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Department of Water Resources
Eastern Region

Attorneys for Marshall Todd and Norma Perkes

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79006 IN THE NAME OF
MARSHAL AND NORMA PERKES

**PERKES' RESPONSE TO PETITIONS
FOR RECONSIDERATION**

Marshall Todd and Norma Perkes ("Perkes"), by and through their attorney of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby responds to (1) a *Petition for Reconsideration* filed by Joel and Jason Anderson (collectively "Anderson") through their attorney Jim Speck of Speck & Aanestad, and (2) a *Petition for Reconsideration* filed by Kirby Jensen. Joel Anderson, Jason Anderson, and Kirby Jensen are collectively referred to herein as "Protestants." Perkes and the Protestants are collectively referred to herein as the "Parties."

I. INTRODUCTION.

After significant analysis of two approved exchange agreements and a subsequent district court case and settlement agreement involving the water rights associated with the exchange

agreements—the detailed analysis of which was performed primarily by Perkes—and after a number of months of negotiations, the Parties entered into a *Stipulation for Withdrawal of Protests* concerning Perkes’ Transfer No. 79006 (the “Stipulation”) which was filed with IDWR on October 22, 2014. Based on the Stipulation, IDWR approved 79006 on December 10, 2014, and it was consistent with the contents of the Stipulation.

On December 23, 2014, the Protestants requested reconsideration of 79006’s approval and now request a condition in Perkes’ Water Right Nos. 34-7096A, 34-7097A, and 34-7223 referencing the approved exchange agreements discussed in the Stipulation. Jensen also requests an additional condition containing more detail as to the delivery system used to effectuate the exchange.

As set forth below, Perkes does not necessarily oppose inclusion of a condition referencing the exchange agreements provided that the order granting the petitions for reconsideration is clear that it does not amend the terms of the exchange agreements or mandate that the exchange must continue, but does opposes Jensen’s proposed condition referencing a more detailed delivery system.

II. ARGUMENT

A. Perkes is not opposed to reference of the exchange agreements in 79006’s approval, but with some suggested changes.

Perkes has mixed feelings regarding the need to include reference to the exchange agreements. As contained in the very first paragraph of the agreement portion of the Stipulation, it did not purport to amend the exchange agreements in any way, and the Parties all agree that the exchange agreements are valid, binding, and operative. The approved exchanges are part of IDWR’s records, and both exchanges are well known in the Big Lost River Valley due to their

operation, the long tenure of the exchanges, previous litigation over them, and the exchanges are well-known and understood by the current watermaster—Perkes, of all people. Notice does not therefore seem to be an issue. Furthermore, Perkes' Water Right Nos. 34-7096A, 34-7097A, and 34-7223 have previously been exchanged without incident even without reference to the exchanges in the water rights themselves.

Given the generally litigious nature of the Big Lost River basin concerning water rights in both district court and the administrative arena, which the Protestants have actively participated in, it is unclear what their motivation is to include their proposed conditions. The concern, of course, is that the proposed conditions could support an argument that alters the provisions of the exchange agreements. If the hearing officer were to issue an order including the exchange agreement conditions, the hearing officer's order should be clear that inclusion does not alter or amend the exchange agreements in any way and is only made for descriptive purposes.

While the above paragraph sounds slightly paranoid, it is not without good reason. Counsel for Perkes was involved in litigation in the Big Lost spanning four years, and one of the primary arguments advanced by the opposing side was that a descriptive condition describing the delivery system was a *mandate* to deliver water through that system despite clear law to the contrary. Ultimately, the Idaho Supreme Court unsurprisingly held that such conditions are not mandatory requirements, but it nevertheless resulted in extensive litigation expenses and ultimately an appeal to the Idaho Supreme Court:

In connection with this assignment of error, the Cains also argue that the district court ignored conditions placed on the water rights of Telford Lands and PU Ranch that required them to transport the water from their two wells by means of the Moore Canal. In opposition to the Ranchers' motion for partial summary judgment, the Cains attached to their memorandum water right reports printed from the website of the Idaho Department of Water Resources. With respect to Telford Lands, the reports included as one of the conditions of approval the

statement, "Water delivered through the Moore Diversion and Timberdome Canal." The PU Ranch water right report included a statement, "No more than 2.90 cfs or 435 acre feet per annum shall be injected into the Moore Canal." The Cains argued that this showed there was an existing means for Telford Lands to transport water from its well. In response, the Ranchers presented the affidavit of Ernest Carlsen, who had been a 33-year employee of the Department. He stated that the Department uses the word "shall" when requiring the water right holder to do or not to do something and that it "will sometimes include remarks in a transfer approval that are added for explanatory purposes only, generally to provide information to the state-employed water master to aid in on the ground delivery of water diverted under the water right." He then averred that the statement regarding the use of the Moore and Timberdome Canals did not use the word "shall" and so did not require that the water be delivered through those canals, but rather "it informs the watermaster that as of the date of the transfer approval, water actually is delivered through the Moore and Timberdome Canals." The Ranchers also filed the affidavit of James Cefalo, the Water Resources Program Manager for the Department's eastern regional office, who stated that Ernest Carlson's affidavit is consistent with the Department's current policy. In its decision granting the Rancher's motion for partial summary judgment as to their condemnation claim, the district court wrote that "identification of a delivery system in a permit, license, transfer application or other similar document is for descriptive purposes only and has no binding effect for purposes of the pending motions."

The Cains filed a motion for reconsideration, in which they argued, among other things, "It is not the province of this court to render a nullity the conditions that have been legitimately imposed by an administrative agency of the State of Idaho." They relied for their argument upon the affidavit of Dr. Charles E. Brockway, who stated that in addition to the elements of water rights listed in Idaho Code section 42-1411(2), "the rights themselves also contain additional conditions of approval and sometimes remarks relative to each of these water rights" and that "[t]he additional conditions of approval further explain and define the water rights and provide direction to the Watermaster for administration of the right." Notably lacking from Dr. Brockway's carefully crafted affidavit was any assertion that the specific statements at issue were mandatory requirements for exercising the water rights. He did not mention or refer to those statements in his affidavit. The district court did not err in holding that these statements were not mandatory requirements for exercising the water rights.

Telford Lands LLC v. Cain, 154 Idaho 981, 988-89, 303 P.3d 1237, 1244-45 (Idaho 2013) (underlining added). Even with this unequivocal holding, it is possible that the argument could still be advanced in the future by the Protestants or others that the exchange conditions are

mandates to exchange water under the water rights, and that such a mandate trumps the exchange agreements themselves. As to the exchange agreements, suppose that by their terms or even by voluntary agreement they are terminated. Then the water right conditions should be meaningless, but it could be argued as was argued in the *Telford* case that water must be delivered as it was when the exchange agreements were valid and existing because of the conditions in the water rights. Worse yet, the condition could be interpreted to require an advertised transfer to remove the condition, and the Protestants could protest asserting injury if the water right condition is removed.

To ensure that such arguments are nipped in the bud at this point, if the hearing officer is inclined to include conditions referencing the exchange conditions, his order should state expressly that it is for descriptive purposes only. The practical effect is that if Perkes decides to find another way to deliver surface water to his property after the surface water is diverted into the Moore Canal,¹ he can clearly do so without the threat of an argument or lawsuit from the Protestants or others that he is forever stuck with delivering his water through most of the Moore Canal to the crossover ditch and down the Timberdome Canal. Also, if the exchange agreements are terminated, the hearing officer's order should make it clear that the condition will not mandate *under the water right* that water be delivered as it was under the exchange agreements. If conditions referencing the exchange are included on this basis, then Perkes does not object to a descriptive condition referencing the exchange agreements.

¹ Because the surface water rights which are exchanged and delivered to Perkes describe the authorized point of diversion at 5N, 26E, Sec. 4, NWSESE (the Moore Canal heading), then the water right owner would be required to file a transfer to change diversion of water at this heading because there would be a change to an element of the water right covered by Idaho Code § 42-222. But a change in the delivery system is not an element of the water right, and would not require a transfer under this same statute.

But that brings us to the next issue—the wording of the condition. The proposed conditions from the Protestants concerning the exchange agreements are modeled after the existing conditions contained in the surface water side of the exchange (in Water Right Nos. 34-14228 and 34-14229). This may make some sense to maintain consistency, but as we see it, the hearing officer has two options. First, he could maintain consistency with the condition and adopt the Protestants' proposed condition. Provided that the hearing officer's order makes it clear that the condition is for descriptive purposes only, the Protestants' proposed conditions are satisfactory.

The second, and from Perkes' perspective, the better alternative is amend the condition to include language informing the watermaster that if the exchange agreements are operative—because under the exchange agreements' plain terms, there can be times when it is not—then water is exchanged as described. Perkes therefore proposes the following condition—or something very similar drafted by the hearing officer—in Water Right Nos. 34-7096A and 34-7097A (and a similar condition for 34-7223 with reference to the correct water rights and exchange approval):

This water right is subject to approved Exchange No. 34-0032A and the terms of an associated private exchange agreement. Provided that the exchange remains operational under the terms of the exchange and private agreement, water diverted under this right is exchanged with water diverted from the Big Lost River under Water Right Nos. 34-14228 and 34-14229. Water diverted under this right is used for the purposes and at the places of use described in Water Right Nos. 34-14228 and 34-14229, and water diverted from the Big Lost River pursuant to Water Right Nos. 34-14228 and 34-14229 are used for the purposes and at the place of use described above. The right holder shall notify the watermaster if the exchange is not operational under its terms or if the parties to the exchange mutually agree to either suspend or terminate the exchange.

Even though this condition will not exactly mirror the condition contained on the surface water

rights on that side of the exchange, this should not prevent the inclusion of the additional detail set forth in Perkes' proposed condition above because it is more accurate.

Finally, we do not know why the Petitions request replacing 79006's condition no. 9, which is a reference to the Timberdome Canal. Instead, we propose that condition no. 9 remain unaltered, and that any condition referencing the exchange simply is added as another condition to the approval.

In short, Perkes prefers that if a condition is included in 79006's approval referencing the exchange agreements that the hearing officer adopt his proposed condition. Alternatively, the hearing officer could include the Protestants' version of the condition, but only if the hearing officer's order expressly declares that the condition is for descriptive purposes only. In either event, the condition should simply be added to 79006's approval, and not replace condition no. 9 as requested by the Protestants. If the hearing officer will not include such a declaration, then Perkes opposes inclusion of the Protestants' conditions and requests that the Petitions be denied because there is sufficient notice under the approved exchanges, the exchange agreements, and the Stipulation.

B. Jensen's proposed condition including additional detail of how the exchange water is currently delivered through the crossover ditch and into the Moore Canal should not be incorporated into 79006's approval.

Jensen's petition requests an additional condition referencing the current delivery system of the surface water. For all of the same reasons described above and supported by the *Telford* case, Perkes opposes such a condition primarily because while the exchange agreements were at least referenced in the Stipulation, there was no discussion or provision of the Stipulation regarding the import of further identification of the current delivery system for the exchanges. Therefore, Jensen is attempting to add to the Stipulation which he executed which cannot be

amended without Perkes' consent as provide in paragraph 10 of the Stipulation.

Furthermore, Jensen's proposed condition will be redundant and unnecessary if Perkes' proposed condition is adopted because it references the approved exchange and exchange agreement, both of which describe how and where the ground water is used.

DATED this 7th day of January, 2014.

for 

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 7th day of January, 2014.

DOCUMENT SERVED: PERKES' RESPONSE TO PETITIONS FOR RECONSIDERATION

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