

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

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 70887 IN THE NAME OF
BRACKETT RANCHES LTD. AND
APPLICATION FOR TRANSFER NO.
70890 IN THE NAME OF BERT
BRACKETT AND PAULA BRACKETT

**AMENDED PRELIMINARY
ORDER APPROVING TRANSFER
APPLICATIONS**

PARTIES

On February 18, 2003, Bert and Paula Brackett filed Application for Transfer of Water Right No. 70890 (Transfer No. 70890) to change the place of use of water right no. 51-12895A, and Brackett Ranches Ltd. filed Application for Transfer of Water Right No. 70887 (Transfer No. 70887) to change the place of use of water right no. 51-12898A. Bert Brackett signed Transfer No. 70887 on behalf of Brackett Ranches Ltd. Transfer No. 70887 and Transfer No. 70890 are sometimes jointly referred to as “the transfers” or “both transfers” in this order. When referred to separately, the transfers will be identified by number. “Brackett” or “Bracketts” is used in this order to refer collectively to Bert and Paula Brackett and Brackett Ranches Ltd.

Bruneau Buckaroo Cooperative Ditch Company (BBCDC) protested both transfers.

The United States of America, Bureau of Land Management, filed and later withdrew a protest to Transfer No. 70887 and is not a party in this proceeding.

FACTUAL SUMMARY AND ISSUES PRESENTED

Bracketts own extensive cattle ranching operations in southern Idaho and northern Nevada. Among Bracketts’ water rights for stock watering purposes are Water Right No. 51-12895A and Water Right No. 51-12898A, both of which authorize the diversion and use of water from Pence Spring, a tributary of Little Spring Creek. The waters of Little Spring Creek are eventually tributary to the Bruneau River. Bracketts propose to add more stock watering troughs to each of the two water rights. Bracketts claim the additional troughs can be added without exceeding the daily volume limit of 13,000 gallons for each of the two water rights.

BBCDC diverts water from the Bruneau River and delivers it to its members for irrigation purposes pursuant to several decreed water rights. BBCDC alleges that the changes proposed in the transfers will enlarge the Bracketts’ water rights and/or injure BBCDC by depleting the flow of water available to satisfy its Bruneau River water rights.

On May 12, 2009, the Department conducted a hearing to obtain testimony about the proposed transfers. At the hearing, California attorney Craig A. Pridgen represented Bracketts. Attorney Charles Honsinger represented protestant BBCDC. The following witnesses testified at the hearing:

- Dale Pippitt, owner of Floyd Lilly Co., an installer of water pumps
- Bert Brackett, the applicant
- Frank Bachman, president of the BBCDC board of directors
- John Westra, Western Region Manager of the Idaho Department of Water Resources

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

- Exhibit 2 – July 15, 2003, memorandum from Department employee Shane Bendixsen to Department employees Glen Saxton and Hal Anderson.
- Exhibit 4 – Pump performance curves for 4” submersible pumps
- Exhibit 202 – Approval document for Transfer of Water Right No. 70694
- Exhibit 203 – Partial Decree for Water Right No. 51-00002
- Exhibit 204 – Partial Decree for Water Right No. 51-00003
- Exhibit 205 – Partial Decree for Water Right No. 51-00005
- Exhibit 206 – Partial Decree for Water Right No. 51-10271
- Exhibit 207 – Partial Decree for Water Right No. 51-10350
- Exhibit 208 – Partial Decree for Water Right No. 51-10351

The hearing officer also reserved the right to take official notice of any water right records maintained by the Department for water rights that may be affected by the proposed water use.

GOVERNING STATUTES

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

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.

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

Idaho Code § 42-604 states, in pertinent part:

The director of the department of water resources shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect

or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two (2) or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.

Idaho Code § 42-602 states, in pertinent part:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

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.

Idaho Code § 42-701(7) states:

All domestic uses, as defined in section 42-111, Idaho Code, and all stock watering uses, as defined in section 42-1401A, Idaho Code, shall be exempt from the measuring device installation and maintenance, measuring and reporting requirements of this section.

Idaho Code § 42-1401A(11) states:

"Stock watering use" means the use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day.

FINDINGS OF FACT

1. Bert Brackett and Paula Brackett own decreed water right no. 51-12895A, which has the following elements:

Priority Date: September 14, 1966

Source and Point of Diversion: Pence Spring, a tributary of Little Spring Creek, diverted in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 26, Township 15 South, Range 10 East, B.M., Owyhee County.

Water Use, Quantity, and Season of Use: Stockwater 0.23 cfs 01/01 to 12/31

Total Quantity: 0.23 cfs The quantity of water under this right shall not exceed 13,000 gallons per day.

Place of Use: NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 35, Township 12 South, Range 9 East, B.M.
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 2, Township 13 South, Range 9 East, B.M.
NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, Township 13 South, Range 9 East, B.M.
NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 13 South, Range 9 East, B.M.
SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, Township 13 South, Range 9 East, B.M.
NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 4, Township 13 South, Range 10 East, B.M.
Govt. Lot 6, Section 6, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 18, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 18, Township 13 South, Range 10 East, B.M.
SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, Township 13 South, Range 10 East, B.M.
SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 20, Township 13 South, Range 10 East, B.M.
NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 22, Township 13 South, Range 10 East, B.M.

2. Brackett Ranches Ltd. owns decreed water right no. 51-12898A, which has the following elements:

Priority Date: September 14, 1966

Source and Point of Diversion: Pence Spring, a tributary of Little Spring Creek, diverted in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 26, Township 15 South, Range 10 East, B.M., Owyhee County.

Water Use, Quantity, and Season of Use: Stockwater 0.23 cfs 01/01 to 12/31

Total Quantity: 0.23 cfs The quantity of water under this right shall not exceed 13,000 gallons per day.

Place of Use: SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 35, Township 13 South, Range 9 East, B.M.
Govt. Lot 1, Section 1, Township 14 South, Range 9 East, B.M.
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 11, Township 14 South, Range 9 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 14 South, Range 9 East, B.M.
SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 6, Township 14 South, Range 10 East, B.M.
NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 8, Township 14 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 18, Township 14 South, Range 10 East, B.M.

3. Water right nos. 51-12895A and 51-12898A are for stock watering use as defined in Idaho Code § 42-1401A(11).

4. Pence Spring discharges into a pond. Water right nos. 51-12895A and 51-12898A share a combined diversion system that lifts water from the pond. The diversion system consists of a Sta-Rite brand three-horsepower submersible pump capable of delivering 17.5 gallons per minute (.04 cfs), as the system is currently configured, through a two-inch pipeline to the top of Pence Butte. From the top of Pence Butte, water is distributed by gravity flow to the Bracketts' stock watering troughs. Each stock watering trough is equipped with a float switch and valve system designed to minimize waste by shutting off the delivery of water to the trough when it is full. Because the Bracketts rotate cattle from pasture to pasture, not all of the troughs are in use at any point in time.

5. The Bracketts' stock watering troughs are located on public land administered by the Bureau of Land Management.

6. The Bracketts' system for diverting water from Pence Spring is capable of delivering about 25,200 gallons per day into the pipeline that conveys water to the stock watering troughs served by water right nos. 51-12895A and 51-12898A.

7. Bracketts divert water from Pence Spring pursuant to water right nos. 51-12895A and 51-12898A from approximately July 10 to October 15 each year.

8. Brackett Ranches Ltd. typically grazes from 400-450 cattle at a time. Bert Brackett and Paula Brackett simultaneously graze "slightly fewer."

9. When range conditions are good, the Bureau of Land Management sometimes issues Temporary Non-Renewable Grazing Allowances to the Bracketts so they can graze more than the typical number of cattle on their allotments for a short time.

10. When calculating the volume of water needed for stock watering purposes, the Department typically estimates that a range cow drinks an average of 12 gallons per day.

11. On February 18, 2003, Bert Brackett and Paula Brackett filed Transfer No. 70887 proposing to change the place of use for water right no. 51-12898A from seven stock watering troughs to 18 troughs in the following locations:

SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 35, Township 13 South, Range 9 East, B.M.
NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 31, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 33, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 13 South, Range 10 East, B.M.
SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 35, Township 13 South, Range 10 East, B.M.
Govt. Lot 1, Section 1, Township 14 South, Range 9 East, B.M.
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 11, Township 14 South, Range 9 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 14 South, Range 9 East, B.M.
NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 2, Township 14 South, Range 10 East, B.M.
SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 6, Township 14 South, Range 10 East, B.M.

NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 8, Township 14 South, Range 10 East, B.M.
NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 11, Township 14 South, Range 10 East, B.M.
NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 14 South, Range 10 East, B.M.
NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, Township 14 South, Range 10 East, B.M.
NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 14, Township 14 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 18, Township 14 South, Range 10 East, B.M.
NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 23, Township 14 South, Range 10 East, B.M.
NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 24, Township 14 South, Range 10 East, B.M.

12. On February 18, 2003, Bert Brackett and Paula Brackett filed Transfer No. 70890 proposing to change the place of use for water right no. 51-12895A from 12 stock watering troughs to 20 troughs in the following locations:

SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, Township 11 South, Range 8 East, B.M.
SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, Township 11 South, Range 8 East, B.M.
NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 15, Township 11 South, Range 8 East, B.M.
NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 18, Township 11 South, Range 9 East, B.M.
NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 35, Township 12 South, Range 9 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 32, Township 12 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 2, Township 13 South, Range 9 East, B.M.
NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, Township 13 South, Range 9 East, B.M.
NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 13, Township 13 South, Range 9 East, B.M.
SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 24, Township 13 South, Range 9 East, B.M.
NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 25, Township 13 South, Range 9 East, B.M.
NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 4, Township 13 South, Range 10 East, B.M.
Govt. Lot 6, Section 6, Township 13 South, Range 10 East, B.M.
NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 9, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 9, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 18, Township 13 South, Range 10 East, B.M.
SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 18, Township 13 South, Range 10 East, B.M.
SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, Township 13 South, Range 10 East, B.M.
SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 20, Township 13 South, Range 10 East, B.M.
NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 22, Township 13 South, Range 10 East, B.M.

13. The purpose of the proposed transfers is to facilitate the rotation of cattle among various pastures within the Bracketts' grazing allotments to provide seasonal rest for each pasture and to avoid endangered species habitat during critical times of the year. Preservation and protection of rangelands for grazing and wildlife habitat purposes is essential to the ranching economy in southern Idaho.

14. The proposed places of use described in the two transfers are completely separate from each other.

15. BBCDC owns the following water rights, all of which have an authorized diversion point of SW¼SW¼, Section 26, Township 7 South, Range 6 East, B.M.

Water Right No.	Basis	Priority Date	Rate(cfs)	Source	Water Use(s)
51-2	Decreed	1883-01-02	10.96	BRUNEAU RIVER	IRRIGATION, STOCKWATER
51-3	Decreed	1888-02-20	20.00	BRUNEAU RIVER	IRRIGATION, STOCKWATER
51-4A	Decreed	1897-04-01	12.38	BRUNEAU RIVER	DOMESTIC, IRRIGATION, STOCKWATER
51-4B	Decreed	1897-04-01	0.26	BRUNEAU RIVER	IRRIGATION, STOCKWATER
51-5	Decreed	1905-04-01	16.40	BRUNEAU RIVER	IRRIGATION, STOCKWATER
51-10271	Decreed	1925-02-15	42.60	BRUNEAU RIVER	IRRIGATION, STOCKWATER
51-10350	Decreed	1897-04-01	13.54	BRUNEAU RIVER	IRRIGATION, STOCKWATER
51-10351	Decreed	1893-10-27	1.60	BRUNEAU RIVER	IRRIGATION, STOCKWATER

16. BBCDC's diversion point is approximately 70 miles downstream from Pence Spring, the source of the water rights proposed to be transferred.

17. BBCDC measures its own diversions from the Bruneau River.

18. The flows of the Bruneau River are not sufficient to satisfy BBCDC's water rights for the entire irrigation season. In the late summer, BBCDC voluntarily cooperates with two other nearby water delivery organizations to regulate diversions from the Bruneau River according to the priority dates of the water rights held by the three organizations.

19. Over a 20-year period, BBCDC has experienced a decline in the amount of Bruneau River water available to it for irrigation purposes.

20. BBCDC has not hired a professional engineer, hydrogeologist, hydrologist, or other qualified professional to study or report on the potential causes for the decline in water available to satisfy its irrigation water rights.

21. The State of Idaho has not established a water district pursuant to title 42, Chapter 6, Idaho Code, for the purposes of electing a watermaster to administer diversions of water throughout the Bruneau River basin. Historically the watermaster of Water District 51A administered the diversions of water upstream from the confluence of Flat Creek, Three Creek, and the East Fork of the Bruneau River. Water District 51A has not been active since 1977.

22. On June 11, 2007, the Department approved Transfer No. 70694 authorizing Bert Brackett and Paula Brackett to change the places of use for irrigation Water Right Nos. 51-96, 51-7085, and 51-7267. In addition to irrigation, Water Right No. 51-96 authorizes a diversion of water for stock watering purposes. The transfer approval included the following four conditions on all three of the water rights involved in the transfer:

At the time of this approval, this water right is within State Water District No. 51A. In the future use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within the

water district or any subsequent water district that may supercede 51A.

Upon reactivation or creation of a new water district (I.C. 42-604) or a water management [sic]district (I.C. 42-706), and after specific notification by the Department, right holders shall install a suitable measuring device and shall annually report the information to the Department. [NOTE: 42-706 provides for the creation of water measurement districts.]

When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.

When actively regulated by a Water District, a lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.

23. The Department does not usually impose the four approval conditions listed in Finding of Fact No. 22 on water rights outside of active water districts.

ANALYSIS

BBCDC is concerned that adding additional stock watering troughs to the Bracketts' water systems would enable the Bracketts to exceed the limits of their water rights. According to BBCDC, if the Bracketts exceeded the limits of their water rights, the decrease in flows in the Bruneau River system would reduce the amount of water available to fill BBCDC's senior water rights. BBCDC wants the Department to require Bracketts to install measuring devices and lockable controlling works on their diversions as a means of ensuring that Bracketts do not exceed their water rights.

Bracketts' system for diverting water from Pence Spring is capable of delivering about 25,200 gallons per day into the pipeline that conveys water to the stock watering troughs served by water right nos. 51-12895A and 51-12898A. Collectively the two water rights authorize the diversion of 26,000 gallons per day. Brackett Ranches Ltd. typically grazes 400-450 cattle at a time on the grazing allotment served by water right no. 51-12898A. Applying the Department's standard estimate of 12 gallons per day per head for range cattle, 450 cattle would drink about 5,400 gallons per day. Even if each animal drank double the average, or 24 gallons per day, on the hottest days, the herd would require only 10,800 gallons per day, which is less than the 13,000 gallons per day authorized by the water right. While there could be some microclimatic variation from place to place that would affect by some small increment how much water each animal might drink, distributing the cattle among more troughs will not noticeably alter the amount of water they drink collectively. The pipeline distributing water to the stock watering troughs is filled before the cattle drink water from the troughs. Once filled, the amount of water in the pipeline is static. The amount of water in the pipeline should not be added to the amount consumed by the cattle to determine the total amount of water diverted daily. Therefore, Brackett Ranches Ltd. does not now exceed the established volume limit of its water right. The same analysis applies to proposed changes to water right no. 51-12895A, which serves even fewer cattle. Consequently, authorizing additional stock

watering troughs will not of itself result in enlargement of the Bracketts' water rights. Moreover, because the proposed changes will not result in the diversion and use of more water than authorized pursuant to Bracketts' water rights, BBCDC will not be injured by the proposed changes.

BBCDC is also concerned that the addition of more stock watering troughs will enable the Bracketts to manage their grazing allotments more effectively, thereby increasing the carrying capacity of the land, which, in turn, may result in the BLM authorizing the grazing of more cattle on the allotments. Already BLM sometimes issues temporary non-renewable grazing permits for additional grazing on some allotments. Grazing more cattle would increase the demand for water from Pence Spring, possibly beyond the limits of the Bracketts' water rights. However, there is no indication that the Bracketts have historically exceeded the limits of their water rights, even when the BLM has authorized temporary increases in the number of cattle allowed on their allotments. BBCDC argues that the Bracketts should be required to install measuring devices and lockable controlling works because they cannot voluntarily regulate their diversions to ensure compliance with their water rights. At the same time, BBCDC voluntarily cooperates with other water delivery organizations to comply with their own water rights. The argument that Bracketts cannot voluntarily regulate their own diversion while BBCDC can is not persuasive.

Theoretically, just about any water diversion and distribution system in Idaho could be modified at some future time to exceed the authorized water use. Under Idaho Code § 42-701, the Department has broad authority to require measuring devices and lockable controlling works to prevent water right holders from exceeding the limits of their water rights. Because they can be expensive and troublesome to purchase, install, and maintain, the Department usually does not require measuring devices and lockable controlling works merely because there is a potential for exceeding the limits of the water right.

On Transfer No. 70694, which involved the diversion of significantly more water than 26,000 gallons per day in the same drainage, the Department did not require the immediate installation of measuring devices and lockable controlling works, but merely used the approval conditions listed in Finding of Fact No. 22 to notify the right holder that the Department could, under its statutory authority, require them in the future, should a water district be established. The conditions placed on the water rights changed by Transfer No. 70694 provide no more protection to BBCDC and other Bruneau River drainage water users than the statutes in chapters 6 & 7, title 42, Idaho Code, that the Department would rely on to create a water district and to require measuring devices and lockable controlling works. The Department creates a water district when there is an actual need to regulate water rights by priority to ensure that senior water right holders receive their entitlement before junior water right holders receive any water. Water districts elect watermasters to distribute water in accordance with established water rights. When a water district is formed, the Department usually requires water right holders in the district to install measuring devices and lockable controlling works in response to the immediate need. Placing the same or similar conditions on water right nos. 51-12895A and 51-12898A as on the water rights changed by Transfer No. 70694 would accomplish no more than could be accomplished through the formation of a water district or districts in Administrative Basin 51.

As for the stock watering rights involved in the transfers that are the subject of this order, Idaho Code § 42-701(7) exempts stock watering rights from measuring device requirements. The need for lockable controlling works (as opposed to measuring devices) on the Pence Spring

diversion should be evaluated when a water district is formed and a watermaster is hired to actively regulate diversions, when there is evidence that water users have actually exceeded the diversion rate or volume limits of their water rights (which there is not), or when there is some other strong public interest, such as a scientific interest, for doing so.

CONCLUSIONS OF LAW

Enlargement

1. Water right nos. 51-12895A and 51-12898A each authorize the diversion of 13,000 gallons per day, for a combined total of 26,000 gallons per day.

2. The place of use change proposed in Transfer No. 70887 will not result in enlargement of water right no. 51-12898A.

3. The place of use change proposed in Transfer No. 70890 will not result in enlargement of water right no. 51-12895A.

Injury

4. The place of use change proposed in Transfer No. 70887 will not result in injury to other water rights.

5. The place of use change proposed in Transfer No. 70890 will not result in injury to other water rights.

Conservation of Water Resources with the State of Idaho

6. The place of use change proposed in Transfer No. 70887 is consistent with the conservation of water resources within the State of Idaho.

7. The place of use change proposed in Transfer No. 70890 is consistent with the conservation of water resources within the State of Idaho.

Local Public Interest

8. The place of use change proposed in Transfer No. 70887 will not conflict with the local public interest.

9. The place of use change proposed in Transfer No. 70890 will not conflict with the local public interest.

Beneficial Use

10. The transfers do not propose to change to a new water use. Diverting water pursuant to water right nos. 51-12895A and 51-12898A for stock watering purposes remains a beneficial use.

Overall

11. The Department should approve Transfer No. 70887 as provided in Idaho Code § 42-222 subject to conditions necessary for the proper administration of the right.

12. The Department should approve Transfer No. 70890 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. 70887 is **APPROVED** subject to the following conditions:

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

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

3. 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.

4. This right does not grant any right-of-way or easement across the land of another.

5. The following rights are diverted through the point of diversion described above: 51-12895A, 51-12896A, 51-12897A, 51-12898A, and 51-12957.

6. This right, when considered with all other rights common to the same grazing allotment, is limited to the quantity of water beneficially used by the number of stock within the allotment.

7. The quantity of water under this right shall not exceed 13,000 gallons per day.

8. The quantity of water decreed for this water right is not a determination of historical beneficial use.

IT IS FURTHER HEREBY ORDERED that Transfer No. 70890 is **APPROVED** subject to the following conditions:

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

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

3. 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.

4. This right does not grant any right-of-way or easement across the land of another.

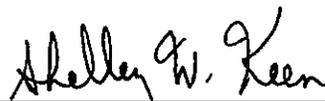
5. The following rights are diverted through point of diversion described above: 51-12895A, 51-12896A, 51-12897A, 51-12898A, and 51-12957.

6. This right, when considered with all other rights common to the same grazing allotment, is limited to the quantity of water beneficially used by the number of stock within the allotment.

7. The quantity of water under this right shall not exceed 13,000 gallons per day.

8. The quantity of water decreed for this water right is not a determination of historical beneficial use.

Dated this 23rd day of July, 2009.



SHELLEY KEEN
Hearing Officer