

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	)	ORDER DENYING PETITIONS
IN THE NAME OF HEIDI AND EUGENE	)	FOR RECONSIDERATION
MATTHEWS	)	AND GRANTING HEARING
_____	)	

I. HISTORY

Applications for Transfer Nos. 66132 and 66133 (“transfers”) were filed by Anderson Farms in 2001. 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 the transfers. On December 2, 2009, the Department issued preliminary orders approving Transfer Nos. 66132 and 66133. (“orders”).

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.

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. Right 45-534 is split with the portion retained by the applicant (45-14216) being placed in the PPU. The portion of 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.

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.

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 seek similar modifications to the orders. The Applicant complains that:

1. The proposed transfers 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. Applicants request that a provision be inserted in the transfers recognizing Applicants’ right to divert these high flows.
2. The proposed transfers authorize the Applicants to use the water rights on 527.2 acres per year out of a total of 905.9 acres having a water right. The precise 527.2 irrigated each year can vary. Applicants request 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.

II. ANALYSIS

1. Authority to divert early and late in the irrigation season.

The decree entered in Cassia County Civil Case No. 11125 is commonly known as the Basin Creek Decree. Applicants claim that the Department failed to include “necessary provisions” from the Basin Creek Decree related to high flow water rights. Although the Applicants do not identify the exact provisions, the Department assumes that the Applicants are referring to the early and late season irrigation provision in the Basin Creek Decree. The provision states:

The normal irrigation season is from March 15 to November 15, inclusive. Irrigation users shall be allowed to divert water during both the pre-irrigation and post-irrigation season periods provided:

- a. Waters so diverted are applied to a beneficial use, and existing water rights effective during November 15 to March 15, including future appropriations, are first satisfied.
- b. In times of extremely high flows water may be diverted to avert flood damage downstream.

The Applicants' request to add the language from the Basin Creek Decree through this transfer proceeding must be denied. A transfer proceeding is not the proper forum to seek the requested relief. The transfers are based on the SRBA claims for these water rights. The Applicants' predecessor did not claim a right to use early or late season irrigation in its SRBA claims. As such, no early or late season irrigation was recommended for these individual water rights in the Department's recommendations to the SRBA court. As the Department has already submitted its recommendations to the SRBA court for these water rights and no objections were filed, it would be improper to allow for the amendment of the SRBA claims through a transfer proceeding that was filed to create a permissible place of use for these water rights. Furthermore, the Applicants and their predecessor could have requested that the language be decreed as a general provision in the SRBA. The Department has already recommended the Basin 45 general provisions to the SRBA court. It is improper for the Applicants to seek what is essentially a new general provision through a transfer proceeding. Jurisdiction over these issues rests with the SRBA court, not with the Department.

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

Authorization of fall irrigation for acres in excess of the 527.2 acres previously irrigated in the same season would be an enlargement of the place of use/acreage and potential enlargement of the consumptive use of water. Consumptive use of the rights could be enlarged depending on the timing of fall irrigation of new lands in relation to the status of crops under current season lands. The seasonal acreage limitation applied in these transfer approvals have been established in the SRBA process by review of historical aerial photographs. The SRBA record indicates that to the extent additional acres have been irrigated beyond the historical decrees and licenses, those additional acres have been captured in the recommended enlargement and expansion rights referenced above.

The Matthews have not provided sufficient reason for the Department to grant the portion of the petitions seeking to modify the acreage limits and that relief should be denied.

However, the Matthews have a right to an administrative hearing on matters within the jurisdiction of the Department pursuant to Idaho Code § 42-1701A(3). Thus, because the issue of fall pre-irrigation of land in excess of the acreage limits established under the water rights is within the jurisdiction of the Department, the Department should grant the request for hearing on that issue.

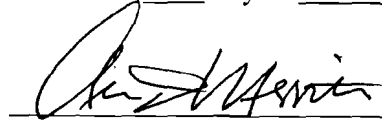
III. ORDER

IT IS HEREBY ORDERED that the petitions for reconsideration of the preliminary orders approving Transfer Nos. 66132 and 66133 are **DENIED**.

IT IS FURTHER ORDERED that a hearing is **GRANTED** pursuant to Idaho Code

§ 42-1701A(3) for the limited purpose of hearing the issues related to allowing fall pre-irrigation of lands in excess of the acreage limits established under the water rights.

Dated this 5th day of January, 2010.



ALLEN MERRITT
Manager, IDWR Southern Region

CERTIFICATE OF SERVICE

I hereby certify that on the 5th of January, 2010 I mailed a true and correct copy, postage prepaid, of the foregoing Order Denying Petitions for Reconsideration and Granting Hearing to the persons listed below:

RE: Transfer No. 66132, Water Right Nos. 45-2405, 45-2406, 45-2661, 45-12928, 45-12930

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

KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY ID 83318

RE: Transfer No. 66133, Water Right Nos. 45-14216, 45-14217, 45-577A, 45-577B, 45-578A, 45-578B, 45-579A, 45-579B, 45-580A, 45-580B, 45-586, 45-587, 45-588, 45-600, 45-12927, 45-12929

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Mary Baldwin
Administrative Assistant I

EXPLANATORY INFORMATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief 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.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. 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, 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 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 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.