



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 1341 Fillmore Street, Suite 200 • Twin Falls, Idaho 83301-3380

Phone: (208) 736-3033 • Fax: (208) 736-3037 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

April 13, 2011

SCHENK LAND AND CATTLE LP
1380 S 50 W
OAKLEY ID 83346

Re: Preliminary Order Rejecting Application for Transfer No. 66569

Gentlemen:

Please find enclosed a Preliminary Order Rejecting the above referenced Application. Please note that the Order can and will become a final order without any further action by the Department as outlined in the attachment to this letter.

Please note that the transfer being rejected modified the place of use of several water rights. Without these modifications the authorized place of use is unchanged and remains as decreed. Irrigation of lands not authorized for irrigation under a valid water right constitutes a violation of Idaho water law and may be subject to a Notice of Violation and subject to civil penalties.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. D. Merritt', is written over a horizontal line.

Allen D. Merritt
Regional Manager

Cc:
Donald Chisholm
Watermaster, Water District # 140

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 66569 IN THE)
NAME OF SCHENK LAND & CATTLE)
_____)

**PRELIMINARY ORDER REJECTING
APPLICATION FOR TRANSFER**

This matter having come before the 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 July 29, 1997, Elquist Ranches applied to the Department for authorization to change the place of use (POU) for 18.44 cubic feet per second (cfs) of water diverted from Groundwater, Land Creek, and Land Ranch Spring sources for irrigation purposes in Cassia County in accordance with, what are currently known as, Water Rights 45-12450, 45-4013B, 45-703, 45-12444, and 45-12447. The transfer application received a designation number 5147 (later renumbered as Application 66569) by the Department. Changes proposed in Application 66569 were subsequently advertised in the South Idaho Press on October 6, 1997 and October 13, 1997.

2. On December 31, 1997, the Department notified Sander Elquist of Elquist Ranches that SRBA Claim issues regarding water right 45-698 (now represented by WR 45-12444) needed to be resolved prior to approval of the changes proposed in Application 66569.

3. On January 20, 2004, Elquist Ranches, Inc. , filed an amended the application with the Department to accommodate changes to the water rights and practices that had been made since the 1997 application had been filed.

4. On December 2, 2004, Sandor Elquist of Elquist Ranches, was notified that SRBA issues preventing the processing of Application 66569 had been resolved, but questions regarding the proposed POU needed to be resolved.

5. On May 6, 2005 and May 13, 2005, Partial Decrees for Water Rights 45-12450, 45-4013B, 45-703, 45-12444, and 45-12447 were issued by the SRBA Court.

6. On September 2, 2005, John Marshall of Givens Pursley, representing Elquist Ranches, corresponded to the Department and indicated that, "...I am continuing to review this application and do not know at this point what direction we intend to go..."

7. On February 12, 2008, Dallan Schenk of Schenk Land & Cattle, L.P., filed for a change of ownership for Water Rights 45-4013B, 45-12444, 45-12447, 45-12450, and 45-703.

8. On March 6, 2008, Mr. Schenk was contacted by the Department that Application for

Transfer 66569 needed to be assigned to Schenk Land & Cattle, L.P. He was also informed that the application needed to be amended to align his water rights to his current irrigation practices, having noticeably been changed since the 2004 amended application was filed.

9. On March 18, 2008, the Department received an executed Assignment of Application for Transfer which assigned Application 66569 from Elquist Ranches, Inc. to Schenk Land & Cattle, L.P.

10. On March 20, 2008, Mr. & Mrs. Schenk visited with a Department representative regarding the issues presented in Application 66569. During this visit, an Amended Application was drafted and it was outlined that Mr. & Mrs. Schenk would provide the following before the amended application would be received or processed by the Department: (1) The apparent POU on other parties lands needs to be documented by agreement and (2) the location of the wells to be used or any future wells needs to be finalized. Issue no. one (1), specifically refers to parcels in TWP 12S, RNG 22E, Sec. 36 and TWP 12S RNG 23 E, Sec. 31 that the applicant does not own.

11. On July 31, 2008, the Department notified Schenk Land and Cattle, L.P. that the amended application had not been filed and the information requested (outlined in no. 10) had not been received. The correspondence also indicates that if the information had not been received within the thirty (30) days of the letter then it would provide sufficient cause to reject the application.

12. On December 8, 2009, the Department met with Donald Chisholm, representing Schenk Land & Cattle, L.P., and Dallen Schenk to resolve outstanding issues with Application 66569 as outlined in the July 31, 2008 letter.

13. On December 31, 2009, the Department received correspondence from Donald Chisholm that agreements had been drafted to address the proposed place of use being placed on parcels not owned by the applicant.

14. As of April 6, 2011, despite repeated attempts by the Department to obtain the information required to finish processing Application 66569 it has not yet been received.

15. Idaho Code §42-222 says, in pertinent part:

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, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

CONCLUSIONS OF LAW

1. Without the additional information requested from Schenk Land and Cattle, L.P., the Department cannot ascertain that the current applicant has authority to make the proposed changes proposed in transfer application no. 66569.
2. The Department should reject transfer application no. 66569.

ORDER

IT IS HEREBY ORDERED that transfer application no. 66569 in the name of Schenk Land and Livestock, L.P., is **REJECTED** without prejudice.

Dated this 13th day of April, 2011.



Allen Merritt, PE
IDWR Southern Region Manager

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of April, 2011 a true and correct copy of the above and foregoing Preliminary Order Rejecting Application for Transfer No. 66569 was forwarded with all required charges prepared, by U.S. Mail to the parties as listed:

Via US Certified Mail:

SCHENK LAND AND CATTLE LP
1380 S 50 W
OAKLEY ID 83346

Via US Regular Mail:

DONALD J CHISHOLM
ATTORNEY AT LAW
PO BOX 1118
BURLEY ID 83318



Mary A. Baldwin
Administrative Assistant

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.