

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

|                                           |                            |
|-------------------------------------------|----------------------------|
| <b>IN THE MATTER OF APPLICATION )</b>     |                            |
| <b>FOR TRANSFER NO. 89436 IN THE )</b>    | <b>PRELIMINARY ORDER</b>   |
| <b><u>NAME OF RENO DITCH CO LLC</u> )</b> | <b>DENYING APPLICATION</b> |

**PROCEDURAL HISTORY**

On October 3, 2024, Reno Ditch Company LLC (“Reno”) filed Application for Transfer 89436 with the Idaho Department of Water Resources (“Department”). The Department published notice of the application in November and December 2024. No protests were filed against the application.

After carefully considering the application and the information available to the Department at this time, the Department finds, concludes, and orders as follows:

**FINDINGS OF FACT**

1. Application 89436 proposes to change the nature of use, season of use, and place of use for the following water rights (“subject rights”) held by Reno:

| Right No.      | Priority Date | Rate (cfs) | Vol (afa) | Comb Vol (afa) | Acres | Combined Acres |
|----------------|---------------|------------|-----------|----------------|-------|----------------|
| 32-63          | 4/1/1904      | 3.2        | 557.2     | 560            | 159.2 | 160            |
| 32-65          | 5/10/1884     | 3.2        | 560       |                | 160   |                |
| 32-64          | 4/1/1907      | 3.2        | 560       | 560            | 160   | 160            |
| 32-74          | 10/1/1910     | 0.14       | 59.4      | 59.4           | 160   | 160            |
| 32-75          | 5/15/1911     | 0.26       | 110.4     | 110.4          | 160   |                |
| 32-76          | 5/15/1912     | 0.8        | 339.6     | 339.6          | 160   |                |
| 32-83          | 5/15/1912     | 0.46       | 195.3     | 195.3          | 160   | 160            |
| 32-101         | 6/4/1909      | 2.9        | 560       | 560            | 160   | 160            |
| <b>Totals:</b> |               | 14.16      |           | 2384.7         |       | 800            |

2. The authorized source of the subject rights is Birch Creek tributary to sinks and the existing nature of use for all the subject rights is irrigation. In combination, the subject rights are used to irrigate 800 acres.

3. Currently, the subject rights are combined with twenty-nine other water rights from Birch Creek and used to irrigate 3,921.4 acres within a 5,723-acre permissible place of use. Application 89436 proposes to change the nature of use of the subject rights from irrigation to

diversion to storage, irrigation storage, and irrigation from storage. Stated differently, the application proposes to change the nature of use from direct irrigation to irrigation storage.

4. The primary crop grown on the 800 irrigated acres authorized by the subject rights is frequently cut alfalfa. Based on evapotranspiration data from the ETIDWR website, the precipitation deficit (irrigation demand) for frequently cut alfalfa is 2.41 acre-feet per acre. *See* Attachment 8a, Application 89436. Therefore, the maximum historical consumptive use associated with the 800 irrigated acres authorized by the subject rights is 1,929.1 acre-feet (800 acres x 2.41 af/acre). *Id.*

5. Application 89436 states that Reno will construct a storage reservoir with an approximate capacity of 1,493.3 acre-feet. *See* Attachment 7a, Application 89436. The proposed place of use for the storage reservoir is within Sections 7 and 8, T08N, R31E, upgradient of the 3,921.4 acres irrigated under Reno's Birch Creek water rights.

6. The proposed place of use for irrigation from storage is the entire 5,723-acre permissible place of use described on Reno's Birch Creek irrigation water rights. The proposed place of use includes the 800 acres associated with the subject rights. In other words, Reno proposes to continue to irrigate the 800 acres with water from the proposed reservoir.

7. The Reno irrigation system is a large, interconnected irrigation system. All of Reno's irrigated acres are served through a common ditch and pipeline from Birch Creek. Reno will use the same common ditch and pipeline to convey water from the proposed reservoir to the proposed 5,723-acre place of use.

8. Reno's diversion on Birch Creek is the last irrigation diversion on Birch Creek. Water District 32D administers surface water rights on Birch Creek. According to delivery records from Water District 32D, Reno diverts all the water available in Birch Creek during the irrigation season. During the irrigation season, the Birch Creek channel below the Reno diversion is usually dry. If the water diverted by Reno is not needed for irrigation, Reno releases the excess water from its irrigation system into dry channels or sink pits near the Reno place of use and the water seeps into the ground.

9. On March 4, 2016, Reno filed Application for Permit 32-13348, seeking a permit to divert water from Birch Creek for ground water recharge. Application 32-13348 stated: "Water will be diverted from Birch Creek into the Reno Ditch system where it will run to the recharge sites described . . . ."

10. The Department approved the application and issued Permit 32-13348 on May 2, 2016. Permit 32-13348 included the following condition ("recharge credit condition"):

This right is not an authorization for the described recharge effort to be used as mitigation or credit for any other purpose. The sufficiency of the recharge effort authorized under this right for mitigation or credit for some other purpose may be determined by the Department upon proper submission of a mitigation plan

pursuant to the Department's Rules of Conjunctive Management of Surface and Ground Water Resources, a mitigation plan to offset depletion in association with a water right application, a Management Program pursuant to Idaho Code Section 42-1416B, or any other proposal to utilize credit for the recharge effort.

11. The Department issued a license for water right 32-13348 on January 21, 2022. The license included the same recharge credit condition that existed on the original permit.

12. Reno sought mitigation credit for the excess water released from the Reno irrigation system in each year from 2016 to 2023. The Department accepted the ground water recharge occurring under water right 32-13348 as mitigation credit in 2016, 2017, 2020, and 2021. The Department did not accept Reno's ground water recharge as mitigation credit in 2018, 2019, 2022, or 2023.

13. Beginning in 2022, Idaho Ground Water Appropriators Inc. ("IGWA"), the entity that manages the collective mitigation efforts of the ground water users across the Eastern Snake Plain Aquifer ("ESPA"), declined to include any recharge occurring under water right 32-13348 in its summary of mitigation. The Department and IGWA are skeptical that the ground water recharge occurring with excess water from the Reno system is benefitting the ESPA because the water would naturally sink in the Birch Creek channel if it were not diverted by Reno.

### **RELEVANT LEGAL PROVISIONS**

Idaho Code § 42-222(1) sets forth the criteria used to evaluate transfer applications and 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.

### **ANALYSIS**

Reno proposes to include its entire 5,723-acre permissible place of use in the proposed irrigation from storage place of use. Idaho Code § 42-222 states: "The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured

thereby.” The irrigation storage volume proposed by Reno, 1,929.1 acre-feet, is created by changing the nature of use for 800 acres from irrigation to irrigation storage. Based on technical information provided by Reno, the historical consumptive use associated with the 800 acres of irrigation is 1,929.1 acre-feet. Storage water from the proposed reservoir could be used to irrigate more acres than the original 800 acres without resulting in an enlargement of use.

Application 89436 does not identify the location of the 800 acres associated with the subject rights. If Application 89436 were approved, these 800 acres, wherever they may be located within the 5,723-acre permissible place of use, cannot be irrigated directly from Birch Creek. If the 800 acres receive any water from Reno’s other water rights from Birch Creek, it would constitute an enlargement in use of the other water rights. Reno’s large, interconnected irrigation system, which would deliver the proposed storage water rights and the direct irrigation water rights from Birch Creek, creates a substantial risk of enlargement.

If Application 89436 were approved and the 800 acres associated with the subject rights were irrigated directly from Birch Creek, not only would that constitute an enlargement in use of Reno’s direct irrigation water rights on Birch Creek, but it would also circumvent the recharge credit condition of water right 32-13348. During the irrigation season, when there is excess water in the Reno irrigation system, Reno releases the excess water into recharge areas near the Reno irrigation place of use. The water released by Reno for ground water recharge is not currently eligible for mitigation credit because the water would sink in the Birch Creek channel if it were not diverted. In other words, the ground water recharge occurring through the Reno irrigation system does not increase the water levels in the regional aquifer, because it would have sunk in the Birch Creek channel anyway. If, instead of releasing the excess water for ground water recharge, Reno now captures the excess water in its proposed reservoir or uses the excess water to irrigate the 800 acres associated with the subject rights, and then uses the water from the reservoir to reduce ground water pumping, Reno would receive a mitigation benefit for the excess water without truly changing the aquifer budget.

Although the changes proposed in Application 89436 are a creative way to maximize the value of the water Reno diverts from Birch Creek, the proposed changes raise substantial enlargement concerns. In Idaho, beneficial use is “the basis, the measure, and the limit of [a water] right.” *U.S. v. Pioneer Irr. Dist.*, 157 P.3d 600, 605 (Idaho 2007) (quoting *Ickes v. Fox*, 300 U.S. 82 (1937)). This means that a water user may only divert the water required to satisfy an existing beneficial use. For irrigation water rights, a water user is not authorized to divert water if there is no immediate irrigation demand. A water user could not legally divert an irrigation water right if the irrigated acres associated with that water right are fallowed.

For Application 89436, there is a substantial risk that Reno will divert water from Birch Creek to fill the proposed irrigation storage reservoir during times when there is little or no irrigation demand. In the early irrigation season (April and May), there are times when temperatures are too cold to irrigate or there is no irrigation demand at Reno’s permissible place of use. There is a substantial risk that Reno would divert water to fill the reservoir during this period. Such a diversion would constitute an enlargement in use of the subject rights.

The proposed reservoir could only be filled during times when there is a demand for irrigation water on the 800 acres associated with the subject rights. Reno would have to wait until there is an irrigation demand to start storing water in the reservoir and could only irrigate the 800 acres with water from the reservoir. Based on the authorized diversion rate for the subject rights, Reno would only be able to divert 14.16 cfs to fill the reservoir. Therefore, the reservoir would fill at a rate of approximately 28 acre-feet per day. Given the capacity of the proposed reservoir (1493.3 acre-feet), it will take approximately 53 days for Reno to fill the reservoir. During this period, if the entire 14.16 cfs is dedicated to completely filling the proposed reservoir, the 800 acres associated with the subject rights cannot be irrigated. There is no evidence that Reno intends to forgo 53 days of actual irrigation demand to completely fill the proposed reservoir.

Measurement at locations throughout the Reno irrigation system would not alleviate the enlargement concerns. First, it is not reasonable to require the watermaster for Water District 32C to read multiple gages or meters throughout Reno's interconnected irrigation system to ascertain whether the 800 acres associated with the subject rights are receiving water from the storage reservoir or receiving water directly from Birch Creek. Second, it is not reasonable to require the watermaster to track the irrigation demand on the 800 acres associated with the subject rights to determine, on a day-to-day basis, whether there is an irrigation demand and, therefore, whether Reno can fill the proposed reservoir. Finally, there is no feasible means for the watermaster to ensure that excess water from Reno's other Birch Creek rights is not stored in the proposed reservoir. For these reasons, measurement and additional regulation by the watermaster will not overcome the substantial risk of enlargement. Reno has not proposed any conditions or regulation methods to avoid enlargement in use of its water rights.

### CONCLUSIONS OF LAW

Reno has not demonstrated that the changes proposed in Application 89436 will not result in an enlargement in use of the subject rights or Reno's associated Birch Creek water rights. Therefore, Application 89436 should be denied.

### ORDER

IT IS HEREBY ORDERED that Application for Transfer 89436 in the name of Reno Ditch Company LLC is DENIED.

Dated this 12<sup>th</sup> day of March, 2025.



James Cefalo  
Regional Manager

## CERTIFICATE OF SERVICE

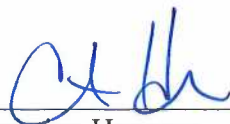
I hereby certify that on the 12<sup>th</sup> day of march 2025, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER DENYING APPLICATION, with the United States Postal Service, certified mail with return receipt requested, postage prepaid and properly addressed to the person(s) listed below:

**US MAIL - CERTIFIED**

**RE: APPLICATION FOR TRANSFER 89436**

**RENO DITCH CO LLC  
711 E TURTLE POINT DR  
IVINS, UT 84378-6775**

**ROBERT HARRIS  
HOLDEN KIDWELL HAHN & CRAPO  
1000 RIVERWALK DR, STE 200  
PO BOX 50130  
IDAHO FALLS, ID 83405-0130**



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Christina Henman  
Administrative Assistant

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department 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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

### **REQUEST FOR HEARING**

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

### **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 IDAPA Rules 37.01.01302 and 37.01.01303 (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 service date 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.