

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 78362 (OLD NO. 77970))
IN THE NAME OF SALLY JOHNSON)

**PRELIMINARY ORDER
APPROVING TRANSFER**

On May 30, 2012, Sally Johnson ("Ms. Johnson" or "Applicant") filed Application for Transfer No. 77970 with the Idaho Department of Water Resources ("Department"), proposing to add points of diversion to eight water rights from the Big Lost River, to correct the legal description for another point of diversion from the Big Lost River, and to create a combined place of use for the eight Big Lost River rights and another right from a tributary creek. As a result of the Department transitioning to new transfer processing software, the application was renumbered to Transfer No. 78362 in December 2012.

The transfer application was advertised to the public beginning on June 14, 2012. Protests were filed by Dwight Simmons, Logan Williams, and Churndasher Ranch. Mr. Simmons withdrew his protest without conditions on March 4, 2013.

Pre-hearing conferences were held on August 14, 2012, and January 17, 2013. The parties were unable to resolve the protests and asked the Department to conduct a formal hearing. The hearing was held on March 6, 2013, in Mackay, Idaho. Sally Johnson was represented at the hearing by Rob Harris, an attorney with the firm Holden Kidwell Hahn & Crapo. Churndasher Ranch was represented at the hearing by Jake Johnson, a member of Churndasher Ranch LLC.

At the hearing, the parties offered testimonial and documentary evidence into the administrative record. After considering the evidence in the record, the Department finds, concludes, and orders as follows:

REPRESENTATION OF CHURNDASHER RANCH

At the beginning of the hearing, Mr. Harris, through a verbal motion, asked the hearing officer to strike the protest filed by Jake Johnson on behalf of Churndasher Ranch. Mr. Harris cited a recent case from the Idaho Supreme Court and argued that business entities can only be represented in an administrative proceeding by a licensed attorney.

Idaho Code § 3-104 makes it illegal for a person to practice law in the state of Idaho without first being licensed by the Idaho Supreme Court. In a case interpreting § 3-104, the Idaho Supreme Court stated: "[T]he law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership, must be represented by a licensed attorney before an administrative body" (*Indian Springs LLC v. Indian Springs Land Investment, LLC*, 147 Idaho 737, 744-745

(2009)) The language from *Indian Springs* suggests that a member of an LLC cannot represent the company in an administrative hearing before the Department unless he or she is licensed to practice law in the state of Idaho.

After reviewing the *Indian Springs* case, the hearing officer did not allow Mr. Johnson to represent Churndasher Ranch at the hearing. The hearing officer did not, however, rule on Mr. Harris's motion to strike the protest filed by Churndasher Ranch. Upon further review of the cases cited by Mr. Harris and the evidence in the administrative record, the motion to strike Churndasher Ranch's protest is denied. Even though Mr. Johnson was not allowed to represent Churndasher Ranch at the hearing, the protest filed by Churndasher Ranch is not invalidated and remains part of the administrative record for this contested case.

FINDINGS OF FACT

1. Transfer Application No. 78362 proposes to add points of diversion to eight water rights from the Big Lost River: 34-24, 34-26, 34-54, 34-55A, 34-344, 34-351, 34-734 and 34-735 ("BLR rights"). One of the points of diversion to be added to the BLR rights is located on the Big Lost River at the head of a private ditch known locally as the Nielsen Ditch. The transfer application also proposes to cross list Ms. Johnson's existing private ditches on all of the BLR rights.

2. The Nielsen Ditch heading is located in the SWNW of Section 15, T08N, R21E. The existing points of diversion from the Big Lost River for the BLR rights are all located in Section 16, T08N, R21E.

3. The transfer application also proposes to create a combined place for the BLR rights and water right 34-352 (from Rock Springs Creek) to accommodate the installation of a center pivot.

4. The transfer application also proposes to correct the legal description for a point of diversion from the Big Lost River known locally as the Anderson Ditch. The partial decrees from the Snake River Basin Adjudication describe the Anderson Ditch heading in the SESW of Section 16, T08N, R21E. The historical and correct location of the Anderson Ditch point of diversion is in the SWSW of Section 16, T08N, R21E.

5. According to the transfer application, Ms. Johnson will be limited to the diversion of 4.00 cfs of water at the Nielsen Ditch heading under the BLR rights. Ms. Johnson plans to irrigate with the proposed pivot using water delivered through the Nielsen Ditch. It is estimated that the pivot will require 2.00 cfs of water continuously. (Testimony of Sally Johnson) The remaining 2.00 cfs will be left in the Nielsen Ditch to cover conveyance losses in the ditch. (Id.)

6. The proposed pivot is the only ground under the BLR rights to be irrigated out of the Nielsen Ditch. (Testimony of Sally Johnson) The remaining acres under the proposed combined place of use will continue to be irrigated from the other points of diversion listed on the water rights. (Id.)

7. Ms. Johnson has other water rights in the Nielsen Ditch. Water rights 34-25 and 34-55B authorize the irrigation of 37 acres and list the Nielsen Ditch heading as the authorized point of diversion. The place of use irrigated by these two water rights is located near the head of the Nielsen Ditch, upstream on the ditch from the proposed pivot.

8. On May 3, 2012, the Department received a statement about the proposed transfer from Shane Rosenkrance, a water user on the Nielsen Ditch. The letter stated that Mr. Rosenkrance was the “spokesperson for the Nielson Ditch” and that the ditch could carry an additional 4.00 cfs of water. (Exhibit A400) There is no evidence in the record, other than the May 3, 2012 letter, that Shane Rosenkrance is authorized to speak on behalf of the water users on the Nielsen Ditch.

9. Approximately 70 water rights list the Nielsen Ditch as an authorized point of diversion. (Exhibit A104) In total, these water rights authorize the diversion of more than 65 cfs. (Id.) In 2012, the maximum amount of water diverted by the Nielsen Ditch was 54 cfs. (Testimony of Roger Totten)

10. The Nielsen Ditch is in poor repair. (See exhibits A300-A337) The ditch banks are trampled in some areas and overgrown with vegetation in other areas. The Nielsen Ditch Company is not formally organized and does not conduct regular maintenance or levy regular assessments. Given the current condition of the ditch, Randy Johnson, a water resources engineer hired by Ms. Johnson, estimates that the Nielsen Ditch can only carry between 40 and 45 cfs.

11. There are places on the Nielsen Ditch where water overtops the ditch banks due to the disrepair of the ditch. (Testimony of Sally Johnson) There are areas of the ditch where leaks are being slowed by straw bales. (Id.)

12. Water users at the end of the ditch are not able to draw their full allotment of water during certain portions of the irrigation season. (Testimony of Walt Johnson) The largest shortages occur when all water rights are in priority and there is the greatest amount of water being diverted at the head of the Nielsen Ditch. (Id.) Shortages occur because the water rights on the ditch exceed the current capacity of the ditch. Upper water users on the ditch divert the limited amount of water the ditch can convey, reducing the amount of water going to water users at the end of the ditch.

13. Poorly-maintained sections of the ditch upstream and downstream of Ms. Johnson’s property limit the capacity of the ditch. (Testimony of Randy Johnson) Even if the ditch were repaired and adequately maintained between the Big Lost River and Ms. Johnson’s diversion from the ditch, the maintenance issues downstream of Ms. Johnson’s property would still limit the capacity of the ditch. (Id.)

14. Ms. Johnson has already constructed a pumping station in the banks of the Nielsen Ditch to facilitate diversion from the ditch. (See exhibits A338 and A339) At the time the pumping station was constructed, Ms. Johnson did not have an easement to use the Nielsen Ditch to convey her water from the Big Lost River to the pumping station. Ms. Johnson still does not have an easement or other agreement to convey the 4.00 cfs described in the transfer application through the Nielsen Ditch.

15. During the summer, the Big Lost River “breaks” or sinks into the bottom of the river channel downstream of the Nielsen Ditch at a river section called the Chilly Sinks. The exact location of the river break changes from year to year, but is generally located downstream of the Nielsen Ditch.

16. When the river breaks, the water rights upstream of the break are no longer curtailed against the priority date set for the Big Lost River downstream of Mackay reservoir. This creates a futile call situation, where junior water users upstream of the break in the river are allowed to turn back on to the extent that water is available.

17. There are no water right points of diversion between the existing points of diversion under Ms. Johnson’s rights and the Nielsen Ditch heading. (Exhibit A200) There is no evidence in the record that the changes proposed by Ms. Johnson will affect the location of the break in the Big Lost River or the implementation of the futile call.

EVALUATION CRITERIA / ANALYSIS

1. Idaho Code § 42-222 sets forth the criteria used to evaluate transfer applications:

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

2. The applicant bears the burden of proof for all of the evaluation criteria listed in Idaho Code § 42-222.

Injury to Other Water Rights

3. There is no evidence in the administrative record that the water rights held by Logan Williams will be affected as a result of the water right transfer. There is no evidence in the record that the changes being proposed by Ms. Johnson will cause injury to any other water rights.

4. The protest filed by Churndasher Ranch states a concern that existing water users on the Nielsen Ditch may be impacted if Ms. Johnson is allowed to convey 4.00 cfs of her water rights through the ditch. Churndasher Ranch’s protest notes that the Nielsen Ditch does not have the capacity to carry an additional 4.00 cfs.

5. This order does not, by itself, authorize Ms. Johnson to use the Nielsen Ditch headgate or to convey water through the Nielsen Ditch. The Department does not have the authority to create or grant easements across private property or to authorize the use of privately-owned headgates,

measurement sections, or diversion structures. Approval of the proposed transfer only creates an authorized point of diversion on the Big Lost River at the heading of the Nielsen Ditch.

6. If Ms. Johnson wants to use the Nielsen Ditch to convey her water rights, she must obtain the legal right to do so, whether through an easement with the Nielsen Ditch Company or through an easement with private landowners.

7. Because of the poor condition of the Nielsen Ditch, the ditch may not have the capacity to convey an additional 4.00 cfs during parts of the irrigation season. Concerns about capacity should be addressed privately between the Nielsen Ditch Company and Ms. Johnson. The Nielsen Ditch Company may choose to address ditch maintenance issues to accommodate Ms. Johnson's water rights. It is also possible that the Nielsen Ditch Company might refuse a conveyance agreement for Ms. Johnson because of capacity concerns. As stated, questions of easements, ditch capacity, and ditch maintenance are private matters to be handled by the ditch company.

Enlargement of Water Rights

8. Ms. Johnson sufficiently demonstrated that approval of this transfer will not result in the enlargement of the water rights in the transfer. The diversion rates and the total number of acres authorized under the water rights will not be increased.

Conservation of Water Resources

9. Prior to the hearing, the protestants stipulated that the review criteria relating to conservation of water resources was not at issue in this contested case. There is no evidence in the record suggesting that this review criteria is a concern with the pending transfer application.

Local Public Interest

10. The local public interest analysis under Idaho Code § 42-222 is meant to be separate and distinct from the injury analysis. Local public interest is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." (Idaho Code § 42-202B(3))

11. The protest filed by Churndasher Ranch stated that Ms. Johnson's transfer should be denied because the existing ditches associated with the BLR rights are sufficient to irrigate Ms. Johnson's property.

12. An inadequate or broken irrigation system is not a prerequisite to filing a transfer application to change or add a point of diversion. Ms. Johnson does not have to demonstrate an inability to use her current system in order to pursue the proposed transfer.

13. Idaho Code § 42-222 allows a water user to pursue a transfer application to change or add points of diversions to her water rights, even if existing delivery systems are adequate to

irrigate the place of use. Water users are allowed to pursue transfers to increase the efficiency of their systems and reduce maintenance costs.

14. Ms. Johnson presented evidence that the efficiency of her irrigation system will be improved as a result of the proposed transfer, assuming she can obtain authorization to use the Nielsen Ditch. The water rights will continue to be used for agricultural purposes, the primary use of water in the local community. No other evidence was offered relating to the local public interest. The Applicant met her burden of proof for this element.

Summary

15. Ms. Johnson met her burden of proof for all of the applicable review criteria set forth in Idaho Code § 42-222. The transfer application should be approved with specific conditions stating that the Department does not have the authority to grant Ms. Johnson an easement to convey water through the Nielsen Ditch.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 78362 in the name of Sally Johnson is APPROVED upon conditions. Water rights 34-24, 34-26, 34-54, 34-55A, 34-344, 34-351, 34-734, 34-735 and 34-352 have been changed as described in Transfer Approval 78362 issued in conjunction with this Order.

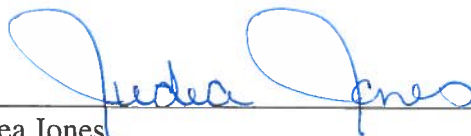
Dated this 24th day of April, 2013.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of April 2013, I mailed a true and correct copy, certified and postage prepaid, of the foregoing PRELIMINARY ORDER APPROVING TRANSFER to the person(s) listed below:



Judea Jones
Administrative Assistant

US MAIL - CERTIFIED

RE: Preliminary Order Approving Transfer (No. 78362)

**Sally Johnson
6222 Bartlett Point Road
Mackay, ID 83251**

**Robert Harris
Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls, ID 83405-0130**

**Dwight Simmons
5457 Fish Hatchery Road
Mackay, ID 83251**

**Churndasher Ranch
c/o Jake Johnson
5366 Fish Hatchery Road
Mackay, ID 83251**

**Logan E. Williams
PO Box 96
Mackay, ID 83251**

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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.