

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
FOR TRANSFER NO. 78878 IN THE)
NAME OF BLF LAND LLC)

**PRELIMINARY ORDER
DENYING TRANSFER**

This matter having come before the Idaho Department of Water Resources (“Department”) as a result of an application to transfer a water right, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On October 18, 2013, BLF Land LLC (“Applicant”) filed Application for Transfer No. 78878 (“Application”), seeking to change the point of diversion and place of use for a 40-acre portion of water right 31-7215.

2. The 40-acre portion to be transferred is currently located in the SENW of Section 7, T08N, R38E (“SEnw of Section 7”). The proposed place of use is located in Section 16, T08N, R36E, approximately 11 miles west of the current place of use. The application stated that the 40-acre portion of water right 31-7215 to be transferred has not undergone a period of five or more consecutive years of non-use.

3. The Department issued License 31-7215 on May 29, 1981. The water right license was based on a field exam conducted in 1981, which described 40 irrigated acres in the SENW of Section 7. License 31-7215 listed a priority date of November 12, 1976 and authorized the diversion of 4.84 cfs and the irrigation of 308 acres, including 40 acres in the SENW of Section 7.

4. On March 23, 1989, Golden Eagle Ranch filed Claim No. A31-7215 in the Snake River Basin Adjudication (“SRBA”). The claim mirrored the elements of the water right license and included 40 irrigated acres in the SENW of Section 7.

5. The Department completed another field exam of water right 31-7215 in 1999 in conjunction with the creation of a water measurement district in the area. The examiner found only two pivots being irrigated under the water right. The 40 acres in the SENW of Section 7 were not actively irrigated at that time.

6. In March 2000, the Department contacted the Farm Service Agency about the irrigation taking place under water right 31-7215. The Department was told that the Farm Service Agency had no record of the SENW of Section 7 ever being cropped.

7. During its initial review of SRBA Claim No. A31-7215, the Department found that the SENW of Section 7 was not irrigated. The Department's initial recommendation to the SRBA Court was to exclude the 40 acres in the SENW of Section 7 from water right 31-7215.

8. The Department's recommendation to exclude the 40 acres in the SENW of Section 7 was opposed by Golden Eagle Ranch (the owner of the property at that time). In March 2001, Golden Eagle Ranch filed three statements with the Department about the irrigation of the SENW of Section 7. The statements were from farm workers who were familiar with the property. Each of the statements asserted that the SENW of Section 7 had been tilled and watered with hand lines in 1981 and 1982.

9. Relying on the statements filed by Golden Eagle Ranch, the Department revised its recommendation to the SRBA Court to include 40 acres of irrigation in the SENW of Section 7. A partial decree for water right 31-7215 was issued by the SRBA Court on February 22, 2002. The partial decree included 40 irrigated acres in the SENW of Section 7. The adjudication claim was pending before the SRBA Court between March 23, 1989 and February 22, 2002.

10. Aerial photography and satellite imagery available to the Department for 2002, 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 indicate that the SENW of Section 7 was not irrigated in those years.

11. The pending Application included a document titled *Second Amendment to Real Estate Purchase Contract* (dated December 15, 2010). It is associated with the sale of certain property, including the SENW of Section 7, by Farmland Management Services to the Applicant. The document includes the following recital: "The parties have discovered that a portion of the [p]roperty has not been irrigated in the SE1/4 NW1/4 of Section 7 . . . which is authorized by water right 31-7215 . . . for 40 acres of irrigation."

12. The Application also included a notarized statement from Steve Vadnais, VP & Chief Operating Officer for Blaine Larsen Farms (BLF Land LLC). The statement included the following paragraph:

Water has been periodically applied to [the SENW of Section 7] via hand lines, normally during early spring, and late summer or fall, dependent upon annual rainfall conditions throughout the summer months. The primary purpose has been to [maintain] high plant populations for livestock feed purposes. Secondary use has been to maintain erosion control on this fragile soil where it is surrounded by farmed land on the south and east borders susceptible to erosion outside the farmed borders.

13. The Application included affidavits from Lionel Harker and Scott Clawson stating that the SENW of Section 7 was irrigated during the last week of October 2011. According to the affidavits, the irrigation was supervised by employees of Circle C Ranch.

14. The Application also included copies of approximately 50 pictures taken between October 26, 2011 and October 31, 2011 showing workers moving field pipe and sprinklers being used to irrigate a large piece of property. The ground being irrigated was generally covered by sagebrush and brush grasses. The irrigated ground was not cultivated or cleared.

15. Water right 31-7215 authorizes a diversion rate of 4.84 cfs, an annual diversion volume of 1,078 acre-feet and the irrigation of 308 acres (3.5 acre-feet per acre). No other water rights are associated with the authorized place of use.

16. Measurement records available to the Department show that the maximum volume of water diverted under water right 31-7215 between 1997 and 2012 is 704 acre-feet (occurring in 2012). The second highest diversion volume was 665 acre-feet (occurring in 2007). The highest measured diversion rate under water right 31-7215 between 1997 and 2012 was 4.01 cfs (occurring in 1999).

17. Department measurement records (from Water District 110) state that the irrigation system for water right 31-7215 was visited in 1999, 2000, 2002, 2005, 2008 and 2011. In all of the site visit reports, the irrigation system is described as a ground water well to two pivots. The reports do not include any reference to hand line irrigation occurring in the SENW of Section 7.

ANALYSIS / CONCLUSIONS OF LAW

1. When a transfer application is filed, the Department must confirm that the portion of the water right proposed to be transferred constitutes a valid water right. See *Jenkins v. IDWR*, 103 Idaho 384 (1982). As part of its responsibility to prevent injury to other water rights, described in Idaho Code § 42-222, the Department must verify that the portion of the water right proposed to be transferred has not been forfeited due to non-use.

2. Idaho Code § 42-222(2) states: “All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated” Forfeiture must be proven by clear and convincing evidence. *McCray v. Rosenkrance*, 135 Idaho 509 (2001).

3. A portion of a water right may be forfeited under Idaho Code § 42-222(2) if the portion has undergone a period of five years of non-use. *State v. Hagerman Water Right Owners*, 130 Idaho 727 (1997).

4. The 40-acre portion of water right 31-7215 proposed to be transferred in the pending Application has been forfeited for non-use between 2004 and 2008. The information available to the Department, including aerial photography, satellite imagery, field reports and measurement records, constitutes clear and convincing evidence that the 40-acre portion of water right 31-7215, located in the SENW of Section 7, was not actively irrigated between 2004 and 2008.

5. Idaho Code § 42-223 sets forth a number of statutory defenses to forfeiture. Idaho courts have also recognized some additional defenses to forfeiture. The owner of a water right bears the burden of raising defenses to forfeiture. *Jenkins v. IDWR*, 103 Idaho 384 (1982). However, the party asserting forfeiture of a water right bears the burden of persuasion for forfeiture and must disprove any defenses to forfeiture raised by the water right holder. *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 842 (2003).

6. In its transfer application, the Applicant did not identify any specific defenses to forfeiture. However, the photos of the irrigation occurring in October 2011 were likely intended to assert resumption of use as a defense to forfeiture.

7. The Idaho Supreme Court recognizes the common law doctrine of resumption of use as a valid defense to forfeiture. *Sagewillow, Inc. v. IDWR*, 138 Idaho 831 (2003). The doctrine of resumption of use is that, although a water right has not been used for a period of more than five years, forfeiture of the water right may be avoided, if use under the water right is resumed prior to a claim of right by a third party. *Id.* at 842 (emphasis added).

8. Given the Idaho Supreme Court's description of the resumption of use doctrine, forfeiture might not actually occur until a claim of right is established by a third party. See *Memorandum Decision and Order on Motion for Summary Judgment*, SRBA Subcase 63-2446, pages 7-9 (2009). In other words, five or more years of non-use of a water right, by itself, does not constitute forfeiture. *Id.* Rather, an unused water right becomes forfeited only after a claim of right is made by a third party. *Id.*

9. In order to disprove resumption of use as a viable defense to forfeiture in this case, the Department must demonstrate that there has been a claim of right made by a third party subsequent to the five year period of non-use but prior to the resumption of beneficial use under the portion of water right 31-7215 proposed to be transferred.

10. A third party makes a claim of right by (1) initiating proceedings to declare the water right forfeited; (2) obtaining a valid water right authorizing use of water from the same source with a priority date prior to the date of resumption of use; or (3) using water pursuant to an existing junior water right. *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 842 (2003).

11. The first two methods of establishing a claim of right by a third party do not apply to the current application. The Department is not aware of any pending civil proceedings to declare water right 31-7215 partially forfeited. Further, no new ground water rights were issued in Administrative Basin 31 ("Basin 31") between 2008 and 2011 because, as described below, Basin 31 is subject to a moratorium on new ground water rights.

12. In this case, water users in Basin 31 have made a claim of right against the unused 40-acre portion of water right 31-7215 by diverting water under junior ground water rights in the 2009 and 2010 irrigation seasons.

13. Department records indicate that there are over 450 ground water rights in Basin 31 with priority dates junior to water right 31-7215. Water was diverted under most of these water rights in 2009 and 2010.

14. On April 30, 1993, the Department issued an Amended Moratorium Order (“1993 Moratorium”), restricting the processing and approval of applications for new water rights within the Trust Water Area of the Eastern Snake Plain Aquifer (“ESPA”). The Trust Water Area includes the existing and proposed points of diversion for the 40-acre portion of water right 31-7215. The 1993 Moratorium was based, in part, on declining aquifer levels in the Trust Water Area.

15. The Department regularly monitors aquifer levels in Basin 31. A monitoring well located less than one mile north of the existing point of diversion for water right 31-7215 shows a gradual decline in aquifer levels between 1997 and 2013. (Well 08N38E06DDA1)

16. The hydrologic connection between the ESPA and the Snake River is well recognized. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011). Diversion of ground water from the ESPA, including the existing location for water right 31-7215, results in a reduction in gains to the Snake River. The upper Snake River (above Milner Dam) is fully appropriated for most of the irrigation season.

17. Junior water users have clearly established a claim of right to the ground water which was not used to irrigate the 40-acre portion of water right 31-7215. Therefore, the doctrine of resumption of use cannot be used to overcome forfeiture in this case.

18. There is a question whether the irrigation activities occurring in late October 2011 constitute a beneficial use and would even qualify as a resumption of use. Because the Department has determined that resumption of use is not a viable defense to forfeiture in this case, this Order does not address the question of whether the attempted resumption of use constituted an actual beneficial use of water.

19. In summary, the 40-acre portion of water right 31-7215 proposed to be transferred was forfeited for non-use between 2004 and 2008. The information available to the Department, described above, constitutes clear and convincing evidence of non-use during that time period.

20. It appears that the Applicant attempted to resume use under water right 31-7215 on the 40-acre parcel by applying water to the ground between October 26 and October 31, 2011. The doctrine of resumption of use is not a valid defense to forfeiture in this case, because a claim of right has been made by third parties. Junior ground water users in Basin 31 diverted water in 2009 and 2010 that would have otherwise gone to satisfy the 40-acre portion of water right 31-7215.

21. Allowing a forfeited water right to be transferred would injure existing water rights. Therefore, Transfer 78878 should be denied and the elements of water right 31-7215 should be changed to reflect the partial forfeiture of 40 acres in the SENW of Section 7.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 78878 in the name of BLF Land LLC is DENIED. Water right 31-7215 has been reduced to reflect the partial forfeiture described above.

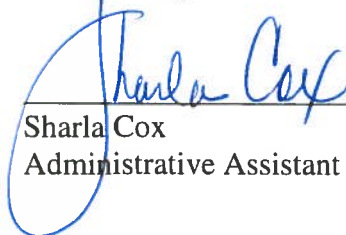
Dated this 6th day of January, 2014.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of January 2014, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING 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 Cox
Administrative Assistant

US MAIL - Certified

RE: PRELIMINARY ORDER DENYING TRANSFER

**BLF Land LLC
PO Box 188
Hamer, ID 83425**

IDAHO DEPARTMENT OF WATER RESOURCES
Proof Report

1/6/2014

Water Right 31-7215

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	NORTHERN AGRICULTURE V LLC C/O FARMLAND MANGEMENT SERVICES 301 E MAIN ST TURLOCK, CA 95380 (209)669-0742

Priority Date: 11/12/1976

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
IRRIGATION	04/01	11/01	4.210 CFS	938.0 AF
	<u>Total Diversion</u>		4.210 CFS	938.0 AF

Source and Point(s) of Diversion

GROUND WATER SENESE Sec. 12, Twp 08N, Rge 37E, FREMONT County

Place Of Use

IRRIGATION within FREMONT County

			NE				NW				SW				SE				Totals
Twp	Rng	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
08N	37E	12													34.0	32.0	32.0	34.0	132.0
08N	38E	7									34.0	34.0	34.0	34.0					136.0
												L3	L4						

POU Total Acres: 268.0

Conditions of Approval:

1. C18 THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY
OF A FINAL UNIFIED DECREE. SECTION 42-1412(6), IDAHO CODE.
2. C03 RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION
PURSUANT TO SECTION 42-1425, IDAHO CODE.

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.