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RECEIVED

Mar 26, 2025

DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 89436 IN THE
NAME OF RENO DITCH CO LLC

**APPLICANT'S PETITION FOR
RECONSIDERATION**

Reno Ditch Co., LLC ("Applicant" or "Reno"), by and through its attorney of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby files Applicant's Petition for Reconsideration (this "Petition") regarding the Idaho Department of Water Resources' ("IDWR" or "Department") issuance of a *Preliminary Order Denying Application* ("Preliminary Order") concerning Transfer No. 89436 (the "Transfer"). The *Preliminary Order* is dated and was served on March 12, 2025 by James Cefalo, Eastern Regional Manager of the Department.

IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho." Rule 001.02.¹ The *Preliminary Order* initiated a contested case before the Department. Idaho Code § 67-5243 and Rule 730 allows parties fourteen (14) days after the service date of a

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

preliminary order to file a petition for reconsideration. This *Petition* is being filed within this timeframe. *See also* Idaho Rules of Civil Procedure 11.2(b) (“A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.”).

BACKGROUND

Prior to filing the Transfer application, Reno’s counsel and company representatives discussed the specifics of its project proposal with Department staff to construct two storage reservoirs and what necessary changes to Reno’s water rights are necessary to authorize the storage of water. Ultimately it was decided to select certain Reno water rights that span different priority dates and then change the nature of use of these rights for storage water purposes. Because the Transfer proposes a change in the nature of use (from irrigation to irrigation storage water purposes), to protect against enlargement as provided in Department’s guidance memoranda, the converted irrigation water rights were proposed to be limited to the historic consumptive use of water diverted under these rights for irrigation (resulting in a reduction of the authorized diversion volume of the water rights) as summarized in the following summary chart submitted with the Transfer application:

RENO DITCH COMPANY, LLC WATER RIGHTS																	
Water Rights BEFORE Transfer																	
Type	Basin	Sequence	Basis	Status	Priority Date	Div. Rate (cfs)	Comd. Div. Rate (cfs)	Div. Volume (AF)	Cmbd. Div. Volume (AF)	Permiss/ble POU	1st Cmbd. POU	2nd Cmbd. POU	Individual Acre Limit	Source	Water Use	Season of Use	Owner
WR	32	63	Decreed	Active	4/1/1904	3.2	None	557.2	560	5723 (along with other irrigation water rights)	3921.4 (along with other irrigation water rights)	160	159.2	BIRCH CREEK	IRRIGATION	4/1 to 11/1	RENO DITCH CO LLC
WR	32	65	Decreed	Active	5/10/1884	3.2		560					160				
WR	32	64	Decreed	Active	4/1/1907	3.2		560					160				
WR	32	74	Decreed	Active	10/1/1910	0.14		59.4					160				
WR	32	75	Decreed	Active	5/15/1911	0.26		110.4					160				
WR	32	76	Decreed	Active	5/15/1912	0.8		339.6					160				
WR	32	83	Decreed	Active	5/15/1912	0.46		195.3					160				
WR	32	101	Decreed	Active	6/4/1909	2.9		560					160				
TOTALS						14.16		2384.7				800					
Conversion Analysis																	
C/R of Altaifa (freq. cuttings) (mm)								735									
C/R of Altaifa (freq. cuttings) (in)								28.9									
C/R of Altaifa (freq. cuttings) (ft)								2.41									
Total Acres								800.00									
Total Conversion Volume								1929.1									
Water Rights AFTER Transfer																	
Type	Basin	Sequence	Basis	Status	Priority Date	Div. Rate (cfs)	Comd. Div. Rate (cfs)	Div. Volume (AF)	Cmbd. Div. Volume (AF)	Permissible POU	1st Cmbd. POU	2nd Cmbd. POU	Individual Acre Limit	Source	Water Use	Season of Use	Owner
WR	32	63	Decreed	Active	4/1/1904	3.2	None	385.8	1929.1	5723 (along with other irrigation water rights)	None	None	None	BIRCH CREEK	DIVERSION TO STORAGE IRRIGATION STORAGE IRRIGATION	4/1 to 11/1 (DIVERSION TO STORAGE) 1/1 to 12/31 (IRRIGATION STORAGE) 4/1 to 11/1 IRRIGATION	RENO DITCH CO LLC
WR	32	65	Decreed	Active	5/10/1884	3.2		385.8									
WR	32	64	Decreed	Active	4/1/1907	3.2		385.8									
WR	32	74	Decreed	Active	10/1/1910	0.14		385.8									
WR	32	75	Decreed	Active	5/15/1911	0.26		385.8									
WR	32	76	Decreed	Active	5/15/1912	0.8		385.8									
WR	32	83	Decreed	Active	5/15/1912	0.46		385.8									
WR	32	101	Decreed	Active	6/4/1909	2.9		385.8									
TOTALS						14.16		1929.1				N/A					

As summarized, after approval of the Transfer, the authorized diversion volume would be limited to what the historically irrigated crops actually consumed—1,929.1 acre-feet—rather than the authorized diversion volume of 2,384.7 acre-feet, which is a reduction of 455.6 acre-feet.

The Transfer was advertised and not protested by any water users. On March 12, the Department *sua sponte* denied the Transfer. The *Preliminary Order* states that “Reno has not proposed any conditions or regulation methods to avoid enlargement in use of its water rights.” *Preliminary Order* at 5. However, the Department did not outline concerns with the Transfer in writing or provide an opportunity for Reno to address enlargement concerns with proposed conditions or regulation before issuing the *Preliminary Order*.

For the reasons set forth below, the *Preliminary Order* should be reversed, and an approval for the Transfer should be issued with the conditions described below contingent upon submission of a filing by Reno of an abandonment of Water Right No. (“WR”) 32-13348.

ARGUMENT

The *Preliminary Order*'s analysis begins with a citation to a portion of Idaho Code § 42-222 important for this matter, which provides the following: "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." Idaho Code § 42-222(1); *Preliminary Order* at 3-4. Based on this statute, the *Preliminary Order* acknowledges that "[s]torage water from the proposed reservoir could be used to irrigate more acres than the original 800 acres without resulting in an enlargement of use." *Preliminary Order* at 4.

This above-quoted statutory provision should govern and guide the enlargement analysis of a converted storage right (again, with a reduction in authorized diversion volume). However, despite acknowledgement of this statutory provision, the *Preliminary Order* outlines several matters of enlargement that served as the basis to deny the Transfer. These bases are:

1. The Transfer does not identify the specific location of the 800 acres of the water rights subject to the Transfer, and if the Transfer is approved, these 800 acres "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." *Id.* at 4.
2. Approval of the Transfer would also circumvent the recharge credit condition of WR 32-13348. *Id.*
3. Approval of the Transfer would create "a substantial risk that Reno will divert from Birch Creek to fill the proposed irrigation storage reservoirs during times when there is little or no irrigation demand." *Id.*
4. "Measurement at locations throughout the Reno irrigation system would not alleviate the enlargement concerns," particularly in relation to the first item of concern described above. *Id.* at 5.

Each of these bases are addressed below.

- A. As provided in Idaho Code § 42-222, storage water can be used to irrigate more acres than the original 800 acres without resulting in an enlargement, and further, to protect against an increase in the volume of water diverted, the water rights subject to the Transfer will be limited to their historic consumptive use.

There is no statutory definition of enlargement in the Idaho Code. In a guidance document, the Department has described enlargement as follows: “Generally, enlargement occurs when there is an increase in the total diversion rate, **annual diversion volume** or extent of beneficial use (except for non-consumptive rights) beyond the amounts authorized under the water right prior to a transfer application.” Cefalo, James, *Administrator’s Memorandum, Transfer Processing No. 24*, October 1, 2024 (the “*Transfer Memo*”) at 18 (emphasis added) (*available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/guidance/Transfer-Process-24-October-1-2024.pdf>*). To address concerns with enlargement, and in particular increase the volume of water diverted under a water right, the *Transfer Memo* further provides:

Change in Nature of Use. For a transfer application seeking to change the nature of use of a water right, the extent of beneficial use under the right must not be enlarged.

...

For a transfer seeking to change a water right previously used for irrigation, the historical consumptive use may be estimated using general evapotranspiration data for the region and the crops grown (ET Idaho), diversion records and system efficiency data, or other reliable methods.

Transfer Memo at 20-21. “Consumptive use” is defined by statute:

“Consumptive use” means that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use is not an element of a water right. Consumptive use does not include any water that falls as precipitation directly on the place of use. Precipitation shall not be considered to reduce the consumptive use of a water right.

Idaho Code § 42-202B(1).

The basis for consumptive use with an irrigation right is that a certain portion of water diverted for irrigation is not transpired, evaporated, or otherwise is returned to the waters of the

state. There is normal and natural “loss,” and it is an enlargement to convert the entire volume of an irrigation water right into a type of use where there is no normal or natural loss, such as a commercial water right. For that reason, to generally maintain water balance, it is necessary to limit the converted right(s) to the historical consumptive use of the irrigation water right before the conversion. As a simple example, if 100 acre-feet was historically diverted under an irrigation right, and 75 acre-feet was consumptively used, only 75 acre-feet could be converted into a commercial water right. This requirement ensures that the volume of consumptively used water with an irrigation right is the same after the transfer is approved.

This is precisely the type of analysis that Reno performed with the Transfer as summarized on page 3, *supra*. Accordingly, there will be no change in the volume of water diverted by Reno under its water rights than it has historically. This ensures there is no enlargement.

The *Preliminary Order* holds that irrigation of the 800 acres under the water rights subject to the Transfer that are converted cannot be irrigated with water under other Birch Creek water rights. *Preliminary Order* at 4. However, statutorily, Reno can continue to irrigate these acres because of the introduction of storage water into the delivery system under Idaho Code § 42-222 which provides that “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.” Idaho Code § 42-222(1). No other rights are injured because of the consumptive use analysis previously described and the statutory ability to irrigate more acres with storage water.

Overall, the main protection against enlargement is the express volumetric amount of storage water allowed under the water rights subject to the Transfer (1,929.1 acre-feet), an amount that is proposed to be measured and accounted by a meter measuring volume into the storage

reservoir. When Reno elects to divert water for storage to be used later in the irrigation season, Reno will necessarily and simultaneously reduce the amount of water it land applies for irrigation use at the same time. Not all acres historically irrigated will be irrigated when water is being diverted into storage or at least the acres will not be irrigated with as much volume of water as there was historically. Reno understands this but still seeks the benefit of stored water that can be used at targeted times during the height of the growing season within the irrigation season to supplement available natural flow water at that time. Farmers understand that the same volume of water applied during a certain month of the year is more critical for the crops than its application at another time of the year. The same overall amount of water will be diverted and used, only the water will be more effectively applied from a crop production standpoint when it is more critically needed. In other words, the Transfer seeks the right to save water for later use, but the overall volume of water will not change. As a result, there is no enlargement under Idaho law, and the *Preliminary Order* should be reconsidered and reversed accordingly.

B. To resolve any concerns that approval of the Transfer would also circumvent the recharge credit condition of WR 32-13348, Reno will abandon this right.

The *Preliminary Order* concludes that another stand-alone water right, not subject to the Transfer, could be used in conjunction with the water rights proposed to be changed by the Transfer to circumvent the recharge credit condition of WR 32-13348. *Id.* WR 32-13348 is a ground water recharge right that contains the following 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.

The *Preliminary Order* elevates Reno's right to receive a "credit" under this condition to Reno receiving a mitigation "benefit" because it could divert and use water for storage rather than for recharge for which it receives no credit. *Preliminary Order* at 4. As an initial matter, there is no law in Idaho that requires a water right holder to exercise a water right. The decision to exercise a water right is made exclusively by the water right holder. Otherwise, there would be no need for water right forfeiture law in Idaho. See Idaho Code § 42-222. As a result, Reno would be within its rights to decide not to exercise WR 32-13348 at any time it chooses.

But more to the point, Reno would not receive any sort of "credit" for diverting water to storage under WR 32-13348 or another right because only the Director of IDWR can authorize recognition of "credit" for ground water recharge under the plain language of the condition. Reno may receive a "benefit" for its agricultural operations in diverting water to storage, but that is not the sort of mitigation "credit" that the above-quoted condition authorizes or addresses. For these reasons, the *Preliminary Order*'s enlargement concern with the mitigation credit condition found in WR 32-13348 is unavailing.

Nevertheless, despite the foregoing, to avoid any concern with Reno attempting to circumvent the condition in WR 32-13348, provided the *Preliminary Order* is reversed and an approval for the Transfer will be issued, Reno will abandon WR 32-13348 in its entirety through execution and filing of the Department's *Notice of Abandonment of Water Right* form (available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/forms/notice-of-abandonment-of-water-right.pdf>).

- C. With an appropriate condition, approval of the Transfer would not create "a substantial risk that Reno will divert from Birch Creek to fill the proposed irrigation storage reservoirs during times when there is little or no irrigation demand."**

Another basis to deny approval of the Transfer found in the *Preliminary Order* is a concern

that the Transfer would create “a substantial risk that Reno will divert from Birch Creek to fill the proposed irrigation storage reservoirs during times when there is little or no irrigation demand.”

Preliminary Order at 4.

When the Transfer was originally discussed with Department staff, this question came up, and was presumably addressed by not changing the season of use the water rights subject to the Transfer to authorize diversion to storage year-round. The rationale is that in the Reno Ditch area, if water is capable of being delivered into a canal, there are crops (mainly alfalfa or wetting up ground for grain planting) that need water. In other words, the presence of a storage facility on the Reno system would not change the historic operations of the Reno Ditch, and more particularly, would not change when Reno begins diverting water into its system. If it is too cold after April 1 to divert water to irrigate, then it is too cold to divert water into storage. If it is warm enough after April 1 to divert water for irrigation, then it is warm enough to divert water for storage. Contrary to the *Preliminary Order*, there is no “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.” *Preliminary Order* at 4.

Nevertheless, to avoid any possibility of abuse on this issue, Reno would welcome a condition imposed on the water rights subject to the Transfer like the following: “This water right may not be exercised unless water is being diverted into the Reno Ditch, under water rights authorized for irrigation purposes, for the active irrigation of crops within the Reno Ditch system.” The *Preliminary Order* states that “Reno has not proposed any conditions or regulation methods to avoid enlargement in use of its water rights[.]” even though Reno was not given a formal opportunity to do so before the *Preliminary Order* was issued. Reno requests that the *Preliminary Order* be reconsidered and reversed, with an approval for the Transfer to include a condition such

as the condition described in this paragraph (or one substantially similar).

D. Reno's storage facility is similar to other storage facilities in Idaho, where water is able to be measured and accounted for without issue. The Preliminary Order's basis to deny the transfer on this basis is without merit.

The *Preliminary Order* states that “[m]easurement at locations throughout the Reno irrigation system would not alleviate the enlargement concerns,” particularly in relation to the first item of concern described above. *Preliminary Order* at 5. The first item of concern is addressed above where enlargement concerns are addressed through the consumptive use analysis and the specific provision of Idaho Code § 42-222 concerning storage water. While that should address the issue with measurement, to be clear, Reno fully anticipates that there will be a metered inflow into the storage reservoirs that will track the volume of water diverted into the reservoir during an irrigation season. Reno cannot divert more than the 1,929.1 acre-feet authorized during an irrigation season, or it will be subject (like all other water users in Idaho) to the Department's enforcement authority under Chapter 17 of Title 42 of the Idaho Code. Approval of the Transfer would not elevate Reno to a status different than all other water users in Idaho.

CONCLUSION

For the reasons set forth above, the *Preliminary Order* must be reconsidered and reversed, and an approval for the Transfer issued with the inclusion of the irrigation season condition set forth above, along with any standard measurement and accounting. Upon issuance of a Transfer approval, Reno will abandon WR 32-13348.

DATED this 26th day of March, 2025.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2025, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: PROTEST AND PETITION FOR HEARING

ORIGINAL TO: **James Cefalo**
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