

T1664 GEORGETOWN IRR

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

DENIED

APPLICATION FOR TRANSFER OF WATER RIGHT

To Change the Point of Diversion and/or the Place of Use

Agricultural Products Corporation with shares in
Georgetown Irrigation Company

1. Name of Right Holder

Post office address Georgetown, Idaho 83239

2. Right obtained by:

a. Decree to Georgetown Irrig. Company in Case of Utah Power & Light Co.

The Last (Name) et al
vs Chance Canal Co., Dated July 14, 1920 in U. S. District Court, District of Idaho
(Name of Court)

Court. County of Bear Lake

Decree

b. License No. 11-0290 issued by the State of Idaho, Department of Reclamation.

3. Source of water Georgetown Creek tributary to Bear River
(Name of stream or source)

4. Date of Priority May 1, 1881

5. Amount of water a. 70 c.f.s. and/or

b. acre feet/annum

6. Water is used for Irrigation from Apr. 1 to October 31
(Month, Day) (Month, Day)

7. Original location of point of diversion is SE 1/4 NE 1/4 of Section 4
Township 11S, Range 44E, B.M., in Bear Lake County;

Additional points of diversion, if any SW 1/4 SE 1/4, Sec. 32, T. 10S, R. 44E, (The points of diversion are as changed by the approved transfer dated 7/15/1971).

8. Lands presently irrigated or place of use:

TWP.	RANGE	SEC.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				TOTALS
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	
11S	43E	Section No. 1, 11, 12, 13, 14, and 24.																	
11S	44E	Section 5, 6, 7, 8, 18, and 19.																	

9. If applicant was not the original holder of this right explain how it was acquired: _____

10. CHANGE IN POINT OF DIVERSION 104 shares owned by Agricultural Products Corp.

- a. Quantity to be diverted at new point: 2.08 c.f.s. and/or _____ acre feet
- b. New point of diversion: SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 35, Township 10S
_____, Range 44E, B.M.
- c. Description of method of diversion and conveyance from new points of diversion: _____
Concrete sump pump and conveyed through a pipeline to a place of use

- d. Is water to be conveyed to the lands previously irrigated? Yes X No _____
If not, the place of use should be changed below. _____
- e. Describe the reasons for applying for a change in the point of diversion:
Change from agricultural use to manufacturing to facilitate the operation of
an elemental phosphorus producing plant. This application requests a change
in the nature of use from irrigation to manufacturing.

- f. Do you intend to make the transfer permanent? Yes
- g. Do you intend to abandon completely the old point of diversion? No, the remainder of the
Georgetown irrigation Co. users will continue to use the old points.
- h. Indicate on the above plat the new point of diversion and lands to be irrigated.

11. CHANGE IN PLACE OF USE

- a. Describe the new lands on which you wish to use your right.

TWP.	RANGE	SEC.	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				TOTALS
			NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	NE $\frac{1}{4}$	NW $\frac{1}{4}$	SW $\frac{1}{4}$	SE $\frac{1}{4}$	
10S	44E	24									X	X	X	X	X	X	X	X	
"	"	25	X	X	X	X	X	X	X	X									

Properties for which the water has been attached for irrigation purposes
and which use will be abandoned are more fully described on attached
sheets

Total number of acres to be irrigated _____

RANGE 44E

TOWNSHIP 10S

PLACE OF
USE

Point of
direction

35

36

BRIDGE TOWNSHIP

SCALE: 2 Inches Equal 1 Mile. Draw Plan in Ink.

RECEIVED

AUG 2 1974

Department of Water Resources
Eastern District Office

ATTACHMENT TO APPLICATION FOR TRANSFER OF WATER RIGHT

Department of Water Administration
State of Idaho
Statehouse
Boise, Idaho

This statement is made as an attachment to application for transfer of water right and changing the point of diversion, place of use and nature of use. This application is being filed by Agricultural Products Corporation, a stockholder in Georgetown Irrigation Company, which is the holder of the water right. Applicant's interest and right in the water are represented by the shares of the corporation. Due consideration of the Department of Water Administration is urgently requested in this matter.

The shortage of fertilizer products throughout the nation and world is critical, and the federal task force concerned with the problem has requested increased production, including rehabilitation of existing plants. At the present time there are millions of tons of phosphate in the Georgetown Canyon owned by this applicant, in addition there is a plant site and machinery rusting and unproductive.

In the opinion of this applicant, it is imperative that this resource be developed and the use of the water involved in this application is absolutely necessary.

AGRICULTURAL PRODUCTS CORPORATION



By: DEAN F. COWLEY
Senior Vice-President - Production

- b. Do you intend to make the transfer permanent? Yes
- c. Are you completely abandoning the lands previously irrigated by this right? If not, explain your plans:
Yes, the lands previously irrigated by these 104 shares will be abandoned.
- d. Describe any other water rights that you claim for the new ground upon which you wish to transfer this right: _____
- e. Indicate on the above plat the new land to be irrigated and the point of diversion.

I hereby assert that no one will be injured by such transfer and that the change will be made at my own risk. The information contained in this application is true to the best of my knowledge.

Dean F. Cowley
AGRICULTURAL PRODUCTS CORPORATION

Subscribed and sworn to before me this 1st day of August, 1974
By: Dean F. Cowley, Senior Vice Pres.

Ferris L. Galt
(notary public)

My commission expires Apr. 1977

SEE ATTACHED STATEMENT

**ACTION OF DIRECTOR, DEPT. OF WATER RESOURCES
AND CERTIFICATE OF TRANSFER**

This is to certify that I have examined Application for Transfer of Water Rights No. 11-0290,
and said application is hereby DENIED

1. Approval of said application is subject to the following limitations and conditions:

2. Denial of said application is for the following reasons:

Pursuant to Memorandum Decision dated December 26, 1974.

Witness my hand this 7 day of January, 1975

DENIED

R. Keith Higginson
R. KEITH HIGGINSON, Director
Idaho Department of Water Resources

FOR DEPARTMENT USE ONLY

Received by MB Date 8-2-74

Prelim. check by RDC Date 8/2/74

Fee received by MB Date 8-2-74 Fee \$ 30.00
#12997

Approved for publication by CB - 9/6/74

Published in Idaho Examiner Dates Aug. 22 + 29, 1974

Hearing held _____

Watermaster Recommendation sent L.D. #11 Russell Stoker

Protest filed by: _____ Date _____

W. Lloyd Clark 8-27-74

Greentown Irrig. Co. 9-5-74

Sent US
8-13-74

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF PROTESTS AGAINST	)	
APPROVAL OF APPLICATION FOR TRANSFER	)	MEMORANDUM DECISION
OF WATER RIGHT NO. 11-0290 IN THE	)	
NAME OF AGRICULTURAL PRODUCTS CORPORATION.	)	
	)	

The applicant, Agricultural Products Corporation, filed an application for transfer of its shares in the Georgetown Irrigation Company to a different place of use and also for a change in the nature of that use. The transfer was protested by Georgetown Irrigation Company. A hearing was held on October 18, 1974 at which time both parties agreed to submit two legal issues to the Director for decision prior to taking any evidence. Those issues are:

- 1) The effect of Idaho Code, §42-108 when the consent of the irrigation company has been withheld; and
- 2) Whether the Director of the Department of Water Resources has authority to grant a change in the nature of use of water.

Idaho Code, §42-108 provides in essence that any person entitled to the use of water may change the point of diversion and/or place of use upon application to and approval of the Director, Department of Water Resources. However, if the right is one based upon:

"shares of stock in a corporation or if the works or system is owned and/or managed by an irrigation district, no change in the point of diversion or place of use of such water shall be made or allowed without the consent of such corporation or irrigation district, except to lands which may be irrigated through the same system . . ."

The protestant herein is the irrigation company from whom the applicant derives its shares of stock and rights to water. The protestant has refused to agree to the transfer. It is also evident from the argument of counsel that the applicant would not be using the same system. It is applicant's contention that

the stream channel is the system used. This is unrealistic and not within the obvious intent or meaning of the statutory language. The language of the statute refers to the system, which in ordinary meaning and the context of this statute, is some man-made structure by which water is delivered. If we adopted the interpretation urged by the applicant, the statutory provision would have little or no effect, since all districts take water from a stream. An interpretation will not be given that has the effect of nullifying an act of the Legislature. Applicant's interpretation would nullify the exception in the statute because all the water of an irrigation company is derived from some stream and thus water shares could be transferred without any approval of the company as long as the point of diversion was from the company's source of supply.

I, therefore, find and hold that Georgetown Creek is not part of the irrigation company system and the applicant can not change its point of diversion or place of use without the approval of the company.

Even if the system was as contended for by the applicant, the Director has no authority to approve a change in the nature of use of a water right.

Idaho Code, §§ 42-108 and 42-222(1) speak to changes in place of use and point of diversion, but not the nature of the use. There is clearly no specific authorizing language which would allow the Director to approve such a change. It is argued by the applicant that because there is a fee for a change in use, and although not argued by applicant, there is a procedure for appeal from a decision approving or rejecting a change in use (42-222(3)) the legislative intent exists for the implied assumption of that power.

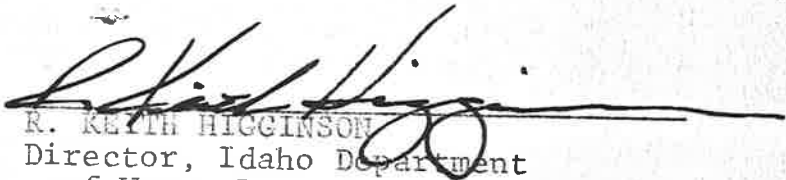
The statute in question was repealed and re-enacted in 1969 (Chapter 303, §2, pg. 905, 1969 Session Laws). The legislative history of that act reveals that the bill originally submitted to the Legislature provided the authority in Idaho Code, §42-222(1) for a change in nature of use. However, that language

was amended out of Idaho Code, §42-222(1), but by apparent oversight was not removed from §§ 42-221(b) and 42-222(3). It is thus clear that the Legislature did not intend to grant such power to the then Department of Reclamation, but instead specifically struck it from the bill.

It is therefore my conclusion and finding that the Director of the Department of Water Resources has no authority to grant a change in the nature of use of any water right.

IT IS THEREFORE ORDERED AND THIS DOES HEREBY ORDER that the application for transfer and change in the nature of use be and the same is hereby denied.

DATED this 26th day of December, 1974.


R. KEITH HIGGINSON
Director, Idaho Department
of Water Resources

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FEB 16 1978

Department of Water Resources

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

IN THE MATTER OF THE APPLICATION)
FOR AND PROTESTS AGAINST)
APPLICATION FOR TRANSFER OF WATER)
RIGHT NO. 11-0290 IN THE NAME OF)
AGRICULTURAL PRODUCTS CORPORATION.)

Case #2796

O R D E R

This matter is before the Court on a motion for summary judgment.

It appears to the Court that the plaintiff's herein made application to the Department of Water Resources for transfer of the point of diversion of water and a change of character of use of water. Plaintiff's rights to the water exist by virtue of ownership of stock in an irrigation company.

The procedure for changing a point of diversion is outlined and set forth in Idaho Code 42-108. A portion of that section requires the owner of stock in an irrigation company to obtain the written consent of the corporation to change the point of diversion.

In this case, the corporation responding to the application for change of the point of diversion has refused to give consent to the transfer.

The points which control in this situation are set out in the case of Johnston vs. Pleasant Valley Irrigation Company, Ltd., 69 Idaho 139, 204 P2d 434, in which the court stated that a transfer of point of diversion without the consent of the corporation was not possible. The Court stated that the stockholder did not have any rights in changing the point of diversion, but only had a right to use the water under the direction of the corporation.

It is apparent to the Court on reading this case and other cases that the right to the use of the water vested in the corporation and the rights of the stockholder are only existant by reason of the grant of the corporation to the stockholder, and the stockholder only has those rights given to him by the corporation.

In recognizing the restriction that the corporation can apply to the water user, and the reasons therefore, the Court stated, "The exercise of such a right can tend to disrupt the unity of the corporation and to impair the very purpose for which the same was formed. Carried to excess, it would destroy the usefulness of the corporation." Thus the Court recognized that if the stockholder user had the right to change the point of diversion without the consent of the corporation, the purpose for which the corporation was originally formed would be destroyed and the corporation would not be a functioning, viable entity.

The facts that the plaintiff petitioner herein, the stockholder user, desires to change the point of diversion and had not obtained the consent of corporation owner, and in fact the corporation owner refuses to give consent to said change of point of diversion, fully determine this cause of action.

The Court will therefore not discuss the request for change of character of use of the water.

Petitioner contends that the transfer was within the system, however, the application evidences that the transfer was in the natural channel upstream and therefore not within the system.

IT IS HEREBY ORDERED AND ADJUDGED that this matter is dismissed with prejudice.

DATED this 14th day of February, 1978.


FRANCIS J. CHUSKI
District Judge

cc: Wallace M. Transtrum
Nathan W. Higer
Kent W. Foster

IN THE SUPREME COURT OF THE STATE OF IDAHO

1664

No. 12938

IN THE MATTER OF THE APPLICATION)
 FOR AND PROTEST AGAINST APPLI-)
 CATION FOR TRANSFER OF WATER RIGHT)
 No. 11-0290 IN THE NAME OF AGRI-)
 CULTURAL PRODUCTS CORPORATION.)

Pocatello, September Term,
 1979

BEKER INDUSTRIES INCORPORATED,)
 formerly AGRICULTURAL PRODUCTS)
 CORPORATION,)

Filed: April 18, 1980

Applicants-Appellants,)

R. H. Young, Clerk

v.)

GEORGETOWN IRRIGATION DISTRICT,)

Protestant-Respondents.)

Appeal from the District Court of the Sixth Judicial
 District, State of Idaho, Bear Lake County. Hon. Francis J.
 Rasmussen, District Judge.

Appeal from summary judgment dismissing an appeal of
 Beker Industries, Inc. from a decision of the director of the
 Idaho Department of Water Resources. Judgment affirmed.

A. Bruce Larson, of Transtrum & Budge, Soda Springs,
 for applicants-appellants.

Kent W. Foster, of Holden, Holden, Kidwell, Hahn &
 Crapo, Idaho Falls, for respondent.

McFADDEN, J.

This is an appeal from a summary judgment of the
 district court dismissing applicant-appellant Beker Industries'
 (Beker's) appeal from a ruling of the director of the Department
 of Water Resources dismissing Beker's application for transfer of
 the point of diversion, and place and nature of use of its water
 right.

The principal issue before the court in this appeal is
 whether the Director of the Department of Water Resources has the
 statutory authority to approve an application by a holder of a
 water right to change the use of that water right from agri-
 culture to manufacturing.

Protestant-respondent Georgetown Irrigation District (GID) is entitled to divert up to 70 cubic feet per second (cfs) of water from Georgetown Creek between April and October for irrigation. It obtained rights to this water by decree of the federal district court for the district of Idaho in *Utah Power & Light Co. v. Last Chance Canal Co.*, (known as the "Dietrich Decree"), July 14, 1920.

In the mid-1950's Central Farmers, Inc. acquired real property in Georgetown Canyon which included 104 shares of stock in GID. Subsequently these shares of stock and apparently the real property as well were transferred to El Paso Products Co., and then to Agricultural Products Company, which later merged with Beker Industries. The surviving corporation is applicant-appellant, Beker Industries (Beker).

Because Beker wishes to produce elemental phosphorous in Georgetown Canyon, it petitioned the Department of Water Resources (DOWR), on August 2, 1974, to allow it to make a change in point of diversion, place of use, and in nature of use of the water represented by its 104 shares of stock in GID. The change in place of use was to be to a place "several miles upstream" from the land which the 104 shares of stock had originally been used to irrigate; the change in point of diversion was to be to a place "some distance upstream" from the first of GID's diversion works; and the change in nature of use was to be from agricultural-irrigation to manufacturing.

GID refused to consent to the requested changes, and protested to DOWR. On October 18, 1974, the director of DOWR held a hearing, at which the parties agreed to submit two issues for resolution before any fact finding by the director. These were, first, whether GID's consent to the proposed changes in point of diversion and place of use was required, and second, whether, in any case, DOWR had authority to permit a change in

the nature of use of an established appropriation. These same two issues are the essence of this appeal.

On December 26, 1974, the director of DOWR issued his memorandum decision in which he held, first, that Beker's proposed changes in point of diversion and place of use were not "to lands which may be irrigated through the same system," and that GID's consent to the changes was thus required; and, second, that DOWR was not empowered to permit a change in the nature of use of the established appropriation.

Thereafter, on February 21, 1976, Beker appealed to the district court for relief from the director of DOWR's decision. The appeal was taken pursuant to I.C. § 42-222(3) which provides for a "trial de novo" at the district court level. GID and DOWR filed responses to Beker's appeal. Two months later GID filed its motion for summary judgment, on the ground that Beker had not obtained GID's consent to change the point of diversion and place of use (I.C. § 42-108) and on the additional ground that the Director could not authorize a change in nature of use of the water. This motion was supported by reference to the proceedings before and briefs submitted to the director of DOWR. No briefs in support of or in opposition to the motion for summary judgment were filed and no hearing was held by the district court at this time. A year later GID filed a motion to dismiss based on Beker's failure under I.R.C.P. 83(h) to file a cost bond on appeal to the district court. Rule 83(h) was promulgated on January 1, 1975, and rescinded effective July 1, 1977. Both GID and Beker submitted briefs to the court on the motion to dismiss which discussed Rule 83(h).¹

The district court entered an order stating that the matter was before it on GID's motion for summary judgment, and

¹ At oral argument, GID conceded that I.R.C.P. 83(h) was not applicable to this case.

discussed the merits of the motion. Concluding that the decision of the director of DOWR was correct, it dismissed Beker's appeal. Beker thereafter moved for relief from the order, for its amendment, reconsideration and to have it set aside. These motions were denied.

Before consideration of the principal issue presented by this appeal, two procedural problems must first be discussed. The first is whether it was necessary for appellant to post an appeal bond pursuant to I.R.C.P. 83(h) on taking the appeal from the DOWR ruling to the District Court as asserted by respondent when it moved in the district court on May 5, 1977, to dismiss appellant's appeal for failure to do so. Respondent contends that if for any reason the ruling on the motion for summary judgment is not sustained, the appeal to the district court should be dismissed for lack of bond. On May 25, 1977, this court rescinded the provisions of I.R.C.P. 83(h) effective July 1, 1977, eliminating any necessity of posting a bond on an appeal to the district court. Here the trial court did not pass on this motion, but on February 14, 1978, entered summary judgment dismissing the action, not on the grounds of failure to post bond, but on other grounds. No decision being rendered until after rescission of the requirement, there would be no basis for dismissing the appeal. See, Erickson v. Amoth, 99 Idaho 907, 591 P.2d 1074 (1978).

The next procedural question presented deals with whether use of a summary judgment procedure is permissible on an appeal under I.C. § 42-222(3) from a ruling by the director of DOWR. It is our conclusion that such procedure is permissible. I.C. § 42-222(3) authorizes an appeal from a ruling by the DOWR approving or rejecting an application "to change the point of diversion, place, period of use or nature of use of water under an established right" It provides the procedure to be used

to perfect such an appeal, and states, "[s]uch an appeal shall be heard and determined de novo." The term "de novo" generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. Black's Law Dictionary 5th ed. 1979, p. 649. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction. *Collier & Wallis v. Astor*, 70 P.2d 171, 173 (Cal. 1937). A moving party is entitled to a motion for summary judgment when there is no genuine issue as to any material fact. I.R.C.P. 56(c). All the rules of civil procedure apply uniformly in the district court in all actions, proceedings and appeals of a civil nature. I.R.C.P. 1(a). Therefore, on appeal from the magistrate's court to the district court, a motion for summary judgment is applicable on trial de novo when there is no genuine issue as to any material fact. *Yribar v. Fitzpatrick*, 87 Idaho 366, 373, 393 P.2d 588, 591 (1964); I.R.C.P. 56(c). The same reasoning should apply to an appeal from a ruling of the Director of DOWR to the district court, and we so hold.

In considering the merits of this appeal, the essential issue to be resolved is whether the director of DOWR has been granted the authority to approve an application for a requested change in the nature of the use of water.² The record reflects that appellant's right to the use of the water was by

2 Other prior appropriation jurisdictions have recognized a common law right to change the nature of use of water without losing one's appropriation date. See *Ramelli v. Irish*, 31 P. 41 (Cal. 1892); *Gallagher v. Montecito Valley Water Co.*, 35 P. 770 (Cal. 1894); *Seven Lakes Reservoir Co. v. New Loveland and Greeley Irrig. and Land Co.*, 93 P. 485 (Colo. 1907); *Power v. Switzer*, 55 P. 32 (Mont. 1898); *In re Water Rights in Alpowa Creek*, 224 P. 29 (Wash. 1924); 2 *Kinney on Irrigation and Water Rights*, 2d ed. §§ 869-73 (1912). This court has never had to consider this issue, nor is such an issue presented in this case. Herein we address only the issue of whether the DOWR has the authority to grant the requested change in nature of use.

3

reason of ownership of 104 shares of stock of respondent GID. The record also discloses that respondent GID was decreed its water right in the case of Utah Power & Light Company v. The Last Chance Canal Company, et al., dated July 14, 1920, in the United States District Court, the so-called "Deitrich Decree." Appellant by its petition before the DOWR stated that it desired to change its place of use and to

"change from agricultural use to manufacturing to facilitate the operation of an elemental phosphorus producing plant. This application requests a change in the nature of use from irrigation to manufacturing."⁴

The DOWR denied the petition on the basis that it did not have the power to grant a change in nature of use. The district court did not discuss this issue. (District court order of February 14, 1978, C.T. p. 32)⁵ We agree that the DOWR did not have the power and the respondent is entitled to a judgment as a matter of law. Because the answer to the question of authority is so resolved, we need not address the question of whether the proposed changes in point of diversion and place of use were to places within GID's system. It appears from the record that the only purpose for these changes was to produce elemental phosphorus.

3 It is to be noted that in the title of this appeal, respondent has been referred to as Georgetown Irrigation District, although appellant in its petition for appeal in the district court alleged respondent was an irrigation company, which appellant "is informed and believes is a corporation organized under the laws of the State of Idaho." This allegation in the petition was admitted by the response to the petition filed by respondent and the response of the director of DOWR.

4 The petition referred to the fact that the recorded point of diversion was in the SE 1/4 NE 1/4 Sec. 4, Twp. 11S R. 44 E.B.M., Bear Lake Co., and that additional points of diversion are SW 1/4 SE 1/4 Sec. 32, T. 10 S. R. 44 E "The points of diversion are as changed by the approved transfer dated 7/15/1971."

5 "The facts that the plaintiff petitioner herein, the stockholder user, desires to change the point of diversion and had not obtained the consent of corporation owner, and in fact the corporation owner refuses to give consent to said change of point of diversion, fully determines this cause of action." District Court Order of February 14, 1978,

Beker requested the changes pursuant to I.C. § 42-108 and 222(1), the same sections relied upon by the DOWR in rendering its decision in this case. These sections speak to power to grant changes in place of use and point of diversion, but not the nature of use. There is no specific language allowing the director of DOWR to approve change in nature of use. The statutes in question were repealed and reenacted in 1969. 1969 Sess. Laws, ch. 303, p. 905-909. In the original version of the bill, language specifically allowing for a change in the nature of use of water was included. Before passage, the bill was amended twice. In the third and final version, the legislature struck the language providing for the change in the nature of use. By addressing the question directly and eliminating the provision in the amendment, this court cannot interpret this legislative action in any other manner than to say that it is not the intent of the legislature to give the DOWR the authority to grant a change in nature of use or allow an individual to make it without the possibility of abandonment.

In addition, during the 1978 legislative session, House Concurrent Resolution no. 48 was passed stating that water users should be allowed to change the nature of use of their own water rights and that I.C. § 42-222 should be amended to allow such changes. Also adopted was I.C. § 42-1736A which states that it is the legislative intent in the public interest that H.C.R. 48 be recognized as the guide for the state water plan. However, I.C. § 42-222 was not amended. Without such revisions, there are no provisions authorizing the DOWR to approve a change in the nature of use. An administrative agency like the DOWR has only such powers as the statute or ordinance confers. Idaho Const. art 15 § 7; I.C. § 42-1734, 1736; 1 Am.Jur.2d § 69, p.

865. See also *Peters v. Hobby*, 349 U.S. 331, 345, 99 L.Ed. 1129, 1140-41, 75 S.Ct. 790, 797 (1955).

As the appellant correctly points out, references to a change in the nature of use in I.C. § 42-221 providing for filing fees and I.C. § 42-222(3) providing appeal procedures remained at the time of this action. The fact that the references in these sections existed is not definitive. As the director of DOWR stated in his memorandum opinion, the remaining references appear to be an oversight in omission. This interpretation is supported by the fact that in 1978, during the same legislative session that I.C. § 42-1736A was passed, the legislature removed the reference to change in the nature of use from I.C. § 42-221. 1978 Sess. Laws ch. 143, p. 324. The remaining reference exists in § 42-222(3).⁶

In light of the more definitive action of the legislature outlined above, we cannot rely on a passing reference in § 42-222(3) for authority to allow the change in the nature of use requested here. While it may not make sense to give the DOWR authority to grant changes in place of use and point of diversion while not giving them power to grant such changes in the nature of use, we leave that incongruity to the legislature to remedy if they see fit. Until the current statutory provisions are amended there is no authority to grant a change in nature of use of water.

We have examined the cases cited by appellant in support of its claim that the DOWR was authorized to change the nature of use of water and find them unpersuasive in light of the above legislative actions. In *Hard v. Boise City Irrig. and Land*

⁶ There is also a reference to a change in the nature of use in § 42-211. This section was originally enacted in 1907. In 1967, the legislature replaced it with totally new provisions although it was called an amendment. It refers to changes in permits and seems by its history to be part of I.C. §§ 42-205-210. It does not apply to the instant case as the water right was acquired by decree, not permit.

Co., 9 Idaho 589, 76 P. 331 (1904), the court only addressed question of whether a change in place of use of water could be made. The court, however, quoted two cases, one federal and one California, which allowed changes in nature of use of water (9 Idaho at 598). As this language was unnecessary for the resolution of this case, we find it unpersuasive. In Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915), the court denied the change requested because the change was from non-consumptive to consumptive use and would injure the water rights of other appropriators. The court, therefore, did not address the specific issue presented here. Finally, in Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937), the only change made was from one type of mining to another. There is a distinction between a change from one generic use to another as requested here (agriculture to manufacturing) versus a change within a category of use in light of the fact that the Idaho Constitution grants a priority of appropriation based on the nature of use. (Art. 15, § 3) The change here would lower the priority of the appellant for appropriation where the change in Zezi did not. There are no cases in Idaho where a change from one type of use to another has been upheld.

Therefore, DOWR was without authority to authorize a change in the nature of the use and therefore there are no factual issues in dispute. We decline, to address the other issues raised by the appellant, and affirm the district court's granting of the motion for summary judgment. Costs to Respondent.

DONALDSON, C.J., SHEPARD, BAKES and BISTLINE, JJ.,
concur.

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 12938

IN THE MATTER OF THE APPLICATION
FOR AND PROTEST AGAINST APPLI-
CATION FOR TRANSFER OF WATER RIGHT
No. 11-0290 IN THE NAME OF AGRI-
CULTURAL PRODUCTS CORPORATION.

BEKER INDUSTRIES INCORPORATED,
formerly AGRICULTURAL PRODUCTS
CORPORATION,

Applicants-Appellants,

v.

GEORGETOWN IRRIGATION DISTRICT,

Protestant-Respondents.

Pocatello, September Term,
1979

Filed: April 18, 1980

R. H. Young, Clerk

Appeal from the District Court of the Sixth Judicial
District, State of Idaho, Bear Lake County. Hon. Francis J.
Rasmussen, District Judge.

Appeal from summary judgment dismissing an appeal of
Beker Industries, Inc. from a decision of the director of the
Idaho Department of Water Resources. Judgment affirmed.

A. Bruce Larson, of Transtrum & Budge, Soda Springs,
for applicants-appellants.

Kent W. Foster, of Holden, Holden, Kidwell, Hahn &
Crapo, Idaho Falls, for respondent.

McFADDEN, J.

This is an appeal from a summary judgment of the
district court dismissing applicant-appellant Beker Industries'
(Beker's) appeal from a ruling of the director of the Department
of Water Resources dismissing Beker's application for transfer of
the point of diversion, and place and nature of use of its water
right.

The principal issue before the court in this appeal is
whether the Director of the Department of Water Resources has the
statutory authority to approve an application by a holder of a
water right to change the use of that water right from agri-
culture to manufacturing.

Protestant-respondent Georgetown Irrigation District (GID) is entitled to divert up to 70 cubic feet per second (cfs) of water from Georgetown Creek between April and October for irrigation. It obtained rights to this water by decree of the federal district court for the district of Idaho in *Utah Power & Light Co. v. Last Chance Canal Co.*, (known as the "Dietrich Decree"), July 14, 1920.

In the mid-1950's Central Farmers, Inc. acquired real property in Georgetown Canyon which included 104 shares of stock in GID. Subsequently these shares of stock and apparently the real property as well were transferred to El Paso Products Co., and then to Agricultural Products Company, which later merged with Beker Industries. The surviving corporation is applicant-appellant, Beker Industries (Beker).

Because Beker wishes to produce elemental phosphorous in Georgetown Canyon, it petitioned the Department of Water Resources (DOWR), on August 2, 1974, to allow it to make a change in point of diversion, place of use, and in nature of use of the water represented by its 104 shares of stock in GID. The change in place of use was to be to a place "several miles upstream" from the land which the 104 shares of stock had originally been used to irrigate; the change in point of diversion was to be to a place "some distance upstream" from the first of GID's diversion works; and the change in nature of use was to be from agricultural-irrigation to manufacturing.

GID refused to consent to the requested changes, and protested to DOWR. On October 18, 1974, the director of DOWR held a hearing, at which the parties agreed to submit two issues for resolution before any fact finding by the director. These were, first, whether GID's consent to the proposed changes in point of diversion and place of use was required, and second, whether, in any case, DOWR had authority to permit a change in

the nature of use of an established appropriation. These same two issues are the essence of this appeal.

On December 26, 1974, the director of DOWR issued his memorandum decision in which he held, first, that Beker's proposed changes in point of diversion and place of use were not "to lands which may be irrigated through the same system," and that GID's consent to the changes was thus required; and, second, that DOWR was not empowered to permit a change in the nature of use of the established appropriation.

Thereafter, on February 21, 1976, Beker appealed to the district court for relief from the director of DOWR's decision. The appeal was taken pursuant to I.C. § 42-222(3) which provides for a "trial de novo" at the district court level. GID and DOWR filed responses to Beker's appeal. Two months later GID filed its motion for summary judgment, on the ground that Beker had not obtained GID's consent to change the point of diversion and place of use (I.C. § 42-108) and on the additional ground that the Director could not authorize a change in nature of use of the water. This motion was supported by reference to the proceedings before and briefs submitted to the director of DOWR. No briefs in support of or in opposition to the motion for summary judgment were filed and no hearing was held by the district court at this time. A year later GID filed a motion to dismiss based on Beker's failure under I.R.C.P. 83(h) to file a cost bond on appeal to the district court. Rule 83(h) was promulgated on January 1, 1975, and rescinded effective July 1, 1977. Both GID and Beker submitted briefs to the court on the motion to dismiss which discussed Rule 83(h).¹

The district court entered an order stating that the matter was before it on GID's motion for summary judgment, and

¹ At oral argument, GID conceded that I.R.C.P. 83(h) was not applicable to this case.

discussed the merits of the motion. Concluding that the decision of the director of DOWR was correct, it dismissed Beker's appeal. Beker thereafter moved for relief from the order, for its amendment, reconsideration and to have it set aside. These motions were denied.

Before consideration of the principal issue presented by this appeal, two procedural problems must first be discussed. The first is whether it was necessary for appellant to post an appeal bond pursuant to I.R.C.P. 83(h) on taking the appeal from the DOWR ruling to the District Court as asserted by respondent when it moved in the district court on May 5, 1977, to dismiss appellant's appeal for failure to do so. Respondent contends that if for any reason the ruling on the motion for summary judgment is not sustained, the appeal to the district court should be dismissed for lack of bond. On May 25, 1977, this court rescinded the provisions of I.R.C.P. 83(h) effective July 1, 1977, eliminating any necessity of posting a bond on an appeal to the district court. Here the trial court did not pass on this motion, but on February 14, 1978, entered summary judgment dismissing the action, not on the grounds of failure to post bond, but on other grounds. No decision being rendered until after rescission of the requirement, there would be no basis for dismissing the appeal. See, Erickson v. Amoth, 99 Idaho 907, 591 P.2d 1074 (1978).

The next procedural question presented deals with whether use of a summary judgment procedure is permissible on an appeal under I.C. § 42-222(3) from a ruling by the director of DOWR. It is our conclusion that such procedure is permissible. I.C. § 42-222(3) authorizes an appeal from a ruling by the DOWR approving or rejecting an application "to change the point of diversion, place, period of use or nature of use of water under an established right" It provides the procedure to be used

to perfect such an appeal, and states, "[s]uch an appeal shall be heard and determined de novo." The term "de novo" generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing. Black's Law Dictionary 5th ed. 1979, p. 649. On such a hearing the court hears the matter as a court of original and not appellate jurisdiction. *Collier & Wallis v. Astor*, 70 P.2d 171, 173 (Cal. 1937). A moving party is entitled to a motion for summary judgment when there is no genuine issue as to any material fact. I.R.C.P. 56(c). All the rules of civil procedure apply uniformly in the district court in all actions, proceedings and appeals of a civil nature. I.R.C.P. 1(a). Therefore, on appeal from the magistrate's court to the district court, a motion for summary judgment is applicable on trial de novo when there is no genuine issue as to any material fact. *Yribar v. Fitzpatrick*, 87 Idaho 366, 373, 393 P.2d 588, 591 (1964); I.R.C.P. 56(c). The same reasoning should apply to an appeal from a ruling of the Director of DOWR to the district court, and we so hold.

In considering the merits of this appeal, the essential issue to be resolved is whether the director of DOWR has been granted the authority to approve an application for a requested change in the nature of the use of water.² The record reflects that appellant's right to the use of the water was by

² Other prior appropriation jurisdictions have recognized a common law right to change the nature of use of water without losing one's appropriation date. See *Ramelli v. Irish*, 31 P. 41 (Cal. 1892); *Gallagher v. Montecito Valley Water Co.*, 35 P. 770 (Cal. 1894); *Seven Lakes Reservoir Co. v. New Loveland and Greeley Irrig. and Land Co.*, 93 P. 485 (Colo. 1907); *Power v. Switzer*, 55 P. 32 (Mont. 1898); *In re Water Rights in Alpowa Creek*, 224 P. 29 (Wash. 1924); 2 *Kinney on Irrigation and Water Rights*, 2d ed. §§ 869-73 (1912). This court has never had to consider this issue, nor is such an issue presented in this case. Herein we address only the issue of whether the DOWR has the authority to grant the requested change in nature of use.

reason of ownership of 104 shares of stock of respondent GID.³
The record also discloses that respondent GID was decreed its water right in the case of Utah Power & Light Company v. The Last Chance Canal Company, et al., dated July 14, 1920, in the United States District Court, the so-called "Deitrich Decree." Appellant by its petition before the DOWR stated that it desired to change its place of use and to

"change from agricultural use to manufacturing to facilitate the operation of an elemental phosphorus producing plant. This application requests a change in the nature of use from irrigation to manufacturing."⁴

The DOWR denied the petition on the basis that it did not have the power to grant a change in nature of use. The district court did not discuss this issue. (District court order of February 14, 1978, C.T. p. 32)⁵ We agree that the DOWR did not have the power and the respondent is entitled to a judgment as a matter of law. Because the answer to the question of authority is so resolved, we need not address the question of whether the proposed changes in point of diversion and place of use were to places within GID's system. It appears from the record that the only purpose for these changes was to produce elemental phosphorus.

3 It is to be noted that in the title of this appeal, respondent has been referred to as Georgetown Irrigation District, although appellant in its petition for appeal in the district court alleged respondent was an irrigation company, which appellant "is informed and believes is a corporation organized under the laws of the State of Idaho." This allegation in the petition was admitted by the response to the petition filed by respondent and the response of the director of DOWR.

4 The petition referred to the fact that the recorded point of diversion was in the SE 1/4 NE 1/4 Sec. 4, Twp. 11S R. 44 E.B.M., Bear Lake Co., and that additional points of diversion are SW 1/4 SE 1/4 Sec. 32, T. 10 S. R. 44 E "The points of diversion are as changed by the approved transfer dated 7/15/1971."

5 "The facts that the plaintiff petitioner herein, the stockholder user, desires to change the point of diversion and had not obtained the consent of corporation owner, and in fact the corporation owner refuses to give consent to said change of point of diversion, fully determines this cause of action." District Court Order of February 14, 1978,

Beker requested the changes pursuant to I.C. § 42-108 and 222(1), the same sections relied upon by the DOWR in rendering its decision in this case. These sections speak to power to grant changes in place of use and point of diversion, but not the nature of use. There is no specific language allowing the director of DOWR to approve change in nature of use. The statutes in question were repealed and reenacted in 1969. 1969 Sess. Laws, ch. 303, p. 905-909. In the original version of the bill, language specifically allowing for a change in the nature of use of water was included. Before passage, the bill was amended twice. In the third and final version, the legislature struck the language providing for the change in the nature of use. By addressing the question directly and eliminating the provision in the amendment, this court cannot interpret this legislative action in any other manner than to say that it is not the intent of the legislature to give the DOWR the authority to grant a change in nature of use or allow an individual to make it without the possibility of abandonment.

In addition, during the 1978 legislative session, House Concurrent Resolution no. 48 was passed stating that water users should be allowed to change the nature of use of their own water rights and that I.C. § 42-222 should be amended to allow such changes. Also adopted was I.C. § 42-1736A which states that it is the legislative intent in the public interest that H.C.R. 48 be recognized as the guide for the state water plan. However, I.C. § 42-222 was not amended. Without such revisions, there are no provisions authorizing the DOWR to approve a change in the nature of use. An administrative agency like the DOWR has only such powers as the statute or ordinance confers. Idaho Const. art 15 § 7; I.C. § 42-1734, 1736; 1 Am.Jur.2d § 69, p.

865. See also Peters v. Hobby, 349 U.S. 331, 345, 99 L.Ed. 1129, 1140-41, 75 S.Ct. 790, 797 (1955).

As the appellant correctly points out, references to a change in the nature of use in I.C. § 42-221 providing for filing fees and I.C. § 42-222(3) providing appeal procedures remained at the time of this action. The fact that the references in these sections existed is not definitive. As the director of DOWR stated in his memorandum opinion, the remaining references appear to be an oversight in omission. This interpretation is supported by the fact that in 1978, during the same legislative session that I.C. § 42-1736A was passed, the legislature removed the reference to change in the nature of use from I.C. § 42-221. 1978 Sess. Laws ch. 143, p. 324. The remaining⁶ reference exists in § 42-222(3).

In light of the more definitive action of the legislature outlined above, we cannot rely on a passing reference in § 42-222(3) for authority to allow the change in the nature of use requested here. While it may not make sense to give the DOWR authority to grant changes in place of use and point of diversion while not giving them power to grant such changes in the nature of use, we leave that incongruity to the legislature to remedy if they see fit. Until the current statutory provisions are amended there is no authority to grant a change in nature of use of water.

We have examined the cases cited by appellant in support of its claim that the DOWR was authorized to change the nature of use of water and find them unpersuasive in light of the above legislative actions. In Hard v. Boise City Irrig. and Land

⁶ There is also a reference to a change in the nature of use in § 42-211. This section was originally enacted in 1907. In 1967, the legislature replaced it with totally new provisions although it was called an amendment. It refers to changes in permits and seems by its history to be part of I.C. §§ 42-205-210. It does not apply to the instant case as the water right was acquired by decree, not permit.

Co., 9 Idaho 589, 76 P. 331 (1904), the court only addressed the question of whether a change in place of use of water could be made. The court, however, quoted two cases, one federal and one California, which allowed changes in nature of use of water (9 Idaho at 598). As this language was unnecessary for the resolution of this case, we find it unpersuasive. In Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 147 P. 1073 (1915), the court denied the change requested because the change was from non-consumptive to consumptive use and would injure the water rights of other appropriators. The court, therefore, did not address the specific issue presented here. Finally, in Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937), the only change made was from one type of mining to another. There is a distinction between a change from one generic use to another as requested here (agriculture to manufacturing) versus a change within a category of use in light of the fact that the Idaho Constitution grants a priority of appropriation based on the nature of use. (Art. 15, § 3) The change here would lower the priority of the appellant for appropriation where the change in Zezi did not. There are no cases in Idaho where a change from one type of use to another has been upheld.

Therefore, DOWR was without authority to authorize a change in the nature of the use and therefore there are no factual issues in dispute. We decline, to address the other issues raised by the appellant, and affirm the district court's granting of the motion for summary judgment. Costs to Respondent.

DONALDSON, C.J., SHEPARD, BAKES and BISTLINE, JJ.,
concur.