

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF TRANSFER	)	
APPROVAL 76311 IN THE NAME OF	)	PRELIMINARY ORDER RESCINDING
<u>VELMA OR LYNN METCALF</u>	)	TRANSFER APPROVAL

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an Idaho District Court Order provided to the Department as part of an ownership change, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On April 12, 2010, Lynn Metcalf filed transfer application 76311 with the Department, seeking to change the place of use for water rights 34-322, 34-323, and 34-2421. In February 2010, the Department updated the water right records for the three rights to show Velma or Lynn Metcalf as the current owners of the rights. The transfer proposed changing the three rights to reflect a land exchange between the Metcalfs and Keith and Juanna Lewis that had occurred in 2006.

2. Water right 34-322 carries a priority date of 7/21/1886 and authorizes the diversion of 0.80 cfs from the Big Lost River for the irrigation of 40 acres within a 70-acre place of use. Water right 34-323 carries a priority date of 6/1/1889 and authorizes the diversion of 0.80 cfs for the irrigation of 70 acres. Water right 34-2421 carries a priority date of 6/6/1961 and authorizes the diversion of 1.28 cfs from ground water for the irrigation of 70 acres. The rights are used to irrigate the same 70-acre place of use. All three rights include a condition stating that the rights, in combination, are limited to the irrigation of 70 acres.

3. Because there were no apparent issues relating to ownership and no anticipated hydrologic impacts (the water right points of diversion were not changing), the transfer application was not advertised to the public. The Department reviewed the transfer application and found that the transfer satisfied the criteria set forth in Idaho Code § 42-222. Transfer 76311 was approved on August 4, 2010 and the water right places of use were updated accordingly.

4. In August 2012, the Department received a copy of an order issued by the Idaho Seventh District Court relating to water rights 34-322 and 34-323. The order stated that Velma and Lynn Metcalf never, at any time, owned water rights 34-322 or 34-323. The court stated that Russell and Virginia Hanks were the proper current owners of water rights 34-322 and 34-323.

5. In August 2012, Paul and Marianne Lanier filed a Notice of Change in Water Right Ownership, seeking to update the ownership records for water rights 34-322 and 34-323. The Laniers provided a quitclaim deed, conveying the two rights from Russell and Virginia Hanks to the Laniers. The Department updated the ownership records for the two rights to reflect the order from the Idaho Seventh District Court and the conveyance in the Hanks to Lanier quitclaim deed.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 sets forth the review criteria used by the Department for transfer applications. In its review of a transfer application, the Department must confirm that the water rights involved are valid rights and that the transfer applicant has the legal authority to make the proposed changes to the rights. Idaho Code § 42-222(1) makes it clear that only a person legally entitled to use a water right, or her representative, can pursue a transfer application to change any of the elements of the right.

2. The evidence available to the Department at this time shows that Lynn and Velma Metcalf did not have any ownership interest in water rights 34-322 or 34-323 at the time transfer application 76311 was filed. Lynn and Velma Metcalf have never had an ownership interest in water rights 34-322 or 34-323.

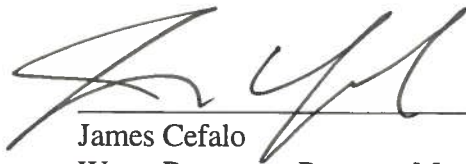
3. Lynn and Velma Metcalf were the current owners of water right 34-2421 at the time transfer application 76311 was filed. However, because water rights 34-322, 34-323, and 34-2421 are combined and limited to the same 70-acre place of use, the Department cannot separate the rights and approve Transfer 76311 just for water right 34-2421.

4. Because Lynn and Velma Metcalf have never owned water rights 34-322 or 34-323, the changes made in Transfer Approval 76311 were unauthorized. The Department should rescind Transfer Approval 76311 and return the elements of water rights 34-322, 34-323, and 34-2421 to the way they existed prior to the transfer approval.

ORDER

IT IS HEREBY ORDERED that Transfer Approval 76311 is RESCINDED. Water rights 34-322, 34-323, and 34-2421 shall be returned to the way they existed prior to the transfer approval.

Dated this 11th day of February, 2013.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of February 2013, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER RESCINDING TRANSFER APPROVAL, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:



Judea Jones
Administrative Assistant

US MAIL - CERTIFIED

RE: TRANSFER APPROVAL 76311

**Velma or Lynn Metcalf
3816 West 4050 North
Moore, ID 83255**

Courtesy copy sent via standard mail to:

**Paul and Marianne Lanier
3820 West 4400 North
Mackay, ID 83251**



IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report 34-322

WATER RIGHT NUMBER: 34-322

Owner Type: Name and Address

Current Owner PAUL LANIER
3820 W 4400 N
MACKAY, ID 83251
208-588-3160

Current Owner MARIANNE LANIER
3820 W 4400 N
MACKAY, ID 83251
(208)588-3160

Priority Date: 7/21/1886

Basis: Decreed

Status: Active

Source: BIG LOST RIVER Tributary: SINKS

<u>Beneficial Use:</u>	<u>From / To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	05/01 to 10/15	0.800 CFS	
	<u>Total Diversion</u>	0.800 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER SENWNW Sec. 34, Twp 07N, Rge 24E B.M. CUSTER County

Place of Use:

IRRIGATION within BUTTE County

			NE				NW				SW				SE				Totals
Twp	Rge	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	25E	12					35.0	35.0											70
																			Total Acres: 70.0
																			Acre Limit: 40.0

Conditions of Approval:

1. X27 This right is limited to the irrigation of 40 acres within the authorized place of use in a single irrigation season.
2. X35 Rights 34-322, 34-323, and 34-2421 when combined shall not exceed a total diversion rate of 1.88 cfs and the irrigation of 70 acres.
3. S34 The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.
4. Water is delivered through the Burnett Ditch.
5. 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.

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report 34-323

WATER RIGHT NUMBER: 34-323

Owner Type: Name and Address
Current Owner PAUL LANIER
3820 W 4400 N
MACKAY, ID 83251
208-588-3160

Current Owner MARIANNE LANIER
3820 W 4400 N
MACKAY, ID 83251
(208)588-3160

Priority Date: 6/1/1889

Basis: Decreed

Status: Active

Source: BIG LOST RIVER Tributary: SINKS

<u>Beneficial Use:</u>	<u>From / To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	05/01 to 10/15	0.800 CFS	
	<u>Total Diversion</u>	0.800 CFS	

Location of Point(s) of Diversion:

BIG LOST RIVER SENWNW Sec. 34, Twp 07N, Rge 24E B.M. CUSTER County

Place of Use:

IRRIGATION within BUTTE County

			NE				NW				SW				SE				Totals
Twp	Rge	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	25E	12						35.0	35.0										70
																			Total Acres: 70.0
																			Acre Limit: 70.0

Conditions of Approval:

1. X35 Rights 34-322, 34-323, and 34-2421 when combined shall not exceed a total diversion rate of 1.88 cfs and the irrigation of 70 acres.
2. S34 The period of use for irrigation described above may be extended in seasons of unusual characteristics to a beginning date of 04-20 and an ending date of 10-31 at the discretion of the Director of the Idaho Department of Water Resources.
3. Water is delivered through the Burnett Ditch.
4. 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.

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report 34-2421

WATER RIGHT NUMBER: 34-2421

Owner Type: Name and Address
Current Owner LYNN J METCALF
3816 W 4050 N
MOORE, ID 83255
(208)588-3362

Current Owner VELMA L METCALF
3816 W 4050 N
MOORE, ID 83255
(208)588-3362

Priority Date: 6/6/1961

Basis: Decreed

Status: Active

Source: Tributary:
GROUND WATER N/A

<u>Beneficial Use:</u>	<u>From / To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	04/01 to 10/31	1.280 CFS	224.00 AF
	<u>Total Diversion</u>	1.280 CFS	224.00 AF

Location of Point(s) of Diversion:

GROUND WATER SWNWNW Sec. 12, Twp 06N, Rge 25E B.M. BUTTE County

Place of Use:

IRRIGATION within BUTTE County

			NE				NW				SW				SE				Totals
Twp	Rge	Sec	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06N	25E	12						35.0	35.0										70
																			Total Acres: 70.0
																			Acre Limit: 64.0

Conditions of Approval:

1. X27 This right is limited to the irrigation of 64 acres within the authorized place of use in a single irrigation season.
2. X35 Rights 34-322, 34-323, and 34-2421 when combined shall not exceed a total diversion rate of 1.88 cfs and the irrigation of 70 acres.
3. C05 Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
4. 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.

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.