

BEFORE THE DIRECTOR OF 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 DENYING PETITION
FOR RECONSIDERATION**

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of an approved transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On March 17, 2016, the Department issued a preliminary order approving Transfer of Water Right No. 79778 (transfer) authorizing the City of Meridian (city) to divert ground water pursuant to twenty six water rights held by the city from twenty seven existing wells.
2. On April 1, 2016, the Department received a petition for reconsideration (petition). The petition sought revision of a condition included on each water right in the transfer approval. The revision was sought on the grounds that vague and confusing language precludes the city from ever asserting the priority dates of its water rights at the new points of diversion against a junior appropriator regardless of whether the junior appropriation was made before or after approval of the transfer. The condition (hereafter referred to as Condition A) states:

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].

3. The Department finds the language of Condition A affirms the priority of the water right at the points of diversion identified in the license or decree confirming the water right. The language is silent on the priority the city can assert at points of diversion authorized after the right was initially licensed or decreed.
4. The petition also asserts that a condition added to 20 of the 26 water rights places an impermissible restriction on a valid property right and should be removed. The condition was already present on the remaining six of the 26 rights previous to approval of the transfer and is not proposed to be removed from those six rights. The condition (hereafter referred to as Condition B) states:

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.

5. The wells operated by the city divert water from an aquifer that provides water that is generally of high quality. That aquifer will be relied upon for future development that requires high quality water.
6. Transfer 79778 affords the city the ability to divert water rights from alternate points of diversion. This creates an opportunity for the city to enlarge the use of a water right beyond what would have been possible without the transfer approval. Such enlargement can be offset by restricting the ability of the city to expand use of the municipal groundwater rights to irrigate ground currently irrigated with surface water.

CONCLUSIONS OF LAW

1. Idaho Code §42-222(1) provides in pertinent part as follows:

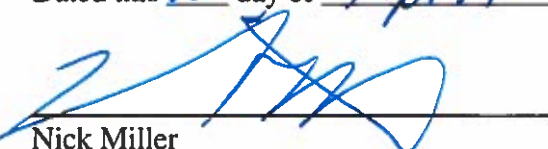
The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, 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 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates...

2. Condition A affirms the priority of the water right at the decreed or licensed points of diversion. The condition is silent on the priority at alternate points of diversion and therefore does not preclude or guarantee any particular priority date. The priority and quantity the city is entitled to at the alternate points of diversion is a distribution question that must be decided in part on facts related to development activities that may not have occurred yet.
3. Use of high quality groundwater to irrigate lands for which surface water is available and historically used is not consistent with conservation of water resources in Idaho.
4. Condition B is a permissible limitation on the city's water rights as it promotes conservation of water resources within the state of Idaho without restricting established uses of the city's water rights.
5. Condition B is a necessary condition to prevent enlargement of the city's groundwater use that could occur as a result of this transfer approval.
6. The Department should deny the petition for reconsideration of the order pursuant to Idaho Code §67-5243(3).

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the order approving Transfer No. 79778 is **DENIED** pursuant to Idaho Code §67-5243(3).

Dated this 22nd day of April, 2016.



Nick Miller
Manager, IDWR Western Region



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region • 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER

Governor

April 22, 2016

GARY SPACKMAN

Director

CHARLES HONSINGER
HONSINGER LAW PLLC
PO BOX 517
BOISE, ID 83701

RE: Petition for Reconsideration of Transfer No. 79778

Dear Mr. Honsinger:

The Department has reviewed your petition dated April 1, 2016 and I have prepared the enclosed order denying the petition. As you are aware, you may file exceptions to the director within 14 days of the service date of this order.

If you have any questions, please call or email.

Respectfully,

Nick Miller
Manager, IDWR Western Region

enclosure

cc:

Kyle Radek, City of Meridian 33 E Broadway Ave Meridian, ID 83642
Shelley Keen, Jeff Peppersack (IDWR)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of April, 2016, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, with return receipt, postage prepaid and properly addressed to the following:

Documents Served:

- Order Denying Petition for Reconsideration

CHARLES HONSINGER
HONSINGER LAW PLLC
PO BOX 517
BOISE, ID 83701

KYLE RADEK
CITY OF MERIDIAN
33 E BROADWAY AVE
MERIDIAN, ID 83642



Rachel Sommer
IDWR

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.