

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 73969 IN THE NAME OF) FINAL ORDER DENYING PETITION
ROBERT ROHE) FOR REVIEW OF ORDER DENYING
) PETITION TO INTERVENE
)
_____)

FINDINGS OF FACT

1. On August 2, 2007, the Department received application for transfer no. 73969 ("transfer application") in the name of Robert Rohe ("applicant"). The transfer application proposed to change the point of diversion and place of use for water right no. 37-21956 from the Big Wood River. The transfer application was published in the *Idaho Mountain Express* on November 5 and 12, 2008. The Department received a protest to the application from the Big Wood Canal Company on November 21, 2008. A prehearing conference regarding the protest was held on March 27, 2009. The protest was withdrawn on March 30, 2009. There were no other timely protests to the application.

2. The Department approved the transfer application on August 7, 2009 and issued the approval as a preliminary order of the Department pursuant to Section 67-5243, Idaho Code. On August 21, 2009, the Department received a petition for reconsideration of the order from the applicant. On September 4, 2009, the Department issued a preliminary order amending the transfer application approval. On September 16, 2009, the Department received a second petition for reconsideration from the applicant. On September 18, 2009, the Department denied the applicant's second petition for reconsideration.

3. On October 13, 2009, the Department received a *Brief in Support of Exceptions to Order Denying Petition for Reconsideration* from the applicant. The applicant has not requested a hearing to contest the transfer application approval. A final order regarding the transfer application is being issued simultaneously with this order.

4. On August 21, 2009, the Department received *South County Estates Protest and Petition for Hearing on Transfer Approval Notice* filed on behalf of South County Estates, LLC ("South County"). On August 24, 2009, the Department received *Hiawatha Canal Water Users Association of Lateral or Laterals Protest and Petition Contesting Transfer* filed on behalf of Hiawatha Canal Water Users Association of Lateral or Laterals ("Hiawatha"). South County and Hiawatha requested a hearing on the matter before the Director pursuant to Section 42-1701A(3), Idaho Code. On September 4, 2009, the Department issued an order rejecting South County and

Hiawatha's protests against the transfer application and denied their requests for hearing because they had not filed timely protests in the matter pursuant to Section 42-222, Idaho Code. The Department also ruled that pursuant to the Department's Rule of Procedure 350 (IDAPA 37.01.01.350), South County and Hiawatha cannot petition to intervene in the proceedings initiated by the transfer application unless a formal hearing is requested by the applicant.

5. On January 26, 2010, the Department received a *Petition to Intervene* filed on behalf of the Idaho Water Resource Board ("Board"). The Board holds two minimum stream flow water rights in a reach of the Big Wood River where the transfer application proposes to change the point of diversion. On February 9, 2010, the Department denied the Board's request to intervene in this proceeding. Consistent with its position in the South County and Hiawatha protests, the Department ruled the Board cannot petition to intervene at this stage in the proceeding unless a formal hearing is requested by the applicant. On February 25, 2010, the Department received a petition titled *Idaho Water Resource Board's Petition for Review of Order Denying Petition to Intervene*. The petition asks the Department to reconsider its denial of the Board's request to intervene.

CONCLUSIONS OF LAW

1. The Rules of Procedure of the Idaho Department of Water Resources govern contested case proceedings before the Department of Water Resources. IDAPA 37.01.01.001. Rule of Procedure 350 sets forth the standard for when intervention in a contested case is permissible. It provides:

Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party, if a formal hearing is required by statute to be held in the proceeding.

IDAPA 37.01.01.350 (emphasis added).

2. The Board is not an applicant or claimant or appellant, petitioner, complainant, protestant, or respondent to this proceeding. As such, pursuant to Rule of Procedure 350, the Board may petition for intervention only if a formal hearing is required by statute to be held in the proceeding.

3. In this case, a protest was filed but the protest was resolved prior to the hearing on the protest. Since there is no requirement to hold the hearing absent a protest and the applicant has not requested a hearing, Rule of Procedure 350 does not allow for intervention and the Board's request should be denied.

4. Even if intervention were proper under the Rule of Procedure 350, the Department is reluctant to grant intervention at the final stage of the contested case proceeding. Rule of Procedure 352 provides:

Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice. Petitions not timely filed must state a substantial reason for delay. The presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons. Intervenors who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

IDAPA 37.01.01.352.

The prehearing conference in this matter was held on March 27, 2009. Because the petition to intervene was not submitted 14 days before the prehearing conference, the petition is not timely. Under Rule of Procedure 352, approval of an untimely petition to intervene is discretionary. Because the petition to intervene was filed late in the proceeding and the final order regarding the transfer is being issued simultaneously with this order, it does not make sense to grant intervention at this late stage of the process. There is almost nothing left for the Board to participate in now.

5. This does not mean that the Board is precluded from participating should the applicant seek a hearing before the Department or if the applicant appeals the final order to a district court. If the applicant seeks a hearing in the matter before the Department, the Department may consider petitions to intervene at that time pursuant to Rule of Procedure 350. If the applicant instead appeals the final order regarding the transfer to a district court, the Board can seek permission to intervene from the district court.

ORDER

IT IS HEREBY ORDERED that the *Petition for Review of Order Denying Petition to Intervene* filed by the Idaho Water Resource Board on February 25, 2010 is DENIED. This order

does not preclude possible intervention before the Department if a hearing is requested by the applicant, nor does it preclude possible intervention before the district court upon judicial review of the final order of the Director.

DATED this 12th day of May 2010.

A handwritten signature in black ink, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

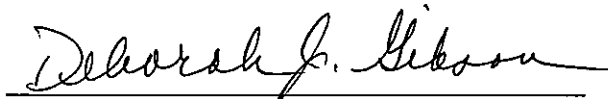
I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, and properly addressed to the following:

Document(s) Served: Final Order and Explanatory Information to Accompany a Final Order.

Fritz X. Haemmerle
Haemmerle & Haemmerle
P.O. Box 1800
Hailey, ID 83333

Shasta Kilminster-Hadley
OFFICE OF ATTORNEY GENERAL
NATURAL Resources Division
P.O. Box 83720
Boise, ID 83720-0010

Idaho Water Resource Board
322 East Front St.
Boise, ID 83720-0098

A handwritten signature in black ink, reading "Deborah J. Gibson", written over a horizontal line.

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau