

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 79125 IN THE)
NAME OF SCOTT NELSON)

**PRELIMINARY ORDER
REJECTING TRANSFER**

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application for transfer, the Department finds, concludes, and orders as follows:

PROCEDURAL HISTORY

Scott Nelson ("Nelson") filed Application for Transfer No. 79125 with the Department on February 24, 2014, seeking to make changes to water right 11-73. The Department published notice of the application on December 10 and 17, 2014. No protests were filed. On March 6, 2015, the Department issued a *Preliminary Order Rejecting Transfer* (Application 79125) because Nelson failed to demonstrate ownership of water right 11-73.

On March 20, 2015, Nelson, through his attorney, filed a petition for reconsideration, asking for additional time to assemble evidence of ownership. The petition stated that Nelson would likely initiate a quiet title action in Idaho District Court to confirm his ownership of water right 11-73. The petition asked for a six-month stay in the proceedings to address the ownership issues.

On April 8, 2015, the Department issued an *Order Granting Petition for Reconsideration and Withdrawing Preliminary Order*. The *Order* stated: "Nelson shall have six months to demonstrate his ownership interest in water right 11-73. If additional documentation is not provided on or before October 9, 2015, the Preliminary Order Rejecting Transfer shall be reinstated." The Department has not received any additional documentation or evidence from Nelson or his attorney. Therefore the *Preliminary Order Rejecting Transfer* is reinstated as follows:

FINDINGS OF FACT

1. On February 24, 2014, Nelson filed Application for Transfer No. 79125 with the Department, seeking to change the point of diversion and place of use for water right 11-73. The proposed place of use is property owned by Mr. Nelson and is presently irrigated through the Paris Relief Canal with canal company shares. The proposed point of diversion is the main headgate of the Paris Relief Canal.

2. Water right 11-73 is still in the name of R.W. Caldwell, the owner listed in the 1932 Decree for Paris Creek (*Pioneer Irrig. and Manufacturing Co. v. Southfield Ditch and Canal Co.*,

July 27, 1932). Water right 11-73 bears a priority date of May 1, 1864 and authorizes the irrigation of 15 acres in the SENE of Section 9 and the SWNW of Section 10, T14S, R43E (hereinafter "Caldwell Property"). The current point of diversion for water right 11-73 is located in the SWNE of Section 9, T14S, R43E.

3. Nelson does not own and has never owned any part of the Caldwell Property, the existing place of use for water right 11-73. The Department asked Nelson to provide documents supporting his claim of ownership of water right 11-73. Nelson provided some documents purportedly demonstrating ownership of water right 11-73 in November 2014.

4. The Department published notice of the proposed changes beginning on December 10, 2014. No protests were filed against the application.

5. Nelson's claim of ownership for water right 11-73 ties back to William Froerer ("Froerer"), who owned the Caldwell Property in the 1970s. According to Nelson, Froerer sold the water right to Frank Egginton ("Egginton"), who sold the right to Sterling Wallentine ("Wallentine"), who sold the right to Nelson.

6. Nelson provided a document dated June 4, 2014 and signed by Froerer which states: "Water Right 11-73 located at Paris Creek Idaho. Given to Frank Egginton." Nelson also provided a document from November 2009 where Egginton agreed to transfer "all water rights [owned by Egginton] in Paris Creek Water District 11-E" to Wallentine for a certain sum of money. The document was signed by Egginton and Wallentine. Nelson also provided a document dated October 30, 2014 which states: "I Sterling Wallentine do transfer water right [11 73] located at Paris Creek Idaho to Orson Scott Nelson." The document was signed by Wallentine and notarized in Bear Lake County.

7. Nelson also provided two deeds showing that Froerer purchased portions of the SENE of Section 9 and the SWNW of Section 10, T14S, R43E from the Caldwell family in 1972. The deeds were recorded in Bear Lake County.

8. As part of its investigation of ownership, the Department contacted the current property owners of the Caldwell Property to see if they asserted any ownership interest in the right. Two of the property owners responded and provided documents relevant to the ownership issue.

9. One of the documents provided by the property owners is a warranty dated March 3, 1977 in which Froerer conveyed a portion of the Caldwell Property to Earl and Anne Heninger. The deed does not refer to any water rights. The other document is a warranty deed dated August 12, 1977 in which Froerer conveyed a portion of the Caldwell Property to Jay and Lorraine Allred. The deed does not refer to water rights.

CONCLUSIONS OF LAW

1. Pursuant to Idaho Code § 42-222, a transfer applicant must demonstrate his authority to make the changes proposed in the transfer application. In Idaho, water rights are real property. As

such, they are governed by Idaho Code § 9-505 which requires that conveyances of real property be made in writing.

2. In Idaho, a water right is considered an appurtenance to the underlying land and is conveyed with the sale of the land unless expressly reserved from the sale. In other words, if a deed is silent about water rights, then any water right existing on the subject property is conveyed to the new owner along with the land.

3. Froerer purchased most of the Caldwell Property in 1972 and likely acquired most or all of water right 11-73 with the purchase. When Froerer sold portions of the Caldwell property in 1977, he did not expressly reserve water right 11-73 from the conveyance of the land. Therefore, unless Froerer sold or moved water right 11-73 prior to subdividing and selling the Caldwell Property, water right 11-73 would have passed with the conveyance of the land.

4. The Department does not have and Nelson has not provided any documents showing that Froerer sold or moved water right 11-73 prior to March 1977. The 2014 document signed by Froerer is of no value because Froerer did not own any of the Caldwell Property in 2014, and would not have had any remaining ownership interest in the water right at that time.

5. Nelson is of course free to pursue a quiet title action to settle the ownership issues relating to water right 11-73. Nelson is also free to pursue an adjudication claim for the water right if a general adjudication of water rights is commenced in the Bear River basin. In both instances, an Idaho judge would have the authority to decide the current ownership of water right 11-73.

6. Nelson may in fact be the proper owner of water right 11-73. However, at this time, the documents available to the Department do not support Nelson's claim to ownership of the water right. Therefore, Transfer 79125 must be rejected for the applicant's failure to demonstrate the legal authority to make the proposed changes.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79125 is REJECTED. Nelson may pursue a similar or identical transfer in the future if additional documents supporting his claim of ownership come available or if he quiets title for water right 11-73.

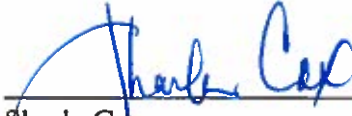
Dated this 19th day of November, 2015.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of November 2015, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER REJECTING TRANSFER, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:



Sharla Cdx
Administrative Assistant

US MAIL - CERTIFIED

RE: APPLICATION FOR TRANSFER NO. 79125

Scott Nelson
PO Box 53
Paris, ID 83261

Robert Harris
Holden Kidwell Hahn & Crapo, PLLC
PO Box 50130
1000 Riverwalk Drive, Suite 200
Idaho Falls, ID 83405

Courtesy copy sent via regular mail to:

Water District 11E
David Matthews, Watermaster
PO Box 222
Paris, ID 83261

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.