BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN AND FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 71551 (WATER RIGHT NOS. 29-10121, 29-10122, 29-10123, 29-10124, 29-10125, AND 29-13483) IN THE NAME OF KING CREEK GRAZING ASSOCIATION	)	**PRELIMINARY ORDER**

On December 15, 2005, the Idaho Department of Water Resources ("IDWR") conducted a hearing regarding protests filed against application for transfer no 71551 in the name of King Creek Grazing Association ("King Creek"). Randall C. Budge, Attorney at Law, appeared on behalf of King Creek.

Protests against the application were filed by Lynn and Jerry Hatch ("the Hatches"), Michael ("Mike Chambers") and Eileen Chambers ("the Chambers"), and Darwin Caldwell ("Caldwell"). In addition, the Shoshone – Bannock Tribes ("the Tribes") were granted intervenor status and were entitled to full participation as a party in the contested matter. Kent Foster, Attorney at Law, filed a Notice of Appearance for Todd Hatch, Lynn Hatch, Mike Chambers, and Darwin Caldwell. Caldwell subsequently withdrew his protest. At the hearing, Mike Chambers appeared pro se on behalf of Mike and Eileen Chambers. Todd Hatch appeared on behalf of Lynn and Jerry Hatch. Mike Chambers and Todd Hatch stated that Kent Foster had withdrawn his representation of Lynn Hatch and the Chambers. Mike Chambers stated he would represent himself and Eileen Chambers at the hearing. Todd Hatch stated he would speak for the Hatches.

Jeanette Wolfley, Attorney at Law, appeared on behalf of the Tribes. Jeanette Wolfley stated for the record that King Creek and the Tribes had struck an agreement, and the Tribes withdrew their protest on the record. Because of the verbal withdrawal of protest, the Tribes did not participate as a party during the hearing.

Following the hearing, staff at IDWR's Eastern Regional Office discovered an error in the public land survey description of the proposed new point of diversion. The hearing officer returned the application for transfer to the regional office. King Creek corrected the application. Notice of the amended application for transfer was served on all the parties and they were given an opportunity to challenge the amendment. The protestants did not file any response to the notice of the amendment.

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. King Creek acquired land owned by the Redford Trust (Redford) in 2004. The land is contiguous with land owned by King Creek, and King Creek farmed/ranched the land for several years prior to its purchase.

2. Six water rights are appurtenant to the Redford property purchased by King Creek. The water rights are 29-10121, 29-10122, 29-10123, 29-10124, 29-10125, and 29-13483. These water rights will be referred to hereafter as the "Redford water rights." All of the water rights presently authorize diversion from Toponce Creek at the same three points of diversion:

T6S	R38E	Section 34	NWNESE[1]
		Section 35	SWSENW
			NWNESW

3. Water right no. 29-10121 is the sole water right authorizing the irrigation of a specific 324 acres. Water right nos. 29-10122, 29-10123, 29-10124, 29-10125, 29-13483 all identically describe another 321 acres as an irrigation place of use. The place of use for the overlapping water rights will be identified once in the following summary of the water rights, and will be incorporated by reference into the other water right summaries

Water Right no. 29-10121:

Priority Date: July 6, 1868
Flow Rate: 3.536 cfs
Annual Volume: 619.5 acre-feet

Place of Use:			PLS Description		Acres
T7S	38E	Section 1	Lt. 1	(NENE)	21
			Lt. 2	(NWNE)	26
				SWNE	40
			Lt. 5	(SENE)	32
			Lt. 3	(NENW)	26
			Lt. 4	(NWNW)	27
				SWNW	40
				SENW	40
			Lt. 6	(NESE)	32
				NWSE	40
			Total Acres		324

(The total acreage irrigated is limited to 177 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. 29-10122:

Priority Date: July 6, 1868
Flow Rate: 2.00 cfs
Annual Volume: 350.0 acre-feet

Place of Use:		PLS Description		Acres
T7S R39E	Section 6	Lt. 5	(NWSW)	28
			SWSE	40
			SESE	35
	Section 7		NENE	40
			NWNE	40
			SWNE	40
		Lt. 1	(NENW)	24
		Lt. 2	(SENW)	25
		Lt. 3	(NESW)	25
		Lt. 4	(SESW)	24
		Total Acres		321

(The total acreage irrigated is limited to 100 acres in a single irrigation season.)

Water Right no. 29-10123:

Priority Date: June 17, 1902
Flow Rate: 1.80 cfs
Annual Volume: Not specified
Place of Use: Same as 29-10122
(The total acreage irrigated is limited to 90 acres in a single irrigation season.)

Water Right no. 29-10124:

Priority Date: April 15, 1885
Flow Rate: 0.90 cfs
Annual Volume: Not specified
Place of Use: Same as 29-10122
(The total acreage irrigated is limited to 45 acres in a single irrigation season.)

Water Right no. 29-10125

Priority Date: June 17, 1902
Flow Rate: 2.28 cfs
Annual Volume: Not specified
Place of Use: Same as 29-10122
(The total acreage irrigated is limited to 114 acres in a single irrigation season.)

Water Right no. 29-13483

Priority Date: April 15, 1886
Flow Rate: 0.22 cfs
Annual Volume: Not specified
Place of Use: Same as 29-10122
(The total acreage irrigated is limited to 11 acres in a single irrigation season.)

4. Application for transfer no. 71551 seeks to add a point of diversion to all six water rights, located in the NWSWSE, Section 33, T6S, R38E. The proposed additional point of diversion is located approximately 1 5 miles upstream from the most upstream of the existing point of diversion described by the Redford water rights (Section 34, T6S, R38E) and approximately two miles upstream from the two lower points of diversion described by the Redford water rights (Section 35, T6S, R38E). By adding the upstream point of diversion, King Creek can divert Toponce Creek water authorized by the Redford water rights into a pressurized pipeline.

5. In approximately 1982, 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.

6. After the conceptual planning was complete, King Creek approached other water users who held Toponce Creek water rights 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 Redford agreed to participate in the cost of the construction. As a result, the pipeline was enlarged to accommodate flow rates that might be diverted under the Ken Andrus and Redford water rights in addition to the water rights owned by King Creek.

7. 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.

8. In 1994, King Creek finished construction of the pipeline and began diverting its water through the pipeline. In addition, the Redford water rights and water rights held by Ken 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 Ken Andrus, Redford, or the Shoshone – Bannock Tribes. Water was diverted illegally into the pipeline under the water rights held by these individuals or entities.

9. In 2003, IDWR ordered cessation of diversion of water into the pipeline under the Redford 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.

10. The additional point of diversion from Toponce Creek proposed by this application for transfer is located a couple of 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.

11. Protestants 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

12. Protestant Lynn Hatch does not hold any water rights authorizing diversion from Toponce Creek.

13. 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.

14. Water rights bearing priority dates of June 17 and June 18, 1902 are only deliverable during high water. During the four irrigation seasons spanning 2002 through 2005, 1902 priority water rights were not deliverable for the entire irrigation season.

15. 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 . . . ."

16. 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.

17. 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.

18. Exhibit no. 3 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

19 King Creek 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.

20. The hearing officer evaluated whether King Creek's 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 its present 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 King Creek for delivery of its water rights at its present points of diversion were futile, but by adding a point of diversion above, King Creek's water rights could still be delivered.

21 None of the parties presented any evidence to show whether Toponce Creek loses or gains water through the reach from the head of the King Creek Pipeline to King Creek's present points of diversion. Furthermore no parties presented any evidence to show the extent of the losses or gains, and the effect adding an upstream point of diversion would have on other water rights

22. Steve Hebdon testified that King Creek received its water rights during low flows when all other water rights are curtailed. If Toponce Creek loses water, the losses have not been significant enough to result in a futile call when King Creek has requested delivery of its water.

23. The distance between the Chambers diversion (SWSE, Section 33) and King Creek's current most upstream diversion (NWNESE, Section 34) is less than 1.5 miles. The distance between the Hatch diversion (NWNWSE, Section 34) and King Creek's current most upstream diversion (NWNESE, Section 34) 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, King Creek's proposed diversion at the head of the King Creek Pipeline will not diminish the flow of water available for diversion under other water rights.

24. Drought and the additional delivery calls by earlier priority water right holders in the lower Portneuf River reduced the amount of water available for diversion by Hatches and Chambers.

25. Although approval of this transfer will remove water flowing in a reach of Toponce Creek, there is no evidence that the removal will affect fisheries habitat.

25. 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 by King Creek 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. Application for transfer no. 71551 should be approved.

8. Water rights owned by the Shoshone – Bannock Tribes and Ken Andrus should not be diverted through the King Creek Pipeline unless IDWR approves a transfer authorizing the diversion.

ORDER

IT IS HEREBY ORDERED that application for 71551 is **Approved** subject to the following conditions:

Water Right no. 29-10121

This right is limited to the irrigation of 177 acres within the place of use described above in a single irrigation season.

Water Right no. 29-10122

This right is limited to the irrigation of 100 acres within the place of use described above in a single irrigation season

Water Right no. 29-10123

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

This right is limited to the irrigation of 90 acres within the place of use described above in a single irrigation season

Water Right no. 29-10124

This right is limited to the irrigation of 45 acres within the place of use described above in a single irrigation season

Water Right no. 29-10125

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

This right is limited to the irrigation of 114 acres within the place of use described above in a single irrigation season

Water Right no. 29-13483

This right is limited to the irrigation of 11 acres within the place of use described above in a single irrigation season.

All Water Rights Except 29-10121

Rights 29-10122, 29-10123, 29-10124, 29-10125 and 29-13483 when combined shall not exceed the irrigation of 321 acres at any one time within the place of use described above

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

The period of use for the irrigation described in this approval may be extended to a beginning date of April 1 and an ending date of October 31 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before April 15 and after July 1 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than July 30, 2004.

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.

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.

IT IS FURTHER ORDERED that the Shoshone – Bannock Tribes are dismissed as parties as a result of their verbal withdrawal of protest at the hearing.

Dated this 22nd day of May, 2006.

Gary Spackman
Hearing Officer