

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

IN THE MATTER OF APPLICATION     )  
FOR EXCHANGE OF WATER RIGHT    )  
NOS. 34-12050C AND 34-10400 FILED )  
IN THE NAME OF SHANE             )  
ROSENKRANCE                        )  
\_\_\_\_\_ )

**PRELIMINARY ORDER**

This matter having come before the Idaho Department of Water Resources ("Department" or "IDWR") in the form of a protested application for exchange and the Department having held a conference and a hearing in the matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

**FINDINGS OF FACT**

1. On December 8, 1997, the Snake River Basin Adjudication ("SRBA") Court decreed water right no. **34-12050** to Doug G. Rosenkrance and Dolores Rosenkrance as follows:

Source:	Alder Creek tributary to Big Lost River
Priority:	September 30, 1882
Rate of diversion:	4.76 cubic feet per second ("cfs")
Point of diversion:	NW1/4NE1/4SE1/4 (Lot 18) Section 14, T6N, R24E, B.M., Custer County, Idaho
Use:	Irrigation
Season of use:	Irrigation season
Place of use:	162 acres in parts of Sections 12 and 13, T6N, R24E, B.M.
Remarks:	Use of this right with right no. 34-02329 is limited to the irrigation of a combined total of 203 acres in a single irrigation season

*(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).*

2. Right no. 34-12050 was split into parts A and B by an ownership change as follows:

Identification no:	<b>34-12050A</b>
Owner:	Doug G. Rosenkrance and Dolores Rosenkrance
Source:	Alder Creek tributary to Big Lost River
Priority:	September 30, 1882

Rate of diversion: 1.50 cfs  
Volume: 178.5 AFA  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: SWNE (17.5 ac), SENE (2 ac), SENW (28.5 ac) and SWSW (3 ac), Section 12, T6N, R24E, B.M. 51 acres total.

Identification no: **34-12050B**  
Owner: Jerry and Stephanie Gould  
Source: Alder Creek tributary to Big Lost River  
Priority: September 30, 1882  
Rate of diversion: 3.26 cfs  
Point of diversion: NESE (Lot 18) and SWSE (Lot 21) Section 14, T6N, R24E, B.M., Custer County, Idaho  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: 111 acres in parts of Sections 12 and 13, T6N, R24E, B.M.

3. Part A was then split by an ownership change into parts C and D as follows:

Identification no: **34-012050C**  
Owner: Doug G. Rosenkrance and Dolores Rosenkrance  
Source: Alder Creek tributary to Big Lost River  
Priority: September 30, 1882  
Rate of diversion: 1.41 cfs  
Point of diversion: NWNESE (Lot 18) Section 14, T6N, R24E, B.M., Custer County, Idaho  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: SWNE (17.5 ac), SENE (2 ac), SENW (28.5 ac), Section 12, T6N, R24E, B.M. 48 acres total.

Identification no: **34-012050D**  
Owner: Lonnie G. Olson and Susan M. Olson  
Source: Alder Creek tributary to Big Lost River  
Priority: September 30, 1882  
Rate of diversion: 0.09 cfs  
Point of diversion: NWNESE (Lot 18) Section 14, T6N, R24E, B.M., Custer County, Idaho  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: 3 acres in SWSW Section 12, T6N, R24E, B.M.

4. Water right no. **34-10400** has been recommended in the SRBA in the name of Shane D. Rosenkrance and Mimi L. Rosenkrance as follows:

Source: Alder Creek tributary to Big Lost River  
Priority: May 1, 1928  
Rate of diversion: 5.0 cfs  
Point of diversion: NWNWSW (Lot 3) Section 7, T6N, R25E, B.M., Custer County, Idaho  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: 268 acres in parts of Sections 9, 16, 17, 20 and 21, T6N, R25E, B.M.  
Remarks: Several other water rights irrigate the same land

5. Water right no. **34-00600** has been decreed in the Supreme Court of the state of Idaho in the case of John McCray and Matea McCray v. Doug Rosenkrance, Shane Rosenkrance and James C. Lambert, filed on January 24, 2001 as follows:

Owner: John and Matea McCray  
Source: Alder Creek tributary to Big Lost River  
Priority: September 30, 1882  
Rate of diversion: 0.5 cfs - Irrigation  
0.02 - Stockwater  
Point of diversion: SWSE Section 14, T6N, R25E, B.M., Custer County, Idaho  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: NWNE (9 ac), SWNE (9 ac), SENE (7 ac), Section 13, T6N, R25E, B.M. (25 acres total)  
Remarks: Use of this right when used in combination with right 34-00606 is limited to a total of 25 acres within the place of use described above

6. Water right no. **34-00606** has been decreed in the Supreme Court of the state of Idaho in the case of John McCray and Matea McCray v. Doug Rosenkrance, Shane Rosenkrance and James C. Lambert, filed on January 24, 2001 as follows:

Owner: John and Matea McCray  
Source: Alder Creek tributary to Big Lost River  
Priority: September 30, 1882  
Rate of diversion: 0.5 cfs - Irrigation  
0.02 - Stockwater  
Point of diversion: SWSE Section 13, T6N, R25E, B.M., Custer County, Idaho  
Use: Irrigation  
Season of use: May 1 to October 15  
Place of use: NWNE (9 ac), SWNE (9 ac), SENE (7 ac), Section 13, T6N, R25E, B.M. (25 acres total)  
Remarks: Use of this right when used in combination with right 34-00600 is limited to a total of 25 acres within the place of use described above

7. On August 21, 2001, Shane Rosenkrance ("applicant") filed an application for exchange ("application") proposing to exchange 1.2 cfs of water right no. 34-10400 ("Shane Rosenkrance right") with 1.2 cfs of water right no. 34-12050C ("Doug Rosenkrance right").

8. IDWR published notice of the application that was subsequently protested by John and Matea McCray.

9. On May 10, 2001, IDWR conducted a hearing in the matter. The applicant was present and represented himself. The protestants were present and represented themselves.

10. Issues that IDWR can consider in a contested case involving a proposed exchange are as follows:

- a. Whether the proposed exchange will injure other water rights.
- b. Whether the proposed exchange constitutes an enlargement in use of the original right.
- c. Whether the proposed exchange is in the local public interest.
- d. Whether the proposed exchange is consistent with the conservation of water resources within the state of Idaho.

11. Exhibits premarked, offered or accepted as a part of the record are as follows:

- a. Protestant's Exhibit 1 - Letter dated December 6, 1990, signed by Francis L. Smith
- b. Protestant's Exhibit 2 - Envelope post-marked October 13, 1998, a letter to the Department of Water Resources from Francis Smith and Notice of Protest with attachments
- c. Protestant's Exhibit 3 - Letter to Ron Carlson from Matea McCray (letter received April 19, 2001)
- d. Protestant's Exhibit 4 - Letter dated April 24, 2001 to Matea McCray from Harold W. Jones and IDWR printout of water right no. 34-12050C
- e. Protestant's Exhibit 5 - Letter dated June 11, 1999 to Alder Creek Water Users from Tim Luke and Guidance for Distribution of Alder Creek Water Rights and Flows, Water District 34 prepared by IDWR
- f. Protestant's Exhibit 6 - Warranty Deed to Isabel L. Eaton from Douglas G.

Rosenkrance and Dolores I. Rosenkrance dated July 12, 1995 together with attachments

- g. Protestant's Exhibit 7 - Idaho Supreme Court decision titled John McCray and Matea McCray v. Doug Rosenkrance, Shane Rosenkrance and James C. Lambert, Filed January 24, 2001

The hearing officer also officially noticed a copy of a U.S. Geological Quadrangle sheet showing the Alder Creek area and the Darlington Ditch area on which the applicant marked the location of 4 diversion points that are used to divert the 1882 water rights from Alder Creek.

12. Alder Creek is a tributary of the Big Lost River and is to be administered in priority with the Big Lost River unless a futile call determination has been made and confirmed as described in a document titled Guidance for Distribution of Alder Creek Water Rights and Flows, Water District 34, prepared and distributed by IDWR on June 11, 1999.

13. The Darlington Ditch diverts water from the Big Lost River. Alder Creek flows into the Darlington Ditch or can be passed through the Darlington Ditch to the Big Lost River. (The point where Alder Creek meets the Darlington Ditch will be referred to in this order as the "Darlington Ditch junction" or "junction").

14. Several water rights on Alder Creek have a priority date of September 30, 1882, that is the most senior priority of use on the creek. The 1882 rights are all diverted from Alder Creek upstream from the Darlington Ditch junction through 4 points of diversion. The location of the point of diversion for the Doug Rosenkrance right is located about 1.75 miles upstream from the junction. The protestant's point of diversion is located about 1.25 miles upstream from the junction and is located about 0.5 miles downstream from the Doug Rosenkrance diversion. The protestant's diversion is the most downstream of the diversions that divert 1882 water.

15. There are several water rights on Alder Creek with junior priority dates ranging from 1896 to 1928. These rights are all diverted into the Darlington Ditch at the junction, and are re-diverted from the Darlington Ditch at each right holder's turnout on the ditch.

16. When the flow in Alder Creek is not sufficient to fill water rights with a priority later than September 30, 1882, the water distribution practice has been to proportionately distribute the available water to the 1882 rights based on the amount of the 1882 rights.

17. The applicant believes he can best utilize water right no. 34-12050C at the place of use decreed for right no. 34-10400.

18. The applicant does not believe there will be an enlargement in use, since

he proposes to exchange 60 miner's inches of water with 60 miner's inches.

19. The protestant's concerns are as follows:
  - a) Water right no. 34-12050C has been forfeited through non-use.
  - b) The exchanged 1882 water right will be used on more acres that originally decreed, thus enlarging the water use.
  - c) If 60 miner's inches of the Doug Rosenkrance right is delivered to the junction, the loss in the Alder Creek channel that occurs between the protestant's point of diversion and the junction, being a distance of about 1.25 miles, will have to be borne by the other September 30, 1882 right holders on Alder Creek resulting in injury to their rights.

20. Doug Rosenkrance who is the watermaster for the Big Lost River including Alder Creek stated that there is a loss in Alder Creek in the 1.25 mile reach from the protestant's point of diversion and the junction, but that he has not measured the loss. The watermaster, however, stated that the loss was directly related to the amount of flow in the creek and estimated the loss to be from 20% to 30% of the flow.

21. As presently divided by ownership splits, water right no. 34-12050C has been used on about 48 irrigated acres of the original place of use of right no. 34-12050. The exchange would allow the applicant to use water right no. 34-12050C on 268 acres.

22. Measuring devices do not exist in the Alder Creek channel that could be used to measure and regulate delivery of the Doug Rosenkrance right to the junction. Outside of offering to subordinate the Doug Rosenkrance right to the protestant's right, the applicant did not propose a means of preventing injury to other water rights or enlargement in use of the right proposed for exchange.

## **ANALYSIS**

The protestants contend that water right no. 34-12050C has been lost through non-use, since in 1995, Doug Rosenkrance sold most of the land to which the right is appurtenant. Although use of the Doug Rosenkrance right during the last 5 or so years is not clear in the record due to the sale of some of the appurtenant land, a finding of forfeiture requires clear and convincing evidence. Such clear and convincing evidence was not shown by the protestant or by information in the record.

The protestants allege they will be injured if the Doug Rosenkrance right is now used by the applicant, since reduced use of the right in the last several years has made more water available for their use. The loss of this incidental benefit to the protestants due to resumed use of the Doug Rosenkrance right can not be considered as an injury to the protestant's water rights.

The applicant's use of the older water right on more acres than the right was originally used will enlarge the water use. While the rate of diversion may be the same or similar to the exchanged right, if the right is used for a longer period of time, a larger volume is removed from the system and other rights will be injured. The applicant did not offer any proposal to prevent enlargement in use or to prevent the existing users on Alder Creek from having to assume additional loss which would be incurred in the delivery of the 1882 water right to a more downstream point of diversion.

## **CONCLUSIONS OF LAW**

1. Section 42-240, Idaho Code, provides in pertinent part as follows:

The director shall examine all the evidence and available information and shall approve the exchange in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the exchange does not constitute an enlargement in use of the original right or rights, the exchange is consistent with the conservation of water resources within the state of Idaho and the exchange is in the local public interest as defined in section 42-203A, Idaho Code.

2. The applicant carries the burden of coming forward with evidence that the proposed exchange will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

3. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

4. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-240, Idaho Code.

5. The proposed exchange will constitute an enlargement in use of the Doug Rosenkrance right, since more acres can and will be irrigated for a longer period of time with the older water right from Alder Creek than could be irrigated with the junior Alder Creek right.

6. The application does not provide a means to prevent the additional channel loss that will be incurred by all water users on Alder Creek with a September 30, 1882 right, if the Doug Rosenkrance right is delivered to a point 1.25 miles further downstream on Alder Creek. The additional loss would have to be assessed to the users of the 1882 water rights resulting in less water being distributed to the rights, ultimately resulting in injury to all 1882 water rights on the creek, not just to the rights of the protestant.

7. The Department should not approve the proposed exchange.

**ORDER**

IT IS THEREFORE, hereby ORDERED that the proposed exchange of water right nos. 34-12050C and 34-10400 submitted in the name of Shane Rosenkrance is **DENIED**.

Signed this \_\_\_\_24th \_\_\_\_\_ day of \_\_May \_\_\_\_\_, 2001.

\_\_\_\_ Signed \_\_\_\_  
L. GLEN SAXTON  
Hearing Officer

