

Evans, Lynne

From: Evans, Lynne
Sent: Thursday, July 18, 2024 4:56 PM
To: Michael P. Lawrence; Scanlan, Terry; Darrell Early; Conrad, Vic
Cc: Miller, Nick
Subject: Order on Petition for Reconsideration for Transfer No. 87042
Attachments: 87042 Order on Petition for Reconsideration.pdf

Dear Parties,

Please see the attached Order on Petition for Reconsideration and/or Clarification regarding Application for Transfer No. 87042. This order has also been sent to all parties by mail.

If you have any questions or concerns, please reach out to Nick Miller.

Regards,



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

**IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 87042 IN THE)
NAME OF BRISBIE LLC)
_____)**

**ORDER ON PETITION FOR
RECONSIDERATION AND/OR
CLARIFICATION**

PROCEDURAL HISTORY

On October 6, 2020, the Department of Water Resources (“Department”) received an application for transfer (“Application”) filed by Brisbie LLC (“Brisbie”) to change elements of four water rights (“the transferred rights”) pursuant to §42-222, Idaho Code. In short, the Application proposed to change the place of use, points of diversion, season of use, and nature of use of the four water rights from irrigation to year-round industrial use on the Applicants’ land, from wells on the Applicant’s land for uses at a data center to be constructed on that land. The Application was protested by the City of Boise. The protest was resolved through settlement with the Applicant to limit the diversion rate from certain wells in the vicinity of the City of Boise’s nearby wells, and additional obligations of the parties agreed to as a private agreement.

On June 13, 2024, the Department approved the Application as a preliminary order (“Approval”). The Approval included the requested changes to the four transferred rights, as well as changes to conditions on four associated water rights that had, prior to the Approval, contained combined use limitations with the transferred rights.

On June 27, 2024, Brisbie filed *Petition for Reconsideration and/or Clarification* (“Petition”), asking the Department to reconsider and/or clarify two aspects of the Approval. The first asks the Department for clarification or modification of the following condition of approval (“Condition”) that was added to each of the four transferred water rights:

“The place of industrial use authorized by this approval may include land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not be used for irrigation unless the water is first used in the industrial facility as authorized by this water right.”

Brisbie notes two practices associated with treatment of the industrial effluent via land application that are common, but potentially prohibited by the Condition. Both involve the use of “fresh” water (water that has not been sent through the industrial facility). First, the effluent may require dilution with “fresh” water prior to being suitable for further treatment by land application. Second, Brisbie notes the irrigated ground used for treatment may require periods of “maintenance” i.e. irrigation with solely “fresh” water to maintain the viability of the land to treat the water when the industrial effluent is periodically not being produced.

SUPPORT DATA

Second, in the Petition, Brisbie asks the Department to reconsider the Approval by adding a combined diversion rate limitation to some of the associated water rights to prevent enlargement of some of those rights and diminishment of others. **IN FILE # 63-3362**

ANALYSIS

The condition authorizing wastewater application for irrigation purposes to satisfy water quality requirements.

In the Petition, Brisbie asks the Department to either clarify that the Condition, “does not preclude the use of industrial water for dilution of treated wastewater or maintenance of land application sites typically irrigated with treated wastewater when wastewater is not available.” or modify the Condition to provide the clarification as follows, with the revisions to the Condition underlined:

The place of industrial use authorized by this right may include land upon which wastewater may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this right shall not be used for irrigation unless the water is first used in the industrial facility as authorized by this water right or unless the water is needed for wastewater dilution purposes or to maintain land application areas within the authorized place of use for subsequent wastewater discharge when treated wastewater is intermittently unavailable.

The Condition, as applied in the Approval, represents a standard Department condition that is (sometimes with slight variations) included on hundreds of water rights in Idaho, including other rights associated with the transferred rights. The questions raised by Brisbie are likely applicable to many other industrial water users that hold rights with the same condition. Brisbie’s situation is not distinguishable from other industrial right holders and, as discussed below, administration of the Condition is fact-specific and the facts, even for Brisbie can change over time, so the Department declines to modify the standard Condition and instead elects to grant the request for clarification.

Brisbie asks for clarification that the Condition, “does not preclude the use of industrial water for dilution of treated wastewater or maintenance of land application sites typically irrigated with treated wastewater when wastewater is not available.” The Department offers the following discussion for clarification.

The Department considers the use authorized under the industrial right to include reasonable methods of wastewater treatment that are necessary to meet state or federal regulatory requirements. Land application by irrigation with effluent is a reasonable and common method of wastewater disposal. The Department considers dilution of the industrial effluent with “fresh” water diverted under the industrial water right as an authorized use to the extent it is necessary to meet water quality requirements¹. Maintaining (irrigating) an effluent-irrigated field using the industrial water right without applying effluent would be authorized if it is reasonable and necessary to meet water quality requirements. Whether a practice is reasonable or necessary is somewhat fact-specific, but in general, the Department would look, for example, to best management practices as well as any project-related permits, plans, etc. adopted by responsible state or federal agencies.

¹ Nothing here should be construed to imply that any practice authorizes the right holder to exceed the elements on the face of the water right, including rate, volume, season of use, etc.

The request to impose combined limitations on the associated water rights.

Brisbie asks the Department to impose a combined diversion rate limitation of 3.60 cfs on three of the four associated water rights. Brisbie asserts that the Approval, lacking that combined limitation, “results in an impermissible enlargement of the rights that could impair Brisbie’s use of right no. 63-10383”. See Petition Page 6. Note that 63-10383 is the fourth associated water right included in the Approval. The Petition, in other words, is not asking the Department to take any action on water rights that are the subject of the application for transfer. The request is for a change to only the associated rights; a change that will not impact the transferred rights. Further, the request is to change a situation that preexisted the Approval, not a situation created by the Approval. For these reasons, this part of the Petition will not be granted as this is not the appropriate venue to address this topic. Nevertheless, the Department agrees that actions taken by the Department prior to this approval appear to have resulted in water right records for the associated rights that, when taken together, do not accurately reflect the authorization of the rights as partially decreed or licensed. Nevertheless, the Department would address this situation separately from the Petition.

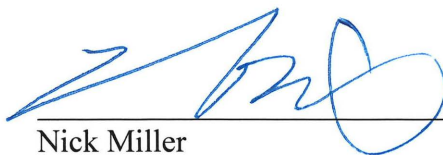
ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that Brisbie’s petition for clarification is GRANTED. The Approval does not preclude the use of industrial water for dilution of treated wastewater or maintenance of land application sites typically irrigated with treated wastewater when wastewater is not available, provided such activities are reasonable and necessary to comply with state or federal regulatory requirements.

IT IS FURTHER ORDERED that Brisbie’s petition to modify conditions on 63-3362, 63-11347, 63-34795, and 63-35388 is DENIED.

IT IS FURTHER ORDERED that Brisbie’s petition to modify the Approval to impose additional conditions on 63-7531, 63-35356, and 63-35411 is DENIED as it is beyond the scope of the Application.

Dated this 18th day of July 2024.



Nick Miller
Manager, IDWR Western Region

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July, 2024, I served a true and correct copy of the foregoing document on the following by the method(s) indicated below:

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Lynne Evans

Administrative Assistant I