

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

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO 73426)
)
JACK & SHELDON HATLEY,)
Applicants)
)
DAVID EMERY NESTOR)
Protestant)
_____)

PRELIMINARY ORDER

On May 20, 2007 Jack Hatley and Sheldon Hatley ("Hatleys"), filed with the Department of Water Resources ("IDWR" or "Department") an application to transfer the public waters of the State of Idaho.

Application for Transfer No. 73426 seeks to change the place of use of a portion of six water rights used for irrigation.

Notice of the application was published in the Idaho State Journal on May 24 and 31, 2007. A protest to the application was timely received from David Emery Nestor ("Nestor") on June 8, 2007.

On July 19, 2007, IDWR conducted a prehearing conference at the McCammon City Hall, McCammon, Idaho. Hatleys and Nestor were present but failed to resolve the protest.

On August 28, 2007, IDWR conducted a hearing at the McCammon City Hall, McCammon, Idaho. Hatleys and Nestor were present and appeared pro se.

At the hearing, the applicants offered five exhibits into the record. The protestant stipulated to the admission of these exhibits. The exhibits considered by the hearing officer are listed as follows:

Applicant's exhibit no.	Description
1	Aerial Photo of Place of Use
2	List of applicant's Garden Creek water rights
3	Protestant's Garden Creek water right
4	Color Photos
5	Page from Annual Report for WD29B

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

FINDINGS OF FACT

1. Application for Transfer No. 73426 proposes to change the place of use for six decreed water rights held by Hatleys presently described in the records of the IDWR as follows:

Decreed Water Right No. 29-403

Source Garden Creek
Priority Date 05/01/1896
Purpose of Use Irrigation
Flow Rate 0.75 cfs
Point of Diversion T10S, R36E, Sec. 7, SENWNW¹
Place of Use T10S, R36E Sec. 5, S1/2NE, E1/2NW, NESE; Sec. 7, NENW
Conditioned to irrigation of 37.5 acres within 117.3 acres when used in combination with other rights

Decreed Water Right No. 29-404

Source Garden Creek
Priority Date 5/1/1904
Purpose of Use Irrigation
Flow Rate 1.00 cfs
Point of Diversion T10S, R36E, Sec. 7, SENWNW
Place of Use T10S, R36E Sec. 5, S1/2NE, E1/2NW, NESE; Sec. 7, NENW
Conditioned to irrigation of 50 acres within 117.3 acres when used in combination with other rights

Decreed Water Right No. 29-405

Source Garden Creek
Priority Date 5/1/1895
Purpose of Use Irrigation
Flow Rate 0.75 cfs
Point of Diversion T10S, R36E, Sec. 7, SENWNW
Place of Use T10S, R36E Sec. 5, S1/2NE, E1/2NW, NESE; Sec. 7, NENW
Conditioned to irrigation of 37.5 acres within 117.3 acres when used in combination with other rights

Decreed Water Right No. 29-406

Source Garden Creek
Priority Date 5/1/1904
Purpose of Use Irrigation
Flow Rate 1.00 cfs
Point of Diversion T10S, R36E, Sec. 7, SENWNW
Place of Use T10S, R36E Sec. 5, S1/2NE, E1/2NW, NESE; Sec. 7, NENW
Conditioned to irrigation of 50 acres within 117.3 acres when used in combination with other rights

¹ Public land survey descriptions in this decision without a fraction following a two alpha character-descriptors are presumed to be followed by the fraction "1/4". The full description of this location is SE1/4NW1/4NW1/4, Section 7, Township 10 South, Range 36 East, Boise, Meridan. All locations are in Bannock County.

Decreed Water Right No. 29-4102

Source Spring
Priority Date 6/1/1942
Purpose of Use Irrigation
Flow Rate 1.00 cfs
Point of Diversion T10S, R36E, Sec. 5, NESENW
Place of Use T10S, R36E Sec. 5, S1/2NE, E1/2NW, NESE
Conditioned to irrigation of 10 acres within 104.3 acres when used in combination with other rights and 46.5 acres when used in combination with 29-4187

Decreed Water Right No. 29-4187

Source Little Gap Creek
Priority Date 6/1/1942
Purpose of Use Irrigation
Flow Rate 1.00 cfs
Point of Diversion T09S, R35E, Sec. 36, NESE
Place of Use T10S, R36E Sec. 5, S1/2NE, E1/2NW, NESE
Conditioned to irrigation of 36.5 acres within 104.3 acres when used in combination with other rights and 46.5 acres when used in combination with 29-4187

2. Applicant's Exhibit 1 illustrates the 16 acres in T10S, R36E, Section 5, S1/2NE, NESE from which the applicant proposes to transfer water under water rights 29-403, 29-404, 29-405, 29-406, 29-4102 and 29-4187. Exhibit 1 also illustrates the 16 acres in T10S, R36E, Section 5, S1/2NW the applicant proposes to begin irrigating. The new place of use joins the decreed place of use on the west.

3. Nestor protested the application for the following reasons:

- a. Lower end of the North Lateral Ditch ("North Lateral") must be enlarged because there is no room for more water
- b. It would change the rotation schedule in the North Lateral
- c. A measuring device would be necessary because water rights would be uneven
- d. Hatleys must bear the cost of making the changes in the North Lateral.

4. Hatleys, Nestor, and Diamond I receive water via the North Lateral diverted from Garden Creek in T10S, R36E, Section 7, NWNW. The North Lateral channel flows in a north westerly direction traversing Section 6 and Section 5. Hatleys presently divert their irrigation water from the North Lateral at a check structure in Township 10 South, Range 36 East, Section 5, NWSNW. Nestor diverts his irrigation water from the North Lateral down stream from Hatleys.

5. Hatleys propose installation of a new check structure approximately one-quarter mile upstream from their existing diversion structure. The new check structure will be located just inside the southern boundary of Township 10 South, Range 36 East, Section 5, SWNW where the North Lateral enters the quarter-quarter. This proposed structure will consist of a 21-inch diameter concrete culvert with a metal slide gate. Hatleys propose diversion of water into an open channel at the check structure that will convey the water to the new place of use.

6. Garden Creek is in Water District 29B ("WD29B"). As required by Idaho Code 42-222, IDWR contacted the Watermaster for WD29B to obtain his opinion of the transfer application. Gary Blanchard, 2007 Watermaster, returned to IDWR a written recommendation for the application for transfer stating he does not oppose approval of this application.

7. Hatleys presented the proposal of installing a new check structure in the North Lateral at the 2007 annual meeting for WD29B. The meeting participants did not object to the proposal.

8. The proposed change will not result in more water being diverted into the North Lateral or adding days to the present rotation schedule.

9. Hatleys also hold 30 shares of stock in Garden Creek Irrigation Company, the holder of decreed right no. 29-362. The new place of use identified on the application is included in the service area of Garden Creek Irrigation Company.

10. Nestor's diversion(s) on the North Lateral is down stream from Hatleys' current and proposed diversion.

ANALYSIS

Implementing the change in place of use proposed by the application will not affect the quantity of water diverted into the North Lateral nor will it effect the established rotation for distributing water on Garden Creek and the North Lateral. Hatleys acknowledge they are responsible for paying the cost of constructing a new check structure. They are also responsible for maintaining the check structure.

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 Sec. 42-222, Idaho Code.

3. The change requested by the transfer application will not injure other water rights

4. The change requested by the transfer application will not enlarge the use of the rights sought to be changed.

5. The change requested by the transfer application is in the local public interest as defined in Idaho Code § 42-202B.

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

7. The application for transfer should be approved.

ORDER

IT IS HEREBY ORDERED that application for transfer no. 73426 is **Approved**. All the water rights are subject to the conditions listed below.

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.

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

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

Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 29B.

This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the lands above.

The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).

Rights 29-403, 29-404, 29-405, 29-406, 29-4102 and 29-4187 when combined shall not exceed a total diversion rate of 2.35 cfs and the irrigation of 117.3 acres.

In addition, the water rights transferred are also subject to the following conditions:

WATER RIGHT NO. 29-403

This right is limited to the irrigation of 37.5 acres within the place of use described above in a single irrigation season.

WATER RIGHT NO. 29-404

This right is limited to the irrigation of 50 acres within the place of use described above in a single irrigation season

WATER RIGHT NO. 29-405

This right is limited to the irrigation of 37.5 acres within the place of use described above in a single irrigation season.

WATER RIGHT NO. 29-406

This right is limited to the irrigation of 50 acres within the place of use described above in a single irrigation season

WATER RIGHT NO. 29-4102

This right is limited to the irrigation of 10 acres within the place of use described above in a single irrigation season

WATER RIGHT NO. 29-4187

This right is limited to the irrigation of 36.5 acres within the place of use described above in a single irrigation season

Dated this 29th day of February, 2008.

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

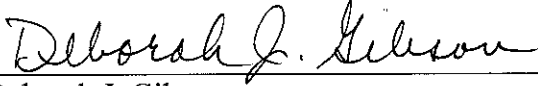
I HEREBY CERTIFY that on this 29th day of February, 2008, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, and properly addressed to the following:

Document(s) Served: Preliminary Order and Explanatory information to accompany a Preliminary Order when a hearing was held.

SHELDON HATLEY
13595 THACKER
ARIMO ID 83214

JACK HATLEY
3417 W ARIMO RD
ARIMO ID 83214

DAVID EMERY NESTOR
1789 W STINGER RD
MCCAMMON ID 83250


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

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 issuance 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.