

4-29-04

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

**IN THE MATTER OF)
TRANSFER NO. 4520 IN THE)
NAME OF RINKER COMPANY)**
_____)

**FINAL ORDER
AMENDING TRANSFER APPROVAL**

This matter has come before the Director of the Department of Water Resources ("Director" or "Department") as a result of the filing of a petition to amend a water right transfer approval. The Director makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On December 5, 1994, the Department received application for transfer no. 4520 ("transfer") in the name of Rinker Company ("applicant"). The application was accompanied by a companion application for a permit to appropriate water, numbered as 37-8838. The combined application for transfer no. 4520 and application for permit to appropriate water no. 37-8838 proposed delivery of water from the Big Wood River for storage in and flow through a pond for wildlife and aesthetic uses.

2. Application for transfer no. 4520 proposed changing the point of diversion, place of use, period of use, and nature of use for portions of rights numbered 37-154A and 37-577BP from irrigation to wildlife and aesthetic uses. The application for transfer sought to change 0.10 cfs under water right no. 37-577BP and 0.22 cfs under water right 37-154A for a total of 0.32 cfs that historically had been used to irrigate 5.6 acres. The application for transfer was filed to provide water from existing, deliverable water rights to mitigate for consumptive and other losses from the pond and delivery ditches.

3. Notice of the application for transfer was published in the *Wood River Journal* on January 4 and January 11, 1995. There were no protests to the transfer.

4. The transfer was approved by the Department on May 23, 1995, and authorized wildlife and aesthetic uses for each right involved in the transfer in the amounts shown on the following page:

Right no. 37-154D (split from right no. 37-154A):

<u>Beneficial Use</u>	<u>Period Of Use</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
Wildlife	1/1 to 12/31	0.22 cfs	159.3 af
Aesthetic	1/1 to 12/31	<u>0.22 cfs</u>	<u>159.3 af</u>
	Subtotals:	0.22 cfs	159.3 af

Right no. 37-577BT (split from right no. 37-577BP):

<u>Beneficial Use</u>	<u>Period Of Use</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
Wildlife	1/1 to 12/31	0.10 cfs	72.4 af
Aesthetic	1/1 to 12/31	<u>0.10 cfs</u>	<u>72.4 af</u>
	Subtotals:	0.10 cfs	72.4 af
	Totals for both rights:	0.32 cfs	231.7 af

5. The transfer was approved with conditions, including condition no. 7 as shown below:

The total instantaneous diversion of water from all points of diversion under Transfer No. 4520 shall not exceed 0.32 cfs, nor total combined annual volume of 231.7 af.

6. The annual volume of water authorized for diversion under the approved transfer for wildlife and aesthetic uses was incorrectly based on the authorized flow rate for the transferred portion of each water right as though diverted continuously throughout the year. The volume under the approved transfer should have been limited to the volume of water diverted for irrigation use under the water rights as they existed prior to approval of the transfer.

7. The transfer approval did not specify a consumptive volume limit for the wildlife and aesthetic uses.

8. Water right no. 37-577BT has been renumbered as 37-30029 by the Department.

9. Application for permit to appropriate water no. 37-8838 ("permit") was approved by the Department on May 23, 1995. A field examination report was submitted on August 25, 1999, by Charles E. Brockway, P.E., a certified water right examiner, to document the beneficial use developed under the permit (see Idaho Code §42-217). The field examination report indicated the pond surface area was 1.6 acres and the maximum evaporative depletion from the pond was 0.0168 cfs.

10. On September 24, 2003, Rinker Company filed a petition to amend the transfer approval ("petition") with the Director. The petition requested that the Director amend the transfer approval to recognize the actual use for the pond.

11. The Department estimated the annual volume of consumptive use for the pond based on average evaporation and precipitation data for the area near Hailey, Idaho. The Department estimated consumption of 3.2 acre feet annually for a pond with a surface area of 1.6 acres. The Department also determined the potential annual volume of consumptive use of water for the irrigation use under the water rights sought to be transferred. The average annual consumptive irrigation requirement for alfalfa hay at the place of use authorized under the water rights sought to be transferred is 2.14 af per acre, totaling 12 af annually. The annual volume of water consumed by evaporation from the pond is equivalent to the consumptive irrigation requirement for alfalfa hay on 1.5 acres of irrigated land. No estimates of the amount of water required to mitigate for other losses from the pond and delivery ditches have been made.

12. Prior to the transfer approval, the diversion rate per irrigated acre for each right sought to be transferred was 0.039 cfs per acre for water right no. 37-154D and 0.018 cfs per acre for water right no. 37-30029. The diversion rates associated with the irrigation of 1.5 acres under each of the rights, which for alfalfa hay results in the consumption of an amount of water equivalent to the annual volume of water consumed by evaporation from the pond, are 0.06 cfs for water right no. 37-154D and 0.03 cfs for water right 37-30029. The combined diversion rate of 0.32 cfs and the annual volume of water historically diverted under the portions of the rights sought to be transferred probably exceeds the amount needed to mitigate for the evaporation from the pond and other losses from the pond and delivery ditches.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 prohibits the enlargement in use of water in a transfer of water rights. The transfer approval issued by the Department on May 23, 1995, authorized an annual diversion volume greater than the volume that could be diverted for the irrigation use authorized under the water rights prior to the transfer.

2. The transfer approval should accurately describe each established water right as changed by the transfer pursuant to Idaho Code § 42-222.

3. The annual volume of water authorized for diversion under the transfer for wildlife and aesthetic uses must be limited to the maximum historic use under the rights prior to the transfer to ensure that enlargement of the water rights does not occur as a result of the transfer.

4. The Department should amend the transfer approval, including conditions of approval, to correct the maximum annual diversion volume for wildlife and aesthetic uses authorized under the water rights subsequent to the transfer.

5. The Department should also add conditions of approval to clarify the purpose of the transfer.

ORDER

IT IS HEREBY ORDERED that the order approving Transfer No. 4520 issued by the Department on May 23, 1995, is **AMENDED** as described below.

1. Wildlife and aesthetic uses under each right are corrected to the amounts shown below:

Right no. 37-154D:

<u>Beneficial Use</u>	<u>Period Of Use</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
Wildlife	1/1 to 12/31	0.22 cfs	19.6 af
Aesthetic	1/1 to 12/31	<u>0.22 cfs</u>	<u>19.6 af</u>
	Subtotals:	0.22 cfs	19.6 af

Right no. 37-30029:

<u>Beneficial Use</u>	<u>Period Of Use</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
Wildlife	1/1 to 12/31	0.10 cfs	19.6 af
Aesthetic	1/1 to 12/31	<u>0.10 cfs</u>	<u>19.6 af</u>
	Subtotals:	0.10 cfs	19.6 af
	Totals for both rights:	0.32cfs	19.6 af

2. Condition of approval no. 7 is corrected as shown below:

The total instantaneous diversion of water from all points of diversion under Transfer No. 4520 for wildlife and aesthetic uses shall not exceed 0.32 cfs, nor a total combined annual volume of 19.6 af.

3. Condition of approval no. 11 is added as shown below:

The combined rate of diversion and the annual volume of water diverted under Transfer No. 4520 for consumptive uses and other uses are limited to the combined rate of diversion and maximum annual volume of water diverted under the rights prior to the transfer. The annual volume of consumptive wildlife and aesthetic uses under rights 37-154D and 37-30029 due to evaporation is 3.2 af

per year. Whether all of the water transferred for wildlife and aesthetic uses under these rights is required to mitigate for consumptive losses and other losses from the pond and delivery ditches has not been determined and may be addressed in a subsequent application for transfer.

DATED this 29th day of April, 2004.



Karl J. Dreher
Director

