

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION                    )  
FOR TRANSFER NO. 75471 IN THE                )  
NAME OF CARIBOU LANDS, LLC                    )

**PRELIMINARY ORDER  
APPROVING TRANSFER**

On March 27, 2009, Caribou Lands, LLC ("Applicant") filed an application for transfer with the Idaho Department of Water Resources ("Department"). The Department assigned number 75471 to the transfer application and advertised it to the public. Four individuals protested the application: Erika Ingersoll, David Burton, Pete Nelson, and Dennis Haderlie.

On June 24, 2010, the Department conducted an administrative hearing regarding the protests in Idaho Falls. Attorneys Michael Tribe and Matt Darrington represented the Applicant. Upon approval by the other parties, Linda Nelson represented Pete Nelson. Mr. Burton, Mr. Haderlie, and Ms. Ingersoll represented themselves. Based on the testimony and other evidence presented at the hearing, the Department finds, concludes, and orders as follows:

**FINDINGS OF FACT**

1. Application for Transfer 75471 proposes to change the nature of use for and add a point of diversion to water right 24-10700, which authorizes the diversion of water from Grouse Creek (known locally as Schiess Creek). Said water right was claimed in the Snake River Basin Adjudication ("SRBA") and was decreed by the SRBA court in 2008. 24-10700 was decreed as an irrigation water right for 27.5 acres. It carried a diversion rate of 0.55 cfs and a season of use from June 15 to September 1. The application proposes to transfer a portion of the water right from irrigation use to storage in an on-stream pond to be used for recreation, wildlife, and fire suppression purposes and to offset the losses associated with the pond. The storage pond has a capacity of 1.5 million gallons (4.6 acre-feet) and will be appurtenant to a residential development.

2. The Applicant began construction of the residential development, including alterations to wetlands and stream channels and construction of diversion structures, without contacting the Department or the United States Army Corps of Engineers ("ACOE"). The Department and the ACOE were notified of the development activity and immediately ordered the Applicant to cease construction until the necessary permits were obtained. The Applicant was required to mitigate the damage and impacts resulting from its previous work.

3. As part of the remediation process, the Applicant filed this transfer to address the proposed change in the use of water on the development property. The initial transfer application included three off-stream reservoirs. The development proposal and transfer application have since been amended to eliminate two of the ponds. The current proposal calls for construction of a single, on-stream pond that will be used for recreation, fish habitat, and fire suppression. A screened intake pipe and fire hydrant will be constructed near the pond to allow for pumping of the fire suppression storage out of the pond.

SUPPORT DATA  
24-10700

4. The Department's Stream Channel Protection Program and the ACOE have recently authorized the Applicant to restore a section of Grouse Creek. A previous land owner channelized the creek through his property, causing damage to the channel and impairing its viability as fish habitat. The existing channel is muddy and severely incised, causing the water to flow through the channel too rapidly. The new stream channel proposed by Applicant is similar to surrounding sections of Grouse Creek and will constitute a vast improvement of the fish habitat and will provide other benefits to the creek and the surrounding ecosystem. The creek will raise the local water table and will increase flow in Grouse Creek in the late season. The on-stream pond will also provide some benefits to the local fish, by providing protection during extreme temperature conditions.

5. The bulk of the testimony provided at the hearing related to the stream channel alteration project. Although the project is part of the Applicant's larger remediation plan, and the restored stream channel and the proposed pond are hydrologically-connected water features, the transfer application before the Department only relates to providing water for the pond.

6. The Applicant proposed to dry up 13.5 irrigated acres to provide water for the three ponds described in the original transfer application. Because the scope of the application has been reduced to only include one pond, the number of irrigated acres to be dried up has also been reduced. According to data collected at the Soda Springs Agrimet site, a pond with a surface area of 0.7 acres will lose 1.0 acre-feet of water to evaporation in one calendar year. The Applicant is required to dry up enough acres to offset the storage capacity of the ponds and the annual evaporation losses (4.6 acre-feet + 1.0 acre-feet = 5.6 acre-feet). The Soda Springs Agrimet site shows that alfalfa consumes 1.86 acre-feet of water per irrigated acre. Therefore, the Applicant must dry up 3.0 irrigated acres as part of this transfer. The transfer approval requires the pond to be lined, eliminating any losses due to seepage.

### **CONCLUSIONS OF LAW**

1. Idaho Code § 42-222 sets forth the standards for evaluating an application for transfer:

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 restoration of the Grouse Creek stream channel is a separate issue from the transfer application. The Applicant would be allowed to go forward with the stream channel alteration, provided the proper authorization is obtained from the Department and the ACOE, regardless of whether its transfer application were approved or denied. The scope of the transfer application and this Order are limited to the transfer of water rights from irrigation to the proposed on-stream storage pond.

3. Once the ACOE and the Department's Resource Protection Bureau authorize the Applicant to turn Grouse Creek into the new channel, IWDR will recognize that channel as the natural Grouse Creek channel. No water right is required to run water through a restored natural channel created under the joint authority of the ACOE and the Department.

4. The proposed transfer, as conditioned by the Department, will not injure other water rights.

5. The proposed transfer, as conditioned by the Department, will not enlarge the original right. The acres dried up by the applicant are sufficient to offset the storage capacity of the on-stream pond and the losses associated with the pond.

6. The proposed transfer is consistent with the conservation of water resources within the State of Idaho and is in the local public interest. Applicant's witness, Terry Holubetz, provided persuasive testimony regarding the benefits of the pond for native fish species during extreme weather conditions. Although documentary evidence suggests that the Idaho Department of Fish and Game has concerns relative to the water temperatures of the pond, the Applicant has agreed to take appropriate steps to address those concerns.

7. "Local Public Interest" is defined by statute to be "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." (Idaho Code 42-202B) Mosquito propagation does not fall within the statutory definition of "local public interest." If, as the protestants argue, the proposed use of water for a pond results in an increased number of mosquitoes, then the "effect" of the water use is on an insect population. The "effect" of the water use is not on the public water resource, as required by the statutory definition. Even if mosquito propagation fell within the definition of local public interest, the protestants failed to present sufficient evidence that the mosquito population in the area would in fact increase as a result of the on-stream pond.

8. Protestants raised the issue of limited public access to the restored portion of Grouse Creek. This Order does not attempt to answer the question of whether public access exists for the Grouse Creek natural channel. Public access to the various waterways of Idaho is a difficult issue and is generally very fact specific. With regards to the area of Grouse Creek associated with the transfer application, public access either exists or does not exist. Approval of this transfer does not

alter the right of the public to access the Grouse Creek natural channel, if any such right exists.

9. Protestants argued that the Applicant, alone, stands to benefit from the proposed transfer and the stream channel restoration project and should be barred from obtaining a private benefit from a public resource. Such an argument has no foundation in law or reason. The very nature of water rights in the State of Idaho is to provide private benefits, including monetary benefits, from the use of public water resources.

10. The fact that the Applicant violated stream channel protection laws and diverted water illegally in the past, even the recent past, does not preclude the Applicant from pursuing a valid transfer application. Testimony provided by the Applicant's witnesses confirmed that a number of violations occurred at the beginning of the project. However, evidence presented also indicated that the Applicant has addressed all existing violations with the appropriate agencies. Therefore, the Applicant may pursue its water rights transfer, even if the Applicant continues to be viewed negatively by the local public due to its previous violations.

### ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 75471 in the name of Caribou Lands, LLC is APPROVED subject to the terms and conditions set forth in the Transfer Approval issued in conjunction with this Order.

Dated this 20<sup>th</sup> day of July, 2010.

  
James Cefalo  
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 20<sup>th</sup> day of July 2010, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER APPROVING TRANSFER to the person(s) listed below:

  
Sharla Cox  
Administrative Assistant

US MAIL

RE: TRANSFER NO. 75471

Michael Holliday  
10498 Hwy 95  
Payette ID 83661

David H Burton  
PO Box 430  
Iona ID 83427

Michael Tribe  
Matt Darrington  
Robinson Anthon & Tribe  
PO Box 396  
Rupert ID 83350

Pete Nelson  
2346 Fairview Rd  
American Falls ID 83211

Erika Ingersoll  
PO Box 159  
Aberdeen ID 83210

Caribou Lands LLC  
14400 N 76<sup>th</sup> PL  
Scottsdale AZ 85260

Holden Kidwell Hahn & Crapo  
Robert L Harris  
PO Box 50130  
Idaho Falls ID 83405-0130



## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

**(To be used in connection with actions when a hearing was held)**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

## **CERTIFICATE OF SERVICE**

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

## **FINAL ORDER**

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.