

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 78862 IN THE)	ORDER DENYING TRANSFER
<u>NAME OF DONALD D. BROWN</u>)	AND VACATING HEARING

On September 20, 2013, Donald D. Brown filed Application for Transfer 78862 with the Idaho Department of Water Resources ("Department"). The application proposed adding a point of diversion to water right 29-4391. Currently, water right 29-4391 authorizes a single point of diversion from a spring located in the SWSENE of Section 12, T07S, R34E. Application for Transfer 78862 proposes adding a second point of diversion to the water right from a nearby creek (known locally as Buck Creek). The creek channel is located approximately 50 feet from the spring. The spring is located slightly down-gradient from the creek.

Application for Transfer 78862 was advertised to the public beginning on October 17, 2013. Protests were filed by Terry Walsh and by the Cedars Subdivision Owners Association ("CSOA"), represented by attorney Thomas J. Holmes. On January 22, 2014, the Department conducted a pre-hearing conference for the contested application. All of the parties were in attendance. The parties asked the Department to schedule a formal hearing to decide the contested case.

On January 28, 2014, the Department issued a Notice of Hearing and Disclosure Order. The hearing was scheduled for April 8, 2014. The Disclosure Order stated as follows:

On or before **March 24, 2014**, each party must disclose to all parties and the hearing officer, in writing, the identity of all witnesses that may testify for the party at the hearing. On or before **March 24, 2014**, each party seeking to offer exhibits at the hearing must serve on all parties and the hearing officer copies of the exhibits.

Mr. Brown did not identify any witnesses or exhibits by the March 24th deadline, indicating that he does not intend to call any witnesses or offer any exhibits into the administrative record.

On March 6, 2014, Mr. Holmes on behalf of CSOA filed a *Motion to Vacate Hearing, Deny Transfer or Establish Briefing Schedule for Argument of Threshold Legal Issues*. The motion included a report prepared by Rocky Mountain Environmental Associates, Inc. Mr. Brown did not file a response to the CSOA motion.

Idaho Code § 42-222 authorizes the filing of transfer applications and sets forth the criteria used to evaluate such applications:

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.

...

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

Mr. Brown, as the transfer applicant, bears the burden of establishing all of the factors listed in Section 42-222.

Section 42-222 does not specifically authorize changing the source of a water right. Before a water user can add a point of diversion from a source not listed on a water right, the water user must establish that there is a substantial and immediate hydraulic connection between the existing source and the proposed source. This can only be done with site-specific, detailed technical information. Establishing the direct hydraulic connection is required to demonstrate that the proposed change will not injure other water rights.

As stated above, Mr. Brown has not identified any technical documents establishing the hydraulic connection between Buck Creek and the existing spring. Mr. Brown has not identified any expert witnesses who will discuss the hydraulic connection between Buck Creek and the existing spring. Mr. Brown has not asserted that he is personally qualified to provide expert testimony about the alleged hydraulic connection. The deadline for identifying witnesses and exhibits passed on March 24, 2014.

Without the required technical information, Mr. Brown will not be able to satisfy the requirements of Idaho Code § 42-222. Therefore, Application for Transfer 78862 cannot be approved and should be denied to avoid unnecessary expense for the parties.

ORDER

IT IS HEREBY ORDERED that Application for Transfer 78862 in the name of Donald D. Brown is DENIED without prejudice. Mr. Brown may file an identical or similar transfer in the future, provided the application is accompanied by site-specific, detailed technical information relating to the hydraulic connection between the existing spring point of diversion and Buck Creek.

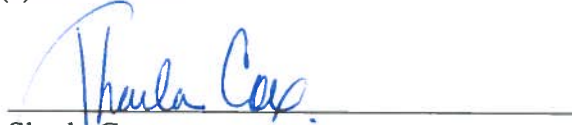
IT IS FURTHER ORDERED that the hearing scheduled for April 8, 2014 in Pocatello, Idaho is VACATED.

Dated this 31st day of March, 2014.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 31st day of March 2014, I mailed a true and correct copy, certified and postage prepaid, of the foregoing ORDER DENYING TRANSFER AND VACATING HEARING to the person(s) listed below:


Sharla Cox
Administrative Assistant

US MAIL - CERTIFIED

RE: Order Denying Transfer and Vacating Hearing - Transfer 78862

**Donald D. Brown
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**Thomas J. Holmes
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**Terry Walsh
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