

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

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 77757 IN THE NAME OF
TOMMY C. WADDOUPS LLC

**ORDER WITHDRAWING
TRANSFER APPROVAL**

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application for transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Transfer Application No. 77757, filed by Tommy C. Waddoups LLC ("Applicant") on December 23, 2011, proposed to change the point of diversion and place of use for three water rights: 34-784, 34-785, and 34-786. The transfer application also proposed to correct the source for one of the points of diversion listed on the three water rights.

2. According to the transfer application, the point of diversion listed in the NWSW of Section 36, T05N, R24E (hereinafter "POD4") was incorrectly identified as Antelope Creek in the Snake River Basin Adjudication ("SRBA") partial decrees for the three rights. The transfer application proposed to change the source for POD4 from Antelope Creek to Cherry Creek. Cherry Creek is tributary to Antelope Creek.

3. During the transfer review process, the Department determined that it did not have the statutory authority to change the source listed on the water rights. (Idaho Code § 42-222) On August 23, 2012, the Department approved Transfer No. 77757. The transfer approval was issued as a preliminary order pursuant to Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01). The transfer approval did not change the source for POD4 from Antelope Creek to Cherry Creek.

4. On September 6, 2012, Rob Harris, the attorney representing the Applicant in this matter, filed a Petition for Reconsideration asking the Department to withdraw the transfer approval. According to Mr. Harris, the Applicant has decided to file a motion with the SRBA court to set aside the partial decrees for rights 34-784, 34-785, and 34-786 in order for the source listed on POD4 to be corrected. Mr. Harris's petition states a concern that approving the transfer at this time could complicate the SRBA proceeding.

CONCLUSIONS OF LAW

1. Pursuant to the timeline set forth in Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01), Transfer Approval 77757 has not yet become a final order. The Department can withdraw a preliminary order before it becomes final.

2. Idaho Code § 42-222 sets forth the provisions governing changes to water rights. Section 42-222 does not authorize the Department to approve changes to the source of a water right proposed as part of a transfer application. Therefore, the only avenue available to the Applicant to correct the suspected error in the source of POD4 is to petition the SRBA court to set aside the partial decrees and make any source correction within the SRBA process.

3. The Department has a responsibility to ensure that water rights described in transfer approvals are correct. Therefore, the Department should temporarily withdraw Transfer Approval 77757 to allow the Applicant time to petition the SRBA court to correct the suspected error prior to approving the pending transfer application.

ORDER

IT IS HEREBY ORDERED that the preliminary order approving Transfer No. 77757 is **WITHDRAWN**.

Dated this 7th day of September, 2012.


JAMES CEFALO
Water Resources Program Manager

CERTIFICATE OF SERVICE

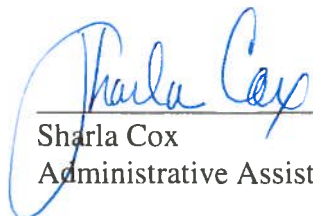
I hereby certify that on this 7th day of September, 2012, a true and correct copy of the document(s) described below were served by delivering a copy of the same to the United States Postal Service, postage prepaid and properly addressed to the following:

Document: Order Withdrawing Transfer Approval (Transfer 77757)

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

Tommy C. Waddoups LLC
22914 North Shorthorn
Sun City West, AZ 85375

Water District 34
PO Box 53
Mackay, ID 83251


Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

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

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department 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 with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

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, requests 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 IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director 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.