

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 DENYING PETITION
TO INTERVENE**

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. The protest was conditionally withdrawn on March 30, 2009. There were no other timely protests to the application.

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 timely petition for reconsideration of the order from the applicant through his attorney Fritz X. Haemmerle. On September 4, 2009, the Department issued a preliminary order amending the transfer application approval. On September 16, 2009, the Department received a further timely petition for reconsideration of the order amending the transfer application approval from the applicant. On September 18, 2009, the Department denied the applicant's petition for reconsideration.

On October 13, 2009, the Department received a timely *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 decision has not been issued by the Director.

Section 42-222(5), Idaho Code provides:

Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right ... may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A(4), Idaho Code. If no protest was filed and no hearing

held, the applicant may request a hearing pursuant to section 42-1701A(3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A(4), Idaho Code. (emphasis added).

On August 21, 2009, the Department received *South County Estates Protest and Petition for Hearing on Transfer Approval Notice* filed by attorney James R. Laski 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 by attorney Fritz X. Haemmerle 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 ruled that 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.

On January 26, 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.

The Department's Procedure Rule 350 provides that "persons, not applicants, 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." (emphasis added).

The Department's Procedure Rule 353 provides that "if a timely-filed petition to intervene shows a direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions, unless the applicant's interest is adequately represented by existing parties"

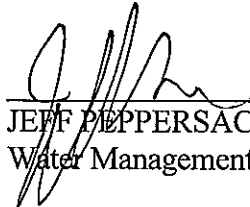
The Board has a direct and substantial interest in the transfer application and its intervention in a hearing would not unduly broaden the issues. There are no other parties to represent the Board's interest in the proceeding. However, the Board did not protest the transfer application to allow its participation as a party in the proceeding and the applicant has not requested a hearing to allow for intervention by the Board.

The Department should deny the petition to intervene on the basis that the applicant has not requested a formal hearing on the matter. If a hearing is requested by the applicant to contest the Director's decision on the transfer application approval, the Department may consider petitions to intervene at that time.

ORDER

IT IS HEREBY ORDERED that the *Petition to Intervene* filed by the Idaho Water Resource Board on January 26, 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 9th day of February, 2010.


JEFF PEPPERSACK, Acting Administrator
Water Management Division

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of January 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 DENYING PETITION TO INTERVENE

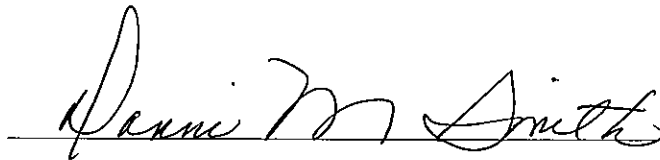
TRANSFER NO. 73969

WATER RIGHT NO. 37-21956

IDAHO WATER RESOURCE BOARD
322 EAST FRONT STREET
BOISE ID 83720-0098

OFFICE OF ATTORNEY GENERAL
NATURAL RESOURCES DIVISION
SHASTA KILMINSTER-HADLEY
PO BOX 83720
BOISE ID 83720-0010

FRITZ X HAEMMERLE
HAEMMERLE & HAEMMERLE
PO BOX 1800
HAILEY ID 83333

A handwritten signature in cursive script, reading "Danni M. Smith", written over a horizontal line.

Danni M. Smith

Office Services Supervisor 1