BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR TRANSFER NOS. 66132 AND 66133 IN THE NAME OF HEIDI AND EUGENE MATTHEWS	)))))	**AMENDED PRELIMINARY ORDER AMENDING TRANSFER APPROVALS**

HISTORY

Applications for Transfer Nos. 66132 and 66133 ("transfers") were filed by Anderson Farms in 2001with the Idaho Department of Water Resources ("Department"). Prior to 2001, Anderson Farms claimed the water rights associated with the transfers in the Snake River Basin Adjudication ("SRBA"). These rights were recommended to the SRBA court in the Director's Report for Basin 45 in 2004. Currently all recommendations involved in these transfers are pending before the SRBA court without objection.

In 2004 Anderson Farms deeded the subject lands to Heidi and Eugene Matthews ("Matthews or Applicants"). The Matthews continue to pursue final approval of the transfers. On December 2, 2009, the Department issued preliminary orders approving Transfer Nos. 66132 and 66133 ("orders").

On December 16, 2009, the Department received petitions for reconsideration ("petitions") of the orders and a request for a hearing in these matters from Matthews. The petitions sought similar modifications to the orders. The Applicants complained that:

1. The orders failed to mention necessary provisions of the water rights as found by the Court in that Decree entered in the District Court of the Fifth Judicial District of the State of Idaho, in and for Cassia County, Civil Case No. 11125, that authorize the Applicants to divert high water flows. Historically, the Applicants have diverted and applied these high flow rights to a beneficial use, allowing the Applicants to grow crops on all 905.9 acres recognized by the Department. The Applicants requested that a provision be inserted in the orders recognizing Applicants' right to divert these high flows.

2. The orders authorized the Applicants to use the water rights on 527.2 acres per year out of a total of 905.9 acres listed as the place of use for the water right. The precise location of the 527.2 acres irrigated can vary from year to year. Applicants requested clarification that so long as the annual volumes described in the transfers are not exceeded, Applicants

can fall irrigate on that portion of the 905.9 acres not irrigated in one crop year in order to prepare that acreage for planting the following crop year.

On January 5, 2010, the Department denied the petitions for reconsideration regarding the high flows issues raised by the Applicants but granted the hearing request regarding fall pre-irrigation. The Department limited the scope of the hearing to issues related to allowing fall pre-irrigation of lands in excess of the acreage limits established under the water rights.

Prior to scheduling the hearing, the hearing officer requested a staff memorandum be prepared addressing the excess irrigation issue. On February 4, 2010, Cindy Yenter, Water Rights Supervisor with the Department and then watermaster of Water District 140, submitted a staff memorandum to the hearing officer. The memorandum was shared with the Applicants at the time the notice of hearing was mailed.

On March 25, 2010, the Department conducted a hearing with limited scope as described above. At the hearing testimony was taken from Eugene Matthews (applicant), Cindy Yenter (Department employee and past watermaster of Water District 140) and Brian Higgs (newly elected watermaster of Water District 140).

No exhibits were offered for consideration at the hearing. The hearing officer took official notice of the files for Transfer No. 66132 and Transfer No. 66133 including the February 4, 2010 staff memorandum, holdings in past decisions and orders of the Department as the holdings and orders may apply to these matters, the Department's water right records including the SRBA records for the subject water rights, and other records of the Department including water master records, water measurement records or well logs.

On June 30, 2010, the Department issued a "Preliminary Order Amending Transfer Approvals" with attached Irrigation Plan. One July 13, 2010 the Department received a petition for reconsideration of the June 30, 2010 order. The petition requested that the condition of approval limiting fall irrigation to "two applications or sets of water" be removed from the order and Irrigation Plan.

FINDINGS OF FACT

1. Transfer No. 66132 involves ground water right nos. 45-2405, 45-2406, 45-2661, 45-12928 and 45-12930. The transfer modifies the place of use creating a permissible place of use ("PPU") of 905.9 acres within which 527.2 acres may be irrigated in any one season. Recommendations 45-12928 and 45-12930 are expansion rights pursuant to Idaho Code § 42-1416B.

2. Transfer No. 66133 involves surface water rights 45-577A, 45-577B, 45-

578A, 45-578B, 45-579A, 45-579B, 45-580A, 45-580B, 45-600, 45-12927, 45-586, 45-587, 45-588, 45-12929 and 45-534, diverted within the Basin Creek area. The transfer modifies the place of use of all recommendations, except 45-534, creating a PPU of 905.9 acres within which 527.2 acres may be irrigated in any one season. Water right 45-534 is split with the portion retained by the Applicants (45-14216) being placed in the PPU. The portion of water right 45-534 retained by Robert and Carol Bedke (45-14217) is described on the Bedke property. Recommendations 45-12927 and 45-12929 are enlargement rights pursuant to Idaho Code § 42-1426.

3. The authorized PPU for Matthews' property on both transfers is the same 905.9 acres and the total authorized number of acres to be irrigated in any one season is 527.2 acres when the transfers are combined. The transfers do not modify the claimed season of use for any of the water rights.

4. The applicant and prior owners have irrigated as much as 905.9 acres in a single season but not prior to 1987.

5. Common agricultural practice by the applicant and other farmers in the area includes fall irrigation of land (after September 1) for preparation of planting of crops to be grown the following year.

6. At the hearing the Applicants proposed to irrigate only 527.2 acres for early season crop production. Once crops are harvested (prior to September 1) some portion of the 527.2 acres will not be irrigated for the remainder of the irrigation season. As a result of the non-irrigation of a portion of the 527.2 acres, the Applicants propose to fall irrigate an equivalent number of acres for preparation of lands intended to be irrigated in the following year under the 527.2 acre limit of the water right. The Applicants argue this proposal would not enlarge the water rights. The Applicants also argue that monitoring of their proposal by the watermaster is not burdensome to the watermaster.

7. The Applicant's proposal without strict regulation by the watermaster and the Department will likely result in enlargement of the water rights given the history of enlarged use.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 states, 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. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

2. The applicant bears the burden of proof for all of the factors listed in Idaho Code § 42-222. The preliminary orders issued December 2, 2009, were based on the applicant meeting these burdens of proof. Any amendment of the orders must be based on the same standard of proof.

ANALYSIS

Fall irrigation of acres in excess of the 527.2 acres previously irrigated.

The Applicants and the prior owner of the subject property have irrigated up to 905.9 acres in a single season after 1987. The SRBA review finds that 527.2 acres are the legal limit of use to be associated with these lands as recommended to the SRBA court. In light of past practice the unconditioned irrigation of more than 527.2 acres in the same irrigation season or calendar year represents a great potential for enlargement in use.

In certain situations involving PPUs, the set of water rights in the PPU have an acre limit that is less than the total acres of the authorized PPU. The Department's December 2, 2009 orders provided authorization for this type of PPU. PPUs of this nature have been created to allow flexibility for the water user to rotate use of water year to year within a PPU without having to file a transfer each year. PPU's have been authorized with conditions to ensure that the authorized number of acres is not exceeded within any irrigation season and the acres irrigated are within the bounds of the PPU. As a practice, the time period for consideration of use has been viewed as the irrigation season within a calendar year.

To the hearing officer's knowledge the fall season irrigation plan the Applicants propose has not been previously considered by the Department.

In analyzing the Applicants' proposal, the hearing officer views the proposal as a shift of the beginning and end of the annual time accounting for the number of acres irrigated. [1] For example, the start of the year's accounting of acres would be September 1 and end August 31 of the following year. As long as during this year long time frame only 527.2 acres are irrigated (crop growing and soil preparation of no more than 527.2 acres) this should be no different than irrigation of 527.2 acres during a calendar year or during an irrigation season and there would be no enlargement as long as the rates and annual volumes of the water rights are not exceeded during the normal irrigation season and the number of acres are not exceeded during the September 1 to August 31 acre accounting period.

To assure that the water rights will not be enlarged will require monitoring of use beyond current levels of monitoring provided by IDWR and the watermaster. Additionally, any approval should be such that if the conditions of approval are not explicitly met, then the approval may be rescinded or revoked.

ORDER

IT IS HEREBY ORDERED that applications for transfer No. 66132 and transfer No. 66133 **Approvals are Amended** subject to those conditions originally established in the orders dated December 2, 2009 and the additional conditions as listed below:

1. The use of water is subject to the attached "IRRIGATION PLAN".

    1.1 Prior to August 31, 2010 the applicant shall report directly to the Department and the watermaster of Water District 140 the location of the 527.2 acres initially irrigated from March 15, 2010 to August 31, 2010. The applicant shall also report that portion of the 527.2 acres intended to be dried up (defined as "A" acres under the plan) in exchange for irrigation of other lands between September 1 and November 15 of 2010 (defined as "B" acres under the plan) necessary to prepare soil for tilling, for application of chemicals, or for establishing fall planting.

    1.2 Beginning in 2011 and for each successive year, the applicant shall report directly to the Department and the watermaster of Water District 140 prior to May 1, the location of the 527.2 acres of crops that will be irrigated between March 15 and August 31. The applicant shall also report prior to August 31, the location and number of the "A" acres (that portion of the 527.2 acres to be dried up on or before August 31), and the number and location of the

[1] This analysis does not propose an actual shift or change to the normal irrigation season or a change to the annual volume of use limitation.

"B" acres (the acres to be irrigated in the fall between September 1 and November 15).

1.3 Identification or reporting to the Department and the Water District 140 watermaster of the 527.2 cropped acres, the "A" acres, and the "B" acres shall be in the form of a land list and a map sufficiently detailed to allow creation of an electronic shape file.

1.4 The total number of "B" acres shall not exceed the number of "A" acres in any irrigation season.

1.5 Application of water to "B" acres in the fall is limited to water necessary to prepare soil for tilling, for application of chemicals, or for establishing fall planting. Application of water to "B" acres shall not provide water to irrigate crops for harvest in the same fall.

1.6 The "B" acres identified for fall irrigation in any year shall be included in the 527.2 cropped acres for the subsequent season.

1.7 The watermaster of Water District 140 shall monitor the place of use and regulate the use of water under the approved transfers pursuant to these conditions of approval. The watermaster of Water District 140 shall coordinate delivery and regulation with the watermaster of Water District 45-A of the surface water rights covered by transfer No. 66133.

1.8 Original conditions of approval associated with transfer No. 66132 and transfer No. 66133 that are in the standard form of: *"This right is limited to the irrigation of ### acres within the place of use described above in a single irrigation season."* shall be amended to the form of: *"This right is limited to the irrigation of ### acres within the place of use described above in accordance with the attached Irrigation Plan."*

2. Failure to adhere to the conditions of use and timelines set forth on the "IRRIGATION PLAN" shall be cause for this amended approval to be revoked with prejudice and the transfers to revert back to the approval established in the orders dated December 2, 2009.

Dated this 20th day of July, 2010.

ALLEN D. MERRITT
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 20th of July, 2010 I mailed a true and correct copy, postage prepaid, of the foregoing Amended Preliminary Order Amending Transfer Approvals to the persons listed below:

E. EUGENE MATTHEWS &
HEIDI F. MATTHEWS
1249 S HWY 27
OAKLEY ID 83346

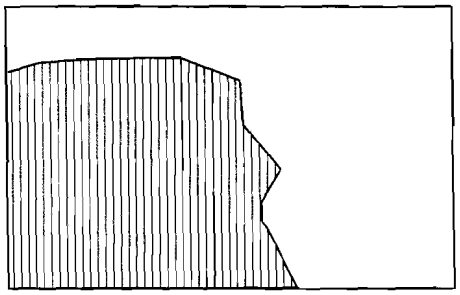
KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318

BRIAN HIGGS,WATERMASTER
WATER DISTRICT # 140
6330 W 33RD S
IDAHO FALLS ID 83402

Mary Baldwin
Administrative Assistant I

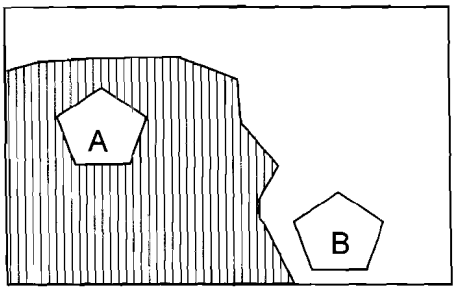
IRRIGATION PLAN

The following sketches visually illustrate the concept being approved. The rectangle represents the established permissible place of use of 905.9 acres. The vertically hatched area represents the allowed 527.2 cropped acres that may be irrigated within any one year.



Phase I

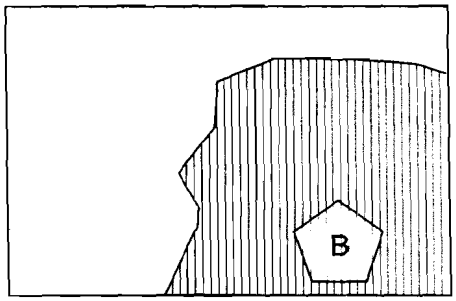
March 15 to August 31 of First Year
Irrigation of crops.



Phase II

September 1 to November 15 of First Year

"A" acres not irrigated for remainder of year.
"B" acres prepared[1] during fall for irrigation in Second year equal in size to "A" or smaller.



Phase III

March 15 to August 31 of Second Year
Irrigation of crops.

Phase II process would be repeated in the fall of the second year identifying potentially different "A" and "B" acres as long as the "B" acres are included in the irrigated acres the following year.

To start the process the applicant on or before August 31, 2010 must identify the 527.2 acres initially irrigated from March 15, 2010 to August 31, 2010 and the "A" and "B" acres. Beginning in 2011 and for each successive year, the applicant shall report prior to May 1, the location of the 527.2 acres of crops that will be irrigated between March 15 and August 31. On or before August 31, 2011 and similarly for each successive year the applicant must identify the "A" and "B" acres.

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[1] Application of water to "B" acres in the fall is limited to water necessary to prepare soil for tilling, for application of chemicals, or for establishing fall planting. Application of water to "B" acres in the fall shall not provide water to irrigate crops for harvest in the same fall.

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.