

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 76308 IN THE NAME OF)	
KENT MERRILL)	ORDER PARTIALLY GRANTING
_____)	PETITION FOR RECONSIDERATION

This matter having come before the Department of Water Resources ("Department") as a petition to reconsider the approval of an application for transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On February 10, 2010, Kent Merrill ("Applicant") filed an Application for Transfer with the Department seeking to change the point of diversion and place of use for a portion of an existing ground water right. The transfer proposed to split water right 25-7603 into 25-14247 (the portion remaining at the original place of use) and 25-14248 (the portion being transferred to the new place of use). The Department approved the Application for Transfer on May 20, 2010.

2. The conditions from water right 25-7603 were carried forward on water right 25-14247, the portion of the water right remaining at the original place of use. One of these conditions states:

Diversion and use of water under this right is subject to rules that may subsequently be promulgated for existing rights used for supplemental purposes. (hereinafter "Condition A")

3. In accordance with Idaho Code § 42-222 and current Department practices, a number of new conditions were added to water right 25-14248, the transferred portion of the right. The following two conditions were among the conditions added:

The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right. (hereinafter "Condition B")

If the surface water right(s) appurtenant to the place of use is abandoned, forfeited, sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required. (hereinafter "Condition C")

4. On May 28, 2010, the Applicant, acting through his representative, filed a Petition for Reconsideration, stating that the Department erred by including the three conditions set forth above on the approved water rights. Specifically, the Applicant argued that the original ground water right was not a supplemental right in its original place of use and therefore should not be conditioned as a supplemental right in its new place of use. The Applicant requested that the three conditions set forth above be removed from the respective water rights.

5. Evidence submitted by the Applicant and collected by the Department suggests that the ground water right was in fact the only means of irrigation at the original place of use. There may have been canal shares associated with the property in the past. However, groundwater has been used exclusively on the property from the time ground water permit 25-7603 was issued in 1992.

6. The new place of use for water right 25-14248 is presently irrigated by surface water canal shares. In a letter dated February 3, 2010, Kristin Moore, consultant for the Applicant, confirmed that “[c]anal shares from the North Rigby Irrigation and Canal Company, Inc. are currently used on the proposed place of use when available.”

7. The file does not contain any evidence that the North Rigby canal shares have been sold or that those shares cannot continue to be delivered to the new place of use.

CONCLUSIONS OF LAW

1. Because Condition A existed as part of the original water right, 25-7603, the Department correctly carried the condition forward on water right 25-14247, the portion of the water right remaining at the original place of use. Applying Condition A to water right 25-14247 does not place any new limitation on the water right or any new burden on the Applicant.

2. Idaho Code § 42-222 requires the Department to evaluate whether an application for transfer “is consistent with the conservation of water resources within the state of Idaho and is in the local public interest . . .” The statute also authorizes the Department to add conditions to a transferred water right to ensure that these and other statutory requirements are met.

3. The place of use proposed to be covered by transferred right 25-14248 already carries a full supply of surface rights, meaning that any additional rights added to that place of use are supplemental to the existing full supply. A water right can become a supplemental right at a new place of use based on the existing conditions at the new place of use, regardless of whether the water right was supplemental at the original place of use. The Department concludes in this application for transfer that it is consistent with the conservation of water resources within the state of Idaho and in the local public interest to include Condition B as part of transferred right 25-14248. So long as the North Rigby canal shares remain associated with and deliverable to the new place of use, the water right holder will be required, according to Condition B, to make full use of the canal shares for irrigation purposes before diverting any water under the transferred ground water right.

4. The Department erred by including Condition C as part of the transfer approval. Because there were no surface water rights associated with the original place of use, the Applicant should not be restricted in his ability to remove the surface water rights from the new place of use,

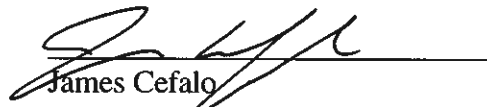
leaving the ground water right as the sole irrigation source, to mirror the existing conditions at the original place of use. However, if the surface water canal shares are not moved from the new place of use within five years, the ground water right may become strictly supplemental to the surface water right through partial forfeiture pursuant to Idaho Code § 42-222.

ORDER

IT IS HEREBY ORDERED that Applicant's petition to reconsider transfer approval Condition C (as identified above) is GRANTED, pursuant to Idaho Code § 67-5243(3). Condition C shall be removed from the transfer approval for water right 25-14248. The change is reflected in the Amended Transfer Approval 76308 issued in conjunction with this Order.

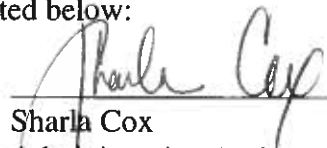
IT IS FURTHER ORDERED that Applicant's petition to reconsider transfer approval Conditions A and B (as identified above) is DENIED, pursuant to Idaho Code § 67-5243(3).

Dated this 16th day of June, 2010.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of June 2010, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER PARTIALLY GRANTING PETITION FOR RECONSIDERATION** to the person(s) listed below:


Sharla Cox
Administrative Assistant

US MAIL

RE: TRANSFER NO. 76308

Kent Merrill
532 N 3825 E
Rigby Id 83442

Water District 120
900 N Skyline Dr Ste A
Idaho Falls ID 83402

Rocky Mountain Environmental
482 Constitution Way #303
Idaho Falls ID 83402

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES

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 within fourteen (14) days after service 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 issuance 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.