

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 69783 IN THE)	PRELIMINARY ORDER REJECTING
NAME OF SULPHUR CREEK LIVESTOCK)	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 March 13, 2002, Sulphur Creek Livestock filed an Application for Transfer (No. 69783) with the Department seeking to move the point of diversion for water right 73-2098, from Mahogany Creek to the Pahsimeroi River. The application stated that 2.37 cfs of the irrigation portion of the water right would be transferred to the new point of diversion. The application was protested by Western Watersheds Project, who argued that the irrigation portion of water right 73-2098 had not been used for many years and should be deemed forfeited.

2. Water right 73-2098 was originally developed through an application for permit filed with the Department on May 13, 1915. Proof of beneficial use was submitted by Chris Carlson on November 30, 1923 and a license was issued by the Department on December 19, 1923. The license carried a diversion rate of 2.4 cfs to be used for irrigation and domestic purposes.

3. A claim for water right 73-2098 was filed in the Snake River Basin Adjudication by the Aetna Casualty and Surety Company in 1989. The claim identified irrigation and stockwater use. An amended claim for water right 73-2098 was filed by Sulphur Creek Livestock in January 2001, also listing irrigation and stockwater as beneficial uses.

4. The Department reviewed Sulphur Creek Livestock's amended SRBA claim and discovered that the irrigation portion of water right 73-2098 had not been used between January 5, 1985 and January 5, 1990 and was therefore lost due to forfeiture. The evidence indicated that irrigation had actually not taken place for many years. The stockwater portion of the water right, however, was used during that time period. The Department recommended that water right 73-2098 be limited to a diversion rate of 0.14 cfs for stockwater use only. The water right was decreed as recommended by the Department on October 15, 2009.

5. Letters were sent from the Department to Judd Whitworth, the listed representative for Sulphur Creek Livestock, on January 11, 2010 and February 26, 2010. The letters asked Sulphur Creek to withdraw or amend its application for transfer based on the fact that the irrigation component of water right 73-2098 was forfeited. The February 26, 2010 letter stated that if Sulphur Creek Livestock did not respond within 30 days, its Application for Transfer would be rejected. The Department has not received any response from Sulphur Creek Livestock.

CONCLUSIONS OF LAW

1. Application for Transfer No. 69783 seeks to transfer a portion of water right 73-2098 which no longer exists as a result of the partial decree issued in the Snake River Basin Adjudication and cannot be approved.
2. The Department should reject Transfer Application No. 69783.

ORDER

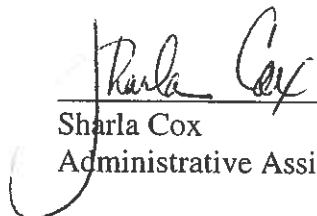
IT IS HEREBY ORDERED that Transfer Application No. 69783 in the name of Sulphur Creek Livestock is **REJECTED** without prejudice.

Dated this 24th day of May, 2010.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 24th day of May 2010, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER REJECTING APPLICATION FOR TRANSFER to the person(s) listed below:


Sharla Cox
Administrative Assistant

US MAIL

RE: TRANSFER NO. 69783

SULPHUR CREEK RANCH
JUDD WHITWORTH
2604 PAHSIMEROI RD
MAY ID 83253-2011

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.