

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

**IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79778 IN THE NAME OF
CITY OF MERIDIAN**

**ORDER ADDRESSING
EXCEPTIONS AND AMENDING
TRANSFER APPROVAL**

PROCEDURAL HISTORY

On March 17, 2016, the Idaho Department of Water Resources (“Department”) issued a preliminary order approving Transfer No. 79778 (“Transfer”) authorizing the City of Meridian (“Meridian”) to divert ground water for municipal purposes from twenty-seven wells under each of their twenty-six water rights. The Transfer included the following condition of approval:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, this right retains its original priority for well locations authorized under this right as identified in the [decree or license] dated [decree or license date].

This condition is hereafter referred to as the “administration condition.” The Transfer included an additional condition of approval:

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use or where the use of surface water was replaced by the use of water diverted in connection with this right before the approval of Transfer 79778. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

This condition is hereafter referred to as the “surface water first condition.”

On April 1, 2016, Meridian filed a petition for reconsideration of the order. After communication between Meridian and the Department to clarify the administration condition and the surface water first condition, the Department issued an order denying the petition for reconsideration on April 22, 2016.

SUPPORT DATA

IN FILE # 63-2893

On May 5, 2016, Meridian filed its *Exceptions to Order Denying Petition for Reconsideration* (“Exceptions”).

EXCEPTIONS TO PRELIMINARY ORDER

Meridian takes exception with the administration condition and the surface water first condition. Meridian argues the administration condition “is vague and confusing and may result in unintended and negative impacts to the City.” *Exceptions* at 1. Meridian also argues:

[T]he [transfer approval] failed to recognize the potential consequences of [the surface water first condition] regarding the use of surface water for irrigation purposes prior to the use of water under any of the rights subject to transfer that was added to the rights even though it was not present in the conditions prior to approval of the transfer.

Id.

Administration Condition

Meridian argues that the administration condition is “vague and confusing” and that “[i]t is unknown exactly what is meant by the word ‘administration.’” *Exceptions* at 3. Meridian suggests that in a basin wide administration action by the Department, the administration condition “requires that the City’s water rights be limited to only one single diversion point for the majority of its water rights,” *Exceptions* at 4-5. In another example, Meridian suggests that “under the administration condition, a junior priority water right holder can insist that the water right be limited to its original point of diversion... .” *Exceptions* at 6.

The Transfer authorizes Meridian to use its city wells as alternate points of diversion for each of its municipal water rights. The effect of the Transfer is that Meridian can divert its most senior rights from any of its wells. This raises the potential for injury to other water rights existing prior to the Transfer, either due to local interference between wells or due to a geographically limited¹ delivery call. The administration condition was applied to each right in the Transfer to identify well locations associated with the priority date under each right in the event administration of rights becomes necessary.

The language in the administration condition is substantially similar to language used by the Department in an alternate point of diversion condition which was upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830 (2012). In that case, the Court agreed with the Department that the condition was necessary to assist in the administration of water rights and to avoid injury to other water rights. *Id.* at 835. The Court recognized that the key consideration is injury to the priority of the water rights. As the Court recognized, “Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.” *City of Pocatello*, 152 Idaho at 835.

¹ The condition helps ensure that a municipality cannot circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area to protect junior priority wells within the curtailment area.

From the Department's perspective, there is no substantive difference between the language in the administrative condition and the language in the condition upheld by the Idaho Supreme Court in *City of Pocatello*. Meridian seems to believe otherwise, however. To remove any question regarding the language, the Director will modify the administration condition. Those water rights decreed in the SRBA with an alternate point of diversion condition (for example, water right no. 63-08332) will retain the decreed condition. A condition similar to the SRBA decreed alternate point of diversion condition will be added to those water rights which previously did not include an alternate point of diversion condition if the location information is available to the Department.

The administration condition does not identify which points of diversion are alternate points of diversion, which is pertinent information for a transfer with regard to potential injury claims by other water rights. The Department will also include the following condition for each right in the Transfer as follows:

Transfer _____ authorizes additional Well No(s) _____ located in T_____, R_____, S_____, _____, _____ as a point(s) of diversion under this right as of the date of approval.

In a basin wide curtailment action by the Department encompassing all the points of diversion in the entire Meridian system, the alternate point of diversion conditions would have no impact on Meridian because the city would only be required to curtail its junior water rights, but would retain flexibility to use its remaining senior water rights at alternate locations. *See* Brief for Respondent at 9, fn. 2, *City of Pocatello v. State of Idaho*, (S.Ct. Doc. No. 37723-2010).² In a limited curtailment action by the Department that does not encompass all the points of diversion in the Meridian system, the alternate point of diversion conditions only serve to identify the original locations for points of diversion associated with the priority date under each right to ensure that Meridian does not attempt to avoid curtailment of its junior priority water rights by moving them outside the curtailment area and moving its senior water rights into the curtailment area to undermine the curtailment. *See id.*

With regards to well-to-well interference issues, the alternate point of diversion conditions ensure that if, at some time in the future, a well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the Meridian well, alleges injury from pumping water from the Meridian well, and Meridian's increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, Meridian will be required to reduce pumping to not cause interference. *See Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Meridian cannot pump water from alternate points of diversion to the detriment of other existing well owners. But this condition does not mean "the City will never be able to assert the priority dates of its water rights at the new points of diversion approved under the transfer against any other water right" as suggested by Meridian. *Exceptions* at 6.

² Available on Westlaw at 2011 WL 3512891.

Surface Water First Condition

Meridian suggests the Director lacks the authority to impose the Surface Water First condition on water rights on which the condition was not imposed prior to the approval of the Transfer. *Exceptions* at 8. Meridian argues “the ‘Surface Water First’ condition constitutes the impermissible restriction of a valid property right, and should be removed from those rights where it was not present prior to approval of Transfer no. 79778.” *Id.* at 9.

Idaho Code § 42-222 requires that the Department “examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided...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...” Idaho Code § 42-222(1). Prior to the Transfer approval, six of the city’s 26 water rights involved in the Transfer included a condition requiring the use of available surface water to be used prior to the diversion of ground water. The condition helps conserve Idaho’s ground water (which is a limited resource in certain areas and which is generally a higher quality water source) by requiring that surface water be used first when available for irrigation use.³ The Transfer authorizes Meridian to use its city wells as alternate points of diversion for each of its 26 water rights. The effect of the Transfer is that Meridian can more easily divert ground water at any location under any of its water rights. This raises the potential for Meridian to circumvent the requirement to use surface water first on lands historically irrigated under the six water rights with the condition because Meridian could assert that the water is diverted under a right without the Surface Water First condition. It also raises the potential to enlarge the use of ground water under Meridian’s rights in lieu of available surface water because Meridian could use ground water in situations where it had been restricted to using surface water in the past. The Surface Water First condition is necessary to ensure that approval of the Transfer will not be inconsistent with the conservation of water resources within the State and will not enlarge the water rights being transferred. The Department is not limited in its use of conditions to those that existed under each right prior to the Transfer so long as conditions are added to ensure statutory criteria for a transfer can be met. The Surface Water First condition is necessary to ensure that the statutory criteria of Idaho Code 42-222 are met.

Meridian argues that “imposition of the ‘Surface Water First’ condition may prevent the City from flexibly using its water rights to ensure compliance under future water quality regulations.” *Exceptions* at 8. Meridian desires to use lower quality water from certain wells for irrigation use to ensure higher quality water is available for culinary purposes. Additionally, Meridian desires to maintain natural ground water pressure gradients in the aquifer by continuing to pump the lower quality water for irrigation to reduce migration of the lower quality water into other areas. *Exceptions* at 8-9. The Director disagrees that the surface water first condition reduces flexibility. The condition does not restrict which wells or ground water rights can be used for irrigation, it only ensures that the status quo is maintained regarding use of surface

³ The strong public policy in favor of the use of surface water first when both ground water and surface water sources are available is also reflected in Idaho’s land use code. Idaho Code § 67-6537 provides, in relevant part, that “[a]ll applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation.” Idaho Code § 67-6537(1).

water on lands where surface water is available and has been historically used. The surface water first condition includes an exception where the use of surface water was replaced by the use of ground water diverted in connection with each right before the approval of the Transfer.

ORDER

IT IS HEREBY ORDERED that Transfer No. 79778 is APPROVED with amended conditions as shown in the accompanying approval document.

Dated this 4th day of October, 2016.



GARY SPACKMAN
Director

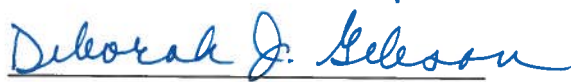
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October 2016, a true and correct copy of the document described below was 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 Addressing Exceptions and Amending Transfer Approval and Explanatory information to accompany a Final Order

CITY OF MERIDIAN
33E BROADWAY AVE
MERIDIAN, ID 83642

CHARLES HONSINGER
HONSINGER LAW PLLC
P O BOX 517
BOISE, ID 83701



Debbie Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.