

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO 73263)
)
ROBER HALLEN)
 Applicant)
)
ARNE VETRUS)
 Protestant)

)

AMENDED PRELIMINARY ORDER

On June 11, 2008, Hallen amended protested Application for Transfer No. 73263. Notice of the amended application was published in the Recorder Harold on July 24 and 31, 2008.

On October 30, 2008 IDWR conducted a hearing at the BLM office, 1206 S Challis St, Salmon, Idaho. Robert Hallen ("Hallen"), applicant, and Arne Vetrhus ("Vetrhus"), protestant, were present and appeared pro se.

On February 24, 2009, the hearing officer issued a preliminary order, served on February 24, 2009, approving Transfer No 73263.

On March 10, 2009, Hallen petitioned the hearing officer to reconsider the preliminary order.

ISSUES PRESENTED

The following are issues raised by Hallen in the petition for reconsideration.

Place of Use

Hallen submitted a map showing the boundary for a different 7.5 acres he wants identified as the place of use under transfer no. 73263. The new 7.5 acres are located in the same forty acre tract as the original 7.5 acres but do not overlap with any lands irrigated from Fourth of July Creek. Since there will be no overlap between land irrigated from Little Fourth of July Creek and Fourth of July Creek Hallen want condition #2 removed which restricts the use of water right no. 75-2003 when water rights 75-146 and 75-148 are deliverable from Fourth of July Creek.

Response: The Department will accept Hallen's request to modify the boundary for the place of use, because the new 7.5 acres are located in the same forty acre tract designated as the location for the new place of use under Transfer No. 73263. This change will eliminate the overlap between lands irrigated from Little Fourth of July Creek and Fourth of July Creek so the findings

of fact and condition restricting the use of 75-2003 when water rights 75-146 and 75-148 are deliverable will be removed.

Storage Volume Limitation

Hallen states condition number 4, limiting the volume of water diverted to storage in the pond, should be removed for two reasons. First, the volume limitation does not recognize that Hallen has a diversion from Little Fourth of July Creek below the pond used to irrigate a small pasture. Second, the volume restriction does not account for delivery of water right 75-10433 which is diverted from Little Fourth of July Creek below the pond.

Response: Hallen testified in the hearing that the pump was the only irrigation diversion he used from Little Fourth of July Creek. His testimony is consistent with the application for transfer which lists only one irrigation diversion from Little Fourth of July Creek. To be recognized as part of the water right, the point of diversion down stream from the pond should have been identified on the application for transfer. Because it was not listed on the transfer application it can not be recognized under approved transfer 73236 as a point of diversion for water right 75-2003. The pasture can be included as part of the 7.5 acres irrigated under right 75-2003 but with the approval of transfer no. 73236 will have to be irrigated with water diverted by the pump. Approval of the transfer is not intended to interfere with delivery of water right 75-10433. This right is recommended for 0.06 cfs diverted below the pond to irrigate 2 acres under a priority of August 13, 1913. This right is junior to both 75-2003 and 75-4011 but is senior to 75-7027. The findings of fact and order will be modified to identify the relationship between the location of the pond and water right 75-10433.

SUMMARY OF PROCEEDINGS

On March 30, 2006, Robert Hallen ("Hallen"), filed with the Department of Water Resources ("IDWR") Application for Transfer No. 73263 seeking a change in nature of use for a portion of water right 75-2003 and modifying the shape file identifying the place of use.

Notice of the application was published in the Recorder Herald in Salmon, Idaho on August 2 and 9, 2007. A protest to the application was timely received from Arne Vetrhus ("Vetrhus") on August 17, 2007. A second protest was received on August 22, 2007 for the Idaho Department of Fish and Game ("IDFG"). IDFG subsequently withdrew its protest on November 8, 2007.

On April 17, 2008, IDWR conducted a prehearing conference at the Bureau of Land Management ("BLM") office, 1206 S Challis St, Salmon, Idaho. Hallen was present and Vetrhus participated by telephone but the parties failed to resolve the protest.

On June 11, 2008, Hallen amended Application for Transfer No. 73263 increasing the acreage and quantity of water designated for the nature of use change.

Notice of the amended application was published in the Recorder Herald on July 24 and 31, 2008. No additional protests were received.

On October 30, 2008 IDWR conducted a hearing at the Bureau of Land Management Office in Salmon, Idaho. Hallen and Vetthus were present and appeared pro se.

At the hearing, Hallen offered eight exhibits into the record. The protestant stipulated to the admission of these exhibits. Exhibits one through seven listed below were entered into evidence by the hearing officer.

Applicant's Exhibits	Description
1	Photo of old irrigation ditch
2	Photo of polypipe tubing
3	Photo of pipe used for conveying irrigation water
4	Photo of old pump and hoses
5	Photo of pond
6	Photo of current irrigation system
7	Photo of fire suppression
8	Photo of Vetthus property

After considering the evidence and testimony, the hearing officer finds, concludes and orders as follows.

FINDINGS OF FACT

1. Amended Application for Transfer No. 73263 proposes changes to water right 75-2003 held by Hallen. Records for IDWR show water right 75-2003, with a priority date of May 20, 1913, was decreed in the Snake River Basin Adjudication ("SRBA"). This right has a combined total quantity of 0.12 cubic feet per second ("cfs") to be diverted from Little Fourth of July Creek a tributary of Fourth of July Creek. Uses under the water right include, irrigation of 8 acres with a diversion rate of 0.12 cfs and stock water with a diversion rate of 0.02 cfs. The place of use and point of diversion for both uses is located in the NESE¹, S25, T24N, R21E.

2. The amended transfer application proposes to add a point of diversion and change the nature of use for a portion of 75-2003. The change in nature of use would convert 0.5 acres of irrigation and 0.02 cfs to recreation storage for an on-stream pond with a storage volume of 0.04 acre feet ("af") leaving unchanged the diversion of 0.10 cfs for irrigation of 7.5 acres. With

¹ Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4". In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Lemhi County.

the addition of the pond there are two points of diversion: one is the pump used to divert irrigation water and the second is the dam for the on-stream pond. The two diversions, the pond and all the irrigated acres are located in the NESE, S25, T24N, R21E.

3. The amended transfer application seeks to change the nature of use for 0.5 acres of irrigation and 0.02 cfs. As decreed, the rate per acre for 75-2003 can be determined by dividing 8 acres by 0.12 cfs, resulting in a flow rate per acre of 0.015 cfs. As drafted, the amended transfer application would decrease the flow rate per acre for the residual irrigation portion of the water right resulting in an enlargement of the irrigation portion of the water right, which is not allowed by Idaho Code § 42-222. Because of the enlargement prohibition, the retirement of 0.5 acres will not result in 0.02 cfs being available for transfer, and the application for transfer must either propose the retirement of 1.3 acres, which proportionally corresponds to a reduction in the irrigation flow rate of 0.02 cfs, or the retirement of 0.5 acres, which proportionally corresponds to a flow rate of 0.0075 cfs, rounded up to 0.01 cfs.

4. This decision first assesses whether conversion of 0.5 acres of irrigation and the associated 0.01cfs is sufficient for the proposed recreation storage.

5. Vetrhus protested the application for the following reasons:

- a) The uses of the water right are irrigation and stock water and should not include recreation storage.
- b) The reduction in irrigated acres is dubious because prior to Hallen purchasing the property going back to at least 1984 there was no irrigation.
- c) Accommodating an on-stream recreation pond would injure his water rights identified by Nos. 75-4011 and 75-7027 recently decreed in the SRBA.

6. Vetrhus' senior water right is 75-4011 with a priority date of May 22, 1913. This right authorizes diversion of 1.08 cfs from Little Fourth of July Creek to irrigate 54 acres. Vetrhus' junior water right is 75-7027 with a priority date of June 5, 1973. This right authorizes diversion of 1.38 cfs from Little Fourth of July Creek to irrigate 69 acres. Vetrhus diverts water from Little Fourth of July Creek at various points along a one mile reach of the creek adjoining his place of use. All of Vetrhus' points of diversion are located upstream of Hallen point of diversion for irrigation and the proposed onstream impoundment. The place of use for both Vetrhus rights is a narrow strip of land one mile long, adjacent to the creek channel, in the E1/2SE, S24, T24N, R21E and the W1/2W1/2, S19, T24N, R22E. The place of use for Right 75-7027 overlaps with 75-4011 plus contains an additional 15 acres. The lower end of Vetrhus' property begins approximately one mile up the Little Fourth of July Creek drainage from Hallen's pond.

7. Water right 75-10433 with a priority of August 13, 1913 provides for the diversion of 0.06 cfs from Little Fourth of July Creek for the irrigation 2 acres. The point of diversion is in the SESE S25, T24N, R21E, down stream from the Hallen pond.

8. Hallen testified that, when he purchased the property in 1990, it was in a dilapidated state and, as part of restoring and developing the property, he wanted to construct an on stream pond for recreation. Hallen contends he contacted both the Idaho Department of Fish and Game and submitted an application to appropriate water to the IDWR. Hallen further contends the

Department of Fish and Game told him it was not concerned about Little Fourth of July Creek because it was not recognized as a fishery and IDWR returned the application allegedly because the volume of the pond was insignificant. In 1991, Hallen constructed an earthen dam across the channel of Little Fourth of July Creek creating a pond, pictured in Applicant's Exhibit 5, approximately 500 feet upstream from the confluence of Little Fourth of July Creek and Fourth of July Creek.

9. Hallen testified he initially used the existing ditches to flood irrigate around the buildings but had to abandon this method because the irrigation water flooded the pump house. He then tried more elaborate irrigation systems enabling him to irrigate more acres while not flooding the pump house. Eventually he installed the current irrigation system consisting of an electric pump and timer, pictured in Applicant's Exhibit #6, which pressurizes a sprinkler system irrigating property on both sides of Little Fourth of July Creek. The electric pump can divert 47 gallons per minute (0.10 cfs) and is approximately 150 feet upstream from the pond. This pump is the only point of diversion for irrigation.

10. IDWR records reveal license 75-2003 was the only right used for irrigation of 13.8 acres of land on the west side of Little Fourth of July Creek in the E1/2NE, and NESE, S25, T24N, R21E. Transfer 2844, approved in September 1984, authorized a new point of diversion for water right 75-2003 at the north end of Hallen's property for irrigation of the eight acres of his land, covered by the license, lying west of Little Fourth of July Creek.

11. Irrigation of land east of Little Fourth of July Creek was initiated by Hallen with the installation of his sprinkler system. The shape file identifying the 7.5 acre place of use proposed by the amended transfer application includes land on both sides of Little Fourth of July Creek, but does not include any land being irrigated from Fourth of July Creek under rights 75-146 and 75-148.

12. The amended transfer application states the on-stream pond has a surface area of 0.12 acres and a volume of 0.40 af. Hallen testified he uses the pond to maintain a population of fish and during the winter the pond is a source of drinking water for stock. When necessary it is also been used as a source of water for fire protection. Hallen stated he wants a continuous flow of water into the pond in order to maintain a constant water level and provide suitable fish habitat. The level of water in the pond is maintained with a stand pipe connected to a culvert that goes through the dam three feet below the dam's crest. A metal screw gate in the culvert can be opened to partially drain the pond.

13. When converting a portion of a natural flow irrigation right to a storage pond, consideration must be given to the volume of water needed to replenish losses due to evaporation, seepage, filling the pond and refill if provided by the application. The quantity of water designated for the change in nature of use, by retiring irrigated acreage, must equal or exceed the quantity of water required for the new nature of use to prevent an increase in the elements of the original right prior to the change, particularly rate of diversion, volume and consumptive use. To ensure there is no enlargement of the water right, each of these elements must be evaluated separately.

14. Hallen testified that other than de minimus stock water during the non-irrigation season, there is no diversion from the on-stream pond. Absent a diversion depleting the volume

of water stored in the pond, refilling the pond does not require analysis in these findings and was not provided for in the amended transfer application.

15. Consumptive use volume for irrigation equals the evapotranspiration of the plant type being irrigated by the water right. The calculations for irrigation consumption annotated in Attachment 1 of the original application show 2.4 af per acre for pasture, but does not reference the source. For determining evapotranspiration, IDWR uses the Kimberly website at <http://www.kimberly.uidaho.edu/ETIdaho/> which was updated in 2007. On this website, the table for evapotranspiration of low management pasture in the Salmon area shows 1.82 af per acre for the irrigation season. Hallen proposes to dry up 0.5 acres, which equates to a consumptive use volume of 0.91 af.

16. The consumptive use volume for a pond equals the pond capacity plus evaporation. Though evaporation from the pond occurs all year, impact to upstream irrigation water rights is limited to the time of year when they are deliverable, April 1 to October 31, the irrigation season. For a small pond in the Salmon area during the irrigation season, the table for evaporation on the Kimberly website shows 1.6 af per acre. Attachment 1 of the application indicates the surface area of the pond is 0.12 acres which is verified in ArcMap. Based on its size, evaporation from the pond during the irrigation season equals 0.19 af. Therefore, consumptive use of the pond equals the pond capacity of 0.4 af plus evaporation of 0.19 af for a total of 0.59 af.

17. The consumptive use volume of the pond is less than the consumptive use volume for the half acre being retired from irrigation by 0.41 af.

18. The formula for calculating consumptive use volume of the pond is based on the premise the pond maybe empty at the beginning of the irrigation season. In this case, the on-stream pond is small enough that during the non-irrigation season the flow in Little Fourth of July Creek keeps it full. With the pond full at the beginning of the irrigation season, the consumptive use volume is limited to the 0.19 af of evaporation, calculated in Finding 16.

19. Total irrigation volume equals evapotranspiration plus deep percolation plus irrigation runoff. With the high efficiency rate associated with water application of sprinkler irrigation, deep percolation and irrigation runoff are generally consider negligible. Therefore, irrigation volume and consumptive use volume for irrigation are the same at 0.91 af.

20. The total pond volume equals consumptive use volume plus seepage. Disregarding seepage and using the consumptive use volume for the pond determined in Finding 18, the difference between total irrigation volume and total pond volume is 0.72 af. No information was provided at the hearing regarding seepage from the pond, but the pond has remained essentially full year around for sixteen years, and during this time silts and fine sediments settling out of the water and lining the bottom of the pond should have created an almost impermeable layer minimizing seepage. Hence 0.72 af should be sufficient to off set existing seepage during the irrigation season.

21. For an on-stream pond there typically is no rate of diversion since water is not removed from the stream channel. To specify a flow rate into the pond would result in a continuous overflow or flow through past the pond creating a de facto minimum stream flow.

22. In Part 3 of the original application the written response for describing the quantity and quality of return flows and location of discharge states, “Non-consumptive use, no change” (punctuation added). In response to describing effects on other water uses resulting from the proposed change the application states, “None, use is non-consumptive” (punctuation added). These responses suggest Hallen only wants to fill the pond and does not speak to overflow or flow through.

23. The provisions of Title 15, Chapter 42, Idaho Code specify a water right for minimum stream flow can only be held by the Idaho Water Resource Board and only applies to water which is not subject to diversion and use under any prior existing water right.

24. During the irrigation season, flow through or overflow into the stand pipe or over the dam spillway may occur when there is sufficient flow in Little Fourth of July Creek for delivery of water to water right 75-10433 with a priority of August 13, 1913 and there is a call by the water user for delivery of the water right.

25. Retiring 0.5 acres from irrigation under water right 75-2003 is sufficient to compensate for evaporation and seepage from Hallen’s on-stream pond during the irrigation season.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 states, in pertinent part:
 - a. 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....
2. The applicant bears the burden of proof for all of the factors listed in Idaho Code § 42-222.
3. Appropriately conditioned the change requested by the transfer application will not injure other water rights.
4. Hallen is retiring sufficient acreage from irrigation to compensate for evaporation and seepage from the on-stream pond without causing enlargement of water right 75-2003.
5. Appropriately conditioned the change requested by the amended transfer application will not conflict with local public interest as defined in section 42-202B, Idaho Code.

6. The change requested by the amended transfer application will not adversely affect the local economy.

7. The amended transfer application should be approved.

ORDER

IT IS HEREBY ORDERED that amended application for transfer no. 73263 is **Approved** subject to the conditions listed below.

1. Approval of transfer 73263 authorizes diversion of 0.11 cfs for irrigation of 7.5 acres, 0.02 cfs or stock water and 0.4 af for recreation storage. The total combined diversion rate is limited to 0.11 cfs and 0.4 af.

2. The pond authorized by approval of transfer 73263 is limited to a surface area of 0.12 acres and volume of 0.4 af.

3. Approval of transfer 73263 authorizes up to 0.91 af under water right 75-2003 to flow into the pond each year between 4-1 and 10-31 to compensate for water lost to evaporation and seepage and to maintain a constant water level without providing water for overflow or flow through past the pond.

4. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.

5. The right holder shall accomplish the change authorized by this transfer within one year(s) of the date of this approval.

6. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

7. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Dated this 5 day of ^{June}~~May~~, 2009.



Ernest Carlsen
Hearing Officer

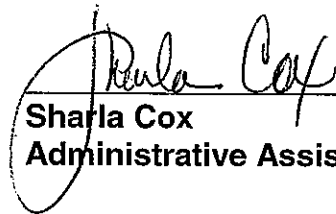
CERTIFICATE OF SERVICE

I hereby certify that on **June 8, 2009** I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER (Amended Transfer Approval)** to the person(s) listed below:

RE: Transfer 73263– Water Right 75-2003

**Robert R Hallen
PO Box 243
Carmen ID 83462**

**Arne Vetrhus
34 Coiner Lane
Salmon ID 83467**



**Sharla Cox
Administrative Assistant**

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.