual volume limit under 37-23027 is listed at 202.7 acre-feet, we applied for 1,111.6 acre-feet. We would like to know how the 202.7 AF was calculated, why the limit isn't 1,111.6 AF as applied for?"*

ANALYSIS & CONCLUSIONS

1. Transfer No. 81331 - Right 37-7319 Diversion Volumes (Finding of Fact 4A)

Finding of Fact 4A states:

"Relative to the transfer, there is an error on the 1st page associated with the transfer volume listed in the portion titled "Summary of Water Rights After the Approved Change". Specifically, the 395.3 af should be 395.7. We also need to fix the diversion volumes on page 2 as they do not coincide with other volumes listed in the approved transfer and or our application."

Finding of Fact 4A refers to the diversion volumes that were listed for water right 37-7319 in the Transfer No. 81331 approval document (Page 1 – Summary of Water Rights After the Approved Change and Page 2 – Diversion Volume). The Transfer No. 81331 approval limited the irrigation diversion volume for right 37-7319 to 391.6 acre-feet and the diversion volume for aesthetic, wildlife, recreation, aesthetic storage, wildlife storage, recreation storage, and irrigation storage uses for right 37-7319 were limited to 3.7 acre-feet with the total diversion volume being limited to 395.3 acre-feet.

Right 37-7319 was decreed in the Snake River Basin Adjudication for 395.7 acre-feet for 222 acres of irrigation. Transfer No. 81331 converted 2.3 acres to uses associated with

ponds, leaving 219.7 acres of irrigation. The remaining irrigation volume was calculated as follows...

$$(395.7 \text{ acre-feet} / 222 \text{ acres}) \times 219.7 \text{ acres} = 391.6 \text{ acre-feet}$$

- Limiting the irrigation diversion volume for right 37-7319 to 391.6 acre-feet is appropriate.

The 2.3 acre portion of right 37-7319 that was converted has a diversion rate of 0.01 cfs (aesthetic, recreation, wildlife, and diversion to storage uses). The period of use for these uses is 4/15 to 10/15 (as decreed for irrigation use on right 37-7319). This equates to 184 days of potential diversion. The volumes for the converted portion of right 37-7319 were calculated as follows...

$$0.01 \text{ cfs} \times 184 \text{ days} \times 1.9835 \text{ acre-feet per cfs per day} = 3.649 \text{ acre feet (rounded to 3.7 acre-feet)}$$

- Limiting the diversion volume for aesthetic, wildlife, recreation, aesthetic storage, wildlife storage, recreation storage, and irrigation storage uses for right 37-7319 to 3.7 acre-feet is appropriate.

Total diversion volume for right 37-7319 is 391.6 acre-feet + 3.7 acre-feet = 395.3 acre-feet

- Limiting the total diversion volume for right 37-7319 to 395.3 acre feet is appropriate.

2. Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 - 0.02 cfs Per Acre Condition Limit (Finding of Fact 4B)

Finding of Fact 4B states:

"All existing rights as well as the four new permits are limited to no more than 0.02 cfs per acre for irrigation when combined. The surface water sources are not limited to 0.02 cfs per acre now when combined so this condition is not warranted and effectively limits the diversion rate under those rights to amounts less than were partially decreed."

Approved Application for Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 all include the following condition:

"This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use."

Transfer No. 81331 modified rights 37-7319, 37-22065, 37-22067, and 37-22069. Right 37-7319 was decreed in the Snake River Basin Adjudication for the diversion of 1.09 cfs of groundwater for the irrigation of 222 acres. Right 37-22065 was decreed in the Snake River

Basin Adjudication for the diversion of 6.8 cfs of water from Croy Creek for the irrigation of 319.9 acres. Right 37-22067 was decreed in the Snake River Basin Adjudication for the diversion of 1.94 cfs of water from Croy Creek for the irrigation of 319.9 acres. Right 37-22069 was decreed in the Snake River Basin Adjudication for the diversion of 0.29 cfs of water from an unnamed stream for the irrigation of 319.9 acres. All four rights included a condition indicating that when they are combined, they are limited to the irrigation of 319.9 total acres of irrigation. However, there was no condition on any of the decrees indicating that the four rights when combined are limited to a diversion rate less than the total summation of the diversion rates of the four rights. Therefore, the total amount of water that can be diverted via the four rights is the summation of their individual diversion rates (1.09 cfs + 6.8 cfs + 1.94 cfs + 0.29 cfs) which equals 10.12 cfs.

The total decreed diversion rate per acre would be:

$$10.12 \text{ cfs} \div 319.9 \text{ acres} = 0.03 \text{ cfs per acre}$$

0.03 cfs per acre, as decreed, is greater than 0.02 cfs per acre, as limited in the Transfer No. 81331 approval and approved Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027.

- Modifying the rate per acre condition on approved Application for Transfer No. 81331 and Applications for Permit No. 37-23021, 37-23022, 37-23023, and 37-23027 by removing the 0.02 cfs per acre limitation is appropriate.

3. Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 – Measuring and Reporting Condition (Finding of Fact 4C)

Finding of Fact 4C states:

“Condition number three on all water right permits 37-23021, 37-23022, 37-23023 and 37-23027 requires excessive infrastructure and cost, and is inconsistent with how IDWR has permitted and or licensed irrigation and other non-consumptive water rights in the past.”

Approved Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 all include the following condition (identified as condition # 3 on all permits):

On an annual basis during the development period of this permit, and upon filing Proof of Beneficial Use, the permit holder shall submit a report to IDWR showing the total annual volume, the total monthly volume, and the maximum instantaneous rate of flow diverted from the point of diversion (Unnamed Stream) during the previous year. The report shall show water diverted under this permit independent of water diverted from other sources under permits 37-23021, 37-23022, and 37-23023. The report shall also include the total annual volume, total monthly volume, and the maximum instantaneous rate of flow for irrigation purposes from each pond.

Rule 50.01 of the Department's Water Appropriation Rules (IDAPA 37.03.08.040.01.d) provides as follows:

Issuance of Permits with Conditions. The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A, Idaho Code, and to meet the requirements of Section 42-203C, Idaho Code, to the fullest extent possible including conditions to promote efficient use and conservation of energy and water.

Brockway Engineering contends that the condition is “inconsistent” with how the Department has issued permits in the past. However, the Department has issued numerous permits with reporting requirements in the past. Examples of approved permits with reporting requirements include, but are not limited to, the following:

1-10609, 1-10625, 1-10626, 1-10629, 2-7471, 11-7491, 11-7641, 11-7718, 11-7719, 15-7299, 22-13265, 22-13589, 22-13689, 22-13690, 22-13691, 22-13717, 22-13764, 22-13765, 22-13766, 22-13767, 22-13768, 22-13831, 22-13888, 22-13979, 25-14166, 25-14167, 25-14198, 27-12251, 27-12252, 27-12253, 27-12254, 29-13672, 34-7571, 34-7573, 34-14101, 35-14240, 35-14241, 35-14242, 35-14243, 37-21297, 37-22252, 37-22545, 37-22599, 37-22850, 43-7321, 43-13731, 43-13732, 43-13733, 43-13734, 43-13735, 43-13736, 43-13737, 45-14446, 45-14455, 45-14456, 47-8363, 47-17435, 55-13912, 57-11690, 61-11954, 61-12090, 63-12448, 63-12546, 63-31218, 63-31858, 63-32061, 63-32083, 63-32089, 63-32090, 63-32157, 63-32221, 63-32225, 63-32228, 63-32367, 63-32388, 63-32423, 63-32573, 63-32603, 63-32680, 63-32812, 63-33207, 63-33235, 63-33236, 63-33237, 63-33261, 63-33262, 63-33263, 63-33296, 63-33401, 63-33403, 63-33404, 63-33415, 63-33434, 63-33467, 63-33645, 63-33654, 63-33714, 63-33744, 63-33769, 63-33882, 63-33888, 63-33931, 63-33938, 63-33944, 63-33956, 65-23064, 65-23088, 65-23107, 65-23493, 67-14750, 67-14951, 72-16624, 85-15755, 91-7157, 95-9244, 95-9385, 95-9395, 95-9431, 95-9445, 95-9480, 95-9490, 95-16175, 95-16492, 95-16580, 95-16962, and 98-7843

Approved Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 all propose multiple uses of water (irrigation storage, irrigation from storage, aesthetic storage, recreation storage, wildlife storage, aesthetic, recreation, wildlife, and diversion to storage uses). The system(s) described by the approved applications for permit propose diverting water from multiple sources and then re-diverting these sources of water from ponds at multiple locations for multiple uses. If the permit holder develops the system(s) described by Approved Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 and files Proof of Beneficial Use, the Department or a certified water right examiner must determine the extent of beneficial use for each of the uses on approved Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027. This includes diversion rates and diversion volumes associated with each use. The condition was implemented as part of the approval of Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 to establish a record of the quantity of water diverted for each of the uses associated with each of the approved applications for permit.

- Implementing a measuring and reporting condition, including quantifying the amount of water diverted from each pond and used for irrigation use is appropriate.

4. Application for Permit No. 37-23023 – Irrigation Storage and Irrigation from Storage Volumes (Finding of Fact 4D)

Finding of Fact 4D states:

“The annual volume limit for irrigation storage and irrigation from storage associated with 37-23023 should be 391.9 acre-feet, not 391.6 acre-feet as listed on the permit.”

Approved Application for Permit 37-23023 limits the irrigation storage and irrigation from storage volumes to 391.6 acre-feet. Note that this is the same volume limitation applied to right 37-7319 in the Transfer No. 81331 approval. Right 37-7319 and Approved Application for Permit 37-23023 both allow for diversion of groundwater through the same system. The Narrative in Support of Water Right Permit and Transfer Applications that was submitted with Application for Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 includes the following statement:

“no new consumptive use is sought to be appropriated under the applications”

Application for Permit 37-23023 seeks to appropriate water within the area covered by the Eastern Snake River Plain Area, and is subject to the Amended Moratorium (“Moratorium”) issued by the Department on April 30, 1993. Pursuant to the Moratorium, the Department is prohibited from processing applications for new consumptive uses except in limited circumstances. Two of the exceptions outlined in the Moratorium indicate that the Department may continue to process applications proposing non-consumptive uses of water and application where the proposed consumptive uses are mitigated. In order to process, and ultimately, approve, Application for Permit 37-23023 the uses must be non-consumptive or mitigated. The irrigation storage and irrigation from storage volumes proposed by Application for Permit 37-23023 are mitigated by converting a portion of irrigation right 37-7319 and overlapping surface rights to storage uses via Transfer No. 81331, ceasing irrigation of acres to allow for the filling of the storage ponds, and utilizing the water remaining under right 37-7319 for irrigation storage and irrigation from storage uses (additional uses of the same water). Basically, the amounts listed on approved Application for Permit 37-23023 for irrigation storage and irrigation from storage uses must match the amounts listed for irrigation use identified on right 37-7319 after the Transfer No. 81331 approval, in this case 391.6 acre-feet.

Right 37-7319 was decreed in the Snake River Basin Adjudication for 395.7 acre-feet for 222 acres of irrigation. Transfer No. 81331 converted 2.3 acres to uses associated with the ponds, leaving 219.7 acres of irrigation. The remaining irrigation volume was calculated as follows...

$(395.7 \text{ acre-feet} / 222 \text{ acres}) \times 219.7 \text{ acres} = 391.6 \text{ acre-feet}$

- Limiting the irrigation storage and irrigation from storage volume for approved Application for Permit 37-23023 to 391.6 acre-feet is appropriate.

5. Application for Permit No. 37-23023 – Condition Referring to Storage Volume Limitation for Right 37-7319 in Transfer No. 81331 (Finding of Fact 4E)

Finding of Fact 4E states:

“Condition number eleven on water right permit 37-23023; pond evaporation should be 3.8 acre-feet as is listed in other permits for same ponds.”

Approved Application for Permit No. 37-23023 included the following condition (identified as condition # 11 on permit):

“Per Transfer 81331, Right 37-7319 authorizes the diversion of 0.01 cfs and 3.7 af of water to storage to offset evaporation losses from the ponds authorized by this right.”

The 2.3 acre portion of right 37-7319 that was converted to new uses, including storage uses, via approved Transfer No. 81331 has a diversion rate of 0.01 cfs (aesthetic, recreation, wildlife, and diversion to storage uses). The indicated period of use for these uses is 4/15 to 10/15 (as decreed for irrigation on right 37-7319). This equates to 184 days of potential diversion. The volumes for the converted portion of right 37-7319 were calculated as follows...

$0.01 \text{ cfs} \times 184 \text{ days} \times 1.9835 \text{ acre-feet per cfs per day} = 3.649 \text{ acre feet (rounded to 3.7 acre-feet)}$

- Limiting the diversion volume for aesthetic, wildlife, recreation, aesthetic storage, wildlife storage, recreation storage, and irrigation storage uses for right 37-7319 to 3.7 acre-feet and referencing this amount in a condition on approved Application for Permit No. 37-23023 is appropriate.

6. Application for Permit No. 37-23027 – Annual Volume Limitation (Finding of Fact 4F)

Finding of Fact 4F states:

“Annual volume limit under 37-23027 is listed at 202.7 acre-feet, we applied for 1,111.6 acre-feet. We would like to know how the 202.7 AF was calculated, why the limit isn’t 1,111.6 AF as applied for?”

Application for Permit No. 37-23027 identifies a total volume limitation of 1,111.6 acre-feet. This 1,111.6 acre-feet volume, which was also listed on Applications for Permit Nos. 37-23021 and 37-23022, appears to be based on the maximum allowable acres (317.6 acres) multiplied by the standard irrigation volume allowance for the area (3.5 acre-feet per acre). However, approved Application for Permit No. 37-23027 allows for year round diversion to storage at a rate of 0.28 cfs. Approved Application for Permit No. 37-23027 identifies a total volume

limitation, irrigation storage limitation, and irrigation from storage limitation of 202.7 acre-feet. This 202.7 acre-feet was calculated as follows:

$$0.28 \text{ cfs} \times 365 \text{ days} \times 1.9835 \text{ acre-feet per cfs per day} = 202.7 \text{ acre-feet}$$

Upon review, while this calculation appears correct for the maximum allowable diversion volume it appears that there was an error in logic in how the maximum irrigation storage volume and irrigation from storage volume was calculated. While, diverting 0.28 cfs for a 365 day period will produce a volume of 202.7 acre-feet, the limited season of use for the irrigation uses allowed by approved Application for Permit No. 37-23027 should result in a smaller volume limitation for the uses associated with irrigation. Upon further review, applying this error in logic also resulted in an excessive maximum allowable irrigation storage volume and irrigation from storage volume for approved Application for Permit 37-23021.

The ponds described by approved Application for Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 have a total storage volume of 24.0 acre-feet. The ponds are proposed to be lined, so there will be no seepage losses associated with the ponds. The evaporative losses associated with the ponds are covered by the storage uses described on the rights in approved Application for Transfer No. 81331. The maximum amount of irrigation storage and irrigation from storage volume should represent the maximum amount of volume produced by the diversion to storage rate authorized for the permit during the irrigation season as long as this amount does not exceed the 1,111.6 acre-feet that was listed as the total volume on the applications for permit. The irrigation season for approved Applications for Permit Nos. 37-23021, 37-23022, and 37-23027 was limited to 4/15 to 10/31, or 200 days. The irrigation storage volumes and irrigation from storage volumes should be calculated as follows:

Application for Permit 37-23021

$$1.93 \text{ cfs} \times 200 \text{ days} \times 1.9835 \text{ acre-feet per cfs per day} = 765.6 \text{ acre-feet}$$

$$765.6 \text{ acre-feet} < 1,111.6 \text{ acre-feet therefore, use } 765.6 \text{ acre-feet}$$

- Limiting the irrigation storage and irrigation from storage volume to 765.6 acre-feet for approved Application for Permit No. 37-23021 is appropriate.

Application for Permit 37-23022

$6.75 \text{ cfs} \times 200 \text{ days} \times 1.9835 \text{ acre-feet per cfs per day} = 2,677.7 \text{ acre-feet}$

$2,677.7 \text{ acre-feet} > 1,111.6 \text{ acre-feet}$ therefore, use 1,111.6 acre-feet (also use for maximum allowable diversion volume since this is what was listed on the application for permit)

- Limiting the irrigation storage and irrigation from storage volume to 1,111.6 acre-feet and the total maximum allowable diversion volume to 1,111.6 acre-feet for approved Application for Permit No. 37-23022 is appropriate.

Application for Permit 37-23027

$0.28 \text{ cfs} \times 200 \text{ days} \times 1.9835 \text{ acre-feet per cfs per day} = 111.1 \text{ acre-feet}$

$111.1 \text{ acre-feet} < 1,111.6 \text{ acre-feet}$ therefore, use 111.1 acre-feet

- Limiting the irrigation storage and irrigation from storage volume to 111.1 acre-feet for approved Application for Permit No. 37-23027 is appropriate.

ORDER

IT IS HEREBY ORDERED that the *Petitions for Reconsideration* are GRANTED, in part. Approved Application for Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 should be modified by removing the 0.02 cfs per acre limitation on the approval conditions. Approved Application for Permit No. 37-23021 should be modified to limit the irrigation storage and irrigation from storage volume to 765.6 acre-feet. Approved Application for Permit No. 37-23027 should be modified to limit the irrigation storage and irrigation from storage volume to 111.1 acre-feet. The approved Application for Transfer No. 81331 and Applications for Permit Nos. 37-23021, 37-23022, 37-23023, and 37-23027 have been revised to reflect these changes. All other arguments and proposals made in the *Petitions for Reconsideration* are DENIED.

Dated this 19th day of September, 2017.



Corey Skinner
Southern Region Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of September 2017, true and correct copies of the document described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Granting Petition, in Part, and Denying Petition, in Part

**YARD BIRD LLC
PO BOX 41
KETCHUM ID 83340**

**BROCKWAY ENGINEERING PLLC
C/O ZACH LATHAM
2016 N WASHINGTON ST STE 4
TWIN FALLS ID 83301**

**WATER DISTRICT 37
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**Denise Maline
Administrative Assistant**