

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	PRELIMINARY ORDER APPROVING
FOR TRANSFER NO. 78044 IN THE	)	IN PART AND REJECTING IN PART
<u>NAME OF RONALD AND JANIECE BAIR</u>	)	APPLICATION FOR TRANSFER

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

FINDINGS OF FACT

1. On May 31, 2012, Ronald and Janiece Bair filed Application for Transfer No. 78044 seeking to change the place of use and point of diversion for three water rights from the Big Lost River: 34-14259, 34-14261, and 34-14263. The application also proposes to change the period of use and add beneficial uses to water right 34-14259. Ronald and Janiece Bair are listed as the current owners of the three water rights.

2. The transfer application proposes adding Recreation Storage, Aesthetic Storage, and Diversion to Storage as beneficial uses under water right 34-14259. These additional beneficial use descriptions are intended to cover a 0.2-acre recreation pond constructed on the Bair property at some point prior to 2009.

3. Water right 34-14259 is a split portion of right 34-605D. An amended partial decree for right 34-605D was issued in the Snake River Basin Adjudication ("SRBA") in December 2001. Water right 34-14259 carries a priority date of March 3, 1894 and lists a diversion rate of 0.12 cfs from the Big Lost River.

4. Water right 34-14261 is a split portion of right 34-494B. An amended partial decree for right 34-494B was issued in the SRBA in December 2001. Water right 34-14261 carries a priority date of May 26, 1904 and lists a diversion rate of 0.42 cfs from the Big Lost River.

5. Water right 34-14263 is a split portion of right 34-361A. An amended partial decree for right 34-361A was issued in the SRBA in December 2001. Water right 34-14263 carries a priority date of June 1, 1900 and lists a diversion rate of 0.45 cfs from the Big Lost River.

6. Water rights 34-14259, 34-14261, and 34-14263 state that water from the Big Lost River is delivered through the Sutter Ditch and list the point of diversion at the head of the Sutter Ditch. In combination, the three rights describe the irrigation of 26.7 acres located in Section 9, T06N, R25E. According to Custer County records, Ronald and Janiece Bair are the owners of the water right place of use in Section 9.

7. The three water rights listed in the transfer have never been offered into the Idaho Water Supply Bank. A petition seeking an extension of time to avoid forfeiture has never been filed on these rights after the issuance of the amended partial decrees in 2001.

8. Aerial photography and satellite imagery available to the Department indicate that the irrigation place of use described in rights 34-14259, 34-14261, and 34-14263 was not irrigated from 2004 to 2011. A statement provided by Ronald Bair in the transfer application confirms that water from the Big Lost River has not been used on the property for several years.

9. The Big Lost River is fully appropriated during the summer months. Junior water rights from the Big Lost River are curtailed for much of the irrigation season.

10. Water delivery records from Water District 34 (Big Lost River and its Tributaries) show that all three of the Bair water rights were in priority and deliverable for more than 50 days of the irrigation season in each of the following years: 2005, 2006, 2009, 2010, and 2011. The delivery records also show that the three Bair water rights were never in priority or deliverable during the 2004 and 2007 irrigation seasons.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 sets forth the criteria that the Department considers in determining whether an application for transfer should be approved:

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

2. In its review, the Department must confirm that the water rights proposed to be transferred are valid water rights. The Department may address concerns of forfeiture when considering an application for transfer. (see Jenkins v. State of Idaho, 103 Idaho 384 (1982))

3. In the state of Idaho, a water right is lost and forfeited through “a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated . . .” (Idaho Code § 42-222(2)) Forfeiture is closely related to the injury and enlargement criteria within the Department’s transfer review. If a water right has not been used for five or more years, the historic consumptive use becomes zero. To allow such a right to be transferred and fully utilized again would constitute an enlargement of the right and would result in injury to junior water users from the same source.

4. Although the Idaho Supreme Court has recognized some limited circumstances where diversion of water under a forfeited water right can be resumed (see Sagewillow, Inc. v. IDWR, 138 Idaho 831 (2003)), because the Big Lost River is fully appropriated, the concept of resumption of

use does not apply to the water rights listed in Application for Transfer 78044.

5. Evidence available to the Department strongly suggests that rights 34-14261 and 34-14263 and a large portion of right 34-14259 were not diverted or beneficially used during the 2005, 2006, 2009, 2010, or 2011 irrigation seasons, even though water was available under the rights during those seasons. Although recreation storage was not listed as a beneficial use of the right at the time, a small portion of water right 34-14259 began to be used for recreation storage at some point prior to 2009.

6. The portion of right 34-14259 used for recreation storage prior to 2009 has not been forfeited. The remaining portion of right 34-14259 and all of rights 34-14261 and 34-14263 have been forfeited under the provisions of Idaho Code § 42-222 and are no longer valid water rights. To allow Ronald and Janiece Bair to resume the use of these rights after more than five years of non-use would result in injury to other water rights on the Big Lost River.

7. The Department should approve the portion of Transfer Application No. 78044 associated with the 0.2-acre pond located on the Bair property and should reject the remainder of Transfer Application No. 78044.

ORDER

IT IS HEREBY ORDERED that Transfer Application No. 78044 in the name of Ronald and Janiece Bair is **APPROVED**, in part, and **REJECTED**, in part. Water rights 34-14261 and 34-14263 have been forfeited and cannot be transferred. Water right 34-14259 has been changed as described in Transfer Approval 78044 issued in conjunction with this Order.

Dated this 10th day of September, 2012.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of September 2012, I mailed a true and correct copy, certified and postage prepaid, of the foregoing PRELIMINARY ORDER APPROVING IN PART AND REJECTING IN PART APPLICATION FOR TRANSFER to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL - CERTIFIED

**RE: Preliminary Order Approving in Part and Rejecting in Part Application for Transfer
(No. 78044)**

**Ronald and Janiece Bair
3969 West 4100 North
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.