

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 TODD AND NORMA PERKES)

**ORDER GRANTING PETITION
FOR RECONSIDERATION**

On December 13, 2013, Todd and Norma Perkes filed Application for Transfer 79006 with the Idaho Department of Water Resources ("Department"). The application was advertised to the public and was protested by Joel Andersen, Jason Andersen, Kirby Jensen, and Don Cain. Joel and Jason Andersen were represented by attorney Jim Speck of Speck & Aanestad. The Perkes were represented by attorney Rob Harris of Holden Kidwell Hahn & Crapo.

The parties were able to resolve the issues of protest informally and filed a Stipulation for Withdrawal of Protests with the Department on October 23, 2014. The Stipulation included two conditions which were proposed to be added to the water rights upon approval of Transfer 79006.

On December 10, 2014, the Department issued Transfer Approval 79006. The approval included the conditions proposed by the parties in the Stipulation for Withdrawal of Protests.

On December 23, 2014, Jim Speck filed a Petition for Reconsideration on behalf of Joel and Jason Andersen. Mr. Speck requested that the following condition be added to water rights 34-7096A and 34-7097A:

[Condition A₁] Water diverted under this right is exchanged with water diverted from the Big Lost River under Water Right No. 34-14229. Water diverted under this right is used for the purposes and at the places of use described in Water Right No. 34-14229, and water diverted from the Big Lost River pursuant to Water Right No. 34-14229 is used for the purposes and at the place of use described above.

Mr. Speck also requested that the following condition be added to water right 34-7223:

[Condition B₁] Water diverted under this right is exchanged with water diverted from the Big Lost River under Water Right No. 34-14231. Water diverted under this right is used for the purposes and at the places of use described in Water Right No. 34-14231, and water diverted from the Big Lost River pursuant to Water Right No. 34-14231 is used for the purposes and at the place of use described above.

On December 24, 2014, Kirby Jensen filed a Petition for Reconsideration. Mr. Jensen requested that the following condition be added to water rights 34-7096A and 34-7097A:

[Condition A₂] Water diverted under this right is exchanged with water diverted from the Big Lost River under Water Right No. 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 No. 34-14228 and 34-14229, and water diverted from the Big Lost

River pursuant to Water Right No. 34-14228 and 34-14229 is used for the purposes and at the place of use described above.

Mr. Jensen also requested that the following condition be added to water right 34-7223:

[Condition B₂] Water diverted under this right is exchanged with water diverted from the Big Lost River under Water Right No. 34-14230 and 34-14231. Water diverted under this right is used for the purposes and at the places of use described in Water Right No. 34-14230 and 34-14231, and water diverted from the Big Lost River pursuant to Water Right No. 34-14230 and 34-14231 is used for the purposes and at the place of use described above.

Mr. Jensen also requested that the following condition be added to water rights 34-7096A, 34-7097A and 34-7223:

[Condition C] Water from this Ground Water source are delivered directly, via closed system, into the irrigations systems for the purposes and at the places of use described in 34-14228, 34-14229, 34-14230 and 34-14231. And water diverted from the Big Lost River pursuant to Water Rights 34-14228, 34-14229, 34-14230 and 34-14231 are delivered via the Moore Canal to the Crossover Ditch, thence into the Timberdome Canal to the place of use described above.

Both petitions for reconsideration ask the Department to remove Condition #9 from the water rights which states: "Water is delivered through the Timberdome Canal." It is unclear why this condition should be removed. Water will be delivered through the Timberdome Canal to the Perkes place of use whether or not the exchange agreements are operative. In other words, the Timberdome Canal is part of the Perkes conveyance pathway whether Perkes are diverting ground water or Big Lost River water.

On January 7, 2015, Rob Harris filed Perkes' Response to Petitions for Reconsideration. The Response stated that the applicant, Perkes, was not opposed to adding some of the conditions proposed by Mr. Speck and Mr. Jensen as long as the order clearly stated that the conditions did not change the terms of the existing exchange agreements or restrict the parties ability to terminate or amend the exchange agreements in the future.

The Response brief stated that the Perkes opposed the last condition proposed by Mr. Jensen (identified above as "Condition C") because it would be duplicative of other conditions already listed on the water rights.

The conditions proposed by Mr. Speck and Mr. Jensen (Conditions A & B) are useful because they help the watermaster (and any other person reading the water right) understand how and where water is diverted under the existing exchange agreements without requiring the watermaster to find a copy of the exchange agreement.

ORDER

IT IS HEREBY ORDERED that the Petitions for Reconsideration filed by protestants Joel Andersen, Jason Andersen and Kirby Jensen are GRANTED. Transfer Approval 79006 shall be amended as follows:

The following condition shall be added to water right 34-7096A and 34-7097A:

Water diverted under this right is exchanged with water diverted from the Big Lost River under water rights 34-14228 and 34-14229. Water diverted under this right is used for the purposes and at the places of use described in water rights 34-14228 and 34-14229, and water diverted from the Big Lost River pursuant to water rights 34-14228 and 34-14229 is used for the purposes and at the place of use described above.

The following condition shall be added to water right 34-7223:

Water diverted under this right is exchanged with water diverted from the Big Lost River under water rights 34-14230 and 34-14231. Water diverted under this right is used for the purposes and at the places of use described in water rights 34-14230 and 34-14231, and water diverted from the Big Lost River pursuant to water rights 34-14230 and 34-14231 is used for the purposes and at the place of use described above.

This Order and Transfer Approval 79006 do not attempt to alter the respective exchanges or the private exchange agreements in any way. The conditions added to the water rights in conjunction with this order are included for informational purposes and only have effect if the respective exchange agreements remain operative. If, at any point, the exchange agreements are terminated, the conditions referring to the exchange agreements will no longer be in effect and the water rights will be delivered according to the elements listed on the face of the rights.

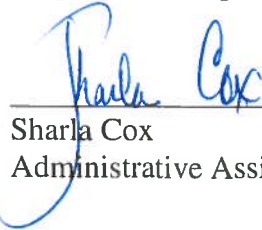
The additional condition proposed by Mr. Jensen (Condition C) is duplicative of the other conditions on the water rights and is unnecessary.

Dated this 13th day of January, 2015.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of January 2015, I mailed a true and correct copy of the foregoing ORDER GRANTING PETITION FOR RECONSIDERATION, with the United States Postal Service, postage prepaid and properly addressed to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL

RE: ORDER GRANTING PETITION FOR RECONSIDERATION

**Marshal Todd Perkes
Norma Perkes
2790 North 3325 West
Moore, ID 83255**

**Holden Kidwell Hahn & Crapo PLLC
Rob Harris
PO Box 50130
Idaho Falls, ID 83405**

**Kirby Jensen
2781 North 3375 West
Moore, ID 83255**

**Joel Andersen
2791 North 3375 West
Moore, ID 83255**

**Don Cain
3230 North Highway 93
PO Box 927
Moore, ID 83255**

**Jason Andersen
2791 North 3375 West
Moore, ID 83255**

**Water District 34
PO Box 53
Mackay, ID 83251**

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.