

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

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 76877 IN THE NAME OF
MICHAEL AND/OR SHELLEY VAUGHAN

**ORDER WITHDRAWING
PRELIMINARY ORDER**

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 76877 seeks to change the place of use and point of diversion for a water right on Cherry Creek, 29-348B. The water right was conveyed from Carl Barnes to Michael Vaughan through a Water Right Transfer Deed signed on October 8, 2010. The transfer application proposed moving water right 29-348B to a piece of property farmed by Mr. Vaughan, upstream on Cherry Creek, to resolve a possible water rights violation.

2. At its original place of use, water right 29-348B overlapped with two water rights from Marsh Creek, 29-2268 and 29-11799. The Cherry Creek and Marsh Creek water rights, in combination, were limited to the irrigation of 78 acres. Mr. Barnes retained possession of the Marsh Creek water rights and the underlying property. Mr. Vaughan and Mr. Barnes were both notified by the Department that, in order to prevent an enlargement, 34 acres at the original place of use would have to be dried up and no longer irrigated after the transfer approval. Mr. Barnes was also sent a map showing the acres that would have to be dried up after the transfer approval.

3. On May 20, 2011, the Department approved Transfer No. 76877. 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 approval listed Mr. Barnes' Marsh Creek water rights as associated rights and reduced the acres authorized for irrigation under those rights by 34 acres.

4. On June 2, 2011, the Department received a petition for reconsideration from Anavoe and Carl Barnes and another petition from C. Lyle Barnes, Pat Barnes, Jodie Barnes and Robby Barnes. The petitioners requested that the transfer approval be withdrawn. They argued that water has not been used out of Cherry Creek under water right 29-348B at the Barnes property for 30 years. They also argued that they should be allowed to irrigate the full acreage authorized under their Marsh Creek water rights, without a 34 acre reduction.

CONCLUSIONS OF LAW

1. Pursuant to the deadlines set forth in Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01), Transfer Approval 76877 has not yet become a final order.

2. The Department can withdraw a preliminary order before it becomes final.
3. Transfer 76877 can only be approved if 34 acres are dried up at the original place of use. The Department needs additional information and time to determine if the transfer approval should be revised. The Department should withdraw Transfer Approval 76877 to allow Mr. Vaughan and Mr. Barnes time to better define their 2010 water rights conveyance agreement.

ORDER

IT IS HEREBY ORDERED that the preliminary order approving Transfer No. 76877 is **WITHDRAWN**.

Dated this 3rd day of June, 2011.



JAMES CEFALO
Water Resources Program Manager

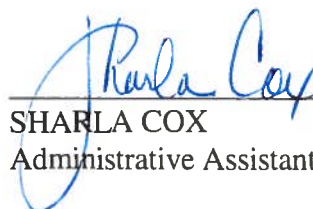
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2011, 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 Preliminary Order (Transfer 76877)

Michael W. Vaughan
Shelley Vaughan
PO Box 266
Downey, ID 83234

Carl Barnes
Avanoe Barnes
3717 East Back Downata Road
Downey, ID 83234



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.