

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

**IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 73969 IN THE)
NAME OF ROBERT ROHE)
_____)**

**ORDER GRANTING
REQUEST FOR HEARING**

On August 2, 2007, Robert Rohe ("applicant") filed transfer application no. 73969 ("transfer"), seeking to change the nature of use, point of diversion and place of use for water right no. 37-21956. The Department of Water Resources ("Department") approved the transfer as a preliminary order on August 7, 2009, pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).

On August 21, 2009, the Department received a petition for reconsideration of the preliminary order pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a) from the applicant. The Department granted the petition for reconsideration in part and issued a preliminary order amending the approval of the transfer on September 4, 2009.

The Department received a second petition for reconsideration of the preliminary order amending the approval of the transfer on September 16, 2009. The Department denied the second petition on September 18, 2009.

On October 9, 2009, the applicant filed a Brief in Support of Exceptions to Order Denying Petition for Reconsideration ("exceptions"), seeking review by the Director. The Department issued a Final Order and Order Denying Exceptions on May 12, 2010.

On May 27, 2010, the Department received a Request for Hearing from the applicant pursuant to Idaho Code § 42-1701A(3). The applicant seeks removal of condition no. 3 of the transfer approval. Condition no. 3 provides:

To prevent injury to water rights 37-7919 and 37-8307 held by the Water Resource Board for minimum stream flow on the Big Wood River the 0.02 cfs allowed for irrigation use from ground water authorized by transfer 73969 shall be subject to curtailment 3 days after flows at the Hailey gauge drop below 189 cfs or curtailed by priority, whichever occurs first. The Director retains jurisdiction to modify the condition of use authorized by transfer 73969 to prevent injury to other users as may be required based on future studies or the addition of gauges on the Big Wood River.

The applicant contests the Director's decision on the basis that inclusion of condition no. 3 gives rise to a takings claim, violates the ability of prior appropriators to divert water under "first in time, first in right," violates the enabling legislation for minimum stream flows, violates

conditions of approval of the minimum stream flow rights, results in an equal protection violation, and is arbitrary and capricious.

A request for hearing in matters before the Department is controlled by Idaho Code § 42-1701A(3):

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing...

The applicant filed a timely request for hearing and has not previously been afforded an opportunity for hearing on the matter. The applicant is entitled to a hearing to contest the inclusion of condition no. 3 of the transfer approval.

ORDER

Based upon the foregoing, it is ORDERED that:

The Request for Hearing of Robert Rohe is **GRANTED**. Interim Director Gary Spackman will be the presiding officer.

DATED this 7th day of June, 2010.



Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of June, 2010, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Order Granting Request for Hearing

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