

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 76447 IN THE	)	PRELIMINARY ORDER REJECTING
NAME OF JOHN L POWERS TRUST	)	APPLICATION FOR TRANSFER
_____	)	

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

FINDINGS OF FACT

1. On April 22, 2010, John L Powers Trust filed an Application for Transfer, No. 76447, with the Department seeking to add a point of diversion to water right 34-7239A. Question 5a of Part 1 of the application form states: "Describe the complete diversion system, including how you will accommodate a measuring device and lockable controlling works should they be required now or in the future." Question 5a was left blank on the transfer application.

2. A description of the proposed irrigation system is critical in processing the pending transfer application. Water right 34-7239A is currently used to supplement a surface water right from the Big Lost River (34-440B). Water right 34-7239A includes specific conditions requiring the water user to make full beneficial use of the surface water right before diverting ground water, except on a 16-acre portion. Therefore, the ground water right is a supplemental water right for all but 16 acres of the irrigated place of use. There is a significant risk that the new ground water well proposed in the transfer application would be tied directly to the main center pivot on the property and that the surface water right would no longer be fully used or would be abandoned. Such a change would result in a conversion of the supplemental ground water right into a primary ground water right, would constitute an enlargement, and should lead to a rejection of the transfer application according to the provisions of Idaho Code Section 42-222.

3. The Department has sent two written requests to the applicant, asking him to provide a response to question 5a of the water right application. Letters were sent on May 27, 2010 and August 24, 2010. The Department has not received any response to the letters.

CONCLUSIONS OF LAW

1. Idaho Code Section 42-222 gives the Department the authority to accept transfers that are complete and accurate. Application for Transfer No. 76447 is incomplete because question 5a has not been answered. The Department should not have accepted the transfer application or the

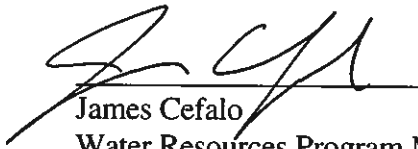
filing fee until the entire application was completed, including a response to question 5a. A complete response to question 5a is critical in this case to ensure that the proposed change does not result in an enlargement of the water right. The applicant has not been willing to provide a response to question 5a despite multiple requests.

2. The Department should reject Transfer Application No. 76447.

ORDER

IT IS HEREBY ORDERED that Transfer Application No. 76447 in the name of John L Powers Trust is REJECTED.

Dated this 15th day of December, 2010.

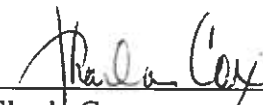

James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of December 2010, I mailed a true and correct copy, postage prepaid, of the foregoing PRELIMINARY ORDER REJECTING APPLICATION FOR TRANSFER to the person(s) listed below:

JOHN L POWERS TRUST
PO BOX 493
MACKAY, ID 83251

JERRY RIGBY


Sharla Cox
Administrative Assistant

US MAIL
RE: APPLICATION FOR TRANSFER NO. 76447

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.