

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

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 73969 IN THE)	FINAL ORDER AND
NAME OF ROBERT ROHE)	ORDER DENYING
_____)	EXCEPTIONS

This matter is before the Director of the Department of Water Resources ("Director") on exceptions to the order denying petition for reconsideration of the amended preliminary order of the Department. The Petitioner, Robert Rohe, seeks removal of Condition of Approval 3 in transfer no. 73969. The Director finds, concludes, and orders as follows:

FINDINGS OF FACT

I. Procedural Background

1. On August 2, 2007, Robert Rohe ("Petitioner") 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.

2. 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 37.02.01.730).

3. 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 Petitioner.

4. The Department granted the petition for reconsideration in part and issued a preliminary order amending the approval of the transfer on September 4, 2009.

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

6. The Department denied the second petition on September 18, 2009.

7. On October 9, 2009, the Petitioner filed a Brief in Support of Exceptions to Order Denying Petition for Reconsideration ("exceptions"), seeking review by the Director.

8. Petitioner challenges only the inclusion of Condition of Approval 3 (“Condition No. 3”) in the transfer approval and does not challenge any other provision in the transfer approval. Petitioner seeks removal of Condition No. 3.

9. 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.

10. Petitioner claims the inclusion of Condition No. 3 is unlawful because it violates the enabling legislation for minimum stream flows, is arbitrary and capricious, results in an equal protection violation and gives rise to a takings claim.

II. Director’s Findings

11. The Idaho Water Resource Board (“Board”) holds two minimum stream flow (“MSF”) water rights in the reach of the Big Wood River from Warm Springs Creek downstream approximately 18 miles to the District 45 Canal diversion. These are water rights 37-7919 and 37-8307.

12. Water right 37-21956 has historically been diverted into the Hiawatha Canal within this MSF reach. The proposed new point of diversion is upstream from the historical point of diversion.¹

13. The movement of the point of diversion for water right 37-21956 upstream on the Big Wood River will decrease the flow in the river between the site of the original diversion and the site of the new diversion. The reduction of flow in this reach injures MSF rights if flows drop below those protected by the MSF rights (189cfs).

14. However, there are ways to mitigate the injury to the Board’s MSF water rights. River gauges do not exist at every diversion up and down the river. Currently a gauge at Hailey allows monitoring of the river. River flows elsewhere up and down the river may be projected or estimated using diversion records of the watermaster of flows diverted from the river and

¹ The application proposes to change the point of diversion from a surface water source to a ground water source. Generally, the Department does not approve changes in source from surface water to ground water. However, where there is a direct and immediate hydrological connection between the surface water source and the new ground water source, the Department has approved a change from surface water to ground water. The change from surface water to ground water is not an issue in this matter.

measurements or estimates of tributaries flowing into the river. To positively determine the flow of the Big Wood River at the proposed site of the Rohe diversion, the applicant could be required to install and maintain a river gauge at that site. This however is likely over burdensome. Reasonably, a statistical analysis to predict the flow at the proposed Rohe site is best but if not acceptable to the applicant then the transfer should be denied.

15. Existing gauge site records suggest that a statistical analysis can be used to predict the flow at the new point of diversion. The Hailey gauge is located near Hailey below the Hiawatha Canal diversion and the Rohe site and currently is the only permanent gauge on the Big Wood River within the MSF rights reach described above.

16. The Department has analyzed available data and finds that on average at the site of the Rohe diversion the flow in the Big Wood River drops below 189 cfs three days after the gauge at Hailey drops below 189 cfs.

17. To allow for approval of the transfer, the Department used the statistical analysis as the basis for Condition No. 3. Condition No. 3 provides that the transfer may be approved, but the right is subject to curtailment 3 days after flows at the Hailey gauge drop below 189 cfs or is curtailed by priority, whichever occurs first.

CONCLUSIONS OF LAW

1. Pursuant to Idaho Code § 42-222, the Department can approve a change in a point of diversion of a water right only if “no other water rights are injured thereby, ...” This code section does not distinguish between minimum stream flow rights and other types of water rights.

2. Junior water right holders have a vested right in the continuance of the conditions that existed on the stream at the time they made their appropriation. *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912); *Crockett v. Jones*, 42 Idaho 652, 659, 249 P. 483, 485 (1926). Changes by a senior water right holder cannot occur unless the changes can be made without injury to the junior water right holders. *Id.*

3. The Director is statutorily required to examine all the evidence of whether a proposed transfer will injure other water rights. *Barron v. Idaho Dept. of Water Resources*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001). The applicant bears the burden of providing the Department with sufficient information to show non-injury to other water rights. *Id.*

4. The authority to establish a minimum stream flow water right is found in Idaho Code § 42-1501 *et seq.* Idaho Code § 42-1503 provides, in relevant part:

42-1503.APPLICATION TO APPROPRIATE -- PROCESS -- JUDICIAL REVIEW. Whenever the board desires to appropriate a minimum stream flow of the unappropriated waters of any stream, it shall submit an application to the

director. Such application shall be made upon forms to be furnished by the director

Approval of any such application must be based upon a finding that such appropriation of minimum stream flow:

(a) will not interfere with any vested water right, permit, or water right application with priority of right date earlier than the date of receipt in the office of the director of a complete application for appropriation of minimum stream flow filed under the provisions of this act;

5. Petitioner suggests that when the legislature authorized the creation of minimum stream flow water rights, the legislature also intended to restrict how the Department evaluates the impact of a transfer on existing MSF water rights. Brief in Support of Exceptions to Order Denying Petition for Reconsideration (“Brief”), at 4-5. Petitioner reads Idaho Code § 42-1503(a) and the rest of Idaho Code § 42-1501 *et seq.* as overriding the requirement that the Department consider injury to all water rights pursuant to Idaho Code § 42-222. However, the Petitioner’s interpretation of this section is not consistent with the plain reading of the statute. Idaho Code § 42-1501 *et seq.* provides for the *establishment* of minimum stream flow water rights. Idaho Code § 42-1503 makes it clear that the Department cannot approve an application to *establish* a MSF water right if it will “interfere with any vested water right, permit or application... .” However, this is not the question before the Department in this proceeding. The issue in this proceeding is whether the Department must assess and address the injury that a change in a point of diversion by an existing water right would cause to an *existing* MSF water right. Nothing in Idaho Code § 42-1501 *et seq.* provides an alternative injury standard for considering the impact a transfer would have on a MSF water right. It simply does not address whether the Department should consider injury to a MSF water right caused by a transfer *after* the MSF water right is established.

6. Petitioner is essentially arguing that in passing Idaho Code § 42-1501 *et seq.*, the legislature impliedly repealed Idaho Code § 42-222 as it applies to MSF rights. The ability to transfer a water right has significant implications for other water rights. If the legislature had intended to change the traditional transfer standard, it would have expressed a clear intent in the act to not have Idaho Code § 42-222 apply to transfers of MSF water rights. The type of repeal by implication suggested by the Petitioner in this case is disfavored. *Tetzlaff v. Brooks*, 130 Idaho 903, 904, 950 P.2d 1242, 1243 (1997). Courts will not declare a statute repealed by implication if there is any other reasonable construction of the statutes. *Id.* “Only when new legislation is irreconcilable with and repugnant to a pre-existing statute may we find an implied repeal.” *Id.* quoting *Doe v. Durtschi*, 110 Idaho 466, 478, 716 P.2d 1238, 1250 (1986). Idaho Code § 42-1501 *et seq.* is not irreconcilable with or repugnant to Idaho Code § 42-222. They do two different things. The first authorizes the Department to license minimum stream flow water rights. The second governs the injury analysis when a transfer of an existing water right is proposed.

7. While Petitioner is correct that the result of Idaho Code § 42-1501 *et seq.* might be to preclude subsequent (i.e. future) diversionary appropriations, it requires a significant leap in logic to say that by intending to preclude future appropriations, the legislature also intended

for the Department to disregard the impact a transfer would have on an MSF water right that was validly created under Idaho Code § 42-1501 *et seq.* Moreover, Petitioner attempts to draw support for his position from the distinctions between Idaho Code § 42-203A and Idaho Code § 42-1503. Brief, at 6. Petitioner suggests it is significant that the standard for establishing a water right set forth in Idaho Code § 42-203A is different from establishing a water right under Idaho Code § 42-1503. However, this argument further underscores the shortcomings in the Petitioner's position. Both Idaho Code § 42-203A and Idaho Code § 42-1503 address how to establish a water right. The issue in this proceeding is whether the Department should assess and evaluate injury to a vested MSF water right in a transfer proceeding.

8. Absent express language to the contrary, the Department must look to the injury standards in Idaho Code § 42-222. This code section requires the Department to consider injury to other water rights when evaluating a transfer and does not distinguish between MSF water rights and other water rights. As such, the Department must evaluate injury that a transfer would cause to the MSF water rights the same way the Department would evaluate injury to any other water right.

9. Petitioner also points to conditions in the Board's MSF water rights that state the rights are "subject to all prior water rights" and "shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use... ." Brief, at 8. The petitioner argues that these conditions show that the Department intended for the Board's MSF water rights to not be considered in transfer proceeding for senior water rights.

10. The records from the Board's MSF water rights show the language quoted by the petitioner was intended to address a different concern. As outlined in the Memorandum Decision and Order on 37-7919, issued by A. Kenneth Dunn on October 17, 1986, when the approval for 37-7919 first issued, there was a concern that the Board's MSF water rights would be able to make a call against senior unrecorded water rights. Memorandum Decision and Order, at 3-4, a copy of which is attached to the Affidavit of Fritz X. Haemmerle. The Department of Fish and Game argued that the MSF rights should take precedent over the undecreed rights until they are fully adjudicated. *Id.* The Department disagreed and included the conditions cited by petitioner to make clear that MSF rights did not get delivered before the senior undecreed water rights. *Id.* In fact, additional language in the order supports the contention the Department was evaluating these water rights with respect to their existing diversion methods and that the conditions were not intended to prevent an inquiry into injury to MSF water rights when senior water rights want to change their historic diversion methods. In the Memorandum Decision and Order approving water right no. 37-7919, the Department included a conclusion of law that states, "The proposed minimum stream flow should not be allowed to alter *historic* delivery practices to valid beneficial use rights in Water District No. 37, Big Wood River." Memorandum Decision and Order on 37-7919, at 5 (emphasis added). Thus, if anything, the Department's orders in 37-7919 undermine Petitioner's argument and support the position that the language cited by Petitioner was to protect the historic delivery practice of the water right users but was not intended to prevent the Department from considering injury when a senior water right user proposes to alter their historic delivery practice.

11. Petitioner also implies the Department is changing its policy with regards to evaluating injury to MSF water rights. Brief, at 8. Petitioner attaches a number of orders Petitioner claims support his position. A reading of the orders shows the issue present in this proceeding was never raised in the orders cited by Petitioner. They are orders creating the Board's MSF water rights. They do not address whether the Department should assess and evaluate injury to a vested MSF water right in a transfer proceeding.

12. Petitioner also argues that even if the Department has authority to consider injury to the Board's MSF water rights, the inclusion of Condition No. 3 is arbitrary and capricious. Brief, at 10. In support of this argument, the Petitioner provides an affidavit from Charles E. Brockway, Ph.D., P.E. Dr. Brockway argues there is no scientific way to calculate injury to the Board's MSF water rights and because of gauging error, "there is no way to measure the diminishment or actual injury, if any, of a transfer of 0.03 cfs of water, using the Hailey Gauge as a surrogate." Affidavit of Charles E. Brockway, Ph.D., P.E., ¶ 6.

13. It is significant that Dr. Brockway does not suggest that there is no injury to the Board's MSF water rights. Dr. Brockway states the Hailey Gauge cannot be used to measure injury to the Board's MSF water right. This is different from saying that the transfer would not injure the Board's water right. Dr. Brockway acknowledges that the consumptive diversion rate of the right being transferred is up to 0.03 cfs. Aff. Brockway ¶¶ 4,6. It is logical and reasonable to assume that if 0.03 cfs is consumed from the MSF reach, in a location where previously no such consumption existed, then the stream is depleted by that same amount. If the proposed depletions are allowed to occur at a time when flows in the river are insufficient to meet the established MSF, then the MSF water rights are injured and all water rights junior to the MSF water rights will bear the burden of a potentially earlier curtailment date to make the MSF water rights whole. While the depletion in flow is small, it is still real and determinable.² Moreover, simply because the injury to a water source is small, doesn't mean the injury should not be mitigated for. The significance of this is much greater when one considers that the Department has pending transfers proposing similar transfers along the Big Wood River. The collective impact of many small transfers will have a negative impact on the Board's MSF water rights.

14. Moreover, the Department does not propose using the Hailey Gauge as a "surrogate" for the measurement of depletions to the Big Wood River. Measurement of the depletion will occur at the point of diversion where the transfer approval requires a measuring device be installed. Instead, the Hailey Gauge is being used as a means of determining the timing of injury to the MSF water rights and as part of a strategy to mitigate the injury Rohe's depletions will cause.

15. Even for the purposes of determining timing of injury, the Department recognizes that uncertainty exists in the recorded measurements of the Hailey Gauge. However, in the

² This is consistent with the Department's previous statements on this issue. See Final Order, In the Matter of Application for Transfer No. 5174 in the name of Dennis M. Baker and No. 5175 in the name of Huf-N-Puf Trust, at 1 ("Even if the maximum instantaneous depletion would not exceed 0.02 cfs and could not be measured using conventional methods, the hearing officer correctly concluded that such depletion would be 'real'").

absence of systematic error, the uncertainty associated with the gauge is evenly distributed about the recorded measurement, with an equal amount of actual stream flow rates greater than and less than the recorded measurement value. As such, the mean of the error will approach zero. Gauging error is not a reason for not using the Hailey Gauge to determine the timing of injury and as part of a strategy to mitigate the injury that Rohe's depletions will cause.

16. More sophisticated means of determining when flows in the Big Wood River near the Rohe point of diversion fall below 189 cfs may exist. For example, as pointed out in the preliminary order, the applicant could be required to install and maintain a river gauge near the point of diversion to determine when the flows in the Big Wood River at the Rohe point of diversion fall below 189 cfs. However, this is likely overly burdensome. The methodology proposed by the Department to mitigate injury is a reasonable alternative that relies on existing data and information readily at hand. If the applicant believes the proposed mitigation is not appropriate, then the applicant must come forward with an acceptable alternative or the application must be denied.

17. Petitioner cites *Anderson v. Spalding*, 137 Idaho 509, 50 P.3d 1004 (2002), in support of his claim that inclusion of Condition No. 3 in the approved transfer results in an equal protection violation. *Anderson* holds that selective or discriminatory enforcement of a statute may amount to an equal protection violation under either the Idaho or United States Constitutions, if the challenger shows a deliberate plan of discrimination based upon some improper motive like race, sex, religion, or some other arbitrary classification. *Anderson*, 137 Idaho at 514, 50 P.3d at 1009. To establish an arbitrary classification for one individual, the challenger must show that there is a deliberate and intentional plan to discriminate against the challenger and that there is no rational basis for the different treatment. *Id*; see also *Terrazas v. Blaine County ex rel. Bd. of Com'rs*, 147 Idaho 193, 205, 207 P.3d 169, 181 (2009).

18. Petitioner complains that the Department has not previously considered the impact transfers along the Big Wood River would have on the Board's water rights in other similar transfer proceedings. Petitioner suggests that the Department lacks a rational basis for considering the impact this transfer would have on the Board's MSF water right now. Brief, at 13. Contrary to the Petitioner's suggestion, the Department has a rational basis for its actions. Quite simply, the issue was not raised in the other transfer proceedings. The issue is now being raised in transfers in the Big Wood River Basin.

19. Water administration in the state of Idaho is becoming more sophisticated and water right transfers are coming under greater scrutiny, including those in the Big Wood River Basin. There is a Ground Water Management Area and a moratorium prohibiting new consumptive water rights in the Big Wood River Basin, so new water users are forced to look to transfers of existing water rights to meet new water uses. This has led to an increase in the number of transfer applications in the Big Wood River Basin. The increased competition for resources has apparently led the Board to become more active in protection of its MSF water rights. Recently, the Board protested a number of other similar transfers because of the impacts the transfers would have on the Board's MSF water rights. The protests in the other transfers brought this issue to the Department's attention. Even though the Board did not file a protest in this matter, once the issue of the potential of injury to the Board's MSF water rights was brought

to the Department's attention, the Department was compelled to consider the potential injury pursuant to Idaho Code § 42-222. The Department's actions in this case were in response to the issue coming to the Department's attention. As such the Department has a rational basis for its actions. Its actions are not based upon a deliberate or intentional plan to discriminate against the Petitioner.

20. Finally, Petitioner claims that requiring mitigation of the injury would result in a shifting of the priority date of the water right. Petitioner alleges that this would result in a diminution in value of the water right and would constitute a taking without just compensation. Brief, at 13.

21. No water user has a vested right to move their water right if doing so would injure other water rights. *Bennett v. Nourse*, 22 Idaho 249, 253, 125 P. 1038, 1039 (1912); *Crockett v. Jones*, 42 Idaho 652, 659, 249 P. 483, 485 (1926). If Idaho Code § 42-222 provides the same protections against injury to the Board's MSF water right as it provides to other water rights, then mitigation that redresses the injury is not a taking of private property. It is the cost of changing a water right when that change injures other preexisting water rights. Of course, if the Petitioner decides the mitigation would make the transfer unacceptable, Petitioner can withdraw the transfer application and the water right can continue to be exercised at its historic point of diversion without change.

22. The Director concludes that the inclusion of Condition No. 3 is necessary in order to approve the transfer. Condition No. 3 mitigates the injury to the Board's MSF water rights 37-7919 and 37-8307. Approving the transfer without Condition No. 3 will result in injury to the Board's MSF water rights in violation of Idaho Code § 42-222.

ORDER

Based on the foregoing, IT IS HEREBY ORDERD as follows:

1. That Petitioner's exceptions are DENIED.
2. That transfer no. 73969 is APPROVED with the inclusion of the previous Condition No. 3, which reads verbatim as follows:

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.

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

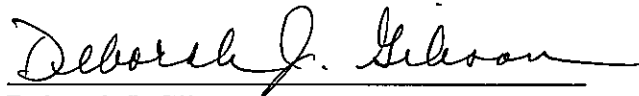
I HEREBY CERTIFY that on this 12th day of May, 2010, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, and properly addressed to the following:

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

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

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau