

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
IN AND FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 72572 (WATER RIGHT NOS.)
29-00091B, 29-00093B, 29-00107B, 29-10327,)
29-10329, 29-10331, 29-13231, 29-13232,)
AND 29-10330) IN THE NAME OF)
KENNETH D. ANDRUS, COLLEEN LLOYD)
ANDRUS, AND JIM ANDRUS)
_____)

PRELIMINARY ORDER

On October 3, 2006, the Idaho Department of Water Resources ("IDWR") conducted a hearing regarding protests filed against application for transfer no. 72572 in the name of Kenneth D. Andrus, Colleen Lloyd Andrus, and Jim Andrus. Randall C. Budge, Attorney at Law, appeared on behalf of Andrus.

Protests against the application were filed by Jerry Hatch ("Hatch"), and Michael ("Mike Chambers") and Eileen Chambers ("the Chambers").

At the hearing, Mike Chambers appeared pro se on behalf of Mike and Eileen Chambers. Jerry Hatch appeared representing himself.

Based on the evidence presented at the hearing and the information contained in the file for the application for transfer, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Kenneth D. Andrus, Colleen Lloyd Andrus, and Jim Andrus (hereafter referred to as a single entity "Andrus") own 375 acres of land located in Sections 26, 35, and 36, T6S, R38E, Boise-Meridian, Caribou County, Idaho.

2. Andrus seeks to transfer nine water rights appurtenant to the Andrus property. The water rights are 29-10331, 29-13232, 29-13231, 29-10329, 29-10330, and 29-1107B, 29-91B, 29-93B, and 29-10327. These water rights will be referred to hereafter as the "Andrus water rights." All but one of the water rights presently authorize diversion from Toponce Creek at the same two points of diversion:

T6S	R38E	Section 34	Lot 11 (SENESEW) ¹
		Section 35	Lot 12 (NENWSW)

Water right no. 29-10331 describes the identical point of diversion in Lot 12 (NENWSW), Section 35. Water right no. 29-10331 describes another point of diversion in the SENESEW of Section 34, but does not locate it within Lot 11. The hearing officer assumes that the non-identification of Lot 11 was an oversight, and that the points of diversion for water right no. 29-10331 are as described above.

3. The place of use for water right nos. 29-10331, 29-13232, 29-13231, 29-10329, 29-10330, and 29-1107B, 29-91B, 29-93B, and 29-10327 is described as follows:

Place of Use:

		<u>PLS Description</u>	<u>Acres</u>	
T6S	38E	Section 26	Lt. 11 (NESEW)	20
			Lt. 12 (NWSW)	37
			Lt. 13 (SWSW)	39
		Section 35	Lt. 1 (NENE)	40
			Lt. 2 (NWE)	41
			Lt. 3 (NENW)	41
			Lt. 4 (NWNW)	40
		Section 36	Lt. 2 (NWE)	39
			Lt. 3 (NENW)	39
			Lt. 4 (NWNW)	39
			Total Acres	375

4. Additional components of each of the water rights are described below:

Water Right no. 29-10331:

Priority Date: July 6, 1868

Flow Rate: 3.144 cfs (The total combined flow rate authorized for this right and right no. 29-10332 is 3.144 cfs)

Annual Volume: Not specified

(Use of this right with right no. 29-10332 is limited to the irrigation of a combined total of 157.4 acres in a single irrigation season.)

Water Right no. 29-107B

Priority Date: June 17, 1902 (noon)

Flow Rate: 0.60 cfs

Annual Volume: Not specified

(The total acreage irrigated is limited to 41 acres in a single irrigation season.)

¹ In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the NW1/4NE1/4SE1/4, Section 34, Township 6 South, Range 38 East, Boise Meridian.

Water Right no. 29-10327

Priority Date: June 18, 1902
Flow Rate: 2.99 cfs
Annual Volume: Not specified
(The total acreage irrigated is limited to 135 acres in a single irrigation season.)

Water Right no. 29-13231:

Priority Date: July 1, 1906
Flow Rate: 0.07 cfs
Annual Volume: Not specified

Water Right no. 29-13232:

Priority Date: July 1, 1907
Flow Rate: 0.11 cfs
Annual Volume: Not specified

Water Right no. 29-10329

Priority Date: July 1, 1908
Flow Rate: 0.30 cfs
Annual Volume: Not specified

Water Right no. 29-91B

Priority Date: July 1, 1909
Flow Rate: 0.48 cfs
Annual Volume: Not specified

Water Right no. 29-10330

Priority Date: July 1, 1910
Flow Rate: 0.145 cfs
Annual Volume: Not specified

Water Right no. 29-93B

Priority Date: July 1, 1913
Flow Rate: 0.095 cfs
Annual Volume: Not specified

5. Application for transfer no. 72572 seeks to add a point of diversion to all nine Andrus water rights, located in the NWSWSE, Section 33, T6S, R38E. The proposed additional point of diversion is located approximately one to one-and-a-half miles upstream from the most upstream of the existing point of diversion described by the Andrus water rights (Section 34, T6S, R38E) and approximately two miles upstream from the lower point of diversion described by the Andrus water rights (Section 35, T6S, R38E). By adding the upstream point of diversion, Andrus can divert Toponce Creek water authorized by the Andrus water rights into a pressurized pipeline.

6. In approximately 1982, King Creek Grazing Association ("King Creek") began studying the feasibility of diverting water from Toponce Creek into a pipeline and pressurizing the water for delivery in closed conduits to sprinklers for irrigation. The United States Soil Conservation Service designed a pipeline system for pressurized water deliveries.

7. After the conceptual planning was complete, King Creek approached other water users who held Toponce Creek water rights, including Andrus, to determine whether they were interested in having the water diverted pursuant to their water rights delivered through the pipeline, and whether the users would be willing to participate in the cost of constructing the pipeline. Ken Andrus and the Redford Trust (or its predecessor) agreed to participate in the cost of the construction. As a result, the pipeline was designed to accommodate flow rates that might be diverted under the Andrus and Redford Trust water rights in addition to the water rights owned by King Creek.

8. In 1992, King Creek filed application for transfer no. 4192 to add the pipeline point of diversion to its water rights. The transfer was approved on July 23, 1993. The approved transfer located the pipeline point of diversion in the SWSE, Section 33, T6S, R38E. The diversion from Toponce Creek for the pipeline is located just downstream from the boundary of the U.S. Forest Service lands.

9. In 1994, King Creek finished construction of the pipeline and began diverting its water through the pipeline. In addition, the Redford Trust water rights and water rights held by Andrus were also diverted through the pipeline. Finally, water right no 29-231, held by the Shoshone – Bannock Tribes, and authorizing delivery of water to a parcel of land leased by King Creek known as Grazing Allotment 61, was also diverted in the pipeline. The point of diversion for the King Creek Pipeline was not authorized as a point of diversion for the water rights held by Andrus, the Redford Trust, or the Shoshone – Bannock Tribes. Water was diverted illegally into the pipeline under the water rights held by these individuals or entities.

10. In 2003, IDWR ordered cessation of diversion of water into the pipeline under the Redford Trust and Andrus water rights. In 2004 and 2005, the Redford water rights and the Andrus water rights were diverted into the pipeline after approval of a temporary transfer by IDWR authorizing temporary diversion of water under the rights into the pipeline.

11. The Redford Trust filed application for transfer no. 71551 with IDWR proposing to add the head of the King Creek Pipeline as a point of diversion. In 2004, King Creek acquired the property owned by the Redford Trust that was described as a place of use for the water rights sought to be transferred. On May 22, 2006, IDWR approved application for transfer no. 71551.

12. The additional point of diversion from Toponce Creek proposed by this application for transfer is located one to two miles upstream from the presently authorized points of diversion. The protestants argue that diverting the additional water from the new point of diversion will diminish the amount of water available to them for irrigation and will diminish the water flowing in the creek for fisheries, wildlife, and other habitat and riparian values.

13. Protestant Jerry Hatch holds water right no. 29-100. Some of the water right components are:

Flow rate:	0.58 cfs from Toponce Creek
Beneficial Use:	Irrigation of 29 acres
Priority date:	June 18, 1902
Point of diversion:	NWNWSE, Section 34, T6S, R38E

14. Protestants Mike and Eileen Chambers hold the following water rights:

Right no. 29-86	Priority date: June 18, 1902	Flow rate: 0.07 cfs
Right no. 29-107A	Priority date: June 17, 1902	Flow rate: 1.0 cfs
Right no. 29-13249	Priority date: June 18, 1902	Flow rate: 2.48 cfs

The point of diversion for the Chambers water rights is located in the SWSE, Section 33, T6S, R38E.

15. Water rights bearing priority dates of June 17 and June 18, 1902 are only deliverable during high water. During the five to seven irrigation seasons preceding 2005, 1902 priority water rights were either not deliverable for the entire irrigation season or deliverable only for a short time. In 2005, the 1902 priority water rights were deliverable until mid-June. In 2006, the 1902 priority water rights were deliverable until the end of June.

16. Chambers filed an adjudication claim for water right no. 29-10278. The claim asserted the existence of a July 6, 1868 water right authorizing diversion of 3.0 cfs of water from Toponce Creek. Records of IDWR show that claim no. 29-10278 was disallowed by the SRBA Court because there was no lawful appropriation shown and that the 1868 priority water was "decreed and used on other lands"

17. Steve Hebdon, Watermaster for the Portneuf River, testified about water deliveries on Toponce Creek. Prior to the early 1990s, the water users on Toponce Creek rotated the water among themselves and were not subject to delivery calls by other water users downstream. As a result, some of the holders of late priority Toponce Creek water rights received water along with the senior priority water right holders.

18. In approximately 1994, the McCammon Ditch Company, a water user holding a water right(s) bearing a priority date earlier than 1902, demanded stricter delivery of water by the watermaster. As a result of the early priority date of the water right(s) held by McCammon Ditch Company, 1902 priority Toponce Creek water rights were shut-off to satisfy the McCammon Ditch Company water rights.

19. Exhibit no. 4 is a listing of the water rights diverted from Toponce Creek. Approximately 30 cfs of water rights bear a priority date of July 6, 1868. During much of the 2005 irrigation season, there was only sufficient water to satisfy all or a portion of the 1868 priority water rights. During the lowest part of the year, the watermaster could only deliver 10

cfs of the 30 cfs demand under the 1868 water rights. As a result, the water in Toponce Creek was totally apportioned among the 1868 priority water right holders.

20. By late July in the 2006 irrigation season, only the 1868 priority water rights were deliverable to users holding water rights authorizing diversion from Toponce Creek.

21. Andrus has more efficiently used water diverted under its water rights by delivering it through the pipeline. Greater efficiency will increase the supply of water available to other water users.

22. The hearing officer evaluated whether the Andrus proposed addition of a point of diversion upstream to the head of the King Creek Pipeline would injure other water rights by removing water from the channel. If Toponce Creek gains water as it flows downstream, particularly if Toponce Creek gains significant flow between the Hatch diversion or the Chambers diversions and the present Andrus points of diversion, addition of an upstream point of diversion could injure other water rights by depriving junior priority right holders of water that could have been delivered to them. If Toponce Creek loses water as it flows downstream, addition of an upstream point of diversion will not injure other water right holders unless a call by Andrus for delivery of the Andrus water rights at their present points of diversion were futile, but by adding a point of diversion above, the Andrus water rights could still be delivered.

23. Steve Hebdon testified that Toponce Creek loses water as it flows downstream between the head of the King Creek Pipeline and the existing Andrus points of diversion.

24. Andrus, or its predecessor diverted their water rights at the old points of diversion during low flows when all other water rights were curtailed. If Toponce Creek loses water between the head of the King Creek Pipeline and the old Andrus points of diversion, the losses were not significant enough to result in a futile call when Andrus or its predecessor requested delivery of water.

25. The distance between the Chambers diversion (SWSE, Section 33) and the current most upstream diversion (NWNSE, Section 34) owned by Andrus is less than 1.5 miles. The distance between the Hatch diversion (NWNSE, Section 34) and the current most upstream diversion (NWNSE, Section 34) owned by Andrus is less than one-half mile. The hearing officer does not believe that Toponce Creek gains or loses significant flows of water in these reaches. As a result, the Andrus proposed diversion at the head of the King Creek Pipeline would not diminish the flow of water available for diversion under other water rights.

26. Diversion of water by Andrus into the King Creek Pipeline at the new proposed point of diversion will reduce the quantity of water flowing in the Toponce Creek Channel for a distance of approximately 11,000 feet. Water flowing in the Toponce Creek Channel through property and past residences owned by Jerry Hatch and Mike Chambers will be diminished as a result of the upstream diversion of water.

27. Irrigation season flows in the reach of Toponce Creek between the head of the King Creek Pipeline and the existing Andrus points of diversion have been diminished by a number of factors:

- (a) Approval of transfer no. 4192 and transfer no. 71551 adding an upstream point of diversion at the head of the King Creek Pipeline;
- (b) Unauthorized diversion of Toponce Creek water into the King Creek Pipeline that should be diverted at other points of diversion from Toponce Creek;
- (c) Administration of Portneuf River and tributary water rights as a single source of water; and
- (d) Several years of drought in years 2000 through 2004.

28. The Portneuf Marsh Valley Canal Co. LTD holds water right no. 29-53, which authorizes diversion from Toponce Creek to storage during the nonirrigation season. Water right no. 29-53 bears a priority date of July 16, 1912. The Portneuf Marsh Valley Canal Co. diverts water from Toponce Creek through a conveyance channel locally referred to as "the Feeder Canal." The Feeder Canal delivers water to the Chesterfield Reservoir. The point of diversion for the Feeder Canal is located approximately one-quarter of a mile downstream from the head of the King Creek Pipeline. For decades prior to construction of the King Creek Pipeline, during the nonirrigation season, almost the entire flow of Toponce Creek was diverted in the Feeder Canal, delivered to, and stored in Chesterfield Reservoir.

29. Based on the testimony of Jerry Hatch, prior to construction of and diversion of water through the King Creek Pipeline, trout could be caught in the reach of Toponce Creek between the Hatch residence and the Forest Service Boundary. Based on testimony about the operation of the Portneuf Feeder Canal and significant dewatering during the nonirrigation season, however, it is unlikely that the fish caught were year-round residents in the reach. It is more likely that the fish were originally residents of Toponce Creek within the U.S. Forest boundary and were distributed into the reach during the spring runoff and when irrigation water was being delivered to downstream points of diversion.

30. Elements of other water rights, particularly the 1868 priority water right held by the Shoshone – Bannock Tribes, require that water be left in Toponce Creek for delivery to parcels downstream of the points of diversion for Chambers and Hatches.

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 Idaho Code § 42-222.

3. Addition of an upstream point of diversion will not reduce the quantity of water available for other water rights. As a result, other water rights will not be injured by the approval of the application for transfer.

4. Adding a point of diversion for the King Creek Pipeline will not result in an enlargement of use of the water rights sought to be transferred.

5. Flexibility in water deliveries and greater efficiencies by delivering water through gravity pressure in the King Creek Pipeline is in the local public interest.

6. Delivery of water through a system pressurized by gravity will result in conservation of the waters of the State of Idaho and conservation of energy.

7. Approvals of additional upstream points of diversion for other early priority water rights may not be in the local public interest. Delivery of water for water rights bearing an 1868 priority to downstream points of diversion will insure that some water will remain in Toponce Creek during the growing season to insure that riparian and aquatic areas receive minimal sustaining quantities of water.

8. Application for transfer no. 71551 should be approved.

9. Water rights owned by the Shoshone -- Bannock Tribes must not be diverted through the King Creek Pipeline unless IDWR approves a transfer authorizing the diversion.

ORDER

IT IS HEREBY ORDERED that application for 72572 is **Approved** subject to the following conditions:

Water Right no. 29-10331:

Rights 29-10331 and 29-10332 when combined shall not exceed a total diversion rate of 3.14 cfs and the irrigation of 157.4 acres.

Water Right no. 29-107B:

The priority date is more accurately described as June 17, 1902 noon.

The total acreage irrigated is limited to 41 acres in a single irrigation season.

Water Right no. 29-10327:

The total acreage irrigated is limited to 135 acres in a single irrigation season.

All Water Rights Except 29-10331:

The period of use for the irrigation described in this approval may be extended to a beginning date of 4/15 and an ending date 9/15 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 4/15 and after 9/15 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than 7/7/2005.

All Water Rights:

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. 29

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.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement and lockable controlling works for all authorized points of diversion. The means of measurement and controlling works must be suitable for control of the diversions and acceptable to the watermaster.

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

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

Rights 29-91B, 29-93B, 29-107B, 29-10327, 29-10329, 29-10330, 29-10332, 29-13231, and 29-13232 when combined shall not exceed a total diversion rate of 7.56 cfs and the irrigation of 375 acres.

Rights 29-13231, 29-13232, 29-10329, 29-91B, 29-93B, 29-10330, 29-10327, 29-10331 and 29-107B are all diverted through the points of diversion described above.

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 29th day of January, 2007.

A handwritten signature in black ink, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2007, a true and correct copy of the documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to:

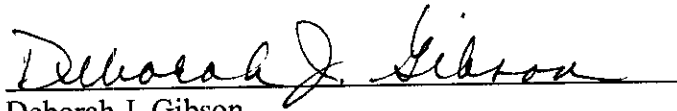
Document(s) Served: Preliminary Order, and information sheet titled: Responding to Preliminary Orders issued by the Idaho Department of Water Resources

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