BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 73901 IN THE NAME OF JERRY L. TLUCEK AND MARY LOU TLUCEK	**PRELIMINARY ORDER APPROVING TRANSFER APPLICATION**

PARTIES

On July 19, 2006, Jerry and Mary Lou Tlucek ("Tluceks") filed Application for Transfer of Water Right No. 73901 (transfer) to change the place of use of water right no. 63-32184. Al Worman and Martha Worman ("Wormans") protested the transfer.

FACTUAL SUMMARY AND ISSUES PRESENTED

Tluceks purchased property in Ada County, Idaho, in June, 2005. The property included a portion of water right license no. 63-7068, which authorizes diversion and use of ground water for irrigation purposes. The portion of water right license no. 63-7068 owned by Tluceks was renumbered by the Department of Water Resources ("Department") to water right no. 63-32184. In August, 2005, Wormans filed a letter of complaint with the Department indicating that they were experiencing a severe drop in the water level of their domestic well and alleging that Tluceks may be exceeding the limits of their right to divert and use ground water. The Department investigated Tluceks' water use and issued a Cease and Desist Order to Tluceks for unauthorized diversion of ground water. In January, 2006, Tluceks signed a Consent Order and Agreement with the Department to remedy the violation. One of the conditions of the Consent Order and Agreement required Tluceks to file a transfer application to modify the place of use authorized under water right no. 63-32184. Tluceks filed transfer no. 73901 in July, 2006, to comply with that requirement.

After some processing delay by the Department, notice of the transfer application was published in October, 2008. Wormans protested the transfer, citing concerns that water pumped by Tluceks for expanded acreage would jeopardize the supply of water available from their well.

On October 14, 2009, the Department conducted a hearing to obtain testimony about the proposed transfer. At the hearing, attorneys Scott L. Campbell and Dylan B. Lawrence represented Tluceks. Al Worman represented himself. The following witnesses testified at the hearing:

- John Westra, Western Region Manager of the Idaho Department of Water Resources
- Scott N. King, Supervising Engineer of SPF Water Engineering, LLC
- Al Worman, protestant

At the hearing, the hearing officer admitted the following items into evidence:

- A Pre-Hearing Memorandum filed with the Hearing Officer for the applicant
- Exhibit A – Original License for Water Right 63-7068
- Exhibit B – SRBA Notice of Claim for Water Right 63-7068
- Exhibit C – SRBA Notice of Claim for Water Right 63-32183
- Exhibit D – SRBA Notice of Claim for Water Right 63-32184
- Exhibit E – Well Driller's Report for Wormans' Well
- Exhibit F – Warranty Deed between Cram and Tluceks
- Exhibit G – Notice of Change in Ownership Filed by Tluceks
- Exhibit H – Complaint Letter Filed by Al Worman and Martha Worman
- Exhibit I – Letter from IDWR Regarding Notice of Change in Ownership
- Exhibit J – SRBA Aerial Imagery Regarding Water Right 63-32184 Prepared by IDWR
- Exhibit K – SRBA Preliminary Director's Report Recommendation for Water Right 63-7068
- Exhibit L – SRBA Preliminary Director's Report Recommendation for Water Right 63-32183
- Exhibit M – SRBA Preliminary Director's Report Recommendation for Water Right 63-32184
- Exhibit N – Consent Order and Agreement
- Exhibit O – Letter from Campbell to Westra Enclosing Items Pursuant to Consent Order
- Exhibit P – Letter from Campbell to IDWR with Application for Transfer 73901 Filed by Tluceks
- Exhibit Q – Letter from IDWR Acknowledging Compliance with Consent Order
- Exhibit R – Letter from IDWR Regarding Processing Delay
- Exhibit S – Resolution and Order by the Board of Directors for Annexation of Lands to Boise-Kuna Irrigation District, Recorded Instrument No. 106076988
- Exhibit T – Letter from Hudak to Lester at IDWR and Amended Application for Transfer
- Exhibit U – SRBA Partial Decree for Water Right 63-32184
- Exhibit V – Letter from IDWR to Wormans Regarding Transfer Application
- Exhibit W – Affidavit of Publication on Oct. 16 and 23, 2008
- Exhibit X – Protest Filed by Wormans
- Exhibit Y – Prehearing Conference Notes
- Exhibit Z – Wormans Well Monitoring
- Exhibit 1 – A-1 Pro-Pump Sales Order No. 2933
- Exhibit 2 – Davis Well & Pump Invoice No. 4969
- Exhibit 3 – Davis Well & Pump Invoice No. 5012

When writing this order, the hearing officer also considered information in the Department's file for water right no. 63-32184 and Application for Transfer No. 73901.

GOVERNING STATUTES

Idaho Code § 42-106 states, "As between appropriators, the first in time is the first in right."

Idaho Code § 42-222(1) states, in pertinent part:

> Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon...
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> 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. 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. A copy of the approved application for change shall be returned

to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42, Idaho Code.

Idaho Code § 42-701(1) states:

The appropriators or users of any public waters of the state of Idaho shall maintain to the satisfaction of the director of the department of water resources suitable headgates and controlling works at the point where the water is diverted. Each device shall be of such construction that it can be locked and kept closed by the watermaster or other officer in charge, and shall also be of such construction as to regulate the flow of water at the diversion point. Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water. Plans for such headgates, rating flumes or other measuring devices shall be approved by the department of water resources.

FINDINGS OF FACT

1. Jerry and Mary Lou Tlucek own decreed water right no. 63-32184, which has the following elements:

Priority Date: February 21, 1968
Source and Point of Diversion: Ground water, diverted in the NE¼NE¼ Section 19, Township 1 South, Range 1 West, B.M., Ada County.
Water Use, Quantity, and Season of Use: Irrigation for 53.2 acres, 1.06 cfs, 239.4 afy, 4/1 to 10/31[1]
Total Quantity: 1.06 cfs, 239.4 afy
Place of Use: 21.7 acres in NE¼NE¼, Sec. 19, Township 1 South, Range 1 West, B.M.
0.5 acres in SE¼NE¼, Sec. 19 Township 1 South, Range 1 West, B.M.
10.0 acres in NW¼NW¼, Sec. 20, Township 1 South, Range 1 West, B.M.
21.0 acres in SW¼NW¼, Sec. 20, Township 1 South, Range 1 West, B.M.

[1] The use of water for irrigation under this right may begin as early as March 1 and may continue to as late as November 15, provided other elements of the right are not exceeded. The use of water before April 1 and after October 31 under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

2. Tluceks divert water under water right no. 63-32184 from a 388' deep well. Ground water is pumped using a 75 horsepower pump and discharged to a catch basin where it is comingled with surface water from Boise-Kuna Irrigation District. Water is relifted by two 25 horsepower pumps to Tluceks' irrigation system.

3. Tluceks own approximately 240 acres in the E½NE¼, Section 19, and NW¼, Section 20, Township 1 South, Range 1 West, B.M. "Tluceks' property" is used in this order to refer to the 240 acres owned by Tluceks.

4. Prior to 2006, 41.05 acres of Tluceks' property were included within the Boise-Kuna Irrigation District. The Boise-Kuna Irrigation District annexed an additional 133.91 acres of Tluceks' property into the district in 2006, of which 80.71 acres can be irrigated with Boise-Kuna water.

5. Wormans divert ground water for domestic use from a well in the SE¼SE¼, Section 18, Township 1 South, Range 1 West, B.M., approximately 500' northwest of Tluceks' well. The well was completed in 2000 to a depth of 320' and deepened in 2002 to a depth of 335'. The pump was set at 280'. No record of the Department or other available evidence confirms a domestic use for Wormans earlier than 2000.

6. In 2005, Wormans began experiencing problems with their domestic well. Wormans replaced a damaged pump in July, 2005, and then lowered the pump 42'. Wormans replaced a damaged motor in August, 2005. On August 15, 2005, the Department received a letter of complaint from Wormans. In the letter, Wormans stated that they had experienced a severe drop in water level in their domestic well and expressed concern that Tluceks may be exceeding their water right.

7. On July 19, 2006, Tluceks filed a transfer application (amended), designated by the Department as Application for Transfer No. 73901. The transfer was filed to change the place of use for water right no. 63-32184 to create a permissible place of use over 175 acres[2] on Tluceks' property in the following locations:

28.82 acres in NE¼NE¼, Section 19, Township 1 South, Range 1 West, B.M.
35.04 acres in SE¼NE¼, Section 19, Township 1 South, Range 1 West, B.M.
27.9 acres in NE¼NW¼, Section 20, Township 1 South, Range 1 West, B.M.
38.03 acres in NW¼NW¼, Section 20, Township 1 South, Range 1 West, B.M.
28.41 acres in SW¼NW¼, Section 20, Township 1 South, Range 1 West, B.M.
16.76 acres in SE¼NW¼, Section 20, Township 1 South, Range 1 West, B.M.

The proposed permissible place of use would allow the Tluceks to divert and use water pursuant to water right no. 63-32184 to irrigate 53.2 acres within the 175 acre area.

8. On October 29, 2008, Wormans protested the transfer. Wormans believe that the cause of their well going dry was directly related to Tluceks' pumping. Wormans expressed

[2] The Tluceks' transfer application describes a place of use of 174.96 acres, which will be rounded to 175 acres to comply with Department record-keeping and regulatory standards.

concern that Tluceks' expanding acreage will jeopardize the supply of water available from their well.

9. Tluceks hired Scott King of SPF Water Engineering, LLC, to measure and monitor the water level in Wormans' well. Mr. King installed a water level sensor in Wormans' well in October, 2009. On October 2, 2009, Mr. King determined the depth to water in Wormans' well to be 203'. Water was pumped from Tluceks' well for about 2.5 days from October 5 to October 7 at an average rate of 0.75 cfs to observe the effects on water in Wormans' well. The water level in Wormans' well dropped about 25' during that period.

ANALYSIS

Under the prior appropriation doctrine and Idaho Code § 42-106, the earlier priority water right is satisfied first, sometimes to the detriment of junior priority water rights. Worman does not have a water right with a priority date confirmed through the statutory appropriation process or an adjudication of water rights. Other records, however, suggest that Tluceks' irrigation water right, no. 63-32184, is senior to Wormans' domestic water use. Because Tluceks' have a decreed water right, and because it appears to be senior to the Wormans' water use, if lawful pumping under Tluceks' water right causes the water level to decline in Wormans' well, it does not constitute injury, even if water is insufficient to satisfy Wormans' domestic use.

However, enlarging Tluceks' irrigation use beyond what is currently authorized could injure the Wormans. It is Mr. King's opinion that water continues to be available to Wormans even while Tluceks' well is pumped. Mr. King testified that pumping over a longer period than 2.5 days would likely cause the water level in Wormans' well to drop further, but it would be hard to project where the decrease in water level might stop. In addition, Mr. King testified that pumping Tluceks' well at a greater rate would likely result in a proportional drop in the water level in Wormans' well, but he did not quantify that amount. Because of the potential for injury through enlargement, Idaho Code § 42-222 directs the Department to ensure that a water right transfer will not result in an enlarged water use.

Tluceks seek authorization to change the place of use under water right no. 63-32184. Tluceks are not proposing to change the location of the well or increase pumping beyond the limits of their existing irrigation right. If Tluceks were authorized to change the place of use from one 53.2-acre parcel to another 53.2-acre parcel on their property, enlargement of the right or increased impacts to Wormans' well would be unlikely. However, Tluceks seek to create a 175-acre permissible place of use on their property and comingle ground water under water right 63-32184 with surface water from Boise-Kuna Irrigation District. Creation of a permissible place of use and comingling with surface water could result in enlargement of Tluceks' right and potentially injure Wormans' domestic use.

Creation of a permissible place of use and comingling ground water with surface water is not likely to enlarge Tluceks' use of ground water as long as Tluceks' surface water supply is fully available. Enlargement of the ground water use under water right no. 63-32184 could result if Tluceks' surface water supply is reduced or becomes unavailable and ground water pumping continues in Tluceks' irrigation system. Enlargement could occur even if the volume limit of 239.4 afy under water right 63-32184 is not exceeded. The volume limit under Tluceks' right is

a maximum volume that is further limited to the amount necessary to irrigate 53.2 acres. Spreading water that is not necessary to irrigate 53.2 acres to other acres within a permissible place of use to make up shortages in surface water supply would be enlargement.

It has not been determined for certain that enlargement of Tluceks' water right no. 63-32184 will injure Wormans' domestic use. Nonetheless, enlargement resulting from a transfer is prohibited, so approval of the transfer must be conditioned appropriately to prevent enlargement. Prevention of enlargement will ensure that no injury will occur to Wormans' domestic use as a result of the transfer.

CONCLUSIONS OF LAW

The applicant bears the ultimate burden of proof regarding all the factors set forth in Idaho Code § 42-222.

Enlargement

1. Water right no. 63-32184 authorizes the diversion rate of 1.06 cfs and an annual volume of 239.4 acre-feet for irrigation of 53.2 acres.

2. The place of use change proposed in the transfer will not result in enlargement of water right no. 63-32184 if the transfer approval is conditioned to ensure water diverted under the right is not spread on additional acres when surface water is unavailable or insufficient within the 175-acre permissible place of use. In addition, the transfer approval should include a condition requiring an acceptable measuring device to ensure the rate and volume limits of the water right are not exceeded.

Injury

3. The place of use change proposed in the transfer will not result in injury to other water rights if the transfer approval is conditioned to prevent enlargement of right 63-32184.

Conservation of Water Resources within the State of Idaho

4. The place of use change for irrigation use in the quantities specified for the transfer is consistent with the conservation of water resources within the State of Idaho.

Local Public Interest

5. The place of use change for irrigation use as proposed in the transfer will not conflict with the local public interest.

Beneficial Use

6. The transfer does not propose to change to a new water use. Diverting water pursuant to water right no. 63-32184 for irrigation purposes remains a beneficial use.

Overall

7. The Department should approve the transfer as provided in Idaho Code § 42-222 subject to conditions necessary for the proper administration of the right.

ORDER

IT IS HEREBY ORDERED that Transfer No. 73901 is **APPROVED** subject to the following conditions:

1. Prior to diversion and use of water under Transfer Approval 73901, the right holder shall install and maintain an acceptable measuring device to measure instantaneous flow rate and total volume diverted at the authorized point of diversion, in accordance with Department specifications.

2. This right is limited to the irrigation of a specific 53.2 acres within the 175 acre place of use authorized by this right in a single irrigation season. The specified 53.2 acres to be irrigated by the right holder shall be identified prior to use by submittal to the Department of a land list and a representative electronic shape file or by submittal to the Department of a land list and a map sufficient in detail to allow creation of an electronic shape file to be associated with this right in the geographic information system component of the water rights database maintained by the Department. Before changing the 53.2 acres to be irrigated within the 175 acre place of use, the right holder shall submit a new land list and representative electronic shape file or map to the Department prior to the irrigation season in which the change will occur.

3. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

4. The period of use for the irrigation described in this approval may be extended to a beginning date of March 1 and an ending date of November 15 provided that beneficial use of water can be shown and other elements of the right are not exceeded. The use of water before April 1 and after October 31 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than February 16, 2007.

5. 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.

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

Dated this 19th day of November, 2009.

Shelley W. Keen

SHELLEY KEEN
Hearing Officer